



Making amends

Is restorative justice the answer to our crowded jails?



Hear, hear!

NAMA cases highlight the borrower's right to be heard



Under your skin

Dodgy implants – developments in product liability

LAW SOCIETY

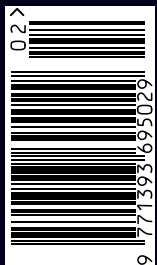
GAZETTE

€4 Jan/Feb 2012



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Minister for Justice, Equality and
Defence



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DES HUDSON
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England and Wales



CAMERON RITCHIE
President, Law Society of Scotland



Law Society of Ireland

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SOCIETY MEETS MINISTER ON BILL

As this is my first message to you in 2012, I would like to take the opportunity to send you every good wish for the New Year. While there is little reason to be hopeful that the economy will improve in the coming 12 months, it appears (from the feedback that the Society has received to date) that there has at least been some relief for the profession in the form of substantially reduced insurance premia during the last renewal period.

The Society would not be so bold as to take full credit for these reductions in premia, which are surely attributable to a number of factors. Nevertheless, we would like to think that the steps taken by the Society during the past year, in particular the serious consideration given to the introduction of a master policy (which remains on the Council agenda), influenced the insurance industry, to some extent, to set lower premia for the profession.

The work done by the Society to introduce a new common form of proposal policy also appears to have achieved its objective of reducing the administrative burden on the profession in the renewal process.

No surprise

Other than that, it will come as no surprise to you to be told that the *Legal Services Regulation Bill* continues to dominate the Society's agenda. The Society met with the Minister for Justice on 16 January to discuss the bill, and the Council of the Society had a lengthy debate about it at its meeting on 20 January. An information forum to enable the profession to discuss the bill took place in Blackhall Place on 23 January.

At its meeting with the minister, the Society set out its key concerns about the bill, including:

- The threat posed to the independence of the profession,
- The running costs of the proposed new authority,
- Concerns for fair procedures,
- The provisions in the bill relating to misconduct, and
- Our concerns about the absence in the bill of any provisions for the transfer of staff from the Law Society to the new authority.

The minister has given assurances that he has no interest in controlling the new authority and has invited submissions in relation to its composition and related matters. However, such is the scope for ministerial and Government involvement in the affairs of the profession in the bill's current form, that the profession must remain vigilant until all of these concerns are

addressed satisfactorily by amendments to it.

At its meeting on 20 January, the Council debated the bill at length and detailed submissions are in the course of preparation. These submissions will be considered and finalised by the Council at a special meeting that has been convened to take place on 10 February.

You should be aware that the Council is not opposing all aspects of the bill. There are many features of the bill with which the Council does not take issue – indeed these run to some 45 sections. Most notably, the Council does not take significant issue with the proposed reforms of procedures relating to costs.

Furthermore, the Council decided that it would not seek to retain control of the handling of client complaints – not because of any inadequacies in the existing system, but because of the need to address the public perception that solicitors should not adjudicate upon complaints against members of their own profession.

However, this should not be confused with regulation of the profession in relation to matters associated with the compensation fund. For as long as the profession has a continuing obligation to maintain such a fund, it must have control over it.

There are many other features of this bill that cause serious concern. If you have not already done so, I would urge you to let the Society have your feedback as soon as possible. The more feedback we have, the better we can represent your interests. The Society expects to be making its detailed submissions to the minister by mid-February. ©



“The Council decided that it would not seek to retain control of the handling of client complaints because of the need to address the public perception that solicitors should not adjudicate upon complaints against members of their own profession”

Donald Binchy
President



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

Get more at lawsociety.ie

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

You can also check out:

- Current news
- Forthcoming events, including the **Law Society's annual conference in the Castlemartyr Resort Hotel, Co Cork on 13 and 14 April 2012**
- Employment opportunities
- The latest CPD courses

... as well as lots of other useful information

Nationwide

Compiled by Kevin O'Higgins



Kevin O'Higgins has been a Council member of the Law Society since 1998

Rights of way

WICKLOW

The Wicklow Bar Association is very active and had its first committee meeting in early January. It is organising its first seminar of the New Year, which will be covering two topics on the *Conveyancing Law Reform Act 2009*, as amended, focusing on registrations of rights of way; and mediation and arbitration. This will take place on 23 February at 5.30pm in the Parkview Hotel, Newtownmountkennedy.

Derelict sites and dangerous structures

LOCAL AUTHORITIES

I'm grateful to Patrick Healy of Dublin City Council, who tells me that over 50 solicitors attended the Local Authority Solicitors' Bar Association annual winter seminar, which was held at the Civic Offices, Wood Quay, on 2 December 2011.

Topics included shared services, derelict sites and dangerous structures, prosecuting companies, buying land from a receiver, and ethical aspects relating to in-house practice. No less than seven excellent speakers gave great presentations on these topics. Members enjoyed dinner in the comfortable surrounds of the Tea Room in the Clarence Hotel. The spring seminar is scheduled to be held in Cork.

DSBA on contentious bill

DUBLIN

The Dublin Solicitors' Bar Association (DSBA), headed by president Geraldine Kelly, and *Legal Services Regulation Bill* gurus Keith Walsh, John Glynn and Stuart Gilhooly, had a constructive exchange of views with Minister Shatter in relation to the bill. The minister and his officials expressed their satisfaction in receiving the DSBA's comprehensive submission, which followed a wide-ranging consultation with members and the larger offices. These submissions will be available on the DSBA website.

The entire judiciary from all courts were invited guests of the DSBA at a dinner held in their honour recently. The gathering included several litigation colleagues. This is only the second year for all judicial colleagues to assemble and proved a huge success.

An important CPD course takes place on 6 February on 'Dealing with vulnerable adults – practice guidance for solicitors'. It takes place in the Radisson, Golden Lane, and details are available on the DSBA website.

Seamus bows out after 35 years

WATERFORD

Gerard O'Herlihy tells me that Seamus McGrath, chief clerk at Waterford Circuit Court Office, is retiring this month after some 35 years of service. Seamus is extremely popular with solicitors, the Bar and judiciary alike. Nothing was ever too much trouble for him and they are losing a fountain of practice and procedural knowledge in the Circuit Office there. To mark the occasion, Waterford solicitors and the Bar have a joint evening planned at Waterford Golf Club on 27 January, when Seamus will be honoured – his wife and children have been invited as guests, together with several members of the judiciary who have worked with Seamus over the years. In addition, a match-play golf event will take place between solicitors and barristers earlier in the day.

Waterford Law Society's hard-working treasurer, Rosa Eivers (Dobbyn & McCoy) welcomed new arrival, baby Isobelle, late in 2011. We send her our congratulations.

On an extremely sad note, members were devastated for Neil Breheny and his wife Jo on the tragic and sudden loss of their young son, Hugh, shortly before Christmas. Neil is a good friend and valued colleague. We continue to wish him and Jo well as they come to terms with their loss.

CPD course by Quinlan

KILDARE

A CPD course on the ubiquitous *Legal Services Regulation Bill* takes place in the Killashee House Hotel on 9 February, organised by Andrew Cody, who has encouraged Michael Quinlan (chair of the Law Society task force on the bill) to update Kildare practitioners.

Let yourself go in Galway!

GALWAY



Edwina Lynch, Jenny Prendergast and Maeve Joyce at the Galway Races with the Galway Bar Association

The results of the election of officers to the Galway Bar Association are as follows: James Seymour (president), David O'Higgins (vice president), Ian Foley (secretary), David Fahy (PRO), Cairbre O'Donnell (treasurer), and committee members Michael Bradbury, Adrian Harris, Claire Irwin, Susan McLoughlin, Antoinette McMahon, Ronan Murphy, Brian O'Callaghan and Brendan O'Connor.

The membership subscription for 2012 is €50 per solicitor. You should send your subscription to: Cairbre O'Donnell, c/o John

C O'Donnell & Son, Atlanta House, Prospect Hill, Galway; DX 4502, Galway. The committee asks that colleagues pay promptly so that they can finance:

- Free CPD seminars, with a guarantee to provide at least the minimum hours required by the Law Society, with 12 hours to be provided before the long vacation and a further 12 hours in the last term of 2012,
- Socials – three evening socials (one at the end of each term), as these have proved to be very popular,
- Day at the races – on the first Monday of race week.

Rule of law fundraiser

Irish Rule of Law International will be holding a concert on Thursday 1 March 2012 in the Presidents' Hall at Blackhall Place, to raise funds for its ongoing work in the developing world.

The concert will draw on the abundance of hidden talent among legal colleagues and friends. A full list of performers will be available on www.irishruleoflaw.ie in the coming weeks.

The evening begins with a wine reception from 7pm and will conclude with a trad session in the Blue Room bar. Tickets are €20 and available from: rpower@irishruleoflaw.ie, or tel: 01 817 5331.

Beauchamps acquires Landwell



John White (Beauchamps Solicitors) and Eddie Evans (Landwell Solicitors)

Beauchamps Solicitors has announced that it is to acquire Landwell Solicitors, the Irish branch of the international network of corporate law firms connected to PwC. Landwell Solicitors has operated in Ireland since 1999. The enlarged firm will operate as Beauchamps Solicitors. Landwell's partners and all its staff and business will move to Beauchamps' offices on Sir John Rogerson's Quay, bringing Beauchamps' staff numbers to 25 partners and 70 solicitors, with 115 employees in total.

In News this month...

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| 7 In-house conference explores Central Bank code | 10 IBA coming to Ireland in 2012 |
| 8 Cohabitants' succession rights | 12 The latest developments on the <i>Legal Services Regulation Bill</i> |

McCann FitzGerald tops table



For the second year running, McCann FitzGerald has been ranked the number one law firm in Ireland for mergers and acquisitions activity by deal value by Experian Corpfin. McCann FitzGerald topped the value league table in 2011 by advising on over €7.7 billion worth of deals in a variety of sectors, including financial services, pharmaceuticals and technology.

Some of the most complex transactions of 2011 included advising on:

- The sale of Quinn's general insurance business to joint venture, Liberty Mutual Direct Insurance Company Limited,
- The demutualisation and acquisition by AIB of EBS Building Society,
- The acquisition by London Stock Exchange-listed BAE Systems plc of AIM and ESM-listed Norkom Group plc (the transaction valued Norkom at approximately €217 million),
- The merger of Azur Pharma with Jazz Pharmaceuticals,
- The sale of Superquinn business and related assets, and
- Sherry Fitzgerald's sale of its London estate agency Marsh & Parsons to publicly quoted LSL Property Services plc for Stg £50 million, among others.



Stamp Office opening hours

The Courts Service has contacted the Society to inform it of revised opening hours of the Stamp Office at Áras Uí Dhálaigh. The previous opening hours, valid until Friday 27 January, were 9.30am to 4.30pm. **The revised opening hours, valid from Monday 30 January, are 9.30am to 12.30pm and 2pm to 3pm.**

Head of resource management at the Courts Service, Sean Quigley, says that the changes are necessary "due to reductions of staffing and funding levels".

"We are satisfied that the revised opening hours will not compromise the level of service we are presently providing to our customers," he said.

Mr Quigley added that many solicitors' firms can avoid the need to attend a court office to have documents stamped by investing in their own franking machines. They will be advising any solicitor firms or law agents currently visiting the Stamp Office of this matter.

President appoints seven to Council of State

President Michael D Higgins has made seven appointments to the Council of State, including a renowned solicitor and a law professor. The President can convene the council to consider legislation.

The appointees are Michael Farrell (senior solicitor with Free Legal Advice Centres), Prof Deirdre Heenan (provost and Dean of Academic Development for the University of Ulster's Magee Campus), Judge Catherine

McGuinness (former senator, Supreme Court judge and president of the Law Reform Commission), Prof Gearóid Ó Tuathaigh (Professor Emeritus, NUI, Galway), Ruairí McKiernan (social entrepreneur and community activist), Sally Mulready (Labour councillor in London who works closely with the Irish emigrant community in Britain) and Prof Gerard Quinn (director of the Centre for Disability Law and Policy at NUI, Galway).

The appointees will join the existing 17 members of the Council, which includes Taoiseach Enda Kenny, Chief Justice Susan Denham and a number of other senior Government figures. Other members include former presidents Mary McAleese and Mary Robinson; former taoisigh Liam Cosgrave, John Bruton, Albert Reynolds, Bertie Ahern and Brian Cowen; and former chief justices John L Murray, Thomas Finlay and Ronan Keane.



ITA GIBNEY AWARDED LIFE FELLOWSHIP BY PRII

Ita Gibney, Managing Director of Gibney Communications, has been awarded a Life Fellowship by the Public Relations Institute of Ireland (PRII). Life Fellowship is the highest honour paid by the PRII to members, recognising outstanding contribution to the communications profession.

Ita has worked in PR for over 30 years, advising public and private companies, multinationals, professional firms, representative bodies and state enterprises. In 1995 she founded Gibney Communications, an award-winning independent public relations consultancy with particular expertise

in the corporate and financial sectors. Today the agency has grown to 15 people who service clients in industry leadership positions as well as new market entrants.

Pictured at the presentation is the Gibney Communications senior team (left to right)

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COMMUNICATIONS

Donnchadh O'Neill .. Deputy Managing Director

Mark Leech Account Director

Ita Gibney Managing Director

Niall Quinn Account Director



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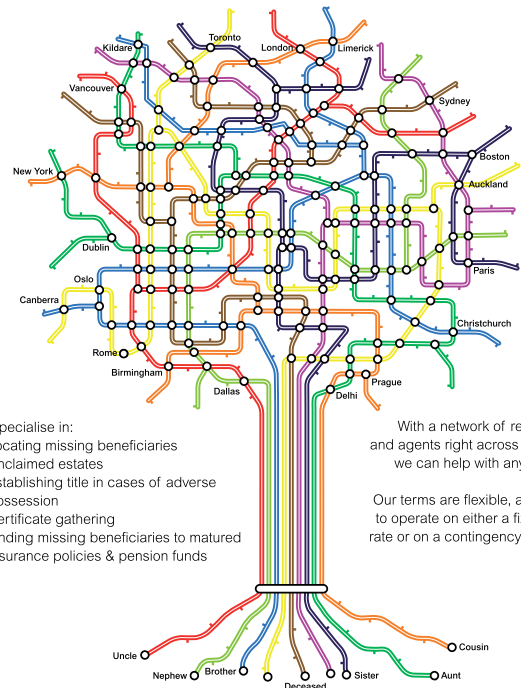
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Changes to CPD scheme categories from 2012

From January 2012, there are changes to the categories of CPD. Solicitors are advised to familiarise themselves with these changes.

The annual requirement for the 2012 CPD cycle (1 January 2012 to 31 December 2012) is 13 hours of CPD. Of these 13 hours, a minimum of three hours must comprise 'management and professional development skills', and at least one hour must comprise 'regulatory matters'.

With effect from January 2012, the category of 'regulatory matters' will be broadened to include both 'professional ethics' and 'risk management training'. This will allow for more varied yearly CPD training for solicitors.

As training in 'professional ethics' also falls within the category of 'management and professional development skills', solicitors may now claim such training as part of their minimum CPD requirement of either CPD category – 'manage-



ment and professional development skills' and/or 'regulatory matters'.

For the purposes of CPD, 'risk management training' covers education/training relating to file management, client management and practice management.

The CPD scheme continues to allow for modifications of the CPD requirement in the following cases:

- A newly admitted solicitor,
- A senior practitioner,

- Maternity/parental/carers/adoptive leave,
- Illness/retirement/unemployment/substantive reasons cases,
- Part-time practice, and
- Part-year practice.

Full and detailed information on the scheme is set out in the revised CPD scheme booklet. For further information, contact the CPD scheme unit, tel: 01 672 4802 or by email: cpdscheme@lawsociety.ie.

Mentors wanted for new Society programme

The Society has launched a new mentor programme that aims to put newly qualified solicitors in touch with more senior colleagues. The purpose is to allow younger solicitors to benefit from the experience of older and wiser heads. The success of the programme will depend on experienced solicitors of good standing who are willing to volunteer as mentors.

Any solicitor who has practised for at least seven years who wishes to volunteer as a mentor should complete the mentor application form and agreement, which is available on the members' area of the Society's website in the 'Support Services' section.

The completed form can be posted to Louise Campbell, Support Services Executive, Law Society of Ireland, Blackhall Place, Dublin 7. Alternatively, it can be emailed to Louise at



l.campbell@lawsociety.ie.
For more information, tel: 01 881 5712.

Many senior professionals derive a strong sense of purpose from the mentoring process, with the satisfaction of passing on hard-won knowledge and experience. The benefits for the mentor comes from gaining insights from younger colleagues about the future

direction of the legal profession.

Before becoming a mentor, a solicitor must complete an induction training programme by e-learning. This helps to ensure that they have the relevant knowledge and skills to effectively mentor new solicitors. CPD credits are awarded for successful completion of induction training.

Once the Society has established a database of trained mentors, it will invite new solicitors who are less than three years qualified to apply to be matched with a mentor. Once matched, the mentor and new solicitor will work together, over a 12-month period, to confidentially discuss issues by face-to-face meetings, telephone and/or email.

Full details, including the guide to the Mentor Support Programme and the mentor application form and agreement, are available on the members' area of the Law Society's website in the 'Support Services' section.

Conference explores Central Bank code

The Central Bank's *Corporate Governance Code for Credit Institutions and Insurance Undertakings* was one of main matters addresses at the In-House and Public Sector Annual Conference, held on 25 November 2011. This code has been effective since January 2011 and covers:

- The composition and role of the board of directors,
- Criteria for appointment and ongoing obligations on members of the board,
- Conduct of the board (meetings, reserved powers and consolidated supervision),



- Risk control and management,
- Committees (audit, risk, remuneration and nomination), and
- Reporting obligations to the Central Bank of Ireland annually and on an ad hoc basis.

The code:

- Recognises industry concerns (for example, a tiered system for major institutions and non-major institutions),
- Strengthens board composition and contribution,
- Imposes conditions on appointments of key officers, recognising time required to fulfil these obligations,
- Is a strengthening of the corporate governance regime for banks and insurance companies in Ireland, and

More details, FAQs and guidance on the code may be found on the Central Bank's website at www.centralbank.ie.

OUTLAWS AND INLAWS

Life outside legal practice



CATRIONA O'DWYER
Recruitment consultant
Catriona has an impressive academic background, with an arts

degree and a Diploma in Business and Financial Information Systems from UCC, as well as an MBS from UCD Smurfit Graduate School.

She trained in the Limerick firm of Sweeney McGann and stayed with the firm after qualifying. Then, with opportunities thin on the ground, in 2010 Catriona's interest was piqued by a Brightwater advertisement inviting solicitors to consider recruitment as a career.

After an extensive interview process, Catriona was offered a job. She has spent the last year-and-a-half recruiting legal staff into both practice and in-house roles in Ireland, Britain and Europe.

Brightwater sponsors the annual SYS conference and the popular DSBA table quiz, and Catriona has been involved with both organisations. Email: c.odwyer@brightwater.ie; tel: 01 662 1000.



BARRY McLOUGHLIN
Presentation skills trainer
Barry helps people prepare for job interviews and important present-

ations in his job at the Terry Prone-owned Communications Clinic. What he does is not as big a separation from law as some might think.

"Lawyers are taught to be accurate, concise and relevant. These are the same skills we train people in when they need

to present effectively," he says.

While studying law at the University of Limerick, Barry was president of the students' union and got involved in debating there. He represented the university, and later the Society's Law School, at international speaking competitions.

He trained in general practice and qualified in 2005. After qualifying, he worked in general practice firms in the Midlands and Mid-West area. Email: barry@communicationsclinic.ie; tel: 01 668 0280.



HANNAH CARNEY
Coach and skills trainer
Hannah has extensive experience in law and

was a partner with Dublin law firm McCann FitzGerald until 2007.

Having trained in Dublin, Hannah then worked and qualified in New South Wales in Australia and in Britain, before returning to Dublin and joining McCann FitzGerald.

As partner, Hannah gradually became increasingly involved in human resource matters. From there, she started initiating learning and talent-management initiatives within the firm.

In 2007, she resigned from her job to establish a coaching and skills training business. She collaborates with Dale Carnegie Ireland, in addition to delivering her own wide range of supports to clients.

Hannah works with corporate clients and individuals across industry sectors. Her services revolve around "designing and delivering skills development interventions that deliver results". Email: hannah@hannahcarney.com; tel: 085 756 6474.

Cohabitants' succession rights



A lively discussion at the Law Society's Family Law Conference in December threw up several issues concerning succession rights of cohabitants. The Family Law Committee wishes to draw practitioners' attention to the following matters.

Section 172(1) of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act* defines a cohabitant as "one of two adults (whether of the same or the opposite sex) who live together as a couple in an intimate and committed relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other".

In determining whether or not two adults are cohabitants, subsection 2 sets out the criteria to which the court shall have regard.

Subsection 5 defines a qualified cohabitant subject to the provisos set out in subsection 6.

The purpose of part 15 of the act was to provide redress for qualified cohabitants in certain circumstances. It is clear from section 173 that economic dependency is necessary to qualify for redress under section 174 (property adjustment orders), section 175 (maintenance orders), section 187 (pension adjustment orders) and section 194, subsection 5 (provision out of estate of deceased).

A different philosophy prevails, however, in respect of an application by a surviving cohabitant of a subsisting relationship for provision out

of the net estate of deceased cohabitants (section 194, subsection 1), provided:

- Such application is made within six months of the date of the grant (subsection 1),
- The court shall have due regard to the certain matters (subsection 4),
- Notice of any such application is given to the personal representative and any spouse or civil partners of the cohabitant (subsection 6),
- The share over which any order can be made shall not exceed the legal right share to which a spouse or civil partner would be entitled (subsection 7).

That is:

Testate succession

- One half share of the estate where no children surviving,
- One third of the estate where there are children surviving.

Intestate succession

- Two-thirds of the estate where the intestate leaves surviving issue,
- The entire estate where there are no issue.

Close consideration needs to be given to the status of the relationship between the cohabitants in order to properly advise on a client's right to apply for provision out of the estate of a deceased cohabitant. Such provision is not automatic and is subject to the court making such orders as it deems appropriate (subsection 3) and taking into consideration all the circumstances of the case.

IBA to come to Ireland in 2012 – twice!

The International Bar Association (IBA) is coming to Ireland in 2012 for two important events. The first is a half-day seminar, co-promoted by the IBA and the Law Society, titled 'Facing up to the challenges and looking to the future'. It will be held at Blackhall Place, Dublin, on Thursday 23 February.

The seminar is aimed at solicitors who are involved in any aspect of operating or managing a law firm, or who aspire to do so, and who wish to enhance their firm's performance by providing a more efficient and effective service to clients. Bookings can be made online at: www.lawsociety.ie/Lspt.

The panellists are: Robert Millard (Linklaters LLP, Britain), Stephen Denyer (Allen & Overy LLP), Norman Clark (Walker Clark LLC, USA), Tarja Wist (Waselius & Wist, Finland),



Martin Carrizosa (Prieto & Carrizosa, Colombia) and Lisa Walker Johnson (Walker Clark LLC, USA).

The second event, the annual IBA conference, will see some 5,000 lawyers from all over the globe travelling to Dublin in September. The conference will be held at the Convention Centre from Sunday 30 September to

Friday 5 October. Irish lawyers will be welcome to take part.

These events will provide a forum for Irish lawyers to meet lawyers from other jurisdictions and to dialogue with them on the challenges that each of us as lawyers face in our respective areas of expertise.

For more information on the IBA, visit www.ibanet.org.

DPP Office appointment

As of Friday, 20 January 2012, Eileen Creedon has stepped down as Chief Prosecution Solicitor to take up her appointment as Chief State Solicitor, based in Osmond House, Little Ship Street, Dublin. Deputy Chief Prosecution Solicitor, Liz Howlin, will be acting as Chief Prosecution Solicitor, effective from 23 January 2012 until a successor is appointed.

Taxing master update

The Government has appointed two new taxing masters, Declan O'Neill and Rowena Mulcahy, following an open competition conducted by the Public Appointments Service. This is the first time in 85 years that a competitive recruitment process for the post of taxing master has been conducted. Until recently, only practising solicitors could be appointed as taxing master. The *Civil Law (Miscellaneous Provisions) Act 2011* expanded this to encompass barristers and legal costs accountants with ten years' practice experience.

Mr O'Neill has over 40 years' experience in practice and is a partner in Cyril O'Neill, legal costs accountants, since 1976. He is the author of the costs chapter in the Law Society publication *Civil Litigation*. Rowena Mulcahy is a solicitor and partner in Mulcahy Robinson Solicitors. She served as the deputy chair of the board of management of the Chartered Institute of Arbitrators, London, and is former chair of its Irish branch. The taxing master provides an independent adjudication of legal costs in dispute. The majority of such adjudications determine the costs payable pursuant to court orders made in litigation. Other adjudications determine disputes that arise between lawyers and their own clients over legal costs and expenditure incurred.

Both appointments are on an interim basis, pending the establishment of the Office of Legal Costs Adjudicator.

Mediation a 'no brainer' for business

At a recent commercial mediation event, Ms Justice Fidelma Macken had a hard-hitting message for the Irish business community – millions of euro and hundreds of business days are being wasted each year in needless litigation when, in many cases, an alternative exists.

The event, organised by the Irish Commercial Mediation Association (ICMA), saw the launch of ICMA's new video *Talk is Cheap*, which illustrates how commercial mediation can be a more effective and efficient way to resolve business-related disputes.

Judge Macken commented: "Mediation is a 'no brainer' for business and I feel it is particularly relevant for the banking and insurance industries at the moment."

At the event, ICMA revealed that the cost of commercial litigation in Ireland is over twice as high as in other jurisdictions – an average of €53,800 (27%) on a €200,000 claim compared with €25,337 (13%) in the rest of Europe. In stark



Austin Kenny (ICMA chairman), Ms Justice Fidelma Macken and Stuart Margetson (ICMA)

comparison, ICMA claims that the average cost of bringing a dispute to resolution in Ireland through the process of mediation is an average of €7,000 (3.5%) – a saving of €46,000 on a €200,000 claim.

The association commented that the majority of cases dealt with by the Commercial Court centre on supply-chain issues relating to finance and the quality of service provision, while HR issues relate to employee grievances.

The body says that certain sectors, such as insurance, construction and the public service, have considerable potential to becoming 'dispute wise' and, as a result, save money, time and preserve valuable business relationships.

The video was sponsored by MII, the Law Society, Bar Council, DSBA, CI Arb and Mediation Cork. It can be viewed online at www.icma.ie.

Implications for pension arrangements in 2012 budget

Members of the Law Society's Retirement Trust Scheme should be aware that the recent budget has a number of implications for pension arrangements. There had been significant concern, in the run-up to Budget 2012, about potential measures that would adversely affect pensions and discourage retirement savings. In particular, the National Recovery Plan agreed with the EU/IMF had provided for income tax relief on pension contributions to be reduced from the marginal rate to the standard rate, while the Programme for Government had provided for a further reduction in the maximum allowable tax-relieved pension of €115,000 to €60,000 per annum. Neither of these two measures has been introduced.

There was also no change to the standard fund threshold. The maximum allowable pension fund remains at €2.3 million. This limit applies to all pension income from all sources, including 'defined benefit' and 'defined contribution' pension schemes.

In his budget speech, the Minister for Finance did sound a word of warning about potential future changes, stating that he did not propose to implement the commitments in the EU/IMF programme "at this time". On this basis, Budget 2013 may include further tax implications for pension arrangements.

Post-retirement pension arrangements

Retirement lump sum: there was no change made to this facility. The first cumulative €200,000 is still tax-free, with the next €375,000 taxed at 20%. The marginal rate applies thereafter.

ARFs and imputed distributions: the annual imputed distribution is increased from 5% to 6% **only** on ARF values **in excess of €2 million at 31 December 2012.**



The increase will apply to aggregate ARF values where an individual holds more than one ARF. Advice may be required on whether or not to draw down funds from the ARF before 31 December 2012 to remain within the 5% limit.

ARFs and payments on death to adult children: the final liability tax rate is increased from 20% to 30% on ARF assets paid on death to a child over age 21 of the deceased ARF owner. This

is in line with increases in CAT and CGT rates. ARF assets paid on death to a child under age 21 will continue to attract income tax at the standard rate of 20%.

Vested PRSAs and imputed distributions: individuals who have vested PRSAs are now liable to taxation on imputed distributions similar to ARFs, namely 5% on fund values under €2 million and 6% on fund values over €2 million.

The budget provides that this will apply to the aggregate of all PRSAs held – both vested and pre-vested – once at least one PRSA held is vested. A vested PRSA is one from which the 25% lump sum has already been taken.

Pension implications for employers

The cost to employers of operating a pension arrangement has increased following changes to the treatment of employer PRSI. The relief of 50% of employer's PRSI on employee pension contributions, where the employer deducts these contributions at source, has been withdrawn. As a result, employer PRSI costs are no longer reduced where employees contribute to pension arrangements by salary deduction.

For further information on the impact of the budget on pension arrangements, contact Brian King, tel: 01 411 8273, Mercer, Charlotte House, Charlemont Street, Dublin 2; tel: 1890 275 275 or email: JustASK@mercer.com.

Over the coming weeks, members of the scheme will be sent detailed instructions on how to login to Mercer OneView (see panel) and will be issued with a secure personal access code separately. If you have queries about accessing and using the new site, contact the JustASK helpline at LoCall 1890 275 275, which operates weekdays from 9am to 5pm.

Not yet a member?

For more information on becoming a member of the Law Society of Ireland Retirement Trust Scheme, contact Brian King by tel: 01 411 8273 or 1890 275 275, by email: JustASK@mercer.com, or write to Mercer, Charlotte House, Charlemont Street, Dublin 2.

COMING SOON – MANAGE YOUR RETIREMENT ACCOUNT ONLINE

'Mercer OneView' will soon be available to all members of the Law Society of Ireland Retirement Trust Scheme. Mercer OneView is an online service that provides scheme members with 24/7 secure access to their personal pension plan information online. The introduction of Mercer OneView will make it easy for members to keep track of their retirement account and to plan for their financial future.

WHAT YOU CAN DO

- View a history of contributions paid into the scheme,
- Access detailed information about the retirement plan and its benefits,
- Update your personal contact information,
- View details of your historic and current investment choices,
- Monitor investment fund performance,
- Make changes to your current and future investment choices,
- Plan for your retirement with the interactive projection tool,
- Learn more about your pension and retirement planning.

NEWS FROM THE LAW SOCIETY'S COMMITTEES AND TASK FORCES

Stage in Paris – October-November 2012

EU AND INTERNATIONAL AFFAIRS COMMITTEE

The Paris Bar organises an international *stage* in Paris every year and invites one lawyer from each jurisdiction to participate. The *stage* is a great opportunity for lawyers to discover and practise French law in the heart of Paris.

The *stage* takes place during October and November and entails:

- One month attending classes at the *l'Ecole de Formation du Barreau*, and
- One month of work experience in a law firm in Paris.

The programme also includes a visit to Brussels to learn about the European institutions.

The Irish participant will be selected by the EU and International Affairs Committee of the Law Society of Ireland. Candidates must:

- Be qualified in Ireland and registered with the Law Society,
- Be fluent in French,
- Be under 40 years old,
- Have insurance cover (for accidents and damages).

Tuition is completely covered by the Paris Bar and candidates must be willing to cover other expenses (travel, accommodation, meals).

If interested, contact Eva Massa at e.massa@lawsociety.ie with your curriculum vitae and a letter explaining your interest in the *stage* (both documents in French and English). The deadline for applications is **Friday 4 May 2012**. For more information, visit: www.avocatparis.org/le-stage-et-echange/le-stage-international.html.



Seminar dealing with elderly clients

PROBATE, ADMINISTRATION AND TRUSTS COMMITTEE

A seminar relating to elderly and vulnerable clients will take place on 7 February 2012 from 5pm until 7pm. The venue is the offices of the Law Reform Commission, 35-39 Shelbourne Road, Ballsbridge, Dublin 4.

- Speakers and topics include:
- Patricia Rickard-Clarke on confidentiality in the context of an elderly or vulnerable client at risk,
 - Sarah Mahon (HSE) on the role of dedicated case workers for the protection of older people within the HSE, and the services available from the State for people aged over 65.

Cost for Solicitors For the Elderly (SFE) members: €25; for non-SFE members: €85.

Technology survey and guide now available

TECHNOLOGY COMMITTEE

The Technology Committee has recently completed a survey of accounts and practice management systems being offered to solicitors in the Irish marketplace. This survey replaces *Get Integrated* (last published in 2007) as a guide to computer suppliers to the legal profession.

The committee prepared a list of questions designed to highlight features it believes should be considered by solicitors when making a decision to buy, or change, systems. Suppliers had to respond in a set format, so that answers could be compared. Suppliers' responses can be viewed on the Technology Committee's page in the members' area (www.lawsociety.ie/technologysurveys).

While the survey asks many useful questions, nothing can be regarded as definitive or complete in the fast-moving world of technology.

The survey is usefully broken down into sections, including:

- Client data,
- Risk management,
- Access security,
- Matter accounting,
- System integrity and support
- Case management and work flow, as well as other matters.

Even if you're not in the market or thinking of changing, a review of the survey questions alone would be a useful exercise for many practices – even those that are happy with their current systems – to see if they're getting the most

out of what they already have – or if there are questions that they should be asking of themselves, or their suppliers.

All suppliers were asked to name five firms that already use their systems. These names have been supplied to the Society, but cannot be released without the firms' consent. As a result, prospective purchasers should ask suppliers for up-to-date references and check these out themselves.

Qualifying expenses for incapacitated individuals

PROBATE, ADMINISTRATION AND TRUSTS COMMITTEE

Section 84 of the *CAT Consolidation Act 2003* provides for an exemption from CAT where a gift or inheritance is "taken exclusively for the purpose of discharging qualifying expenses of an individual who is permanently incapacitated by reason of physical or mental infirmity".

In a recently published *eBrief*, the Revenue Commissioners have highlighted a decision of the Appeal Commissioners in relation to section 84, which decision is now reflected in the recently published part 22 of the Revenue's freedom of information

Capital Acquisitions Tax Manual. Practitioners should read the relevant section (www.revenue.ie/en/about/foi/s16/templates/capital-acquisitions-tax/).

In short, the section states that the Revenue Commissioners interpret the phrase "taken exclusively for the purpose of discharging qualifying expenses" as referring to the intention in the mind of the disponent; and that evidence must be provided "either by will or otherwise" to prove that the disponent intended to provide the benefit exclusively for this purpose.

Skillnet and Finuas funding

LAW SOCIETY SKILLNET AND FINUAS NETWORKS

The Law Society Skillnet and Finuas Networks are now in a position to offer a 25% discount on all 2012 training events run by the Law Society Professional Training team – to those who join the membership scheme for 2012 and who work in the private sector.

Law Society Skillnet annual membership fees start at €135,

while membership of the Finuas Network is free. Those in the public sector can avail of the public sector membership scheme.

For an application form and further details, visit www.lawsociety.ie/lspst; or contact a member of the professional training team on 01 881 7272.

FINAL FORM OF LEGAL SERVICES BILL HANGS IN THE BALANCE

The continued independence of the profession, and many other concerns, depend on the amendments that Minister Shatter will introduce or accept at committee stage

“The bill is not perfect,” Minister Alan Shatter acknowledged when he met with representatives of the Law Society at his office on 16 January 2012. He confirmed that he intends to bring forward amendments at committee stage so that “certain aspects might be improved”.

However, he did not specify what precise amendments he



Alan Shatter: “No hidden agenda in regard to ministerial functions or appointments under the bill”

TAOISEACH'S ASSURANCE



Prior to a dinner in Mayo on 3 December 2011, Taoiseach Enda Kenny invited the Society's director general Ken Murphy and Council member Kevin O'Higgins to brief him on the Society's concerns in relation to the bill.

He assured them privately, and then said publicly, to 100 or more guests at the dinner: “This bill will not be bulldozed through”; and “The only decision taken by the Government in relation to this bill was to publish it.”

intends to bring forward. Until the bill's committee stage is concluded, therefore, the final form of the *Legal Services Regulation Bill 2011* hangs in the balance.

As in his speech at the second-stage reading of the bill on 16 December 2011, the minister denied that there was any ‘hidden agenda’ in regard to ministerial functions or appointments under the bill. He said he was “happy to invite any constructive suggestions

that might enhance the bill's regulatory framework in this regard within the Government's

stated policy objective of independent regulation”.

At the two-hour meeting with the minister and his officials, the Society was represented by the president, Donald Binchy, the director general, Ken Murphy, and members of the Society's task force on the bill, Michael Quinlan, Kevin O'Higgins,

Mary Keane and John Elliot. Beginning with a welcome for the many elements in the bill

that the Society supports (45 of the bill's 123 sections present no obvious problems), the Society then set out its areas of concern, beginning with its chief concern – that the bill, as published, represents a real and dangerous threat to the continued existence of an independent legal profession in Ireland, with incalculable consequences for such fundamental democratic principles as the separation of powers, access to justice and the rule of law.

Government control

Whether intentionally or not, in the Society's view, the bill as published contains a blueprint for Government control of the legal profession. To be a truly independent regulator, the proposed new authority must be made free of the potential for control by the Government, in addition to being free of the potential for control by the profession.

Fair procedures

The Society also raised its concerns about the absence of any proper controls on the potential cost of the proposed new regulator. This was a major and legitimate concern for a profession that is suffering severe economic distress due to the depth of the continuing recession. It was proposed that the cost of the proposed new regulatory model should be limited, at most, to the cost of the current model. Measures to control

“In the Society's view, the bill, as published, represents a real and dangerous threat to the continued existence of an independent legal profession in Ireland”

GROWING INTERNATIONAL CONCERNS

Irish readers of the *Wall Street Journal* may have been surprised recently to see reference, in that globally influential publication, to concerns about the future independence of the legal profession in Ireland.

The issue of 5 January 2012 contained a report on regulatory reforms that “threaten one of the core principles of the legal profession: regulation independent of the executive branch of the state”.

The report was of a letter written by the President of the American Bar Association and the President of the CCBE to the Managing Director of the International Monetary Fund, Christine Lagarde. Ms Lagarde, who is a former chairman of global law firm Baker & McKenzie, was asked to pass on their concerns within the IMF and to her counterparts in the European Commission and the European Central Bank.

In a separate letter, Marcella Prunbauer-Glaser, President of the CCBE (which represents more than one million lawyers in Europe through its member bars and law societies in 42 countries) expressed her concerns on



Marcella Prunbauer-Glaser: has written to the Taoiseach expressing the concerns of the CCBE

11 January to both Taoiseach Enda Kenny and Minister for Justice Alan Shatter. In the final sentence of her three-page letter, she said: “At present, the CCBE considers the bill to constitute a grave threat to the independence of the legal professions in Ireland and, consequently, a threat to the rule of law.”

Ms Prunbauer-Glaser was one of the very distinguished group of national and international speakers who addressed an audience of 600 in the Dublin Convention Centre on 5 December 2011 on



Christine Lagarde: asked to pass on concerns within IMF and to EU and ECB

the need to defend the profession’s independence. A special issue of the *Gazette* summarised the contributions to that conference. A copy of that *Gazette*, with a personal letter in each case from Law Society President Donald Binchy, has been sent to every member of

the Oireachtas.

Numerous reports have now appeared in international legal journals about what the *Gazette* of the Law Society of England and Wales has described as “growing international concerns” on this issue.

costs should be written into the legislation.

The bill appeared to envisage that the solicitors’ profession would retain the responsibility to make contributions to, and payments out of, the compensation fund. The fund was being left with the Society for these two purposes. However, it seemed that the power to police compliance with the *Solicitors’ Accounts Regulations* – thereby controlling the risks to the fund – was to be transferred to the new regulator. It would be better policy if the responsibility to police the fund were also left with the Society, where there is the expertise and the incentive to do it well, in the interest of both the profession and the public.

The Society also expressed concern that some of the fair procedures in relation to complaints, which are built into the current system, appear to have been omitted from the bill. Also, the legal difference between misconduct and inadequate professional services needs to be maintained.

The Society made a great many points about numerous other aspects of the bill. The minister asked that these, and all

other suggested amendments, be communicated to him in writing, which the Society is in the process of doing, and

he promised to give them all due consideration.

One major omission, in the Society’s view, from the bill’s section on structures, was any reference to limited liability partnerships or to limited companies.

The Society, as so often previously, urged legislation to permit solicitors’ firms in Ireland to practise

“The Society also raised its concerns about the absence of any proper controls on the potential cost of the proposed new regulator”

CIVIL LIBERTIES FEARS

In a preliminary report on the bill, the Irish Council for Civil Liberties said: “As it is currently drafted, the *Legal Services Regulation Bill* creates the Authority as a creature of the minister/ Government and is inimical to the rule of law.”

It concluded that “the appointment of personnel to the Legal Services Regulatory Authority should be carried out by an independent body”.

A NEW ERA FOR BUSINESS AND HUMAN RIGHTS?

The UN Human Rights Council has passed a resolution endorsing new 'guiding principles' that, for the first time, set a global standard for business in the area of human rights. Lisa O'Higgins takes a closer look



Lisa O'Higgins recently returned from Geneva, where she worked as a research assistant at the UN Office of the High Commissioner for Human Rights

On 16 June 2011, the United Nations' Human Rights Council in Geneva passed a resolution endorsing new 'guiding principles' that attempt to set out, for the first time, a global standard in the form of a practical three-pronged framework in the area of business and human rights. The *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* comprises three core pillars:

- The state duty to protect against human rights abuses by third parties, including business,
- The corporate responsibility to respect human rights, and
- The need for more effective access to remedies where violations have occurred.

The three principles are intended to form a complementary whole, with each pillar supporting the other in order to achieve sustainable progress in the area of business and human rights.

Duty to protect

The guiding principles affirm that states must protect against human-rights abuse by third parties within their territory and/or jurisdiction, including abuse by business enterprises. This requires states to take appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

In order for states to meet their duty to protect, they should:

- Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws,
- Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not

constrain but, rather, enable business respect for human rights,

- Provide effective guidance to business enterprises on how to respect human rights throughout their operations,
- Encourage, and where appropriate require, business enterprises to communicate how they address their human-rights impacts (principle 3).

However, the state's duty to protect is a standard of conduct and, therefore, states are not, *per se*, responsible for human rights abuse by private agents. The guiding principles provide also that states should set out clearly the expectation that all business enterprises domiciled in their territory

and/or jurisdiction respect human rights throughout their operations – a practice not currently required under international human rights law.

Major shortcomings

Where business enterprises are owned or controlled by the state, or receive substantial support from state agencies, states should take additional steps to protect against human-rights abuses by such enterprises, including requiring human-rights due diligence.

Furthermore, the guiding principles propose that states should ensure that all state-based institutions shaping business practices should be made aware of, and observe, the state's human rights obligations, including by providing them with relevant information, training and support.

At an international level, there is a need for greater policy coherence, including where states participate in multilateral institutions that deal

with business-related issues, such as international trade and financial institutions.

Although suggestions are made as to how these principles should be implemented, the report is not intended to insist on specific legislative or other policy actions, but rather to illustrate important issues and

innovative approaches.

Therefore, although a rough template of what is desired is set out, the lack of specific details regarding the practicalities of implementation of the principles may result in states failing to take appropriate steps to foster a corporate culture respectful of human rights.

The lack of articulation of concrete

measures to be taken by the various parties may prove to be one of the major shortcomings of the report.

Duty to respect

The guiding principles state that business enterprises, regardless of their size, sector, operational context, ownership and structure, should respect human rights. To do this, they should avoid causing or contributing to adverse human-rights impacts through their own activities, and they should address such impacts when they occur. Furthermore they should also seek to prevent or mitigate adverse human-rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

For business enterprises to ensure that this responsibility is met, they should have in place policies and processes to include:

“The guiding principles provide the first practical framework for the implementation of a global standard in the field of business and human rights”

- A policy commitment to meet their responsibility to respect human rights,
- A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impact on human rights, and
- A process enabling remediation of adverse human-rights impacts caused or contributed to by them (principle 15).

Principles 18-21 set out a comprehensive set of steps that a company should follow to ensure compliance with due-diligence responsibilities. The process should include policymaking and assessing existing and potential human-rights impacts, acting upon the findings, tracking responses, and communicating how impacts are addressed. The guiding principles acknowledge that due diligence will vary in complexity with the size of the business enterprise, the risk of severe human-rights impacts, and the nature and context of its operations. They recognise that the process should be continuous, because human-rights risks may change over time as the business enterprise's operations and operating contexts evolve.

The provision of this detailed process enables the company to know what is required of it and, therefore, provides a practical model to formulate policies. For the substantive content of the due-diligence process, companies should look to the *International Bill of Human Rights* and the core conventions of the International Labour Organisation (ILO). This guidance provides a foundation from which companies can develop their responsibility to 'respect' and thus achieve a bridging of the gaps in governance.

In comparison to previous initiatives in the area of business and human rights, the guiding principles are relatively concrete and practical. In 2000, the *Global Compact* was introduced by the UN. Despite over 8,700 companies and 130 countries



pledging their adherence to its ten principles – which cover the areas of human rights, labour rights, environment and anti-corruption – conceptual and practical limitations inhibit its value.

The *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, presented in 2003, were met with scepticism by business organisations due to the inclusion of an exhaustive list of rights, the lack of provision for a monitoring and compliance system, and vague terminology.

The ILO conventions have

also been referred to when debating issues of corporate social responsibility and labour rights. However, in terms of providing a practical template concerning activities of businesses and human rights, the mechanisms instituted by the ILO remain a rather 'soft' tool, limited in scope and unlikely to capture the complexity of the multinational enterprises' activities and social impact. Nevertheless, the guiding principles specifically refer to the eight core ILO conventions that include a minimum set of standards to which businesses

should adhere.

An issue not addressed in previous initiatives in this area is the responsibility of a parent company for the activities of its subsidiary companies. The guiding principles clarify this point by expressly stating that the parent company and its subsidiaries should be viewed as distinct legal entities. For stakeholders and businesses looking for practical guidance from the principles, this clarification will be welcome.

Adoption of the UN resolution

The adoption of the resolution proposing the endorsement of the report is evidence that there is hope among UN member states that the guiding principles provide a practical proposition within which the various participants can work to implement the tripartite framework that it sets out.

The resolution also established a working group, initially to operate for three years, made up of five experts from different geographical regions who were elected at the 18th session of the UN Human Rights Council in September 2011 and who formally took up their role on 1 November 2011.

A forum on business and human rights, operating under the supervision of the working group was also established, with the purpose of discussing trends and challenges in the implementation of the principles, identifying good practice and promoting dialogue and cooperation on issues, including challenges faced in diverse operational environments. The creation of these entities, with specific aims and ambits, increase the potential of the principles to close the identified gaps in governance.

Generally, the guiding principles have received widespread support. However, some interest groups feel that the guiding principles fail to address the governance gaps identified and that they fall short on providing practical mechanisms for implementation. **G**

ACCESS TO REMEDIES

For the third pillar, 'effective access to remedies', five grievance mechanisms are identified:

- Judicial mechanisms,
- Non-judicial mechanisms,
- Company-level mechanisms,
- State-based non-judicial mechanisms, and
- Mechanisms within multi-stakeholder or industry initiatives and financiers.

What constitutes 'grievance mechanisms' has not been defined clearly in previous initiatives in the area of business and human rights. Although the

report asserts that states are expected to take concrete steps to adjudicate corporate-related human-rights abuse, these steps are not identified.

For non-judicial grievance mechanisms, however, a practical suggestion is made. It is stated that such mechanisms must be legitimate, accessible, predictable, equitable, rights-compatible and transparent. Unfortunately, no such guidance is offered for the other grievance mechanisms referred to – a shortcoming that may hinder the implementation of the third pillar of the tripartite framework.

Judicial shortages should have been foreseen

From: Anna Cogan, AB Cogan Solicitors, Abbeylands, Castledermot, Co Kildare

I recently received a telephone call at the very last moment, while in the midst of preparations for a complex family law case, from the solicitor acting on the other side, to tell me that our case and all the other family law cases listed for a particular week had been cancelled due to the unavailability of the judge. There was no permanent judge sitting in this particular area and the judge who was to cover it had been held up elsewhere. We received this news three days before the case was due to go on, and after we had checked with the court office approximately two to three days beforehand, who had confirmed the case would go on.

On enquiry, it seemed that the court office was informed on the Saturday that the judge would not, after all, be available, and had then contacted Dublin and requested that they put the matter up on the website. There was no attempt, as far as I can establish, to contact the various solicitors and litigants involved, and certainly there was no contact with our office.

As practitioners, we must all be aware of the inadequacy of court access due to the lack of sufficient judges. This is particularly



regrettable, not to say reprehensible, when dealing with family law cases. Effectively, and particularly if a case is contested, there will be adjournments going on over at least a year (and possibly two) before a case is heard, which adds enormously to the expense, frustration and stress for the unfortunate litigants. In addition, it adds incalculably to the difficulties faced by solicitors, where, with costs mounting, clients are in an increasingly difficult position in relation to payment of fees, while the solicitor has the responsibility to

bring the case to some kind of finality.

I, at least, am at a loss as to how to explain the situation to my client.

Essentially there is no reason or justification for the shortage in judges. The personnel are available. It seems to me that if we are to continue with our current insistence on the exercise of political control over the appointment of judges, they might at least appoint sufficient judges to meet the sometimes quite desperate need of the public at large.

Better still, would it not be possible to have JAAB, the body set up to facilitate the appointment of judges to the courts, structured to carry out that function as an independent body that delivers the required quota of judges, in an open and transparent fashion, and bypassing political input or interference? Clearly, to date, that basic, democratic standard for such a board has been too much to ask. It is shaming and deeply frustrating for all of us to be involved in a legal process that operates in this manner. Surely it is possible for the Law Society and for practitioners to efficiently publicise this situation and to form an effective pressure group to bring about change, which is required now and not at some vague date in the future.

I find the proposition that very large number of judges are retiring because of pension considerations this year, in addition to the dispute in relation to judges' pay, equally shaming as a reason or an excuse for the shortage in judges. Leaving aside one's own feelings about a mass rush to retirement in order to protect the pension position, it was surely predictable over the past year or more that an increase in vacancies would occur at this time.

Whatchoo talkin' about, Willis?

From: Philomena D'Arcy, Portmarnock, Co Dublin

As I was traversing the old Information Superhighway the other day, I chanced upon a discussion on euphemisms that have – apparently – been overheard in Irish courtrooms. As is my wont, I thought I'd share:

- "I come with clean hands on this" = "My client was lying, even to me",
- "I'm instructed to inform the court" = "I don't want to say this, but I've been told to say it",
- "My client has a motoring

history" = "My client has 50 road traffic convictions",

- "You said you might deal with the matter in a certain way" = "My client really hopes you won't be sending him to prison",
- "My client is willing to take a certain course" = "My client is prepared to stuff the poor box with cash",
- "My client comes from a difficult background" = "My client deserves leniency",
- "My client comes from a good family" = "My client also deserves leniency".

And my personal favourites:

- "With great respect" = "Judge, you have got it wrong here", and
- "With the greatest of all possible respect" = "Judge, you are absolutely and completely wrong and do not appear to have heard, much less understood, what I have submitted to you."

An an aside – and rather belatedly – I love the magazine's new look, though I do miss 'Tech Trends'!

Shatter's 'nail in the coffin' for the ordinary person

From: Richard E McDonnell, solicitor, Ardee, Co Louth

It's probably futile (as Minister Shatter seems to be a law unto himself and to contemptuously dismiss any opinion at variance with his own), but may I use your letters page to whimper one last entreaty on behalf of the legal profession before its complete independence is inevitably (and fatally) compromised by Mr Shatter's latest project?

The system heretofore operating in Ireland is, of course, far from flawless but has, at least, always sought to be a bulwark against the might of the legislature, the Church, the police force and all other mighty organs of State versus the plain citizens of Ireland.

Practically every courageous moral advancement this society has made in the last 50 years has, in fact, been initiated by the High and Supreme Courts, and not by politicians, who rarely, if ever, have the courage to make any difficult changes or decisions about anything, lest they lose their seats at the next election or upset some powerful vested interest.

I can't speak for the practice among the solicitors in the huge firms in Dublin and the bigger cities (which I acknowledge seem to operate on a different plane from the rest of us), but I am sure I speak for the majority of my country colleagues when I point out that the State (and the media) never acknowledge the huge amount of time

and expertise provided on a daily basis by my profession and members of the Bar to impecunious and increasingly desperate people (of whom there are now so many in Ireland) – free of charge – as we have a conscience and don't want them thrown to the wolves that the banks and other such amoral inanimate entities (such as government departments) are.

We are often all that stand between the increasingly aggressive pursuit in the courts of 'ordinary', desperate people by these banking institutions, which are themselves unable to pay their own debts but, instead, expect the same 'little people' to pay for them from their meagre earnings or dole.

Contrary to the populist

image constantly propagated by the media and politicians (who, incidentally, had no qualms about hiding behind numerous tribunals established by them nearly 20 years ago, while simultaneously protesting about the excessive fees being paid to the same lawyers they negotiated those fees with), solicitors and barristers represent clients who have no money to pay them, whether or not the end result may produce payment.

Ireland is unique (to my knowledge) as the only country in the world where an 'ordinary' person can have access to a top-class solicitor and barrister without having to pay over any money at all. Mr Shatter's plans will put paid to that. **G**

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FLOOD, SWEAT AND TEARS

The OPW is the competent authority in Ireland for implementing the *European Floods Directive* and its associated regulations. Alice Whittaker and Heather Murphy assess the flood risks in property transactions



Alice Whittaker is head of planning and environmental law at Philip Lee Solicitors, www.philiplee.ie



Heather Murphy is a senior trainee with Philip Lee Solicitors

Between 2000 and 2010, flood damage cost an estimated €516 million, according to the Irish Insurance Federation. The effects of climate change may increase the frequency and severity of flood events, particularly in coastal regions. Increased flood risks, together with increasing insurance costs and limited availability of insurance cover in certain flood-risk areas, means that flood risk is an increasingly important issue for lending institutions, property management companies, owners, occupiers, developers and local authorities – and their lawyers.

In order to address flood risks on a Europe-wide scale, the European Commission and parliament adopted the *Floods Directive* (Directive 2007/60/EC on the assessment and management of flood risks). The *Floods Directive* was transposed in Ireland by the *European Communities (Assessment and Management of Flood Risks) Regulations 2010* (SI 122 of 2010). The Office of the Commissioners of Public Works (OPW) has been appointed the competent authority for the purposes of implementing the *Floods Directive* and regulations, and it has overarching responsibility for flood-risk management in Ireland. It is required to work closely with other statutory authorities, including local authorities and river-basin districts under the *Water Framework Directive*.

There are three significant deadlines imposed by the *Floods Directive*, one of which was passed recently:

- By 22 December 2011, the OPW was required to have completed its preliminary flood-risk assessment. This preliminary assessment essentially identifies areas where the risks associated with flooding could be significant. The draft preliminary flood-risk assessments may be found at www.cfram.ie.
- By 22 December 2013, the OPW

will be required to prepare flood-hazard maps and flood-risk maps. In the case of flood-hazard maps, they will need to identify areas with low, medium and high probability of flooding. In the case of flood-risk maps, they will need to identify the potential adverse consequences of flooding.

- By 22 December 2015, the OPW will be required to have completed detailed flood-risk management plans. These plans will set out the objectives for the management of flood risks and specific measures to meet those objectives. These plans and maps must be updated every six years.

Consultation process

Both the directive and the regulations are explicit about the requirement for consultation with stakeholders and the public at various points in the three-stage process.

Very significant and far-reaching powers, obligations and duties are conferred on the OPW by the regulations, including compulsory purchase order powers, with particular implications for landowners, local authorities and persons in possession of fishing, navigation and water rights.

Where the OPW wishes to carry out works provided for in a flood-risk management plan, the regulations require that a flood-risk management scheme is prepared. The scheme

will set out the proposed works to be carried out, the affected land and water courses, and any lands or other rights and interests (including fishing, navigation, water and other rights) that may be interfered with or compulsorily acquired. For those interested in influencing the OPW's decision-making powers, it would be prudent to engage early in the

consultation process in relation to the preliminary flood-risk assessments, the flood-risk and hazard plans, and the flood-risk management schemes as they are developed, rather than wait until the more detailed individual schemes are prepared.

Planning for floods

Poor planning decisions can result in inappropriate development in flood-risk areas. Flood-risk assessment has formed part of the planning process for some time. In 2009, the Department

of the Environment and the OPW issued detailed guidance to planning authorities on incorporating flood-risk identification, assessment and management into the planning process. Planning authorities are required to have regard to these guidelines in carrying out their functions. The guidelines should also be used by developers and the public in preparing planning applications.

Ongoing improvements in flood-risk information could highlight areas previously zoned for development

“In 2009, the Department of the Environment and the OPW issued detailed guidance to planning authorities on incorporating flood-risk identification, assessment and management into the planning process ... The guidelines should also be used by developers and the public in preparing planning applications”



that are at risk of flooding. The 2009 guidelines recommend that planning authorities may address this by reducing, removing or replacing zoning for all or certain types of development; preparing local area plans to deal with the issue in more detail; or putting in place flood-management measures. In cases where planning permission has been granted for an area with significant flood risk, planning authorities may, pursuant to section 44 of the *Planning and Development Act 2000*, revoke the permission, provided the proposed development has not been carried out or is not substantially completed, and where the development no longer complies with the local development plan.

With respect to developments that have already been carried out in high flood-risk areas, the consequences of flooding can be devastating, both in relation to the physical damage and the exposure to long-term financial liability. There may be particular implications for lenders and developers in relation to property transactions in locations affected by flooding.

Legal obligation

One of the implications of the *EC (Assessment and Management of Flood Risks) Regulations 2010* could be that legal advisers may have a positive legal obligation to advise clients in relation to the availability of the preliminary flood-risk assessment and subsequent maps and plans as they are prepared by the OPW. Pending the publication of these maps and plans, information on historic flood events can be

found on the OPW's historic flood-map website, www.floodmaps.ie.

Purchasers are responsible for matters either within their knowledge, or that they were capable of discovering by reasonable inquiry or inspection. The same doctrine of constructive notice applies to solicitors and agents appointed by a purchaser. In England, the Standard Commercial Property Enquiries (CPSEs) and Property Information Form for residential

transactions ask whether the property has been affected by flooding and, if so, to provide details. In Ireland, however, the Law Society's *Standard Objections and Requisitions on Title* form does not currently provide for queries specifically in relation to flood events or flood risks, although questions in relation to the availability of insurance cover for the property will be relevant in this context. As the vendor is not under a duty to disclose physical defects in the property, it would

be prudent for solicitors to make specific inquiries of vendors and also to advise and warn the client to have flood risks assessed as part of a survey carried out by a suitably qualified surveyor before the contract for sale is signed.

According to the Irish Insurance Federation, flood insurance cover is currently available to approximately 98% of householders in Ireland. There are, however, many property owners who have lost, or will lose, flood insurance cover due to previous claims following severe flood events over the last few years. In 2010, the then government stated that the introduction of an insurance scheme for householders who could not obtain flood insurance cover would not be financially viable. In November 2011, in response to a parliamentary question, Deputy Brian Hayes stated that he would look at this decision again to see what, if anything, might be done to assist householders and businesses in this position. **G**



FLOOD RISK MANAGEMENT

The Catchment Flood Risk Assessment and Management (CFRAM) programme (www.cfram.ie) is the OPW's programme for the implementation of national flood policy and the requirements of the *Floods Directive*. The www.floodmaps.ie website, also operated by the OPW, provides historic information on the location of flooding in Ireland.

These historic flood maps provide information on known flood events and can be distinguished from the more sophisticated predicative flood hazard and flood-risk maps being prepared under the CFRAM programme, which use techniques such as modelling to predict areas likely to flood, and the potential consequence of flooding scenarios.

FOREVER IN BLUE GENES

With rapid advances in genetics, questions arise about the appropriate framework to protect the privacy of genetic information and to prevent genetic discrimination. Michael Waterstone and Aisling de Paor take a sample

FAST FACTS

- > Genetic testing technology may offer the prospect of being able to detect the onset of future disabilities
- > However, appropriate regulation is vital
- > There is a real possibility that discrimination and violation of privacy will become more widespread



Groundbreaking genetic discoveries and technological advances have opened up a new era in genetic exploration, and technological advances have enabled geneticists to successfully chart the genetic basis of a wide range of diseases. Genetic testing promises to potentially revolutionise health care and medical treatment. Among other things, genetic testing technology may offer the prospect of being able to detect the onset of future disabilities. It also offers the possibility of personalised medicine and can offer the possible treatment and even cures for diseases at an early stage.

Scientific advances have led to an increase in the practice of genetic testing for medical and non-medical purposes. Some tests are used to clarify a diagnosis and direct a physician toward appropriate treatments, while other tests identify people at high risk for conditions that may be preventable. A family history of illness may be confirmed by undergoing a genetic test. Genetic testing offers opportunities for individuals to be fully informed as to their genetic status, so that they can effectively manage their health care and treatment plans. Advancing genetic science can also reveal potentially valuable profiles – for example, the prevalence of the ‘risk-taking’ gene, which some employers may view as highly desirable in a potential employee, while others may see it as indicative of a high-risk candidate who may financially jeopardise a company.

Blue gene blues

Questions, however, arise as to whether an appropriate framework exists to protect the interests of individuals (specifically to protect the privacy of sensitive genetic information and to prevent genetic discrimination), and also to encourage further advances in the scientific field. With these genetic advances come new economic opportunities, together with ethical, social and legal considerations.

Apart from the ethical

issues, such as a person’s right not to know and the psychological consequences of knowing one’s genetic make-up, one of the main concerns arising is the potential use of genetic testing to discriminate. Genetic discrimination refers to the differential treatment of individuals or their relatives based on an apparent or perceived genetic variation from the ‘normal’ human genes. Every individual is a potential victim of genetic discrimination, as no one has ‘perfect’ genes and everyone carries genes that predispose to a variety of common illnesses.

Interested third parties may use the results of genetic tests (as well as genetic information elicited from family history) to discriminate based on perceptions of long-term health risks and possible future disabilities.

Employers and insurance companies have an interest in utilising genetic information as a powerful predictive tool. Although genetic testing by employers and insurance companies is not yet taking place on a widespread basis, advancing genetic technology indicates that testing will inevitably become cheaper, more sophisticated, and more readily accessible for non-medical purposes.

Employers have an interest in using genetic testing, primarily for economic reasons. An employer might not hire an individual who is at risk of developing a genetic disease and who, as a result, would be frequently absent from work, be less productive than other workers, or may require more health care. Employers arguably have no right to require that an individual submit to genetic testing (or use the results of genetic tests) when that person shows no signs of a disease that would interfere with his or her current ability to do a job. Making an employment decision on the basis of the probability of an individual developing a certain disease or disability – rather than on his/her actual capacity to perform the work – can constitute discrimination. In addition to arguments based on economic self-interest, employers often argue that, for health and safety reasons, use of genetic information should be permitted. An employer might not hire or

“Every individual is a potential victim of genetic discrimination, as no one has ‘perfect’ genes and everyone carries genes that predispose to a variety of common illnesses”



Prof Michael Waterstone is Associate Dean for Research and Academic Centres, Loyola Law School, Los Angeles, USA



Aisling de Paor, is a doctoral candidate (IRCHSS scholar) at the Centre for Disability Law and Policy, National University of Ireland, Galway



The Honorable Society of King's Inns

Notice of Decision of Benchers to disbar Mr Patrick Russell, barrister at law

Pursuant to Rule 37(4) of the Society notice is hereby given that the Bar Council made the following complaints to the Disciplinary Committee of the Society in relation to Mr Patrick Russell.

1. Mr Russell had acted unprofessionally in purporting to conduct an appeal to the Supreme Court on behalf of a named person ("the Complainant"), in particular that he acted without the intermediary of a solicitor, although he falsely informed the Complainant that a named solicitor was, in fact, acting; that he caused the Complainant to make a substantial payment to him for the purpose of pursuing the appeal; that he deceitfully told the Complainant that a notice of appeal had been lodged and continued the deception by informing him that the Supreme Court had ruled in his favour and had remitted the Complainant's claim to the High Court; that he lied to the Complainant by telling him that a settlement was available and caused him to sign a purported settlement document and led him to believe that his claim had been settled and that he would be paid a substantial amount of compensation;
2. Mr Russell failed to pay to the Bar Council a fine of €25,000 imposed on him in 2008 by the Barristers' Professional Conduct Tribunal in respect of a previous finding of misconduct.

The Benchers of the Honorable Society of King's Inns at its meeting of 11 January 2012 confirmed the report of the Disciplinary Committee in which it upheld the two complaints made and decided that they constituted professional misconduct by Mr Russell. The Benchers confirmed the sanction recommended by the Disciplinary Committee and resolved that Mr Patrick Russell be removed from the Register of Members and be expelled from the Honorable Society of King's Inns and thereby be prohibited from practice as a barrister and from enjoyment of all rights and privileges granted to him by virtue of being a barrister and be prohibited from holding himself out as being a barrister and that he be disbarred.

Mr Patrick Russell is now disbarred.

A fuller statement of the procedure and findings made is on the Society's website www.kingsinns.ie pursuant to Rule 37(3).

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permit an individual to work in an area if that individual was known to have a heightened susceptibility to the toxic or carcinogenic effects of certain environmental agents.

The balance of rights between employer and employee therefore needs to be considered – and how best to reconcile these competing rights. The appropriate basis for the employer's 'right to know' must be explored and also the corresponding limits on this right. It is necessary to ensure protection against unfair discrimination in hiring, promotion and employee benefits. Such a task will require that we weigh the harms and benefits of genetic testing, the values placed on privacy and justice, and society's interest in maintaining a healthy and productive workforce.

Gene genie

Insurers may also use advancing genetic science for financial advantage and as a tool for selecting low-risk customers. Insurance law generally requires insured persons to inform the insurer of all relevant facts known to them. Insurers consider it difficult, if not impossible, to draw up a fair contract of insurance unless the parties are equally provided with information. Genetic tests therefore pose a problem, in that they transform into predictable risk the uncertainty that has long been the foundation for the concept of risk governing insurance.

It is necessary to strike a balance between the competing interests of both insurers and customers to ensure fairness of contract and to uphold the fundamental principles of insurance law. It is important that the social purpose of insurance is held intact – to ensure that those who need the benefits that insurance affords are not removed or pushed out of the insurance pools, either

“Making an employment decision on the basis of the probability of an individual developing a certain disease or disability, rather than on his/her actual capacity to perform the work, can constitute discrimination”

through being denied insurance cover or being charged inordinately high premiums.

When considering the phenomenon of genetic discrimination, it is useful to examine transatlantic perspectives. In May 2008, the United States Congress passed the *Genetic Information Non-Discrimination Act (GINA)*. GINA targets genetic discrimination by employers and health insurers. The legislation is novel, as it is the first pre-emptive anti-discrimination statute in American history, meaning that it attempts to eliminate a new brand of discrimination before it becomes widespread. This is different from predecessor civil rights statutes, which typically look for a documented history of discrimination as the basis to prohibit similar conduct in the future. The law was enacted to help ease concerns about discrimination that might discourage individuals from taking genetic tests that could benefit their health. GINA's advocates believed that the existing anti-discrimination regime was not equipped to deal with this unique form of discrimination.

My generation

In Ireland, genetic discrimination is regulated primarily by the *Disability Act 2005* (section 42) and prohibits the processing of genetic data in employment and insurance. Although Irish law has been relatively proactive in this area, it is thought that comprehensive European-level regulation in this area is preferable. There is currently no concrete European-level regulation in this area. In light of the unprecedented advances in genetic technology and the corresponding

potential for misuse of genetic information, comprehensive and uniform legislation is desirable at EU level, perhaps in the form of a new genetic information non-discrimination directive. Genetic discrimination has already been singled out by the European Commission as a priority area of reform (for example, article 21.1 of the EU *Charter of Fundamental Rights* expressly prohibits discrimination based on genetic features). In addition, the signing and ratification of the UN *Convention on the Rights of Persons with Disabilities* by the EU gives added impetus to the argument that a European-level response is both inevitable and necessary.

As interest in genetic science is growing, appropriate regulation is vital. If left inadequately regulated, there is a real possibility that discrimination and violation of privacy will become more widespread and that interested third parties will misuse sensitive genetic information. Such a legislative and policy vacuum could further set back the inclusion of persons with disabilities (and older persons) into society. In order to take advantage of genetic developments, careful consideration of the ethical issues and appropriate legal safeguards are necessary, having regard to the potential for abuse and the fundamental human rights at stake. **G**

GENETIC DISCRIMINATION SEMINAR

The Centre for Disability Law and Policy at NUI Galway will host a seminar entitled 'Genetic discrimination by employers and insurance companies – towards a European-level legal response' (in conjunction with the European Disability Forum and the European Parliament Disability Intergroup) at the European Parliament, Brussels, on 6 March 2012. For further details, contact aisling.depaor@nuigalway.ie.

LOOK IT UP

- *Disability Act 2005*
- *EU Charter of Fundamental Rights*
- *Genetic Information Non Discrimination Act (US)*
- *United Nations Convention on the Rights of Persons with Disabilities*



KEEPING *abreast*



Sarah Carew is a practising barrister and lecturer. In 2009, she published *The Devil's Handbook – a practical guide to the courts and courts services for junior barristers*

Dodgy replacement hip and breast implants are driving up the number of litigants seeking redress through the courts. Sarah Carew keeps abreast of recent developments in product liability

The developments in modern product liability laws have their origins in the Thalidomide tragedy, which caused outrage due to the inability of the law to compensate the many children who suffered from peripheral neuritis

as a result of their mothers taking the morning-sickness drug (*S v Distillers (Biochemicals) Ltd*). In response to the situation, the *European Community Product Liability Directive* was drafted and adopted into Irish law by the *Liability for Defective Products Act 1991*. This act created a strict liability scheme for defective products and, in so doing, changed the basis on which actions of this kind had been brought for over 50 years. To complement these provisions, and to deal specifically with the need for regulation of medical devices as 'products', the European Commission adopted Directive 2007/47/EC (the *Medical Devices Directive*), which came into force on 21 March 2010 and governs companies who sell medical devices in Europe, representing the first significant changes to the law in this area in over 14 years.

With the recent controversy over the French PIP silicone implants, and following close on the heels of the DePuy hip-replacement recall in 2010, the question of liability for defective medical products is a hot legal topic.

Under section 2(2) of the 1991 act, a producer shall be liable for damage caused wholly or partly by a defect in his product where a producer is defined as:

- a) The manufacturer or producer of a finished product, or
- b) The manufacturer or producer of any raw material, or

the manufacturer or producer of a component part of a product, or

- c) In the case of products of the soil, stock-farming and fisheries and game, which have undergone initial processing, the person who carried out such processing, or
- d) Any person who, by putting his name, trademark or other distinguishing feature on the product or using his name or any such mark or feature in relation to the product, has held himself out to be the producer of the product, or
- e) Any person who has imported the product into a member state from a place outside the European Communities in order, in the course of any business of his, to supply it to another, or
- f) Any person who is liable as producer of the product pursuant to subsection 3 of this section.

"The line, therefore, between product liability and the liability of the person promoting or supplying the product is blurred when one resorts to traditional principles of negligence and the duty of care"

The significance of such a wide definition, therefore, is that it covers within its remit both importers and those who re-brand or repackage a product. In the recent case of French manufacturing company Poly Implant Prothese (PIP), whose products were also sold through a Dutch company (ROFIL Medro)

and re-branded as 'M-plants', section 2(2) would establish the Dutch company as a producer, even though they are more strictly a redistributor or supplier in business terms.

A further aspect of the above definition is the provision contained in section 2(3) that imposes potential liability on all who supply a product. However, liability is provisional, in that it only renders suppliers liable in circumstances where that supplier fails to identify a person higher up the chain of liability as a producer. The section, therefore, turns a

FAST FACTS

- > The *Liability for Defective Products Act 1991* – a strict liability scheme for defective products
- > Regulation of medical devices as ‘products’ – the *European Community Product Liability Directive*
- > The scope of liability imposed on suppliers and manufactures under the 1991 act
- > The wider implications for suppliers of other medical products where a producer cannot be identified
- > *Cunningham v Neary* and the *Statute of Limitations*

supplier into a producer for the purpose of imposing liability, if the following conditions are satisfied:

- The producer cannot be identified by taking reasonable steps,
- The injured person requests the supplier to identify someone from the section 2(2) list (above),

- The request is made within a reasonable time after the damage occurs, and
- The supplier fails to comply with the request or to identify the producer.

In practical terms, this has significant implications for proceedings and ensuring that the correct parties are named as

defendants for the purposes of a personal injuries action.

An interesting issue arises in respect of surgical procedures involving implants (be they therapeutic or cosmetic). As noted above, the 1991 act helps identify who the producer/supplier of a particular product is, but there exists a second potentially important player in



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this scenario, and that is the physician who surgically inserts the product.

In this instance, there is an unusual crossover between professional negligence and product liability, and the question arises as to who is liable in circumstances where the products are sourced and supplied as part of a medical package, where the consumer has no real say in the choice of product used.

An increasing feature of modern cosmetic procedures is that certain private clinics have distributing rights to be the sole provider of a particular product or specialised procedure. In such circumstances, the patient is not only availing of that particular clinic, but also that clinic's choice of product. The line, therefore, between product liability and the liability of the person promoting or supplying the product is blurred when one resorts to traditional principles of negligence and the duty of care.

Hip to be square

Two recent high-profile examples can be found in the DePuy Orthopaedics recall of their 'ASR XL Acetabular' hip replacement system in August 2010, due to the high failure rates of the implants. More recently in May 2011, Abbott Laboratories recalled its 'MitraClip' system, which was used to pin damaged heart valves, because part of a delivery catheter was prone to breaking when the catheter was removed.

In ascribing liability, in broad terms, it is fair to say that where a healthcare physician has no reason to suspect any latent or inherent dangers in the product they are using, there is no deviation in the standard of care required of him or her.

However, with increased instances of product recall and widespread media reporting of these, the question must be asked: at what point does a clinic or physician assume a higher duty of care to satisfy themselves that the product they have chosen as the implant of choice is, in fact, the best one in the circumstances?

Considering that over 1,500 Irish women have come forward as having PIP implants, bringing the total number of women affected worldwide to almost 300,000 and, furthermore, given the inconsistent approach taken by the health service providers in Britain as to whether or not they will remove the implants, this issue is of significant importance.

With the recent media storm surrounding the PIP breast-implant scandal and the coverage the issue has received internationally, an issue arises in terms of the *Statute of Limitations*. In *Cunningham v Neary*, the defendant carried out an unnecessary surgical procedure on the plaintiff during the birth of her son. The High Court ruled that the action was not statute barred, as the date of knowledge was when the plaintiff received medical advice from another consultant obstetrician in relation

to the procedure that the defendant had performed. However, on appeal to the Supreme Court, the date of knowledge was held to be the date the plaintiff became aware that the procedure was unnecessary, which was held as the date when the plaintiff became aware of the scandal in the media.

Applying this to the present situation, where a defective product receives widespread media coverage, a potential plaintiff is likely to be affixed with knowledge as of the date of the coverage. In respect of PIP implants, the issue was first exposed in November 2011 and picked up worldwide by December 2011. In those circumstances, it is submitted that regard should be had to the *Statute of Limitations* when instigating any claims of this kind.

A second practical issue is that of identifying the correct defendant for the purposes of proceedings. In these situations, there are a number of parties involved in the process:

- The original manufacturer,
- The European supplier and/or distributor,
- The medical facility that purchases and recommends the product to their patients, and
- The physician who inserts the product (and their respective insurers).

In that regard, it is hugely significant that exposure to costs, from the client's perspective, is a core consideration and, equally, having costs awarded against a plaintiff can raise claims in terms of professional negligence in the drafting and selection of defendants.

In terms of the *Medical Devices Directive* (which came into force on 21 March 2010), of the many changes it introduces, the need for verified clinical data and clinical evaluations,

as well as post-market surveillance, is given prominence. In that respect, the directive is significant in that it expands the requirement that devices must be designed and manufactured in such a way as to minimise the risks posed by hazardous substances leaking from the device. In circumstances where the allegation in respect of the PIP or M-plants is that they contain industrial grade silicone – more usually used in furniture manufacturing – rather than medical grade as required, this may provide a further cause of action for injured plaintiffs.

Keeping your distance

With the overlap between medical negligence and product liability, the question stands: can physicians legally distance themselves from the products they use? The short answer would appear to be 'yes', where the physician is relying on representations made by the producers as to the safety of the product.

However, with increasing concerns as to the quality and standard of the products being used in cosmetic procedures, it remains to be seen whether there is a higher duty of care at purchasing level, particularly in circumstances where the patient has little or no say in choosing the brand of implant to be used.

At the very least, purchasers should take all reasonable steps to ensure the quality of the product they are using and that it is safe and fit for use in compliance with the *Medical Devices Directive*. The complex nature of cosmetic procedures and the extent to which technology is advancing to create new and alternative materials for use internally means this is an area of constant growth, with a corresponding growth in liability for product manufacturers and health-service providers who recommend one product over another. **G**

The author wishes to thank Marjorie Farrelly SC, Ray Ryan BL and David Whelan BL for their comments, and adds that any errors are entirely her own.

LOOK IT UP

Cases:

- *Cunningham v Neary* [2004] IESC 43
- *S v Distillers (Biochemicals) Ltd* [1970] 1 WLR 114

Legislation:

- *European Community Product Liability Directive* (85/374/EEC)
- *Liability for Defective Products Act 1991*
- *Medical Devices Directive*: (2007/47/EC) (SI no 109/2009 – *European Communities (Active Implantable Medical Devices) (Amendment) Regulations 2009*)



John O'Donnell is a senior counsel who practises extensively in the area of commercial law. He is the author of Examinerships: The Companies Amendment Act 1990, a second edition of which is in preparation

Recent NAMA-related cases emphasise the limited options open to borrowers under the 2009 act. However, the unambiguous declarations of a borrower's entitlement to be heard are a welcome assertion of the primacy of the fair procedures guaranteed by the Constitution.

John O'Donnell pricks up his ears

Does the grave economic crisis justify giving a State agency (NAMA) the power to acquire compulsorily a loan – where, although the borrower is currently in ‘negative equity’, all interest payments under an ‘interest-only’ agreement with the bank have (to date) been made – without affording the borrower a right to fair procedures; in essence, a right to be heard? This question (and others) confronted the divisional court (see panel) and the Supreme Court in *Delway Investment Limited and others v NAMA, Ireland and the Attorney General* (otherwise known as *McKillen*).

The general powers of NAMA are set out at section 12 of the act, which makes clear that NAMA has “all powers necessary

or expedient for, or incidental to, the achievement of its purposes and performance of its function”. The specific powers of NAMA in relation to assets are set out under part 9 of the act. Notably, section 84(2) provides that, for the avoidance of doubt, “NAMA may acquire from a participating institution performing or non-performing [essentially, defaulting] eligible bank assets”.

In *McKillen*, the divisional court placed particular emphasis on the purpose of the act (as opposed to the purposes of NAMA itself). The act’s purpose is to address “a serious threat to the economy and the systemic stability of credit institutions

in the State generally”. It does this by establishing NAMA, whose purpose is, in effect, to obtain the best achievable financial return for the State; NAMA does this by expeditiously acquiring eligible assets

“The central issue in McKillen was the power of NAMA – set out in section 84 of the act – to acquire eligible bank assets”

HEAR

HEAR



FAST FACTS

- > What are the rights of a borrower to object to the conduct of NAMA?
- > What obligations does NAMA owe to borrowers?
- > Is the 2009 *NAMA Act* constitutional?
- > The NAMA-related *McKillen* case and developments since then

from participating institutions, hopefully thereby removing uncertainty about those assets and the effect of that uncertainty on credit institutions. NAMA is then entitled to deal with those assets and to protect or otherwise enhance their value in the interests of the State. “Eligible bank assets”, in broad terms, are assets that are (or are connected with) development lands, though again the definition is extremely wide. A participating institution (that is, one of the five banks) may object to the designation of an asset as an “eligible bank asset”, but there is no provision for an objection by a borrower.

The central issue in *McKillen* was the power of NAMA – set out in section 84 of the act – to acquire eligible bank assets. It can do so where it considers this “necessary or desirable ... having regard to the purposes of the act and the resources available to the Minister [for Finance]”. The applicants, property investors, had met their interest obligations as required by their banks. The court did not find it necessary or appropriate to reach any concluded view as to the status of the applicants’ loans (and, in particular, whether or not they could properly be described as impaired or non-impaired). Nor did the courts base their decision on the value of the properties to be acquired – it not being part of the court’s function to resolve any valuation difference between the parties.

The arguments

Appropriate considerations: the applicants contended that NAMA did not take into account appropriate considerations in coming to its conclusion to acquire the *McKillen* loans. This was rejected by the divisional court and by the Supreme Court.

European state aid: The applicants maintained that, because the European Commission had determined that the acquisition of loans by NAMA amounted to state aid under article 107 of the treaty (having regard to the functioning of the European Union and to a recent commission decision), NAMA was obliged only to acquire

what could properly be described as “impaired loans”. This, too, was rejected.

The Constitution: The applicants suggested that, if the act were to be construed as not permitting the applicants to be heard and/or permitted the acquisition of unimpaired loans, then the act must be unconstitutional (and perhaps also incompatible with the *European Convention on Human Rights*). This contention was also rejected.

Timing: The applicants contended that the decision to acquire the loans was taken before NAMA came into existence, and therefore the decision was not legally capable of ratification and had not been ratified or retaken by NAMA in any legally permissible fashion. Mr McKillen contended that the decision to acquire the loans was taken on 11 and 14 December 2009. NAMA was established on 21 December 2009.

The divisional court concluded that the decision made on 11 and 14 December 2009 was adopted (albeit not expressly) by the subsequent actions of NAMA following its establishment (in particular, at a board meeting on 23 December 2009). The Supreme Court took a different view. Delivering the court’s judgment on 3 February 2011, Murray CJ indicated it was an essential precondition of the acquisition process that NAMA formed an intention to acquire. It must exercise its discretion under the section and form an opinion that it is necessary or desirable to acquire the assets: “NAMA is a body established by statute and no act performed in its name has any legal effect except as provided in the act ... It is axiomatic that NAMA could not make any decision before it came into existence.

“...It follows that the decision of the interim team made at meetings on 11 and 14 December 2009 was, in law, at the time when it was made, a nullity and had no legal effect.

“...This is no mere matter of form. It is fundamental to the functioning of a statutory body that it, itself, take such decision as it is empowered to make by the statute and exercise any discretions conferred on it. Consequently, NAMA has made no decision to acquire the appellants’ loans.”

Fair procedures: The applicants contended that they had various constitutionally protected rights that would actually or potentially be affected by acquisition by NAMA, namely (a) property-related rights and (b) the right to fair procedures – and in particular the right to be heard – before any decision adverse to the applicants’ rights was made.

The divisional court held that the “clear underlying imperative urgency” of the act suggested that the process of acquisition of loans needed to be conducted in an extremely expeditious manner. The absence of a provision for consultation with a borrower (especially where an express entitlement to object is given to banking institutions) suggested an ordinary construction of the act could not lead to an implied entitlement to the part of the borrower to be heard.

However, the Supreme Court concluded that the act did not preclude NAMA from receiving and taking into account representations on behalf of borrowers, particularly having regard to their particular circumstances. On the contrary, properly construed in the light of the Constitution and the consequential principles of interpretation that must be applied, the act required that NAMA accord persons such as the appellants the right to make representations concerning any decision that it proposed to take pursuant to section 84 of the act.

The court declared that the appellants were entitled to be informed by NAMA of any intention to consider making a decision to acquire eligible bank assets related to their credit facilities with participating banks, so as to afford them an opportunity of making appropriate

representations concerning such a proposed decision. The judgments referred to various decisions emphasising the presumption of constitutionality attaching to every piece of legislation passed by the Oireachtas. Such legislation must be interpreted on the presumption that discretions and adjudications prescribed by an act are to be conducted in accordance with the principles of constitutional justice governing fair procedures.

“The Supreme Court concluded that the act did not preclude NAMA from receiving and taking into account representations on behalf of borrowers, particularly having regard to their particular circumstances. On the contrary, the act required that NAMA accord persons such as the appellants the right to make representations concerning any decision that it proposed to take pursuant to section 84 of the act”

THE DIVISION BELL

The High Court consists of the president and 36 ordinary judges. The President of the Circuit Court and the Chief Justice are, by virtue of their office, additional judges of the High Court. Matters coming before the High Court are normally heard and determined by one judge, but the President of the High Court may decide that any cause or matter or any part thereof may be heard by three judges in what is known as a divisional court.

Murray CJ said it was “impossible” to reconcile this presumption with the respondent’s argument that the 2009 act not only failed to provide for a procedure enabling the appellants to make representations to NAMA, but actually prohibited (or at least excluded by necessary implication) any possibility of representations to NAMA under section 84. He was satisfied that section 84 “must be interpreted as meaning that NAMA must permit persons whose rights may be adversely affected or on whom liabilities are imposed as a consequence of a decision to acquire an eligible asset to make representations before such a decision is made ... I would have thought that the Oireachtas, if it intended to exclude the operation of procedures of this nature, would have done so expressly.”

After McKillen

The decision of the Supreme Court in *McKillen* has been cited in other contexts; for example, *Re Custom House Capital Limited* (final order appointing of company inspectors not appropriate on an *ex parte* basis) and *Caldwell v Mahon & Ors* (tribunal of inquiry not entitled to refuse to hear any submissions from an affected party before deciding whether to commence or to proceed with particular investigation).

Daly and others v National Asset Loan Management Limited and others is a further refinement of the principles set out in *McKillen*. In *Daly*, the dispute between the

applicant property investors and NAMA did not relate to the decision to acquire the applicants’ loans – instead, the issue was as to whether the loans were term loans or were repayable “on demand”. Having acquired the loans, NAMA demanded repayment and appointed receivers.

At the leave application, Peart J agreed with NAMA’s submission that the facilities were repayable on demand. However, he gave leave to the applicants to commence proceedings against NAMA (under section 182), as they had established that there was a “substantial issue” that their right to be heard prior to demand being made and receivers being appointed had been breached. Peart J refused to grant an injunction restraining receivers appointed by the respondents from acting, noting that section 192 provided that, where there was a remedy in damages, an injunction could only be granted against NAMA if not to do so would constitute an injustice.

McKillen and *Daly* emphasise the limited options open to borrowers under the 2009 act. Practitioners would also do well to note the 30-day time limit within which any application for leave to challenge NAMA must be made, as well as the significantly higher threshold required to obtain leave than is required for ‘normal’ judicial review applications. Neither case decides whether NAMA was the best – or even a good – solution to the economic problems facing the country. But many who read the Supreme Court judgments in *McKillen* may find it heartening that NAMA is not

above criticism. In addition, the unambiguous declarations of a borrower’s entitlement to be heard (particularly a ‘non-delinquent’ borrower) are a welcome assertion of the primacy of the fair procedures guaranteed by the Constitution, notwithstanding the awesome powers given to NAMA. **G**

LOOK IT UP

Cases:

- *Caldwell v Mahon and Ors* [2011] IESC, 21
- *Daly and others v National Asset Loan Management Limited and others* (High Court, 12 September 2011, Peart J)
- *Dellway Investments Ltd and others v National Asset Management Agency* [2011] IESC 4, 13, 14
- *Re Custom House Capital Limited* [2011] IEHC 298

Legislation:

- *National Asset Management Agency Act 2009*

Literature:

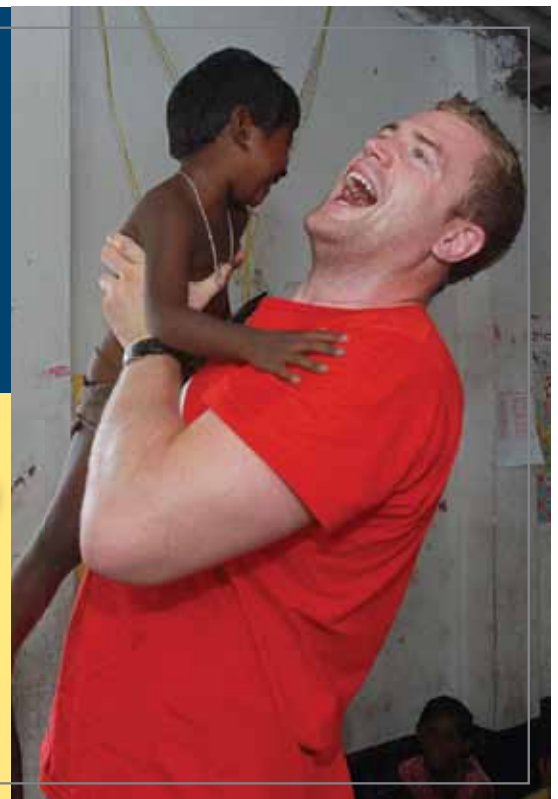
- Hugh B Byrne and Louis McEntagart, *National Asset Management Agency Act 2009: Annotations and Commentary* (Bloomsbury Professional, Tottel Publishing)

IRELAND’S RUGBY STAR JAMIE HEASLIP SAYS

“ Save the date for Calcutta Run - 26 May 2012! ”

The Calcutta Run is a vitally important fund raiser for GOAL and the Peter McVerry Trust, which help improve the lives of homeless young people in Calcutta and Dublin. As most of you know this annual 10km run/walk is a great challenge for people of all ages and abilities. Last year we raised a massive sum of €160,000 for our two charities. Thank you to all of you who made this possible. This year we face the mammoth challenge of trying to top last year’s funds raised so we need your help!

Ireland and Leinster rugby star and GOAL sporting patron Jamie Heaslip says “On my recent visit to Calcutta I saw some of the projects which the Calcutta Run has funded. Over the past 13 years so much has been accomplished to help these children but we still have a lot more to do. Please save the date of 26 May 2012 for this year’s Calcutta Run or sign up to run or walk now on www.calcuttarun.com”





Eva Nagle is a barrister and lecturer and is author of the forthcoming Intellectual Property Law (Thomson Roundball)

The recent decision in *McCambridge v Brennan* is notable, not only because a decision on passing off is rare in this jurisdiction, but also for the reasoning behind that decision. Eva Nagle kneads the dough

A High Court judgment in an intellectual property dispute in Ireland is a rare enough phenomenon. Indeed, for such a dispute to even reach the courts in Ireland is an uncommon occurrence. For this reason, it is interesting that 2011 was a ‘headline’ year for passing off, with high-profile cases such as *Tribune Newspapers plc v Associated Newspapers* and *McCambridge Limited v Joseph Brennan Bakeries* sparking debate.

Unlike the *Tribune* case, which settled before trial, *McCambridge* proceeded to trial and, as a result, Peart J’s decision (given on 25 November 2011) merits discussion – not only because a decision on passing off is somewhat exotic in Irish jurisprudence, but also because of Peart J’s reasoning in the decision, in which he acknowledges the primary ‘themes’ of passing off, including the emphasis on the protection of goodwill rather than consumer protection (which should be ensured through different avenues) and the fact that proving intention to deceive is not necessary to succeed in passing off.

McCambridge’s and *Brennan*’s are two well-known players in the Irish bread market. The case centred on the whole-wheat bread loaf produced by both companies. *McCambridge*’s have a 30% market share for the ‘tradition’ bread market, whereas *Brennan*’s have a 13% share in this section but is the overall market leader in bread in Ireland. The shape, size and colour of the whole-wheat loaves manufactured by both companies are extremely similar.

Use your loaf

In January 2011, *Brennan*’s changed the packaging of its loaf. The new packaging consisted of resealable, transparent ‘bag’-style packaging. The front of the packaging bore a dark green panel. *McCambridge*’s claimed that they were the pioneers of resealable packaging for bread and that they had used transparent, resealable packaging with a dark green panel on their product for many years. They claimed that *Brennan*’s, in adopting this new style of packaging, had created a ‘mimic’ or ‘lookalike’ that was confusingly similar to the packaging used by *McCambridge*’s since January 2008, and that this would deceive consumers. *McCambridge*’s instituted proceedings, seeking an injunction restraining *Brennan*’s from, among other things, infringing the copyright in the *McCambridge*’s packaging and passing off their product as the *McCambridge*’s product. *McCambridge*’s also sought an injunction pursuant

to section 71 of the *Consumer Protection Act 2007*, on the basis that *Brennan*’s were engaging in a misleading commercial practice. *Brennan*’s rejected all claims of confusing similarity and parasitic behaviour as “offensive”. They argued that their new packaging was sufficiently distinctive (through the use of its distinctive red and yellow colours, logo and livery) to differentiate its product from *McCambridge*’s bread.

Well bread

Peart J considered the two rival products and the relevant authorities and concluded that the case in passing off had been made out – while *Brennan*’s packaging was different in a “literal sense”, when it came to the question of “the overall appearance on a first impression ... as it is viewed

by the average and reasonably observant customer” (the standard that the case law in passing off demands), he did not believe that the *Brennan*’s packaging eliminated the risk of consumers being confused by the bread’s “get-up”.

The tort of passing off can be used to protect unregistered intellectual property rights, whereas statute can be used to protect registered rights. Passing off can be distinguished from trademark law protection, however, in that passing off is ‘wider’ than trademark protection as it can be used to protect not only distinctive names, but also distinctive advertising styles, colours and product ‘get up’ – as was the case in *McCambridge*.

Essentially, an action in passing off allows trader A to prevent a competitor, trader B, from misrepresenting and passing off their goods as if they were the goods of trader A. It protects the goodwill of a business, rather than a specific mark as in trademark law.

The ‘modern’ statement on passing off is found in *Perry v Truefitt* (1842), where Lord Langdale MR stated as follows: “A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practice such a deception, nor to use the means which contribute to that end. He cannot therefore be allowed to use names, marks, letters or other indicia by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person.”

In order to succeed in a claim of passing off, the plaintiff must satisfy the “classic trinity” of conditions provided in the ‘Jif Lemon case’ (*Reckitt and Coleman Products Limited v Border Inc and Others*), which was endorsed by Peart J in *McCambridge*. These three ingredients to a claim in passing off are:

“A likelihood of confusion in the absence of misrepresentation is not enough for a claim in passing off to succeed. Furthermore, the intention to misrepresent on the part of the defendant is not necessary to succeed”



BREAKING bread

- ‘Goodwill’ that the plaintiff possesses in a good or service,
- A misrepresentation made by the defendant that is likely to deceive the public,
- Damage to goodwill that results.

Best thing since

In *McCambridge*, Peart J found that the plaintiff “easily satisfied” the first requirement of goodwill. Evidence showed that McCambridge’s have been in the market of traditional bread-making for over 50 years and had expended significant amounts of

money in building that goodwill through advertising during that time. As regards the third requirement, of resulting damage, Peart J was satisfied that, if the plaintiff succeeded in establishing the second condition of misrepresentation, or “actionable confusion”, then it was “reasonable to conclude” that this would “result in customers purchasing the defendant’s product in error, believing he or she has purchased that of the plaintiff”.

Thus, Peart J had to decide whether the second condition, misrepresentation, was established. The courts have made it clear

FAST FACTS

- > The tort of passing off can be used to protect unregistered intellectual property rights, whereas statute can be used to protect registered rights
- > Passing off is ‘wider’ than trademark protection, as it can be used to protect not only distinctive names, but also distinctive advertising styles, colours and product styling
- > Proving intention to deceive is not necessary to succeed in a claim of passing off

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that there must be a likelihood of confusion between the plaintiff's and defendant's products for this condition to be fulfilled. A likelihood of confusion in the absence of misrepresentation is not enough for a claim in passing off to succeed. Furthermore, the intention to misrepresent on the part of the defendant is not necessary to succeed. Misrepresentation is actionable even if it is unintentional or unconscious. As Laffoy J stated in *Guinness Ireland Group v Kilkenny Brewing Company*: "I am satisfied that the name 'Kilkenny Brewing Company Ltd' was chosen innocently and without any consciousness of the possibility of confusion being created in consumers' minds of a connection between the defendant and the plaintiffs. Moreover, on the evidence, I am satisfied that the plaintiff's efforts to procure that the defendant's name be changed prior to and in these proceedings have been resisted in the *bona fide* belief that the plaintiffs are not entitled to require the defendant to change its name. The defendant's state of mind is wholly irrelevant to the existence of the cause of action in passing off."

That said, it will be of significant probative value to a plaintiff if they can show that the misrepresentation was conscious or intentional on behalf of the defendant, as was recognised in *Irvine v Talksport*.

Bread and circus

Peart J acknowledged these principles. At paragraph 14 of his decision, he stated that the case would "not be decided on the basis of whether or not the defendants had such a deliberate intention when adopting its new packaging. Intention is not necessary." Instead, he emphasised that "the court must decide whether, objectively speaking, a reasonable member of the public wishing to purchase a loaf of McCambridge whole-wheat bread is likely to be confused into buying the Brennan's whole-wheat loaf in error, believing it to be McCambridge's, because it so closely resembles same in its general get up". Peart J held that he was not satisfied on the evidence that there was a deliberate intention on the part of Brennan's to mimic the "get up" of McCambridge's and, consequently, to deceive the public – but this did not mean that misrepresentation did not occur.

Regarding the test for the likelihood of confusion, Peart J acknowledged that the court would "put itself in the shoes of the reasonably prudent shopper, who is not in any particular hurry and who neither is overly scrupulous and dilatory and who enters the shop with the wish to purchase a loaf of McCambridge's whole-wheat bread". This is an interesting definition of 'the reasonable shopper' and takes the real circumstances of buying bread into account.

Peart J placed the "first impression" of the shopper at the centre of the "likelihood of confusion" test. In doing so, he gave clear endorsement to the decision of Clarke J in *Jacob's Fruitfield*, which emphasised the first impression rather than "the later opportunities which the customer may have to notice that the wrong product has been placed in the basket or trolley before leaving the shop".

Taking this and witnesses' testimony (bread purchasers) into account, Peart J concluded that likelihood of confusion between the two products was established and granted the injunction. Interestingly, in reaching this decision, the judge took the "circumstances of purchase" as well as the type of product into account. He acknowledged that breads can get "tossed around" a shop shelf in the course of the day and he acknowledged the fact that bread is the type of product to which "careful scrutiny" will not usually be applied when being purchased.

Soon forgotten

Peart J declined to grant the plaintiff an injunction pursuant to section 71 of the *Consumer Protection Act 2007*, on the basis he did not believe that the packaging design was a "commercial practice involving marketing or advertising". Some commentators, such as McMahon, question this view, on the grounds that the *European Communities (Misleading and Comparative Marketing Communications) Regulations 2007*, which informed the 2007 act, are aimed at combating misleading advertising and, as a result, the language of the 2007 act was intended to have a broader application



"Bread is the type of product to which 'careful scrutiny' will not usually be applied when being purchased"

that would encompass packaging and trade 'get up'.

Following the decision in the High Court, Brennan's successfully applied to the Supreme Court for a stay on the High Court injunction pending the appeal of Peart J's decision. The stay was granted on the condition that the appeal is pursued with "all due speed and alacrity". There is no doubt that Peart J provided a very comprehensive discussion and application of the law of passing off in the High Court. We await with interest the Supreme Court's consideration of the appeal. **G**

LOOK IT UP

Cases:

- *Falcon Travel Limited v Owners Abroad Group plc* [1991] 1 IR 175
- *Guinness Ireland Group v Kilkenny Brewing Company Ltd* [1999] IILRM 531
- *Irvine v Talksport* [2002] FSR 943
- *Jacob Fruitfield Food Group Limited v United Biscuits (UK) Limited* [2007] IEHC 368
- *McCambridge Limited v Joseph Brennan Bakeries* [2011] IEHC 433
- *Miss World Limited and Others v Miss Ireland Beauty Pageant Limited and Murray* [2004] 2 IR 394
- *O'Neill's Irish International Sports Co*

Limited v O'Neill's Footwear Dryer Company Limited (High Court, 30 April 1997)

- *Perry v Truefitt* (1842) 49 ER 749
- *Reckitt and Coleman Products Limited v Border Inc and Others* [1990] 1 WLE 491
- *Tribune Newspapers plc v Associated Newspapers t/a Irish Mail on Sunday* 2011/1623P

Legislation:

- *Consumer Protection Act 2007*
- *Copyright and Related Rights Act 2000*
- *European Communities (Misleading and Comparative Marketing Communications) Regulations 2007*



Shane McCarthy is principal of the Skibbereen law firm Shane F McCarthy & Co

TAKE A RESTOR

There are as many as 750 people who have been sentenced to prison walking free, because the jails cannot accommodate them. Restorative justice programmes are the way forward, argues Shane McCarthy

It is a feature of the criminal justice system at the moment that defendants are fully aware of the problem of packed prisons and 'opt' for a prison sentence rather than a non-custodial alternative in the knowledge that they will not have to serve it. This is clearly a situation in dire need of reform.

In November 2010, the then Justice Minister Dermot Ahern announced a scheme to build the foundation for the implementation of a robust restorative justice system, providing an alternative to a prison sentence of less than 12 months' duration. Currently, there are operational schemes in Tallaght and Nenagh, and all of the current indications are that this system will be approved for a nationwide roll-out during 2012. The nationwide roll-

out of restorative justice can be viewed as an opportunity to re-mould the criminal process in a manner that benefits all stakeholders in our society. Restorative justice can be seen as a partnership of community, gardaí, the Probation Service and other stakeholders working together to address the underlying factors leading to problematic behaviour and crime. By dealing with the underlying problems in a community setting, the offender is reformed and reintegrated back into the community – healing rather than retribution is sought.

According to the National Commission on Restorative Justice, "restorative justice is a victim-sensitive response to criminal offending, which, through engagement with those affected by crime, aims

RESTORATIVE JUSTICE – A CASE STUDY

Eddie was rushed to hospital, having been stabbed in the leg. He had taken a cocktail of drugs on the night, which made him very aggressive. Peggy, a staff nurse at A&E, explained that she would have to clean the wound before it could be stitched. While she was cleaning the wound, Eddie felt pain and hit Peggy.

At the restorative justice case conference, Eddie, in the sober light of day, was extremely ashamed of what he had done. It emerged that his parents had recently parted and that he was not coping well. Peggy and the head of security explained how difficult it was to work in an A&E environment, without the added danger of being assaulted. Eddie sincerely apologised to Peggy, and she sensed it was genuine.

An action plan was agreed, which involved Eddie agreeing to get treatment for his drink and drug problems. He also undertook to take a training course to help him get a job. At the end of the conference, in addition to accepting Eddie's apology, Peggy wished him well and gave him a hug.

This case study illustrates the difference between a restorative justice intervention and how a similar set of facts would be dealt with in the District Court. Imagine the typical scenario: Eddie would have entered a guilty plea at an early stage in the District Court in the hope of avoiding a custodial sentence. The District Court judge would have considered the limited range of sentencing options open to him, and the case would have been finalised

with neither the offender nor the victim being involved in the process in any meaningful way, bar a short plea in mitigation made by Eddie's solicitor.

In the restorative justice process detailed above, both Peggy (the victim) and Eddie (the offender) had very substantial roles in the eventual resolution of the incident. Eddie was confronted with what had happened and saw how his behaviour had affected others. Peggy had the opportunity to tell her story, to receive a sincere apology and to play a significant role in the agreement of the action plan for Eddie. The process also allowed Eddie to confront the problematic behaviour that led to the commission of the offence and put in place a plan to address that behaviour.



ACTIVE

to make amends for the harm that has been caused to victims and communities and which facilitates offender rehabilitation and integration into society.”

Pilot projects

New Zealand introduced restorative justice on a legislative basis in 1989. They also laid down the principles that criminal proceedings for adult offenders should not occur if other methods of addressing the problem are available, that measures that address offending behaviour should strengthen the family, and that sanctions should involve the least restrictive alternative and should take heed of the interests of crime victims.

In the Irish system, there is a legislative basis for the use of restorative justice in relation to the operation of the *Children Act 2001*. There is as yet no legislative basis for the use of restorative justice involving adult offenders.

However, there are two restorative justice programmes currently operating in Ireland on a non-statutory basis: the Nenagh Community Reparation Project (NCRP), and Restorative Justice Services (RJS) based in Tallaght. For a number of years, both projects have operated only in Nenagh and Tallaght and, as such, referrals have been confined both geographically and in terms of the numbers that could be facilitated by each project.

FAST FACTS

- > Restorative justice is a victim-sensitive response to criminal offending that aims to make amends for the harm that has been caused to victims and facilitates offender rehabilitation and integration into society
- > There are operational restorative justice schemes in Tallaght and Nenagh and all the current indications are that the system will go nationwide during 2012

This situation has, however, recently changed. Both projects have been expanded both in terms of the geographical area that they cover, and also in the numbers of people who are going through their programmes. The RJS project has been expanded to include the criminal justice courts in Dublin, whereas NCRP has been expanded to include District Courts in North and South Tipperary and is continuing to expand into the mid-west region. The rationale for the

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expansion of these two pilot projects is to examine the potential for a national roll-out of this scheme, and both Minister Alan Shatter and his predecessor Dermot Ahern have indicated that the national roll-out of this scheme is imminent.

Real opportunity

The national roll out of a statutory restorative justice scheme presents a real opportunity for solicitors. The National Commission on Restorative Justice predicts that as many as 10,000 criminal cases a year could be diverted from the criminal courts into restorative justice programmes. Solicitors will have a necessary role in ensuring that the position of the offender is safeguarded and that the reparation proposed is not disproportionate or excessive in the circumstances. Solicitors will also have a role in ensuring that, once these schemes are established on a legislative basis, their clients are fully aware of the powers and limits of these schemes. It will also become important that a solicitor is in a position to reflect on the circumstances of each individual client with a view to considering the potential for a restorative intervention and is in an informed position to propose such an intervention to the court.

But does it work?

The scheme envisaged by the National Commission on Restorative Justice proposes referral for the purposes of a restorative justice intervention at the post-conviction/pre-sanction stage. Restorative justice gives offenders the opportunity to make right, in a practical way, the wrongs done to a victim and to the community. It facilitates the offender in

telling his or her side of the story and affords a victim the opportunity to highlight the hurt and injury the offender's behaviour has caused and to obtain an apology, assurances and explanations.

A study in Northern Ireland found that 98% of young offenders who participated in a restorative justice programme felt that people had listened to them. Moreover, 97% of the offenders accepted responsibility for their actions. A recent study revealed that 89% of the victims who participated in a restorative justice system received an apology, whereas only 19% of the victims whose cases were dealt with in court received one. Victims who went through the restorative justice scheme were also found to be much more likely to feel that the apology received was sincere. The majority of victims participating in restorative justice conferences were willing to forgive offenders for their violation and were 60% less likely to be fearful of being re-victimised compared with those who had their cases dealt with through the courts.


Participants in the restorative justice system are reported to be extremely satisfied with the process, and outcomes indicate significantly higher levels of satisfaction among both victim and offender participants compared with those who have been through the court system. Solicitors and gardaí who have participated in these schemes have also expressed satisfaction with how the system works in practice.

Restorative justice programmes frequently cost less than other sanctions. The process, when successful, removes the need for a trial and also lessens the demand for prison capacity. Benefits also arise from the potential for offenders concerned not to re-offend, and international studies have consistently shown lower recidivism rates among people who have participated in such processes. The National Commission on Restorative Justice did not adopt a definitive range of offences that could be considered

appropriate for a restorative intervention, but indicated that initially cases in which the court is considering a custodial sentence of up to three years should be considered for their suitability.

Challenges

There is a lack of knowledge among legal practitioners with regard to this area of law. I recently conducted a small-scale survey of solicitors practising in criminal defence work and found that 75% of

those surveyed were not aware of the main features of the concept of restorative justice. There is an urgent need to address this lack of knowledge prior to the nationwide rolling out of this system – it is a system that appears to work in other jurisdictions and is worthy of real consideration for its incorporation into the bedrock of Irish criminal justice. Even from a practical point of view, it is likely to become too integral to the Irish criminal justice system for practitioners to ignore. 

“By dealing with the underlying problems in a community setting, the offender is reformed and reintegrated back into the community”

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www.lawcare.ie



CEO Eddie Barron of AB Wolfe & Co celebrates the firm's award as 'Litigation Specialists of the Year' at the IICM Awards for the second year running

Past presidents and Council members of the Law Society gathered on 19 January 2012 to attend the outgoing president's dinner, held in honour of John Costello. Joining the current president, Donald Binchy, are predecessors (*front, l to r*): Gerard Doherty, Geraldine Clarke, Philip Joyce, John Costello, Donald Binchy, Moya Quinlan, Judge Frank O'Donnell and Michael V O'Mahony. (*Back, l to r*): Elma Lynch, Frank Daly, James MacGuill, Adrian Bourke, Laurence K Shields, Michael Irvine, John D Shaw and Andrew Smith



Martin J O'Brien, solicitor, of Hanly's Place, Nenagh, was recently conferred with a Diploma in Mediation and Conflict Intervention at NUI Maynooth



At the conferring ceremony for the Diploma in Intellectual Property and Information Technology on 16 November were guests (*front, l to r*): Shane Smyth (lecturer), Freda Greal (Law Society), Minister Phil Hogan (Department for the Environment, Community and Local Government), Donald Binchy (Law Society President), Pat Cox (President of the Alliance Francaise), John O'Connor (Vice-Chairman, Education Committee). (*Lecturers, standing*): Niamh Hall, Peter Bolger and Patricia McGovern. (*Conferees*): Gabriel Cosgrave, Aideen Delaney, Barbara Dowling, Wendy Doyle, Elizabeth Igoe, Paul Johnson, Jane McCluskey, Jaime Moriarty, Claire Marie Murphy, Orna Murphy, Mark Newman, Karl O'Connor and Martin Tierney



Diploma in Insolvency Law

At the conferring ceremony for the Diploma in Insolvency Law on 23 November were guests (*front, l to r*): Bill Holohan (lecturer), Gavin Simons (lecturer), Freda Grealy (Law Society), Minister John Perry (Department for Small Business), Mr Justice Matthew Deery (President of the Circuit Court), Michelle Ní Longáin (Chairman, Education Committee), Ms Justice Mary Laffoy, Elaine Grier (lecturer), John Kennedy (lecturer) and Deirdre Flynn (Law Society). (*Lecturers, standing*): Myles Kirby, Des Ryan, Rory O'Boyle (Law Society), Brian McEnery and Margaret Finlay. (*Conferees*): Maria Del Mar Rubio Garcia, Rita Garvey, John Gribben, John Healy, Eamonn Keane, Yvonne Kelly, Declan Manley, Susan McCormick, Cormac Mohan, Kieran Mulcahy, Eoin Mullowney, Mark Patterson, Triona Price, Sean Rooney, Tanya Sheridan, Tara Smith, Brendan Smyth, Fiona Somers, Malachy Stephens, Agatha Taylor and Lynn Walsh



Diploma in Employment Law

At the conferring ceremony for the Diploma in Employment Law on 23 November were guests (*front*): Rory O'Boyle (Law Society), Freda Grealy (Law Society), Minister John Perry (Department for Small Business), Mr Justice Matthew Deery (President of the Circuit Court), Michelle Ní Longáin (Chairman, Education Committee), Ms Justice Mary Laffoy, Des Ryan (lecturer) and Deirdre Flynn (Law Society). (*Conferees*): Marie Carroll, Naomi Cody-Sexton, Jennifer Curry, Orlaith Daly, Maria Dilworth, Laura Graham, Patricia Holohan, Kirsten Kingerlee, Emma Madden, Freda Mahon, Annemarie McEnerney, Alexandra Moore, James Morrin, Mary Needham, Colette O'Beirne, Larry O'Brien, Deirdre O'Connor, Joanne O'Connor, Orla Ó Foghlú, Belinda O'Keefe, Patrick O'Riordan, Ciara Quinn, Ruth Stephenson, Edel Stewart, David Went and Elaine Whelan

The Soft Vengeance of a Freedom Fighter

Albie Sachs. Souvenir Press (Independent Voices Series) (2011), www.souvenirpress.co.uk. ISBN: 978-0-2856-402-07. Price: Stg£15.

“For a whole new generation, apartheid has become absurd, unbelievable.” The modern post-apartheid South Africa is the product of many people’s hopes, desires, dreams and lives. Albie Sachs, the former judge of the South African Constitutional Court, is one of these people.

In this updated edition of the book that first appeared in 1990, Sachs outlines his own personal struggle to rebuild his life, physically and mentally, after losing his arm and his sight in one eye. Sachs was the victim of an assassination attempt by the South

African government in the streets of Maputo, Mozambique, in 1988. He was in exile there for his writings and actions as a lawyer on behalf of the ANC. He survived the attempt on his life, and his rehabilitation forms the subject matter of this book.

However, the book is more than just a discussion of his personal journey. It is interlaced with vignettes on life, the ANC and South Africa. Sachs’s style is funny, insightful, thought provoking and at times very moving, while all being presented through his amazingly positive and inspiring personality.

The author was an influential voice

in the drafting of the South African constitution. His views on, and participation in, both this process and the negotiations that led to the end of apartheid are both interesting and humorous.

Sachs himself has now left both the political and judicial arenas. He claims his “soft vengeance is out of date. We have new problems, new injustices to deal with. All are connected with the past, underlined by it, but we need fresh endeavours, new ways of thinking.” This book provides many ideas to use and build on, not alone for any individual or

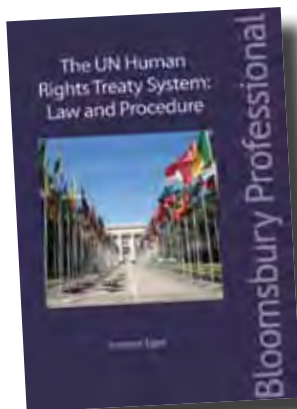


indeed South Africa, but perhaps even our own country. Sachs’s masterpiece has much to offer us all.

Aonghus Kelly is a lawyer at the War Crimes Section of the Prosecutor’s Office of Bosnia and Herzegovina.

The UN Human Rights Treaty System: Law and Procedure

Suzanne Egan. Bloomsbury Professional (2011), www.bloomsburyprofessional.com. ISBN: 978-1-8476-610-98. Price: €125 (incl VAT).



The two well-known international covenants, the ICCPR and ICESCR, and the seven ‘core’ international treaties together

comprise what is commonly referred to as the UN human rights treaty system. The focus of this book is on the procedural mechanisms contained in all of these various treaties, with the aim of assessing their efficacy in practice. Meticulously researched by Suzanne Egan, a lecturer in UCD, the book analyses the development of each treaty, the substantive rights enshrined therein, and the nature and functions of their respective monitoring bodies. Reflecting the law up to May 2011, the book also includes an analysis of the *Convention for the Protection*

of All Persons from Enforced Disappearance, which entered into force in December 2010.

A number of criticisms of the system are considered in detail, namely the lack of publicity the entire process seems to generate, the perceived lack of impartiality of some members of the treaty bodies, and the unfortunate fact that lack of funding and staff has gradually intensified rather than diminished. Highlights include chapter 6, which examines a new breed of investigative mechanism that has recently emerged in the family of treaties, namely preventative mechanisms aimed

at diagnosing problems before they reach crisis stage. Also of particular interest is chapter 16, which looks at reform of the system as a whole.

Overall, this is a very valuable resource reference for any student, practitioner or observer with an interest in the procedural workings of international human rights treaties.

Diarmuid Cunniffe is a solicitor in A&L Goodbody and recently completed the European Master’s in Human Rights.

Clubs and Societies in 18th Century Ireland

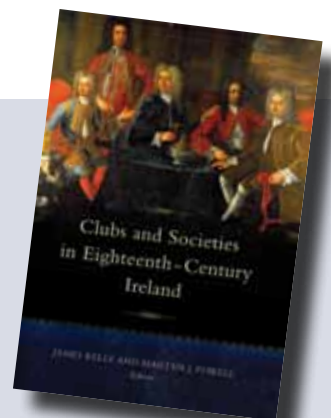
James Kelly and Martyn J Powell (editors). Four Courts Press (2010), www.fourcourtspress.ie. ISBN: 978-1-8468-222-92. Price: €55 (incl VAT).

Many lawyers belong to clubs and associations, such as the Royal Dublin Society and the Royal Irish Academy, and these originated in the 17th or 18th century; they were homosocial (in general), catering generally for men. Thankfully, all that has changed now. The history of these clubs and associations are analysed in this book. Some clubs, like the Hellfire Club, were

ephemeral. Some were dining and drinking clubs, sports and hunting clubs. Some were political, with unusual names like the Monks of the Order of St Patrick (‘the Monks of the Screw’), which assisted the ‘patriots’ in parliament to generate momentum that would free trade with Britain.

There is no mention in this book of the Society for Attornies (1774)

– a short-lived society – or the Law Club of Ireland, founded in 1791. However, mention is made of the Bar Club, which was stated to have flourished in Dublin in the 1780s and 1790s as a convivial and dining club for young barristers “not yet troubled with too much serious business”. ‘Going-ons’ were reported at the time of “burlesque games and parodies on the law and legal process” at the Bar



Club of Ireland – a fruitful topic of research for a gifted scholar! 📖

Dr Eamonn G Hall is principal of EG Hall & Co, Solicitors.

Library catalogue gets a New-Year facelift

An updated version of the library's online catalogue has just been launched, and promises to offer users a more interactive and user-friendly experience, writes Mairead O'Sullivan



Mairead O'Sullivan is executive assistant librarian

The library launched an updated version of its online catalogue in January. The new catalogue has the same functionality as the old, but with some additional features that will assist members with their searches and offer a more user-friendly and interactive browsing experience.

Information about library services and facilities available to members, such as book loans, document supply, precedents lists and library charges, can be accessed through the library services link on the homepage.

Users can also scroll through the new books that the library has acquired and keep up to date with new projects that we are undertaking relating to the digitisation of our unreported judgments collection and selected pre-1922 legislation. The archives page will also be continually updated with old materials relevant to the Law Society, such as charters, acts and almanacs.

The search facility on the new catalogue has been expanded to provide members with greater control over the results that they require. At the top of the home page, the user can perform a simple search of everything in the library catalogue, or they also have the option to narrow the search by 'title', 'author' or 'subject'. Results will be displayed on a separate screen, and users can configure them by clicking on the various options that will appear on the left-hand side of the results screen. The options include 'publication



Jasper failed to realise that he was poking a mouse mat

date', 'author', 'material type' and 'subject', and they allow the user to be as general or as specific as they wish when searching.

RSS feeds

Another new feature of the catalogue will be the RSS feeds, which will allow members to


monitor topics of interest to them and keep up to date on a particular subject.

Users can access their personal accounts through the 'my account' tab on the home page. (You will need your solicitor number and PIN number. Contact the library for help

with accessing this page.) Once logged in, members will be able to place a hold on a book, view the books that are checked out under their name, and view any holds that they may have placed while browsing.

The new catalogue also allows users to create various lists of legal materials that they might find to be of interest or wish to borrow in the future. Users can add items to their temporary list while they browse, which they can then print, save permanently or email by clicking on the 'my lists' tab.

The new catalogue is a work in progress and will continue to expand and develop to meet members' needs. We are aware of the ongoing demand for access to legal materials online, and the new catalogue does have the capability to host and link to digitised copies of unreported judgments and legislation. As previously mentioned, the library is currently working on this project and hopes to make this service available to members in the near future.

A complete user guide is available to download from the homepage. Please feel free to contact the library with any suggestions or queries you may have. 

JUST PUBLISHED

New books available to borrow

- Blizzard, Keith, *The Law of Financial Derivatives in Ireland* (Dublin: Round Hall, 2011)
- Byrne, Raymond and William Binchy, *Annual Review of Irish Law 2010* (Dublin: Round Hall, 2011)
- Carolan, Eoin, *The New Separation of Powers: a Theory for the Modern State* (Oxford: OUP, 2009)
- Coonan, Genevieve and Kate O'Toole, *Criminal Procedure in the District Court* (Dublin: Round Hall, 2011)
- Dunne, Derek, *Judicial Review of Criminal Proceedings* (Dublin: Round Hall, 2011)
- Goff and Jones, *The Law of Unjust Enrichment* (London: Sweet & Maxwell, 2011)
- Jackson, Rupert M, *Professional Liability* (7th ed) (London: Sweet & Maxwell, 2012)
- Keane, Ronan, *Equity and the Law of Trusts in Ireland* (2nd ed) (Dublin: Bloomsbury Professional, 2011)
- Maher, John, *The Law of Defamation* (Dublin: Round Hall, 2011)
- Ryan, Fergus, *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* (Dublin: Round Hall, 2011)
- Stewart, Nicholas et al, *The Law of Unincorporated Associations*, (Oxford: OUP, 2011)
- Talbot, Karen and Simon Boyle, *Civil Litigation Precedents Service* (Dublin: Round Hall, 2011)



This is awarded to the best submission from Networks or Groups who display excellence in training and development.



LAW SOCIETY

PROFESSIONAL Training

DATE	EVENT	DISCOUNTED FEE*	FULL FEE	CPD HOURS
23 Feb	Law Society Professional Training in partnership with the International Bar Association present Looking to the Future! Practising Law in Ireland	€180	€135	3 Management and Professional Development Skills (by Group Study)
13 Mar	Law Society Skillnet in partnership with the Law Society Business Law Committee present the Draft Companies Bill – Are you Prepared and Informed for the Imminent Changes?	€180	€240	4 General (by Group Study)
March/ April	Post-Graduate Certificate in Learning Teaching and Assessment	To register or for further information email: Lspt@lawsociety.ie		
March/ April	Post-Graduate Diploma in Mediation and Conflict Intervention	To register or for further information email: Lspt@lawsociety.ie		
April/ May	Post-Graduate Diploma in International Financial Services Law	To register or for further information email: Lspt@lawsociety.ie		
Ongoing	Law Society Skillnet in partnership with CIMA present an online Certificate in Business Accounting	€670	€895	Full Management & Professional Development Skills requirement for 2012 (by eLearning)
Ongoing	Suite of eLearning courses <ul style="list-style-type: none"> • How to create an eNewsletter - €90 (<i>reduced from €150</i>) • Touch typing - €40 • PowerPoint – all levels - €80 • Microsoft Word – all levels - €80 • Excel for beginners - €80 	To register or for further information email: Lspt@lawsociety.ie		Full Management & Professional Development Skills requirement for 2012 (by eLearning)

For full details on all of these events visit webpage www.lawsociety.ie/Lspt or contact a member of the Law Society Professional Training team on:

P: 01 881 5727

E: Lspt@lawsociety.ie

F: 01 672 4890

*Applicable to Skillnet members/Public sector subscribers

Law Society Council meetings 11 November and 9 December 2011

Taking of office of president and vice-presidents

The outgoing president, John Costello, expressed his gratitude to the Council for their support, dedication and hard work during the previous year. He said that the manner in which they had overcome the challenges during the year had proved their true ability and calibre. He recorded his appreciation to the Law Society staff for their professional skills, and he also thanked his senior vice-president and junior vice-president for their unstinting devotion to Law Society duties.

Donald Binchy was then formally appointed as president. He paid tribute to John Costello, who had acted in a most gentlemanly, congenial and unflappable manner during his year of office. He noted that his obvious concern for the plight of practitioners had made him very popular with the profession and that he had proved himself an able and witty public speaker. He concluded with an apt Irish expression: "*Ni fbeicimid a leithead arís.*"

Mr Binchy noted that a significant part of the Council's agenda for the coming months was the *Legal Services (Regulation) Bill*, some aspects of which were acceptable, others which were inevitable – but the main theme of which amounted to a 'takeover' of the legal profession and was utterly unacceptable. He noted that the Society

would seek feedback from the profession in order that it could properly represent its views and that the special task force on the bill would assess its contents in detail and prepare submissions for consideration by the Council.

He urged that there would be increased two-way communication between the Council and the profession, and he asked what more the Society could do to breach the perceived 'disconnect' between the Society and the members? He noted that the Society communicated with its members in almost every way possible – in person, at bar association meetings; by letter; through the *Gazette*; by email; by e-zine; and through its website. It was difficult to know what more the Society could do to improve communication with its members, but it would remain a key objective of the Society.

He noted that some members might argue that a gap had opened between the Society and the members because of the Society's regulatory role and that, for this reason, the Society did not adequately represent the interests of its members. These were issues that would be considered by the Future of the Law Society Task Force, which had been established to consider the functions of the Law Society in a post-*Legal Services Bill* world.

Mr Binchy noted that, in any event, the day-to-day lives of all practitioners would continue to be afflicted by the collapse of the economy. He urged that the Council should be alert to the plight of their colleagues and do everything possible to identify any new areas of potential in practice and to provide the profession, through professional training, with the means of changing or improving their skills to meet the demands of an ever-changing and ever more challenging world.

Mr Binchy welcomed the new members of the Council and encouraged them to contribute freely to the Council's deliberations. The senior vice-president, James McCourt, and the junior vice-president, Simon Murphy, then took office and expressed their commitment to the Council and the president for the coming year.

Legal Services (Regulation) Bill

At the meeting on 11 November 2011, Michael Quinlan outlined the preliminary conclusions of the task force on the bill, under the headings of independence of the legal profession, costs of the new regulator, misconduct provisions, the compensation fund, reductions in public protection and transparency, and the Society as a representative body. He noted that colleagues had been asked to send views and comments on

the bill in writing to the Society as a matter of urgency to a special email address, lsrb@lawsociety.ie.

It was intended to organise a conference on the importance of the independence of the profession and to engage with other international legal professional bodies and the business community, and to convene a meeting of the profession to discuss all aspects of the bill following an appropriate period of reflection.

Meeting on 9 December

At the meeting on 9 December 2011, Michael Quinlan briefed the Council on the more detailed deliberations of the task force on the bill, how the task force recommended the Society should deal with these matters in its forthcoming meeting with the Minister for Justice and the future work programme for the task force.

The director general briefed the Council on the conference that had been held on 5 December and on other contacts that had been made both nationally and internationally with individuals and organisations who shared the Society's concerns in relation to the bill. The Council agreed that a special issue of the *Gazette* would be produced, reflecting the presentations made at the conference, for circulation to the profession, members of the Oireachtas and other interested parties. **G**

Are you getting your e-zine?

The Law Society's e-zine is the legal newsletter of the solicitors' profession. The e-zine issues once every two months and brings news and information directly to your computer screen in a brief and easily digestible manner.



If you're not receiving the e-zine, or have opted out previously and would like to start receiving it again, you can sign up by visiting the members' section on the Law Society's website at www.lawsociety.ie. Click on the 'e-zine and e-bulletins' section in the left-hand menu bar and follow the instructions. You will need your solicitor's number, which is on your practising certificate and can also be obtained by emailing the records department at: l.dolan@lawsociety.ie.

Practice notes

Complaints to Financial Services Ombudsman's office about lending institutions

CONVEYANCING COMMITTEE

The 2009 certificate-of-title system for residential mortgage lending agreed between the Law Society and the participating lending institutions named in the guidelines to that system sets out the following agreed time limits within which lending institutions are to do the following for borrowers' solicitors:

- Provide deeds on ATR within ten working days of receipt of a written request – clause 4(a) and (b),
- Provide redemption figures within ten working days of receipt of a written request – clause 5(b),
- Release the borrower's solicitor from his/her undertaking within ten working days of lodgement by the solicitor of title deeds and certificate of title – clause 21(d),
- Furnish release/discharge/vacate within one month of receipt of redemption payment or of receipt of a written request for the release/discharge/vacate – clause 23(a).

If a lending institution does not meet the above time limits, clause 24 of the 2009 guidelines sets out the procedure for resolving delays on the part of the lender – essentially a complaint process against the lending institution that includes issuing a warning, initiating a customer complaint within the lending institution, and, if still not satisfied, making a complaint to the Office of the Financial Services Ombudsman. The committee has provided sample letters of complaint for the assistance of practitioners – these are available in the precedents

area and the Conveyancing Committee's page on the Law Society's website.

There may be other instances outside the certificate-of-title system in which a cause of complaint against a lending institution may arise in relation to other matters to do with a client's loan.

A number of practitioners have written to the Conveyancing Committee indicating that the Office of the Financial Services Ombudsman will deal with such complaints lodged by a solicitor only if they are made by the solicitor on behalf of, or as agent of, the client. Solicitors should therefore ensure that:

- 1) They state that they are making the complaint on behalf of, and as agent of, the client.
- 2) They obtain, at the outset of a transaction, the irrevocable authority of the client to process such a complaint in the name of the client in the event that same becomes necessary. This might be covered by a widely-worded initial letter of engagement or by a specific form of authority.
- 3) They obtain, at the outset of the transaction, the agreement of the client for that client to sign the complaint form that is required by the ombudsman's office.

The necessity for the authority and the complaints process should be explained to the client, including the fact that the solicitor, in the course of the transaction, may assume the burden of an undertaking given for the benefit of the client in order to complete the client's transaction.

Lenders requiring 'updated' certificates of title

CONVEYANCING COMMITTEE

The Conveyancing Committee occasionally receives letters from practitioners indicating that they have been requested by lending institutions to provide updated certificates of title in cases where the lender has stated that the existing certificate of title has 'expired'. The view of the committee is that practitioners should not provide any further certificates of title by way of update or otherwise. A cer-

tificate of title certifies the title as of a particular date only.

Practitioners are reminded of the content of the committee's earlier practice note relating to the dating of a certificate of title, published in the *Gazette* (July 2004), that is, a certificate of title given to a lending institution in relation to a client's mortgage transaction should be dated as of the date of parting with the loan funds.

Registration in Registry of Deeds recommended prior to lodging in Land Registry for first registration

CONVEYANCING COMMITTEE

It is the recommendation of the Conveyancing Committee that it is good conveyancing practice when lodging applications for first registration (whether same was previously compulsory or not) that the conveyance/assignment/other assurance of unregistered title would first be registered in the Registry of Deeds before lodging it in the Land Registry, in order to preserve priorities pending registration in the Land Registry.

Important notice regarding criminal appeals from the District Court to Circuit Court in Dublin

From 30 November 2011, when appeals are lodged at the public counter in certain District Court offices, a date for the Circuit Court hearing will be given out at the public counter. Please note that, in such cases, the Courts Service will not write separately to the parties (or their solicitors) to inform them of the date. Initially, this procedure will apply in the CCJ District Courts, but will be rolled out to the Summons Office (Chancery Street)

and the outlying District Court offices (Cloverhill, Swords and so on) in time.

Appeals received by post and from the prisons will continue in the normal way (that is, the Courts Service will write to parties to inform them of the Circuit Court date).

*Kevin Fidgeon,
Criminal Courts of Justice,
30 November 2011*

Prohibition on practising as solicitor without a practising certificate: solicitors cannot be 'legal executives' or 'paralegals'

Section 56(1) of the *Solicitors (Amendment) Act 1994* provides that no solicitor shall practise as a solicitor unless a practising certificate in respect of him or her is in force.

Section 56(2) of the *Solicitors (Amendment) Act 1994* provides that a solicitor shall be deemed to practise as a solicitor if he or she engages in the provision of legal services, whether as a sole practitioner or as a partner in a solicitor's practice, or as an employee of any solicitor or of any other person or body, or as a solicitor in the full-

time service of the State.

The prohibition in section 56(1) does not apply to a solicitor in the full-time service of the State or to a solicitor who is employed to provide conveyancing services for a non-solicitor employer.

'Legal services' are services of a legal or financial nature provided by a solicitor arising from that solicitor's practice as a solicitor.

Solicitors cannot be 'legal executives' or 'paralegals'

The attention of the profession is particularly drawn to the fact that a

solicitor shall be deemed to practise as a solicitor if he or she engages in the provision of legal services as an employee of any solicitor. This means that all persons who are on the Roll of Solicitors who are employed in a solicitor's firm and provide legal services are required to hold a practising certificate. In particular, it is not permissible for a firm to classify a solicitor employed by the firm as a 'legal executive' or 'paralegal', with a view to avoiding the requirement to hold a practising certificate, if the solicitor is engaged in the provision

of legal services. It is professional misconduct and a criminal offence for a solicitor who does not hold a practising certificate to act as a solicitor.

Further information

Any queries relating to practising certificate requirements should be addressed to the Law Society executive responsible for practising certificates, Sorcha Hayes, at 01 672 4963 or s.hayes@lawsociety.ie.

John Elliot, Registrar of Solicitors and Director of Regulation

Local Government (Household Charge) Act 2011

CONVEYANCING COMMITTEE

The *Local Government (Household Charge) Act 2011* was enacted on 19 December 2011, having been first announced by the government on budget day on 6 December 2011. The Law Society was not consulted on how the act might affect the conveyancing process in practice and, regrettably, had no opportunity for input.

- Section 3 of the act provides that, in 2012 and each subsequent year, the 'owner' (as defined) of a residential property shall pay an annual household charge to the relevant local authority. This charge has been set at €100 for 2012.
- Section 4 sets out a list of exemptions and waivers. Section 9 deals with applications for certificates of exemption or certificates of waiver.
- Section 5 requires an owner who is liable to pay a household charge, or who is entitled to a waiver from payment of a household charge, to make to the relevant local authority a declaration of liability or a declaration

of waiver, as appropriate. Where the owner is exempt from payment, there is no requirement to make any declaration to the local authority. This section also allows for payment of the charge in a single payment or by instalments.

- Section 6 requires an owner who is liable to pay a household charge, or who is entitled to a waiver from payment of a household charge, to provide information to the relevant local authority as would allow it to prepare and maintain a database of residential properties in the State. This section does not apply to those owners who are exempt from payment of the charge.
- Section 7 provides for payment of a late payment fee and late payment interest.
- Section 8 provides that any unpaid charge, late payment fee or late payment interest due shall be a **charge** on the property to which it relates (and therefore would fall within the remit of general condition 8(c) of the *General Conditions of Sale 2009* edition). As against a *bona fide* purchaser for value or a mortgagee, the property shall not remain charged after the expiration of a period of 12 years from the date upon which the amount owing fell due.
- The provisions of section 9 mean, in effect, that certificates of waiver and certificates of discharge will be required in connection with sales of residential property.
- Section 10(1) provides for the issue of a receipt in writing for payment of the household charge, an instalment of the charge, late payment penalty or late payment interest. Where there has been payment in full of a household charge, all related late payment fees and related late payment interest, section 10(2) provides for the issue of a certificate of discharge confirming payment.
- Section 10(3) provides that a vendor shall pay the household charge, any late payment fees and any late payment interest that re-

late to the property before completion of the sale. This means that, while it is possible to pay the charge in instalments if the property is retained by the owner in the relevant year, any outstanding charge on the property and any related late payment fees and interest must be discharged in full prior to completion where the owner is selling the property.

- Section 10(4) provides that, on or before completion of the sale, the vendor shall give to the purchaser a certificate of discharge, a certificate of exemption or a certificate of waiver, as appropriate for each year in which the household charge applied since the date of the last sale.
- Section 10(5) provides that such certificate shall, as against a *bona fide* purchaser for value or mortgagee, discharge the property from liability for any household charge, late payment fee or late payment interest due for each year in which the liability date(s) to which the certificate relates fell.

BRIEFING

- Section 10(6) makes it an offence for a person to contravene section 10(3), and any such person is liable on summary conviction to a class C fine (up to €2,500).
- Section 10(8) provides that 'vendor' includes, among other things, in relation to a residential property, an agent of the owner of the residential property who receives the proceeds of the sale or part thereof on behalf of the owner, or who provides legal advice to the owner in connection with a voluntary or below-market-value transfer of the property. This means that a solicitor and/or auctioneer (as agents of a vendor) are liable, under section 10(6) if found guilty of an offence under this section on summary conviction, to a class C fine if the charge is not paid prior to completion of a sale.
- The definition of 'sale' in section 10(8) includes, among other things, the transfer of residential property by the owner to another person for no consideration, or consideration significantly less

than the estimated market value. The provisions relating to a sale in section 10, therefore, also include a voluntary transfer and a transfer below market value.

Because the act provides that the household charge is a charge on the property to which it relates, solicitors should, on or before closing a transaction, seek confirmation of whether the property in sale is liable to the charge and, if so, obtain a certificate of discharge of the statutory charge on the property to place with the title deeds. If it is claimed by the vendor that the property is not liable to the local authority household charge, the purchaser's solicitor should seek confirmation of this by way of either a certificate of exemption or a certificate of waiver, as appropriate. The vendor's solicitor should also keep a copy of the relevant certificate as evidence of the instructions of the client, as it may be of assistance should the solicitor later be prosecuted under section 10(6).

A new item will be added to the

non-title information sheet attached to the standard contract for sale or a new requisition will be added to the next edition of the Law Society's *Objections and Requisitions on Title*. In the meantime, solicitors acting for purchasers should raise the matter at pre-contract stage or raise an additional requisition on title, so as to ensure that a certificate of discharge will be available at closing.

The charge is not an item that is apportionable under the standard contract for sale. If the parties agree to apportion the charge, this should be dealt with by way of special condition in the contract for sale.

Non-principal private residences

Section 19 of the act amends various sections of the *Local Government (Charges) Act 2009* (which dealt with non-principal private residences), including inserting a new section 8A that transposes certain similar provisions of the 2011 act into the 2009 act, so as to provide that:

- A vendor's failure to pay the NPPR charge under the 2009 act before completion of the sale is an offence carrying a class C fine on summary conviction, and
- The definition of 'vendor' as including an agent of the owner who receives the sale proceeds or part thereof on behalf of the owner, or who provides legal advice to the owner in a voluntary or below-market-value transfer.

This means that a solicitor or auctioneer receiving a deposit or booking deposit on behalf of a vendor in the sale of a non-principal private residence become liable to conviction of an offence and payment of a class C fine if the sale is closed without the amount of any outstanding charge and arrears, and late payment fees having been paid to the local authority.

The above is a brief synopsis of the act and its implications for practice, and practitioners are advised to read the act in full so as to fully familiarise themselves with the new legislation. ©

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Legislation update 10 November 2011 – 4 January 2012

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

ACTS PASSED

Access to Central Treasury Funds (Commission for Energy Regulation) Act 2011

Number: 30/2011

Content: Amends the *National Treasury Management Agency (Amendment) Act 2000* to provide for access to central treasury funds by the Commission for Energy Regulation and provides for related matters.

Date: 23/11/2011

Commencement: 23/11/2011

Appropriation Act 2011

Number: 38/2011

Content: Appropriates to the proper supply services and purposes sums granted by the *Central Fund (Permanent Provisions) Act 1965*, to make provision in relation to deferred surrender to the central fund of certain undischarged appropriations by reference to the capital supply services and purposes as provided by the *Finance Act 2004*, s91, and makes provision in relation to the financial resolutions passed by Dáil Éireann on 6/12/2011.

Date: 19/12/2011

Commencement: 19/12/2011

Criminal Law (Defence and Dwelling) Act 2011

Number: 35/2011

Content: Provides for the liability of persons regarding the use of force by them in their dwelling or in a dwelling in which they a lawful occupant against a person who enters the dwelling; amends the *Non-Fatal Offences Against the Person Act 1997* and provides for related matters.

Date: 19/12/2011

Commencement: Commence-

ment order(s) to be made as per s8(2) of the act

Financial Emergency Measures in the Public Interest (Amendment) Act 2011

Number: 39/2011

Content: To provide for the amendment of the *Financial Emergency Measures in the Public Interest Act 2009* in order to provide for the payment of a contribution by judges and military judges; to provide for the amendment of the *Financial Emergency Measures in the Public Interest (No 2) Act 2009* in order to provide for the reduction of the remuneration of judges and to provide for certain other amendments; to provide for the amendment of the *Financial Emergency Measures in the Public Interest Act 2010* to provide for the application of the public service pension reduction to Central Bank pensioners and to clarify the position regarding former public servants with preserved pension benefits, and provides for related matters.

Date: 19/12/2011

Commencement: Commencement order(s) to be made as per s1(2) of the act

Health Insurance (Miscellaneous Provisions) Act 2011

Number: 34/2011

Content: To continue to ensure that, in the interests of societal and intergenerational solidarity, the burden of the costs of health services be shared by insured persons by providing that the cost subsidy (an age-related tax credit funded by the collection of a levy on all insured lives) between the young and the old, as provided for by the *Health Insurance (Miscella-*

neous Provisions) Act 2009, be continued for a further year in 2012.

Date: 16/12/2011

Commencement: 16/12/2011

Irish Film Board (Amendment) Act 2011

Number: 32/2011

Content: Increases the aggregate amount of any investments, loans, grants or moneys provided by the Irish Film Board under sections 6 and 8 of the *Irish Film Board Act 1980*, or repayments on foot of any guarantee under section 7 of that act, from €200 million to €300 million.

Date: 7/12/2011

Commencement: 7/12/2011

Local Government (Household Charge) Act 2011

Number: 36/2011

Content: Requires the owners of private residential properties to pay an annual household charge of €100 in respect of each such property to the local authority in whose functional area the residential property is situated. Requires the furnishing of information relating to each such property to enable the preparation of a database of residential properties in the State. Amends the *Local Government Act 1998*, the *Local Government (Charges) Act 2009*, and provides for related matters.

Date: 19/12/2011

Commencement: 1/1/2012

National Tourism Development Authority (Amendment) Act 2011

Number: 33/2011

Content: Provides the statutory basis to allow the Minister for Transport, Tourism and Sport, with the consent of the Minister for Finance, to increase the aggregate level of advances that may be made to the National Tourism Development Authority (Fáilte Ireland) out of the capital moneys provided by the Oireachtas, for the purpose of supporting enterprises and projects relating to the

development of tourist traffic and the development of tourist facilities and services. Amends section 24(2) of the *National Tourism Development Authority Act 2003* to provide that the aggregate level of advances that may be made to the authority, out of the capital moneys provided by the Oireachtas, is increased from €65,000,000 to €150,000,000.

Date: 7/12/2011

Commencement: 7/12/2011

Nurses and Midwives Act 2011

Number: 41/2011

Content: Enhances the protection of the public in its dealings with nurses and midwives, provides for a board to be known as Bord Altranais agus Cnaimhseachais na hÉireann (Nursing and Midwifery Board of Ireland) and related matters.

Date: 21/12/2011

Commencement: Commencement order(s) to be made as per s1(2) of the act

Property Services (Regulation) Act 2011

Number: 40/2011

Content: Provides for the establishment of the Property Services Regulatory Authority to license and regulate property services providers, including auctioneers, letting agents and property management agents, and to establish, maintain and administer a Property Services Compensation Fund. Provides for the establishment of the Property Services Appeal Board to hear and determine appeals against certain decisions of the authority. Repeals the *Sale of Land by Auction Act 1867* and the 1947, 1967 and 1973 *Auctioneers and House Agents Acts*. Revokes the *Auctioneers and House Agents Act 1947 (Accountant's Examination and Certificate) Regulations 1968* (SI 10/1968), and provides for related matters.

Date: 20/12/2011

Commencement: Commencement order(s) to be made as per s1(2) of the act

BRIEFING

Road Transport Act 2011**Number:** 31/2011**Content:** Makes provisions relating to the occupation of road haulage operator and the occupation of road passenger transport operator; amends section 1 of the *Road Transport Act 1999* and section 2 of the *Road Traffic and Transport Act 2006* and provides for related matters.**Date:** 2/12/2011**Commencement:** 2/12/2011**Social Welfare Act 2011****Number:** 37/2011**Content:** Gives legislative effect to certain social welfare measures announced in the budget statement of 5/12/2011, which are due to come into effect from 1/1/2012. Also provides for miscellaneous amendments to the social welfare code.**Date:** 19/12/2011**Commencement:** various commencement dates – see act**Twenty-ninth Amendment of the Constitution (Judges' Remuneration) Act 2011****Number:****Content:** Amends section 5 of article 35 of the Constitution to provide that remuneration of judges is subject to the imposition of taxes, levies or other charges that are imposed by law on persons generally or persons belonging to a particular class.**Date:** 17/11/2011**Commencement:** 17/11/2011**Welfare of Greyhounds Act 2011****Number:** 29/2011**Content:** Provides for the welfare of greyhounds, regulates the operation of greyhound breeding establishments and establishes a register of greyhound breeding establishments.**Date:** 16/11/2011**Commencement:** Commencement order(s) to be made as per s1(2) of the act**SELECTED STATUTORY INSTRUMENTS****Consumer Protection Act 2007 (National Consumer Agency) Levy Regulations 2011****Number:** SI 560/2011**Content:** Provide for a levy scheme to fund the provision of information in relation to financial services, including information in relation to the costs to consumers, the risks and benefits associated with the provision of those services and promoting the development of financial education and capability. Provides for the collection of the levy with associated requirements and obligations for the regulated entities subject to this levy.**Commencement:** 1/1/2011**Defence (Amendment) Act 2011 (Commencement) Order 2011****Number:** SI 585/2011**Content:** Appoints 9/11/2011 as the commencement date for the act.**Commencement:** 9/11/2011**District Court (Criminal Justice (Money Laundering and Terrorist Financing) Act 2010) Rules 2011****Number:** SI 653/2011**Content:** Amend orders 34 and 38 of the *District Court Rules* to facilitate the operation of the *Criminal Justice (Money Laundering and Terrorist Financing) Act 2010*.**Commencement:** 7/12/2011**District Court (Criminal Procedure Act 2010) Rules 2011****Number:** SI 585/2011**Content:** Amend orders 19, 24, 31 and 34 to prescribe forms and procedure in respect of changes arising from the entry into force of certain provisions of the act.**Commencement:** 10/12/2011**Environment (Miscellaneous Provisions) Act 2011 (Commencement)****(Part 5) (No 2) Order 2011****Number:** SI 583/2011**Content:** Appoints 15/11/2011 as the commencement date for ss28 and 29 (unauthorised quarry development/unauthorised peat extraction) of the act.**Commencement:** 15/11/2011**European Communities (Lawyers' Establishment) Regulations 2003 (Qualifying Certificate 2012) Regulations 2011****Number:** SI 671/2011**Content:** Amend regulations for applying for qualifying certificates by registered lawyers established under the *Lawyers' Establishment Directive* (Dir 98/5/EC).**Commencement:** 1/1/2012**Finance Act 2011 (Section 20) Commencement) Order 2011****Number:** SI 660/2011**Content:** Appoints 1/1/2012 as the commencement date for s20 (relevant contracts tax) of the act.**Commencement:** 1/1/2012**Finance Act 2011 (Section 25 (1)(a) and (b)) Commencement) Order 2011****Number:** SI 663/2011**Content:** Appoints 15/12/2011 as the commencement date for s25(1)(a) and (b) (extension from 1/1/2012 to 31/12/2012 of the general 25% stock relief for farmers) of the act.**Commencement:** 15/12/2011**Health Act 2007 (Section 11) (Commencement) Order 2011****Number:** SI 571/2011**Content:** Appoints 1/12/2011 as the commencement date for s11 (admissibility of standards in court proceedings) of the act.**Commencement:** 1/12/2011**Planning and Development (Amendment) Act 2010 (Commencement) (No 3) Order 2011****Number:** SI 582/2011**Content:** Appoints 15/11/2011 as the commencement date for

ss4 (a)-(d) and 75 (control of quarries) of the act.

Commencement: 1/12/2011**Rules of the Superior Courts (Courts-Martial Appeal Court) 2011****Number:** SI 693/2011**Content:** Amend the *Rules of the Superior Courts* by substituting a new order 86A, rule 1, to extend the definition of 'military judge' to include a judge of the Circuit Court temporarily designated under the *Courts of Justice Act 1947*, s11A, to perform the functions of a military judge.**Commencement:** 20/12/2011**Rules of the Superior Courts (Judicial Review) 2011****Number:** SI 691/2011**Content:** Amend order 84 of the *Rules of the Superior Courts* by substituting new rules 18-29 and new forms 13 and 14 to revise the procedure in respect of applications for leave to apply for judicial review and applications for judicial review.**Commencement:** 20/12/2011**Rules of the Superior Courts (Lodgment of Documents) 2011****Number:** SI 692/2011**Content:** Amend order 79 rule 3 of the *Rules of the Superior Courts* to facilitate the lodgment of documents in each of the offices of the superior courts by various means in addition to personal delivery at the office concerned.**Commencement:** 20/12/2011**Solicitors Acts 1954-2008 (Practising Certificate 2012) Regulations 2011****Number:** SI 670/2011**Content:** Amend regulations and fees relating to the application for practising certificates for 2012 under the act.**Commencement:** 1/1/2012 ©*Prepared by the Law Society Library*

One to watch: new legislation

Insurance (Amendment) Act 2011

The *Insurance (Amendment) Act 2011* was enacted on 30 September 2011. The act will amend the *Insurance Act 1964*, which is the principal act underpinning the operation and role of the Insurance Compensation Fund (ICF).

The main changes that will result from the act are:

- The introduction of 'excluded risks', policies of insurance that will not be subjected to the levy,
- The exemption of the levy to policies that do not relate to 'risks in the State', and
- The introduction of new offences.

Prior to the introduction of the amended act, the Central Bank was entitled to impose a levy of up to 2% of the gross amount of premiums paid, or payable, to an insurer, where it felt that the ICF needed financial support to be provided for it. All income in respect of non-life insurance policies may have been subjected to the levy; however, discretion was used to prevent the levy's application to certain types of insurance policy. This position has changed under the act, insofar as it introduces a list of 'excluded risks' that will not be subjected to the levy. The excluded risks include premiums relating to reinsurance, marine insurance and health insurance risk, among others.

Prior to the act, policies to which the levy might effectively have been applied need not to have been issued in the State. This has changed with the commencement of the act, under which the levy may be applied to the aggregate of the gross

premiums paid to an insurer (the definition of which has expanded to include an insurer authorised in another member state) on policies issued relating to 'risks in the State'. Such policies may relate to any of the following:

- A building located in the State,
- A vehicle registered in the State,
- Short-term travel insurance taken out in the State (a duration of four months or less),
- Any other case, provided the policyholder is an individual who is habitually resident in the State; or, if the policyholder is not an individual, the establishment of the policyholder to which the policy relates in the State.

These changes ensure that the ICF levy legislation is consistent with EU law.

The act also includes measures for an application for ICF funding to be made by the liquidator of an insurer or the administrator of an insurer.

Liquidator of an insurer

Previous legislation provided that, subject to the approval of the High Court, the liquidator of an insolvent insurer may have been paid such amount out of the ICF as the High Court determined was due to have been paid by the insurer to a person under the policy. This amount was not permitted to exceed 65% of such amount due, or IR£650,000 – whichever was the lesser amount.

Under the act, a payment will only be made if the amount due relates to 'risks in the State', as outlined above. The financial limitation

of payment will be set at 65% of such amount due or €825,000 – whichever is the lesser. Furthermore, no payment will be made out of the ICF in respect of liability that is payable by the Motor Insurers' Bureau of Ireland.

The act also provides that an application may be made for ICF funding to the High Court on behalf of an insurer authorised in another member state that is in liquidation. This is permitted, provided that the insurer's liquidator has the same functions as the liquidator of an insurer in the State.

Where a person receives an amount from the liquidator of an insolvent insurer that is in excess of the amount due, that person is obliged to repay the excess. The act provides that failure to do so is an offence, which may result in a conviction on indictment, such as an unspecified fine and/or a term of imprisonment not exceeding five years. The act extends personal liability on directors, managers, secretaries or other officers of an insurer where the offence was committed with that person's consent.


Administrator of an insurer

The previous act permitted that funds would be released to the administrator of an insurer where the funding had been approved by the High Court, and the High Court was of the view that the funds would enable the administrator to carry on the business of the insurer and to perform other functions under the 1964 act in relation to the insurer. Any sum paid to the administrator became an unsecured debt of the

insurer. However, the Minister for Finance was entitled to decide to waive such a debt with a view to facilitating the placing of the business of the insurer on sound commercial and financial footing.

Under the new act, payment to an administrator of an insurer is subject to the opinion of the Central Bank that at least 70% of the insurer's business has related to risks in the State in the three years leading up to the administrator's appointment. If this threshold is met, funds may be provided to enable the administrator to carry on the business of the insurer. However, if the 70% threshold is not met, the administrator may only be granted funding that would defray the expenses of the administrator in the performance of his/her functions in relation to the insurer.

Failure to make contributions

Under previous legislation, failure to make appropriate levy contributions had the potential to lead to revocation of the relevant insurer's authorisation. The act has amended the sanctions that may apply in these circumstances. Now, a non-paying insurer may instead see their authorisation suspended until such time as their levy payments are up to date. Where the insurer may be from another member state, the act provides that the Central Bank may prevent the insurer from issuing new policies in the State until such time as all appropriate levy contributions have been paid. The act will bring about modernisation to the organisation of the ICF and will give more effective powers of enforcement to the Central Bank. 

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BRIEFING

INFORMATION ON COMPLAINTS

Information on complaints about solicitors is published in accordance with section 22 of the *Solicitors (Amendment) Act 1994*

IN RELATION TO COMPLAINTS RECEIVED BY THE SOCIETY FROM 1 SEPTEMBER 2010 TO 31 AUGUST 2011

Allegations of misconduct

Delay.....	5
Failure to communicate.....	56
Failure to hand over.....	92
Failure to account.....	102
Undertaking.....	1,647
Conflict of interest.....	16
Dishonesty or deception.....	9
Witnesses' expenses.....	4
Advertising.....	8
Other.....	264
Total.....	2,203

Allegations of inadequate professional services

Delay.....	99
Failure to communicate.....	58
Shoddy work.....	103
Other.....	41
Total.....	301

Allegations of overcharging

Conveyancing.....	15
Probate.....	19
Litigation.....	39
Matrimonial.....	32
Other.....	13
Total.....	118
GRAND TOTAL.....	2,622

NUMBER OF COMPLAINTS REFERRED TO THE SOLICITORS DISCIPLINARY TRIBUNAL

Delay, failure to communicate, failure to hand over papers.....	4
Delay, failure to communicate, failure to carry out instructions.....	8
Failure to account.....	1
Undertakings.....	132
Multiple undertakings.....	-
Breach of regulations.....	1
Dishonesty/deception.....	3
Conflict of interest.....	2
Counsel's fees.....	4
Other.....	-
Failure to communicate, failure to account.....	1
Acting without client's instructions.....	1
Acting in manner detrimental to client's interests.....	1
Failure to comply with direction of CCR Committee.....	1
Failure to notify claim to professional indemnity insurers.....	1
Total.....	160

OUTCOME OF THE INVESTIGATION OF ABOVE COMPLAINTS BY THE SOLICITORS DISCIPLINARY TRIBUNAL

Part heard.....	1
Strike-off recommended.....	3
Indefinite stay imposed (solicitor out of jurisdiction).....	1
Censure, fine and costs.....	1
Stayed pending judicial review.....	1
Rescinded.....	2
No misconduct.....	1

The remaining cases await hearing

As of 15 December 2011

Solicitors Disciplinary Tribunal

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

In the matter of David O'Shea, solicitor, formerly practising at O'Donovan Solicitors, 73 Capel Street, Dublin 1, and in the matter of the *Solicitors Acts 1954-2008* [6743/DT63/09 and High Court record no 2009 no 108 SA]
Law Society of Ireland (applicant)
David O'Shea (respondent solicitor)

On 15 February 2010, the High Court made an order striking the name of the respondent solicitor from the Roll of Solicitors.

The High Court had before it the findings of misconduct of the Solicitors Disciplinary Tribunal as follows:

- Caused, by the misapplication and/or misappropriation of monies, a deficit on the client account of O'Donovan Solicitors of in or about €273,439.28, in breach of regulation 7(2)(a).
- Misappropriated monies from the client account for his own personal use and benefit of in or about €96,000, in breach of regulation 7(2)(b).
- Misapplied funds of in or about €80,000 from the client ledger account of a named client, in breach of regulation 7(1)(a)(i).
- Failed to stamp/failure to ensure the stamping of the deeds of a named client, despite having been put in funds to do so, causing interest and penalties to arise of in or about €38,220 as at February 2008.
- Dishonestly advanced funds of in or about €47,000 to two named clients from the client ledger account of a named estate, and upon receipt of loan monies to the credit of the two named clients, failed to retain the sum of €47,000 and credit same to the account of the estate. This is in breach of regulations 9, 9(a), 9(b) and 12(2)(a).
- Misapplied and/or misappropriated monies totalling in or

about €198,900 from the client ledger account of the above estate, in breach of regulation 12(1) and 12(2)(a).

- Misappropriated monies in a minimum amount of €40,500 from the client ledger account of the above estate for his own personal use and benefit, in breach of regulation 7(2)(b).
- Maintained, or caused to be maintained, false and misleading accounting records in respect of the client account of the above estate deceased, in breach of regulation 12(2)(a).
- Caused or permitted a transfer deed for a named client to be presented to the Revenue Commissioners for stamping dated 8 February 2008, when the actual date of transfer was in or about March 2007.
- Misappropriated funds of a named client of in or about €16,539.28 by lodging same to his personal ledger account for his personal use and benefit, in breach of regulations 7(2)(b) and 12(2)(a).
- Failed to open a client ledger account for the above client, having received monies outstanding to her credit from a named firm of solicitors, and failed to stamp/ensure the stamping of the deeds of the above named client, in breach of regulation 6(4)(b) and 12(2)(a).

In the matter of Finian Brannigan, a solicitor practising as Finian Brannigan & Co, Solicitors, 16 Fair Street, Drogheda, Co Louth, and in the matter of the *Solicitors Acts 1954-2008* [4342/DT62/10]

Law Society of Ireland (applicant)
Finian Brannigan (respondent solicitor)

On 23 November 2010, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a so-

licitor in that he:

- a) Caused or allowed an apparent deficit on his client account as at 31 August 2009 in the sum of €16,022 due to debit balances and an unexplained difference,
- b) Breached regulation 12 of the *Solicitors' Accounts Regulations 2001* in failing to maintain proper books of account at all times,
- c) Breached regulation 7(2)(1) of the *Solicitors' Accounts Regulations 2001* by creating debit balances on client account,
- d) Breached regulation 7(2)(b) of the *Solicitors' Accounts Regulations 2001* in discharging personal office expenditure from client account,
- e) Breached regulation 5(2) of the *Solicitors' Accounts Regulations 2001* by leaving monies that he had been beneficially entitled to in a client account for longer than three months,
- f) Breached regulation 10(4) of the *Solicitors' Accounts Regulations 2001* in failing to record bills of costs in office ledgers,
- g) Breached regulation 12(7) of the *Solicitors' Accounts Regulations 2001* in failing to prepare balancing statements every six months on client account and for failing to complete the office balancing statement on a yearly basis,
- h) Continues to hold monies on behalf of clients without explanation.

The tribunal made the following orders:

- a) That the respondent solicitor stand censured,
- b) That the respondent solicitor pay a sum of €2,500 to the compensation fund,
- c) That the respondent solicitor pay the whole of the costs of the Society, as taxed by a taxing master of the High Court, in default of agreement.

In the matter of Seosamb O'Daimhin (otherwise Joseph Devine), solicitor, practising as Devine Solicitors at 9 O'Rahilly Street, Nenagh, Co Tipperary, and in the matter of the So-

licitors Acts 1954-2008 [6260/DT17/09 and High Court record no 2010/97 SA]

Law Society of Ireland (applicant) Seosamb O'Daimhin (otherwise Joseph Devine) (respondent solicitor)

On 22 October 2009, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

- Failed to pursue a tax rebate application to the Revenue Commissioners in respect of capital gains tax paid on the sale of the property of the complainant's father, located at Garrykennedy in early 2005,
- Failed to respond adequately to the complainant's correspondence, telephone calls and emails over a three-year period from 2005 to 2007,
- Failed to comply with the directions of the Complaints and Client Relations Committee of 16 April 2008, whereby he was directed to do the following:
 - 1) Provide a copy of his letter and cheque paying the capital gains tax,
 - 2) Provide a letter from the Revenue confirming the amount of CGT paid and the date upon which it is was paid,
 - 3) Provide a statement from his accountant giving a statement of account and, in particular, confirming that the €2,000 referred to in the complainant's letter of complaint had been paid,
 - 4) Provide a copy of his letter to the complainant furnishing a refund of the fees,
- Failed to reply adequately to the Society's correspondence and, in particular, letters dated 12 April 2007, 18 July 2007, 1 August 2007, 9 August 2007, 24 August 2007, 3 September 2007, 11 September 2007, 18 October 2007, 26 October 2007, 18 January 2008, 1 February 2008, 11 February 2008, 26 February 2008, 6 March 2008, 26 March 2008, 9 April 2008, 22 April 2008, 13 May 2008, 28 May 2008 and 5 June 2008 respectively.

The tribunal made the following recommendations in respect of the respondent solicitor:

- a) That the respondent solicitor not be permitted to practise as a sole practitioner or in partnership, that he be permitted only to practise as an assistant solicitor under the direct control and supervision of another solicitor of at least ten years' standing, to be approved in advance by the Law Society of Ireland,
- b) That the respondent solicitor make restitution to a named former client in the sum of €2,000 plus VAT at 21%, which figure includes the fee of another named solicitor,
- c) That the respondent solicitor pay the reasonable expenses of the named former client and the other named solicitor in relation to their attendance at the hearing on the 22 October 2009, to be taxed by a taxing master of the High Court, in default of agreement.

On 29 November 2010, the President of the High Court ordered that:

- 1) The name of the respondent solicitor be struck off the Roll of Solicitors,
- 2) The respondent solicitor pay restitution to the named former client in the sum of €2,000 plus VAT at 21%, which figure includes the fee of the other named solicitor,
- 3) That the respondent solicitor pay the reasonable expenses of the named former client and the other named solicitor in relation to their attendance at the hearing on the 22 October 2009, to be taxed by a taxing master of the High Court, in default of agreement,
- 4) The respondent solicitor pay the costs of the proceedings, to be taxed in default of agreement,
- 5) The respondent solicitor pay the costs of the Solicitors Disciplinary Tribunal proceedings, to include witness expenses to be taxed in default of agreement.

Subsequent to the making of that order by the president, the respondent solicitor has appealed against that order to the Supreme Court and the appeal bears record number 004/2011.

In the matter of Seosamb O'Daimhin (otherwise Joseph Devine), solicitor, practising as Devine Solicitors at 9 O'Rahilly Street, Nenagh, Co Tipperary, and in the matter of the Solicitors Acts 1954-2008 [6260/DT106/09 and High Court record no 2010/84 SA]

Law Society of Ireland (applicant) Seosamb O'Daimhin (otherwise Joseph Devine) (respondent solicitor)

On 15 July 2010, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

- a) Caused or allowed a minimum deficit to arise on his client account of in or about €262,864 as at, on or about, 28 May 2008,
- b) Failed to maintain proper accounting records in the client account of the estate of a named deceased person, in breach of regulation 12, and, in particular, failed to maintain a ledger card that recorded all transactions in the distribution of the estate and failed to record costs of €17,222.12 transferred to the office account,
- c) Misappropriated and/or wrongly drew to the office account excess costs of in or about €54,676 from the same estate,
- d) Caused a debit balance on the client account of the same estate of in or about €7,808 by making overpayments in that amount to beneficiaries of the estate,
- e) Failed to maintain proper accounting records in the client account of a named client family, in breach of regulation 12, and, in particular, failed to maintain ledger accounts that showed the true financial position in relation to his transactions with the client's monies, such that amounts totalling €38,912.10 debited to the ledger account were not written up,

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- f) Misappropriated and/or wrongly transferred to the office account costs totalling in or about €42,500 in the client transactions of the same client family, causing a deficit on the client ledger account in or about that amount,
- g) Misappropriated and/or wrongly discharged VAT payments to the Revenue Commissioners out of the client account in the amount of €12,000 on 14 February 2008, €36,314 on 20 February 2008 and €18,140 on 29 February 2008, creating a deficit of €66,454 on the client account,
- h) Wrongly debited costs and VAT of in or about €5,687 on 21 April 2008 in the client matter of a named file from the client account when there were no funds to meet the payment, and subsequently misappropriated and/or wrongly debited the same costs and VAT to the office account on 29 April 2008, 1 May 2008 and 20 May 2008, causing a total deficit of in or about €22,748,
- i) Wrongly discharged a booking deposit of €10,000 in the client matter of a named file from the client account on or about 26 October 2007 and did not lodge an office account cheque to the client account to meet that payment because there were insufficient funds in the office account to meet the payment,
- j) Wrongly drew a cheque of €300 on the client account for personal expenses, in breach of regulation 7(2)(b),
- k) Wrongly caused or allowed bank charges to be debited to the client accounts in the two years ended 30 April 2008 amounting to a total of €897.61, causing a deficit of that amount on the client account,
- l) Caused or allowed stamp duty funds of €3,779 received from the client on or about 21 December 2006 in a named client matter to be lodged to the office account and, on 4 January 2007, discharged stamp duty in that amount by way of client account cheque, causing a debit balance on the client ledger account, which debit balance increased following the payment of a Land Registry fee of €585 on 15 March 2007, also from the client account,
- m) Failed to maintain proper accounting records in the client matters of a named client and, in particular, failed to maintain separate ledger accounts for each client matter dealt with by him, in breach of regulation 12(3)(a),
- n) Misappropriated and/or wrongly drew costs allocated to a named client file of €3,630 on 15 January 2007 and €4,000 on 30 April 2007 from the client account, causing a debit balance on the client ledger account of €5,226.14,
- o) Wrongly debited the amount of €6,755 in costs from the estate of a named deceased person, instead of the costs due of €675.50, causing a deficit of €6,079.50 on the client account, and subsequently wrongly transferred a further €1,500 to the office account debited to this client matter, increasing the deficit to €7,579.50,
- p) Wrongly drew costs of €3,872 from the client account to the office account in a named client matter in circumstances where monies to cover costs and outlay were not received from clients, causing a debit balance of that amount on the client account,
- q) Failed to maintain proper accounting records in the client matter of the estate of a named deceased person, in breach of regulation 12, and, in particular, failed to post payments of €7,186.15 to the beneficiaries to the ledger card, thereby failing to show a debit balance on the ledger card,
- r) Wrongly lodged two receipts totalling €6,951.41 in the same estate directly to the office account in June 2007 and February 2008, in breach of regulation 4(1) and regulation 6(4)(a), and further wrongly drew costs of €2,325 to the office account on 13 February 2008, which costs had already been drawn in November 2006, causing a total deficit in the client ledger account of €9,276.41,
- s) Misappropriated and/or wrongly transferred costs of €1,210 to the office account from the estate of a named client, causing a debit balance of €847.91 on the client account,
- t) Wrongly lodged monies received in the estate of a named deceased person of €4,199.71 to the office account and failed to lodge further monies received, in the amount of €956.61, to the client account, in breach of regulations 4(1) and regulation 6(4), causing a total deficit in the client ledger account of €5,156.32,
- u) Caused a net overpayment to be made from the client ledger account of a named client of in or about €3,850, creating a deficit in the client account in that amount,
- v) Wrongly caused payments to be made from the client account to or for the personal benefit of his wife in the amount of €50 on 1 February 2008, €135 on 1 February 2008, €12,000 on 6 February 2008 and €639 on 18 March 2008,
- w) Discharged personal expenditure or expenditure to his personal benefit from the client account, in breach of regulation 7(2)(b), and, in particular, mortgage payments of €2,000 on 22 January 2008 and 31 March 2008, payment of €400 to a supermarket on 22 February 2008, and a payment of €122 on 31 March 2008,
- x) Wrongly caused payments to be made from the client account to or for the benefit of a named individual in the amounts of €1,300 on 22 January 2008 and 31 March 2008,
- y) Through wrongful payment out of the client account to or for the benefit of the respondent solicitor, his wife and her cousin, a named individual as detailed above, contributed to a net deficit in the client ledger account of in or about €17,307.40,
- z) Failed to maintain proper books of account for his practice, in breach of regulation 12(1).

The tribunal recommended by report dated 11 August 2010 that:

- a) The respondent solicitor was not a fit person to be a member of the solicitors' profession,
- b) The name of the respondent solicitor should be struck off the Roll of Solicitors.

The tribunal made no recommendation in relation to costs.

Subsequent to the hearing of the Solicitors Disciplinary Tribunal, the respondent solicitor brought an appeal against the decision of the tribunal to make findings of professional misconduct on allegations 10(d), (g), (h), (i), (j), (o) and (t). The respondent solicitor claimed, among other things, that the tribunal had erred in law and on the facts in the manner in which it arrived at the above findings; that he had not acted dishonestly or fraudulently in connection with any of the matters; that his conduct resulted from confusion, distraction, inadvertence and error caused by ill health and bad management of his practice; and that he was suffering at the time of the matters under inquiry from acute anxiety and depression such that his capacity and judgement were impaired. The respondent solicitor claimed that the tribunal had failed to have adequate regard to the significance of missing documentation (among other things, cheque books, VAT books and records, and bank statements) and that, contrary to natural justice, the tribunal had failed to allow him to pursue the significance of the missing documentation by way of cross-examination.

When the matter came before the President of the High Court on 29 November 2010, he asked the respondent solicitor's counsel on what statutory section he was appealing. Counsel stated that there was none and that he relied on the president's inherent jurisdiction to hear the appeal. Counsel, under questioning from the president, confirmed that it was the respondent solicitor's position that there was no *prima facie* case for the disciplinary tribunal inquiry in the first place. The president stated that he

was satisfied that no real issues had been raised by the respondent solicitor to merit an appeal.

On 29 November 2010, the President of the High Court ordered that:

- 1) The name of the respondent solicitor be struck off the Roll of Solicitors,
- 2) The respondent solicitor pay restitution in the sum of €379,385.66 to the Compensation Fund of the Law Society,
- 3) The respondent solicitor pay the costs of the proceedings when these are ascertained,
- 4) The respondent solicitor pay the costs of the Solicitors Disciplinary Tribunal proceedings, to include witness expenses when these are ascertained.

On 29 November 2010, the President of the High Court also ordered that:

- 1) The recommendation of the Solicitors Disciplinary Tribunal made on 11 August 2010 be affirmed and adopted,
- 2) The respondent solicitor pay the costs of the High Court proceedings when taxed in default of agreement.

Subsequent to the making of that order by the president, the respondent solicitor has appealed against that order to the Supreme Court and the appeal bears record number 003/2011.

In the matter of Cathal O'Sullivan, solicitor, of O'Sullivan & Associates, 10 Herbert Street, Dublin 2, and in the matter of the Solicitors Acts 1954-2008 [5346/DT56/10]

*A lay applicant
Cathal O'Sullivan (respondent solicitor)*

On 11 April 2011, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in respect of the following complaint:

- 1) The applicant says that, on the 26 September 2000, he was furnished with an undertaking from O'Sullivan and Associates, Solicitors, for

the sum of £300,000,

- 2) The applicant says that, in consideration of his receipt of the undertaking, he loaned the sum of £300,000 to two named clients of O'Sullivan and Associates, Solicitors,
- 3) The applicant says that the only condition precedent to the return of monies lent was that apartments, as referred to in the undertaking, be sold,
- 4) The applicant says that the apartments have now been sold, as evidenced in an identified Land Registry instrument,
- 5) The applicant says that none of the said monies have since been returned to him,
- 6) The applicant says that he is of the belief that O'Sullivan and Associates, Solicitors, are in breach of their undertaking to him.

The tribunal ordered that the respondent solicitor:

- a) Do stand censured,
- b) Pay a sum of €2,000 to the compensation fund,
- c) Pay the whole of the costs of the applicant, to be taxed by a taxing master of the High Court, in default of agreement.

In the matter of Imelda Leahy, an assistant solicitor carrying on practice at David Walsh & Company, Solicitors, at Kilree Street, Bagenalstown, Co Carlow, and in the matter of the Solicitors Acts 1954-2008 [8250/DT86/09 and High Court record no 2011 no 44SA]
*Law Society of Ireland (applicant)
Imelda Leahy (respondent solicitor)*

On 8 March 2011, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in her practice as a solicitor in that she:

- a) Confirmed to the bank's solicitor on 10 December 2007 that she had received a full 10% deposit in relation to ten sales in the sum of €500,000, which she stated she held in trust when this was not true, in order to draw down the sum of €5,839,000 from the bank,

- b) Prepared contracts in respect of the ten deposits, which contracts were never exchanged,
- c) Confirmed to the bank by letter dated 14 December 2007 that she held a "10% deposit in each instance", when this was not true.

The tribunal ordered that the matter be brought before the President of the High Court and, on 23 May 2011, the President of the High Court made an order that:

- 1) The respondent solicitor should be permitted to continue to practise as an assistant solicitor in the employment and under the direct control and supervision of another solicitor of at least ten years' standing, to be approved in advance by the Society,
- 2) The Society do recover the whole of the costs of the proceedings, including witnesses' expenses, from the respondent solicitor when taxed and ascertained.

The solicitor applied for and was granted a stay on this order on 24 August 2011.

In the matter of Peter McGarry, a solicitor, formerly practising as Peter McGarry & Co, Solicitors, 27 Capel Street, Dublin 1, and in the matter of the Solicitors Acts 1954-2008 [4989/DT02/11 and High Court record no 2011/54 SA]
*Law Society of Ireland (applicant)
Peter McGarry (respondent solicitor)*

On 20 April 2011, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

- a) Caused or allowed an estimated deficit in the client account as at 30 November 2009 in the sum of €126,449.
- b) Failed to keep proper books of account, in that books were not kept up to date, in breach of regulation 12(1) of the *Solicitors' Accounts Regulations 2001*.
- c) Failed on numerous occasions

to furnish his clients with a bill of costs, in breach of regulation 11(1) of the *Solicitors' Accounts Regulations 2001*.

- d) Failed to redeem an existing mortgage on a property from the proceeds of a re-mortgage credited to the client bank account. The respondent solicitor gave an undertaking to AIB that he would discharge a mortgage outstanding with Permanent TSB with approximately €103,000. The sum of €102,000 had been transferred from the relevant client ledger account on the basis that apparently the respondent solicitor provided a loan to the client and this represented the repayment of same.
- e) Failed to redeem an existing mortgage on a property, despite giving an undertaking to provide a discharge or vacated mortgage to the solicitor acting on behalf of the purchaser. The respondent solicitor failed to do this from the proceeds of sale credited to the client bank account. Confirmation was received from Bank of Scotland (Ireland) Limited that the mortgage in the sum of approximately €250,000 was paid on 18 November 2009.
- f) Allowed or permitted the client ledger account of a named client to go into debt in the sum of €12,986.77 in March 2009. On 25 November 2009, the sum of €11,000 was credited to this client ledger account to reduce the deficit to €1,986.77, but it was not possible to vouch the source of these funds.
- g) Made a payment to the Revenue Commissioners of €6,000 on behalf of a named client, which was funded by six other separate clients of the practice and the respondent solicitor.
- h) Transferred the sum of €30,555.56 from the client ledger account of a named client to the client ledger account of the respondent solicitor without any apparent authorisation or evidence to show that the respondent solicitor was legally and beneficially entitled to the

BRIEFING

funds transferred to the credit of his client ledger account.

- i) Transferred round sum amounts in respect of fees from the client ledger prior to the posting of the fee note to the office ledger, in breach of regulation 10(4) of the *Solicitors' Accounts Regulations 2001*.
- j) Caused or allowed, through his conduct, claims to be made on the Society's compensation fund, resulting in a payment from the Society's compensation fund to named clients in the sum of €508,000 on 24 June 2010.
- k) Dealt with the re-mortgage of various properties on the same client ledger account, in breach of regulation 12(3)(a) of the *Solicitors' Accounts Regulations 2001*.

The tribunal made the following recommendations:

- 1) The respondent solicitor is not a fit person ever again to be a member of the solicitors' profession,
- 2) The name of the respondent solicitor be struck off the Roll of Solicitors,
- 3) The respondent solicitor make such restitution to the Society in respect of payments made by the compensation fund arising from the respondent solicitor's practice as the court thinks fit and, pending such restitution, the High Court make an ancillary order freezing the respondent solicitor's assets,
- 4) The respondent solicitor pay the whole of the costs of the Society as taxed by a taxing master of the High Court in default of agreement.

On 30 May 2011, the President of the High Court ordered that:

- 1) The name of the respondent solicitor shall be struck from the Roll of Solicitors,
- 2) The respondent solicitor do make such restitution, being the amount in respect of payments made by the compensation fund arising from the respondent solicitor's practice, and that the assets of the respondent solicitor's

practice be frozen pending such restitution to the Society,

- 3) The Society do recover the costs of the proceedings herein and the costs of the proceedings before the Solicitors Disciplinary Tribunal as against the respondent solicitor when taxed or ascertained.

In the matter of Thomas Mannion, a solicitor practising as Mannion Solicitors, Oranmore House, Taney Road, Dundrum, Dublin 14, and in the matter of the *Solicitors Acts 1954-2008* [3841/DT147/10] *Law Society of Ireland (applicant) Thomas Mannion (respondent solicitor)*

On 4 October 2011, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

- a) Failed to comply expeditiously or within a reasonable time with an undertaking given by him to the complainant on 18 September 2006 in respect of his named clients, over a named property, whereby he undertook to register the mortgage in the appropriate registry so as to ensure that the lender, the complainant, obtained a first legal mortgage over the property and, as soon as practicable thereafter, to lodge with the lender all deeds and documents to the property, stamped and registered as appropriate, as well as the original mortgage,
- b) Failed to reply adequately or at all to the complainant's correspondence and, in particular, letters dated 2 September 2009, 21 September 2009 and 15 October 2009 respectively,
- c) Failed to reply adequately or at all to the Society's correspondence and, in particular, letters dated 2 February 2010, 2 March 2010, 18 March 2010 and 16 April 2010 respectively.

The tribunal made the following orders:

- a) That the respondent solicitor stand censured,
- b) That the respondent solicitor

pay a sum of €2,000 to the compensation fund,

- c) That the respondent solicitor pay the whole of the costs of the Society, as taxed by a taxing master of the High Court in default of agreement.

In the matter of Brian Johnston, a solicitor formerly practising as Brian Johnston & Co, Solicitors, 79 Park Street, Dundalk, Co Louth, and in the matter of the *Solicitors Acts 1954-2008* [6927/DT64/10 and High Court record no 2011/81 SA] *Law Society of Ireland (applicant) Brian Johnston (respondent solicitor)*

On 2 June 2011, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

- a) Failed to maintain proper books of account in respect of his practice,
- b) Failed to furnish reporting accountant's reports to the Society as required by the *Solicitors' Accounts Regulations 2001*,
- c) Falsely stated in his application for a practising certificate that a reporting accountant's reports had been filed when in fact this had not been done,
- d) Allowed overpayments to be made to a number of clients, giving rise to a deficit on client accounts in excess of €700,000,
- e) Committed several breaches of regulation 7(2)(a) of the *Solicitors' Accounts Regulations 2001* by allowing debit balances to arise on the clients' ledger account in respect of a client, other than a debit balance that was totally offset by a credit balance arising on another clients' ledger account in respect of the same client,
- f) Failed to make income tax returns in respect of his practice,
- g) Failed to make VAT returns in respect of his practice,
- h) Retained his name on the headed notepaper of his former practice, thus giving the impression he was still in practice at a time when he had been suspended from practising as a solicitor.

The tribunal made the following recommendations:

- 1) The respondent solicitor is not a fit person to be a member of the solicitors' profession,
- 2) The name of the respondent solicitor be struck off the Roll of Solicitors,
- 3) The respondent solicitor pay 50% of the costs of the Society, to be taxed by a taxing master of the High Court in default of agreement.

In recognition of the respondent solicitor's efforts to pay back the monies to clear the deficit and to regularise his affairs, the tribunal did not make any recommendation in regard to imposing a monetary penalty on him.

On 17 October 2011, the President of the High Court ordered that:

- 1) The name of the respondent solicitor shall be struck from the Roll of Solicitors,
- 2) The Society do recover the costs of the proceedings before the High Court and the costs of the proceedings before the Solicitors Disciplinary Tribunal, to include witness expenses, as against the respondent solicitor when taxed or ascertained.

In the matter of James O'Mahony, a solicitor previously practising under the style and title of James O'Mahony Solicitors at 16 Stoneybatter, Dublin 7, and in the matter of the *Solicitors Acts 1954-2008* [4831/DT32/11]

Law Society of Ireland (applicant) James O'Mahony (respondent solicitor)

On 25 October 2011, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

- a) Failed to deal with his clients' title documentation and mortgage documentation, and in particular the registration of same, in a timely manner or at all, having closed the sale in April 1999 and having confirmed to the Society in 2010 that the registration had

- not yet proceeded,
 b) Failed to inform his clients as to the reason for his failure to deal with their title documentation,
 c) Failed to respond to the Society's letters of 13 September 2010 and 9 November 2010 within ten days, as requested by the Complaints and Client Relations Committee.

The tribunal ordered that the respondent solicitor:

- a) Do stand censured,
 b) Pay a sum of €500 to the compensation fund,
 c) Pay the whole of the costs of the Society as taxed by a taxing master of the High Court in default of agreement.

In the matter of Martin J

Kearns, solicitor, of 1 Devon Place, The Crescent, Galway, and in the matter of the Solicitors Acts 1954-2008 [4403/DT74/10] Law Society of Ireland (applicant) Martin J Kearns (respondent solicitor)

On 26 October 2011, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

- a) Was in breach of his undertaking to the Complaints and Client Relations Committee on 10 July 2009 to submit within 14 days (i) a legible copy of the Inland Revenue affidavit, (ii) a copy of his ledger card, and (iii) a draft bill of costs,
 b) Failed to issue a section 68 letter in relation to the administra-

- tion of the estate, as admitted by him at a meeting of the committee on 10 July 2009,
 c) Failed to comply with the direction of the Complaints and Client Relations Committee at its meeting on 29 May 2009 to furnish an interim set of estate accounts within two weeks,
 d) Delayed the distribution of the estate of the deceased until after the receipt of a letter of complaint in December 2008, notwithstanding the deduction of fees on his own behalf from the estate on 27 August 2008 totalling €22,937.50,
 e) Failed to comply with a section 10 notice issued and served on him by letter dated 29 April 2009 in a timely manner or at all,
 f) Failed to reply to the Society's

- correspondence in a timely manner and, in particular, the Society's letters of 5 December 2008, 4 February 2009, 19 February 2009, 11 November 2009, 3 February 2010,
 g) Failed to attend the Complaints and Client Relations Committee meeting on 29 April 2009 when required to do so,
 h) By his conduct, in his treatment of elderly beneficiaries, brought the profession into disrepute.

The tribunal ordered that the respondent solicitor:

- a) Do stand censured,
 b) Pay the whole of the costs of the Society including witnesses' expenses, as taxed by a taxing master of the High Court in default of agreement. Ⓞ

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Edited by TP Kennedy, Director of Education

Ensuring effective enforcement of arbitral agreements and awards

The Court of Justice's ruling in Case C-185/07, *West Tankers* (see October 2011 *Gazette*, p54) that anti-suit injunctions in aid of arbitration are incompatible with the *Brussels I Regulation* on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters brings into focus a debate that has been ongoing for some time – what is the extent of the exclusion of arbitration from the regulation and how can it be ensured that arbitral agreements and awards can be effectively enforced?

The exclusion of arbitration arose out of a consensus at the time that the regulation's predecessor – the *Brussels Convention* – was negotiated that the recognition of arbitral agreements and awards worked efficiently under the 1958 *New York Convention* and, accordingly, arbitration should not be included. Further, the European Council was at the time preparing a European convention providing a uniform law on arbitration in order to facilitate

the recognition and enforcement of awards – which it was anticipated would be to an even greater extent than the *New York Convention*, but which ultimately proved unsuccessful.

Scope of the exclusion

The relevant provision for the exclusion of arbitration is article 1(2)(d) of the regulation, which simply provides as follows: “the regulation shall not apply to arbitration”.

In Case C-190/89, *Marc Rich*, the CJ ruled that litigation pending before a national court concerning the appointment of an arbitrator is excluded – even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation. Significantly, the court stated that, in order to determine whether a dispute falls within the scope of the *Brussels Convention* (now the regulation), reference must be made solely to the subject matter

of the dispute. It followed that preliminary issues regarding the validity of an arbitration agreement are to be determined by national laws and applicable international conventions.

However, the scope of the exclusion became ambiguous with the CJ's judgment in *Van Uden*, where the court ruled that the relevant Dutch court could grant provisional relief – despite the existence of an arbitration – under article 24 (now 31) of the regulation. This was because that article allows courts to grant provisional measures, even if another member state court has jurisdiction as to the substance of the dispute, provided such laws were allowed under the laws of the granting state.

Differing approaches

The difference in interpretation by the member states regarding the scope of the exclusion stems from their understanding of the correlation between the exclusion as expressed in article 1(2)(d) and the right to apply to the courts for provisional measures as set out under article 31 of the regulation, which provides as follows: “Application may be made to the courts of a member state for such provisional, including protective, measures as may be available under the law of that state, even if, under this regulation, the courts of another member state have jurisdiction as to the substance of the matter.”

The common law understanding of the exclusion of arbitration is that, once an agreement to arbitration is claimed, then all disputes stemming from that legal relationship are subject exclusively to arbitration: the regulation is inapplicable. How-



Brussels sprouts

PROPOSED AMENDED WORDING

ARTICLE 29.4

Where the agreed or designated seat of an arbitration is in a member state, the courts of another member state whose jurisdiction is contested on the basis of an arbitration agreement shall stay proceedings once the courts of the member state where the seat of the arbitration is located or the arbitral tribunal have been seised of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of that arbitration agreement.

This paragraph does not prevent the court whose jurisdiction

is contested from declining jurisdiction in the situation referred to above if its national law so prescribes.

Where the existence, validity or effects of the arbitration agreement are established, the court seised shall decline jurisdiction.

This paragraph shall not apply in disputes concerning matters referred to in sections 3,4 and 5 of chapter II [referring to insurance, consumer contracts and contracts of employment].

ARTICLE 33.3

For the purposes of this section, an

arbitral tribunal is deemed to be seised when a party has nominated an arbitrator or when a party has requested the support of an institution, authority or a court for the tribunal's constitution.

ARTICLE 36

Application may be made to the courts of a member state for such provisional, including protective, measures as may be available under the law of that state, even if the courts of another state or an arbitral tribunal have jurisdiction as to the substance of the matter [replacing article 31].



1958 New York Convention – an empire state of mind

ever, in the civil law traditions, the focus is on the substantive subject matter of the dispute: for example, in Germany, provisional measures related to the merits of arbitration proceedings are available under national law along the line of the arguments in *Van Uden*.

Proposals for reform

The two options for reform are (a) to include arbitration within the regulation in limited circumstances (as set out below) or (b) to reinforce the principle of the exclusion of arbitration (no wording has yet been provided in this regard).

The commission has proposed to amend the regulation by allowing the regulation to apply to arbitration in stated limited circumstances and in a manner favouring the member state the seat of the arbitration. The proposed amending wording to the regulation is in the panel (opposite).

It is clear from the amending wording that the jurisdiction of the member state that is not the designated seat is obliged to stay proceedings once the courts of the member state where the seat of the arbitration is located or the arbitral tribunal have been

seised of proceedings to determine the existence, validity or effects of an arbitration agreement. Further, it is not necessary under the wording of article 33 for an arbitral tribunal to have in fact been established in order for an arbitral tribunal to be ‘seised’.

However, it is submitted that the proposal to allow courts of a member state to grant provisional, including protective measures, even where the courts of another state or an arbitral tribunal have jurisdiction over the substance of the matter, raises difficulties in the context of the *Arbitration Act 2010*.

Preliminary or interim relief

Under article 17 of the *Model Law* – as adopted under section 6 of the act – an arbitrator has authority to order a party to:

- Maintain or preserve the status quo pending determination of the dispute,
- Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself.

Accordingly, an arbitrator operating under the 2010 act would ordinarily have the power to or-

der preliminary or interim relief, without needing the assistance of the court.

Should the courts of another member state grant provisional or protective measures – as permitted under article 36 – such measures could undermine the arbitrator’s authority to use the powers afforded to him or her under article 17.

Anti-suit injunctions

A further issue arises in the context of the granting of anti-suit injunctions by international arbitral tribunals. Significantly, the ruling in *West Tankers* will not affect the ability of international arbitral tribunals to grant anti-suit injunctions. The decisions of the CJ in Case 102/81, *Nordsee and Denuit* and Case C-125/04, *Cordenier* are clear that an arbitrator, called upon to resolve a contractual dispute between the parties to an arbitration clause, is not to be considered ‘a court or tribunal of a member state within the meaning of the [treaty]’.

It follows, in light of *West Tankers*, that greater use may be sought of the power of the arbitrator to make orders under article 17 in international arbitrations. That power could be undermined should a court of

another member state grant provisional or protective measures affecting the arbitral process.

Differences in interpretation

While the approach favouring the member state that is the seat of the arbitration would be a positive development, the differences in interpretation between member states as to the meaning of provisional and protective measures and the national arbitration regimes themselves are probably too great to facilitate the recognition and enforcement of European arbitral awards. Reinforced exclusion may be the preferable course for Ireland in order to protect the arbitration regime established by the 2010 act. Ireland would not be alone in that view – according to the *Heidelberg Report* on the regulation – England, France, Germany and The Netherlands favour priority of the *New York Convention* over the regulation and view an extension concerning arbitration as undesirable. In the meantime, it is suggested that swift action be taken to enforce arbitral awards as judgments and greater use be made of article 17. **G**

James Kinch is a solicitor with the law department of Dublin City Council.

Recent developments in European law

CONSUMER LAW

Case C-83/10, *Aurora Sousa Rodríguez and Others v Air France SA*, 13 October 2011

Regulation 261/2004 on compensation of air passengers provides for standardised measures that airline companies must put into effect for their passengers in the event of denied boarding, cancellation or long delay of a flight. The regulation applies without prejudice to passengers' rights to further compensation. Among the measures required by the regulation in the event of a cancellation, passengers may have their ticket reimbursed or be re-routed. During the wait for a later flight, the airline must offer them adequate care – such as accommodation, meals and the opportunity to make telephone calls. Where the flight is cancelled without notice or with very short notice and there are no extraordinary circumstances, passengers also have the right to a flat-rate compensation, the amount of which varies depending on the distance of the scheduled flight. In parallel, the *Montreal Convention* sets out the conditions in which passengers may bring actions for damages, by way of compensation, on an individual basis against carriers as a result of the cancellation of a flight. The applicants were booked on an Air France flight from Paris to Vigo on 25 September 2008. The flight took off at the scheduled time, but returned to the airport a short time later due to a technical problem with the aircraft. They were re-booked onto other flights the following day, but only one of the seven passengers was offered assistance by Air France in the meantime. The Pato Rodríguez family were re-routed to Porto and had to take a taxi from there to Vigo, where they lived. These seven passengers brought a legal action for €250 each in respect of the cancellation of the flight. The Pato

Rodríguez family claimed €170 to cover the cost of the transfer by taxi and €650 per person as compensation for non-material damage. The López Sousa family also claimed €650 per person as compensation for non-material damage and the reimbursement of the cost of meals in the airport and an extra day for their dog in kennels. Mr Pugo Luiero claimed €300 in compensation for non-material damage suffered. The Spanish Commercial Court asked the CJ whether this case can be considered as a flight 'cancellation'. It also sought guidance on whether the further compensation that passengers can claim covers all types of damage and whether it also refers to costs incurred due to the failure of the air carrier to fulfil its obligations to assist and take care. The Court of Justice held that 'cancellation' does not refer exclusively to the situation in which the aeroplane in question fails to take off at all. The concept also covers the case in which an aeroplane took off but, for whatever reason, was subsequently forced to return to the airport of departure where its passengers were transferred to other flights. The court held that, in these circumstances, the flight cannot be considered as having been operated. In order to examine whether there has been a 'cancellation', it is necessary to examine the individual situation of each passenger transported. In order to find that a flight has been cancelled, it is not at all necessary that all the passengers that had booked a place on the originally scheduled flight were transported on another flight. As the seven passengers in this case were transferred to other flights, scheduled for the day after the expected departure date, the CJ concluded that their original scheduled flight must be classified as cancelled. The court then considered the concept of 'further compensation'. It explained

that this allows a national court to compensate non-material damage arising from breach of a contract of carriage by air under the conditions provided for by the *Montreal Convention* or national law. 'Further compensation' is intended to supplement the application of the standardised and immediate measures provided for by the regulation. Thus, it allows passengers to be compensated for the entirety of the damage (material and non-material) suffered due to the failure of the air carrier to fulfil its contractual obligations under the conditions and within the limits provided for by the *Montreal Convention* or by national law. Where a carrier fails to fulfil its obligations to assist and to take care of costs that fall to it pursuant to the regulation, air passengers are entitled to claim a right to compensation. Insofar as that compensation arises directly from the regulation, it cannot be considered as falling within 'further' compensation.

INTELLECTUAL PROPERTY

Case C-34/10, *Oliver Brüstle v Greenpeace eV*, 18 October 2011

Mr Brüstle is the holder of a patent that concerned isolated precursor cells produced from human embryonic stem cells used to treat neurological diseases. There are clinical applications for this patent, particularly for patients suffering from Parkinson's Disease. Greenpeace applied to the German Federal Patent Court, which ruled that the patent was invalid insofar as it covers processes for obtaining precursor cells from human embryonic stem cells. A German appeal court decided to refer questions to the CJ concerning the interpretation of, in particular, the concept of the 'human embryo', which is not defined in Directive 98/44/EC on the legal protection of biotechnological inventions. The question

is whether the exclusion from patentability of the human embryo covers all stages of life from fertilisation of the ovum, or whether other conditions must be met such as a particular stage of development be reached. The Court of Justice indicated that it is not called upon to broach questions of a medical or ethical nature, but must restrict itself to a legal interpretation of the relevant provisions of the directive. The context and aim of the directive show that the legislature intended to exclude any possibility of patentability where respect for human dignity could thereby be affected. It therefore follows that the concept of 'human embryo' must be understood in a wide sense. Any human ovum must, as soon as fertilised, be regarded as a 'human embryo' if that fertilisation is such as to commence the process of development of a human being. A non-fertilised human ovum, into which the cell nucleus from a mature human cell has been transplanted, and a non-fertilised human ovum whose division and further development have been stimulated by parthenogenesis must also be classified as a 'human embryo'. Although those organisms have not, strictly speaking, been the object of fertilisation, due to the effect of the technique used to obtain them, they are capable of commencing the process of development of a human being, just as an embryo created by fertilisation of an ovum can do so. The case concerned stem cells obtained from a human embryo at the blastocyst stage. The court found that it is for the referring court to ascertain, in the light of scientific developments, whether they are capable of commencement of development of a human being and, therefore, are included within the concept of 'human embryo'. The court then examined whether the concept of 'uses of human embry-

os for industrial or commercial purpose' also covers the use of human embryos for purposes of scientific research. The grant of a patent for an invention implies, in principle, its industrial or commercial application. The use of human embryos for the purposes of research that constitutes the subject matter of a patent application cannot be separated from the patent itself and the rights attaching to it. The use of human embryos for the purpose of scientific research that is the subject matter of a patent application cannot be distinguished from industrial and commercial use and thus avoid exclusion from patentability. Thus, scientific research entailing the use of human embryos cannot access the protection of patent law. Nevertheless, the patentability of uses of human embryos for industrial or commercial purposes is not prohibited under the directive where it concerns the use for therapeutic or diagnostic purposes that are applied to the human embryo and that are useful to it – such as to correct a malformation and improve the chances of life. The court finally turned to the question of the patentability of an invention involving the production of neural precursor cells. Not to exclude from patentability such an invention would allow a patent applicant to avoid non-patentability by skilful drafting of the claim. The court concluded that an invention is excluded from patentability where the implementation of the process requires either the prior destruction of human embryos or their prior use as base material, even if, in the patent application, the description of the process, as in the current case, does not refer to the use of human embryos.

LITIGATION

Joined Cases C-509/09 and C-161/10, *eDate Advertising GmbH v X and Olivier Martinez and Robert Martinez v MGN Ltd*, 25 October 2011

The *Brussels I Regulation* provides that, in matters relating to tort, a defendant may be sued in the courts of his domicile or in the court for the place where the harmful event occurred or may occur – article 5(3). In the case of written defamation by means of a newspaper article distributed in several member states, a plaintiff can sue the publisher where it is established or sue in each member state where the publication was distributed and where he claims to have suffered injury to his reputation. In that latter case, the national courts only have jurisdiction over the damage suffered in that state. In these cases, the Bundesgerichtshof and the Tribunal de grande instance de Paris asked the Court of Justice to apply these principles to infringements of personality rights committed by means of content placed on a website. In *eDate, X*, a German national, was sentenced to life imprisonment in 1993 with his brother for the murder of a well-known actor. He was released on parole in January 2008. *eDate Advertising* is established in Austria. It operates an internet portal on which it published information about the appeals that X and his brother had lodged against their convictions. It removed the disputed information from the website on request. X asked the German courts to order *eDate* to stop using his full name when reporting about him in connection with the crime committed. *eDate* disputed the jurisdiction of the German courts, arguing that only the Austrian courts could hear the case. *Martinez* concerned a story that appeared on the website of the British newspaper, the *Sunday Mirror*. This was titled 'Kylie Minogue is back with Olivier Martinez' and concerned a meeting between the Australian singer and the French actor. The French actor and his father brought an action in France against MGN, which publishes the *Sunday Mir-*

ror. They argued that there had been interference with their private lives and infringement of the right of Olivier Martinez to his image. MGN challenged the jurisdiction of the French courts, arguing that there was no sufficiently close connecting factor between the placing online of the information in Britain and the alleged damage in France. It was argued that such a link would be necessary to establish the jurisdiction of the French courts to rule on the facts giving rise to damage and attributable to the placing of the material at issue online. The Court of Justice held that the placing online of content on a website is to be distinguished from the regional distribution of printed material by reason of the fact that it can be consulted instantly by an indefinite number of internet users worldwide. Universal distribution is liable to increase the seriousness of the infringements of personality rights. It also makes it extremely difficult to locate the places in which the damage resulting from those infringements has occurred. In those circumstances, given that the impact that material placed online is liable to have on an individual's personality rights might best be assessed by the courts of the place where the victim has his centre of interest, the CJ designated that court as having jurisdiction in respect of all damage caused within the territory of the EU. The place where a person has the centre of his interests corresponds in general to his habitual residence. However, instead of this, the victim can bring an action before the courts of each member state in the territory of which the online content is or has been accessible. In that case, the court of that state can only deal with the damage that occurred within its territory. The person whose rights have been infringed can also bring an action, in respect of all the damage caused, before the courts of the member

state in which the publisher of the online content is established.

Case C-406/09, *Realchemie Nederland BV v Bayer Crop-Science AG*, 18 October 2011

In 2005, the German firm Bayer brought proceedings in Germany against a Dutch company, *Realchemie*, for patent infringement. A German court issued an interim order prohibiting *Realchemie* from importing into, possessing or marketing certain pesticides in Germany. The court also ordered *Realchemie* to provide details of its commercial transactions involving the pesticides and to transfer its stock into the custody of the courts. The order was issued on pain of a fine. Subsequently, this court found that *Realchemie* had not complied with these orders and ordered a fine of €20,000 for the breach of the first and €15,000 for the breach of the second. In 2007, Bayer sought to enforce the orders in the Netherlands. The Dutch court referred a number of questions to the Court of Justice for guidance. The CJ firstly considered whether the *Brussels I Regulation* applied. Is a fine ordered to ensure compliance with judgments a 'civil and commercial matter'? The court held that issues of characterisation had to be addressed by examining the subject matter of the legal relationship between the parties rather than the nature of the particular remedy. In the current case, there is a dispute between two private parties concerning alleged patent infringement. Thus, the legal relationship between the parties is a private law one and thus covered by the concept of 'civil and commercial matters'. The fact that the fine was to be paid to the German state was not regarded as decisive. The nature of the enforcement right depends on the nature of the subjective right at issue. In this case, that related to Bayer's right to exclusively exploit the invention protected by its patent. ©

NOTICES

WILLS

Brennan, Alan Joseph (deceased), late of 38 Abbey Court, Abbey Farm, Celbridge, Co Kildare, and previously of no fixed abode. Would any person having knowledge of a will made by the above-named deceased, who died on 22 October 2011, please contact Sarah R Scally & Co, Solicitors, Unit 3, Suite 238, Capel Chambers, The Capel Building, Mary's Abbey, Dublin 7; tel: 01 804 9848, fax: 01 804 9816, email: legal@sarahscallyandco.eu

Brophy, Martin Anthony (deceased), late of 39 The Mill, Crossguns Quay, Phibsboro, Dublin 7. Would any solicitor holding or having knowledge of a will made by the above-named deceased, who died on 18 July 2011, please contact HG Donnelly & Son, Solicitors, 5 Duke Street, Athy, Co Kildare; reference: RP/BRO016-1

Browne, Claire (otherwise Clare) (deceased), late of Clonskeagh Hospital, Dublin, and formerly of 21 Beach Road, Sandymount, Dublin 4, who died on 20 November 2011. Would any solicitor

holding or having knowledge of the whereabouts of any will executed by the deceased contact David Larney of Gleeson McGrath Baldwin, Solicitors, 29 Anglesea Street, Dublin 2; tel: 01 474 4300, fax: 01 474 4343, email: dlarney@gmgb.ie

Connick, John (deceased), late of Templeudigan, Ballywilliam, Enniscorthy, Co Wexford, who died on 15 April 2011. Would any person having knowledge of

any will executed by the above-named deceased please contact Coghlan Kelly, Solicitors, Trinity Chambers, South Street, New Ross, Co Wexford; tel: 051 429 100, fax: 051 422 793, email: info@coghlankelly.com

Delaney, Marcella (otherwise Massie) (deceased), late of The Square, Ballinakill, Co Laois, who died on 8 September 2011, and her husband William Delaney of the same address, who died on 5 March 2009. Would any person holding or having knowledge of a will made by either of the above-named deceased please contact Messrs James E Cahill & Company, Solicitors, Market Square, Abbeyleix, Co Laois; tel: 057 873 1246, email: donaldwunne@securemail.ie

Desmond, Elizabeth (deceased), late of 62 Doyle Road, Turner's Cross, Cork, who died on 13 September 2006. Would any person having knowledge of the whereabouts of a will made by the above-named deceased please contact Carmel Best, Best & Co, Solicitors, Douglas, Cork; tel: 021 489 086

Donovan (otherwise O'Donovan), John (deceased), late of Apartment F5, Cherrydale Court, Dublin Road, Limerick, and formerly of Lord Edward Street, Kilmallock, Co Limerick. Would any person having knowledge of a will executed by the above-named deceased, who died on 10 October 2011, please contact Richard Barrett, solicitor, of Collins Brooks & Associates, 6/7 Rossa Street, Clonakilty, Co Cork; reference: RB/MK/D.361

Drennan, Donal J (deceased), late of Ballygillane House, Cawdor Street, Rosslare Harbour, Co Wexford. Would any person having knowledge of any will executed by the above-named deceased,

who died on 6 April 2003, please contact Donal M Gahan, Ritchie & Co, Solicitors, in writing at 36 Lower Baggot Street, Dublin 2; tel: 01 676 7277, fax: 01 676 7395, or by email on info@dmg.ie

Flanagan, Maureen (deceased), late of 15 Hartigan Villas, Moyross, Limerick, who died on 21 February 2011. Would any person having knowledge of the whereabouts of a will made by the above-named deceased please contact Roisín O'Connell of Melvyn Hanley, Solicitors, 16 Patrick Street, Limerick; DX 3019; tel: 061 400 533

McDermott, Helena Mary (deceased), late of 81 Iveragh Road, Whitehall, in the city of Dublin, who died on 25 September 2011. Would any person having knowledge of the whereabouts of the original will made by the above-named deceased, on 12 November 1982, please contact Owen O'Mahony, Owen O'Mahony & Co, Solicitors, 5 John's Bridge, Kilkenny; tel: 056 776 1733, email: owenomahony@eircom.net

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TITLE DEEDS

In the matter of the *Landlord and Tenant Acts 1967 to 2005* and in the matter of the *Landlord and Tenant (No 2) (Grounds Rents) Act 1978* (as amended) and in the matter of an application by Ken Lawford and Mary Lawford

Take notice that any person having an interest in the fee simple or in any superior interest in the properties known as:

- a) No 39 Upper Clanbrassil Street, Dublin 8, in the city of Dublin, being part of the property comprised in and demised by the 999-year lease dated 29 June 1846, made between Edmond Lawless of the one part and Michael Fitzpatrick of the other part, subject to the yearly rent of £6 pounds (€7.62),
- b) All that and those the rear of the premises known as no 39 Clanbrassil Street, in the barony of Uppercross and county of Dublin, as more particularly delineated on the map annexed to an indenture of assignment dated 28 August 2008 and made between Gregory Conlon of the one part and the applicants, Ken Lawford and Mary Lawford, of the other part, and being part of the premises comprised in and demised by indenture of lease dated 29 June 1846 and made between Edmond Lawless of the one part and Michael Fitzpatrick of the other part, subject to the yearly rent of £6 (€7.62),
- c) All that and those the premises comprised in folio DN84441L of the register of ownership of leasehold interests for the county of Dublin and known as nos 40 and 41 Upper Clanbrassil Street and nos


1, 2, 3, 4, 5, 6, 7, 8 and 9 Orr's Terrace, all of which said premises are situate in the barony of Uppercross and city of Dublin, being the property comprised in the 999-year lease dated 19 June 1844, Edmond Lawless to Thomas Slevin, subject to the yearly rent of ten pounds and sixteen shillings sterling (€13.72).

Take notice that the applicants, Ken Lawford and Mary Lawford, intend to submit an application to the county registrar for the city of Dublin at Áras Uí Dhálaigh, Inns Quay, Dublin 7, for the acquisition of the fee simple interest in the aforesaid properties and that any party asserting that they hold the said fee simple interest or any superior interest in

the said properties are called upon to furnish evidence of title to the under-mentioned within 21 days from the date of this notice.

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

Date: 3 February 2012
Signed: Seamus Maguire & Co (solicitor for the applicants), 10 Main Street, Blanchardstown, Dublin 15



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

For information: Emma at 057 9370210. fundraising@carersireland.com or www.carersireland.com.

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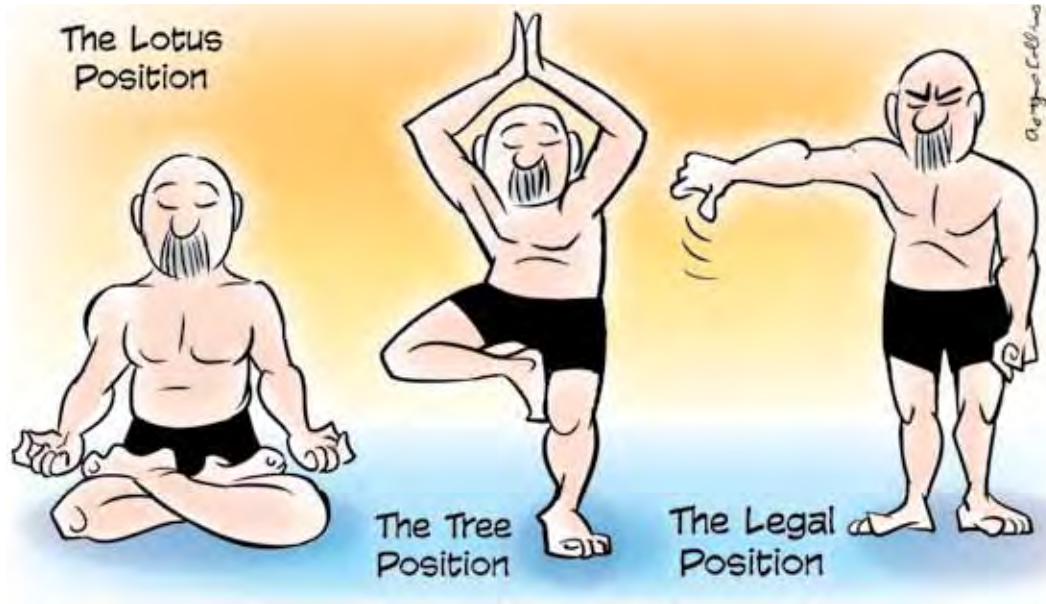
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WILD, WEIRD AND WACKY STORIES FROM LEGAL 'BLAWGS' AND MEDIA AROUND THE WORLD



Yoga-pose copyright bid a stretch too far

Yoga poses, such as head-to-knee stretches and yoga-move sequences, are 'exercises' rather than 'choreography' and can't be copyrighted in the US, regulators have said, in a case taken by Bikram Yoga against three yoga studios.

According to Bloomberg.com, the US Copyright Office previously permitted yoga poses

and their sequences to be registered – even if those exercises were in the public domain. The office reviewed the legislative history of the copyright law and decided that exercises, including yoga, “do not constitute the subject matter that Congress intended to protect as choreography. We

will not register such exercises (including yoga movements), whether described as exercises or as selection and ordering of movements.”

The case is *Bikram's Yoga College of India LP v Yoga to the People, Inc*, 11-cv-07998, US District Court, Central District of California (Los Angeles).

NYPD agrees to share files about missing boy

After months of legal wrangling, the New York Police Department has agreed to cooperate with Skadden, Arps, Slate, Meagher and Flom attorneys, working *pro bono* to help find a boy. Patrick Alford was a seven-year-old ward of the city's foster care system when he went missing almost two years ago. The

American Lawyer reports that the NYPD will begin turning over files related to its investigation into what happened to Patrick, who vanished on 22 January 2010 while taking out the rubbish at his Brooklyn apartment building home.

The sharing of files comes after the Skadden lawyers agreed to sign

a protective order in which they pledged to keep the files' contents confidential and to provide police with any new information they uncover that could help determine the missing boy's whereabouts, according to court documents. The order was signed on the boy's ninth birthday.

Judge orders defendant's mouth taped shut

A Pennsylvania judge ordered a man's mouth to be taped shut by sheriff's deputies for repeatedly disrupting jury selection for his trial.

The unusual order came after Erik Britt, who was acting as his own attorney during the pre-trial hearing for assaulting a prison guard, ignored Judge Timothy Creany's warnings to stop interrupting the court hearing to



say his free-speech rights were being violated and complaining of racism, the *Johnstown Tribune-Democrat* reported.

The judge eventually halted the hearing after Britt continued to make outbursts – despite the heavy red tape across his mouth and around his head, according to the *Tribune-Democrat*. A mental-health evaluation has been ordered.

No such thing as a free lunch?

A Chicago woman who was fired for working on her lunch hour has won an appeal upholding unemployment benefits. The *Chicago Tribune* reports that the estate agency company that had employed Sharon Smiley as a receptionist accused her of misconduct and insubordination when she skipped lunch in January 2010 to try to catch up on work.

A manager told Smiley she was required to take the break and ordered her to go to human resources to discuss the issue. The HR manager who fired Smiley claims the employee interrupted her during their talk.

A Cook County judge ruled Smiley's conduct didn't amount to misconduct that would disqualify her for benefits – an appeals court agreed.

Chicago-Kent law professor Martin Malin told the *Tribune* that companies can be held liable in suits for unpaid overtime if employees work during mandatory lunch breaks with a supervisor's knowledge.

Ring of confidence?

In the first-known incident of its kind, a traffic policeman in Kuwait City has issued a citation against a motorist for having bad breath, reports *Al-Anba Daily* (via legaljuice.com).

A police source said that it was a very strange incident – and problematic, too, because no known penalty existed for the 'offence'. “Will the motorist be fined – if so, how much will he have to pay? And if his car is impounded, how long will it be in the police garage?” the source asked. **G**

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COMMERCIAL LITIGATION PARTNER/TEAM

This established firm is looking to hire a commercial litigation partner/team. You will be coming from a recognised commercial practice where you'll be acting for top quality clients. Your relationships and reputation will be such that you'll be expecting clients to continue to instruct you should you move. This firm is very profitable and there is a potential for equity partnership for the appropriate individual. **Contact Sharon Swan Ref: S2009**

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Easily identified as a leading light in the field of investment funds, our client is actively looking to secure the services of a top tier partner/team with exceptional experience within the investment funds market. The firm continues to go from strength to strength in terms of standing, profile in the market and financial performance. Ideally you will have UCIT's or hedge funds experience. Excellent remuneration on offer to attract the right candidates. **Contact Sharon Swan Ref: S2010**

FUNDS

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For opportunities in Ireland or overseas, please contact carolmcgrath@makosearch.ie on 01 685 4018 or sharonswan@makosearch.ie on 01 685 4017 or visit www.makosearch.ie

Partner – Professional Negligence



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The successful candidate/s will have significant experience in the defence of professional negligence claims, in particular those involving solicitors and/or construction professionals. Expertise in general contentious and non-contentious construction would be useful as would experience of insurance coverage disputes. Exposure to claims against accountants and financial institutions would also be advantageous.

Excellent technical legal skills as well as oral and written communication are an essential pre-requisite, as is the ability to manage, supervise and inspire confidence in a team of lawyers.

A client following is desirable but not essential. More important to us is that candidates will be willing and able to develop the business and establish a high profile with our insurer and other clients.

Applications from solicitors who are also qualified to practise in England and Wales and/or have strong experience in the London insurance market would be particularly welcome.

An excellent remuneration policy is on offer coupled with the opportunity to develop a thriving and successful practice.

For more information, and/or a discussion in strict confidence, please contact our recruitment consultant, Michael Benson BCL Solicitor at Benson & Associates who has been exclusively retained for this assignment. Suite 113, The Capel Building, St. Mary's Abbey, Dublin 7.
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