

**BIG BROTHER** 

Society conference on the impact of technology on privacy



**MEASURING UP** 

The new taxing master explains the basis of the taxation of costs



#### **EVIDENTLY EXCLUSIVE**

Does the exclusionary rule of evidence in Irish law need a makeover?

€4.00 October 2012

# CONSTRUCTING THE CONSTITUTION



The forgotten architect of Bunreacht na hÉireann



# 2012-13 IRISH SOLICITORS' PROFESSIONAL INDEMNITY INSURANCE FACILITY

#### **INTRODUCING MILLER**

Miller Insurance Services LLP (Miller) is a leading independent and specialist broker operating internationally and at Lloyd's. Established in 1902, we are today the largest truly independent broker in the UK.

#### **OUR PROFESSIONAL RISKS EXPERIENCE IN IRELAND**

Our team of leading experts has been providing the Irish legal sector with professional indemnity solutions for over 25 years, placing insurance coverage and advising top firms in the country. In addition, we have acted as the sole reinsurance broker for the Solicitor's Mutual Defence Fund Limited (SMDF) since 1999.

#### WHY CHOOSE MILLER

- We control and place an exclusive London market solicitors' professional indemnity facility led by Allianz GCS and supported by Lloyd's and international insurers
- Our facility offers competitive and sustainable premium options backed by strong financial security
- Experienced specialist local claims handling services

#### **HOW TO GET A QUOTATION**

Access to this facility is via our extensive local broker network:

#### **Crotty Group**

Unit 6, Leopardstown Office Park Sandyford, Dublin 18 Tel: 01 290 8800

Email: solicitors@crottygroup.ie

#### **Compass Insurance Brokers**

14 Pembroke Street Lwr, Dublin 2

Tel: 01 901 7222

Email: john@compassinsurance.ie

#### **Glennon Insurance**

Charlemont House, Charlemont Place Dublin 2

Tel: 01 707 5800

Email: solicitorspi@glennons.ie

#### **Lennon Earley Crotty**

8/9 Marino Mart, Fairview, Dublin 3

Tel: 01 833 0056

Email: solicitors@lecinsurance.ie

#### **Hooper Dolan Insurance Group**

(local offices in Carlow, Clane, Derry, Donegal, Galway, Killarney, Limerick, Newtownmountkennedy, Sligo, Thurles, Tipperary, Tuam and Tullow) Head Office - 31 The Mall, Waterford

Tel: 0818 22 44 88

Email: solicitorspi@hdgroup.ie

#### Kelleher Insurance

Trinity Street, Drogheda Co. Louth

Tel: 041 980 1565

Email: solicitors@kellehers.ie



Law Society Gazette www.gazette.ie October 2012 PRESIDENT'S MESSAGE

## ADAPTING REAPS GREATEST REWARDS

ime flies and, since my term of office comes to a close on 2 November, this is my last 'President's Message'. While my year as president has been dominated by the *Legal Services Regulation Bill*, it is, of course, the economy that dominates our practising lives. The economy has already brought about a significant change for us all in our personal and practising lives, and there is no doubt but that the bill – whatever its final form may take – will also bring about significant change in the profession.

The Minister for Justice has made it clear that he intends to proceed with the introduction of multidisciplinary partnerships (MDPs), and he does not seem open to the Society's submission that these models of practice should first be the subject of a study into *whether* or not they should be permitted, rather than *how* they should be introduced. This is puzzling, because there is no demonstrable benefit from MDPs wherever they have already been permitted – nor does there appear to be any public demand for their introduction.

It is not yet clear if the minister is in favour of the alternative business structures that have been permitted in Britain – which permit non-lawyer ownership of solicitors' firms and, therefore, the provision of legal services by, for example, supermarket chains. If he is thinking along those lines, however, I would strongly suggest that it is better to wait and see how the British experience unfolds. Whatever may transpire, it is clear that the manner in which legal services are provided in the future will be different to today.

#### Online procurement

As more and more consumers shop online, it is certain that they will procure more and more of their legal services online. There is a growing consensus in Britain and Northern Ireland that these developments cannot be ignored if a practice is to survive. New clients are far less likely to simply walk through our doors as in the past, and younger people in particular are far more likely to source their legal services online. We ignore these developments at our peril and, even if it is anathema to those of us who started our legal careers in a different era, I am in little doubt that it is now imperative for the survival of solicitors' firms to have a marketing plan that embraces 21st century technology.

I have already written extensively on the regulations prohibiting acting on both sides in conveyancing transactions, which will come into effect on 1 January. Another change that we may expect to see in the not-too-distant future is the introduction of e-conveyancing. Some colleagues have expressed concern that this may open the door to non-solicitors undertaking conveyancing, but it is important to understand that e-conveyancing means a streamlining of processes that currently take up far more of the solicitor's time than is now necessary. This will free up more time for solicitors to



spend on the real work of investigation of title and all that entails, for which solicitors remain the best qualified.

#### **Enormous change**

Our profession has changed enormously over the past 25 years and has adapted very well to this change – and continues to do so. Obviously, those who adapt quickest and best will reap the greatest rewards.

While it has certainly been a challenging year, it has also been very fulfilling for me personally. It has been my great honour to lead the profession at this most difficult of times. It would be impossible to do so without the great support of colleagues and the staff of the Society.

I would like to take this opportunity to thank you, the profession and also the staff and executive of the Society, for all of the support you have given me during the course of the past year. Finally, I wish you all every success in meeting the challenges and opportunities that lie ahead for us all. **6** 

Donald Binchy President



Law Society Gazette www.gazette.ie October 2012 CONTENTS



#### **Law Society Gazette**

Volume 106, number 8 Subscriptions: €60/€90

Editor: Mark McDermott FIIC Deputy editor: Dr Garrett O'Boyle Art director: Nuala Redmond Editorial secretaries: Catherine Kearney, Valerie Farrell

#### Commercial advertising:

Seán Ó hOisín, tel: 086 811 7116, email: sean@lawsociety.ie

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

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

Printing: Turner's Printing Company Ltd, Longford

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

The Law Society of Ireland can accept no responsibility for the accuracy of contributed articles or statements appearing in this magazine, and any views or opinions expressed are not necessarily those of the Law Society's Council, save where otherwise indicated. No responsibility for loss or distress occasioned to any person acting or refraining from acting as a result of the material in this publication can be accepted by the authors, contributors, editor or publishers. The editor reserves the right to make publishing decisions on any advertisement or editorial article submitted to this magazine, and to refuse publication or to edit any editorial material as seems appropriate to him. Professional legal advice should always be sought in relation to any specific matter.

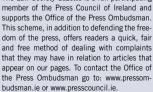


FSC independently certified wood and paper products used by the Law Society Gazette come from ecologically managed forests. Visit: www.fsc.org



PEFC certifies that wood and paper products used by the Law Society Gazette are sourced by suppliers from sustainable, managed forests. Visit: www.pefc.org







#### REGULARS

#### 4 News

#### 12 Analysis

- 12 News feature: The children's rights referendum - what does it mean?
- 14 News feature: An update on the Society's eConveyancing Project
- 18 Human rights watch: How technology has affected the right to privacy

#### 21 Comment

- 21 Letters
- 22 **Viewpoint:** Ten top tips for solicitors in practice

#### 44 People and places

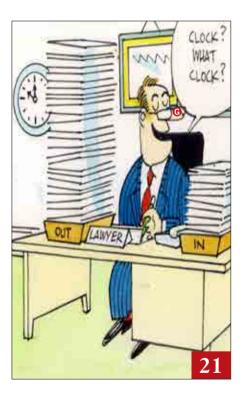
#### 48 Books

48 **Book reviews:** The Devil's Handbook; How to Think, Write and Cite; and Thirty Years of Legal Scholarship

#### 51 Briefing

- 51 Practice notes
- 52 Legislation update: 13 August - 10 September 2012
- 52 **One to watch:** The Gaeltacht Act 2012
- 53 Regulation
- 56 Justis update
- 58 Eurlegal: EU court rulings on gambling and the 'undertaking' concept; recent developments in European law

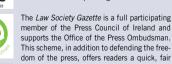
- **62** Professional notices
- 63 Recruitment advertising
- 64 Captain's blawg













Law Society Gazette www.gazette.ie October 2012 CONTENTS 3







#### **COVER STORY**

#### 24 On the origin of species

The *Gazette* presents the first in a series of articles on the Irish Constitution, inspired by the Constitutional Convention. Mr Justice Gerard Hogan speaks to Colin Murphy on the origins of the Constitution



#### **FEATURES**

#### 28 Taxing times

Taxing master Declan O'Neill has described as "a myth" the notion that he is systematically reducing all bills of costs that come before him. In the first of two articles, he explains how he sees his role

#### 32 Exclusive club

The exclusionary rule of evidence in Irish law has been the subject of much controversy in recent years. But after the *Damache* decision, Orla Keenan asks if it's time for a change

#### 36 Need brooks no delay

Some work is fun and some is a grind, and it's so easy to leave the chore to wait. But what happens if the file languishes in the cabinet? Richard Lee unlocks the drawer

#### 40 Carry on abroad

Naturally, some solicitors are among those seeking employment abroad – but where are they going and what are their experiences? Mary Frances Fahy checks the shipping forecast



**HOW TO REACH US:** Law Society Gazette, Blackhall Place, Dublin 7. Tel: 01 672 4828, fax: 01 672 4877, email: gazette@lawsociety.ie

**PROFESSIONAL NOTICES:** send small advert details, with payment, to: *Gazette* Office, Blackhall Place, Dublin 7, tel: 01 672 4828, or email: gazettestaff@lawsociety.ie. **All cheques should be made payable to: Law Society of Ireland.** 

COMMERCIAL ADVERTISING: contact Seán Ó hOisín, 10 Arran Road, Dublin 9, tel: 01 837 5018, fax: 884 4626, mobile: 086 811 7116, email: sean@lawsociety.ie

**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 one-day conference on crime and punishment in the 18th and 19th centuries on 19 October
- · Employment opportunities
- · The latest CPD courses
- ... as well as lots of other useful information

4 NEWS Law Society Gazette www.gazette.ie October 2012

#### Nationwide

Compiled by Kevin O'Higgins



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

# Common cause

**CARLOW** 

A joint seminar will be held with neighbouring colleagues from Kildare on 10 October in the Clanard Hotel, Athy, on PII and the common proposal form.

# Marketing is the CPD focus

#### **KILDARE**

The bar association held an excellent CPD event recently on marketing and business development, how to market professional services, website creation, and social media. On 10 October, the previously mentioned joint seminar with Carlow will, no doubt, be a sell-out.

#### Stress-test your probate skills in Donegal

#### DONEGAL

On Friday 26 October, Mary Jackson of Law Care and Padraic Courtney of the Law Society have agreed to hold a seminar at the Radisson Hotel, Letterkenny, from 10am to 1pm. Tea and coffee will be served. The topics are stress recognition and management, and a probate update. The cost of the seminar is €40, and you will be awarded two management CPD hours and one general CPD hour.

#### **DSBA** experiences the French connection

**DUBLIN** 

Some of our older colleagues, from the capital in particular, will remember the renowned restaurant Jammets, located on Nassau Street near the junction with Grafton Street. The French-style establishment, operated by two French *frères* with great aplomb, from the turn of the last century through to the '60s, was the premier venue for the Dublin legal fraternity to see and be seen.

Readers will be interested then to note that a very special evening took place this week in the Shelbourne, where a gala dinner was held to reminisce and recall the glory days of Dublin's most famous restaurant. The Jack and Jill Foundation was the worthy recipient.

And Bordeaux proved to be an inspired choice of conference location for the annual DSBA event. Great credit is due to Geraldine Kelly for the combination of an excellent programme of activities, including an engaging business session delivered by local Bordeaux lawyers (to our shame, in perfect English!) on topics as diverse as what might constitute a good root of title when acting in the sale or disposal of a vineyard; a curious address regarding an unfortunate lawyer who slipped in his bath but made a packet in legal fees; a tour with a local judge around the surreal and funky court complex that looks akin to a series of massive wine vats; and, oh yes, just a smidgen of wine-tasting here and there!

But of course, legal life in Dublin marches on regardless, and when September dawns, the PII onslaught won't be far behind. At least we all seem collectively to be better prepared year-on-year, and much of this is down to the vast majority of practices planning in advance and marshalling their information so that they present as early as possible. The series of seminars conducted in Dublin and nationally by the Institute of Legal

Research and Standards have been going down very well and are a soothing balm to the worried brows of many colleagues.

Of course, the really big story has to be the International Bar Association Conference: pretty much our own unique 'gathering' of 5,000 lawyers from far and wide. However, the sheer scale and impact on our fine city and the benefits to the local economy have already been seen this week, with every restaurant, bar and hotel in the city heaving with our international colleagues. The Law Society's hospitality, climaxing with Seamus Heaney, will be a very special memory of Irish culture for our foreign guests.

For those of us looking in from the outside, many will have been impressed by the sheer scale of the work undertaken by the IBA through its various committees and workshops throughout the week, parallel to the array of social activities and events.

#### Drumlin County drums up a crowd

#### **MONAGHAN**

The Monaghan Solicitors' Bar Association held a CPD evening on 26 September 2012 for local solicitors and for those from the surrounding counties.

Speakers included Keith O'Malley (head of the Law

Society's Career Support section) who spoke on marketing and business development, and Sarah Hayes (of Inns Court Legal Costs), who spoke on legal costs and the taxing process.



(Front, 1 to r): Sarah Gormley, Michelle Flanagan, Paul McCormack, Donal Branigan, Daniel Gormley, Sarah Hayes (Inns Court Legal Costs), Keith O'Malley (Law Society), Justine Carty and Melissa McCague. (Back, 1 to r): Margaret Smyth, Peter Coyle, John Quigley, Catherine Taaffe, Alan Wilkie, Brian Morgan, Garrett Fortune, Lynda Smyth, Jill Vance, Fergal McManus, Ann McGarry, Roisin Courtney, Sean Kennedy, George Wright, Simon McArdle, Paul Boyce, Enda O'Carroll, Emer Holohan and Rory O'Neill

Law Society Gazette www.gazette.ie October 2012

# Get booking for the London Autumn Ball

The Irish Solicitors' Bar Association, London, will hold its 23rd annual charity ball in aid of Barretstown, the children's charity, in Claridge's on Friday 9 November 2012. The ball is being held in memory of Michael Howell, who died suddenly on 3 June. (Ar dheis Dé go raibh a anam.) Michael was the husband of the President of the Irish Solicitors' Bar Association, Cliona O'Tuama.

The evening will consist of a Champagne reception (sponsored by Schroders Private Banking), three-course dinner with coffee and petits fours, a half bottle of wine and half-bottle of mineral water per person, and a piano bar with Sean Hession/Frankly Sinatra. The night will feature a charity auction and midnight raffle.

Tickets cost Stg£175 each; Stg£1,750 for a table of ten; or Stg£2,100 for a table of 12. A special early booking rate is available of Stg£130 per ticket or Stg£1,300 for a table of ten for early, non-corporate bookings made before 20 October.

For further information and all queries, contact Cliona O'Tuama, direct line: 0044 (0)20 7583 5131. or email: info@clionaotuama.com.

#### Identity theft

Richard Grogan & Associates have been targeted by identity thieves. According to an advert placed by the law firm on page 63 of this *Gazette*, the firm is alerting legal practitioners to the fact that "a person or persons are issuing documentation under the name Grogan's Solicitors giving an address at 17 South Great George's Street, Dublin 2 (our former address)."

The firm goes on to say: "We wish to advise colleagues that the entity Grogan's Solicitors of 17 South Great George's Street, Dublin 2 does not exist" and that Richard Grogan & Associates "is in no way associated with this firm".

All relevant documentation has been forwarded to the Law Society and An Garda Síochána.

#### In News this month...

- 7 Society launches Intellectual Property Law Committee
- 8 Build your website for free
- **9** Find a mediator online
- **9** Group income protection scheme for members
- 10 Revamp of Four Courts offices completed

#### **Blackstairs ascent for Malawi**

On Saturday, 20 October 2012, why not join Irish Rule of Law International (IRLI) for a guided walk of the Blackstairs Mountains, in aid of its Malawi project? IRLI is working on prison overcrowding in Malawi and is seeking to raise funds to provide access to justice for vulnerable prisoners.

For more information, see www.irishruleoflaw.ie. To register or donate, email Rachel Power at rpower@irishruleoflaw.ie.



#### Lensmen's Exile on Main St



Jamie Ryan, Nicole Nelson, Harry Garland, Susan Kennedy (managing director) and Mark Siggins

Longstanding Law Society photographers Lensmen are supplying pictures for the new Rolling Stones film

Fourteen previously unseen photographs of the Stones, which were shot in Dublin in 1965 and are part of Lensmen's Irish Photo Archive, will feature prominently on the Charlie is my Darling film poster, DVD cover, and in the accompanying limited edition hardback book.

The images were taken on 3 September 1965, when the movie was shot on a quick weekend tour of Ireland just weeks after '(I Can't Get No) Satisfaction' hit No 1. The pictures feature the band at Dublin Airport, performing at the Adelphi, backstage and at Connolly Station. The photos will be on public display in the mezzanine area of Terminal 1 at Dublin Airport from November.

The Stones photos were recently discovered when the Irish Photo Archive was being catalogued. The archive (www.irishphotoarchive. ie) is a treasure trove of more than two million photos, including many other celebrity photos that have never been published.

# **Green Street** ticket winners

Winners of tickets to the play Green Street, performed by theatre company Percolate during Absolut Fringe were Brid Heffernan, Cathy Shivnan, Anne Dolan, Síle Larkin and Eoin Mullowney. Congratulations!

The correct answer to the question (What was the name of the radical nationalist lawyer who was secretly in the pay of Dublin Castle and who was to receive a special bonus for the information he supplied about Emmet?) was Leonard McNally.

# Crime and punishment in the past

'Crime and punishment in the past' is the title of an autumn conference being held at Down County Museum on Friday 19 October 2012. This one-day conference (incredible value at Stg£15) examines issues relating to crime and punishment in the 18th and 19th centuries and will include lectures, lunch and a tour of Downpatrick's old gaols, focusing on the stories of some of their inmates.

Speakers will feature Dr Marv Rogan (Dublin Institute of Technology) speaking on the development of gaols and gaol policy in Ireland; Dr Kevin Costello (UCD) speaking on the imprisonment of debtors in 19th century Ireland, Dr Pauline Prior (Queen's University Belfast) speaking on 'Madness and murder - did gender matter?' and **Dr Andrew Sneddon (University** of Ulster) speaking on witchcraft, the law and the criminal justice system in Ulster in the 18th century. Lunch and a walking tour of Downpatrick's gaols will follow (please bring suitable footwear and raincoat).

For further information and booking form, contact Down County Museum, tel: 028 4461 5218, or email: linda.mckenna@downdc.gov. uk, shirley.maguire@downdc.gov. uk, or dolores.mcaleese@downdc.gov.uk.



Law Society Gazette www.gazette.ie October 2012

#### Ireland must seize intellectual property opportunities

"A high standard of intellectual property protection is essential to protect the fruits of [public] research and maintain the necessary conditions for protecting and promoting innovative ideas." This was the central message of Sean Sherlock, Minister of State with responsibility for research and innovation, writes Mark McDermott, when he launched the Law Society's new Intellectual Property (IP) Law Committee on 26 September.

The importance of IP law had long been recognised by the legal profession, he added. Indeed, the Society's Business Law Committee had been very active in this area over many years. "I am particularly pleased to see that the Law Society now has a committee that is specifically dedicated to intellectual property law," he said.

#### **Policy initiatives**

Minister Sherlock reminded the extensive gathering at Blackhall Place that the Government had recently taken a number of policy initiatives to encourage research in areas of strategic opportunity for Ireland. Last June, the Government published a new national IP protocol that, the minister said, "marks a major evolution of Ireland's approach to industry engagement with public research. It sets out the Government policies to encourage industry from start-ups and small and medium enterprises to multinational corporations - to benefit from the research and development done in Ireland's public research institutions".

Referring to Ireland's drive to achieve international best practice in its patents legal infrastructure, Minister Sherlock commented that, in recent weeks, the *Patents (Amendment) Act 2012* had been commenced, implementing the provisions of the *London Agreement* into Irish law by reducing translation costs for



At the official launch of the Law Society's new Intellectual Property Law Committee on 26 September were (from I to r): Brian Cotter (American Chamber of Commerce Ireland), Law Society President Donald Binchy, Minister Sean Sherlock and Patricia McGovern (chairman of the IP Law Committee)

European patents applicants who designated Ireland.

In addition, the Government had undertaken a review of the *Patents Act 1992* to identify further potential improvements.

#### Constitutional referendum

Turning to EU patent law, he said that significant work remained to be done in relation to the Unified Patent Court. "Ireland will require a constitutional referendum to approve the transfer of judicial powers for patent enforcement provided for under the agreement on the Unified Patent Court," he stated.

The minister thanked the members of the Law Society who had already engaged with his department during the progression of negotiations on EU patent reforms. He encouraged members to continue to engage with the Department of Jobs, Enterprise and Innovation on such matters.

#### **Ambitious plans**

Chairman of the IP Law Committee, Patricia McGovern, thanked the minister for officiating at the launch of the new committee and expressed her gratitude to Law Society President Donald Binchy for agreeing to the committee's establishment.

The IP Committee had ambitious plans, she said. While Ireland could be proud of its extensive body of legislation covering the core areas of IP, the new committee was anxious to work with the relevant Government departments, ministers and EU institutions to assist in highlighting where reforms were necessary. It would also be providing its expertise in commenting on upcoming reforms and legislation. To this end, she said, the committee had made a submission to the Copyright Review Group, appointed by the Department of Jobs, Enterprise and Innovation.

#### Litigating costs

Turning to the issue of businesses seeking to protect their intellectual property, Ms McGovern said that the cost of litigation in Ireland was "still prohibitively expensive for many businesses. We plan to work with the Courts Service and the judiciary to ensure our court rules are compatible with all the relevant intellectual property legislation," she said.

Commenting on the "thriving business of counterfeiting", Ms McGovern said that

the committee was working closely with the Revenue Commissioners and the gardaí to see how they could better work together "to help eliminate this scourge to our economy."

#### Government action required

Brian Cotter, commercial and public affairs director of the American Chamber of Commerce Ireland, said that Ireland had to evolve into "a vital global intellectual property or IP 'trading post' in a number of areas of innovation that would make a real and lasting contribution to the economy."

The chamber wanted the country to be globally recognised as a high-competence environment for businesses and entrepreneurs seeking to generate, develop and exploit IP assets and resources.

"The objective," Mr Cotter continued, "is an entrepreneurial environment that provides a vibrant hub for trading IP, transferring technology, securing strategic alliances and managing high-risk investment."

Getting multinationals to place IP into Ireland presented a real opportunity, he said, but one with challenges. "Many countries in Europe or further afield have introduced 'innovation or patent boxes'. These target an effective low rate of tax on mobile IP-generated income."

He said that Britain was looking to introduce its own 'patent box' in April 2013. "When fully operational, this will have a significant impact on Ireland's competitiveness for attracting mobile IP investment," he warned.

"The Government needs to act now to design a substance-based regime that would be attractive and competitive for mobile IP investments in Ireland, as any changes which attract IP to Ireland would only bring an incremental benefit to the exchequer and a strengthened foreign direct investment base."

#### Lives less ordinary



CAROLANN MINNOCK Afghanistan Carolann works with 'Terre des Hommes', a Swiss NGO, as a juvenile

justice coordinator. She is based in Kabul but travels throughout Afghanistan. Working with the government at national level, Carolann is involved in helping to strengthen the juvenile justice system in the country. She also works with the Ministry of Interior and the police academy to strengthen the capacity of the police in the area of child rights.

At a provincial level, she works with local partners to improve the position of children in detention. Previous to this role, she worked as a programme lawyer in Malawi with Irish Rule of Law International.

Carolann got her first taste of working in the international arena as a trainee solicitor when she interned at the United Nations' Criminal Tribunal for Rwanda in Tanzania. She qualified in 2008 and worked as an in-house lawyer before becoming involved in international law.



JOHN MORAN
Department of
Finance
John Moran
is secretary
general
of the
Department
of Finance.

In this role, he is responsible for economic policy matters and management of the State's shareholding in government-supported banks. John has led the implementation of reform and reorganisation of the Irish banking sector. He also serves on the Commission of the Central Bank of Ireland, on the NTMA Advisory Committee and on the National Economic

and Social Committee.

Formerly, within a senior management role in the Central Bank, John managed supervision of wholesale banks in Ireland and new credit institution approvals. During this time, he also developed a vision for the future banking system in Ireland – in conjunction with the IMF-EU Programme.

John previously held the role of CEO and board member of Zurich Bank and was CEO of Zurich Capital Markets. He earlier trained and qualified in McCann FitzGerald and worked with GE Capital Aviation Services, GPA Group and Sullivan & Cromwell in New York.



PÁDRAIG Ó
CEIDIGH
Entrepreneur
Few people
have gone
through
as many
dramatic
changes

in career direction as Pádraig Ó Ceidigh. He started off by qualifying and working as an accountant, but then decided he wanted to teach instead.

He still counts the 12 years he spent teaching maths as the most enjoyable time in his career. However, he left teaching because he ended up feeling frustrated with the "strait-jacket scenario" – unable to provide the facilities and methodologies he believed best facilitated learning.

Pádraig qualified as a solicitor and he set up and ran a legal practice in Galway City. Then, in 1994, he bought Aer Arann. He went on to grow the airline impressively over the next 15 years. He remains chairman and majority owner of the airline.

He has gone on to build up a diverse portfolio of other businesses. These include the Irish-language newspaper, Foinse, an outsourcing business, a printing company and Galway Aviation Services.

# A website – free of charge, in 15 minutes



Practitioner Support is an initiative of the Society's Policy, Communication and Member Services Department aimed at providing practitioners – especially sole practitioners – with business management support.

In collaboration with bar associations, Practitioner Support is currently delivering briefing sessions on marketing and business development countrywide. A central theme of these briefing sessions is to encourage members to establish a website if they haven't already done so, and to show the web's effectiveness in marketing professional services such as law.

Practitioner Support is keen to publicise information about a unique initiative that allows Irish businesses set up a website at no cost – zero – and in just a few minutes. The 'Getting Irish Business Online' initiative is a no-gimmick opportunity for legal firms currently without a website to establish a web presence with minimum commitment.

Those involved in the initiative include Google, An Post and Blacknight Solutions – a website hosting business. Detailed information on the offering is available at: www. gettingbusinessonline.ie.

Resources available through this special, zero-cost initiative are limited, however, and will provide firms who sign up with a restricted choice of basic designs and somewhat reduced scope to promote the firm and develop new business through the web.

What is on offer through the zero-cost offer is generous, though, and should at least be examined by firms who don't currently have a website. Most importantly, all available names ending in the most popular '.ie', '.com', '.eu' and '.biz' extensions are available (until early November) and adequate hosting space for a site with several basic pages are provided free for one year as part of the deal.

The choice of just a few basic designs for web pages is what limits the zero-cost offer most. For practitioners who want extra, Blacknight Solutions can offer a more comprehensive service at a modest priced − starting at about €70 per annum for domain registration, hosting and more.

Of course, a third option is to start with the zero-cost offering, with the plan to develop a more sophisticated site in time, perhaps progressing to a charged-for facility when the economy improves.

A leaflet detailing this whole matter is available from Practitioner Support.
To receive a copy, please email practitionersupport@lawsociety.ie.

Law Society Gazette www.gazette.ie October 2012

# Society launches 'find a mediator' online facility



The Law Society is launching a public database and search engine on its website that will help solicitors and the public to find a solicitor mediator quickly. The facility was launched by Mr Justice Peter Kelly on 8 October at the Law Society's headquarters at Blackhall Place. The service will be free of charge to solicitor mediators and users.

The idea is simple. Solicitors who wish to act as mediators can enter their area of specialty and mediator qualification in the database by following simple instructions on the Society's website. The solicitor must use his or her Law Society logon details to enter their information on the database.

Members of the public searching the database, however, can do so without having to log on. Potential clients can search for mediators by using different search terms, such as county, area of practice, mediation qualification or name.

Solicitors acting for clients wishing to mediate will find the facility very useful, as it will provide details of solicitor mediators quickly.

The public database is distinct from the Law Society Mediators Panel, which comprises solicitor mediators whose qualifications have been reviewed by the Law Society's Arbitration and Mediation Committee, and who have been interviewed by a member of that committee for suitability.

The purpose of that panel is that, if asked, the President of the Law Society may nominate a panel member to act as a mediator in a dispute. Members of the panel may, of course, be included on the public database. Solicitor mediators are very welcome to apply for membership of the panel. Application forms can be found on the website on the Arbitration and Mediation Committee page at www. lawsociety.ie.

# **Group income protection** scheme for members

The Law Society of Ireland, in association with Friends First and PenPro Limited, has launched the Law Society of Ireland Income Protection Scheme to offer members exclusive and preferential income protection rates and benefits.

The scheme is open to all members of the Law Society of Ireland who are under the age of 60. While the Law Society is not an agent, broker or financial institution and cannot accept any responsibility for any financial decisions made on foot of this information, we are advised that

the scheme offers flexible scheme benefits, a simplified application process and competitive prices. We are also informed that the rates, terms and conditions of the contract being offered are superior to those that would be available to an individual effecting this cover.

If you are eligible to join the scheme, application forms can be downloaded from the Law Society (www.lawsociety.ie) or PenPro (www.penpro.ie) websites, by emailing: msheehan@penpro.ie, or by ringing PenPro at tel: 01 200 0100.



#### **IILEX Munster Council**

The Munster Council of the Irish Institute of Legal Executives (IILEX) has just been established.

The Central Council envisages that the success of the Munster Council will set a precedent for the formation of other IILEX regional councils in the near future.

The Munster Council aims to improve the status of legal

executives, to offer assistance to its members, and to promote the role of legal executives. With Central Council, the new body is working towards setting up a CPD-type system for members.

Former and prospective members are welcome to contact the Munster Council by emailing: munsterregionalbranchiilex@gmail.com.

#### Dublin gears up for 2013 international mediation tournament

The Law Society will host the 12th Annual International Law School Mediation Tournament from 12-15 March 2013. The tournament will be held under the auspices of the International Academy of Dispute Resolution, which was founded in the USA in 2002 to further the awareness of mediation as a means

of establishing peaceful resolution in legal practice.

This annual tournament is designed to help law students better understand the mediation process and its importance to the contemporary practice of law. Student teams of three members are required to participate as

advocates/clients, as well as mediators. A special feature of the tournament is the intensive training sessions provided to students in mediator skills and advocate/ client advocacy prior to tournament rounds commencing.

In all, 36 teams will travel from Australia, Canada, England and Wales, Germany, India, Northern Ireland, Scotland and the USA.

If you are a lawyer/mediator who would like to volunteer your time to judge in this prestigious international competition, please contact the Law Society by emailing j.moffatt@lawsociety.ie or tel 01 672 4944.

10 NEWS Law Society Gazette www.gazette.ie October 2012

#### Changing rooms at the Law Society's Four Courts office

One year ago, the Law Society asked all its members to complete a survey regarding the facilities and services at the Four Courts' consultation rooms, writes Paddy Caulfield (manager, Four Courts office). A record number of users responded. The consensus was that the consultation rooms were "bleak, dark, stuffy, old fashioned, depressing and not suitable for long meetings".

The need for a number of new services and facilities was also highlighted, including free wi-fi, videoconferencing, remote printing, phone recharging, and so on. Just over a year later, we are delighted to reveal the results of the last 12 months of planning, plastering, painting and polishing!

#### A major overhaul

For those who have already visited the Society's consultation rooms since the start of the new term, you will have seen the fundamental changes that have taken place. A huge amount of work has been completed in an extraordinary limited amount of time, thanks to the hard work of the Society's facilities manager, Tony Morgan. While the facilities will not be officially launched until all major snags have been cleared and all new services are fully operational, it is hoped that the experience of using the rooms will be vastly improved for members and their clients.

The main objective was to improve the ambience of all rooms through improvements in air-conditioning (which so many users commented on in the survey), maximising natural light, and eradicating the fatigue-inducing feeling of many of the rooms. These changes, along with better artificial lighting and a more restful décor, new furniture and better telephone/IT facilities, should enhance the experience for everyone.

Technology-wise, considerable improvements have been made, including free wi-fi throughout, improved mobile phone coverage and recharging facilities, a dedicated writing room with a suite of laptop portals and



Paddy, Dolores and Mary

remote printing, to mention just some of the enhancements. Videoconferencing facilities and assistive listening is available in a number of rooms and at reception. Despite many demands on space, we have managed to retain the Solicitors' Reading Room, shop and Friary Café.

Once you have had a chance to use the new facilities, we would appreciate your feedback, by sending an email to fourcourtsfeedback@lawsociety.ie.

#### Online booking system

Another major development has been an online booking system for the consultation rooms in the Four Courts. You or your secretaries/ assistants can now book, amend or cancel consultation room bookings in a matter of clicks.

You can also place your catering order online and indicate any special requirements you may have, all while booking your consultation room. Results of the survey showed that many of you were not aware that there are catering facilities available in the rooms, so we have made it as convenient as possible for you. You will find the online booking system in the members' section of the website at www.lawsociety. ie/fourcourtsbookings. If you experience any issues with using the system or would like to give us your feedback on this new system, please email fourcourtsfeedback@lawsociety.ie.

#### VAT on room charge

You will be glad to hear that we have not changed our prices. However, VAT is now being applied to room charges. As you are probably aware, since 2010, Revenue has clarified that the hire of the consultation rooms in the Four Courts should be treated as a VATable outlay when being charged on to clients.

The consequence of this is that, although up to now the Society has not charged VAT on these short-term hires, you had an obligation to apply VAT when recharging this cost to your clients. Given this position, the Society, on advice from its tax advisors, concluded that it would be in the interests of the Society and its members to charge VAT on these short-term lets. With effect from 1 August 2012, VAT has been charged on the hire of the consultation rooms.

#### Some things never change

That's a lot of change in a short period of time. However, some things don't change: the familiar faces of Mary, Dolores and I will still be manning the ship. So for those of you who have visited us already, I hope you like our new surroundings, and for those of you yet to visit, I look forward to showing you around.

- Online booking: www.lawsociety.ie/ fourcourtsbookings
- Email: fourcourts@ lawsociety.ie
- Feedback: fourcourtsfeedback@ lawsociety.ie
- Tel: 01 672 4717

Law Society Gazette www.gazette.ie October 2012 REPRESENTATION 11

#### NEWS FROM THE LAW SOCIETY'S COMMITTEES AND TASK FORCES

#### Calling the in-house and public sector

#### IN-HOUSE AND PUBLIC SECTOR COMMITTEE

The In-House and Public Sector Committee is pleased to announce that its annual conference will take place on Friday 23 November, at the Law Society, Blackhall Place, Dublin 7. This event will provide invaluable guidance and networking opportunities for all solicitors, including those working in-house in private industry and in the public sector.

This year, the committee has carefully selected topics that are current and should be of relevance to all in-house solicitors and those working in the commercial side of private practice. Topics covered will include risk management and regulation (identifying internal and external compliance risks;

risk compliance systems; division of responsibility; the *Legal Services Regulation Bill 2011*); practical tips for negotiating contracts; social media and legal risk (managing defamation, privacy and employment issues; avoiding hidden IP dangers, including copyright and trademark infringement; and practical tips for drafting contracts.

The conference will take place at the new time of 1pm to 4.30pm, with CPD hours comprising two management and professional development skills, plus one regulatory matters (by group study). The fee is €180 per person (with a discounted fee of €135 per person for Skillnet/public sector subscriptions only).

Prompt booking is essential in order to secure your place, as this event was over-subscribed last year.

Full details, including booking form, are available on www.lawsociety.ie/cpd.

Enquiries can be directed to the Professional Training Team,



Blackhall Place, Dublin 7; tel: 01 881 5727, email: lspt@ lawsociety.ie. Please quote seminar code 12008.

# Administration of estates leaflet update

#### PROBATE, ADMINISTRATION AND TRUSTS COMMITTEE

The Probate, Administration and Trusts Committee has reviewed the *Administration of Estates Client Information* leaflet as part of its ongoing review of material of assistance to solicitors. The

updated leaflet is available for download on the committee's page on the website. Solicitors can insert their contact details and/or firm logo prior to printing and providing it to clients.

#### Arbitration works – in the right circumstances

There are many valuable advantages to arbitration, write Michael M Moran and Larry Fenelon. It is a private process. **Decisions of arbitrators are** recognised and enforced in most places in the world and can't be appealed. Arbitrators may have specialist industry knowledge, which can help speed up hearings. Also, in international disputes, arbitration can ensure fairness to both parties as, typically, there are three arbitrators, with the deciding vote held by an independent chairman. However, there may be disadvantages to arbitration, depending on the type of dispute.

Ironically, the existence of an arbitration clause in a contract may give a debtor breathing space. Due the Arbitration Act 2010, which implements the UNCITRAL Model Law, courts no longer have power to award summary judgment where there is an arbitration clause – even where

it is clear that the defendant has no real defence.

In those circumstances, the creditor will have to pursue arbitration, which may delay getting judgment for many months and involve significant expense. Arbitrators rarely award summary judgment.

Parties have to pay the arbitrator and the costs of hosting the arbitration. In litigation, the judge and courtroom are cost-free (apart from court fees).

International arbitration using an institution such the ICC Court of Arbitration in Paris, the London Court of International Arbitration, or the American Arbitration Association are markedly expensive, though, if the money at stake is high enough, that disadvantage may be outweighed.

Arbitrators vary in quality, and while there is an appeal from a poor quality judgment in litigation, parties will be stuck with a bad arbitration decision. Also, a weak

arbitrator will tolerate delay and can be bullied by strong-willed advocates.

This underlines the importance of picking a competent arbitrator, who knows the law and who is efficient and practical. The Law Society has a scheme whereby the President of the Law Society appoints an arbitrator where the parties cannot agree on somebody. Good arbitrators appointed under such schemes encourage lawyers and others to use the scheme.

Arbitration, like litigation, is adversarial and so either process can aggravate bad relations between disputing parties. There is a growing trend towards multi-layered dispute resolution clauses, whereby the parties agree to negotiate directly and, if unsuccessful, then to mediate. If neither are successful, then the parties will arbitrate the dispute.

Alternatives to arbitration include expert determination and

adjudication. Adjudication is becoming particularly popular in the building industry, where the delay and cost in arbitration or litigation can have fatal or nearfatal consequences for a small business that is seeking payment under a contract.

The adjudicator usually decides the dispute within 28 days and, although the parties may be entitled to go to arbitration or court subsequently, in most cases they do not do so, as the adjudication award will often include a payment order that must be paid forthwith and thus effectively end the dispute. Proposed new legislation will strengthen adjudicators' powers.

So, is arbitration worthwhile?
The answer is a definite 'yes' – for the right type of dispute – where privacy is important or where there is an international element, particularly with a party outside the EU where an Irish court award would not be enforceable.

ANALYSIS Law Society Gazette www.gazette.ie October 2012

### PROPOSALS OFFER A NEW BEGINNING FOR CHILDREN

The children's rights referendum is a historic development with the potential to make a real and positive difference to the lives of children in Ireland, says Geoffrey Shannon



Dr Geoffrey Shannon is a solicitor and senior lecturer in family and child law at the Law Society

ecently, Taoiseach Enda Kenny and Minister for Children Frances Fitzgerald published the wording for the children's amendment to the Constitution. This is a historic development and has the potential to make a real and positive difference to the lives of children in Ireland. The referendum will have major positive implications in the areas of child protection and

When I vote 'yes' in the ballot box, I will hold in my mind the faces of the many children and families our child-protection system has failed over the years. I will be voting 'yes' to create a new beginning for the children who have been let down by the system, and as

an acknowledgement of those for whom this amendment comes too late. Time and again, the absence of constitutional provision has led to second-best choices being made for disadvantaged and vulnerable children. I believe this referendum will ensure that we will be able to build a clear, robust childprotection system that safeguards children against abuse. It will also ensure that children are supplied with the necessary means of achieving their full potential.

A very tangible example of the positive impact of this amendment on children is article 42A.2.2. This provision allows for the adoption of any child where there has been a failure of parental duty for such a period as prescribed by law, and where the best interests of the child so require.

The benefit of this provision is that it will allow children to be adopted in circumstances where the child has been abandoned. I have met many children living in long-term foster care who have told me of their desire to be given a 'second chance' for permanent family life with their foster carers. Often, such children have come into care at a very young age and have grown up with little or no regular contact with their birth parents.

#### Profound irony

This provision will allow many children currently in longterm foster care to be adopted. Under current legislation, adoptions can only occur where there has been a failure in the duty towards the child for physical or moral reasons for the previous 12 months; where the failure is likely to continue without interruption until the child is 18; and

where the failure constitutes an abandonment on the part of the parents of all constitutional rights. Only a handful of children in long-term foster care can be adopted due to the Constitution. The profound irony of this situation is that it is easier, by means of adoption, to vindicate the interests of a child born outside of marriage to be part of a caring, stable family unit, than it is to secure the same rights to a child of marriage.

When we voted on the 1995 divorce referendum, we were asked to give parents a 'second chance'. This amendment is asking the people to give children a 'second chance' to experience stability and security within a caring and loving family. There are hundreds of children who are

> currently caught in a twilight zone between a family that cannot fully care for them and a family that cannot fully adopt them. They find themselves trapped in a legal limbo between intervention and adoption, where the State has removed them from their parents to protect their welfare, but the State is unable to have the child adopted by another appropriate family. The amendment will address this anomaly.

> The amendment will also help refocus our child protection system. I co-authored the recent Report of the Independent Child Death Review Group. Its findings are deeply distressing. From my reading of the children's files, I am left with the heartwrenching conclusion that, for some, the outcome could have been different. The report is a unique window into what happens

to children when their parents fail them, when the State supports.

fails them, and they are allowed to drift rudderless in the care system. Early alarms bells, the child dropping out of school, a mental-health concern should have triggered

"The litmus

test for this

referendum,

however, is

whether it will

lead to better

decisions for

believe that

children. I firmly

this amendment

passes that test"

#### Invisibility of children

Another disturbing finding from the Child Death report was the invisibility of the children within the social work case files. This is paralleled in a recurring theme of reports into child-protection failures: consideration of the interests of children is missing. And in its place is a deference to parental rights, or the interests of an institution, which impede intervention to protect the child. In 21st century Ireland, we must acknowledge that this is wrong and must change. No child should suffer to protect an institution;

that this amendment passes

that test - it will lead to better

decisions for children; it will

lead to better childhoods.

The amendment will

allow us to build a

better and brighter

future for the lives

of children in

Ireland. @

no child should be made to live a life of unspeakable abuse and neglect to protect his or her abusive parents. Children must be respected and the State empowered to adequately protect them.

Article 42A.1 and 42A.2.1 of the amendment aim to re-address this imbalance by acknowledging that all children have natural and imprescriptible rights and that the State must intervene to protect the child when his or her parents fail. Article 42A.4 provides the lynchpin to truly make a difference. It provides that the best interests of the child shall be secured in court proceedings brought by the State, and in any proceedings concerning the adoption, guardianship or custody of, or access to, any child.

The courts are consistent on the issue. This threshold for intervention is extraordinarily high. We need a robust childprotection system in which the State can intervene in a proportionate manner, and not only where the life of a child is at risk - but where the welfare of the child is at risk. It is incumbent on the Government to ensure that this happens. In this regard, article 42A.4.1 should be noted, in that it will ensure that, where the decisions of any party, parent or State can be shown to adversely impact on the child, a child's entitlement to have its welfare ensured will be vindicated by the courts.

#### Home truth

Another home truth is that the vast majority of children in care come from poor and disadvantaged backgrounds. There is a clear need to tackle poverty and inequality and specifically to strengthen supports to families. In this regard. I believe that the inclusion in article 42A.2.1 of the term 'proportionate' is most welcome. It will place an onus on the State to ensure that that the first point of State intervention will be family support, unless exceptional circumstances make this inappropriate. The principle of 'proportionality' is central to the European Convention on Human Rights, and European Court of Human Rights judgments make clear that deprivation of parental rights and access should occur only in exceptional circumstances and where the range of alternatives are manifestly unsuitable. All alternatives must be fully considered and the courts must be satisfied that no less radical measure would achieve the necessary end of protecting the child.

In conclusion. constitutional change has the potential to remove several roadblocks within the child-law system that stand in the way of children having the best possible family life. The litmus test for this referendum. however, is whether it will lead to better decisions

for children. I firmly believe

Geoffrey Shannon is a key contributor to the new Certificate in Child Law offered by the Law Society's Diploma Programme. For further details on this course, please go to the Diploma Programme pages at www.lawsociety.ie/diplomas.

ANALYSIS Law Society Gazette www.gazette.ie October 2012

### E-CONVEYANCING PROJECT UPDATE: SAFE AS HOUSES

Work on the Society's eConveyancing Project continues to make good progress. Eamonn Freyne gives an update on various project developments over the last 12 months



Eamonn Freyne is a solicitor on the Law Society's eConveyancing Project team

ssentially, e-conveyancing will involve solicitors using an electronic workspace where all documentation associated with the conveyancing transaction (title, security, contract of sale, closing, and so on, which are currently generated in paper form) will be drafted, executed, transmitted and stored electronically.

Electronic signatures will be a feature of the new system, supporting the move to a fully electronic,

paperless environment. The new system will also support electronic funds transfer to speed up the movement of funds. Some of the obvious benefits of operating in the electronic world for conveyancers are the reduction in material costs and the elimination of postal delay.

#### Stakeholder workshops

In early 2012, a series of stakeholder workshops were held at the Law

Society, the offices of the Irish Banking Federation and at venues around the country. The first set of workshops was attended by conveyancing solicitors, who had an opportunity to highlight their concerns about the current conveyancing process and to see how the technological features of a new e-conveyancing system could address those concerns.

A second set of workshops was conducted for representatives of the lenders, with the purpose of providing an opportunity for participants to make their observations about the conveyancing process from a banking perspective. The request and delivery of redemption figures and title documentation was examined, along with the loan approval and funds-release processes.

A final joint workshop took place between members of the legal and banking professions. The purpose of this workshop was to facilitate the exchange of views and for solicitors and lenders to hear first hand and to fully appreciate the challenges each party faced in respect of their role in the current process.

Both solicitors and lenders showed great enthusiasm for the introduction of an e-conveyancing system that could deliver real cost savings and a reduction in the administrative burden borne by each stakeholder. There was also recognition that the new system, if designed to incorporate an effective system of checks and balances, could bring about a reduction in the risk inherent in the current process for both solicitors and lenders.

#### **DEVELOPMENTS TO DATE**

August 2012: - Detailed mapping of proposed e-conveyancing process in progress

June 2012: - Solicitor and lender surveys conducted identifying current process inefficiencies

March 2012: - Discovery phase affirms that e-conveyancing is an achievable goal and highlights

where barriers to implementation exist

January 2012: - Joint stakeholder workshops identifying key future processes and benefits

November 2011: - eConveyancing Programme Board and steering group established

June 2011: - Compulsory first registration extended to Dublin and Cork

Revenue introduces mandatory electronic payment and filing of stamp duty

January 2011: - eRegistration Project Board decides next phase of e-registration

August 2010: - PRA completes digital mapping with the digitisation of all registered boundaries

February 2010: - Registry of Deeds available online to landdirect.ie account holders

January 2010: - Compulsory first registration extended to all counties (except Dublin and Cork)

Land certificates and certificates of charge ceased to have effect

PRA launches phase 1(b) of e-registration – e-charging orders

December 2009: - Land and Conveyancing Law Reform Act 2009 enacted

Over 150 pre-1922 statutes repealed or re-enacted into a modern format

October 2009: - Land Registry folios converted to digital format

April 2009: - Irish Institute of Surveyors convenes Inter-Professional Task Force on property

boundaries

March 2009: - PRA launches phase 1(a) of e-registration - e-discharges

Law Society and IMC agree streamlined procedures – QeD process for redemption

figures, title documents and discharge/vacate

July 2008: - Law Society publishes Back to Basic Principles - 'eVision'

May 2008: - Registration of Deeds and Title Act 2006 enacted

June 2007: - PRA convenes eRegistration Project Board

PRA launches EULIS service

March 2007: - LRC stakeholder seminar on e-conveyancing

September 2006: - Law Society welcomes the LRC BearingPoint report

April 2006: - LRC publishes BearingPoint report on e-conveyancing

PRA launches landdirect.ie service

February 2006: – Law Society completes IT survey of legal profession November 2005: – Law Society launches eConveyancing Task Force



Solicitor survey

To gain a more in-depth understanding of the benefits that a new e-conveyancing system would bring, the Society carried out a survey in June of this year, inviting conveyancing practitioners to set out how

"A lot of work

worth it - a

e-conveyancing

they perform the various tasks in a standard conveyancing remains to be transaction, done, but the how long things take to do, and prize will be where delays and inefficiencies may lie. The data state of the art gathered from survey participants was then analysed system designed to establish where to meet the an e-conveyancing current and future system could bring real benefit. needs of citizens The survey was and stakeholders" published in the May 2012 edition

of the Society's eZine and received a very good response from a broad representative sample of the profession. The key finding exposes a heavily paper-based conveyancing process that is costly, slow and inefficient.

Much of the delay in the current conveyancing process is associated with communicating and exchanging paper documentation via the postal system. With the introduction of e-conveyancing, all

> information and communication passing between stakeholders will be electronic.

One of the aims of the survey was to identify the extent of paper-based communication by practitioners. Participants were asked how they communicate with lenders and other solicitors when they perform various tasks. Paper-based

communication within the profession remains extensive (see chart, right).

The costs associated with the use of paper as a medium to communicate and convey information is often overlooked. The purchase cost is only the

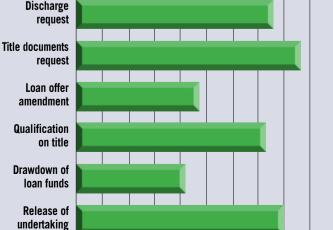
tip of the iceberg. Other costs include printing, photocopying, faxing, posting, couriering, storage, retrieval, and disposal. When added up, the overall cost is quite significant. As mentioned, one of the features

of the proposed new e-conveyancing system will be the reduction, if not elimination, of paper - leading to significant savings.

In the survey, practitioners were also asked to identify where they experienced delays most frequently in the current process (see chart, p17).

The survey produced a number









#### **New Lexcel Events in Dublin**

Improve customer service, increase efficiency, decrease costs. Find out how Lexcel can help you and your practice.

Lexcel is the international legal management quality mark. Find out more at one of our events.

#### **Introduction to Lexcel**

Wednesday 24 October 2012 Radisson Blu Royal Hotel, Dublin 2 CPD hours FREE

Speakers: Brendan Dillon, Partner, Dillon Solicitors Noelle McDonald, Solicitor, O'Rourke Reid Clare Jarratt, Lexcel Manager, The Law Society Andrew Otterburn, Principal, Otterburn Legal Consulting

This **free** session provides practical insight into the benefits, requirements and impacts of Lexcel.

#### **Implementing Lexcel**

**Thursday 8 November 2012**Radisson Blu Royal Hotel, Dublin 7 CPD hours **£200** per delegate

**Speaker:** Anika Patel, Lexcel Operations Manager, The Law Society

This practical course provides in-depth training on how to implement Lexcel.

#### Register your interest

Email lexcel@lawsociety.org.uk to register your interest. Find out more today at www.lawsociety.org.uk/lexcel



#### SEARCH

- Search by solicitor
- ✓ Search by defendant/ plaintiff
- ✓ Search by Circuit Court

#### **ORGANISE**

- ✓ All my cases in one place
- ✓ Simple user interface
- ✓ Facts at our fingertips
- ✓ Add notes to cases

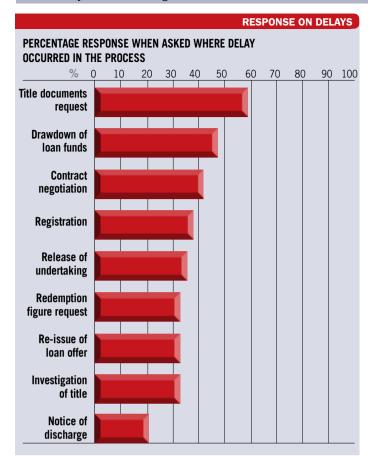
#### **ALERTS**

- ✓ Alert for updates
- ✓ Alert for orders
- ✓ Alert for court dates
- ✓ Alert for perfections

#### www.mylegaldiary.ie

Tel: 01 284 1291 info@mylegaldiary.ie

Law Society Gazette www.gazette.ie October 2012 ANALYSIS 17



of other interesting findings as follows:

- The average work time spent by a solicitor on a standard residential conveyancing transaction is eight hours,
- The average length of a conveyancing transaction is 22 weeks (or 110 working days),
- 85% of solicitors still use an office cheque/bank draft when forwarding the contract deposit,
- 35% of solicitors still receive loan funds by bank draft (solicitors indicated that they would choose electronic funds

transfer if this facility was available to them), and

• 70% of solicitors have a casemanagement system in place.

When asked to comment generally on their conveyancing practice, a significant number of solicitors said that conveyancing was no longer profitable. Two solicitors commented as follows: "To deal with residential conveyancing properly takes more time and effort than is possible to cover costs, never mind make a profit on nowadays," and

"conveyancing is not profitable. It is extremely time consuming and has become more so in recent years."

Following the successful introduction of e-discharges in 2009 and e-charging orders in 2010, the Property Registration Authority continues to advance towards full e-registration. The development of the next phase of e-registration is underway, with a pilot release in December 2012 followed by a full release in early 2013.

The main feature of this phase will be

"The role of

be diminished

of a new

system: a

with the advent

e-conveyancing

solicitor's legal

knowledge and

continue to be of

vital importance"

expertise will

solicitors will not

the provision and creation of electronic documents based on the information submitted to and retrieved from the new PRA system. The new system will facilitate the movement of data in both directions - users will be able to submit data directly from case-management systems (and the e-conveyancing hub when it

arrives), and the new system will supply data directly back to these systems

However, for the moment, while lodgement documents are created in an electronic environment, they will still need to be printed off, signed, and submitted for registration in the usual way, pending the introduction of electronic signatures.

This phase will also introduce

payment of registration fees by variable direct debit, and the system will facilitate the secure circulation of draft documents to other parties.

#### Future role of solicitors

It is important to note that the role of solicitors will not be diminished with the advent of a new e-conveyancing system. The new system will assist solicitors in dealing more effectively with the administrative aspects of a conveyancing transaction but will not obviate the need for solicitors

to interpret the law and apply it to any given transaction. A solicitor's legal knowledge and expertise, whether the process is paper-based or electronic, will continue to be of vital importance.

#### **Next steps**

Immediate project focus is now on legislative change to facilitate e-conveyancing and stakeholder

business cases that will be required to support the necessary investment for e-conveyancing. A lot of work remains to be done, but the prize will be worth it – a state of the art e-conveyancing system designed to meet the current and future needs of citizens and stakeholders.

Eamonn Freyne can be contacted at e.freyne@lawsociety.ie or tel: 01 672 4863





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 2010 practising certificate and can also be obtained by emailling the records department at: l.dolan@lawsociety.ie.

HUMAN RIGHTS WATCH Law Society Gazette www.gazette.ie October 2012

# PROTECTING PRIVACY – IS IT THE IMPOSSIBLE RIGHT?

The Law Society hosted a conference that looked at how technology has impacted on the right to privacy over the past decade. Sarah McDonald was our fly on the wall



Sarah McDonald is the Law Society's human rights executive

ow has technology affected the right to privacy over the past decade – and do steps need to be taken to promote awareness of, and protect, this most fundamental right in light of technological advances? These were the issues addressed by the Law Society conference '21st Century Technology: Stretching the Limits and Notions of our Right to Privacy', on 8 September 2012.

Over 170 people turned up to hear guest speakers thrash out the issues, including Gary Davis (deputy data protection commissioner), Paul C Dwyer (a cyber-security expert), Dr Denis Kelleher (barrister and author of *Privacy and Data Protection Law in Ireland*) and Professor Roy Greenslade (a British journalist with over 48 years' experience). UCD

law lecturer TJ McIntyre chaired the event.

Law Society President Donald Binchy delivered the welcoming address, saying "humanity has progressed from the agricultural to the industrial revolution, and it is now in the midst of an information revolution. If the 20th century was the age of computer technology, the 21st is emerging as the age of information. Technology is advancing very rapidly, and what was yesterday's fiction is today's reality."

The president added that information technology had become so intrinsic to human life that often it is taken for granted, with it being used in every sector of human activity: from communication to banking, trading, learning and teaching, entertainment

and socialising, government and management.

"Despite the massive changes in how we do business, communicate and learn – changes unimaginable even ten years ago – explosive technological advancements are not without their challenges and their risks," he added. "Among those challenges is our right to privacy."

"Over the next ten years, our notions of privacy and what constitutes privacy and safety may become so distorted that now is the time to debate what it really means."

#### Every breath you take

Before introducing the first speaker, chairman TJ McIntyre commented on how privacy underpins human dignity and other key values such as freedom of association and freedom of speech. He added that debate and discussion on emerging issues enhanced our understanding and encouraged consideration on how this area of law could be better protected.

The deputy data protection commissioner, Gary Davis, opened proceedings with a presentation

> entitled 'Data Protection: Looking to the Future'. Personal data, Mr Davis argued, is the "the oil that fuels the engine of the internet and technology economy". Despite this, "technology and the internet are fantastic enablers for individuals", he said, referring to the role of Twitter and Facebook in recent Arab revolutions.

Hundreds of millions of people – including 45% of the Irish population – have social networking profiles on sites like Facebook. However,



Prof Roy Greenslade: 'Journalists are in the disclosure business

Mr Davis said there was "a clear imbalance in what the average individual understands while online ... and what actually happens". Identifying some tweets from his own Twitter feed, Mr Davis demonstrated the challenges faced in regulating and legislating in the area of data protection.

Looking to the future, he said that there were many challenges facing society. "There is currently an imbalance between the capacity of the entities involved. The regulators, current laws and penalties are too weak

- and questions of internet jurisdiction still remain," he said. Although the new EU Data Protection Regulation was intended to address the current imbalance, questions still remained on

the regulation of personal data. The deputy data protection commissioner concluded that, in the future, Ireland would have a key role in addressing these issues during the State's six-month stewardship of the European Union, which begins in January 2013.

#### Someone's looking at you

Cyber security expert Paul C Dwyer gave an overview of what is happening to private information online in his address, entitled 'The Connected World - Where Someone is Always Watching'.

In a stimulating and at times worrying address, Mr Dwyer said that private details and personally identifiable information is the "stock traded in the underground



fiction is today's reality

economy of cybercrime". "On Facebook

alone there are over 900 million users. Some 300 million photos a day are uploaded, with people speaking 70 different languages, and some 30 million apps are activated every day," he said.

conscience and

revenue"

But despite this, a lot of people do not realise that some apps are 'crimeware' intended to 'steal' information.

Every piece of information about people has value for criminals, he said. "Criminals go where people go," and Facebook is essentially "the third-biggest country in the world". For example, he said, many criminals are trawling Facebook and other social networking sites to try to find the location of someone who has announced that they are going on holiday in an attempt to locate

homes to be burgled.

In the future, Mr Dwyer warned, threats to privacy will not just come from cyber-criminals but "from legitimate organisations, based on the information we share".

With the arrival of the 'semantic web' and linkable data, there is a danger that insurance companies may be able to find out if applicants have done a search for keywords like cancer stretching back as far as ten or 15 years in order to gather intelligence on potential customers, Mr Dwyer said.

#### Too much information

Dr Denis Kelleher discussed people's expectations of privacy in relation to personal data. In his presentation, 'Privacy - the Impossible Right', he examined the expectation of privacy, specifically in relation to photographs and other information shared online.

With millions of people doing this every day, Dr Kelleher said there were many questions over this type of information's use and the right to privacy following such a posting.

Privacy is a developing right, which was often perceived in the past as a right for the prominent and wealthy in society, he added. Much of the case law over the past ten years has primarily concerned famous, wealthy and prominent figures in society, such as Naomi Campbell and Caroline, Princess of Hanover. The term 'super-injunction' has also entered common use. However, privacy for the rich alone is not the case anymore, he said.

As technology changes, there is a knock-on impact on everyone's right to privacy, regardless of social standing, Dr Kelleher said. This has been demonstrated by recent events in the Irish courts, he said, highlighting the case of Eoin McKeogh, a young man falsely accused on various social networking sites of failing to pay a taxi fare, when, in fact, he was in Japan at the time. Mr McKeogh successfully sought an interim injunction preventing those sites from hosting or linking to video images that others had wrongly



claimed depicted him. However, to do so, he had to go to court. Article 34.1 of the Constitution – justice shall be administered in public – "created a significant hurdle in his efforts to preserve his reputation", Dr Kelleher said. Given the fact that the proceedings were held in public, the facts of Mr McKeogh's case were fully reported in the press.

#### Looking after No 1

Following on from Dr Kelleher's thought-provoking contribution, Prof Roy Greenslade, a recent witness at the Leveson Inquiry into press standards in Britain, focused on media ethics and the battle for media reform since the *News of the World* phone-hacking scandal erupted in July 2011.

Opening his address, Prof Greenslade quoted current affairs presenter Jeremy Paxman, who told the Leveson Inquiry of his favourite definition of news: "News is something someone, somewhere doesn't want you to know (or print) – the rest is public relations."

"This definition also happened to be the one of the quotes that was, and maybe still is, posted in giant lettering in the newsroom of Britain's best-selling newspaper, *The Sun*," Professor Greenslade said. "*The Sun* views the maxim as a justification for using any means possible to publish anything about anyone – whether it's in the public interest or merely interesting to the public.

"But, for Mr Paxman," he said, "it informs the way he tackles politicians and business people during interviews." The contradiction is obvious.

Given that journalists are



Panel speakers addressed the issues of right to privacy versus the desire to know, and how technology limits privacy



in the 'disclosure business', Prof Greenslade admitted that "whether for benign reasons or not, we [journalists] do intrude into the privacy of individuals".

In his 48-year career as a journalist, including 21 years as a media commentator, he said that no topic had been raised more consistently than privacy – or more accurately, intrusions into privacy. "But, to paraphrase a well-known saying, one man's invasion of privacy is another man's right to know. Or perhaps I should say, 'supposed right to know'."

There was a "seemingly unbridgeable chasm between the two sides of the argument". The major reason for this continuing controversy was "because what we're really

"Staying in

business is

to maintain

plurality and

is important

for Britain's

diversity, which

democracy and.

therefore, in the

interest. I think

you would have

that is a hugely

to agree that

disingenuous

justification

for looking

bedrooms"

into people's

public-interest

wider public

important

dealing with is a coincidence of two powerful forces – human fallibility and commercial greed. Or, to put it more bluntly, hypocrisy".

Prof Greenslade was of the opinion that hypocrisy existed in equal measure on both sides. "Though people are fiercely protective of their own privacy, they cannot but help themselves peeping over the fence and thus intruding into the privacy of others."

"Newspaper and magazine sales go up, as does online traffic, when pictures and articles invade the privacy of someone regarded as famous. It

happened throughout the life of Princess Diana. And it has just happened to her youngest son, Prince Harry."

He quoted from an essay of one of his journalism students, who had written that "most ethical dilemmas in the media are a struggle between conscience and revenue". Prof Greenslade added:

"The truth of this statement was brought home forcefully to me with several contributions to the Leveson Inquiry, in which tabloid editors suggested that it was

important for them to purvey sleazy sex stories in order to maximise circulation and revenues, and thereby stay in business. In turn, staying in business is important to maintain plurality and diversity, which is important for Britain's democracy and, therefore, in the wider public interest. I think you would have to agree that that is a hugely disingenuous public-interest justification for looking into people's bedrooms. I sincerely hope that Lord Justice Leveson will see through that one. We shall see."

The event closed with some audience participation and many questions were asked of all the panel members. The session was brought to a close after almost four hours of stimulating and topical debate.

The Law Society would like to extend its thanks to all those who attended and to the members of the panel. Thanks also to the event's sponsors, Aon Risk Solutions and XL Insurance. ©



Papers and presentations are available to view on the Law Society's website at www.lawsociety.ie.

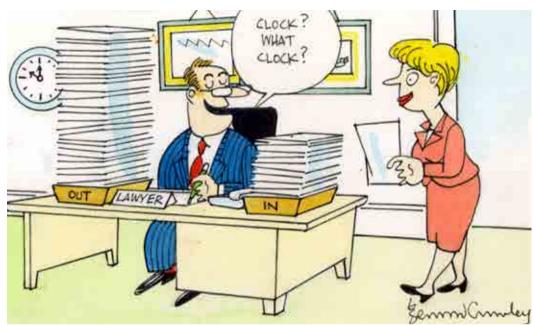
Law Society Gazette www.gazette.ie October 2012

#### Hourly billing - the invention of financial controllers

From: Ronan O'Brien, TP Robinson Solicitors, 94 Merrion Square West, Dublin 2

May I agree wholeheartedly with the views of Chris Ryan, as expressed in his letter to the last *Gazette*. Hourly billing is an invention of financial controllers and is a chimera. In my experience, most clients ask for an estimate before we undertake any work, and they regard an estimate as a ceiling, not an approximation.

On a personal level, I find clock-watching a distraction that takes one's focus off the task at hand. Clock-watching and service to the client are two pursuits I find hard to reconcile.



#### Debt indebtedness scheme should involve solicitors too

From: Richard E McDonnell, Richard H McDonnell Solicitors, Ardee, Co Louth.

Inoted recently that a scheme has been initiated whereby accountants will be paid a fee of €250 for assisting clients

in dealing with their bank indebtedness (and presumably all that entails, including causing banks to desist from phoning destitute and desperate people at night-time and weekends to harass them). I spend large amounts of my time these days doing that very work as, I imagine, many – if not most – of my colleagues do too (without payment, as our unfortunate clients are in such dire straits that payment is out of the question).

Could the Law Society seek for us to be included in this scheme? Continuing to provide the service we do to people in such predicaments is simply not sustainable in such difficult times for us all. ©

LETTERS 21



VIEWPOINT Law Society Gazette www.gazette.ie October 2012

#### TEN TOP TIPS FOR SUCCESS

Now entering 22 years practising as a solicitor, Richard Lee shares some of his hard-won experience in the hope that it might assist fellow practitioners



Richard Lee is founding partner of Lee and Sherlock Solicitors, an accredited mediator, fellow of the Chartered Institute of Arbitrators, and collaborative law practitioner

am now 22 years a solicitor and still learning. In the hope that it assists, I share some of what I have learned so far. As one eminent senior counsel (now a High Court judge) used to say to the jury: "Some of what I say you will agree with, and some of it you will not accept. Keep the part you agree with and throw out what you do not accept."

New clients. Last month in Ireland the word 'solicitor' was Googled 165,000 times. The global monthly search was over four million! The term 'legal advice' was Googled 6,600 times in Ireland. More and more people are using the internet to get information. A client-friendly website is a cost-effective method of attracting new clients. However, to be effective, it must be reviewed and updated regularly. A good content management system is important, as it puts you directly in charge.

Remind existing clients. Keep in regular contact with your clients and remind them of all of the legal services you provide. Email is a very simple and effective way of staying in contact and updating clients. I still kick myself when a client says "oh, I didn't know you did that, so I went to another solicitor."

3 Ask for referrals. In general, solicitors get a lot of work by word of mouth, including referrals. Thank clients for their referrals and let them know that you would welcome more. Satisfied clients are the best advertisement and will usually be happy to give referrals, particularly if they know you specifically want them.

Recognise 'solicitor stress'.

To my mind, the second most stressful profession is the law.

Clients come to us with serious

legal issues and, as solicitors, we take on the burden of achieving a resolution. This expectation and burden creates a unique stress on solicitors given the nature and importance of the legal matters with which we deal. More significantly, and more than any other profession, solicitors are acutely aware of the consequences of getting it wrong.

We live with the constant risk that putting a foot wrong could mean a claim and all of the chaos that follows. Recognising stress levels is critical. The experts say 'low stress good – high stress bad'. Prolonged high stress levels cause fatigue, anger, illness and a diminished quality of life. Stress can by managed by creating good habits, such as regular physical exercise. It is important to take action when necessary and not be dismissive.

5 Shock yourself again. Take out the figure for overheads (administration expenses) from your last set of annual accounts, divide it by 48 (number of working weeks), then divide it by five (the number of working days in a week), divide it again by six (productive working hours in the day). The result – the cost per hour of opening your front door – can be startling. Share the result with all fee earners in the office!

Embrace change. Solicitors are designed to resist change. I am a multiple gold-medal winner at resisting change. Case law – 'we will do the same as we did last time' – is a cornerstone of the profession, and for good reason. Using long-established procedures and precedents underpins a credible legal system.



Resisting change and staying within a comfort zone is very tempting, but changes are coming hard and fast - not just the Legal Services Regulation Bill, but also the harsh ongoing changes forced by the economic downturn, lower fee income and reduced levels of work. Now, it is almost a case of 'adapt or die'. Approaching change with a positive, flexible attitude can be more productive. Every change creates opportunity.

Invest in you. In general, solicitors put their clients ahead of themselves and do not give enough time to the development and management of their business. Take time out for review and implement any changes that might lighten the burden. Three practical examples, if you have not already done so, would be:

- a) Invest in a good casemanagement system. Initially, it is a steep learning curve, but fully implemented, a good case-management system will save a large amount of time, reduce risk, make work simpler and save money.
- b) Invest in a telephone-call management system to automatically direct calls and take messages.
- c) Implement a good riskmanagement system. A good case-management system will now incorporate a lot of the elements of risk management, including a register of undertakings, and so on.
- Boundaries are important. OA number of years ago, a solicitor confessed that he brought his dictation recorder to

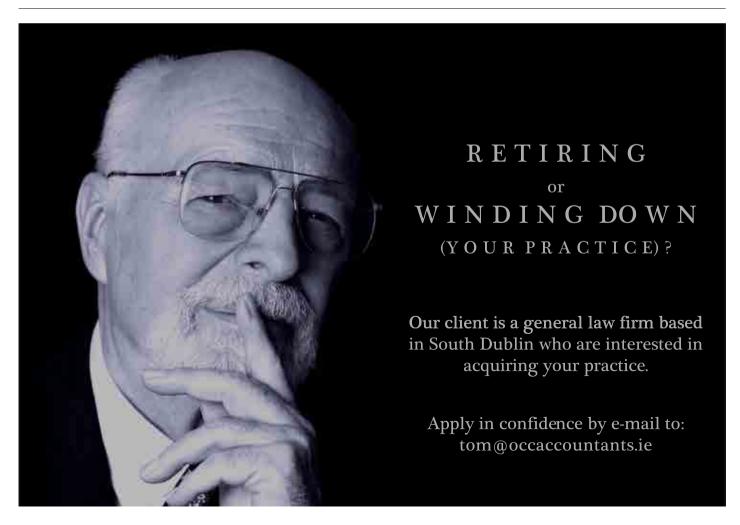
bed with him. What a mental image! I laughed at the time, but now I would tell him to learn to switch off. Boundaries, especially between work and personal life, are important. 'Burn out', which shows itself as apathy and a complete lack of motivation, affects solicitors just as much as any other profession.

Hard look. Solicitors don't do it for the money - but it's important. Take a hard look at your fee income in terms of 'good fees' and 'bad fees'. For me, wills are not profitable, but that is not the only consideration. A useful exercise can be to identify the top ten fee notes for each fee earner and conduct a fee analysis to identify what worked well - and then plan to repeat it.

Marketing and business development. I am still learning. I suspect that gone are the days when being a good solicitor was enough. Now, it is also necessary to be a good business manager and sales person in order to survive.

Initially, I was reluctant, but now, having accepted the necessity, I have embraced the change. I am now setting aside time each week for 'business development and marketing'.

In looking at the possibilities created by social media, it appears that LinkedIn is worthwhile. Recently, I have attended two very practical workshops with an impressive business consultant, and I am in the process of implementing some of what he suggested. 6



Law Society Gazette www.gazette.ie October 2012 **COVER STORY** 

# On the of species



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

The Gazette presents the first in a series of articles on the Irish Constitution, inspired by the Constitutional Convention. Mr Justice Gerard Hogan speaks to Colin Murphy on the origins of the Constitution

"Historians

have long

overemphasised

the influence

of the Catholic

tradition, to the

detriment of the

one, and had

neglected the

case law that

Constitution"

demonstrated the

suppleness of the

social-democratic

n holidays in Provence over the

summer, Judge Gerard Hogan sought respite from the heat with an ice-cream at a pavement café. Looking up, he noticed a plaque giving the address as Place Aristide Briand, and allowed himself

a private smile.

Briand was a leading French statesman of the 1920s; as foreign minister, he devised the 1927 Kellogg-Briand Pact (with the US Secretary of State, Frank Kellogg), which committed states to the resolution of disputes by "pacific means". Ireland was represented at the Kellogg-Briand talks by a young diplomat named John Hearne. Ten years later, Hearne would be the chief architect of Ireland's new Constitution. And among the innovations Hearne would introduce to the Constitution would be a section on international relations, clearly influenced by the language of the Kellogg-Briand Pact.

For Hogan, this direct line between what was a key, progressive development in international relations and Bunreacht na hÉireann is part of a pattern – a pattern he has sought to trace in his

new book, The Origins of the Irish Constitution, which was launched in September. The pattern is a liberal, cosmopolitan one, and Hogan sees it worked through the Irish Constitution with a fine

> thread – too fine, perhaps, for many of the Constitution's traditional critics. Those critics have tended to focus on the perceived influence on the Constitution of 'Catholic clerical authority'. While not denying that influence, the drafters were even more influenced, Hogan says, by somebody not wielding a crozier; it was, rather, a liberal German-Jew named Hugo Preuss.

Hugo Preuss was the chief architect of the Weimar Constitution of 1919, which created the social democratic Weimar Republic out of the ruins of the First World War. (Preuss died in 1925; he was later vilified in the Nazi propaganda film The Eternal 7ew.)

That constitution had key flaws - ultimately allowing Hitler to cloak the Third Reich in a veneer of legality – but in other aspects it was

hugely influential, and was taken as the model for many of the interwar constitutions of Europe. The historian William Shirer described it as "on paper, the most liberal and democratic document of its



Law Society Gazette www.gazette.ie October 2012 **COVER STORY** 

#### ARCHITECT IN CHIEF

The chief architect of the 1937 Constitution was not a Fianna Fáil party man but a "Waterford Redmondite" who had previously served the Cumann na nGaedheal government, Gerard Hogan says.

John Hearne, born in 1893, was a great orator in his student days, and was called to the bar in 1919. He became a parliamentary draftsman and then legal adviser in the Department of External Affairs, where he attended many of the key international conferences of the pre-war years and was highly regarded by the department's longserving secretary, Joe Walshe.

With Eamon de Valera taking responsibility for External Affairs, alongside his prime ministerial role and the department then housed in government buildings. Hearne was "within grabbing distance" of de Valera and duly became a key adviser.

Though his role in drafting the Constitution received no public recognition at the time, and little since, de Valera recognised it in private: on the day the Constitution was enacted, he inscribed a copy to Hearne as "Architect in chief and draftsman of this Constitution ... in testimony of the fundamental part he took in framing this, the first Free Constitution of the Irish People".

Hearne subsequently served abroad, as High Commissioner to Canada, and then as the first Irish ambassador to the US. After retirement, he advised the newly independent governments of Nigeria and Ghana. He died in 1969.

kind the 20th century had ever seen". And it was to Weimar that John Hearne turned when Eamon de Valera asked him to draft a new constitution for Ireland, While

some occasional references in documents presented to de Valera refer to Weimar and other inter-war continental constitutions, the extent to which de Valera realised that Weimar was serving as a model is not clear.

#### Seed of its own demise

Like Weimar, the Free State Constitution contained within it the seed of its own demise: the

provision for amendments to be made by the Oireachtas for a limited initial period allowed the Oireachtas to amend the constitution to extend that period, and thereby reserve the power of amendment to itself, ultimately undermining the constitution as a basic law.

In 1934, de Valera commissioned a Constitution

> existing constitution. It reported ("very impressively," as Hogan notes) within two months. In April 1935, de Valera instructed Hearne to begin work on a draft constitution. "Three weeks

significant proportion of which is retained in the Constitution."

Like anybody facing a deadline, or, as

international developments in constitutional law.

Many of the new constitutions of interwar Europe referred back to Weimar, as had the Free State Constitution in many key respects. Hearne, though, went far deeper into it, according to Hogan. Its influence was "in some cases, word for word; in others it was the style; in others it was the structure". (For Hogan, this realisation has only become fully clear since writing the book. See his address to the Burren Law School from May at http:// burrenlawschool.org/gallery/main.php.)

Hearne was "a voice of cosmopolitanism and the avant-garde," says Hogan. "He wanted to innovate" (see 'The avant-garde constitution' panel).

#### **Drafting the Constitution**

Constitution

@ Eve is a son They

The Former of Earle State be South as from two to true recon como

Done State

After Hearne produced his initial draft, there was a hiatus till August 1936. "We don't know

> why; I haven't found a single document explaining it," says Hogan.

In October 1936, the Iesuits made "an impressive and influential submission". It was "cut and paste from interwar constitutions with some reference to papal encyclicals" and was "not particularly religious", save that they had also borrowed from the 1921 Polish

Constitution and this formed the basis for the (now deleted) "special position" clause in article 44. It was only later that John Charles McQuaid got involved. Then president of Blackrock College (de Valera's alma mater) and later to be Archbishop of Dublin, McQuaid "peppered" de Valera with correspondence on the constitution-in-progress between February and April 1937. According to Hogan, though, his influence has been "significantly overrated".

"The Constitution was substantially drafted at this stage - the first printed draft was ready on 15 March." By April, it appears, de Valera and McQuaid had had some kind of falling out, and the correspondence more or less ceased.

Hogan's depiction of this work is a world away from the clichéd image of the 'Long Fellow' drafting the *Bunreacht* in longhand. (In fact, de Valera's famous longhand notes on the Constitution, written on squared paper torn from a notebook and which are reprinted in the book (see above), are likely to have been notes he made subsequent to discussion with John Hearne, rather than of his own inspiration - and make explicit reference to Weimar.) "There's a common conception that no changes

Review Committee to review the "This was too elegantly drafted

a document to

other than by

somebody who

really knew what

they were doing"

have been done

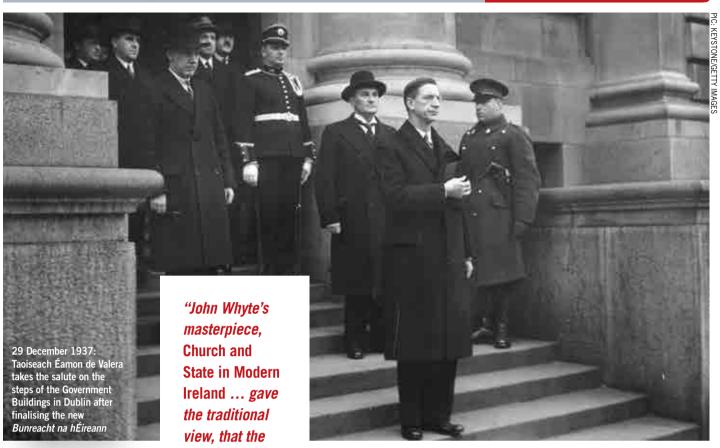
later, he produced a draft, a

Hogan says, as he used to do when faced with an "unusual" case as counsel, Hearne looked for precedent. Already immersed in international law and diplomacy (see 'Architect in chief' panel), he read widely on the latest

#### A CATHOLIC CONSTITUTION FOR A CATHOLIC PEOPLE?

- · "The influence of the Church has been considerably overplayed," says Hogan. It was most notable in elements of the preamble and the ban on divorce.
- The ban on divorce was not in John Hearne's first draft, but seems to date from the drafts circulated in autumn 1936, probably at the behest of de Valera. A provision banning contraception was drafted but not included.
- Clerical authorities sought to have the Catholic Church recognised as the official religion and objected to recognition being given to the Church of Ireland in article 44. Both petitions were rebuffed. The particular provision of article 44 (since repealed),
- which gave the Catholic Church "special position", was modelled on similar provisions in other European constitutions at the time, particularly the Polish Constitution of 1921.
- Article 41, recognising the family "as the natural primary and fundamental unit group of Society" is commonly thought to have been influenced by Catholic social teaching. However, it was clearly influenced by the Weimar Constitution, which had very similar provisions, and the 1848 constitution of the French Second Republic, from which the language of article 41 ("inalienable and imprescriptible" and "antecedent and superior to all positive law") is taken.

Law Society Gazette www.gazette.ie October 2012 COVER STORY



were made after it was published in May 1937. In fact, there were constant changes after that. It was a day-and-night operation for several months. Hearne did almost nothing else from January to June 1937."

Ultimately, Hogan concludes: "It was, perhaps, asking too much of the Ireland of the 1930s to adopt a draft as noble, as fair-minded and as secular as Hearne's original 1935 draft." However, even

as the Catholic influence made itself felt (whether reflecting de Valera's own wishes or clerical lobbying), Hearne's draft remained the basic model. "The substructure of the Constitution was fundamentally liberal-democratic and secular in nature, with the religiously inspired provisions superimposed upon this secular substructure," Hogan notes. (See 'A Catholic constitution for a Catholic people?' panel.)

For Hogan, his latest work completes a cycle of inquiry that started as an undergraduate. "I remember reading John Whyte's masterpiece, *Church and State in Modern Ireland*. This gave the traditional view, that the Constitution was drafted by de Valera, informed by John Charles McQuaid, and designed to reflect Catholic social teaching. That never added up to me."

He had been struck early on by the quality of the drafting of the Constitution: "This was too elegantly drafted a document to have been done other than by somebody who really knew what they were doing."

Constitution was

Valera, informed

by John Charles

reflect Catholic

social teaching.

added up to me"

drafted by de

McQuaid and

designed to

That never

Later, he came to see that the Constitution contained within it the possibility of the "social revolution" that was ultimately ushered in by the decision in *McGee v Attorney General* in 1973, which effectively legalised

contraception. "Anybody who was prepared to look closely from the 1960s could see that this was a real possibility."

"I was always intrigued as to how the document was put together, as an amalgam of different traditions." Historians, he felt, had long overemphasised the influence of the Catholic tradition, to the detriment of the social-democratic one, and had neglected the case law that demonstrated the suppleness of the Constitution. "Historians and lawyers ought to be friends," he observes, pithily.

So does he think de Valera and Hearne foresaw the reading of the Constitution as a 'living' document that would be interpreted anew to fit each age?

"That's impossible to answer. But on balance, I think yes, they did. They didn't anticipate certain types of question, but the fact that they were planning for a constitutional court (even though this didn't make it into the final draft) suggests that they did. Why would you have a constitutional court unless there was going to be something for it to do?"

(Origins of the Irish Constitution 1928-41, by Gerard Hogan, is published by the Royal Irish Academy, price €50.) **ⓒ** 

#### THE AVANT-GARDE CONSTITUTION

- John Hearne and de Valera considered creating a constitutional court, which would have been a radical innovation in the common law world, but ultimately decided against it.
- The creation of 'abstract judicial review', via article 26 (on reference of bills to the Supreme Court), was similarly innovative.
- The provision for socioeconomic rights via the inclusion of 'directive principles of social policy' in article 45, although non-justiciable, was seen as progressive.
- The inclusion of a section on international relations, in article 29, and the commitment of the State to "the pacific settlement of international disputes" was novel at the time.
- Bunreacht na hÉireann was the first constitution in the world to give recognition to the Jewish people.

TAXATION OF COSTS

Law Society Gazette www.gazette.ie October 2012

# taxing the transfer of the second sec



Declan O'Neill is one of the two taxing masters appointed by the Government to provide an independent adjudication of legal costs in dispute

Taxing master Declan O'Neill has described as "a myth" the notion that he is systematically reducing all bills of costs that come before him. In the first of two articles, he explains how he sees his role

"It is highly

unlikely that

values that

have been

considered

appropriate in

relation to legal

services can be

applicable today"

assumed to be

heretofore might

ection 27 of the *Courts and Court Officers Act* 1995 has been in force for some 17 years and has been the subject of a substantial number of judicial decisions. Notwithstanding this, some practitioners, quite inexplicably, do not maintain proper records of professional work or services rendered on behalf of

their clients.

Section 27(1) of the 1995 act provides as follows: "On a taxation of costs as between party and party by a taxing master of the High Court, or by a county registrar exercising the powers of a taxing master of the High Court, or on a taxation of costs as between solicitor and client by a taxing master of the High Court, the taxing master (or county registrar as the case may be) shall have power on such taxation to examine the nature and extent of any work done, or services rendered or provided by counsel (whether senior or junior), or by a solicitor, or by an expert witness appearing in a case or any expert engaged by a party, and may tax, assess and determine the value of such work done or service rendered or

provided in connection with the measurement, allowance or disallowance of any costs, charges, fees or expenses included in a bill of costs."

Subsection 2 provides as follows: "On a taxation of costs as between party and party by a taxing master of the High Court, or by a county registrar exercising the powers of a taxing master of the High Court or on a taxation of costs as between solicitor and client by a taxing master of the

High Court, the taxing master (or county registrar as the case may be) shall have power on such taxation to allow in whole or in part, any costs, charges, fees or expenses included in a bill of costs in respect of counsel (whether senior or junior) or in respect of a solicitor or an expert witness appearing in a case or any expert engaged by

a party as the taxing master (or county registrar as the case may be) considers in his or her discretion to be fair and reasonable in the circumstances of the case, and the taxing master shall have power in the exercise of that discretion to disallow any such costs, charges, fees or expenses in whole or in part."

These subsections, in particular, created a new situation whereby taxing masters are required to objectively analyse, assess and place a monetary value on the professional services of solicitors, barristers and expert witnesses, whether such work falls to be considered on the party and party or the solicitor and client basis.

I do not propose, for the purpose of this article, to present an analysis of the development of the jurisprudence of the

court in relation to subsections 1 and 2 of the 1995 act. Such has been provided in a number of recent judgments, namely *CD v Minister for Health & Children, Cafolla v Kilkenny*, and *Bourbon (a Minor) v Ward*.

It has been explicitly made clear in case law that the proper implementation of these subsections require the taxing master to do the following in relation to the assessment of any bill of costs:



30 TAXATION OF COSTS Law Society Gazette www.gazette.ie October 2012

a) Carry out a root-and-branch analysis of the relevant work,

- b) Ascertain the necessity for the work and who carried it out; if any special skill was involved, to identify both the skill and its impact on the fee ultimately measured,
- c) Identify the time spent on the task by the relevant personnel, whether such time was reasonably spent, and be satisfied that a practitioner of appropriate experience was deployed in respect of the relevant work,
- d) Have regard to the value or importance of the subject matter of the proceedings and any novelty or urgency involved, and
- e) Provide a reasoned decision as to how the fee or fees in question were measured.

The task of a taxing master is rendered extremely difficult if practitioners' files do not contain information of the sort identified by the court as being essential to satisfy the statutory requirements underlying the measurement of a fee. Unless a taxing master properly applies the statutory criteria, the discretion vested in the officer to measure the appropriate amount is not validly exercised (*CD v Minister for Health*).

While it is possible to gain some appreciation of a solicitor's work by reference to the correspondence generated in the course of an action, coupled with sight of any experts' reports, it would be unusual if such documents alone could provide sufficient detail of specific work carried out, by whom, time taken, its necessity and any special skills exercised by the practitioner.

The absence of contemporaneous records that provide such detail militates greatly against the reasonable assessment and valuation of the work. Indeed, it may well be the case that practitioners who neglect to keep such records fail in their duty of care to their clients.

#### Adequate records

The greater number of bills, by far, currently being submitted for taxation arise on foot of the award by the court of party and party costs to successful litigants. One of the prerequisites for recovery of costs from another party is that the costs should have been reasonably incurred. An adjudicating costs officer, to some extent, in the absence of an adequate work record, is obliged to engage in conjecture concerning the nature and extent of the work reasonably carried out in relation to whatever issues arose in the case.

This is not only unsatisfactory in terms of satisfying the statutory obligations already identified, but is also very likely to be detrimental to the interests of a client who may already have paid substantial fees on account, or otherwise, and who is then faced with recovery of a substantially lower sum under the party and party indemnity. Not infrequently,

such a scenario gives rise to a client's perception that an overcharge has occurred and this, in turn, may lead to a taxation as between the solicitor and his/her own client.

An adequate record of professional work should also include a record of instructions received from the client, together with details of any advices proffered to the client on foot of such instructions. Subsequent correspondence with the client in reference to instructions received and providing advices is also extremely useful in terms of corroborating the necessity for incurring costs, and especially the retention of expert witnesses.

Failure on the part of a practitioner to have be keep a client fully advised and informed of issues arising, and costs being incurred, could and does lead to disputes during the "Taxing masters"

are required

to objectively

and place a

services of

barristers and

expert witnesses"

solicitors.

analyse, assess

monetary value on

the professional

lead to disputes during the taxation process concerning the necessity for the retention of some of the experts or counsel in the case.

The picture I am endeavouring to paint is not entirely unusual, whereby the client who is faced with loss of substantial costs, including outlays, following a party and party taxation of costs or following dismissal of an action, subsequently argues before a taxing master that certain costs and outlays should not be recoverable as between

solicitor and client on the basis that the costs were incurred in the absence of the client's instructions. This situation usually arises in circumstances where an unusual number of expert witnesses have been retained and, perhaps, with overlapping expertise. Questions may also arise concerning the number of counsel retained.

Taxing masters have frequently been informed that busy practitioners may not have time to keep contemporaneous records of the sort described. It is my experience that those practitioners who, as a matter of course, take the time to keep a proper record of instructions received, and work done, invariably fare better for their clients in general terms and in terms of recovery of costs, whether as between party and party or solicitor and client.

#### **Economic climate**

In his recent decision in *Bourbon v Ward*, the President of the High Court queried whether costs that had been allowed during years of prosperity could be maintained in the current extreme financial crisis facing the country. The president suggested, by way of *obiter dictum*, that there might be a strong case to be made for factoring current economic circumstances into the taxation process.

The decision in *Bourbon* was not the first time that a court had adverted to the current economic downturn. In the context of the measurement of certain commercial court cases and, indeed, in company insolvency matters, the court has been quite prepared to quite substantially reduce both solicitors' and accountants' hourly charges in order to take into account current difficulties (*ESG Reinsurance Ireland Ltd*).

In my view, while this has been generally reflected in the profession by means of agreement of reduced hourly rates or overall fees with clients, such reductions may not have been taken into account in relation to bills payable by a third party. This is no

longer the case.

In the context of taxation of costs, it is not appropriate, in my opinion, to impose a specific sum, whether measured in percentage terms or otherwise, to reflect the reality of the current economic downturn. Rather, I believe that it is a matter firstly for the solicitor who assesses the amount to be charged to take into account the general legal costs trends in the State. Secondly, the party opposing a bill inter partes must consider the costs from this perspective, as so, ultimately, must the taxing master.

This involves an exercise in balanced judgement as to the necessity for the extent and the reasonableness of the work under consideration before attempting to put a value on it. It is highly unlikely that values that heretofore might have been considered appropriate in relation to legal services can be assumed to be applicable today. In the final analysis, each case must be considered on its facts and merits.

#### Party and party bill of costs

The amount and content of the bill is, of course, dependent upon the extent of the indemnity awarded to the successful party. Accordingly, it is necessary in the first instance to consider the order or award under which the costs are to be assessed and, in particular, whether any limitations have been imposed. In this jurisdiction, unless reserved costs have been specifically awarded under the terms of a final order, such costs cannot be measured as between party and party. The court may restrict the recoverable costs in other ways, for example, by limiting the number of days' hearing or imposing a percentage limitation on the recoverable costs.

As the rules currently stand, the 'scheduled items' in a bill of costs are to be found at Appendix W to the *Rules of the Superior Courts* 

Law Society Gazette www.gazette.ie October 2012 TAXATION OF COSTS

1986 (as amended). They are not 'schedule 2 items', although frequently referred to as such. Schedule 2 of the *Solicitors' Remuneration General Order 1884* (as amended) deals solely with costs relating to non-contentious work. Hopefully, new rules will be introduced following the enactment of the *Legal Services Regulation Bill 2011* that will replace, or at least modernise, Appendix W and also the non-contentious costs rules.

A relatively small proportion of party and party bills of costs are ultimately referred to taxation and, in such cases, it is necessary to prepare and lodge detailed bills of costs. Such bills should contain information as to the date on which instructions were received, together with some detail in regard to the initial work carried out, setting forth the date on which the proceedings were issued and when each pleading was delivered.

Particulars in relation to consultations with counsel, and counsel's fees generally, should also be set out in an understandable format. The bill of costs as a whole should be readily understandable. There is an art to the preparation of a properly detailed bill of costs. The party and party bill may be viewed as akin to a statement of claim and will be subject to forensic scrutiny by paying parties or their representative. Bills may, on the one hand, be too light as to detail and, on the other, so overburdened with unnecessary information as to be almost unintelligible. An experienced solicitor or legal costs accountant can readily identify the matters that it is essential to highlight in any particular bill of costs. A chronologically expressed and brief analysis of the work undertaken is what is required for inclusion in the preamble to the instructions fee.

#### **Pleadings**

The practice of repeating the contents of all pleadings exchanged between the parties as part of the preamble to the instructions fee is not helpful and may indicate an unwillingness to properly explain the issues that arose for determination in the action and the resultant work. The pleadings are self-explanatory; the actual work undertaken by the solicitor in prosecuting or defending the case may not be.

The taxing master is interested in ascertaining the necessity for and the actual work undertaken, together with the time spent by the solicitor in its execution. This is not to suggest that there should be no reference to the pleadings in the bill, but such reference should be in narrative form with the focus clearly on elucidating the extent of the professional work necessarily involved in confronting the issues.

The bill must also contain particulars of the fees of counsel. It is not appropriate to estimate counsel's fees. Fee notes should have been obtained prior to the inclusion of any



fee for counsel. Similarly, it is not appropriate to estimate experts' fees, whether for reports, standby for court or court attendance. It is preferable that all vouchers be sent to the paying party's solicitors prior to the taxation of the costs.

Experts' fees constitute a major part of litigation costs. It would be helpful if, prior to retaining an expert, the solicitor had made enquiries as to the cost involved and obtained the approval of the client. This will be required under the proposed new legislation and, of course, has always been the desirable and reasonable approach.

#### **Full particulars**

The bill of costs should contain sufficient information to enable the client to understand the extent of the work carried out and the basis upon which the charge is made. It should contain full particulars of all work undertaken on behalf of the client – not merely details of work carried out and not captured by party and party costs. Any costs recovered from another party should be alluded to. This has been both the practice and the law for well over a century, and section 68(6) of the *Solicitors (Amendment) Act 1994* requires that the client be provided with such particulars. It is open, in the first instance, to provide the client with a summary bill of costs.

The practice of charging a professional fee by way of a percentage of any damages awarded to a client is forbidden under section 68 of the 1994 act, and the new legislation will have a similar provision. There may be a practice among some solicitors whereby, at the conclusion of an action, a figure that may be described as a 'solicitor and client fee'

is agreed in writing with the client, with the intention that the party and party costs will be retained by the solicitor in addition. The party and party costs are the property of the client and cannot be retained in the absence of specific authority to such effect. Even if written authority is obtained at the time of settlement of the claim, it is not at all certain that payments made on foot of such an agreement would be upheld by a court.

Ideally, the final solicitor and client bill should be prepared when all the work has been concluded on behalf of the client. This is not to say, of course, that payments on account may not be sought – and current legislation provides for this. 

•

Part 2 of this article will examine the Legal Services Regulation Bill 2011 and will highlight potential new features or departures from current law or practice in terms of the taxation of costs.

#### **LOOK IT UP**

#### Cases:

- Bourbon (a minor) v Ward [2012] IEHC 30
- Cafolla v Kilkenny [2010] 2 ILRM 207
- CD v Minister for Health & Children 2008 [IEHC] 299
- ESG Reinsurance Ireland Ltd [2010] IEHC 365

#### Legislation:

- Courts and Court Officers Act 1995
- Legal Services Regulation Bill 2011
- Solicitors (Amendment) Act 1994

32 EVIDENCE Law Society Gazette www.gazette.ie October 2012

# exclusive CLUS

The exclusionary rule of evidence in Irish law has been the subject of much controversy and legal argument in recent years. But after the Supreme Court's decision in *Damache*, Orla Keenan asks if it's time for a change



Orla Keenan is a solicitor in the Office of the Director of Public Prosecutions. She would like to thank Dara Robinson for his input to this article

he widely reported Supreme Court decision of *DPP v Damache* brought a new focus and urgency to the debate on the exclusionary rule of evidence, leading as it did to a number of thwarted prosecutions and high-profile re-trials. The case, decided in February of this year, found that section 29(1)

of the Offences against the State Act 1939
(as inserted by section 5 of the Criminal
Law Act 1976) was repugnant to the
Constitution.

Critics of the rule have argued that the automatic exclusion of evidence flowing from a breach of an accused's constitutional rights has led to a skewed and unhealthy fixation in criminal trials on seeking out such breaches – however unintentional or technical – in an attempt to avoid the admission of probative prosecution evidence. The result, it is said, is that the rights of the victim and the public interest in the prosecution of crime is sidelined by the untrammelled rights of the accused.

On the other hand, advocates for the maintenance of the status quo in respect of the Irish exclusionary rule argue that the rule represents an important commitment to the rule of law and to the vindication and defence of fundamental rights and freedoms enshrined in our Constitution, which cannot be

undermined or compromised in the name of what would merely be short-term public interest.

#### Return to sender

"The experiences of

other jurisdictions

and give weight to

the argument that

the protection of the

fundamental rights of

all citizens can now

equally be ensured

by a discretionary

are also compelling

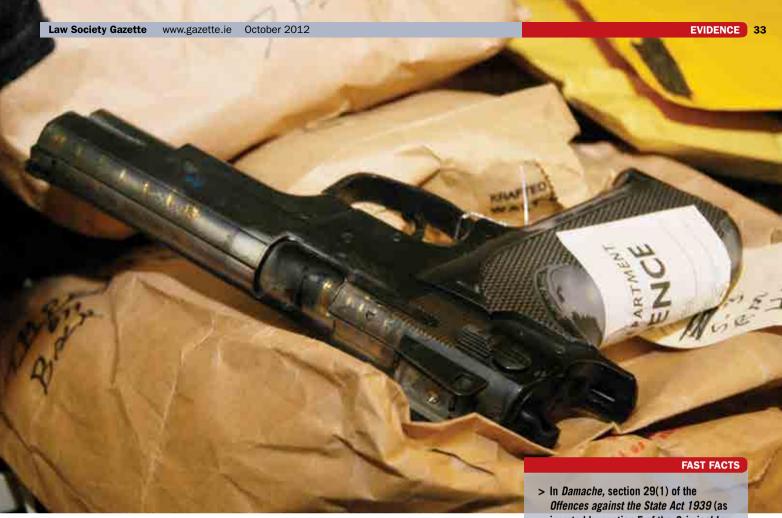
The seminal case in relation to the exclusion of improperly obtained evidence in Ireland is the 1965 one of *People* (AG) v O'Brien. In this case, the gardaí sought a warrant

to search for stolen goods at the suspects' dwelling, which was 118 Captain's Road, Crumlin; however, due to an oversight, it was issued in respect of 118 Cashel Road, Crumlin. Accordingly, the gardaí had no authority to enter the home of the accused and the search was not only illegal but, as it involved the residence of the accused persons, was also a breach of article 40.5 of the Constitution, which guarantees the inviolability of the dwelling. The decision for the court was whether the evidence obtained as a result of the search ought to be admitted at trial.

Two judgments were delivered in the case, the majority by Kingsmill Moore J, with whom Lavery and Budd JJ agreed. Walsh J, with whom O'Dalaigh CJ agreed, dissented. The judgment of Kingsmill

Moore J dealt mainly with evidence obtained illegally as opposed to unconstitutionally.

He found that, in every case, a determination should be made by the trial judge as to whether the public



interest is best served by the admission or exclusion of any such evidence, based on a consideration of all the circumstances and a balancing of competing interests. Factors to be considered were the nature and the extent of the illegality, whether it was intentional or unintentional, whether it was the result of an *ad boc* decision or settled policy, whether there were circumstances of urgency, whether the illegality was of a trivial or technical nature, or whether it struck at the heart of fundamental freedoms. Finally, the nature of the crime being investigated was also important to the court's ultimate ruling.

In reference to the rule proposed by Walsh J in relation to the exclusion of unconstitutionally obtained evidence, Kingsmill Moore J agreed that such evidence should generally be excluded and that there may be certain 'extraordinary excusing circumstances' that may warrant its admission, but he preferred not to enumerate such circumstances and to leave the exclusion or non-exclusion to the discretion of the trial judge.

In his judgment, Walsh J held that a trial judge had no discretion in relation to evidence gathered on foot of a deliberate and conscious violation of the accused's constitutional rights, save in 'extraordinary excusing circumstances'

such as the imminent destruction of vital evidence, the need to rescue a victim in peril, or a search without warrant that was incidental to and contemporaneous with a lawful arrest. Walsh J emphasised the paramount position of constitutional rights in this jurisdiction, stating that "the defence and vindication of the constitutional rights of the citizen is a duty superior to that of trying such citizen for a criminal offence".

On the facts of *O'Brien*, the Supreme Court unanimously held that the flaw in the search warrant was purely an oversight, that there was no deliberate or conscious breach of the accused persons' personal rights, and that the trial judge had thus correctly exercised his discretion to admit the evidence.

#### The gambler

In a number of cases subsequent to *O'Brien*, the courts were to consider the exact meaning of a 'deliberate and conscious' breach of constitutional rights, but the issue was finally authoritatively settled in the 1990 case of *People (DPP) v Kenny*. In *Kenny*, the gardaí executed a search warrant at the accused's home in circumstances where the warrant was later held to be invalid. However, it was only between the issue of the warrant and the date of the hearing of the case that the

In Damache, section 29(1) of the Offences against the State Act 1939 (as inserted by section 5 of the Criminal Law Act 1976) was ruled to be repugnant to the Constitution

- In the United States, a 'good faith' exception to the exclusionary rule has been developed by the Supreme Court
- In England, there is discretion as to whether to admit evidence garnered on foot of a breach of the accused's constitutional rights

High Court (in *Byrne v Grey*) had ruled that, in the circumstances that existed at the time of the issuing of the *Kenny* warrant, such search warrants were not valid. Hence the gardaí could not have known at the time of executing the warrant that they were breaching the suspect's constitutional right to the inviolability of his dwelling under article 40.5.

The question for the court was, in essence, whether the words 'deliberate and conscious' applied to the actions of the gardaí in their execution of the warrant or their state of mind in relation to the constitutionality of the search. In the majority judgment delivered by Finlay CJ, the answer was the former, and thus it was immaterial that the gardaí could not have known that their entry into the suspect's home was a breach of his constitutional rights. As long as their entry was



Woods Hogan Solicitors are pleased to announce that Declan Murphy and Richard O'Sullivan are now Partners with the firm.

Declan will be partner in charge of our Mortgage Litigation Department.

Richard will be partner in charge of our Commercial Litigation and Debt Recovery Department.



Richard O'Sullivan, Damian Woods, Godfrey Hogan and Declan Murphy

Woods Hogan Solicitors, Berkeley House, 17 Berkeley Street, Dublin 7 DX 149007 Phibsborough Email: info@woodshogan.ie. Phone: (01) 8824344. Fax: (01) 8824345



#### WORD PERFECT TRANSLATIONS

/ww.wordperfect.ie



Ireland's Leading Provider of Professional Translation and Interpreting Service Telephone 1890 707 707 Email: translations@wordperfect.ie

## **Hackett Legal Support**

- Dedicated service to the legal profession
- Rapid response to meet crucial deadlines
- Experienced with sensitive, fragile and oversized documents



Hacketts provide a full range of litigation and document management solutions with the flexibility of service needed to cope with <u>any</u> size project to <u>any</u> tight deadline. Services range from large scale litigation support projects through to basic reprographics.

#### Reprographic services:

- •Photocopying b/w & colour
- Binding and finishing
- •Re-construction of originals
- •Large format b/w & colour
- •24/7 working
- •Free collection and delivery within designated areas

#### **Technology services:**

- Scanning to Tiff and PDF
- Electronic transaction bibles
- Litigation support services including coding, software consultancy & electronic disclosure
- •Web Review and Hosting



Limerick 061 468 690 Damien Morgan

www.jdh.ie

#### Dublin

01 676 0301 Colum McNally

#### **Dun Laoghaire**

01 230 3000 Colum McNally

#### Cork

021 427 4014 Brian O'Loughlin Law Society Gazette www.gazette.ie October 2012

# **OVER THE HILLS AND FAR AWAY**

Consideration of an exclusionary rule in other jurisdictions is instructive. In the United States, a 'good faith' exception to the exclusionary rule has been developed by the Supreme Court. In US v Leon, evidence flowing from a defective warrant was held admissible at trial in circumstances where the warrant was subsequently found to be defective. In Hudson v Michigan, which also involved a breach of the constitutional rights of the accused, the US Supreme Court went further in the relaxation of the exclusionary rule. In this case, the police were found to have knowingly breached the accused's constitutional rights: despite this, the court took the approach that, in light of improved police training and accountability and the availability of tortbased remedies, the drastic remedy of the exclusion of probative prosecution evidence was no longer justified in many cases, including the one at issue.

In *R v Shaheed*, the New Zealand Court of Appeal reviewed the exclusionary rule in most common law jurisdictions, including Ireland, and concluded that the balancing test was the ideal approach: "A careful consideration of the experience of this country and other broadly comparable jurisdictions is persuasive, in that the proper approach is to conduct a balancing exercise in which the fact that there has been a breach of the accused's guaranteed right is a very important but not necessarily determinative factor. The breach of the right would be given considerable weight ... But it might, in the end, be held to be outweighed by the accumulation of other factors. In such a case, the conscious carrying out of the balancing exercise will at least demonstrate that the right has been taken seriously."

In England, there is also discretion as to whether to admit evidence garnered on foot of a breach of the accused's constitutional rights. Section 78(1) of the English Police and Criminal Evidence Act 1984 (PACE) provides: "In any proceedings, the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

neither unintentional nor accidental, and no extraordinary excusing circumstances arose, the evidence gathered on foot of the warrant had to be automatically excluded.

# Walk the line

Perhaps the most detailed criticism of the strict exclusionary rule in Irish law came from Charleton J in the 2007 High Court case of *DPP v John Cash*. In this case, the provenance of a set of the accused's fingerprints could not be established. The fingerprints matched those at the scene of a burglary, and the issue arose as to whether this possibly improperly obtained evidence could be used in the prosecution or whether it had destroyed the legality of the arrest.

Although bound by the decision in Kenny, Charleton J emphasised that there was a balance to be struck between the competing rights of the accused to have the law observed and that of the community to have social order upheld. Specifically in relation to Kenny, he stated: "A rule which remorselessly excludes evidence obtained through an illegality occurring by a mistake does not commend itself to the proper ordering of society, which is the purpose of the criminal law. Any system of the exclusion of improperly obtained evidence must be implemented on the basis of the balancing of interests. The two most fundamental competing interests, in that regard, are those of society and the accused.

I would also place the rights of the victim in the balance."

The strict exclusionary rule as set out by Finlay CJ in Kenny has had many detractors and was also criticised directly by the majority of the Balance in the Criminal Law Review Group in their 2007 report. In this report, the group recommended that the rule be changed so that a court would have discretion to admit unconstitutionally obtained evidence, or not, having regard to the totality of the circumstances and, in particular, the rights of the victim. In support of this proposition, the group pointed, among other things, to the radical changes to the nature of policing in recent years, including the videotaping of interviews, the creation of the Garda Ombudsman Commission, and the regulation of the Garda Síochána by statute - all contributing to an environment where a strict exclusionary rule is no longer required to deter the gardaí from engaging in acts that violate constitutionally protected rights. Critics of this argument point out that the deterrence of garda misconduct was never the sole rationale of the rule and that, as enunciated by Finlay CJ, the rule was one of absolute protection that comprised both a negative deterrent as well as a positive encouragement.

It is submitted that the advances in the oversight of garda conduct in this State, although by no means perfect, are still relevant to the efficacy and suitability of the rule in



Horace enjoyed black-balling those nouveau guinea pigs

Kemy to Ireland's modern day criminal justice system. The experiences of other jurisdictions are also compelling (see panel) and both together give weight to the argument that the protection of the fundamental rights of all citizens can now equally be ensured by a discretionary exclusionary rule. This would be based on the balancing of public interests and a consideration of the entirety of circumstances, such as envisaged by Kingsmill Moore J in O'Brien, when dealing with the admissibility of illegally obtained evidence.

It is suggested that the rule acts as an unsatisfactory bar to the exercise of a balanced assessment as to whether, in all the particular circumstances of each individual case, the exclusion of such evidence is warranted and compatible with the constitutional rights, not only of the accused, but also of the victims of crime, and with the needs of society at large. ©

# **LOOK IT UP**

### Cases

- Byrne v Grey [1988] IR 31
- DPP v Damache [2012] IESC 11
- DPP v John Cash [2007] IEHC 108
- Hudson v Michigan [586 US 586 1265 2159 (2006)]
- People (AG) v O'Brien [1965] IR 142
- People (DPP) v Kenny [1990] IR 110
- R v Shaheed [2002] 2 NZLR 377
- US v Leon [468 US 897 (1984)]

# Legislation:

- Offences against the State Act 1939, section 29(1), as inserted by section 5 of the Criminal Law Act 1976
- Police and Criminal Evidence Act 1984 (England)

# Literature:

Balance in the Criminal Law Review Group (2007), *Final Report*, available at www. justice.ie/en/JELR/BalanceRpt.pdf/Files/BalanceRpt.pdf

Some work is fun and some is a grind, and it's so easy to leave the chore to wait. But what happens if, through your procrastinating, the file stays in the cabinet? Richard Lee checks the cupboard

"The only basis on

which the plaintiff

escape a finding

that the delay was

inexcusable is if he

could show that he

was personally not

responsible for the

inaction of his legal

could hope to



Richard Lee is founding partner of Lee and Sherlock Solicitors, an accredited mediator, a fellow of the Chartered Institute of Arbitrators, and a collaborative law practitioner

he recent High Court judgment of Mr Justice Sean Ryan, delivered on 20 July 2012 in *Burke v Minister for Health*, sets out a careful and detailed analysis of the case law relating to delay.

Briefly, the plaintiff's claim was struck out for delay. Court proceedings were issued in August 2005 in respect of events in 1992/1993. Nothing happened for over six years in the proceedings, and the defendants applied to the High Court to have the claim struck out.

# Two tests

Mr Justice Ryan confirmed that there are two tests to be applied. The first is whether the delay was inordinate and inexcusable; the second is whether it is in the interests of justice that the case should be dismissed.

Judge Ryan said: "The only basis on which the plaintiff could hope to escape a finding that the delay was inexcusable is if he could show that he was personally not responsible for the inaction of his legal advisors."

Mr Justice Ryan referred to Finlay P in *Rainsford v Limerick Corporation*, who stated: "Whilst the party acting through a solicitor must to an extent be vicariously liable for the activity or inactivity of his solicitor, consideration of the extent of the litigant's personal blameworthiness for delay is material to the exercise of the court's discretion." Mr Justice Ryan noted that this comment did not arise in considering excusability, but at the subsequent second stage.

On the first test, Mr Justice Ryan found the delay to be inordinate and inexcusable and went on to say:

"I think for this purpose that the plaintiff must be identified with his solicitor, or, to put it another way, the plaintiff is vicariously responsible. It is, moreover, impossible in my view to construct a valid test that could be applied in circumstances where the plaintiff does not reveal any of the transactions that took place between him and his legal advisors or does not make any case to distinguish him from their inactivity. That is the situation here. I think it applies not only to the question of inexcusability, but also

to the exercise of discretion. Since it is not open to the other parties to explore the communication or correspondence or transactions between plaintiff and his lawyer, the matter is entirely left to the plaintiff. If he does not supply a basis for distinguishing him from his lawyers, he must accept the consequences of identification of client and solicitor."

# Balance of justice

Mr Justice Ryan commented that the decided cases reveal differences of approach: "The traditional mode focuses on the conduct of the defendant and the impact of the delay on his position." He added: "The second approach looks at the plaintiff's conduct and circumstances,

on the basis that the case ought to be dismissed if there is inordinate and inexcusable delay, unless the plaintiff is able to adduce some exceptional countervailing argument or circumstance to avert that consequence.

"More recently the court itself has expressed concern in the public interest to see to the efficient dispatch of litigation. This has at its heart a conception of the court's function in litigation that is to ensure that cases are brought to expeditious conclusion." Law Society Gazette www.gazette.ie October 2012 LITIGATION 37 FAST FACTS > A recent High Court judgment sets out a careful and detailed analysis of the case law relating to delay > There are two tests to be applied: the first is whether the delay was inordinate and inexcusable; the second is whether it is in the interests of justice that the case should be dismissed > The decided cases reveal differences of approach



# **Providing the best eDiscovery and litigation** support services to you and your firm

Are your document discoveries becoming unwieldy & burdensome? How do you handle all of this electronic data? Does your eDiscovery take up more valuable time than necessary? Need a cost effective solution?

# WITH TECHNOLOGY AND GEON LEGAL SOLUTIONS' SERVICES LAWYERS CAN:

Hours

2 days

- · Quickly retrieve and review documents
- · Speedily produce a categorised affidavit of discovery list
- · Easily Search documents, transcripts, locate key facts, and information
- Simplify electronic and paper discovery
- Rapidly create on-line redactions
- Efficiently review transcripts and linked exhibits
- Remotely access and share case documents with others

# We maintain the technology to save you time and money.

GEON Legal Solutions Ltd: 96 Upper Drumcondra Road, Dublin 9, Ireland T: +353 1 857 2882 Web: www.geonlegal.com E:info@geonlegal.com



22nd & 23rd November 2012. Ashling Hotel, Dublin 8

# **SPEAKERS AND TOPICS**

# **THURSDAY**

Garrett Simons SC: A Review of the Personal Insolvency Bill 2012

John Healy BL: Recent Developments in the Formulation and Assessment of Damages Des Ryan BL: Employment Injunctions and Developments in Bullying and Harassment

Ross Aylward BL: Recent Developments in Family Law

David Staunton BL: Drink Driving and the Road Traffic Act 2010

Jarlath Ryan BL: An Update on Solicitors' Undertakings

Jarlath Ryan BL: Seeking Recovery for Mis-sold Financial Products -Knowing the remedies

Liam Moloney, Solicitor: Exaggeration and Fraud Defences in Civil Claims Patrick O'Riordan BL: An Overview of the Solicitors' Regulations (1 regulatory hour) Patrick O'Riordan BL: A Comparison of the Irish and the UK Personal Insolvency Regimes Conor O'Connell, MD TMI Training Consultants (3 managment hours): Time Management – Maximising your Productivity and Effectiveness

Date: Location: Ashling Hotel, Dublin 8

22nd and 23rd November €350 (early bird)

# **3 EASY WAYS TO BOOK**

cpd@cltireland.ie Email: Phone: 01 8788258



# **IRISH SOCIETY OF INSOLVENCY PRACTITIONERS**



The Irish Society of Insolvency Practitioners, a society comprising of accountants and solicitors working in the insolvency profession in Ireland, was established in 2004. From a small beginning membership has grown to several hundreds today.

ISIP has a number of objectives, including:

- Providing a forum for consideration and discussion of Insolvency matters.
- Promoting best practice in the area of Insolvency.
- Liaising with Government agencies and making recommendations on legislative reform governing Insolvency.
- Promoting the study and learning of Insolvency practice.

For more information about what we do please go to our website www.isip.ie

**Expertise in Challenging Times** 

### JUDGMENT ALERTER

The Law Society's library service has introduced a very useful, free service to inform solicitors of written available judgments circulated by the Courts Service.

He said that litigation is not simply a matter for the parties, and he referred to the judgment in *Gilroy v Flynn*, in which Hardiman J said: "The courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil or criminal, are determined within a reasonable time." Mr Justice Ryan commented: "This proposition has its source in article 6(1) of the *European Convention on Human Rights*."

### Supreme Court

He referred to the Supreme Court case of *Primor v Stokes Kennedy Crowley* and said: "The court set the bar high for a defendant applying for a dismiss, holding that the question of particular prejudice was central to the exercise of discretion, and it also endorsed and emphasised the importance of the role of the defendant in relation to the plaintiff's delay."

Mr Justice Ryan noted that the Supreme Court held that the principles of law relevant to an application to dismiss an action for want of prosecution were:

- That the courts had an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice so required,
- 2) That the party who sought the dismissal on the ground of delay in the prosecution of the action must establish that the delay had been inordinate and inexcusable,
- 3) That, even where the delay had been both inordinate and inexcusable, the court must exercise a judgment on whether, in its

discretion and on the facts, the balance of justice was in favour of or against the case proceeding,

- 4) That when considering this obligation, the court was entitled to take into consideration and have regard to:
  - a) The implied constitutional principles of basic fairness of procedures,
  - b) Whether the delay and consequent prejudice in the special facts of the case were such that made it unfair to the defendant to allow the action to proceed and made it just to strike out the action.
  - c) Any delay on the part of the defendant, because litigation was a two-party operation and the conduct of both parties should be looked at,
  - d) Whether any delay or conduct of the defendant amounted to acquiescence on the part of the defendant in the plaintiff's delay,
  - e) The fact that conduct by the defendant that induced the plaintiff to incur further expense in pursuing the action did not, in law, constitute an absolute bar preventing the defendant from obtaining a dismissal, but was a relevant factor to be taken into account by the court in exercising its discretion whether or not to dismiss, the weight to be attached to such conduct depending on all the circumstances of the particular case,
  - f) Whether the delay had given rise to a substantial risk that it was not possible to have a fair trial or it was likely to cause or had caused serious prejudice to the defendant,
  - g) The fact that the prejudice to the defendant referred to in (f) might arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business.

In applying the principles of law to the particular case, Mr Justice Ryan detailed ten separate aspects and, in applying *Primor*, his view was that:

- A decision to permit the case to proceed would offend the constitutional principle of fairness of procedures,
- The delay and consequent prejudice in the circumstances of the case are such that make it unfair to the defendant to allow the action to proceed and make it just to strike out the action,
- The fact that the defendants did

not apply earlier to strike out the action did not amount to acquiescence on their part in the plaintiffs delay,

- The delay caused serious prejudice to the defendant, and
- There is a substantial risk that it may not be

possible to have a fair trial because of the very long time since the events that give rise to the claim.

Arising from *Burke*, it would be prudent to review all litigation files and consider whether action is required. **6** 

# **LOOK IT UP**

### Cases:

"Arising from

Burke, it would be

litigation files and

consider whether

action is required"

prudent to review all

- Burke v Minister for Health and Children and others [2012] IEHC 304
- Gilroy v Flynn [2004] IESC 98
- Primor Plc v Stokes Kennedy Crowley [1996] 2 IR 459
- Rainsford v Limerick Corporation [1995] 2 ILRM 561

# Could You Help?

LawCare needs more volunteers. People who could care for a lawyer in need based on their own experience.

If this is you please call 00 44 1268 771333

www.lawcare.ie/volunteers



CAREER DEVELOPMENT Law Society Gazette www.gazette.ie October 2012

# Carry on ABROAD

Naturally, some solicitors are among those seeking employment abroad – but where are they going and what are their experiences? Mary Frances Fahy checks the shipping forecast

"Once you have

strong relocation

can be expensive

to set yourself up

here when you

first arrive"

package, as it

a job offer.

negotiate a



Mary Frances Fahy is principal of the Roscommon firm Fahy Neilan & Co

he recession has had a huge impact on the legal profession across the board. New graduates have a slim chance of securing employment at home and redundancies are now commonplace. Small wonder, then, that solicitors are joining the ranks of those leaving Ireland in search of employment elsewhere. So what are some of them up

# Virgin rebirth

to now?

Vanessa Lawlor, from Dublin, qualified as a solicitor in 2009. She and her husband now live on the sun-drenched British Virgin Islands (BVI) in the Caribbean.

Vanessa left Ireland in February 2010. The recession was a driving factor. "My husband got a job first and was the reason why we moved here. He was despondent with his own job situation at home and had heard that there were jobs in the Caribbean. Once he secured a job, we decided that, in order for the move to work, I, too, would need to secure employment."

Vanessa applied for job in one of the trust companies on the islands and, following a telephone interview, she was appointed. "I have had two jobs since coming to the islands. I started my current job as an associate lawyer in a local law firm in June 2011. In order to be eligible for this job, I had to get admitted in Northern Ireland."

With a job secured, Vanessa then had to apply for a work permit. This was a lengthy process and involved a lot of paperwork. "There are two stages. The first involves completing several forms and having a lot of medical tests done at home beforehand in order to submit the application via the employer. This can take

at times six to eight weeks, or often longer than three months. The permit must be granted before you can come to the islands to take up employment. The second stage occurs on arrival. You need to present yourself to immigration, the immigration clinic and the labour department in order to complete the process. This stage normally takes three to five business days. The fees vary depending on the type of employment and level of salary,

and these are typically borne by your employer."

Vanessa enjoys her work, and it is not unlike what she would be doing in Ireland. "I work in the corporate department of a small local firm. The work would be typical of any corporate and commercial work at home."

Down time, however, is a bit different to what she would be doing in Ireland. "The island has clear blue seas and white sandy beaches. We spend our weekends out on boats, island hopping, scuba diving, snorkelling, wake boarding, sailing and doing other beach/water-related activities. The weather is sunny all year round, and the temperature doesn't really fluctuate

from between 23-28C. The cost of living is expensive on the island. Rents are high and, as most foods are imported, food tends to be expensive also."

So what are the pros and cons of the move for Vanessa? "The pros are that, as a professional, you can earn a very good salary and enjoy a very good standard of living. There is a good work/life balance. It's a very social place. The weather, of course, is a huge factor. As for the cons, it is not home and it's difficult to get to. There is no direct flight. It takes at least three flights to get to Ireland, or a ferry ride and two flights. The cost of living is high, and there's a lot of red tape to the work permit



process, buying/registering a car in your name, opening a bank account, and so on."

What advice would Vanessa give to solicitors considering going to the BVI to work? "Get admitted in Northern Ireland or England and Wales while you are applying for roles, as you need to be admitted in one of these jurisdictions to take up employment as a lawyer here. Start applying for jobs or looking at agencies that specialise in offshore recruitment. Once you have a job offer,

negotiate a strong relocation package, as it can be expensive to set yourself up here when you first arrive."

# Fairytale city

The bright lights of New York and all the opportunities the city presented led Michael Moran to relocate there in 2007.

"I came to the US in 2007, right after completing my four-year law degree at Trinity College Dublin. The economic downturn

### FAST FACTS

- > Dealing with visa and work permit requirements can take a lot of time
- Many Irish graduates seeking work in the US have difficulty getting a visa, as it can be hard to find an employer willing to sponsor a foreign worker
- > Australia is the destination of choice
- > It can be very difficult to qualify to practise in Canada



# gala dinners (a) Blackhall Place

Sophisticated, elegant and glamorous, The Law Society at Blackhall place is a unique venue for your gala dinner.

Whether it's a corporate event, a product launch or an awards ceremony, our events team here at Blackhall can facilitate your every need. Our services are designed to allow you to choose how best we can help to stage your event from conception to completion.







Law Society Gazette www.gazette.ie October 2012 CAREER DEVELOPMENT 43

hadn't happened before I left and therefore was not a factor in my decision to move – although it became relevant later, particularly at times when I considered whether or not to move back to Ireland. During my final year at Trinity, I obtained a scholarship from New York University to complete my Master's there.

"Many Irish

seeking work

in the US have

this visa, as it

can be hard to

willing to go

to the expense

and hassle of

sponsoring a

foreign worker"

find an employer

difficulty getting

graduates

"During my second semester at NYU, I decided that I wanted to remain in the US after my Master's, and so began to look for jobs at some of the big Wall Street firms. Luckily, I landed on my feet when I received an offer from the corporate department of the prestigious international law firm, Davis Polk & Wardwell LLP. Once my Master's ended, I completed an eight-week intensive preparatory course for the New York State Bar Exam, which I sat in summer 2008. Fortunately, I passed the bar exam on my first attempt and became a licensed attorney admitted to both the state and federal courts in New York.

Like Vanessa, Michael had to apply for a visa in order to work in New York. "Initially, I obtained an F-1 student visa. Once I obtained a job at Davis Polk, I continued to work on the F-1 visa for one year. After that, with sponsorship from Davis Polk, I obtained a H1-B work visa. This visa is valid for three years and is then renewable for another three years, after which the visa holder must spend a year abroad or apply for permanent residence. With the support of Davis Polk, getting my H-1B visa was relatively straightforward.

"However, many Irish graduates seeking work in the US have difficulty getting this visa, as it can be hard to find an employer willing to go to the expense and hassle of sponsoring a foreign worker. There are restrictions on the amount of H-1B visas that can be issued each year. In recent years,

economic changes have meant that employers are making less H-1B applications on behalf of foreign employees."

And what for Michael are the pros and cons of living in New York? "There is a strong since of achievement when you find and maintain a successful career in New York

City. Big law firm lawyers are generally well paid and have a good lifestyle. New York City is a fun city to live in and, in the legal profession, there is a diverse variety of work on offer. New York is also nearer to Ireland than Australia, for example, and friends and family can easily visit. Working as an attorney in New York is a good stepping-stone for future career changes."

The cons: "The pace of life in New York is very fast, and work is sometimes prioritised over other things. New York is an expensive city to live in. Despite modern communication methods, you can still miss the physical presence of family and friends who live back in Ireland.

In addition, in the summer, the weather can get very hot and, in the winter, it can be very cold – but Ireland also has its own weather issues!"

What advice would Michael give to someone interested in working as a lawyer in New York? "It remains very difficult to break the New York legal market. Having post-qualification experience in Ireland and a US Master's are very helpful – but neither offer safe assurance of a job. Equally, having passed the New York Bar Exam is no guarantee of getting a job, and doing so can be an expensive endeavour.

"Getting to know and networking with Irish American attorneys who already practice in New York is a common way to get a foot in the door. I would recommend that people who are considering a move come on a visit to New York and attend some local networking events – for example, they could attend an Irish American Bar Association or IN-NYC event. This is a good way to find out how others made the transition: everyone's story of getting here is different. I would be happy to have a conversation with anyone considering a move to the US, and can be reached at michael.moran@davispolk.com."

# Wizard of Oz

Keith O'Malley, head of Career Support at the Law Society, says that, in the last three to four years, there have been large increases in the number of graduates and members of the legal profession generally emigrating to find employment.

"Australia is the destination of choice. They are going to Australia more than anywhere else. Some of them are also going to Britain and other parts of Europe. Some graduates went to Canada in very small numbers but, for some, it was a negative experience, as it is too difficult to qualify over there."

O'Malley estimates that approximately a third of those who emigrate to Australia sit the Australian Bar exams. The other two-thirds tend to look for work in areas relating to law. Others go for a short time, with a view to waiting to see if the economic situation in Ireland will improve.

He added that he could not say exactly what percentage of new graduates emigrated, because some went for short periods and came back. Others stayed in Ireland for a few years and then emigrated.

Contacting Career Support at the Law Society before considering any move is essential. They provide information packs for destinations all over the world and offer advice to anyone thinking of moving abroad. They also host information evenings and have speakers in to talk about all aspects of emigrating.

For further information, contact k.omalley@ lawsociety.ie.

# CONSULT A COLLEAGUE 01 284 8484

The Consult a Colleague helpline is available to assist every member of the profession with any problem, whether personal or professional

THE SERVICE IS COMPLETELY CONFIDENTIAL AND TOTALLY INDEPENDENT OF THE LAW SOCIETY

PEOPLE AND PLACES

Law Society Gazette www.gazette.ie October 2012

# A day at the gee-gees ends in glee for Galway's solicitors



The Galway Solicitors' Bar Association held a day at the races during the Galway Racing Festival on 30 July. Turned out in style were (*I to r)*: Ronan Murphy, Caoimhe Clancy, Lorna O'Dwyer, Sandra Divilly, Lisa Hyland and Cairbre O'Donnell



Catching up at the Galway Solicitors' Bar Association Day were (*I to r*): Liz Herron, Ciara Dooley, Valerie Corcoran, Alma Whelan, Aine Keane and Tom McHale

# Leman lawyers get on their bike for Crumlin Hospital



The winning team members claim their cup

Ten minutes was all that separated two teams of cycling solicitors from Dublin firm Leman at the end of a gruelling 14-and-a-half hour race from opposite ends of the country – Malin Head and Mizen Head – to Galway.

Eyre Square was the converging point on 8 September for both teams. Saddle-sore and weary, they were just about able to crack some smiles at the news that their plucky venture had raised over €13,000 in badly needed funds for Our Lady's Children's Hospital in Crumlin.

The *Gazette* estimates the distance from Malin Head to Eyre Square at 311km, while Mizen Head to the City of the Tribes would have been a tad longer at 320km – which might explain the time difference – though we weren't told which team won!

Leman wishes to thank everybody who donated to the worthy cause, as well as corporate sponsors QOD Ireland, ThinkBike, Donnybrook Fair, Maxol of Mespil Road and Wheelworx for their generous support.

# ON THE MOVE



Mason Hayes & Curran has appointed Deborah McHugh as partner in the firm's pensions division. Deborah is an experienced litigator with a pensions' specialism. She is a council member of the Association of Pension Lawyers in Ireland and the current chair of the Law Society's Pensions Law Sub-Committee.



Leman Solicitors has appointed Declan Tormey as partner. Declan previously worked as a management consultant with one of Ireland's leading independent ICT strategy consultancy firms. He specialises in software licensing, funding and corporate transactions.



Matthew Hall (McGuireWoods LLP) has been appointed to serve a one-year term as vice-chair of the American Bar Association Section of Antitrust Law, International Committee, effective from 1 September 2012. Matthew is a partner in the firm's Brussels office, where he focuses on EU and British competition law.

Law Society Gazette www.gazette.ie October 2012 PEOPLE AND PLACES 4

# First solicitors in the country to graduate with NUIM Master's in Mediation and Conflict Intervention

The first solicitors in the country to graduate from NUIM's MA in Mediation and Conflict Intervention are Joe Maguire (Maguire McNeice Solicitors, Bray) and Eoin O'Connor

(O'Connor McCormack Solicitors, Naas). Both graduated with first class honours.

The two-year course combines extensive study on the theory of conflict, together with the

use of mediation in specialist areas and practical learning. It includes mediation modules in family, organisational and workplace, commercial and elder mediation, as well as peace-process studies, restorative practice and conflict resolution in education. Individual feedback and coaching sessions provide a considerable amount of practical experience.

While the course lays particular emphasis on theory, specialist areas are delivered by academics and family mediators.

# **Grant Thornton 5K Corporate Challenge**



The Grant Thornton 5K
Corporate Challenge took
place on 6 September. Two
teams from the Law Society,
comprising representatives
from Education, Regulation and
Finance and Administration,
took part. Everyone performed
strongly and thoroughly enjoyed
the event.

Close to 450 teams took part in the run around the docklands. Teams from A&L Goodbody, Davy Solicitors, and Collins Crowley Solicitors were in the top five in the mixed teams categories. Congratulations to them!

A contribution from entry fees will be made to the designated charity, St Vincent de Paul.



Celebrating their graduation on 7 September 2012 are Joe Maguire and Eoin O'Connor, with Delma Sweeney (course director, who is also course director for the Mediation Diploma run in conjunction with the Law Society)



Leman Solicitors are celebrating five years – their 'wood' anniversary – in practice this year. At a special event held at the Royal Hibernian Academy during the summer to mark the occasion were (front, I to r): Catherine Cooney, Linda Hynes, Orlaith Doorley, Lisa Jackson and Maria Edgeworth (Back, I to r): Gearóid Grogan, Declan Tormey, Larry Fenelon, John Hogan, Gavin Bluett and John Walsh



# Whose copy of the Gazette are you reading?

# Why not subscribe.

I would like to subscribe to the Law Society Gazette				
I enclose my cheque for €60 (Subscribers in the Republic of Ireland)				
I enclose my cheque for €90 (Overseas subscribers)				
Please charge my Access Visa Mastercard Eurocard				
Credit card number:				
Expiry date:				
MONTH/YEAR				
Name:				
Address:				
Telephone:				
Signature:				

Law Society Gazette www.gazette.ie October 2012 PEOPLE AND PLACES 47

# DSBA Solicitors' Soccer League 2012

Darren Maher (captain, MOP) receives the trophy and bottle of bubbly from

Carol Eager (chairperson,

The Young Dublin Solicitors (YDS) hosted the final of the DSBA Solicitors' Soccer League 2012 on 6 August 2012 at Blackhall Place. Sixteen teams took part this season, with a wide mix of teams from all sectors large, mid-sized and small firms, the Legal Aid Board and even the Bar Council.

After a tightly contested league, Matheson Ormsby Prentice secured their place in the final with a win over Arthur Cox on penalties in the semi-final. Classy Birds (a mixed team) beat LK Shields 1-0 in their contest.

In the final, Classy Birds were first on the score sheet. Matheson Ormsby Prentice responded, however, with two goals in quick succession late in the first half. They held that lead to win 2-1.

This year, the YDS also awarded a 'Fair Play' award to a team nominated by their peer league members. The inaugural award went to the Bar Council.

The YDS congratulates the winners and thanks everyone who contributed to running the league, including the staff at the Law Society, the DSBA and Bill Jolley.



It was an action-packed final, with MOP (in blue and black) and Classy Birds contesting every ball



Matheson Ormsby Prentice celebrate winning the DSBA Solicitors' Soccer League 2012, sponsored by the YDS

**Sarah Carew and Sonya Donnelly.** Thomson Reuters (2011), www.roundhall.ie. ISBN: 978-1-85800-666-6. Price: €35 (incl VAT).

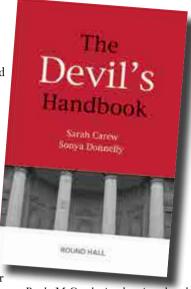
Sarah Carew and Sonya Donnelly have put together a useful handbook to help young devils to get through the year with as little pain as possible. The county registrar for Dublin and the master of the High Court have each provided guidance on what they require in their courts at the beginning of the book, which is critical information for each new devil.

The practical tips on the proofs and requirements for motions in the both the High Court and Circuit Court are excellent and will definitely ensure that all young barristers

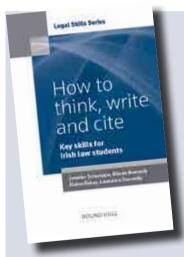
are prepared before going into court. There is an equivalent chapter for District Court criminal procedure, and the most likely applications that a devil will face in their first year.

The book also deals with the simple logistics of finding your way around the Four Courts and Criminal Courts of Justice (which, on your first day, can be quite daunting), to etiquette, managing your finances and dealing with ethical issues as they arise. There are some practical tips provided by colleagues, which emphasise the collegiality of the profession.

This work is primarily focused on Dublin-based practitioners - an additional chapter on practising on the circuit outside of Dublin would be a useful addition. This will be a useful tool for devils starting out. However, it is important to remember that it is no substitute for the practical elements of the profession and over-reliance should be avoided, as appearing in court, getting guidance from your master and, of course, from your colleagues are essential elements to completing a successful devilling year.



Paula McCarthy is a barrister based at Cork Bar Library, Courthouse Chambers, Washington Street, Cork.



How to Think, Write and Cite is a clear and well-thought-out guide to legal research and writing that will be welcomed by Irish law students, since a text of this nature was not previously available. It is easy to navigate and understand and should provide an indispensible

# How to Think, Write and Cite

Jennifer Schweppe, Rónán Kennedy, Elaine Fahey and Lawrence Donnelly. Thomson Reuters (2011), www.roundhall.ie. ISBN: 978-1-85800-631-4. Price: €25 (incl VAT).

resource to students.

The authors' opening chapter is aimed at assisting students to develop their legal reasoning skills. This is followed by guidance on how to source and analyse case law, as well as advice on how to write case notes.

Chapter 4 will be particularly useful to students in the early stages of their legal studies, as it provides an accessible explanation of the process of enacting legislation. It includes information on how to find and read legislation and how to determine whether a particular piece of legislation is in force and whether it has been amended.

This leads to chapters that

focus on legal writing and, more specifically, writing essays and answering exam questions. These encourage the student to use plain English, and include sample answers and advice on how to avoid common pitfalls. The final chapter is dedicated to providing a practical guide to legal research. This helpfully provides guidance on online research, but emphasises the continued importance of library-based investigation.

The book is filled with useful tips and advice for students. There are assignments provided within the text and on the companion website to ensure the student's understanding of

the material. A comprehensive citation guide for Irish law students has been long overdue and 'OSCOLA Ireland', which is included as an appendix, may offer the solution to this problem.

While elements of the text have the potential to become outdated over time, the companion website will allow the authors to keep the material current. In summary, this is a timely, user friendly and affordable text that no student should be without.

Fíona Conroy is a recently qualified solicitor and registered trade mark agent.

# **DX DELIVERY OF LIBRARY BOOK LOANS**

Law Society Library book loans are now delivered by DX courier service only. Parcels of books are generally too large to fit in DX boxes – the practice of the DX is to leave such parcels either on top of boxes or in an insecure area.

A number of valuable library books have been lost in the DX system over the last few months and, in an effort to prevent this recurring, the DX courier service is being used instead.

This service delivers to office addresses only and requires a signature on receipt. Delivery is next day during business hours. Next morning delivery is not guaranteed. Please allow at least two days when ordering book loans from the library.



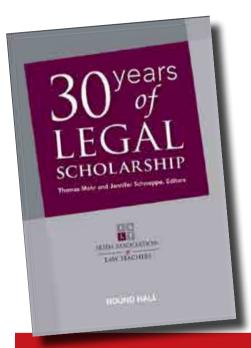
Law Society Gazette www.gazette.ie October 2012 BOOK REVIEWS 49

# Thirty Years of Legal Scholarship

Thomas Mohr and Jennifer Schweppe (eds). Irish Association of Law Teachers; Round Hall (2011), www.roundhall.ie. ISBN: 978-1-8580-062-60. Price: €145 (incl VAT).

Twenty-eight authors have collaborated in this book with the Irish Association of Law Teachers (IALT) to reflect on legal scholarship in Ireland, North and South, during the 30-year period when IALT has facilitated and harnessed that scholarship. The resulting publication achieves its editors' stated aim in analysing the changed nature of that scholarship since 1980.

The disparate nature of its content is presented in three distinct sections that sequentially review general issues in legal scholarship, progress in discreet and



familiar key areas of law, and the way in which law is taught. Each chapter stands comfortably on its own merits in a manner in which the reader can 'dip in' at any stage of the text to engage with a preferred area of interest. So, if you are keen to experience perspectives from familiar distinguished authors in both of the island's jurisdictions, you will be spoilt for choice from among the following legal topics — land, human rights, criminal, criminal evidence, tort, corporate, medical, family, constitutional, contract, European, labour and legal history.

This very accessible publication is recommended for those engaged in legal practice and research, legal education or to those who wish to become a solicitor or barrister. It provides extensive citations in comprehensive footnotes in discreet areas of law, clinical legal education, teaching law with technology, and professional legal training in Blackhall Place and Kings Inns.

It provokes debate on the merit of lawyers writing clearly, interdisciplinary scholarship, scholastic collaboration between legal academics and practitioners and 'competing' institutions. This engaging book demonstrates how lawyers across all disciplines and jurisdictions can learn from each other and be moved to continue a commitment to legal scholarship. <sup>(3)</sup>

Maura Butler is course manager at the Law Society of Ireland.

**JUST PUBLISHED** 

# New books available to borrow from the Law Society's library

- Buckley, Austin J, *Insurance Law* (2nd ed, Bloomsbury Professional, 2012)
- Buckley, Niall *et al*, *Specific Performance in Ireland* (Bloomsbury Professional, 2012)
- Gaffney, Michael, *Tax Advice for Irish Family Businesses* (Irish Tax Institute, 2011)
- Glendenning, Dympna, *Education and the Law* (2nd ed, Bloomsbury Professional, 2012)
- Guest, AG, Guest on the Law of Assignment (Sweet & Maxwell, 2012)
- Kelly, Tadgh, *Neighbours and the Law* (Clarus Press, 2012)
- Russell, Helene, Knowledge Management Handbook (Law Society of England & Wales, 2012)

# **NEW E-BOOKS AVAILABLE TO BORROW**

(E-books are available to borrow on your PC, laptop or iPad. Please contact the library for login details. For further information, view the e-book user guide on the library catalogue.)

- Brownsword, Roger et al, Law and the Technologies of the 21st Century (Cambridge UP, 2012)
- Fairgrieve, Duncan, *Public Procurement Law: Damages as an Effective Remedy* (Hart, 2011)
- IBA, The Business of Law: Strategies for Success (Global Law & Business, 2012)
- Vasudev, PM, Corporate Governance After the Financial Crisis (Edward Elgar, 2012)

THOMSON REUTERS

# **ROUND HALL**

# ONLINE LEGAL RESEARCH TRANSFORMED

A NEW, IMPROVED AND MORE POWERFUL

# ONLINE LEGAL RESEARCH

EXPERIENCE IS HERE WESTLAW IE

# **SEE IT. BELIEVE IT.**



1800 50 90 34



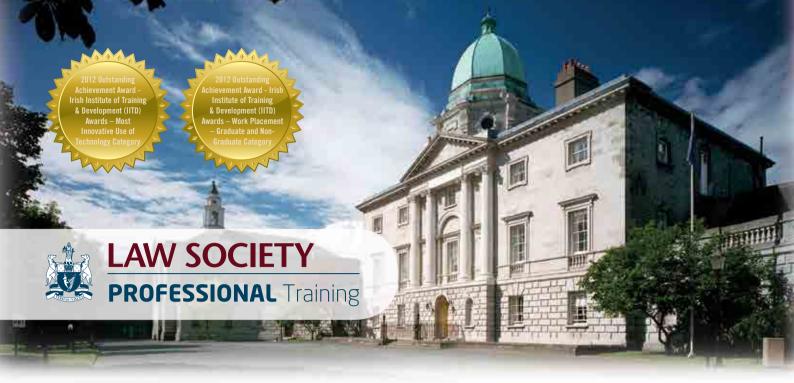
customer.service@westlaw.ie



westlaw.ie



THOMSON REUTERS





# To view our full programme visit www.lawsociety.ie/Lspt

DATE	EVENT	DISCOUNTED FEE*	FULL FEE	CPD HOURS
11 Oct	Annual Property Law Conference	€158	€210	2.5 General Plus 1 Regulatory Matters (by Group Study)
18 Oct	Managing your Third Age Client - Updates, Guidelines and Precedents	€170	€225	2.5 General Plus 1 Regulatory Matters (by Group Study)
1 Nov	Contract Law update	€135	€180	3 General (by Group Study)
23 Nov	In-house and Public Sector Annual Conference	€135	€180	2 Management & Professional Development Skills plus 1 Regulatory Matters (by Group Study)
23 Nov	Advising the Farmer – a full-day Conference and evening dinner in Kilkenny	Visit www.lawsociety.ie/ Lspt for details <b>or</b> email Lspt@lawsociety.ie		5 General Plus 1 Regulatory Matters (by Group Study)
30 Nov	Annual Family Law Conference	€180	€240	4.5 General (by Group Study)

ONLINE COURSES: To Register for any of our online programmes OR for further information email: Lspt@Lawsociety.le				
Online	Legal Costs Seminar: Recent Decisions and Pending Legislation	€72	€96	1 hour General (By eLearning)
Online	The LinkedIn Lawyer	N/A	€55	Full Management & Professional Development Skills requirement for 2012 (by eLearning)
Online	Regulatory Matters	N/A	€45	Full Regulatory Matters requirement for 2012
Online	How to create an eNewsletter	N/A	€90	Full Management & Professional Development Skills requirement for 2012 (by eLearning)
Online	Touch typing	N/A	€40	Full Management & Professional Development Skills requirement for 2012 (by eLearning)
Online	Powerpoint - All levels	N/A	€80	Full Management & Professional Development Skills requirement for 2012 (by eLearning)
Online	Microsoft Word - All Levels	N/A	€80	Full Management & Professional Development Skills requirement for 2012 (by eLearning)
Online	Excel for beginners	N/A	€80	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

# Practice notes

# Commercial leases database

# CONVEYANCING COMMITTEE

The Conveyancing Committee has been asked to provide guidance on what role, if any, solicitors should take in relation to submission of information to the Property Services Regulatory Authority for inclusion in the public database for commercial leases that the authority is to establish, pursuant to section 87 of the Property Services (Regulation) Act 2011.

The tenant under a commercial lease granted on or after 3 April 2012, or a person authorised in writing by the tenant, is required to submit particulars in specified forms to the authority at three separate points in the life of the lease: (a) on creation of the lease, (b) on rent review and (c) when the tenant ceases to have an interest in the lease, in other words, on assignment, termination or expiry of the lease. The obligation to disclose information to the authority overrides any agreements relating to confidentiality of commercial terms.

It is likely that tenant clients will ask their solicitors to submit the required forms to the authority on their behalf. If a solicitor accepts written authorisation to act on his client's behalf for this purpose, he becomes subject to the primary obligation to comply with the statutory obligations to submit the particulars to the authority in the specified form and within the relevant period.

A person who, without reasonable excuse, contravenes the provisions requiring submission of particulars to the authority is guilty of an offence and liable on summary conviction to a class A fine. Any person who makes any false or misleading statement or gives false or misleading information to the authority is guilty of an offence and liable on summary conviction to a class A fine or imprisonment for a term not exceeding 12 months or both.

### **Forms**

The forms to be submitted to the Property Services Regulatory Authority on rent review and on cesser of tenant's interest in the lease have not yet been published. The form to be submitted on creation of a lease is now available on www. npsra.ie. The extensive list of particulars required to complete the form includes information that a solicitor will not know and his client may not know. A solicitor will be relying on third parties, such as the landlord's agent, to provide these particulars.

# Risks for solicitors

Solicitors who accept their clients' authorisation to make the submissions to the authority on their behalf could expose themselves to the following risks:

- If the particulars are not forthcoming from the relevant third parties, a solicitor may fail to meet the deadline for compliance with the statutory obligations and become guilty of an offence.
- If the information received from third parties is incorrect, a solicitor could commit an offence by providing false or mislead-

ing information to the authority (although it may be possible to argue a defence of reasonable excuse where the solicitor can demonstrate the exercise of due care in obtaining the information),

• If the authorisation from the client is expressed in general or ambiguous terms, it could be interpreted as including authorisation to submit the required information on rent review and cesser of interest in addition to the information to be submitted on creation of lease. A solicitor who acts for a client taking a lease may not always be involved subsequently in the rent review process (particularly if the parties agree to maintain rent at current levels) and/or when their client's interest under the lease ceases. In such circumstances, the solicitor would not be aware that the obligation to submit information to the authority has been triggered and could be prosecuted for failing to make the submission within the relevant timeframe, drawn into any prosecution of the client for failure to make the submissions, and/or face a negligence claim from the client.

Solicitors should not expose themselves to unnecessary and inappropriate risks by routinely accepting authorisation to make submissions of particulars to the authority on behalf of their clients. The Conveyancing Committee recommends that practitioners inform clients of their obligations as tenants under the act and the time limits that apply for submission of information to the authority.

There may be particular circumstances in which practitioners wish to accept their clients' written authorisation to submit the prescribed forms to the authority. Before accepting such responsibility, practitioners should satisfy themselves that accurate information as required to complete the prescribed forms will be forthcoming within the time limits required for complying with the act. The solicitor should ensure that the client authorisation clearly states which lease or leases it relates to and whether the authorisation relates to the form to be submitted on creation of the lease only, or also extends to submission of particulars following each rent review and on cessation of the tenant's interest in the lease. @

NOTICE

# Important notice from the Office of the DPP

# **ARTICLE 40 APPLICATIONS**

When leave to bring an article 40 application has been given, contact should be made in the usual way with this office. Given the urgent nature of article 40 applications, the more notice and information that this office receives the better position we will be in to deal with the matter on the return date.

I outline below the relevant contact details for this office, including a newly dedicated fax number that has been set up for service of urgent papers in respect of article 40 applications only. Any relevant papers should be marked for the urgent attention of the Judicial Review Section and faxed to the new number outlined below.

Contact details for article 40 inquiry applications:
Judicial Review Section,
Office of the DPP, 90 North King
Street, Smithfield, Dublin 7;
tel: 01 858 8500 (office hours),
087 776 6866 (out of office hours

only); fax (article 40 applications only): 01 858 8557. Hours of business: 9.15am to 5.30pm (Monday to Thursday); 9.15am to 5.15 (Friday)

With your cooperation, it is hoped that the above arrangements will ensure that any such matters will be dealt with in a timely and appropriate manner.

Peter Mullan, Chief Prosecution Solicitor

# RIEFING

# Legislation update

# **13 August – 10 September 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 available in PDF at www.attorneygeneral.ie/esi/esi index.html

# SELECTED STATUTORY **INSTRUMENTS**

Consumer Credit Act 1995 (Section 2) (No 1) Regulations 2012

Number: SI 322/2012

Revokes the prescription of certain entities prescribed pursuant to paragraph (e) of the definition of 'credit institution' in the Consumer Credit Act 1995.

Commencement: 15/8/2012

Road Traffic Acts 1961-2011 (Fixed Charge Offences) Regulations 2012 Number: SI 294/2012

Declares offences involving the driving or use of mechanically propelled vehicles to be fixed charge offences for the purposes of the Road Traffic Act 1961, as amended, and prescribes the amount of the fixed charge for each offence.

Commencement: 3/8/2012

# One to watch: new legislation

# Gaeltacht Act 2012

The Gaeltacht Act 2012 was signed by the President on 25 July 2012. The act has two primary objectives: to provide for a new definition of the Gaeltacht and to make amendments to the structure and functions of Údarás na Gaeltachta. Under the act, designated Gaeltacht areas that are entitled to State funding will now be decided according to linguistic criteria rather than by geography, which has been the position to date.

Language planning at community level will also be essential to the new definition of the Gaeltacht. Areas located outside the existing statutory Gaeltacht will be given the opportunity to achieve statutory recognition as 'Irish language networks' or as 'Gaeltacht service towns', subject to fulfilling particular criteria.

In addition to amendments to Údarás na Gaeltachta's functions. the Gaeltacht Act 2012 gives statutory effect to the implementation of the 20-year Strategy for the Irish Language 2010-2030. The strategy promotes an integrated approach to the Irish language that is consistent with international best practice.

It also provides for a significant reduction in the number of members on the board of Údarás na Gaeltachta and dispenses with the requirement for elections to the board. @

Celebrate your Wedding at The Law Society



For further details contact:

Christina Schoeman, Sales Executive, Blackhall Place. telephone. 01 672 4918 or email. events@lawsociety.ie www.lawsociety.ie

. Wedding Package from - €85.00









# 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 Paul Madden, solicitor, practising as Paul Madden & Co, Solicitors, The Diamond, Clones, Co Monaghan, and in the matter of the *Solicitors Acts* 1954-2011 [10035/DT119/10]

Law Society of Ireland (applicant) Paul Madden (respondent solicitor)

On 21 February 2012, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

- a) Failed to honour an undertaking expeditiously or within a reasonable time on behalf of a named client to a named credit union, dated 21 September 2006,
- b) Failed to honour an undertaking expeditiously or within a reasonable time on behalf of another named client to the same credit union, dated 12 December 2006,
- c) Failed to honour an undertaking expeditiously or within a reasonable time on behalf of another named client to the same credit union, dated 31 January 2007,
- d) Failed to attend a meeting of the Complaints and Client Relations Committee held on 29 April 2010, despite being required to do so,
- e) Represented in a letter dated 30 October 2009 to the Society that he held all original title documents "with the exception of those lodged to the Property Registration Authority to effect registration", creating the misleading impression that he had lodged his application in the PRA when in fact he had only obtained a dealing number,
- f) Represented in a letter dated 19 March 2010 to the Society that he had "sent the original documents pertaining to title and ancillary reliefs to its office (com-

plainant's) on the basis that such are not required for registration" in the file of named clients when same were never received by the complainant,

g) Failed to respond satisfactorily to the Society's correspondence, and in particular to requests to furnish copies of the stamped deeds to the Society, despite repeated requests to do so.

The tribunal made the following orders:

- a) The respondent solicitor stand censured,
- b) The respondent solicitor pay the sum of €10,000 to the compensation fund,
- c) The respondent solicitor pay a contribution of €5,000 plus VAT towards the costs and outlay of the Society.

In the matter of John D Devane, a solicitor practising as John Devane, solicitor, at 7 Quinlan Street, The Crescent, Limerick, and in the matter of the Solicitors Acts 1954-2002 [7909/DT26/06]

Law Society of Ireland (applicant) John D Devane (respondent solicitor)

On 27 February 2012, 28 February 2012 and 14 May 2012, the Solicitors Disciplinary Tribunal sat to consider a case against the respondent solicitor. The tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Breached the provisions of section 68(1) of the *Solicitors* (*Amendment*) Act 1994 by failing to provide the complainant with particulars in writing of the charges for the provision of services in respect of the judicial review proceedings brought on her behalf, arising out of her trial in the Circuit Court in June/July 2003 or, in the alternative,

High Court 2011 no 99SA In the matter of Patrick J Munnelly, solicitor, formerly practising as Fair & Murtagh Solicitors at Northgate Street, Athlone, Co

Take notice that, by order of the High Court made on Monday 30

Westmeath.

an estimate of such charges or the basis on which such charges were to be made, and further by failing to provide particulars in writing of the circumstances in which the complainant might be required to pay costs to any other party or parties,

- b) Breached the provisions of section 68(6) of the *Solicitors* (Amendment) Act 1994 by failing to provide a bill of costs to the complainant in respect of the said judicial review proceedings in the manner prescribed by the section,
- c) Purported to exercise a lien over the complainant's criminal file due to outstanding costs and expenses to be paid by the complainant without having issued a bill of costs in respect of same,
- d) Failed to hand the complainant's criminal file over to her so as to enable her to defend criminal charges against her.

The tribunal ordered that the respondent solicitor:

- a) Do stand censured,
- b) Pay a sum of €7,500 to the compensation fund,
- c) Pay the whole of the costs of the Society, including witness expenses, as taxed by a taxing master of the High Court in default of agreement.

In the matter of Noel Brennan, a solicitor formerly practising as a partner in Joy Brennan & Company, Solicitors, at 1 New Quay, Clonmel, Co Tipperary, and in the matter of the Solicitors Acts 1954-2008 [4028/DT21/11 and 2012 no 62SA] Law Society of Ireland (applicant) Noel Brennan (respondent solicitor)

NOTICE: THE HIGH COURT

July 2012, it was ordered that the name of Patrick Munnelly, formerly practising in the practice of Fair & Murtagh Solicitors, Northgate Street, Athlone, Co Westmeath, be struck off the Roll of Solicitors.

John Elliot, Registrar of Solicitors, 31 August 2012

On 24 April 2012, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

- a) Improperly retained substantial fees in the client account, in breach of regulation 5(2), and avoided tax thereon until the matter was rectified after the Society's investigation in June 2007,
- b) In the case of a named client, transferred €22,097.72 to the office account in circumstances where €19,427 of the said monies was received to pay stamp duty,
- c) In the course of acting for a named client, delayed in stamping a deed on which the stamp duty was €19,427 from in or about 2001 until after the Society's investigation was completed in June 2007,
- d) Transferred to the office account, in the case of a named client, monies received for Land Registry fees,
- e) Was in serious delay in registering the transfer of properties purchased by a named client in 1997 and in 2001, in that the transfers were not registered at the time of the completion of the investigation report in June 2007
- f) Caused or allowed a deed to be updated from December 2003 to December 2005 while in the course of acting for a named client in the transfer of property to him, thereby avoiding interest and penalty on the stamp duty amount of €5,400,
- g) Improperly caused or allowed the sum of €170,800 to be misapplied from the client account in May 2003 for the benefit of a named client, when there

REGULATION Law Society Gazette www.gazette.ie October 2012

# BRIEFING

- was no money to his credit in the client account to cover the payment, in breach of regulation 7(1)(a),
- h) Failed to reimburse monies referred to at (g) above to the client account until in or about June 2006,
- i) Failed to maintain the relevant ledger account card for the named client at (a) above, in breach of regulation 12(3)(a),
- j) Maintained inaccurate listings of clients' ledger balances at the balancing dates of 30 June 2004 and 31 December 2004, which did not show the sum of €170,800 referred to at (g) above as a debit balance,
- k) Improperly caused or allowed the sum of €50,000 to be paid from the client account to a builder in October 2004, on foot of the respondent solicitor's personal liability to the builder, in breach of regulation 7(2)(b).
- Caused or allowed the updating of a deed in relation to a named client in the purchase of property, thereby avoiding interest and penalties for late stamping of the deed,
- m) Caused or allowed the updating of a deed in relation to two other named clients in the purchase of property, thereby avoiding interest and penalties for late stamping of the deed,
- n) Caused or allowed the updating of a deed in relation to another two named clients in the purchase of property, thereby avoiding interest and penalties for late stamping of the deed,
- Caused or allowed the updating of a deed in relation to another named client in the purchase of property, thereby avoiding interest and penalties for late stamping of the deed,
- p) Caused or allowed the updating of a deed in relation to another named client in the purchase of property, thereby avoiding interest and penalties for late stamping of the deed,
- q) Caused or allowed the updating of a deed in relation to another named client in the purchase of property, thereby

- avoiding interest and penalties for late stamping of the deed,
- r) Caused or allowed the updating of a deed in relation to another named client in the purchase of property, thereby avoiding interest and penalties for late stamping of the deed,
- s) Caused or allowed the updating of a deed in relation to another two named clients in the purchase of property, thereby avoiding interest and penalties for late stamping of the deed,
- t) Caused or allowed the updating of a deed in relation to another named client in the purchase of property, thereby avoiding interest and penalties for late stamping of the deed,
- u) Caused or allowed the updating of two deeds in relation to another named client in the purchase of property, thereby avoiding interest and penalties for late stamping of the deeds,
- v) Caused or allowed the updating of a deed in relation to another named client in the purchase of property, thereby avoiding interest and penalties for late stamping of the deed,
- w) Caused or allowed the updating of a deed in relation to another named client in the purchase of property, thereby avoiding interest and penalties for late stamping of the deed,
- x) In the course of acting for both a named vendor and the named purchasers, in a property transaction that closed in April 2006, was in delay in stamping the deed, which was not stamped until after the investigation was completed in June 2007,
- y) Breached regulation 7(1)(a)(iii) by transferring to the office account the balance of €3,900 on a named client ledger account without furnishing to the clients a bill of costs,
- z) Caused or allowed his reporting accountant to submit unqualified accountant's reports for the years ended 31 December 2001, 2002, 2003, and 2004, in circumstances where he knew or ought to have known that such reports should have been qualified.

The tribunal ordered that the matter go forward to the President of the High Court, and the President of the High Court on 23 July 2012 made an order striking the name of the respondent solicitor from the Roll of Solicitors and ordered that the respondent solicitor pay the costs of the Society, to be taxed in default of agreement.

In the matter of Noel Brennan, a solicitor formerly practising as a partner in Joy Brennan & Company, Solicitors, at 1 New Quay, Clonmel, Co Tipperary, and in the matter of the Solicitors Acts 1954-2008 [4028/DT22/11 and 2012 no 62SA] Law Society of Ireland (applicant) Noel Brennan (respondent solicitor)

On 24 April 2012, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he

- Failed to comply with his undertaking to Bank of Scotland (Ireland) in respect of clients identified in the proceedings,
- Failed to comply with his undertaking to Bank of Ireland Mortgage Bank in respect of clients identified in the proceedings,
- Failed to comply with his undertaking to ICS Building Society in respect of a client identified in the proceedings,
- d) Failed to comply with his undertaking to Bank of Ireland in respect of a client identified in the proceedings,
- e) Failed to comply with his undertaking to National Irish Bank in respect of a client identified in the proceedings,
- f) Failed to comply with his undertaking to Ulster Bank in respect of clients identified in the proceedings,
- g) Failed to comply with his undertaking to Allied Irish Bank in respect of clients identified in the proceedings,
- h) Failed to comply with his undertaking to Permanent TSB in respect of clients identified in the proceedings,
- i) Failed to comply with his un-

- dertaking to ACC Bank in respect of clients identified in the proceedings,
- Failed to act properly or at all in or about the purchase of property for a named client,
- k) In the course of acting for a named client in the purchase of property at Urlingford, Co Kilkenny, obtained funds from Ulster Bank on foot of an undertaking dated 16 December 2005, but failed to perfect the bank's security, in breach of his undertaking,
- I) In the course of acting for a named client in the purchase of property at Clonmel, obtained funds from Ulster Bank on foot of an undertaking dated 16 December 2005, but failed to perfect the bank's security, in breach of his undertaking,
- m) In the course of acting for a named client in the purchase of property in Clonmel, obtained funds from First Active on foot of an undertaking dated 10 June 2005, but failed to perfect the bank's security, in breach of his undertaking,
- n) In the course of acting for a named client in the purchase of property at Moangariff, obtained funds from National Irish Bank on foot of undertakings in November 2002 and April 2008, but failed to perfect the bank's security, in breach of his undertaking,
- o) In the course of acting for a named client in the purchase of a property in Clonmel, obtained funds from Permanent TSB on foot of an undertaking dated 5 June 2007, but failed to perfect the bank's security, in breach of his undertaking,
- p) In the course of acting for a named client in the purchase of property in Clonmel, obtained funds from ACC Bank on foot of an undertaking, but failed to perfect the bank's security, in breach of his undertaking,
- q) In the course of acting for a named client in the purchase of a property in Stillorgan, obtained funds from Bank of Ireland Mortgage Bank on foot of an undertaking, but failed to

Law Society Gazette www.gazette.ie October 2012 REGULATION 55

BRIEFING

perfect the bank's security, in breach of his undertaking,

- r) In the course of acting for a named client in the purchase of a property in Pembroke Square, obtained funds from Bank of Ireland on foot of an undertaking, but failed to perfect the bank's security, in breach of his undertaking,
- s) In the course of acting for a named client in the purchase of a named property, obtained funds from Bank of Ireland Mortgage Bank on foot of

- an undertaking, but failed to perfect the bank's security, in breach of his undertaking,
- t) In the course of acting for a named client in the purchase of a named property, obtained funds from Ulster Bank on foot of an undertaking, but failed to perfect the bank's security, in breach of his undertaking,
- u) In the course of acting for named clients in the purchase of a property at Burgess Court, obtained funds from IIB Homeloans on foot of an undertak-

- ing, but failed to perfect the bank's security, in breach of his undertaking,
- v) In the course of acting for a named client in the purchase of a property at Fitton Street, obtained funds from Bank of Ireland on foot of an undertaking, but failed to perfect the bank's security, in breach of his undertaking,
- w) In the course of acting in respect of named clients in the purchase of a property at Kilsheelin, obtained funds from National

Irish Bank on foot of an undertaking, but failed to perfect the bank's security, in breach of his undertaking.

The tribunal ordered that the matter go forward to the President of the High Court, and the President of the High Court on 23 July 2012 made an order striking the name of the respondent solicitor from the Roll of Solicitors and ordered that the respondent solicitor pay the costs of the Law Society to be taxed in default of agreement. <sup>6</sup>

# **Social Media for Solicitors – Part 2**

# CREATING AND UPDATING YOUR OWN WORDPRESS WEBSITE



The Technology Committee is building on the success of its recent seminars and workshop on social media with an intensive 'blogging' workshop to take place at the Education Centre, Blackhall Place on Wednesday, 10 October. The workshop will provide interactive training in creating and maintaining a blog as a potential key business tool for solicitors. A blog can be used as an additional information and business resource or as a potential substitute for a full website.

Blogs are easy to maintain and manage, and the workshop will concentrate on the key requirements to get set up and take the first steps. A blog can facilitate improved client communications, identify niche practice areas and generally improve the market presence of practitioners. Blogs allow for easy and timely circulation of comment, information or opinions.

We are delighted to welcome back Martin Molony, lecturer in communication, journalism and public relations in DCU, and consultant in the corporate and voluntary sectors as the facilitator for this workshop. Martin has collaborated with the committee in a number of our presentations and workshops in this area.

# Law Society Technology Committee seminar

INIL	RACTIVE WORKSHOP		
			В
	IT Lab, Education Centre, Law Socie Blackhall Place, Dublin 7 Wednesday 10 October 2012, 6pm – 8.45pm. Fee €100 Maxium 20 participants	ty,	
	3 hours CPD (management and professional development Skills)		

# SOCIAL MEDIA FOR SOLICITORS – PART 2: CREATING AND UPDATING YOUR OWN WORDPRESS SITE

VENUE: IT Lab, Education Centre, Law Society, Blackhall Place, Dublin 7. TIME: 6pm to 8.45pm. DATE: Wednesday 10 October 2012. FEE: €100

Name:	Firm:	
Address:		
DX:	Phone:	
Please reserve	place(s) for me on the above course. I enclose cheque for $\ensuremath{\in}$	
Signature:		

JUSTIS UPDATE Law Society Gazette www.gazette.ie October 2012

# Justis update

News of Irish case law information and legislation is available from FirstLaw's current awareness service on www.justis.com
Compiled by Rory Campbell

### **AIRCRAFT**



# Leasing

Plaintiff leasing three helicopters and medical kit to first defendant – first defendant

sub-leasing helicopters to second defendant – plaintiff alleging default in payment of rental fees.

The plaintiff had been formed to facilitate the leasing of aircraft. The plaintiff had agreed to lease three helicopters and a medical kit to the first defendant. The first defendant in turn had subleased the items to the second defendant. The plaintiff alleged that there had been substantial default in the payment of rent under the leases, totalling €3,195,000. The plaintiff now sought liquidated damages and relief in respect of the items and applied for summary judgment or, in the alternative, injunctive relief.

Kelly J held that the first issue to be determined was whether the plaintiff could seek summary judgment for non-liquidated sums. In the court's view, there was no reason why a defendant without any defence could not be subject to summary judgment for non-liquidated sums, given that that remedy existed for liquidated sums. This power was derived from the inherent jurisdiction of the court, notwithstanding any express provision in the *Rules of the Superior Courts*.

The court considered that plaintiffs should have the ability to seek summary judgment regardless of the type of proceedings, where it could be shown that the defence lacked any reasonable prospect of success. This view was supported by the fact the instant case was in the Commercial List and the powers available to judges hearing cases in that list.

Having established that summary judgment was available as a remedy in the instant case, the court granted summary judgment in respect of the liquidated damages aspect and allowed conditional

leave to defend the remainder of the claim.

Abbey International Finance Ltd v Point Ireland Helicopters Ltd & Another, High Court, 7/7/2012

# CONSTRUCTION



# Building contract

Third party agreeing to construct office for plaintiff – third party enter-

ing into subcontract for certain works – dispute between parties – whether conclusion to arbitration prevents further action against third party by plaintiff – section 17 of the Civil Liability Act 1961.

The plaintiff had contracted with the third party for the construction of an office building in a large industrial estate in Dublin. The defendant was the plaintiff's architect, and the third party had subcontracted elements of the construction to SIAC Architectural Limited.

The defendant considered that the work carried out by SIAC was substandard and decertificated a sum of fees from the monies due to SIAC by the third party. As the third party had already paid these sums to SIAC, they were effectively out of pocket. The third party had tried to sue SIAC, but the application for summary judgment was refused in 2003.

The plaintiff had, in the same period, issued his own proceedings against SIAC. In an effort to resolve the matter, without prejudice discussions took place but, in the absence of agreement, the third party referred the matter to arbitration. The plaintiff having agreed to pay the third party the monies outstanding, the parties now confined the arbitration to interest and costs. The arbitrator having determined the matter on those issues, the third party now sought to prevent the plaintiff disputing them again in this claim. The plaintiff had sued the defendant, who joined

the third party to the claim.

Hedigan I held that the building contract stated that any party could refer "any dispute or difference" to arbitration upon giving notice. The plaintiff had failed to concede the third party's claims in the notice to refer, and a number of issues were to be determined by the arbitrator. The plaintiff had failed to contest the matter and later agreed to concede his claim, and by ordinary inference could be said to have abandoned any relevant submissions or arguments. Allied Marine Transport Limited v Vale De Rio Doce Navegacao (The Leonidas D) ([1985] 1 WLR 925) applied.

The third party had made submissions on the rule set out in Henderson v Henderson ([1843] 3 Hare 100). That rule prevented parties reopening matters, both express and ancillary, that formed a part of an earlier compromise. In the instant case, the plaintiff had shown no reason why this rule should not be applied. Considering the effect of section 17 of the Civil Liability Act 1961, the compromise of the arbitration proceedings was a complete accord between the plaintiff and the third party, and relief would be granted to the third party to that effect. Henderson v Henderson applied.

Arnold v Mitchell O'Donoghue and Another, High Court, 4/9/2012

# **DEFAMATION**



# Unincorporated association

Golf club – subcommittee of club – plaintiff holding membership of

club – plaintiff complaining his handicap had been reduced unfairly many times – allegation that notice sent to plaintiff defamed him.

The plaintiff was a longstanding member of the first defendant. The first defendant, an unincorporated association, had a number of subcommittees, including a handicap subcommittee. The plaintiff had submitted a large number of score cards between the summers of 2002 to 2003, which had in turn had prompted a number of adjustments to his handicap.

This led to a dispute that culminated in the plaintiff receiving a sealed certificate detailing the handicap allocated to him, endorsed with the phrase 'general play (handicap building)'. The plaintiff submitted that the use of the phrase was defamatory of him and imputed he was a cheat. The defendants denied this.

Herbert J held that the court was satisfied the phrase 'handicap building' could be capable of being defamatory, and this would be accepted for the purpose of the instant case. However, the fact that the phrase could be defamatory did not mean automatically that the plaintiff had been defamed. On the assumption that the phrase had been published or communicated to the IT company who installed the first defendant's handicap software, the issue was whether the publication was protected by qualified privilege. The court accepted this was the case because of the genuine and reasonable interest in making the communication. As such, the plaintiff had to prove malice or an improper motive for making the communication before the privilege could be challenged.

The plaintiff alleged that the third defendant was motivated by malice or a similar motive against the plaintiff, and this led to the third defendant forming a 'conspiracy' of sorts. However, having considered the evidence in the matter, the court was satisfied that the plaintiff had failed to prove malice on the part of the third defendant, or indeed recklessness in publishing the phrase. The court was also satisfied that a number of related letters were not defamatory, or were protected by qualified privilege. The plaintiff had further failed to prove conspiracy on the part of the

defendants, and the claim would be dismissed fully.

Talbot v Hermitage Golf Club & Others, High Court, 27/7/2012

# **ENVIRONMENT**



# Genetically modified crops Permission to release crops grant-

ed by respondent challenge to

decision – application for costs.

The respondent had exercised the powers available to it under the Genetically Modified Organisms (Deliberate Release) Regulations 2003 to permit the release of a genetically modified potato crop. The applicant sought to challenge this decision within the time frame specified by statute and applied for a cost order pursuant to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998 (Aarbus Convention), recently ratified by the State in June 2012.

Hogan I held that the mere ratification of a convention did not in itself incorporate the convention into domestic law. Firstly, the date of commencement of the Aarbus Convention was stated to be 90 days after the deposit of a notice of ratification. In the State's case, commencement therefore would not be until October 2012. Secondly, the convention had not been approved by the Oireachtas as part of domestic law, as required constitutionally. The convention could only apply therefore insofar as permitted by EU law.

The court considered the relevant directives and case law and stated that costs orders were permitted in such applications as the present, provided they were "not prohibitively expensive." Clarification of the meaning of that phrase had been requested by the English Supreme Court. Pending that clarification, and as the other parties in the case had not been fully heard, the court refused the order sought by the applicant. Case C-427/07, Commission v Ireland)([2009] ECR I-6277) and R (Edwards) v Environmental Agency ([2010] UKSC 57) considered.

October 2012

NO2GM Ltd v Environmental Protection Agency & Another. High Court, 28/8/2012

# Genetically modified crops

Release of variant - challenge to decision of respondent to approve release.

The respondent had approved the release of a genetically modified form of potato crop in Co Carlow. The applicant, an organic farmer, sought to challenge the decision of the respondent to approve the release. The applicant sought to have the court award a costs order pursuant to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998 (Aarbus Convention), recently ratified by the State in June 2012.

Hogan J held that, as per the similar case of NO2GM Ltd v Environmental Protection Agency & Another ([2012] IEHC 369), heard by Hogan J also, a mere ratification of the Aarbus Convention did not mean the provisions of that convention took effect in domestic law. Until full incorporation after commencement of the provisions and approval by the Oireachtas, the Aarhus Convention could only apply insofar as permitted by EU law.

As the case was similar to the decision in NO2GM Ltd, the court would refuse the order sought by the applicant. Case C-427/07, Commission v Ireland ([2009] ECR I-6277) and R (Edwards) v Environmental Agency ([2010] UKSC 57) considered.

O'Connor v Environmental Protection Agency & Another, High Court, 28/8/2012

# **PARTNERSHIP**



# **Partnership** agreement

Medical practitioners - modified agreement plaintiff alleging

the defendant had failed to effect clause requiring arrangement of life assurance and health insurance for plaintiff's now deceased busband.

The plaintiff's husband ('the deceased') and the original defendant were medical practitioners who, in 1994, agreed to form a partnership and arranged a partnership agreement to that effect. Part of that agreement required a payment by the deceased in consideration for the goodwill the original defendant brought to the partnership. The agreement was later modified to change the payment schedule of the consideration and to reflect a requirement demanded by the local health board.

The agreement also contained clauses requiring the original defendant to effect life insurance, and to also provide health insurance, for the deceased. The plaintiff contended, as the deceased's personal representative, that the original defendant had failed to arrange these matters. As the original defendant had also passed away after the issue of the claim, his wife and son now acted as defendants.

The plaintiff sought damages for the breach of the agreement, together with payment of outstanding sums and interest due to the deceased under the agreement. The defendants in turn sought final payment of the outstanding consideration, together with sums they alleged would have been due to the original defendant if life insurance had been effected. The court would consider these issues in turn.

Laffoy J held that, firstly, it was clear from the agreement that the duty to effect life insurance fell on the original defendant. Notwithstanding the claims that the deceased had not cooperated in this, there was a clear breach of the agreement. Therefore, the sum claimed as damages for the breach, together with the sums outstanding to the deceased in respect of the partnership, were payable.

In turn, it was clear that the defendants could not counterclaim for sums they alleged were due if the insurance had been arranged as required of the original defendant. In respect of the outstanding consideration, the consideration was a premium that the deceased had arranged to pay for entry into the partnership. While the original defendant had agreed to modify the payment schedule, he had not agreed to forgo the balance of the premium in the event of the deceased's death. As such, the balance was payable to the defendants.

Cronin v Kehoe and Another, High Court, 22/8/2012 @

# PREMISES TO LET

**Dublin 10 area** First floor circa 80sq.meters Available for viewing immediately Will be furnished as required by tenant

Call 087 2242582

# SUMMONS SERVERS IRELAND

Enniscorthy, Wexford.

Retired Officer of An Garda Siochana, served 30vrs. Contact details: 053/9235062: 087/6179428

www.summonsserversireland.ie

# Eurlegal

Edited by TP Kennedy, Director of Education

# EU court rulings on gambling and the 'undertaking' concept

his article examines two recent decisions of the CJEU in the areas of freedom to provide services and competition. The first relates to whether a national law restricting gambling infringes the freedom to provide services. The second relates to whether a state entity can be considered to be an 'undertaking' when it maintains a register of company information and makes that information available for a charge.

In the ruling on Case C-176/11 HIT, handed down on 12 July 2012, the CJEU demonstrated that it remains tolerant of national rules limiting gambling services, in the absence of harmonised EU legislation. The ruling followed a preliminary reference under article 267 of the Treaty on the Functioning of the European Union (TFEU) on whether Austrian legislation restricting advertising by gambling establishments in other member states was compatible with the freedom to provide services. Article 56 TFEU provides that restrictions on freedom to provide services within the union shall be prohibited in respect of nationals of member states who are established in a member state other than that of the person for whom the services are intended.

# Games of chance

HIT and HIT LARIX, two public limited companies in Slovenia, hold licences in Slovenia to operate certain games of chance there. Austrian legislation requires that any gambling establishments located in member states outside Austria obtain permission to advertise in Austria, and a condition for granting the permission is that the laws of the member state in which the establishment operated at least correspond to the Austrian provisions in relation to the protection of gamblers. The companies concerned

applied for permits; however, their applications were rejected on the grounds that they had not proved that the Slovenian legal provisions had a comparable level of protection for gamblers.

HIT and HIT LARIX brought an action against those decisions, contending that they were in breach of the right of freedom to provide services, and the Administrative Court in Austria referred the issue to the CJEU. The CJEU agreed that the legislation in question constitutes a restriction on the freedom to provide services, since it impedes the access of consumers resident in Austria to the services offered in casinos located in another member state. The restriction was the requirement that an operator of a casino prove that the laws relating to protection of gamblers in the member state in which it operates at least correspond to the Austrian law.

The CJEU noted the necessity to consider the extent to which the restriction may be allowed as a derogation expressly provided for by article 52 of the TFEU or justified, in accordance with case law of the CJEU, by overriding reasons in the public interest. It noted that it is clear from its case law that restrictions on gaming activities may be justified by overriding reasons in the public interest, such as consumer protection and the prevention of both fraud and incitement to squander money on gambling. It is not in dispute that the national legislation has this objective. In the absence of harmonisation in the field, it is for each member state to determine in those areas, in accordance with its own scale of values, what is required to protect the interests in question. The mere fact that a member state has opted for a system of protection that differs from that adopted by another member state cannot affect the assessment of the proportionality of the provisions enacted to that end.

# **Greater risks**

The CJEU noted that the application of Austria's strict rules had resulted in a significant reduction in the number of gamblers. In the absence of the contested condition, gamblers would be further encouraged to cross the border and to incur greater risks in casinos located in other member states where similar regulatory guarantees of protection in some cases do not exist.

The CJEU ruled that the legislation in question does not go beyond what is necessary if it only requires that the legislation in the other member state ensures a level of protection equivalent to that which it guarantees itself; however, the position would be different if it required that the rules in the other member state be identical or if it imposed rules not directly related to protection against the risks of gaming.

It is interesting to note that the CJEU's decision differed from the opinion of Advocate General Mazák. While Advocate General Mazák was also of the view that the Austrian legislation constitutes an obstacle to the freedom to provide services and that "the obstacle does indeed pursue an objective of consumer protection", he differed as to whether such an objective was justified in the circumstances. He indicated that the CJEU's case law concerning justification required that the obstacle must be suitable for attaining the objective pursued, must not go beyond what is necessary to attain that objective, and must not be applied in a discriminatory way.

### Prior authorisation

In the advocate general's view, the system of prior authorisation goes beyond what is necessary to achieve the objective of protecting consumers for two reasons: firstly, the difficulties of comparing the level of protection of gamblers in different legal systems may result in a total prohibition of advertising of foreign casinos; secondly, the system of prior authorisation would lead to discrimination based on the origin of the applicant, given that applicants are assessed on the basis of the member state in which the casino is established and, more specifically, its legal system. This would lead to Austrian authorities gradually compiling a list of member states whose legal systems do not satisfy the condition of an equivalent level of protection for gamblers, with subsequent applicants being judged solely on the basis of the member state in which the casino is established.

Unfortunately, the advocate general did not elaborate further on his arguments. Given that the CIEU did not refer to the advocate general's opinion in its ruling and instead proceeded to consider that the Austrian legislation constituted a justifiable restriction, it is difficult to draw firm conclusions as to the rationale behind the CJEU's thinking. It is interesting to note that in a previous preliminary reference ruling in Case C-64/08, Engelmann, also relating to Austria's legislation concerning games of chance, the CJEU followed Advocate General Mazák's opinion ruling that the categorical exclusion of operators whose seat is in another member state was disproportionate, as it goes beyond what is necessary to pursue that objective of combating crime.

### Meaning of an 'undertaking'

A further articulation on the meaning of an 'undertaking' was set out in a CJEU ruling on Case C-138/11, *Compass-Datenbank*, also delivered on 12 July 2012. The

# BRIEFING

judgment considered whether the state could be considered to be acting as an undertaking when a public authority charged by the state with maintaining a registry of company information makes that data available for a charge. The CIEU conducted a balancing exercise to ascertain whether the entity acted as an undertaking. On the one hand, it considered that factors of reliance on intellectual property rights and charging for access to the information protected by these rights. Weighing against these factors, it considered whether the activities could be considered as the exercise of public powers and whether the remuneration involved could be considered as economic. Its conclusion was that the public authority was not acting as an undertaking.

This ruling was the result of a preliminary reference from the Oberster Gerichtshof, the Supreme Court of Austria, on whether a public authority whose activity consists of storing data on a public register of businesses and of permitting individuals to search and obtain print-outs of this data in return for payment constitutes an 'undertaking' within the meaning of article 102 of the TFEU. If so, the referring court asked whether the essential facilities doctrine applies.

Under Austrian law, businesses are required to place certain information on the undertakings register (Firmenbuchgesetz), which also must be made available to the public. This includes the names of the undertakings, their legal form, their seat, an indication of their area of activity, their branches, the names, dates of birth and so on. Public access to the undertakings register by electronic means is operated through billing agencies, which levy a statutory fee (which is forwarded to the state) and charge remuneration for their services. These establish an internet connection between the undertakings register and the customer. They are prohibited from re-using the undertakings register data or from altering the content or presenta-



tion of the information that has been transmitted.

# **Essential facilities**

Compass-Datenbank is a company that operates a trade and industry database in Austria. This database contains a range of information drawing from the undertakings register and supplemented by its own research. In 2001, Austria instituted proceedings against Compass-Datenbank to prohibit it from using data from the undertakings register and reproducing or transmitting it to third parties. For its part, Compass-Datenbank argued that it has a right to provide a service that builds upon that data that is already accessible to everybody through the billing agencies, and that its business model requires it to have access to daily updates of this information for a fee that is lower than the statutory fee payable through billing agencies. Its argument was that Austria acted as an undertaking that had a dominant position on the market within the meaning of article 102 of the TFEU and was obliged to provide it with data from the Firmenbuch, applying the essential facilities doctrine.

The CJEU repeated some of its long-standing utterances in this area of law: that for the purposes of competition law, an undertaking is any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed. It noted that it is clear from established case

law that any activity consisting in offering goods and services on a given market is an economic activity and that, by contrast, activities that fall within the exercise of public powers are not of an economic nature justifying the application of the TFEU rules of competition. In addition, it noted its case law findings that a legal entity, including a public entity, may be regarded as an undertaking in relation to only part of its activities, if the activities that form that part must be classified as economic activities. If the economic activity cannot be separated from the exercise of its public powers, the activities exercised by that entity as a whole remain activities connected with the exercise of those public powers.

# **Public powers**

Taking the entirety of its case law into account, it considered that the activity of data collection, on the basis of a statutory obligation on undertakings to disclose that data with powers of enforcement related thereto, is an activity that falls within the exercise of public powers and is not an economic activity. It considered that the maintenance of such a database and making the data available to the public are activities that cannot be separated from the activity of collection of the data, since the collection of the data would be rendered largely useless in the absence of these other activities. Applying the principles from earlier case law regarding whether activities can be classified as separate economic activities, it noted that, to the extent that the fees or payments due for the making available to the public of such information are not laid down directly or indirectly by the entity concerned, but are provided for by law, the charging of such remuneration can be regarded as inseparable for that making available of data.

The CIEU was keen to emphasise the point, also made by the advocate general, that the activities of the billing agencies were not relevant when considering whether Austria operated as an undertaking in this instance. Although the billing agencies may charge the final client with a supplement of a reasonable amount over and above the statutory charges, the activities of Austria must not be confused with those of the billing agencies, and it is the activities of Austria that are at issue. As the billing agencies are selected on the basis of qualitative criteria and not on the basis of a financial tender, the only remuneration that the public authorities receive is constituted by the statutory charges.

The CJEU held that a public entity that creates a database and then relies on intellectual property rights with the aim of protecting the data does not act, by reason of that fact alone, as an undertaking.

Although there is remuneration involved, the CJEU honed in on whether that remuneration is of such a nature as to enable the activity concerned to be classified as economic. It said that, to the extent that the remuneration for the making available of data is limited and regarded as inseparable from it, reliance on intellectual property rights in order to protect that data and, in particular, to prevent its re-use, cannot be considered to be an economic activity. As the public authority concerned is not an undertaking, there was no need to answer to question regarding essential facilities.

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



Diploma Programme

Autumn 2012 – Spring 2013



Law Society of Ireland Diploma Programme winner of Law School of the Year award (Irish Law Awards 2012)



AUTUMN PROGRAMME 2012	START DATE	FEES *
Diploma in Finance Law	Monday 1 October	€2,150
Diploma in In-House Practice	Saturday 6 October	€2,150
Diploma in Intellectual Property and Information Technology Law (incl iPad2)	Saturday 6 October	€2,490
Diploma in Investment Funds (new)	Wednesday 10 October	€2,150
Diploma in Corporate Law and Governance	Wednesday 17 October	€2,150
Diploma in Aviation Leasing and Finance (new)	Tuesday 23 October	€2,150
Certificate in Banking Law and Practice	Thursday 11 October	€1,160
Certificate in Commercial Contracts (incl iPad2)	Saturday 13 October	€1,510
Certificate in Trade Mark Law	Monday 5 November	€1,160**
Certificate in Child Law (new)	Tuesday 6 November	€1,160
Diploma in Legal French	Wednesday 17 October	€1,600
Certificate in Legal German	Tuesday 18 September	€1,120

<sup>\*</sup> Fees quoted are for solicitors. Non-legal personnel are subject to an application process and supplemental fee

Please note discounts are available for trainees, out-of-work solicitors and multiple applications.



# For further information:

W: www.lawsociety.ie/diplomas E: diplomateam@lawsociety.ie

**P:** 01 672 4802

<sup>\*\*</sup> Optional fee of €1,490 to include iPad2

# BRIEFIN

# Recent developments in European law

### **FREE MOVEMENT**

Case C-542/09, Commission v Netherlands, 14 June 2012



In the Netherlands, funding for studies is available to students who are between 18

and 29 years old and have Dutch nationality or the nationality of any other EU member state. To receive funding for higher education pursued outside the Netherlands, students must be eligible for funding for higher education in the Netherlands and must also have resided lawfully in the Netherlands for at least three out of the six years preceding enrolment at an educational establishment abroad. This condition applies irrespective of the student's nationality.

The commission brought an action before the CJEU, arguing that this requirement indirectly discriminated against migrant workers and members of their family. The court noted that, under article 45 of the Treaty on the Functioning of the European Union, freedom of movement for workers is to entail the abolition of any discrimination based on nationality between workers of the member states as regards employment, remuneration and other conditions of work and employment. Regulation 1612/68 also provides that a worker who is a national of a member state is to enjoy, in the territory of another member state, the same social and tax advantages as national workers. That applies equally to migrant workers residing in a host member state and frontier workers employed in that member state while residing in another.

Assistance granted for maintenance and education in order to pursue university studies evidenced by a professional qualification is a social advantage for the purposes of Regulation 1612/68. For the migrant worker, study finance granted by a member state to the children of workers is a social advantage for the purposes of that regulation, where the worker continues to support the child.

A measure that requires a specified period of residence operates to the detriment of migrant workers and frontier workers who are nationals of other member states. insofar as non-residents are usually non-nationals. The three out of six years' residence requirement creates inequality in treatment as between Dutch workers and migrant workers residing in the Netherlands, or employed there as frontier workers. Such an inequality is unlawful indirect discrimination unless it is objectively justified.

The court rejected the argument of the Netherlands that the residence requirement is necessary in order to avoid an unreasonable financial burden that could have consequences for the very existence of the assistance scheme. The objective of avoiding an unreasonable financial burden cannot be regarded as an overriding reason relating to the public interest capable of justifying the unequal treatment between Dutch workers and workers from other member states.

The Netherlands argued that the national legislation is intended to encourage students to pursue studies outside the Netherlands. The requirement ensures that the portable funding is available solely to those students, who, without it, would pursue their education in the Netherlands.

The court noted that the objective of encouraging student mobility is in the public interest and is capable to justifying a restriction on the principle of non-discrimination on grounds of nationality.

Legislation that is liable to restrict a fundamental freedom guaranteed by the treaty, such as freedom of movement for workers, can be justified only if it is appropriate for attaining the legitimate objective pursued and does not go beyond what is necessary in order to attain that objective. In this context, the Netherlands claims that the legislation has the merit of encouraging student mobility.

The court acknowledged that the residence requirement is appropriate for the objective of promoting student mobility. Nevertheless, the Netherlands should have shown why they opted for the three out of six years' rule, prioritising length of residence to the exclusion of all other representative elements. By requiring a specific period of residence, the rule accords most importance to an element that is not necessarily the sole element representative of the actual degree of attachment between the concerned party and that member state.

As a result, the court held that the Netherlands has failed to establish that the residence requirement does not go beyond what is necessary to attain the objective sought by that legislation. @



# **LEGAL** vacancies

For Law Society members to advertise for all their legal staff requirements, not just qualified solicitors

Visit the employment section on the Law Society website, www.lawsociety.ie, to place an ad or contact employer support by email on employersupport@lawsociety.ie or tel: 01 672 4891. You can also log in to the members' area to view the job seekers

register.



62 PROFESSIONAL NOTICES Law Society Gazette www.gazette.ie October 2012

# NOTICES OTICES

### WILLS

Banville, Mary Bridget (deceased), formerly of 42 Davitt Road South, Wexford, and late of Lawson House Nursing Home, New Ross, Co Wexford. Would any person having knowledge of a will made by the above-named deceased, who died on 14 February 2012, please contact Stone Solicitors, 14 North Main Street, Wexford; tel: 00353 5391 46144, fax: 00353 5391 46099, email: info@stonelaw.ie

Keogh, Mary (deceased), late of 1 Marian Terrace, Hackettstown, Co Carlow, and with previous addresses at Kilteegan, Co Wicklow and Kilcarey, Hackettstown, Co Carlow, who died on 30 August 2012. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact O'Connor McCormack, Solicitors, 16 South Main Street, Naas, Co Kildare; tel: 045 875 333, email: info@oconnormccormack.ie

Neilan, Maura (deceased), late of 137 Sycamore Avenue, Rathbane, Limerick. Would any person having knowledge of a will made by the above-named deceased, who died on 6 July 2012, please contact the office of Ted McCarthy & Co, Wyvern House, 2 Newenham Street, Limerick; tel: 061 461 024, email: reception@tedmccarthy.com

Tansey, Margaret (deceased), late of 60 Coolamber Drive, Rathcoole, Co Dublin, formerly of 9 Kenilworth Park, Harold's Cross,

# **LONDON SOLICITORS**

will be pleased to advise on UK matters and undertake agency work.

We handle probate, litigation, matrimonial and property. **Cubism Law** (ref **Angela Robbins**), 116-118 Chancery Lane, London WC2A 1PP.

DX 477 London/Chancery Lane. Tel: 44 207 831 0101. Fax: 44 207 831 0001.

Email: angela.robbins@ cubismlaw.com.

# **Professional notice rates**

RATES IN THE PROFESSIONAL NOTICES SECTION ARE AS FOLLOWS:

- Wills €147 (incl VAT at 23%)
- Title deeds €294 per deed (incl VAT at 23%)
- Employment/miscellaneous €147 (incl VAT at 23%)

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

ALL NOTICES MUST BE PAID FOR PRIOR TO PUBLICATION. CHEQUES SHOULD BE MADE PAYABLE TO LAW SOCIETY OF IRELAND. Deadline for November *Gazette*: 17 Oct 2012. For further information, contact the *Gazette* office on tel: 01 672 4828 (fax: 01 672 4877)

Dublin 6, who died on 26 November 2011. Would any person having knowledge of any will executed by the above-named deceased please contact Maire Teahan & Co, Solicitors, Main Street, Rathcoole, Co Dublin; tel: 01 458 0035, fax: 01 450 8483, email: maireteahan@eircom.net

### **MISCELLANEOUS**

Sole practitioner planning to retire and wishes to dispose of their practice. The practice is located within 30 miles of Dublin in an expanding area. Currently fee income is split between litigation (both CC and HC) conveyancing, probate and family law. In addition, there is a well-established DC criminal practice. The owner is interested in remaining as a consultant for a period of time to help with the transition to the new

owner. If interested, please contact box no 10/12/01 in the first instance, indicating any particular issues you would like further information on before being furnished with details of the principal, location, accounts and so on. Enquiries from principals only considered

### **TITLE DEEDS**

In the matter of the Landlord and Tenant Acts 1967-2005; in the matter of the Landlord and Tenant (No 2) (Ground Rents) Act 1978 (as amended); in the matter of an application by Leydens Limited; in the matter of the premises situate at 152-156 Richmond Road, Fairview in the city of Dublin

Take notice that any person having an interest in the freehold estate or any intermediate interests in the property being:

> Matt Barnes LAND REGISTRY MAPPING SERVICE

from €149 + VAT
Contact Matt Barnes
mbarnes.land.reg@gmail.com

087 2544443

Is your client interested in selling or buying a 7-day liquor licence?

If so, contact Liquor Licence Transfers

Contact 0404 42832

1. Re: 152 Richmond Road, Fairview, Dublin 3. Held under indenture of lease dated 20 July 1942 between Dublin Distillers Company Limited of the one part and Thomas Patrick Cummins of the other part, and more particularly therein described as "all that and those the house and premises known as as 'Waterfall Cottage', bounded on the north by a lane or passage, on the south by premises known as 'Susanville', on the west by the River Tolka, and on the east by the road leading from Ballybough Bridge to Drumcondra, all which said hereby demised premises are situate in the barony of Coolock, formerly in the county and now in the city of Dublin, as delineated on the map in the fold of these presents and thereon surrounded with a red verge line for the term of 115 years, subject to the yearly rent of £15 per annum and subject to the covenants and conditions therein contained".

2. Re: Richmond Road, Fairview, Dublin 3. Held under indenture of sub-lease made 28 April 1947 and made between Kelly and Shiel Limited of the one part and Brooks Thomas & Company Limited of the other part for the term of 150 years from 25 March 1907, subject to the yearly rent of one shilling and therein described as a plot or piece of ground with the buildings erected thereon situate at Richmond Road in the barony of Coolock, parish of St George, and formerly in the county but now in the city of Dublin, which said lands and premises are more particularly delineated and described on the



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.

map annexed hereto and thereon edged with a red verged line, being part of the premises comprised in and demised by the said indenture of lease of 15 July 1907 and the said indenture of assignment 28 November 1956 and subject to the covenants and conditions therein contained.

- 3. Re: 154 Richmond Road, Fairview, Dublin 3. Held under lease dated 15 July 1907 and made between Francis Bernard Swete of the one part and Benjamin Young of the other part for a term of 150 years from 25 September 1907 (indemnified against the payment of ground rent), being the property known as 'Susanville' (now 154 Richmond Road), Richmond Road, Fairview, in the city of Dublin and subject to the covenants and conditions therein contained.
- 4. Re: 156 Richmond Road, Fairview, Dublin 3. Held under lease dated 15 July 1907 made between Francis Swete of the one part and Benjamin Young of the other part for a term of 150 years from 25 September 1907 (indemnified against the payment of ground rent), being the property known as 'Lizzieville' (now 156 Richmond Road), Richmond Road, Fairview, in the city of Dublin and subject to the covenants and conditions therein contained.

Take notice that Leydens Limited intends 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 freehold interest and all intermediate interest in the property, and that any party asserting that they hold the said freehold interest or any intermediate interest in the property are hereby called upon to furnish evidence of title to the property to the under-mentioned solicitors within 21 days from the date of this notice.

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

be appropriate on the basis that the person or persons beneficially entitled to all superior interests and all intermediate interests in the property up to and including the fee simple in the said property are unknown and unascertained.

Date: 5 October 2012 Signed: Donal T McAuliffe & Co (solicitors for Leydens Limited), 57 Merrion Square, Dublin 2

In the matter of the Landlord and Tenant (Ground Rents) Acts 1967-2005 - notice of intention to acquire fee simple (section 4): an application by Fitzers Holdings Limited ('the applicant')

Notice to any person having any interest in the freehold interest of the following property: all that and those the lands more particularly described in and demised by an indenture of lease made 20 November 1884 between (1) Louis Riall of the one part and (2) John Newport of the other part and therein described as: "all that and those that part of the 30 acres of land called Luntsland now called Coldblow, being part of Donnybrook otherwise Donnybroke Farm known on the ordnance survey as Donnybrook West, which is situate on the west side of the road leading from Donnybrook to Dublin and now called Morehampton Road and on the northwest side of the road lately called Coldblow Lane (now Belmont Avenue), which said premises together with other parts of said lands called Luntsland have been lately in the tenancy of the representatives or undertenants of Francis Kenny, which parcel of land intended to be hereby demised contains in breadth in the front to Morehampton Road 149 feet, in breadth to Belmont Avenue 160 feet, in depth on the northwest side 204 feet, and on the southwest side 197 feet, and is bounded on the northeast by Morehampton Road aforesaid on the southeast by Belmont Avenue aforesaid and on the northwest and southwest sides thereof by other parts of the said 30 acres of land called Luntsland aforesaid lately in the tenancy of the representatives or undertenants of Francis Kenny as the same

The firm of Richard Grogan & Associates, 16/17 College Green, Dublin 2, wishes to alert colleagues that it has come to our attention that a person or persons are issuing documentation under the name Grogan's Solicitors giving an address at 17 South Great George's Street, Dublin 2 (our former address). We wish to advise colleagues that the entity Grogan's Solicitors of 17 South Great George's Street, Dublin 2 does not exist and it is in no way associated with this firm. We confirm that all relevant documentation has been sent to the Law Society and to An Garda Síochána.

is more particularly described by a map or terchart thereof laid down on these presents with the houses and buildings thereon and all which said demised lands and premises are situate in the parish of St Mary's Donnybrook in the barony and county of Dublin", all which said premises are now known as numbers 127, 129, 133, 133a and 135 Morehampton Road and number 1a Belmont Avenue and numbers 1, 3, 5 and 7 Belmont Avenue and the premises comprising Belmont Court, all situate in the city of Dublin, now known as 1 Belmont Avenue, Donnybrook, Dublin 4.

# **High Spec Office** To Let

Smithfield, D7



- 85m<sup>2</sup> with parking
- Close to Four Courts & Luas
- Fully furnished
- Flexible lease terms



www.hookemacdonald.le

Take notice that the applicant, being the party entitled to the lessee's interest under the lease, intends to submit an application to the county registrar for the city of Dublin for the acquisition of the freehold interest and all intermediate interests in the aforesaid property, and any parties asserting that they hold a superior interest in the aforesaid property are called upon to furnish evidence of title to the aforementioned property to the solicitors for the applicant, details of which are provided below, within 21 days from the date of this notice.

In default of such notice being received, the applicant intends to proceed with the application before the county registrar for the city of Dublin for directions as may be appropriate on the basis of the person or persons beneficially entitled to the superior interest including the freehold reversion in the above premises are unknown or unascertained.

Date: 5 October 2012 Signed: Hanley & Lynch (solicitors for the applicant), 24 Clonskeagh Road, Dublin 6

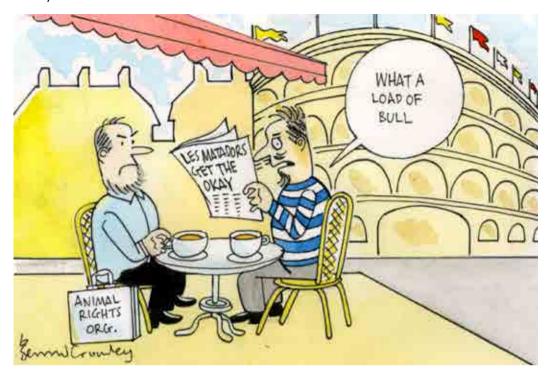
# RECRUITMENT

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

of the Law Society Gazette, NO recruitment advertisements will tion experience (PQE)

CAPTAIN'S BLAWG Law Society Gazette www.gazette.ie October 2012

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



# The sun also rises in France, apparently

France's Constitutional Council has rejected a plea from animal rights campaigners to ban bull-fighting. The campaigners wanted the fights categorised as cruelty to animals, the *Guardian* reports.

But the judges said the "traditional fights", held in areas of southern France, "do not harm people's protected

constitutional rights".

Although bullfighting originated in neighbouring Spain, it took root in France a century and a half ago. Fights, known as corridas in Spain, are especially popular in the Nimes and Arles areas. More than 1,000 bulls are killed annually in French bullfights.

A ban on bullfighting came into force in Spain's Catalonia region this year, after lawmakers voted for it last year – the first such ban in the country's mainland.

Bullfights are banned in some parts of France. Animal rights groups are now considering taking the issue to the European Court of Bovine Rights.

# Herd mentality

'Buffalo buffalo Buffalo buffalo buffalo buffalo Buffalo buffalo' is a grammatically valid sentence in the English language, used as an example of how homonyms (word of the same spelling as another, but with a different meaning) and homophones (words that sound the same, but with a different meaning) can be used to create complex linguistic constructs. It has been discussed since 1972. when the sentence was used by William J Rapaport, an associate professor at the University at Buffalo.

The sentence's intended meaning becomes clearer when it's understood that it uses the city of Buffalo, New York, and the somewhat-uncommon verb 'to buffalo' (meaning 'to bully or intimidate'). The meaning becomes even clearer when synonyms are used: 'Buffalo-origin bison that other Buffalo bison intimidate, themselves bully Buffalo bison.'

# Weirdy beardy hate crime gets federal treatment

An Ohio Amish sect leader and 15 of his followers were convicted on 20 September 2012 of hate crimes at a federal courthouse in Cleveland, USA. The charges were in connection with a string of beard and hair-cutting attacks on other Amish people last autumn.

Samuel Mullet Sr and each of his followers were found guilty on multiple charges stemming from attacks on six Amish men and two women. They are likely to face years in prison. The jury verdict came on the fifth day of deliberations.

Prosecutors contended the crimes were motivated by religious

disputes between Mullet (66) and other Amish religious leaders who had accepted into their communities people Mullet had excommunicated from his.



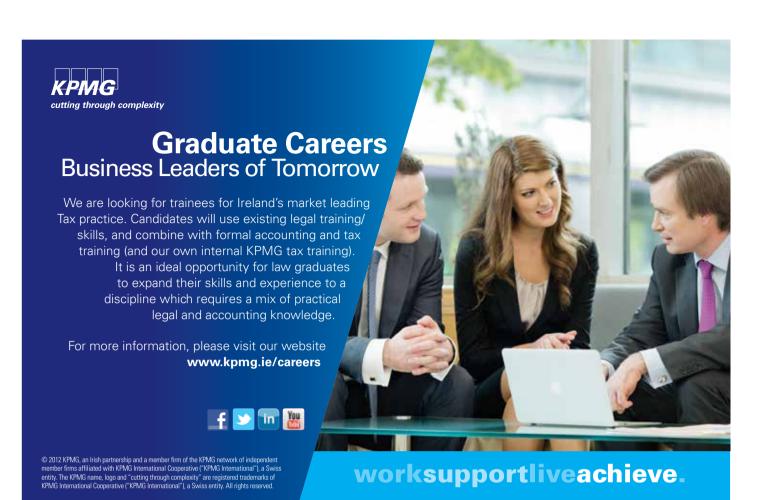
# Boy and girl activities slammed

A school district in Rhode Island, USA, has decided to ban father/daughter and mother/ son activities organised by the school because of fears they are illegal under gender discrimination law.

School superintendent Judith Lundsten acted after a single mother complained that her daughter was not able to attend a father/daughter dance, as reported by the *Providence Journal*. The American Civil Liberties Union (ACLU) wrote a letter to the school on behalf of the mother.

Lundsten said the federal Title IX statute has an exemption for 'father/son' and 'mother/daughter' events, but state law does not. Her decision has put an end to the school's father/daughter dance and the mother/son baseball game.

The ACLU issued a statement in response to the controversy: "The school district recognized that, in the 21st century, public schools have no business fostering the notion that girls prefer to go to formal dances while boys prefer baseball games. This type of gender stereotyping only perpetuates outdated notions of 'girl' and 'boy' activities and is contrary to federal law."



# **POSITION AVAILABLE**



# Want to place your recruitment advertisement here?

Contact Seán Ó hÓisín Tel: 01 8375018 Mobile: 086 8117116

Email: sean@lawsociety.ie

# New Openings



Our clients are currently searching for candidates for the following positions:

Aircraft Finance: Assistant to Senior Associate

Asset Management and Investment Funds: Assistant to Senior Associate

**Banking:** Assistant to Senior Associate

Corporate: Assistant to Senior Associate

**Commercial Insurance Litigation:** Assistant to Associate

Financial Regulation: Assistant to Associate

IT/IP: Assistant to Senior Associate

**IP:** Assistant

**Insolvency/Restructuring:** Assistant to Senior Associate

Project Finance: Assistant to Senior Associate

