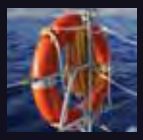
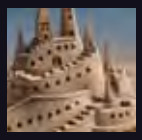


PII prognosis
Survey of the profession identifies the main issues on PII renewal

Michael Farrell
His evolution from civil rights activist to senior solicitor at FLAC



MUD in your eye
The *MUD Act 2011* and its implications for unit owners and developers

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GAZETTE

€3.75 **May 2011**

BETTING THE HOUSE:

The games people play to keep their assets

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Headquarters of the Law Society of Ireland

EMBRACING OPPORTUNITY

The Chinese symbol for 'crisis' is composed of two characters – one representing danger and the other opportunity. Our opportunity, at this challenging time, is to react to the challenges facing us as a united profession, acting in the best interests of the profession as a whole. I firmly believe that it is both in the interests of the profession and the public that we stand together in unity, so that we will emerge from our present turmoil much stronger and in a far healthier position to serve our clients.

Firstly, the results of the professional indemnity insurance survey of the profession are detailed in this issue of the *Gazette* (see p12). I would like to thank all 770 firms that participated. Some of the findings include the following:

1) Residential and commercial property conveyancing comprises, on average, 22.5% of member firms' income.
2) More than two out of three firms received notification from the insurer of its decision on PII cover after 18 November 2010.
3) The average increase in the cost of PII in the past 12 months was 56%. The rate of increase varies considerably among firms and appears especially influenced by a firm's claims history.
4) On average, firms completed three proposal forms to obtain a quote for PII.
5) 49% of firms admitted they had difficulty in the renewal process. Of the factors causing difficulty, over 60% of firms with difficulties mentioned the delay in response from the insurer, the little time given to consider a quote, and the difficulty in completing the proposal forms.

SMDF requires €16 million

The additional horrendous news that the SMDF requires €16 million to remain solvent, facilitate an orderly wind-down, and exit the market this year has caused enormous anger, upset and amazement in the profession. The EGM on 4 May will decide the profession's response to this crisis. In any event, the 22% of firms that are currently members of the SMDF will require further options next December.

The PII Task Force has serious concerns regarding the sustainability of freedom of choice in the insurance market. This is due partly to increased market instability, the growing inability of solicitors to purchase cover at affordable prices, a bigger number of solicitors in the Assigned Risks Pool, punitively steep increases in premiums for firms with claims or notification of claims, and the difficult renewal process.

Accordingly, the PII Task Force instructed Marsh, insurance brokers, on 7 March last, to investigate the viability of a master policy for the profession. This would involve one insurance policy for the whole profession. The total of the annual insurance premiums (at present €55 million approximately) would be spread among five or six insurance companies, who would share the risk for the entire profession. There would be one proposal form and a formula used to calculate the premium to be apportioned to each firm, based on certain criteria such as claims history, type of practice, turnover, number of solicitors, and other matters. The formula would be critically reviewed to ensure, as far as possible, that it is fair and equitable.

"A full consultation will take place regarding the possible implications of a master policy for members and each firm"

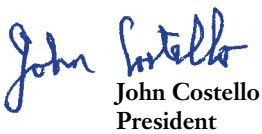
When Marsh has completed its research, hopefully in early May, a full consultation will take place with the profession regarding the possible implications of a master policy for members and each firm. If a master policy is to be introduced, a final decision must be made before the end of June to have all arrangements in place for the next renewal process.

The Law Society is already meeting with bar associations and with many of the larger firms in Dublin to receive initial soundings about a master policy. Such a policy would provide cover only to the compulsory limit of €1.5 million, but individual firms would be free to obtain top-up cover as they wished. One major benefit would be automatic run-off cover for firms that have ceased to practise in the lifetime of the master policy.

In early/mid May, it is hoped to send all firms detailed information on the master policy proposal and to request feedback.

It was William Shakespeare who wrote in *Julius Caesar*: "...we must take the current when it serves, or lose our ventures."

Shakespeare's character Brutus seems to be saying that circumstances sometimes offer an opportunity that must be recognised and then embraced. Perhaps we should take these words to heart.



John Costello
President

Law Society Gazette
Volume 105, number 4
Subscriptions: €57

Editor: Mark McDermott FIIC
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email: sean@lawsociety.ie

For professional notice rates (wills, title deeds, employment, miscellaneous), see page 59.

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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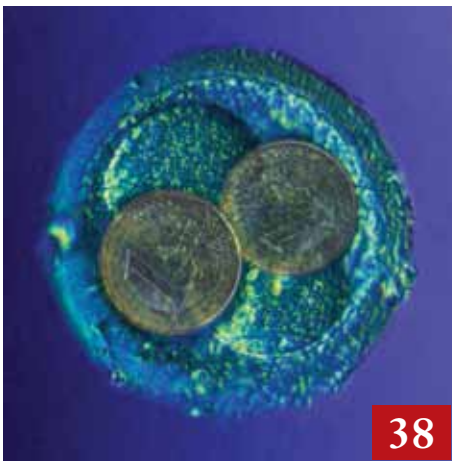

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- Employment opportunities
- The latest CPD courses

... 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

Sporting Dublin sets the pace

DUBLIN

There's nothing like the recent great weather to get colleagues thinking of matters sporty, and outdoor activities, and so the DSBA has come up with a galaxy of sporting attractions for its members.

Already, the DSBA Golf Society is in full 'swing', with a good turnout for the spring event in Portmarnock. Organiser-in-chief John O'Malley has a host of other events in store, as well as tennis in Donnybrook in June, more golf, cricket – and, of course, Eamon Shannon's eagerly awaited soccer league for the DSBA cup.

News of all of these events, and especially the forthcoming DSBA Ball on Saturday 14 May, can be found on the website, www.dsba.ie.

One doesn't come across CPD events on sport too often, so in the month when the Law Society will host the Calcutta Run, an interesting seminar will be held on 28 May entitled 'Sport and the Law: Ensuring Sport is Fit to Meet Modern Challenges'. This will examine key developments in sports law over the last 12 months, with particular emphasis on decisions of the ECJ.

Of course, the biggest sporting event in the legal calendar is the Calcutta Run – which takes place on Saturday 14 May and starts from Blackhall Place. It is always an excellent fun run, and the Law Society lays on a lot of post-run activity and fun for all ages.

CPD under sunny Western skies

GALWAY

Galway members continue to support their CPD initiative. Providing lectures for members is possible due to the payment of a modest annual membership fee by members – reduced from €75 to €50 to reflect the times. A wide variety of topics are covered, from arbitration and alternative dispute resolution through to the new *Land and Conveyancing Law Reform Act 2010.*

Events planned for the summer include some relaxation for members, either through the annual golf outing or letting yourself go at the Galway Races. With an eye to the community at large, David Higgins and his team are arranging charity walks and fundraising events, where members can make an additional contribution to the community in a practical way. They hope to encourage members to mingle more, outside the constraints imposed in the day-to-day business of representing clients. This commendable initiative is worthy of the support of the profession throughout the county, and all are encouraged to lend their voice and get involved.

It is the intention of the Galway Solicitors' Bar Association to expand on its successful social events of last year, which included the Christmas Ball and the very popular Galway Races night.

The association recognises the value in colleagues having the opportunity to meet each other in an informal setting to discuss matters relevant to the profession. Any member with ideas or suggestions should make contact with Aoife Rooney, Sinead Gallagher or Geraldine O'Malley (social events liaison officers).

The committee recognises the difficulties that many sole practitioners and regional offices are currently facing, and Ian Foley (sole practitioner liaison) or David Fahy (regional liaison) should be contacted by any such practitioners, if only to help highlight such difficulties, so that they can be addressed, if possible.

The association is delighted to announce that wi-fi broadband access has now been introduced to the bar room in the Galway Courthouse, and the log-in details have been furnished to all members.

The association's website (www.gsba.ie) will be regularly updated with information on all social events and upcoming CPD events.

Southern Law Association

Attending the SLA annual dinner at Marybourgh House Hotel on 4 March were John Buckley (partner, Ronan Daly Jermyn), Fergus Long (president, SLA) and Judge Sean Ó Donnabháin

Voluntary code for inter-colleague complaints

MAYO

In a commendable initiative – which is worthy of careful consideration and adoption by other bar associations throughout the country – the MSBA has established a voluntary code for inter-colleague complaints. Tensions rise when colleagues unilaterally make a formal complaint, and the feeling is that, if local common sense could have been applied, the particular problem could have been resolved at that level without souring a situation, which can inevitably be the consequence of lobbing the complaint up to Blackhall Place. In a development heartily encouraged by Linda Kirwan (senior solicitor in the Complaints Section of the Law Society), the bar association initiative will, at first instance, see whether the matter can be resolved locally, with the intervention of respected independent colleagues.

In other news, association president Evan O'Dwyer is looking forward to the arrival in the county of several lawyers from Pennsylvania as part of the Brehon Law Project. The event, sponsored by the county council, should give a boost to the local hospitality industry and – to the delight of tourism minister Michael Ring – takes place in Westport.

Evan and his committee also recently arranged a CPD day on regulatory matters and is looking forward to the next one, on criminal law, to be held in Castlebar in June, when specialist Robert Eager will attend. G

Remember Cancer Care West

Cancer Care West would like to encourage practitioners to remember the charity when it comes to making their wills.

"Leaving a legacy is a simple, wonderfully fulfilling experience," says the charity, " and, rest assured, every legacy counts – no matter how large or small." If you wish to leave a legacy, please contact info@cancercarewest.ie or call 091 545 000.

William Fry wins IP award

William Fry was awarded the title of 'Irish Intellectual Property Law Firm of the Year 2011' at the annual global awards ceremony of Managing Intellectual Property in April in London.

The award recognises outstanding achievement in intellectual property. The firm beat off competition from other intellectual property firms in Ireland.

In News this month...

16% drop in available training contracts in England & Wales

A report from the Law Society of England and Wales shows that there was a 16% fall in the number of available training contracts last year, despite the profession as a whole continuing to expand.

The latest annual statistical report shows that the number of registered training contracts offered in the 12-month period ending 31 July 2010 was 4,874, a decrease of 16.1% on the previous year's figure of 5,809.

The annual number of training contracts has now fallen 23% from a 2007-2008 peak of 6,303.

STEP annual conference

The STEP annual conference – themed 'Challenging times for practitioners' – takes place on Friday 27 May 2011. For details, visit www.step.ie.

Half of small firms 'wait months for payment'

ISME CEO Mark Fielding

A new survey has revealed that almost 50% of all small and medium-sized businesses are waiting up to three months to get paid by larger businesses and State agencies.

The Irish Small and Medium Enterprises Association said the problem of late payments is putting some companies out of business. ISME boss Mark Fielding has called for new legislation to stop it from happening, saying that the Government should introduce a statutory 30-day payment period.

Mid-sized firms hardest hit

The average cost increase for professional indemnity insurance among firms of solicitors at the annual renewal on 1 December 2010 was 56%, according to the comprehensive survey undertaken for the Law Society by Behaviour & Attitudes in late January 2011 (see pages 12 and 13).

Last year, the average cost of PII across the profession as a whole was €24,695 per firm. For the current insurance year, the equivalent figure is €38,416.

But the survey reveals that this average increase is far from evenly spread across either size of firm or geographical region. For a firm with one solicitor, the average increase was 22%. For firms of two solicitors, there was in fact, on average, a reduction of 2% (the only category where there was a reduction).

For firms with three or four solicitors, the average increase was 16%. However, for firms with five to nine solicitors, the average increase was a whopping 236%. For firms with ten or more solicitors, the average increase was 89%.

In terms of geographical region, the average increase in Dublin was 46%. In Munster, the increase was 6%, and there was a 15% increase in Connaught/Ulster. However, in Leinster (excluding Dublin), a massive average increase of 157% applied.

British Supreme Court ends immunity for expert witnesses

In a landmark case, the British Supreme Court has abolished an expert witness's immunity from being sued with respect to testimony in court or work connected with the conduct of court proceedings.

The case (*Jones v Kaney* [2011] UKSC 13) arose from previous legal proceedings issued by the appellant, where the judge instructed the two opposing experts in the case to prepare a joint statement on the psychiatric injuries sustained by the appellant in a road traffic accident. The appellant subsequently sued the expert, a clinical psychologist, maintaining that she had wrongly signed a joint statement that agreed that he had not suffered post-traumatic stress disorder, resulting in a significantly lower settlement in the case than he would otherwise have achieved. The appellant's case for negligence against the psychologist was struck out on the basis that an expert witness was entitled to immunity for such a claim. The appeal went directly to the Supreme Court as a point of general public importance. The Supreme Court by a majority allowed the appeal.

Society urges action on limited liability partnerships

The Law Society hopes that the new Minister for Justice, Alan Shatter, will be more open to the introduction of limited liability partnerships (LLPs) – perhaps even limited companies – as business models for solicitors' firms than was his predecessor Dermot Ahern.

The Society has written to the new minister, urging him to introduce legislation that would allow solicitors' firms to operate, as they do in most other common law jurisdictions, in these 21st century business models, rather than be confined, as they are in Ireland, to unlimited liability partnerships based on concepts and legislation from the Victorian era.

As far back as 2001, the Society submitted to Government an extensively researched and fully argued report outlining the rationale for the introduction of limited liability partnerships in Ireland. The report even contained a draft bill.

Despite the Society raising it directly with a succession of ministers over the decade, the issue was in effect put on the back-burner by Government. The Minister for Enterprise, Trade and Employment back in 2001, Mary Harney, saw the proposal as having a relevance beyond the solicitors' profession and referred it to the Company Law Review Group for consideration and assessment. The review group decided that it would address the issue of limited liability partnerships only when it had completed the primary project it had on hand, namely the consolidation of the *Companies Acts*. This consumed it for many years, and it was not until recent years that any real intention was paid to the limited liability partnerships proposal. Last year, the Company Law Review Group recommended further study of

Mary Harney: In 2001, she saw the proposal as having relevance beyond the profession

the proposal as it would apply to the solicitors' profession.

The Society forcefully raised the issue again in correspondence and at a number of meetings with Department of Justice officials. Finally, in late October 2010, the then President Gerard Doherty, Senior Vice-President John Costello and Director General Ken Murphy made a presentation on the issue face to face with the then Minister for Justice Dermot Ahern.

Among many other arguments, the Society representatives pointed out that LLPs – indeed, in many jurisdictions, limited companies – were available as business models for law firms right across the common law world, including in England and Wales, Scotland and Northern Ireland, providing a competitive advantage to firms in those jurisdictions over solicitors' firms in this one.

An LLP solicitors' firm in other jurisdictions is required to hold professional indemnity insurance, just as an unlimited partnership must. However, in an LLP, innocent partners do not have personal liability for the acts of negligent partners, although a negligent partner continues to be personally liable for his or her negligent actions.

The imposition of unlimited liability on partners belongs to an earlier era, when few varieties of professional services were available, financial capital requirements of partnerships were relatively low, services were normally provided by very small groups of people, and potential exposure to significant claims in respect of legitimate professional activity was relatively rare. In addition, the requirements of the *Partnership Act 1890* long predate the era of strict professional regulation and of professional indemnity insurance.

The Society has requested an early meeting with the minister to urge that this measure be adopted by Government as soon as possible.

Solicitors' profession far from 'sheltered'

"It really does annoy me to hear the solicitors' profession being described as a sheltered part of the economy", Director General Ken Murphy recently told a radio interviewer. "We are about as sheltered as the building sector or the retail sector. We are right in the front line of a very chill economic wind.

"One the traditional mainstays of legal work – property work – fell away precipitously in about 2008", he continued. "All sorts of commercial legal work did also, because legal work is so connected with the level of economic activity in the country generally. We now have, in our estimation, well in excess of 1,000 solicitors unemployed. That figure would have been practically zero three years ago."

Murphy: "About as sheltered as the building or retail sectors"

He made clear that solicitors, like all businesses in the country, are finding it extremely difficult to get paid. Economically, the profession is "in a pretty dire state, with a very, very considerable reduction in income".

Asked about the future for those thinking of studying to become solicitors he said: "It is going to continue to be tough. I have confidence in the long-term future of the legal profession, and I would never try to discourage people from becoming lawyers if they really wanted to, but I would urge them to do it on the basis of information, not illusions."

Law School wins national innovative training award

The Law Society Professional Training team has won an Irish Institute of Training and Development award. Presented on 4 March, the award was made in the 'Networks and groups' category, in recognition of the team's excellence in developing, designing and delivering innovative training to the legal profession.

The unit is meeting the diverse and challenging lifelong learning needs of solicitors working in both the public and private enterprise sectors. It caters to the entire legal profession in Ireland, with 2,231 member firms. It incorporates the Law Society Skillnet and the Law Society Finuas Network.

In 2010, the network trained 3,082 trainees and delivered 4,765 training days through its suite of over 120 training programmes. These programmes included a suite of postgraduate courses and regular training programmes to inform the legal profession of new legislation and its implications for day-to-day practice. It also ran a number of successful networking events to foster a community of learners through social interaction and sporting events.

Michelle Nolan (communications executive, Law School), Edward McDermot (accountant), John Gorman (president, Irish Institute of Training and Development), Attracta O'Regan (head of Law Society Professional Training) and Tracey Donnery (Finuas programme manager)

New course development

Law Society Professional Training has been heavily engaged in recent years in new course design and development, including the Postgraduate Certificate in Teaching, Learning and Assessment, which is run in collaboration with the Dublin Institute of Technology. This is the first stage of a master's programme developed by Law Society Skillnet. This course has generated employment for graduates, opening doors to new employment opportunities in professional education. The certificate began in April.

The award also recognises the Law Society Skillnet's Postgraduate Certificate in Mediation and Conflict Intervention, which runs in collaboration with NUI Maynooth. Another very successful course is being run with the Commercial Law Centre in UCD – the Law Society Finuas Network Postgraduate Diploma in International Financial Services Law.

Law Society Skillnet and Law Society Finuas Network are funded by member companies and the Training Networks Programme and the Finuas Networks Programme respectively. Both these programmes are managed by Skillnets Ltd and are funded from the National Training Fund through the Department of Education and Skills.

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

Business, law and human rights seminar

The Law Society's Human Rights Committee, with the Public Interest Law Alliance, held a seminar on 'Business, law and human rights' on 19 April at Blackhall Place. A packed room heard addresses from three speakers: Michael Smyth CBE, Esther Lynch, and Tomas Sercovich.

Michael Smyth is vice-chairman of the International Bar Association's Corporate Social Responsibility Committee. He has over 25 years' experience litigating before domestic and international tribunals, including the European Court of Human Rights. He is the author of *Business and the Human Rights Act*.

Esther Lynch is legislation and social affairs officer with the Irish Congress of Trade Unions. She is a board member of the Health and Safety Authority and an alternate member of the Company Law Reform Group.

Tomas Sercovich represents the Irish Government in the EU at the European Commission DG Enterprise Expert Group on Corporate Social Responsibility. He represents Business in the Community Ireland.

The event was chaired by Mr Justice Gerard Hogan.

(Front, l to r): Colin Daly, Jo Kenny, Law Society President John Costello, Esther Lynch and Michael Smyth CBE. *(Back, l to r)*: Alma Clissmann, Betsy Keys Farrell, Larry Donnelly, Tomas Sercovich, Joyce Mortimer and Noeline Blackwell

Get the best return from your tech

The Society's Technology Committee is addressing the best ways to improve the return from members' technology investment in a half-day seminar at Blackhall Place on Friday 24 June.

Most practitioners have invested substantially in office technology. The seminar will look at current issues and developments and how to apply them to a legal practice, including innovative ways to communicate with clients and the concept of the 'paperless office'.

It will also cover the hot topic of 'cloud computing' – what it is and how it can be used in the legal office. The afternoon will look at quick ways to build a web presence and will review the potential use of social-networking tools.

NUIG student to become first female judge in the Seychelles

An NUI Galway master's student is to become the first female judge in the history of the Seychelles. Mathilda Twomey is currently undertaking an LLM in NUIG.

Mrs Twomey was appointed a justice of the Court of Appeal following the recommendation of the Constitutional Appointments Authority.

Mrs Twomey is a Seychellois barrister who practised in the Seychelles between 1987 and 1995. From 1992 to 1993, she was a member of the Seychelles Constitutional Commission that drafted the Constitution of the Third Republic. Since 1995, Mrs Twomey has been living and working in Ireland.

Outstanding line-up for inaugural symposium

At the launch are Peter Hynes (manager, Mayo County Council), Joseph Kelley (president, Brehon Law Society), Joanne Grehan (regional development executive, Western Development Commission) and Judge Seamus Hughes

The inaugural US/Ireland Legal Symposium takes place in Knockranny House Hotel, Westport, Co Mayo from 11-13 May, and boasts an outstanding line-up of speakers. Taoiseach Enda Kenny is guest speaker at the gala dinner; the event is chaired by Deirdre Somers, chief executive of the Irish Stock Exchange; and speakers include Mr Justice Peter Kelly of the Commercial Court and Chief Justice Maureen O'Connor of the Ohio Supreme Court.

This international symposium is hosted by the Brehon Law Society of Philadelphia and is supported by the Western Development Commission, Mayo County Council, NUI Galway – who are the main sponsors – and Temple University Beasley School of Law in Philadelphia.

The event qualifies for 9.5 general CPD hours. Attendees will include Irish and American lawyers, business consultants, and businesses operating in Ireland, the US and Britain. Delegates will also include representatives from the banking and financial services sector, accountants and tax professionals, venture capitalists, state bodies, government departments and local authorities. Registration is at www.brehonsymposium.com.

OUTLAWS

Life outside legal practice

MICHAEL MEE
Comedian and writer

Michael qualified in 1993 and then lectured in law in the University of Limerick. In 1997, he tried stand-up comedy and has been a full-time stand-up comedian and writer ever since.

He has been described as "Woody Allen with a Cork brogue" by *Time Out New York* and as "the brightest Irish comedy talent of recent times" by *The Sunday Times*.

His TV credits include *The Late Late Show*, *Kenny Live*, *The Stand-Up Show*, *The Empire Laughs Back*, *The World Stands Up* and *The Savage Eye*.

He has performed at the Edinburgh Fringe, the New York Irish Comedy Festival, the Kilkenny Cat Laughs Festival, as well as numerous comedy clubs across Britain, the US and Ireland. In 2009, Michael was the opening act on 42 dates of Des Bishop's *Unbearlable* tour.

Michael has a 2XM radio show *Pimp my iPod* that can be accessed at www.rte.ie/digitalradio/twoxm/index.html.

TARA HEAVEY
Novelist

Born in London, Tara spent her early childhood in Britain. Her family moved to Dublin when she was 11. She did a degree in English and history in Trinity before training and qualifying in law.

Tara practised law in Co Kilkenny and Co Waterford for five years. During this time, she began writing fiction in the evenings as a leisure activity.

After being offered a book contract, she took the decision to write full time. Her first book, *A Brush with Love*, went straight to number one in the Irish bestseller lists.

Children came next. It was book – baby – book – baby – book. Sarah has had five books published to date.

She says her ambition is still to "dig deep and write the very best of what's inside. And when that's done, to do it all again. Better... deeper..."

Dr MUIRIS Ó CÉIDIGH
Chief executive and poet

Muiris Ó Céidigh is the founding chief executive of Ireland's National Milk Agency, established in the mid 1990s. His organisation oversees liquid milk supply within the State and is funded by the industry.

As a solicitor, Muiris worked as a commercial lawyer with A&L Goodbody. He was the first to be awarded the Law Society's JP O'Reilly Prize in commercial law by Sir Anthony O'Reilly.

He holds an MSc (Econ), an MBA from Trinity, and an MA from the Institute of Public Administration.

He also has a doctorate in governance from Queen's University Belfast.

He was appointed as a director of the Economic Research Institute of Northern Ireland in 2003.

Muiris also writes poetry and has been published extensively, including in *Oxford Poetry* by Oxford University.

He is a former winner of the Francis Ledwidge National Poetry Award. He represented Ireland at the World Poetry Festival in Taiwan in 2005.

Career Support events are coming to a location near you

The Society's Career Support service has scheduled 11 training events to go ahead in May 2011 – with most taking place in regional locations outside Dublin.

All events will take place in the evening, from 6pm to 8pm, to facilitate people who are working. All members of the Society are welcome to attend, free of charge, provided places are available.

Information on working abroad

Following on from information evenings that took place recently in Dublin, the up-to-date situation on visas and qualifying in all popular locations worldwide will be covered in a single evening at the following regional locations:

- Sligo – Sligo Park Hotel, Tuesday 3 May,
- Galway – Harbour Hotel, Thursday 12 May,
- Cork – Washington Street, Tuesday 17 May,
- Limerick – Strand Hotel, Tuesday 24 May.

There will also be a briefing on opportunities in Australia, provided by the Law Council of Australia, in Blackhall Place on Monday 30 May.

Effective CV preparation

Workshops addressing job-seeking, and focusing on self-marketing and how to produce a CV with a covering letter to set one apart, will take place at the following locations:

- Cork – Washington Street, Thursday 5 May,
- Galway – Harbour Hotel, Wednesday 18 May,
- Dublin – Blackhall Place, Thursday 19 May.

Non-legal jobs

Workshops aimed at helping solicitors take a more expansive approach to career management and job-seeking have also been scheduled. These will provide guidance on how to identify suitable opportunities and how to make applications that will succeed. The venues and dates are as follows:

- Cork – Washington Street, Wednesday 11 May,
- Galway – Harbour Hotel, Wednesday 25 May,
- Dublin – Blackhall Place, Thursday 26 May.

Reserve your place

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

Career Support is a Law Society initiative established to assist solicitors faced with career challenges such as unemployment, underemployment and uncertainty about what to do next. A wide range of supports is provided, including telephone and email support, CV review and feedback, one-to-one consultations, and other services.

Landlord-and-tenant code not 'fit for purpose', says minister

Minister for Justice Alan Shatter has indicated that the "entire landlord-and-tenant code" is not fit for purpose and needs to be updated. As a result, he said that he was bringing forward proposals to reform and streamline landlord and tenant law.

Minister Shatter has invited submissions from interested parties on the contents of a draft *Landlord and Tenant Law Reform Bill*. An information paper and the text of the draft bill have been published at www.justice.ie. Submissions from interested parties will be accepted up to 31 May 2011.

The draft *Landlord and Tenant Law Reform Bill* is largely based on proposals made by the Law Reform Commission in 2007. It has been described as "a logical sequel to ... provisions in the *Land and Conveyancing Law Reform Act 2009*", which entered into operation on 1 December 2009.

Minister for Justice, Equality and Defence Alan Shatter

Consultation process

Launching the consultation process, the minister said: "While the law relating to residential tenancies was updated in 2004, our general landlord-and-tenant law dates back to *Deasy's Act* [the *Landlord and Tenant Law Amendment (Ireland) Act 1860*] in the middle of the 19th century and is greatly in need of reform.

"A modern landlord-and-tenant code applicable to business tenancies is essential for our economic recovery, and while attention has, quite understandably, been focused in recent times on problems associated with 'upward-only' rent reviews, the entire landlord-and-tenant code needs to be updated to make it 'fit for purpose' in the 21st century."

Statutory redress scheme

The proposed legislation is expected to involve the repeal of at least 35 pre-1922 statutes – some dating from the 17th century. These will be replaced with "a streamlined statutory framework more suited to modern conditions".

Ancient 'eviction' remedies available to landlords are facing the axe. These would be abolished and replaced by an updated statutory redress scheme. "Clarifying the rights and obligations on all the parties would help to reduce costly disputes and litigation delays," the minister said.

On the issue of 'upward-only' rent reviews, the minister added that, in light of the current economic difficulties, consultations were ongoing with the Attorney General in order to progress the matter "as expeditiously as possible".

He stressed that this issue was being addressed separately and would not be delayed by the consultative process.

NEWS FROM THE LAW SOCIETY'S COMMITTEES AND TASK FORCES

Lay litigants in family law proceedings

FAMILY LAW COMMITTEE

As part of the ongoing efforts of the Family Law Committee to ascertain the views and experience of solicitors in family law matters, the committee is currently looking for information from practitioners in relation to the issue of lay litigants in family law proceedings.

There is evidence that an increasing number of people are now pursuing family law proceedings as lay litigants. While lay litigants were historically more common in District Court proceedings, there appears to be a significant rise in lay litigants generally and, in particular, in the Circuit Court. This development is understandable in the current economic climate. Furthermore, every individual has the right to represent himself or herself, if they so choose. However, there is anecdotal evidence that this increase in lay litigants has given rise, in some cases, to certain difficulties – in particular, the complication or prolonging of proceedings. This obviously has a negative impact on the courts and legal practitioners and, most significantly, can lead to an increase in legal costs for people who have engaged legal representation.

In order to consider this issue further and with a view to the committee possibly putting forward recommendations for reform, the committee invites practitioners to provide details of their own experiences on this issue, together with comments and suggestions for possible reform.

Please address any relevant correspondence on the issue of lay litigants to the committee secretary, Colleen Farrell, by email: c.farrell@lawsociety.ie.

New Personal Assets Record

PROBATE, ADMINISTRATION AND TRUSTS COMMITTEE

The Personal Assets Record has been updated by the Probate, Administration and Trusts Committee, and the *Making a Will* and *Administration of Estates* brochures have been reformatted in a similar style.

The Personal Assets Record is not a will, nor is it instructions for a will. It is a document to be completed and regularly updated by a client. A copy can either be handed to a solicitor for keeping with a will and/or kept by the client in a secure location. It is designed to make life easier for the personal representatives when identifying and tracing assets of the client on the client's demise.

The new Personal Assets Record can be downloaded at www.lawsociety.ie/Documents/committees/Probate/AssetList.pdf.

The content of the *Making a Will* and *Administration of Estates* brochures have not changed since their reissue in January 2011. However, they have been reformatted in a more professional style, leaving room for firm details and/or a firm logo to be inserted. These brochures are accessible on the Law Society website under the Probate, Administration and Trusts Committee in the members' area.

"The committee welcomes comments and suggestions from practitioners"

The committee welcomes comments and suggestions from practitioners. Please contact committee secretary Padraic Courtney at p.courtney@lawsociety.ie.

Retirement age rise?

EMPLOYMENT AND EQUALITY LAW COMMITTEE

The Employment and Equality Law Committee and the Pensions Sub-committee are seeking to form a focus group to consider fully the significant employment, equality and pension-related implications arising from the Government proposal to raise to 68 years the age at which individuals can qualify for the State pension.

CAT treatment of step-relations and relations of the half-blood

PROBATE, ADMINISTRATION AND TRUSTS COMMITTEE

A recent enquiry by a practitioner referred to the CAT treatment of relations of the half-blood. The Revenue Commissioners confirmed that such relations are treated in exactly the same way as any other relation. In the original query, a child of a half-brother was confirmed to be a 'Group B' beneficiary. A further query in relation to step-relations elicited the following response:

The stepchild of a half-brother or half-sister is a child of that half-brother or half-sister under the definition of 'child' in section 2 of *CATCA 2003* and, accordingly, qualifies to be treated as a nephew and is thus 'Group B'. However, as a stepsibling is 'Group C' (there being no blood relationship), therefore that child of a stepsibling is 'Group C'. In short, the stepchild of my brother is my 'nephew' but the child of my stepbrother is not.

High Court recordings

LITIGATION COMMITTEE

Digital audio recording of proceedings in courtrooms has already been taking place for some time in the Central Criminal Court and in family law and asylum hearings in the High Court. It is now being introduced on a phased basis in all High Court courtrooms over the coming weeks, as directed by the President of the High Court. Courtrooms where the system has been activated will be clearly marked with signage. The recording will be for the internal use of the court only and will not be available to practitioners, or publicly.

Legal aid claim forms backlog

CRIMINAL LAW COMMITTEE

The Criminal Law Committee has been in correspondence with the Courts Service about reported delays in the processing of legal aid claim forms in respect of District and Circuit Criminal Court cases in the Criminal Courts of Justice. The backlog of claims has now been cleared.

In order to minimise processing delays in the future, the Courts Service has asked that solicitors ensure that the claim forms used are the **up-to-date version** of the claim form and that they are:

- Fully completed,
- Contain the correct information,
- Submitted in a timely fashion, and
- Do not contain multiple claims on one form.

For more information, see www.justice.ie.

PII SURVEY REVEALS AVERAGE COST INCREASE OF 56%

The shortage of time to consider PII quotes, more competition in the market, standardised forms, and new timing practices are the main issues identified in a recent PII survey of members. John O'Mahony reports

John O'Mahony is an associate director at Behaviour & Attitudes

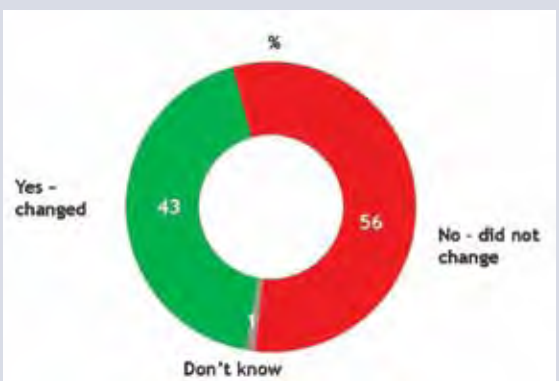
Recent research on professional indemnity insurance indicates that the average cost increase for PII among firms in the past 12 months is 56%. Furthermore, the findings suggest that there has been a fundamental shift in the way that insurers are calculating PII premiums for those firms with a claims history.

This research was conducted on behalf of the Law Society by Behaviour & Attitudes in January 2011 and took the form of a census of firms, with all firms being given the opportunity to reply to the survey by post or online. In total, 770 firms replied to the survey, which constitutes an excellent response rate for a self-completion survey and indicates the level of engagement with the survey's subject matter.

Responding firms were strikingly representative of the profession as a whole in relation to:

- Number of partners in firm,
- Areas where firm has offices, and
- Current insurer for PII cover.

CHANGE FOR PII COVER FOR 2010/11



B5 Did your firm change its insurer for compulsory PII cover for 2010/2011?

The market for PII cover appears particularly consolidated, with two insurers, XL Insurance and the SMDF, accounting for over 65% of the cover provided. This level of concentration is naturally, in part, a function of key insurers RSA and Quinn leaving the market for PII cover in the last 12 months.

The switching of insurers for PII was very high in the latest renewal process, with 43% of firms changing their insurer – this figure rises to over half for younger/newer firms.

The PII application process clearly presents a range of difficulties for solicitor practices. Over two-thirds (66%) of firms were notified by their insurer of its decision on PII after 18 November 2010, with this rising to 73% of firms with a recent claims history on their PII cover.

The consequent shortage of time given to firms to consider quotes is a key factor, causing them difficulty in renewing their PII. However, there does appear to be an opportunity for firms to facilitate a smoothening of this process, as 50% of firms submitted their application to insurers after 1 November.

This apparent delay in applying may be due to delays in receiving proposal forms from insurers – and, indeed, those proposal forms proving difficult to complete. There also appears to be considerable variation in the proposal forms from the different insurers.

Not receiving a response from an insurer is also a consistent issue in the application process: firms on average approached three insurers for PII cover, but only received an average of two offers back.

"The consequent shortage of time given to firms to consider quotes is a key factor, causing them difficulty in renewing their PII. However, 50% of firms submitted their application to insurers after 1 November"

Cost

While the average increase in the cost of PII across all firms in the survey is 56%, the year-on-year increase varies considerably – with the rate of increase much higher among larger practices.

Vitally, the cost of PII appears especially influenced by a firm's claims history. While this is, of course, likely to have always been the case up to a point, the relationship between past claims and the cost of PII appears to have fundamentally altered in the past 12 months.

The survey indicates that, in previous years, firms with a PII claims history were paying one-and-a-half times more for their premium, on average, than those without a claims history.

For the most recent PII renewal

period (2010/2011), it appears that firms with a claims history are now paying a PII premium three times that of firms without a claims history. The year-on-year increase in the cost of PII insurance for firms with a claims history is, on average, +132% for 2010/2011.

Who's making claims?

Overall, one in five firms has made a claim on their PII policy in the past five years – larger firms are much more likely to have made a claim. Firms with a claims history are also considerably more likely to have made notifications on their policy in the same time period.

All the indications suggest that insurers have begun to take a more negative view of a firm's broad claims-related performance on PII. Unfortunately, the survey findings also suggest that insurers are less impressed by the range of risk-management procedures and activities that are being initiated by firms.

Firms with a PII claims history have typically been much more proactive in adopting risk-management procedures and activities in recent years. In all, 90% of such firms have adopted formal risk-management procedures, and over one-third hold risk-management accreditations. More than one-third of these firms also have had a risk-management audit – compared with 24% of firms in total.

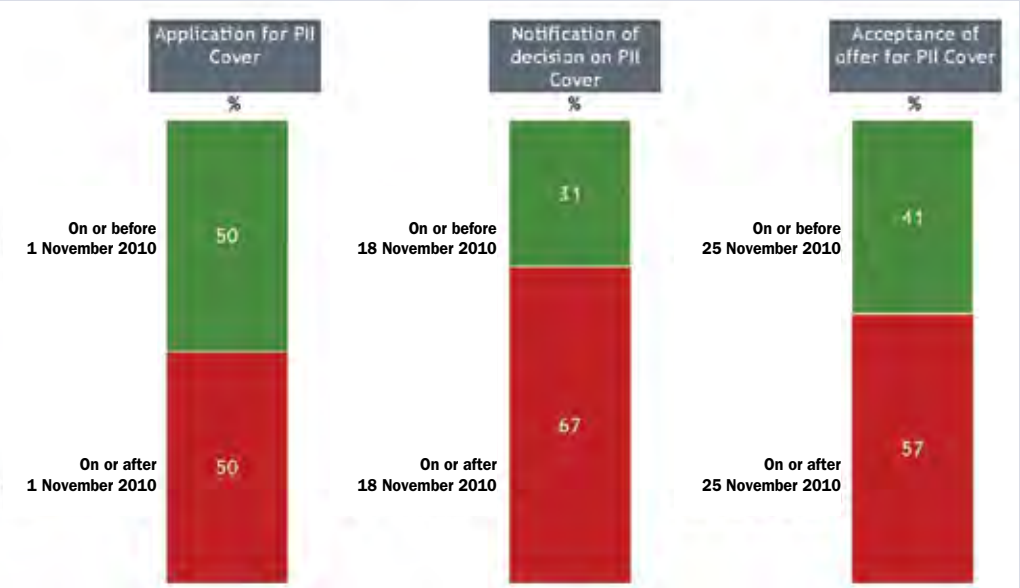
"Insurers are less impressed by the range of risk-management procedures and activities that are being initiated by member firms"

The review of the risk-management audit is somewhat equivocal, with only half of firms who have undergone an audit describing it as either 'good value' or 'a benefit to the firm' in the renewal process for PII. The survey findings suggest that, on this latter point, the firms are probably correct. Firms that have claimed also appear to suffer extra delays in relation to the application process: they are typically notified later of an insurer's decision on PII cover, and are more likely to accept offers of PII cover later than other firms.

Challenging experiences

This is not to suggest that firms without a claims history have not had challenging experiences with the PII process for 2010/2011. These firms have, on average, seen a rise in the cost of PII insurance of 26% in the past 12 months. Two-thirds of firms without a claims history were also notified of insurers' decisions on PII cover after 18 November 2010.

PII COVER APPLICATION PROCESS – KEY DATES



FIRMS WITH CLAIMS HISTORY MOST LIKELY TO BE NOTIFIED OF DECISION AND TO ACCEPT OFFER AFTER SPECIFIED DATES

B2 Did your firm submit its application to your insurer on or before 1 November 2010, or after 1 November 2010?
B3 Did your insurer notify you of its decision on or before 18 November 2010, or after 18 November 2010?
B4 Did your firm accept the offer from your insurer for cover for 2010/2011 on or before 25 November 2010, or after 25 November 2010?

COST OF PII INSURANCE FOR 2009/2010 VS 2010/2011

	2009/2010	2010/2011	Shift
Average Costs	€	€	
Total All Firms	24,695	38,416	+56%
PII Claim – Past 5 Years			
Yes	34,752	80,691	+132%
No	22,356	27,863	+26%

Ultimately, there is considerable agreement among solicitors in relation to how the PII renewal process could be improved:

- More competition in the market is required,
- Proposal and renewal forms need to be standardised and simplified,
- New practices in relation to timing should be applied to the application process – renewals dates should not be confined to 1 December, and
- Insurers should be obliged to quote within a specified short time limit.

Given its compulsory nature, the general survey findings indicate clearly the extent to which the cost and processes around PII insurances have increasingly become rife with challenges for solicitor firms in Ireland.

IRISH HUMAN RIGHTS UNDER THE SPOTLIGHT

Three recent human rights reports cast an interesting, if sometimes disturbing, light on Ireland's human rights record – and the adverse impact the recession is having on the rights of vulnerable groups, says Joyce Mortimer

Joyce Mortimer is the Law Society's human rights executive

Ireland has recently been subject to a number of human rights reviews, resulting in the US Department of State *2010 Human Rights Report: Ireland*, the *Concluding Observations* of the UN Committee on the Elimination of Racial Discrimination on Ireland, and the UN Independent Expert on Human Rights and Extreme Poverty findings on Ireland. Some of the issues arising are examined below.

US Department of State Report

The US Department of State releases an annual *Human Rights Report* for every country. In April 2011, the department published its report on human rights protections in Ireland.

Prisoners

The report raises the issue of the inappropriate detention of mentally ill prisoners who should be detained in mental-health facilities rather than in prisons. The issue of vulnerable prisoners at risk of self-harm and suicide being placed in safety/observation cells for weeks at a time was addressed. It was noted that this was because there was no high-support unit at Mountjoy Prison, according to a report by the Mental Health Commission.

Criticisms by various human rights groups in relation to understaffing and poor infrastructure at the Central Mental Hospital were raised in the report. The report highlighted the lack of an ombudsman to address issues such as:

- Alleviating overcrowding by offering alternatives to incarceration for non-violent offenders,
- Monitoring the circumstances of confinement of juvenile offenders, and
- Ensuring prisoners do not serve beyond the maximum sentence for charged offences by improving pre-trial detention, bail and record-keeping procedures.

Children

The report highlights the issue of child sexual abuse, with the Dublin Rape Crisis Centre reporting that 53% of the calls to its crisis line in 2009 involved child sexual abuse. Unaccompanied minors entering the country were also raised as a serious issue. It is stated: "During the year, 11 unaccompanied children seeking asylum in the country went missing from government care."

> ***"During the year, 11 unaccompanied children seeking asylum in the country went missing from government care"***

Immigrants, racial and ethnic minorities

Also highlighted is societal discrimination and violence against immigrants and racial and ethnic minorities, which continues to be a problem. NGOs had reported "problems with landlords refusing to rent property to immigrants who were not born in Ireland". NGOs also reported that "immigrants, particularly Africans, suffered unemployment disproportionately during the economic downturn".

Concluding Observations of the Committee on the Elimination of Racial Discrimination: Ireland

The United Nations CERD Committee examined Ireland's third and fourth combined periodic reports on its endeavours to meet its human rights obligations under the *Convention on the Elimination of All Forms of Racial Discrimination* on 22 and 23 February 2011 in Geneva.

Budget cuts to human rights bodies

The first concern raised by the committee was "the disproportionate budget cuts to various human rights institutions' mandated to promote and monitor human rights, such as the Irish Human Rights Commission, the Equality Authority and the National Consultative Committee on Racism and Interculturalism".

In this regard, the committee reiterated that the recession should not lead to a situation that would potentially give rise to racism, racial discrimination, xenophobia and related intolerances against foreigners, immigrants and minorities. The committee recommended that "the functions of the bodies that have been closed are transferred and subsumed by the existing or new institutions".

Travellers

The committee expressed its concern at Ireland's persistent refusal to recognise Travellers as an ethnic group. The committee recommended that "the State party should pay particular attention to self-identification as a critical factor in the identification and conceptualisation of a people as an ethnic minority group."

The committee noted "the poor outcomes in the fields of health, education, housing, employment for Travellers as compared to the general population".

It also noted that there is no affirmative action being taken or planned to improve the representation of the Traveller community in political institutions or to encourage the Traveller community to participate in the conduct of public affairs.

"The economic recession should not lead to a situation that would potentially give rise to racism, racial discrimination, xenophobia and related intolerances against foreigners, immigrants and persons belonging to minorities"

Immigration and Residence Protection Bill 2010

The committee recommended that the *Immigration and Residence Protection Bill 2010* should be improved to (a) provide for the right of migrants to judicial review against administrative actions and prescribe reasonable periods within which to do so, and (b) the right of migrant women in abusive relationships to legal protection by providing them with separate residence permits.

Convention on the Elimination of Racial Discrimination

The committee noted that Ireland "has made no efforts to incorporate the convention into the domestic legal order, particularly in light of the fact that the State party has incorporated other international human rights instruments into domestic law".

Racial profiling

The committee raised the issue of racial profiling by the Garda Síochána and other law enforcement personnel. The committee highlighted the reality that "many non-Irish people are subjected to police stops, and are required to produce identity cards, which practice has the potential to perpetuate racist incidents and the profiling of individuals on the basis of their race and colour".

UN Independent Expert on Human Rights and Extreme Poverty: statement on Ireland

The UN Independent Expert on Human Rights and Extreme Poverty, Magdalena Sepúlveda, recently visited Ireland to examine how Ireland is addressing poverty and social exclusion, and promoting human rights. Supported by the Community Workers' Cooperative, the UN expert visited community projects in Dublin, Galway, Limerick and Longford and also met with a number of representative organisations to discuss major issues of concern.

Financial crisis

Ms Sepúlveda noted that the economic downfall in Ireland was posing a disproportionate threat to the vulnerable parts of the country that had benefited little from the economic boom from the outset. She stated, in this regard, that the financial crisis "is a serious threat to the milestones achieved in social protection". Furthermore, she added, "Ireland's problems in the long term will not be solved if inequality increases, or if the most vulnerable do not have a standard of living which is regarded as acceptable by Irish society in general."

Ms Sepúlveda called on the authorities to incorporate into their recovery plan a comprehensive and consistent policy to protect the most vulnerable members of society, in full compliance with human rights standards. She stated: "Specific measures must be taken to ensure that the recovery plan does not disproportionately impact the poorest sector of society, pushing them deeper into poverty and increasing their social exclusion."

Children

The independent expert highlighted the fact that children continued to be the group most at risk of poverty in Ireland. She stated that some single-parent families in particular struggled to "ensure food, appropriate housing, heating and decent winter clothing".

Ms Sepúlveda said that the substantial cuts in child payments were of grave concern, "as they can exacerbate the situation of children and lead to an increase in child poverty rates, which are already worryingly high". This would represent a major step backward for children's rights in Ireland, she stated firmly.

Lone parents and the working poor

She drew attention to the situation facing lone parents and the working poor, stating that "the decrease in the minimum wage, the extension of the tax base by lowering the entering threshold, the cut in child benefits, and the new universal social charge, among other measures, will hit lone parents and the working poor disproportionately hard.

"The cumulative effect of all these measures can have devastating consequences on their standard of living and their capacity to escape from poverty."

Direct provision system

Ms Sepulveda raised her concern that the direct provision system, aimed at supporting asylum seekers only for a short period of time (up to six months), is now the only system provided, despite the fact that more than one-third of asylum seekers spend more than three years in such accommodation.

This, she stated, "raises serious concerns as to the autonomy and enjoyment of human rights of asylum seekers, in particular their right to privacy and family life, adequate standard of living and adequate standards of physical and mental health". G

'Freedom of expression' versus 'hate speech' – US v EU?

From: Emma Keane BL, Law Library, Four Courts, Dublin 7

I was disappointed to discover that US Supreme Court judge Antonin Scalia recently described the *European Convention on Human Rights* as a "grab-bag of vague provisions" ('Judges should not decide on moral issues in a democracy', *The Irish Times*, 14 March 2011). The same judge joined with the majority in the recent US Supreme Court ruling that the Westboro Baptist Church was not liable for protesting at the funeral of a soldier shot in Iraq with placards stating 'Thank God for Dead Soldiers' and 'God Hates Fags' (*Snyder v Phelps et al*, 2 March 2011).

The US has a strong tradition of protecting the right to free speech. This is to be applauded. It is unfortunate, however, that US custom goes so far as to defend the use of 'hate speech'. Article 10 of the *European Convention on Human Rights* provides a robust protection of freedom of expression. The European Court of Human Rights has firmly stated that the provision does not extend to hate speech.

It is to be hoped that the courts in Europe will continue to uphold freedom of expression as one of the pillars of human rights, that hate speech will not be tolerated, and that the dignity of the convention will remain intact.

Profession must re-establish itself as the setter of standards

From: Stephen Miley, managing partner, Miley & Miley Solicitors, 35 Molesworth Street, Dublin 2

I was shocked at the recommendation of the Conveyancing Committee in relation to the practice note ('Lodgement of title deeds with lenders') published in the January/February 2011 issue of the *Gazette* (p48) and, in particular, with the implications of that recommendation for standards in the profession.

The committee recommends the insertion of paragraphs into correspondence lodging title deeds with lenders. One recommended paragraph reads: "In default of hearing from you within ten working days, this firm will take it that you have received all the documents on the schedule and that it is released from any undertaking given in relation to this transaction and in relation to the title documents, and thereafter this firm disclaims all responsibility for the title documents."

This recommendation, in my opinion, reflects the triumph of expedience over best practice. If the profession is now to base its standards upon expedience, will we not perpetuate and repeat the bad practice of some of our colleagues and former colleagues over the last few years?

If title deeds are delivered to a lender in any circumstances where a signed receipt is not procured in conjunction with the delivery, an exposure is created to a practitioner. When the deeds eventually get to be checked, the practitioner will, rightly or wrongly, be fixed with responsibility for any missing documents, as he/she will have no means to prove that the document(s) in question was/were actually delivered to the lender. Apart from any other difficulties that arise from lost or mislaid documents, such an event will, no doubt, have adverse implications for the practitioner's professional indemnity insurance.

Until lenders, for their own convenience, sought to change the procedure, the time-honoured manner in which title deeds were returned to a lender (and, indeed, in which title deeds were taken up from a lender) was for the documents to be checked in the presence of both parties and for a receipt to be signed at that time to reflect the position. Anything short of this is not best practice and is not something into which the profession should be coerced.

In the case of my firm, our safe is full of deeds that are ready to be delivered to lenders who have refused to make an official available with authority and the relevant knowledge to check a schedule of documents and to sign a receipt in respect of the deeds. In the case of two lenders, we have written to them pointing out the problems with the procedure they wish to apply and asking them to either contact the writer to discuss the matter or to make the required official available. To date, no response has been received to any of this correspondence.

This profession used to be, and must re-establish itself as, the setter of standards. It must give leadership and not compromise the standards of best practice on the grounds of expedience or any other grounds. I urge the Conveyancing Committee to reconsider its recommendation to reflect this.

What's wrong with you?

From: Dermot O' Reilly, solicitor, Donal Reilly & Collins Solicitors, 20 Manor Street, Dublin 7

I am writing to you in relation to my recent attendance on behalf of clients at the Solicitors Disciplinary Tribunal. I was struck, not so much by what I saw, but by what I did not see. As far as I could make out, my clients were the only respondents who had obtained representation. No one present was being advised by anyone other than themselves.

While some solicitors present seemed to spend their time getting agitated with both the solicitor for the Law Society and her barrister, others seemed simply resigned to their fate. To those coming before the tribunal, Client Relations Committee or indeed the Regulatory Committee, and intending on representing themselves, what is wrong with you?!

As the adage goes, 'a solicitor who acts for themselves has a fool for a client'. With the current situation regarding insurance, your very livelihood is at stake – unless you have piles of money to throw at the Assigned Risks Pool. Get over whatever hang-up you may have and get yourself representation, immediately.

Deckchairs on the *Titanic*?

From: Eamon Murray, Eamon Murray & Co, Bantry, Co Cork

David Rowe's excellent analysis of the professional indemnity insurance crisis (March issue, p22) made me more depressed about the subject than I had previously been – and then the SMDF collapsed!

I thought the graphic of the umbrella blowing out of the man's hand and floating away in the breeze beyond his control was a very apposite illustration of where the profession currently stands.

Staggered renewal dates, master policies, simpler proposal forms, and even risk management are analogous to deckchairs being moved on the *Titanic*.

Recognising as I do the sterling and tireless work of the PII Task Force, it is my humble view that meaningful improvement can only be brought to the current situation by regulatory change.

A non-exhaustive list of possible questions that need to be asked in this regard are:

1) How many practitioners require professional indemnity insurance in excess of €500,000?
2) Why should insurers be obliged to indemnify in respect of each and every claim up to a limit of €1.5 million in any coverage period without any ceiling or limit?
3) Why, if a practitioner negotiates a self-insured excess, which he

can establish and he has the resources to meet, should an insurer become liable for that excess if the practitioner is in default after 30 days?
4) Why should solicitors take compulsory cover for investment services or advice that most practitioners don't engage in?

Whereas protection of the public is paramount, survival of the profession as we know it is not an insignificant consideration. Only through modification of the regulations can we hope to promote any degree of certainty for practitioners going forward.

Talk of regulatory change is regarded as being heretical in certain quarters, but considerable 'softening' of the regulatory framework is the only thing that will promote any level of stability and predictability in the professional indemnity insurance market.

I would respectfully urge that this debate begin.

International scam (*part deux*)

From: Name and address withheld at request of author

Could I refer to you to the letter from a colleague at p21 of the March 2011 *Gazette*, 'Debt collection request appears to be an international scam'.

Unfortunately, this office was also subject to an international scam; however, the sum involved was Stg£454,000. If it was not for my own hands-on approach to lodging cheques, signing cheques and disbursing international funds, then this office may have been in a very compromising position.

The incident was an extremely unpleasant one.

Therefore, every client in this office must comply with money-laundering requirements to include copy passports, copy driving licence and utility bills. This is an essential requirement that we are regulated to provide, and I think it should be borne in mind that we all receive substantial spam emails on a weekly basis and caution must be observed by us.

I did report the matter to the Fraud Squad, but they indicated to me that, as there was no loss at my end, then no fraud was committed. I think my colleague might be left disheartened (as I was when I spoke with the gardaí), but I think it should be made known to the rest of our colleagues that any requests for work to be undertaken by email should be backed up by the usual requirements that we are regulated by, such as the money-laundering requirements, letters of engagements to be signed, and section 68 letters to issue. It goes without saying that we should always meet with our client to 'press the flesh' at the outset.

Trojan work deserves praise

From: Seán Ó Ceallaigh, consultant, Cormac Ó Ceallaigh & Co, Solicitors, Main Street, Ashford, Co Wicklow

Congratulations to Fergal Mawe on his challenging article in your April issue on the underprivileged children of the Philippines (p12).

It is a shocking indictment of a country that claims to be a democracy that helpless children should be forced to endure what he aptly calls "a living hell", and that, in trying to help them, he and his colleagues should meet with such totally unnecessary obstacles because of the corruption of the judicial system there. Hopefully, some more of our recently qualified members will answer his call and will volunteer to work with PREDA, which under the able leadership of Fr Shay Cullen has been doing Trojan work for years, but which could do even more if it were blessed with more members of the calibre of Fergal Mawe.

Bridge over MUD-ied waters

From: Majella Egan, chairman, Conveyancing Committee

The Conveyancing Committee is concerned at the report published on p5 of the April *Gazette* in relation to the new *Multi-Unit Developments Act 2011*, which states that "as a result of the act, no residential apartment or unit in a multi-unit development can be bought or sold legally after October 2011 where an owners' management company … is not in control and has ownership of all common areas".

The committee is satisfied that this does not represent a correct interpretation of the provisions of the act. While the act, in quite complex sections, does provide for the compulsory transfer of common areas to owners' management companies, it does not contain any provision that would make the sale of a unit in a multi-unit development illegal.

I would be grateful if you could bring this to the attention of readers in the next available issue of the *Gazette*.

SUSPECTS' SOLICITORS SHOULD BE AT GARDA INTERROGATIONS

Cases from Europe and Britain suggest that it is the desirable rule – rather than the exception – that lawyers should be present at all times during police questioning of suspects. Dara Robinson argues that the long overdue reform of the Irish position is now inevitable

Dara Robinson is a partner in the Dublin law firm Garrett Sheehan and Partners

Every so often, the sequence of events in a criminal trial points to the need for reflection on how well our system of justice functions. One such case in point was the recent trial of Barry Doyle for the murder of Limerick man Shane Geoghegan. Despite apparently having made a full confession to the gardaí while in detention at a Limerick garda station, the accused was the subject of a 'hung jury' – that is, a disagreement – and will face a retrial later in the year. Crucial to the case, and no doubt a factor in the jury's deliberations, was the fact that Ms Victoria Gunnery, mother of Doyle's baby daughter, who suffered from a serious heart condition, was herself under arrest at the same time, in the same garda station. Her arrest, on suspicion of "possession of information" relating to the murder, was, it was alleged by the defence, a crude device to pressure Doyle into making a confession.

A court will decide, in due course, on the guilt or innocence of Mr Doyle. However, the case underlined, if it were needed, the manner in which the focus of many serious criminal investigations is the interview process at the garda station. Evidence at the trial also canvassed the role of a local solicitor, acting as a sort of go between, attempting to broker an arrangement that would lead to the release of Ms Gunnery. Mr Doyle was not entitled, in keeping with other such cases, to have a solicitor present throughout the period of his detention and questioning.

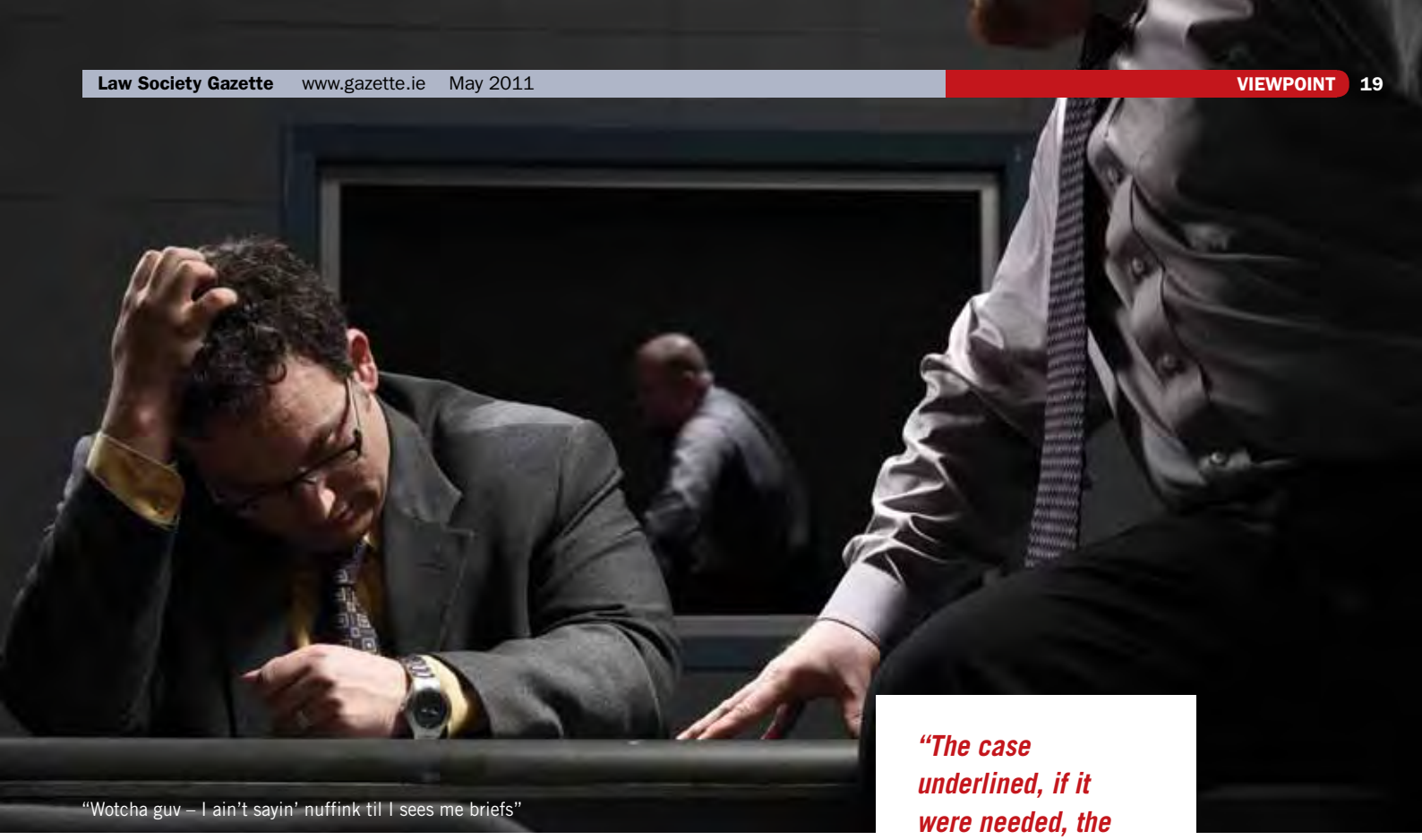
> ***"Notwithstanding that there is no provision in our law to deny a suspect access to legal advice, the* Lavery *decision, in just a couple of lines, purported to exclude the entitlement of a suspect to have their solicitor present during interview"***

Reasonable access

The *Criminal Justice Act 1984*, section 4, and other legislation, provides for the detention for investigation, including questioning, of people suspected of having committed certain types of criminal offences of a minimum seriousness. Regulations made in 1987 provide for the right of "reasonable access" to a solicitor for a detainee, and, in 1997, for the videotaping of interviews. The Supreme Court, in the *Lavery* case ([1999] IESC 29), ruled that solicitors, while entitled to "reasonable access", are not permitted to be present during the questioning of their clients, an *obiter* decision that was never seriously challenged. However, events outside the jurisdiction now threaten a massive upheaval in the established legal order.

For many years, since the commencement of the *Police and Criminal Evidence Act 1984* (PACE), solicitors have been permitted to sit through interviews in police stations in England and Wales. Indeed, regulations pursuant to PACE have provided for an hourly rate of payment for solicitors for such service. Now, cases from the European Court of Human Rights (ECtHR) in Strasbourg and from the British Supreme Court suggest that it is, as a matter of principle, the desirable rule, rather than the exception, that lawyers should be present at all times during police questioning.

In *Salduz v Turkey* ([2008] ECHR 1542), the ECtHR ruled that denial of access to a lawyer to the detained juvenile offender contravened his convention rights. Article 6 of the convention provides for a bundle of 'due process' entitlements, including, at article 6(3)(c), "the right ... to defend himself ... through legal assistance of his own choosing ... [and] to be given it free when the interests of justice so require". Even, or perhaps particularly, allowing for the different legal order pertaining in Turkey, where access to a lawyer can, in certain circumstances, be denied, the court found that, for the right of access to be "sufficiently practical and effective" (a recurring theme in convention jurisprudence), early access to legal advice was essential. The court noted that aspects of a police interrogation could be "decisive" for the prospects of the defence at trial; it underlined "the importance of the investigation [that is, interrogation] stage"; it noted the effect of "increasingly complex … rules governing the gathering and use of evidence", leading "in most cases" to the requirement for legal assistance for a suspect. The court found that the subsequent (post-police station) assistance of a lawyer could



"Wotcha guv – I ain't sayin' nuffink til I sees me briefs"

not "cure the defects which had occurred during police custody", concluding that the "absence of a lawyer while he was in police custody irretrievably affected [Salduz's] defence rights". The court found, at paragraph 55 of the judgment, that "as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police".

Consensus across Europe

Many Strasbourg judgements fly under the radar in the common law jurisdictions, but *Salduz* is an exception. Peter Cadder, a Scottish detainee, was convicted of assault in large measure on the basis of admissions made in police custody. In substantial reliance on *Salduz*, Cadder subsequently challenged his conviction, culminating in an appearance before the Supreme Court, formerly known as the House of Lords. The Supreme Court, in *Cadder v HM Advocate* ([2010] UKSC 43), reviewed the case law and highlighted safeguards available against unsafe confession evidence grounding convictions in Scotland. The court reviewed, in particular, the *McLean* case ([2009] HCJAC 97), a Scottish appellate decision heard by a seven-judge High Court in Scotland, which was the previous authority on the issue of detention safeguards. Lord Hope, giving the leading judgement, observed that "there is no doubt that [the *McLean* decision] was entirely in line with authority. The question, however, is whether it can survive scrutiny in the light of *Salduz v Turkey*."

In a nutshell, Lord Hope, with whom Lord Rodger concurred, decided that *Salduz* was to prevail. He found that the words "as a rule", per paragraph 55 above, did not mean "as a general rule", but meant that it was a rule to be applied unless it was "impracticable to adhere to it". *Salduz*, he said, was the culmination of Strasbourg jurisprudence, but the direction of the case law had been obvious and inexorable for years. He observed that Strasbourg saw "a consensus across Europe" that the presence of a lawyer was both a safeguard against ill treatment and a reinforcement of the right against self-incrimination. He noted that, already, *Salduz* had been followed on numerous occasions in Strasbourg applications.

> ***"The case underlined, if it were needed, the manner in which the focus of many serious criminal investigations is the interview process at the garda station"***

Critically, in the course of the hearing of the appeal, an *amicus curiae* brief was presented by Justice, the British pressure group. According to Lord Hope, the European trend was shown by Justice to allow legal representation at interview, and "the majority of those member states which prior to *Salduz* did not afford a right to legal representation at interview ... are now recognising that their legal systems are, in this respect, inadequate". Lord Hope pointed out that Belgium, Holland and France, in their different ways, had responded to the *Salduz* case with a concession that their existing safeguards offended the *Salduz* principles. He noted that Scotland was isolated within Britain and Europe and would be almost alone among the member states in not responding with remedial action. (The Scottish Parliament reacted with immediate legislative amendment.) As to Ireland, he continued, "there has, as yet, been no decision as to the effect of *Salduz*".

Reform overdue

Notwithstanding that there is no provision in our law to deny a suspect access to legal advice, the *Lavery* decision, in just a couple of lines, purported to exclude the entitlement of a suspect to have their solicitor present during interview. The 1987 regulations allowed a suspect to have "reasonable access" to their solicitor, but there is no discussion in the *Lavery* judgment as to the propriety, wisdom, necessity or otherwise of a solicitor being present or not during interview – a critical, and often controversial, stage of a garda investigation. It is submitted that the inherent weakness of the *Lavery* case, together with the powerful persuasive authorities of *Salduz* and *Cadder*, make long overdue reform of the law in this critical area of investigation now inevitable.

MEDIATION – THE ANSWER TO LEGAL COSTS CRITICS?

Mediation could play a valuable role in assisting the Government to dramatically cut its public sector legal spend. Michelle Quinn and Nicola White *don't* cut out the middle man

Michelle Quinn is an accredited civil and commercial mediator and qualified solicitor. She is also a lecturer in law at Independent Colleges Dublin

Nicola White is the course director of dispute resolution at Independent Colleges. She was principal researcher for the Law Reform Commission's Report on ADR

It has been estimated that the Government spends approximately €300 million in litigation and associated legal expenses annually. However, Karen Erwin, president of the Mediators Institute of Ireland, in her address to the institute's 2010 annual conference, extrapolated that the true cost of litigation in civil cases could be in the region of €1.2 billion per year, given that approximately 90% of cases settle without going to court and, therefore, without costs officially being claimed.

The legal costs incurred by public bodies were also examined by the group behind the 2009 *McCarthy Report*. The group's mandate was to examine all current exchequer spending across all departments and agencies. It noted the practice of different State organisations pursuing legal cases against one another. As an example, it chose the case of *Aer Rianta v Commissioner for Aviation Regulation*. The group said: "This duplication unnecessarily increases the burden of legal costs borne by the State. The group proposes that there should be compulsory arbitration of legal disputes involving State bodies. Any State body wishing to resolve a legal dispute with another State body would be required to inform the relevant minister, who would then be responsible for mediating a solution or arranging for other forms of independent mediation. Legislative change should be initiated to implement this proposal if necessary."

The group noted that the revised and updated *Code of Practice for the Governance of State Bodies* provides that, where a legal dispute involves another State body, every effort should be made to mediate, arbitrate or otherwise, before expensive legal costs are incurred. In addition, the Department of Finance should be notified of such legal issues and their costs.

In its report on altrnative dispute resolution (ADR), the Law Reform Commission, in acknowledging the role for mediation within the public sector, also recommended that "the Government should commit to the integration and use of ADR processes, such as mediation and conciliation, in resolving disputes, both internally within the public sector and where the State is a party to a civil dispute".

It is evident that mediation should, as in private sector disputes, have a role to play in the resolution of public sector disputes – particularly given the cost effectiveness of the process compared with litigation. But the question remains as to what exactly that role should be.

> ***"It is evident that mediation should, as in private sector disputes, have a role to play in the resolution of public sector disputes"***

Integral component

The integration of mediation within the Irish civil justice system has long been promoted – with the result that mediation is fast becoming an integral component in the Irish litigation landscape. In the last 12 months alone, there have been a number of substantial developments in the field. These include the introduction of the *Rules of the Superior Courts (Mediation and Conciliation) 2010*; the publication of the Law Reform Commission's *Report on Alternative Dispute Resolution: Mediation and Conciliation*, with its draft *Mediation and Conciliation Bill 2010*; and provision for mediation in the *Multi-Unit Developments Act 2011* and the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*.

Furthermore, the EU *Directive on Mediation in Certain Civil and Commercial Matters* must be transposed by all member states by May 2011.

These developments represent a cultural shift in terms of how disputes are resolved in this jurisdiction. Slowly, there is an increasing recognition that "the courts of this country should not be the places where resolution of disputes begins – they should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried" (US Supreme Court Justice Sandra Day O'Connor).

The model litigant

If Irish citizens and private entities are expected to attempt mediation prior to the commencement of legal proceedings, the Government must also become the 'model litigant' – leading the way in terms of the promotion and uptake of ADR in resolving disputes to which they are a party. Indeed, the new Government has already committed to promoting the increased use of mediation, stating in its *Programme for Government*: "We will encourage and facilitate use of mediation to resolve commercial, civil and family disputes in order to speed up

The medium is the message

resolution of disputes, reduce legal costs and ameliorate the stress of contested court proceedings."

The *National Recovery Plan 2011-2014* also explicitly provides for mediation, stating that it will "provide for a more structured approach to mediation in the legal system and promote further the use of alternative dispute resolution, taking into account recommendations of the Law Reform Commission in its [2010] report on the subject … and provide for increased use of arbitration and mediation."

Governments in a number of other jurisdictions have committed to using ADR processes, such as mediation and conciliation, for the resolution of disputes to which they are a party. The choice for Ireland is to either follow a light-touch approach, such as in Britain, where the government has committed to an ADR pledge, or to introduce, like in the United States and Australia, legislation providing for mediation within the public sector.

Cost savings

One of the main catalysts for the Government to integrate mediation into the public sector is based on the cost savings reported in other jurisdictions that have done so. For example, according to the *Annual Pledge Report 2008/09* monitoring the effectiveness of the British government's commitment to using ADR, the process was used in 314 cases, leading to settlement in 259 (82%), with cost savings estimated at Stg£92 million. It is worth noting that, in *Royal Bank of Scotland v Secretary of State for Defence*, the English High Court refused the Ministry of Defence its costs in a successful defence because it had not adhered to the 2001 pledge to resolve the dispute through ADR.

The cost effectiveness of mediation in the public sector has also been reported by the Department of Justice in the State of Oregon, USA. In 1998, the department introduced a pilot programme to encourage the appropriate use of mediation (and other collaborative processes) in order to more efficiently and effectively resolve civil cases involving the state.

> ***"Mediation cannot be seen as a panacea. It will only be appropriate in certain cases, and it has its limitations"***

Studies of the effectiveness of the programme found that cost savings for the state were remarkable. In a typical case, the cost of mediation was $9,537 – in stark contrast to the $60,557 required to proceed to a full hearing at trial or other adjudicated procedure.

Using mediation, the 'Oregon model' demonstrated savings of up to 85% of litigation costs per case.

A governmental task

It can easily be argued that the public sector legal spend is unsustainable in the current economic climate and, as noted by Chief Justice Murray, the promotion of mediation as an alternative to litigation, which is of benefit to society as well as to the parties concerned, is a governmental task.

While mediation must go public in terms of how public bodies resolve their disputes, it cannot be seen as a panacea for all public-sector disputes. It will only be appropriate in certain cases, and it has its limitations. Power imbalances between the parties and a lack of authority to settle by a State party representative are two considerations that must be addressed when introducing mediation into the public sector. Overcoming these issues should not be difficult, as the success of public sector mediation in other jurisdictions has proven.

The Irish Government must become 'the model litigant'. There needs to be a more systematic and strategic approach taken by the Government in preventing and managing disputes, and the costs incurred in resolving them. G

TO HAVE AND TO HOLD

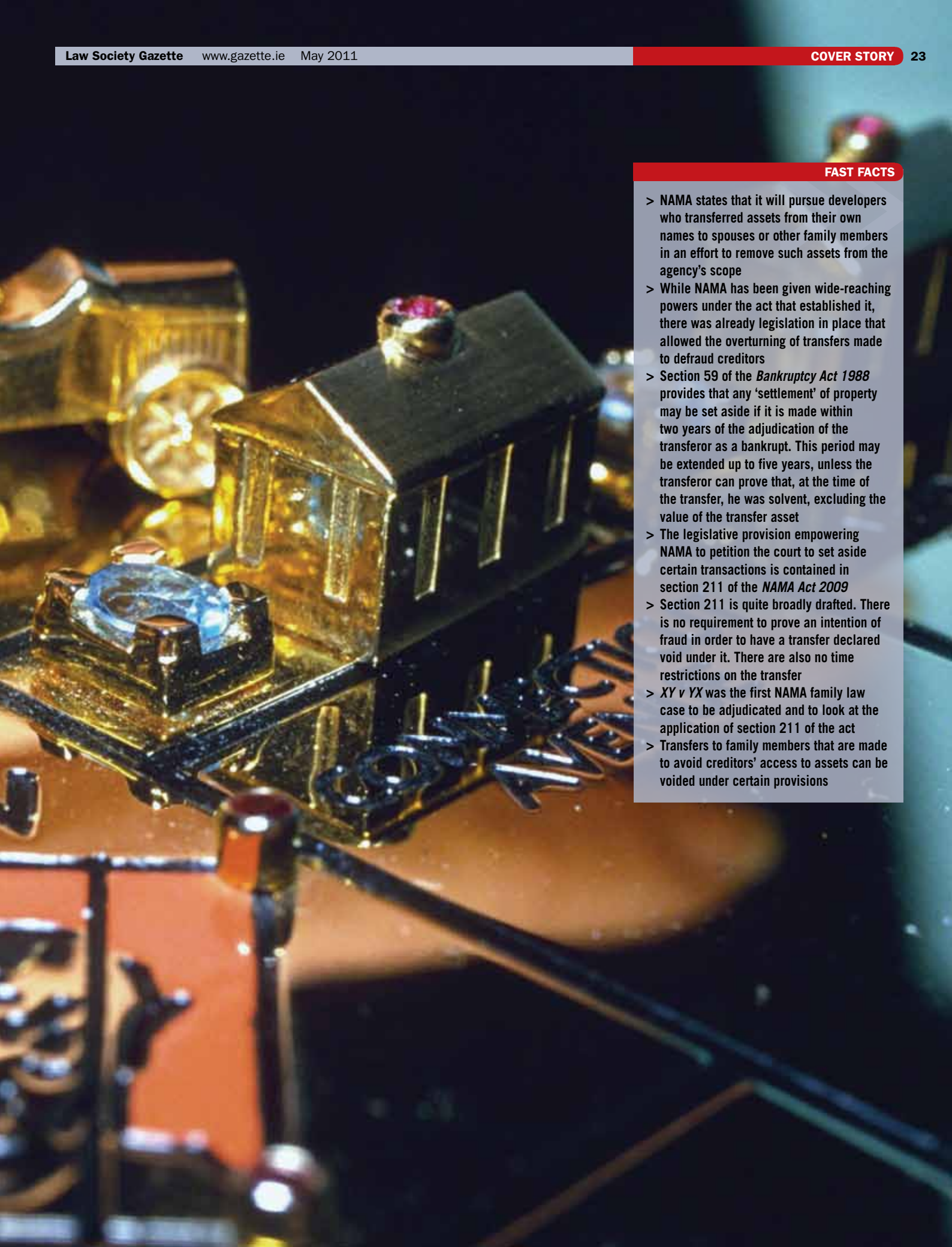
NAMA says that it will pursue developers who have transferred assets from their own names to spouses or other family members in an attempt to remove such assets from the agency's scope. But how will the agency overturn the transfer of assets to spouses? Orla Veale Martin shakes the dice

Orla Veale Martin is an associate solicitor in the litigation and dispute resolution department of LK Shields Solicitors

Through a statement issued on 21 December last, following on from an investigation by RTÉ's *Prime Time*, the National Asset Management Agency stated that it would pursue developers who transferred assets from their own names to spouses or other family members in an effort to remove them from the agency's scope. The hard-line enforcement intentions of NAMA are likely to be welcomed by most – but intention is not much good without a framework for implementation.

In this article, it is intended to set out the legislative framework that will aid NAMA or other creditors to have such transfers declared void and its effect on property transfers made in case of separation or divorce, following the recent case of *XY v YX*.

While NAMA has been given wide-reaching powers under the act that established it, there was already legislation in place that allowed the overturning of transfers made to



FAST FACTS

- NAMA states that it will pursue developers who transferred assets from their own names to spouses or other family members in an effort to remove such assets from the agency's scope
- While NAMA has been given wide-reaching powers under the act that established it, there was already legislation in place that allowed the overturning of transfers made to defraud creditors
- Section 59 of the *Bankruptcy Act 1988* provides that any 'settlement' of property may be set aside if it is made within two years of the adjudication of the transferor as a bankrupt. This period may be extended up to five years, unless the transferor can prove that, at the time of the transfer, he was solvent, excluding the value of the transfer asset
- The legislative provision empowering NAMA to petition the court to set aside certain transactions is contained in section 211 of the *NAMA Act 2009*
- Section 211 is quite broadly drafted. There is no requirement to prove an intention of fraud in order to have a transfer declared void under it. There are also no time restrictions on the transfer
- *XY v YX* was the first NAMA family law case to be adjudicated and to look at the application of section 211 of the act
- Transfers to family members that are made to avoid creditors' access to assets can be voided under certain provisions


NAMA is much less interested in the issue of the transfer of bassets

defraud creditors. In fact, creditors prejudiced by fraudulent conveyances have been able to take action since the *Conveyancing Act 1634*, of which relevant provisions have only recently been replaced and repealed by section 74 of the *Land and Conveyancing Law Reform Act 2009*. Under section 74 of the latter act, any transfer of land made with the intention of defrauding a creditor or subsequent purchaser of the land is voidable by that creditor or purchaser, or any person prejudiced by the transfer.

This act does not, however, affect the rights of a *bone fide* purchaser for valuable consideration without notice. As was held in *MIBI v Standbridge*, the fraudulent intent of the transferor may be express or assumed from the probable consequences of their actions.

In *MIBI v Standbridge*, the court held that the defendant's disclaimer to any share in his wife's estate was a fraudulent conveyance. Even though there was no evidence before the court of the defendant's state of mind in giving the disclaimer, the effect of the disclaimer was to put assets out of the reach of the plaintiff, who was a judgment creditor of the defendant. It would, therefore, be prudent for a legal advisor to closely scrutinise any transfer to spouses, or other family members, for its potential to hinder or defraud creditors.

Section 59 of the *Bankruptcy Act 1988* provides that any 'settlement' of property may be set aside if it is made within two years of the adjudication of the transferor as a bankrupt. 'Settlement' is defined by the act as including conveyances or transfers of property. This period may be extended up to five years unless the transferor can prove that, at the time of the transfer, he was solvent, excluding the value of the transfer asset. The section has been applied to void a transfer made with the intent to "delay, hinder or defraud creditors of their just debts", as applied by Hamilton P in *Re O'Neill (A Bankrupt)*.

Section 59 does not apply to a *bona fide* purchaser for value. However, even if a transfer is for valuable consideration, it may still be found to be in bad faith, depending on the facts. In *Re O'Neill*, a transfer for value of a bankrupt's house to his daughter was set aside where it was held that the conveyance was made with the intent to hinder, delay and defraud creditors, and that the transferee had due notice of this intention.

While the application of section 59 is quite broad, it may not cover all forms of property transfer and it has been held in cases such as *Re Plummer* that the transfer of money, where it is to be immediately expended, will not be considered a 'settlement' for the purposes of section 59.

Delaying tactics

The legislative provision empowering NAMA to petition the court to set aside certain transactions is contained in section 211 of the *NAMA Act 2009*. Section 211 provides that, where the court is satisfied that "an asset of the debtor or associated debtor, guarantor or surety was disposed of" and that "the effect of the disposition was to defeat, delay or hinder the acquisition by NAMA or a NAMA group entity of an eligible bank asset or to impair the value of an eligible bank asset or any rights", then the court may set aside such a transaction.

Section 211 is quite broadly drafted. There is no requirement to prove an intention of fraud in order to have a transfer declared void under it. There are also no time restrictions on the transfer, thus extending the scope of the provision and so widening the net of potential transfers that could be set aside. This provision applies to all assets of debtors, associated debtors or guarantors under the *NAMA Act*, and not just "eligible bank assets".

In any such event, the court may "declare the disposition to be void if, in the court's opinion, it is just and equitable to do so". It is likely that it will be up to the transferor to satisfy the court that it would not be "just and equitable" to declare the transfer void. This is the case with similarly worded provisions in relation to the restriction and disqualification of directors of companies. In deciding whether it is just and equitable to make a declaration under this section, a court must have regard to the rights of a *bona fide* purchaser for value. In consideration of whether a transfer was "for value", it is likely that a court will have regard to bankruptcy and conveyancing case law.

> ***"Whereas it is clear that any collusive agreement by separating spouses to defraud creditors would fall foul of bankruptcy and conveyancing laws, such collusion is not required under section 211 of the NAMA Act"***

Family matters

Whereas it is clear that any collusive agreement by separating spouses to defraud creditors would fall foul of bankruptcy and conveyancing laws, such collusion is not required under section 211 of the *NAMA Act*. The potential for property adjustment or maintenance orders to be overturned by this section was reviewed by the court in the recent case of *XY v YX*.

In this case, the court had to take into consideration – when making maintenance orders under a judicial separation – that the husband's assets were being taken over by NAMA. The court was asked to make an order to provide that the husband grant security by way of a charge on unencumbered property, so as to secure maintenance until the family home had been sold. The charging of the property had the potential to hinder the acquisition by NAMA of an asset and, therefore, it could be reviewed under section 211.

In *XY v YX*, Abbott J was satisfied that a court could set aside such a property transfer or maintenance order if satisfied that it was made for the purposes of defeating creditors and not for the purposes of making proper provision for a spouse. Judge Abbott was also satisfied that the English cases provided

persuasive authority in relation to the public-policy considerations involved in the division of functions between the family and insolvency courts. Judge Abbott pointed out that the English family law courts are of the opinion that it would be unfortunate if a maintenance order could potentially be undone during the five-year window because of the bankruptcy of the paying spouse.

In relation to maintenance provisions and creditors, Abbott J stated that, while not dividing assets to the exclusion of creditors, the family law courts should not allow the rights of creditors to act in an oppressive manner over the rights of spouses, so as to leave them without means.

XY v YX was the first NAMA family law case to be adjudicated and to look at the application of section 211 of the act. The court held that the provision of security for maintenance would not be a disposition to be void under section 211, on the basis that it would not be just and equitable to make such a disposition void.

Judge Abbott outlined that a court, in making maintenance orders, will have to "harken to the provisions of section 211". Following *XY v YX*, it appears likely that a court will require evidence of bad faith on the part of separating spouses before it will overturn any property adjustment or maintenance orders – certainty and finality in such matters being of benefit to both NAMA and the parties involved.

> ***"As was held in MIBI v Standbridge, the fraudulent intent of the transferor may be express or assumed from the probable consequences of their actions"***

Voiding transfers

In summary, transfers to family members that are made to avoid creditors' access to such assets can be voided under the following provisions:

a) Under section 59 of the *Bankruptcy Act 1988*, a transfer may be declared void if the transferor is adjudicated bankrupt within two years, or sometimes five years, of the transfer,

b) Under section 74 of the *Conveyancing Act 2009*, a transfer may be declared void if the intention of the transferor was to defraud creditors and if the transfer had a lack of good faith or valuable consideration, and

c) Under section 211 of the *NAMA Act*, a transfer with the effect of hindering or delaying the acquisition by NAMA of an eligible bank asset may be voided if a court considers it just and equitable.

NAMA is just over a year old and, already, its acquisition of assets has been closely scrutinised by the courts. It will be interesting to see how a court will apply section 211, and the circumstances in which a court will consider it "just and equitable" to void a transfer to a spouse – even where no intent to defraud NAMA has been established.

Section 211, arguably, could not have been more broadly drafted, and it is a good bet that its application will be contested. G

(With thanks to Orla Crowe.)

LOOK IT UP

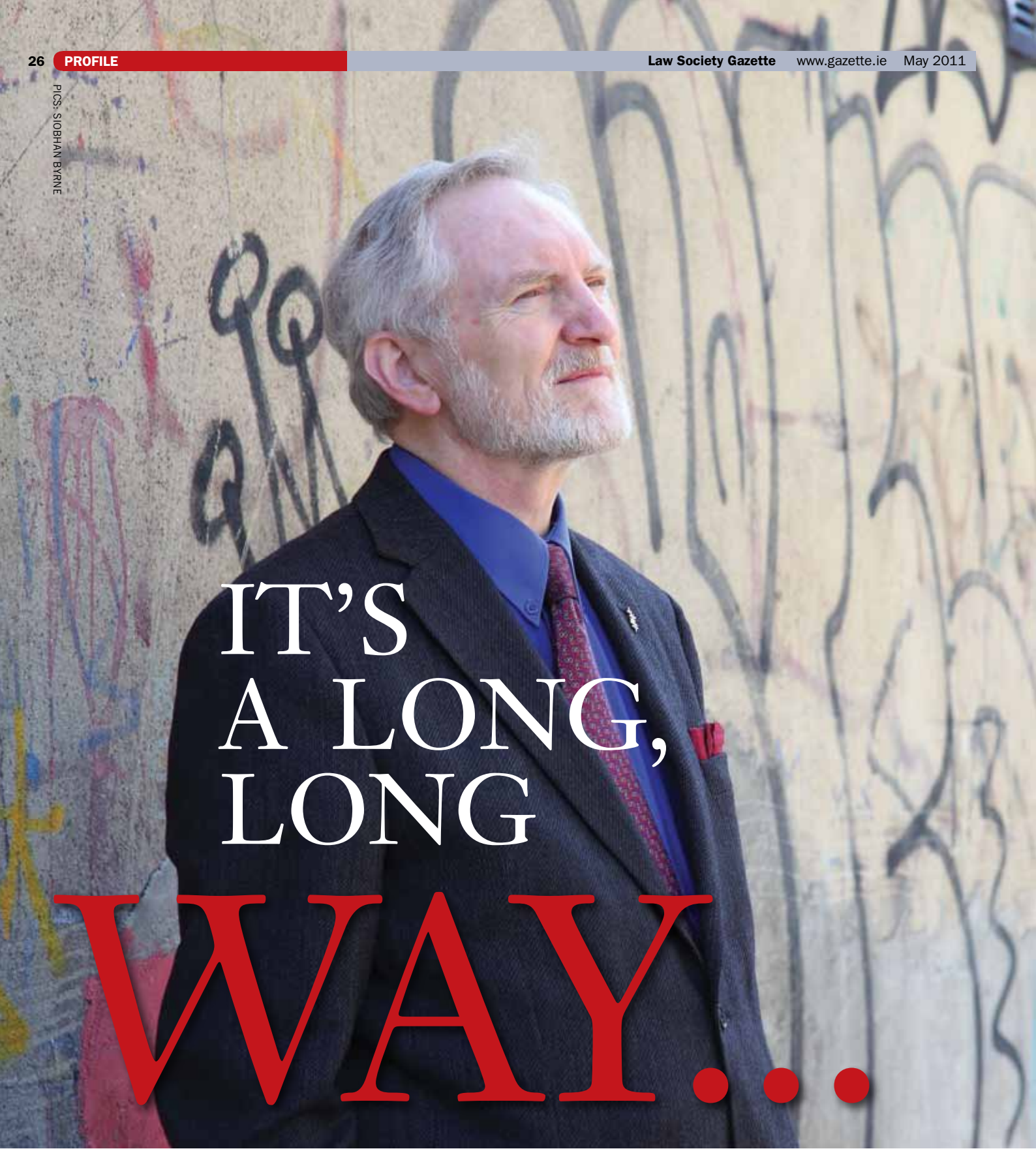
Cases:

- *MIBI v Standbridge* [2008] IEHC 389
- *Re O'Neill (A Bankrupt)* [1989] IR 544
- *Re Plummer* [1900] 2 QB 790
- *XY v YX* [2010] IEHC 440

Legislation:

- *Bankruptcy Act 1988*, section 59
- *Land and Conveyancing Law Reform Act 2009*, section 74
- *NAMA Act 2009*, section 211

PICS: SIOBHAN BYRNE



IT'S A LONG, LONG WAY...

As a young man in Belfast in the late 1960s and '70s, Michael Farrell was batoned and interned for his role in the Civil Rights Movement. Now he's a senior solicitor with Free Legal Advice Centres. Colin Murphy charts how he got from there to here

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

Michael Farrell had "a lot of brushes with the law" before finally becoming a lawyer. As a young man in Belfast in the late 1960s and '70s, he was batoned and interned for his role in the Civil Rights Movement. Twenty years later in Dublin, in the 1980s, he investigated the great Irish miscarriage-of-justice cases in Britain for *Magill* magazine and the *Sunday Tribune*.

He had started out on a different path, as a student of English and history at Queen's in the early to mid-1960s, where he was taught by Seamus Heaney. ("A kind of politicised Stephen Dedalus" is how Heaney remembers him in Dennis O'Driscoll's book *Stepping Stones*.)

In Northern Ireland, even literature was political (in the broadest sense). "Literature, then, was 'high literature', written mostly by people in England. It wasn't written by Irish people from rural or small-town backgrounds," Farrell recalls, wryly. Slowly, that was changing. Seamus Heaney was to the forefront of that move, among a group of poets and writers known as the 'Belfast Group'.

"These were people talking to *us*, from *our* backgrounds. We had thought nothing could come out of Bellaghy [Heaney's hometown], or Magherafelt [where Farrell is from], or even Monaghan [the birthplace of Patrick Kavanagh]."

If literature was empowering, international events proved influential. It was the time of the Black Civil Rights Movement in the US, of a gathering momentum of anti-apartheid resistance in South Africa, of the war in Vietnam. Farrell had watched reports on the school desegregation crisis in Little Rock, Arkansas, and on the Sharpeville massacre in South Africa on Pathé newsreels at the local cinema, and keenly followed subsequent events.

By the time of the emergence of the Civil Rights Movement in Northern Ireland, in 1968, Farrell was lecturing in the Belfast College of Technology (having done a master's degree in politics) and was chairman of the Young Socialists. He watched the Soviet invasion of Czechoslovakia that heralded the end of the Prague Spring. Days later, he joined Northern Ireland's first civil rights march.

All I remember

On the march in Derry in October 1968 that really launched the Civil Rights Movement, he was batoned by police, and his wife Orla was arrested. Later, he was interned for a month in a round-up of civil rights leaders. Some of those arrested with him were blindfolded, taken up in helicopters and, with the helicopter just off the ground, thrown out (to cause fright, not injury).

Did such events drive many around him from 'civil' protest towards 'armed struggle', I ask.

"All around you, young people were joining the IRA. We [in the Civil Rights Movement] saw our role as trying to oppose the measures of oppression imposed on the community in which we were living. The answer to violence was to secure sufficient political change that people didn't feel they had to resort to violence."

He doesn't dwell on these experiences, and prefers to talk of his contemporary work than of historical events. His experiences "pale into

FAST FACTS

- Growing up in Northern Ireland in the 1960s and '70s
- The empowerment of literature and the influence of international events
- Marching in Derry and the internment of civil rights leaders
- Opposing the measures of oppression imposed on the community
- Securing sufficient political change so that people don't have to resort to violence
- Achieving legal change for the greater good
- Influencing change in social welfare law procedures
- The use of strategic litigation to attempt to remedy a systemic problem

insignificance compared with what others suffered", he says.

In the early 1980s, Farrell moved to Dublin and took up journalism, working as a sub-editor at Douglas Gageby's *Irish Times* and then as a freelance journalist among a stable of young writers that moved between *Magill* and the *Sunday Tribune*. He specialised in coverage of Northern Ireland and, in the early 1980s, travelled to England to do an investigative story on the Birmingham Six. That led to collaboration with Gareth Peirce, and to other stories on miscarriage-of-justice cases: the Guildford Four and Judy Ward in Britain, and Nicky Kelly in Ireland.

"There were a lot of things to be uncovered. Ireland was coming out of an intensely repressive atmosphere. It was a very exciting time. You really felt you were opening up things."

In that excitement, did supposedly 'objective' journalism cross over into 'partisan' campaigning?

"You couldn't investigate things that were wrong without having some commitment."

Irish ways and Irish laws

That commitment increasingly expressed itself in an interest in legal remedies. The *Widgery Report's* whitewash of Bloody Sunday had critically undermined belief in the possibility of securing redress through the Northern Irish or British courts. This issue was crucial, Farrell thought: "If you had an effective legal system, and people could secure redress through it, people wouldn't feel that the only way to secure redress was through violence."

He worked on the campaign leading to the MacBride Principles on fair employment practices, launched in 1984. In the late 1980s, he took up law and qualified as a solicitor in Dublin in 1993. He became chairman of the Irish Council for Civil Liberties, and joined Free Legal Advice Centres (FLAC) as senior solicitor five years ago. He has been one of the 15 members of the Irish Human Rights Commission since 2001, and was vice-chair of the Law Society's Human Rights Committee. At FLAC, he was involved in establishing the Public Interest Law Alliance (PILA).

Both FLAC and PILA share the objective of achieving legal change for the greater good. Farrell talks of "strategic litigation – using litigation to attempt to remedy a systemic problem". This is "designed to do more than resolve individual problems for clients. It seeks to change the law at the same time."

> ***"Our legal system is based on the rights of the individual client. You have to have a system that will defend those rights. A lawyer has to focus on the individual client, even where, as a member of society, you might be worried about bigger, global problems"***

Legislative change often requires changing the sociopolitical climate as well. The *Norris* case is a classic example: when David Norris took the State to the European Court of Human Rights in Strasbourg over the criminalisation of gay sex, the court ruled in his favour in 1988. But it was a further five years before the Oireachtas legislated to repeal the law.

Farrell worked on the case of Lydia Foy, who challenged the State's refusal to amend her birth certificate to reflect her 'reassigned' gender as a woman (she had been born Donal Mark Foy). That case started in the Irish courts in 1997. Foy won two years ago by using the new *European Convention on Human Rights Act*, but the necessary legal change is still being considered by a Government committee. In the face of initially hostile (or lurid) tabloid media coverage, FLAC has worked with Foy to promote greater awareness of transgender issues.

The iron behind the velvet

Another area of public interest is that of social welfare law. As he began to take social welfare cases with FLAC, Farrell spotted various anomalies in the system. There are no costs available in social welfare law, so many solicitors shy away from it. And the Social Welfare Appeals Office doesn't publish its decisions. Farrell has taken numerous social welfare appeals to try and force change in procedures. A number of these have centred on the refusal of child benefit to asylum seekers.

Farrell took a series of nine cases to the chief appeals officer, arguing that clients had been refused child benefit just because they were asylum seekers, without considering the circumstances of each case. In all cases, the Chief Appeals Officer held in his favour, creating considerable pressure for a systemic change in the rules. Instead, the Government changed the law, putting through an amendment to the *Social Welfare and Pensions Act 2009* to explicitly refuse child benefit to asylum seekers. The amendment was passed under guillotine, meaning there was no debate on it.

"That's one of the downsides of this kind of work," he admits. "It can be very disillusioning to win a case and have the law changed without even a debate." Such is the disconnect between law and politics.

In recent years, the State has taken a more hostile stance on asylum. Since the numbers seeking asylum in Ireland started to rise precipitously in the late 1990s, the State responded with a series of measures designed to reduce so-called 'pull' factors and make both entry into the country, and life here, more difficult for people seeking asylum. This was done in response to a perception that many people's claims for asylum were 'bogus' and that they were migrating for reasons of economic, rather than physical, security.

Farrell is loath to accept the premise of that argument. He thinks that attempts to describe entire nationalities as being effectively 'fraudsters' are "dangerous", and argues that the United Nations convention-led asylum system, by itself, is ill-geared to the circumstances of international crises today. "It's geared towards people fleeing an individual threat, not a country in meltdown. And it's very difficult to prove an individual threat in a country in meltdown."

The time has come

"Ultimately, we're not going to solve the problems of the nation by denying a fair deal to people who deserve it. It's like the criminal justice system: there are people who commit crimes who are not convicted; you don't solve that by convicting people who haven't committed crimes.

STRATEGIC LITIGATION – THE FREE TRAVEL SCHEME

Under the pensioners' free travel scheme, Irish citizens living abroad (such as elderly emigrants in Britain) were not entitled to free travel when visiting Ireland. Michael Farrell took a case to a little-known Council of Europe body, the European Committee of Social Rights. He lost (on a majority vote), but was impressed by how accessible and effective a mechanism the committee proved to be.

A decision wouldn't have been binding on the Irish courts, but it would have had "moral authority", he says. And there is no requirement to exhaust domestic remedies first, which "is a big advantage".

"Part of our job at FLAC is to use innovative mechanisms like this to widen the avenues for redress open to people." In doing so, they set an example that is increasingly being followed – and, crucially, being taught. "A lot of this was not taught in Irish law schools till recently," he says.

"If you had an effective legal system, and people could secure redress through it, people wouldn't feel that the only way to secure redress was through violence"

"Or to take a more controversial area: you don't solve that problem through a process that is unfair. Maybe the person who gets convicted *is* guilty, but if they're convicted using unfair methods, you can't be *sure* if they're guilty, and you run a serious danger of convicting other people who *aren't* guilty.

"Our legal system is based on the rights of the individual client. You have to have a system that will defend those rights. A lawyer has to focus on the individual client, even where, as a member of society, you might be worried about bigger, global problems."

GOING *PRO BONO*

In the US, Michael Farrell says, all law firms are required to do a proportion of *pro bono* work, and their experience has been that this is in the interests of the firm itself, improving its standing in the community and boosting staff morale. "Corporate law firms want the best graduates, and the best graduates are often quite idealistic."

The Public Interest Law Alliance is attempting to foster this culture here, and the firm of William Fry has already come on board. Firms are being encouraged to do *pro bono* work in the courts (compensating for a civil legal aid system that is "so limited"), in policy work, and in advising NGOs.

Ultimately, Farrell hopes that the Law Society will require firms to take on a measure of *pro bono* work. Many already do, he notes, though not in a particularly structured way.

We meet in a café on Dorset Street, down the road from the FLAC office, in the week after the funeral of murdered PSNI officer Ronan Kerr. For Farrell, the public response to the killing was epitomised by the sight of Tyrone GAA manager Mickey Harte carrying a coffin with a police cap on it. This was evidence of 'the sea change' in Northern Ireland since his time as a rights activist there, he says.

"That means the Nationalist community in Tyrone feels he was right to join the police. They are now feeling an ownership of the police. And though there are dissident allegations of mistreatment by police, if you have a grievance, at least now there's somewhere to go with it."

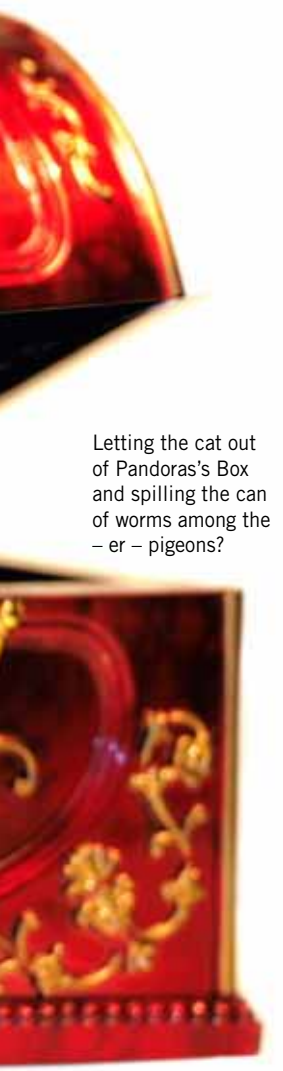
This is the crucial factor that underlies the Northern peace process, and also underlies his move from protest, activism and journalism into the law. "Having a legal system that can respond to people's grievances is crucial. It's the way to avoid conflict. It's the way to provide people with the means for change."

PANDORA'S

John Handoll heads the competition and regulation department in William Fry

The ECJ decision in the *Zambrano* case has significant ramifications for the 'third-country' parents of children who are nationals of an EU member state. John Handoll gets to grips with Pandora's Box

BOX?



Letting the cat out of Pandoras's Box and spilling the can of worms among the – er – pigeons?

Mr Ruiz Zambrano and his wife are Colombian nationals. They came to Belgium with their first child in April 1999 and, shortly afterwards, sought asylum. This was refused in September 2000, but they could not be sent back to Colombia because of the civil war there.

Between then and 8 March 2011 (the date of the judgment of the Court of Justice in the *Zambrano* case), the family had a rather precarious status in Belgium. The couple had two more children, in September 2003 and August 2005, who acquired Belgian nationality, since children born outside Colombia do not have Colombian nationality except where the parents take the necessary steps.

In 2005, Mr Zambrano's employment contract was temporarily suspended on economic grounds, and he lost his job for good in 2006, since he did not have a work permit. To make things worse, he was denied unemployment benefit on the basis that he had not completed the requisite number of working days required under the legislation on foreigners' residence and employment. However, he argued before the Brussels Employment Tribunal that he himself enjoyed an *EC Treaty* right of residence or, at least, a derived right of residence as the parent of a minor child who was the national of a member state, and was, therefore, exempt from the requirement to hold a work permit.

"In one fell swoop, this already rather tenuous link has been sundered and third-country national rights derived from Union citizens remaining in their member state of nationality have been recognised"

In December 2009, the Brussels Employment Tribunal asked the European Court of Justice whether provisions in the *EC Treaty* and the *Charter of Fundamental Rights* of the EU conferred on a third-country national parent, with dependent minor children who were Union citizens, a right to residence in the member state of the children's nationality and an exemption from the requirement to

FAST FACTS

- **Mr Ruiz Zambrano argued before the Brussels Employment Tribunal that he himself enjoys an *EC Treaty* derived right of residence as the parent of a minor child who is the national of a member state**
- **In December 2009, the tribunal asked the European Court of Justice whether provisions in the *EC Treaty* and the *Charter of Fundamental Rights* confer, on a third-country national parent, a right to residence in the member state of their children's nationality – and an exemption from the requirement to obtain a work permit there**
- **The court's Grand Chamber decided that the 2004 *Residence Directive* does not apply**
- **Union citizenship rules are, however, applicable. Article 20 TFEU confers Union citizenship on every person holding the nationality of a member state**
- **Article 20 precludes national measures having the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by this status**
- **Ireland's new Minister for Justice has instituted an urgent review of the 120 or so cases before the courts where *Zambrano* may be relevant**

obtain a work permit there.

The operative part of the judgment delivered by the court's Grand Chamber is so carefully crafted that it needs to be quoted in full: "Article 20 TFEU [*Treaty on the Functioning of the European Union*] is to be interpreted as meaning that it precludes a member state from refusing a third-country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the member state of residence and nationality of those children, and from refusing to grant a work permit to that third-country national, insofar as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen."

The court's reasoning is very short, amounting to a page of printed text. It can be summarised as follows: the 2004 *Residence Directive* did not apply, since it covered only Union citizens moving to, or residing in, a member state *other* than that of nationality.

The Union citizenship rules were, however, applicable. Article 20 TFEU conferred Union citizenship on every person holding the nationality of a member state. The two Belgian national children undeniably enjoyed this status, which was intended to be the fundamental status of nationals of the member states.

Article 20 precluded national measures having the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by this status. If the right of residence of the third-country national parent was refused, it had to be assumed that the Union citizen children would have to leave the territory of the Union to be with their parents. In the absence of a work permit, there was a risk that he would not have sufficient resources and, again, the Union citizen children would leave.


"So that's where I left my Timotei!"

"In this concrete application of the futuristic idea that Union citizenship is the fundamental status of nationals of the member states, Union citizenship trumps national citizenship – even in the member state of nationality. Was this what the member states intended?"

Decoupling citizenship

The main significance of the judgment lies in the decoupling of Union citizenship residence rights from 'free movement'. Before *Zambrano*, member states could be reassured that, where there was no connection with free movement, the question of residence in the member state of nationality was a situation internal to a member state. The intervening member states and the Commission argued that this was the case for Mr Zambrano as well. The court disagreed.

In setting the divide between situations internal to a member state and those governed by EU law, the court has, at times, strained the link with free movement. In one fell swoop, this already rather tenuous link has been sundered, and third-country national rights derived from Union citizens remaining in their member state of nationality have been recognised, without any need to show a connection with free movement.

Nationality issues

According to article 20(1) TFEU, every person holding the nationality of a member state is a Union citizen. Mr Zambrano enjoyed rights deriving from the Union citizenship rights of his Belgian national (and therefore Union citizen) children.

Rules on the attribution and loss of nationality remain within the retained competence of the member states. Although the court has signalled that nationality laws cannot be used to defeat fundamental rights of free movement, it seems for that member states can avoid – at least for now – the application of free movement (and Union citizenship) rules by changing its nationality laws. Indeed, in the 2004 citizenship referendum and *Irish Nationality and Citizenship Act 2004*, Ireland availed of a suggestion by Advocate General Tizzano in the *Chen* case that it could, by changing its nationality rules, avoid the future (unintended) EC law consequences of *jus soli* citizenship by birth anywhere on the island of Ireland.

FREE MOVEMENT FOR WORKERS

Freedom of movement for workers is based on article 45 TFEU and developed by EU secondary legislation and the case law of the Court of Justice.

Under article 20 TFEU, Union citizens are to have the right to move and reside freely within the territory of the member states. They are entitled to look for a job throughout the Union, reside in other member states, and work without the need for a work permit. They are to enjoy equal treatment with host member-state nationals in access to employment, working conditions and tax and social advantages (see http://ec.europa.eu/social/main.jsp?langId=en&catId=457).

The 2004 *Residence Directive* applies to all Union citizens who move to or reside in a member state other than that of which they are a national, and to their family members, including third-country nationals. This directive was not applicable in the *Zambrano* case, since the children sought rights in the member state of nationality. It was precisely because the free movement of workers provisions did not apply that the court relied on Union citizenship rights *vis-à-vis* the member state of nationality.

This possibility may be limited. Where obtaining the nationality of another state is impossible, or impracticable, failure to obtain the nationality of the member state of birth could lead to the child becoming stateless. The two children in the *Zambrano* case could have acquired the Colombian nationality of their parents only if specific steps were taken by their parents (and, as refugees, there may have been an understandable reluctance to take such steps).

Implications for Ireland

In the 2003 judgment of the Supreme Court in the *AO & DL* cases, the majority of the Supreme Court held that the constitutional right of Irish citizen children to the company, care and parentage of their parents in the State was not absolute and unqualified, but could be overridden by grave and substantial reasons associated with the common good – in that case, the need to ensure respect for the integrity of the immigration and asylum system.

The Minister for Justice was thus enabled to deport a number of third-country national parents of Irish citizen children, who, in turn had – as a practical matter – to leave their state of nationality. This wholly unsatisfactory situation was 'resolved' from 1 January 2005 by the constitutional amendment and new nationality legislation, under which children born to third-country national parent(s) in the island of Ireland acquire Irish citizenship only where a parent satisfies a prior, lawful, residence requirement.

The interpretation in *Zambrano* certainly extends to third-country national parents of Irish citizen children who reside in Ireland, even where they have not exercised any free movement rights. It does not, in terms, apply to parents of Irish citizen children who have 'involuntarily' left the European Union as a result of the deportation of their parent(s) after the *AO & DL* cases. It is certainly arguable that those children and their parents should be able to return, so that they may now avail of the treaty rights denied them at the time.

In a welcome move, the new Minister for Justice has instituted an urgent review of the 120 or so cases before the courts where *Zambrano* may be relevant and where it may be appropriate to act without waiting for a judgment. Cases where there is a possibility of deportation will also be considered, as will cases of Irish citizen children who have already left the State because their parents were refused permission to remain.

Drawing the line

Zambrano is carefully limited to the case of third-country national parents who have dependent Union citizen minor children residing in the member state of their nationality. However, the key driver here – and connecting factor with EU law – is the Union citizen's "genuine enjoyment of the substance of the rights attaching to the status of European Union citizen". It should be asked whether the reasoning could, in principle, apply to Union citizen spouses, partners and relatives other than minor children.

> **"Zambrano *is carefully limited to the case of third-country national parents who have dependent Union citizen minor children residing in the member state of their nationality … It should be asked whether the reasoning could, in principle, apply to Union citizen spouses, partners and relatives other than minor children"***

I can see no good reason why it should not. If the test is the assumption, or risk, that the Union citizen would leave Union territory were the third-country national denied the right of residence and the right of access to work, this could certainly be the case for spouses and other partners, and for other close family members. It is possible that the forthcoming *McCarthy* judgment will address the issue as regards spouses of Union citizens.

One limiting factor is the need to show dependency of the Union citizen on the third-country national. This could almost always be taken for granted for minor children and spouses/committed partners. The position is less clear for other family members, where some actual dependency would have to be established.

A step too far?

The court restricted its judgment to the interpretation of the Union citizenship provisions of article 20 TFEU. It did not take up the opportunity given it by the referring tribunal – and the erudite opinion of Advocate General Sharpston – to address the question of reverse discrimination or the application of fundamental rights provisions.

The argument that Union citizenship rules should not be applied to a situation internal to a member state was made by a number of member states, including Ireland, and by the European Commission. The court's decoupling of free movement from Union citizenship, and its conclusions on the consequences of Union citizenship in the hitherto 'internal' domain of the member state of the Union citizen's nationality, is a bold step.

Article 20 TFEU states that Union citizenship is "additional to and does not replace" national citizenship. The relationship of the two citizenships is unclear, but in this concrete application of the futuristic idea that Union citizenship is the *fundamental* status of nationals of the member states, Union citizenship trumps national citizenship – even in the member state of nationality. Was this what the member states intended?

Another result of the judgment is that the European Court has trespassed further into the area of national immigration law than it did in the *Metock* case on the basis of the 2004 *Residence Directive*. One should not begrudge Mr Ruiz Zambrano his success in his case. However, the court needs to factor immigration policy and fundamental rights considerations in its reasoning, if its approach is to be credible. G

LOOK IT UP

Cases:

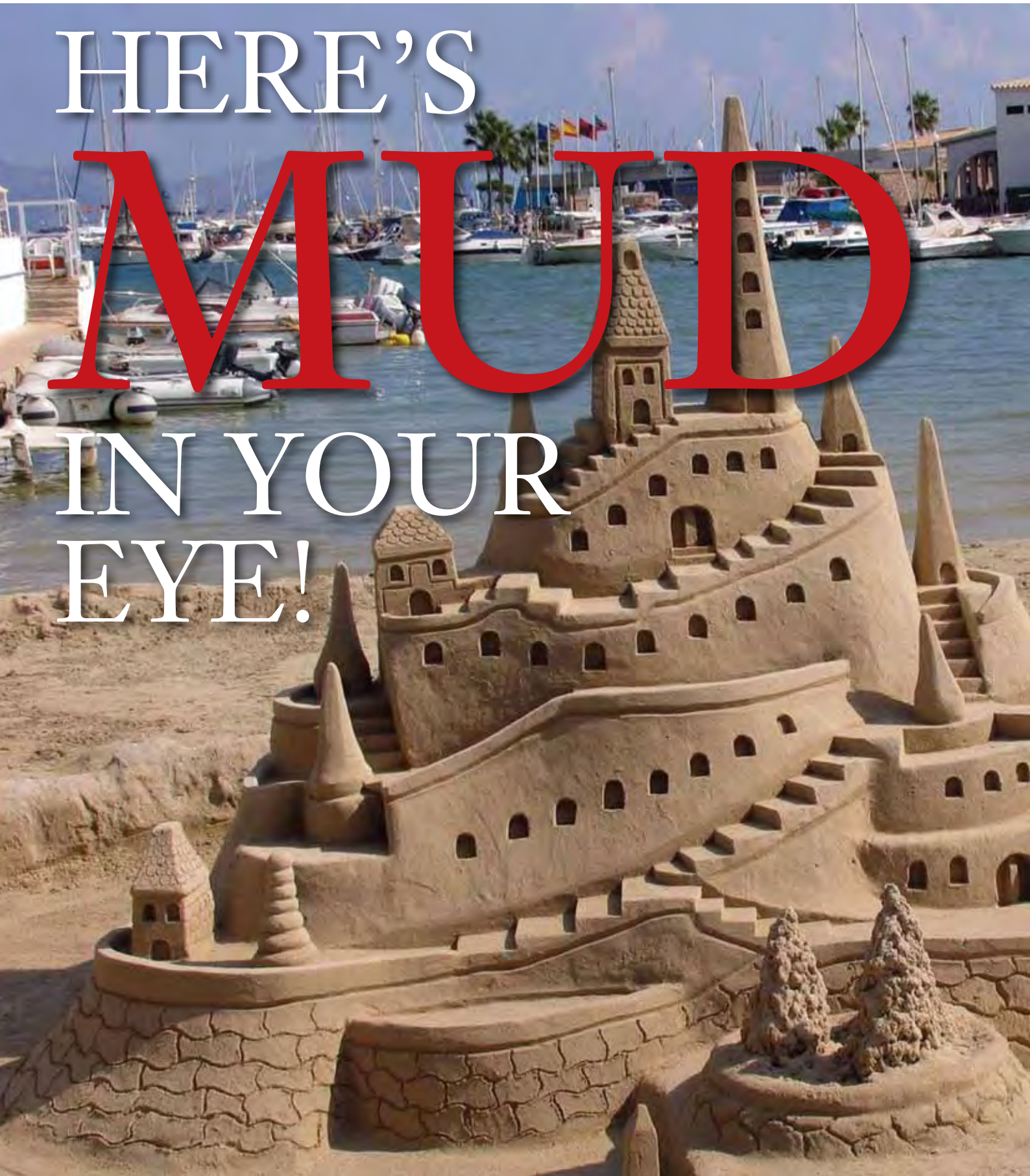
- *AO & DL v Minister for Justice* [2003] 1 IR 1
- Case C-34/09, *Ruiz Zambrano v Office National de l'Emploi* (judgment of 8 March 2011)
- Case C-439/09, *McCarthy v Secretary of State for the Home Department* (opinion of Advocate General Kocott, judgment awaited)
- Case C-127/08, *Metock and Others* [2008] ECR I-6241
- Case C-200/02, *Zhu and Chen* [2004] ECR I-9925

Legislation:

- *Irish Nationality and Citizenship Act 1956*
- *Irish Nationality and Citizenship Act 2004*
- *Treaty on the Functioning of the European Union*, article 20

Literature:

- Statement by Minister for Justice, Equality and Defence on the implications of the recent ruling of the Court of Justice of the EU in the case of *Ruiz Zambrano* (21 March 2011), www.justice.ie
- John Handoll, *Country Report: Ireland* (June 2010), www.eudo-citizenship.eu



HERE'S MUD IN YOUR EYE!

Conor Feeney is a Dublin-based barrister

The *Multi-Unit Developments Act 2011* finally became fully operational on 1 April 2011. Conor Feeney looks at the implications for unit owners and developers and warns unit owners and developers not to get pasted

The *Multi-Unit Developments Act 2011* finally became fully operational on 1 April 2011. This long-overdue piece of legislation addresses the myriad issues that have affected, and continue to affect, the transfer and operation of multi-unit developments in the State. Many of the sensible management practices already operated are now given a statutory footing, while new obligations on developers in relation to the completion and transfer of developments should stamp out many of the abuses that have occurred in recent years.

For developers of existing developments who have not yet transferred the common areas and the reversion of the units to the management company, the clock has now started ticking. As will be seen below, they have only a few months within which to arrange for the transfer to take place. Furthermore, the days of unit owners having to foot the maintenance bill for unsold units, even those rented out by the developer, are numbered. Developers are now obliged, under statute, to pay service charges levied in respect of unsold units.

The *Multi-Unit Developments Act 2011* covers residential developments of five or more units sharing amenities, facilities and services. Certain provisions, set out in schedule 1, also apply to residential developments of two to four units. Developments with a mix of residential and commercial units are also covered, but are treated differently in certain respects (not dealt with in this article). The act does not just apply to developments built following its commencement – it also covers existing developments. However, buildings containing bedsit-type units are excluded from the scope of the act; the units must have "self-contained facilities (that is, bathroom and cooking facilities)".

FAST FACTS

- By 1 October 2011, developers who have not already done so must transfer the common areas and the reversion in multi-unit developments to the management company
- In future, the common areas and reversion in new developments must be transferred before the units are sold
- The transfer of the common areas does not relieve developers from their duty to ensure completion of the development
- Developers are now obliged to pay service charges in respect of unsold units
- Management companies can now be restored to the register of companies without the need to apply to the High Court – up to six years after being struck off the register

Radical provisions

The most radical provisions of the act apply to new developments – that is, those in which no unit has been sold and the common areas have not yet been transferred to the management company. These provisions should eradicate many of the problems that have arisen in existing developments, but will, unfortunately, apply to comparatively few developments for the foreseeable future, given the state of the property market.

Under section 3, a developer cannot transfer an interest in a residential unit unless:

a) A management company has been established at the expense of the developer,
b) The common areas and the reversion in the residential unit have been transferred to the management company,
c) The management company is issued with a certificate from a suitably qualified person, to the effect that the issue of the fire-safety certificate for the development has been complied with, and
d) The developer and the management company have entered into an

agreement, setting out their rights and obligations in relation to, among other things, statutory requirements, completion of works and dispute resolution. (The management company must be separately legally represented in respect of this procedure, at the cost of the developer.)

In the transfer of the common areas and the reversion, the beneficial interest therein is reserved to the developer to facilitate the completion of the development. However, once the development stage has ended (that is, the development has been completed in accordance with statute and contract), the developer is obliged, under section 11 of the act, to swear a statutory declaration to the effect that the beneficial interest in the common areas and the reversion has transferred to the management company, and has thus merged with the legal interest.

"Annual service charges to cover the ongoing expenditure of the management company is placed on a statutory footing by the act. The estimated service charge for the coming year must be placed before, and approved by, the members at the annual general meeting of the management company"

The practice whereby developers protected their interests by skewing voting rights in the management company in their favour will be a thing of the past. Section 14 of the act provides that unit owners in new developments will have one vote of equal value each in the management company, and no other person is to have voting rights.

Thus, in future, unit owners will be part of a powerful, independent management company from the beginning and will, through this company, have a written agreement with the developer in relation to the completion of the development. This will be a useful weapon in an action against a developer who has abandoned an unfinished development.

Existing developments

On top of the extensive provisions aimed at regulating the transfer and operation of new multi-unit developments, the act attempts to improve the situation for unit owners in existing developments through a number of key provisions tackling problem areas that have come to the fore in recent years.

The most significant provisions are sections 4 and 5, which apply to existing developments in which the common areas and the reversion have not yet been transferred to the management company. These sections set a six-month deadline (from 1 April) for the developer to complete the transfer of the common areas and the reversion. In developments in which less than 80% of the units have been sold, the beneficial interest is reserved to the developer; however, as in the case of new developments, once the development is complete, the developer is obliged to swear a statutory declaration that the beneficial interest has transferred to the management company.

There is no sanction for failure to effect the transfer within the six-month period and nothing stopping the transfer being made after the expiry of the period. However, once the period has expired, developers may find themselves subject to directions and costs orders in court proceedings under the dispute resolution procedure discussed below.

While the provisions in relation to voting rights in new management companies do not apply to management companies of existing developments, section 15 provides important protection to unit owners against developers attempting to exercise skewed voting rights in existing management companies. That section provides that, where the allocation of votes and voting rights is not one vote of equal value per unit, any person seeking to exercise those different voting rights can only do so following authorisation from the Circuit Court. Furthermore, section 16 restricts directorships to three years.

Completion works

Another area of concern addressed by the act is that of the rights, liabilities and obligations in relation to completion works. Section 7 makes clear that the transfer of the common areas does not relieve the developer from "the duty, obligation or responsibility to ensure completion of the development" in compliance with planning and building control legislation.

Section 9 ensures that the developer retains such access rights as are reasonably necessary for this purpose, but also importantly requires the developer to indemnify the management company in respect of all claims arising from the works. Section 9 further requires the developer to have "adequate insurance in respect of all risks in respect of the developer's use or occupation of the multi-unit

SERVICE CHARGES

The practice of charging annual service charges to cover the ongoing expenditure of the management company is placed on a statutory footing by section 18 of the act. The estimated service charge for the coming year must be placed before, and approved by, the members at the annual general meeting of the management company and must be broken down into the categories of expenditure listed in section 18(3). This section provides a number of further detailed provisions regarding what the members can do in relation to the service charge at the AGM.

One highly significant provision is section 18(10), which places an obligation to pay all service charges levied, not only on the unit owners, but also, in the case of unsold units, on the developer. This will come as a huge relief to unit owners who have effectively been footing the bill for unsold units, even, in some cases, those that the developer has rented out. Previously, there was no clear legal basis upon which to sue a developer who was unwilling to pay such service charges. Whether the courts will interpret this provision as extending to developers' service charge arrears remains to be seen.

development". It requires that disruption and inconvenience to unit owners is minimised during the works. As for the unit owners and the management company, they must not obstruct the developer in exercising any rights or discharging obligations.

Sinking fund

Another practice given statutory footing is the establishment and maintenance of a building investment fund – or 'sinking fund' – to cover "refurbishment, improvement, maintenance of a non-recurring nature" or advice in relation to such matters. Section 19 requires, among other things, that such a fund is established and maintained, obliges unit owners (including the developer, in respect of unsold units) to contribute to it, and sets a contribution of €200 per unit per year, unless otherwise agreed.

"The practice whereby developers protected their interests by skewing voting rights in the management company in their favour will be a thing of the past"

Dispute resolution

Section 24 of the act deals with the resolution of disputes arising in respect of multi-unit developments. The Circuit Court in which the development is located is granted a wide jurisdiction to make orders in disputes under the act. The section provides a non-exhaustive list of examples, such as altering management company voting rights, apportioning funds as between the sinking fund and service charges, amending covenants in leases, and directing changes to the management structure with a view to complying with the act.

In line with the general shift towards alternative dispute resolution procedures, section 27 provides that the court may, at any stage in the proceedings, of its own motion or upon request, direct that a mediation conference takes place. Where such a direction is made, "each party to the application concerned shall comply with that direction".

However, a party's duty in relation to the mediation conference goes further than merely attending. Costs sanctions are provided for in section 28(3), where a party's conduct is "substantially the cause of the failure to reach a settlement". The court will be armed with the necessary information in this regard, as section 28(1) obliges the chairperson of the mediation conference to submit a report to the court including, where no resolution was reached, "a statement as to whether such outcome is substantially due to the conduct of one or more than one of the parties, and in that case specifying the identity of such party or parties".

Restoration to the register

Another recurring problem for unit owners is that, when they finally get control of their management company, they find that the developer and his or her nominees have failed in their duty to make annual returns, and the company has been struck off the register of companies.

Under normal circumstances, where a company has been struck off for more than one year, the registrar of companies cannot restore the company to the register and a costly application must be made to the High Court. Section 30 provides an exception in the case of applications to restore by members and officers of management companies, extending the period within which the registrar may effect the restoration to six years.

SEED MONEY

Fiona Duffy qualified as a solicitor in 1980. A partner in Patrick F O'Reilly & Co, she has over 20 years of litigation experience and is a member of the Law Society's Litigation Committee

The European Court of Justice is soon to determine a case that examines whether inventions resulting from the use of human embryonic stem cell lines may be patentable in Europe. The case could have major ramifications for the commercial funding of embryonic stem cell research in Europe. Fiona Duffy peers into her microscope

Stem cell research is at the cutting edge of modern science and is moving at such a pace that the law cannot keep up with it. It is also at the centre of much debate, raising many legal and ethical questions, particularly where embryonic stem cell research is concerned. Notwithstanding this, there is no specific legislation governing stem cell research in Ireland, nor is there any regulation. The Irish Stem Cell Foundation, in its policy document published in April 2010, states that the lack of a regulatory regime creates confusion and could potentially allow improper research to take place.

The legal position of the embryo in Ireland was considered in the case of *Roche v Roche*. The Supreme Court – while holding that the embryo, *in vitro*, has moral status and, in the words of the Chief Justice, "cannot be divorced from our concepts of human dignity" – held that the embryo, *in vitro*, is not "the unborn" within the meaning of article 40.3.3 of the Constitution, and therefore is not constitutionally protected under that provision.

The Irish Medical Council, in the seventh edition of its *Guide to Professional Conduct and Ethics for Registered Medical Practitioners*, no longer contains the provision that all fertilised ova created through IVF must be used for normal implantation and must not be deliberately destroyed. This means that there is no guidance to doctors on what should become of surplus embryos.

Science Foundation Ireland (SFI) notes on its website that "pending legislation from the Department of Health and Children governing assisted human reproduction and related practices, and in line with a current directive from the Department of Enterprise, Trade and Innovation, SFI is not in a position to fund research using human embryonic stem cells".

> ***"In effect, this directive prohibits the granting of a patent for a biotechnological invention, the commercial exploitation of which would be contrary to public order or morality"***

The definition of 'human embryo' is shortly due to be considered by the Grand Chamber of the European Court of Justice (ECJ) in the case of *Oliver Brüstle v Greenpeace eV*. On 10 March 2011, Advocate General Yves Bot, an advisor to the ECJ, delivered his opinion. Generally, the court tends not to overturn the opinion of the advocate general.

This case comes before the ECJ by way of reference from the Federal Court of Justice in Germany for preliminary ruling on the meaning of 'human embryos' in article 6(2)(C) of Directive 98/44/EC,

specifically asking whether it includes all stages of the development of human life, including unfertilised human ova and stem cells obtained from human embryos at the blastocyst stage *(see 'Greenpeace action' panel, p31)*.

The court is also required to consider the concept of "uses of human embryos for industrial or commercial purposes", within the meaning of article 6(2)(c) of the directive.

Mother of invention

Directive 98/44/EC was transposed into Irish law by SI 247 of 2000, the *European Communities (Legal Protection of Biotechnological Inventions) Regulations 2000*. Section 6(1) of the directive and the Irish transposing legislation provides: "A patent shall not be granted in respect of a biotechnological invention, the commercial exploitation of which would be contrary to public order or morality, provided that the exploitation shall not be deemed to be so contrary only because it is prohibited by law."

The directive and SI at section 6(2) specifically provides: "Any of the following in particular shall not be regarded as a patentable invention on the basis of paragraph (1):

a) A process of cloning human beings,
b) A process of modifying the germ line genetic identity of human beings,
c) The use of human embryos for industrial or commercial purposes,
d) A process of modifying the genetic identity of animals which is likely to cause them suffering without any substantial medical benefit to man or animal, and animals resulting from such a process."

In effect, this directive prohibits the granting of a patent for a biotechnological invention, the commercial exploitation of which would be contrary to public order or morality, and specifically "the use of human embryos for industrial or commercial purposes" shall not be regarded as a patentable invention.

This prohibition, however, does not affect inventions for therapeutic or diagnostic purposes that are applied to the human embryo, and are useful to it (recital 42 of the preamble to the directive).

It is interesting that, despite the fact that it was open to all member states to express their views, only two member states availed of the opportunity. These states took the view that the definition of 'human embryo' should be left to the sole discretion of each member state.

FAST FACTS

- The legal position of the embryo in Ireland was considered in *Roche v Roche.* The Supreme Court, while holding that the embryo, *in vitro*, has moral status that "cannot be divorced from our concepts of human dignity", held that such embryos are not "the unborn" within the meaning of article 40.3.3 of the Constitution. Therefore, they are not constitutionally protected under that provision
- The definition of 'human embryo' is shortly due to be considered by the Grand Chamber of the European Court of Justice (ECJ) in the case of *Oliver Brüstle v Greenpeace eV*
- This case comes before the ECJ for preliminary ruling on the meaning of 'human embryos' in article 6(2)(C) of Directive 98/44/EC. It specifically asks whether the human embryo includes all stages of the development of human life, including unfertilised human ova and stem cells obtained from human embryos at the blastocyst stage
- The court is also required to consider the concept of "uses of human embryos for industrial or commercial purposes" within the meaning of article 6(2)(c) of Directive 98/44/EC
- In effect, this directive prohibits the granting of a patent for a biotechnological invention, the commercial exploitation of which would be contrary to public order or morality and, specifically, "the use of human embryos for industrial or commercial purposes" shall not be regarded as a patentable invention

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EU SEMINAR

'MONEY LAUNDERING: Emerging Challenges'

Tuesday 24 May 2011 6.30 – 8.30pm
(6.00pm registration & coffee)

The Blue Room, Law Society of Ireland

Chaired by **James MacGuill**, MacGuill & Co

Speakers include: Frank Cassidy, Criminal Assets Bureau
John Fish, Working Group on ML Legislation
Paula Reid, partner, A&L Goodbody
Michael Ashe, SC, QC

Followed by a wine reception

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(CPD points can be claimed for this seminar)

GREENPEACE ACTION – BACKGROUND

Mr Brüstle has a German patent, which was granted in 1997, concerning isolated and purified neural precursor cells, processes for their production from embryonic stem cells, and the use of neural precursor cells for the treatment of neural defects.

It is claimed, in the patent specification, that the transplantation of brain cells into the nervous system allows the treatment of numerous neurological diseases, for example, Parkinson's. The process used is to transplant immature precursor cells, which exist only during the brain's development phase.

The proceedings in Germany arose out of an action by Greenpeace to have the patent annulled. Greenpeace is against the commercial exploitation of human embryos and suggests that the only reason why Mr Brüstle would want to patent his invention is for commercial purposes. It argued that, as the invention is derived from human embryonic stem cells, it is unpatentable under the directive.

In considering the definition of the term 'human embryo' within the meaning of article 6(2)(3) of Directive 98/44/EC, Advocate General Bot considered the legislation of different member states, the provisions of the directive itself, and current scientific information.

From his analysis of the legislation, it was clear that member states were not all in agreement with each other. Principally, they fell into two categories, namely:

- Those where the human embryo exists from fertilisation, and
- Those where the human embryo exists when the fertilised ovum has been transferred into the lining of the womb.

Noting the provisions of article 5(1) of the directive and, in particular, the reference to the human body "at various stages of its formation and development" and the requirement to respect the fundamental primacy, dignity and integrity of the person, he took the view that the definition of 'human embryo' should be by reference to the development of the human body.

Finally, he commented that contemporary science cannot tell us when the human person truly begins. Indeed, he suggests that the question – when life begins – can only be answered in the negative, because it is impossible to detect the appearance of life.

He took the view that totipotent cells *(see glossary)* represent the first stage of the human body, as each of them has the capacity to develop into a complete human being, and, on that basis, they should be legally categorised as embryos.

He then noted that the blastocyst is the product of the capacity of the totipotent cells to develop into a human body, and, as such, categorised the blastocyst as an embryo for the purposes of this directive.

In relation to pluripotent cells, he noted that, as they cannot develop separately into a complete human being, they cannot be defined as an embryo within the meaning of the directive. He noted that, as embryonic stem cells taken in isolation are no longer capable of developing into a complete individual, they cannot be categorised as human embryos within the meaning of the directive.

Notwithstanding this, he stated that it is not possible to ignore the origin of a pluripotent cell. He noted that it is not a problem, in itself, that it comes from some stage in the development of the human body – provided only that its removal does not result in the destruction of that human body at the stage of its development at which the removal is carried out.

In the particular case he was dealing with, it was noted that, if the pluripotent stem cell was removed from the blastocyst (in itself an embryo), such removal would result in the destruction of the developing human body. In the circumstances, he took the view that inventions relating to pluripotent stem cells can be patentable only if they are not obtained to the detriment of an embryo, whether through its destruction or its modification.

He therefore held that:

1) Article 6.2(c) of the directive must be interpreted to the effect that the concept of 'human embryo' applies from the fertilisation stage to the initial totipotent cells, and to the entire ensuing process of the development and formation of the human body, including the blastocyst,
2) Pluripotent embryonic stem cells are not included in the concept of a human embryo because they do not, in themselves, have the capacity to develop into a human being, and
3) An invention must be excluded from patentability if it has resulted from the prior destruction of human embryos.

The advocate general noted that 98/44/EC is a harmonising directive and that, as such, the definition of 'human embryo' within the meaning of the directive must be defined specifically for European Union law and that such definition be applicable in all member states. He did differentiate and note that, while each member state is free to authorise research under conditions laid down by that state, the patenting laws for such products in Europe must all be governed by the same laws.

He also emphasised that this definition is for the purposes of the directive only.

It would now seem that inventions resulting from the use of human embryonic stem cell lines derived from 'spare' human embryos left over from IVF treatment, and which would otherwise be destroyed, may not be patentable in Europe. That is not to say that research on embryos and human embryonic stem cell lines cannot be carried out.

One wonders, however, whether funding for such research will be available to researchers and universities if the resultant inventions cannot be patented. If upheld by the Grand Chamber, this decision could have serious financial and economic repercussions for such research in Europe.

As against the financial question, there are always the moral and ethical questions, and the stance of Greenpeace is that the human body should not be exploited for commercial gain. G

GLOSSARY

- ***Blastocyst*** – an embryo that has developed to the point of having two different cell components and a fluid cavity. In other words, it has started to differentiate.
- ***Pluripotent stem cells*** – the stem cells present in very early embryos, called embryonic stem cells, are pluripotent. They cannot grow into a whole new body, but in the right environment, they can grow into almost any of the body's cell types.
- ***Totipotent cells*** – a newly fertilised egg is totipotent because it has the potential to form an entire body.

LOOK IT UP

Cases:

- *Oliver Brüstle v Greenpeace eV* (case no C34/10)
- *Roche v Roche & ors* [2009] IESC 82

Legislation:

- Directive 98/44/EC
- *European Communities (Legal Protection of Biotechnological Inventions) Regulations 2000* (SI 247 of 2000)

Literature:

- Medical Council, *Guide to Professional Conduct and Ethics for Registered Medical Practitioners* (2009)

Louth Solicitors' Bar Association

PIC: PADDY CLARKE OF PADDY CLARKE PHOTOGRAPHY

At the annual meeting of the Louth Solicitors' Bar Association (LSBA), which took place at Dundalk Courthouse on 28 March 2011, were *(front, l to r)*: John Costello (Law Society president), Elaine Connolly (honorary secretary, LSBA), Tim Ahern (president, LSBA), Ken Murphy (director general). *(Second row, l to r)*: Barry O'Hagan, Don McDonough, Dermot Lavery, Peter Lavery, Niall Lavery, James MacGuill, John Kieran and Larry Steen. *(Third row, l to r)*: Sharon McArdle, Una Lyons, Caroline Berrills, Alison Quail, Olivia McArdle, Niall O'Hagan, Francis Bellew and Gary Matthews. *(Back, l to r)*: Donal O'Hagan, Seamus Roe, Sara McDonnell, Stephen Reel and Conor MacGuill

Monaghan Bar Association

PIC: PHILIP FITZPATRICK PHOTOGRAPHY

Monaghan Bar Association held its annual meeting at the Hillgrove Hotel on 29 March 2011, which was attended by Law Society President John Costello and Director General Ken Murphy. Those at the meeting included: *(Back, l to r)*: Brendan Larney, Paul MacCormack, Fergal McManus, Justine Carty, Rory O'Neill, Edel Mullen, Enda O'Carroll, Kevin Hickey, Tommy Myles, Brian Morgan and Adrian O'Doherty. *(Front, l to r)*: Maria Connolly, Melissa McCague, Sarah Gormley, Lynda Smyth (secretary) John Costello (president of the Law Society), Dan Gormley (president, Monaghan Bar Association) Ken Murphy (director general), Grainne Dolan, Sinead O'Brien and Pauline Barry

SYS raises €2,580 for charities

The Society of Young Solicitors (SYS), with the Chartered Accountants of Ireland Young Professionals, raised €2,580 at their annual charity table quiz on 3 February in Dublin's Café en Séine on Dame Street. The amount was split equally between the Royal National Lifeboat Institute and Dublin Samaritans. *(From l to r)*: Eileen Kearney (RNLI), Micheál Grace (chairman, SYS), Stephen Molloy (Chartered Accountants Ireland), Shane McAleer (chairman, CAI YPN) and Bernie Bissett (chairperson, Dublin Samaritans)

At the launch of the diploma programme's new Certificate in Investment Funds Law and Compliance on 6 April were *(l to r):* Elaine Grier BL (student), Patricia Taylor (chairperson of the Irish Funds' Industry Association Legal and Regulatory Committee), Monica Nally Hennessy, Maguire McClafferty (student) and Rory O'Boyle (course leader of the diploma programme)

Inaugural Law Book Prize

Child Law (2nd edition), by the Law Society's Deputy Director of Education Geoffrey Shannon, was one of six nominees for the Inaugural Law Book Prize, launched this year by the Irish Association of Law Teachers. Congratulations to Geoffrey on making the shortlist. Pictured are: Catherine Dolan (commercial manager, Round Hall Thomson Reuters) and Geoffrey Shannon

David Carey is this year's winner of the 'Green Business Plan Competition', seen here with Declan Moylan (chairman, Mason Hayes & Curran, sponsors). A second-year student on the BSc Sport Science and Health programme in Dublin City University, David devised a business plan for sports nutrition and healthy lifestyle products

At the William Fry breakfast briefing, 'Building for the Future – Key Employment Law Considerations', were *(l to r)*: Boyce Shubotham (head of the employment and benefits department, William Fry), Myra Garrett (managing partner, William Fry) and Jerry Kennelly (founder and CEO of Tweak.com). Over 100 business professionals attended the briefing and heard how outdated agreements – registered employment agreements and employment regulation orders – are impeding growth in employment and, in certain cases, creating cosy cartels

ON THE MOVE

Three's new general counsel

Patrick Foyle has been named general counsel for mobile network Three. He is a solicitor and holds an LLB from Trinity College Dublin, as well as diplomas in e-commerce and commercial law from the Law Society

Three new partners announced at Mason Hayes & Curran

Mason Hayes & Curran has appointed Eimear Collins as a partner in its commercial litigation team. Eimear's appointment is part of an ongoing development and expansion programme at the firm. Her particular areas of expertise include commercial, contract disputes, professional negligence claims and insurance. The firm has also appointed Brian Horkan and James Bardon as partners in its administrative and public law unit. Their areas of expertise include public health law, constitutional law and administrative law. They also advise extensively on a wide variety of child law issues

Southern Law Association celebrates in style

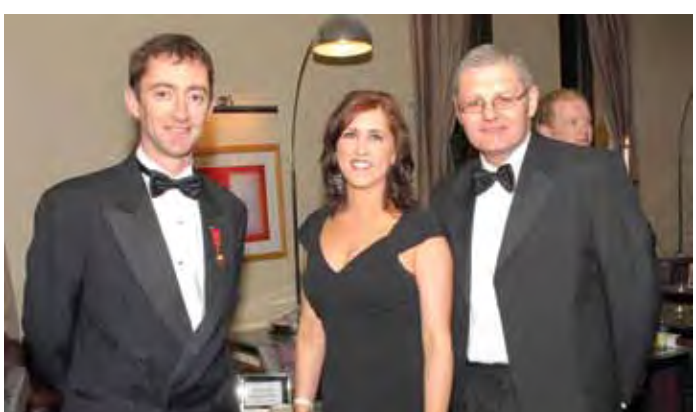
There was a great turnout at the Southern Law Association annual dinner at Maryborough House Hotel on 4 March. Our photos give a flavour of the atmosphere on the night.

Attending the SLA annual dinner were Circuit Court judges *(l to r)*: Judge James O'Donohoe, Judge Sean Ó Donnabháin, Fergus Long (SLA pr esident), Judge Patrick Moran and Judge Con Murphy

Stunning designs at the SLA's dinner: Susan O'Sullivan *(left)* and Louise Moore

They came from near and far to the SLA annual dinner *(l to r)*: Hazel McCarthy, Bernadette Cahill, Mort Kelleher and Susan Martin

Glamorous trio *(l to r)*: Sinead Behan, Mellisa Gowan and Elaine O'Sullivan



At the SLA annual dinner were *(l to r)*: Jerome O'Sullivan, Emer McNamara and Kieran Moran

Nuala Teahan and Kieran Hughes were at the SLA event on 4 March

Style duo : Sinead Corcoran *(right)* and Rosemary Horgan

ALL PICS: DEIRDRE BAUMANN

Sitting pretty: Claire Flavin and Philip O'Doherty

Catching up at the annual dinner were: Orla O'Connell *(left)* and Mary O'Callaghan

At Maryborough House Hotel were *(l to r)*: Kate Murphy, Louise O'Brien, Uilliam Ó Lorcain and Elaine O'Sullivan

SLA senior officers *(l to r)*: Eamonn Murray (immediate past-president, SLA), Fergus Long (president, SLA) and Kieran Moran (vice-president, SLA)

Ronan Daly Jermyn partners caught up at the SLA event *(l to r)*: John Dwyer, Fergus Long (president, SLA) and Frank Daly

At the SLA annual dinner were *(l to r)*: Judge Patrick Moran, Fergus Long (president, SLA), Fiona Twomey (past-president, SLA), Judge Con Murphy and Judge James O'Donohoe

Having fun: Elaine Sweeney and Peter Wise

LAW SOCIETY PROFESSIONAL Training

Winner of the 2011 Irish Institute of Training & Development (IITD) Awards – Networks & Groups Category
This is awarded to the best submission from networks or groups who display excellence in training and development.

DATE	EVENT	DISCOUNTED FEE*	FULL FEE	TRAINING HOURS
11 May	Law Society Skillnet: report writing skills workshop	€180	€240	**4** Management and professional development skills (by group study)
27 May	Law Society Skillnet: tactical negotiation skills workshop – Cork	€126	€168	**3** Management and professional development skills (by group study)
28 May	Law Society Skillnet in partnership with the Federation of Irish Sports presents: ensuring sport is fit to meet modern challenges	€135	€180	**3** General (by group study)
31 May	Law Society Skillnet: impressive presenting for solicitors	€202	€270	**4.5** Management and professional development skills (by group study)
10 June	Law Society Skillnet: Yes I can – secure the future for sole practitioners in Ireland	€50		**5** Management and professional development skills (by group study)
10 June	Law Society Skillnet: how the *Civil Partnership Act 2010* affects probate practitioners – Cork	€124	€165	**3** General (by group study)
17-18 June	Law Society Skillnet in partnership with the Arbitration and Mediation Committee of the Law Society and the DSBA present: two-day mediation skills training workshop	€395	€493	**14** Management and professional development skills (by group study)
23 June	Law Society Skillnet: setting up in practice – a practical guide	€225	€285	**5** Management and professional development skills plus **1** regulatory matters
29 Sept	Law Society Skillnet in association with the Society of Trust and Estate Practitioners present: legislation and practice update 2011	€202	€270	**4** General (by group study)
25 Nov	Annual in-house and public sector conference	TBC	TBC	TBC
Ongoing	CIMA Certificate in Business Accounting in partnership with Law Society Skillnet (online course)	€670	€895	Full management and professional development skills requirement for 2011 (by e-learning)
Ongoing	Suite of e-learning courses • Touch typing – €40 • *PowerPoint* – all levels – €80 • Microsoft *Word* – all levels – €80 • How to create an e-newsletter – €150	To register or for further information, email: professionaltraining@lawsociety.ie		Full management and professional development skills requirement for 2011 (by e-learning)

For full details on all of these events visit our webpage www.lawsociety.ie/lspt or contact a member of the Law Society Professional Training team on:
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*Applicable to Law Society Skillnet members/public sector subscribers

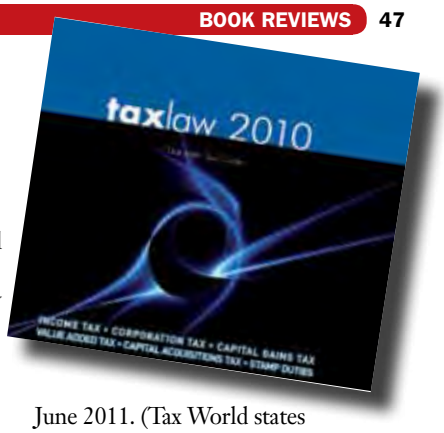
LAW SOCIETY FINUAS Network

DATE	EVENT (INCLUDING SPEAKERS)	DISCOUNTED FEE*	FULL FEE	TRAINING HOURS
7 May – Dec	Postgraduate diploma in international financial services law, Law Society Finuas Network in partnership with UCD Commercial Law Centre	€3,600	€5,750	**Full** General, management and professional development skills requirement for 2011
21 June	Pensions seminar: 'A NAMA for pensions – where now for defined benefit schemes?'	€120	€90	**2** General (by group study)

For full details on all of these events, email: finuas@lawsociety.ie
*Applicable to Law Society Finuas members/public sector subscribers

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

Tax Law 2010



Alan Moore. Taxworld (2010), www.taxworld.ie. ISBN: 978-1-902065-39-7. (The hardback edition is now out of stock, but is available as an e-book). Price: €75.

Tax Law 2010 is a sister book to other publications by Alan Moore, such as *Tax Book 2010*, which was reviewed in the January/February 2011 issue of the *Gazette*.

Tax Law 2010 gathers together, in one volume, all the primary direct tax legislation, capital taxes, stamp duty and value-added tax legislation and is correct as at 3 April 2010. This means that the book is up to date with all the changes introduced by the *Finance Act 2010*, which was 263 pages in length. The fact that this volume is over 1,000 pages in length reflects the vast quantity of tax legislation that we are now subject to on an annual basis.

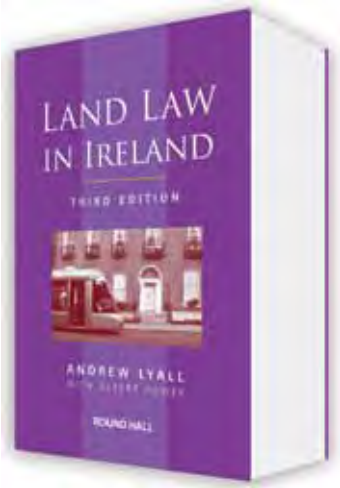
Therefore, *Tax Law 2010* allows a practitioner to have ready access, in one publication, to all the key primary tax legislation that he may come across in practice, together with helpful footnotes as to when this constantly changing legislation was amended.

Unfortunately for the practitioner, the length of the volume is going to continue to increase, as the hastily passed *Finance Act 2011* is over 220 pages in length and will need to be included in the next volume. Indeed, there is very likely to be a further *Finance Act* passed before the summer recess.

Finally, as well as the changes introduced by the *Finance Act 2011* since publication of the book, the *Value Added Tax Act 1972* has been repealed and replaced with the *Valued Added Tax Consolidation Act 2010*. Practitioners should be aware that *Tax Law 2011* will be available in hardback edition in June 2011. (Tax World states that, in the event of a second *Finance Act*, it will release a free supplementary PDF for all affected publications.)

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

Land Law in Ireland



Andrew Lyall with Albert Power. Roundhall, Thomson Reuters (3rd ed, 2010), www.roundhall.ie. ISBN: 978-1-8580-058-43. Price: €100.

Practitioners have long used and admired Lyall's book on *Land Law in Ireland*, and the recently published third edition doesn't disappoint. This edition is published with the assistance of others, most notably Dr Albert Power, who revised a number of key chapters.

Lyall acknowledges that books on property law tend to get bigger with each successive edition, but felt it important to retain some of the historical aspects, given that the changes introduced by the *Land and Conveyancing Law Reform Act 2009* are so recent.

The text acknowledges that largely obsolete subject areas, which are deemed fundamental to an understanding of the subject, are retained. That acknowledgement aside, the sheer size and depth of the text will prove a tremendous resource for the experienced – bridging the gap between old archaic law and new developments – while possibly intimidating the student or novice. This would be unfortunate, as the text explains concisely the law before the 2009 act and the current position, often through the medium of charts and diagrams. For example, Lyall makes a compelling argument for the study of tenure, to which he devotes an entire chapter, thus providing any student of land law with a comprehensive grounding in the historical context of land law and conveyancing.

Lyall is to be commended for unapologetically dealing with these topics, while also helping us keep an eye on the future, with references to the impact of human rights and the advance of new technology with electronic conveyancing. This text also has the advantage of dealing with the new legislation on civil partnership and cohabitation. This is a worthy addition to any bookshelf, and it is likely to be the last modern textbook to deal in any great detail with topics like fee farm grants, fee tail, rentcharges and the old law on settlements.

Gabriel Brennan is the Law Society's e-conveyancing project manager.

The Ombudsman Enterprise and Administrative Justice

Trevor Buck, Richard Kirkham and Brian Thompson. Ashgate Publishing Ltd (2010), www.ashgate.com. ISBN: 978-0-7546-755-63. Price: Stg£70.

There are certain solutions that a court may be unwilling or unable to impose on parties in the traditional court setting. In *The Ombudsman Enterprise and Administrative Justice*, the authors present an analysis of the role of the ombudsman by comparing the role as established in different jurisdictions.

They also analyse the evolution of the ombudsman role and the interplay between that and other forms of dispute resolution in the administrative justice system. Finally, they look at its function in the 21st century and ask what the future holds for the role in an increasingly fragmented environment of dispute resolution.

The authors highlight the importance of the ombudsman role in detecting maladministration and promoting good administration.

There is some focus on the legitimisation of the role, for example, by way of enshrining the role in the constitution. The authors' view is that the role is best viewed as an autonomous body – and not as an agent of the judiciary, the executive or the legislature. The authors set out their vision for what they term "a proactive ombudsman enterprise" that sits at the heart of constitutional arrangements. The recommendations they make could easily be adopted in this jurisdiction, given the publicity given to decisions that that have been made by the Financial Services Ombudsman, for example.

The recommendations in this book will assist ombudsmen in meeting the challenges that face them as they adapt to the changing nature of administrative justice.

Sarah Conroy is an associate in the litigation and dispute resolution department of A&L Goodbody Solicitors.

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A matter of precedent

Precedents – paper and electronic – are readily available from the Law Society's library, writes Mary Gaynor

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

Members regularly contact the library with requests for precedent forms. The library staff have many years of experience searching a range of precedents available in various published sources, and the library's collection covers a wide range of subject areas.

Traditionally, precedent forms were available in hard copy only – this is still the case for a large part of the collection. All hard-copy material can be scanned and emailed in PDF format, subject to copyright restrictions. A list of selected Irish and British textbooks containing precedents is available on the library's home page in the members' area of the website at www.lawsociety.ie. Most of these books can be borrowed on ten-day loans.

Irish books of precedent forms are available in the areas of:

- Conveyancing (*Laffoy's Irish Conveyancing Precedents*),
- Commercial (*Irish Commercial Precedents*),
- Family (*Irish Family Law Precedents*),
- Probate (*Irish Probate Precedents*),
- Company secretarial (*Jordan's Irish Company Secretarial Precedents*), and
- Wills (*Irish Wills Precedents*).

Useful Irish precedents can also be found in commentaries prepared by the Society's Law School and published by Oxford University Press, including the areas of civil and criminal litigation, employment, family, business, insolvency and intellectual property.

The Law Society has, of course, also published a range of precedents and these are available in the members' area of the website under the heading 'best practice and guidance'. Employment-specific precedents are available under the Employment and Equality Law Committee section.

LexisNexis precedents

The Society's library is licensed by LexisNexis to supply electronic precedents by email in Microsoft *Word* format from *Laffoy's Irish Conveyancing Precedents* (available online from the LexisNexis Irish Property Library). There is a sliding-scale charge for this service, depending on the page count, and the library staff will quote for specific forms. This service is particularly aimed at small-to-medium-size practices that would not ordinarily subscribe to the LexisNexis online products.

Our licensing arrangements with LexisNexis also allow us to email *Word* format precedents from the illustrious multi-volume *Encyclopedia of Forms and Precedents*, an A-Z encyclopedia of British-published precedents. These may prove useful in the event of an Irish-published precedent not being available. G

NEWS

- **March saw a record number of books being borrowed by members and trainees – a total of 749 books were distributed throughout the country.**
- **The winner of the raffle for using the online catalogue during Library Ireland Week was Lisa Mahony (solicitor), who won a book token worth €100.**
- **You can request a book on loan by phone or by using the online catalogue.**
- **You can also use the freely downloadable library app *BookMyne*, which is compatible with the Apple iPhone and iPad. Further details are available on the website or from the library.**

JUST PUBLISHED

New books available to borrow

- Bartlett, Francesa (ed), *Alternative Perspectives on Lawyers and Legal Ethics: Reimagining the Profession* (Abingdon: Routledge, 2011)
- Bird, Timothy, *Financial and Emergency Provision Legislation 2009-2010* (Dublin: Round Hall, 2011)
- Black, Gillian, *Publicity Rights and Image: Exploitation and Legal Control* (Oxford: Hart, 2011)
- Butler, Mike (ed), *E-commerce and Convergence: a Guide to the Law of Digital Media*, 4th ed (Haywards Heath: Bloomsbury Professional, 2011)
- Circus, Philip, *Promotional Marketing Law: a Practical Guide*, 6th ed (London: Sweet & Maxwell, 2011)
- Costello, Kevin, *The Court of Admiralty of Ireland 1575-1893* (Dublin: Irish Legal History Society, 2011)
- Dunleavy, Nathy, *Competition Law: a Practitioner's Guide* (Haywards Heath: Bloomsbury Professional, 2010)
- Farbey, Judith and RJ Sharpe, *The Law of Habeas Corpus* (Oxford: OUP, 2011)
- Goodman, Andrew, *Mediation Advocacy*, 2nd ed (London: Nova Law & Finance, 2010)
- Goyder, Joanna, *EU Distribution Law*, 5th ed (Oxford: Hart, 2011)
- Harris, Brian, *Disciplinary and Regulatory Proceedings*, 6th ed (Bristol: Jordans, 2011
- Lastra, Rosa M, *Cross-Border Insolvency* (Oxford: OUP, 2011)
- Mullen, Mark, *Companies Limited by Guarantee*, 3rd ed (Bristol: Jordans, 2011)
- Owen, Lynette (ed), *Clarke's Publishing Agreements: a Book of Precedents*, 8th ed (Haywards Heath: Bloomsbury Professional, 2010)
- Pope, David, *Mooting and Advocacy Skills*, 2nd ed (London: Sweet & Maxwell, 2011)
- Silva-Tarouca Larsen, Beatrice von, *Setting the Watch: Privacy and Ethics of CCTV Surveillance* (Oxford: Hart, 2011)
- Tranter, Kieran, (ed) *Reaffirming Legal Ethics: Taking Stock and New Ideas* (Abingdon: Routledge, 2010)

Law Society Council meeting 25 March 2011

Motion: *Guide to Professional Conduct*

"That this Council approves the draft Guide to Professional Conduct (Third Edition)."

Proposed: Brendan Twomey
Seconded: James Cahill

The Council agreed to a consultation process with the profession in relation to the latest draft of the guide, with the exception of the chapter on conflicts of interest, which would form part of a separate consultation process.

Presentation by Behaviour & Attitudes

The Council received a presentation from Behaviour & Attitudes, which addressed a variety of aspects of the recent survey of the profession, including the background, the survey process, the response rate, the sample profile, the proportion of firms' income derived from conveyancing, the percentage of the PII market per insurer, key dates for the PII application process, difficulties with the PII process, cost issues, risk factors, claims, risk management, and a concluding summary.

It was agreed to disseminate the results of the survey to each firm and also to include a report on the survey in the *Gazette*. The possibility of a webcast of the presentation by Behaviour & Attitudes would also be explored.

Professional indemnity insurance

A presentation was made to the Council on behalf of the SMDF. The Council discussed a number of issues arising and agreed that a special Council meeting would be held on Wednesday 6 April 2011 to consider matters further.

The Council considered a report from the PII Task Force in relation to the future of professional indemnity insurance for the profession. The report outlined the various advantages and disadvantages of both a master policy and a freedom-of-choice system and concluded that the balance had shifted in favour of the introduction of a master policy. The key issues supporting this conclusion were outlined as follows:

- The freedom-of-choice market was unstable. There was great uncertainty during the previous renewal period, with two insurers withdrawing from the market. The task force had encountered difficulty in encouraging new entrants.
- The task force also had difficulty with late entrants and concerns as to the capacity of those late entrants to provide good value for money to solicitors.
- The withdrawal of the SMDF for the next indemnity period would reduce available capacity, which could be replaced by predatory insurers who could exploit the vacuum by abusing a dominant position. The profession would no longer have a mutual fund that would dampen the market.
- 50% of the profession had reported problems during the last renewal period. This was despite every effort being made to try and reduce the stress of the renewal period. While not all of the trauma had been caused by insurers, the scale of the problems was extraordinary.
- Indeed, matters had become so severe for some firms that they were fearful during the last renewal period that they might not get cover at all, and they remained fearful for the next indemnity period.
- Given the trauma of what had occurred in a dysfunctional freedom-of-choice market, the PII Task Force believed that the Society had no real alternative but to consider a change of system.

The task force indicated that it was reasonable to anticipate that there would be resistance to a master policy on the grounds of (a) a possibly increased cost, and (b) a fear that 'good firms' would end up subsidising 'bad firms'.

Firstly, while a master policy would ensure that all members would receive quotes, if a firm was a high risk, the quote would reflect that risk. While the freedom-of-choice model was putting 'bad firms' out of business, it also had unfair consequences. The Society was aware of well-run firms that had claims against them by reason of having accepted undertakings from solicitors who had subsequently been struck off – these firms were unlucky, not negligent, yet they were being quoted vastly increased premiums. A master policy would avoid this. Well-managed firms would pay less than badly managed firms. The relative weighting would be fair and transparent.

Secondly, there was an issue in relation to cost. Member firms would want to know what premium they would have to pay. The task force could not say that it would cost less, and it was certainly unlikely to do so for all firms. The task force's insurance advisor was working on an indicative costing schedule that would enable firms to estimate the likely premium that they would have to pay under the new model. Again, the model would be transparent and fair.

The task force noted that there was a downside, of course, in that anybody who believed that they would have to pay more than they currently paid would instinctively be reluctant to embrace a master policy, especially in the current difficult times when many firms had difficulty paying their premium at last renewal.

However, what all firms would get under a master policy was:

- Certainty of a quote – insurance should be available to all firms,
- Reward for good risk management – there would be no fundamental unfairness as, otherwise, well-managed firms would be subsidising badly managed firms,
- Transparency in how the premium was calculated,
- A smoother renewal process,
- Less uncertainty at each renewal period and vastly increased stability,
- Certainty for members that bad luck in the course of one year would not automatically jeopardise their livelihood, and
- Guaranteed run-off cover available to all firms.

The Council authorised the task force to engage with the insurance market with a view to obtaining more accurate information on the likely cost of a master policy and, in particular, on the formula that would be used to calculate the premiums if a master policy was introduced. It was agreed that the Society would engage in a consultation process with the profession once this further information was available.

Conveyancing Conflicts Task Force

The Council approved the terms of reference for the Conveyancing Conflicts Task Force, as follows: "To review the Society's existing guidance and regulations relating to solicitors acting for both vendor and purchaser in conveyancing transactions and to examine also the systems in other jurisdictions with a view to making any recommendations for change considered appropriate."

The Council approved the membership of the task force, as follows: *chair* – Catherine Treacy, former chief executive, Property Registration Authority; *members* – Patrick Dorgan, former chair, Conveyancing Committee; Brendan Twomey, chair, Guidance and Ethics Committee; Dan O'Connor, chair, eConveyancing Task Force; Deirdre Fox, vice-chair, Conveyancing Committee; Gerard Doherty, past-president; Ken Murphy, director general; Niall Farrell, Council member; Owen O'Connell, Finance Committee member; John P Shaw, Council member; *secretary* – Catherine O'Flaherty. G

BRIEFING

Legislation update 10 March – 8 April 2011

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

SELECTED STATUTORY INSTRUMENTS

Circuit Court Rules (Discovery) 2011
Number: SI 122/2011
Contents: Substitutes order 32, rules 5 and 7, to clarify the county registrar's jurisdiction to determine an issue of privilege on an application for inspection of documents and to determine liability for costs in proceedings for discovery.
Commencement: 21/3/2011

Circuit Court Rules (Hague Convention 1996) 2011
Number: SI 121/2011
Contents: Inserts new rule 7 into order 59 to prescribe the procedure in respect of proceedings under the *Protection of Children (Hague Convention) Act 2000* and the *Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in respect of Parental Responsibility and Measures for the Protection of Children 1996*.
Commencement: 21/3/2011

Circuit Court Rules (Multi-Unit Developments Act 2011) 2011
Number: SI 153/2011
Contents: Inserts a new order 46B into the *Circuit Court Rules* to provide for the procedure in respect of proceedings under the act.
Commencement: 31/3/2011

District Court (Criminal Law (Insanity) Act 2010) Rules 2011
Number: SI 154/2011
Contents: Amends order 23A of the *District Court Rules* to facilitate the operation of the act.
Commencement: 31/3/2011

Finance Act 2010 (Section 37(1)(i)) (Commencement) Order 2011
Number: SI 114/2011
Contents: Appoints 1/1/2011 as the commencement date for s37(1)(i) (providing for the amendment of the *Taxes Consolidation Act 1997*, s262, which requires a relevant deposit taker to issue to the person entitled to the relevant interest a statement showing details of deposit interest retention tax deducted from a payment of relevant interest).

Finance Act 2010 (Section 37(1)(f) (g) and (h)) (Commencement) Order 2011
Number: SI 115/2011
Contents: Appoints 1/1/2011 as the commencement date for s37(1)(f), (g) and (h) (providing for the amendment of the *Taxes Consolidation Act 1997*, ss258, 259 and 260, which relate to the return and collection of deposit interest retention tax deducted by relevant deposit takers).

BRIEFING

Health and Social Care Professionals Act 2005 (Part 8) (Commencement) Order 2011
Number: SI 144/2011
Contents: Appoints 31/3/2011 as the commencement date for part 8 (dissolution of the National Social Work Qualifications Board) of the act.

Housing (Miscellaneous Provisions) Act 2009 (Commencement) Order 2011
Number: SI 83/2011
Contents: Appoints 1/4/2011 as the commencement date for s19 (provision of social housing support), s20 (social housing assessment – except for subsection (5)), s21 (summary of social housing assessments), other 2009 act provisions related to ss19-21 of the act.

Housing (Sale of Houses to Long-standing Tenants) Regulations 2011
Number: SI 82/2011
Contents: Sets down the details of a fixed-term scheme for the purchase of local authority houses by long-standing local authority tenants, involving discounts up to 45% off the market value for tenants with 15 years' tenancy. Includes form of transfer order under the *Housing Act 1966*, s90.
Commencement: 24/2/2011

Multi-Unit Developments Act 2011 (Section 27) (Prescribed Bodies) Order 2011
Number: SI 112/2011
Contents: Relates to the nomination of chairpersons of mediation conferences in the event that the parties do not agree on the chairperson. In such cases, the chairperson shall be appointed by the court and shall be either a practising barrister or practising solicitor of not less than five years' standing or a person nominated by one of the bodies prescribed by this order.
Commencement: 1/4/2011

Patents (Amendment) Rules 2011
Number: SI 79/2011
Contents: Aligns the patent rules with the European Economic Agreement (EEA) for the purposes of registering an address for service from EEA countries and to allow EEA patent agents to represent patent applications in this country. Amends the Patents Office form 1 (request for the grant of a patent) to allow applicants communicate with the Patents Office by email, with extra sheets for supplementary information relating to additional applicants and inventors also included in the form.
Commencement: 23/2/2011

Planning and Development (Amendment) Act 2010 (Commencement) Order 2011
Number: SI 132/2011
Contents: Appoints 23/3/2011 as the commencement date for ss23(a), 23(c), 41(a), 41(b) and 49 of the act.

Social Housing Assessment Regulations 2011
Number: SI 84/2011
Contents: Prescribes the procedures for households to apply to housing authorities for social housing support and the conduct and review of social housing assessments.
Commencement: 1/4/2011

Prepared by the Law Society Library

ONE TO WATCH

One to watch: new legislation

Criminal Law (Insanity) Act 2010
The *Criminal Law (Insanity) Act 2010* has amended the *Criminal Law (Insanity) Act 2006* to effectively permit conditional discharge from the Central Mental Hospital. The 2010 act makes provision for the effective enforcement of conditional orders of discharge by the Mental Health Review Board for patients who are detained in the Central Mental Hospital by order of the court.

The *Criminal Law (Insanity) Act 2006* established the Mental Health (Criminal Law) Review Board, which is the independent body responsible for reviewing the detention of patients at the Central Mental Hospital who have been referred there arising from a decision by the courts that they are unfit to be tried or found not guilty of an offence by reason of insanity.

Section 13 of the 2006 act provided that the review board should review the detention of patients and could grant conditional or unconditional discharge if it considered that the detention was no longer required. However, section 13 did not provide that the conditions attached to a conditional discharge order could actually be enforced. Consequently, there has been considerable difficulty in the granting of such orders.

The chairperson of the review board, Mr Justice McCracken, stated: "The failure to amend the 2006 law meant that the board's considerations in relation to the discharge of some patients to the community with safeguards in place for the patient and the public has been, of necessity, severely curtailed."

This weakness in the 2006 act created "a relatively black-and-white situation where a person either required in-patient treatment or the person was completely cured", as stated by the then Minister of State for Health, John Moloney. "This has resulted in difficulties, not only for the patients concerned, but also for the Central Mental Hospital, whose limited capacity is being used up by the retention of patients who might otherwise be considered for conditional discharge under the act."

Since the board was established in 2006, it has only made two orders for discharge – an unconditional discharge in July 2010 and the first conditional discharge, which was made as recently as March 2011.

In its observations on the *Criminal Law (Insanity) Bill 2010*, the Irish Human Rights Commission (IHRC) stated that it "welcomes the provision of the 2010 bill, which provides for the enforceability of conditions specified by the review board, where the board orders the conditional discharge of a person detained under the 2006 act".

The IHRC recommends that "adequate resources should be allocated to put in place the types of community outpatient treatment or supervision that will be necessary to allow for conditional discharge, as soon as is reasonably possible, where a person is deemed suitable for such discharge."

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

CONSTITUTIONAL

Judicial review

Administrative law – employment law – arbitration – Defence Forces – economic downturn – reduction in pay – role of Government – legitimate expectation – whether Government entitled to reduce allowances paid – whether Government obliged to engage in arbitration process first – Defence Act 1954 – Payment of Wages Act 1991 – Bunreacht na hÉireann 1937.

The applicant was a member of the Defence Forces and instituted judicial review proceedings against the State. It was the applicant's contention that the State was not entitled to enforce reductions in the amount of a certain allowance (the RDF allowance) that the applicant received. Arising from the economic downturn, the Government had decided to unilaterally reduce certain allowances paid to all public servants, including the RDF allowance. The applicant submitted that the State was obliged to engage in a procedure involving the use of a conciliation and arbitration scheme before such reductions could be put into effect. It was contended that these procedures had to be fully exhausted before such reductions could be unilaterally imposed. It was further submitted that the applicant and his colleagues had a legitimate expectation that such a payment would be made and had a legitimate expectation that the agreed process of arbitration would be utilised first. On behalf of the State authorities, it was submitted that, due to the serious decline in the economic circumstances of the State, the common good required that the Government take strong budgetary action to reduce the gap between the State's revenues and expenditures. Under article 28.2 of the Constitution, the Government had clear constitutional functions and duties in the area of budgetary control in the interests of the common good. This overriding duty and right of Government was reflected and expressly acknowledged in the relevant arbitration scheme.

Edwards J refused the reliefs sought, holding that it was part of the constitutional mandate of the Government that it should be able to act swiftly and – if necessary – unilaterally in urgent protection of the national interest. Under article 28 of the Constitution, the Government had a very wide freedom of action pursuant its mandate to discharge the executive power of the State in the area of budgetary control in the public interest or in the interests of the common good. The applicants had been treated in the same way as everybody else in the public service and had not been singled out for special treatment or discrimination. In the particular circumstances of the case, there was nothing to conciliate or to arbitrate about. If one particular interest group was allowed to make representations concerning the intended measure, then every other interest group would have to be afforded the same facility. The Government would potentially have then become mired in an extensive controversy, which would have most likely given rise to significant delay in the implementation of the relevant measures, to the prejudice of the overall national interest. The *Payment of Wages Act 1991* had no application in the circumstances of this case. The reduction in the PDF allowance was not a 'deduction' from wages payable, it was a reduction of the allowance payable.

***McKenzie and another v Minister for Finance and Others*, High Court, 30/11/2010,** [2010] 11 JIC 3003

EUROPEAN

Primacy of European law

Immigration – refugee law – domestic statutory time limit – deportation – principles of equivalence and effectiveness – whether domestic statutory time limit breached European law – Refugee Act 1996 – Procedures Directive *(Council Directive 2005/85/EC)* – Illegal Immigrants (Trafficking) Act 2000.

The applicants had been refused refugee status in the State and had sought leave to bring judicial review proceedings against the refusal. The applicants were South African nationals, and the first applicant was the mother of the second and third applicants. It was contended on her behalf that she had suffered persecution in South Africa and, in particular, from a local chief. The Refugee Appeals Commissioner and the Refugee Appeals Tribunal had refused the application, and the minister informed the applicants that he was refusing their application and making deportation orders in respect of all of them. Of immediate concern in this application was that the present application to challenge these decisions was well outside the 14-day time limit prescribed by section 5 of the *Illegal Immigrants (Trafficking) Act 2000*. The court considered this matter in the context of EU law as to whether the domestic statutory time limit complied with EU law. The applicants maintained that key aspects of the 1996 act were incompatible with article 23 and article 39 of the *Procedures Directive* (Council Directive 2005/85/EC).

Hogan J granted leave, holding that no satisfactory explanation had been offered by the applicants in respect of the delay in instituting proceedings. In the ordinary way, the court would not have been prepared to grant an extension of time under section 5 of the 2000 act. European case law had made it clear that a member state was entitled to apply a national limitation period, even in cases where the member state had failed properly to transpose the relevant directive, provided that the limitation period complied with the principles of both equivalence and effectiveness. It was compatible with Community law to lay down reasonable time limits for bringing proceedings in the interests of legal certainty that protected both the taxpayer and the authorities concerned. The section 5 time limit for judicial review of immigration matters was significantly shorter than the general time limit for judicial review prescribed by order 84, rule 21(1) of the *Rules of the Superior Courts*. Section 5 of the 2000 act did not comply with the principle of equivalence, since the 14-day period was considerably shorter than, for example, the eight weeks for judicial review as set out in section 50(2) of the *Planning and Development Act 2000* (as amended). As section 5 of the 2000 act failed the principles of equivalence and effectiveness, it followed that the limitation provision could not be relied upon as against the applicants insofar as the claim based on the *Procedures Directive* was concerned.

***D(T) & D (N) (applicants) v Minister for Justice, Equality and Law Reform (respondents)*, High Court, 25/1/2011,** [2011] 1 JIC 2503

IMMIGRATION

Validity of marriage

Asylum – foreign marriage – religious marriage – documentation – proofs – Refugee Act 1996, *as amended.*

The proceedings raised similar questions to the related case of *Hamza v Minister for Justice, Equality and Law Reform* (2009 no 794 JR). The applicants were nationals of Somalia who had fled the country, and the second-named applicant was the subject of a family reunification procedure as the spouse of the first-named applicant. The first-named applicant had been unable to provide documentation of the marriage, and the ceremony was alleged to have been religious. The application for family reunification had been refused on the basis of inadequate documentation. The question arose as to the required formalities for a valid marriage and

how the marriage was valid under Irish law.

Cooke J held that the court would grant the application for an order of *certiorari* to quash the refusal by the respondent of the applicant on the basis that it was predicated on a mistaken view that a foreign marriage contracted in a religious ceremony was incapable of recognition as valid under Irish law and that it was based upon an incorrect interpretation of the test of a marital relationship applicable under section 18(3)(b) of the *Refugee Act 1996*. It still was possible that the marriage was valid under Irish law as a common law marriage.

***Hassan & Other (applicants) v Minister for Justice, Equality & Law Reform (respondents)*, High Court, 25/11/2010,** 11 JIC 2502

PLANNING AND DEVELOPMENT

Judicial review

Development plan – ministerial direction – legitimate expectation – standard of review – fair procedures – Interpretation Act 2005 – Planning and Development Act 2000.

The applicant was a landowner of lands zoned for economic development. The applicant challenged the direction of the minister, issued pursuant to section 31 of the *Planning and Development Act 2000*, requiring Dun Laoghaire Rathdown County Council to delete their designation of Carrickmines as a district retail centre. The council then amended its development plan accordingly. The minister had delivered a first direction, which was then replaced by a second direction, and both were similar, though not identical, in terms. The issue arose as to whether the minister could conclude that the plan had failed to set out an overall strategy, which the minister could take into account and whether the conclusion of the minister was sustainable. The question arose as to the legitimate expectations of the application and the standard of review, the application of the *Interpretation Act 2005*, the proper interpretation of section 31 of the 2000 act, and relevant criteria and the application of principles of fair procedures.

Clarke J held that the two directions of the minister had to be quashed. There was a general obligation that all parties be given an opportunity to be heard in relation to planning matters. Even if the minister had a legitimate basis for intervening pursuant to section 31, the minister had a range of options open to him as to the precise form of direction to give. At a minimum, the minister was obliged to afford some proper level of ability to make representations to all interested parties. Even if the direction was sustainable otherwise, the failure to give interested parties an opportunity to be heard rendered the direction invalid. No legitimate expectation arose on the facts.

***Tristor Limited (applicant) v Minister for the Environment & Others (respondents)*, High Court, 11/11/2010,** [2010] 11 JIC 1103

PRACTICE AND PROCEDURE

Inordinate delay

Set aside renewal of summons – order 8, rule 2, Rules of the Superior Courts – *whether the plaintiff's proceedings ought to be struck out on the grounds of inordinate delay.*

The plaintiff issued proceedings against the defendants in 1997, which related to events alleged to have occurred in 1991. Essentially, the plaintiff claimed that she was sexually assaulted by the first-named defendant and that the other defendants were negligent in their role or supervision of the first defendant. For some reason, neither defendant was served with the plenary summons until December 2009. An *ex parte* order had been made in July 2009 by Peart J to renew the summons for a period of six months. Following service of the summons, the first-named defendant entered an appearance and then brought a motion to have the proceedings struck out by reason of inordinate and inexcusable delay in both the commencement and prosecution of the proceedings. The second-named defendant did not file an appearance, but instead brought a motion pursuant to order 8, rule 2 seeking to have the order of Peart J set aside.

Hogan J allowed the applications of both defendants, holding that, on the basis of decided case law, any order made *ex parte* renewing a summons must be regarded as being in the nature of a provisional order. Furthermore, a judge hearing a matter *inter partes* was not bound or constrained by any view formed by the judge who granted the order *ex parte* (*Adam v Minister for Justice* [2001] 3 IR 53 and *East Donegal Co-operative v Attorney General* [1970] IR 317 followed and applied).

Having regard to the striking delay in this case, the fact that no obvious 'good reason' for renewing the summons was advanced, and based on fundamental constitutional and *European Convention on Human Rights* principles, the order of Peart J ought to be set aside.

In respect of the first-named defendant, the risk of injustice and prejudice arising from the delay was obvious. The plaintiff would also suffer loss, but the fact that she was pursuing a professional negligence action against her former solicitors was a relevant factor in terms of assessing the question of prejudice. Having regard to all matters, the prejudice that the first-named defendant would suffer significantly outweighed the prejudice that would be visited on the plaintiff by reason of the gross and unexplained delay in pursuing the claim herein.

***Siobhan Doyle (plaintiff) v Gibney and Others (defendants)*, High Court, 18/1/2011,** [2011] 1 JIC 1801

Summary judgment application

Development of land – representations made – whether loan due to be repaid on completion of development.

The plaintiffs advanced a loan of €3,606,000 to the defendants for a term of 12 months from the date of the first drawdown of the facility, unless a demand for earlier payment was made, in accordance with clause 6 of the facility letter. The plaintiffs sought an application for summary judgment for non-payment. The defendants did not dispute the loan, but did dispute that the loan was due for repayment at this time. The loan was for professional fees and planning contributions in relation to development land. The defendants claimed that representations were made by and on behalf of the plaintiffs that the money borrowed would be repaid when the development of the lands on the site in question was completed.

McGovern J granted the application for summary judgment. Applying the tests laid down in *Aer Rianta v Ryanair* ([2001] 4 IR 607) and *Harrisgrange Ltd v Dunkan* ([2003] IR 4 IR 1), there could be no reasonable basis on which the defendants could have believed that the monies were not repayable until the building development was complete. On any view of the facts, it did not seem that the defendants have satisfied the court that they have a fair or reasonable probability of establishing a *bona fide* defence.

***ACC Bank PLC (plaintiff) v Pat Flynn and Helen McGardle (defendants), High Court, 3/12/2010,** [2010] 12 JIC 0303 G

Eurlegal

Edited by TP Kennedy, Director of Education

Closing the gap – Energy Efficiency Plan 2011

Prompted by a fear of failing to meet the EU's target of saving 20% of its primary energy consumption by 2020, the European Commission has adopted 'Energy Efficiency Plan 2011'. Energy efficiency is regarded as a key tool to strengthen Europe's competitiveness, improve security of energy supply and decrease emissions. Based on recent projections with a 'business as usual' scenario, it is estimated that, by 2020, the EU will only make a saving in the region of 9% – less than half of the 20% target that was set in 2007. The reasons given for this limited progress are market and regulatory failures, including insufficient priority on policy agendas, low awareness of benefits, low mobilisation of available funds, and a shortage of skills.

On 8 March 2011, the commission published its communication on the plan (COM (2011) 109 final) setting out a strategy with ideas for energy saving. Legislative proposals with binding measures are due to follow in the coming months. The area of greatest energy-saving potential relates to buildings, followed by transport and industry, with the public sector expected to lead by example. Reaching the 20% target is imperative and, to ensure that it is met, the commission has proposed a two-step approach to target setting: in 2013, member states' individual efforts will be evaluated against the overall 20% objective; if the 2013 review reveals that the target is unlikely to be reached, then the commission will propose mandatory national targets for 2020.

The commission is to consider introducing rules concerning BAT levels

Public sector

The focus on the public sector is not surprising, given that public spending accounts for 17% of EU GDP and around 12% of the EU's building stock is publicly owned or occupied. Four main strands comprise the public sector role: energy efficiency in public spending, renovation of public buildings, energy performance contracting, and implementing energy efficiency on the ground. In terms of energy efficiency in public spending, the public sector is already to take into account energy efficiency criteria when procuring vehicles (Directive 2009/33/EC) and office equipment (EC no 106/2008). From 2019, this approach will also cover the sector's new buildings (Directive 2010/31/EU). The commission proposes to build on this, so that high standards of energy efficiency are systematically applied when public authorities purchase goods (for example, ICT equipment), services (for example, energy) and works (for example, refurbishment of buildings). The commission has also proposed that public bodies at least double the current renovation rate of buildings, and will present a legal instrument requiring public bodies to refurbish at least 3% of their buildings (by floor area) each year. Energy performance contracting is seen as a significant tool in building refurbishment, but its deployment has been hampered in many member states due to ambiguous legal frameworks. The commission is to advance legislative proposals to overcome this issue in 2011. On the ground, implementation of energy efficiency is centred on the EU-supported 'Covenant of Mayors' (www.eumayors.eu), of which Dublin (www.codema.ie) is a member. The commission will continue to support this local approach, which is realised through sustainable energy action plans. In 2011, it will launch a new 'Smart Cities and Smart Communities' initiative to develop innovative low-carbon and efficient solutions at municipal level.

Buildings

Buildings represent a large energy saving potential – nearly 40% of final energy consumption is in buildings – but the current rate of renovation and use of 'most efficient' appliances is too low. District heating, in the context of integrated urban planning, is to be explored further. One significant barrier is 'split incentives' (where owners and tenants are reluctant to pay for upgrading energy performance of a rented property). The commission is expected to develop legislative provisions obligating member states to introduce measures – in line with national property law – to address this hurdle. Energy service companies (ESCOs) (Directive 2006/32/EC) are considered to play a key role in overcoming this problem in public and commercial buildings, but currently there is little information on them. The commission will propose that member states provide market overviews, lists of accredited energy service providers, and model contracts. The European public/private partnership expertise centre (www.eib.org/epec) is also referred to as providing useful information. ESCOs will need access to financial resources if they are to play their role – innovative financing with high leverage (instruments may include provision of liquidity and guarantees, credit lines and revolving funds) at national and European level is seen as an appropriate way to spark the market's development.

Transport

Accounting for 32% of final energy consumption, transport is another key area for energy savings. The forthcoming *White Paper on Transport* will address this by a variety of elements, including the introduction of advanced traffic management systems, infrastructure investment, the creation of a Single European Transport Area, smart pricing, and efficiency standards for all vehicles.

Industry

The commission's plan also examines energy efficiency in the context of industry, specifically the efficient generation of heat and electricity, energy efficiency in electricity and gas networks, energy efficiency as a business sector, increasing the competitiveness of European manufacturing industry, and research and innovation as a catalyst for cost-effective energy-efficient technologies. The energy sector uses about 30% of the EU's primary energy consumption to transform energy into electricity and heat and to distribute it. New generation capacity and infrastructure needs to be built (COM (2010) 677/4 – *Energy Infrastructure Priorities for 2020 and Beyond*). Energy ef-

ficiency is required to be taken into account, as is 'best available technology' (BAT). The commission is to consider introducing a legal provision requiring member states to have achievement of BAT levels to new installations as a mandatory condition for authorisation of new capacity and to ensure that existing installations are upgraded to BAT levels when their permits are updated.

The effective recovery of heat losses from electricity and industrial processes is another area that the commission will address, along with a greater use of (high-efficiency) cogeneration. The commission proposes that electricity distribution system operators provide priority access for electricity from combined heat and power. Energy efficiency priorities in network regulations and tariffs, network and technical codes also appear to be on the cards. With respect to the business sector, instruments are needed to put a financial value on energy savings and link the profit of utilities to energy efficiency instead of volume delivered energy. The commission is to propose that all member states create a national energy saving obligation scheme.

While great progress in terms of energy efficiency has been made in industry, there is still more to do. Energy-saving opportunities remain, and the Emissions Trading Scheme and *Energy Taxation Directive* (Directive 2003/96/EC, due to be reformed) are regarded as vehicles for their take-up. Obstacles to investment are evident, most acutely for small and medium enterprises, and the commission hopes to tackle these by providing member states with information (for example, about legislative requirements and criteria for subsidies to upgrade machines) and developing appropriate incentives (for example, tax rebates, funding for energy audits). For larger companies, the same challenge is to be met by developing incentives to introduce an energy management system and by regular mandatory energy audits. In addition, the commission is investigating whether and which energy performance (ecodesign) requirements may be appropriate for standard industrial equipment (for example, motors, large pumps, melting, casting), and continues to encourage use of voluntary agreements on implementing energy efficiency processes and systems (Directive 2006/32/EC). The commission will continue to promote development, testing and deployment of new energy efficient technologies through the Strategic Energy Technology Plan (http://ec.europa.eu/energy/technology/set_plan_en.htm).

Funding

Market and regulatory barriers exist in terms of funding. The commission believes that market incentives and price signals need to be intensified through energy and carbon taxes, as well as through national energy-saving obligations for utilities – complemented by mechanisms to improve availability of suitable financing products. The EU currently supports energy efficiency through the cohesion policy (see key amendments Regulations (EC) no 397/2009 and (EU) no 832/2010); the Intelligent Energy Europe Programme (2007-2013), which, among other things, provides grants to local and regional authorities for technical assistance costs of developing bankable sustainable energy investments; intermediated finance; the European Economic Recovery Programme; and the framework programme for research, technological development and demonstration (2007-2013). The commission is to analyse the scope for improvement of current EU financial mechanisms and options to trigger investments in the scale of energy efficiency required to attain the 2020 EU energy and climate objectives.

Consumers

Consumers are not left out of the plan. The commission aims to research consumer behaviour and purchasing attitudes and pre-test policy solutions on consumers to ascertain those most likely to create desired behavioural change. In addition, the commission will continue its current ecodesign plan (COM (2008) 660), setting stricter consumption standards for heating boilers, water heaters, computers, air conditioners, tumble driers, pumps, vacuum cleaners and lighting. A survey on consumer understanding of energy labels, and facilitation of a market update of more efficient building components, are also likely. Deployment in the future of a European 'smart grid' will provide the information to allow consumers to save energy. By 2020, member states are required to deploy smart electricity meters for at least 80% of their final consumers, provided this is supported by a favourable national cost-benefit analysis (Directive 2009/72/EC). Smart grids and smart meters are regarded as the backbone for smart appliances, adding to energy savings. Smart meters are expected to allow ESCOs to offer credible energy performance contracts.

The binding measures proposed in the plan are to be implemented by way of legislative instruments, including revision of the existing directives on energy services (Directive 2006/32/EC) and combined heat and power (Directive 2004/8/EC). We should see these proposals in 2011, along with the adoption of new ecodesign and energy labelling measures, the launch of the 'Smart Cities and Smart Communities' initiatives, and proposals on financing tools.

Diane Balding is a member of the EU and International Affairs Committee.

Citizenship and residency rights

On 8 March 2011, the Court of Justice of the European Communities handed down its much anticipated decision in Case C-34/09, *Ruiz Zambrano v Office National de l'Emploi*. The court ruled that article 20 of the *Treaty on the Functioning of the European Union* (TFEU) – which lays down that nationals of member states are citizens of the European Union – is to be interpreted as preventing member states from refusing a right of residence and a right to a work permit to third-country national parents of EU citizen minors, where such a refusal would deprive those children of genuine enjoyment of the substance of their rights as EU citizens.

The facts of the case concerned a Colombian national, Mr Zambrano, and his wife, who made an asylum application in Belgium. This was turned down by the Belgian authorities, although a non-refoulement order was made so that Mr Zambrano and his family would not be forced to return to Colombia, which would place them in a position of real danger. Despite the rejection of their asylum application, they made a residence application, which was refused. The Zambranos had a second child, who acquired Belgian nationality because they did not take the steps necessary under Columbian law to have him recognised as a Columbian national by registering him with the diplomatic authorities. Belgian law provided that any child born in Belgium, who would be stateless if he or she did not have Belgian nationality, shall be Belgian. Although he did not hold a work permit, Mr Zambrano was working in a contract of employment and was subjected to statutory social security deductions. Following an inspection by state officials at his place of work, Mr Zambrano

lost his job and was refused unemployment benefits. The Zambranos made another application for residence, which was rejected on the grounds that the Zambranos had tried to legalise their residence by using the Belgian nationality of their child, which was in turn acquired by failing to register the child with the Columbian authorities. Mr Zambrano, who now had a third child, also a Belgian national, challenged this rejection of his application on the grounds that he enjoys a right of residence by virtue of the *EC Treaty* or a derived right of residence recognised in Case C-200/02, *Zhu and Chen*, for the ascendant relative of a minor child who is a national of a member state.

The employment tribunal in Brussels hearing the appeal referred three questions to the court, by which it asked (a) whether the provisions of the TFEU on EU citizenship confer a right of residence upon a citizen of the EU in the territory of the member state of which that citizen is a national, irrespective of whether he has previously exercised his right to move within the territory of the member states; (b) whether these provisions, in conjunction with certain provisions of the *Charter of Fundamental Rights*, mean that a relative in the ascendant line of an infant who is a national of a member state (regardless of whether that citizen has exercised free movement rights) is entitled to a secondary right of residence, which that same third-country national would have if the child who is dependent upon him were an EU citizen who is not a national of the member state in which he resides; and (c) whether in these circumstances such a third-country national is entitled to be exempted from the requirement to hold a residence permit.

The court rephrased these questions, stating that essentially they ask whether the provisions of the TFEU on EU citizenship are to be interpreted as meaning that they confer on a relative in the ascending line, who is a third-country national, upon whom his minor children, who are EU citizens, are dependent, a right of residence in the member state of which they are nationals, and also exempt him from having to obtain a work permit in that member state.

The court then handed down a very succinct judgment, indicating at the outset that the *Citizenship Directive* (Directive 2004/38 of the European Parliament and council (29 April 2004) on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states) does not apply, as there is no movement in this instance. It added that it has stated on many occasions that citizenship of the EU is intended to be the fundamental status of nationals of the member states. As such, article 20 of the TFEU precludes national measures that have the effect of depriving citizens of the EU of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the EU. Refusing to grant a right of residence to a third-country national with dependent minor children in the member state where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect. It must be assumed that such a refusal would lead to a situation where those children – citizens of the EU – would have to leave the territory of the EU in order to accompany their parents, the court reasoned. In those circumstances, those citizens of the EU would be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the EU.

The European Court of Justice – mmm ... flags

It is interesting to note that the court's judgment does not address the issue of reverse discrimination raised by the national court in its questions of referral. Reverse discrimination refers to the less preferential treatment by member state governments of its own EU citizens who have not exercised their rights of free movement, versus its treatment of nationals from other member states. The court has traditionally maintained that EU law cannot be applied to purely internal situations. In other words, in order to benefit from the treaty rules on free movement, some movement between member states is required. However, this position has been eroded somewhat in case law, including in the case of *Zhu and Chen* referred to above. In this case, the court ruled that what is now article 21 of the TFEU (providing that every citizen of the EU shall have the right to move and reside freely within the territory of the member states, subject to limitations and conditions) confers on the non-national parent of a young minor, who is a national of one member state, a right to reside with that minor in another member state. This was despite the fact that the movement concerned was internal: the baby was born in Northern Ireland (which, at the time, granted her Irish citizenship automatically) and moved to England – that is, within the one member state.

Advocate General Sharpston, in delivering her opinion in *Zambrano*, invited the court to deal openly with the issue of reverse discrimination. She considered that the words "right to move and reside freely within the territory of the member states" in articles 20(2)(a) and 21 of the TFEU refer to separate rights to 'move' and 'reside' and that the latter is not contingent on the former. She argued that article 18 of the TFEU, which prohibits discrimination on grounds of nationality, should be interpreted as prohibiting reverse discrimination caused by the interaction between article 21 of the TFEU and national law that entails a violation of a fundamental right protected under EU law, where at least equivalent protection is not available under national law.

Despite the detailed consideration of reverse discrimination by the advocate general, the court did not address this at all. Nor did it consider the issue of the application of fundamental rights, more specifically the right to a family life, which the advocate general did not consider possible to invoke as a freestanding right at the time of the facts. The court did not accept or reject the advocate general's opinion that citizenship confers separate rights to move and to reside, although its conclusion would seem to indicate this, given that the Zambrano children had not moved between member states, but nevertheless it was held that they were entitled to reside with their parents. G

Rosemary O'Loughlin is a member of the EU and International Affairs Committee.

NOTICES

PROPERTY REGISTRATION

Property Registration Authority, Cork Road, Waterford

To whom it may concern – re: property at 5 Waterloo Road, Co Wexford: application by Patricia Doyle for registration based on possession; reference no D2009LR051541K

Take notice that Patricia Doyle, of the above address, has applied to be registered as owner in fee simple of the property at 5 Waterloo Road, Wexford.

Would any person having knowledge of the whereabouts of Patrick Connick or the Connick estate, the reputed freehold owner of the property, contact the undersigned within 21 days of the date of this publication.

Ann Fetton, examiner of titles

RATES

Professional notice rates

RATES IN THE PROFESSIONAL NOTICES SECTION ARE AS FOLLOWS:

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

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

ALL NOTICES MUST BE PAID FOR PRIOR TO PUBLICATION. CHEQUES SHOULD BE MADE PAYABLE TO LAW SOCIETY OF IRELAND. Deadline for June *Gazette*: 18 May 2011. For further information, contact the *Gazette* office on tel: 01 672 4828 (fax: 01 672 4877)

WILLS

Briody, Matthew (deceased), late of Clonlohan, Kilcogy, in the county of Cavan, who died on 11 June 2003. Would any person having knowledge of the whereabouts of will made by the above-named deceased on 2 March 1998, or any other will made by him, please contact John V Kelly & Co, Solicitors, 27 Church Street, Cavan (reference 2/B119); tel: 049 433 1988, fax: 049 436 2653, email: info@jvkelly.com

Carr, James Joseph (deceased), late of 57 Raheny Park, Dublin 5, who died on 5 September 2010. Would any person having any knowledge of a will executed by the above-named deceased please contact Mrs Louise Gordon, 26 Blackrock, Upper Rock Street, Tralee, Co Kerry; tel: 087 248 0186

Clohessy, Martin (Murty) (deceased), late of St Joseph's Hospital, Ennis, Co Clare, formerly of Rehy East, Cross, Co Clare, who died on 17 January 2009. Would any person having knowledge of a will executed by the above-named deceased please contact Martin Clohessy, 17 Fernleigh Close, Castleknock, Dublin 15; tel: 01 640 9315 or 086 356 8442, email: m.clohessy@yahoo.ie

Cunningham, Ellen (deceased), late of Skehogue, Burren, Castlebar, Co Mayo, who died on 24 June 2010. Would any person having knowledge of any will executed by the above-named deceased please contact James Cahill, solicitor, Cahill & Cahill, Solicitors, Ellison Street, Castlebar, Co Mayo; tel: 094 902 5500, fax: 094 902 5511, email: info@jamescahill.com

Durkan, Seamus (deceased), late of Greenfields, Pontoon Road, Castlebar, Co Mayo, who died on 11 August 2010. Would any person having knowledge of any will executed by the above-named deceased please contact James Cahill, solicitor, Cahill & Cahill Solicitors, Ellison Street, Castlebar, Co Mayo; tel: 094 902 5500, fax: 094 902 5511, email: info@jamescahill.com

Durkin, John (deceased), late of 6 Percy French Road, Crumlin, Dublin 12, and formerly of 28 Birchview Heights, Kilnamanagh, Dublin 24. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, who died on 17 January 2011, please contact Richard McGuinness & Co, Solicitors, 24 Sundrive Road, Dublin 12; tel: 01 492 1544, fax: 01 492 1820, email: info@richardmcguinness.ie

Gannon, John (deceased), late of Derrykill, Glenhest Road, Newport, Co Mayo, who died on 11 August 2010. Would any person having knowledge of any will executed by the above-named deceased please contact James Cahill, solicitor, Cahill & Cahill Solicitors, Ellison Street, Castlebar, Co Mayo; tel: 094 902 5500, fax: 094 902 5511, email: info@jamescahill.com

Gannon, William (deceased), late of 33 Glin Court, Coolock, Dublin 17, who died on 7 January 2011. Would any person having knowledge of the whereabouts of a will executed by the above-named deceased please contact Gerard M Neilan, solicitor, Patrick J Neilan & Sons, Solicitors, Golf Links Road, Roscommon; tel: 090 662 6245, fax: 090 662 26990, email: pjneilan@securemail.ie

Keenan, Maureen (deceased), late of 8 St Mary's Park, Navan, in the county of Meath, who died on 12 March 2010. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Paul Brady & Co, Solicitors, 3 Railway Street, Navan, in the county of Meath; tel: 046 902 8011, email: info@paulbradysolicitors.ie

Kelly (Ni Lonergan/Lonergan), Eileen (deceased), late of Patrick Street, Templemore, Co Tipperary. Would any person having any knowledge of any will executed by the above-named deceased please contact James J Kelly & Son, Solicitors, Patrick Street, Templemore, Co Tipperary; tel: 0504 31278, email: info@jjkellylaw.ie

McArdle, Noel (deceased), late of 192 Larkhill Road, Whitehall, Dublin 9, who died on 31 July 1990. Would any person having knowledge of the whereabouts of any will made by him please contact McKeever Taylor, Solicitors, 31 Laurence Street, Drogheda, Co Louth; tel: 041 983 8639, fax: 041 983 9726, email: info@mckeevertaylor.ie

McCarthy (otherwise Carthy), Thomas (deceased), late of Ballybeg, Littleton, Thurles, Co Tipperary, and 46 Lady Margaret Road, London, NWS 2NR, England, who died on 8 October 2010. Would any person having any knowledge of any will executed by the above-named deceased please contact McCarthy Looby & Co, Solicitors, Church Street, Cahir, Co Tipperary; tel: 052 744 1355, fax: 052 744 1000

Mangan, John (Joseph) (deceased), late of Drumcomogue, Knocklong, Co Limerick, who died on 11 October 2010 at South Tipperary General Hospital, Clonmel, Co Tipperary, having made a will on 19 April 1996, witnessed by a solicitor in Limerick whose signature is illegible and a second witness, Lisa Scanlan, legal secretary, Limerick. Would any person having knowledge of the whereabouts of the original will made by the above-named deceased please contact Paul Morris, solicitor, of Henry Shannon & Co, Solicitors, Kickham Arch, Davis Road, Clonmel, Co Tipperary; tel: 052 612 1700, mobile: 085 778 4554, email: paul@hshannon.ie

NOTICES

O'Dea, Michael (deceased), late of Cloncoleman, Lissycasey, Co Clare, who died on 6 March 2011. Would any person having any knowledge of the whereabouts of a will executed by the above-named deceased please contact Lorraine Burke of Desmond J Houlihan & Co, Solicitors, Salthouse Lane, Ennis, Co Clare; tel: 065 684 2244, email: lburke@djhoulihan.ie

O'Reilly, Dympna (deceased), late of Old Road, Ballyvary, Castlebar, Co Mayo, who died on 27 December 2010. Would any person having knowledge of any will executed by the above-named deceased please contact James Cahill, solicitor, Cahill & Cahill, Solicitors, Ellison Street, Castlebar, Co Mayo; tel: 094 902 5500, fax: 094 902 5511, email: info@jamescahill.com

Peggs, Ethel Teresa (deceased), late of Garden Flat, 4 Waterloo Road, Dublin 4. Would any person having knowledge of a will executed by the above-named deceased, who died on 1 February 2009, please contact Maeve Breen, solicitor, MT O'Donoghue & Co, Solicitors, 11 Main Street, Gorey, Co Wexford; tel: 053 942 1137, fax: 053 942 1725, email: maeve.breen@mtodonoghue.com

Phillips, Mary (deceased), late of 25 St Laurence's Park, Wicklow, in the county of Wicklow, who died on 7 December 2010. Would any person having knowledge of a will made by the above-named deceased, or if any firm is holding same, please contact Haughton McCarroll, Solicitors, of 2 Church Street, Wicklow, Co Wicklow; tel: 0404 67755, fax: 0404 68131

Quinn, Felim (deceased), late of 14 Rampark, Lordship, Dundalk, Co Louth. Would any person having knowledge of a will made by the above-named deceased, who died on 15 September 2008, please contact McDonough & Breen, Solicitors, Distillery House, Distillery Lane, Dundalk, Co Louth; tel: 042 933 1143, fax: 042 682 0166

Ruane, James (deceased), late of Ballinamore, Kiltimagh, Co Mayo, who died on 10 March 2011. Would any person having knowledge of any will executed by the above-named deceased please contact James Cahill, solicitor, Cahill & Cahill Solicitors, Ellison Street, Castlebar, Co Mayo; tel: 094 902 5500, fax: 094 902 5511, email: info@jamescahill.com

MISCELLANEOUS

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TITLE DEEDS

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of *Landlord and Tenant (Ground Rents) Acts (No 2) Act 1978* and in the matter of an application by Patrick McAuliffe of Summerhill Cottage, Mallow, Co Cork

Take notice any person having an interest in the freehold estate or any other estate of the following property: 'Vista Villa', 124 Sunday's Well Road, in the parish of St Mary's Shandon and city of Cork.

Take notice that Patrick McAuliffe intends to submit an application to the county registrar for the county of Cork for the acquisition of the freehold interest and all superior interest in the aforementioned property, and any party asserting that they hold a superior interest in the aforementioned property are called upon to furnish evidence of title to the aforementioned premises to the below named.

In particular, such persons who are entitled to the interest of Anthony Butler St Ledger, Henry Mannix, Anthony Butler St Ledger, George Lindsay, Francis Lindsay, Mary De Courcey and Mary O'Malley, under a lease of 5 December 1850 to Edward Dale for a term of 200 years from 29 September 1850 in the aforesaid property are called upon to furnish evidence of title to the below named.

In default of such notice being received, the applicant, Patrick McAuliffe, intends to proceed with the application before the county registrar and will apply to the county registrar for the county of Cork for directions as maybe appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold interest and all intermediate interest are unknown and unascertained.

Date: 6 May 2011

Signed: Peter Fleming & Co (solicitors for the applicant), 30 South Mall, Cork

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 all that messuage and tenement situate partly in Clanbrassil Street and partly in Bachelors Walk in the town and parish of Dundalk, barony of Upper Dundalk, Co Louth: an application by PB Gunne (Dundalk) Limited

Take notice that any person having any interest in the fee simple or in any superior interest in all that messuage and tenement situate partly in Clanbrassil Street and partly in Bachelors Walk in the town and parish of Dundalk, barony of Upper Dundalk and county of Louth, being the property demised in a lease of 1 February 1954 between Marjory Rosalind McDowell and John Clarke of the one part and William Ryan, Mary Ryan, John Carey and Michael Ryan of the other part for the term of 99 years from 1 May 1953, subject to the yearly rent of £40 (€50.79).

Take notice that the applicant, PB Gunne (Dundalk) Limited, intends to submit an application to the county registrar for the county of Louth at the Courthouse, Dundalk, Co Louth for the acquisition of the fee simple and any intermediate superior interest or interests in the aforesaid property and that any party asserting that they hold the said fee simple or any such superior interest in the aforesaid property is called upon to furnish evidence of title to the undermentioned within 21 days from the date of this notice.

In default of any such notice being received, the said applicant intends to proceed with the application before the said county registrar at the end of 21 days from the date of this notice and will apply to 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

NOTICES

the said property are unknown or unascertained.
Date: 6 May 2011
Signed: McDonough & Breen (solicitors for the applicant), Distillery House, Distillery Lane, Dundalk, Co Louth

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (Number 2) Act 1978* and in the matter of an application by Davy Property Holdings
Take notice that any person having an interest in the fee simple estate or any intermediate interests in all that and those the hereditaments and premises now known as 371 and 373 North Circular Road (formerly 3 and 5 Madras Place), Phibsborough, in the parish of St George and city of Dublin, and demised by an indenture of lease dated 15 May 1872 between (1) the Right Honourable Charles Stanley Viscount Monck and the Honourable Henry Power Charles Stanley Monck and (2) Thomas Dunphy, for a term of 150 years from 31 December 1894, and therein described as "all that and those that piece or plot of ground situate lying and being on the east side of Glasnevin Road in the city of Dublin and which is more particularly described in the map thereof hereon delineated in the parish of St George and city of Dublin, together with the dwellinghouses, messuages, tenements and premises erected thereon, known as nos 1, 2, 3, 4, 5, 6 and 7 Madras Place and 160 and 161 Phibsborough Road", held for a term of 150 years from 31 December 1894, subject to but indemnified against the yearly rent of £100 sterling.

Take notice that Davy Property Holdings, being the person entitled to the lessee's interest in the lease, intends to apply to the Dublin county registrar at Áras Uí Dhálaigh, Inns Quay, Dublin 7, for the acquisition of the fee simple estate and all intermediate interests in the said property, and any party asserting that they hold the fee simple or any intermediate interests in the said 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 Davy Property Holdings 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 this said property are unknown and unascertained.
Date: 6 May 2011
Signed: Arthur Cox (solicitors for the applicant), Earlsfort Centre, Earlsfort Terrace, Dublin 2

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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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The ideal candidate will be able to demonstrate:
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- Good knowledge of Financial Services Law to include bonds, derivatives, securitization and structured finance

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

'He crawled up from the sewers – honest!'

Gary Ryder has been battling for seven years to prove that police in Greenwich, Connecticut, had no constitutional right to enter his mansion without a warrant in August 2004. They were looking for a 16-year-old boy – and found a crocodile instead, reports the *Connecticut Law Tribune*.

An officer, looking for the son of a man Ryder once had a relationship with, scaled a fence and entered the house. In a bathroom, he saw a dark object behind frosted glass in a shower. Was it the boy? No. It turned out to be a three-foot crocodile.

Ryder was charged with owning an illegal reptile, which carried a $35 fine. Ryder took his claim that the search was illegal all the way to the Connecticut Supreme Court. He claims to have spent $225,000 in legal fees fighting the fine – enough to buy 98 pairs of Salvatore Ferragamo Pireneo crocodile moccasins at $2,300 each!

No Smoak without fire

A press release issued by *Girls Gone Wild* founder Joe Francis only hints at the troubles he is facing in a Florida courtroom as he defends himself in a lawsuit filed by four women, who say that their racy underage cameos have caused lasting emotional harm.

US District Judge Richard Smoak of Panama City warned Francis that he could be found in contempt of court for his outbursts and unconventional legal tactics, *The Walton Sun* reports. Judge Smoak was particularly troubled by Francis's questioning of a woman identified by the pseudonym 'Plaintiff B', who testified of strained family relationships, homelessness and a commitment to a mental hospital after she appeared in the video.

The Walton Sun prints Smoak's warning, delivered before Francis questioned the witness: "Mr Francis, shut up. You're going to have the whole jury hating you."

Much ado about nothing?

A US federal judge used a Shakespeare put-down in rejecting a lawyer's claim of copyright infringement for a copied sentence. District Judge Dolly Gee said lawyer Kenneth M Stern may have to pay attorney fees for pursuing "such folderol", relating to a claim of copyright for a forwarded sentence-long message, the *Volokh Conspiracy* reports.

The sentence, posted on an email discussion group for consumer attorneys, asked whether anyone had ever had billing problems with a specific forensic accounting firm. The defendant, a lawyer, had forwarded the message to his sister, also a lawyer – who forwarded it to the forensic accountants, according to Stern's complaint.

In a footnote, Judge Gee said: "Plaintiff begins his argument rhetorically, querying whether the following sentence is

copyrightable: 'To be, or not to be, that is the question'. Perhaps a more appropriate play from which to draw quotations would be *Much Ado About Nothing*."

Gee said that some sentences may deserve copyright protection, but Stern's discussion group query isn't among them. Whether a short work deserves copyright protection depends on creativity, she said, adding that the plaintiff's Listserv post displayed "no creativity whatsoever".

US Supreme Court rules against exonerated inmate

A death row inmate, whose case may be portrayed in a film starring Ben Affleck and Matt Damon as his two lawyers, has suffered a defeat in the US Supreme Court, as reported in SCOTUSblog.

John Thompson was seeking to uphold a $14 million judgment obtained after the New Orleans District Attorney's office withheld exculpatory blood evidence in his trial for attempted armed robbery, which led to a conviction and 18 years in prison, and had ramifications in a later murder case. Thompson had maintained that New Orleans' District Attorney Harry Connick had failed to properly train prosecutors about their duty to disclose evidence that would be helpful to the defence.

In a 5-4 opinion, the US Supreme Court overturned the award, obtained under section 1983 of the *Civil Rights Act*. Justice Clarence Thomas wrote the majority opinion. A district attorney may not be held liable for a civil rights violation for failure to train prosecutors based on just one failure to disclose, Thomas wrote in *Connick v Thompson*. Justice Ruth Bader Ginsburg read her dissent from the bench, signalling a serious objection to the majority opinion.

Touchstone Pictures signed a deal to produce a movie on the case, according to stories about the film published in 2009. Ben Affleck and Matt Damon would play the lawyers, according to a *New York Times* story.

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