



FUTURE PROOF

What are the practice options for small to medium-sized firms?



WHAT'S IN A NAME?

Some of the terms in the *Civil Partnership Act* may be problematic



A SILVER BULLET?

The new debt resolution schemes allow for lump-sum payments

LAW SOCIETY

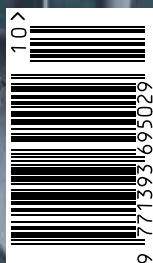
GAZETTE

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EVOLUTION OR EXTINCTION: IT'S YOUR DECISION

I attended a conference hosted by the Law Society of Scotland recently, where the theme was 'Evolution or extinction'. One keynote address was given by Prof Richard Susskind, who is a key observer and commentator on the theme of 'tomorrow's lawyers'. A second keynote address was given by Bruce MacEwen, the author of the book *Growth is Dead: Now What?*

While the prophecies of either or both of these commentators might be regarded in some quarters as extreme, we would do well to at least consider what they have to say. Our profession must evolve – and quickly – if it is to maintain its position of prominence in the greater market.

The profession has evolved enormously since I entered it in the early 1980s. The coming evolutionary process will occur at a much faster pace, however.

I believe that our younger members, for their future professional survival, must exploit the technological skills they already have in order to meet the coming challenges head-on. We will not be cowed by the attempted 'dumbing down' of the solicitors' myriad roles or by the move towards the commoditisation of legal services.

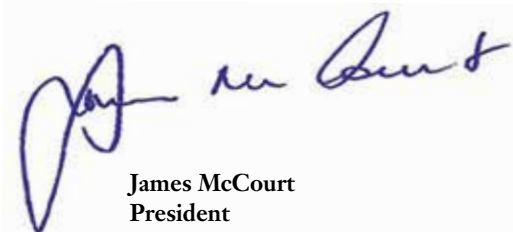
We will ignore at our peril, however, the inevitable onset of processes such as alternative dispute resolution. The American car industry dismissed the arrival of the first Japanese car in the late 1970s without a second thought. The city of Detroit declared itself bankrupt earlier this year.

We have resolutely come to terms with online stamping of deeds and online property registration. Paperless offices are emerging. The litigation department in the future ought to be a joyful, paperless entity. The public and markets that we serve will no longer settle for vague comments with regard to the cost of our services.

We will find a way to deliver our services in a more efficient manner – yet one that enables us to claim a reasonable income. If we don't, the market will force it to happen anyway. I urge the legal innovators out there – and you are many – to come forward and lead us towards this brave new world!

I have discussed this topic of evolution with lawyers from many jurisdictions around the world. Whether we operate in the largest firms or are sole practitioners, we all face the same challenges, so we must find ways to embrace the evolution and re-emerge the stronger. ©

"We will not be cowed by the attempted 'dumbing down' of the solicitors' myriad roles or by the move towards the commoditisation of legal services"

James McCourt
President



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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

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Mark McDermott (secretary), Mairéad Cashman,
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LAW SOCIETY GAZETTE

REGULARS

4 News

12 Analysis

- 12 **News feature:** Seamus Heaney: *On the Gift of a Fountain Pen*
- 14 **News feature:** Courts Service annual report mirrors society
- 16 **News feature:** Alternative dispute resolution – the options explored
- 18 **Human rights watch:** Defending the ECHR

21 Comment

- 21 **Letters**

46 People and places

53 Student spotlight

54 Books

- 54 **Book reviews:** *Buying and Selling Insolvent Companies and Businesses in Ireland; Family Law: Jurisdictional Comparisons; Legal Professional Privilege; and Law of Torts*

56 Briefing

- 56 **Council report:** 13 September 2013
- 56 **Practice notes**
- 58 **One to watch:** *Central Bank (Supervision and Enforcement) Act 2013*
- 59 **Regulation**

- 60 **Eurlegal:** Data privacy law; recent developments in European law

62 Professional notices

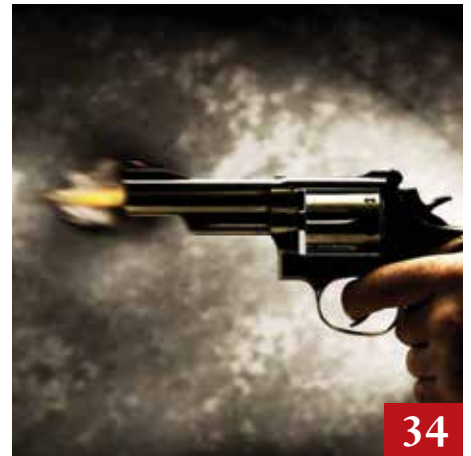
63 Recruitment advertising

64 Captain's blawg





42



34

COVER STORY

22 What lies beneath

Commander Pat Burke is legal officer in the Defence Forces, with particular responsibility for the Naval Service. Mark McDermott met him at Navy HQ in Cork and came away wondering how he'd missed the dream...

FEATURES

26 When I'm 64

What happens when compulsory retirement ages and age discrimination legislation collide? The CJEU has come up with some answers. Serena Connolly and Claire Callanan clear out their desks

30 We can work it out

The *Civil Partnership Act 2010* contains many troublesome terms that defy simple definition and are open to broad interpretation. Inge Clissmann and Ciara McMenamin weigh their words

34 Biting the bullet

The *Personal Insolvency Act 2012* allows debtors to dispose of secured and unsecured creditors by means of a one-off 'bullet' payment. Alec Flood locks and loads



38 Behind the veil

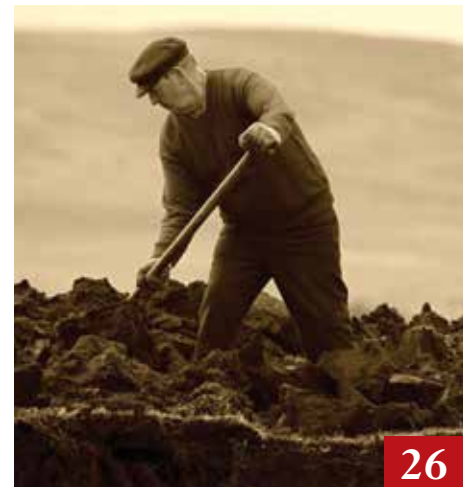
To have and to hold: what might the British decision in *Prest v Petrodel Resources* mean for Irish clients and the desirability of prenuptial agreements? Jennifer O'Brien pops the question

42 Back to the future

In the second of two articles, David Rowe examines the options that are out there for smaller firms seeking to ride the crest of the recession wave



30



26

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You can also check out:

- Current news
- Forthcoming events, including the **Commercial Law Conference in Griffith College, on 18 October**
- Employment opportunities
- The latest CPD courses

... as well as lots of other useful information

Nationwide

Compiled by Kevin O'Higgins



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

Specialist judge

ROSCOMMON

Roscommon Bar Association congratulates county registrar William Lyster on his recent appointment as one of the specialist judges of the Circuit Court. Mr Lyster, who hails from Elphin, practised in Boyle and Elphin for some 14 years prior to being appointed as county registrar in 1997.

The association donated the sum of €5,000 to the Solicitors' Benevolent Fund recently, raised from its ongoing series of CPD seminars.

Fahan forges ahead

INISHOWEN

Inishowen Bar Association is to be commended for hosting an excellent CPD event in September in Fahan, which dealt with the introduction of case management and accounts management software (presenter: Roisin Doherty), criminal law updates (Frank Dorrian), dealing with complaints (Sinead Travers), the information retail revolution and how law firms are responding (Keith O'Malley), updates on the new *Mediation Bill* and issues relating to mediation (Eimear Hayden), probate pitfalls (Karl Dowling), and some sombre words on the PI market from Ray O'Higgins (JLT). If all that wasn't enough, dinner and some social drinks followed.

Charity begins at home

MEATH

The Meath Solicitors' Bar Association invited members of local charities to join the association for a cup of coffee last month – and made a number of charitable donations. Among the beneficiaries were Meath Women's Refuge and Support Service, Amen Support Services Ltd (which provides a confidential helpline, support and information for male victims of domestic abuse), and Eureka Secondary School, Kells. The association also made a contribution to the Solicitors' Benevolent Association.



(Front, l to r): Oliver Shanley (president, Meath Solicitors' Bar Association), Edel Traynor and Elaine Traynor (both of Eureka Secondary School, Kells), Deirdre Murphy (manager, Meath Women's Refuge and Support Service) and Elaine Byrne (honorary secretary, Meath Solicitors' Bar Association); (back, l to r): Sandra Kelly and Niamh Farrell (both AMEN Support Services Ltd) and Stephen Murphy (Meath Solicitors' Bar Association)

Castleblayney's CPD bonanza!

MONAGHAN

Just a reminder about the all-day CPD event in Monaghan, on 11 October at the Glencarn Hotel, Castleblayney. Seven CPD points will be available, including three management, one regulatory and three general. Certificates of attendance will be provided.

The cost is €70, or €110 if also attending the dinner-dance that follows) For further details and to reserve your place, contact Justine Carty, Barry Healy & Company, Laurel Lodge, Hillside, Monaghan; DX 34 006; email: justinec@healylaw.ie, tel: 047 71556.

Judicial appointment

LEITRIM

Noel Quinn has informed me about the appointment of James Faughnan as a judge of the District Court. Judge Faughnan attended University College Cork and then Blackhall Place. On qualifying as a solicitor, he practised first in the firm of Kevin P Kilrane & Co, Mohill, and

subsequently in the firm of Cathal L Flynn & Co, Solicitors, Carrick-on-Shannon. He is a native of Annaduff, Co Leitrim, and has been an active member of the Leitrim Bar Association. His colleagues wish him every success in his new position.

Surfin' Wicklow Bay!

WICKLOW

Wicklow Bar Association president Paddy McNeice was particularly gratified with the turnout for their July CPD event – given that it was a sweltering hot day and many would have been forgiven for skipping off to the beach for a 99!

Keith O'Malley and Sinead Travers from the Law Society's Career Support section provided information about how firms in this jurisdiction and others are responding to the retail revolution and, in particular, the huge growth in the use of internet marketing. Sinead discussed the top ten tips for practice growth, as referred to in Steven Reilly's *The Busy Lawyers' Guide to the Laws of Practice Growth*.

Copenhagen truly wonderful

DUBLIN

DSBA president John Glynn led the annual conference trip to Copenhagen this year. The all-day business session was arranged with the fantastic assistance of local firm Gorissen Fedespiel. Judge Frank Clarke of the Supreme Court participated, with a highly relevant and hugely interesting talk on matters relating to litigation. The evening dinner in the world famous Tivoli Gardens was equally memorable.

John and the DSBA council are looking forward to hosting a lunch for older members in the RDS in the near future.

The AGM takes place in mid October, when elections will take place for the new council and incoming president.

DPC assesses privacy policy

The Office of the Data Protection Commissioner (DPC) has taken part in a Global Privacy Enforcement Network internet privacy sweep, along with other privacy enforcement authorities in Australia, Britain, Canada, Estonia, Finland, France, Germany, Hong Kong, Macao, New Zealand, Norway and the USA.

The DPC's privacy sweep involved audits of the internet sites of 79 organisations to assess their privacy practices, as stated in their website-published privacy policies or within their mobile applications.

The organisation was reported to be encouraged by the results. It found that, of the 79 websites reviewed, 48 scored five or more out of a total of six, while 14 achieved top marks.

The DPC noted, however, that the chief finding that 21% of the websites and mobile applications reviewed internationally had no privacy policy available was "a significant cause for concern".

Enforcement authorities are taking follow-up action directly with these organisations.

Organisations are encouraged to review their privacy policies regularly and update their internet site statements to reflect any changes in how they process personal data.

In News this month...

- | | |
|--|--|
| 7 Irish firm bags first STEP award | 8 EC launches consumer rights campaign |
| 7 PRA launches new e-registration services | 9 ISO ten in a row |
| 8 Society welcomes Lynn arrest | 11 An app for that – <i>Dictamus</i> |

Irish Legal History Society to meet at Stormont



The silver anniversary AGM of the Irish Legal History Society will be held in the Parliament Buildings at Stormont on Friday 8 November 2013 at 5 pm.

Following the AGM, the society's 25th anniversary volume, entitled *Changes in Practice and Law* and edited by Daire Hogan and Prof Colum Kenny, which is the third book to be published by the society this year, will be launched by David Ford, the Northern Ireland justice minister.

At 6.30pm, Dr Conor Mulvagh (UCD) will deliver the autumn discourse, 'Legislative landmine? Evaluating the third *Home Rule Bill*'. It will examine the provisions concerning finance, federalism, Ulster, and religion with a view to assessing the workability of the bill.

The discourse and reception are open to non-members. Further details, including access arrangements, will be available at www.ilhs.eu in advance of the meeting.

Parole in Ireland – the way forward

'Parole in Ireland: the way forward – experiences from other jurisdictions' is the title of a conference being organised by the Parole Board with the assistance of the Association for Criminal Justice Research and Development (ACJRD).

The conference will take place on Friday 25 October from 9am (registration starts at 8.30am) to 1pm, at the Law Society's headquarters, Blackhall Place, Dublin 7.

Speakers will include Minister for Justice Alan Shatter, Christine Glenn (chief commissioner, Parole Commissioners for Northern Ireland), John Watt (chairperson, Parole Board for Scotland), Prof Ralph Serin from Canada, Tapio Lappi-Seppala from Finland, and barrister Michael Lynn. The conference will be chaired by Mr Justice Garrett Sheehan.

Full conference details can be found on the ACJRD website, www.acjrd.ie. The booking page is <https://parole-in-ireland.eventbrite.ie/>. The delegate fee is €55 and the student fee is €25. The ACJRD can be contacted by email at enquiries@acjrd.ie or tel: 01 617 4864.

New Supreme Court judges



At its meeting on Wednesday 11 September, the Government formally made a decision to advise the President of Ireland to appoint two serving High Court judges, Ms Justice Mary Laffoy and Ms Justice Elizabeth Dunne, to the Supreme Court.

SYS annual conference



The Society of Young Solicitors' Annual Conference 2013 is being held at the Mount Wolseley Hotel, Tullow, Co Carlow, on the weekend of 8-10 November. The topic of this year's conference is 'The legal scandals of 2013 and their impact on the Irish legal system'.

Tickets for two nights' B&B, entry to the conference (with materials), and black-tie gala ball are priced at €170 and are available at www.sys.ie. Places are limited.

For further information, visit www.sys.ie or 'like' them on Facebook.

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O'Connell Brennan Solicitors STEPs up to the mark

O'Connell Brennan Solicitors has taken the 'Boutique Firm of the Year' at the STEP Private Client Awards 2013/14 in London on 18 September – the first ever Irish firm to do so. The firm pipped runners up from Britain and the US, including McKie & Co, McManus & Associates, Aquarius Tax, and PWT Advice.

Through an independent and rigorous judging process, the private client awards set the industry standard for excellence in private client practice. STEP – the Society of Trust and Estate Practitioners – is the worldwide professional association for practitioners dealing with family inheritance and succession planning.

The judges commented: "O'Connell Brennan has grown significantly and achieved much over the last 12 months. The firm has doubled in size in its first year, has 99 new clients and now acts for 10% of the Irish rich list. Led by well-known names with strong technical reputations, the increase in the client base is a big indicator of how much their clients value the firm."

More than 650 private-client professionals attended the awards ceremony, held at London Hilton on Park Lane



Susan O'Connell and Cormac Brennan (O'Connell Brennan Solicitors) celebrate winning the 'Boutique Firm of the Year' award at the STEP Private Client Awards 2013/14 in London

hotel, which was hosted by BAFTA special award winner Clare Balding.

Commenting on their win, partners Susan O'Connell and Cormac Brennan said: "We're delighted with this award, particularly given that the firm has been established only since February 2012. To receive this recognition from such a prestigious organisation as

STEP is a great boost for our team and our clients."

When pressed on the secrets of their success, Cormac replied: "In our first 19 months of practice, we have advised over 100 new clients, which represents approximately 30% of our current active client base. We act for approximately 10% of individuals and families appearing on the recently

published *Sunday Times* 'rich list' for Ireland.

"We believe that our growth is, in part, a result of the intimate and boutique profile of the firm. We develop close relationships with our clients and pride ourselves on being very accessible to clients."

Staff numbers have doubled at O'Connell Brennan Solicitors since it opened its doors in February 2012. In addition to its two partners, personnel include barrister Andrea McNamara (who is in the process of becoming a solicitor), office manager Pauline Burke, legal executive Mary Dwan, trainee solicitor Shona Hughes and legal intern Cian O'Rourke. The firm is planning to recruit another trainee by the end of the year.

Chair of the presiding judges, Paul Stibbard, commented: "This year's competition raised the bar for the depth and quality of entries from an increasingly international arena. This should act like a beacon for exceptional practice, shining across the more challenging fiscal and economic conditions many professionals now face."

To view the full list of winners, photos and a film of the event, visit www.step.org/pca.

PRA launches new range of e-registration services

The Property Registration Authority (PRA) released its new range of e-registration services in September, writes Peter McHugh (e-registration project manager with the PRA). The system allows practitioners to interact with the Land Registry database and generate documents that are subsequently lodged for registration. Initially, users can create deeds of transfer. Charges will shortly be added as the financial institutions sign up to e-registration. Other applications will be added in 2014, including transmissions and priority entries.

Features of the system include:

- Direct access to Land Registry

data, including mapping detail, address of property, names of owners, and so on. Data is incorporated into registration documents.

- Preview of documents, created in real time, which can be securely circulated to other parties.
- Electronic correspondence from the PRA, including notifications to issue to appropriate parties at key points in the transaction, that is, lodgement and final status.
- Fees payable by variable direct debit.
- Web services to allow for direct interaction with legal case management systems.

While the documents are generated in an electronic environment, it is still a requirement to lodge the signed hard-copy deeds. However, the system has been designed to progress to a digitally-signed-electronic-documents solution when the necessary legal changes are introduced and a suitable digital signature solution is available.

The PRA hosted three seminars in May demonstrating the system, which were attended by more than 150 practitioners. Feedback was very positive and a number of practices have already signed up and are beginning use the system. These seminars also included an update

on e-conveyancing, provided by the e-conveyancing project manager of the Law Society.

The PRA, in conjunction with the Law Society, is planning to conduct a number of these sessions before the end of the year. If your bar association is interested in hosting a seminar, or if you are looking for further details on e-registration, please contact Peter McHugh at peter.mchugh@prai.ie.

If you wish to sign up for e-registration services, application forms are available on www.eRegistration.ie by clicking on 'eRegistration' and accessing 'account administration'.

Society welcomes Lynn arrest in Brazil

The Society warmly welcomed the news that former solicitor Michael Lynn had been arrested in Brazil and that the State is seeking his extradition to face serious criminal charges in Ireland.

"The solicitors' profession is delighted to see progress, at last, in bringing Michael Lynn back to Ireland to face justice and his many victims," director general Ken Murphy told TV3 News when the story broke of Lynn's arrest on 30 August 2013.

And Lynn's former professional colleagues are among his victims. On that day and subsequent ones, the Society reminded the public, through the media, that more than €4.7 million has so far been paid to clients of Lynn from the Law Society's Compensation Fund. While €2.1 million of this has been recovered from funds in the 44-year-old's client accounts, the balance of the payments have been made from the compensation fund, to which all practising solicitors must contribute.

In addition, when Lynn was struck off the Roll in May 2008, he was fined the unprecedented amount of €2 million, which, in addition to legal costs, he also still owes in full to the Society.



Former solicitor Michael Lynn owes millions still

Apart from this, Lynn is reported to owe some €80 million to various financial institutions and to the clients of his property company, Kendar, which was separate from his solicitor's practice.

Apart from the monies paid out from the Law Society in relation to the former solicitor Michael Lynn, the director general said: "Considerable reputational damage was done to the solicitors' profession."

He added that this was the case "although the overwhelming

majority of his activity was as a property speculator and developer in Ireland and abroad, rather than as a solicitor".

The director general has gone to considerable lengths in contacting the national media to stamp out references to "the solicitor, Michael Lynn". "It's just wrong – factually inaccurate in fact – since his name was struck off the Roll," he insists.

And he quips, "He has left *Les Misérables* behind him in Ireland. Bring him home!"

EC launches campaign on consumer rights

With so many people in need of loans or struggling to repay debts, it has never been more important for consumers to understand their rights when it comes to credit agreements.

Yet only 48% of people feel informed about their rights and are confident about choosing loan products. Just 25% of 18-35-year-olds are aware of the five key consumer credit rights under the *EU Credit Directive* (Directive 2008/48/EC).

These five rights are:

- The right to transparent advertising,
- The right to receive standardised and comparable information before signing a contract,
- The right to clear information in the contract,
- The right to withdraw from an agreement within 14 days without explanation, and
- The right to repay early.

Consumer credit rights are being highlighted by the European Commission in a year-long pan-European campaign, aimed in particular at young people.

The campaign also highlights that consumers have the right to:

- Have the credit contract drawn up on paper and to receive a copy,
- Be informed if their request for credit is rejected on the basis of existing information in creditworthiness databases (unless this is not in line with national data protection legislation),
- Be informed about the assignment of rights to third parties and not to be put in a worse position because of this.

The campaign will take place in Ireland, Spain and Malta. An exercise to evaluate its impact will also be undertaken. For more information, visit: <http://ec.europa.eu/consumer-credit>.

Collaborating on assisted decision-making



Solicitors for the Elderly, in collaboration with Law Society Professional Training, presented a seminar on the *Assisted Decision Making (Capacity) Bill 2013* on 12 September. The large attendance learned about the British experience and were apprised of best-practice skills. At the event were (from l to r): Rachael Hession (Law Society), Mary Condell (chair of Solicitors for the Elderly in Ireland), Judge John O'Connor, Patricia Rickard-Clarke, Judge Denzil Lush, Caroline Bielanska, Anne Stephenson (Stephenson's Solicitors) and Margaret Walsh (Sheil Solicitors)

ISO ten in a row!



PIC: LENSEMEN

The Complaints and Client Relations Section, situated in George's Court, Dublin 7, recently marked the tenth successive year in which it has achieved a certificate of Registration of Quality Management System to the international standard IS EN ISO 9001:2008. Pictured is Helen Mountaine, joint office manager, with special responsibility for the ISO project

To boldly go...

A&L Goodbody is seeking applications from law students for its 'Bold Ideas Law Student Innovation Award' competition. The firm plans to recruit around 30 graduates over the coming months.

Now in its second year, students are being asked to present their ideas on what would, or could, make the Irish legal profession proud of its international reputation. The deadline for submissions is 2 November 2013.

The first prize winner will receive €3,000 in cash and an internship at one of A&L Goodbody's office locations (in Dublin, Belfast, London, New York or San Francisco), including

travel and accommodation.

Judges for the competition include Michael McDowell (SC and former attorney general), Clíodhna O'Sullivan (head of legal for Telefónica Ireland) and John Whelan (partner and head of the international technology group at A&L Goodbody).

A&L Goodbody's trainee recruitment programme offers law graduates a paid two-year traineeship, working across the firm's practice areas. On offer is a full-time position upon successful completion of the programme and graduation from the Law Society of Ireland or the Institute of Professional Legal Studies (QUB, Northern Ireland).



Bold ideas... A&L Goodbody interns Hilary Grubb, Shahrukh Abbasi, John Whelan (head of A&L Goodbody's international technology group) and Killian Breen

THERE'S AN APP FOR THAT



Totally flexible digital dictation

APP: **DICTAMUS** PRICE: €9.99

Dictamus is my all-time favourite 'must-have' app, writes *Dorothy Walsh*. This is a fully functional digital dictation device for iPhone and iPad. It is the best solution to remote and digital dictation out of all of the options I have tried – and at €9.99 from the App Store, it is an absolute bargain when compared with other digital dictation systems.

I have downloaded *Dictamus* to both my iPhone and iPad and can therefore have a total dictation solution on either device. This is the only dictation device I use, whether in office or out and about.

There are housekeeping elements to this app that need to be addressed, and they relate to the transcription end of the process. Essentially, I dictate my work to the *Dictamus* app, which has all the usual functionality of an expensive hand-held digital dictation device. There are record, pause, rewind, fast-forward, overwrite, and review functions for the voice file as I am creating it. I then save it into the app, which is all very intuitive and predictive. The settings allow the user to set up default modes, such as naming files and adding a default recipient (in my case, it is Colette in the office) for transcription. The files are sent as an attachment to an email

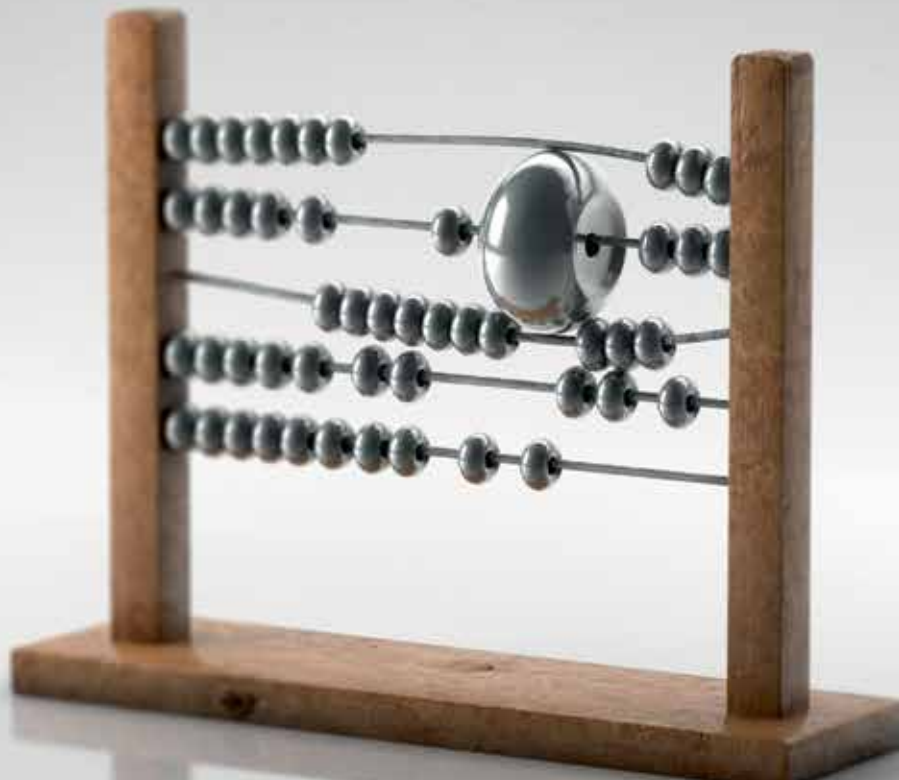
to Colette, so that she can then open them on her PC and type them up. They literally pop into her *Outlook* inbox as an unread email.

Colette uses an ordinary PC to transcribe the dictation. In order to do this, she downloaded a programme called *Express Scribe* from the internet. It is a paid-for programme and costs €14.99 to download. It is saved to the PC's programmes and is the default programme for opening the dictation files that come to the email account.

The programme itself requires a special foot pedal to operate the functions (play, rewind, and so on) that the typist uses in conjunction with a headset/earphones. The compatible foot pedal that we sourced can be purchased from V-Pedal.com for the sum of \$75, including shipping. We purchased a number of pedals for our office and found the ordering, delivery and the quality of the product to be excellent. The after-sales service was also very helpful.

Having priced up other digital dictation devices, I tried out this system at a total cost of approximately €250 for the *Dictamus* app (which iCloud placed on iPhone and iPad), two foot pedals and two transcription programmes.





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NEWS FROM THE LAW SOCIETY'S COMMITTEES AND TASK FORCES

CAT pay-and-file deadline 2013

PROBATE, ADMINISTRATION AND TRUSTS COMMITTEE

For gifts or inheritances where the valuation date took place on or before 31 August 2013, the file-and-pay deadline is 31 October 2013. Where the taxpayer or his/her agent is paying and filing online for the tax year

2013, there is an extension of the deadline from 31 October 2013 to 14 November 2013. See Revenue eBrief no 13 of 2013 ('ROS – extension of pay and file deadline for ROS customers for 2013'), which can be found at

www.revenue.ie/en/practitioner/ebrief/2013/no-132013.html.

If practitioners experience any difficulties using ROS, please contact committee secretary Padraic Courtney at p.courtney@lawsociety.ie, so that these



difficulties can be brought to the attention of Revenue at the CAT ROS Users Group and, where possible, solutions provided for the future.

Independence, ethics and the role of the in-house lawyer

IN-HOUSE AND PUBLIC SECTOR COMMITTEE

The In-House and Public Sector Committee had its fifth and most successful panel discussion to date on 30 May 2013. The topic for the panel discussion was 'Independence, ethics and the role of the in-house lawyer'.

We were extremely fortunate to have an entertaining and engaging panel of speakers in Orla Muldoon (chief counsel, Kellogg Europe), Mike Shea (European chief counsel, Elavon Financial Services) and Noreen Mackey

BL (former legal advisor to the Competition Authority), who each shared their views and experiences on independence and ethics.


The round-table discussion on various case studies proved to be a great success, as it provided a platform for a high level of interaction between delegates. There was also a robust question-and-answer session, which was very informative.

The feedback received from delegates was also very positive,

with some excellent suggestions on how to improve the panel discussion in the future.

The committee will be organising another panel discussion next year. It's hoped that this will become a key annual date on the calendar of the in-house lawyer.

The committee's annual conference will be held on 20 November 2013 from 2pm to 5.30pm. The focus will be on the practical implementation of

the data protection regulatory regime, together with an overview of recent developments. Speakers will include Christopher Docksey (director of the secretariat of the European Data Protection Supervisor), Billy Hawkes (data protection commissioner) and Remy Farrell SC. Full details and booking information are available on the Professional Training section of the Society's website at www.lawsociety.ie. 

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SEAMUS HEANEY: 'ON THE GIFT OF A FOUNTAIN PEN'

In October 2012, Seamus Heaney sent the Law Society what may be a previously unpublished poem as a token of thanks for a pen that was presented to the poet by the Society. **Ken Murphy** writes about the poet and his poem

On the facing page appears a Seamus Heaney poem that does not appear in any of his published collections. The Law Society is not aware of it ever having been published previously. Entitled *On the Gift of a Fountain Pen*, it was sent in the poet's own handwriting to the Society. A covering note expressed thanks for the gift of a Mont Blanc fountain pen that was presented to him by the Society as

a token of gratitude following an address he gave at Blackhall Place. He added apologetically "I just wish my handwriting was better."

The poet's sudden death on 30 August 2013 was felt as a profound shock and a deep personal loss by vast numbers of people in Ireland and around the world. His popularity, both as a poet and as a person, was immense.

Although a global giant of literature – news of his death appeared on the front page of *The New York Times* – he was remarkably accessible and loved. The BBC noted that, in Britain, two out of every three sales of books by living poets were books by Seamus Heaney. In Ireland, he had the status of what is recognised in Japan as a 'living national treasure'.

On 2 October 2012, Seamus Heaney was the guest speaker at a very special occasion in Blackhall Place. The event comprised his lecture, followed by a dinner hosted by the Society for 160 presidents and chief executives from bars and law societies across the globe, who were in Dublin for a conference of the International Bar Association.

These leaders of millions of lawyers, from every continent, were utterly enthralled by Heaney's specially prepared address entitled 'The Web and the World'. His remarks were based loosely on his essay *Writer & Righter*, which he had delivered some years previously to the Irish Human Rights Commission and

a copy of which the Society had sent as a supplement with the *Gazette* to every solicitor in 2010.

Seeing Seamus Heaney and hearing him speak was recognised as something very special by his audience. I had the privilege of introducing him. Having set the scene in terms of Ireland's remarkably rich contribution to world literature and Heaney's place on the peak of that pantheon, I invited the very distinguished audience to welcome their very distinguished guest speaker. As the

poet walked across to the podium, the entire audience in the lecture theatre rose to give him a sustained standing ovation before he had uttered a word.

"When asked why the Irish as a nation had produced so many of the world's great writers, he brought the house down with the response 'sheer bloody genius!'"

Worldwide web of principles

His address concerned "the worldwide web of principles", where the role of the poet interweaves with

that of the lawyer when defending human rights and the cause of justice. He took as his foil a line from the WH Auden poem, *In Memory of WB Yeats*. There Auden wrote: "For poetry makes nothing happen".

Describing the line as "perhaps too famous", Heaney mused on "the capacity of art to face, or perhaps outface, atrocity". Among the texts he quoted and assessed in his address of about 40 minutes was the United Nation's *Universal Declaration of Human Rights*.



On the Gift of a Fountain Pen

Now that your pen is in my hand
And I have seen

That poems may cease to be,

What of the years
Of every other obligation
Imposed and undertaken?

Am that 'Do unto others
As you would have done unto you'?
Mistaken? Virtue?

Yes and no. I dip and fill
And start again:
After the spade, the hoe.

Seamus Heaney
October 2012



Seamus Heaney and Ken Murphy on one of the poet's previous visits to Blackhall Place



thanked him and presented him with the Mont Blanc fountain pen as a token of the Society's appreciation. It was in the course of some correspondence we had later that month that Seamus sent the handwritten poem *On the Gift of a Fountain Pen*.

He intimated that the manuscript had not been written with his old Conway Stewart fountain pen – a poem dedicated to that pen is published in Heaney's final collection, *Human Chain* – but with the pen newly acquired on his visit to Blackhall Place.

His famous first poem in his first-published collection, *Death of a Naturalist*, was

Digging. "I'll dig with it" he concludes, in relation to "the squat pen" that rests between his finger and his thumb.

The echo is unmistakable as he writes in another poem in relation to a pen, written many decades later: "After the spade, the hoe."

When Seamus Heaney received the Nobel Prize in Literature in 1995, he was expressly honoured by the Nobel Academy "for words of lyrical beauty and ethical depth, which exalt everyday miracles and the living past".

The best way to remember Seamus Heaney is to read what he wrote. Addressing the new PPC I students on their first day in Blackhall Place on 10 September 2013, drawing from the "ethical depth" of Heaney's work to illustrate the need for lawyers to have an ethically informed conscience at the core of their being, I recited the immensely powerful concluding lines from the very poem that he had read in the same lecture theatre less than a year previously, *From the Republic of Conscience*. **G**

His erudite analysis quoted numerous "foundational texts of Western civilisation" as well as an extensive number of fellow writers, including his late friend and fellow winner of the Nobel Prize in Literature Czeslaw Milosz, whose ringing challenge was "what is poetry that does not save nations or people?"

He read just one of his own poems that evening. It was *From the Republic of Conscience*. He preceded this by explaining how he had come to write it in response to a request from

Amnesty International.

Having delighted the audience with his address, he thrilled it further by answering numerous questions. When asked why the Irish as a nation had produced so many of the world's great writers, he brought the house down with the response "sheer bloody genius"!

When the address ended, the entire audience in the lecture hall of the Society's Education Centre rose again to a prolonged standing ovation. The Law Society President Donald Binchy

EXTRACT

Concluding stanza of *From the Republic of Conscience*

I came back from that frugal republic
with my two arms the one length, the customs woman
having insisted my allowance was myself.

The old man rose and gazed into my face
and said that was official recognition
that I was now a dual citizen.

He therefore desired me when I got home
to consider myself a representative
and to speak on their behalf in my own tongue.

Their embassies, he said, were everywhere
but operated independently
and no ambassador would ever be relieved.

SHEDDING LIGHT ON SOCIETY

The Courts Service's annual report contains some fascinating findings that shed some interesting light on the state of Irish society. **Richard Lee** reports



Richard Lee is a partner in Lee and Sherlock Solicitors and a fellow of the Chartered Institute of Arbitrators

Tell me I need to get out more, but one thing I look forward to reading each year is the Courts Service's annual report! It gives a good overview, not just of the courts, but of Irish society.

In July, the service published its detailed 2012 report. In her introduction, Chief Justice Susan Denham comments: "The courts do not operate in a vacuum, but rather their work can be seen as a reflection of the prevailing climate in our society."

The report's findings shed some interesting light on how Irish society is changing – and allows us to compare ourselves with other jurisdictions in terms of criminality, family law matters, personal injury, wills and probate, and how our courts are coping with an ever-increasing workload.

Murder and rape

In all, 31 new murder cases were received by the Central Criminal Court, down 20% on the previous year. The court dealt with 41 murder cases, which would include cases received prior to 2012. There were

20 convictions for murder, four acquittals and 15 convictions for lesser offences. A total of 20 life sentences were imposed, with five sentences for periods of more than ten years, and ten sentences for periods of between five and ten years. Considering the size of the Irish population, these are low figures.

The court received 83 new rape and sexual assault cases – three more than in the previous year. It dealt with a total of 84 cases, which included cases previously received. In all, 35 guilty pleas were entered. Put another way, in four out of ten cases, the accused pleaded guilty. There were 21 acquittals, representing one in four cases. Twelve cases did not proceed (*nolle prosequi*). The majority of the sentences were for periods of between five and 12 years

Divorce and separation

There were 3,482 applications for divorce in 2012 – an increase of 3.5% on the previous year. Once

again, this is a comparatively low figure, given the size of the Irish population. Examining the figures more closely, 53% of divorce applications were made by wives, 47% by husbands.

The number of applications for judicial separations fell by 6% to 1,290. Curiously, wives comprised 73% of applicants, while 27% came from husbands. These figures would suggest that wives are the more proactive party when a marriage breaks down.

"These figures would suggest that wives are the more proactive party when a marriage breaks down"

Personal injury

Between the High Court and Circuit Court, 16,864 personal injuries cases were issued – up 5% on the previous year. Between the High Court and Circuit Court, 1,860 awards were made. Approximately 70% of these awards were for

amounts of less than €20,000, while 83% of the awards were for amounts of less than €38,000. There were 1,040 medical negligence cases.

A very loose and unscientific analysis of the figures would suggest that 95% of High Court cases were settled or did not proceed and that 81% of Circuit Court cases settled or did not proceed.

Death and wills

It would appear that one in four Irish people do not make a will. A total of 10,461 wills were probated last year, which was a decrease of 16%. There were 3,149 intestacies – a decrease of just under 18%. I suspect that the reduced figures are a consequence of the recession.

Waiting times

In 2012, the waiting time to have a High Court appeal heard

FIGURES AT A GLANCE*

Murder:

- 41 cases dealt with
- 20 convictions
- 15 convictions for lesser offences
- 4 acquittals

Rape:

- 84 cases dealt with
- 35 guilty pleas (42%)
- 21 acquittals (25%)

Divorce and judicial separation:

- Divorce applications – 3,482 (up 3.5%), of which wives (53%); husbands (47%)
- Judicial separation applications – 1,290 (down 6%), of which wives (73%); husbands (27%)

Personal injury – High Court and Circuit Court:

- Cases issued – 16,864 (up 5%)
- Awards made – 1,860
- Awards less than €38,000 (83%)
- Awards less than €20,000 (70%)
- High Court medical negligence cases: 1,040

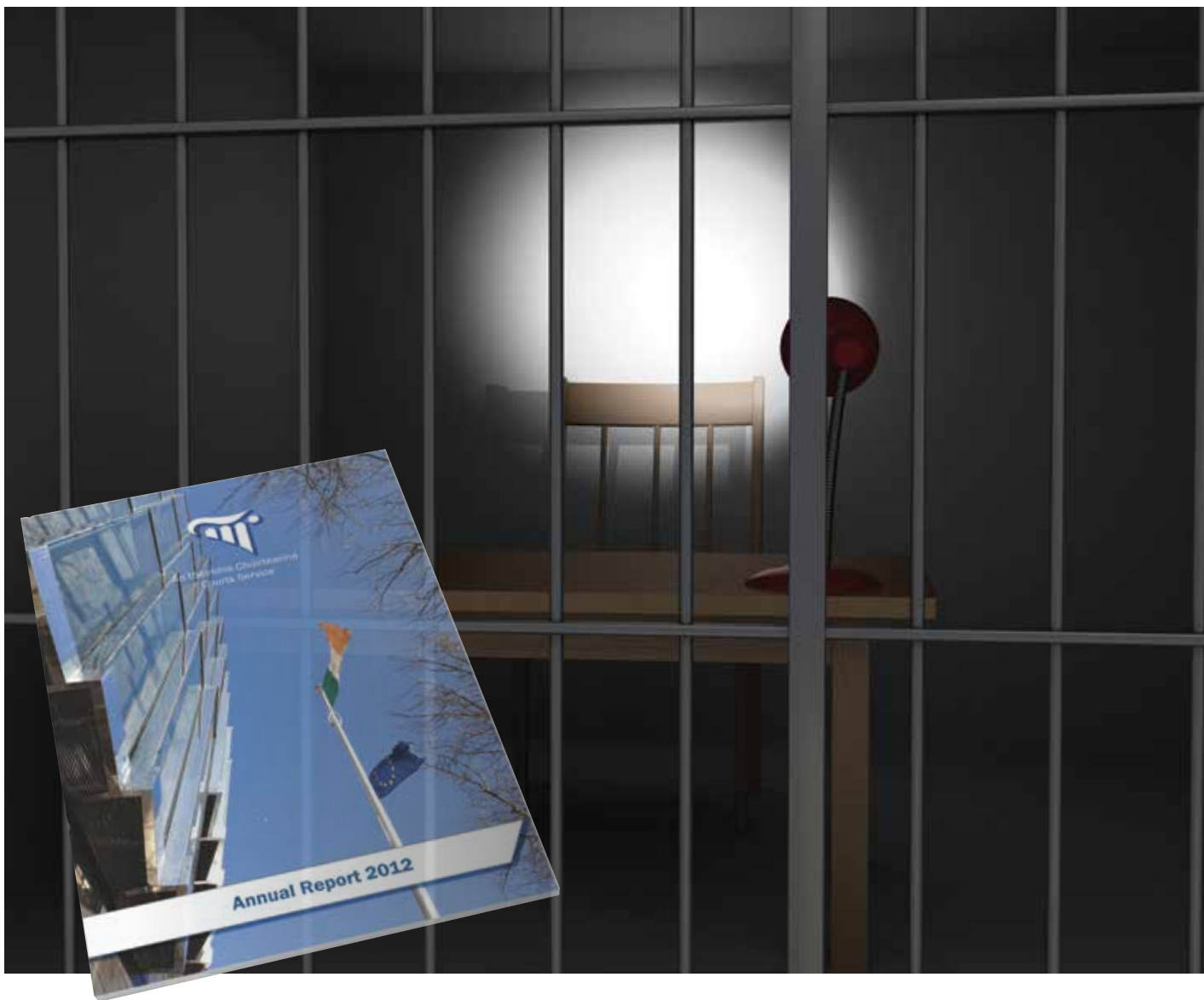
Probate:

- Wills probated – 10,461 (down 16%)
- Intestacies – 3,149 (down 17%)
- No will – (23%)

Judges:

- 146 judges (on 31 December 2012)

*Source: Courts Service Annual Report 2012.



by the Supreme Court was approximately four years, with priority cases having a waiting time of nine months. This illustrates how urgently a Court of Appeal is needed. There was no delay in the Commercial Court, with dates available on request. The waiting time for a personal injury High Court case was approximately three months in Dublin, 27 months in Cork, six months in Dundalk, eight months in Galway, 12 months in Kilkenny/Waterford, 15 months in Limerick, and six months in Sligo.

In High Court chancery matters, the average waiting

time for hearing was five months subsequent to case certification.

The waiting time for the hearing of a civil case in the Circuit Court varied throughout the country, from six to ten weeks in Dublin, to three years in some areas.

The waiting time for a civil hearing date in the District Court again varied considerably, from four weeks in some districts to 30 weeks in Dublin.

The poor box

The poor box recorded receipts of just over €1.9 million. To my mind, the poor box is an important element of the District


Court, as it allows 'a second chance' where minor offences are committed. The figure suggests that it is being used frequently.

Trends

It would appear that the number of people representing themselves in court – that is, without legal representation – is on the increase. For example, in the Supreme Court, 158 of the 605 appeals received by the Supreme Court in 2012 were from lay litigants – or one in four cases. These figures indicate an increase of 8% on the previous year.

On the positive side, the annual report is reassuring in

terms of what it says about the courts system and Irish society in particular, in terms of the relatively low divorce and serious crime figures. On the negative side, however, the waiting times in some courts cannot be seen as acceptable in a modern society, and continued urgent action is required.

In relation to the future, it would appear that mediation will play a greater role in civil and family law cases – an avenue that has the support of the chief justice: "We continue to support alternatives to full-scale court processes, such as mediation in civil and family law areas." 

ALTERNATIVE MEDICINES?

In cases involving litigation, the nominal winner is often the real loser in fees, expenses and time.

James Kinch sings the praises of alternative dispute resolution, but advocates choosing the most appropriate mechanism when advising clients



James Kinch is a solicitor with the law department of Dublin City Council and is vice-chairman of the Law Society's Alternative Dispute Resolution Committee

“As a peacemaker, the lawyer has superior opportunity for being a good man. Discourage litigation. Persuade your neighbours to compromise whenever you can.” But Abraham Lincoln’s words are probably more apt today than when he first spoke them to fellow lawyers more than 160 years ago.

The issue of the cost of resolving legal disputes has been brought into sharp focus in recent years. Clients often do not have the money to fund the dispute resolution process – whether as the would-be claimant or the defendant. Of the various forms of dispute resolution, the traditional court litigation route is invariably the most expensive.

The Law Society’s Alternative Dispute Resolution Committee is keen to improve awareness among members of the wide variety of alternative dispute resolution (ADR) mechanisms that are available to assist clients in effectively resolving disputes. Such mechanisms include well-known methods such as arbitration, mediation and conciliation – but also lesser known ones like expert determination, collaborative law and adjudication.

Some of the lesser-known processes, such as expert determination, are greatly underused in Ireland, especially in circumstances where a swift and binding resolution is regarded as a priority.

To put expert determination in context, it may be useful to compare it with other forms of dispute resolution. Unlike litigation or arbitration (where the parties are inclined to adopt ‘formulated’ or mutually antagonistic positions requiring a decision), the parties to expert determination do not usually adopt defined positions, but rather agree that there is a need for evaluation.

In *O’Mahony v Patrick O’Connor Builders (Waterford) Limited & Others*, Justice Clarke approved the following proposition from Kendall, a recognised leading authority on expert determination: “The procedure adopted by an expert may be less like the adversarial, party-driven mechanisms of arbitration and litigation, and more like an inquisitorial investigation. By these words is meant a freedom for the expert to initiate lines of enquiry, with or without the involvement of the parties. The expert clause and/or the parties may preclude the expert from making independent investigations without involving the parties.”

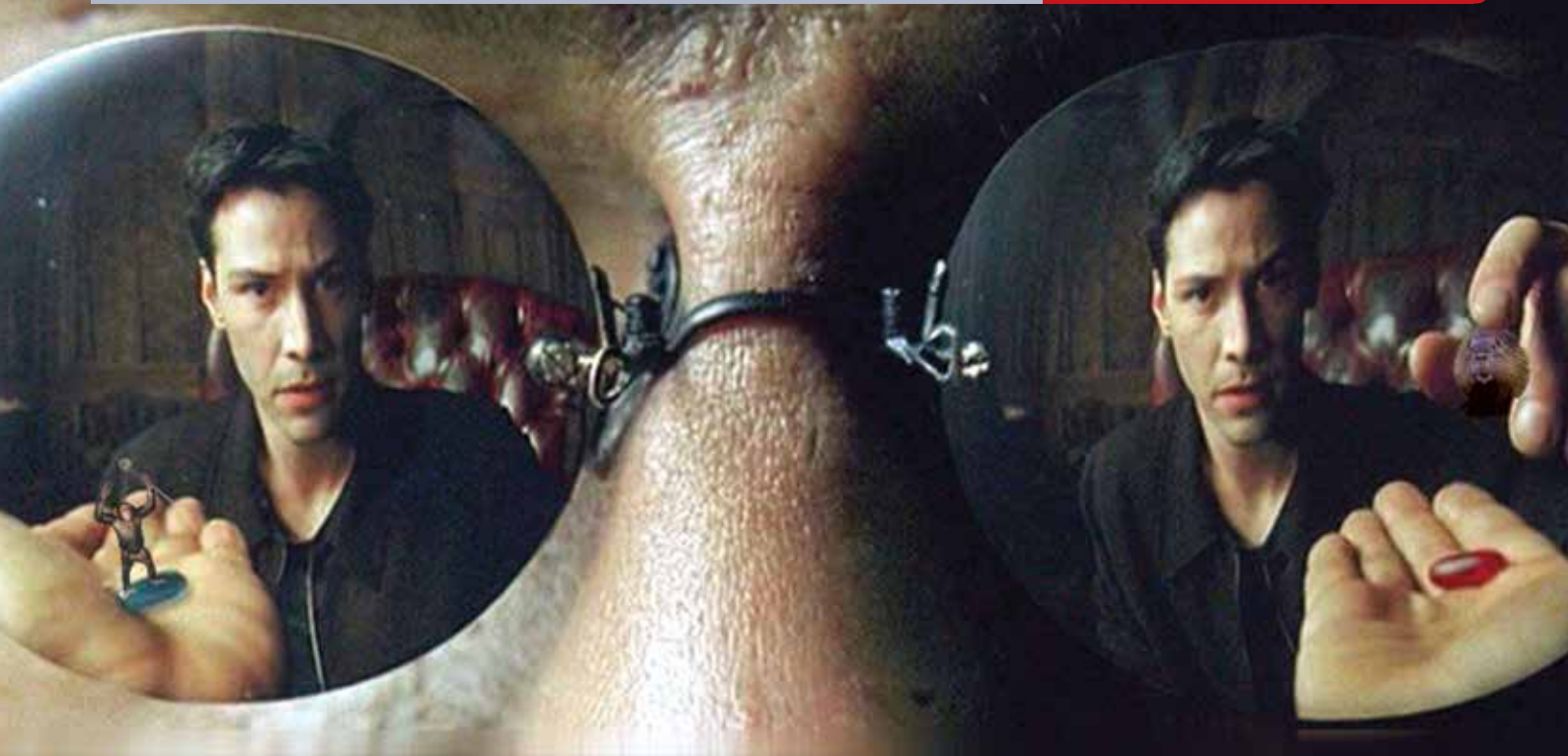
While such an absence of ‘position taking’ can be welcomed, it must be viewed in the context of an absence of legislation regulating expert determination in Ireland – a factor that may give rise to some legal uncertainty, especially in circumstances where the parties had not contemplated using expert determination as the means to resolve disputes,

“The ability for practitioners to advise on means other than litigation in resolving disputes will, shortly, no longer be optional”

DISPUTE RESOLUTION PROCESSES COMPARED

Litigation	Arbitration	Conciliation and mediation	Adjudication	Expert determination
Strict application of legal principles	Flexible application of legal principles	Less emphasis on legal principles	Flexible application of legal principles	Flexible application of legal principles
Technical expertise must be introduced through expert witnesses	Arbitrator may be expert in field	Conciliator may be expert in field	Adjudicator may be expert in field	Expert
Outcome binding and enforceable	Outcome binding and enforceable	Settlement agreement enforceable as a contract only	Outcome temporarily binding	Outcome binding
Limited range of outcomes	Limited range of outcomes	Creative solutions possible	Limited range of outcomes	Limited range of outcomes
Outcome transparent	Outcome not transparent unless reasons provided	Parties alone determine outcome	Outcome not transparent unless reasons provided	Outcome not transparent unless reasons provided
Outcome public	Outcome private	Outcome private	Outcome private	Outcome private
Appeal possible	No appeal	No need for appeal	Appeal to arbitration possible	No appeal
Polarising – emphasis on differences	Polarising – emphasis on differences	Brings parties together – emphasis on common goals	Polarising – emphasis on differences	Less polarising than adversarial mechanisms

Extracted from Arbitration and ADR in Construction Disputes, by G Brian Hutchinson, p16.



but regard the matter as too technical or arcane to be dealt with by the courts. Clearly, in such circumstances, arriving at mutually agreeable terms regarding the expert determination may prove a considerable task in itself.

Traps for the unwary

A key issue that may be overlooked by practitioners concerns not only the wording of the particular dispute resolution clause in the relevant contract, but whether the particular process itself is appropriate, having regard to the subject matter of the contract. For example, the incorporation of an arbitration clause in certain information technology contracts may frustrate the parties' objective of achieving effective resolution of disputes that may involve issues that are arcane in nature – that may be more appropriately resolved by expert determination. Apart from the additional costs that may needlessly be incurred by the parties – due to the binding nature of the dispute resolution mechanism – there is the matter of the ongoing relationship between the parties. This can be all the more apposite in contracts of long duration.

The following factors may be relevant in the context of agreeing the form of dispute resolution process:

- The bargaining positions of the parties: a large difference in bargaining positions may be counterbalanced with a dispute resolution process that involves considerable flexibility – such an approach may also prevent the escalation of disputes that may simply be the result of a misunderstanding or lack of communication,
- The willingness of the parties to engage and participate in the process: the voluntary nature of certain dispute resolution processes, such as mediation and conciliation, depend for their success on the willingness of the parties to engage and participate in the process and come to an agreement,
- The subject matter of the contract: clearly, a contract for the sale of land may require a different resolution mechanism than may be more appropriate than highly technical IT contracts.

The ability for practitioners to advise on means other than litigation in resolving disputes

will shortly no longer be optional. Under heading 4 of the draft general scheme of the *Mediation Bill 2012*, solicitors advising or acting for a client will be required, prior to commencing litigation proceedings on behalf of the client, to:

- Advise the client to consider using mediation as an alternative means of resolving the dispute,
- Provide the client with (a) information concerning mediation services, (b) names and addresses of persons or organisations qualified to provide mediation services, and (c) insofar as is possible, provide an estimate of the client's legal costs in the event of court proceedings.

It is suggested that, in addition to providing this information, members would consider informing the client of the other dispute-resolution processes that may, in fact, be more appropriate for the particular contract. Such an approach could assist in achieving client 'buy in' to the chosen means of dispute resolution.

More generally, it is suggested that careful consideration be

given, in the context of ADR, to whether the selected dispute resolution mechanism is, in all the circumstances, *appropriate* ADR. ©

LOOK IT UP

Cases:

- *AMEC Civil Engineering Ltd v Secretary of State for Transport* [2005] BLR 227
- *Arenson v Arenson* [1977] AC 405
- *Collis Lee v Millar* [2004] IEHC 144
- *Hounslow London Borough Council v Twickenham Gardens Development Limited* [1971] Ch 233
- *National Grid Co Plc v M25 Group plc* [1999] 1 EGLR (65)
- *O'Mahony v Patrick O'Connor Builders (Waterford) Limited & Others* [2005] IEHC 248 (22 July 2005)

Literature:

- Hutchinson, GB (2010), *Arbitration and ADR in Construction Disputes* (Round Hall)
- Kendall, John, et al (2008), *Expert Determination* (fourth edition; Sweet & Maxwell)

IN DEFENCE OF THE ECHR

Britain recently celebrated the 60th anniversary of its signing up to the *European Convention on Human Rights*. One of key events marking the commemoration looked at the convention's significance for Britain.

Michael Finucane was there to hear about the benefits it has brought to that island



Michael Finucane is the founding partner of Michael Finucane Solicitors, Dublin and the chairperson of the Law Society's Human Rights Committee

Britain reached a significant milestone recently: the 60th anniversary of its signing up to the *European Convention on Human Rights*. As part of the commemorations, I attended an event co-hosted by the Law Society of England and Wales and the British Institute of Human Rights, entitled 'Sixty years of the *European Convention on Human Rights and Fundamental Freedoms*: what does the future hold?' The keynote speaker was the British nominee and former Chief Judge of Court, Sir Nicholas Bratza.

Despite the fact that Britain was one of the founder members of the Council of Europe and one of the original signatories to the ECHR, there has been increasing criticism of the convention, the Strasbourg court, and the mechanism giving effect to domestic incorporation of the convention in Britain, the *Human Rights Act 1998*. In a refreshingly direct and highly engaging speech, Sir Nicholas Bratza met many of these criticisms head-on, arguing that Britain's membership of the Council of Europe was not only important domestically but also for the reputation of Britain abroad.

Speaking about the convention system and the increasing political and media debate about its role and impact in Britain, Sir Nicolas said: "I question what has happened here at home to bring about the tarnishing

of the legacy the UK inherited when ratifying the convention and enacting the *Human Rights Act* that gave effect to it – that remarkable piece of legislation, which has brought great benefits to a great many people in this country."

He went on to ask: "More importantly, what can be done to restore the act, and what it stands for, to its rightful place and to rekindle

the fire which inspired its original enactment – to bring the convention rights home?"

Forthright defence

In his remarks, Sir Nicholas was forthright in his defence of the court against its detractors, particularly those in the tabloid press. He emphasised the need for a greater degree of public education, describing it as the "key" to winning the fight against the foes of the convention, whose criticism was "too often motivated by malice".

In the face of this, it was vital that lawyers and NGOs did everything they

could to defend and promote the *European Convention on Human Rights* and to ensure that its influence was not diminished. Politicians were also identified as having an important role in "speaking up openly in defence of the *Human Rights Act* and the convention".

"Rekindling the fire and keeping the act and the UK within the

convention will not be an easy task. It will involve confronting those determined to destroy both. But it will also involve taking every opportunity to make more widely known to the general public the untold benefits which have derived from bringing rights home. It will be a hard fight, but one worth winning. It is more than that; it is a fight which must be won."

The address by Sir Nicholas was followed by a panel of distinguished academics and lawyers exploring how the convention has affected legal systems other than Britain's. Prof Phillip Leach began by highlighting how invaluable the European court had been in ending deliberate state evasion of justice and providing much-needed accountability.

He spoke about how the ECHR system provided a vital forum for many disenfranchised people to have a voice, shine a spotlight on abuses, and seek justice. The ECHR meant that the practice of forced disappearances came under the scrutiny of the court, compelling states to dispense with the practice and challenging state impunity in countries such as Turkey and Russia.

Britain and Ireland compared

Contributions were also heard from experts such as noted Irish academic Prof Fiona De Londras (Durham University) who provided a comparative analysis of Britain's and Ireland's attitudes and traditions towards guaranteeing and interpreting human rights. Prof De Londras noted that the rights guaranteed by the Irish Constitution mirrored the rights outlined by the ECHR – and that they are understood as legal constitutional rights as opposed to political rights. The constitutional

"It was clear that there was not much difference, conceptually, between the two sides of the ECHR debate when it came to the question of rights – but the divisions were much more pronounced when it came to enforcement of rights domestically by a European court"



Criticism of the convention is "too often motivated by malice" – Sir Nicholas Bratza

"The fact that the Strasbourg court was prepared to be critical of member states, even during periods of civil conflict, was highlighted as particularly important"

importance of these rights allows for the judiciary to strike down incompatible laws, a practice that is not disputed, criticised or undermined. This raised interesting questions for Britain and the view that any new *Bill of Rights* there would have to guarantee the rights set out in the *Human Rights Act* as a bare minimum and might actually require conferring new powers on the judiciary.

Prof Aileen McColgan (King's College London) provided a chilling reminder of the conflict in Northern Ireland and how only the European Court of Human Rights was prepared to rule the British state's interrogation practices as amounting to inhuman and degrading treatment, contrary to article 3 of the convention.

In the absence of such protection, practices like throwing detainees out of helicopters, depriving them of food and sleep, and subjecting them to white noise and beatings would continue to have been characterised as 'unintentional hardship'. The fact that the Strasbourg court was prepared to be critical of member states, even

during periods of civil conflict, was highlighted as particularly important. The development of article 2 (right to life) and article 6 (fair trial) obligations reminded states that they always had to be cognisant of their overriding obligation to preserve the rule of law, even in difficult times.

Question time

With all of this high-minded academic analysis still ringing in our ears, the conference then provided some 'light relief', with a *Question Time*-style panel of three MPs who debated the pros and cons of the European convention and the continued influence of the *Human Rights Act*.

In an exciting (and often heated) debate between Sadiq Khan (Lab), Julian Huppert (Lib Dem) and Mark Reckless (Con), the politicians outlined their views and put forward their parties' respective commitments to human rights. At times, they even had their human rights knowledge tested (with varying degrees of success)!

The debate on the role of human rights was made all the keener, since it came on the

back of David Cameron's defeat in the House of Commons on his motion for military intervention in Syria. In this regard, the point made by Mark Reckless that this represented a "democratisation of foreign policy" was interesting, insofar as it brought the view of many Britons on the ECHR into focus. It was clear that there was not much difference, conceptually, between the two sides of the ECHR debate when it came to the question of rights, but the divisions were much more pronounced when it came to enforcement of rights domestically by a European court.

Stephen Bowen, director of the British Institute of Human Rights (BIHR), closed the conference with reflections on the role of the convention in Britain and how it had informed the approach of BIHR. Referring to a nationwide BIHR commemoration initiative, Bowen announced: "Today, individuals and groups have

joined together to show their support for the convention and how these rights, expressed through our *Human Rights Act*, are a vital safety net for us all.

This includes an

open letter signed by over 85 civil society organisations and a 60th anniversary card from groups representing countless people, members of the public, parliamentarians, officials and judges with messages of support for the ECHR."

The open letter, coordinated by BIHR, was published in the *Daily Telegraph* on 3 September and was signed by many of the leading organisations in human rights and civic advocacy all across Britain, including the British Institute of Human Rights, Children's Rights Alliance for England, Disability Rights UK, Howard League for Penal Reform, Human Rights Watch, INQUEST, the Law Society of Northern Ireland, Liberty, the Refugee Council, and Rights Watch (UK). 

Patients' Rights, Access to Justice and the Case for Candour

4 November 2013, Morrison Hotel, Dublin

Access to justice is vital for patients and their families who suffer injuries or die as a result of deficiencies in our health care system. Trust is at the heart of the doctor-patient relationship and thus if a medical accident or negligence occurs the patient is entitled to be told by their doctor what went wrong and how it happened. Instead, what usually happens is that there is a policy of "deny and defend everything" and this corrodes and eventually destroys the doctor-patient relationship, causing more harm to doctor and patient alike. Where there is no effective system of civil legal aid for medical negligence claims, the patient faces a 'David and Goliath' battle.

This joint conference hosted by Action against Medical Accidents (AvMA) and Medical Injuries Alliance (MIA) considers the barriers to justice for those affected by medical negligence in Ireland, the costs associated with the current system and considers a favourable alternative. Delegates will learn that the case for candour is a compelling one.

N.B.: programme subject to change

Conference Programme

09.15 Registration and refreshments

10.00 Chair's Welcome and Introduction
Peter Walsh, Chief Executive,
Action against Medical Accidents

10.10 The Honourable Mr Justice William McKechnie,
Judge of the Supreme Court

- The risk of access to justice being compromised
- Reforms in the UK – Lord Jackson
- Proposed amendments to court rules by report of judicial working group to encourage early disclosure of all relevant issues and early settlement of medical negligence actions

10.55 The economic cost of medical accidents and what are the potential savings that could be made?
Moore McDowell, Economist, UCD School of Economics

11.40 Refreshments

12.00 Open disclosure of medical accidents - the Irish experience
Ann Duffy, Clinical Indemnity Scheme,
State Claims Agency

12.45 Lunch

Fees:
AvMA/MIA members, Public Sector €150.00
Standard rate, Private Sector €200.00

13.45 Dr. Timothy McDonald, Professor of
Anaesthesiology and Paediatrics at University
of Illinois, Chicago &
Chief Safety and Risk Officer for Health Affairs
for the University of Illinois, Chicago

- How defence in every case drives up cost
- Why it is relevant in Ireland, with reference to the policy of the State defending claims
- How the "Seven Pillars" positively impacted on patient safety and costs in University of Illinois
- How Ireland could benefit from the introduction of system grounded in 'honesty and transparency' from both cost and patient safety perspective

14.45 The ongoing need for candour, the aftermath of
the Jackson Reforms and patients' access to
justice
Peter Walsh, Chief Executive,
Action against Medical Accidents

15.15 Patients' Stories
Two patients will tell the conference of their experiences both in terms of interaction with the medical/hospital community, but also with the legal world. They will address the human cost of the 'defend and deny' policy.

15.45 Discussion

16.05 Chair's Closing Remarks

16.10 Refreshments and networking

Scan to download
the programme



To receive a booking form or for more information, contact the AvMA Events team at conferences@avma.org.uk, call +44 (0)20 8688 9555 or go to www.avma.org.uk/events.

Answering a question with a question!

From: Richard H McDonnell,
Solicitors, Market Square, Ardee,
Co Louth

I refer to Bernadette Glynn's letter published in the July 2013 issue, 'Data protection catch-22 when dealing with KBC bank' (p17). Could I suggest that the next time she is asked such frustrating questions, she might like to do what a client of mine has recently taken to doing when he is being harassed by phone calls from banks and credit-card companies who call him at all hours, initially demanding his date of birth and mother's maiden name. He refuses to answer that question until the caller first tells him his/her mother's maiden name and date of birth, pointing out, quite reasonably, that just as they can't be sure that he (my client) is who he says he is, he can't be sure that they are who they claim to be (for example, 'Mary' from the credit-card company). This usually puts a swift end to the conversation, as the caller hangs up in high dudgeon.

I have recently been passing on this tip to many clients in financial difficulties, who have gone off chuckling and delighted with this gambit, which serves them well ever after. It won't ease Ms Glynn's frustration, but is surely very entertaining!

On a separate note, while banks are quick to threaten solicitors with reporting them to the Law Society and demanding they notify their insurers at the drop of a hat, their own incompetence and inefficiencies apparently do not concern them.

Property sales are being lost on a daily basis because banks simply fail to respond, sometimes for weeks on end, to requests for consent where the purchase price is less than the redemption price. Sales then fall through and, many months later, the same bank is asked to consent to a sale of the same property at an even lower price.

Only when it is pointed out to them that their failure to



En garde...

consent to a sale will not render the borrower – but themselves – liable for any subsequent shortfall in the value thereof do they appear to respond.

Redemption figures take weeks to issue and, very often, correspondence is very belatedly answered with the quasi-defamatory request that the solicitor provide written evidence of his own client's consent to enter into the correspondence in the first place.

The fact that they largely caused the mess we're all in by blithely ignoring any rational consideration of whether a borrower had the ability to repay, or that the property being mortgaged was grotesquely over-valued, does not appear, in that alternative universe in which banks live, to constitute moral hazard.

It appears that that standards demanded by banks of solicitors (and their own unfortunate customers) are not demanded of

themselves. Do as we say, not as we do.

Banks are, if anything, more dysfunctional, inefficient and disconnected from the reality of ordinary people's lives than they were before the crash. This is slowly choking the life out of SMEs and therefore hugely inhibiting the creation of thousands of jobs in the private sector. While this continues, there is no prospect of a sustainable turnaround in the economy.

PSRA commercial lease 'requirements' – what's going on?

From: Paddy Duffy, Patrick Duffy
Solicitors, Carrick-on-Shannon,
Co Leitrim

We have recently received letters from the Property Services Regulatory Authority requiring that a return be made online to that authority in relation to the details of commercial leases. The requirement for the return

is set out in section 88 of the *Property Services Regulation Act 2011* – putting the onus on the tenant of a commercial lease to file the return. It appears that the authority is picking up these details from Revenue subsequent to the stamp-duty certificate being issued.

Questions:

- Why are these letters being sent

to solicitors?

- What duty, if any, has a solicitor in relation to this return?
- Why is the letter not sent directly to the tenant (who has the duty to make the return)?
- What is the purpose of this return?
- Who will pay for the solicitor's time in dealing with these requests?

WHAT LIES *beneath*



Mark McDermott
is editor of the Law
Society Gazette

Commander Pat Burke is legal officer in the Defence Forces, with particular responsibility for the Naval Service. Mark McDermott met him at Navy HQ in Cork and came away wondering how he'd missed the dream...

“G oing for an Army coffee, Pat?” was the jeering question ringing in our ears as we made our way up to the Officers’ Mess at the Naval Service headquarters in Haulbowline.

As we laboured our way to the first-floor, we were like the proverbial fishes swimming against a tide of blue-uniformed officers who were heading back to their duties after morning coffee.

Being the landlubber, I didn’t get the in-joke, so I asked Commander Pat Burke to explain it to me. “Navy coffee is always at 10.30am; Army coffee at 11am – we’re late!”

The laughter rang in our ears as we emerged into a haven of tranquillity at the top of the stairs, only to bump into the Flag Officer Commanding, Commodore Mark Mellett – the top-ranking naval officer in the country. Friendly, efficient, quick introductions over, Commodore Mellett gave an enthusiastic overview of operations at Haulbowline – and left me with some enigmatic parting words: “It’s not so much what’s on the surface. It’s what lies beneath.”

Following walkabout with Commander Burke and an excellent presentation from Lieutenant Pat Doherty on the role of the Fisheries Monitoring Centre, I had a much better understanding of the extensive roles and responsibilities of the Naval Service – and the significance of Commodore Mellett’s words. From this outsider’s point of view, our mariners are working darn hard, with extremely limited resources (it has to be said), to keep our waters – and what

“This is the Boy’s Own job – it’s the adventure and we’ll allow you to find what you want to be within it”

lies beneath – safe, secure and green (in the patriotic, economic and ecological senses of that word).

The *Boy’s Own* job

Pat Burke is legal advisor to the Irish Naval Service, holding the rank of commander. The Middleton man grew up only 15 miles from the Naval Service HQ in Haulbowline, which overlooks Cork harbour. He describes himself as always having had an interest in the sea – an interest most likely inspired by his father, Jerry Burke, who served in the Navy and retired as a senior NCO before going to work in one of the chemical plants dotted around Ringaskiddy. His mother Maureen stayed at home to look after Pat, his two brothers and one sister. Her family background was the Army. Given his pedigree, it probably should have come as no surprise that Pat might end up in the





FAST FACTS

- > The lure of the District Court as a teenager
- > Two years into a business studies and marketing degree, he arrived home to tell his mother "I'm joining the Navy"
- > The arrival of the *LÉ Eithne* and how it turned his head
- > The *Boy's Own* job
- > Nine months in the Britannia Royal Naval College, Dartmouth
- > Becoming a legal officer



Defence Forces. His mother hoped otherwise, however, of which more anon.

His schooling was in the Christian Brothers' secondary school in Midleton – nothing extraordinary there – but one thing stands out. "During the summer holidays, I would go into the local District Court and sit at the back and watch what happened. At one stage, at about

the age of 15 or 16, I thought about becoming a guard – then a lawyer. I suppose watching the court procedures piqued my interest. I would read the local newspapers, the court cases – some of which were amusing, several of which were more interesting. I was keen, but wasn't sure if I wanted to do law – seeing the six or seven years of study ahead of me. At the time, I thought about it and said 'no'. I wasn't quite sure I was up to it. If my mother had had her way, God be good to her, and I got the points, I would have done law – but I wasn't sure."

After the Leaving Cert, he skirted around the problem by selecting a business studies and marketing degree. Two years into that, Pat arrived home to tell his mother "I'm joining the Navy!"

It didn't go down well at the time.

A number of cadetships came up in 1986, when not a whole lot was happening in Ireland. "It was more the adventure, if I'm honest," he says. He joined the Navy as a cadet in 1986.

What had turned Pat's head had been the arrival of a spanking new, state-of-the-art ship, the *LÉ Eithne*. "When I joined, the *Eithne* was just two years old. It had helicopters flying off the back of it. Fisheries, arms interdiction and drugs were starting to become more prevalent problems. The Navy was expanding, and it seemed to be a very interesting job for a young guy who wasn't sure about where he was going."

"I remember making the application and then talking to a guy I knew in the Navy. I was in the FCA at the time. He said, 'Well look, this is the *Boy's Own* job – it's the adventure and

we'll allow you to find what you want to be within it – provided you do what we need from you as well'."

Siren call

Unlike the Army, which at that time was sending all of its officers to the National University of Ireland in Galway for third-level studies, the Naval Service cadets were being dispatched to Britannia Royal Naval College in Dartmouth for nine months as part of an exchange programme with the Royal Navy (the Britannia's alumni include Prince Charles and Prince Andrew).

"Despite the fact that the Troubles were at their height, there were no issues for us whatsoever. I was in an international class and played soccer for the college. I had a fantastic nine months."

It was there that he heard the Siren call of the law. "What sparked my interest was a maritime law module there. Everything in the Navy is based on jurisdiction – your powers depend on knowing your location and who you're dealing with. That resonated with me."

Pat completed his 'ship driving licence', came back to Ireland and passed his bridge watchkeeping course. "The guy in the cabin next door to me – Ronan Long, who is now lecturing in NUIG – was doing a law degree at night in UCC. He gave me Smith and Hogan's *Criminal Law* during one patrol and said, 'See what you make of that'."

The newly commissioned officer's compass was now set firmly in the direction of law. "I got really interested and suddenly realised that

"Navigator was the job I most enjoyed. I did a trip to the Lebanon in '96. We were the first ship into Beirut since the end of the conflict there. We were literally driving around wrecks still stuck in the harbour, which was eye-opening"

I could be part-funded by the Naval Service for doing my law degree – depending on my results and the relevance of the degree to the service, of course. There's nothing like being part-funded to focus your mind on your studies..."

As a young sub-lieutenant in 1988, he joined his first ship with his appointment to the *LÉ Deirdre* (since decommissioned). "It was the first ship built for the Naval Service. She was sold in late 2000, was completely reconfigured and is now a luxury yacht."

Pat embarked on a four-night programme at UCC over four years. "It was a superb course. I couldn't recommend it enough. I missed more lectures than I attended, however, because I was at sea – but there was backup." He shared the course with a broad spectrum: "Everybody from public servants, trainee solicitors, senior gardaí, clerks, people who wanted to do a law degree but who were working and had missed the chance first time around – the full mix and all ages."

At this stage, the Naval Service didn't have its own legal officer, instead 'borrowing' the Army's legal officer from Cork. "I can remember as a young cadet attending lectures with him, where he would openly say, 'You know, this is not my subject area of specialisation – you should look at it'."

All at sea

The assets of the Naval Service were starting to expand, growing from one ship in the early '70s to four by the late '80s. By the early '90s, it had five. All the talk was that it would expand to become an eight-ship fleet.

Pat fleshes out the picture: "The consultants had been in. We'd had the Gleeson Commission and then the Price Waterhouse Cooper report on the Naval Service in 1998 – which had reviewed the service from top to bottom. That report had recommended the efficiency model. On top of that, the Attorney General's Office was putting pressure on us, telling us that we needed our own in-house legal personnel."

"The Navy's policy on everything in-house is that you must be able to go to sea, so you have to fulfil that role first," says Pat. "In terms of my legal future, I looked at the solicitor's route, but it would have required me to take a leave of absence. At the time, the Bar suited my purposes better, which also married up with a requirement to spend time at headquarters in Dublin." As a result, he attended King's Inns and was called to the Bar in 2002.

Pat was already signed up for a year ashore to complete his master of laws degree in UCC. "As part of my LLM, I was writing a thesis on the Common Fisheries Policy, covering international law, while also serving as the enforcement officer on board my ship. I acted as the fisheries officer as well, so I was advising the ship's captain about the nationality of



Cdr Pat Burke and captain of the *Lé Róisín* Lt Cdr Terry Ward on the bridge



“I had to make a decision: whether I was going sailing or sailing a desk, as the Flag Officer put it to me at the time. And I jumped, and I haven’t looked back”

trawlers, their location, and their quota for each month for different species.

“Then I was toggling off, boarding trawlers, ‘guesstimating’ what their catch should be and measuring that against the actual amount caught. I was getting a

360-degree immersion in my subject matter. It was fantastic. Then it was back to land to write-up my reports. If any trawler was detained, you had to write the statement and then appear in the local District or Circuit Court to give your evidence.

“The Navy is always very much of a ‘lessons learned’ culture so we would write up what we had learned afterwards. We were looking at how we could do things better – or whether we should we be doing certain things at all.”

During this time, Pat refers to attending workshops carried out by “a very good state solicitor in West Cork, Malachy Boohig. We were doing courtroom presentations – putting cases together – and you were dealing with all nationalities”.

Making the case


Meanwhile, the Naval Service had been making its case to the Army looking for a dedicated legal officer with maritime law qualifications. Pat points out that the legal team in the Defence Forces is “a tiny cell of six legal officers”.

Says Pat: “The director of legal service at the time, Colonel Bill Nott, was very forward thinking and said, ‘Well, okay; but he’ll also have to be able to cover the Army.’ So they

insisted that I would do the ‘international law of armed conflict’ courses and be able to wear both uniforms, for want of a better term.”

Colonel John Spierin is now Director of Legal Services, based in Newbridge. He’s in charge of the Defence Force’s six legal officers, including two based in Dublin, another in the Curragh, two staff officers based in Newbridge and Pat based in Cork. “I cover the Southern Brigade for the Army and the Naval Service as well,” he adds.

Following his ‘ship driving’ course, his first appointment on board ship was as a gunnery officer, responsible for the ship’s armaments, weapons trainings for the crew, and conducting boardings for all types of vessels. He then moved on to become navigator – “the job I most enjoyed. I did a trip to the Lebanon in ’96, where you start out from Cork and your job is to get the ship to Lebanon in seven days. We were the first ship into Beirut since the end of the conflict there. We were literally driving around wrecks still stuck in the harbour, which was eye-opening.

“After finishing as navigator, I went back to sea as second-in-command and then worked my way up to lieutenant commander, and subsequently to command. When I finished at King’s Inns, I had been promoted to lieutenant commander and literally had just taken my first ship as commander when the legal officer’s job came up and I had to make a decision: whether I was going sailing or sailing a desk, as the Flag Officer put it to me at the time. And I jumped, and I haven’t looked back.” 

WORKING SMART

With eight ships to patrol 220 million acres at sea, the Naval Service “works hard by working smart”, as Commander Pat Burke puts it. In reality, Ireland’s navy has just four ships operating at sea at any one time – due to service schedules and the number of mariners

available to man those vessels. Despite that, the Naval Service manages to outstrip the navies of the world in its patrolling output with regard to the number of days its ships spend at sea – including the Royal Navy by a factor of well over two-to-one.

NAVY/COUNTRY	Average sea-days per patrol vessel per year
British Royal Navy	95
Royal Canadian Navy	132
Royal New Zealand Navy	81
Royal Australian Navy	128
United States Navy	67
French Navy	77
Irish Naval Service	207

Table 1: Patrolling outputs

In next month’s Gazette, Commander Burke on the ‘Dances With Waves’ drugs bust, protecting Ireland’s fisheries, and working smarter.

When I'm 64

What happens when compulsory retirement ages and age discrimination legislation collide? The CJEU has come up with some answers. **Serena Connolly** and **Claire Callanan** clear out their desks



*Serena Connolly
is a professional
development solicitor
in Beauchamps
Solicitors*



*Claire Callanan
is a partner in
Beauchamps
Solicitors*

Using compulsory retirement ages as a means of managing the exit of older workers from the workforce has long been standard practice for many Irish employers. Indeed, the practice of fixing mandatory retirement ages without having to provide justification as to why they are necessary is permitted under Irish equality legislation. However, it is clear from recent decisions of the Court of Justice of the European Union (CJEU) and the Equality Tribunal that employers may no longer rely on this legislation to defend claims of age discrimination taken by disgruntled employees who have been compulsorily retired. While compulsory retirements are still not prohibited, they must now be capable of being justified on a legitimate and objective basis. Failing this, they will be considered to constitute age discrimination.

In light of recent European case law on this topic, Britain has phased out default retirement ages and introduced new legislation that provides that employers must be able to

objectively justify compulsory retirement ages. Legislative reform is also required in this jurisdiction to bring Irish equality legislation in line with EU legislation and case law, and it is likely that this will be addressed in the near future. In the meantime, however, employers should review their retirement policies and look to the emerging case law for examples of grounds that have been accepted as justifying retirement on a legitimate and objective basis.

Irish legislation

The *Employment Equality Acts 1998 to 2011* prohibit direct discrimination in employment on nine grounds, one of which is age. Direct age discrimination occurs where a person is treated less favourably than another person is, has been, or would be treated in a comparable

situation on the grounds of age. Age discrimination is prohibited at all stages of the employment relationship, from recruitment to dismissal. However, there are certain exceptions to this, including section 34(4) of the

“Legislative reform is also required in this jurisdiction to bring Irish equality legislation in line with EU legislation and case law”



FAST FACTS

- > The practice of fixing mandatory retirement ages without having to provide justification as to why they are necessary is permitted under Irish equality legislation
- > However, it is clear from recent decisions of the CJEU and the Equality Tribunal that employers may no longer rely on this legislation to defend claims of age discrimination
- > While compulsory retirements are still not prohibited, they must now be capable of being justified on a legitimate and objective basis. Failing this, they will be considered to constitute age discrimination

Equality Acts, which provides that “it shall not constitute discrimination on the age ground to fix different ages for the retirement (whether voluntarily or compulsorily) of employees or any class or description of employees”.

Although, on the face of it, compulsory retirement ages are permitted under the *Equality Acts*, they are clearly directly discriminatory on grounds of age. Employees are required to cease employment, and thereby are treated less favourably, solely because they have reached a specific age. Such action does not require justification under the *Equality Acts* and, until recently, this meant that private sector employers could fix any contractual retirement age of their choosing without having to justify why they were doing so.

Under the *Unfair Dismissals Acts 1977 to 2007*, employees who have reached the “normal retiring age for employees of the same employer in similar employment” are precluded from bringing a claim for

unfair dismissal. Employers must therefore establish the normal retiring age in their organisation to rely on this exclusion.

European legislation

Council Directive 2000/78/EC, which establishes a general framework for equal treatment in employment and occupation, prohibits direct age discrimination in employment. The directive takes precedence over Irish domestic law.

Under the directive, direct discrimination may not be justified. However, direct discrimination on grounds of age is treated differently than discrimination on the other protected grounds. The directive recognises that differences in treatment in connection with age may be justified by member states under certain circumstances. Accordingly, article 6(1) of the directive provides that discriminatory treatment directly based on age is permissible subject to certain conditions. The first is that it must be objectively and reasonably justified by a

legitimate aim within the context of national law. The directive provides examples of such aims and refers to legitimate employment policy, labour market, and vocational training objectives. The second condition is that the means of achieving these aims must be appropriate and necessary.

By ostensibly permitting direct age discrimination through the use of compulsory retirement ages and not requiring such treatment to be objectively justified, section 34(4) of the *Equality Acts* is inconsistent



with article 6(1) of the directive. This inconsistency has become more apparent as case law in this area develops.

European case law

The CJEU has considered the legality of compulsory retirement rules set down in national legislation and collective agreements in a number of cases.

In one of the first European cases regarding the legality of compulsory retirement ages, *Félix Palacios de la Villa v Cortefiel Servicios SA*, the CJEU considered the legality of a compulsory retirement age of 65 contained in a Spanish collective agreement. The CJEU stated that compulsory retirement ages are directly discriminatory on grounds of age unless they can be objectively justified in line with article 6(1) of the directive.

Subsequent cases of the CJEU dealing with compulsory retirement ages have reiterated the objective justification test referred to by the CJEU in the *Palacios* case, namely that (a) the discrimination must be in pursuit of a legitimate objective, (b) the means used to achieve the objective must be appropriate, and (c) those means must also be necessary to achieve the objective.

Irish case law – a new departure

Until recently – regardless of these CJEU cases – private sector employers in Ireland were able to avail of the exemption at section 34(4) of the *Equality Acts* when their compulsory retirement practices were

challenged. However, in a number of recent decisions, the Equality Tribunal has made it clear that this blanket exemption can no longer be relied upon, and private sector employers are now obliged to objectively justify their compulsory retirement ages in line with article 6(1) of the directive.

In *Saunders v CHC Ireland Limited*, the equality officer, for the first time, construed section 34(4) of the *Equality Acts* in light of article 6(1) of the directive. This meant that, regardless of the provisions of section 34(4) of the *Equality Acts*, the employer had to satisfy the equality officer that the retirement age of 55 was objectively justified.

The dispute involved a claim by the complainant that he was discriminated against by the respondent on grounds of age when he was required to retire from employment at the age of 55 years, as provided for in his contract of employment. The complainant was employed by the respondent as a winchman for a search and rescue service.

The equality officer was satisfied that the aims of protecting the health and safety of the winchmen and the people they rescued were legitimate aims in terms of article 6(1) of the directive.

The equality officer then considered whether the means of achieving these aims (that is, the setting of the retirement age at 55 years) were appropriate and necessary in the circumstances. In light of research showing that a person's respiratory capacity,

musculature and endurance diminish with age, the equality officer accepted that the use of a mandatory retirement age of 55 years by the respondent was an appropriate and necessary way to achieve the above-mentioned aims.

The tribunal has followed the approach adopted in the above case and construed section 34(4) of the *Equality Acts* in light of article 6(1) of the directive in a number of subsequent cases dealing with mandatory retirement ages. In *Harte v Q Park Ireland Limited*, the Equality Tribunal found that the respondent had discriminated against the complainant by forcing him to retire and was unable to objectively justify this action. The respondent was ordered to pay the complainant the sum of €15,000 in respect of the discrimination.

Lessons learned

While objective justification will vary according to the circumstances of each individual case, it is useful for practitioners to note that the following have been accepted by the CJEU and the tribunal as legitimate objectives in the context of compulsory retirement ages:

- Creating opportunities in the labour market,
- Protecting health and safety,
- Ensuring motivation and dynamism through increased prospect of promotion,
- Facilitation of workforce planning,
- Pension arrangements,
- Avoiding disputes relating to employees' ability to perform their duties beyond the age of 65, and
- Sharing employment between generations.

It is clear from the case law that objectives that may be legitimate are those with social policy aims (for example, those related to employment policy, the labour market or vocational training) rather than purely individual reasons particular to an employer's situation, such as cost reduction or improving competitiveness.

It is also clear that an employer's objectives in using a specified retirement age must be relevant to their individual business circumstances rather than mere generalisations that do not relate directly to their workforce.

Many cases to date have advanced the argument, which has been accepted by the courts, that compulsory retirement ages are required to facilitate 'intergenerational fairness'. However, despite this assumption that older people in work 'block' younger people from finding work, recent evidence referred to by the British government when considering phasing out their default retirement age of 65 suggests that this is

incorrect. As a result, the courts may well start to look more closely at 'job blocking' arguments and potentially require employers to prove any such arguments by reference to their particular workforce.

When considering whether the means used to achieve legitimate objectives are appropriate and necessary, employers should firstly consider whether there is an alternative to the compulsory retirement age. If not, they should consider why they have chosen that particular retirement age, whether it achieves their legitimate aim, and whether they have evidence to back this up.

Case law has highlighted that the courts will also consider whether the compulsory retirement age arose as a result of negotiations and whether it takes account of retirement income or allows for individual assessment of an employee's circumstances (that is, allows them to request to work past the retirement age). A blanket retirement policy that does not take account of at least some of these factors is likely to be more difficult to justify.

With the increase in the State pension age from 65 to 66 in January 2014, more employees are likely to request to work beyond age 65 and challenge

compulsory retirement ages. In advance of this, employers who plan on relying on compulsory retirement ages should consider what objective they are trying to achieve by using such ages and whether the means used to achieve that objective are appropriate and

necessary. If employees will be permitted to remain in employment beyond their normal retiring age, employers will need to consider the various pensions and employment consequences of this, of which there are many. **G**

LOOK IT UP

Legislation:

- Council Directive 2000/78/EC
- Employment Equality Acts 1998 – 2011
- Unfair Dismissals Acts 1977 – 2007

Cases::

- *Calor Teoranta v McCarthy*, determination no EDA089
- *Donnellan v Minister for Justice, Equality and Law Reform and Others* [2008] IEHC 467
- *Doyle v ESB International Limited*, DEC-E2012-086
- *Félix Palacios de la Villa v Cortefiel Servicios SA* (case C-411/05)
- *Fuchs and anor v Land Hessen* (joined cases C-159/10 and C-160/10)

- *Harte v Q Park Ireland Limited*, DEC-E/2012-119
- *Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* (case C-388/07)
- *O'Neill v Fairview Motors Limited*, DEC-E/2012-093
- *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* (case C-341/08)
- *Rosenblatt v Oellerking Gebäudereinigungsges mbH* (case C-45/09)
- *Saunders v CHC Ireland Limited*, DEC-E/2011-142
- *Torsten Hörnfeldt v Posten Meddelande AB* (case C-141/11)



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We can work it OUT

The *Civil Partnership Act 2010* contains many troublesome terms that defy simple definition and are open to broad interpretation. **Inge Clissmann** and **Ciara McMenamin** weigh their words



Inge Clissmann SC is an expert in family law and a fellow of the International Academy of Matrimonial Lawyers



Ciara McMenamin has a master's in international law from the University of Cambridge and is currently studying for the Bar

The *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* came into effect on 1 January 2011 and, upon meeting certain requirements, cohabitants are provided with extensive rights and obligations. Section 172(1) requires that cohabitants be, among other things, “one of two adults ... who *live together* as a couple in an *intimate and committed relationship*.” Section 172(2)(c) outlines that, among other things, “the degree of *financial dependence* of either adult on the other and any agreements in respect of their finances” shall also be considered [emphasis added].

Due to the natural increase in cases concerning cohabitation, it is vital that practitioners familiarise themselves with the elasticity of the act's terms. This article focuses on some of the most troublesome terms, namely:

- ‘Living together’,
- ‘Intimate and committed relationship’, and
- ‘Financially dependent’.

Come together

While section 172(2)(b) provides that the court shall consider the basis on which the couple live together, the concept of ‘living together’ is vague. When does it commence? When does it end? What if cohabitants only live together a few nights a week or are forced to live apart due to circumstances outside their control?

In considering when ‘living together’ commences, it may be useful to consider case law from other jurisdictions. In the New Zealand case of *L v P [Division of Property]*, the parties decided to live together in October 2000, found accommodation in November, and moved into shared accommodation on 8 December 2000. The relationship ended on 8 November 2003. Due to legislation generally requiring those in *de facto* relationships to ‘live together’ for three years, the appellate judge (Asher J) considered when cohabitation commenced. It was held that the parties began to live together when they physically assumed a common residence and shared life. Essentially, nothing changed in their life in October 2000. All the changes occurred in December 2000.

“It appears that any definition of ‘living together’ for the purposes of the 2010 act is entirely speculative”

Considering this rationale, it is likely that Irish courts may be influenced by this decision and thus find that ‘living together’ commences when parties physically live together, rather than decide to live together. Questions remain, however, in circumstances where parties purchase or rent accommodation together, but for some reason delay in living together. As per Asher J's rationale, could it be considered that,

with a joint mortgage or rental agreement, the parties have commenced some form of shared residence?

Queries also arise as to how frequently parties are required to live together in order to come within the 2010 act. This issue has been addressed in Australia. In particular, the New South Wales Supreme Court



has held in *Dries v Ryan* that a couple with separate homes and finances who stay together one night per week are not in a *de facto* relationship. In *Parks v Thompson*, the same court held that two to three nights of 'living together' per week is insufficient, while in *Greenwood v Merkel*, a couple that stayed together in either of their respective homes almost every night were deemed to be in a *de facto* relationship. In *S v B*, the Queensland Supreme Court held that parties to a seven-year relationship were in a *de facto* relationship, where the parties maintained separate lodgings in the same house, yet continued a sexual relationship, shared meals and household chores.

Couples are often required to live apart and maintain two homes, one of which may be shared with a partner, while the other acts as accommodation during the working week or university term-time. Cohabitants may also be required to live away from their partners due to a need for medical treatment, to care for a relative or to serve a custodial sentence. In his book, *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*, Ryan

notes at p271 that "by analogy with case law relating to the meaning of 'living apart' for the purpose of divorce law, it is possible to argue that the couple are still 'living together' provided that they did not form an intention to end their relationship".

Thus, the question arises as to whether the courts would consider cohabitants who have been forced to live apart unintentionally as still 'living together' for the purposes of the 2010 act. In *PY v CY*, the New South Wales Court of Appeal held that a *de facto* relationship continued where the applicant moved out of her shared home to care for her parents.

In *Howland v Ellis*, the same court held that a *de facto* relationship terminated upon the imprisonment of a male partner, regardless of the parties' intentions to maintain their relationship.

In *Scrags v Scott*, the New Zealand courts considered a 12-year relationship, wherein the applicant lived in Guam. The parties lived together while in the same country; however, both had other sexual partners. The High Court stressed that a common-sense

"It is apparent that there is no clear-cut method of objectively determining who is in an 'intimate and committed' relationship"

FAST FACTS

- > Some of the more vague terms of the *Civil Partnership Act* present problems for practitioners, and it is vital that they familiarise themselves with the elasticity of the act's terms
- > It is yet unclear what is comprised in the concept of 'living together' and whether a period of 'living apart' negates a claim
- > Questions arise as to how intimacy and commitment are to be measured in relation to the 2010 act
- > Queries also arise regarding 'financial dependence', which, unless afforded a broad interpretation, has the potential to undermine many claims
- > Undoubtedly, the 'certain rights and obligations' of cohabitants will require clarification from the courts

approach should be applied, as a wide variety of situations could be found on the scale of *de facto* relationships. It was held that a regular common residence was only one factor to be considered. Having considered, among other things, the significant amount of time that the parties had lived together, the court ultimately held that a *de facto* relationship existed.

In conclusion and considering the above, it appears that any definition of 'living together' for the purposes of the 2010 act is entirely speculative.

All you need is love

The requirement that cohabitants be in an intimate and committed relationship first arises in section 172(1), while section 172(3) states



“Due to the limited nature of the phrase ‘financially dependent’, it seems likely that a vast number of future claims of qualified cohabitants will be hard won unless the courts adopt a liberal stance”

that intimacy does not cease merely because a relationship is no longer sexual in nature. The phrase ‘no longer sexual’ implies that there must at some point have been a sexual basis to the relationship. This requirement is in contrast to other jurisdictions that have forgone such a requirement, such as Belgium, which provides for legal recognition of non-romantic relationships in its *Cohabitation Légale*.

Questions exist as to how courts will define and measure ‘commitment’. Ryan states at p273 that “the term ‘commitment’ is not susceptible to easy calibration and, pending clarification from the courts, the precise status of two persons who are living together in a dysfunctional relationship may be difficult to determine”.

For these and many other reasons, Bailey-Harris believes that the law should adopt a broad definition of commitment.

Guidance may be taken from foreign jurisprudence as to how to define commitment. The Queensland courts held in *M v T* that there was insufficient emotional connection between two women who shared a house, with separate lodgings, and who had on numerous

occasions slept together. While the respondent wanted a relationship, the applicant did not and had been sleeping with other people concurrently.

In *Scragg v Scott*, the High Court of New Zealand held that generalisations should be avoided when considering commitment: “Sexual fidelity may be a factor which ... may indicate a lack of commitment, but it depends on all the circumstances.”

In *SPM v PJS*, the New Zealand courts considered the case of parties that had a child together and shared accommodation. In finding that a *de facto* relationship did not exist, Walsh J held that “the parties lived in an arrangement” that “as time went by ... consolidated more by default and not by agreement.” The woman was a lesbian and had been a prostitute and “her various relationships and liaisons are consistent with her view she did not want to commit”.

While it is evident that the 2010 act has avoided the issue of whether to recognise non-romantic relationships, it remains uncertain as to how our courts will interpret the phrase ‘intimate and committed’. Intimacy and

commitment are merely two hard-to-measure factors to consider in a plethora of other factors, and it is apparent that there is no clear-cut method of objectively determining who is in an ‘intimate and committed’ relationship.

You never give me your money

Section 172(2)(c) of the 2010 act provides that, in determining whether or not two adults are cohabitants, the court shall consider the degree of financial dependence of either adult on the other and any agreements in respect of their finances. Section 173 further enables financially dependent qualified cohabitants to apply for redress. In particular, subsection 2 provides: “If ... the financial dependence arises from the relationship or the ending of the relationship, the court may, if satisfied that it is just and equitable to do so in all the circumstances make the order concerned.”

The above limitation is in line with the Law Reform Commission’s view that the redress model’s purpose is to “operate a safety net to address the needs of the vulnerable qualified cohabitants on breakdown of the relationship”.

It is clear that redress is not available

to those able to support themselves independently. Thus, the precise meaning of 'financial dependence' becomes vital. As Rodgers states, it is a term that "has the potential to be very restrictive".

Mee suggests that section 173 means "that the claimant must be *in need of* financial support for his or her maintenance in principle from any source, as a result of the relationship or its termination". Rodgers agrees: "Financial dependency most obviously translates into 'need' as the basis of relief, potentially being seen as a sort of needs-based insurance policy. Need is a theme familiar to divorce, as a spouse's formal legal commitment may be taken as evidence that the parties have assumed a responsibility to support each other ... Some argue that it is difficult to justify obligating a partner to relieve financial hardship on the ending of the relationship, especially where there was no requirement to do so during the relationship. One could ask why a family member or the state is not the better entity to be burdened."

Tomorrow never knows

The 2010 act also appears restrictive when contrasted with the law of New Zealand, where 'relationship' property is divided upon separation according to the general rule of equal sharing. New Zealand courts are also empowered to grant compensation for economic disparity, which, as Atkin states, permits courts to award unequal division, most likely in favour of the party with the least property.

Due to the limited nature of the phrase 'financially dependent', it seems likely that a vast number of future claims of qualified

cohabitants will be hard won unless the courts adopt a liberal stance. While the term 'financially dependent' is used in the 2010 act, it appears that this will inevitably be interpreted by the courts on a 'needs' basis.

Atkin states that there has been a steady flow of litigation in New Zealand concerning terminology in its laws on cohabitation. It would appear that the same is likely in Ireland. As regards 'living together', it is yet unclear

what is comprised in this concept, and whether a period of 'living apart' negates a claim.

Questions also arise as to how intimacy and commitment are to be measured. Queries also arise regarding 'financial dependence', which, unless afforded a broad interpretation, has the potential to undermine many claims. Undoubtedly, the 'certain rights and obligations of cohabitants' will require clarification from the courts. **G**

LOOK IT UP

Cases:

New Zealand

- *L v P [Division of Property]* [2008] NZFLR 401
- *Scragg v Scott* [2006] NZFLR 1076
- *SPM v PJS* (9 May 2008) FC Mas FAM-2007-035-00200 (Family Court)

Australia

- *Dries v Ryan* [2000] NSWSC 1163
- *Greenwood v Merkel* [2004] NSWSC 483
- *Howland v Ellis* [1999] NSWSC 1142
- *M v T* [2006] QDC 300
- *Parks v Thompson* (1997) DFC 35-182
- *PY v CY* (2005) DFC 95-323
- *S v B* [2005] 1 Qd R 537

Legislation:

- *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*
- *Family Law Act 1975; Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Australia)
- *Property (Relationships) Act 1976* (New Zealand)

Literature:

- Atkin, Bill (2008), 'The legal world of unmarried couples: reflections on "de facto relationships" in recent New Zealand legislation', *Victoria University of Wellington Law Review*, vol 39, no 4, p793; available at www.austlii.org/nz/journals/VUWLawRw/2008/44.pdf
- Bailey-Harris, Rebecca (1998), *Dividing Assets on Family Breakdown* (Jordan Publishing)
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- Mee, John (2011), 'The property rights of cohabitants under the 2010 act', conference on the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*, 2 April 2011, School of Law, Trinity College Dublin
- Rodgers, Niamh (2012), 'Should have put a ring on it? A comparative analysis of the law of cohabitation in Ireland, Scotland and England and Wales', *Hibernian Law Journal*, 11 HLJ 122
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Biting the BULLET

The *Personal Insolvency Act 2012* allows debtors to dispose of secured and unsecured creditors by means of a one-off bullet payment. **Alec Flood** locks and loads



Alec Flood is a Dublin-based barrister specialising in commercial and insolvency law. He wishes to thank Declan Murphy BL, who specialises in corporate, insolvency and banking law, for reviewing the article

A previous *Gazette* article ('At debt's door', June, p32) succinctly outlined the two main debt resolution mechanisms available under the *Personal Insolvency Act 2012* – namely, the debt settlement arrangement and the personal insolvency arrangement.

This article progresses the topic by focusing particular attention on the provisions that allow debtors to successfully conclude an arrangement with creditors in a short time frame by means of a bullet or lump-sum payment.

The 2012 act significantly changes Ireland's personal insolvency laws. It provides for the introduction of three new debt resolution processes, which, though requiring approval by the court, are essentially non-judicial in nature. The new act addresses personal debt and makes significant changes to the bankruptcy laws. The purpose of the act is to help mortgage holders and others with unsustainable debt to reach agreements with their creditors.

An important issue is whether the debt is secured or not. A secured debt is a loan on which property or goods are available as security against non-payment. Mortgages are the most common secured loans. In general, debts such as bank loans and credit card debt are unsecured but, if they become rolled up into a mortgage by way of an 'all-monies' clause, they become secured loans. The three new debt resolution processes flow from the nature of the debt and are as follows:

- Debt relief notice (DRN): under section 26 of the act, this process will allow for the write-off of qualifying unsecured debt up to €20,000, subject to a three-year supervision period.
- Debt settlement arrangement (DSA): section 57 of the act sets out the eligibility criteria for a debtor

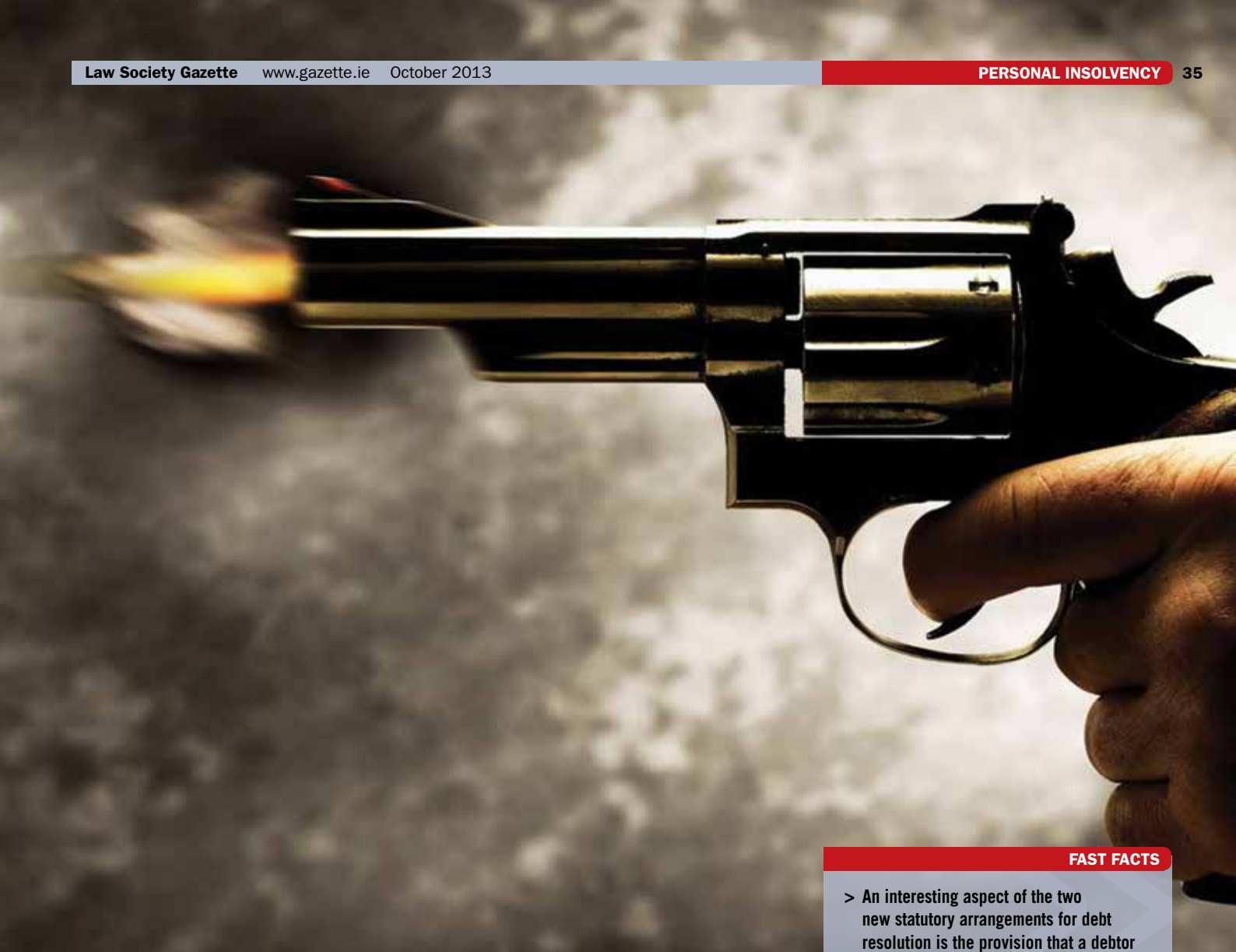
entering a DSA. A DSA provides for the settlement of unsecured debt, with no limit involved; secured debt is unaffected (section 68). A DSA will not adversely affect bank security, and secured creditors may choose not to participate in a DSA (section 68).

- Personal insolvency arrangement (PIA): under section 91 of the act, a PIA will enable the settlement of unsecured debt without limit and secured debt up to €3 million, although this cap may be increased with the consent of all secured creditors.

An interesting aspect of the two new statutory arrangements (DSA and PIA) is the provision that a debtor can successfully conclude certain arrangements over a relatively short period of time by way of a lump-sum payment. A review of where such arrangements may be adopted may prove useful in allowing insolvency lawyers to advise clients who find themselves 'at debt's door' or who are owed money by an insolvent debtor.

Get Shorty

Both statutory schemes of arrangement allow for the conclusion of the agreed arrangement in a short time-frame by means of a lump-sum payment.



With regard to a DSA, under section 65 of the act, the maximum duration of the arrangement must be five years, but this can be extended by one year by party agreement.

However, a DSA can be for a shorter period of several months and be concluded by the provision of a lump-sum payment to creditors (section 66). The arrangement must be accepted by vote of creditors representing 65% of the value of the debt and approved by either the Circuit Court in cases up to €2.5 million or the High Court in larger cases. This arrangement does not require the disposal of the principal private residence unless the costs of continuing to reside there are disproportionately large or the debtor has consented, having obtained independent legal advice – and any non-owning spouse or partner also consents.

“Both statutory schemes of arrangement allow for the conclusion of the agreed arrangement in a short time-frame by means of a lump-sum payment”

Although six years is the maximum duration for a PIA (extended by one year by party agreement), it is possible under section 99(2)(b) to have a shorter PIA when the PIP deems it the most appropriate duration. There is no minimum duration for a PIA and, as a result, a lump sum payment (section 100) could be made in full and final settlement of all debts where there is no repayment capacity. The arrangement must be accepted by a vote of creditors representing 65% of the value of the total debt (secured and unsecured), with a minimum of 50% in value of both secured and unsecured creditors participating in and voting at a creditors’ meeting, and approved by the appropriate court. A creditor has a right to objection by notifying the court within 14 days.

FAST FACTS

- > An interesting aspect of the two new statutory arrangements for debt resolution is the provision that a debtor can successfully conclude certain arrangements over a relatively short period of time by way of a lump-sum payment
- > As a result of these provisions, debtors who find themselves in suitable circumstances and with no capacity to repay may be allowed, with agreement of their creditors, to dispose of their secured debt (up to €3 million) and unlimited unsecured debts by way of a lump-sum, short time-frame arrangement

As a result of these provisions, debtors who find themselves in suitable circumstances and with no capacity to repay may be allowed, with agreement of their creditors, to dispose of their secured debt (up to €3 million) and unlimited unsecured debts by way of a lump sum, short time-frame arrangement. A review of the scenarios provided by the ISI’s website indicates that such arrangements could be terminated after four months. As a result, debtors will not necessarily be required to

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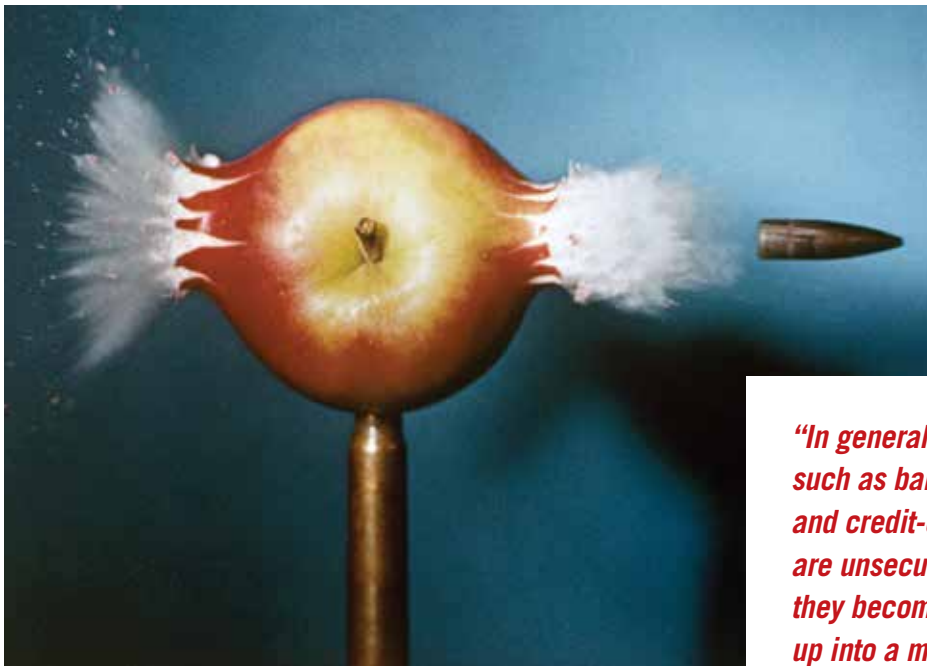


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“In general, debts such as bank loans and credit-card debt are unsecured, but if they become rolled up into a mortgage by way of an ‘all monies’ clause, they become secured loans”

make periodic payments for a duration lasting up to six years where they have no future capacity to repay. In such circumstances, a financially independent spouse or family member may be in a position to provide the lump sum. This is obviously a very attractive option for certain debtors, but it may come at a cost to both the debtor and creditors involved.

Miller's crossing

Section 59 of the act permits the ISI to impose “such fee (if any) as may be prescribed” to accompany applications for a DSA. However, section 93(2) of the act makes no such allowance for the ISI to impose fees on applications for a PIA, although the

generality of section 20 (‘power to charge and recover fees’) of the act may mend this oversight.

Under the act, a DSA (section 65) and a PSA (section 99) shall make provision for the PIP's costs in making and supervising the arrangement. As a result, a PIP must indicate the likely amount of the fees, cost and outlays to be incurred or – where this is not practicable – the basis on which those fees, costs and outlays will be calculated. In the scenarios accompanying the DSA guidelines, presented on the ISI website, the ISI gives as an example a fee of €4,000 over five years to be paid to the PIP. In the two scenarios provided, the

PIP's fees are made up of an initial fee of €1,500 to reflect the upfront work undertaken by the PIP and is followed by yearly amounts staggered over the remaining five years. We may infer from these examples that this is the level of fee the ISI may deem appropriate for PIPs to charge in most scenarios.

In general circumstances, a PIP's fees are expected to be deducted from the periodic payments made by the debtor. However, where an arrangement (both DSA and PIA) is a lump sum, short-term arrangement, terminating after, say, four months and where no periodic payments will be made, an alternative approach is permitted, and the PIP may invoice the debtor separately from the arrangement. Scenarios provided by the ISI indicate fees of between €5,000 and €6,000 per debtor for a PIA, single, joint and interlocking, as per section 89(4). Furthermore, as part of developing an arrangement proposal, the PIP will seek to agree fees with the creditors. Fees will vary in accordance with the complexity

of a case and what is acceptable to the creditors. In proposing a fee, the PIP may suggest a staggered drawdown of the fee to reflect the upfront work associated with making an application and a proposal, as well as their other statutory duties during the lifetime of the arrangement.

White heat

Now that the ISI has opened its doors for business, it is anticipated that insolvency lawyers will experience a surge in enquiries from clients – debtors seeking a remedy for their financial woes and creditors seeking advice regarding debtors who enter personal insolvency.

Much has been publicised about the personal insolvency guidelines (PIGs), particularly in relation to the issue of ‘reasonable living expenses’, with citizens moving from ‘being on the pig's back’ to ‘having the pig on their back’ for anything up to six years. However, with a greater understanding of the provisions allowed for in the 2012 act, insolvency lawyers may now be able to explain to their clients the full breadth of options open to PIPs in resolving personal insolvency. Debtors may be encouraged to engage with the new regime knowing that there are possible short time-frame arrangements available to them. Creditors may be open to accepting a lump-sum payment from a third party in full and final settlement of the debt. ©

ROAD TO PERDITION

The exact details of entering a statutory scheme of arrangement have been dealt with elsewhere but, in general, applications for DSA and PIA must be made through a personal insolvency practitioner (PIP) and regulated by the Insolvency Service of Ireland (ISI).

To apply for either a DSA or a PIA, a debtor must give all relevant financial information to the PIP. The practitioner shall meet and advise the debtor on whether or not they meet the conditions, what the procedures are, the costs involved (including the fees to be charged by the practitioner), and what other options may be available.

If the debtor decides to proceed, they appoint a practitioner – it need not be the person who has provided the initial advice

– who will assist the debtor to complete a ‘prescribed financial statement’. The practitioner shall advise of the options available to the debtor, whether or not they are eligible for either a DSA or a PIA, and give an opinion on which of these is more appropriate.

The practitioner will also have obligations towards the creditors and will be required to advise them about the outcome for them of any proposed arrangement. The practitioner will be obliged to take various actions if it transpires that the debtor's circumstances have changed and is unable to meet the terms of the arrangement, or if they become aware that the debtor did not meet the requirements for an arrangement.

BEHIND THE

Veil

To have and to hold: what might the British decision in *Prest v Petrodel Resources* mean for Irish clients and the desirability of prenuptial agreements? **Jennifer O'Brien** pops the question



Jennifer O'Brien is a partner and head of family law at Mason Hayes & Curran

The recent landmark decision of the British Supreme Court in *Prest v Petrodel Resources* has been hailed as “a victory for all women” after the seven justices allowed an appeal by Yasmin Prest and upheld the transfer to her of substantial property assets held in the names of her husband’s companies. So what implications has the decision for Irish cases, and will it have a significant effect on ‘piercing the corporate veil’ in the context of company law and future divorcing spouses in this jurisdiction? Should those seeking to protect corporate assets consider entering into pre and/or post-nuptial agreements?

The original position

Yasmin and Michael Prest married in 1993 and divorced in 2008. Aside from the matrimonial home, all of Mr Prest’s properties were vested among several offshore companies controlled by him, including a Stg£4 million property at 16 Warwick Avenue, London. The former wife sought orders under section 24(1)(a) of the *Matrimonial Causes Act 1973* against those companies for transfer of certain properties from their control. In a unanimous decision, the British Supreme Court reinstated the family court ruling, but not for the reasons given by the trial judge, Moylan J. The Court of Appeal’s reasons for not piercing the veil were confirmed, but it was held that Petrodel Companies were merely bare trustees of the properties in question.

As Lord Sumption observed: “Whether assets legally vested in a company are beneficially owned by its controller is a highly fact-specific issue. It is not possible to give general guidance going beyond the ordinary principles and presumptions of equity, especially those relating to gifts and resulting trusts. But I venture to suggest, however

tentatively, that in the case of the matrimonial home, the facts are quite likely to justify the inference that the property was held on trust for a spouse who owned and controlled the company ... Judges exercising family jurisdiction are entitled to be sceptical about whether the terms of occupation are really what they are said to be, or are simply a sham to conceal the reality of the husband’s beneficial ownership.”

As such, the court found that “the corporate veil may be pierced only to prevent the abuse of corporate legal personality. It may be an abuse of the separate legal personality of a company to use it to evade the law or to frustrate its enforcement.”

“In light of the recent decision in *Prest*, it might be prudent to seek to ring-fence or protect corporate assets, such that the parties could acknowledge their intention to make ‘proper provision’ from the other assets available”

The difference principle

In the course of his judgment in *BD v JD*, McKechnie J gives some insight on this issue from an Irish perspective: “Even in the absence of any case law being opened on what possible complications the existence of a private company might have, I wish to assert, as a matter of principle, that this court has jurisdiction over all of the assets of both the applicant and the respondent, including those held by the latter through the medium of a limited company, and can make use of them in the most appropriate manner feasible, so as to make proper provision for the parties of this marriage. This jurisdiction is found in the relevant statutory provisions of the *Family Law Acts* and, if necessary, subject to any third parties’ vested rights, would take precedence over any business decision made by a corporate entity such as the company in question in this case. I could not under any circumstances

accept that this court could be disabled from performing its constitutional and statutory duties simply by the creation and existence of a private company where its entire affairs are in the exclusive control of one party to the marriage.”

He went on to say: “Notwithstanding these comments, however, I do not find it necessary in the particular circumstances of this case to invoke the type of jurisdiction above described. This is because I am satisfied that proper provision can be made without substantially affecting the structure of the company or intervening with previously made decisions or altering or modifying the thrust of its present policy or direction.”

Reflective equilibrium

FJW v M v CNRTM concerned the interrelationship between family legislation and the law of trusts. The main asset in the case was a house and 750 acres of land, which were held in a trust established before the commencement of matrimonial litigation between the applicant and respondent. The matter came before the court by way of preliminary issue as to

FAST FACTS

- > There is no specific statutory provision for prenuptial agreements in Irish law
- > Previously, such agreements were considered invalid, on the basis that they were contrary to public policy
- > However, since the introduction of divorce, there is a view that public policy objections may no longer be valid
- > In addition, the introduction of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* facilitates cohabitants in regularising financial matters by written agreement

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whether the trust came within the provisions of section 9(1)(c) of the *Family Law Act 1995*. It was accepted by all parties that, under the trust document, the trustee for the time being of the trust had full discretion to nominate persons or classes of persons to be beneficiaries for the purposes of the trust, and also had full discretion over any advancement made in exercise of its powers under the trust. It would appear that the trust had been established in the mid 1970s in order to deal with certain tax and inheritance issues. As such, there was no question that the trust was a device to diminish the assets of the family.

McKechnie J summed up his conclusions, having considered a number of textbooks and authorities in the area: "In my view, therefore, these cases over a lengthy period of time demonstrate the court's approach to statutory provisions almost identical, for present purposes, to section 9(1)(c) of the 1995 act. That approach leads to a result that, once arrangements confer a benefit on the spouses or either of them in their capacity as husband or wife and was provided for, with and by reference to their marriage status, then same should be treated as a settlement within the said statutory provisions."

He distinguished the judgment of McGuinness J in *JD v DD*, on the basis that none of the authorities that he had reviewed had been opened to McGuinness J in that judgment. He relied on the English authority of *Howard v Howard* that a discretionary trust did not fall to be dealt with under section 9(1)(c) of the *Family Law Act 1995*. Mr Justice McKechnie concluded that the trust in the case was a settlement within section 9(1)(c) of the 1995 act. As such, McKechnie J held that it would be inappropriate for him to decide the matter as a preliminary issue, and he concluded that he was unwilling to exclude the trust from consideration at the substantive hearing. Subsequently, the case went to full hearing before Mr Justice Abbott, who proceeded to make orders dividing the land that was the subject of the litigation between the parties, giving detailed directions in this regard.

The veil of ignorance

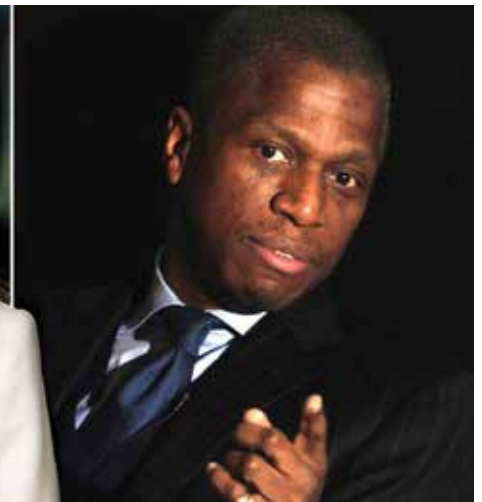
With regard to prenuptial agreements generally, there is no specific statutory provision for these agreements in Irish law. Previously, such agreements were considered invalid, on the basis that they were contrary to public policy.

However, since the introduction of divorce, there is a view that public policy objections may no longer be valid. In addition, the introduction of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* facilitates cohabitants in regularising financial matters

"Should those seeking to protect corporate assets consider entering into pre and/or post-nuptial agreements?"



Yasmin and Michael Prest



by written agreement. This legislation creates a strong basis upon which to argue that intended spouses should also be facilitated in regulation of financial matters by written

agreement, in advance of and during marriage. It is also likely that the British Supreme Court decision in *Radmacher* would be persuasive, such that the Irish courts are likely to have regard to pre-nuptial agreements, provided certain procedural safeguards are adhered to.

While prenuptial agreements are unlikely to be directly enforceable on account of the court's obligation to make proper provision, it is likely that such an agreement would be considered together with the other factors contained in the legislation, such as the length of the marriage, the financial contributions made by both parties, the level of dependency, the number of children, work carried out within the home and elsewhere. As such, a prenuptial agreement is likely to be given more weight in respect of a shorter marriage with no children, and less weight for a longer marriage where there are dependents. An agreement also enables each party to set out clearly the financial resources brought by each individual person to the marriage, by scheduling details of them. With regard to the position on death, it should be noted that it is also possible to renounce *Succession Act* rights by entering into a separate deed of waiver and renunciation.

Thought experiment

While not on a statutory basis, it would be preferable that procedural safeguards are observed:

- Endeavour to execute the agreement at least 28 days before the intended marriage,
- Both parties to be separately and independently legally advised with a certificate contained in the agreement to this effect,
- Outline financial disclosure exchanged, as

scheduled to the document, and

- There should be no undue pressure or stress on any party to sign the agreement.

In light of the recent decision in *Prest*, it might be prudent to seek to ring-fence or protect corporate assets, such that the parties could acknowledge their intention to make 'proper provision' from the other assets available. Such an arrangement makes particular sense in the context of family holdings (including business, corporate, farm and trust assets) where it is intended to preserve assets for the next generation and where individuals are anxious to avoid any negative impact on the business that might be created by contentious divorce proceedings.

The recent financial turmoil has brought a renewed prudence, especially for those fortunate enough to have preservation-of-wealth issues. They must now take the time to consider proper estate management, review of wills, pre/postnuptial agreements, and whether a cohabitants' agreement is required.

Unless, of course, they'd rather be the Irish Mr Prest or the female equivalent. ☺

LOOK IT UP

Cases:

- *BD v JD* [2005] IEHC 407
- *FJW v CNRTM* [2004] IEHC 114
- *Howard v Howard* [1945] 2 All ER 91
- *JD v DD* [1997] 3 IR 64 and [2006] IEHC 333
- *Prest v Petrodel Resources* [2013] UKSC 34
- *Radmacher v Granatino* [2010] UKSC 42

Legislation:

- *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*
- *Family Law Act 1995*
- *Matrimonial Causes Act 1973 (Britain)*

BACK TO THE FUTURE



David Rowe is managing director of Outsource, a company that provides practice management and financial management support to Irish law firms

In the second of two articles, **David Rowe** examines the options that are out there for smaller firms seeking to ride the crest of the recession wave

In last month's article, I looked at the effects of the recession on Irish law firms of different sizes and type. While there has been significant change for all firms in the market, those most challenged in terms of earning a living are the one-to-three solicitor firms, especially those in private client areas. The statistics in relation to the number of solicitors per firm make for interesting reading. Of the firms in the country, 43% fall into the one-solicitor size and an astonishing 82% fall into the three-or-less solicitor size. Only 1% of firms have 21 solicitors or more. This evidence shows that the financial turmoil of the past five years has led to more fragmentation and that the recession has resulted in firms having fewer solicitors, to match the work available. As we (hopefully) begin a new phase of improving fee income and ultimately profitability, how

"The number of successful mergers outnumbers the ones that have run into difficulty by about 20 to one"

can the small-to-medium Irish law firms make it easier on themselves? Are there options outside of merging? Why is all of this necessary?

1.21 gigawatts

A recent merger we were involved in showed that, if four sole practitioners came together, there was additional income of €30k per partner simply by merging and saving on expenses. In many firms, profit levels are struggling to reach €30k, so doubling this by simply merging is presumably an attractive proposition. However, mergers get a lot of negative press, with the one that does not work overshadowing the 19 that successfully

come together and change existing partnerships.

For many practitioners, a merger is the right answer. By merging, practitioners can bring in different contacts and a different client bank, leading to less dependence on one





or two key clients, and they can share costs and achieve economies of scale. Importantly, they can also separate practice areas and thus become better than average in one or two areas, using the individuals in the enlarged firm in their different areas of strength.

The challenges revolve around the ability to work together and to recognise that partnerships are seldom exactly equal every year. Relationships are also a huge factor: many sole practitioners who are used to making their own decisions struggle with being answerable and having obligations to others. There is a visible change in the profession, with younger practitioners being more open to partnership, and many of the more recent start-ups indicate that they do not see sole ownership as the right long-term business model. The number of new firms that are multi-partner confirms this.

Going through the 'getting to know you' and due diligence phases in a planned way, rather than making decisions solely on instinct and first impressions, is how to avoid the costly mistake of merging with the wrong firm or set of individuals. Dealing with difficult issues pre-merger gives a good indication of how potential partners will react to difficult decisions post-merger. The number of successful mergers outnumbers the ones that have run into difficulty by about 20 to one, and the practitioners within those that have succeeded will say they achieved more in one year than they would have done in five years of organic growth on their own.

We see achieving economies of scale becoming more important in the highly competitive market for commoditised legal work – such as residential conveyancing, routine personal injury litigation, and so on

FAST FACTS

- > By merging, practitioners can bring in different contacts and a different client bank, leading to less dependence on one or two key clients, and they can share costs and achieve economies of scale
- > There are several offices throughout the country where a number of firms share the same premises, share facilities, and share staff – but keep their own fee income
- > The *Legal Services Regulation Bill* opened up the possibility of multidisciplinary partnerships, but experience in other jurisdictions would indicate that take-up is likely to be low

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– where fee levels have fallen dramatically in recent years. To service this work profitably in the future will require systems and processes, which will necessitate significant investment, something that may be beyond most sole practitioners

Flux capacitor

For firms that do not see themselves merging, there are a number of workable alternatives, such as overhead sharing arrangements.

There are several offices throughout the country where a number of firms share the same premises, share facilities, and share staff – but keep their own fee income. They each have their own professional indemnity insurance record, and each firm ends up with a different profit.

Typically all firms have their nameplates on the door and there is a system, often by rotation, whereby walk-in clients are steered to one firm or another.

I have seen this work very well, and it has all the advantages of merging, in terms of economies of scale, without a full commitment to each other. There are elements missing with this arrangement, however, such as the lack of marketing and specialisation in different practice areas, and each of the firms in the building is competing with the others. Where we have seen this arrangement, it works with practitioners who are well disposed towards each other but do not want to be in partnership. The arrangement is somewhat similar to having a law firm with the administration and resources pooled centrally and paying a service charge for the use of those resources.

Another alternative is to have like-minded individuals with different catchment areas (and therefore not competing with one another) in a formal or loose alliance where they share market knowledge, facilities, know-how and challenges together – but not sharing pricing information or setting fixed fees. In Outsourced, we have a number of managing partner forum groupings that achieve this for our clients. In our experience, if the individuals are like-minded, open, and the information shared is used within those practices only, these groups succeed. There is potential within these groups to develop common systems that require a lot of effort and cost for firms to invest in individually, such as case-management systems, risk-management systems, libraries, precedents, and so on.

We are beginning to see a trend of

practitioners shutting down their own practices and going to work for others under a larger firm umbrella in a financial arrangement that is linked to the clients and fees they bring in and to contributing to the overhead base of the larger firm. Often in these arrangements, the former smaller practitioner will be working for a fixed salary together with a performance related bonus, but is freed from the burdens of ownership and running a practice individually. For the larger firm, they are achieving economies of scale, making a profit, and spreading their own overheads over a greater number of fee earners.

Other professions have more diverse ownership structures, such as an overseas parent firm or a franchise arrangement. Accountancy practices and estate agents are good examples of this. The medical profession have medical centres. We work with one entity in this sector where each of eight firms retains its own separate identity, but there is a joint venture that gives this group of eight the capacity, expertise and geographical cover to pitch for national work. There is no doubt that there is scope for similar alliances of law firms, particularly smaller

to medium ones, in going after particular tranches of work. The franchise type arrangement, so common with estate agents, meets current regulatory requirements, provided both franchisor and franchisee are solicitors' firms.

88 miles per hour

More radical options may well become available to practitioners in the future. These include admitting barristers as partners and forming multidisciplinary partnerships with other professions. The *Legal Services Regulation Bill* opened up the possibility of multidisciplinary partnerships, but experience in other jurisdictions would indicate that take-up is likely to be low.

Another potential development through the bill is the introduction of limited liability partnerships and limited liability companies. In addition to the protection of personal assets, this will create a number of potential tax planning opportunities. In Britain, all of this has gone a step further with the introduction of alternate business structures, meaning that law firms need no longer be owned by a lawyer, leading to multinationals entering the British legal services market.

In the post-recession environment, the



'Great Scott! A merger!'

price for many legal services has been driven down by clients and is therefore very competitive. This means that firms servicing what has become 'commoditised' work will have to have systems in place in order to be profitable and, as this work is much of the target work of smaller practices, many now need to invest in systems and procedures. This is more difficult to achieve as a smaller firm and may drive more practitioners towards a merger or an overhead-sharing arrangement.

Do not open until 1985

For many smaller and medium-sized practices, the reality is that their current business structure is not viable. For others, life could be made much easier by sharing the challenges and opportunities with others. Merging with another practitioner or another firm creates the best environment and provides the most comprehensive practice arrangement within which to address the challenges ahead. Larger small firms are more profitable, share resources, can be easier to run, and are more competitive, leading to an unequal tussle for work.

For many, the realities of the last number of years have been about survival, but it is now time to look up and outwards. If you are a smaller practice and merger is not for you, then there are huge advantages in either an overhead-sharing arrangement or a friendly alliance with a number of other practices in similar towns facing the same challenges. More radical options loom but are not immediately available. In ten years, I suspect we will be looking at a much-changed profession, where practices have come together, either formally, informally or in business alliances, to enable smaller and medium-size practices compete on an equal footing with larger firms. For the outward looking, the opportunities are here now. ©



SLIGO BAR ASSOCIATION

On 3 September, Law Society President James McCourt and director general Ken Murphy met with members of the Sligo Bar Association in the Glasshouse Hotel, Sligo. Attending were (*front, l to r*): Declan Gallagher, Michael Horan, Maurice Galvin (president, Sligo Bar Association), Ken Murphy (director general), Michele O'Boyle (Council member, Law Society), James McCourt (president, Law Society), Deirdre Munnelly (secretary, Sligo Bar Association), Derville O'Boyle, Tom MacSharry and Peter Martin. (*Second row, l to r*): Tom Martyn, John Creed, Donnacha Anhold, Claire Gilligan, Aisling Lupton, Shane McDermott, Hugh Sheridan and Lisa Walsh. (*Third row, l to r*): Michael Mullaney, Eamonn Creed, Noel Kelly, Edmund Henry, John McShane, Elaine Coghill, Ita Lyster and Tommy McNamara. (*Fourth row, l to r*): Joe Carter, Eamonn Gallagher, Eamonn McGowan, Mark Mullaney, Sinead Maguire, Aine Mulderigg, Michael Monahan and Brian Gill. (*Back, l to r*): Michael Quigley, Gerry McCanny, Lorraine Murphy, Caroline McLaughlin, Donal Carroll, Mel Burke, Fergal Kelly and John Murphy



LEITRIM BAR ASSOCIATION

Leitrim Bar Association welcomed Law Society President James McCourt and director general Ken Murphy to Carrick-on-Shannon on 4 September 2013. The meeting, held at the Landmark Hotel, included a discussion on the updates to the *Legal Services Regulation Bill* as well as the proposed changes to jurisdiction in the courts. Attending the meeting were (*front, l to r*): Kieran Ryan, Emma Egan, Ken Murphy (director general), Noel Quinn (president, Leitrim Bar Association), James McCourt (Law Society President), Aoife Kelly, Conor Maguire, John McNulty and Carol Ní Chormaich. (*Back, l to r*): John Paul Feeley, Michael Keane, Claire Moran, Matthew Browne, Gabriel Toolan, Donal Scanlon, Peter Collins and Aoife McDermott (honorary secretary, Leitrim Bar Association)

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Magnificent Seven's iconic photo op!



Four solicitors and one barrister were among the team that took on the challenge of cycling from Land's End to John O'Groats in Britain – a distance of over 1,039 miles – to raise badly needed funds for 'The Forgotten Irish Campaign' (www.irelandfund.org). The Ireland Fund of Great Britain congratulated the 'Magnificent Seven' for their efforts.

The Forgotten Irish Support Team comprised Bernard McEvoy, Neill Shrimpton, Gerald Byrne and Ben Williams (all from Brown Rudnick LLP), Ercus Stewart SC (Dublin), Kenny Dalby (Glasgow), Matt Hoyle (Australia) and, finally, Michael O'Driscoll (Cork) in support.

On arrival at John O'Groats, the seven cyclists travelled abreast, reaching the finishing line just before sunset. Draped in their respective country's flags, they were looking forward to having their photos taken with the

famous John O'Groats sign in the background – but couldn't believe it when they saw that the famous sign had, quite literally, just been taken down, with the photo-booth being dragged away by a digger!

Apparently they had missed out on their photo op by half an hour. Having cycled for ten days, however, they took it upon themselves to recover the sign and lift it above their heads to get the photo they all wanted – the last people ever to have their photo taken with the iconic sign!

To date, the group has raised over Stg£14,000 but wishes to raise more. If you'd like to contribute, please send sterling drafts to the Ireland Fund of Great Britain, Wigglesworth House, 69 Southwark Bridge Road, London, SE1 9HH.

You can read all about the team's challenge on the team's blog at <http://1039miles.wordpress.com>.

5k Team Challenge surpasses expectations



The Grant Thornton Corporate 5k Team Challenge 2013 took place at the Dublin Docklands. Entries surpassed expectations, doubling the numbers entered in 2012, with over 750 teams competing, comprising of over 3,050 individuals. In all, 10% of all entry fees will be made to the designated charity Pieta House, the suicide and self-harm crisis centre. Law Society personnel who successfully took part in the challenge included (*l to r*): Lindsay Bond O'Neill, Caroline Foley, John Lunney, Jane Callaghan (Diploma Centre), Anne Walsh (Education), Belinda O'Keeffe and Tom Blennerhassett (Finance and Administration)

Southern Law Association victorious in Cork Bar battle



The Southern Law Association team defeated the Cork Bar, 3-2, in their recent annual solicitors v barristers soccer match. (*Back, l to r*): Brendan O'Sullivan, Ronan Geary, Kevin McCarthy, Graham Hyde, Eugene Murphy, John Powell and Gavin Hinchy; (*front, l to r*): Brendan O'Connell, Dermot Kelly, Pat Mullins, Harry McCullagh, Robert O'Keeffe and Peter Kiely



At the recent launch of the fourth edition of *Law of Torts* were (*l to r*): Prof William Binchy, Mr Justice John Quirke and Bryan MacMahon



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14 Oct	Job Seeker Support Programme Law Society Skillnet: <i>Online Legal officer</i>	Free for Eligible Jobseekers Contact jssp@lawsociety.ie		
16 Oct	Property Law Annual Conference 2013	€180	€240	4 General (by Group Study)
11 Oct	Sole Practitioners Network – Mullingar Park Hotel <i>Hot Lunch & Evening Networking Reception included</i>	€102	€136	5 General plus 1 Regulatory Matters (by Group Study)
30 Oct	Annual Contract Law Update	€135	€180	3 General (by Group Study)
4 Nov	Job Seeker Support Programme Law Society Finuas Network: <i>Online Corporate Governance, Risk Compliance, Investment Funds and Credit Union Law</i>	Free for Eligible Jobseekers Contact jssp@lawsociety.ie		
5 Nov	Certificate in Adjudication (Law Society of Ireland Certified Adjudicator)	€1,960	€2,450	Full CPD Requirement
15 Nov	Essential Solicitors' Update for 2013 – Clarion Hotel, Cork <i>Hot Lunch & Evening Networking Reception included</i>	€102	€136	5 General plus 1 Regulatory Matters (by Group Study)
20 Nov	Annual In-house and Public Sector Conference 2013	€135	€180	2 General plus 1 Regulatory Matters (by Group Study)
22 Nov	General Practice Update 2013 – Hotel Kilkenny, Kilkenny <i>Hot Lunch & Evening Networking Reception included</i>	€102	€136	5 General plus 1 Regulatory Matters (by Group Study)
(Tbc) Nov	Annual Family & Child Law Conference 2013	€180	€240	4.5 General plus 1 Regulatory Matters (by Group Study)
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10 Dec	How to use Blogging, Facebook, LinkedIn and Twitter in the legal sector. <i>Places are limited – early booking advised</i>	€180	€240	7 Management & Professional Development Skills (by Group Study)
12 Dec	Tactical Negotiation Skills <i>Places are limited – early booking advised</i>	€105	€140	3 Management & Professional Development Skills (by Group Study)
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Twenty lawyers, four marathons, three charities, €100k

Declan O'Flaherty is a man on a mission – and that mission revolves squarely around his severely disabled daughter, Muireann.

Declan is a solicitor with Tormey's Solicitors, Castle Street, Athlone. Two-and-a-half years ago, Muireann was discharged from hospital as a perfectly normal, healthy baby – though compared with their other children, Declan says that she was “a little on the small side”.

Things took a turn the worse for both him and his wife Gina when they sensed that Muireann might have a severe sight problem. Their fears were realised, when approximately six months later, they were told by doctors in Temple Street Children's Hospital that Muireann was ‘brain blind’. It would be a further 12 months before they received a full diagnosis. Muireann was diagnosed with an extremely rare neurological disorder – pontocerebellar hypoplasia – a group of related conditions that affect the development of the brain. She also has microcephaly and epilepsy.

Declan describes the impact: “She can't walk, she can't talk, she can't feed herself and she requires constant monitoring. She is frequently unwell and takes a daily cocktail of medication, including anti-seizure tablets, approximately six sachets of Movicol to keep her bowels clear, and antibiotics to fight infections. When Muireann is well, her laugh lights up the room and all of us feel better for having her in our lives.”

Amazement

Declan cites a number of factors that have helped them survive this far. “The first is the love and support of family and friends who always give, but seek nothing in return.

“I also think it fair to say that we couldn't have survived this period without the magnificent



At the launch of the Marathons 4 Muireann appeal were (l to r): ironman Gerry Duffy, Muireann's parents Declan O'Flaherty and Gina O'Flaherty, and the mayor of Athlone, Jim Henson

support of three organisations, namely the staff and doctors of Temple Street Hospital; the Jack and Jill Foundation that provided us with relief and solace at the time of our greatest need; and the fantastic staff and services provided by the Brothers of Charity in Roscommon who have helped maximise Muireann's abilities to such an extent that doctors who see her MRI scans are amazed when they see Muireann herself – such as her levels of improvement.”

In an effort to give something back, Declan is attempting to raise €100,000 for these three organisations. To date, the fund-raising team has managed to raise €46,000, so they're on their way.

Four marathons

As part of the ongoing fundraising efforts, Declan plans to run from Athlone to Temple Street Children's Hospital (a distance of 83 miles – or more than three marathons-worth)



The little girl who has inspired it all – Muireann O'Flaherty

during the October bank holiday weekend, arriving there on Sunday night, 27 October, before running the Dublin Marathon the following day.

To help him in this Herculean task, Declan is looking for the assistance of 20 lawyers who would be willing to run half marathons alongside him between Athlone and Dublin on Sunday 27 October 2013.

“We would hope that each runner would raise a minimum of €250 sponsorship – each will receive a specially commissioned ‘Marathons 4 Muireann’ t-shirt. I appeal to all members of the legal profession to support us in our efforts to assist these charities in their wonderful work.”

Anyone wishing to donate can do so online at www.marathons4muireann.com (see the ‘donate’ page), or www.mycharity.ie/event/marathons_4_muireann, or by cheque to Marathons 4 Muireann, c/o Tormey's Solicitors, Castle Street, Athlone, Co Westmeath.

The final word goes to Declan: “Disabled children can't vote, they can't march on the Dáil, they can't even lobby their local councillor or mayor. But we, as their families and friends of their families, can make a difference by supporting those who provide services for these amazingly beautiful and courageous children.”

One man and his dog

Guide-dog owner Donnacha McCarthy, from Drimoleague, Co Cork, was the keynote speaker at the Corporate and Public Lawyers' Association annual fundraising lunch for the Irish Guide Dogs for the Blind at the Fire Restaurant in the Mansion House on 13 September.

Donnacha has been living in Dublin for the past 12 months. He studied in UCC and furthered his studies in DCU in IT security and now works for Vodafone in Leopardstown. A member of the Irish Blind Football team, Donnacha is able to live his life fully and independently, thanks to his guide dog Holly, which he has had since August 2008.

The Corporate and Public Lawyers' Association represents the views and interests of lawyers working in the public and in-house sector. The



PICT: CONOR MCCABE PHOTOGRAPHY

Guide-dog owner Donnacha McCarthy, with his guide dog Holly, and Terrence O'Keeffe, president of the Corporate and Public Lawyers' Association

association runs networking events and occasional lectures and seminars throughout the year.

Pensions handbook launched



At the recent launch of *Pensions: A Handbook for the Family Law Practitioner* in the Distillery Building were: authors Laura Cahill BL (left) and Sonya Dixon BL with Pensions Ombudsman Paul Kenny

Leman zest for iron challenge

Two teams from Leman Solicitors took part in the 'Iron Leman Challenge' on 7 September, taking each other on in rowing, running and cycling around the Ring of Kerry. Their aim is to raise €20,000 for Youth Suicide Prevention Ireland but, at time of writing, they had only reached

€12,000. They're looking for practitioners' help to reach their target. Anyone wishing to donate should visit www.yspi.eu/index.php/funds/leman-solicitors-challenge-2013. There's even an option to pay over the phone. They will be most grateful for all donations.

ON THE MOVE



Matheson has announced that it is expanding its offices in the United States. Gina Conheady, a senior corporate lawyer in the firm's international business practice, is relocating to Matheson's Palo Alto office. She will work alongside the firm's existing team of Irish lawyers already based in the US.



Micheál Grace has been appointed as head of Mason, Hayes & Curran's London office and partner in the financial services division. Micheál advises British institutional and corporate clients in relation to Irish law on banking and finance transactions and is a member of the firm's projects and energy group.



Kathy Irwin has been appointed head of private client and family law at Beauchamps. She joined the firm as a partner in July. Kathy was previously owner of Irwin Solicitors, a family law and private client practice based in Dalkey, Co Dublin.



Ronan McGoldrick has been named partner designate in the litigation and dispute resolution team at Leman Solicitors. Ronan joined Leman in May 2013, having trained and worked for nine years with Eversheds.



Elaine Keane has joined A&L Goodbody as a partner in the firm's investment funds and asset management team. Elaine specialises in legal and regulatory issues surrounding the establishment, authorisation, operation and maintenance of Irish regulated funds.



McCann FitzGerald has announced that Ronan Molony has joined its corporate practice section. Currently, Ronan is a partner in the banking and financial services section of the firm. He served as former chairman of the firm from 1997 to 2008. He has broad corporate and financial experience.

Ovarian cancer research progresses thanks to Emer Casey Foundation

The inaugural Irish Ovarian Cancer Forum was convened in Barberstown Castle, Kildare, on 6 and 7 September. Over 200 delegates from around the world specialising in the diagnosis and treatment of female gynaecological cancers attended, *writes Juliette Casey.*

The Emer Casey Foundation was proud to facilitate the Emer Casey Symposium, which formed part of this auspicious conference. The foundation was established following the death of solicitor Emer Casey at the age of 28 due to ovarian/uterine cancer. The Emer Casey Foundation was established in her memory.

Three leading professors from the research projects that benefit from foundation funding presented their findings at the symposium. Prof O'Leary from the Dublin-based 'Discovery' consortium was joined by Prof

Charlie Gourley (Edinburgh) and Prof Ian Campbell (Melbourne).

While there is still much to discover, progress has been made in relation to predicting the development of the cancer, isolating its origin, working out how it spreads, and determining how best to treat it.

That evening, the foundation hosted a fundraising concert in the dining hall of Trinity College. Internationally acclaimed Irish soprano Mary Hegarty entertained the audience with a selection of songs from Moore to Gounod.

The Emer Casey Symposium presented a unique opportunity for the dissemination of scientific knowledge to an international audience and represents a milestone in the work of the foundation. The Emer Casey Foundation wishes to thank all of its loyal supporters.



Prof John Bonnar, Prof Charlie Gourley and Dr Lucy Norris



Pat Power, Prof Brian Sheppard, Prof Daniel Clarke-Pearson and Dr Elizabeth Bonner



Susan Casey, Juliette Casey, Brendan Casey, Prof Charlie Gourley, Prof Ian Campbell, Prof John O'Leary, Annelee Casey and Juliette Casey



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Certificate in Healthcare Law	Tuesday 8 October	€1,200
Certificate in Human Rights Law	Saturday 19 October	€1,200
Certificate in Trade Mark Law (<i>iPad</i>)	Saturday 30 November	€1,520

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Brewing up a storm: Law Soc rockers wig out, man!

The newly formed Blackhall Music Society organised its first Law Soc Rock Concert in aid of the Musical Youth Foundation last spring. The Musical Youth Foundation is an inner-city musical charity set up by Chris Maher that raises funds to provide instruments and run after-school music lessons for inner-city Dublin organisations. All €2,030 raised on the night went directly to the charity.

The event took place in the Grand Social, which kindly donated the venue, a sound engineer and the door for the event – for which we are most grateful.

The band was put together from those brave souls who answered the call and gave their time and energy to rehearse intensely from November 2012 to January 2013 in the Button Factory, Temple Bar, on some very wet and cold Tuesday evenings. A huge shout-out to Billy in the Button Factory, who was always in great form whatever the weather or nature of the request (such as extra leads and amps – but sadly no white room or orchids). The Button Factory was generous too with its rates and the use of its larger rehearsal rooms. It proved to be a fantastic resource.



Planet of Sound: "Baby, baby, baby..."

The society was marshalled superbly all year by our chairman and lead guitarist Jack Walsh. His abilities on lead guitar, in keeping everyone focused, band member admin and compiling the set list ensured a successful outcome!

Gratitude goes to our PROs, Suzanne Parker and Lauren O'Brien, ably assisted by Donna O'Driscoll, who organised the venue, ticket sales and ancillary

marketing; to our treasurer Liam Cadogan, who managed the purse-strings and the acoustic guitar; and to Andrienne Wallace, who prepared the posters and tickets.

The gig was a great success. First up in the 19-song set-list was Ciara Cunningham, who bravely opened the show with 'Valerie', followed by Setanta Landers with a rendition of 'Last

Night', Dara Higgins performing the Pixies and a duet with Ciara for two XX songs, Fran Moran taking to the stage with 'Run', Finin O'Brien wowing with 'Wagon Wheel', James Dunphy doing Johnny Cash better than Johnny C, Jack Walsh with a daredevil 'Dancing in the Moonlight', Brian Barry throwing everything at 'Teenage Kicks' and 'In a Little While', and finally, James Dunphy, whose version of 'Thunderstruck' brought the house down!

Support for all songs was provided by the talented Brendan Curran, Brian Maloney and Vincent McConnon who rotated on drums; Andrew Keane and Ricar Barandika alternating on the bass; and Jack Walsh, Dan O'Connell and Tom Mulligan alternating on lead guitar, with the multi-talented Brian Barry rotating between the keyboard and guitar, as well as finding time to sing lead. Emer NicDhiarmada and Clodagh Power made 'Fisherman's Blues' come alive.

Finally, the biggest thanks go to the PPC I class of 2012, who turned out in great numbers and brought vast energy to the event. Without your support, the event would have been a damp squib. We'll see you all for the PPC II gig. 🍷



At the presentation of a cheque for €2,030 to the Musical Youth Foundation were (back, l to r): Jack Walsh, Chris Maher (Musical Youth Foundation), Liam Cadogan, Andrew Keane and Tom Mulligan; (front, l to r): Suzanne Parker, Lauren O'Brien, Setanta Landers, Brendan Curran and Emer NicDhiarmada

Buying and Selling Insolvent Companies and Businesses in Ireland

Bill Holohan, Ted Harding and Ger O'Mahoney. Bloomsbury Professional (2013), www.bloomsburyprofessional.com. ISBN: 978-1-8476-699-40. Price: €175.

Renowned practitioners Bill Holohan (solicitor), Ted Harding (barrister), and Ger O'Mahoney (accountant) have endeavoured to draw together in one tome the disparate strings of theory, practice, and multidisciplinary perspectives relating to this highly relevant subject.

Starting with an overview of insolvency and progressing through early warning signs and practical measures, the text sets out a helpful foundation of knowledge for the reader.

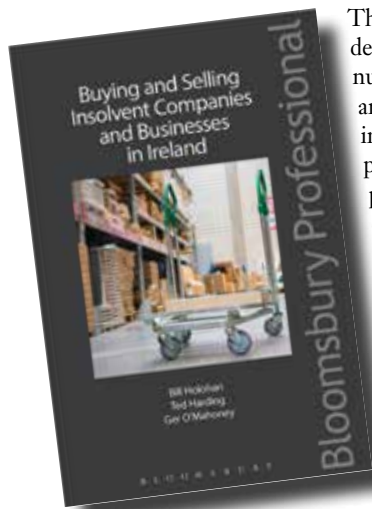
Then the book delves into a number of distinct areas, such as intellectual property, data protection, due diligence, and issues relating to partnerships, covering each with an informative and practical outlook.

A number of chapters

then consider core insolvency issues in detail, particularly sales by receivers, sales by liquidators, rights of creditors, disclaiming onerous property, and taxation. Seven chapters are devoted to the complexities pertaining to the rights of employees, including transfer of undertakings, pensions, and redundancies.

Although a number of topics dealt with in this book are also dealt with in other core texts, the unique charm of this publication is that it combines treatment of these topics together with analysis of the subject at hand within one cover, focused on the needs of the practitioner. Though the unwieldy yet precise title may give the impression that this book is for the commercial practitioner, it will be of assistance to solicitors in practices of all shapes and sizes, whether advising a large company, a sole trader, or an employee affected by the insolvency of an employer. While the erudite text will be of benefit, it is the extensive array of practical resources found in the appendices that is likely to find most favour with the reader of this timely and impressive publication.

Richard Hammond is partner in Hammond Goode, Mallow.



JUST PUBLISHED

New books available from the library

- Biehler, Hilary, *Judicial Review of Administrative Action: a Comparative Analysis* (3rd ed; Round Hall, 2013)
- Bond, Robert, *Negotiating Software Contracts* (5th ed; Bloomsbury Professional, 2013)
- Dowling, Karl and Robert Grimes, *Probate Pocketbook* (Round Hall, 2013)
- Larkin, Felix M and NM Dawson (eds), *Lawyers, the Law and History* (Four Courts Press/Irish Legal History Society, 2013)
- Lyall, Andrew, *The Irish House of Lords: a Court of Law in the 18th Century* (Clarus Press, 2013)
- McConville, Catherine, *Company Law* (3rd ed; Round Hall, 2013)
- Ni Choileain, Cecilia, *Criminal Law* (3rd ed; Round Hall, 2013)
- Thomson Round Hall, *Employment Law Conference 2013* (Round Hall, 2013)
- Walmsley, Keith, *Butterworth's Company Law Handbook 2013* (27th ed; LexisNexis, 2013)
- Wylie, John, *Irish Land Law* (5th ed; Bloomsbury Professional, 2013)

Family Law: Jurisdictional Comparisons

James Stewart (ed). Sweet & Maxwell (2nd edition, 2013), www.sweetandmaxwell.co.uk. ISBN: 978-0-4140-287-08. Price: Stg£180.

As I was passing the Carlisle Pier in Dun Laoghaire and thinking about this review, I noticed a cruise ship in from Nassau, USA. The comings and goings were fascinating. It occurred to me that, after one night in the harbour, any number of liaisons could have resulted that could become the subject of international family law proceedings at some time in the future!

The usefulness of this book is indisputable. The layout is clear, with 21 questions asked and answered for each of the 46 countries (or 39, if you count the eight states for the USA as one country).

Basic questions are answered relating to grounds for divorce – for example, in Argentina, threatening to murder your spouse is an acceptable ground – and extending

to questions concerning domicile, adoption, child abduction, and conflict of laws where one party applies to stay proceedings in favour of a foreign jurisdiction. These are areas that a practitioner may be confronted with in a family law case.

The question of the enforceability of surrogacy agreements is dealt with in depth in the chapters on the states of the US, and this, in itself, could become the subject of a separate article beyond the scope of this review.

A vast amount of very useful and interesting information has been assembled in this 835-page tome.

Katherine Irwin is a partner and head of private client and family law in Beauchamps Solicitors.



LEGAL
PROFESSIONAL
PRIVILEGE

LIZ HEFFERNAN

Legal Professional Privilege

Liz Heffernan. Bloomsbury Professional (2011), www.bloomsburyprofessional.com. ISBN: 978-1-8476-673-35. Price: €165.

Legal professional privilege (LLP) was centre stage in recent Irish banking and EU competition litigation, as well as in

the phone hacking issue in Britain.

Liz Heffernan's 300-page book on the subject is therefore timely. However, this 11-chapter book is also an innovative *tour de force*. It is the first book on this subject in Irish law and would be very difficult to surpass in its clarity, thoroughness and readability.

The current worship of openness, transparency and accountability would apparently leave no room for clients and their lawyers to have privileged communications – and yet such communications must occur if justice is to be administered properly.

In her carefully researched treatise, Heffernan draws out carefully the value of LLP to society, the client and the lawyer. While the privilege is the client's, she observes incisively that the lawyer can also benefit from the freedom to give advice, knowing that it

will probably not be opened to scrutiny.

The opening chapter examines the relationship between lawyers and clients, the various concepts of privilege, the history and rationale of LLP, and the relationship between privilege and confidentiality.

Subsequent chapters consider legal advice privilege, litigation privilege, without-prejudice privilege, the exceptions to LLP (for example, statute, crime, fraud, conduct injurious to the administration of justice), civil procedure, expert evidence in personal injuries litigation, criminal procedure, informer privilege, and pre-trial legal advice. The sixth chapter deals with loss of privilege and, therefore, deals with issues such as inadvertent disclosure.

The book is researched thoroughly, with a large number of unreported judgments being cited, which is always useful. It is a remarkably readable book that describes the policy and principles very lucidly and in a way that reads almost like a well-delivered lecture rather than a turgid tome. It is eminently recommendable.

Dr Vincent JG Power is a partner in A&L Goodbody and adjunct professor of law at University College Cork.

Law of Torts


Bryan McMahon and William Binchy. Bloomsbury Professional (4th edition, 2013), www.bloomsburyprofessional.com. ISBN: 978-1-8476-691-79. Price: €225.

I was a law student in 1981, when the first edition of *Law of Torts* was published. With deference to the infirmities of memory – the sun always shone and we led indolent lives mimicking Charles Ryder in *Brideshead Revisited* – my recollection is that the weight of Irish legal texts hardly troubled library shelves.

Wylie's *Irish Land Law* had appeared in 1975, followed by Shatter's *Family Law* two years later. Consequently, the release in little over 12 months of two other seminal works – John Kelly's *Irish Constitution* and this one – felt like a tsunami of Irish legal writing.

Why the dearth of material? As Judge Brian Walsh pithily put it in the foreword to the first edition, it had not "been recognised that the man on the Crumlin omnibus was not the man on the Clapham omnibus (and) there appeared to be an unquestioned assumption that English text-books would satisfy all needs".

Much has happened in the 13 years since the third edition of the *Law of Torts*. The *PIAB Act 2003* and the *Civil Liability and Courts Act 2004* fundamentally altered practice and procedure in the area of personal injuries litigation. Moreover, there has been a 'revolution' in the law relating to negligence.

McMahon and Binchy remains the textbook of choice for litigators. The authors are no longer the young Turks they were when they broke new ground in the early 1980s. However, in the words of a Supreme Court judge, they remain "brilliant examples of the academics who emerged from a new generation of lawyers". 

Michael Kealey is in-house counsel at Associated Newspapers.

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BRIEFING

Law Society Council meeting 13 September 2013

The Council observed a minute's silence in memory of James C. McCourt, father of President James McCourt, and James Gilhooly SC, father of junior vice-president Stuart Gilhooly.

Legal Services Regulation Bill

Michael Quinlan updated the Council on the *Legal Services Regulation Bill* and the minister's published amendments in respect of sections 1-30 of the bill. He confirmed that the Society would be reverting to the Department of Justice with its views on the proposed amendments and, indeed, on other amendments sought by the Society that had not been adopted by the minister.

The director general confirmed that his most recent information was that the committee stage would not recommence before the end of October at the earliest. The minister had also indicated that he intended to produce a regulatory impact assessment. In

terms of the published amendments, they contained a number of changes to remove the minister from involvement in the appointment and removal of members of the authority. The minister had opted for the appointment of an authority comprising the nominees of a number of bodies.

District Court Rules Committee

Stuart Gilhooly briefed the Council on a presentation made by the Society to the District Court Rules Committee, in the context of the forthcoming increase in jurisdiction and the opportunity for the District Court to become a court of pleading, which would necessitate the removal of the District Court scale. The committee had indicated that it would revert to the Society within a matter of weeks.

Developments in the Lynn case

The Council noted the recent media coverage of the arrest of

Michael Lynn in Brazil. It was noted that the Society continued to emphasise to the media and others that Mr Lynn was no longer a solicitor and should not be referred to as such. While Mr Lynn's arrest had received national coverage, the ultimate question of whether he would be extradited back to Ireland remained unanswered.

Forthcoming referenda

Following a lengthy discussion, the Council agreed to publicly support the referendum to create a Court of Appeal and not to take a position on the Referendum to abolish Seanad Éireann.

SMDF update

The Council received a presentation from Patrick Dorgan on the current position in respect of the number of claims, estimated gross liability and the SMDF 10% share of that liability. The Council noted that, as of September 2013,

none of the funding approved by the members had been required or drawn down, although a portion might be required before year-end. On current projections, the €16 million commitment by the members would meet the SMDF share of the liability and administration costs.

Solicitor personal insolvency practitioners

The Council considered a report from the Regulation Department that reflected discussions with the Insolvency Service of Ireland in respect of solicitor PIPs and the current legal position in respect of the regulation of solicitors under the *Solicitors Acts*. The Council was unanimously of the view that the work of solicitor PIPs amounted to the provision of legal services as defined by the acts and that the Society should resist any proposal that it should not continue to regulate solicitors who became registered as PIPs. Ⓢ

Practice notes

Local Property Tax: Revenue guidelines

CONVEYANCING COMMITTEE

Following several meetings with Revenue – during which representations about the practice implications for solicitors in the implementation of the Local Property Tax (LPT) were made on behalf of the profession by members of the Law Society's Conveyancing Committee, Taxation Committee, eConveyancing Task Force, and the Probate, Administration and Trusts Committee – *Guidelines for the Sale or Transfer of Ownership of a Relevant Residential Property* have now been published by Revenue on its website, www.revenue.ie/en/tax/lpt/sale-transfer-property.html.

The guidelines are extensive and detailed and, because they deal with a tax that is new to practitioners, the committees recommend that

solicitors read them in full and thoroughly familiarise themselves with them before advising either a vendor or a purchaser in a sale or purchase transaction.

The Society is pleased to say that most of its submissions and representations made throughout the course of its liaison with Revenue have been taken on board and are reflected in Revenue's guidelines. The Society was successful in getting Revenue to accept that purchasers must be given some assurance that the property they purchase is not subject to a charge in respect of a vendor's unpaid LPT where the value declared by the vendor on an LPT return is less than the subsequent sale price. This assurance is provided in one of two ways.

1. General clearance – subject to three conditions

This general clearance should cover the vast majority of sales. It is determined by a purchaser by reference to the online LPT status of a property. Revenue is not directly involved in this clearance process and will not issue written clearance if any one of the three conditions below applies. See section 4.2 for Revenue's outline of what this general clearance entails and, in particular, the details of the three conditions, any one of which, if it is met, will assure a purchaser that Revenue will accept that there is no charge on a property following a sale where it establishes after the sale that a vendor had under-declared his/

her LPT liability before a sale. The three conditions can be broadly described as:

- **Allowable valuation margin.** This relates to the allowable margin by which the sale price of a property exceeds the valuation band/chargeable value declared for the property at the valuation date. See section 4.2.1 for the three levels of allowable margins set respectively for (a) the first five valuation bands (that is, up to €300,000) – the sale price must fall into the valuation band immediately succeeding the band that was declared; (b) the remaining 14 valuation bands (the sale price must not be more than 15% higher than the upper limit of the

band that was declared); and (c) properties whose declared chargeable value exceeded €1,000,000 (the sale price must not be more than 15% higher than the declared chargeable value).

- *Expenditure on enhancements to a property.* This relates to whether or not a vendor has enhanced the value of the property since the valuation date by carrying out construction or refurbishment work. See section 4.2.2 in relation to adjustments of the margins referred to in section 4.2.1 by the value of construction and/or refurbishment carried out. Take note, also, of the requirement that the vendor produce receipts/verification of expenditure on construction and/or refurbishment.
- *Sales of comparable properties.* This relates to whether or not a vendor based the declared chargeable value on

the valuation date on known and verifiable sales prices of comparable properties in the area. See section 4.2.3 for the rule and for the guidelines on deciding whether two properties are comparable and whether two properties are in a similar state of repair/condition.

This general clearance is for the protection of a purchaser. Revenue reserves the right to pursue the vendor for any LPT liability attributable to a pre-sale under-declaration.

2. Specific Revenue clearance in certain circumstances

Revenue will provide specific written clearance on request from a vendor where the conditions specified in sections 4.2.1, 4.2.2, and 4.2.3 are **not** met, but the vendor nevertheless claims that the valuation made at the valuation date was made in good faith.

See section 4.3 in the guidelines for all the conditions that apply and for a list of the supporting documentation that must accompany a request for clearance. It should be noted that:

- This request for clearance is conducted by secure email (pre-registration with Revenue is required) using Form LPT5 (which is confusingly titled 'Application for General Clearance').
- Application is made following agreement of the sale price but in advance of closing.
- Revenue will **either** issue a written clearance (where satisfied there was no under-declaration of the chargeable value), which the vendor must furnish to the purchaser on or before closing, **or** make an assessment on the vendor (where not satisfied that the valuation band/chargeable value that was declared was reasonable),

which then becomes part of the standard online clearance process and which should be paid online by the vendor in advance of closing and the usual evidence of payment produced to the purchaser on or before closing.

It will be seen from section 1 of the guidelines that self-correction by a vendor (section 2.4) and the clearance procedures in section 4 of the guidelines relate to the first valuation date, 1 May 2013, and will operate on a trial basis up to the end of 2014, after which they will be reviewed. The Law Society committees continue to monitor this matter, and practitioners should continue to let them know of any difficulties being encountered in practice, or suggestions as to how the system could be improved, so they can continue to take these matters up with Revenue on their behalf.

Revised precedent section 72 declaration

CONVEYANCING COMMITTEE

The Conveyancing Committee has revised its precedent long form section 72 declaration to remove references to capital acquisitions tax and the *Farm Tax Act 1985*.

The revised precedent is now available in the members' area of the Society's website in either the 'best practice and guidance'

general precedents section or the Conveyancing Committee's precedents page.

Practitioners or their staff who may have downloaded the previous version of this document to their PCs for use as a precedent should now arrange to replace it by downloading this latest version.

MUDs revised precedent pre-contract enquiries

CONVEYANCING COMMITTEE

The Conveyancing Committee has revised its precedent pre-contract enquiries under the *Multi-Unit Developments Act 2011* by making provision for dates and solicitors' signatures at the end of the document so as to conform to the layout of the standard requisitions on title. The revised precedent is now available in the members' area of

the Society's website in either the 'best practice and guidance' general precedents section or the Conveyancing Committee's precedents page. Practitioners or their staff who may have downloaded the previous version of this document to their PCs for use as a precedent should now arrange to replace it by downloading this latest version. ©

Law Society of Ireland
NEWSLETTER



Are you getting your e-zine?

The Law Society's e-zine is the legal newsletter of the solicitors' profession. The e-zine issues once every two months and brings news and information directly to your computer screen in a brief and easily-digestible manner. If you're not receiving the e-zine, or have opted out previously and would like to start receiving it again, you can sign up by visiting the members' section on the Law Society's website at www.lawsociety.ie. Click on the 'e-zine and e-bulletins' section in the left-hand menu bar and follow the instructions. You will need your solicitor's number, which is on your 2010 practising certificate and can also be obtained by emailing the records department at l.dolan@lawsociety.ie.

ONE TO WATCH**One to watch:** new legislation**Central Bank (Supervision and Enforcement) Act 2013**

Part 2 of the act gives the bank powers to gather information from financial service providers. Section 9 states: "The bank may, for the purposes of the proper and effective regulation of financial service providers and having regard to the matters set out in section 10, by notice in writing given to a reviewee, require the reviewee to provide to the bank, in accordance with such notice, a report on any matter specified in the notice about which the bank has required or could require the provision of information, or the production of documents, under any provision of financial services legislation."

(Note: a reviewee is a regulated financial service provider or a related undertaking of a regulated financial service provider.)

According to section 10, before giving a notice under section 9, the bank shall have regard to the following matters:

- Whether any other powers that may be available to the bank under any provision of financial services legislation may be more appropriate in the circumstances concerned,
- The relevant knowledge and expertise available to the reviewee, and

- The cost implications for the reviewee of providing the report, the resources available to the reviewee, and the benefit to the reviewee of providing the report.

Ombudsman's report

Section 72 of the act allows the Financial Services Ombudsman to publish, in its annual report, the name of a regulated financial services provider against which it has made an adverse finding. A regulated financial service provider falls within this subsection if, in the preceding financial year, at least three complaints relating to the regulated financial service provider, which have been made to the Financial Services Ombudsman, have been found by that ombudsman to be substantiated or partly substantiated.

Third country branches

The act now allows credit institutions operating in third countries (that is, outside the EU/EEA) to operate branches in Ireland. According to section 73: "The bank may grant an authorisation to a relevant credit institution to operate a branch in the State for the purpose of carrying on banking business in the State."

'Relevant credit institution' means a credit institution whose head office is located in a state or

territory other than an EEA state and that holds an authorisation to carry on banking business in that state or territory from the authority that exercises in that state or territory functions corresponding to those of the bank under this part (relevant third country authority).

Customer protection

The Central Bank now has the power to direct redress for customers. In circumstances where the bank is satisfied that there have been widespread or regular relevant defaults by a regulated financial service provider and that, in consequence of the relevant defaults, customers of the regulated financial service provider have suffered, are suffering, or will suffer loss or damage, the bank may give the regulated financial service provider a direction requiring the making of appropriate redress to the customers.

According to section 43(2), 'relevant default' means:


- a) Charging a customer an amount that the regulated financial service provider is not entitled to charge,
- b) Providing a customer with a financial service that the customer has not agreed to receive,
- c) Providing a customer with a financial service that was not suitable for the customer at the time

when it was provided,

- d) Providing a customer with inaccurate information that influences the customer in making a decision about any financial service,
- e) A failure of any system or controls of the regulated financial service provider, or
- f) A prescribed contravention.

Protected disclosure

Section 38 provides that, where a person makes, in good faith and whether in writing or otherwise, a disclosure to an appropriate person, that disclosure shall be a protected disclosure for the purposes of this part, as long as the person making the disclosure has reasonable grounds for believing that the disclosure will show one or more of the following:

- a) That an offence under any provision of financial services legislation may have been or may be being committed,
- b) That a prescribed contravention may have been or may be being committed,
- c) That any other provision of financial services legislation may have been or may be being contravened,
- d) That evidence of any matter that comes within paragraph (a), (b) or (c) has been, is being, or is likely to be deliberately concealed or destroyed. 

JOB-SEEKERS'
register

For Law Society members seeking a solicitor position, full-time, part-time or as a locum

Log in to the members' register of the Law Society website, www.lawsociety.ie, to upload your CV to the self-maintained job seekers register within the employment section or contact career support by email on careers@lawsociety.ie or tel: 01 881 5772.

**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.



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 Matthew J Breslin, a solicitor formerly trading as Donal J O'Neill & Company, Solicitors, 3 Denny Street, Tralee, Co Kerry, and in the matter of the *Solicitors Acts 1954-2011* [7159/DT122/11] *Law Society of Ireland (applicant) Matthew J Breslin (respondent solicitor)*

On 7 March 2013, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

- a) Failed expeditiously or within a reasonable time to comply with an undertaking given by him on 12 September 2008 to furnish a deed of partial discharge in respect of a mortgage in favour of a named bank appearing on a named folio on behalf of his named clients to the complainant,
- b) Failed to reply adequately or at all to the correspondence from the complainant and, in particular, letters dated 10 December 2008, 26 February 2009, 8 April 2009, 18 May 2009, 12 November 2009, 12 April 2010 and 3 November 2010.

The tribunal ordered that the respondent solicitor:

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

In the matter of John Lynch, a solicitor practising as John Lynch & Co, Bridge House, South Quay, Newcastle West, Co Limerick, and in the matter of the *Solicitors Acts 1954-2008* [8613/DT117/11] *Named client of the respondent solicitor (applicant)*

John Lynch (respondent solicitor)

On 14 May 2013, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

- a) Failed to comply with a valid and binding professional undertaking, in breach of the *Solicitors Acts 1954-2008* and the professional conduct and standards applicable to solicitors pursuant to the *Guide to Professional Conduct of Solicitors in Ireland* (2nd edition).
- b) Failed to discharge the duty of trust and candour towards the intended recipients of the undertaking.

The tribunal ordered that the respondent solicitor:

- a) Do stand censured,
- b) Pay the sum of €10,000 to the compensation fund.

In the matter of Niall Patrick O'Connor, a solicitor formerly practising as Niall O'Connor, Solicitor, at 33 Wexford Street, Dublin 2, and in the matter of the *Solicitors Acts 1954-2011* [3636/DT148/12] *Law Society of Ireland (applicant)*

Niall Patrick O'Connor (respondent solicitor)

On 21 May 2013, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

- a) Failed to comply with an undertaking dated 20 November 2002, furnished to the complainants in respect of a named client and a property at Sanddyford, Dublin 18, in a timely manner,
- b) Failed to respond to the Society's correspondence within the time stipulated in a timely manner or at all, in particular, the Society's letters of 16 September 2011, 20 December 2011, 16 January 2012 and 16 April 2012,

Record no 2013 no 84 SA

In the matter of Paul Madden, practising as Paul Madden & Company, Solicitors, Fitzpatrick Square, Clones, Co Monaghan, and in the matter of the *Solicitors Acts 1954-2011*

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

10 September 2013, no bank shall make any payment out of an account in the name of the respondent solicitor or his firm and that he shall be suspended from practising as a solicitor.

*John Elliot,
Registrar of Solicitors,
13 September 2013*

- ber 2011, 20 December 2011, 16 January 2012 and 16 April 2012,
- c) Failed to attend the meeting of the Complaints and Client Relations Committee on 5 June 2012, despite being required to do so.

The tribunal ordered that the respondent solicitor:

- a) Do stand censured,
- b) Pay a sum of €3,000 to the compensation fund,
- c) Pay the whole of the costs of the Society, as taxed by a taxing master of the High Court in default of agreement.

In the matter of Niall Patrick O'Connor, a solicitor formerly practising as Niall O'Connor, Solicitor, at 33 Wexford Street, Dublin 2, and in the matter of the *Solicitors Acts 1954-2011* [3636/DT149/12] *Law Society of Ireland (applicant)*

Niall Patrick O'Connor (respondent solicitor)

On 21 May 2013, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

- a) Failed to comply with an undertaking dated 17 December 2001, furnished to the complainants in respect of a named client and property in Ennis-corthy, Co Wexford, in a timely manner,
- b) Failed to respond to the Society's correspondence in a timely manner or at all and, in particular, the Society's letters of 16 September 2011, 20 December 2011, 16 January 2012, 16 March 2012 and 16 April 2012,

- c) Failed to attend the meeting of the Complaints and Client Relations Committee on 5 June 2012, despite being required to do so.

The tribunal ordered that the respondent solicitor:

- a) Do stand censured,
- b) Pay a sum of €3,000 to the compensation fund,
- c) Pay the whole of the costs of the Society, as taxed by a taxing master of the High Court in default of agreement.

In the matter of Christopher B Walsh, solicitor, of 90 Park Drive Avenue, Castleknock, Dublin 15, and in the matter of the *Solicitors Acts 1954-2011* [4940/DT54/12] *Named client (applicant) Christopher B Walsh (respondent solicitor)*

On 12 June 2013, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

- a) Failed to carry out the applicant's instructions to prosecute his case,
- b) Caused delay to such an extent that the applicant's case was dismissed,
- c) Did not advise the applicant of the delay,
- d) Exposed the applicant to an award of costs by his inordinate delay.

The tribunal ordered that the respondent solicitor:

- a) Do stand censured,
- b) Pay the sum of €500 to the applicant as a contribution towards his expenses in respect of this matter. **G**

BRIEFING

Eurlegal

Edited by TP Kennedy, Director of Education

‘Right to be forgotten’ focus of recent case

Data privacy law specialists have been keenly awaiting the opinion of Advocate General Niilo Jääskinen in Case C-131/12, *Google Spain SL, Google inc v Agencia Española de Protección de Datos, Mario Costeja González*. This is not least because the right at the core of the case, the so-called ‘right to be forgotten’, has been the focus of intense debate in the context of the radical revision to privacy law that is contained in the draft general *Data Privacy Regulation*. Issues of censorship and free speech are at play, and observers were keen to see how the AG, and eventually the court, sees this concept.

The data subject in the case was Mr Mario Costeja Gonzalez. The defendant is the Spanish regulator for data privacy, much like our Data Protection Commissioner. The case concerns the application of the 1995 *Data Protection Directive* (95/46/EC) to Google’s internet search engine.

In 1998, personal data about the data subject was published by newspapers in Spain. In the electronic editions, the material was repeated. The data subject objected to this and wished to stop the material being available on Google searches. The referring court indicated that it had several such cases before it, so this issue was likely to continue to be controversial.

The data subject’s view was that the proceedings reported about him in the newspapers relating to his social security debts, which had been concluded and resolved many years earlier, were of no relevance now. The newspaper publisher’s position was that erasure of his data was not appropriate, given that the publication was effected by order of the Spanish Ministry of Labour and Social Affairs and was in effect a matter of public record. The data subject complained to the national data privacy regulator, the AEPD, which upheld his complaint against the two Google



entities named in the proceedings. Their appeal led to the case before the General Court.

Data Protection Directive

Article 1 of the 1995 directive obliged member states to protect the fundamental rights and freedoms of natural persons and, in particular, their right to privacy with respect to the processing of personal data, in accordance with the provisions of that directive.

Article 2 went on to define the concepts of ‘personal data’ and ‘data subject’, ‘processing of personal data’, ‘controller’ and ‘third party’. Article 3 states that the directive is to apply to the processing of personal data wholly or partly by automatic means, and in certain situations to the processing otherwise than by automatic means.

Under article 4(1), a member state is to apply the national provisions it adopts pursuant to the directive to the processing of personal data where there is an establishment of the controller on its territory or, in cases where the controller is not established in the union, if he makes use of equipment situated on the territory of

the member state for the purposes of processing personal data.

Article 12 of the directive provides data subjects ‘a right of access’ to personal data processed by the controller, and article 14 provides a ‘right to object’ to the processing of personal data in certain situations.

The territorial issue

In his opinion, given on 25 June 2013, the advocate general had to examine whether Google was in fact ‘established’ in Spain for the purposes of article 4(1). Google argued that it was neither established in Spain nor making use of equipment there. It was, it said, a commercial representative of Google Inc for its advertising activities and not using equipment (it also argued that its use of web spiders didn’t constitute the ‘making use of equipment’ in this context).

The advocate general relied heavily on the previous decision of the court in Case C-101/01, *Bodil Lindqvist*, which was to the effect that the operation of loading personal data on an internet page must be considered to be processing of personal data (not being

the controller of the data). The court also noted the importance of Google’s Irish operation relative to its other EU activities, which assisted the decision of the advocate general in Google’s favour.

Data controller

He then moved on to the key issue of whether an internet search engine service provider is a ‘controller’ of personal data on third-party source web pages.

He found that it was not a controller (the publisher is). Further, the advocate general went on to add that, if this was not his view, he would have to find the activities of internet search engines in the EU to be *per se* illegal, a view that he described as being “absurd”. However, he did express the view that a search engine could be a controller of the data of its index of key words used in searching.

Do the rights to rectification, erasure, blocking and objection provided in the directive amount to a data subject’s ‘right to be forgotten’? No.

The advocate general emphasised that a data subject’s right to

protection of his private life must be balanced with other fundamental rights, such as freedom of expression and freedom of information. They are not absolute rights.

He found that the rights to erasure and blocking of data provided for in article 12(b), and the right to object provided for in article 14(a) of directive 95/46 do not go so far as to confer on the data subject a right to address himself to a search engine service provider in order to prevent indexing of the information relating to him personally, published legally on third

parties' web pages. He could not allow a data subject to insist that such information should not be known to internet users when he considered that it might be prejudicial to him or he wished it to be "consigned to oblivion".

Long-established principle

The application of the EU directive on data protection to a search engine service provider is triggered as soon as it sets up an office or a subsidiary in a member state for the purpose of promoting and selling advertising space on the

search engine, which orientates its activity towards the inhabitants of that state. The EU directive does not recognise a 'right to be forgotten' against the controller.

It remains to be seen whether the court will follow this rational and logical application of data privacy law. Its decision is expected in the coming months. The decision is in accord with long-established principles in traditional publishing law that content responsibility lies with the publisher in the first instance, not with intermediaries who handle it. In this case, Google

would have been an intermediary.

The hotly debated 'right to be forgotten' is the subject of controversy in a backlog of Spanish cases (some to come before the court next year). It also features in the proposed general *Data Protection Regulation*. As a result, the court decision on this issue is eagerly anticipated. It is certainly not a legal issue that is destined to be forgotten.

Jeanne Kelly is a technology and IP law partner at Mason Hayes & Curran, Solicitors.

Recent developments in European law

ASYLUM

Case C-648/11, *MA, BT, DA v Secretary of State for the Home Department*, 6 June 2013

MA and BT, two minors of Eritrean nationality, and DA, a minor of Iraqi nationality, applied for asylum in Britain. No member of their families was legally present in another EU member state. They had already lodged applications for asylum in other member states. Britain decided to transfer them to those states, as it considered them responsible for examining their asylum applications.

Regulation 343/2003 (the *Dublin II Regulation*) provides that, where an applicant for asylum is an unaccompanied minor, the member state responsible for examining that application is to be that where a member of his family is legally present. In the absence of a family member, the member state responsible for examining the application is to be that where the minor has lodged his application for asylum. The regulation does not specify whether that is the first application the minor lodged in a member state or the most recent application lodged in another member state.

The CJEU decided that, where an unaccompanied minor with no member of his family legally present in the territory of a member state had lodged an asylum appli-

cation in more than one member state, the member state responsible for examining it will be that in which the minor is present after having lodged an application there.

The regulation seeks to guarantee effective access to an assessment of the asylum applicant's refugee status. Since unaccompanied minors are a category of particularly vulnerable persons, it is important not to prolong more than is strictly necessary the procedure for determining the member state responsible. This means that, as a rule, unaccompanied minors should not be transferred to another member state. This is supported by the requirement that the fundamental rights of the EU should be observed. This includes the right that, in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests are to be a primary consideration.

In the interest of unaccompanied minors, it is important not to prolong unnecessarily the procedure for determining the member state responsible and to ensure that unaccompanied minors have prompt access to the procedures for determining refugee status.

REFUGEE LAW

Joined Cases C-199/12, C-200/12 and C201/12, *X, Y, Z v Minister voor Immigratie, In-*

tegratie en Asiel, 11 July 2013, opinion of Advocate General Eleanor Sharpston

X, Y and Z are nationals of Sierra Leone, Uganda and Senegal. All three are homosexual men and sought refugee status in the Netherlands. They claim that they have a well-founded fear of persecution in their home states based on their sexual orientation. Homosexual acts are criminal offences in all three states and can lead to severe punishments, ranging from heavy fines to imprisonment, in some cases for up to life.

Directive 2004/83 sets out the minimum standards for a third-country national to apply for refugee status. A third-country national who, owing to a well-founded fear of being persecuted for membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, unwilling to avail himself or herself of the protection of that country, can claim refugee status. Such acts of persecution must be sufficiently serious by their nature or repetition to constitute a severe violation of basic human rights.

The Dutch Raad van State asked the CJEU whether third-country nationals who are homosexual form a particular social group within the meaning of the directive. It also asked how national authorities should assess

what constitutes an act of persecution concerning homosexual activities within this context and whether the criminalisation of those activities in the applicants' country of origin, which can lead to imprisonment, amounts to persecution.

Advocate General Sharpston proposed that applicants for refugee status who have a homosexual orientation may form a particular social group within the meaning of the directive. The national court has to assess whether such a group has a "distinct identity" in each applicant's state of origin, "because it is perceived as being different by the surrounding society".

The criminalisation of homosexual activity does not *per se* constitute an act of persecution for the purposes of the directive. It is for the competent national authority to assess whether a particular applicant is likely to be subject to acts that are sufficiently serious by their nature or repetition to be a serious violation of human rights or to an accumulation of various measures that is sufficiently severe similarly to affect the applicant. The national authorities must take into account the risk and frequency of prosecution, the severity of the sanction normally imposed, and any other measures and social practices to which the applicant may reasonably fear to be subjected. ☺

NOTICES

WILLS

Carey, Maureen (deceased), late of Ballyhackett, Belclare, Tuam, Co Galway, and also late of 9 Grosvenor Road, London E6 1HE, England. Would any person having knowledge of any will made by the above-named deceased, who died on 21 July 2013, please contact Crimmins Howard, Solicitors, Dolmen House, Shannon, Co Clare; DX 174 001 Shannon; tel: 061 361 088, fax: 061 361 001, email: rcrimmins@crimminshoward.ie

Corroon, Michael (deceased), late of Knockmant, The Downs, Killucan, Mullingar, Co Westmeath, who died on 7 March 2013. Would any person having knowledge of a will made by this deceased please contact Groarke & Partners, Solicitors, 32/33 Main Street, Longford; tel: 043 334 1441, fax: 043 334 5335, email: patrick@groarkeandpartners.ie

Desmond, Elizabeth (deceased), late of 62 Doyle Road, Turner's Cross, Cork. Would any person

having knowledge of a will made by the above-named deceased, who died on 13 September 2006, please contact Carmel Best, solicitor, Best & Co, Solicitors, 42 South Mall, Cork; tel 021 427 1012

Hanley, Brian (Reverend) (deceased), late of Kedagh Park House, Glenamaddy, Co Galway, formerly of Ballinafad, Co Sligo, and also formerly of Ballyleague,

Lanesboro, Co Roscommon, and also formerly of Ballinamore Bridge, Ballinasloe, Co Galway, and also formerly of Castlecoote, Co Roscommon, who died on 11 September 2012. Would any person having knowledge of any will executed by the above-named deceased please contact Timothy JC O'Keeffe & Co, Solicitors, Abbey Street, Roscommon; tel/fax: 090 662 6239, email@terryokeeffe@eircom.net

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16 April 1912.

25TH ANNIVERSARY AGM

PARLIAMENT BUILDINGS, STORMONT,
FRIDAY 8 NOVEMBER, 2013 @ 5 PM

Following the AGM, the Society's 25th Anniversary Volume entitled "Changes in Practice and Law" edited by Daire Hogan and Prof. Colum Kenny will be launched by Mr David Ford, MLA, Minister for Justice. Dr Conor Mulvagh, UCD Dublin will then deliver the Autumn discourse.

The launch and discourse are open to non members.



"Legislative landmine?: evaluating the third Home Rule Bill"

Dr Conor Mulvagh UCD Dublin

The discourse commencing at 6.30pm will examine the provisions concerning finance, federalism, Ulster, and religion with a view to assessing the workability of the Bill.



IRISH LEGAL HISTORY SOCIETY

Landy, Margaret (deceased), late of Greenhill Nursing Home, Carrick-on-Suir, Co Tipperary (formerly 3 Greystone Street, Carrick-on-Suir, Co Tipperary). Would any person having knowledge of a will made by the above-named deceased, who died on 18 August 2006, please contact Heffernan Foskin, Solicitors, South Parade, Waterford, tel: 051 877 766, email: khf@khfsolicitors.com

McKeen, John (deceased), late of Bellewstown House, Bellewstown, Drogheda, Co Meath, who died on 6 February 1987. Would any person holding or having knowledge of any will made by the above-named deceased please contact Whitney Moore, Solicitors, Wilton Park, Wilton Place, Dublin 2; tel: 01 611 0000, fax: 01 611 0090, email: michael.ohle@whitney.moore.ie

O'Rourke, Oliver (deceased), late of Dunogue, Carrickmacross, Co Monaghan. Would any person having knowledge of any will made by the above-named deceased, who died on 16 December 2010, please contact Bowman McCabe, Solicitors, 5/6 The Mall, Lucan, Co Dublin; tel: 01 628 0734, email: info@bowmanmccabe.ie

Sisk, William (deceased), late of 23 Glentworth Park, Ard na Greine, Malahide Road, Dublin 13, in the county of Dublin. Would any person having knowledge of any will made by the above-named deceased, who died on 15 November 2012, please contact Brendan Shar-

key, Reddy Charlton Solicitors, 12 Fitzwilliam Place, Dublin 2; tel: 01 265 0800, email: bsharkey@reddycharlton.ie

Walsh, Nora (deceased), late of St Canice's Nursing Home, St Luke's Unit, St Canice's Hospital, Co Kilkenny. Would any person having knowledge of a will made by the above-named deceased, who died on 14 September 2013, please contact Joseph P Kelly & Son, Solicitors, Patrick Street, Templemore, Co Tipperary, tel: 0504 31278, fax: 0504 31983, email: info@jkkellylaw.ie

NOTICE TO THOSE PLACING RECRUITMENT ADVERTISEMENTS IN THE LAW SOCIETY GAZETTE

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

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



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CORPORATE PARTNER

Ref BD08

Well known corporate firm seeks to appoint an additional partner to its growing M&A group which advises on both domestic and international deals. While a client following is not prerequisite, the appointee must have a proven ability to leverage existing client relationships and develop new business. As a senior appointment, the new Partner is also expected to bring the benefit of their commercial acumen, client management skills and professional vision to the role.

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This award winning firm has long been associated with the aviation sector and has garnered international plaudits for its market leading team which acts both as lead counsel on domestic transactions and Irish counsel on complex cross border aviation financings. Its broad ranging experience includes acting for high profile domestic and international airlines, lessors, aircraft financing and aircraft engine financing companies. 7 years relevant experience required.

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The in-house legal team of this global biopharmaceutical company work on an extensive range of agreements including confidentiality, R&D, commercial manufacturing, service and outsourcing agreements. In joining the business, you will be involved in reviewing, analysing and amending existing agreements, delivering expert internal guidance on contract interpretation and legal compliance issues. 4+ years relevant experience required.

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This top ranking aviation service provider works across six continents with a very broad portfolio of aviation related investments. Clients include international financial institutions, airlines and investors. This close knit legal team provides a broad spectrum of advice in relation to corporate, contract management, risk analysis and asset management in the execution of large international transactions. 5+ years relevant experience required.

To arrange a confidential discussion on any of these opportunities or other non-advertised appointments please contact:

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Diligence pays for fast-car lawyer

A Canadian lawyer who abandoned his \$200,000 Ferrari in rising flood waters to get to a court hearing on time has been richly rewarded for his efforts. Employment lawyer Howard Levitt has got a "very generous" deal on a new Ferrari, courtesy of the Italian sports car company, the *National Post* reports.

Levitt refused to say what

he's paying for the new car, which retails at about \$300,000 after tax, but he said Ferrari gave him a deal he couldn't refuse.

Levitt abandoned his car on a Toronto highway during very heavy rain so he could catch a flight to Ottawa to attend a hearing for a client there the following morning. He was forced to abandon his metallic

blue 2010 Ferrari California after he got stuck in sewage-filled waters while on his way to the airport. The car, which was a total write-off, was covered by insurance.

Levitt said: "I thought I was reasonably prominent. But I've gotta say, whatever titbit of prominence I had has been dramatically overshadowed by this one incident."

In one ear...

A judge, bored and frustrated by a lawyer's tedious arguments, had made numerous rulings to speed the trial along. The attorney had bristled at the judge's orders, and their tempers grew hot.

Finally, frustrated with another repetition of arguments he had heard many times before, the judge pointed to his ear and said, "Counsellor, you should be aware that at this point, what you are saying is just going in one ear and out the other."

"Your honour," replied the lawyer, "That goes without saying. What is there to prevent it?" (From Richard Hammond)

Blue suede shoes

A lawyer has been fined more than €1,100 for entering a Romanian court wearing blue suede trainers, the *Irish Independent* reports. Judge Ioan Adrian Chitoiu gave defence lawyer Catalin Dancu a maximum fine of 5,000 lei for flouting dress regulations and for being late at the trial of five people accused of art theft.

Mr Dancu had a black robe over jeans and the bright-blue trainers, which he said cost him €200. "I am scented, shaved and fresh," he said, explaining that he had been delayed in another court. "I am going to contest this fine."

Proceedings were adjourned after Mr Dancu moved for the judge to be suspended, which another court will rule on.



No fire without smoke

The son of a smoker who won a \$3 billion verdict against Philip Morris USA Inc in 2001 is entitled to an additional \$12.8 million for the loss of his father's relationship, an intermediate California appeals court has ruled, the *National Law Journal* reports.

Richard Boeken died of lung cancer in 2002 while Philip Morris was appealing a Los Angeles jury's award granting him \$3 billion in punitive damages and \$5.5 million in compensatory damages. At the time, it was the largest award in a smoker case. That award was later reduced to \$50 million.

His son, Dylan Boeken, in a subsequent wrongful death suit against Philip Morris, alleged that he was deprived of his father's consortium in the years leading to his death. A jury awarded \$12.8 million on that claim in 2011.

On appeal, Philip Morris insisted that the jury had been erroneously instructed on damages under California law. The company also cited the California Supreme Court's 1922 decision in *Blackwell v American Film Co* as preventing such a double recovery.

But the Second District Court of Appeal found that Philip Morris had misinterpreted *Blackwell*, which pertained only to economic damages – not those for loss of consortium.

"According to Philip Morris, had Richard lived without lung cancer, but been killed instantly by some other tortious means, Dylan would have been entitled to recover against the tortfeasor; but because Richard died a long, agonising death caused by Philip Morris, Dylan is entitled to no recovery," the appeals court wrote.