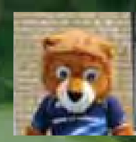
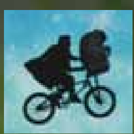
Conference call
Gerald Kean speaks on networking at the annual conference



Crossing the lion
Calcutta Run does the business for the 13th year in a row



Fly me to the moon
Shannon Airport and the stopover of extraordinary rendition flights

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GAZETTE
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PRIVATE INVESTIGATIONS:
Covert surveillance evidence in injury cases

BUSINESS TO BUSINESS MAGAZINE OF THE YEAR
Magazines Ireland

EXPERT WITNESS CONFERENCE 2011

The Honourable Mrs. Justice Fidelma Macken will open **The Expert Witness Conference 2011** where the issue of expert evidence in Ireland will be examined by an eminent panel of speakers including:

- The LRC Recommendations - **Mr. Ray Byrne**, Law Reform Commission
- The Experts' Roles & Duties - **Mr. Paul Anthony McDermott**, Barrister-at-law
- Regulation, Accountability & the Expert Witness - **Dr. Simon Mills**, Barrister-at-law
- Expert's Fees - **Mr. Stephen Fitzpatrick**, Legal Cost Accountant

OPTIONAL PARALLEL SESSIONS INCLUDE:

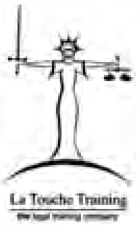
Towards an Integrated System of Justice – Experts and Mediation

- Mary Lou O'Kennedy & Phil O' Hehir, Amicus
- Oliver Connolly B.L, ADR Lawyer, Friary Law

Procedural Aspects of Giving Expert Evidence
Caroline Conroy, Solicitor

The Conference merits 5.5 CPD hours

Cost: €275.00 (€225.00 for every additional person from the same organisation)
Date: 23rd June 2011
Venue: Radisson Royal Blu Hotel, Golden Lane, Dublin 8



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PROMOTING CIVIC RESPONSIBILITY

As I write this message, former Taoiseach Dr Garrett FitzGerald has been laid to rest, two days ago. In the words of President McAleese, he was "a true public servant and national treasure". In one of his last articles in *The Irish Times*, Dr FitzGerald wrote: "A factor common to a whole range of recent Irish economic and financial failures seems to have been a striking absence of a sense of civic responsibility throughout our entire society."

Closer to home, it seems to me that that civic responsibility should guide us in how we vote on the proposal to provide financial support to the SMDF. Firstly, I would like to thank everyone who attended the special general meeting on 4 May, and those colleagues who contributed. It was the largest general meeting of the Society, and it was very useful and essential to debate the issues involved.

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. We have to ask ourselves what the correct decision should be in terms of protecting colleagues, their clients and the reputation of the profession as a whole. The financial support proposed is estimated at €200 (€100 net of tax) per practising solicitor per year for ten years. The SMDF currently insures 22% of firms (482 firms with 1,479 solicitors) – until the last two years, the SMDF insured more than 50% of firms. In addition, all solicitors have a colleague or a friend who is, or has been, a member of the SMDF at one time. In my view, a vote in favour of financial relief would demonstrate the dignity, honour, integrity, collegiality and decency of the profession in supporting colleagues and numerous members of the public. We might also remember Queen Elizabeth's words in her historic speech in Dublin Castle on 18 May when she said: "Whatever life throws at us, our individual responses will be all the stronger for working together and sharing the load."

Master policy

At the time of writing, there is no final decision made in relation to the master policy issue. A special Council meeting on 1 June will debate the issue in full.

Little over half of my term as president has flown by. We had a very successful annual dinner, where President McAleese was our guest of honour and gave an inspiring speech. We also had a most successful annual conference recently, and I would like to thank everyone who attended and contributed to its success. I, and director general Ken Murphy, have also met with nine bar associations and a number of the larger firms in Dublin to discuss our challenging issues. I thank all of our colleagues who gave of their time to discuss these matters, and I look forward to further such meetings.

One of my initiatives is a Forum for Sole Practitioners, which is taking place in Blackhall Place on 10 June, which is now fully booked. The aim is to provide a platform for sole practitioners to discuss challenges and opportunities, explore new ideas, and support future sustainability and future growth. I hope to meet many of you there. It is hoped to repeat it again in July.

"Whatever life throws at us, our individual responses will be all the stronger for working together and sharing the load"

Mentor scheme

I am also progressing a mentor scheme for newly qualified and young solicitors. In addition, I hope to appoint a Special Mediation Committee to discuss new areas of practice where mediation can be encouraged. In addition, I will be holding a Legal Information Day on 8 July for charities and NGOs. On the social scene, a tennis tournament and barbecue has been organised for solicitors and barristers in aid of the Solicitors' Benevolent Fund, in Donnybrook Tennis Club on Sunday 26 June at 1.30pm.

Finally, may I say that, during my career, I have been motivated to serve my clients and colleagues purely for their benefit. I have no hidden agendas or desire to create any antagonism between colleagues. I may have a tendency for a greater concern towards the welfare of our more vulnerable clients and colleagues, but for that I make no apology. I listen to every colleague who has written to me or spoken to me during the year, and I thank you all for your contributions.

During his official visit to Ireland on 23 May 2011, Barack Obama said, in Dublin: "If anybody ever tells you that your problems are too big or your challenges too great, that we can't do something, that we shouldn't even try … think about all that we have done together. Remember that whatever hardships the winter may bring, springtime is always just around the corner." Apt words for our profession at this time.

John Costello

John Costello
President

Law Society Gazette
Volume 105, number 5
Subscriptions: €57

Editor: Mark McDermott FIIC
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Commercial advertising:
Seán Ó hOisín, tel: 086 811 7116, email: sean@lawsociety.ie

For professional notice rates (wills, title deeds, employment, miscellaneous), see page 62.

Published at Blackhall Place, Dublin 7, tel: 01 672 4828, fax: 01 672 4877. Email: gazette@lawsociety.ie Website: www.gazette.ie

Printing: Turner's Printing Company Ltd, Longford

Editorial board: Michael Kealey (chairman), Mark McDermott (secretary), Mairéad Cashman, Paul Egan, Richard Hammond, Mary Keane, Aisling Kelly, Tracy Lyne, Patrick J McGonagle, Ken Murphy, Andrew Sheridan

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You can also check out:

- Current news
- Forthcoming events, including a **seminar on getting the best return from your technology, at Blackhall Place on Friday 24 June**
- Employment opportunities
- The latest CPD courses

… 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

Kilkenny marks Judge Hartnett retirement

KILKENNY

The Kilkenny Bar Association (KBA) hosted a dinner in honour of Judge William Hartnett on the occasion of his retirement from the bench, having served in Kilkenny for 18 years. This much-loved Dubliner (ex TP Robinson) was admired by the entire profession in the South-East.

KBA secretary Sonya Lanigan said: "Judge Hartnett will be greatly missed by the solicitors practising in the Kilkenny and Castlecomer areas. The judge always exercised his duties with the utmost grace and integrity, and he was particularly regarded for his concern for the public who appeared before him." She adds that the judge was always keen to give defendants from disadvantaged and difficult backgrounds every chance and, as a result, inspired many defendants to mend their ways.

Dublin ball

DUBLIN

The recent ball was a great success, with close on 300 attendees. The open forum on the insurance position held in early May attracted a huge crowd to the Radisson. Stuart Gilhooly is looking forward to leading a Dublin delegation to Belfast for the annual get-together with colleagues from the three cities of Dublin, Belfast and Liverpool.

Circuit of Ireland

Congratulating Judge Tom O'Donnell on his appointment to the Circuit Court at a presentation ceremony on 20 April were *(l to r)*: Christopher Lynch, Judge Tom O'Donnell, Elisa McMahon (secretary, Limerick Solicitors' Bar Association), Andrew D'Arcy (solicitor) and Ted McCarthy (solicitor)

MSBA sets about 'ruining a good walk'!

MAYO

The Mayo Solicitors' Bar Association (MSBA) was delighted with the take-up for the Brehon Law Symposium, held recently in Westport, at which Taoiseach Enda Kenny was the keynote speaker.

The MSBA has established a golf society – with the inaugural event taking place in Westport, with a follow-up event in Carne. Contact Michael Keane if interested in taking part.

Mary heads for Garden County

TIPPERARY

President of the Tipperary Solicitors' Bar Association Fred Binchy notes that colleagues were sad to see the departure of county registrar Mary Delehanty for Wicklow. They wish her well in her new appointment. Her replacement, Patrick Wallace, has been serving in the Clare Circuit. Mr Wallace met with the bar committee on 25 May to fully brief practitioners on changes in the Courts Service and how his office will work with solicitors during this difficult time of change.

The association will host an event for a number of the area's sitting judges and the new county registrar in the near future. The association's annual golf outing will take place on 24 June from 2 to 4pm. Interested colleagues should contact Joe Kelly at 0504 31278.

CPD topics on 10 June include: 'Pensions – past, present and future' and 'What is the future for the small to medium-sized solicitor's practice?'

Limerick's linked in

LIMERICK

Congratulations to Limerick Solicitors' Bar Association secretary Elisa McMahon, who is the driving force behind the association's new website and its LinkedIn presence – all essential tools in the endeavour to keep colleagues in touch.

The 2011 golf outing will take place on Friday 24 June at Adare Golf Club, Adare Manor. The cost of entry is €400 per team. All proceeds will go to charity. To sign up, contact Gerard O'Neill, O'Neill & Co Solicitors, 25 Glentworth Street, Limerick, email: gerard@oneillsolicitors.ie, tel: 061 416 469.

Waterford solicitors walk tall

WATERFORD

Waterford Law Society (WLS) president Gerard O'Herlihy and secretary Johanna Geary inform me that Waterford solicitors and Courts Service staff have arranged an informal retirement function for retiring District Judge William Hartnett on Thursday 9 June. All members are welcome.

Judge Gerard Griffin recently presided at the Criminal Circuit Court sessions in the city. A past-president of the Law Society, Judge Griffin was appointed to the Circuit Court bench in 2007. This was his first occasion, however, to preside in Waterford. To mark the event, local solicitors organised a dinner in his honour at La Palma Restaurant on 19 May.

WLS is supporting the Tall Ships Races 2011, which will come to the city for the second time in six years. Local solicitors raised €15,000 for the event, which Gerard O'Herlihy (solicitor) presented to Des Whelan (chairman of Waterford's Tall Ships Races committee) on 20 May. The city anticipates some 500,000 visitors to the city from 30 June to 3 July 2011.

Law Society President John Costello and director general Ken Murphy will meet with Waterford members on 30 June. An evening reception on board one of the tall ships will follow, which will coincide with a large outdoor concert by Brian Ferry.

International copyright conference for Dublin

The Copyright Association of Ireland will host the bi-annual study days of ALAI in Dublin from 30 June to 1 July. Leading global copyright lawyers and industry representatives will debate the most significant issues facing those involved in the industry. International participants will include the president of the French online enforcement agency HADOPI, and prolific author Professor Silke von Lewinski of the Max Planck Institute. The industry perspective will be represented by speakers from Google and the Walt Disney Corporation.

Irish contributors will include Judge Peter Charleton, Professor Robert Clark, and solicitor Helen Sheehy, who represented the plaintiffs in the Eircom/UPC file-sharing litigation.

The cost of the two-day conference package is €400, which includes lunch on both days and the conference dinner on 1 July. There is a special one-day rate of €150. Student discounts are available. The programme and application forms can be downloaded at www.alaidublin2011.org.

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7 Fifty new staff for MH&C
8 Law Society's cross-training initiative for job seekers
9 In the media spotlight – Judge Tom O'Donnell
10 Special general meeting on SMDF
11 New legal body to serve elderly

Genocidal intent conference

Destructive intent is one of the most significant elements of the crime of genocide – one that has often been difficult to prove in a trial setting. The University of Leicester will host a conference on genocidal intent from 21-23 September 2011. The conference is organised by Dr Paul Behrens from the University's School of Law and Dr Olaf Jensen (director of the Stanley Burton Centre for Holocaust and Genocide Studies).

One of the keynote speakers at the conference will be Prof William A Schabas, author of the seminal book *Genocide in International Law: The Crime of Crimes.*

The call for papers is available at www.le.ac.uk/hi/centres/burton.

Anyone for tennis?

Fancy yourself as a Rafael Federer or a Venus Sharapova? Then battle it out on the tennis court with friends and colleagues (from the Law Society and Bar) for bragging rights in the picturesque surroundings of Donnybrook Lawn Tennis Club, while being entertained, fed and refreshed.

In aid of the Solicitors' Benevolent Fund, this tournament and summer barbecue will be held on Sunday 26 June from 1.30pm at Donnybrook Lawn Tennis Club. For information and details of how to book your place, please contact Andrea Flynn, email: aflynn@eversheds.ie; Rachel Halligan, email: rachel.halligan@dilloneustace.ie; or Emer Walsh, email: emer.walsh@mop.ie. 'Coaches', fans, guests and curious bystanders are most welcome!

New member elected to arbitrators' committee

Bill Holohan, senior partner of Holohan Solicitors, has been elected to the committee of the Irish Branch of the Chartered Institute of Arbitrators at the body's AGM for a three-year term. Mr Holohan is a fellow of the Chartered Institute of Arbitrators and is an accredited mediator. He is also a founder member of www.commercialmediators.ie. He is the author of *Alternative Dispute Resolution and Mediation in Ireland – 2010 and Beyond.*

Marked rise in reports of abandoned solicitors' firms

Britain's Solicitors Regulation Authority (SRA) has seen a "marked increase" in reports that solicitors' practices have been abandoned, with abandonment reports at their highest level since 2008.

According to the *Law Society Gazette* of England and Wales, the regulator's latest figures show that its risk unit received 94 reports that a law firm had been abandoned from legal complaints bodies, members of the public and other sources in the three months to 31 March this year.

The figure represents a 45% increase on the number received in the same quarter last year. There has also been a rise in the number of 'allegations' its risk unit received relating to bankruptcy and dishonoured office account cheques at law firms, compared with the same period last year.

There was a fall, however, in the number of reports made to the SRA relating to the legal and administrative competence of practices.

Add some colour into your career

Did you know you can use your existing qualifications in law and pursue a career as a Chartered Secretary?

ICSA's Chartered Secretary Qualifying Scheme can open up a wealth of career opportunities from company secretary to director of legal services to chief executive and the good news is, as a law graduate, you may be exempt from two modules.

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To find out more about how ICSA can add some colour into your career, call our student support team on 020 7580 4741 or visit www.icsaglobal.com/lawireland.

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Senior Appointments at Gibney Communications

Gibney Communications is pleased to announce the appointments of Donnchadh O'Neill as Deputy Managing Director and Mark Leech as Account Director.

Donnchadh O'Neill has been with Gibney Communications for more than five years and continues to look after key clients while also taking a leading role in the management of the company reporting directly to Managing Director Ita Gibney.

Mark Leech joins from Micksgarage.ie, the leading e-commerce firm he co-founded and served as PR and Marketing Director in for the past three years. He previously held senior positions in Q4 and Murray Consultants.

Gibney Communications is a leading, independent Irish public relations company and recently marked its 15th year serving clients in Ireland.

www.gibneycomm.ie

(Left to Right)

Donnchadh O'Neill	Deputy Managing Director
Mark Leech	Account Director
Ita Gibney	Managing Director

Practitioner support: online help at your fingertips

A new facility has been made available on the Society's website, www.lawsociety.ie, aimed at providing practitioners with easy access to information and other resources relevant to them.

Located in the members' area of the website, the 'practitioner support' facility brings together, in one place, information on:

- **Setting up in practice,**
- **Buying, selling and merging a practice,**
- **Promoting your business,**
- **Managing operations,**
- **HR management,**
- **Support services, and**
- **Retiring and closure.**

The practitioner support section also features an upgraded, online Solicitor Link Register. Members keen to buy, sell, merge or share overheads can advertise and check out proposals from other members.

The Solicitor Link Register went online in 2010. Further changes to the site now make it easier to access and check out new listings on a regular basis.

The practitioner support facility, managed by the Society's Member Support service, will be further extended in the coming months to allow busy practitioners to gain quick access to useful ideas and facilities.

Members with suggestions on how this facility might be improved should contact Louise Campbell (support services executive) at email: l.campbell@lawsociety.ie.

A&L Goodbody named 'Irish Tax Firm of the Year'

At the *International Tax Review* European Tax Awards were *(l to r)*: Ralph Cunningham (managing editor of *International Tax Review*), and James Somerville (tax partner, A&L Goodbody)

A&L Goodbody has been named 'Irish Tax Firm of the Year 2011' at the *International Tax Review* European Tax Awards, held at a ceremony in London.

A&L Goodbody beat off competition from many of the larger Irish firms to secure the award for its high-quality work in the area of tax structuring and planning.

The firm was also shortlisted in the 'European Capital Markets Tax Team of the Year' category, along with international firms such as Linklaters, Freshfields Bruckhaus Deringer, The Alliance (Herbert Smith, Gleiss Lutz, Stibbe) and Deloitte.

Commenting on the award, Peter Maher, head of tax at A&L Goodbody said: "This award is international recognition of the top quality tax advice A&L Goodbody provides to its clients. It acknowledges our team's ability to effectively execute complex and novel transactions, on both the corporate legal and tax aspects of commercial deals."

Expert witness conference

Mrs Justice Fidelma Macken will deliver the keynote address at an expert witness conference on Thursday 23 June 2011 in Dublin. Organised by La Touche Training, the event will be held at the Radisson Blu Royal Hotel, Golden Lane, Dublin 8 from 9am-5pm. The conference should prove interesting, given the Law Reform Commission's 2009 recommendations on expert evidence and a recent landmark Supreme Court decision in Britain on the immunity of experts. It will also examine how to manage costs and fees more effectively.

Speakers will include solicitor Ray Byrne (Law Reform Commission), barristers Paul Anthony McDermott and Simon Mills, legal cost accountant Stephen Fitzpatrick, Phil O'Hehir (solicitor), Mary Lou (Amicus Mediation Ltd), Oliver Connolly BL and Caroline Conroy (solicitor, La Touche Training). The day will include practical workshop sessions dealing with mediation and procedural reform.

For further information and booking, contact Adrian Kiernan at tel: 01 878 8263, email: akiernan@latouchetraining.ie, or visit www.latouchetraining.ie.

Missing TD

In our story about solicitors who were elected to the 31st Dáil (see *Gazette*, April 2011, p7), one successful candidate slipped under our radar. Seán Conlon TD – take a bow! A native of Ballybay, Seán is a practising solicitor and owns Conlan's Bar on Main Street. Educated at St Macartan's College, Monaghan, he graduated with a BA Honours degree in Economics from UCD. He was elected to Ballybay Town Council in June 2009.

Up to 50 new staff for MH&C

Mason Hayes & Curran celebrated its fifth anniversary at its Barrow Street offices in Dublin 4 by announcing plans for the recruitment of up to 50 new staff over the next 12 months. The influx will service demand in new business from local and international clients and will see staff numbers rise to over 300 across their offices in Dublin, London and New York.

The firm is expanding its financial services, taxation and commercial litigation departments, and will also provide trainee solicitor positions.

Mason Hayes & Curran was established in 1968 and currently employs over 260 staff, including 50 senior partners.

Mason Hayes & Curran managing partner, Emer Gilvarry, celebrates five years at their Barrow Street offices with some of the firm's 270 staff, with plans to recruit up to 50 new staff in the coming year

OUTLAWS

Life outside legal practice

NICK KELLY
Music, films and creative

Nick started his band, The Fat Lady Sings, while training. Immediately after qualifying, he persuaded other people in the band to give up their jobs and move to London.

They released two internationally acclaimed albums and toured the world, and Nick went on to release three solo albums. His second album, *Running Dog*, won 'Irish Album of the Year' in 1999 and Nick was voted 'Best Irish Male Solo' artist the same year.

He has had great success in writing and directing films. His third short film, *Shoe*, was shortlisted for the 'Live Action Short Oscar' at the 2011 Academy Awards.

Over the past 15 years, he has become one of Ireland's best-regarded advertising copywriters and creative consultants. He has produced numerous award-winning adverts, including the Tom Crean advert for Guinness, which won the 2003 Clio TV advertisement award.

COLETTE BENNETT
Money Advice and Budgeting Service

Colette qualified in 2008 and practised in the corporate department of a large law firm. In the evenings, she volunteered with FLAC and Dublin Simon Community.

Keen to work in the not-for-profit sector, Colette joined the Money Advice and Budgeting Service – a rights-based organisation working with low-income people who are experiencing, or at risk of experiencing, over-indebtedness.

Colette was appointed national development officer for casework technical support and, in this role, she has been able to mix her legal and banking expertise with her interest in the community and voluntary sector.

She supports staff in their casework and is also involved in organising training and in the further development of policies and procedures for the delivery of the national service.

Colette liaises with stakeholders on issues of social policy. She also does research and drafts submissions on civil rights issues.

OWEN KENNEDY
Sign business owner

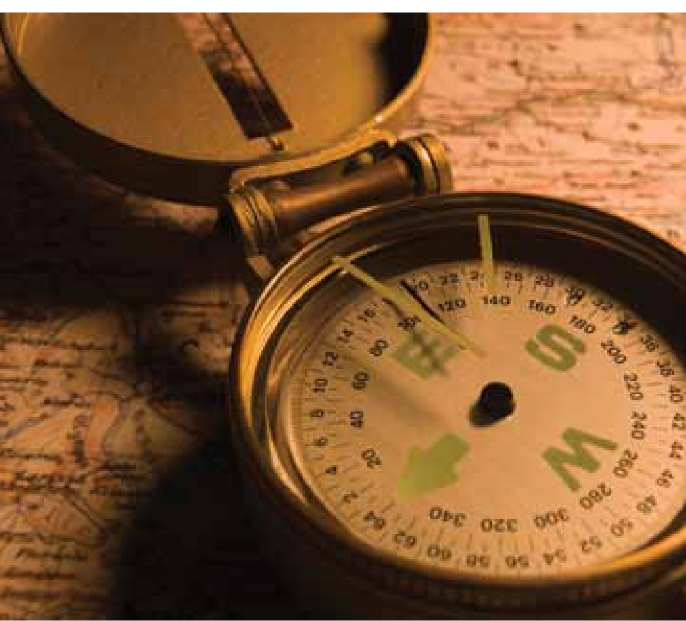
Owen established Alpha Sign, Nameplate and Decal in 1993. He has grown and developed the business since. Today, it employs 12 people.

He says his legal training has stood by him. In particular, it helped him to identify and move into lucrative markets, such as the manufacture of safety labels for machinery.

Owen trained in a conveyancing practice but did not overly enjoy the work involved. While still training, he also tried court work. He found that quite different to what he had expected – and not very interesting.

Having a drink in The Bailey to celebrate qualifying, Owen met an acquaintance who asked him to form a company. It was his first and last job as a lawyer. That person asked Owen to join him in the business and, as they say, the rest is history!

Law Society charts new directions for job seekers



The Law Society has been approved to establish a major 'cross-training' initiative for solicitors who have worked in general practice firms and who are now finding it difficult to find work.

Funded by Skillnets Ltd (the State-funded, enterprise-led support body), this initiative will involve step-up training and work experience that will facilitate participants to move into jobs that remain in demand by employers – and that also suit the skills and abilities of solicitors.

A number of growing and emerging work opportunities suited to solicitors exist within the financial services sector. Under this initiative, training will be provided to facilitate solicitors move into, and work in, areas such as:

- Compliance and regulation,
- Funds management, and
- Islamic finance.

Training will also be provided to facilitate solicitors to avail of opportunities in other sectors, including jobs in:

- Social policy,
- Litigation, and
- In-house – as legal officers.

The aim of the initiative is to open up opportunities for solicitors to move into rewarding new work areas. It will also assist employers to fill vacancies in areas where skills shortages currently exist.

This initiative has been developed by the Law Society Skillnet and Law Society Finuas Network, in collaboration with the Society's Policy, Communications and Member Services department and its Career Support service.

The initiative is funded by Skillnets Ltd under its Job Seekers' Support Programme. Training programmes start in June 2011, with opportunities to participate immediately. Other opportunities will become available right through to the end of 2011.

The goal of this programme is to offer an opportunity to every solicitor who is not working to train in a new work area and gain valuable work experience. Participants will be entitled to retain their job-seekers' allowance for the duration of the programme and all training will be 100% grant funded.

The initiative involves six different training courses – each focused on the individual work areas identified above – incorporating four weeks of in-classroom training, followed by up to six months of work experience.

STEP in the right direction

The diploma programme and the Society of Trust and Estate Practitioners (STEP) will once again offer their highly regarded Diploma in Trust and Estate Planning, starting in autumn 2011.

The course is designed to enable successful candidates to advise clients on all aspects of the creation of wills, the operation of trusts, associated tax implications and overall estate planning for clients.

The fee for the diploma is €2,150, but standard diploma discounts apply in respect of unemployed solicitors, multiple applications from the same firm or where the applicant has attended two or more diplomas.

The diploma will begin in November 2011; however, completed applications must be received by 31 August 2011. To ascertain eligibility to attend the diploma, please see www.lawsociety.ie/diplomas.

For those who do not have the requisite practical experience, or who have not completed the PPCII Advanced Probate and Taxation Module, an eight-week foundation certificate course will begin on 10 September 2011. Successful completion of the certificate will permit entry to the diploma course. A reduced fee of €850 applies to the certificate course. In addition, those who complete the certificate and go on to attend the diploma will be eligible for a €350 discount on their diploma application.

For further information, visit www.lawsociety.ie/diplomas or email diplomateam@lawsociety.ie.

MEDIA

In the media spotlight

JUDGE TOM O'DONNELL
NEWLY APPOINTED JUDGE OF THE CIRCUIT COURT

Why is he in the news?
Judge Tom O'Donnell has been appointed recently to the Circuit Court. His previous position as District Court judge in Limerick has been making the news of late. A successor has yet to be appointed, and Limerick's media have been arguing that one District Court judge is simply not enough for the region's significant case load.

What does he have to say about it?
Well, first of all, I was appointed a Circuit Court judge on 12 October last and I was sworn in recently. In respect of the comments being made in Limerick about my potential successor, the reality is that the Limerick court is very, very busy. The statistics are there, through the Courts Services, and, in my view, there is plenty of work for a second judge there.

Why law as a career?
That goes back quite a ways. My grandfather, P O'Donnell, was a solicitor in Limerick City. My father was a solicitor who I was apprenticed to for a short period of time, also in Limerick. Unfortunately, during my first year as an apprentice, he passed away that summer. My brother Jim is also a solicitor and the family has been involved in Limerick District Court and legal life in the city for quite a number of generations.

Most interesting cases?
In the early days, I was involved as an instructing solicitor in the case of *Ryan v DPP* [(1989] IR 399], which was a challenge to the bail laws. Being on the legal aid panel only a short time, I found myself in the Supreme Court briefing counsel on the matter. The Supreme Court debated the matter for a number of days but, during the course of the case, it came out that the client, in fact, had pleaded guilty to all of the charges and was now serving a sentence, so the whole exercise was moot. We all left the Supreme Court without any change in the law.

The other case that gained some notoriety was the Good Friday decision in March 2010 regarding an area exemption order from the licensing laws. The case took on legs due to its association with a Magner's League clash between Munster and Leinster in Thomond Park. The reality of that particular decision was practical and based on the evidence that I had before me.

The media seemed to completely gloss over the fact that Thomond Park had a sports arena licence and, no matter whether I granted the area exemption or not, they could, in fact, have sold intoxicating liquor to 26,000 people on the day – Good Friday or not!

The health-and-safety aspect was also significant. The match was a sell-out. The gardaí and the Thomond Park authorities were going to have to deal with 26,000 people and, if it was the only place in town that was open to sell alcohol, they were going to experience difficulties there. To get people to and from the match safely was the object of the exercise.

I made it very clear, also, that I wasn't creating a precedent with this decision, though some people believe very, very strongly that I have created a very important precedent – which is just not true.

Lessons he will take with him?
I have described Limerick District Court as one of the best training grounds for solicitors and for members of the Garda Síochána – for everybody, including the judge. The chief lesson I'll take with me is to always treat people with courtesy and dignity, be they defendants, witnesses, members of the public generally, and the people you are working with. It is a very important feature of the running of a court.

Limerick, no more than other places, has had its difficulties, but we always seemed to be ripe to try out any piece of new legislation that came on the books, particularly in respect of criminal organisation, detentions – things of that nature. There's been a flurry of *Criminal Justice Acts* over the past number of years, and they seem to try them out in Limerick first. That possibly made us somewhat unique, but we dealt with them – we had to.

The hardest day I've ever had in Limerick District Court was on 12 May this year, when I sat for the last time as the judge there. It was the culmination of 12 years as judge, but also 35 years of being part-and-parcel of the District Court. I qualified at 21 years of age. The following day, I was working in Limerick District Court, and I've been there since.

As a Circuit Court judge, I'll have to get used to being on the circuit, but I'm delighted to have been given the opportunity. It's a learning curve, and I hope that I'll be up to the challenge.

520 attend special general meeting on SMDF

The biggest special general meeting in the history of the Law Society was held at Citywest Convention Centre on 4 May 2011. Citywest was chosen as the venue, as Blackhall Place could not have accommodated the anticipated numbers and, close to the M50 on the outskirts of Dublin, Citywest was as convenient a location as could be found for solicitors travelling from all over the country.

The 520 solicitors who attended would probably have been much greater in number but for the news the previous day that the resolution, which the special general meeting had been called to consider, would ultimately be decided by a postal ballot of all members, and not simply by those who attended the meeting.

The meeting lasted almost four hours. A total of 32 solicitors spoke from the floor and each point raised was responded to, either by the spokespersons for the Society's PII Task Force or, where appropriate, by a director of the SMDF.

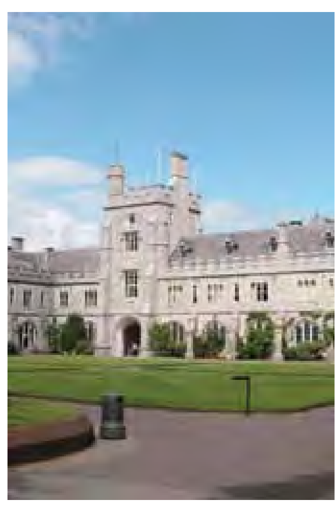
Of the 32 speakers, 17 declared themselves to be in support of the motion put forward by the Council of the Law Society, six declared themselves to be opposed to it, and the balance of speakers raised questions or made points without declaring a position.

Novel master's programme invites applications

The LLM (Practitioner) is an innovative master's programme developed collaboratively between the Faculty of Law, University College Cork, and the Law Society of Ireland.

The programme offers an excellent opportunity to practising professionals who wish to increase their skills base while continuing to work. Participants may wish to claim CPD points for attendance in accordance with the regulations provided by the professional bodies.

A unique aspect of this programme is that participants have the opportunity to apply for a maximum of 20 credits in recognition of completed professional diplomas. This provision facilitates practitioners to combine practical and academic elements in their postgraduate studies.



The Law Society offers a number of diplomas that are eligible for recognition, including diplomas in civil litigation, corporate law and governance, employment law, European Union law, family law, finance law, trust and estate planning, as well as a diploma for in-house lawyers.

The programme is open to qualified solicitors and barristers who have a minimum of two years' full-time, post-qualification professional legal experience. The programme adopts a blended approach to learning and many modules incorporate elements of distance and online learning. Most modules are also assessed wholly or in part by continuous assessment.

Participants must complete 90 credits of law over a minimum of 12 months full-time, or a maximum of 36 months part-time. This includes a ten credit compulsory module (clinical practice/reflective learning) and 30 credits for a minor thesis, to be completed under the supervision of an academic member of the Faculty of Law.

The clinical practice/reflective learning module is designed to encourage practitioners to reflect on, and utilise, their practical experience in an academic context. Participants have a comprehensive choice of modules available to complete the remaining credits and, as noted above, this may include credits for professional diplomas. Candidates may also take individual modules on an ad hoc basis as a bridge to full entry into the degree.

Further information on the programme is available at www.ucc.ie/en/lawsite/postgrad/LLMPractitioner. Any enquiries should be addressed to Anna O'Sullivan at anna.osullivan@ucc.ie.

New body to serve needs of the elderly

It has been recognised for some time by legal practitioners working in the area that there is both a lack of, and a need for, an organisation in Ireland dedicated exclusively to legal issues concerning elderly clients or vulnerable clients (being two distinct categories of client), ***writes Richard Hammond.***

This deficit in the landscape of legal organisations in Ireland will be redressed by the establishment of Solicitors for the Elderly Ireland (SFE Ireland), which will be launched on Thursday 23 June 2011 at Dr Steevens' Hospital, Dublin 8, at 4.30pm.

The impetus to create SFE Ireland was initiated by Mary Condell (Porter Morris & Company) and Anne Stephenson (Stephenson Solicitors) as practitioners immersed in the field of elder law, with the assistance of an inaugural committee.

Given the aging demographic of Irish society, complexities pertaining to capacity, abuse, substituted autonomy and care needs, coupled with the more traditional topics of wills and enduring powers of attorney, are a growing feature of legal practice in Ireland.

SFE Ireland will be a resource for solicitors offering peer support and education in relation to the myriad of legal developments in this area arising from legislation and case law. Elderly clients will also benefit from the work of SFE Ireland in promoting the specialist legal knowledge and other skills in which this category of clients is entitled to expect proficiency from their legal advisors.

Solicitors interested in this area of legal practice are encouraged to visit www.sfe.ie for further information, and to register their interest in the new body.

Where to from here?

Are you a practitioner seeking change and considering your options? Would you like to run your practice more effectively? If so, a forthcoming seminar, 'Where do I go from here? Options for legal practitioners in the current market', is not to be missed.

Offered by Law Society Professional Training, in partnership with Law Society Member Support Services, the seminar will take place on Friday, 1 July, from 9.30am to 3pm, in Blackhall Place. Chaired by Law Society President John Costello, speakers will include:

- Brian Hyland (Baker Tilly Ryan Glennon),
- Anne Neary (Anne Neary Consultants),
- John Elliott (director of regulation, Law Society),
- Representative from Haydon Chartered Accountants,
- David Rowe (Outsource),
- Des Peelo (Peelo and Partners),
- Louise Campbell (support services executive, Law Society).

The seminar will consist of two sessions:

Morning: 'Buying, selling, merging, closing practices and partnerships', including:

- Valuation of firms in the current market,
- Due diligence,
- Risk management,
- Partnerships,
- Regulatory requirements, and
- Professional indemnity insurance.

Afternoon: 'Back-to-basics in practice management', which will cover guidelines for the effective running of a practice, including:

- Four crucial qualities – clients, staff, work and systems,
- Maintaining and building your practice,
- Member support services, and
- Practice advisory service.

Full details of the seminar are featured on the Law Society Professional Training section of the Society's website www.lawsociety.ie/lspt. To reserve your place, contact the Law Society Professional Training team at tel: 01 881 5727; or email: lspt@lawsociety.ie.

NUI Galway holds summer school on disability rights

The Centre for Disability Law and Policy at NUI Galway will hold its third International Summer School from Monday 6 June to Saturday 11 June 2011. The theme of the school is: 'The *United Nations' Convention on the Rights of Persons with Disabilities* – from paper rules to action'.

The event will be co-hosted by the Harvard Law School Project on Disability and will take place in Áras Moyola on the NUI Galway campus.

Further information is available from the summer school website at www.nuigalway.ie/cdlp/summer_school/welcome.html.

Access programme still opening doors ten years on

The Society's very successful Access scholarship programme is celebrating its tenth anniversary this year. The programme provides financial and practical assistance to students from disadvantaged backgrounds who would not otherwise be able to pursue legal careers.

In all, 109 highly motivated students from across the country have participated in the programme to date, 23 of whom are now fully qualified solicitors.

The main challenges for Access students lie in gaining appropriate legal work experience, and in securing traineeships. To that end, the Dublin Solicitors' Bar Association (DSBA), together with the Law Society, are initiating an internship programme, coordinated by solicitor Keith Walsh on behalf of the DSBA.

Students will be placed in law firms for periods of three months in order to gain some practical experience of working in a solicitor's office. It is hoped that such internships may grow into traineeships – or, at the very least, equip students to compete more competently for traineeships.

If your firm has what it takes to offer practical assistance to an Access student and if you wish to be part of this innovative programme, please email studentadvisor@lawsociety.ie, or call the Student Development Service at 01 672 4802 for further information. A list of interested firms located across the country is currently being compiled and will be made available to Access students as soon as it becomes available.

WHAT THE STUDENTS SAY

What Access students are saying about the scholarship programme:

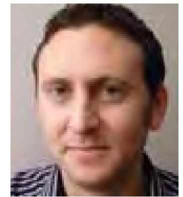
"Both my parents are unemployed and I have supported myself through work since the age of 13. Having to work during college also affected my study time. Access was a great help." – Student

"I found it very hard to secure a traineeship. I didn't know any solicitors, or people who knew solicitors on a social level. Access changed that." – Student

"Lack of connection to the legal world … for me it was pretty much jump in with both feet. Access pointed me in the right direction." – Former Access student – now a qualified solicitor

MAKING CONNECTIONS TO GROW YOUR BUSINESS

'The smart economy in action: strategies for growth in the legal profession' was the theme of the Society's Annual Conference 2011 in Wicklow. The conversation also turned to the State of Ireland today and – more pertinently – the state of the profession. Gordon Smith reports (additional reporting: Mark McDermott)



Gordon Smith is a freelance journalist and has covered business and technology for more than 15 years. He is a regular contributor to The Irish Times, *Siliconrepublic.com and* Technology Ireland

Making connections of one kind or another was a main theme of this year's Law Society annual conference, held at the Ritz-Carlton, Powerscourt, Co Wicklow on 6 and 7 May. Those connections included both the 'real-world' kind and the 'virtual' links of the internet and online social networks – both equally valid as means of promoting legal practices and encouraging new business.

Introducing the afternoon's proceedings, President of the Law Society John Costello urged solicitors, in particular sole practitioners, to network – even to consider sharing office space and secretarial services as a way to control costs more effectively.

Sole practitioners were also the focus for Attracta O'Regan, head of professional training at the Law Society. She spoke of solicitors' roles in the smart economy, noting that one multinational corporation has 500 in-house legal staff, but retains thousands more 'garage' lawyers – specialist sole practitioners – worldwide.

"Corporations are using this to save costs and obtain value for money. This is an area where local sole practitioners can benefit," she said. The Law Society provides professional training and development to help re-skill solicitors in areas outside of traditional practice, O'Regan added.

> **"One multinational corporation has 500 in-house legal staff, but retains thousands more 'garage' lawyers – specialist sole practitioners – worldwide"**

Harnessing the internet

Other presentations covered different aspects of how to harness the internet for building and maintaining relationships with clients.

Ian Jackson of Go2Web said that setting up a business website can cost as little as €1,500 to €1,750 – with some additional charges thereafter for hosting and updates. A site should look good and be easy for visitors to navigate, and Jackson recommended using pictures and video to create a good impression for visitors. "Potential clients, on a visit to your website, may make a decision whether or not to do business with you," he said. "The primary question to ask is, why are you doing this: is it part of a marketing plan and have you an idea about who your audience is?' Also, what will differentiate you from another solicitor's practice?"

Using the right keywords repeatedly throughout a site ensures that a firm appears at, or near, the top of the rankings whenever someone uses an internet search engine like Google for 'employment law solicitor in Dublin', for example. Jackson said firms should monitor their sites regularly to check rankings on search engines, ensuring that people are able to find them easily. Every page on a site should include a prompt to contact the firm through filling out a form, sending an email or calling a number. "Calls to action need to be everywhere," he added.

Andrew O'Shaughnessy, CEO of Newsweaver, said that email newsletters or e-zines can be an extremely effective way for law firms to stay in touch with their clients, as

(ALL PICS: SIOBHAN BYRNE PHOTOGRAPHY)

Participants and speakers on day one of the conference *(back, l to r)*: Tracey Donnery (Skillnets), Killian Flanagan, Andrew O'Shaughnessy, Ian Jackson, Attracta O'Regan, Gerald Kean, Brian Hyland. *(Front, l to r)*: Mary Condell, John Costello (Law Society president) and Mary Keane (deputy director general)

they are far cheaper to produce than print equivalents and can be sent more frequently. "Possibly the number one sector to benefit from email newsletters is the legal profession," he said.

He pointed out that newsletters don't fall foul of regulations around advertising for solicitors, because clients will have opted in to receive the messages. Emails including descriptions of the services provided by a legal firm are also permitted.

On the question of what to put in emails, O'Shaughnessy said that firms can provide factual articles and information that might be relevant to clients. "Content can come from any area in law; for example, a 'top ten things you should know about' list. Make it useful and valuable, such as telling people about changes in legislation," he said. Most importantly, firms should plan their content in advance to ensure they have a regular supply of material.

The software packages for assembling email newsletters are easy to use, O'Shaughnessy said. An invaluable feature of email newsletters is that everything in the message can be tracked, allowing firms to evaluate the results and spot trends that could help the business, such as if readers show an interest in a particular area.

Summing up the benefits, he said: "You will get more revenue from your existing clients by talking to them through email and telling them about your services. And if you are communicating more regularly with a customer, they are more likely to refer you. You are building confidence and trust over time in your expertise because you're putting it out on a regular basis."

Killian Flanagan of Star Trawler spoke about how dedicating a small amount of time to the business networking website LinkedIn can pay dividends. It's free to join and, when creating a profile page, he recommended using the same

Law Society President John Costello addresses the conference

OUTSIDERS' VIEWS ON THE MASTER POLICY

Former EU commissioner and previous attorney general, Peter Sutherland, addressed the conference on day two, focusing on the topic of 'The State of Ireland Today'.

This was followed by an in-depth look at the professional indemnity insurance market for Irish solicitors. Unsurprisingly, it proved to be an extremely popular topic, given the difficulties that have been experienced during the past two years – and the current crisis facing the Solicitors' Mutual Defence Fund.

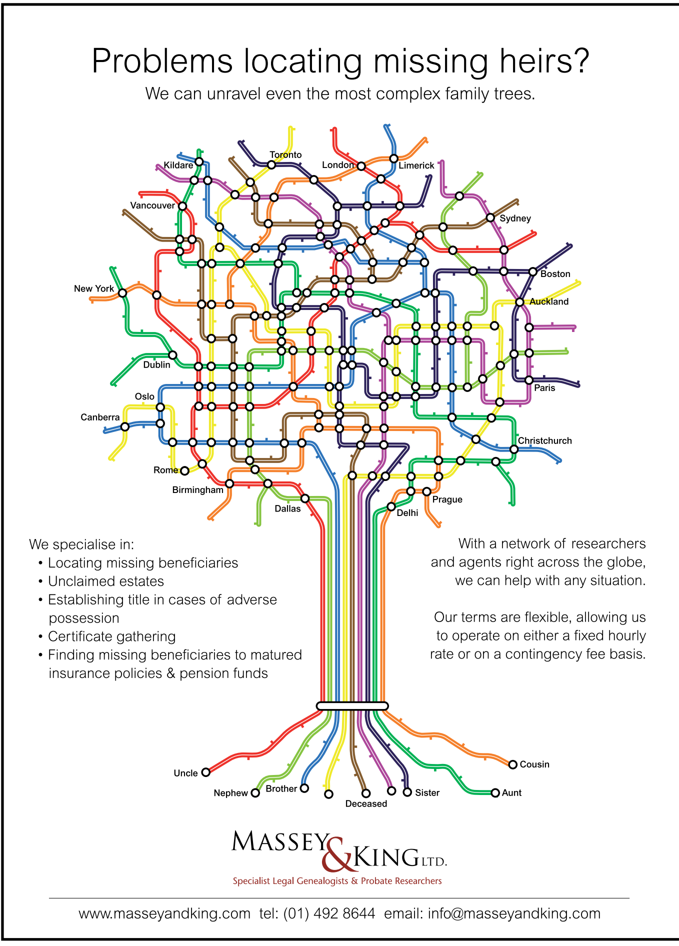
Those attending the conference heard about an alternative model to the current 'freedom-of-choice' model that currently operates in the Republic of Ireland, namely, the 'master policy' model. Speaking on the topic of 'Master policy – the experience in Northern Ireland and Scotland' were Brian Speers (president of the Law Society of Northern Ireland), Simon Murray (chairman of the PII Committee, Law Society of Northern Ireland), Jamie Millar (president of the Law Society of Scotland) and Lorna Jack (chief executive of the Law Society of Scotland).

Jamie Millar (president, Law Society of Scotland), John Costello (president, Law Society of Ireland), Peter Sutherland (non-executive chairman of Goldman Sachs International), Brian Speers (president, Law Society of Northern Ireland), Simon Murray (chairman of the PII Committee of the Law Society of Northern Ireland), Ken Murphy (director general, Law Society of Ireland)

They spoke of their experiences in Northern Ireland and Scotland, where all solicitors' firms have obtained their primary level of compulsory professional indemnity insurance through a master policy since the 1980s.

They were 'not selling anything' to this jurisdiction, but merely describing their overwhelming satisfaction with the master policy model as it works for them. They said that it provides stable, predictable, transparently priced and – by comparison with their neighbouring jurisdictions of Ireland, and England and Wales – relatively inexpensive insurance.

The master policy was popular with firms of all sizes, including the large commercial firms in Glasgow and Edinburgh, they told the conference.



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words that people might use when they're looking for a legal service. LinkedIn indexes all of those words to suggest groups to join.

"Like any form of networking, the more visible you are, the better," Flanagan said. "Contribute content to a group that others will find interesting. You may end up getting showcased on the page. There are thousands of questions being posted on LinkedIn every day and you can pick the one that allows you to give the most authoritative answer."

Flanagan recommended spending 30 minutes each day on the site, although he admitted that target might be difficult to achieve. "LinkedIn needs consistent investment and that pays itself back," he said. However, he cautioned against spending too much time: "Social networking can very easily become 'social not-working'."

Kevin O'Higgins, Anne Leech, Claire Loftus and Rory Benville

"Clients that are satisfied with the value they are given are the biggest source of referrals … Think about how complicated and urgent the matter is, and communicate with the client the value you are giving them"

Old-school networking

Colourful solicitor Gerald Kean's freewheeling, entertaining presentation changed tack from technology and focused on old-school networking. He explained how he uses every opportunity to meet clients and hand out business cards, since this has proven very successful in leading to repeat and referral business. "If you embrace clients, they become your selling product," he said. He said that his firm typically opens more than 75 new files every week, including upwards of 30 accident claims. "Our practice has grown through the recession because it grows through personal contact."

Brian Hyland of Baker Tilly Ryan Glennon broadened the discussion to talk about what makes a successful practice, stressing the importance of strategic planning, which lets firms identify strengths, weaknesses, opportunities and threats to their business over a three-to-five-year timeframe.

Many times, firms make the mistake of having their most expensive fee-earners doing mundane administration work, he said. Hyland advised looking carefully at systems and procedures to correct this. "Too often, people spend time doing things that aren't productive. Use the right person for the right piece of work," he recommended.

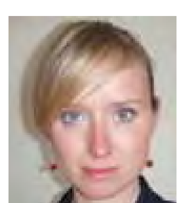
Other tips on becoming more cost-efficient included having templates for letters of engagement and certain types of reports, which can reduce the time and the cost of producing them repeatedly.

"Most costs are controllable. You should review your costs on an ongoing basis," said Hyland. He also suggested considering mergers between firms as a strategic way to increase turnover and cash flow while saving on rent, rates and other overheads. "You may be able to put two and two together and come up with five," he said.

Returning to one of the themes of the conference, Hyland said: "Clients that are satisfied with the value they are given are the biggest source of referrals … Think about how complicated and urgent the matter is, and communicate with the client the value you are giving them." G

RIGHT TO HOUSING STILL SUBJECT TO POLITICAL WILL

Until the commitments set down in the homeless strategy are placed on a statutory footing, the basic human right to housing remains vulnerable to political will, argues Rose Wall



Rose Wall is the solicitor in charge of the Mercy Law Resource Centre, an independent centre that provides free legal advice and representation to people who are homeless or at risk of homelessness

Ireland is a signatory to the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), which recognises, at article 11(1), "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions". The human right to adequate housing – which is thus derived from the right to an adequate standard of living – is of central importance for the enjoyment of all economic, social and cultural rights.

This right is also echoed in article 25(1) of the *Universal Declaration of Human Rights*, article 5(e)(iii) of the *International Convention on the Elimination of all forms of Racial Discrimination*, article 14(2) of the *Convention on the Elimination of Discrimination against Women* and article 27(3) of the *Convention on the Rights of the Child*, all of which have been signed up to by Ireland.

Seven aspects of the right to adequate housing were identified by the Committee on Economic, Social and Cultural Rights (CESCR General Comment 4), including legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy.

There is a disturbingly large gap between the standards set in General Comment 4 and article 11(1) of the ICESCR and the situation prevailing in Ireland, where there are significant problems of homelessness and inadequate housing. This can be highlighted by examining three of the seven aforementioned aspects to the right to adequate housing: legal security of tenure, habitability and accessibility.

"NAMA could act as a conduit through which government spending on social housing is channelled towards the purchase of NAMA properties"

Legal security of tenure

Article 17 of the *International Covenant on Civil and Political Rights* places an obligation on the State to ensure that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation".

Section 62 of the *Housing Act 1966* is a summary procedure for the recovery of possession of local authority housing. Under this procedure, a local authority is not obliged to provide reasons as to why it is seeking to recover possession, and no independent or impartial hearing of the merits of the case takes place.

Where a local authority tenant has been subject to section 62 possession proceedings on the basis of a decision by a local authority that the tenant has engaged in antisocial behaviour, the future entitlements of the individual will also be affected. Section 14 of the *Housing (Miscellaneous Provisions) Act 1997* provides that, where a local authority considers that a person was engaged in antisocial behaviour, it may refuse to make or defer the making of a letting of a dwelling to such a person. Also, under section 16 of the *Housing Act 1997*, the HSE may determine that such an individual is not entitled to a payment of rent supplement allowance for private accommodation.

A person found guilty of antisocial behaviour may thus end up in emergency accommodation indefinitely. This affects a wide range of other human rights. Residents in emergency accommodation generally have to leave their home all day. Access to adequate cooking facilities is totally interrupted. Health will suffer as a result of poor diet. The family unit is totally disjointed. Education and ability to remain employed or gain employment also suffers.

The lack of an independent or impartial hearing on the merits of a case where so fundamental a matter as one's entitlement to remain in one's home is concerned has led the Irish courts in a number of cases (see panel), following the European Court of Human Rights, to make a declaration under section 5 of the *ECHR Act 2003* that section 62 is incompatible with article 6 (right to a fair hearing) and article 8 (right to respect for private life and the home) of the ECHR.

These cases are currently under appeal to the Supreme Court.

Local authority tenants are further disarmed in section 62 proceedings, as such proceedings have been interpreted as falling within one of the exemptions, contained in section 28(9)(a)(ii) of the *Civil Legal Aid Act 1995*, to the entitlement to civil legal aid, that is, "disputes concerning rights and interests in or over land".

Habitability

CESCR General Comment 4 provides that "adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health".

Many local authority homes are not maintained to an adequate standard, and regeneration projects have been delayed or put on hold. One highly publicised example is Dolphin House, where residents have experienced unprecedented levels of damp, mould

and sewage in their homes. Tests carried out on water coming up through the plug holes of sinks and baths in the flat complex found the levels of faecal coliforms were consistent with those found in raw sewage. Research shows that 75% of residents surveyed are living in damp, 64% report mould, 84% have sewage coming up through their sinks and baths, and 91% say their health is affected.

There is no independent forum to complain to if local authorities do not comply with minimum standards, as set out in the *Housing (Standards for Rented Houses) Regulations 1993*, *2008* and *2009*. This leads to lengthy waiting times for repairs, and disputes regarding the obligation of repair.

> ***"There is a disturbingly large gap between the standards set in the* International Covenant on Economic, Social and Cultural Rights *and the situation prevailing in Ireland, where there are significant problems of homelessness and inadequate housing"***

Accessibility

CESCR General Comment 4 provides that "adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources …Within many states, parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal."

While there is no reliable data on homelessness at national level, the Homeless Agency in Dublin carries out a regular count of rough sleepers to assess the extent of homelessness in Dublin. The latest data show that rough sleeping has not been eliminated in Dublin, contrary to what was committed to by Dublin City Council in its local action plan.

There are significant waiting lists for social housing, and persons with homeless priority may have to wait a number of years before receiving an offer of accommodation. Figures from the Department of Environment, Heritage and Local Government show that, by 2008, the number of households on the waiting lists for local authority housing had grown to 56,249 – an increase of 33% on 2005. Of the 56,249 households, 49% had been waiting for more than two years. This is despite the fact that the housing crisis has created a large surplus of housing stock throughout the country.

In an effort to bridge the gap between properties for which there are no buyers and households that are unable to access housing, NAMA could act as a conduit through which government spending on social housing is channelled towards the purchase of NAMA properties.

While the commitment in the recent programme for government to end long-term homelessness and to "offer homeless people suitable, long-term housing in the first instance" is be applauded, significant, concrete steps need to be put in place before the standards set in CESCR General Comment 4 and article 11(1) of the ICESCR are met.

Until the right to housing is recognised in Irish law and assimilated into national and local government housing policy, and the commitments set down in the homeless strategy are placed on a statutory footing, the basic human right to housing remains vulnerable to political will. G

CASES

- ***Connors v United Kingdom*** **(application no 66746/01, judgment of 27 May 2004)**
- ***McCann v United Kingdom*** **(application no 19009/04, judgment of 13 May 2008)**
- ***Pullen & Others v Dublin City Council*** **[2008] IEHC 379**
- ***Dublin City Council v Gallagher*** **[2008] IEHC 354**
- ***Donegan v Dublin City Council*** **(unreported, High Court, 8 May 2008)**

These cases are currently under appeal to the Supreme Court.

1-13 June 2011 – Poll of Members on a resolution conducted

At the Special General Meeting of the Law Society of Ireland held on 4 May 2011 ("the meeting"), the meeting, in accordance with Society Bye-law 4(8) (c), nominated and directed that Mr Stuart Gilhooly, as a proponent of the resolution, the text of which is set out opposite*, and Mr Vincent Crowley, as an opponent of the said resolution, each be responsible for the preparation of, respectively, a memorandum in writing (of no more than 500 words each) summarising the arguments advanced at the meeting in support of the resolution and in opposition to the resolution. The said two Memoranda are reproduced below.

MEMORANDUM
by
Vincent Crowley, as **opponent** of the resolution

WHY YOU SHOULD VOTE NO

€16 MILLION – DO NOT BANK ON IT

1. The Council of the Law Society ("Society") has grossly underestimated the extent of the SMDF liabilities by neglecting its own advisors' (Deloitte) estimate of €308 million for 2009/10. Without proper due diligence of SMDF reinsurance contracts the Society should not assert that "*the financial support proposed* ***should*** *enable the SMDF pay its 10% of claims, which in turn* ***should*** *safeguard the 90% re-insurance*".

   SMDF will be exposed to claims of at least €308 million if re-insurers repudiate contracts. In its estimate of €16 million, the Society sidestepped:

   (a) Deloitte's €308 million estimate;

   (b) SMDF's audited accounts where reinsurers expressly reserved their position on payment;

   (c) potential taxation issues; and

   (d) potential exposure for 2010.

2. If the proposal is approved the Society will be obliged to further fund SMDF and will be compelled to take the same steps in the event of failure of another insolvent insurer. There is no logical justification for fixing the entire profession with the cost of bailing out insolvent insurers.
3. There are 17 members of the Society's Council who have interests as SMDF members in the passing of the resolution, which puts those Council members in a position of irredeemable conflict of interest.
4. Under legislation, solicitors covered under SMDF policies can be levied, allowing the Society to remain distinct from the SMDF. The cost per solicitor is not prohibitive.
5. The Society has obtained legal advice that it can successfully resist any claim that it has a liability for SMDF, yet it urges assumption of responsibility for that very liability.
6. The Society has refused to furnish **any** of the extensive experts' reports it purports to rely upon in support of the bail-out. It has not engaged in discussions with other insurers or the Government for an alternative. The Society should be open, frank and transparent in dealing with solicitors on this very serious issue. SMDF 2010 accounts are undisclosed.
7. Failure to disclose claims and their nature raises concerns that a small number of firms may be responsible for the bulk of the €308 million. We have been informed that financial institutions comprise the majority of claimants against SMDF.

8. In light of:

   (a) the Council's haste to fund SMDF without proper due diligence on reinsurance contracts,
   (b) seriously conflicted interests,
   (c) concerns about past and future management of SMDF and upwards of €16 million in investment losses,
   (d) non-disclosure of professional reports commissioned,
   (e) no meeting of SMDF members convened to seek support, and
   (f) the fact that if the estimates are incorrect we will be called upon to further fund the SMDF to the extent of the deficit,

AS A SOLICITOR, WOULD YOU NOT BE NEGLIGENT IF YOU ADVISED A CLIENT TO FUND A SIMILAR INSOLVENT ENTITY IN SUCH CIRCUMSTANCES?

THE SOCIETY SHOULD RETAIN ITS INDEPENDENCE FROM SMDF.

A NO VOTE WILL PROTECT THE SOCIETY AND OUR PROFESSION FROM EXPOSURE TO UNKNOWN FINANCIAL LIABILITIES AND PERMIT CAREFUL EXPLORATION OF ALTERNATIVES.

Vincent Crowley,
18 May 2011

pursuant to the Bye-laws of the Law Society of Ireland

RESOLUTION

** "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)."*

Proposed: John Costello, President
Seconded: Donald Binchy, Senior Vice-President

YES

MEMORANDUM
by
Stuart Gilhooly, as **proponent** of the resolution

€200 per year to ensure that colleagues do not experience financial ruin, clients are not left without compensation and the profession maintains its good name. Put simply, that is the proposition.

The SMDF is insolvent and cannot meet its liabilities. In order to avoid going into liquidation, it requires support in the amount of €16 million. Liquidation would have unthinkable consequences for those with claims and notifications. The total number of firms with outstanding claims is 551. If SMDF (which is 90% reinsured) goes into liquidation, then it is likely the reinsurance will fail, as a liquidator could use his discretion not to pay claims resulting in the reinsurers' obligations to pay lapsing. At the very least, reinsurers would engage in a process called attrition which essentially involves them not paying compensation without litigation. This could cost those firms with claims between €200 and €300 million.

Important points to note:

- The SMDF is not being saved. It will not write business again no matter what happens.
- The overwhelming majority of firms with claims have less than four solicitors.
- The consequences of liquidation would extend beyond SMDF firms and would potentially affect all firms by way of undertakings received by those firms, clients whose compensation or costs would not be paid and reputational damage as a whole.
- No director of the SMDF will receive any remuneration in the future and the legal panel will be put out to tender.
- The Minister for Justice has backed the proposal as being in the public interest, which it clearly is.

To answer some of the arguments against the proposition:

- SMDF has no power to levy its own members and a voluntary contribution is highly unlikely to be successful.
- A levy by the Law Society on SMDF members would be practically impossible and unfair. Most members do not have any claims so are in no different position to non-SMDF members. In any event, it would be utterly impractical to levy only solicitors in current SMDF firms over a ten year period as some of these firms may close, some employed solicitors in these firms may move on and therefore the amount required could not be quantified.
- The amount sought is capped at €16 million and consequently cannot be increased. Two sets of actuaries (including Deloitte on behalf of the Law Society) have confirmed that it is more than likely to be sufficient anyway.
- This situation is highly unlikely to occur again as the SMDF is the only unregulated mutual fund in the market and all other insurers are regulated elsewhere and backed by appropriate compensation funds.

The documentation which accompanied the SGM notice should be read carefully. These are the facts and, unpalatable as they are, a decision has to be made in the best interests of the profession. The solution proposed is the only realistic answer to the problem.

A no vote could have catastrophic consequences.

Saying yes is a victory for collegiality and common sense.

Stuart Gilhooly,
18 May 2011

FAILURE TO FOLLOW BRITISH EXAMPLE IS DISAPPOINTING

It is disappointing that the *Construction Contracts Bill* fails to follow the British example in relation to the binding nature of adjudication, argues Fiona Forde

Fiona Forde is a Dublin-based barrister

On 19 May 2010, Senator Feargal Quinn introduced the *Construction Contracts Bill* to the Seanad and the concept of adjudication to Ireland. The bill was passed by the Seanad on 8 March 2011 and is currently awaiting further debate in the Dáil.

In order to properly consider the subject of the appropriate form of such legislation for Ireland, due consideration must be given to the choices made by other jurisdictions in relation to equivalent legislation.

Construction contracts and security for payment legislation introduced in other jurisdictions tend to share certain commonalities, such as the prohibition of the use of 'paid when paid' clauses and ensuring the claimant's right of suspension of works either for non-payment or non-compliance with an adjudicator's determination.

The underlining shared priority of the legislation is to secure payment where validly due and owing for work and services rendered in relation to construction projects through an expeditious forum of dispute resolution.

An indication of the key differences in the various forms of the legislation can be established through a comparison of the British *Housing Grants, Construction and Regeneration Act 1996* (as amended) and New South Wales' *Building and Construction Industry Security of Payment Act 1999* as amended ('the NSW act'): The NSW act deals with payment-only disputes, where a purported payee can submit a payment claim to be dealt with within a certain timeframe. The British act allows for the possibility of any party to a construction contract referring any dispute arising under the contract to adjudication.

The NSW act only allows for progress payment claims to be made by the purported payee to the purported payer, effectively prohibiting the purported payer's rights of counterclaim and severely restricting the purported payer's avenue of defence on failure to comply with the payment scheme set out in the act. The British act allows for consideration of both claims and counterclaims made by any party to the construction contract.

"A successful construction industry payments legislative scheme needs to offer the facility of effective dispute resolution as well as the assurance of fair procedures"

Under the British act, adjudicators are under a duty to exercise their initiative to ascertain the facts and the law. The NSW act does not allow for consideration by the adjudicator of submissions made by the respondent regarding reasons for withholding payment, other than those which have been made in accordance with the payment scheme set out in the act.

Scope of claims

In comparison to the restriction on the respondent's entitlement to counterclaim for delay, damages under the NSW act may be regarded as stripping a party of its rights pursuant to the contract to claim for damages at adjudication stage, thereby calling into question both the substantive and procedural fairness of the procedure set out in the act.

The scope of the British act is wider, providing the right for either party to make an adjudication application in relation to any dispute falling within the scope of the construction contract. While this would lead to a greater immunity to adjudications being set aside on the basis of procedural unfairness, the all-encompassing nature of the legislation may result in adjudication being sought on a project for any reason. This may present potential for abuse, particularly having regard to the suspension rights that can be invoked by a claimant under the British act in relation to a dispute defined in section 108(1) of the act simply as "any difference", as opposed to the more limited suspension rights under the NSW act arising only in relation to progress payment disputes.

Right to defend claim

Under the NSW act, a claimant serves a payment claim on the person who is or may be liable to make payment under the construction contract ('the respondent'). The respondent may reply by serving a payment schedule on the claimant, identifying the amount the respondent proposes to pay the claimant ('the scheduled amount'). If the scheduled amount is less than the amount claimed by the claimant, the respondent must set out in the payment schedule the reasons why he is withholding payment.

If the claimant seeks to recover through court proceedings the

scheduled amount due and owing or the payment claimed to which the respondent has failed to submit a payment schedule, the respondent is not entitled to make a cross-claim against the claimant or to raise any defence in relation to matters arising under the construction contract (section 25(4)(a)).

Alternatively, if the claimant makes an adjudication application in respect of the payment claimed, the adjudicator is only entitled to consider submissions made by the respondent in support of the payment schedule. In comparison, an adjudicator under the British legislation is not restricted to a consideration of documents submitted by the parties when making his or her determination (section 108(2)(f)).

While the NSW act offers an efficient and expeditious approach to the payment of monies due and owing on a construction project, the lack of opportunity for the respondent to present its defence or counterclaim can lead to a subsequent challenge to the adjudicator's decision by the respondent on the grounds of the determination being unjust. This has been reflected by the number of applications made by adjudication respondents to the NSW courts over the past decade to have adjudicators' determinations set aside.

> *"It is, however, slightly disappointing that the bill has failed to follow the British example in relation to the binding nature of adjudication"*

Unlike the NSW act, the British act adheres to the parties' agreed contractual payment regime and applies a statutory regime only where the parties have failed to reach such an agreement (section 109). The British legislation does not make the serving of a response to a payment claim a condition precedent to the right of a party who is served with an adjudication application to lodge an adjudication response. Additionally, there are no limitations as to the inclusion of reasons for withholding payment in a response to an adjudication application. Thus, provided that a party lodges their response to an adjudication application within the time allowed by the legislation, it will not be deprived of the opportunity to present its full case.

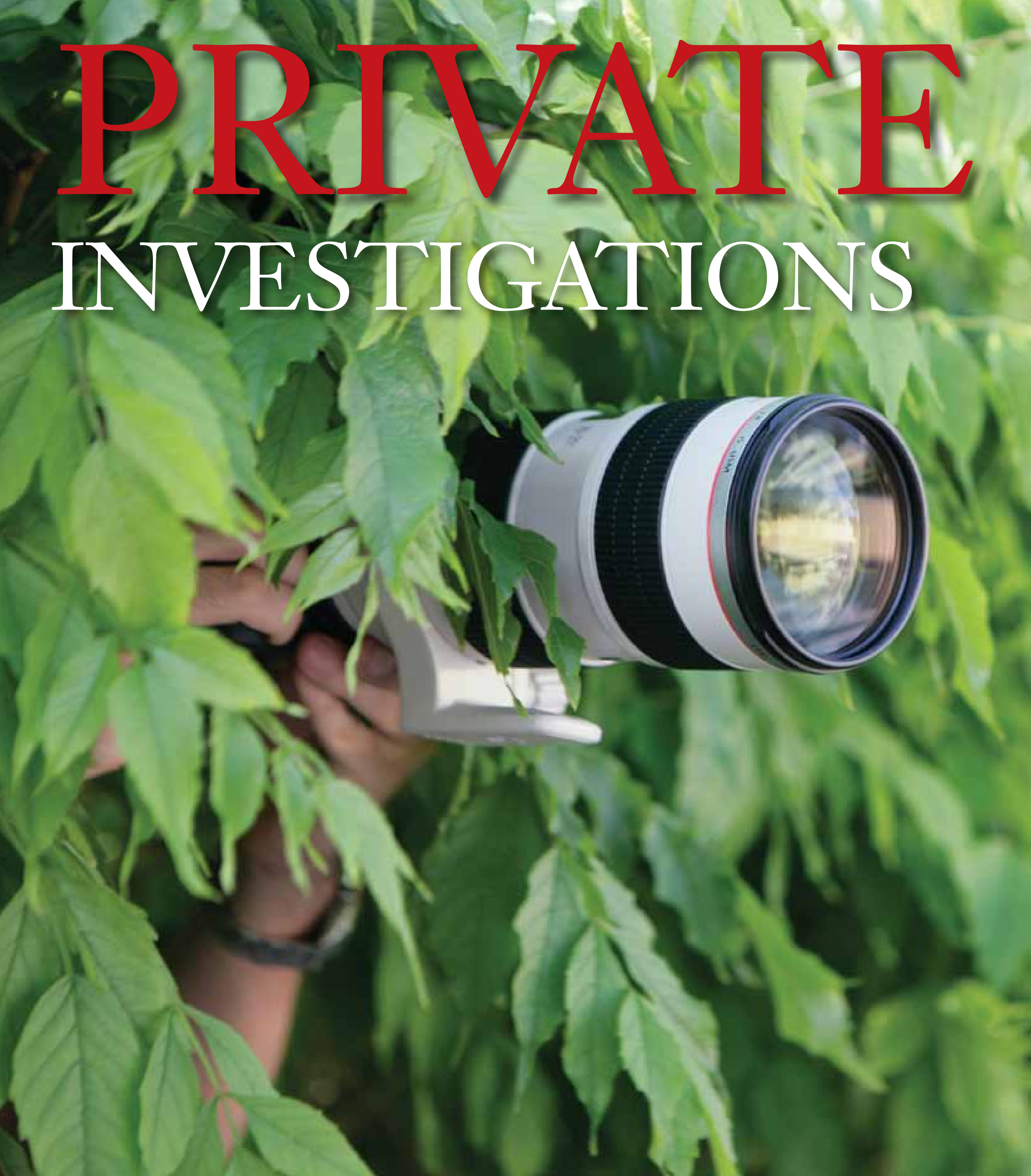
Appropriate form

In considering the appropriate form of legislation for Ireland, a party's entitlement to adequately make their case must be ensured and, in this context, it is submitted that the Irish *Construction Contracts Bill* as presently drafted is correct to follow at least in broad outline the procedural initiatives set out in the British act.

It is, however, slightly disappointing that the bill has failed to follow the British example (section 108(3)) in relation to the binding nature of adjudication. In most cases in Britain, the adjudicator's decision is final and binding and takes immediate effect. It is only on rare occasions that the adjudication decision is superseded by the later decision of a judge or arbitrator. Under the Irish bill (section 6(12)), adjudication shall not be binding if the payment dispute is referred to arbitration or litigation, unless agreed between the parties.

The overall costs to the construction industry of settling disputes needs to be considered, and this includes the costs of possible challenges to an adjudicator's findings on the grounds of procedural unfairness. However, a successful construction industry payments legislative scheme needs to offer the facility of effective dispute resolution as well as the assurance of fair procedures, and it remains to be seen whether failing to follow the British example of essentially binding adjudication will afford the *Construction Contracts Bill* the significance it deserves in the Irish context.

PRIVATE INVESTIGATIONS



Liam Moloney is principal of Moloney & Co, Naas. He has been practicing in the areas of personal injury, employment, and medical negligence litigation for the past five years

FAST FACTS

- The potential threat of unfair and unbalanced surveillance evidence
- The advice solicitors should give in cases involving potential surveillance
- The preliminary steps to be taken when a private investigator has been listed as a witness for the defendant
- Intrusion and the right to privacy
- Courts less reluctant to accept private investigators' evidence
- Courts have yet to address the issue of whether a plaintiff, who has been observed by a private investigator (the evidence of whom has not been accepted by a court), is entitled to an award of aggravated or exemplary damages

While video surveillance can be a useful tool for defendant insurance companies, the use of material obtained through covert surveillance can lead to possible injustice for genuine accident victims. Liam Moloney gets his long lens out

There has been a marked increase in the use of video surveillance by defendant insurance companies in the past few years. In serious injury cases, where millions of euro are at stake, the cost of a few days' surveillance is a modest amount to pay for evidence that may undermine, and potentially destroy, a plaintiff's claim.

However, in some cases, the use of video footage or pictures obtained through covert surveillance may distort the real picture for the genuine plaintiff and lead to possible injustice for genuine accident victims.

Plaintiffs' solicitors should be in a position to provide practical advice to combat the potential threat of unfair and unbalanced surveillance evidence.

Social networking sites are now routinely surveyed by defendants and their advisors. Security settings, either for plaintiffs or their contacts, are often at a low level, which enables far greater access than may have been anticipated by the individual user.

Money for nothing

Defendants are routinely using the punitive provisions of section 26 of the *Civil Liability and Courts Act 2004* to challenge plaintiffs who, they allege, are deliberately exaggerating their symptoms to obtain greater awards. This issue was addressed in the case of *Danagher v Glantine Inns Ltd*. The plaintiff in that case had unsuccessfully sought to have liability imposed upon the defendant's nightclub, arising from alleged injuries sustained by him during an altercation in which security staff intervened.

The plaintiff had maintained that, for several years following the incident, he had suffered from persistent neck and back pain that had adversely affected his third-level studies and sporting activities. He gave evidence that he had required some 70 sessions of physiotherapy in the two-year period following the incident, and that he had attended his GP on no less than 50 occasions during this period.

In the context of describing his physical symptoms, the plaintiff specifically denied that he had participated in a parachute jump for charity in July 2006, which had received coverage in his local newspaper. He maintained that this parachute jump had taken place in the previous year, 2005.

In order to explain the delay in the reporting of the parachute jump in the newspaper, he told the court that the reason that the article did not appear in the paper until the following year was because it was only at that stage that the monies collected were being handed over to the relevant charities. The defendant challenged this version of events and led evidence to establish that the parachute jump had actually taken place in July 2006, just six months after the alleged injuries sustained by the plaintiff.

Judge Irvine found that the plaintiff sought to mislead the court, knowing full well that if he had admitted his involvement in the parachute jump, just six months after his alleged assault, it would

completely undermine the extent of his injuries, for which he was claiming damages. She held that the plaintiff had also misled the court in claiming the level of attendances with his GP and physiotherapist, which he did deliberately, hoping to impress upon the court the severity of his symptoms.

The judge held that these were "phantom visits" to his GP and physiotherapist and that his evidence was false and undoubtedly destined to influence and mislead the court as to the severity of his symptoms. She held that he had deliberately overstated his injuries.

The judge said that, if it were not for the fact that she was dismissing the claim on liability grounds, she would have, in any event, been obliged to dismiss the plaintiff's claim, having regard to the provisions of section 26 of the *Civil Liability and Courts Act 2004* and to the falsity of the plaintiff's evidence.

"The use of video footage or pictures obtained through covert surveillance may distort the real picture for the genuine plaintiff and lead to possible injustice for genuine accident victims"

On every street

As a matter of routine, all clients should be advised that they are likely to be surveyed, and that investigations of their social networking use may be undertaken by defendants and their representatives.

All clients should be warned to be careful about the information they place on their sites. The purpose of this is not to seek to protect the fraudster, but to ensure that the 'naïve' plaintiff is protected. In certain cases, people may say they were out socialising, which can be purely innocent commentary, but can be taken up the wrong way – even by a court. This does not mean that a plaintiff is not suffering genuine symptoms that would not preclude them from having a night out. Much of this evidence is subjective and is often only a snapshot in someone's life. How many of us are not prone to exaggeration when we are using our social sites?

If a private investigator is listed as a witness for the defendant, the following preliminary steps should be taken:

- Request all edited and unedited footage, to include DVDs and pictures,
- Seek discovery of all logs and records relating to the said surveillance,
- Seek discovery of the letter of instruction and payment terms – it is known that some

SETTING ME UP

By its very nature, surveillance is intrusive. Perfectly innocent plaintiffs who have suspected that they are under surveillance find the process very threatening. There is a right to privacy enshrined under article 6 of the *European Convention on Human Rights Act 2003*. The Irish courts have to give effect to the provisions of the convention and, therefore, it is appropriate to explore at the trial how this surveillance evidence has been obtained.

In some instances, evidence may have been obtained through breach of constitutional and convention rights. In the case of *Herrity v Associated Newspapers (Ireland) Ltd*, Dunne J confirmed the entitlement of the private individual to sue for infringement of the right to privacy. The judge in that case confirmed that:

- **There is a constitutional right to privacy,**
- **The right to privacy is not an unqualified right,**
- **The right to privacy may have to be balanced against other competing rights or interests, and**
- **The right to sue for damages for breach of the constitutional right to privacy is not confined to actions against the State.**

Therefore, surveillance evidence obtained through breach of convention and constitutional rights that are in breach of the right to privacy may entitle a plaintiff to damages against the investigator and, as a corollary, against his or her principal. However, in civil injury claims, this is a matter that has yet to be tested.

private investigators work on a 'no-fraud, no-fee' basis and so may be incentivised to produce material (in the edited version) that justifies payment,
- Request confirmation that the defendant's solicitors have complied with the provisions of the *Data Protection Act* in relation to any information given to private investigators (this will also include seeking a copy of the letter of engagement between the private investigator and his client),
- Check the defendant's defence to see if fraud has been specifically pleaded by the defendants in their defence, and take counsel's advice, and
- Discuss with your client the footage when received, and your client's response.

It is essential that late disclosure of private investigators and their evidence does not cause panic among a plaintiff's solicitor or his client. In many cases, it is a tactic used by defendant insurance companies to try to force the unwitting plaintiff to accept a lesser amount in settlement.

"Social networking sites are now routinely surveyed by defendants and their advisors. Security settings, either for plaintiffs or their contacts, are often at a low level, which enables far greater access than may have been anticipated by the individual user"

Follow me home

In a recent High Court decision in the case of *Murphy (née Condon) v Roche*, MacMahon J made an award of €212,608 to an injured plaintiff who had been the subject of surveillance by a private investigator. The plaintiff, who was a 36-year-old woman, sustained injuries to her right shoulder, neck, back and chest in a traffic accident on 13 November 2006.

The defendant's insurance company engaged a private investigator to observe her. He told the court that he observed her covertly, on two separate occasions. On one occasion, he told the court that he saw her throwing a snowball in the garden at her daughter, and that he did not observe any restriction in her movements on that day. On another occasion, he followed her as she and her husband drove to town to see her solicitor. He said that he had noticed marked restrictions in her movements on that day, and that she had linked her husband's arm as she walked.

The inference was that she was exaggerating her symptoms by adopting a more restricted gait in an effort to impress her solicitor. The investigator produced 86 photographs to the court.

Judge Brian MacMahon carefully examined the photographs and came to the view that they disclosed nothing that would take from the plaintiff's version of events. He ruled that, as there were no photographs of her bending, lifting, running, jumping or carrying heavy shopping bags, the evidence of the private investigator did not take from the genuineness of her complaints. He said: "As to the allegation that the plaintiff was seen linking her husband as they walked to the solicitor's office, this could hardly be something to be held against her, as married couples frequently link each other for no other reason than to display affection for each other."

The court took a balanced approach to this type of evidence, which shows an increased willingness on the judiciary's part to look objectively at the entirety of the evidence.

Walk of life

An issue that has not yet been addressed by the courts is whether a plaintiff who has been observed by a private investigator, and the evidence of whom has not been accepted by a court, would be entitled to an award of aggravated and/or exemplary damages. Surely, where a defendant indirectly pleads fraud on the part of a plaintiff, and this evidence is rejected by the court, the penalty should be an award of exemplary damages?

The issue was *not* addressed by Mac Mahon J in the *Murphy* case, but will probably be tested quite soon in the civil courts. In many other cases that have come before the High Court in recent years, exemplary damages have been awarded by the courts. The landmark case of *Conway v Irish National Teachers' Organisation* may be relied upon by successful plaintiffs in negligence cases where fraud has been alleged on the parts of the defendants.

Griffin J in the *Conway* case said: "Such damages may be awarded where there has been, on the part of a defendant, wilful and conscious wrongdoing in contumelious disregard of another's rights. The object of awarding exemplary damages is to punish the wrongdoer for his outrageous conduct, to deter him and others from any such conduct in the future, and to mark the court's detestation and disapproval of that conduct."

Aggravated damages were also awarded in the case of *Mary Iris Daly v Dessie Mulhern and the Motor Insurers' Bureau of Ireland*. In that case, the plaintiff sustained whiplash injuries when her car was hit from the rear by a car driven by the first-named defendant. The first-named defendant subsequently wrote a letter alleging that the plaintiff had called to her door enquiring as to whether she had had an accident with the first defendant, or any of his drivers, while she had drink taken; and the first defendant alleged that the accident never took place.

The plaintiff, when informed of this by her solicitors, couldn't believe that the first defendant had denied the accident. She was particularly hurt by the allegation that she was drunk, and by the implication that she had fabricated the accident. Murphy J awarded aggravated damages in that case. It is clear, therefore, that insurance companies and their representatives must be careful in how they mount their defences. Defendant solicitors also have to advise their clients as to the danger of running a 'fraud' defence that, if rejected, could lead to aggravated damages being awarded.

Plaintiff solicitors also need to make sure that their clients are protected by ensuring that such evidence is obtained fairly, and accurately present the entirety of their client's case to the court.

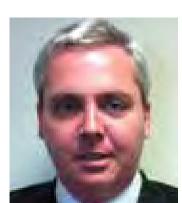
Surveillance is now a part of dealing with injury claims, and it is essential that solicitors should be able to properly advise their clients and be aware of the law in this area. G

LOOK IT UP

Cases:
- *Conway v Irish National Teachers' Organisation* [1991] 2IR305
- *Danagher v Glantine Inns Ltd* [2010] IEHC214
- *Herrity v Associated Newspapers (Ireland) Limited* [2008] IEHC 249
- *Mary Iris Daly v Dessie Mulhern and the Motor Insurers' Bureau of Ireland* [2005] IEHC 140
- *Murphy (née Condon) v Roche* [2011] IEHC 35

Legislation:
- *Civil Liability and Courts Act 2004*
- *Data Protection Acts*
- *European Convention on Human Rights Act 2003*

Ireland was used over a significant period as a transit stop for flights engaged in the US extraordinary rendition programme. However, it is clear that the transit of prisoners from other states through Ireland must be attended by a significant degree of formality and procedure. Remy Farrell checks in



Remy Farrell is a Dublin-based barrister and the co-author, with Anthony Hanrahan, of The European Arrest Warrant in Ireland *(Clarus Press)*

It is a feature of extradition law that detailed provision is generally made for the transit of prisoners through third states – that is, states that have neither surrendered nor sought the extradition of the prisoner. This is no more than the result of a practical reality that will be familiar to anyone who has had to take a connecting flight to reach their final destination.

Our own law is no different in that regard, in that both the *Extradition Act 1965* and the *European Arrest Warrant Act 2003* contain detailed and elaborate provisions for the transit of such prisoners. Both acts require that the Minister for Justice be notified of the identity of the person and the details of the offence for which they are in the process of being surrendered. It is also a feature of both acts that the transit of these prisoners can be subject to supervision by the gardaí.

It is quite clear from even the briefest perusal of the relevant legislative provisions that the transit of prisoners from other states through Ireland must be attended by a significant degree of formality and procedure. It is not difficult to deduce why this ought to be so: it is simply a manifestation of the State's duty under both domestic and international law to protect and vindicate the rights of the individual. It also serves as an important protection for the State itself to ensure that it is not made an unwitting accomplice to illegal rendition.

"The principle of 'mutual trust' between EU member states has, on occasion, been deployed to trump evidentially-based concerns and complaints as to the prison conditions or defects in the trial process in other European countries"

Leaving on a jet plane

The concerns of the legislature in laying down such detailed procedures for the transit of prisoners have, however, been all but entirely ignored by the executive in more recent years, particularly insofar as rendition flights involving the United States government have been concerned. It is now entirely beyond dispute that Ireland was used over a significant period as a transit stop for flights engaged in the US extraordinary rendition programme. The extent of the Irish involvement was highlighted recently in an extraordinarily detailed and comprehensive report by the Irish Human Rights Commission (IHRC) into extraordinary rendition.

The report described in laborious detail the evidence relating to the use of Shannon Airport. It cited the conclusions and evidence as related in other international reports, in particular, the reports of the Parliamentary Assembly of the Council of Europe, which specifically concluded that the CIA had been operating what were somewhat euphemistically described as 'black sites' in Poland and Romania. These were, in fact, interrogation centres, where interrogation techniques that would be recognised as torture by any meaningful definition of that word were being employed.

The IHRC report also made specific reference to a European Parliament report from January 2007, which had gone so far as to censure Ireland for its involvement in the CIA extraordinary rendition programme. The EU parliament report went so far as to identify the specific prisoners who had stopped over in Shannon before being shipped to detention centres in North Africa and Eastern Europe.

Indeed, it was a remarkable feature of the various reports collated in the IHRC report that they contained specific information in relation to the registration numbers of the aircraft involved, the dates of flights, and even tied the flights into specific incidents of torture and kidnap.

The response of a number of European member states to the various reports of the different European bodies was to conduct their own probes. Sweden, Germany and Italy each carried out investigations. In Italy, a number of US nationals were, in fact, convicted of various offences connected with the programme.

FLY ME TO THE MOON

FAST FACTS

- The *Extradition Act 1965* and the *European Arrest Warrant Act 2003* contain detailed and elaborate provisions for the transit of prisoners through Ireland
- Both acts require that the Minister for Justice be notified of the identity of the person and details of the offence for which they are in the process of being surrendered
- These detailed procedures for the transit of prisoners have been all but ignored insofar as rendition flights involving the US Government have been concerned

The response in Ireland was somewhat different. The then Minister for Foreign Affairs, Dermot Ahern, in response to the IHRC report, issued a rather terse statement. He deplored the practice of extraordinary rendition and suggested that there was no evidence of any Irish involvement: "No evidence has been produced – despite the various investigations which have been carried out – that any person has ever been subject to extraordinary rendition through Ireland, and this was acknowledged by chairman Maurice Manning in his submission to the European Parliament."

The extraordinary rendition of an illegal alien

Magic carpet ride

Quite how anyone could sensibly draw such a conclusion from the IHRC report is at best unclear. The minister laid very particular emphasis on the entitlement of the State to rely upon diplomatic assurances received from the US Government to the effect that none of the airplanes landing at Shannon were engaged in extraordinary rendition. The assurances received were backed up by the implicit threat that the gardaí could investigate where there were grounds for suspecting misconduct: "The Garda Síochána already have full powers to search civil aircraft of the type alleged to have been involved in extraordinary rendition where they have reasonable grounds for suspecting illegal activity."

The minister proudly pointed to the various examples of allegations that had been made to the gardaí about rendition flights and the steps taken on foot of these allegations. On each occasion, where a private citizen or member of the Oireachtas made an allegation about extraordinary rendition at Shannon Airport, a senior garda was appointed, presumably for the purpose of conducting an investigation. The minister's statement recounted how none of the individuals who had the impertinence to raise the issue did any more than point to the material that was in the public domain in the form of the various reports already alluded to, and media coverage of same. In each case, the gardaí felt entitled to leave matters lie on the basis that 'evidence' had not been produced by those making the allegations.

"The use of extraordinary rendition and torture by the US in the aftermath of 9/11 represents the most glaring and cynical abuse of human rights by a Western democracy in living memory"

It is difficult to reconcile such an approach with the minister's comments to the effect that the gardaí were entitled to search aircraft once they had a reasonable suspicion. Indeed, it rather turns on its head the investigative process – experience tends to suggest that the formation of a reasonable suspicion precedes the exercise of powers of search that results in evidence, not the other way around.

Notably, the minister did not, at any point, seek to actually engage with the material set out in either the IHRC report or, indeed, the other European reports. Rather, he simply sought to dismiss it by blithely suggesting that such reports were informed by party political concerns and that the various enquiries had been hijacked by 'activists' – this last term deployed in what was presumably intended to be a pejorative context.

Shot down in flames

That would be the extent of the criticism that might be made of the State's position on extraordinary rendition were it not for the more recent disclosures arising from Wikileaks. The national media seem to have been entirely uninterested in contrasting Mr Ahern's statement of 11 December 2007 with the comments it is claimed he made in private to the US ambassador on the same topic just over a week later.

In a leaked cable, it was stated that: "Ahern noted that he had 'put his neck on the chopping block' and would pay a severe political price if it ever turned out that rendition flights had entered Ireland or if one was discovered in the future. He stated that he 'could use a little more information' about the flights, musing that it might not be a bad idea to allow the random inspection of a few planes to proceed, which would provide cover if a rendition flight ever surfaced. He seemed quite convinced that at least three flights involving renditions had refuelled at Shannon Airport before or after conducting renditions elsewhere."

The cable goes on to note that a hearing before the Oireachtas Foreign Affairs Committee, on the same day as the publication of the IHRC report on extraordinary rendition, was barely reported.

The cable – assuming it to be a correct account of that meeting – is rather disturbing on a number of fronts.

Notwithstanding his public assurances, the minister is described as being quite convinced that rendition flights had used Shannon. This is notwithstanding his robust protestations to the contrary. Insofar as the cable relates that he rather deferentially suggested allowing inspections, this was not in any sense for the purpose of preventing extraordinary rendition, but rather for the express purpose of providing political cover in circumstances where he had 'put his neck on the block'.

This flight tonight

The use of extraordinary rendition and torture by the US in the aftermath of 9/11 represents the most glaring and cynical abuse of human rights by a Western democracy in living memory. The most basic norms of humanitarian law were simply dispensed with. The role played by Ireland, while relatively minor, was nonetheless significant.

The most disturbing aspect of the whole affair, however, is the extent to which the State considered itself entitled to rely upon bland diplomatic assurances over detailed and specific evidence on the issue of extraordinary rendition. Such

an approach will strike something of a chord with those who practice in the area of extradition law. Much of the more recent jurisprudence in this area has been underlined by the principle of 'mutual trust' between EU member states. This principle has, on occasion, been deployed to trump evidentially-based concerns and complaints as to the prison conditions or defects in the trial process in other European countries. From the lawyer's perspective, there must be a concern that this represents a new approach on the part of sovereign states and that there will be an increased tendency to seek to remove conditions of trial and detention in other states from forensic scrutiny by means of the simple expedient of citing some diplomatic or judicial assurance.

Indeed, one might well question why it is that the State would appear to be so reluctant to afford an equivalent respect or trust to its own domestic institutions, which it has established specifically for the purpose of vindicating and protecting basic human rights. The contemptuous manner in which Minister Ahern sought to rubbish not only the IHRC report but also the other reports emanating from European bodies is chilling. The subsequent savage cuts to the budget of the IHRC would tend to suggest that it will be some considerable time before such bodies can expect to receive the respect or trust from the core institutions of the State, which are their due, having regard to the vital role that they play. G

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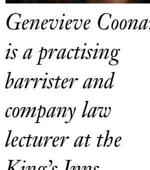
A MEETING OF *minds*



Genevieve Coonan is a practising barrister and company law lecturer at the King's Inns

As a result of a 2010 High Court decision, the informal agreement of all shareholders to enter into a transaction that ordinarily contravenes section 29 of the *Companies Act 1990* will constitute an act of the company. Genevieve Coonan examines this decision and its repercussions for company law in general

The effect of the decision in *Kerr v Conduit Enterprises Ltd* is that the informal agreement of all shareholders to enter into a transaction that ordinarily contravenes section 29 of the *Companies Act 1990* will constitute an act of the company. In turn, the passing of a formal resolution at a general meeting is not absolutely necessary. In light of the current economic downturn, directors should be particularly careful to ensure that transactions entered into by the company do not fall foul of section 29 of the *Companies Act 1990*. The provision prohibits the transfer of substantial non-cash assets between directors (or persons connected to them) and the company. Breach of the prohibition may, in certain circumstances, result in the transaction being rendered void. Worse yet, a director or connected person may find themselves liable to account to the company for any gain made as a result and/or to indemnify the company for any resulting loss or damage.

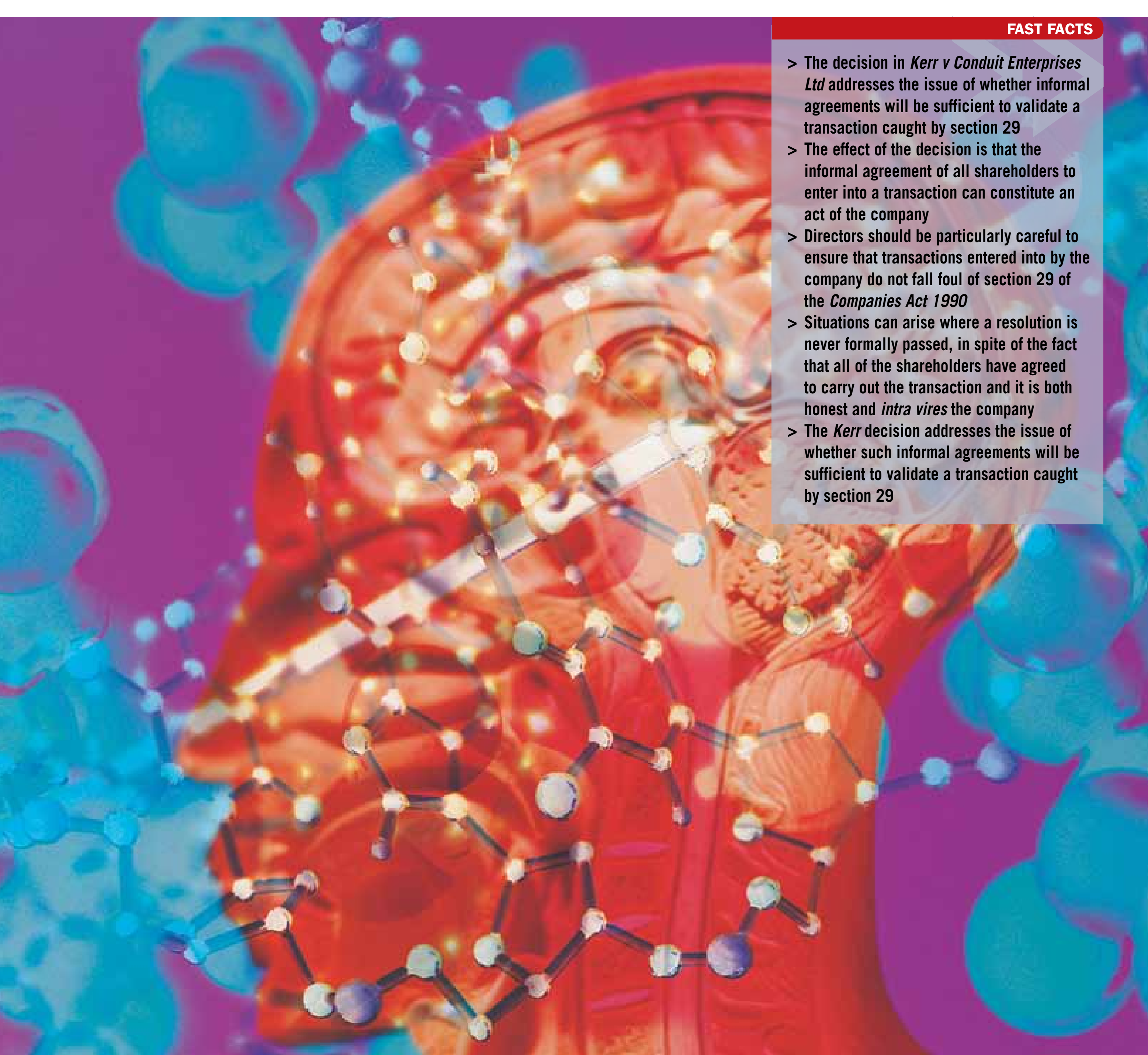
Of course, such transactions may be rendered enforceable by the passing of an ordinary resolution by shareholders. In many private companies in Ireland today, this can be achieved quite easily, due to the fact that the owners and management are often one and the same. Nevertheless, situations can arise where a resolution is never formally passed, in spite of the fact that all of the shareholders have agreed to carry out the transaction, and it is both honest and *intra vires* the company. The decision in *Kerr* addresses the issue of whether such informal agreements will be sufficient to validate a transaction caught by section 29.

> **"The *Kerr* decision has significant ramifications due to the plethora of situations in which the passing of an ordinary resolution is a prerequisite to entering into a transaction. There may be many cases in which it will prove very useful"**

In *Kerr v Conduit Enterprises Ltd*, the defendant company had leased premises owned by a number of individuals, two of whom were directors of the company when the lease was entered into. The company subsequently underwent multiple ownership changes, and the new owners sought to void the lease on the grounds that it had never been approved by "a resolution of the company in general meeting", pursuant to section 29(1). The landlords argued that this requirement had been satisfied, as all of the shareholders with a right to both attend and vote at a general meeting had agreed to and authorised the grant of the lease, albeit at a meeting of a board of directors.

In refusing to void the lease, Finlay Geoghegan J first noted that it was settled law since the 1954 decision in *Buchanan Ltd v McVey* that the informal agreement of all shareholders to do something that is honest and *intra vires* the company is to be regarded as an act of the company and does not require the passing of a formal resolution at a general meeting. The decision in *Buchanan* was subsequently cited with approval in *Re Greendale Developments (No 2)* and *Re PMPA Garages Ltd*. A similar approach was also adopted in England in the 1969 case of *Re Duomatic Ltd*.

However, Finlay Geoghegan J went on to note that the decision in *Buchanan* did not involve the passing of a resolution in relation to the type of statutory requirement specified in section 29(1). Furthermore, although the application of the *Duomatic* principle to a statutory provision had since been approved of in England in *NBH Ltd v Hoare*, such decisions were of persuasive authority only. As a result, whether the principles outlined



FAST FACTS

- The decision in *Kerr v Conduit Enterprises Ltd* addresses the issue of whether informal agreements will be sufficient to validate a transaction caught by section 29
- The effect of the decision is that the informal agreement of all shareholders to enter into a transaction can constitute an act of the company
- Directors should be particularly careful to ensure that transactions entered into by the company do not fall foul of section 29 of the *Companies Act 1990*
- Situations can arise where a resolution is never formally passed, in spite of the fact that all of the shareholders have agreed to carry out the transaction and it is both honest and *intra vires* the company
- The *Kerr* decision addresses the issue of whether such informal agreements will be sufficient to validate a transaction caught by section 29

in *Buchanan* applied to section 29 depended upon the rationale underlying the statutory prohibition.

Purpose of statutory prohibition

Turning to the intention of the Oireachtas in enacting section 29, Finlay Geoghegan J said: "The purpose of section 29 of the act of 1990 is to protect the shareholders of a company against directors entering into certain transactions with the company in which they have a personal interest, without the approval of at least those shareholders holding a simple majority of the voting shares. Section 29(1) only requires an ordinary resolution. The mischief sought to be avoided appears confined to the protection of shareholders with a right to vote. It does not have any wider ambit. Notice is not required to be given to any other person of the proposed transaction, and the resolution of the shareholders is not one which requires to be filed in the Companies Registration Office. Section 29 does not so require, and it does not come within the types of resolution specified in

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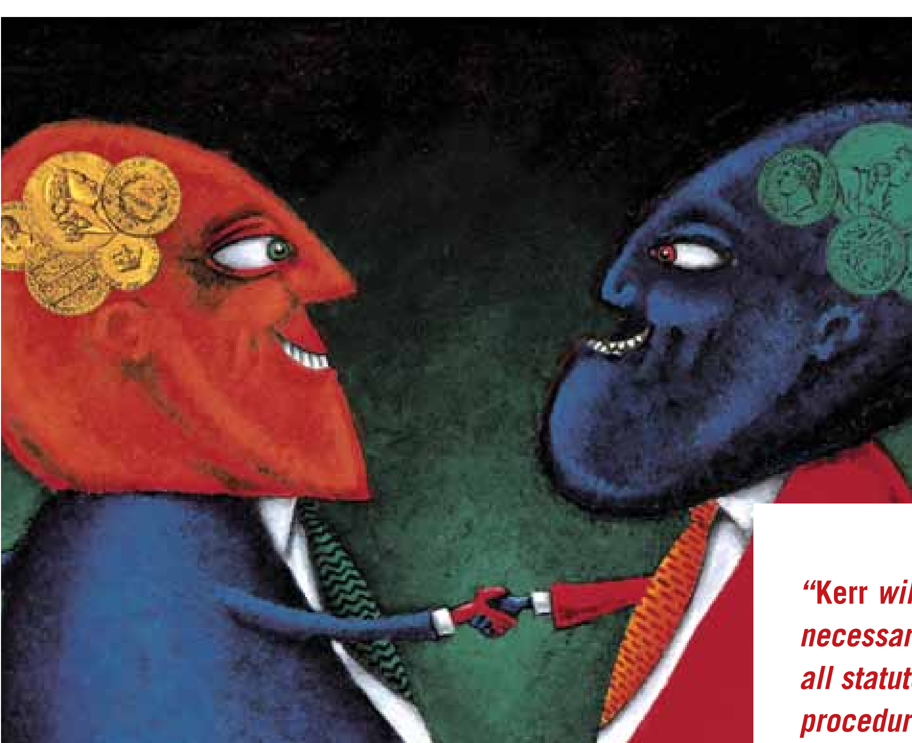


section 143 of the act of 1963, which require filing in the Companies Registration Office."

Finlay Geoghegan J was also satisfied that there was nothing in the wording of section 29 that indicated that the Oireachtas intended to preclude *Buchanan* from applying to the express requirement for a resolution of a general meeting. In fact, she went further and stated that such an interpretation would render the application of section 29 absurd in certain circumstances. She said: "Suppose the landlords had included all four of the persons who were then the shareholders entitled to both attend and vote at a general meeting of the defendant, would the Oireachtas have intended, in the enactment of section 29, that where a company entered into a transaction with all of its then ordinary shareholders, obviously fully aware of and consenting to the transaction, 11 years later, following many changes of ownership, the company should be entitled to avoid the transaction just because all the shareholders who entered into the transaction did not also record their approval by the passing of a resolution in general meeting? It appears to me such an interpretation would be absurd, having regard to the clear intention of the Oireachtas to protect shareholders against transactions entered into by directors with the company, unless notice is given to and there is approval of shareholders representing a majority of the voting shares."

She concluded that there had been sufficient approval for the purposes of section 29(1), as all of the ordinary shareholders had, prior to the grant of the lease, been aware of the key terms of the lease and of the fact that two of the landlords were also directors of the company.

Of course, the court's findings regarding this issue are, strictly speaking, *obiter*, as it had already held that section 29 did not apply to the grant of the lease due to the fact that it was virtually worthless and, therefore, did not constitute an asset of "requisite value" within the meaning of section 29. Even so, it is difficult to dismiss the decision on that basis, having regard to the strength of the court's logic, the purpose of section 29, and the fact that it is in line with the English authorities on the same issue.

"Kerr will not necessarily apply to all statutory validation procedures. For example, it does not apply where the passing of a special resolution is required, as such must be filed in the CRO"

One size does not fit all

It must be borne in mind that the reasoning in *Kerr* will not necessarily apply to all statutory validation procedures. For example, it does not apply where the passing of a special resolution is required, as such must be filed in the CRO. Formal procedures must, therefore, be adhered to where a company seeks to act as guarantor or provide security on a director's behalf in connection with a loan, quasi-loan or credit transaction pursuant to section 34 of the 1990 act (as amended).

They must also be adhered to where the company seeks to provide financial assistance in the purchase of its shares pursuant to section 60(2) of the 1963 act. Indeed, with regard to the latter provision, Costello J said in *Lombard v Bank of Ireland* that "strict compliance with the procedures is necessary" where reliance is placed on the fact that a special resolution has been passed. This makes a good deal of sense when one considers the fact that these statutory prohibitions are designed to take into account the interests of creditors and other third parties who deal with the company.

Furthermore, the decision in *Kerr* is based on the fact that the purpose of section 29 is to protect shareholders, and it does not require that notice be given to any other person of the proposed transaction. As a result, the decision will not apply where such notice must be given. Strict adherence to formalities will, therefore, be necessary where shareholders wish to remove a director or auditor, as the *Companies Acts* require that the latter be given notice of the meeting at which that removal will be proposed.

Nevertheless, the decision has significant ramifications due to the plethora of situations in which the passing of an ordinary resolution is a prerequisite to entering into a transaction. There may be many cases in which it will prove very useful. While non-adherence to legal formalities is not to be recommended, it can be said that a failure to formally pass an ordinary resolution, be it through inadvertence or otherwise, will not always result in the invalidation of the resulting transaction, provided it is honest and *intra vires* and that all shareholders have agreed to enter into it. G

LOOK IT UP

Cases:

- *Buchanan Ltd v McVey* [1954] IR 89
- *Kerr v Conduit Enterprises Ltd* [2010] IEHC 300 (unreported, High Court, Finlay Geoghegan J, 22 July 2010)
- *Lombard v Bank of Ireland* (unreported, High Court, 2 June 1987)
- *NBH Ltd v Hoare* [2006] EWHC 73
- *Re Duomatic Ltd* [1969] 2 Ch 365
- *Re Greendale Developments (No 2)* [1998] 1 IR 8
- *Re PMPA Garages Ltd* [1992] IR 315

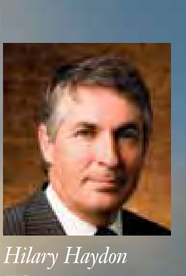
Legislation:

- *Companies Act 1990*

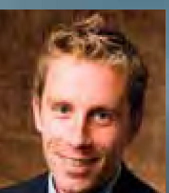
FAST FACTS

- At the moment, there is very little current value in your practice
- Most practitioners are facing longer working hours and working longer in years than was expected five years ago
- The challenge will be to focus on running practices to stay in the game and on planning for the future potential that will develop as the economy starts on the road to recovery
- Focus on your areas of work and current skills resources, and ensure your current staff levels and skills base, as well as your overheads and costs, reflect these

REALITY dawns



Hilary Haydon FCA is a partner in Haydon Chartered Accountants



Jason Bradshaw ACA is director of corporate finance and strategic development at the firm, which specialises in providing business and accounting services to the legal profession

The reality is that, in the current climate, there is very little value in solicitors' practices. However, there are ways to face these challenges. Hilary Haydon and Jason Bradshaw get down and dirty back in the trenches – walking the walk, not just talking the talk

Wow, has the landscape changed in recent times! In the last two years, we have seen it all – or have we? We have gone from NAMA to the IMF, and from Fianna Fáil to Fine Gael. We have seen almost all Irish banks nationalised. It is total carnage in boardrooms and offices all around the country. The mighty Quinn Group has fallen. We have seen the number of receiverships and liquidations rise beyond all expectations. We now talk about losing billions, while losing millions hardly gets noticed. The country is in ruins. While we all used to enjoy listening to *Morning Ireland* and Ivan Yates on Newstalk on the way to the office, the talk now is nothing but doom and gloom, day in and day out.

For most legal practitioners – whether working on your own, in partnership or, indeed, with one of the bigger firms – the past two years have brought almost total financial devastation. We have seen the economic tsunami sweep through our business life, bringing considerable financial headache and loss.

Fees have been cut, business has been lost, income is down, salaries have been cut, professional indemnity insurance is almost impossible to arrange, insurance costs have risen, commercial rates have to be paid, bills are mounting, the electricity and phone bills beckon, school fees are on the horizon, and the list goes on.

This is not what we 'bought into' when we decided to follow a career within the professional ranks. The legal profession is supposed to be a safe haven when it comes to business risk.

> *"In this current financial climate, most legal practitioners need to swallow the 'reality pill' – there is very little current value in your practice"*

Reality pill

In this current financial climate, most legal practitioners need to swallow the 'reality pill' – there is very little current value in your practice.

The key elements needed to make a market include a willing seller and willing buyer.

There are some willing buyers, but most want only the client fee block and would prefer having no ongoing involvement from the seller – not very appetising for a willing seller who might want either an earn-out or consultative role.

Price is a key component of any market, and it must offer a win/win solution for both the buyer and the seller. With current low profitability, the price or value of the practice is at an all time low in terms of value for the seller – therefore, it is not surprising to find that there are few willing sellers.

The banks have no money and, as such, there is little to no finance available to fund any possible deal. Furthermore, the professional indemnity insurance rules surrounding the takeover of work-in-progress files from practices is proving very difficult and, when possible, the cost of run-off cover is proving to be prohibitively expensive.

In order to create value you must have a market. Legal practices are not unlike many businesses in Ireland today, in which – due to the low level of transactions – the market for sellers is currently very poor and expectation for sellers is at a significant low.

Back to zero

For most practitioners, you are facing longer working hours and working longer in years than you had thought or expected five years ago.

The challenge in 2011 and into 2012 for many practitioners will be to focus on running their practice to stay in the game. We have seen practices with losses in fee income of up to 60% and more. Bad debts are on the rise. Slow paying clients are now part of normal practice. The cost of professional indemnity insurance has increased over twofold in many cases. The list goes on. In this current economic and financial war, there are no safe havens. It is all about getting out and down and dirty in the trenches.

Many practitioners have now taken the hard decisions, redundancies have been unavoidable, and yet there is still much to be done.

For many, the challenge of 'getting back to zero' presents a very positive opportunity for the next 12 months. For others, who have managed to successfully ride this economic wave and have already trimmed overheads and got their house in order, the challenge may well be planning for the future potential that will develop as the economy starts on the road to recovery.

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The solution for most is to ensure that your practice is put back into shape. The key challenges include:

- Business – review your areas of work and current skills resources, and see if skills resources, marketing plans and the ability to generate new business are correctly harmonised,
- Staff – consider your current staff levels and skills base and ensure that these match your business profile and fee budgets,
- Overheads – examine your overheads and ensure that these costs are appropriate for your current business size and plan of action.

Consideration needs to be given to setting the business goals for the next two to three years. For some, these targets may involve looking at merging, passing the business on, or retirement. In the current financial climate, this may involve preparing your practice for these objectives, which could take a couple of years in order to maximise the value and benefit.

For others, these targets will focus on restructuring, reorganising and innovating the current business model. Similarly, this will also involve changing the way business has been done through the 'Celtic Tiger' years.

For many practitioners, work needs to be done to improve the current business plan, which may involve getting down and dirty back in the trenches. These practitioners have to go back to the basics that were the original foundation stones of the practice when they first it up. It's called walking the walk, and not just talking the talk.

We need to focus on maintaining and building strong relationships with our clients, whereby they fully appreciate the value and quality of the advice given. The importance of these relationships has been lost in many businesses over the last few years and, now more than ever, we must understand and accept the value of the client relationship.

One good referral from an existing client is worth volumes in terms of goodwill. How many of your existing clients refer their friends and business contacts to you? How many of your clients have been asked to refer clients to you?

The key word is quality

Legal practices need to focus on quality when trying to maximise profitability within their firm:

- Quality of client – clients who bring good work to the practice and/or require a professional service and who are prepared to pay for the advice they receive,
- Quality of staff – ability to get the job done in a timely manner and commitment to care and attention,
- Quality of work – commercial, insolvency, family law and good litigation work,
- Quality of systems – technology/time management and costing systems.

All practitioners need to continue to develop strong relationships with their clients. Letters of engagement not only need to be sent out to comply with regulations, but time must also be taken to sit down with clients and explain the billing process.

Value must be delivered both in terms of what the practitioner believes is value but, more importantly, this value must be appreciated by the client. This takes a little bit of communication and marketing.

It is not good enough to say that you and your staff spent 12 hours working on a particular issue – it is also essential that you can demonstrate that value was delivered for that time. Your client must appreciate the value delivered and, when they do, then real goodwill and value will evolve for your practice.

If your client appreciates the work you do, the easier it becomes to collect their fees and persuade them to refer other work to you.

"Make sure that your staff understand your business plan and are willing to work with you to achieve your objectives. Key staff can contribute greatly to goodwill and the generation of fees and indeed new clients. Poor and unmotivated staff can cause major damage to your business"

If you build it, they will come

Survival will continue to be the name of the game for many practitioners throughout 2011 and, unfortunately, 2012. Practices that work hard and deliver quality to clients will see the dawn on the other side of the mountain. Unfortunately, for many, there will be continued stress and hardship until the economic climate improves.

However, there are many things that can be done. Take a closer look at your own business model. Decide what you want from your business over the next two or three years and start getting your house in order to achieve those objectives. No matter what the target, your business needs to be put into shape.

Talk to your clients, even those that you have not spoken to in some years – open the dialogue. Opportunities for business will emerge if you put the time into rebuilding relationships. Look back and see where your business came from in the past. Are there accountants or indeed bank managers who introduced business to you in the past? Is there scope for them to bring you more business in the future? Put time into building those relationships too. If you have fallen out with them in the past, mend the bridge if you can, as this life is no dress rehearsal. Relationships count for everything in business. It will take time. Results will not be immediate, but they will happen in time.

Make sure that your staffing is appropriate to the business plan and model. Carry out a skills audit. Talk to your staff and understand their goals and ambitions. Make sure that your staff understand your business plan and are willing to work with you to achieve your objectives. You do not need any players in your team who do not want to play for the team. Your staff are one of the most important assets of your business – as such, make sure that everything fits. Key staff can contribute greatly to goodwill and the generation of fees and indeed new clients. Poor and unmotivated staff can cause major damage to your business.

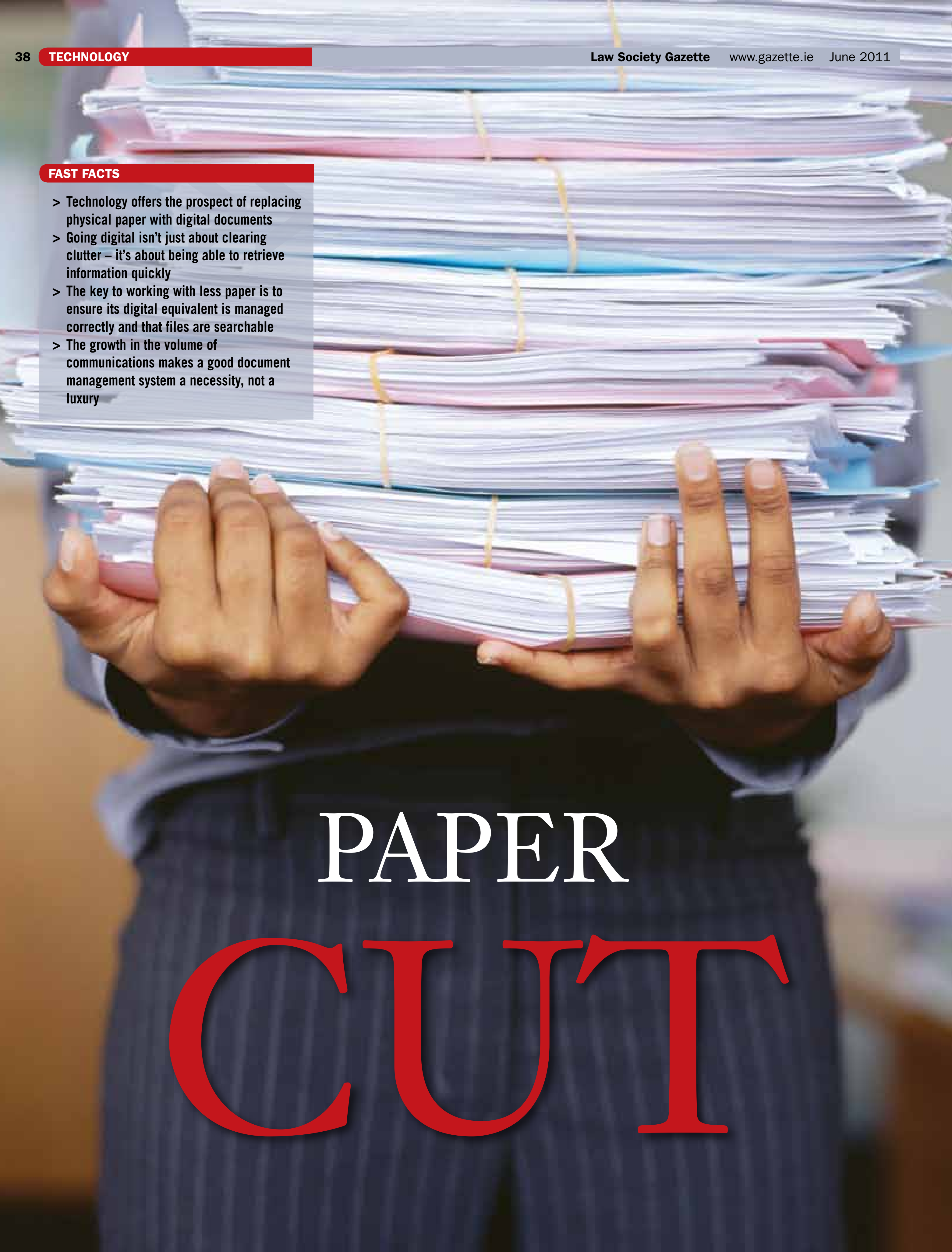
Take a good look at the areas of specialisation that your practice offers. Can you focus on new areas of expertise? Can you reinvent yourself? In 2011, the focus must be on change – and remember, if you want to stay here, you must move along.

Future value of your practice

We need to be able to change in order to influence the future for our benefit and reward. Value will return to the market. The storm will pass – and after it passes, we need to be ready to grasp opportunity as it emerges. We need to create that opportunity. By focusing on the day-to-day way we run our practices and connect with our clients, we can bring that change and bring that opportunity.

Golfer Gary Player has been quoted many times: "The harder I practise, the luckier I get." Start practising now, and real value will return to your practice when the tsunami subsides.

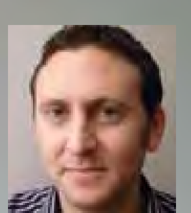
Confidence will return as we all strive towards a better working environment and business structure. If you are worried about retirement or the need to merge your business, the time could not be better to focus on your existing business and preparing it for such an opportunity. G



FAST FACTS

- Technology offers the prospect of replacing physical paper with digital documents
- Going digital isn't just about clearing clutter – it's about being able to retrieve information quickly
- The key to working with less paper is to ensure its digital equivalent is managed correctly and that files are searchable
- The growth in the volume of communications makes a good document management system a necessity, not a luxury

PAPER CUT



Gordon Smith is a freelance technology journalist

For more than 35 years, people have been forecasting the arrival of the 'paperless office', to the extent that some have dismissed the concept as a myth. However, Gordon Smith talks to some lawyers who are making the idea a reality

From legal briefs and case files to the leather-bound tomes adorning office shelves, paper and the legal profession have been inextricably linked for centuries. Technology offers the prospect of replacing those reams of physical paper with digital documents; easily stored and retrieved, they can free up valuable office space and – more importantly – fee earners' time.

In the legal sector, however, the irresistible force of technological change often meets the immovable object of tradition. But with harsh economic reality causing many firms to pare their costs to the bone, paper is the elephant in the courtroom. Can solicitors sustain the expense involved in creating, filing and archiving physical documents in 2011? According to the research group, Gartner, managing a piece of paper in its lifetime costs nine times the price of printing it. Improving features and falling prices make the move to digital more of a reality than ever, but is the long-promised 'paperless office' an achievable aim? The *Gazette* spoke to five firms to hear how they tackled the paper mountain.

No-brainer

Leman Solicitors started in January 2007, and partner Larry Fenelon says that it is the first legal firm in the country to go entirely paperless, which it did in October 2009. The following year it was honoured in the FBD Business Awards for best use of technology. "When anybody runs a business, the prudent thing is to keep overheads low," he explains.

> *"According to the research group, Gartner, managing a piece of paper in its lifetime costs nine times the price of printing it"*

All paper documents coming in to the firm are automatically scanned and every solicitor has an online in-tray rather than a physical one. This allows them to read letters and assign them to files in the software. Leman can also let its clients view files relating to them via the internet. As well as eliminating the cost of handling paper, Fenelon considers this good customer service. "If we're not watching our costs, and we're not watching our clients, they'll walk," he says. "Clients have benefited from our efforts because our rates are competitive. We have been able to keep prices down."

He advises firms to plan for going paperless well in advance. "There has to be a lead-in date. To manage it properly, there has to be a four-to-six-month period," he adds.

Fenelon acknowledges Leman's inherent advantage over most other law firms: no bound volumes and files built up over decades to have to scan. Even so, the six-person firm managed to accumulate enough paper in two short years to push a paperless agenda. Going digital wasn't just about clearing clutter, but about being able to retrieve information quickly. "The advantages are just overwhelming. Files are at our fingertips. When a client rings up, it's not a case of 'I'll call you back'. Documents aren't lost any more. Your office becomes mobile, so you don't have to hold every meeting with a client at your office, you can go to theirs. It also allows for more flexible working arrangements for staff. It's a no-brainer, quite frankly," says Fenelon.

Follow me

Byrne Wallace, which has close to 120 solicitors and a further 40 other fee earners, has been steadily working towards a 'green' and more efficient office environment. It is currently formulating a plan to go paperless and, at the time of going to press, representatives were in London to look at two law firms that have already made the move. The switch is most likely a couple of years away, according to Michael Walsh, a partner with Byrne Wallace. "For us to be able to operate safely and efficiently in a full digital environment, we have a number of practical and cultural challenges to overcome – something we are taking on in stages," he says.

The firm has already taken substantial steps to reduce its use of paper in the office. Two years ago, it set out a policy that discourages wasteful printing. To aid this, printers throughout the firm offer double-sided printing, scan to DMS (document management system) workspace facilities, as well as having a 'follow me' feature that only outputs the document when the person who requested it is standing at the printer. This avoids the common problem of hitting the 'print' key at the desktop and then forgetting to collect the documents from the printer. Similarly, faxes received are distributed digitally and, in tandem with the introduction of digital signatures, software has been installed on desktops to enable faxes to be issued without the necessity of printing.

Walsh reports that paper use has decreased by up to 50% so far in some departments. Other results have been achieved through a well-used intranet and internal forms that pass by way of email links through the reporting chain, reducing processing time and the loss risks associated with physical paper transmission.

The 2009 policy was introduced just as Byrne Wallace invested in a document management system from Interwoven. Having this spring concluded an upgrade,

the latest version has improved filing features and the ability to put relevant emails and documents in a workspace through predictive email management. "The absolute key for DMS is the ability to search and retrieve data in a Google-like manner," says Walsh. "The implementation of the document management system involved a substantial investment of time, money and resources, but in the short, medium and long term, it was in our commercial interest to make this move."

Other technology that is reducing reliance on hard copy is a research facility called Solcara SolSearch, which allows fee earners to check in-house and external legal precedents, opinions, case law and so forth. This system connects both to the firm's own DMS and also to a variety of subscription-based sites, including Westlaw and LexisNexis, and returns a composite view of the best and most relevant search results.

Learning curve

Neil Butler of Neil J Butler Solicitors in Thurles has been scanning paper documents since 1994. While this meant a steep learning curve, and the network scanner technology was more expensive at the time, he says that productivity was immediately improved. Client service was enhanced, while finding old documents no longer involved checking archives or off-site storage.

Butler uses one multi-function unit that acts as a colour copier, scanner and printer for pages up to A3 size. While there are less expensive black-and-white machines, he believes that this is a false economy, because some work might involve maps or photos of accidents for an insurance claim. Butler estimates that he scans around 50 pages per day. "In the 'tiger' years, volumes might have been at least double that. The reduction in volume is also explained by the fact that I have so much stuff digitally now and can so much more easily access more – for example, downloads of PDFs from Revenue, the Law Society website for precedents and so on, vastly increased use of email (so correspondence is already digitised) – that the need for scanning is reducing."

Scanning is only a small part of the picture, he emphasises. The key to working with less paper is to ensure its digital equivalent is managed correctly and that files are searchable. He uses an email-to-fax facility that is available for a minimal monthly charge. As well as reducing paper further, it also saves the expense of renting a fax line and frees up the space taken up by the fax machine, not to mention the running costs.

Butler notes how technology has improved, saving unnecessary re-scans: for example, Microsoft *Word* 2007 and 2010 both have the ability to convert documents into PDF, while case-management suites can now view a greater array of file formats.

Necessity, not luxury

John Barton, IT manager with Matheson Ormsby Prentice, believes technology has only recently reached a stage where systems for scanning large volumes of paper have become readily available. However, full scanning of all post at the point of entry hasn't yet become a reality at MOP. That's partly for cultural reasons, he says, but also because certain documents are confidential and, as such, they aren't opened until they reach the secretaries in practice areas. However, the growth in litigation and related correspondence in recent years has made searching large volumes of paper documents "nearly impossible", he says.

The growth, not just in the volume of communications but the means of doing so – email being a prime example – makes a good document management system a necessity, not a luxury. "You have to make sure you can control every method of information coming into a firm, not only in hard copy but in soft copy too," Barton recommends.

Scanning volumes alone have doubled in the past two years. MOP has engaged with Xerox to provide outsourced scanning and document services and, in recent months, the firm has been encouraging partners to avail of a service where stacks of paper occupying desk space and filing cabinets can be catalogued, scanned, and filed in the appropriate electronic location. "When the fee earners see the clear desk, they realise the benefit of it," Barton reports. "It's all about trying to change the culture. Once you win the battle, the good news spreads quickly."

The cost is also a factor: "We have been highlighting the costs of printing to people in the firm – that covers the paper, recycling costs, maintenance of machines, the cost of having an archiving department and so on," Barton adds. "Costs have focused people's minds, and the bottom line tends to grab people's attention."

> *"This isn't technology for its own sake: it's directly connected to the need to adapt to clients' expectations and to operate more cost-effectively"*

That extra little step

Binchy Solicitors in Clonmel operates a complete electronic office, but managing partner Fred Binchy stops short of calling it paperless. "There's a slight hint of fiction. I find you actually need the break that paper gives you. There's the ease of spreading paper out on a desk, especially when you're working on a court case," he says. Moreover, he finds some clients will still want to send hard-copy letters by post, so a firm's dealings with clients have to take into consideration what they are comfortable with.

There are some individual desktop scanners within the firm and then one large unit that acts as the workhorse, taking most of the major scanning jobs. Every single piece of post is scanned every day, and this is then stored in the firm's case management system. "Your procedures are a critical component of this: documents are archived and scanned, there has to be a complete record. It needs meticulous archiving. You're taking that extra little step every day, once you accept that those disciplines are essential. If you engage in the electronic paper exercise, and you're not prepared to engage in the extra effort, you may fall down and lose a document," he cautions.

Technology is changing not just the roles of fee earners in a firm. Binchy uses digital dictation and "couldn't abide the idea of going back to the old way". This has meant that his secretary has now become a legal executive who can prepare documents: rather than someone who types out files, she can edit or prepare affidavits or meet clients while Binchy may be in court.

Adapting to expectations

Based on the experiences of the solicitors here, most agree that 'less paper' rather than 'paperless' is the most likely outcome. What's not in doubt is that this isn't technology for its own sake: it's directly connected to the need to adapt to clients' expectations and to operate more cost-effectively at a time when all sectors are feeling the economy's chill winds. Michael Walsh of Byrne Wallace sums up: "The role of technology is taking centre stage in terms of the ability of lawyers to operate profitably. The old practice focused solely or predominantly on paper files is a model that, in my opinion, the market may not tolerate for very much longer." G

TIPS FOR GOING PAPERLESS

- **Plan for the move well in advance – ideally, as much as six months ahead,**
- **There are external companies that provide scanning services for historical documents, to save on staff time,**
- **Factor in additional costs, such as an uninterruptible power supply and strong data backup,**
- **Ensure that any scanned documents are stored in a system where they can be easily searched and retrieved.**

Law Society annual conference in Powerscourt, Co Wicklow

Solicitor to the celebrities Gerald Kean encouraged all lawyers to use every opportunity to meet clients and hand out business cards. *(From l to r)*: John Costello, Moya Quinlan, Michael Houlihan, Dan O'Connor and Gerald Kean

Margaret O'Connell (Michael Houlihan & Partners, Ennis) and Maeve Callanan (Dundon Callanan)

Michael Moran, Emma Lovegrove, Denis Moriarty, Karen Grenham and Jonathan Dunphy

Eimear Binchy, Philip Joyce, Deirdre McDermott, Owen Binchy and Maura Derivan

Joe Mannix, James Wolsey and Cliodhna Mulcahy

Gareth Noble, Jonathan Dunphy, Brian McKenzie and Nicola Dunphy

Cavan Solicitors' Association

PIC: ADRIAN DONOHOE

While Dublin and Moneygall were awaiting the arrival of President Barack Obama, Cavan had its own presidential visit when President of the Law Society, John Costello, visited Cavan, accompanied by director general Ken Murphy. The Cavan Solicitors' Association (CSA) met at Cavan Courthouse on the evening of Wednesday 18 May. The meeting discussed the proposed financial assistance to the SMDF for its orderly wind-down of business and the proposed master policy for professional indemnity insurance. The meeting was attended by 31 solicitors, including *(front, l to r)*: Aine McGuigan, Damien Rudden, Ken Murphy (director general), CSA president Rory Hayden, John Costello (Law Society president), Helena Brady and Eilis McCabe. *(Second row, l to r)*: Jacqueline Maloney, Paul Carolan, Hugh Thornton, Damien Glancy and Fionnuala Finn. *(Third row, l to r)*: Diane Dawson, Maire Barr, Ronan O'Brien, Aisling Hayes, Rita Martin, Marian O'Donovan-Mackey, John Keaney, Kathleen McCabe-Gibbons, Joan Smith, Brid Brennan and Brid Mimnagh. *(Back, l to r)*: Michael Ryan, John Quigley, Barry McAllister, Aileen Dolan, Brid McQuillan, Mary McAveety, Eirinn McKiernan, Noel O'Gorman, Paul Kelly and Elaine Grills

Meath Solicitors' Bar Association

At the Meath Solicitors' Bar Association (MSBA) meeting with Law Society President John Costello and director general Ken Murphy in the Knightsbrook Hotel, Trim, Co Meath on 9 May 2011, were *(front, l to r)*: Áine McCabe, Audrey O'Reilly, Ken Murphy (director general), Anthony Murphy (MSBA president), John Costello (Law Society president), Katie Barbour (MSBA secretary), Elaine Byrne and Cora Higgins. *(Middle, l to r)*: Cliona Martin, Brian Coady, Barry Lysaght, Brendan Steen, Fiona Geraghty, Paul Brady, Peter Higgins, James Martin and Annie Walsh. *(Back, l to r)*: Mark Dillon, Michael Keaveny, Kevin Martin, Liam Keane, Declan Brooks, William O'Reilly, Pat O'Reilly, Raymond Finnegan and Paul Moore

Sligo Bar Association

PIC: JAMES CONNOLLY, PICSELL8

Law Society president John Costello and director general Ken Murphy met with members of the Sligo Bar Association (SBA) on 18 May 2011 at the Glasshouse Hotel, Sligo. The meeting discussed many matters, including the wind-down of the SMDF, professional indemnity insurance, Law Society regulations to prohibit solicitors giving 'commercial undertakings', the new programme for government and the EU/IMF Programme of Financial Support for Ireland, and Law Society initiatives on sole practitioners. A CPD course followed on 'Surviving the current climate: PII – learning from 2010 and preparing for 2011'. Attending the event were *(front, l to r)*: Sean Cosgrove, Michael Monahan, Ken Murphy (director general), John Costello (Law Society president), Tom MacSharry (SBA president), Michele O'Boyle, Caroline McLaughlin (SBA secretary), Gerry McCanny, Eoin Armstrong, Eamonn Gallagher and Brian Gill. *(Middle, l to r)*: Declan Gallagher, John Creed, Sinead Travers, Deirdre Munnelly, Lorraine Murphy, Claire Gilligan, Aisling Lupton, Lisa Walsh, Paula Daly, Eamonn Creed, Mark Mullaney and Roger Murray. *(Back, l to r)*: Fergal Kelly, Damien Martyn, Trevor Collins, Noel Kelly, Carol Ballantyne, Kieran Ryan, John Murphy, Donnacha O'Connor, Keenan Johnson and Peter Martin

Hats off to Law Society team on Stetson moot court win!

Three students from the Law Society of Ireland have won the 15th Stetson International Environmental Law Moot Court Competition. The annual event was held at the University of Maryland School of Law in Baltimore, USA.

The three-day event, which took place from 17-20 March 2011, saw teams from Ireland, the United States, Ukraine, the Philippines, Brazil, Zimbabwe, Trinidad and Tobago, India and China compete to be named champions.

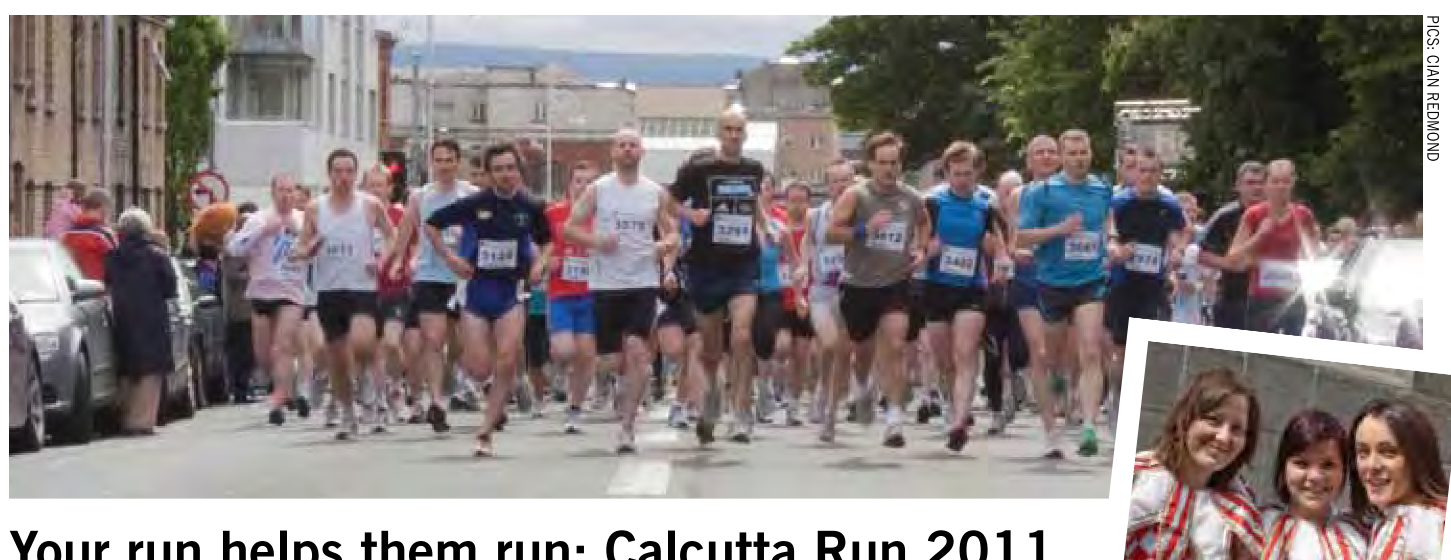
The team, consisting of Maeve Larkin, Denise Daly and Clare McQuillan, argued successfully in the final against the University of Hawaii to be named winners of the competition.

In all, 80 teams from around the world took part in national and regional rounds, with 16 teams qualifying for the international finals. This year's problem was very topical, dealing with international law governing oil-spill liability. The preliminary rounds were judged by professors and practitioners specialised in the fields of international law and environmental law.

PIC: JASON CLARKE PHOTOGRAPHY

Winners of the 15th annual Stetson International Environmental Law Moot Court Competition in Baltimore, USA, were *(l to r)*: Clare McQuillan, Law Society Director of Education TP Kennedy (team coach), Maeve Larkin and Denise Daly

The Society team won its quarter-final round against Ateneo de Manila School of Law from the Philippines. Their semi-final was against the North America (Atlantic) champions, Hugh Wooding Law School from Trinidad and Tobago. The Law Society of Ireland team took the title after arguing in the international final against a team from the University of Hawaii William S Richardson School of Law.



PICS: CIAN REDMOND

Your run helps them run: Calcutta Run 2011

On Saturday 14 May, ominous clouds loomed over Blackhall Place, prompting anxious faces to wonder whether anyone would turn up for this year's Calcutta Run? The good news was that the bad weather proved no deterrent for runners and supporters of the 13th annual run.

Expectant queues started to form at the registration desks before the registrars had finished their briefing sessions. The legal profession and a motley collection of friends, family and colleagues came out in force to support the 10k run in aid of homeless children in Dublin and Calcutta.

Nowadays, 10k runs are in vogue, but, 13 years ago, the original committee was way ahead of the curve when it organised its first Calcutta Run. This year, RTÉ sports presenter Michael Lyster was on hand to give everyone their final instructions, while the MaSamba Drummers kept spirits high. Matt Cooper was the man with the gun and he was as adept on the trigger as his namesake Gary! The pistol smoke had barely cleared at the starting line when the rain started to fall, but the plucky runners saw it as an opportunity to stay cool. Snaking through the Phoenix Park's leafy boulevards, the cavalcade rushed, cantered or strolled towards the finish line.

As is customary, the 2011 event comprised an eclectic mix of solicitors, trainees, Law Society staff, families and friends.

In addition, just about every profession was represented, including those working in the financial services and insurance industries. One runner even completed the entire route running backwards!

Given the recession, 900 people made great efforts to raise money for this year's event and initial figures are looking promising. The grand total will be announced on www.calcuttarun.com in the coming weeks. Every cent raised goes to the GOAL and the Peter McVerry Trust. This is due to the generous support of the event's sponsors, namely Irishjobs.ie, Bank of Ireland, 1escape Health Club, DX, Shred-it, the Priory Clinic, Pearl Audio, N Smyth & Co and Thornton's Recycling.

Thanks to everyone who took part, to all the helpers and volunteers, as well as all the families, friends and colleagues who sponsored participants, or who made direct donations to the charities. Your run helps them run!

Top troika: Donald Binchy, John Costello and Kevin O'Higgins

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PIC: MICHAEL MCLOUGHLIN, WESTPORT

Irish and American lawyers descended on Westport, Co Mayo, in May for the inaugural US/Ireland Brehon Law Legal Symposium. *(From l to r)*: Katie Cadden, Donncha O'Connell, Taoiseach Enda Kenny, Professor Willie Golden and Professor Nollaig Mac Congáil

A copy of the book *Child Law* by Geoffrey Shannon was presented to Uachtarán na hÉireann Mary McAleese, on 20 May. *(From l to r)*: Geoffrey Shannon, President Mary McAleese, Catherine Dolan (Round Hall), and Mark Schlageter (president, Thomson Reuters, Britain and Ireland)

PIC: LENSMEN

The Society's Student Development Service hosted a seminar for PPCII trainees on 4 May at the Law School. The event focused on how professional legal training can support newly qualified solicitors into the future. *(From l to r)*: Antoinette Moriarty, Robert Connolly (Abrivia Recruitment manager), Keith O'Malley and Attracta O'Regan

PIC: ALICE CLANCY

At the launch of the book *Corporate Crime* (Bloomsbury Professional) on 5 May 2011 were *(l to r)*: Judge Doirbhile Flanagan, James Hamilton (DPP), Shelley Horan BL (author) and Mr Justice George Birmingham

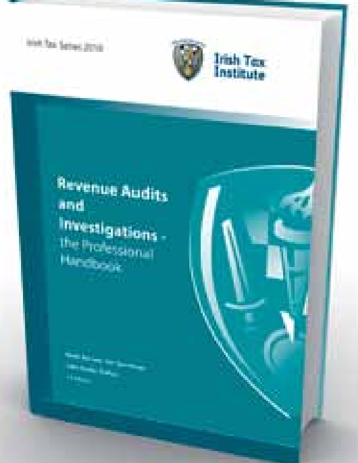
PIC: LENSMEN

Celebrated human rights lawyer, Gareth Peirce, officiated at the conferral of the Law Society's Certificate in Human Rights at Blackhall Place on 10 May 2011. *(Front, l to r)*: Betsy Keys Farrell (lead tutor), John Costello (Law Society president), Gareth Peirce, Mr Justice Garrett Sheehan and Ruth Dowling (student). *(Back, l to r)*: Rory O'Boyle (course leader), Sinead Haughey (student), Dr Elaine Dewhurst (lecturer), Patrick J Ryan (student), Patrick Wall (student), Deirdre Kenny (student), Augustus Cullen (student), Joyce Mortimer (human rights executive, Law Society), and Colin Daly (chairman, Human Rights Committee)

Receiving their parchments at a Law Society of England and Wales ceremony in Chancery Lane, London were *(l to r)*: Michael Twomey (Arthur Cox), Lucy Scott-Moncrieff (deputy vice-president, Law Society of England and Wales) and Olan Buckley (Harrison O'Dowd Solicitors)

Revenue Audits and Investigations – the Professional Handbook

Mark Barrett, Tim Quinlivan and Julie Burke (editor). Irish Tax Institute (2010), www.taxireland.ie.
ISBN: 978-1-8426-021-26. Price: €35 (incl VAT).



The *Code of Practice for Revenue Audits* (2010 code) came into effect in October 2010, replacing an earlier version that had been in effect since 2002.

One of the reasons for the replacement of the 2002 code was the introduction of a new civil penalties regime by the *Finance (No 2) Act 2008*. The new regime included a range of tax-geared penalties for tax defaults across most tax heads and various categories of default for the purposes of mitigation of penalties.

This handbook clearly and concisely sets out the tax-geared penalties regime and the criteria for mitigation of penalties. It shows, for comparison purposes, the pre and post-*Finance (No 2) Act 2008* position in a series of clear tables. It also helpfully lists, in an appendix, the legislative sources of the penalty regimes.

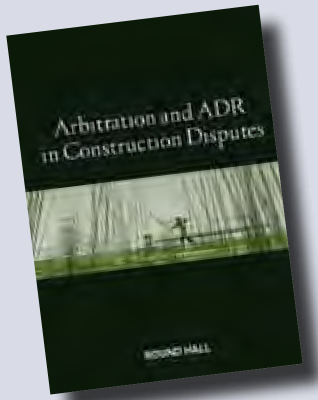
The book also clearly analyses the meaning and consequences of, and procedures for, the making of qualifying disclosures. It also contains a section dealing with publication of the names of tax defaulters and (albeit not within the scope of the 2010 code) a short section on the prosecution of tax offences.

While the topic of Revenue audits is not likely to be of concern to most solicitors, the analysis of tax-geared penalty regimes and mitigation of penalties in the handbook will be useful to solicitors who are dealing with capital acquisition tax and stamp duty matters.

Emmet Scully is a solicitor at LK Shields.

Arbitration and ADR in Construction Disputes

Brian Hutchinson. Round Hall (2010), www.roundhall.ie.
ISBN: 978-1-8580-061-78. Price: €145 (incl VAT).



The construction alternative dispute resolution (ADR) landscape in Ireland has undergone a significant transformation in recent years, with the advent of the new public works contracts and the *Arbitration Act 2010.* This book provides a comparative analysis of the dispute resolution mechanisms under the Engineers Ireland, RIAI and public works contracts and a detailed account of the law and practice of arbitration under both the 1954 and 2010 acts, from the initiation of the arbitral process to award. A useful brief chapter is also included on statutory arbitrations, describing the correlation between such arbitrations and the 2010 act.

The procedures and practices applicable to the various types of ADR – mediation, conciliation, expert determination, adjudication and the use of dispute boards – are well canvassed and explored, as are the consequences of the power of the court to refer the parties to ADR as provided in order 56A of the *Rules of the Superior Courts (Mediation & Conciliation) 2010.* The text of the 1954 and 2010 *Arbitration Acts* is also appended.

The result is a very rewarding and practical reference for the use of arbitration and ADR that will be an indispensable resource to those who practise or have an interest in this area.

James Kinch is a member of the Law Society's Arbitration and Mediation Committee.

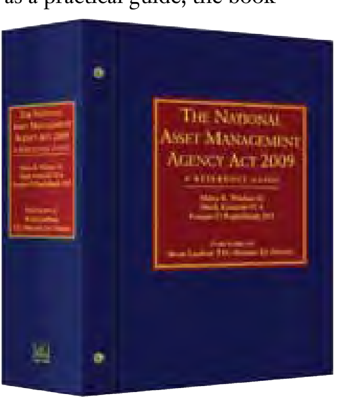
The National Asset Management Agency Act 2009: A Reference Guide

Máire R Whelan, Mark Kennedy and Feargus Ó Raghallaigh. Gill & Macmillan (2011), www.gillmacmillan.ie. ISBN: 978-0-7171-484-00. Price: €315.

There has been, and continues to be, vast media coverage and analysis of NAMA, but such coverage has not generally focused on the legal aspects. To this end, this work provides us with a comprehensive source of legal commentary and guidance.

The book's stated intention is that it "is not a textbook; rather, it is intended as a practical guide to the legislation and an explanation of its origins, including the international context and the EU setting, and the economic rationale that underpins it".

Regarding its principal aim as a practical guide, the book certainly achieves that objective comprehensively. The act is broken down into each of its 15 constitutive parts. All 241 sections of the act are reproduced and supplemented by general notes, legal commentary, details of legislative cross-references (including EU provisions), details of amendments made during the enactment process, details of relevant provisions of the Constitution, and details of relevant case law.

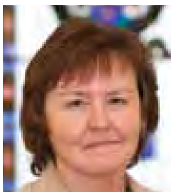


Regarding the book's secondary aim of providing background, context and economic rationale, each of the three authors has contributed a chapter on the act from the different perspectives of law, accounting and corporate governance. These chapters focus on themes such as state aid, the EU dimension and the 'exceptionalist' nature of the act and would be an interesting read not only for legal practitioners but also for most Irish citizens. G

Peter O'Toole is a solicitor in A&L Goodbody.

Preserving the past for the future

The library has an ongoing programme of repair and restoration of old leather-bound books, writes Mary Gaynor



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

In 1895, a catalogue of materials held by the library was compiled by the librarian, Samuel W Evans. It shows an entry under 'Irish acts' for the statutes at large passed in the parliaments held in Ireland from 1310-1800: 21 volumes, edited by William Ball and printed by George Grierson in Dublin between 1786 and 1804.

Whether the corresponding set of volumes still in the library is the set listed in the 1895 catalogue is doubtful, as virtually all of the library stock was destroyed in the Four Courts fire in 1922. It is more likely that this set of volumes is the series included in a list in the *Gazette* in March 1926 (pp39-40) as having been added to the library since March 1925. Some evidence suggests that they may have originally been owned by a prominent firm of Kilkenny solicitors – one of the volumes has a GS & WR train ticket 'to Kingsbridge' firmly embedded in the outer leather binding, which suggests that they may have taken a train journey to Dublin many years ago!

The passage of time has not been kind to these volumes. Charles Dunn, managing director of Riley Dunn & Wilson, has advised the library on conservation of these volumes. He explains that "leather-bound books from this period show distinctive symptoms, including 'red rot decay', which causes the leather surface to become a red powdery mess and the joints of the covers to weaken and become detached from the books". Material from this period has also suffered over the years from manipulation for photocopying purposes and fluctuations in temperature and humidity.

During 2010, repair and restoration work began, which has strengthened and enhanced the condition of these volumes for preservation into the future. The volumes were surface cleaned to remove grime, dust and dirt, and repairs have been made to the original bindings to a high archival standard. This has now been completed. Thanks to scanning techniques, most of the acts from this period that are still required by practitioners are readily available from the library in PDF format, and photocopying from these volumes will not be required in future. Unfortunately, the set is incomplete, as three volumes are missing.

The library has an ongoing programme of repair and restoration of old leather-bound books, and many volumes of law reports and journals have been repaired or re-backed over the last decade. Eddie Mackey, executive assistant librarian, who is responsible for library binding, says that "during the next two years, it is hoped to concentrate on the acts of the United Kingdom of Great Britain and Ireland for the period 1801-1829, which require fairly substantial refurbishment".

NEWS

- **LinkedIn: the library has created a group on the LinkedIn professional network (www.linkedin.com) as a forum for discussion of library services among members, trainees and legal information professionals within law firms. We welcome new participants to the group. The discussion forum will be used to invite comments and suggestions and to convey news on library services and developments.**
- **Electronic precedents in MS *Word* – available from Laffoy, *Irish Conveyancing Precedents* (LexisNexis), *Encyclopedia of Forms and Precedents* (LexisNexis) and *Practical Commercial Precedents* (Sweet & Maxwell). Contact the library for further details; tel: 01 672 4841, email: library@lawsociety.ie.**

JUST PUBLISHED

New books available to borrow

- Andrew, Jill (ed), *Managing People in a Legal Business* (London: Law Society, 2010)
- Bariatti, Stefania, *Cases and Materials on EU Private International Law* (Oxford: Hart, 2011)
- Bracken, Tim and Margaret Campbell, *The Probate Handbook* (Dublin: Clarus Press, 2011
- Dworkin, Ronald, *Law's Empire* (Oxford: Hart Publishing, 1986 (Reprint, 2010))
- Fox O'Mahony, Lorna, *The Idea of Home in Law: Displacement and Dispossession* (London: Ashgate, 2011)
- Horan, Shelley, *Corporate Crime* (Haywards Heath: Bloomsbury Professional, 2011)
- Hopper, Andrew, *The Solicitor's Handbook 2011* (London: Law Society, 2011)
- Kenna, Padraic, *Housing Law: Rights and Policy* (Dublin: Clarus Press, 2011)
- Godfrey, Gwendoline (ed), *Neate and Godfrey: Bank Confidentiality* (5th ed) (Haywards Heath: Bloomsbury Professional, 2011)
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TECHNOLOGY COMMITTEE

CUTTING EDGE
GETTING THE BEST FROM YOUR TECHNOLOGY

Venue: Green Hall Law Society, Blackhall Place, Dublin 7

Date: Friday 24th June, 1.45pm. to 5.30pm **Fee:** €95.00

CPD Hours: 3 hours & 15 minutes Management and Professional Development Skills by Group Study

Most practitioners have invested substantially in office technology. This seminar will look at ways to ensure you get the best return from your investment. What are the current issues and developments in technology as it applies to a legal practice? How can you use innovative ways to communicate with clients? Is there really such a thing as the "paperless office"? A practical and stimulating afternoon which will encourage new thinking in the use of existing technology and assist you in operating a cost efficient practice.

PROGRAMME

1.45 **Registration**

2.00 **Chairman's Introduction – *Frank Nowlan, AB Wolfe & Co***

2.15 **Using Technology in Recessionary Times**
This session will provide an overview of key issues and developments in the use of technology within the legal sector. The session will include an overview of how a firm can leverage developments in client and practice management systems, accounts and other key applications to improve profitability and cashflow. ***Donal Maher, Outsource Consultants***

3.00 **Up in the Clouds – Can cloud computing assist the legal profession?**
It looks like cloud computing is here to stay. This session will identify what cloud computing actually consists of and how it is relevant to the legal profession. The session will consider practical issues surrounding cloud computing including licensing arrangements and security issues. ***Tom Heerey, General Counsel, Legal & Corporate Affairs, Microsoft Ireland***

3.45 **Coffee**

4.00 **The "Paperless Office" – Does it really exist?**
Is it possible to function as a legal practice with minimal use of paper? A practitioner with significant experience in this area will provide an overview of how he has introduced paperless systems in his practice. The session will provide practical experience in the set up and operation of such systems. ***Laurence Fenelon, Leman Solicitors***

4.45 **Online Marketing and the Legal Sector**
The session will look at ways in which you can better communicate with clients and promote your practice online. It will include an overview on how to successfully and quickly build a web presence using traditional web tools and blogs or wikis. The session will also consider the potential for use of social networking tools such as Facebook, Twitter and Linked In by the legal profession. ***Martin Molony, Dublin City University***

5.30 **Questions & Answers**

Technology Committee

Cutting Edge – Getting the Best Return from your Technology

Venue: Green Hall, Law Society, Blackhall Place, Dublin 7. **Time:** 1.45p.m. to 5.30p.m.

Date: Friday 24th June, 2011 **Fee:** €95.00

Name: ______________________ **Firm:** ______________________

Address: ____

______________________________________ **DX:** ______________

Please reserve __________ **place(s) for me on the above course. I enclose cheque for €** __________

Signature: ____

Please return to Veronica Donnelly, Law Society of Ireland, Blackhall Place, Dublin 7. Email: v.donnelly@lawsociety.ie

Practice notes

Transfers by housing authority or Affordable Home Partnership now stampable

CONVEYANCING COMMITTEE

The Conveyancing Committee would like to highlight the recent e-brief from Revenue regarding the changes in stamp duty for transfers by a local authority or the Affordable Homes Partnership, whereby such transfers are now stampable. There has been no change regarding transfers to a local authority or the Affordable Homes Partnership – the position remains that these need not be stamped. See the details as set out in Revenue's e-brief below:

"Revenue eBrief no 15/11
15 March 2011:
Stamp duty on transfers of property by housing authorities the Affordable Home Partnership
Paragraph 3 of schedule 1 to the *Stamp Duty (E-stamping of Instruments) Regulations 2009* (SI no 476 of 2009) lists instruments that do not have to be stamped using the e-stamping system. They include instruments giving effect to the conveyance, transfer or lease of a house, building or land to or by a housing authority or the Affordable Homes Partnership (AHP).

However, with effect from 1 April 2011, section 64 of the Finance Act 2011 (which amended section 106B of the *Stamp Duties Consolidation Act 1999*):

1) Removed the stamp duty exemption that applied on the transfer of property by a housing authority or the AHP, and
2) Limited the stamp duty payable on such transfers to a maximum of €100.

As a result of these changes, paragraph 3 of the *Stamp Duty (E-stamping of Instruments) Regulations 2009* (SI no 476 of 2009) has been amended by the *Stamp Duty (E-stamping of Instruments) (Amendment) Regulations 2011* (SI no 87 of 2011).

The regulations now provide that only instruments to which section 106B(2) of the *Stamp Duties Consolidation Act 1999* apply (that is, transfers to a housing authority or to the AHP) do not have to be stamped.

Accordingly, any instrument executed on or after 1 April 2011 that gives effect to the conveyance, transfer or lease of a house, building or land by a housing authority or the Affordable Homes Partnership (AHP) must be stamped through the e-stamping system and any stamp duty, up to a maximum of €100, must be paid."

Heading letters in conveyancing transactions 'without prejudice'

CONVEYANCING COMMITTEE

The Conveyancing Committee has been asked to express a view as to the significance of correspondence passing between solicitors during the negotiation of contracts for the sale of land being headed 'without prejudice' in addition to, or in substitution for, 'subject to contract'.

Correspondence between parties to a dispute, which is entered into with a view to settling the dispute, is regarded as being made without prejudice and cannot normally be opened to a court dealing with the dispute. The mere use of the words does not mean that the correspondence must automatically be regarded as being without prejudice – the court will always reserve the right to examine the correspondence to see it was genuinely entered into with a view to settling the dispute.

The committee cannot see any justification for the use of the words 'without prejudice' in the heading of correspondence between solicitors engaged in the negotiation of a contract for the sale of land, and believes that the use of such words is mistaken and will not confer any benefits on the parties whose solicitors are using them. The committee recommends that solicitors should cease using such words in correspondence leading to the creation of a contract.

The committee is aware that some solicitors have been adding the words 'without prejudice' to their replies to pre-contract enquiries. This is entirely inappropriate. A prospective purchaser is entitled to get clear and unequivocal replies from the prospective vendor to such enquiries.

New and revised family law declarations: civil partnership and cohabitants

CONVEYANCING COMMITTEE

The Conveyancing Committee has recently published a new set of precedent family law declarations to take account of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*. These can be found in the precedents section and on the committee's page in the members' area of the Law Society's website.

A table of all current declarations is also published as a basic guide to use of the precedents. Some of the precedents are revised versions of pre-existing declarations for married or single people, while others are new declarations to cater for civil partners and for co-habitants.

It is vital for practitioners to take full and detailed instructions of clients' history of marriage, civil partnership and cohabitation.

The precedents are drafted to deal with most routine situations, but practitioners should adapt them to meet the facts of individual cases as necessary, and it may be appropriate, in some cases, to use parts of two or more precedents.

Cloud computing consultation

TECHNOLOGY COMMITTEE

The Technology Committee wishes to draw the attention of practitioners with an interest in 'cloud computing' to the European Commission's recently launched consultation process. On 16 May 2011, as part of its 'digital agenda' the European Commission launched a public consultation seeking views on how best to exploit cloud computing in Europe.

For those interested in participating, the online questionnaire can be found at: http://ec.europa.eu/yourvoice/ipm/forms/dispatch?form=cloudcomputing&lang=en.

Guidance on the 'virtual' execution of documents

BUSINESS LAW COMMITTEE

This note offers general guidance only. A particular document may require specific execution formalities or may specify its own procedures, restrictions or requirements, and so every transaction must be approached on its facts. Also, this note does not address regulatory or tax considerations that may be relevant to execution and completion.

This note applies only to the execution of a document that is governed by Irish law. This is an evolving area of law. You should keep up-to-date with any relevant developments.

The recent British case *R (Mercury Tax Group and Another) v HMRC*[1] (*Mercury*) has cast doubt on the effectiveness of the practice of 'virtual' signings and completions where some or all of the signatories involved are not present either physically or by attorney at the same meeting.

In circumstances where it is not practical to have all parties in attendance at completion, parties to a transaction often arrange for:

- Signature pages to transaction documents to be executed in advance and then transferred to the final form of the documents once the transaction is ready for completion (the signature pages being then circulated by email or fax to the various parties upon completion), and/or
- Final form documents to be emailed to the parties by the lawyers drafting them and executed by the parties remotely (the signature pages being then circulated by email or fax upon completion).

Background

Mercury was a first-instance decision and the comments concerning virtual execution were *obiter dicta*. The court in *Mercury* held that the signature on an incomplete draft deed could not be transferred to execute a complete and amended final version of the deed because section 1(3) of the British *Law of Property (Miscellaneous Provisions) Act 1989* required the signature and attestation to form part of the same physical document when the deed is signed. Accordingly, the *Mercury* decision, while concerned with very particular circumstances, has led to discussion about the effectiveness of the use of pre-signed signature pages and virtual signings and completions

SUMMARY

OPTION	STEPS	DOCUMENTS
Option 1 (return the entire PDF/ *Word* document and a PDF of the signed signature page)	• Once the documents have been agreed, final execution versions are emailed to the parties and/or their lawyers. • For convenience, a separate extracted signature page may also be attached to the email, but this is not necessary. • Each authorised signatory prints and signs the signature page. If appropriate, the signing may need to take place in the presence of a witness. • The signature page is then scanned and returned by email together with the whole document previously emailed to the signatory. (For a deed, make it clear when delivery is to occur.) • See suggested wording for covering email (*panel, p53*)	Option 1 may be used for any document or deed, ie including: • A deed, • A real estate contract, • A guarantee (whether a deed or in simple contract form), • A simple contract.
Option 2 (return a PDF of the signed signature page only)	• Once the documents have been agreed, final execution versions are emailed to the parties and/or their lawyers. • For convenience, a separate extracted signature page may also be attached to the email, but this is not necessary. • Each authorised signatory prints and signs the signature page. • The signature page is then scanned and returned by email, together with authority for it to be attached to the final approved version of the document. (The degree of formality required for this authority will depend on the circumstances.)	Option 2 may be used for: • A guarantee (in simple contract form only), • A simple contract, • A real estate contract, Option 2 may not be used for a deed (of any type).[6]
Option 3 (use a pre-signed signature page and an authority to add it to the document as agreed)	• Before the documents are in final agreed form, signature pages from the drafts are emailed to the parties and/or their lawyers. • Each signature page should, as a matter of good practice, clearly identify the document to which it relates, for example: 'Credit Agreement: Signature Page'. • The signature page is executed by each authorised signatory and then returned by email (or, if there is time, by courier), to be held to the order of the signatory (or his lawyers) until authority is given for it to be attached to the relevant document. • Once each document has been finalised, final versions are emailed to the parties and/or their lawyers. • Each party should confirm that the final version of the document is agreed and authorise the attachment of the pre-signed signature page to the final version of the document and authorise it being dated. (The degree of formality required for this authority will depend on the circumstances.)	Option 3 may be used for: • A guarantee (in simple contract form only), • A simple contract, • A real estate contract. Option 3 may not be used for a deed (of any type).[7]

where signature pages are sent or transmitted by email or fax. The *Mercury* decision is a cautionary tale against the practice of the transfer of signature pages from one version of a written contract to another without proper procedures being agreed in advance and complied with at completion.

British guidance

In response to concerns raised in Britain, the Law Society of England and Wales (LSEW) has issued guidelines outlining a non-exhaustive range of options for the execution (by virtual means) of documents governed by English law (the *Guidance*).[2]

The *Guidance* was drafted to allay concerns following the *Mercury* case and with a view to facilitating the continuation of the practice of virtual signings and closings.

The *Guidance* confirms that the decision in *Koenigsblatt v Sweet*[3] remains the leading authority on the execution of documents, that *Mercury* should be seen as limited to its particular facts and that, to the extent that *Mercury* is inconsistent with *Koenigsblatt*, the latter should prevail. *Koenigsblatt* upheld a contract that had been altered by a party's agent after signing, the party having ratified the alteration thereafter.

The approach in Ireland

The Law Society of Ireland, mindful both of *Mercury* and also of the potential interpretation of the execution provisions of section 64 of the *Land and Conveyancing Reform Act 2009*, endorses the position adopted in the *Guidance* in respect of documents governed by Irish law, but, in respect of Irish law, the Law Society advises that options 2 and 3 below may also properly be used to execute real estate contracts (which the LSEW excludes from options 2 and 3 on the basis of English law).[4]

The suggested procedure

The physical presence of all parties at the execution stage should always be the preferred completion method. In the alternative, attorneys should be formally appointed by the relevant parties and the attorneys should be physically present for the purposes of completion.

If, however, neither of these options is practical, then practitioners in this jurisdiction should have regard to the options as set out below and agree, in advance of completion, which option, or any other method deemed appropriate in any particular circumstance, will be employed and proceed to effect the appropriate steps:

- *Option 1* (may be used for a document of any type): return the entire PDF/*Word* document and a PDF of the signed signature page,
- *Option 2* (may be used for a document of any type except a deed): return a PDF of the signed signature page only,
- *Option 3* (may be used for a document of any type except a deed): use a pre-signed signature page and an authority to add it to the document as agreed.

A detailed explanation of each option is set out in the panel on the previous page.

The options suggested below are practical and are for the most part already being followed in practice in Ireland and in England and Wales.[5]

For each of the options where a contracting party cannot attend the closing meeting in person, it is recommended that such party is made aware of the need for someone suitably authorised to be available remotely (such as online) at the time of the virtual closing in order to:

a) Receive and approve final versions of the documents,
b) Sign the relevant documents under options 1 and 2, or
c) Authorise the release of the pre-signed signature pages under option 3.

For options 1 and 2, you should ensure that signatories have access to a PDF scanner.

Note: for registration and other purposes, a 'wet-ink' signature by every party may be required on a document, so appropriate undertakings should be sought to obtain same, post-closing.

Caution: Prior to giving any undertaking to forward original executed documents, it is recommended that the solicitor should obtain an undertaking in writing from his/her client to send the original signed document to his/her solicitor by courier/post on the day the PDF document is released or the next business day thereafter.

In reliance on this undertaking, the solicitor should then only undertake to forward the original document if and when received.

Whichever option is used, the solicitor who is arranging to have a PDF version of the signed signature page sent should ensure that his or her client has approved the finally agreed terms of the entire document. G

TEMPLATE WORDING FOR AN EMAIL RELATING TO OPTION 1

We attach the execution version[s] of [...].
Please ensure that [you/your client]:
Print(s) off [the/each] document in full,
Sign(s) [the/each] document on the signature page,
Return(s) to [...], by fax or email, copies of [the/each] complete document, and
Return(s) the original executed of [the/each] document to [...], by post or courier, by [date].

The return by [you/your client] of a PDF or faxed copy of each signed signature page and each fully executed document will constitute confirmation that:
a) [You/your client] approve(s) the relevant document,
b) In the case of the deeds, [you have/your client has] executed each complete document in the form attached to this email,
c) [You authorise/your client authorises] us, without further notice to [you/your client], at closing to release the copies of each signed signature page to each other party and to date each document accordingly; on our doing so, [you/your client] will be bound by the terms of that document,
d) In the case of any document which is a deed, its release and dating constitutes delivery of the deed by [you/your client] or by the person on whose behalf the deed was signed, and
e) [You/your client] will send each original signed signature page for the contractual documents and in the case of the deeds, the executed document to us by post or courier by [date].

Footnotes

1 [2008] EWHC 2721.
2 www.lawsociety.org.uk/productsandservices/practicenotes/executionofdocs.
3 [1932] 2 Ch 314.
4 The provisions of the *Law of Property (Miscellaneous Provisions) Act 1989*.
5 The inclusion of a 'counterparts clause' in transaction agreements is recommended. Such a provision clarifies that separate copies of an agreement may be executed by different parties and each copy will be considered to be an original.
6 Options 2 and 3 may not be used for a deed of any type because of the view that a signature on an incomplete deed is not valid.
7 See footnote 6.

Legislation update 9 April – 11 May 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

ACT PASSED

Road Traffic Act 2011
Number: 7/2011
Content: Provides for the amendment to existing legislation (sections 12 and 15 of the *Road Traffic Act 1994*) to permit the early introduction of the mandatory alcohol testing of drivers of mechanically propelled vehicles in certain circumstances, including involvement in road traffic collisions, in advance of the provisions contained in part 2 of the *Road Traffic Act 2010* coming into force in September 2011. The bill also clarifies the position regarding mandatory preliminary breath testing and the powers of arrest conferred by law on the Garda Síochána.
Enacted: 27/4/2011
Commencement: Commencement order(s) required as per s5 of the act

SELECTED STATUTORY INSTRUMENTS

European Communities (Electronic Money) Regulations 2011
Number: SI 183/2011
Content: Implements Directive 2009/110 (*Electronic Money Directive*) on the taking up, pursuit and prudential supervision of the business of electronic money institutions.
Commencement: 30/4/2011

Immigration Act 2004 (Visas) Order 2011
Number: SI 146/2011
Content: Classifies the classes of non-nationals who are exempt from Irish visa requirements and those who are required to be in possession of a valid Irish transit visa when transiting within a port within the State.
Commencement: 25/4/2011

Road Traffic (Courses of Instruction) (Cars) Regulations 2011
Number: SI 172/2011
Content: Requires learner drivers in future – that is, learner drivers whose first learner permit is issued on or after 4 April 2011 – to undergo essential driver training before sitting a driving test.
Commencement: 4/4/2011

Road Traffic (Courses of Instruction) (Learner Permit Holders) Regulations 2011
Number: SI 173/2011
Content: Requires learner drivers in future – that is, learner drivers whose first learner permit is issued on or after 4 April 2011 – to undergo essential driver training before sitting a driving test.
Commencement: 4/4/2011

Prepared by the Law Society Library

ONE TO WATCH

One to watch: new legislation

European Communities (Electronic Money) Regulations 2011

Directive 2009/110/EC on the taking up, pursuit and prudential supervision of the business of electronic money institutions has been implemented in Ireland by way of the *European Communities (Electronic Money) Regulations 2011*. The regulations are effective from 30 April 2011. The Central Bank will be the competent authority for the purpose of the *Electronic Money Directive*.

Electronic money

Under the regulations, 'electronic money' means electronically (including magnetically) stored monetary value as represented by a claim on the electronic money issuer that:

- Is issued on receipt of funds for the purpose of making payment transactions,
- Is accepted by a person other than the electronic money issuer, and
- Is not excluded by regulation 5.

Persons that may issue electronic money

- A credit institution (within the meaning of Directive 2006/48/EC, which includes a branch located in a member state of a credit institution having its head office in or elsewhere than in a member state),
- An electronic money institution as defined in article 2 of the *E-Money Directive*,
- An Post,
- The Central Bank of Ireland, the European Central Bank, or the central bank of another member state that is not acting in its capacity as a monetary authority, or other public authority,
- A member state, or a regional or local authority of a member state, that is acting in its capacity as a public authority,
- A credit union,
- A person that has been registered after qualifying as a small electronic money institution under regulation 33,
- A person for the time being permitted under part 6 to issue e-money, or
- An e-money institution authorised as such in another member state pursuant to a law giving effect to the *Electronic Money Directive*.

Authorisation of electronic money institutions

An application for authorisation as an electronic money institution shall be directed to the Central Bank of Ireland and shall contain the following:

- A programme of operations,
- A business plan,
- Evidence that the applicant holds initial capital,
- For some applicants (those to which regulations 29 and 30 apply), a description of the measures taken for protecting electronic money holders' funds,
- A description of the applicant's governance arrangements and internal control mechanisms, including administrative, risk-management and accounting procedures,
- A description of the internal control mechanisms that the applicant has established to comply with its obligations in relation to money laundering and terrorist financing,
- A description of the applicant's structural organisation, including, if applicable, a description of the intended use of agents and branches and a description of any outsourcing arrangements,
- Names and details of each person holding in the applicant, directly or indirectly,
- Names and details of each director or other person responsible for the management of the applicant,
- The name of the person who will carry out for the applicant the functions of audit required by the *Companies Acts*,
- The applicant's legal status and memorandum and articles of association or other constitutional documents,
- The address of the applicant's head office.

Initial capital

The Central Bank of Ireland shall not authorise an applicant as an e-money institution unless the applicant holds initial capital of at least €350,000.

Safeguarding requirements

According to section 29 of the regulations, an electronic money institution that is engaged in the issuance of electronic money shall safeguard user's funds in either of the following ways:

- Users' funds (a) shall not be mixed at any time with the funds of any person other than the electronic money holder's on whose behalf the funds are held, and (b) if still held by the electronic money institution and not yet delivered to the payee or transferred to another electronic money institution by the end of business day after the day of receipt, shall be deposited in a separate account in a credit institution or invested in assets accepted by the Central Bank of Ireland as secure and low risk, or
- Users' funds shall be insured by an insurance company or guaranteed by a credit institution that does not belong to the same group as the electronic money institutions.

Registration

The regulations contain a waiver in relation to small electronic money institutions (in terms of authorisation and safeguarding requirements). A person qualifies as a small electronic money institution if:

- The total business activities of the person immediately before the time of registration do not generate average outstanding electronic money that exceeds €1 million, and
- The average amount of payment transactions executed by the person and any agent for which the person bears full responsibility during the previous 12 months, or the average amount of payment transactions likely to be executed by the person within the next 12 months, assessed on the projected total amount of payment transactions in its business plan, is not more than €3 million per month. G

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BRIEFING

Solicitors Disciplinary Tribunal

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

In the matter of Charles A Kelly, solicitor, practising as Douglas Kelly & Son, Solicitors, Swinford, Co Mayo, and in the matter of the *Solicitors Acts 1954-2002* [2512/DT20/08 and High Court record no 2009 no 1 SA]

Law Society of Ireland (applicant)
Charles A Kelly (respondent solicitor)

On 26 November 2008, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor, in that he:

a) In the course of acting for named clients in a purchase of property, the question of interest and penalty on the stamp duty of €7,110 was avoided because he 'updated' the deed from on or about 31 March 2000 to a date close to when the deed was submitted to the Revenue in August 2005,
b) In the course of acting for a named client in a purchase of property, the question of interest and penalty on the stamp duty of €13,300 was avoided because he 'updated' the deed from on or about 20 July 2005 to a date close to when the deed was submitted to the Revenue in December 2005,
c) In the course of acting for a named client in a purchase of property, the question of interest and penalty on the stamp duty of €12,000 was avoided because he 'updated' the deed from on or about 7 April 2004 to a date close to when the deed was submitted to the Revenue in February 2006,
d) In the course of acting for a named client in a purchase of property, the question of interest and penalty on the stamp duty of €5,286 was avoided because he 'updated' the deed from on or about 16 December 2004 to a date close to when the deed was submitted to the Revenue in May 2005,
e) In the course of acting for a named client in a purchase of property, the question of interest and penalty on the stamp duty of €22,500 was avoided because he 'updated' the deed from on or about 2 December 2004 to a date close to when the deed was submitted to the Revenue in December 2005,
f) In the course of acting for a named client in the purchase of three properties, the question of interest and penalty on the stamp duty of €4,493 on each of the properties was avoided because the deeds were 'updated' from on or about 7 January 2005 to a date close to when the deeds were submitted to the Revenue in July 2005,
g) In the course of acting for named clients in a purchase of property, the question of interest and penalty on the stamp duty of €22,320 was avoided because he 'updated' the deed from on or about 13 December 2004 to a date close to when the deed was submitted to the Revenue in July 2005,
h) In the course of acting for a named client in a purchase of property, the question of interest and penalty on the stamp duty of €17,910 was avoided because he 'updated' the deed from on or about 12 April 2005 to a date close to when the deed was submitted to the Revenue in September 2005.

The tribunal ordered that the respondent solicitor:

a) Do stand censured,
b) Pay a sum of €15,000 to the compensation fund,
c) Pay the whole of the costs of the Law Society of Ireland, as taxed by a taxing master of the High Court, in default of agreement.

The reasons for the tribunal's opinion that it was appropriate to make such an order were as follows:

i) The activity complained of within the practice would appear to have been the exception rather than the rule in view of the number of incidents taken into account in comparison to the firm's turnover,
ii) The respondent solicitor had a 20-year unblemished record, despite being audited by the Society during that period,
iii) The respondent solicitor would appear to have cooperated with the investigation,
iv) The respondent solicitor took appropriate and prompt steps to address and rectify matters with the Revenue Commissioners to their satisfaction, and
v) The respondent solicitor appears to have submitted the documents for stamping shortly after being put in funds by the client.

The Society applied to the President of the High Court for:

i) Orders rescinding or varying that part of the order of the tribunal whereby the tribunal censured the respondent solicitor and imposed a monetary penalty of €15,000, and
ii) An order prohibiting the respondent solicitor from practising on his own account as a sole practitioner or in partnership and placing a restriction on the practising certificate of the respondent solicitor requiring that he be in the direct employment of another solicitor of at least ten years' standing, *inter alia* on the ground that the sanction imposed by the tribunal was inadequate in all the circumstances.

On 2 March 2009, the President of the High Court ordered that:

1) The respondent solicitor shall not be permitted to practise as a sole practitioner or in partnership and that he be permitted only to practise as an assistant solicitor for ten years under the direct control and supervision of another solicitor of at least ten years' standing, to be approved in advance by the Law Society of Ireland,
2) The respondent solicitor do pay the sum of €50,000 to the Compensation Fund of the Law Society – that he have three months to pay same,
3) The Law Society do recover the cost of the High Court proceedings and the cost of the proceedings before the Solicitors Disciplinary Tribunal when taxed and ascertained.

In the matter of Daniel J Coleman, solicitor, formerly practising as Coleman & Co, Solicitors, Main Street, Baltimore, Co Mayo, and in the matter of the *Solicitors Acts 1954-2008* [8347/DT20/09 and High Court record no 2010/65SA]

Law Society of Ireland (applicant)
Daniel J Coleman (respondent solicitor)

On 10 February 2010, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Caused or allowed the name of another named solicitor to be written on contracts for sale dated 19 May 2004 without the authority of that solicitor,
b) Caused or allowed a fictitious contract, dated 19 May 2004, to come into existence and purportedly made between the complainant's clients and that other solicitor in trust for the purpose of misleading ACC Bank into advancing monies to a named client, knowing that the sale of the land from that named client had not closed and that the dwelling units had not been constructed,
c) Destroyed a file consisting of merely three contracts relating to the contested contract, dated 19 May 2004, without the express or implied instructions of both parties and, in particular,

the complainant's named clients,

d) Acted for both the vendor/builder, a named client, and purchasers of 13 newly constructed houses at Galway Road, Tuam, Co Galway, involving himself in a possible conflict of interest contrary to the provisions of article 4(a) of the *Solicitors (Professional Practice, Conduct and Discipline) Regulations 1997*, SI no 85 of 1997.

The tribunal directed that:

i) The respondent solicitor is not a fit person to be a member of the solicitor's profession,

ii) The name of the respondent solicitor be struck off the Roll of Solicitors,

iii) The respondent solicitor pay the whole of the costs of the Law Society of Ireland (to include the Law Society's costs of the adjourned hearing of 26 November 2009), to be taxed by a taxing master of the High Court in default of agreement.

On 26 July 2010, the President of the High Court ordered that:

1) The name of the solicitor be struck from the Roll of Solicitors,
2) The respondent pay the applicant the costs of the Solicitors Disciplinary Tribunal, to include witness expenses, same to be taxed in default of agreement,
3) The respondent do pay to the applicant the costs of the High Court proceedings, same to be taxed in default of agreement.

Subsequent to the making of that order, the respondent solicitor has lodged an appeal against the decision of the President of the High Court under Supreme Court appeal number 319/2010.

In the matter of Daniel J Coleman, solicitor, formerly practising as Coleman & Co, Solicitors, Main Street, Ballinrobe, Co Mayo, and in the matter of the *Solicitors Acts 1954-2008* [8347/DT89/09 and High Court record no 2010/66SA]
Law Society of Ireland (applicant)
Daniel J Coleman (respondent solicitor)

On 25 February 2010, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor, in that he:

a) Failed in a timely fashion or at all to comply with an undertaking given by him in a letter dated 6 February 2004 to the complainant, whereby he undertook to hold the title deeds in respect of an identified folio in trust to the order of a named credit union,

b) Failed to adequately respond to the complainant's correspondence and, in particular, the complainant's letters dated 31 January 2008 and 1 September 2008,

c) Failed to reply adequately to the Society's correspondence, in particular, letters dated 30 January 2009, 3 March 2009 and 6 April 2009.

The tribunal directed:

i) That the respondent solicitor is not a fit person to be a member of the solicitors' profession,

ii) That the name of the respondent solicitor be struck off the Roll of Solicitors,

iii) That the respondent solicitor pay the whole of the costs of the Law Society of Ireland, including witness expenses, to be taxed by a taxing master of the High Court, in default of agreement.

On 26 July 2010, the President of the High Court ordered that:

1) The name of the solicitor be struck from the Roll of Solicitors,
2) The respondent do pay the sum of €320,000 in restitution to a named credit union,
3) The respondent pay the applicant the costs of the Solicitors Disciplinary Tribunal, to include witness expenses, same to be taxed in default of agreement,
4) The respondent solicitor pay the applicant the costs of the High Court proceedings, same to be taxed in default of agreement,
5) That a named firm of solicitors be notified as to the making of the order,
6) Liberty to apply to both parties.

Subsequent to the making of that order, the respondent solicitor has lodged an appeal against the decision of the President of the High Court under Supreme Court appeal number 318/2010.

In the matter of Frank McArdle, solicitor, of McArdle & Associates, 10 Roden Place, Dundalk, Co Louth, and in the matter of the *Solicitors Acts 1954-2008* [2472/DT74/09]
Named client (applicant)
Frank McArdle (respondent solicitor)

On 9 March 2011, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that:

1) An amount of €1,184 remains in the possession of the respondent solicitor to this day, and he has made no effort whatsoever to rectify the matter in question.

2) The respondent solicitor received €1,400 from the Law Society that was held in the accounts of a named firm of solicitors. The applicant paid €1,400 to a named solicitor when the applicant purchased a property. The named solicitor failed to complete the necessary work in order that the applicant be registered as owner of the property. It is quite evident from the correspondence between the respondent solicitor and the Law Society, and in particular one of the Society's investigating accountants, that the €1,400 was to be rightfully returned to the applicant, yet it remains in the possession of the respondent solicitor to this day.

3) The respondent solicitor has refused to acknowledge written correspondence that the applicant sent to his office by registered post requesting reasonable information in relation to the applicant's file. The respondent solicitor failed to communicate with his client in a reasonable manner.

The tribunal ordered that the respondent solicitor:

a) Do stand censured.
b) Pay a sum of €2,584 as restitution to the applicant without prejudice to his legal rights. G

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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

EUROPEAN

Judicial review

Immigration – residence card – applicant married to EU citizen – statutory time limit – decision to refuse residence card – delay in issuing decision – deportation – European Communities (Free Movement of Persons) (No 2) Regulations 2006.

The first-named applicant had been refused a residence card under the provisions of the *European Communities (Free Movement of Persons) (No 2) Regulations 2006* and brought judicial review proceedings to quash the decision. An order of *mandamus* was also sought to compel the minister to issue a decision regarding an administrative review of the refusal. The first-named applicant contended that he had entered the State illegally and had subsequently unsuccessfully applied for refugee status. Thereafter, the first-named applicant had married the second-named applicant, a Polish national. Accordingly, the first-named applicant submitted a form EU1 application for a residence card to the minister, pursuant to the regulations, on the basis that he was a 'family member' of a Union citizen. The minister refused the application as the relevant section (the EU Treaty Rights Section) were unable to verify that the second-named applicant was in the employment stated. A review of the decision was thereafter sought and no decision had issued in respect of same.

Cooke J granted the relief sought, holding that the minister was entitled to carry out appropriate checks to confirm the reality and authenticity of an application when a residence card was applied for and that the relevant conditions were fulfilled. This must not involve the imposition of additional administrative obstacles outside those allowed by the regulations. As the relevant section had made efforts to verify the application, it would not be justifiable to quash the refusal decision. However, it was thereafter open to the applicants to adduce further evidence to contradict the evidence gathered by the minister. The applicant's solicitors had in fact subsequently clarified the matter in respect of the second-named applicant's employment. It was then a relatively straightforward matter for the EU Treaty Rights Section to decide whether or not that documentation answered the doubts that had been raised. The delay in giving the review decision was unreasonable and excessive to a degree that justified granting an order of *mandamus*. There would therefore be an order of *mandamus* to direct the minister to give a decision on the review application within 28 days from the date of perfection of the order.

***Adbenour Chikhi and Ilza Orechowska (applicants) v Minister for Justice, Equality and Law Reform and Others (respondents)*, High Court, 18/2/2011**

LANDLORD AND TENANT

Judicial review

Definition of lease – definition of tenant – service charges – statutory definition – whether dispute relating to service charges referable to PRTB – Deasy's Act 1860 – Residential Tenancies Act 2004 – Interpretation Act 2005.

The Private Residential Tenancies Board brought judicial review proceedings seeking to quash the order of the respondent (vacating a District Court order) and seeking an order of *mandamus* compelling the respondent to deal with a dispute that had arisen between the two notice parties. The dispute centred around the jurisdiction of the applicant board and the Circuit Court to deal with disputes brought by management companies for the recovery of service charges by reason of the wording of the *Residential Tenancies Act 2004*. The second-named notice party contended that it was the applicant board and not the respondent Circuit Court judge that had jurisdiction to hear the dispute in respect of service charges. The first-named notice party, S&L Management Company Limited, had brought District Court proceedings against the second-named notice party regarding sums allegedly owing relating to service charges. A District Court order had been granted regarding the sums, which order the Circuit Court judge had vacated. The second-named notice party was the owner of an apartment and held the apartment on a long lease of 500 years from S&L Management Company Limited, subject to a yearly rent of €0.05. It was the applicant's contention that the respondent erred in law in that it was never the intention of the Oireachtas to include owner-occupied long leases within the ambit of the 2004 act, as the act could not accommodate the realities of a long lease, and if the 2004 act was so to apply, many of the results would be wholly absurd. Counsel on behalf of the second-named notice party submitted that the relationship between the first and second-named notice parties was that of landlord and tenant as defined by section 3 of *Deasy's Act 1860*. The second-named notice party had relied on the provisions of the 2004 act as meaning that the act applied to his tenancy, that the dispute, being in respect of alleged arrears of service charges, was capable of being referred to the PRTB and that the courts had no jurisdiction in the matter.

Budd J refused the relief sought, holding that the Circuit Court judge was correct, in that, if the relevant provisions of 2004 act were not to apply to long leases of owner-occupied apartments, then the legislature should have expressly excluded such dwellings. If the person drafting the act omitted such a dwelling in error, then it was not the function of the court to concoct an appropriate exclusionary provision or to rectify such a mistake. The relevant section was clear and unambiguous, and the function of the court in interpreting a statute was confined to ascertaining the true meaning of each statutory provision. The courts had no license to trespass on the policy making and legislative role of the Oireachtas in devising amending legislation. The apartment was a dwelling to which the act applied, and the court was precluded from dealing with the dispute in respect of the service charges. Accordingly, the court would refuse the reliefs sought by the applicant.

***Private Residential Tenancies Board (applicant) v Judge Linnane and Others (respondent)*, High Court, 23/4/2010**

TORT

Employer's liability

Duty of care – vicarious liability – contributory negligence – safe system of work.

The appellant had been employed in a mart as a yardman and drover. It was his case that he had ended up working an unsafe system of work in separating animals on his own. One of the animals kicked him, and it was the appellant's case that the respondent was liable for the accident in question. It was the appellant's case that the respondent was vicariously liable in allowing two other employees absent themselves at the time of the incident. This had resulted in an unsafe system of work. The High Court had rejected the claim, and the appellant lodged an appeal.

The Supreme Court (Fennelly J delivering judgment) allowed the appeal, holding that the fellow employees of the appellant had committed a breach of duty of care to the appellant by absenting themselves at the time of the incident. The employer was vicariously liable for this breach. The employer bore prime responsibility for a safe system of work not being in operation. The appellant, as an experienced handler of cattle, should have appreciated the risks involved, and contributory negligence would be assessed at 33%. The case would be remitted to the High Court for assessment of damages.

***Patrick J Lynch v Binnacle Limited (t/a Cavan Co-Op Mart)*, Supreme Court, 9/3/2011**

Eurlegal

Edited by TP Kennedy, Director of Education

Recent developments in European law

EMPLOYMENT

Case C-29/10, *Heiko Koelzsch v Luxembourg*, 15 March 2011

Mr Koelzsch is a heavy goods vehicle driver domiciled in Germany. He was hired by Gasa, the Luxembourg subsidiary of a Danish company, to transport flowers from Denmark to various locations in Germany and in other EU states by means of lorries based in Germany. The lorries were registered in Luxembourg and the drivers were covered by Luxembourg social security. His employment contract provided for the application of Luxembourg law and the jurisdiction of its courts. In March 2001, he was elected as a representative of the employees of Gasa. He was discharged a week later. He brought proceedings in Germany, but the German court declined jurisdiction. He then sued in Luxembourg, arguing that he was protected by mandatory rules of German labour law protecting employees' representatives. The court in Luxembourg held that, as he was not working in a single state, the mandatory rules of the place protecting him under article 6 of the *Rome Convention* were those of the place where the business that has engaged him was located (Luxembourg). The Court of Justice considered the convention and held that the criterion of the country in which the employee "habitually carries out his work" must be given a broad interpretation. The CJ listed factors to be taken into account in determining this. The local court must consider in which state the employee carries out his transport tasks, where he received instructions concerning this tasks, where he organises his work, and the place where his work tools are located. The local court must also determine the places where the transport is principally carried out, where the goods are unloaded, and the place to which the employee returns after completion of his tasks.

ESTABLISHMENT

Case C-400/08, *Commission v Spain*, 24 March 2011

The opening of a large retail establishment in Catalonia is subject to a prior authorisation system. This system limited the localities available for new establishments and their sales areas. Licences for new establishments were granted only where it was found that there would be no impact on existing small traders. The European Commission took the view that this legislation was precluded by freedom of establishment and took this case against Spain for failure to fulfil its obligations. The Court of Justice held that the contested legislation restricted freedom of establishment. It has the effect of hindering or making less attractive the opening of retail establishments in Catalonia and thus affects their rights of establishment in the Spanish market. Such restrictions can be justified on the basis of overriding reasons in the public interest, provided that they are proportionate. Such overriding reasons include environmental protection, town and country planning, and consumer protection. Purely economic objectives cannot constitute an overriding reason in the public interest.

FREE MOVEMENT OF PERSONS

Case C-434/09, *Shirley McCarthy v Secretary of State for the Home Department*, 5 May 2011

Shirley McCarthy was born in Britain of an Irish mother. She is a British national and has always resided there. She is also an Irish national. Following her marriage to a Jamaican national, she applied for an Irish passport for the first time and obtained it. She then applied to the British authorities for a residence permit, as an Irish national wishing to reside in Britain under EU law. Her husband applied for a residence document as the spouse of an EU citizen. Those applications were refused, as Mrs McCarthy could not base her residence on EU law and invoke that law to regularise the residence of her spouse, since she had never exercised her right to move and reside in member states other than Britain. The British Supreme Court asked the CJ whether she could invoke the rules of EU law designed to facilitate the movement of persons within the territory of the member states. The Court of Justice stated that Directive 2004/33/EC, relating to freedom of movement for persons, determines how and under what conditions EU citizens can exercise their right of freedom of movement within the territory of the member states. Under a principle of international law, reaffirmed in the *European Convention on Human Rights*, citizens residing in the member state of which they are a national, such as Mrs McCarthy, enjoy an unconditional right of residence in that state. The directive cannot apply to such persons. The fact that an EU citizen is a national of more than one member state does not mean that he has made use of his right of freedom of movement. Thus, the directive is not applicable to Mrs McCarthy's situation. As her husband is not the spouse of a national of a member state who has exercised her right to freedom of movement, he also cannot benefit from the rights conferred by the directive. In the absence of national measures that have the effect of depriving her of the genuine enjoyment of the substance of the rights arising by virtue of her status as an EU citizen or of impeding the exercise of her right to move and reside freely within the territory of the member states, the situation of Mrs McCarthy has no connection with EU law and is covered exclusively by national law. In these circumstances, she cannot base her residence in Britain on rights associated with European citizenship.

Case C-61/11, *Hassen El Dridi alias Soufi Karim*, 28 April 2011

Mr El Dridi, a non-EU national, entered Italy illegally. In 2004, a deportation decree was issued against him. On the basis of that decree, an order for him to leave Italy within five days was issued in 2010. The order stated that he had no identification documents, no means of transport were available, and it was not possible for him to be accommodated temporarily at a detention centre as no places were available. He did not comply with the order and was sentenced by the Trento District Court to one year's imprisonment. He appealed this sentence, and the appeal court asked the Court of Justice whether Directive 2008/115, on the return of illegally staying third-country nationals, precludes national rules that provide for a prison sentence to be imposed on the sole ground that an illegally staying foreign national remains on the national territory contrary to an order that he leave the territory within a given period. The Court of Justice observed that the directive on return establishes common standards and procedures with a view to implementing an effective removal and repatriation policy for persons with respect for their fundamental rights and their dignity. Member states may not apply stricter standards than those in the directive. The directive set out the procedure to be followed for the return of illegally staying foreign nationals and the sequential order of the different stages of that

procedure. The first stage consists of the adoption of a return decision, with priority given to the possibility of a voluntary departure. If voluntary departure does not take place, the member state can then proceed with forced removal, using the least coercive measures possible. It is only where the removal risks being jeopardised by the conduct of the person concerned that the member state may hold that person in detention. The detention must be for as short a period as possible, to be reviewed at reasonable intervals of time, and is to be ended when it appears that a reasonable prospect of removal no longer exists. The detainees are to be placed in a specialised centre and to be kept separated from ordinary prisoners. The directive calls for a proportionate response and a gradation of the measures to be taken in order to enforce the return decision. The directive, therefore, pursues the objectives of limiting the maximum duration of detention and of ensuring the observance of illegally staying third-country national's fundamental rights. In that regard, the CJ takes account of the jurisprudence of the European Court of Human Rights. The directive has not been transposed into Italian law. However, the relevant provisions are unconditional and sufficiently precise to be relied on by individuals against the member state that has failed to transpose them. The CJ held that the Italian removal procedure differed significantly from that provided for by the directive. Italy was not free to apply rules, even criminal rules, that are liable to jeopardise the achievement of the objectives pursued by a directive and deprive it of effectiveness. Member states may not provide for a custodial sentence on the sole ground that a third-country national continues to stay illegally on the territory of a member state after an order to leave the national territory was notified to him and the period granted in that order has expired. Such a custodial sentence risks jeopardising the attainment of the objective pursued by the directive, namely the establishment of an effective policy of removal and repatriation of illegally staying third-country nationals in a manner in keeping with fundamental rights.

Case C-424/09, *Christina Ionna Toki v Ipourgos Ethnikis Pedias kai Thriskevmaton*, 5 April 2011

In Greece, the profession of environmental engineer is regulated by the state, but it is not in Britain. In Britain, the Engineering Council provides some regulation of the profession, but membership of that organisation is not required in order to work as an engineer. Ms Christina Toki, a Greek national, obtained a bachelor of engineering degree and a master of science in environmental engineering in Britain. From 1999 to 2002, she worked for the University of Portsmouth in the Department of Civil Engineering. Her duties included research and assisting and assessing student work. She applied for recognition in Greece of her right to pursue there the profession of environmental engineer, on the basis of her British qualifications and experience. This application was made on foot of Directive 89/48/EEC, which provides for recognition of higher education diplomas. The Greek Council for the Recognition of the Equivalence of Higher Education Diplomas rejected her application as she was not a full member of the Engineering Council and did not hold the title of 'chartered engineer'. She challenged this before the Greek courts. That court sought guidance from the CJ on the conditions established by the general system for the recognition of higher education diplomas where a profession is regulated by a private organisation such as the Engineering Council and where the applicant for recognition is not a full member of such an organisation. The Court of Justice noted that the Greek legislation transposing the directive excluded the mechanism in the directive of recognition based on professional experience where the person has acquired his/her education and training in a member state in which the pursuit of that profession is regulated not by the member state itself but by private organisations recognised by that member state. In this case, the court held that the mechanism of recognition that requires full-time pursuit of the profession for at least two years is applicable. That mechanism is applicable irrespective of whether the person concerned is, or is not, a member, of the organisation concerned. The court stated three conditions governing whether professional experience should be taken into account. Firstly, the professional experience must consist of full-time work for at least two years during the previous ten years. Second, the work must have consisted of the continuous and regular pursuit of a range of professional activities that characterise the profession concerned in the member state of origin. This work need not encompass all the activities characteristic of the profession. Third, the profession as normally pursued in the member state of origin must be equivalent, in respect of the activities it covers, to the profession that the person has sought authorisation to pursue in the host member state. The directive covers professions that, in the member state of origin and the host member state, are identical or analogous or, in some cases, simply equivalent in terms of the activities they cover. The court considered that Ms Toki's activities, such as research work or assisting the work of students, do not constitute actual pursuit of the profession of environmental engineer. However, the work of assessment carried out in collaboration with a private company that specialised in technology relating to liquid waste processing might constitute actual pursuit of the profession concerned.

INTELLECTUAL PROPERTY

Case C-70/10, *Scarlet Extended v Société Belge des Auteurs Compositeurs et Éditeurs (Sabam)*, opinion of Advocate General Cruz Villalón, 14 April 2011

Belgian law allows its courts to issue an order for any infringement of an intellectual property right to be brought to an end. Where a third party uses the services of an intermediary to breach such a right, the courts can issue an order against that intermediary. Sabam applied for interim relief against Scarlet Extended SA, an internet service provider. It sought a declaration that copyright in musical works in its repertoire had been infringed because of unauthorised sharing of music files through the use of Scarlet's services – in particular by means of peer-to-peer software. Sabam sought an order requiring Scarlet to bring such infringements to an end by blocking or making impossible the sending or the receiving by its customers in any way of files containing a musical work, using peer-to-peer software, without the permission of the copyright holders. The Belgian court found that there had been infringements of copyright and granted the order sought by Sabam. Scarlet was given a period of six months to comply with the order, with a penalty of €2,500 per day if it failed to do so. Scarlet appealed against this order to the Court of Appeal, Brussels. The appeal court sought a ruling from the Court of Justice on whether EU law and, in particular, the *Charter of Fundamental Rights*, permits a national court to order an internet service provider to install a system for filtering and

blocking electronic communications. Advocate General Cruz Villalón noted that the system to be installed must, first, filter all data communications passing via Scarlet's network in order to detect data that involve a copyright infringement. The system must block communications that infringe copyright either at the point at which they are requested or at the point at which they are sent. He considered that the court order is a general obligation that, it is intended, will be extended in the longer term on a permanent basis to all internet service providers. The court order will have a lasting effect for an unspecified number of natural or legal persons, irrespective of whether they have a contractual relationship with Scarlet and regardless of their state of residence. The system must be capable of blocking any file sent by an internet user, who is one of Scarlet's customers, to any other internet user, where that file is thought to infringe a copyright managed, collected or protected by Sabam. It must also be capable of blocking receipt by an internet user, who is one of Scarlet's customers, of any file infringing copyright that has been sent by any other internet user. The obligation to protect copyright would be imposed on Scarlet. It would also be responsible for the cost of installing the filtering and blocking system. Thus, the legal and economic responsibility for combating illegal downloading of pirated works from the internet would largely be delegated to internet service providers. Thus, the advocate general considered that the installation of that filtering and blocking system is a restriction on the right to respect for the privacy of communications and the right to protection of personal data, both of which are rights protected under the *Charter of Fundamental Rights*. The deployment of such a system would restrict freedom of information, which is also protected by the charter. The charter accepts that the exercise of the rights and freedoms it guarantees may be restricted, on condition that any such restriction is in accordance with the law. The advocate general looked to the cases of the European Court of Human Rights and thus considered that the legal basis for any restriction on the exercise of the rights and freedoms guaranteed by the charter must meet requirements concerning "the quality of the law" at issue. A restriction on the rights and freedoms of internet users would be permissible only if it were adopted on a national legal basis that was accessible, clear and predictable. It cannot be held that the obligation on internet service providers to install the filtering and blocking system at issue, entirely at their own expense, was laid down expressly and in clear, precise and predictable terms in the Belgian legislation. Neither the filtering system, which is intended to be applied on a systematic, universal, permanent and perpetual basis, nor the blocking mechanism, which can be activated without any provision being made for the persons affected to challenge it or object to it, are coupled with adequate safeguards. G

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WILLS

Baker, Brian (deceased), late of 55 Moyard, Shanballa, Lahinch Road, Co Clare. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, who died on 13 November 2008, please contact Bowen & Co, Solicitors, Pound Street, Sixmilebridge, Co Clare; tel: 061 713 167, fax: 061 713 642, email: info@legalsupportservices.ie

Conran, Carrie (deceased), late of 27 Lyons Avenue North, Newcastle Lyons, Newcastle, Co Dublin, and formerly of Derryclooney, New Inn, Co Tipperary, who died on 13 April 2011. Will any person having knowledge of any will executed by the above-named deceased please contact Barrett Solicitors, First Active House, Blessington Road, Tallaght Village, Dublin 24; tel: 01 462 3999, fax: 01 462 3032, email: info@barrettsolicitors.ie

Dunne, Frances (deceased), late of Little Sisters, Kilmainham, Dublin 8, and formerly of 142 Curlew Road, Drimnagh, in the city of Dublin. Would any person having knowledge of the whereabouts of the original will executed by the above-named deceased, please contact B&P Byrne, Solicitors, 5 Tyrconnell Road, Inchicore, Dublin 8; tel: 01 453 3309, fax: 01 453 8180, email: info@byrnesolicitors.com

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Joyce, Martin (deceased), late of Halting Site, Dunsink Lane, Finglas, Dublin 11, who died on 17 February 2011. Would any person having knowledge of any will executed by the above-named deceased please contact E O'Shea, solicitor, 3 Chancery Place, Dublin 7; tel: 01 677 7495, fax: 01 878 2347, email: eoshea@osheabusiness.ie

Kelly, Ulick (deceased), late of no 8 Rossvale, Green Road, Portlaoise, Co Laois. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, who died on 2 May 2011, please contact Brian P Adams & Co, Solicitors, Cormac Street, Tullamore, Co Offaly; tel: 057 932 1866, fax: 057 935 1443, email: bpadams@brianpadams.ie

McNamara, Denis (deceased), late of Coolnahilla, Bodyke, Co Clare. Would any person with knowledge of a will executed by the above-named deceased, who died on 10 February 2011, please contact Desmond J Houlihan & Company, Solicitors, Salthouse Lane, Ennis, Co Clare; tel: 065 684 2244, email: lburke@djhoulihan.ie

Mathews, Sarah Gertrude (otherwise Sally) (deceased), late of 5 Tivoli Terrace North, Dun Laoghaire, Co Dublin, who died on 8 May 2011. Would any person having knowledge of any will executed by the above-named deceased please contact Mary Casey, solicitor, Mason Hayes & Curran, South Bank House, Barrow Street, Dublin 4; tel: 01 614 5000, fax 01 614 5001, email: mcasey@mhc.ie

Murray, Philip (deceased), late of Elm Green Nursing Home, Castleknock, Dublin 15, who died on 22 September 2009. Would any person having knowledge of any will executed by the above-named deceased please contact Reddy Charlton McKnight Solicitors, 12 Fitzwilliam Place, Dublin 2; tel: 01 661 9500, fax: 01 678 9192, email: bsharkey@rcmck.com

O'Rahilly, Eileen (deceased), late of 24 Avondale Road, Killiney, Co Dublin, who died on 8 February 2010. Would any person having knowledge of a will made by the above-named deceased please contact Fagan Bergin Solicitors, 57 Parnell Square West, Dublin 1; DX 266003 Parnell Square; tel: 01 872 7655, fax: 01 873 4026, email: info@faganlaw.com

Queally, Patrick Joseph (deceased), late of 6 St Francis Avenue, Askeaton, Co Limerick, who died on 19 January 2011. Would any person having knowledge of the whereabouts of a will made by the above-named deceased please contact Ted McCarthy & Co, Solicitors, Wyvern House, 2 Newenham Street, Limerick; tel: 061 461 024, fax: 061 461 025

Sweeney, Marie (deceased), late of 4 Stirrup Lane, Dublin 7, who died on 8 April 2011. Would any person having knowledge of any will executed by the above-named deceased please contact Barbara Tanzler, solicitor, of Denis McSweeney, Solicitors, 1 Upper Grand Canal Street, Dublin 4, tel: 01 676 6033, fax: 01 661 5723, email: barbaratanzler@denismcsweeney.com

Waller, Mary (deceased), late of 27 Ormond Square, Dublin 7, who died on 3 April 1990. Would any person having knowledge of any will executed by the above-named deceased please contact Mary McKeever of Eugene F Collins, So-

WPG DocStore's professional e-discovery support service from €500 per GB. ISO 27001 certified; tel: (01) 2454800, email: crogan@wpg.ie or website: www.wpg.ie/docstore.htm

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A Caring Legacy: bequests to The Carers Association (CHY10962) help to support home-based family care in Ireland.

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licitors, Temple Chambers, 3 Burlington Road, Dublin 4, tel: 01 202 6400, fax: 01 667 5200, email: mmckeever@efc.ie

TITLE DEEDS

To whom it may concern – re: property at Old Railway Station, Shillelagh Road, Tullow, Co Carlow

Would any person having knowledge of the whereabouts of the following original documents:

1) Grant of probate in the estate of Samuel Agar, dated 6 January 1977 and granted to Beatrice Agar,
2) Assent dated 14 October 1977, granted by Beatrice Agar to herself of all that and those part of the lands of Tullowphelim in the barony of Rathvilly and county of Carlow, comprising six acres, one rood statute measure or thereabouts, which said premises is more particularly described and delineated on the map endorsed on the within recited conveyance of 4 October 1961 and thereon coloured pink and marked 'lot 2' and coloured yellow and marked 'lot 3', together with all the Tullow Railway Station Buildings and other buildings, erections, stores, platforms, banks and cabins standing on the said lands for an estate in fee simple,
3) Lease dated 1988 and made between John and Gordon Agar and Fitzpatrick Construction (Carlow) Limited of all that part of the factory premises with concrete surround situate at Station Road, Tullow, in the county of Carlow as the same are outlined in red on a map annexed hereto, all of which said property is situate in the townland of Tullowphelim in the barony of Rathvilly and county of Carlow,
4) Lease dated 23 February 1990 and made between Beatrice Agar and Tullow Investments Limited of all that part of the factory premises with concrete surround situate at Station Road, Tullow, in the county of Carlow as the same are outlined in red on a map annexed hereto all of which said property is situate in the townland of Tullowphelim in the barony of Rathvilly and county of Carlow.

Please contact Morrissey & Co, Solicitors, Lismard House, Bridge Street, Tullow, Co Carlow; tel: 059 915 2910, fax: 059 915 2163, email: tmurphy@morrisseycosolicitors.ie

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

Any person having any interest in the fee simple estate or any intermediate interest in all that and those the hereditaments and premises known as 43 Upper O'Connell Street in the city of Dublin, held under a lease for lives dated 12 May 1792 from Thomas Bennett to John Allen, subject to the adjusted yearly rent of £64.42

Take notice that Joseph O'Reilly, being the person entitled to the lessee's interest in the said lease, intends to apply to the county registrar for the city of Dublin for the acquisition of the fee simple estate and all intermediate interests (if any) in the said property, and any party asserting that they hold the fee simple or any intermediate interest in the aforesaid property is called upon to furnish evidence of their title thereto to the under-mentioned solicitors within 21 days from the date of this notice.

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

Date: 3 June 2011

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

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of the dwellinghouse and premises lately occupied by Bridget Murphy, deceased, at Abbey Street, Ballinrobe, Co Mayo: an application by Patrick U Murphy

Take notice that any person having a superior interest in the following property: the plot of ground together with the dwellinghouse standing thereon lately occupied by Bridget Murphy, deceased, at Abbey Street, Ballinrobe, Co Mayo, being the land demised by a lease dated 25 March 1869 made between Henry Augustus Dillon of the one part and Patrick Murphy of the other part from 1 March 1866 for and during the lives of Michael Murphy, eldest son of Patrick Murphy, Edward Fergus, eldest son of Patrick Fergus and James O'Connor, youngest son of John O'Connor and the survivor of them, plus the term of 61 years, subject to the yearly rent of £1.15s.0d (€2.22), should give notice of their interest to the undersigned solicitors.

Take notice that Patrick U Murphy intends to submit an application to the county registrar for the county of Mayo for the acquisition of all superior interests in the aforesaid property, and any party asserting that they hold an interest therein is called upon to furnish evidence of their title to the undersigned solicitors within 21 days from the date of this notice.

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

Date: 3 June 2011

Signed: Patrick J Durcan & Co (solicitors for the applicant), Westport, Co Mayo

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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*.

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

Suits you, sir

Hilton Stein, who literally wrote the book on how to sue one's lawyer, has not practised since 2002 – but an unhappy client continues to pursue a ten-year-old claim against him, the *New York Lawyer* reports.

US Bankruptcy Judge Donald Steckroth (Newark, New York) has refused to dismiss an adversary action by Dr Monica Mehta, who wants to block the discharge of a $40,000 debt Stein allegedly owes her. Stein is the author of *How To Sue Your Lawyer: The Consumer Guide to Legal Malpractice*, which was first published in 1989.

GPS surveillance wrong turn

A Washington appeals court has struck down a man's conviction and life sentence in a drug case on the grounds that the police unlawfully tracked his movements with a GPS device that had been installed on his vehicle without a warrant.

The *BLT* (blog of the *Legal Times*) reports that the unanimous three-judge ruling in the US Court of Appeals for the District of Columbia Circuit says that law enforcement officers must obtain a warrant to use GPS tracking equipment. The appeals court said the government had violated the Fourth Amendment and reversed the conviction of the defendant, Antoine Jones.

Federal prosecutors used data from a global positioning system device to link Jones to an alleged drug house in Maryland, where the authorities found nearly 100 kilograms of cocaine and about $850,000 in cash.

California shuts 'maternity tourists' birthing centre

Authorities have shut down a Californian birthing centre for Chinese 'maternity tourists' who wanted their babies born in the United States. The women paid tens of thousands of dollars to have their babies delivered in a row of connected townhouses on a quiet street lined with palm trees in San Gabriel, the *New York Times* reports. The possible incentive for the baby boom? After babies born in the US turn 21, they can petition for permanent residence status for their parents. The newspaper said that the discovery of the facility raised questions about whether maternity tourism had entered "a new, more institutionalized phase".

One other possible incentive – a Turkish-owned hotel in New York City includes a stroller with its month-long 'baby stays'!

Belly dancer stripped ... of settlement

A Staten Island woman who lost her hefty divorce deal when her former husband showed a judge her online belly-dancing photos says she was just posing. "I wasn't really belly-dancing in them," Dorothy McGurk (43) is reported to have said, in the *New York Daily News*. "I was posing. In some of them I was moving a veil around with my arms, but I wasn't belly dancing."

McGurk won $850 a month for life and the couple's home three years ago after convincing a judge that her injuries from a 1997 car wreck prevented her from working.

Her ex-husband, Brian McGurk, went back to court when he saw a blog in which she posted the photos and boasted of dancing "every day for three years".

The posts and photos were enough to persuade Richmond County Supreme Court Justice Catherine DiDomenico to strip Dorothy McGurk of her settlement.

Flapper flap as dresses reveal much too much

Seven former cocktail waitresses are suing Atlantic City's Resorts Casino Hotel, claiming they were fired because revealing new 'flapper' dresses – part of a rebranding plan to evoke a Roaring '20s theme – were not flattering on them, the *New York Lawyer* reports.

The suit, *Agudelo v RAC Atlantic City Holdings*, alleges that the new owners had waitresses audition for their positions by trying on the skimpy dresses and posing for faceless photos reviewed by a modelling agency. Those deemed unsexy or unfeminine in the outfits – all of whom were older and "not of a certain body shape" – had their employment terminated for not "meeting uniform standards," the plaintiffs claim.

The waitresses allege violations of the state law against discrimination and are seeking reinstatement, compensatory and punitive damages, attorneys' fees – and so-called 'back and front pay'.

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LAW FIRM MERGER

Our client is a highly successful and dynamic commercial law firm with a strong brand and turnover in excess of €5 million. As part of its continued expansion the firm is seeking expressions of interest from like minded commercial firms open to entering into a merger or alliance. The right entity will be focused on delivering first class services to businesses in practice areas which are complementary with those of our client. It will also need to be a good cultural fit. The successful merger will bring synergies and economies of scale and an enhanced ability to win and perform quality work.

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For a confidential discussion please contact
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New Openings

Private Practice

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

Commercial Property/Banking – Associate to Senior Associate: Our client is a leading full service Irish law firm with a first class client base and an enviable reputation. We are instructed to search for a solicitor with strong transactional experience in the sale/purchase of Commercial Property. The successful candidate will be dealing with a range of matters including security reviews and NAMA. A thorough understanding of the financial aspects of property transactions and the taking of security is an essential pre-requisite.

Corporate/Commercial – Associate to Senior Associate: An exciting opportunity has arisen for a strong Corporate/ Commercial practitioner to join this major legal practice. The team deals with a broad range of transactions spanning the corporate and commercial spectrum. You will be a strong all-rounder, ideally with exposure to FDI. An excellent academic record is essential.

Intellectual Property/Technology – Senior Associate to Partner: This highly regarded Dublin firm seeks to recruit an additional solicitor to join this specialist department. The successful candidate will have specialised in non-contentious IP and general commercial work.

Professional Indemnity – Associate to Senior Associate: A high calibre practice with an excellent client base is searching for a first class PI practitioner. Strong exposure to professional indemnity matters is essential. Candidates will need to demonstrate the drive and enthusiasm to market and develop the firm's services with existing and prospective clients.

In-house

Banking and Insolvency – Associate to Partner: If you have strong experience in either of these practice areas, we would like to hear from you.

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