**RIGHT TO DIE?**
The High Court decision in the landmark case of *Fleming v Ireland*

**MIGHTY OAKES**
The Central Bank's director of enforcement on regulation and compliance

**STATE COLLUSION**
Why the facts of Pat Finucane's murder must not be whitewashed

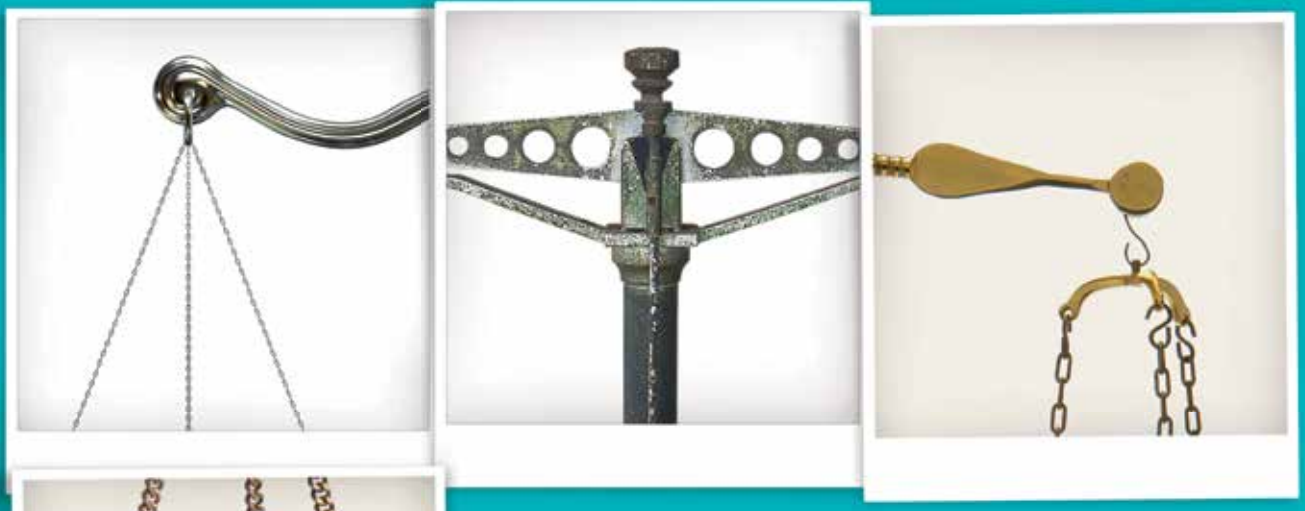
LAW SOCIETY

# GAZETTE

€4.00 **Jan/Feb 2013**


## MEMORIA IN AETERNA:

## Who owns your digital legacy?



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# READY, WILLING AND ABLE

I write my first message of 2013 on a cold and dark January day. I hope that the social, political and economic climate improves and turns to heat and light for all of you over the coming months. However, the challenges facing our profession are no different to those that face everyone in Ireland in these difficult times. Let us hope that the current Irish presidency of the EU, coupled with a year of 'The Gathering' encourages a rising tide to lift all of our boats.

It is indeed pleasing to note again that professional indemnity renewals appear to have gone reasonably smoothly. As a profession, we must continue to apply always the highest standards as we strive to deliver a quality service to clients at home and abroad.

In difficult times particularly, some may be tempted to cut corners. An inevitable outcome of such practices is a decline in the standard of work, with occasional catastrophic consequences for practitioner and client alike. We should always apply the highest standards and charge proper and appropriate fees for doing so.

### Constructive engagement

In February 2012, the Society delivered a detailed 100-page submission to the Minister for Justice regarding the *Legal Services Regulation Bill*. We remain ready, willing and able to actively and constructively engage with Minister Shatter when the bill reaches committee stage.

The minister is to be commended for his unstinting efforts to promote reform in many areas. In particular, I welcome his recent announcement of impending change in the area of periodic payments of damages to the victims of catastrophic injury. The Law Society has supported and called for such change for some considerable time.

We understand that there are further initiatives and changes in the offing relating to the levels of jurisdictions of the courts in civil litigation. We will inform you as soon as any announcements are made. Meanwhile, the Society's staff continues to provide unstinting service in all areas.

### Ever-increasing delays

Of growing concern to court practitioners are, we understand, ever-increasing delays in the process. These, coupled with the proposed closure of a great number of courts and garda stations around the country, inevitably raise concerns about access to justice. While we recognise the need to maximise the use of limited resources, we question the ability to deliver adequate legal services when resources are being depleted to such an extent.

I have dispatched a number of *eBulletins* over the past two months, briefing the profession, for example, on the Society's demand that the British government establish a public inquiry into the murder of solicitor Pat Finucane – to which the Society received a negative response in a letter from the Secretary of State for Northern Ireland.

The Society's committees are busy with a wide variety of projects. The Legal Services Regulation Task Force continues to refine its submissions and, has recently written again to Minister Shatter. The Future of the Law Society Task Force is expected to produce a report for Council at its April meeting.

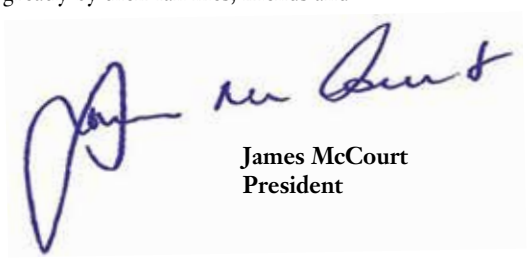
***"The proposed closure of a great number of courts and garda stations around the country, inevitably raises concerns about access to justice"***

### Sympathy

On a sad note, we have lost a number of eminent colleagues recently. On behalf of the Law Society and its members, I extend my deepest sympathy to the Overend family on the passing of Brian, a pillar of A&L Goodbody and a true gentleman. Both his father and his brother served as presidents of the Law Society. Brian's outstanding commitment was his astonishing 30 years of selfless service as a director of the Solicitors' Benevolent Association.

I also express my sympathy to the Dowling family on the untimely passing of Dominic, who practised in Dalkey, Co Dublin. At the time of his passing, Dominic was chairman of the Society's Public Relations Committee and a member of both the Curriculum Development Unit (which he had previously chaired) and the Law Clerks' Joint Labour Committee. He was an unsung hero – one who contributed unstintingly to numerous committees of the Law Society over many years. He had served as a Council member and, also, as president of the Dublin Solicitors' Bar Association – roles he performed with distinction.

Both men were paragons of the profession who always applied the highest standards in their daily work. They will be missed greatly by their families, friends and colleagues. G



**James McCourt**
**President**

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# LAW SOCIETY GAZETTE

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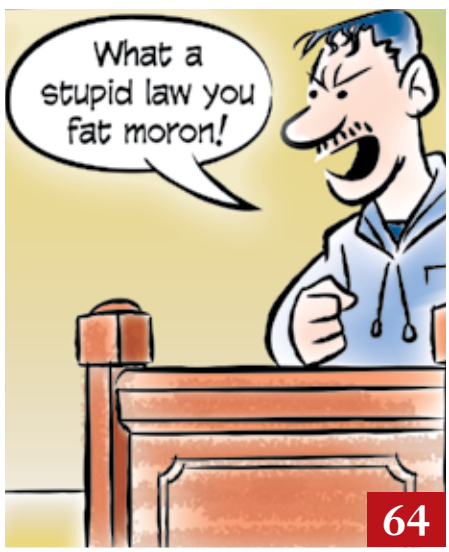






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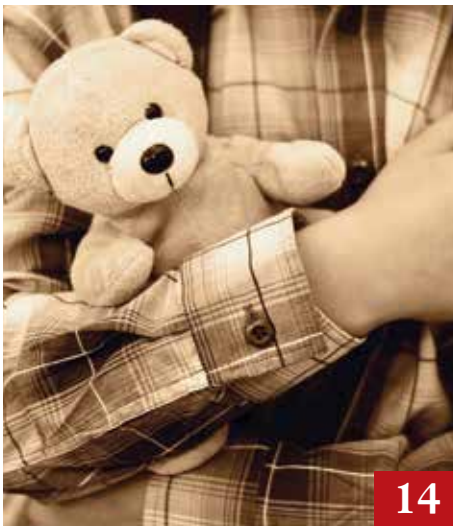


## FEATURES




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

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You can also check out:

- Current news
- Forthcoming events, including the **Law Society Annual Conference 2013 in Hotel Europe, Killarney, on 10/11 May**
- 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*

## Shaken, not stirred

LIMERICK

Congratulations to St John Dundon on becoming the new president of the Limerick Bar Association following the recent AGM. St John, of Dundon Callinan, succeeds Donal Creaton and continuity will be assured as Elisa McMahon (fortuitously also from Dundon Callinan) will continue as honorary secretary.

## Christmas corral

WEXFORD

**Helen Doyle rounded up Wexford colleagues for a collegiate Christmas dinner with Judge Haughton, and District Court staff and senior gardaí were guests. Judge Haughton was appointed almost a year ago and has put his own stamp on court proceedings. Thanks are due to Tim Cummings, who organised a most successful evening.**

**Helen also observes that one of Wexford's outstanding colleagues has called it a day: Anita Kent has retired to devote herself to family and other interests. We all wish her well.**

**Circuit Court practitioners have got the year off to a busy start, with five judges on circuit, presided over by permanent judge Alice Doyle, together with her colleagues Judge Ray Fulham, Judge James O'Donoghue and Judge Thomas Teehan. Helen says: "This will make inroads into a very long list in Wexford, where all types of cases experience delay in getting hearing dates." It's a welcome development.**

## Courthouse renovation in the offing?

WATERFORD

Waterford Law Society is concentrating on the upgrading and renovation of Waterford Courthouse. The Government has allocated funding for the redevelopment, which involves the courthouse moving into an area currently occupied by Waterford Fire Station. Fortunately, the Government has also allocated funding towards the building of a new fire station at Kilbarry in Waterford.

In other news, Jim Hally is the incoming president of the society, succeeding Gerry O'Herlihy. The other officers are Jill Walsh of Nolan Farrell & Goff (secretary), Rosa Eivers of Dobbyn & McCoy (treasurer), Ken Cunningham (PRO) and Bernadette Cahill (CPD officer).

On a sad note, from my own longstanding friendship with Niall and the King family, I join with the president and his Waterford Law Society colleagues in regretting the death of one of its longest serving members, Eamonn P King of JF Williams & Co, Dungarvan, on 9 December. Eamonn had been in practice for over 50 years and will be missed by all his colleagues.

## New Sligo team go walkabout

SLIGO

PIC: FRANCES MULDOON

Then President of the Law Society Donald Binchy and director general Ken Murphy paid a recent visit to Sligo to address local solicitors on the *Legal Services Regulation Bill*. (*From l to r*): Ken Murphy, Maurice Galvin (president, Sligo Bar Association, Deirdre Munnelly (secretary, Sligo Bar Association) and Donald Binchy

**The Sligo Bar Association held its AGM in early December. The elected committee is: president – Maurice Galvin (Martin & Galvin Solicitors), secretary – Deirdre Munnelly (McDermott, Creed & Martyn Solicitors), treasurer – Noel Kelly (Kelly & Ryan Solicitors), PRO – Laura Spelman (McGovern & Walsh Solicitors) and CPD officer – John McShane (Johnson & Johnson Solicitors).**

**It seems that our Sligo brethren have tried to emulate our Mayo colleagues, who reached the summit of Croagh Patrick last July. Last October, the Sligo Bar Association arranged a trek to the summit of Ben Bulben. It proved so popular that another trek is being arranged in early March. So you better buff up those boots.**

## Dominic's passing leaves a void

DUBLIN

The Dublin legal community was shocked to hear of the recent passing of our much loved colleague Dominic Dowling. A past president of the DSBA, Dominic served on the Law Society Council in the 1990s. As was evident from his funeral in Dalkey, where he had both lived and practised, Dominic was intrinsically interwoven into the community, voluntarily devoted himself to a myriad of local causes, was immensely popular, and commanded huge respect from both colleagues and public alike.

In truth, he epitomised all the very best in the solicitor's profession and his funeral even seemed to rival the last big funeral there six months previously – that of the iconic Maeve Binchy.

We extend our deepest commiserations to his widow Ruth and particularly wish his business partner Jeanne Kelly, daughter Gina and son Mark all the very best in continuing the proud Dowling name, now a third-generation family practice. G

# Cyber-cop appointed

Detective Inspector Paul Gillen has been appointed as head of operations at the newly established European Cyber Crime Centre in Europol in The Hague. The centre is to become the focal point in the EU's fight against cybercrime and cyber-attacks.

## In News this month...



# New Smithfield bye-laws

Bye-laws to regulate Dublin's Smithfield horse fair have been passed by Dublin City Council. The new laws will limit the number of fairs to two a year – in March and September.

Horse owners will have to comply with a licensing system to ensure animal welfare standards. The proposal requiring horse owners to take out public liability insurance was dropped.

A new subcommittee comprising horse owners, councillors, DSPCA officers and local interests will look at ways of promoting the fair. Extra fair days in the summer may be added at a future date.

Colm Kiernan of the Smithfield Horse Owners' Association said that owners welcomed the new laws.

# Four Courts access

**The application form for access cards for legal executives at the Four Courts has been revised. The only change on the form is on page 2, where there is now an additional question regarding security clearance. The form is available on the Courts Service website, www.courts.ie, in the 'Court forms', 'Other forms' section.**

# Criminal justice efficiency report out

**The Working Group on Efficiency Measures in the Criminal Justice System (Circuit and District Courts) was established in November 2011 at the request of Chief Justice Susan Denham and Minister for Justice Alan Shatter.**

**The remit of the group was to identify and report on how greater efficiencies and cost reduction measures could be achieved in the operations of the Circuit and District Courts, with particular emphasis on how the agencies in the sector interact with the courts and with each other.**

**The group submitted its report to the Chief Justice and the minister on 30 November 2012. A link to the report is available at: www.justice.ie/en/JELR/Pages/PB12000364.**


# ByrneWallace 'Lexcels' in quality of client care

**ByrneWallace's has achieved the international Lexcel standard – developed for the global legal profession – and awarded by the Law Society of England and Wales for excellence in practice management. Law firms who achieve the standard must prove that they meet the highest standards of client care, risk, quality and business management. The process includes onsite assessment by an accredited external auditor.**

# New Dublin partner for BLM

Berrymans Lace Mawer LLP (BLM) has appointed Aidan Carr to develop and oversee the firm's new Dublin office, which opened last October. Aidan is currently a partner based in BLM Manchester. He transferred to the Dublin office in December. Aidan will advise and work closely with current clients, many of whom operate in Dublin. He will also focus upon building the office's profile and practice.

# Huge A&L transactions

A&L Goodbody is Ireland's top law firm for mergers and acquisitions for 2012, according to the leading international research publications, Mergermarket, Bloomberg, CorpFin and Thomson Reuters.

According to Mergermarket, A&L Goodbody advised on a total of 25 M&A transactions in 2012 with a value of more than €500 million. The combined value of the transactions the firm advised on has been valued at over €16 billion.

DATE FOR YOUR DIARY

# Law Society
# Annual Conference
## 10th/11th May 2013

### CONFERENCE RATES

**Full delegate package: €300**
Access to full conference, Gala Dinner on Friday, 10th May, B&B accommodation for one night sharing with another delegate or registered accompanying person and a light lunch on Saturday, 11th May, all in Europe Hotel and Resort. If you will not be sharing and request a single room, a single supplement of €75 will be charged.

**Accompanying Person package: €200**
One night's B&B accomodation (Friday, 10th May) sharing with a delegate, Gala Dinner on Friday, 10th May, light lunch on Saturday, 11th May.

**Additional night: €200**
B&B accomodation per room

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*Law Society of Ireland*

10th/11th May 2013

## Hotel Europe
**Killarney**

# Shock at unexpected passing of solicitor Dominic Dowling

It was with enormous shock and sadness that we learned of the untimely death of our Dalkey-based colleague, Dominic Dowling, *writes Ken Murphy*. Dominic had recently commenced his second year as chairman of the Society's Public Relations Committee.

He chaired the Public Relations Committee meeting on 1 November 2012, sending apologies in advance of the 13 December committee meeting, but without any indication that anything was amiss.

In early January, he sent a message to President James McCourt and me to the effect that he had recently been diagnosed with cancer of the liver. He was receiving treatment for it and, as he wrote, "the prognosis is not good but nor is it hopeless". The message in no way indicated the imminence of his death, which occurred on Saturday 19 January 2013.

Dominic's approach to his illness seems to have been characterised by the calm and unruffled approach he took to everything. A former Law Society Council member and president of the Dublin Solicitors' Bar Association, Dominic served on a number of Law Society committees over the years.

On the Public Relations Committee, his thoughtful, analytical and always positive approach to PR issues, either to do with the public or with the members of the profession, commanded great respect from his fellow committee members. So also did his very hardworking and dedicated commitment to producing positive results in this always challenging issue for the Society and the profession. He invariably sought practical measures and he was a key figure, for example, in the devising and operation of the Society's radio advertising campaign in recent years.

While it is a terrible shock to his colleagues and friends in the Law Society to suddenly discover that we have lost him, it must be an almost unimaginably greater shock to his wife, Ruth, and his six children, Mark, Emma, Gina, Ruthie, Dominic and Rebecca and his mother Joan.

He sent an email to me on 9 January 2013, that read: "Thank you so much for your support. It means a lot. My friends in the Society go back a long way. Lots of happy memories."

*Ar dheis Dé go raibh a anam dílis.*

# Goodbody to build bridges with top Indian law firms

At the launch were *(from l to r)*: Amit Tambe (Trilegal), Mark Rasdale (partner, A&L Goodbody), Minister of State Ciaran Cannon, Julie Sinnaman (executive director, global business development, Enterprise Ireland), Feilim McLaughlin (Irish ambassador to India), Minahshi Batra (IDA director India) and Alan McCarthy (partner, A&L Goodbody)

**Some of India's top law firms are to participate in a new international law programme designed by A&L Goodbody that will help to forge closer ties, and facilitate investment, between Ireland and India.**

**The International Lawyers' Placement Programme was launched in Mumbai in December by the Minister of State for Training and Skills Ciarán Cannon. Skilled Indian lawyers will spend up to six months working with A&L Goodbody, gaining frontline exposure to its international client base and global advisory partners. Participants will learn how to apply their knowledge to commercial situations in a practical way.**

**The roll-out of the programme follows a highly successful partnership between A&L Goodbody and a number of China's top law firms and universities in March last year.**

**Managing partner at A&L Goodbody, Julian Yarr, commented: "This programme is specifically designed to give the best young lawyers from leading corporate law firms in India all of the skills they will need to advise their clients on international transactions."**

# It's not too late to fulfil a New Year resolution

Although all three New Year Diploma Programme courses have begun, it's not too late to sign up. All courses are webcast, so it's possible to catch up on the lectures missed by watching online. These are archived and available to students for the duration of the course.

For further information on all New Year and spring courses, visit the Diploma Programme section of the Law Society website at: www.lawsociety.ie/Diplomas, or email: diplomateam@lawsociety.ie.

| Course name | Fee | Start date | Course duration |
|---|---|---|---|
| Diploma in Insolvency and Corporate Restructuring (iPad) | €2,490 | Saturday 12 January | Six months |
| Certificate in Healthcare Law and Practice (new) | €1,160 | Thursday 17 January | Three months |
| Certificate in Public Procurement Law and Practice | €1,160 | Tuesday 26 February | Three months |

# New year, new scheme, new regime – CPD rules

New CPD Scheme regulations (*Solicitors (Continuing Professional Development) Regulations 2012*) came into effect on 1 January. All practitioners will be sent a copy of the new statutory instrument and booklet explaining the details of the new scheme.

### An annual requirement

The CPD cycles will continue to run from 1 January to 31 December every year. This means you have 12 months within which to fulfil your CPD obligations. There is no carry-over of hours from one cycle to the next. Verification of compliance with the CPD Scheme continues to be tied to your annual practising certificate application, as previously occurred.

### Hours per year

Solicitors to whom the regulations apply are required, in each of the three CPD cycles to which the regulations relate, to undertake at least the minimum specified number of hours of CPD.

For the 2013 CPD cycle, the minimum CPD requirement is 14 hours, to include a minimum of three hours' management and professional development skills and a minimum of one hour regulatory matters.

The new CPD regulations provide for an incremental increase of one hour per CPD cycle for each of the three cycles.

### Ways of completing CPD

There are three different ways of undertaking the minimum CPD requirement:

1) Group study: an organised session of CPD undertaken by three or more persons, for a period of not less than 30 minutes.
2) E-learning: the provision of education or training (or both) that is generated, communicated, processed, sent, received, recorded, stored and/or displayed by electronic means or in electronic form provided through:
   - The internet or other computer network connections, sound only, sound and vision formats, or a combination of both,
   - By the provision of an electronic file, a CD-ROM and/or DVD, and
   - Other technologies and formats that may be advised from time to time.

   The requirement for e-learning to contain at least two interactive elements has been removed. A maximum of five hours of the annual CPD requirement may be claimed for time spent in relevant e-learning.
3) Writing relevant material that is published: written relevant material that is published in a legal periodical or other textbook may count for CPD. Solicitors should also note that reference to legal periodicals also includes those published in printed or online form.

   A maximum of three hours of the annual CPD requirement may be claimed for time spent writing a relevant article or section of a legal periodical or textbook.

### Newly qualified

Under the previous scheme, newly qualified solicitors were exempt from the requirement to undertake CPD for a period of 12 months following their admission to the roll.

Solicitors should note that the new scheme provides that a solicitor who qualifies during a CPD year will be required to undertake CPD from the first day of admission to the Roll of Solicitors. However, such newly qualified solicitors may modify their minimum CPD requirement in proportion to the number of weeks remaining in the cycle in which they qualify.

### Modification of the minimum CPD requirement

The revised scheme will continue to allow for modifications of the minimum CPD requirement. The revised scheme booklet details the particular circumstances in which the minimum CPD requirement may be reduced, such as:

a) A senior practitioner,
b) Maternity/parental/carers/adoptive leave,
c) Illness/retirement/unemployment/substantive reasons cases,
d) Part-time practice, and
e) Part-year practice.

### Automatic audit in event of failure to comply with CPD requirements

Solicitors should note that, in the event of a failure to comply with annual CPD requirements, they will be automatically required to provide proof of compliance with their CPD obligations for a period of two years, in addition to the cycle in which they failed to comply.

Full and detailed explanations of the above modifications, together with clarification on all aspects of the new scheme, are provided in the revised 2013 scheme booklet.

Further details may also be obtained by contacting the CPD Scheme Unit on 01 672 4802 or by email: cpdscheme@lawsociety.ie.

# Murphy clears the air on the *Marian Finucane Show*

For many years, director general Ken Murphy has been a frequent contributor on Sunday morning radio programmes. Indeed, he appeared as a panellist on two separate Sunday morning *Marian Finucane Show* programmes in December 2012.

The issues came at him particularly thick and fast, however, on the 2 December 2012 programme. Murphy seized the opportunity to get a number of things off his chest – and that of the solicitors' profession – on a variety of important issues.

Among the topics he communicated to the show's huge audience were the value to the public of the Society's compensation fund, the profession's commitment to the highest standards of conduct among its members, the frustration at the delay in the garda investigation of disgraced former solicitor Michael Lynn, the profession's view of the criminally convicted former judge Heather Perrin, the profession's attitude to the changes in the *Legal Services Regulation Bill*, and the recent regulatory changes in relation to the conveyancing conflicts.

Ken Murphy: seized the opportunity

Marian Finucane: huge audience

### Rooting out bad apples

What was unusual and gratifying was the extent to which other panellists were supportive and spoke in praise of the work done in recent years by the Society and the profession to root out its 'bad apples'.

Asked about former solicitor Michael Lynn, Murphy answered: "The solicitors' profession in Ireland, out of its own income, compensates the clients of solicitors who have lost money in such cases. We probably don't get much credit for it, but solicitors give a level of protection that is far greater than anyone else provides."

He continued: "It comes at great cost to the profession. It is a badge of honour." Contrasting it with the financial services sector, he made the point: "If your money is lost in a bank account, they will only compensate you up to a maximum of €100,000. But if say €600,000 is entrusted by a client to a solicitor and lost through that solicitor's dishonesty, the rest of the profession in the country will repay that in full. We don't get much credit for that."

However, other panellists on the programme indicated appreciation for what the profession did in this regard. Former Senator Joe O'Toole was the most explicit, stating: "I completely agree that the Law Society has behaved admirably in these cases. I was a frequent critic of the Law Society in the past. But, more recently, I have said in many places that they have been dealing with these issues, working in almost continuous session, at huge cost to the profession and I think they need to be applauded."

Murphy was questioned by Finucane about former solicitor Michael Lynn. Lynn has been reported to be in Brazil and, as the father of a child born there, apparently not amenable to extradition if criminal charges were now brought against him in Ireland. Not for the first time, Murphy expressed the intense frustration of the solicitors' profession at "the incomprehensible delay of more than five years in concluding the still unfinished garda investigation in this case".

The amount reported as lost through Lynn's activities is some €80 million. "The hackles of the profession are very high. The reputational damage done to the profession by this guy was enormous," Murphy conceded, while confirming that the amount owed by Lynn to the Law Society as a result of claims on the compensation fund and his unpaid fine was approximately €4.5 million.

He acknowledged, as had been reported on the front page of that day's *Sunday Business Post*, that the Society was considering whether it would be worthwhile pursuing Lynn through the civil courts in Brazil for the money he owes the profession.

### Breach of trust

Separately, Murphy expressed the profession's revulsion at the disgraceful deception perpetrated on a client, towards the end of her time as a practising solicitor, by former District Judge Heather Perrin.

Murphy unreservedly condemned Perrin's breach of the trust – both contractual and moral – that every solicitor owes their client to act towards them always with utmost good faith.

In response to a listener's criticism of the Society's new regulation prohibiting the same solicitor or firm acting for both vendor and purchaser in conveyancing transactions, Murphy gave an explanation of the underlying public interest principles and a robust defence of the decision.

In addition to citing the support for the measure from various quarters, including from Justice Minister Alan Shatter, he spoke of the public welcome for the measure from expert campaigners against abuse of the elderly.

Murphy was pleased when, once again, all panellists in the studio were supportive of the Society's initiative. One of them, Dr Austen O'Carroll, gave examples from his own experience as a medical practitioner to show why the new regulations should be welcomed by everyone.

# New Solicitors Disciplinary Tribunal members appointed

The President of the High Court, Mr Justice Nicholas Kearns, has appointed Ward McEllin as chairman of the Solicitors Disciplinary Tribunal, effective 1 December 2012.

Mr McEllin succeeds Frank Daly, who has been the chairman of the tribunal for many years. He ceased to be a member of the tribunal at the end of November 2012, having completed the ten-year maximum term prescribed by statute.

Mr McEllin has been an active member of the tribunal since his original appointment in May 2005.

New chairman of the Solicitors Disciplinary Tribunal, Ward McEllin

His appointment as chairman will last until May 2015. Ward qualified as a solicitor in 1977 and practices in Claremorris, Co Mayo. He served for many years as a member of the Council of the Law Society and was president of the Society from November 2000 to November 2001.

In addition, the President of the High Court has appointed ten other solicitors as members of the Solicitors Disciplinary Tribunal with effect from 1 December 2012. Their term of appointment is also for a period of five years each.

The new members are: Owen Binchy, Helena Bowe O'Brien, Fiona Duffy, Niall Farrell, Philip Joyce, Elizabeth Lacy, Stephen Maher, Brian McMullin, Fiona Twomey and Michael Tyrrell.

# Business confidence improving in Ireland's legal sector

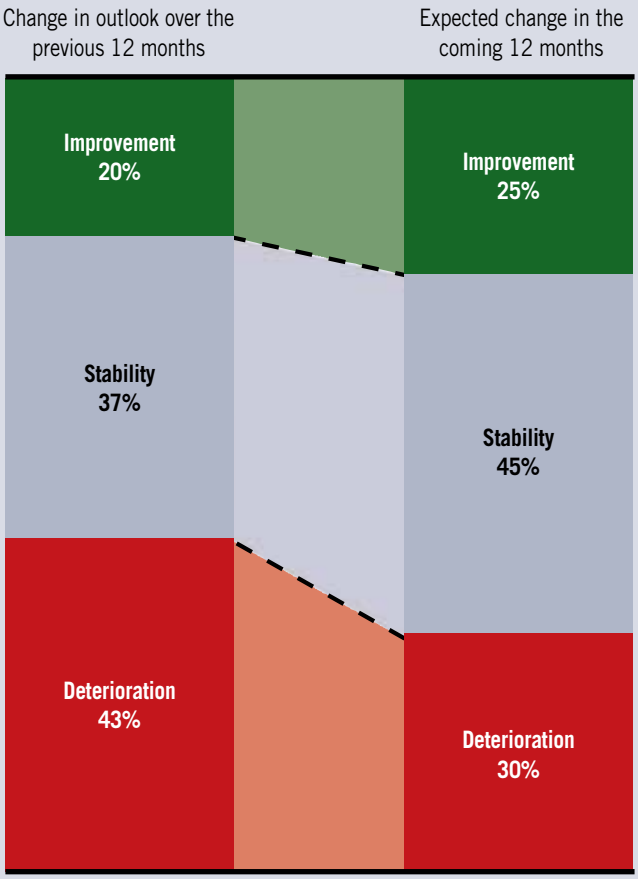
"Business confidence is improving in the legal sector, with approximately 70% of solicitors' firms expecting things to stabilise or improve in the next 12 months. This is up from 57% in the current 12-month period", according to a survey published in December 2012 by accountancy firm Smith & Williamson.

This survey of Irish law firms was carried out through telephone interviews of managing partners. As reported by Smith & Williamson, 93 separate law firms took part in the survey "including five of the top ten Irish law firms, 14 mid-tier firms and 74 small firms". There was a bias towards Dublin, where 71% of the participating firms were located.

The survey was not conducted by or on behalf of the Law Society. However, the managing partner of Smith & Williamson, Paul Wyse, was happy to have contents of the report appear in the *Gazette*.

In his executive summary of the report, Wyse wrote: "The financial crisis which has beset the nation since 2008 has led to an extremely difficult and challenging marketplace for all professional practices and their clients.

**CURRENT AND FUTURE OUTLOOK FOR THE LEGAL SECTOR IN IRELAND**




"International business, bank restructuring, NAMA and litigation have helped to shelter Dublin's top commercial law firms from the full impact of the recession, but all have been affected by it. 2012 has seen little growth in the domestic economy and continuing uncertainty about the Eurozone.

"Despite the current recession, the sector has responded and now confidence is up again," he continued.

The full 27-page *Survey of Irish Law Firms 2012/13* can be accessed on the Smith & Williamson website at www.smith.williamson.ie.

Speaking separately from the above, the frequent commentator on such matters in the *Gazette*, Outsource managing director David Rowe, said: "Our work with Irish law firms would show a definite pick-up in activity levels and confidence. The extent of this depends on where the firm is located – Dublin and other large urban areas have seen the best pick-up – and the markets in which the firm is operating. Conveyancing and commercial work are seeing much better activity levels, albeit from a low base. Litigation continues to be plentiful.

"Most firms believe that 2013 will be a better year. There are very large differences in the confidence levels between different parts of the country and cash flow continues to remain a problem. Overall, there is more optimism now and definite signs of a recovery."

NEWS FROM THE LAW SOCIETY'S COMMITTEES AND TASK FORCES

# IP law conference – proposed developments

INTELLECTUAL PROPERTY LAW COMMITTEE

The Intellectual Property Law Committee is pleased to announce that, in association with Law Society Professional Training, it will be running an intellectual property (IP) law conference on Tuesday 16 April at the Law Society, Blackhall Place, Dublin 7. The conference aims to provide an opportunity for lawyers and members of industry to discuss proposed developments in IP law.

The morning session will look at the impact on practitioners and industry of the EU proposals to establish a Unified Patent Court. The committee's members are concerned that the consequences of the Unified Patent Court may be detrimental to practitioners and their clients, possibly having a negative effect on investment in Ireland and Ireland's endeavours to brand itself as a knowledge economy. Therefore, it is hoped that the conference will be an opportunity to have a public and informed discussion of the impact of the proposals.

The afternoon session will consider the consequences to trademarks of the proposed tobacco plain-packaging legislation and will also look at developments in copyright legislation. It will be possible to attend either morning or afternoon sessions or both. Details of the conference are available at www.lawsociety.ie/cpd. Enquiries may be directed to the professional training team at lspt@lawsociety.ie.

In addition, the IP Law Committee has recently made submissions to the director of the Office for Harmonisation in the Internal Market (OHIM) on the OHIM Observatory work programme for 2013 and to the EU Commission on proposals for implementation of a common logo for legally operating online pharmacies/retailers offering medicinal products for human use for sale at a distance.

Copies of these submissions and others made by the committee are available on the committee's page on the Law Society's website.

# VAT on property – submissions invited

CONVEYANCING AND TAXATION COMMITTEE

In August 2011, the Society's Taxation and Conveyancing Committees produced a new edition of the Society's pre-contract VAT enquiries (PCVE) and a new edition of Special Condition 3 of its standard contract for sale in relation to VAT on property. The PCVE (August 2011) and Special Condition 3 (August 2011) are available on both the Conveyancing and Taxation Committees' web pages in the members' area of the Society's website (www.lawsociety.ie), along with the September 2011 practice note that accompanied them.

The committees believe that it is time again to review these two documents to see if they require amendment or refinement in order to improve their efficiency and fitness for purpose.

Members are invited to submit feedback on the suitability of the current (August 2011) editions of both the PCVE and Special Condition 3 when applied in practice. You should email your comments to vat@lawsociety.ie.

Comments can be submitted up to 31 March 2013. Members are urged to submit any observations or suggestions they may have so that these can be considered when both committees review the current documents in April 2013. G

# CIVIL LEGAL AID NEEDS MUCH MORE THAN A HELPING HAND

**The State may be in breach of human rights standards for its failure to deliver a proper civil legal aid system, according to the Society's Legal Aid Task Force. Mark McDermott reports**

*Mark McDermott is editor of the* Law Society Gazette

"It is a matter of concern that access to legal services may not be available to certain sectors of society. By failing to provide such services, the State may be in breach of human rights standards as defined by the Constitution and the *European Convention on Human Rights Act 2003*." So states the Law Society's Legal Aid Task Force in its recently published report on the civil legal aid system.

*Access To Justice: A Report of the Legal Aid Task Force* aims to enhance understanding among the profession and the public of the current problems in the civil legal aid system and to provide recommendations for future improvement.

The report highlights the effects of the increased pressure on resources in today's economy and the impact that such pressure has had on the civil legal aid scheme at a time when, because of the economic difficulties, demand for civil legal aid services has increased significantly.

**"By failing to provide such services, the State may be in breach of human rights standards as defined by the Irish Constitution and the European Convention on Human Rights Act 2003"**

### Access to justice

The task force expresses concern that the pressure placed on the civil legal aid scheme – and the delays encountered by all those whose cases cannot proceed because of capacity issues in the legal aid scheme – leads to a denial of access to justice.

This affects not just those who are entitled to civil legal aid but cannot receive it, but also those other parties to disputes who are represented by lawyers in private practice, but who cannot proceed to have their issues resolved while the other side waits to get access to legal aid.

The report states that the fundamental human right of access to justice includes the right of legal representation at a hearing, where that is needed to ensure a fair trial. In addition, access to justice includes access to the appropriate legal information and advice needed by an individual to manage their lives within the law.

"Failing to adequately resource the civil legal aid system without ensuring that people have alternative means of receiving required legal assistance is short-sighted and a false economy," the task force says. "Delayed advice and action is likely to lead to exacerbation of the original problem. It is a matter of concern that access to legal services may not be available to certain sectors of society because of waiting times for services."

### Exchequer funding

While civil legal aid is not free, and almost everyone availing of civil legal advice must pay a contribution of at least €10 – and at least €50 if court representation is required – the bulk of the funding of the Legal Aid Board comes from the exchequer.

Like other State organisations, its funding has reduced in recent years. The grant-in-aid for general legal services (excluding refugee/asylum related matters) reduced from €26,988 million in 2008 to €26.31 million in 2009, €24.225 million in 2010, and €24.125 million in 2011. Therefore, despite an increased throughput by the board's staff in law centres, those who are entitled to access the civil legal aid scheme are waiting for longer periods of time.

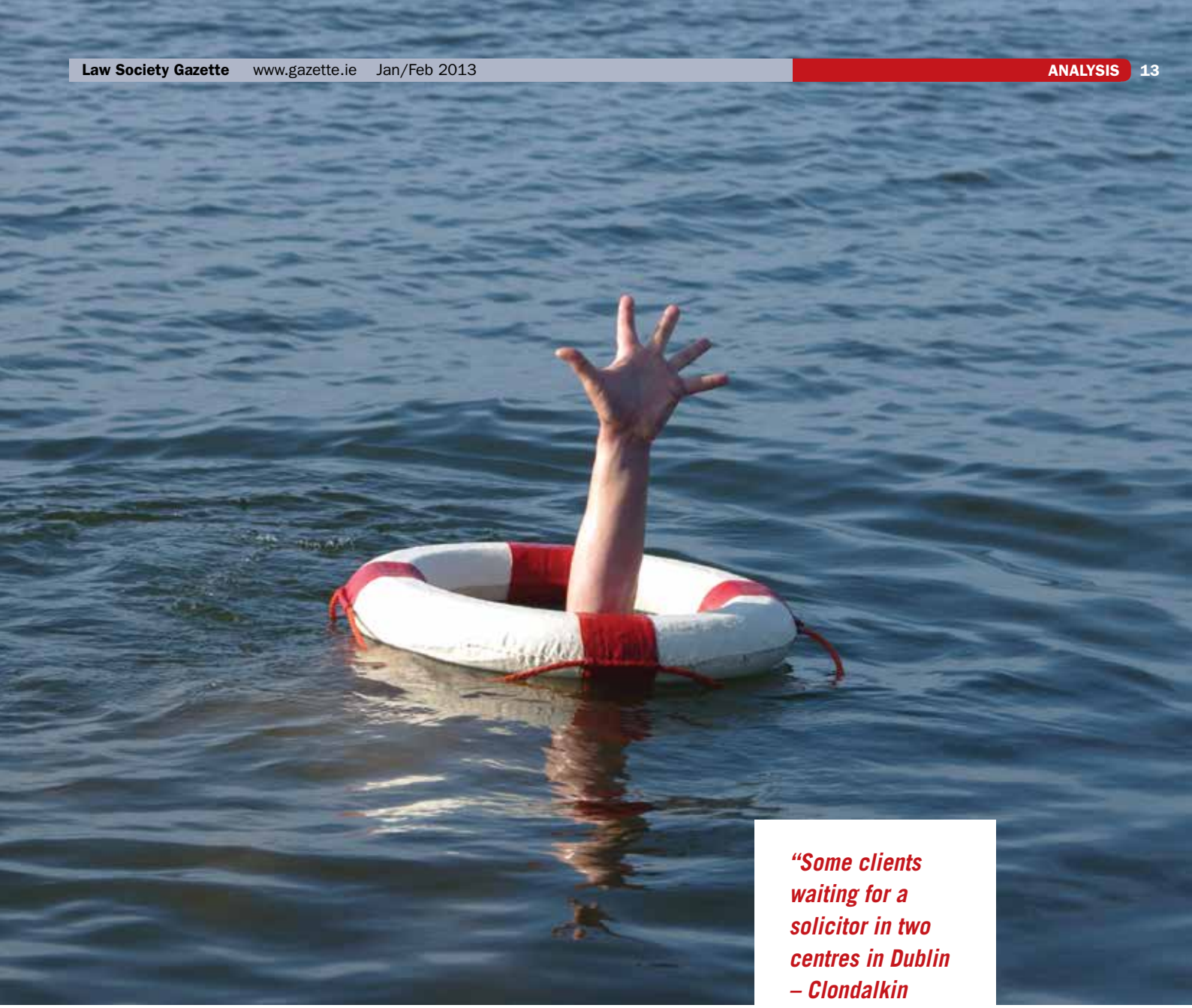
Some of those can be waiting for a very long time. According to the Legal Aid Board, of the 4,877 people waiting in June 2012, some clients waiting for a solicitor in two centres in Dublin – Clondalkin and Gardiner Street – could expect to wait for 13 months and 11 months respectively for a solicitor's appointment. Around the country, clients waiting for representation could expect to wait between four and ten months in all but two centres – Dundalk and Monaghan – where the waiting time was just a month.

### Task force recommendations

Given the current economic climate and significant waiting periods, the Legal Aid Task Force says that "new and practical recommendations about sustainable legal aid and access to justice in general have become a task of great urgency".

The Legal Aid Board has taken a range of measures with a view to addressing the increasing demand for services in a resource-constrained environment. These include:

- Increasing the number of cases referred to private solicitors for the purpose of providing a service,
- An advice-only service that facilitates an earlier brief meeting with a solicitor where applicants are



likely to have to wait in excess of four months for a substantive appointment,
- An integration of the delivery of all services with a view to ensuring the most effective deployment of resources, and
- The recent introduction of a pilot integrated mediation initiative in Dublin involving the board co-locating and cooperating with the Family Mediation Service and the Courts Service. The purpose of the initiative is to offer applicants for legal services alternatives to litigation in the courts as a better and – from the State's point of view – a more cost-effective means of resolving family law disputes.

The task force says that it endorses these initiatives and recommends that consideration be given to the following:
- The Legal Aid Board provides an essential service, and the Government should continue to fund it to the greatest extent possible,
- In view of the very significant increase in demand for its services and the fact that it provides front-line services, the Government should look sympathetically on any application to recruit staff outside the public-service recruitment moratorium/employment control framework,
- An analysis should be undertaken of the amount spent by the State on legal fees, with a view to seeking to ensure that a significant portion of the amount so spent is directed for the benefit of individuals of modest means who need to access civil legal aid and advice,
- The Legal Aid Board should review its schemes for retaining private solicitors, with a view to allowing it greater flexibility in relation to their retention and to allow for more meaningful support from private solicitors towards the reduction of waiting times for persons seeking legal services, and
- People seeking legal services to defend proceedings on foot of the *Child Care Act 1991* are not required to make a financial contribution to the Legal Aid Board, and consideration should be given to ensuring that people involved in domestic violence cases do not have their access to the courts hindered by being required to make such a contribution. G

***"Some clients waiting for a solicitor in two centres in Dublin – Clondalkin and Gardiner Street – could expect to wait for 13 months and 11 months respectively for a solicitor's appointment"***

# JUST HOW CHILD-FRIENDLY SHOULD JUSTICE BE?

**All children enjoy the inviolable right to be protected from harm. Killian O'Brien argues that this should be extended to include adjustments to the adversarial cross-examination procedure in Ireland**

*Killian O'Brien is a course director in European public law at the Academy of European Law in Trier, Germany. The views expressed in this article are personal*

For his role in the death of a small infant in the much-publicised *Baby P* case in Britain, the trial of Steven Barker gained considerable notoriety, primarily due to the seemingly abject failure of social services support networks to intervene and undertake measures at an earlier stage that would have prevented the death of the infant in that case.

Barker had, however, also previously been convicted on charges of the anal rape of a two-year-old girl, which took place before baby Peter's death, in a trial that did not garner quite as much attention as it might have done (*R v Barker* [2010] EWCA Crim 4).

Notwithstanding the material criminal law aspects of this trial, it raised some interesting points pertaining to evidentiary procedures permitted and, in particular, the treatment by the legal system of the key witness at the trial. The decisive characteristic of that witness is that she was a four-year-old child and, moreover, the victim of the alleged rape.

It goes without saying that all children enjoy the inviolable right to be protected from harm, whether that harm takes the form of abuse, violence, neglect or exploitation. But it is unclear whether the necessity to ensure that children's rights are upheld and the tenets of child-friendly justice are adhered to require that adjustments be made to the adversarial cross-examination procedure present in Ireland.

> **"All too often, children are deprived of their right to be heard and their views are not sufficiently taken into account on matters of direct concern to them"**

## Daddy or chips?

The practical relevance of furthering children's rights is self-evident if one considers for a moment the many opportunities that exist for children to encounter the justice system. Whether they are involved as part of a civil dispute between two parents over custody, or when they are accused of committing a crime or, in some jurisdictions, where they are involved in administrative matters by seeking to claim asylum, there are countless scenarios in which children may find themselves involved in legal proceedings.

Equally, there are also countless opportunities within those legal proceedings where children may be subject to manifold restrictions of their rights. Such restrictions may include, for instance, children being deprived of the information necessary in order for them to be in a position to fully exercise their rights. This could easily be the case in a situation where the information is presented to the child in a manner or using language that is not readily understandable to them. All too often, children are deprived of their right to be heard and their views are not sufficiently taken into account on matters of direct concern to them. One thinks, for example, of custody disputes where the child's opinions are not adequately considered.

## Child-friendly justice

With a view to making the justice systems of the member states more child-friendly right across Europe, the EU announced its 'Agenda for the Rights of the Child' in February 2011 and listed this aim as one of its designated key priorities. In its efforts to implement this laudable goal, the EU has adopted legislation containing specific provisions for children, such as the *Victims' Directive* (COM(2011) 275 final).

The European Commission has also committed to promoting the Council of Europe *Guidelines on Child-Friendly Justice* and to take account of these in future legal instruments. These non-binding guidelines aim to guarantee the respect and the effective implementation of all children's rights and aim to make justice, in particular, accessible, age-appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child and respecting the rights of the child, including the rights to due process, to participate in and understand the proceedings, to respect for private and family life, and to integrity and dignity.

The responsibility to turn the rights of children on paper into rights in their daily lives and in all dealings with the legal system requires considerable effort on the part of legal professionals, court systems and other parties involved. The *Barker* case, for example, may well have profited from the application of the Council of Europe guidelines to the trial and the evidentiary procedure adopted when dealing with the key witness and victim of the sexual assault.

## Mind your language

It goes without saying that questions should be put in a language children can understand and in an order that avoids confusion. Counsel for the defendant made good use of simplified language and gave clear example to

the witness, often rephrasing where it was apparent that the witness was not following the questioning. However, in his cross-examination, he also asked leading questions on several occasions and often repeated the same or similar questions. Both of these forms of questioning ought to be avoided when dealing with small children. The former type of question, where an assertion is often followed by an "isn't it?" or "didn't she?" appended to it, often lead to misunderstandings and inaccurate answers, as the child witness may agree with a statement without fully comprehending its significance.

With regard to the latter ploy of repeating a question or asking a similarly phrased question, this runs the risk of a child feeling pressured or overawed by the questioner. Added to this is the fact that the questioner often appears to be a person of some authority, and children have been observed to be cowed into changing their original answer in a desire to please, believing that they have provided a wrong or an unacceptable answer in the first place.

Finally, and perhaps most troublingly, the witness was asked the baited question: "Do you ever tell fibs?" Given that most adult witnesses would not cope particularly well with such a question, assuming that it were even deemed permissible, implying as it does that the witness had a stronger propensity to lie than any other witness, it would seem most inequitable to pose such a question to a small child.

As John R Spencer and Michael E Lamb point out in their compendium on *Children and Cross-Examination: Time to Change the Rules?*, most children will answer this question with either a 'yes' or a 'no', the first of which will discredit the child unfairly and the second of which almost certainly amounts to a lie.

The Council of Europe guidelines clearly indicate the need for respect and sensitivity to be used when children are heard in judicial proceedings. They also maintain the need for less-strict rules on the giving of evidence and, moreover, that the evidence of a child should not be presumed to be untrustworthy simply by reason of the child's age.

All this illustrates the need for a well-informed, proactive approach to the involvement of children in the judicial process. It is essential that children's rights are promoted at an early stage. By the time their rights have been violated, irreparable harm may already have been done. G

**BELFAST TRAINING EVENT IN MARCH**

**Using an applied approach involving case studies and practical workshops, as well as presentations from established European and domestic experts in this area, the Academy of European Law is organising a training event to be held in Belfast on 7-8 March 2013, in cooperation with the Law Society of Northern Ireland.**

**This event will bring the Council of Europe guidelines closer to the practitioner and enhance their practical applicability, as well as providing useful practical information and best practice on age-group-specific communication, appropriate interview techniques, and the organisation of child-sensitive judicial proceedings. Further information can be found on ERA's website: www.era.int/?123474&en.**

# SUPREME COURT GRANTS SYRIAN LAWYER CITIZENSHIP

**The Minister for Justice has a duty to provide an appellant with the reasons for his decision to refuse an application for naturalisation, according to a recent Supreme Court judgment. Joyce Mortimer reports**

*Joyce Mortimer is the Law Society's human rights executive*

In December 2012, the Supreme Court overturned the High Court decision refusing to grant a Syrian lawyer Irish citizenship. Having applied successfully for asylum and been declared a refugee by the Minister for Justice, the appellant, Ghandi Mallak, applied for a certificate of naturalisation and was refused. In the appeal, the Supreme Court found that Mr Mallak was given no reasons for the Minister for Justice's refusal to grant him citizenship. The minister relied on his absolute discretion in not providing any reason for his decision and insisted he was not obliged to explain his decision.

Handing down the judgment of the five-judge court, Mr Justice Nial Fennelly stated that "the underlying principles of judicial review are universal". The judge referred to the extraordinary developments in this area of law in the past 30 years. He explained the influence of international human rights instruments, such as the *European Convention on Human Rights*, and the Irish Constitution. He explained that "those to whom discretionary powers are entrusted will exercise them fairly insofar as they may affect individuals". He stated: "Where fairness can be shown to be lacking, the law provides a remedy. The right of access to the courts is an indispensable cornerstone of a state governed by the rule of law."

Justice Fennelly explained that the basic issue for decision in the appeal was the extent to which decision-makers are obliged to disclose the reasons for any decision made.

### Decision delay

The appellant is a Syrian national. He and his wife arrived in Ireland in 2002. Both individuals were granted refugee status on 22 November 2002 by formal declarations of the minister. On 9 December 2005, the appellant applied to the Minister for Justice for a certificate of naturalisation with a view to obtaining citizenship pursuant to section 15 of the *Irish Nationality and Citizenship Act 1956*.

In September 2008, he complained in writing about the delay of over two-and-a-half years that had elapsed. He received a response, stating that no decision had yet been made.

In a letter dated 20 November 2008, the appellant received a letter from the minister stating that his application had been refused. The appellant's wife had received a letter of notification in October 2008 granting her Irish citizenship.

The appellant's solicitor applied, pursuant to section 18 of the *Freedom of Information Act 1997*, for a statement of the reasons for the refusal of his application for naturalisation. In a letter dated 26 January 2009, the minister responded, declining the request. By letter dated 11 January 2010, the Office of the Information Commissioner acknowledged that the circumstances were such that the appellant was "left none the wiser as to why his naturalisation request and subsequent request for reasons were refused".

> ***"The minister was under a duty to provide the appellant with the reasons for his decision to refuse his application for naturalisation"***

### Grounds for judicial review

In May 2009, the applicant was granted leave by the High Court to apply for judicial review of the minister's 20 November 2008 decision. While this application was pending, Clark J, in July 2010 in *Albuissa v Minister for Justice, Equality and Law Reform*, held that "the discretion of the minister in considering applications for certificates of naturalisation is absolute".

In light of this decision, the appellant amended his grounds for judicial review in December 2010. He added the following grounds:

- That the provisions of the act of 1956 were unconstitutional insofar as they ousted the jurisdiction of the court to exercise its full original jurisdiction to review decisions of the minister, and
- That the said provisions had the effect of conferring power on the minister to deprive the applicant of access to citizenship of the European Union without any obligation to state reasons and, for that reason, the provisions infringe against article 41(2), paragraph 3 of the *Charter of Fundamental Rights of the European Union*.

### Effectively stateless

It was pointed out in the appeal that the court would not address an issue as to the constitutionality of a law if the case before it could be resolved without declaring the law to be unconstitutional. It was stated that if the appellant obtained an order of *certiorari* of the minister's decision by reason of its failure to state reasons, it would then be unnecessary to consider the constitutionality of the provisions of the1956 act or to refer any question for preliminary ruling to the Court of Justice.

Mallak v Minister for Justice – decision makers are obliged to disclose reasons for their decisions

The appellant explained that the minister's decision refusing him a certificate of naturalisation had significant adverse consequences for him as a refugee. He complained that it had left him "effectively stateless, though he retains Syrian nationality, that he is unable to obtain a passport, and is severely restricted in free movement and travel".

He explained that it was impossible for him to exercise his right to reapply for the grant of a certificate of naturalisation as he was ignorant of the reasons for its initial refusal. The appellant drew the court's attention to three previous High Court decisions in which orders were made quashing decisions refusing to grant certificates of naturalisation *(Mishra v Minister for Justice*, *LGH v Minister for Justice, Equality and Law Reform*, and *Hussain v Minister for Justice, Equality and Law Reform*). He pointed out that, in each of these decisions, the minister had provided reasons.

### Reasons to refuse

The minister accepted that a decision to refuse an application for a certificate of naturalisation is, in principle, amenable to judicial review. The minister also recognised the development of the duty to give reasons as an aspect of constitutional justice. The minister submitted, however, that, in cases of absolute discretion, there is no obligation to give reasons.

Mr Justice Nial Fennelly, in giving the decision of the Supreme Court, stated: "The minister was under a duty to provide the appellant with the reasons for his decision to refuse his application for naturalisation. His failure to do so deprived the appellant of any meaningful opportunity either to make a new application for naturalisation or to challenge the decision on substantive grounds."

The judge continued: "If reasons had been provided, it might well have been possible for the appellant to make relevant representations when making a new application. That might have rendered the decision fair and made it inappropriate to quash it."

Justice Fennelly concluded that, in the absence of any reasons, the appropriate order was one of *certiorari* quashing the decision. G

## LOOK IT UP

**Cases**

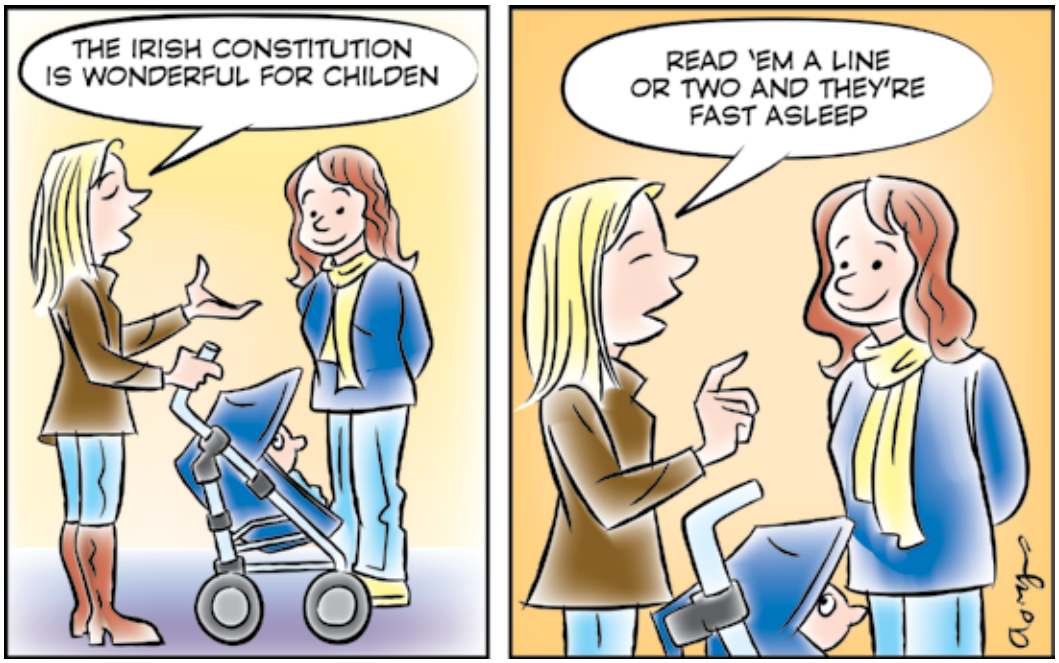
- *Abuissa v Minister for Justice, Equality and Law Reform* [2011] 1 IR 123
- *Hussain v Minister for Justice, Equality and Law Reform* [2011] IEHC 171
- *LGH v Minister for Justice, Equality and Law Reform*, 31 January 2009 (Edwards J)
- *Mishra v Minister for Justice* [1996] 1 IR 189

**Legislation:**

- *Charter of Fundamental Rights of the European Union*
- *Freedom of Information Act 1997*
- *Irish Nationality and Citizenship Act 1956*

# Children's Referendum is 'well-intentioned legalistic guff'

*From: Colm MacGeehin, MacGeehin Toale Solicitors, 10 Prospect Road, Glasnevin, Dublin 9*




There has been much debate about the low turnout in the recent Children's Referendum. Some commentators tend to blame the electorate for being lazy and indifferent. I am inclined to believe, in fact, that they were sceptical about the referendum's usefulness and effect. There were exaggerated claims for and against the changes. In my view, the changes were much ado about nothing.

There is one aspect of childcare where material change could have been brought about, and that is the area of adoption. Many proponents claimed that such change was achieved but, in fact, the amendment brought no change whatsoever. I will deal with each paragraph of article 42A but, for greater clarity, not in the order in which they appear in that article.

First, 42A.1: in which the State guarantees to protect and vindicate children's rights. But the existing article 40.3 already guarantees to protect the rights of all citizens, including children, and indeed article 40.3.3 guarantees the right to life of the unborn. So there was no need for 41A.1, unless, of course, the objective was to guarantee rights to the children of all (often illegal) migrants, who are not citizens. At no juncture did any of the amendment's proponents suggest that this was its purpose.

42A.2.1: in exceptional instances of what may be described as catastrophic parental neglect, the State can appropriately intervene. This is almost the same as the earlier and now repealed article 42.5, with the exception that is adds "regardless of their married status". But the married status of parents has never been a decisive bar to their children being put into care or fosterage in appropriate circumstances, nor is there any court decision (outside the context of adoption – see below) that rules that the parents' marriage prevents doing what otherwise ought to be done for severely neglected children.

42A.4.1: in all legal proceedings involving children, their best interests are paramount. But a provision to this effect already exists in various pieces of legislation. There was no need to amend the Constitution to enable such a requirement to be made more general.

42A.4.2: the views of children should be heard in all legal proceedings that concern them. But there never was a bar against hearing the views of sufficiently mature children when their welfare was the issue. As with the preceding sub-paragraph, there was no need to have the Constitution amended to make this a general requirement. Further, and significantly, the amendment does not guarantee that appropriate resources will be made available to ensure that this admirable objective will be secured.

Adoption is the subject of article 42A.2.2 and 3, and this is where the amendment's proponents have been dishonest. There is a difficulty when children of married parents are being considered for adoption because, in the courts' consistent case law, in principle (albeit not invariably), the child's best interests are regarded as being with its married biological parents rather than with the envisaged adopters, for example, the *Baby Ann* case ([2006]IR 374). According to many of its proponents, the amendment addresses this problem. But it does not. Its provisions specific to adoption make no reference whatsoever to the marital status of the parents, in contrast to article 42A.2.1 (see above) on children's fosterage, and so on. Thus, where perhaps change was needed, there is none.

Enacting the amendment may make some of us feel much better. Those citizens who have the Constitution as a beacon in their daily lives now have the comfort of knowing that children are "at its heart" and that it is a "child-centred" document. From a practical point of view, the amendment is little more than well-intentioned legalistic guff.

# SHOUT IT FROM THE ROOFTOPS

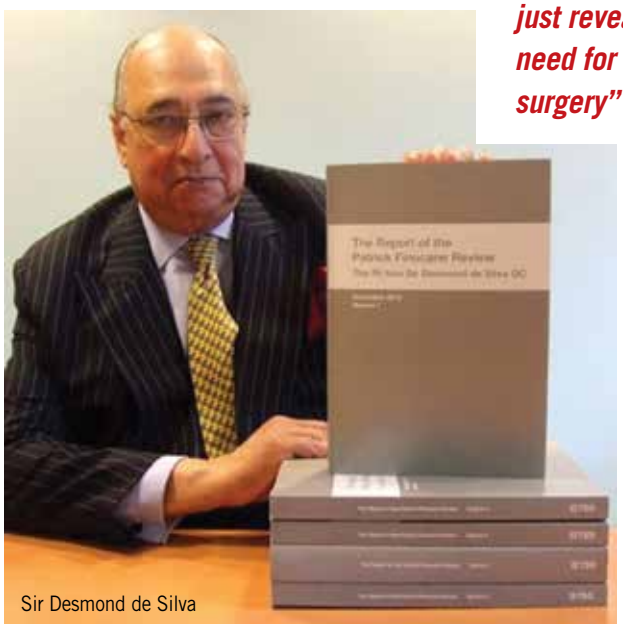
**The De Silva report on British state collusion in the murder of solicitor Pat Finucane was released on 12 December 2012. We mustn't let the facts be swept under the carpet, and we should be shouting from the rooftops for an independent inquiry, says Stuart Gilhooly**

*Stuart Gilhooly is junior vice-president of the Law Society*

I am a West Brit, apparently. Whatever that is. I know this because I've been told it many times. I can only assume it's my childhood obsession with the BBC that causes me to be accused of such a heinous crime. You see, I like cricket, I love Wimbledon and support Liverpool Football Club with a passion. Hell, I've even been known to shout for the England football team at major championships and jumped for joy when England won the 2003 Rugby World Cup. There, it's out: boil lanced, and many friends and colleagues will never talk to me again. (It was the rugby bit that really hurt, wasn't it?)

It won't surprise you that this particular West Brit has never had any real interest in the Northern troubles. Like many southern Catholic children, I grew up listening to stories of people being killed. Quite frankly, I neither knew nor cared what side they were on. You see, it was a different country to me. I know now it's only up the road, but then it might as well have been in China. I never had any time for, or interest in, Sinn Féin or the IRA. I still don't.

*"David Cameron knows that this report is only scraping at the scab of the wound and an independent inquiry might just reveal the need for serious surgery"*



Sir Desmond de Silva

On 12 February 1989, I was living at home with my parents. So was Michael Finucane. Neither of my parents was shot that day (or indeed any day since). But Michael Finucane's father, Pat, was. And he was there, with his younger siblings. He saw it all. In 2001, he wrote: "The thing I remember most vividly is the noise; the reports of each bullet reverberating around the kitchen, how my grip on my younger brother tightened with every shot. It's not a memory I care to visit very often, but it's there. I expect it always will be."

### Just doing his job

Patrick Finucane was 39 years of age. He was a solicitor doing his job. Many of his clients were members of the IRA, though he also had acted for loyalists. It really doesn't matter who he acted for. Either way, he was murdered by the UDA, like many other innocent men.

So why does a West Brit from Dublin suddenly care after decades of complete disinterest?

Because there, but for the grace of God, go us all. Pat Finucane was a solicitor acting for clients and trying to get to the best result he could. Nothing more, nothing less. He wasn't a terrorist, involved in illegal activity, or doing anything untoward. But he was a thorn. He was trouble with a capital 'T'.

You see, Pat Finucane believed in justice. Even for those accused of terrorism. He believed that everyone had the right to a fair trial and if they didn't get it, then maybe Europe would have something to say about that. And funnily enough, they did.

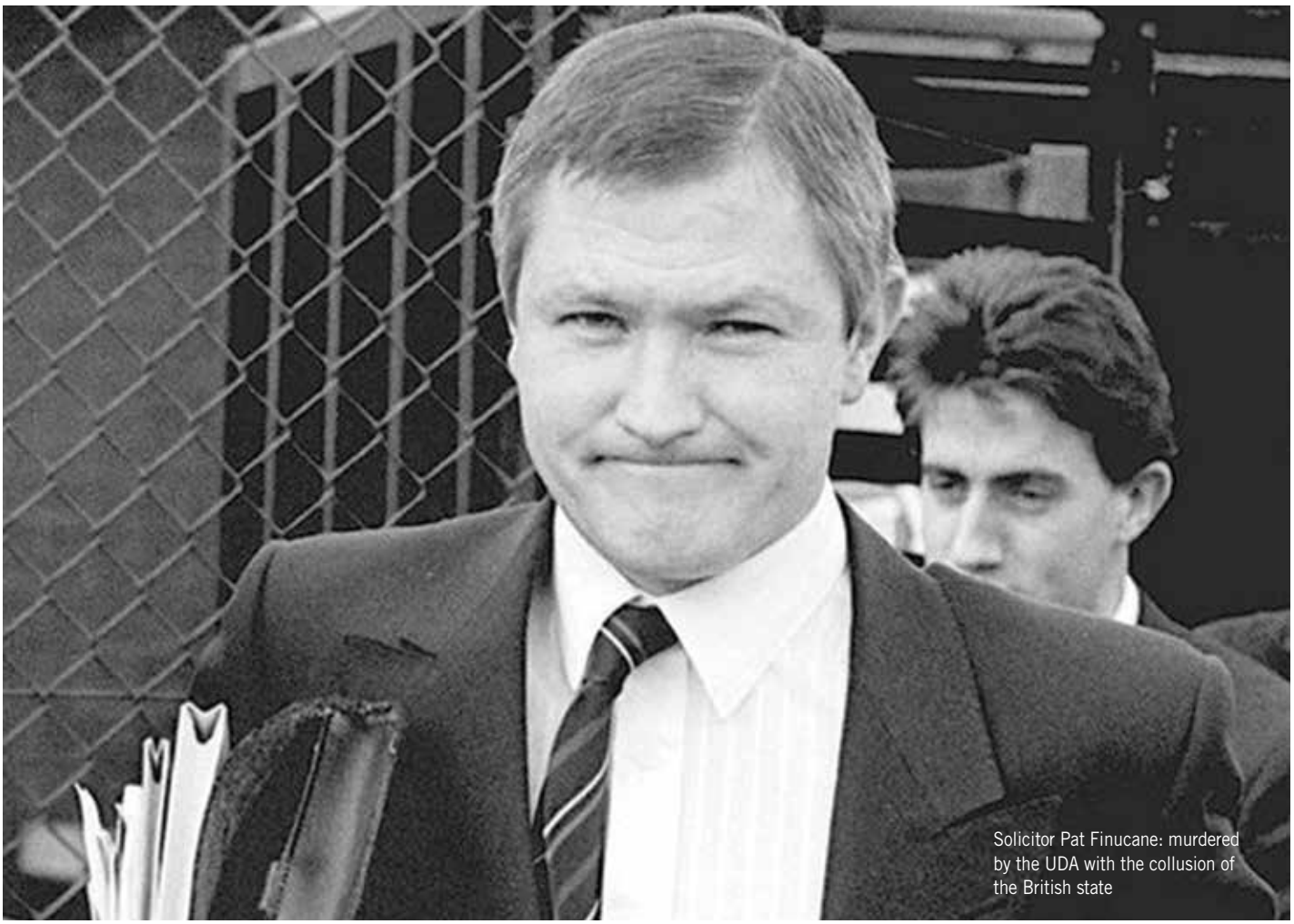
On 17 January 1989, Douglas Hogg, junior Home Office minister at the time, said: "I have to state as a fact, with great regret, that there are in Northern Ireland a number of solicitors who are unduly sympathetic to the IRA."

No one believes that Finucane's death, less than a month later, is a horrible coincidence. Least of all Desmond De Silva, author of the latest report into this disgusting scandal. Although he expressly absolves ministers of awareness of the plot to kill Pat Finucane, he is utterly damning in respect of other state employees: "The real importance in my view is that a series of positive actions by employees of the state actively furthered and facilitated his murder and that, in the aftermath of the murder, there was a relentless attempt to defeat the ends of justice.

"My review of the evidence relating to Patrick Finucane's case has left me in no doubt that agents of the state were involved in carrying out serious violations of human rights up to and including murder."

### British state collusion

So there you have it. The British state colluded in the murder of an innocent man for doing his job: administering justice. David Cameron thinks it's "appalling" and "unacceptable". I'm sure these sentiments are real, but most of all, he just wants it to go away. He knows



Solicitor Pat Finucane: murdered by the UDA with the collusion of the British state

that this report is only scraping at the scab of the wound and that an independent inquiry might just reveal the need for serious surgery.

I'm sure he thinks that the best thing to do is leave well enough alone. We have peace, and never kick a sleeping dog.

Well, here's the thing. It wasn't sleeping. It was murdered. In cold blood. For barking. Very loudly.

Twenty-three years have passed since Pat's death and all we have seen is whitewash. The wash is so gleaming that you'll need sunglasses to watch the British Government sweep the remainder of the mess under the carpet.

That year also saw another scandal involving collusion and cover up. This time, it took place in Sheffield, at Hillsborough. Only last year did the many campaigners finally get a reward and can finally see the dimmest light at the end of the tunnel of justice.

They have proven that, although the past is another country, all you need is a desire to travel and persuade others that no matter how far away it is, justice is a universal language.

***"The British state colluded in the murder of an innocent man for doing his job: administering justice"***

**Seven-hour wonder**

The De Silva report was released on 12 December 2012. It wasn't even a seven-day wonder, as they say in media circles. It barely got seven hours. Down here, it seems that we are sick of Northern Ireland, of murders, and we are like David Cameron. We just want it go away.

Except we must not let that happen. This isn't about what side of the fence you are on. It isn't about what foot you kick with. It's about one of us.

Most of us know the famous line in Shakespeare's *King Henry VI* when Dick the Butcher says: "The first thing we do, let's kill all the lawyers."

The purpose of this vignette was to demonstrate how easy it would be to start a revolution if the lawyers were dead. The murders of Pat Finucane, and subsequently Rosemary Nelson, were certainly steps in that direction. There was no revolution, but two innocent people were left in coffins. Who is to say it won't happen again? And who is to say it won't be you next time?

We should be shouting from the rooftops for an independent inquiry. We should be banging drums and marching outside the British Houses of Parliament.

I was much the same age as Michael Finucane when my mother died later in 1989. It wasn't anyone's fault, but I still ask 'why' to this day. The difference is that Michael might just get an answer. That's why we should never stop asking the question. G

# The REMAINS of the data

*Damien McCallig is a PhD candidate at the NUIG School of Law and is an Irish Research Council scholar*

**Online accounts may hold a vast 'back catalogue' of information, some of which is potentially valuable. So, who inherits your online legacy? Damien McCallig logs on**

Through the use of social media, email and other online accounts, our lives and social interactions are increasingly mediated by digital service providers. The vast storage capacities offered by these services mean that users no longer tend to delete old messages, and these accounts now may hold a 'back catalogue' of communications and interactions with family, friends, business contacts and the world at large, thus creating a virtual biography and archive of one's life. As the volume of these interactions increases and displaces traditional physical forms of communication, questions take on greater significance regarding access to and control over the 'digital remains' of deceased relatives and friends contained in online accounts.

Some of these accounts may have economic value, depending on their use, the status of the account holder (while alive), or the type of account in question. For example, players of multiplayer online games can amass significant digital assets through virtual property or virtual currency, which often are traded for monetary value offline. However, the vast majority of digital remains will primarily hold sentimental value in remembering deceased loved ones, in the same way that old letters and photographs stored in shoeboxes and scrapbooks act as mementos.

This new phenomenon of the digital age will see legal practitioners increasingly faced with novel questions such as what rights, if any, do surviving family members or heirs have with respect to the online accounts of their loved ones? Can one bequeath social media, email or other online accounts? Other users may wish to have all their accounts deleted at death and may seek advice on taking the secrets of their online lives to the grave with them. This article focuses on the current position regarding the transmission of social media and email accounts at death – but other classes of digital remains exist and can raise more complex legal issues.

***"Can one bequeath social media, email or other online accounts?"***

### Are you being served?

The cornerstone of a user's relationship with an online service provider is the terms of service that are signed up to when establishing the online account. Service providers may have specific clauses or policies relating to the death of the account holder, but these agreements are rarely read, if at all, by users. In any case, online service providers are only beginning to grapple with the question of death, inheritance and access to online accounts. Little or no consistency has emerged in the ever-changing policies put in place by providers.

Gmail, the free email service provided by Google, has a deceased user policy, which currently states that "in rare cases, we may be able to provide the Gmail account content to an authorised representative of the deceased user". However, following the initial steps


PHOTO MANIPULATION: CIAN REDMOND

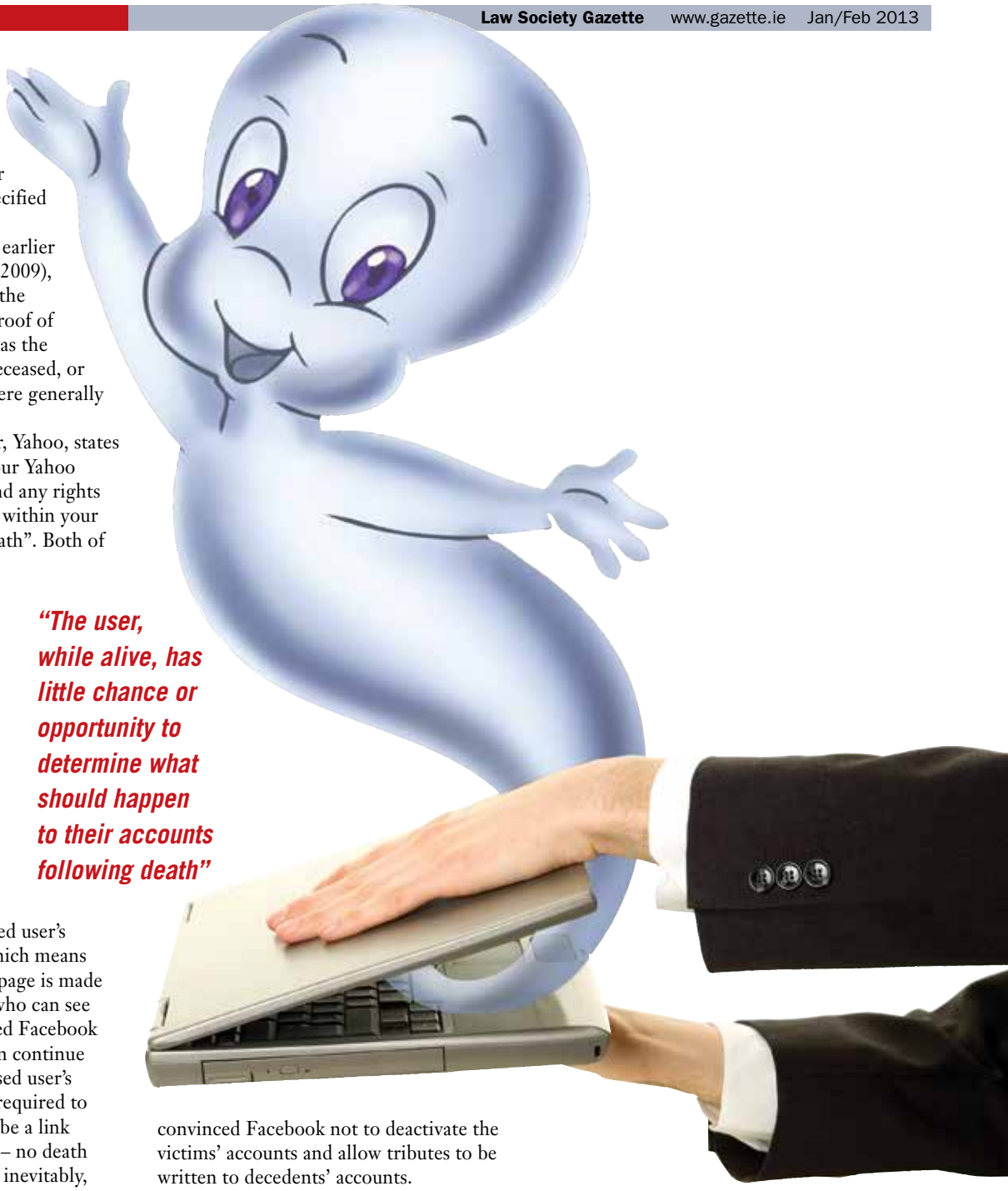
**FAST FACTS**

- Social media and email accounts may leave 'digital legacies'
- The terms of service are important
- Gmail, Yahoo and Facebook have 'death policies'
- US case law and legislation provide some guidance
- Service providers should offer choice to users regarding the disposition of their 'digital remains'

of submitting a death certificate and a rigorous identification process, the Gmail account content may only be provided following "an order from a US court" or the production of other unspecified additional materials, or both.

This contrasts sharply with earlier versions of the policy (March 2009), where, upon identification of the account, proof of death and proof of authority that the requester was the lawful representative of the deceased, or their estate, access requests were generally dealt with in 30 days.

Another free email provider, Yahoo, states in its terms of service that "your Yahoo account is non-transferable and any rights to your Yahoo ID or contents within your account terminate on your death". Both of these service providers, in defending their policies, cite privacy of the account holder as paramount. Yet, in most common-law jurisdictions, the right to privacy terminates at death.



***"The user, while alive, has little chance or opportunity to determine what should happen to their accounts following death"***

### In loving memory

Facebook, the ubiquitous social media service provider, takes a different approach. Anybody can submit an online form to Facebook reporting a user's death; this then results in the deceased user's page being 'memorialised', which means that the decedent's Facebook page is made 'private', thus limiting those who can see or locate the page to confirmed Facebook friends. Confirmed friends can continue to post messages to the deceased user's timeline. The proof of death required to initiate 'memorialisation' can be a link to an obituary or news article – no death certificate is required. Almost inevitably, Facebook has had to introduce a process for the reinstatement of accounts memorialised in error.

For the accounts of those who are genuinely deceased, only one alternative to memorialisation is available: "verified immediate family members" or those holding proof of legal authority, such as an executor, may make a "special request" to have the deceased user's account removed. It is unclear what criteria Facebook uses to assess and subsequently grant such special requests. The origins of memorialisation and the deceased user policies employed by Facebook can be traced back to the Virginia Tech college shootings in 2007, when friends of victims, through media pressure, convinced Facebook not to deactivate the victims' accounts and allow tributes to be written to decedents' accounts.

What is clear from this very brief survey of service provider policies is that the user, while alive, has little chance or opportunity to determine what should happen to their accounts following death. Surviving family members are often left at the mercy of the terms of service and the discretion of online service providers when making requests relating to a deceased relative's account. This has led to a number of court cases in the United States. The earliest case appears to be that of Justin Ellsworth, a US marine killed in Iraq in 2004. Justin's father took a case to the Oakland County Probate Court, Michigan, against Yahoo in order to gain access to his son's email account. Yahoo had initially denied access, citing their terms of service, but later complied with the court's order to provide copies of the emails in the account.

In a more recent judgment (20 September 2012), a British family were refused an order from the US District Court in the Northern District of California to compel Facebook to provide the contents of their deceased daughter's account for use in a coroner's inquest in England. The choice of a Californian court was determined by Facebook's terms of service (at section 16.1). Facebook successfully argued that the US *Stored Communications Act*, a federal law designed, among other things, to protect privacy,

prevented the court from ordering the release of the account's contents. The court did leave open the opportunity for the family, which is also the executor of the daughter's estate, to reach an agreement with Facebook for the voluntary release of the contents of the account. However, this type of solution leaves a surviving family dependent on the goodwill or discretion of a service provider when dealing with an access request.

### Hawaii 5-0

Five US states have attempted to address the issue of digital legacies through legislation by recognising specific categories of online account as probate property. Connecticut (2005) and Rhode Island (2007) provide executors with access to, or copies of, the contents of email accounts; Indiana (2007) provides for the release of documents or information stored electronically to a personal representative of the deceased; and Oklahoma (2010) and Idaho (2011) give executors the power to control, conduct, continue or terminate social media, microblogging and email accounts.

A further four states (Nebraska, Oregon, Massachusetts and New York) are considering similar laws. The Uniform Law Commissioners, a group that promotes uniformity in state laws across the US, are also in the process of drafting a model state law for fiduciary access to digital assets. However, uncertainty remains regarding the application of the current state laws, as these might not override specific terms of service and could be pre-empted by US federal law.

### Get smart

These uncertainties and the gaps in the regulation of a decedent's digital remains are also being addressed by online legacy services such as Assetlock.net, LegacyLocker.com and SecureSafe.com. These companies offer a service that allows for the transfer of passwords for online accounts to chosen beneficiaries following death. These are simple workarounds that require the maintenance of an active list of online accounts, passwords and beneficiaries. Some of these providers also offer to terminate accounts that a user may not wish to remain active or be linked to them following death.

The other more obvious solution is for testators to leave passwords in their wills. The placing of such detail in a will is not recommended as, following probate, the will becomes a public document but, according to a 2011 survey, one in ten people in Britain do record passwords and online account information in their wills. However, the sharing of passwords with third parties is likely to breach the terms of service of many of the online service providers.

Furthermore, accessing or further modifying content in a decedent's account without the knowledge of the service provider may constitute a criminal offence in some jurisdictions. Also, solutions that require the sharing of passwords create another difficulty, in that they must be updated when passwords are changed in order to maintain an accurate list. However, this type of solution does, at least, recognise the intention and desire of the deceased to allow access to those to whom the passwords are posthumously assigned.

> ***"According to a 2011 survey, one in ten people in Britain do record passwords and online account information in their wills"***

Ultimately, as with all succession planning, the recording of the intentions of the deceased in relation to the disposition of their online accounts is the optimal solution. Legislating for this area offers another option, but the experience from the US suggests that further work is required before adopting such legislation in other jurisdictions.

Data can live forever

The most practical method to deal with this issue is for online service providers to offer the choice to users of whether or not they wish to assign their online accounts to beneficiaries. Service providers are best placed to record and maintain the intentions of the user relating to each specific account. Reaching this point may take some time, but surviving family members will continue to seek the economic and sentimental value in these digital remains and, with time, as more service users die, the inevitable increase in the volume of access requests is likely to provide the stimulus for change. G

## LOOK IT UP

**Cases**

- *In Re Justin Ellsworth, Deceased*, State of Michigan, Oakland County Probate Court, 2005-296, 651-DE
- *In Re Request for Order Requiring Facebook, Inc to Produce Documents and Things*, US District Court, Northern District of California, San Jose Division, Case no C12-80171 LHK (PSG) (20 September 2012)

**Legislation**

- Connecticut General Statute, sections 45a-334a(b) (2005), as added by Connecticut Public Act no 05-136, *An Act Concerning Access to Decedents' Electronic Mail Accounts*
- Idaho Code, section 15-3-715(28) (2011), *An Act Relating to the Uniform Probate Code*
- Idaho Code, section 15-5-424(3)(z) (2011), *An Act Relating to the Uniform Probate Code*
- Indiana Code, sections 29-1-13-1.1 (2007), 'Electronically stored documents of deceased'
- Oklahoma Statutes, section 58-269 (2010)
- State of Rhode Island General Laws, section 33-27-1-5 (2007), *Access to Decedents' Electronic Mail Accounts Act*

**Literature**

- Facebook, *Statement of Rights and Responsibilities* (8 June 2012), available at www.facebook.com/legal/terms, accessed 14 November 2012
- Facebook, *Deactivating, Deleting and Memorializing*, www.facebook.com/help/359046244166395, accessed 14 November 2012
- Gmail, *Accessing a Deceased Person's Mail* (8 November 2012), available at http://support.google.com/mail/bin/answer.py?hl=en&answer=14300, accessed 14 November 2012
- Yahoo, *Terms of Service – UK and Ireland* (3 December 2010), available at http://info.yahoo.com/legal/ie/yahoo/utos.html, accessed 14 November 2012

# In my time OF DYING

*Michaela Herron is a solicitor on the Healthcare and Life Sciences Team in A&L Goodbody Solicitors. She wishes to thank Cliona Christle for her assistance in reviewing the article*

**The crime of assisted suicide is punishable by up to 14 years' imprisonment. *Fleming v Ireland & Ors* is a landmark case that challenges the constitutionality of the *Common Law (Suicide) Act 1993*. Michaela Herron weighs up the options**

In 1993, assisted suicide became a crime, punishable by up to 14 years' imprisonment, pursuant to section 2(2) of the *Common Law (Suicide) Act 1993*. On 10 January 2013, a three-judge High Court delivered its judgment in *Fleming v Ireland & Ors* in the first challenge to the constitutionality of the 1993 act.

Marie Fleming, a 59-year-old mother of two who is in the latter stages of multiple sclerosis (MS), lost her High Court battle seeking a declaration that section 2(2) of the 1993 act was unconstitutional and incompatible with the *European Convention on Human Rights* (ECHR).

Ms Fleming also failed in her application to have the DPP issue public guidelines outlining the factors the DPP would take into account when deciding whether to prosecute an offence under the 1993 act.

In 1989, Ms Fleming was diagnosed as suffering from MS and, since 2001, she has been wheelchair-bound. She now requires assistance with all aspects of her daily living. While she remains able to communicate, it is becoming increasingly difficult for her to speak. She suffers significant pain, which she describes as, at times, "almost unbearable". Ms Fleming's mental capacity is not impaired. Her request to the court was for assistance in having a peaceful, dignified death in the arms of her partner and with her children in attendance, without leaving a legacy behind her whereby her partner or her children could be prosecuted.

> ***"Applying the proportionality test, the court held that the three-tiered test (laid out in Heaney v Ireland) was satisfied. The State has an overwhelming interest in safeguarding all human life and article 40.3.2 commits the State to this objective"***

## Proceedings

The proceedings were commenced by a plenary summons on 25 October 2012 and case-managed to full hearing before the High Court on 5 December 2012. Ms Fleming's claim was for orders declaring that section 2(2) of the 1993 act is invalid, having regard to the provisions of the Constitution of Ireland, and that it is incompatible with her rights pursuant to the ECHR. Alternatively, the plaintiff included a claim for an order directing the DPP to promulgate guidelines stating the factors that would be taken into account in deciding, pursuant to section 2(4) of the 1993 act, whether to prosecute or to consent to the prosecution of any particular person in circumstances such as those that would affect a person who assists the plaintiff in ending her life.

The defence delivered on behalf of the State denied that the 1993 act infringed any specific or unenumerated constitutional right enjoyed by Ms Fleming and further denied that the Constitution of Ireland expressly or implicitly conferred on Ms Fleming, or any person, a right to die.

The defence argued that the provisions were necessary in the interests of the common good and that the public interest in maintaining that statutory provision without qualification outweighs any alleged rights that Ms Fleming might claim to have in terms of obtaining the assistance of another person to end her life.

It was denied that the statutory provision was incompatible with the State's obligations under the ECHR and that Ms Fleming was even entitled to seek a remedy directly from the court on the basis of a claim that there had been an alleged breach of her rights by reference to the provisions of the ECHR, as the *European Convention on Human Rights Act 2003* does not give direct effect in Irish law to the ECHR. It was denied that the 1993 act contravened any right of the plaintiff under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the ECHR or that it discriminates against Ms Fleming on the grounds of disability, contrary to article 14 of the ECHR.

### 'No exception or defence'

The defence of the DPP denied that the common law provides no exception or defence, in that any person charged with an offence under this section would have available any common law defences that arise generally in the case of serious indictable crime.

The DPP further denied that she is obliged, under the Constitution or law, to promulgate guidelines and that the entitlement to exercise discretion whether or not to prosecute arises only after the commission of an offence. It was denied that the DPP's refusal to promulgate guidelines constitutes a breach of the plaintiff's right to privacy, either under article 40 of the Constitution or article 8 of the ECHR. It was further denied that the convention rights articulated in the plaintiff's claim are directly applicable in this jurisdiction, and the DPP contended that the plaintiff is confined to such rights and remedies as arise under the *ECHR Act*.

The Human Rights Commission invited the court to consider if the ban could be achieved in less absolute terms and whether it could be replaced by legislation that would be a measured and proportionate reconciliation of the right to life, reflecting the sanctity of life but also taking into account personal rights of autonomy, privacy and equality rights.

### Evidence

The court heard testimony from three expert witnesses. Philosophy professor Margaret Battin, who co-authored a study in 2007 on

**FAST FACTS**

- **Marie Fleming, who is in the latter stages of multiple sclerosis, sought a declaration from the High Court that section 2(2) of the 1993 act was unconstitutional and incompatible with the *European Convention on Human Rights***
- **She also applied to have the DPP issue public guidelines outlining the factors the prosecution should take into account when deciding whether to prosecute an offence under the 1993 act**
- **On 10 January 2013, three judges of the High Court found against the challenge**
- **An appeal has been lodged and is due to be heard on 19 February 2013 before a seven-judge Supreme Court over several days**


Marie Fleming in younger, healthier days

legal physician-assisted dying in Oregon and the Netherlands, gave evidence for the plaintiff. That study concluded that the impact on vulnerable persons was not disproportionate where assisted dying was legalised, and that there were sufficient safeguards in place to ensure abuse did not occur.

Evidence for the State was given by two consultants in palliative medicine, Dr Tony O'Brien and Prof Robert George, who supported the ban on assisted suicide. Dr O'Brien feared that a change in the law would result in people opting for assisted suicide in the belief they were an excessive burden on those around them. He was also of the view that, if the law changed "the whole issue of persons with impaired competence would be enormously difficult and the situation would become quite impossible".

Prof George believed that legalising assisted suicide would result in "a paradigm shift in society". He stated that "if there is one person who is considered legitimate or justified in making a claim, then the territory changes by the very fact of the acceptance of that claim".

He pointed to concerns that voluntary euthanasia in the Netherlands became non-voluntary for people who were incapable. He expressed great concern about the effect on mental-illness sufferers. He warned that economic utility also becomes a factor, noting one case from the *Remmelink Report* in which a patient had experienced non-voluntary euthanasia to free up a hospital bed. He also explained that 42% of patients in Oregon said that being a burden on their family was a contributing factor in their decision to opt for assisted suicide. Both witnesses felt that Ms Fleming's situation could be greatly enhanced by active engagement with palliative-care consultants.

**'ROAD MAP' TO CRIME**

**The DPP contended that she would be "aiding a crime" if she were to grant the plaintiff's request to outline the factors that would be considered when deciding whether or not to prosecute the crime, and that to do so would constitute a "road map" under which a person might more safely commit a crime and avoid prosecution.**

**The court refused Ms Fleming's request that the DPP issue guidelines for the following reasons:**

- **The *Prosecution of Offences Act 1974* contains no similar provision to that of the *British Prosecution of Offences Act 1985*, which requires the DPP to issue guidelines. In the absence of a statutory power, the court held that the DPP was not entitled to issue guidelines and that to do so would encroach upon article 15.2 of the Constitution and interfere with the separation of powers. The court stated that law making is for the Oireachtas and not the DPP.**
- **The ECHR could not be relied upon in the same direct way as the English courts, as the "form of incorporation in Ireland does no more than require, at a sub-constitutional level, that a court shall 'insofar as is possible, subject to the rules of law relating to such interpretation and application', interpret a statutory provision or rule of law in a manner compatible with the Convention".**

**However, the court did not stop there. Moved by the tragic circumstances of Ms Fleming's case, the court said that, should Ms Fleming's family assist her in ending her life, they would be entitled to submit documents to the DPP surrounding the circumstances of doing so. The court said that the British guidelines were of considerable assistance here and referred to them at length.**

**While the DPP was not permitted to issue her own guidelines, the court said that the British guidelines would "surely inform" the DPP's decision. The court said it felt sure that "the DPP, in this of all cases, would exercise her discretion in a humane and sensitive fashion".**

***"The DPP contended that she would be 'aiding a crime' if she were to grant the plaintiff's request to outline the factors that would be considered when deciding whether or not to prosecute the crime"***

### The constitutional issue

In finding that the 1993 act was constitutional, the court stated that the plaintiff's decision to seek assistance to end her life is a decision that, "in principle", is engaged by the right to personal autonomy that lies at the core of the protection of the person in article 40.3.2.

The court held that there is a "real and defining difference between a competent adult patient making the decision not to continue medical treatment on the one hand – even if death is the natural, imminent and foreseeable consequence of that decision – and the taking of active steps by another to bring about the end of that life of the other". This distinction reflects the fact that one necessary feature of the Constitution's protection of the person is that he or she cannot be compelled to accept medical treatment.

The court held that it could not be satisfied that the safeguards put in place in Switzerland, the Netherlands, Washington and Oregon addressed the serious concerns and objections that remain. If the law were liberalised, the risk of wrongful diagnosis, the risks to the vulnerable, the risk of complacency with regard to statutory safeguards, the pressure on disabled and elderly to avoid consuming scarce public healthcare funds, the pressure on disabled and elderly due to their perception of being a burden to their family, the destruction of the traditional integrity of the medical profession, and a fear of assisted suicide becoming a "normal option" were all too real.

Applying the proportionality test, the court held that the three-tiered test (laid out in *Heaney v Ireland*) was satisfied. The court held that the State has an overwhelming interest in safeguarding all human life and that article 40.3.2 commits the State to this objective.

The equality guarantee in article 40.1 commits the State to valuing equally the life of all persons. The court held that the prohibition on assisted suicide is connected to this objective and that, if it were to adjudicate in favour of Ms Fleming, it feared that it might "open a Pandora's box, which thereafter would be impossible to close".

### Case law

The court then carried out a detailed overview of the case law in the area. It is clear (save for the Canadian judgment in

*Carter v Canada*, which is currently under appeal) that, in jurisdictions with similar constitutional provisions, the assisted suicide ban is considered not to be disproportionate.

In *Carter*, Lynn Smith J held that the ban on assisted suicide was disproportionate, whereas the Irish judges held that they could not agree that the risks inherent in legally permitting assisted suicide had not materialised in jurisdictions such as the Netherlands and Belgium.

Additionally, the case law before the ECHR has made it clear, from cases such as *Pretty* and *Purdy*, that the absolute ban on assisted suicide is not incompatible with the provisions of the ECHR. *Purdy* confirmed that, while article 8 is engaged, the restriction is justified pursuant to article 8(2), as the contracting states are permitted to think that such a ban is necessary to prevent abuse and exploitation of the vulnerable.

**"The court held that if it were to adjudicate in favour of Ms Fleming, it feared that it might 'open a Pandora's box, which thereafter would be impossible to close'"**

An appeal to the Supreme Court has been lodged and is due to be heard on 19 February. Given the constitutional issues involved, it is expected that seven judges will preside over several days.

The High Court's decision on the constitutional and ECHR issues did not come as a surprise.

Thus far, it has been the court's comments on the usefulness of the DPP's guidelines in Britain that have attracted a degree of controversy (see panel, previous page). It appears likely that the Supreme Court will uphold the High Court's decision, in which case it will be for the Oireachtas to decide whether to amend the 1993 act to require the DPP to issue guidelines in relation to a decision to prosecute an offence of assisted suicide. G

## LOOK IT UP

**Cases:**

- *Carter v Canada* [2012] BCSC 886
- *Heaney v Ireland* [1994] 3 IR 593 at 607
- *Marie Fleming v Ireland & Ors* [2013] IEHC 2
- *The Queen on the Application of Dianne Pretty v UK*, 2002 35 EHRR 1
- *R (on the application of Purdy) v DPP*, 2009 UKHL 45

**Legislation:**

- *Common Law (Suicide) Act 1993*
- *European Convention on Human Rights*

**Literature:**

- Read the full judgment at www.courts.ie (High Court, 2012 10589 P)
- *Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide* (British guidelines); see www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.pdf
- *Remmelink Report 1991* – also known as *Medical Decisions about the End of Life*

# FROM LITTLE *acorns*

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

**From high-rise Sydney to the seventh floor of the Central Bank, Peter Oakes has had a mighty career. But can Colin Murphy see the wood for the trees?**

Six months into his first-ever job, in Sydney, Australia, Peter Oakes approached a senior member of the team and asked him to train him. As a statement of ambition, it was in keeping with his later career – but as a career direction, it couldn't have been more different. Oakes was working as a labourer on a building site; the man he asked to train him was a rigger. He duly took Oakes on, and the young apprentice joined him hanging on the outside of high-rise construction projects, helping to rig up platforms and hoist up materials and equipment. (He gestures out the dramatic seventh-floor window of the Central Bank as he tells me this, to illustrate a point about how they worked.)

It would be glib to suggest that such a training in construction might be a useful background for working on the regulation of the Irish banks – banks that, notoriously, became inextricable from the construction industry and property market they funded. But construction taught Oakes some valuable lessons.

"I learned about risk management and about the value of the trust that others place in you. As riggers, we were responsible for laying down the lifeline to which the high-rise workers attached themselves. If we made a mistake, it could be fatal."

It taught him hard work: 80-hour weeks as Sydney went through a construction boom. And it taught him some robust people skills. "Get it wrong on the site and you might lose your teeth!"

### Cactus Jack

Oakes joined Matthew Elderfield's financial regulation team at the Central Bank in late 2010, as director of enforcement. This April, he will leave "to pursue other interests". He is coy on what these may be, other than to confirm that he sees Irish financial services "continuing to be a big part of my life". Though his career has been international, his life appears firmly rooted here: he is married to an Irish woman, Ruth, they have two children born here, and he is now an Irish citizen.

Early on in his time in construction, a colleague gave him some advice. "Your future is in the office. Get a qualification." He considered quantity surveying but opted for law, choosing to study part-time. (His mother was a legal secretary, his father a carpenter, later a manager.) His early career was paradoxical: he took a slow route to legal qualification, but was precociously successful as a lawyer.

Shortly after he started his studies, he landed a job as a paralegal in the pension fund of the New South Wales government, which managed a portfolio worth AUS$2 billion, a portion of which was in commercial property. One afternoon, they received a hefty cheque. Too late to have it lodged, the chief solicitor asked him to bring it up to the traders' floor, so they could trade on it overnight.

The legal office worked exclusively on the property side of the house and had few dealings with the traders, but Oakes was intrigued and asked the traders could he help. They suggested he review their counterparty contracts and he brought the suggestion to his boss. "Could you do the work to the extent that you will know what you know – and, more importantly, that you will know what you don't know, and seek assistance?" he was asked. He affirmed. The insight stayed with him.

From there – while still studying law by night – he went to work at the Australian Securities and Investments Commission, which had been newly established as a national corporate regulator. Oakes found himself advising on investigations and, even though not yet qualified, appearing in magistrate and federal courts as "agent of the crown" in summary

PIC: SIOBHAN BYRNE PHOTOGRAPHY

*"To be considered a credible regulator, you have to be prepared to lose cases"*

High rise: view from Oakes's seventh floor offices in the Central Bank

prosecutions of company directors and corporate law matters. He was promoted to registrar of the disciplinary board and successfully introduced a mediation scheme to expedite the disciplinary process.

### Willow the wisp

He finally qualified in 1997 and was admitted as a solicitor, receiving an exemption from articles due to his unusual degree of experience. He had met an Irish girl (now his wife) in Sydney and her second (and final) one-year visa was coming to an end. Within a month of qualifying, they were in London. There, a former colleague put him in touch with the Financial Services Authority, newly created out of the pre-existing Securities and Investments Board as part of the regulatory response to the 1995 collapse of Barings Bank. Oakes soon found himself working for his second national financial regulator as it underwent a process of "transformative change".

Two years later, he left to join an investment management firm as head of legal and compliance. A classic case of gamekeeper turned poacher? He demurs: people should move between regulator and industry, he believes (as he has consistently done). The regulator needs the insight that

**FAST FACTS**

- Born: Sydney, Australia
- Passions: surfboat racing (akin to currach or skiff racing)
- Career highlight: joining the Central Bank at a time of 'transformative change'
- Most difficult moment: dropping two clients of his consultancy when he became "concerned about things they were saying to the regulator that weren't evidence based"
- Career distinction: has worked for three national regulators during eras of radical reform and renewal

can only come from people working in industry and, if regulators subsequently leave for positions in industry, they take the ethics and culture of good regulation with them, he says.

After a few years in London, life interfered again. He was newly married and friends offered some wry advice: "Be careful – if you start breeding in London, you'll never get out of it!" They decided to try his wife's homeland, and Oakes contacted some Irish headhunters. The result? "Zip." So he tried a more direct route, combing through the IFSC yearbook and making a list of 30 firms whose business model he understood, then whittling that down to ten and writing to them directly. They all responded, and he soon started work with a large funds business as director of legal and compliance.

There, he spotted a market niche: between the lawyers brought in to do contracts and the accountants doing audits, there was, typically, nobody specialising in compliance. In 2004, he set up Compliance Ireland, a consultancy providing training and compliance services to the financial services sector. An American friend suggested that 'compliance Ireland' was an oxymoron, but Oakes's view was less jaundiced: "I believed there was willingness here, but a lack of leadership."

### On the trail of the lonesome pine

His view of compliance was holistic: "I didn't see compliance and governance being mutually exclusive. With the continuing codification of governance standards, compliance is a fundamental part of an organisation's governance framework." He targeted company directors, especially non-executive directors, pitching to them that compliance should be a core concern: "non-compliance can negatively impact upon your fitness and probity as a director".

His legal training was inherent to his understanding of the responsibilities of company directors, as it rooted him in "evidence-based decision making". "How can you approve a set of accounts unless you've gone through the accounts?" Going through accounts or a business plan with care may "give colleagues the impression you're being pedantic, but if you don't do the job diligently you could miss the fundamental flaw that takes you from solvency to insolvency overnight or debases the premise of your whole strategy".

He has served on boards, and recalls declining an invitation to be a non-executive director. At a meeting with the firm's senior executives, he was told he was asking too many questions about the firm's strategy, which was decided by their parent company overseas. "We're not looking for someone to come on board and discuss strategy," they said. They should look elsewhere, he told them.

Then, in 2010, Matthew Elderfield called and asked him to join his team at the financial regulator (which was in the process of being incorporated into the new unitary central bank and financial regulator, the Central Bank of Ireland. "It was an opportunity to come in, again, to a regulator at a time of transformational change. It gave me the means and ability to contribute from within."

Oakes has overseen a radical rethinking of the approach to enforcement. Staff in the unit increased from 20 to 70, fines have increased (65% of the fines imposed since 2006, by value, have been imposed in the last three years, he says), and there is now a marked emphasis on transparency. "There's a deterrence aspect to enforcement," he says; this requires the Central Bank to make public key information about enforcement actions.

> *"Non-compliance can negatively impact upon your fitness and probity as a director"*

They have taken cases in "ground-breaking areas," he says. "We're one of the few regulators to have pursued solvency/liquidity and capital requirements against insurance companies and banks. We have taken enforcement actions against IFSC firms, retail banks, retail intermediaries, insurers, reinsurers, investment firms, stockbrokers, listed firms and credit unions."

### Ashes to ashes

He sees having former industry professionals on the regulator staff as crucial. "You need to be able to speak to them [regulated firms] in their own language. You need to be able to explain to them why they've got it wrong, because if they don't see why they've got it wrong, they will fight it tooth and nail."

He believes in a robust approach to regulation: "To be considered a credible regulator, you have to be prepared to lose cases. This doesn't mean we will act recklessly, but that we will act decisively, being prepared to take on the risks inherent in untested areas. Taking on cases, even though you may lose, helps in arguing for a change to the law to make the type of case more winnable in the future."

In Britain, following the Financial Services Authority's report on the failure of the Royal Bank of Scotland, the Treasury has consulted on the introduction of a rebuttable presumption that a director of a failed bank is not suitable to serve as a senior executive in a bank; Oakes and Elderfield have suggested that this should be considered here. (See their speeches to the Central Bank Enforcement Conference in December on www.centralbank.ie.)

There is a popular perception (partly allayed by charges being brought against Anglo Irish Bank executives) that the enforcement response to the banking collapse has been inadequate and that this is typical of a response to white-collar crime here that could be described, at best, as lethargic. Oakes says he is "appreciative" of this view but stresses that prosecutions against white-collar crime are "notoriously complex" and "take time to build".

When he took office, he wrote to all those directors of the guaranteed financial institutions who had remained in place since the guarantee, informing them of new powers to investigate the fitness and probity of banking directors – subsequently, many resigned. The Central Bank conducted a review of the few who remained, which included Richie Boucher of Bank of Ireland and Fergus Murphy of EBS/AIB. It concluded that it had "no reason to suspect the fitness and probity of those individuals".

### A man fir all seasons

With a second *Central Bank (Supervision and Enforcement) Bill* due this year, regulation and enforcement powers are being strengthened, Oakes says, and he is bullish about the prospects for Ireland Inc. "There was a 'Wild West' banner floating over Ireland in the past [since a 2005 article by *The New York Times* on loose practices in the IFSC], but that's not the way that Ireland does business going forward. There is an opportunity for the IFSC to promote themselves not just as 'low cost' but also 'best practice'. Better regulation can add value to an economy. This is a growth area for Ireland. If we get it right, it will generate more inward investment."

From high-rise Sydney to the seventh floor of the Central Bank (and soon on to pastures new), an ability to assess risk and enforce standards has taken Oakes to impressive professional heights. So, what advice would he give young legal graduates seeking a career in this area? "Develop business experience. You need to be able to talk to business people. You need to be able to say to them, 'the law says you can't do it that way – but let's look at other ways you could do it, if you're prepared to adjust your business model'."

# Shifting SANDS

**The administration of stamp duty has seen a range of changes due to the *Finance Act 2012*, and these changes are likely to present significant challenges for solicitors. Emmet Scully surveys the shifting sands**

*Emmet Scully is a partner in LK Shields Solicitors and co-author of* The Law and Practice of Irish Stamp Duty. *He has been the Law Society's representative on the audit subcommittee of the Tax Administration Liaison Committee for the past four years*

**FAST FACTS**

- For instruments executed on/after 7 July 2012, a new late-filing surcharge applies
- Late filing interest is charged on the amount of the original stamp duty liability plus the surcharge amount
- The *Finance Act 2012* introduces a new fixed penalty of €3,000 on each accountable person for failure to file a stamp duty return and expands the category of tax-geared penalties to include failure to file a stamp duty return

The *Finance Act 2012* introduced a range of changes in the administration of stamp duty that came into effect by ministerial order in respect of instruments executed on or after 7 July 2012.

The specified return date for the filing of stamp duty returns – that is, 30 days after first execution – and the rate of late filing interest (0.0219%) have not been changed by the act. The Revenue Commissioners have confirmed that they will continue to accept returns filed up to 44 days after first execution, in line with previous practice.

For instruments executed on/after 7 July 2012, a new late filing surcharge applies, equal to 5% of the unpaid duty where the stamp duty return is filed within two months after the specified return date, subject to a maximum of €12,695, or 10% of the unpaid duty where the return is filed later than two months after the specified return date, subject to a maximum of €63,485.

The surcharge is not a penalty and therefore forms part of a stamp duty charge. Late filing interest is charged on the amount of the original stamp duty liability plus the surcharge amount.

The tables below, reproduced from guidance published by the Revenue Commissioners, illustrates the main differences between the sanctions applicable to late filing under the old and new regimes (excluding fixed and tax-geared penalties for non-filing).

### Failure to file a return

The *Finance Act 2012* introduces a new fixed penalty of €3,000 on each accountable person for failure to file a stamp duty return. This penalty applies to instruments executed on/after 7 July 2012. There is no *de minimus* threshold on the application of this penalty, which could theoretically apply even where the amount of stamp duty payable on the unfiled return would have been negligible. However, it is understood that it is not intended to apply this penalty automatically in each case of late filed returns and, in my view, is more likely to be levied in audit cases.

**PENALTIES AND INTEREST FOR INSTRUMENTS EXECUTED BEFORE 7 JULY 2012**

| Scenario | Penalty | Daily interest |
|---|---|---|
| Return filed and stamp duty paid in full within 44 days of the date of execution | Nil | Nil |
| Return filed after 44 days and/or stamp duty unpaid, but filed/paid within six months of the date of execution | 10% | 0.0219% on any unpaid balance from the date of execution |
| Return filed and/or stamp duty remains unpaid later than six months, but within 12 months of the date of execution | 20% | 0.0219% on any unpaid balance from the date of execution |
| Return filed and/or stamp duly remains unpaid after 12 months of the date of execution | 30% | 0.0219% on any unpaid balance from the date of execution |

**NEW DUTY SURCHARGE AND INTEREST REGIME FOR INSTRUMENTS EXECUTED ON OR AFTER 7 JULY 2012**

| Scenario | Duty surcharge | Daily interest |
|---|---|---|
| Return filed and stamp duty paid in full within 44 days of the date of execution | Nil | Nil |
| Return filed within 44 days of the date of execution, but stamp duty remains unpaid after 44 days | Nil | 0.0219% on the total of any unpaid balance |
| Return filed after 44 days and/or stamp duty remains unpaid but filed/paid within 92 days of the date of execution | 5%<br>Note: The maximum surcharge here is capped at €12,695 | 0.0219% on the total of any unpaid balance plus surcharge, from the date of execution |
| Return remains unfiled and unpaid after 92 days of the date of execution | 10%<br>Note: The maximum surcharge here is capped at €63,485 | 0.0219% on the total of any unpaid balance plus surcharge, from the date of execution |

### Tax-geared penalties

The act also expanded the category of tax-geared penalties to include failure to file a stamp duty return, which operates similarly (but not identically) to the tax-geared penalties for non-disclosure introduced by the *Finance (No 2) Act 2008*. The operation of the tax-geared penalties for failure to file a stamp duty return are summarised in the table overleaf.

Tax-geared penalties are most likely to be levied in the context of an audit, and the matrix for mitigation of penalties follows a similar approach to that used in other tax heads that are the subject of regular audits.

### Abolition of adjudication

Adjudication had been compulsory in order to claim certain reliefs. Adjudication is no longer possible in respect of instruments executed on or after 7 July 2012 and nor can adjudication be requested by the Revenue or the taxpayer.

The principal benefit of an instrument that had been adjudicated was that it was considered to be duly stamped (see below). Practitioners also drew comfort from the fact that the interaction with the Revenue made it less likely that the transaction would be reopened and therefore adjudicated transactions carried with them a fair degree of certainty.

Although the Revenue Commissioners no longer retain the power to adjudicate documents, they have the power to require the taxpayer to produce the instrument together with such other evidence (including statutory declarations similar to those routinely required in adjudicated transactions) as they deem necessary in order to establish that the instrument has been properly stamped. In addition, the *Finance Act 2012* granted the Revenue Commissioners new powers to inspect and require the production of documents (see below).

### Admissibility in evidence

Under section 127 of the *Stamp Duties Consolidation Act 1999* (SDCA), an instrument that is not duly stamped is not (subject to limited exceptions) admissible in evidence in court or arbitral proceedings. Prior to the *Finance Act 2012*, instruments that had

**TAX-GEARED PENALTIES: FAILURE TO FILE STAMP DUTY RETURNS**

| | Category of default | Base penalty where no cooperation | Penalty where taxpayer fully cooperates (and no other factors apply) | Prompted qualifying disclosure | Unprompted qualifying disclosure |
|---|---|---|---|---|---|
| **First default** | Deliberate | 100% of unpaid duty | 75% of unpaid duty | 50% of unpaid duty | 10% of unpaid duty |
| | Careless but not deliberate | 40% of unpaid duty | 30% of unpaid duty | 20% of unpaid duty | 5% of unpaid duty |
| **Second default** | Deliberate | 100% of unpaid duty. | 75% of unpaid duty | 75% of unpaid duty | 55% of unpaid duty |
| | Careless but not deliberate | 40% of unpaid duty | 40% of unpaid duty | 30% of unpaid duty | 20% of unpaid duty |

been adjudicated were considered to be duly stamped, but instruments that had been 'straight stamped' were not considered to be duly stamped.

Section 127 of the SDCA has been amended by the *Finance Act 2012* so that *all* instruments executed on/after 7 July 2012 and stamped using the e-stamping system are considered to be duly stamped. This change will be of considerable benefit to solicitors and other professionals, who otherwise would have had to satisfy themselves as to the sufficiency of the stamping of documents. Solicitors will still have to ensure that instruments executed prior to 7 July 2012 (unless bearing an adjudication stamp) have been duly stamped.

> ***"Solicitors will still have to ensure that instruments executed prior to 7 July 2012 (unless bearing an adjudication stamp) have been duly stamped"***

### Expression of doubt

Prior to the *Finance Act 2012*, a valid expression of doubt (EOD) operated to protect the taxpayer against certain penalties associated with inadequate disclosure. However, for all instruments executed on/after 7 July 2012, a valid EOD will only operate to remove any liability to the late filing interest that could arise on any additional stamp duty that may be payable when the subject matter of the EOD is determined.

EOD cases are now more narrowly defined: they are cases where the accountable person is in doubt about the application of any enactment relating to stamp duty to an instrument that could give rise to a liability to stamp duty for that person or could affect that person's liability to stamp duty or his entitlement to an exemption or a relief from stamp duty.

An EOD must meet certain additional criteria in order to valid. It must:

- Set out full details of the facts and circumstances affecting the liability of an instrument to stamp duty and make reference to the provisions of the law giving rise to the doubt,
- Identify the amount of stamp duty in doubt,
- Be clearly identified as an expression of doubt, and
- Be accompanied by supporting documentation where relevant.

The Revenue Commissioners may reject an EOD as not being genuine. The *Finance Act 2012* set out a non-exhaustive list of situations that will not be accepted by the Revenue Commissioners as genuine EODs. These include where the Revenue Commissioners:

- Have issued general guidelines concerning the application of the law in similar circumstances,
- Are of the opinion that the matter is sufficiently free from doubt so as not to warrant an expression of doubt, or
- Are of the opinion that the accountable person was acting with a view to the evasion or avoidance of tax.

Where the Revenue Commissioners do not accept an EOD as genuine, they will notify the accountable person and they will issue a notice setting out their reasons. Immediately upon receipt of such notification, the filer must file an amended return and pay the additional duty and late filing interest thereon.

An accountable person who is aggrieved by a decision of the Revenue Commissioners not to accept an EOD as genuine can, within 30 days of the notification of such decision, bring an appeal to the Appeal Commissioners on the net point of whether the EOD is genuine

The *Finance Act 2012* imposes a duty on an accountable person to retain, or cause to be retained, certain records for a period of six years from the later of (a) the date on which the stamp duty return is delivered to the Revenue Commissioners, or (b) the date on which stamp duty was paid.

An accountable person is required to retain, or to cause to be retained on his or her behalf, such records as are required to enable a true return or statement to be made, or a claim to a relief or an exemption to be substantiated. Any person who fails to comply with these requirements is liable to a fixed penalty of €3,000.

### Powers of inspection

The *Finance Act 2012* gives the Revenue Commissioners new powers to require the production of records and to inspect records held by, or on behalf of, an accountable person, which are backed up with significant penalties for non-compliance. These new statutory provisions do not contain any defence based on legal privilege.

These new powers give authorised officers of the Revenue Commissioners the power to require the production of books, records and documents, the furnishing of information and explanations, and the giving of assistance by a relevant person and an employee of a relevant person. These new powers also allow an authorised officer of the Revenue Commissioners to enter any premises or place of business of a relevant person for the purpose of auditing a stamp duty return.

A 'relevant person' is defined as an accountable person and any person who holds records on behalf of an accountable person. An employee of an accountable person is defined as an employee who, by virtue of his or her employment, is in a position to procure the production of the books, records and so on, or the furnishing of information, explanations and particulars.

If a relevant person fails to comply with the requirements of an authorised officer of the Revenue Commissioners, he is liable to a penalty of €19,045 and, where the failure

continues, a further penalty of €2,535 for each day on which the failure continues. An employee of a relevant person who fails to comply with the requirements of an authorised officer of the Revenue Commissioners is liable to a penalty of €1,265.

**Implications for practitioners**

Due to the abolition of adjudication and narrowing of the EOD facility, the Revenue Commissioners will have less visibility of the details of the transactions behind the stamp duty returns that are filed. The Revenue Commissioners have indicated that they will be conducting post-stamping assurance checks and audits of stamp duty returns. They have also indicated that the level of interventions in stamp duty cases will ultimately be in line with those in other tax heads. Recent *Finance Acts*, and especially *Finance Act 2012*, have brought the administration of stamp duty into line with other tax heads, thereby making it easier for Revenue auditors to conduct stamp duty audits, either as part of a more general audit or on a stand-alone basis. The *Code of Practice for Revenue Auditors* will apply to such audits.

***"The Finance Act 2012 gives the Revenue Commissioners new powers to require the production of records and to inspect records held by or on behalf of an accountable person"***

Any stamp duty return is therefore potentially open to a post-stamp assurance check or audit, and the Revenue Commissioners have been given extensive powers to require production of documentation (including documents held by a solicitor), and no defence based on confidentiality or privilege can be asserted. The burden of dealing with such enquiries will inevitably fall on the solicitor who has filed the stamp duty return on behalf of the accountable person, who will expect that the solicitor will hold all necessary records.

The application of the EOD facility has been significantly restricted, and particular care needs to be exercised in assessing whether a particular case meets the statutory requirement to qualify as a valid EOD.

Solicitors need to familiarise themselves with the legislation underpinning the new self-assessment regime and equip themselves in order to be able to deal with more frequent and more formal interactions with the Revenue Commissioners, such as EODs, post-stamp assurance checks and audits, and stamp duty appeals. The changes discussed here will give the advantage to the Revenue Commissioners in such interactions, and solicitors will have to get to grips with the new legislative landscape quickly. G

# CARA SA *chúirt?*

*Colm MacGeehin is principal at MacGeehin Toale Solicitors, Prospect Road, Glasnevin, Dublin. He expresses his thanks to Dáithí MacCárthaigh BL for his assistance in producing this article*

**The right to put one's case in the official language of one's choice is a right enjoyed by both sides, but your right to choose Irish or English does not oblige another party to use your official language of choice. Cleachtadh a dhéanann maistreacht, a dúirt Colm MacGeehin**

My first public law case was *O'Monacháin v An Taoiseach & Ors* in 1982. In that case, the Supreme Court unanimously decided that a District Court judge sitting in a Gaeltacht court could conduct the business of the court in the language of his choice (English), notwithstanding the objections of Gaeltacht litigants. At the time, Justice Sean Delap was sitting in the famous Court No 6 in the Bridewell, a native of the same Gaeltacht as my client. I felt an urge to write to him suggesting that he impose the language of his choice on Court 6, as the Supreme Court would surely stand by his decision! The loss of that case did not cure me of my fascination with public law issues, which include quite a number of other language-related cases I fought over the years.

The following give some flavour of language litigation before and after the *O'Monacháin* case in 1982. Given how the law has evolved since then, I wonder if the Supreme Court today were to re-run the *O'Monacháin* case, would they decide it the same way?

## Ní tír gan teanga

The right to use Irish before the courts is an unenumerated right and predates the present Constitution. In *R (Ó Coileáin) v Crotty* (1927), Mr Ó Coileáin's summary conviction and £50 fine were quashed in circumstances where his submissions to the District Court were ignored as he had spoken in Irish and had been convicted without an opportunity to put his side of the case. The judge had insisted that the accused speak English, but Mr Ó Coileáin demurred, citing article 4 of the Free State Constitution, which made Irish the national language.

This stance found further support in the statement of Chief Justice Hugh Kennedy in *Ó Foghludha v McClean* (1934) in the following terms at 483: "The declaration by the Constitution that the national language of the Saorstát is the Irish language … did mean … by implication, that the State is bound to do everything within its sphere of action … to establish and maintain it in its status as the national language … None of the organs of the State, legislative, executive or judicial, may derogate from the pre-eminent status of the Irish language as the national language of the State without offending against the constitutional provisions of article 4."

Article 8 of the present Constitution provides:

- The Irish language as the national language is the first official language,
- The English language is recognised as a second official language,
- Provision may, however, be made by law for the exclusive use of either of the said languages for any one or more official purposes, either throughout the State or in any part thereof.

## Ní fhanann trá le fear mall

The first definitive statement of the right to use Irish in court under the 1937 Constitution was made by O'Hanlon J in *An Stát (Mac Fhearraigh) v Mac Gamhnia* (1982). The Employment Appeals Tribunal sought to compel the applicant to conduct his case in English,


PIC: NUALA REDMOND

having established that he understood that language and so would not be prejudiced. The applicant sought a judicial review of this decision and was successful. The High Court held: "Whenever any party wishes to put his side of a case to a court or tribunal, whether by submission, the giving of evidence, or the examination or cross-examination of witnesses, I am of opinion that he has a constitutional right to do all of this through Irish if he so wishes" [translation].

This right to use either Irish or English in the courts was upheld as a constitutional right by the Supreme Court in *Ó Beoláin v Fahy* (2001), which upheld *Mac Fhearraigh v Mac Gamhnia* in trenchant terms. Hardiman J agreed with Chief Justice Kennedy's aforementioned comments at 339: "I believe that Kennedy CJ's implication into the text of the Constitution of 1922 of a binding obligation on the State in relation to the language, in the terms which he sets out, is appropriate also to the construction of article 8. I believe that article 8 gives rise, apart from any other effect it may have, to a constitutional imperative requiring to be

**FAST FACTS**

- **The right to use Irish before the courts is an unenumerated right and predates the present Constitution**
- **In criminal proceedings, the DPP still has the unfettered constitutional right to proceed in her official language of choice**
- **The State is not required to produce any particular class of documents that concern a criminal process in either Irish or English: it can choose one language or the other**


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considered by the courts in dealing with a case of this kind" [translation].

He went on to state at 342-3: "It will be noted that in the two last mentioned cases, and in *An Stát (Mac Fhearraigh) v Mac Gamhnia* (1982) TÉ 29, heavy emphasis was placed on the right of those wishing to conduct their legal business in Irish to equality of treatment with those wishing to do so in English. Having regard to the status of the Irish language, it seems to me that persons wishing to use it are absolutely entitled to do so and to be afforded every necessary facility in doing so, at least to the extent that such facilities are available to those using the second official language … In view of the terms of article 8, and the official policy of bilingualism to which the State is committed, the State must facilitate the use of either language without discrimination" [translation].

### Is iomaí cor sa tsaol

The unfettered right to put one's side of the case in the official language of one's choice is a right enjoyed by both sides: your right to choose Irish or English does not extend to the right to oblige another party to use your official language of choice.

This is somewhat mitigated in civil proceedings involving the State or public bodies, whereby such parties are obliged pursuant to legislation (section 8 of the *Official Languages Act 2003*) to use the official language of the 'private' litigant. Where there is more than one private litigant and they choose to use different official languages in the proceedings, the public body can then elect to proceed in either English or Irish.

In criminal proceedings, the DPP still has the unfettered constitutional right to proceed in her official language of choice, including the right to serve summonses and charge sheets and to furnish disclosure in English, even where the defence is conducted through Irish (*Ó Conaire v Mac Gruairc* [2009]). Charleton J stated in *Ó Gríofáin v Éire* (2009) at paragraph 12: "The State is not required to produce any particular class of documents that concern a criminal process in either Irish or English. The State can choose one language or the other. This is not an abuse of anyone's rights. An illiterate person can get a document read, an English-speaking person can get someone to explain an Irish document to him, and so can an Irish-speaking person an English document" [translation].

One wonders what the public reaction would be were the DPP to exercise this right by furnishing all documents that make up the book of evidence in Irish on an accused conducting his defence through English. Perhaps the Oireachtas should exercise a margin of appreciation here and oblige the director to conduct prosecutions in the language of the accused, without prejudice to the rights of all witnesses to give evidence in the official language of their choice and, in the case of witnesses conversant in neither Irish nor English, through an interpreter.

> ***"One wonders what the public reaction would be were the DPP to exercise this right by furnishing all documents that make up the book of evidence in Irish on an accused conducting his defence through English"***

### Ní bhíonn saoi gan locht

The situation of the prosecution proceeding in the majority language (English) and the accused proceeding in the minority language (Irish) has given rise to the question of whether it is necessary that the court (judge, or judge and jury) be conversant with both official languages to ensure a level playing pitch.

This question falls to be resolved within the concept of equality of arms. The European Court of Human Rights gave a helpful definition of this principle in *Gorraiz Lixarraga & Ors v Spain* at paragraph 56: "The court reiterates that the principle of equality of arms is part of the wider concept of a fair hearing within the meaning of article 6.1 of the convention. It requires a 'fair balance' between the parties: each party must be afforded a reasonable opportunity to present their case under conditions that do not place them at a disadvantage vis-à-vis their opponent or opponents."

In *Mac Cárthaigh v Éire* (1999), the accused's request for a jury that would understand evidence, submission, and counsel's speeches in Irish without the intervention of an interpreter was refused, as such a jury would need to be drawn from a shrunken jury pool and would therefore – according to the court – not be a constitutional jury.

This was in spite of the fact that Hamilton CJ accepted the truth of the following passage by Michael B Shulman from the *Vanderbilt Law Review*: "The first noticeable difficulty in the present system of court interpretation is that non-English-speaking defendants are not judged on their own words. The words attributed to the defendant are those of the interpreter. No matter how accurate the interpretation is, the words are not the defendant's, nor is the style, the syntax, or the emotion. Furthermore, some words are culturally specific and, therefore, are incapable of being translated. Perfect interpretations do not exist, as no interpretation will convey precisely the same meaning as the original testimony. While juries should not attribute to the defendant the exact wording of the interpretation and the emotion expressed by the interpreter, they typically do just that ... Given that juries often determine the defendant's guilt or innocence based on small nuances of language or slight variations in emotion, how can it be fair for the defendant to be judged on the words chosen and the emotion expressed by the interpreter?"

The redacted passage reads: "In addition, American juries often are biased against non-English-speaking defendants; therefore, these defendants are disadvantaged from the outset of the case."

It is ironic that the right to a representative jury is a right enjoyed by the accused and can therefore be waived by the accused (*State (Byrne) v Frawley* [1978]).

If the accused is happy that his right to a jury drawn from a representative pool to ensure his fair trial is not compromised by such a pool consisting only of people who will understand his evidence and the speeches of his counsel, then it would appear that no conflicting rights need to be balanced here, as the accused is the proper person to apply that margin of appreciation. G

## LOOK IT UP

**Cases:**

- *Gorraiz Lixarraga & Ors v Spain* (62543/00-ECHR)
- *Mac Fhearraigh v Mac Gamhnia* (1982) IRSR [1980-98] 29
- *Mac Cárthaigh v Éire* [1999] 1 IR 186
- *Ó Foghludha v McClean* [1934] IR 469
- *Ó Beoláin v Fahy* [2001] 2 IR 279
- *Ó Conaire v Mac Gruairc* [2009] IEHC 430
- *Ó Gríofáin v Éire* [2009] IEHC188
- *O'Monacháin v An Taoiseach & Ors* (1982 IR)
- *R (Ó Coileáin) v Crotty* [1927] 61 ILTR 81
- *State (Byrne) v Frawley* [1978] IR 326

**Legislation:**

- *Official Languages Act 2003*

**Literature:**

Michael B Shulman, 'No hablo Ingles: court interpretation as a major obstacle to fairness for non-English speaking defendants', *Vanderbilt Law Review*, January 1993

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## Kerry Law Society

Managing director of *The Star*, Gerard Colleran, was the guest speaker at the annual dinner of Kerry Law Society in the Ballyroe Heights Hotel, Tralee, on 1 December. Mr Colleran addressed the society on the topic of media and the law. Chairman, John Galvin added: "Quite clearly, the members of Kerry Law Society are delighted that the Law Society is holding its annual conference in Killarney and look forward to welcoming members." If you haven't already booked, then don't miss out. The dates for your diary are 10 and 11 May 2013, in the five-star Hotel Europe, Killarney. Bookings can be made at www.lawsociety.ie

## Sligo Bar Association

Attending the recent meeting of the Sligo Bar Association at the Glasshouse Hotel were *(front, l to r)*: Joe Keyes, Damian Martyn, Orla Moran, Ken Murphy (director general, Law Society), Maurice Galvin (president, Sligo Bar Association), Deirdre Munnelly (secretary), Donald Binchy (President of the Law Society), Michelle O'Boyle and Derville O'Boyle. *(Back, l to r)*: Michael Mullaney, John Murphy, Eamonn Gallagher, Tom Martyn, Caroline McLaughlin, Michael Quigley, Martin Burke, Carol Ballantyne, Aine Kilfeather, Brian Gill, Eoin Armstrong, Shane McDermott, Ita Lyster, Noelle Galvan, Hugh Sheridan, Seamus Monaghan, Lisa Keaveney, Trevor Collins, Declan Gallagher, Peter Martin and Gerry McCanny

At the conferral of the Certificate in Human Rights, which took place at the annual Human Rights Conference, were: Salma Iqbal Paryani, Anna Hickey, Deirdre Flynn (diploma programme course co-ordinator), Michelle Sheeran, Siobhan Coleman, Sean O'Reilly, Avril Sheridan, Susan Miner, Patricia M Carroll and Rhea Bohan

PIC: LENSMEN

At a dinner to mark the end of Dr Carol Coulter's 15 years as Legal Editor of *The Irish Times* were *(front, l to r)*: Kevin O'Sullivan (Editor, *The Irish Times*), Dr Carol Coulter, James McCourt (Law Society President), retired Supreme Court Judge Catherine McGuinness. *(Back, l to r)*: Noeline Blackwell (director general, FLAC), Paddy Smyth (foreign editor, *The Irish Times*), Stuart Gilhooly (Junior Vice-President), James McGuill (past-president), John McManus (business editor, *The Irish Times*) and Ken Murphy (director general)

An informal graduation ceremony was well attended by the first cohort of PPCII trainees who successfully completed their English and Welsh Property and Practice course. The course allows successful candidates to apply to be admitted on the roll of solicitors in England and Wales

# Legal History Society visits Glasnevin Cemetery

The annual general meeting of the Irish Legal History Society was held in the museum building at Glasnevin Cemetery on 30 November, following a well-attended tour of the cemetery. In the course of that tour, the society paid its respects to some of the lawyers buried there, including John Philpot Curran MR, Chief Justice Monahan, Chief Justice Kennedy, Sergeant Sullivan, Master Toirleach De Valera, Sean McBride and Daniel O'Connell.

The Society was delighted to welcome to the AGM its current patrons, Chief Justice Susan Denham and the Lord Chief Justice of Northern Ireland, Sir Declan Morgan, who had travelled from Belfast, together with former Chief Justice Ronan Keane, a former patron of the Society.

The meeting elected Robert D Marshall as the Society's ninth president to serve for a three-year term. The officers elected for the coming year are Sir Donnell Deeny and Dr Patrick Geoghegan (vice-presidents); Dr T Mohr (UCD) and Dr David Capper (QUB) (secretaries); John M Gordon (solicitor) and Yvonne Mullen BL (treasurers). The outgoing president, Prof Norma Dawson (QUB), is a member of the council *ex officio*. The elected council members are Dr Kevin Costello (UCD), Dr Sean Patrick Donlon (UL), Dr Kenneth Ferguson BL, Hugh Geoghegan, Sir Anthony Hart, Prof Desmond Greer QC, Dr Robin Hickey (Durham), Daire Hogan, Dr Niamh Howlin (UCD), Prof Colum Kenny (DCU), Felix M Larkin, John Larkin QC, John Martin QC, James McGuire and Prof Jane Ohlmeyer (vice-provost TCD).

Prof Norma Dawson prepares to deliver her presidential discourse

Before the conclusion of the meeting Prof Dawson, as president, presented the society's gold medal for 2012 to Anthony Hart in recognition of his work in fostering interest in Irish legal history and his expertise in the field, particularly the Irish Serjeants and the Bar of Northern Ireland.

Following the meeting, Prof Dawson delivered her lecture, 'Letters from Inverary: the correspondence between the Eighth Duke of Argyll and the First Marquess of Dufferin and Ava, with particular reference to the Irish land question'.

This was based on correspondence that threw new light on the philosophical discussions between landowners surrounding the legal recognition of customary tenant right in the *Land Act 1871* and subsequent developments under the *Land Act 1881* involving rent control, lease renewal and more extensive land purchase.

The next meeting of the Society on Friday 15 February will mark the opening of its 25th anniversary celebrations. It will be held in the Graduates' Memorial Building, TCD, when Daire Hogan, solicitor, and a founding member of the Society, will present a paper.

All those interested are welcome to attend the discourse. Further details on www.ilhs.eu.

## ON THE MOVE

**MARIE O'BRIEN**
**A&L Goodbody has announced the appointment of Marie O'Brien as aviation partner. Marie's expertise is in the area of asset finance and leasing, including advising companies on acquisition, leasing, financing and trading of a variety of asset classes including aircraft, engines, helicopters, ships, rail, machinery and equipment. The aviation finance team at A&L Goodbody boasts four partners, namely: Catherine Duffy, Seamus O'Cronin, Maireadh Dale and now Marie O'Brien.**

**BARRY REYNOLDS**
**DAC Beachcroft Dublin has appointed Barry Reynolds as employment partner with immediate effect. Barry brings more than ten years' experience as an employment law specialist to the role. He will focus on leading the employment team at the DAC Beachcroft Dublin offices. Most recently, Barry was a senior associate in the Arthur Cox employment law group advising on both contentious and non-contentious employment law issues for clients across diverse business sectors and the public sector.**

# Legal eagle Grainne all set for Cheltenham festival

Grainne Loughnane is a newly qualified solicitor who enjoys wearing silks! Having just passed all of her Law Society exams last December – she'll be attending her parchment ceremony in the coming weeks – she is now set to take on one of her most challenging roles to date.

Grainne has succeeded in her application to ride in the St Patrick's Day Derby in Cheltenham during the National Hunt Festival in March. She intends to ride Newmill, which was the surprise winner of the Queen Mother Champion Chase in Cheltenham in March 2006. She came by Newmill two years ago when his owner, Mrs Mary T Hayes, generously offered the horse to her on loan to compete in the racehorse to riding horse classes.

"It's a difficult class," she told the *Gazette*, "as racehorses tend to be very highly strung. The key to competing is keeping the animal relaxed. I have competed on Newmill successfully in the show ring and competed on him in the RDS in 2011 and 2012."

Grainne Loughnane, sporting Newmill's racing colours, at the RDS in 2012

No stranger to horses, Grainne kept ponies as a child and became involved in racing at the relatively late age of 20. She took out an amateur licence at the age of 23 and has ridden in point-to-points, bumpers and hunter chases.

Her highlight as an amateur was riding around the banks in Punchestown in the Ladies Cup in 2009 and 2010. She rides out every Saturday and Sunday morning for businessman and racehorse trainer Luke Comer in Dunboyne, Co Meath, and hunts regularly with the Ward Union Hunt.

A condition of being allowed to take part in the St Patrick's Day Derby is that Grainne has to raise Stg£5,000 for cancer research. She adds that any additional funds raised will go to the CARI Foundation, which offers support and therapy for sexually abused children.

To ensure she fulfils her dream, she is organising a charity ball on Saturday 23 February 2013 at the Burlington Hotel, Dublin. The black-tie event will begin with a drinks reception at 7.30pm. It will include a three-course meal, an auction, band and DJ until late. The special guest will be Peter Casey, the trainer of Flemenstar, which may go for the Gold Cup in Cheltenham. (Readers may remember Mr Casey's notorious interview with Tracy Piggott, which was carried on live TV!)

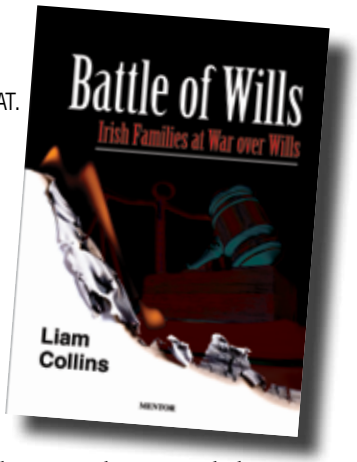
More details can be found at www.justgiving.com/grainneloughnane. Donations are welcome and can be made through that website. Tickets for the charity ball costing €65 each can be purchased directly from Grainne, by email at: grainneloughnane@yahoo.ie.

Grainne works for Walsh & Co, Dundalk, whose principal is Brendan Walsh. The firm opened in summer 2009 and focuses chiefly, though not exclusively, on litigation and family law.

# Calcutta Run – save that date!


The Calcutta Run 2012 was a huge success, with a total of €125,000 being raised for GOAL and the Peter McVerry Trust. The amount was split evenly between both charities, with each receiving €62,500 to help with their work for the homeless youths of Calcutta and Dublin. At the handover of the cheque to GOAL were members of the Calcutta Run Organising Committee, including Eoin Mac Neill, Alan Johnson, Joe Kelly, Cillian MacDomhnaill, Chris Connolly, Auveen Curran, Tony Morgan, Belinda O'Keeffe, Lisa O Shea and Carmel Drumgoole (GOAL), James McCourt (Law Society president), Ronnie Feeney and Helen Leahy (Bank of Ireland). This year's Calcutta Run will take place on Saturday 25 May 2013. Participants can run or walk the 10k route through the Phoenix Park – and recover afterwards at a monster barbecue, with music, entertainment and plenty of fun! Visit www.calcuttarun.com for more details – and don't forget to save that date!

# Battle of Wills – Irish Families at War over Wills




**Liam Collins.** Mentor Books (2012), www.mentorbooks.ie. ISBN: 978-1-906623-89-0. Price: €14.95 (web price €11.95) incl VAT.

This is a collection of intriguing tales, mostly of strife and woe, arising from will disputes concerning the estates of some well-known Irish figures. Many of the stories will have a ring of familiarity for readers; if not for the substance, certainly for the names involved. The collection ranges over the political controversy of Hugh Lane's art bequest, the royal secrets of Sir Alfred Beit, the literary style of Nuala Ó Faoláin, and the mystical and murderous – but never the mundane.

A sadly prevalent theme, which probably reflects the reality of litigation of this nature, is the breakdown, sometimes irretrievably, of family relationships and friendships. This may result from a myriad of causes, such as ineffective will drafting, poor estate planning, lack of communication by the testator with their loved ones, or simple greed on the part of potential beneficiaries.

The probability, though, in such cases that cannot be quietly and peaceably settled, is that the will was merely a catalyst bringing pre-existing tensions to the surface. Some of these stories are a poor indictment of human nature. Others, however, remind us in a more positive way that a well-constructed will is a vitally important document to anyone with assets to bequeath, responsibilities to others or debts to be paid, whether financial or otherwise.

We were slightly irked by the author's apparent lack of understanding of the role of a solicitor in preparing a will, which includes drawing out and clarifying a testator's thoughts and wishes. Nonetheless, *Battle of Wills* is an interesting and enjoyable light read, if somewhat salacious, and we particularly enjoyed the older stories.

*Siobhán Laighléis is a solicitor at Gartlan Furey Solicitors, 20 Fitzwilliam Square, Dublin 2*

# The Taxation of Gifts and Inheritances

**Joanne Whelan and Ann Williams.** Irish Tax Institute (2012), www.taxinstitute.ie. ISBN 978-1-84260-288-1. Price: €65.


**This book provides a much-needed commentary on the operation of capital acquisitions tax and, in particular, on the changes brought in following the Revenue's 2010 review of the operation of the CAT system.**

**The book covers the legislation, case law, and administration of CAT and discretionary trust tax and approaches these taxes in a very practical way. Part 1 covers the calculation of tax with an emphasis on legislation, Revenue practice and worked examples. Part 2 deals separately with return and compliance issues and audits. Part 3 provides five practical scenarios to explore the operation of the taxes in more complex cases.**

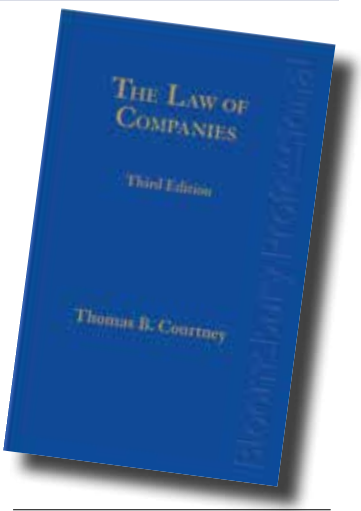
**Some chapters will be of particular interest for practitioners. Chapter 2 deals with the legal locus of assets rules, providing a useful quick reference, and chapter 6 provides a good overview of the issues arising on the valuation of private company shares. There is a useful summary of British inheritance tax and other foreign tax provisions in chapter 11.**

**Practical assistance is included where relevant. For example, there is a guide on how a beneficiary can evidence occupation of a property for dwellinghouse relief purposes and a checklist of the information likely to be needed in assessing the availability of business property relief.**

**The authors have produced a very user-friendly and informative book on tax practice in the area of gifts and inheritances, which should be of great value to students, taxpayers and practitioners alike.**

*Finola O'Hanlon is a solicitor specialising in tax matters and is a director of O'Hanlon Tax Ltd, Lower Bridge Street, Dublin 8*

# The Law of Companies (3rd edition)




**Thomas B Courtney.** Bloomsbury Professional (2012), www.bloomsburyprofessional.com. ISBN: 978-1-84766-951-3. Price: €225 (hardback, incl VAT).

This book, in its previous two editions entitled *The Law of Private Companies*, has undergone a change of title that indicates an expansion of subject matter to include new chapters on PLCs and SEs, guarantee companies, unlimited companies, prospectus, market abuse and transparency law, conversion by re-registration and, finally, external companies and branches.

You might ask why this book is published now rather than when the *Companies Bill 2012* (published just after the book) is passed. The answer has three elements. The first is the likely delay in enactment and the transitional period. The second is that the ten years since the second edition have seen six new acts and a transformation of the law on public issues of securities by a series of Irish and EU regulations.

The third and most important reason is the development of Irish case law during that time, in particular from the fallout from the financial crisis. Examples featured include *Honninball v Cunningham and BPI Property Co Ltd*, *Banfi Ltd v Moran et al*, *Re Walls Properties Ltd*, and *Fyffes plc v DCC plc et al*.

Like the previous editions, this is beautifully put together. As well as being thoroughly and rigorously researched, it is clear, articulate and practical. I commend it as the definitive textbook on Irish company law and unreservedly recommend it as essential for every solicitor's library.

*Paul Egan is chairman of Corporate at Mason Hayes & Curran.*

# New judgment indices available online

## Mary Gaynor outlines what's new at the Law Society Library

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

The annual index of Supreme Court, High Court and Court of Criminal Appeal judgments for 2009 is available in PDF format on the library catalogue website. You can access this via the member's area at www.lawsociety.ie. The annual index for 2010 will be available shortly. Annual indices list all of the reserved written judgments by subject and include abstracts prepared by the Law Reporting Council. Entries in the index include neutral citations, reported citations, record numbers, date, and links to the Bailii website where available.

### New delivery charge on book loans

Members who request to have book loans delivered to their offices by An Post or DX courier will be charged a €5 delivery charge per item for delivery by An Post, or per packet inclusive of VAT for delivery by DX courier, from 1 January 2013. Members who wish to collect book loans in person or by arranging their own courier can continue to have parcels collected from the library or main reception as heretofore.

### Will precedents

Release 42 of *Laffoy's Irish Conveyancing Precedents* (will precedents) was published in October and contains a range of general will precedents that "provide for the varying needs of beneficiaries whether they are adults, minors, those needing simple trusts or those whose needs require discretionary trusts. In addition to the will providing for the spouse to inherit, all the precedents provide for two differing life interests. The third limited interest is the provision for parents. There is a precedent will for cohabitants and a precedent for a beneficiary with a disability." Copies are available to borrow from the library, which is licensed to supply these precedents in MS *Word* format. Pricing details are available on request.

JUST PUBLISHED

# New books available to borrow

- Courtney, Thomas, *The Law of Companies* (3rd ed; Bloomsbury Professional, 2012)
- Dewhurst, Elaine *et al*, *Principles of Irish Human Rights Law* (Clarus Press, 2012)
- Dodd, Stephen and Cian Carroll, *NAMA: the Law Relating to the National Asset Management Agency* (Round Hall, 2012)
- Fox O'Mahony, Lorna, *Home Equity and Ageing Owners: Between Risk and Regulation* (Hart, 2012)
- Heilbron, Rose, *The Story of England's First Woman Queen's Counsel and Judge* (Hart, 2012)
- MacCann, Lyndon and Thomas B Courtney, *Companies Acts 1963-2012* (Bloomsbury Professional, 2012)
- Mercurio, Bryan *et al*, *World Trade Law* (2nd ed; Hart, 2012)
- Murphy, Rob and Nasreen Desai, *Aircraft Financing* (4th ed; Euromoney, 2011)
- Noctor, Cathleen and Richard Lyons, *The MIBI Agreements and the Law* (2nd ed; (Bloomsbury Professional, 2012)
- Uzelac, Alan and CH van Rhee, *The Landscape of the Legal Professions in Europe and the USA: Continuity and Change* (Hart, 2011)

### New e-books available to borrow – contact the library for login details

- Stokes, Simon, *Art and Copyright* (2nd ed; Hart, 2012)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| DATE | EVENT | DISCOUNTED FEE* | FULL FEE | CPD HOURS |
|---|---|---|---|---|
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| **22 March** | Criminal Litigation Update 2013 in partnership with Law Society Skillnet, the Dublin Solicitors Bar Association (DSBA) and the Law Society Criminal Law Committee | €135 | €180 | 3 hours General (by Group study) |
| **16 April** | Law Society Intellectual Property Law Committee: IP Law Conference – Patents, Trademark and Copyright in 2013 | TBC | TBC | 6 General (by Group study) |
| **1 & 2 March** | English and Welsh Property Law and Practice Certificate course | €441 | €588 | 9 hours General (by Group study) |
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| **Online** | Legal Costs Seminar: Recent Decisions and Pending Legislation | N/A | €55 | 1 hour General (By eLearning) |
| **Online** | The LinkedIn Lawyer: The How To Guide | N/A | €55 | 5 hours Management & Professional Development Skills (by eLearning) |
| **Online** | Facebook for Lawyers: The How to Guide | N/A | €55 | 5 hours Management & Professional Development Skills (by eLearning) |
| **Online** | New Terms of Business –Contract Precedent | N/A | €45 | One Hour Regulatory Matters (by eLearning) |
| **Online** | **Regulatory Matters:**<br>• Professional indemnity insurance<br>• Guide to professional conduct<br>• Solicitors' accounts – common problems arising from year to year | N/A | €45 | One Hour Regulatory Matters (by eLearning) |
| **Online** | How to create an eNewsletter | N/A | €90 | 5 hours Management & Professional Development Skills (by eLearning) |
| **Online** | Touch typing | N/A | €40 | 5 hours Management & Professional Development Skills (by eLearning) |
| **Online** | Powerpoint – All levels | N/A | €80 | 5 hours Management & Professional Development Skills (by eLearning) |
| **Online** | Microsoft Word – All levels | N/A | €80 | 5 hours Management & Professional Development Skills (by eLearning) |
| **Online** | Excel for beginners | N/A | €80 | 5 hours Management & Professional Development Skills (by eLearning) |

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*Applicable to Law Society Skillnet members

**Please note FIVE hours on-line learning is the maximum that can be claimed in the 2013 CPD Cycle**

# Law Society Council meetings 2 November and 14 December 2012

### Sympathy
Following an address by Simon Murphy, the Council observed a minute's silence in memory of Council member James O'Sullivan.

### Welcome
The president extended a warm welcome to all of the newly elected and newly nominated Council members: Christopher Callan, Garry Clarke, Brendan Cunningham, Geraldine Kelly, David Lavelle, Sonia McEntee, Shane McCarthy and Deirdre O'Sullivan.

### Taking of office by president and vice-presidents
Outgoing President Donald Binchy thanked the Council for their 100% support of him throughout the year and, in particular, the senior vice-president and junior vice-president. He also recorded his appreciation for the dedicated and loyal support of the Society's staff. It had been his great privilege to serve as president of the Society and, although it had been difficult at times, it had been extraordinarily fulfilling. He recorded his particular appreciation for the support and commitment of his wife Claire and his brother Fred.

James McCourt was then formally appointed as president. He paid tribute to Mr Binchy for the time, effort and commitment that he had invested in the role of president. He noted, in particular, his involvement in the conference on the independence of the legal profession in the National Convention Centre in response to the publication of the *Legal Services Regulation Bill*. This event, which had been addressed by leading lawyers from Ireland and around the world, clearly demonstrated Mr Binchy's desire and ability to lead.

Mr McCourt said that he wanted to lead a united and hardworking Council, and he encouraged Council members to debate the issues in a robust and constructive way and, following informed debates, to speak with one voice and to move forward for the greater good of the profession.

He praised the great value of the work of the Society's committees and the hugely positive services that the Law Society provided for its members, and he underlined the Society's commitment to represent all of its members, whether sole practitioners, sole principals, in small firms or large, and whether located in rural areas or in larger cities. He urged colleagues to remember their calling as solicitor and said that, if they behaved fairly, honestly, and in the public interest, they would serve their clients well and would improve their standing in the larger community. He noted that unemployment continued to be a harrowing problem for some colleagues and that underemployment required solicitors to innovate and to identify new areas of work

He expressed his intention to act decisively in all matters, but to avoid conflict and confrontation and to find consensus. He also thanked the Society's staff for their unstinting efforts throughout the past 12 months.

The senior vice-president John P Shaw and junior vice-president Stuart Gilhooly then took office and expressed their commitment to the Council and the president for the coming year.

### Motion: *PII (Amendment) Regulations 2012*
"*That this Council approves the* Solicitors Acts 1954 to 2011 (Professional Indemnity Insurance) (Amendment) Regulations 2012."
**Proposed:** Stuart Gilhooly
**Seconded:** Valerie Peart
The Council approved the *PII (Amendment) Regulations*, which reduced the period for confirmation to the Society of PII cover from ten working days to three working days.

### *Legal Services Regulation Bill 2011*
The Council approved a report by Deloitte entitled *Oversight and Control Measures for External Regulatory Costs* for submission to the Department of Justice in relation to measures to control the costs of the Legal Services Regulation Authority.

### IBA annual meeting
The Council acknowledged the extraordinary achievement by a small group of solicitors, in particular Michael Greene, Geraldine Clarke and John Buckley, to secure a decision by the International Bar Association to hold its annual meeting in Dublin from 30 September to 5 October. The conference had been a resounding success, and the feedback from delegates was that it was the best IBA conference ever, with 7,500 to 8,000 delegates and their spouses/partners in attendance

### Referendum on the rights of the child
Following a comprehensive presentation by Dr Geoffrey Shannon on the constitutional referendum on the rights of the child, the Council agreed that the Society should take a public position in support of the referendum, with 24 votes in favour and six votes against.

### Solicitors Disciplinary Tribunal
The Council noted that the term of office of Frank Daly as chairman of the Solicitors Disciplinary Tribunal would expire on 30 November 2012, as would the terms of office of nine other members of the tribunal, all having served on the tribunal for ten years. The Council recorded its thanks to Mr Daly and to the other tribunal members for their commitment to the profession and to the work of the tribunal during that period.

### Past-president Philip Joyce
On the occasion of his retirement from the Council after 19 years of service, Philip Joyce thanked the Council for their support and collegiality over many years. He also thanked the staff of the Society for their friendship and assistance during his year of presidency.

### Report on AGM
The Council noted that the following motion had been passed at the annual general meeting on the previous evening: "It is hereby proposed that regulation 13 (direct unsolicited approach to non-client) be reviewed, as it has ceased to have any practical effect and is impossible in practice to enforce."

The Council approved the establishment of a review group, under the chairmanship of past-president James MacGuill, to conduct the review.

### Meeting on 14 December 2012
The Council approved the *Practising Certificate Regulations* and fees for 2013, with a full fee of €2,500 and a fee for solicitors less than three years qualified of €2,150. In relation to the breakdown of the fee, the Council noted that the registration fee had been reduced by €60, but that a corresponding €60 had been added to the compensation fund contribution, which would now stand at €760.

The Council approved the appointment of Norville Connolly, Brian Speers, Imelda MacMillan, Michael Robinson and Richard Palmer as extraordinary members of the Council representing the Law Society of Northern Ireland.

James MacGuill outlined a decision of the European Court of Human Rights in *Michaud v France*, following a challenge to the requirement that French lawyers would report their 'suspicions' regarding possible money-laundering activities by their clients. While the court had concluded that there had been no violation of article 8 of the *European Convention on Human Rights*, there were interesting aspects of the judgment that might distinguish the regime that operated in Ireland.

Andrew Cody noted that a practice note had been issued by the Regulation of Practice Committee and the Complaints and Client Relations Committee confirming that, where a conveyancing contract had been executed before 1 January 2013, a solicitor could continue to act on both sides of a transaction, notwithstanding the new *Conveyancing Conflicts Regulations*.

The Council unanimously agreed that the Society should reiterate its demand for an independent public inquiry into the murder of Mr Patrick Finucane, solicitor. G

Practice notes

# New *Land Registration Rules 2012*

**The new *Land Registration Rules 2012* (SI 483/2012) will come into force on 1 February 2013. The rules are a consolidation of previous *Land Registry Rules* from 1972 to 2011, but they also contain a revision of some rules. The rules contain Land Registry forms to which they refer. Some forms have been revised and some have been rescinded and replaced, and some replaced forms have a new form number.**

**Practitioners should check the new rules and forms and familiarise themselves with them. There is a link to the new rules and forms from the home page of the Property Registration Authority website www.prai.ie.**

**It is expected that the PRA will have completed its cross referencing of form numbers in the new rules by 1 February 2013.**

**Below, Liz Pope, examiner of titles at the Property Registration Authority, gives a brief overview of some of the main changes in the rules for users of Land Registry registration services.**

***Conveyancing Committee***

The *Registration of Deeds and Title Act 2006* was enacted on 7 May 2006. The main aims of the act were to restructure and modernise land registration structures in the State, update and streamline the law relating to registration of deeds, and reform the law relating to the registration of title to land. The act provided for the establishment of the Property Registration Authority. One of the authority's functions under section 10 is to manage and control the Land Registry and the Registry of Deeds. As part of its legislative remit, the authority is responsible for ensuring that adequate rules are in place that legally support an efficient and effective registration of title process. A Rules Committee was established for that purpose, pursuant to sections 48 and 74 of the 2006 act.

The 2012 rules are a revision and consolidation of the *Land Registration Rules* of 1972, 1975, 1977, 1981, 1986, 2000, 2005, 2006, 2007, 2008, 2009, 2009 (2) and 2011.They relate solely to registration of title in the Land Registry and were considered necessary as a result of the acceleration in the reform of conveyancing law arising from the 2006 act, together with changes necessary pursuant to the *Land and Conveyancing Law Reform Act 2009* and the *Civil Law (Miscellaneous Provisions) Act 2011*.

In addition, information and telecommunication technologies that led to increased efficiencies in the registration process required new rules to provide a sound legal basis for registration. As a result, a series of interim *Land Registration Rules* were implemented and, as so many additions and amendments have been made, it was both time consuming and laborious for users of Land Registry services to access the rules and forms. Consolidation was therefore considered necessary and, while this process was underway, the Rules Committee took the opportunity to revise the rules as deemed necessary.

## Consultation process

The resulting rules followed from a consultation process that involved input from the Law Society's Conveyancing Committee, together with publication of the proposed consolidation and revision in advance on the Property Registration Authority website (www.prai.ie). For example, one particular change came about as a result of this process: the amendment of 'opinion of counsel' to 'legal opinion' in order to provide for the opinion of either a practising solicitor or practising barrister under the rules, which formerly made provision for the lodgment of the opinion of counsel only.

Another change arose as a result of a working group – comprising representatives of the authority, the Irish Mortgage Council and the Law Society – that was set up to look at the legal, procedural and practical issues involved in enabling electronic registration of a 'priority entry' (that is, the registration of an entry that protects a person who has contracted to purchase, take a lease of, or to lend money on the security of a charge on registered land). It was considered that the existing period of protection of 21 days could be a major hindrance to the increased use of any proposed 'ePriority Entry' facility. The amended rules now provide for a period of 44 days protection on registration and for the entry of an electronic ePriority notice.

The consultation process also informed the Rules Committee's view that the Land Registration forms were not easily accessible or user friendly and, as a result, the forms were amended in light of feedback received. Forms have been amalgamated where possible, and each form now comprises a stand-alone document, all of which will be available online in a format that will be easy to access and download. Many that were considered no longer relevant have been rescinded and replaced; for example, the numerous application forms for transmission on death(s) that occurred prior to 1 June 1959 have now been replaced by one application in Form 33.

## First registration forms

Practitioners are aware that compulsory registration on sale applies in all counties since June 2011. It was considered that the application forms for first registration required amendment to include emphasis on registration requirements in order to assist in a smoother processing of first registration applications. Under the 2009 (no 2) rules, the first registration application Forms 1 (freehold) and 2 (leasehold) were amended to include the averments previously provided by way of an additional affidavit of discovery in Form 16. Rule 15(1)(b) of the *Land Registration Rules 1972*, as amended by rule 9 of the 2009 rules, stipulates that "all original deeds and all documents in the applicant's possession or under his control relating to the title" should be lodged. The 2009 change was made in order to allow for title to commence with the root of title and dispense with the necessity to lodge all deeds and document of title, including those not necessary to prove title.

Under the 2012 rules, Forms 1 and 2 have been further amended to make provision for the inclusion in part 3 of the schedule to the forms of a statement of title. The statement of title is now included in the actual application forms rather than as a separate document to be lodged as, in many applications for first registration, the statement of title was overlooked or, where included, merely comprised a schedule of deeds and documents. The statement should identify the root of title (and, if the root is an assignment of a leasehold interest or a conveyance of a fee farm grant, the lease or fee farm grant should be recited and lodged) and then trace title to the applicant. Identification of the root of title can be shown by stating that a specified deed is the "root of title" or that "title commences with" a specified deed. Pre-root documents should not be listed in the statement of title if the title is based on a good root. A statement

of title should enable the chief/examiner of titles in the Land Registry to get a clear picture of the title to the property, including any defects in the title. If a good root of title is not available, the statement should commence with the available root of title and all the title documents in the applicant's possession or control should be lodged.

The Form 3 certificate is an application for first registration where the title is certified by a solicitor or adapted as the case may be where legal opinion is relied upon. Initial proposals to include, in paragraph 2, reference to an application map that correctly shows the boundaries of the property was removed in light of representations by the Law Society's Conveyancing Committee. The deletion of the proposed amendment addressed practitioners' concerns in this regard.

A new form has been added to emphasise the difference between an application for first registration based on possession and an application based on possession over land that is already registered – that is, an application under section 49 of the *Registration of Title Act 1964*. Form 5 now relates solely to application for first registration and Form 6 to an application in respect of registered land under section 49. It is intended that this will draw practitioners' notice to an aspect of this type of application for first registration that is often overlooked: the title against which adverse possession is claimed must be shown, together with devolution of title. In many cases in an application for first registration based on possession, the history of possession only is shown – that is, as if the land were already registered – and little or no effort is made to support the view that an unencumbered fee simple has been acquired by the applicant and his/her predecessors. Paragraph 2(b) of Form 5 is a new addition that states the title claimed must be set out. If the title is a fee farm grant or leasehold, full details must be shown and, if the title is unknown, the efforts made to establish the title should be fully set out in the averments.

The authority published an article in the August/September 2012 *Gazette* (p30) to draw attention to the new form of application for the registration of easements and profits *à prendre* acquired by prescription that can be made directly to the authority. Many difficulties are being encountered in the processing of this type of application due to the lack of information being averred in the application form. As a result, the form has been updated to draw attention to the requirements necessary in order to establish the acquisition of an easement or profit *à prendre* by prescription that is actually capable of registration under section 49A of the *Registration of Title Act 1964*. The application Form 68 (previously Form 5A) now brings an applicant's attention to the legal requirements necessary to establish a prescriptive claim in paragraph 2. The form has been updated to assist practitioners and applicants in this regard.

The revision and consolidation of what was a series of land registration rules and the updating and amendment of forms will assist users of Land Registry services by providing easier access to the procedural requirements for registration and result in a more efficient processing of applications by Land Registry staff. They are compatible with e-registration wherever possible.

# Mandatory advertising of BER

CONVEYANCING COMMITTEE

The *European Union (Energy Performance of Buildings) Regulations 2012*, contained in SI 243 of 2012, came into operation on 9 January 2013. The SI revokes earlier regulations contained in SI 666 of 2006, SI 229 of 2008 and SI 591 of 2008.

Part 3 of the new regulations set out the requirements in relation to the production of BER certificates.

Section 10 deals with the issue of BER certificates for dwellings. Section 11 deals with the issue of BER certificates for buildings other than dwellings.

Section 12 sets out new requirements for advertising of BER:

- "12(1) A person who offers for sale or letting (whether in writing or otherwise) – (a) a new dwelling, the construction of which commences on or after 9 January 2013, or (b) a dwelling that is in existence on or before 9 January 2013, and any agent acting on behalf of such person in connection with such offering, shall ensure that the energy performance indicator of the current BER certificate for the dwelling is stated in any advertisements, where such advertisements are taken relating to the sale or letting of that dwelling."
- Section 12(2) sets out a similar requirement in relation to a building that is not a dwelling.
- Section 12 (3) provides that the energy performance indicator of the current BER certificate for the dwelling or, as appropriate, a building other than a dwelling, shall be displayed in any advertisement in relation to the sale or letting of a dwelling or a building other than a dwelling.
- Section 12(4) provides that the issuing authority may publish guidance on how the energy performance indicator may be displayed in an advertisement and on the format it may take.
- Section 15(1) provides that a person who contravenes any provision of part 3 of the regulations is guilty of an offence.

Section 32 provides, among other things, that a person guilty of an offence under regulation 15(1) is liable on summary conviction to a class A fine. For the purpose of the regulations, 'agent' means any person who acts for, or represents, a person who:

- Commissions the construction of a new building,
- Offers a building for sale, or
- Offers a building for letting.

An agent shall include, in particular but by no means exhaustively, estate agents, sales agents, letting agents and solicitors. Therefore, a vendor or vendor's agent should ensure that BER information is inserted into any advertisement relating to a property for sale or rent, which will include catalogues, brochures, websites, and so on. G

NOTICE: 2013 COURT CONFERENCES

# Circuit, High and Supreme Court conferences

**The Circuit Court conference, held under the auspices of the Committee for Judicial Studies, will take place on Friday 19 and Saturday 20 April 2013. No cases should be listed for the Circuit Court on Friday 19 April 2013, save on the instruction of the judiciary.**

**The 2013 Supreme and High Court conference, held under the auspices of the Committee for Judicial Studies, will take place on Friday 5 July 2013. No cases should be listed for the Supreme or High Court on Friday 5 April 2013, save on the instruction of the judiciary.**

**The date of the District Court conference, provisionally set for Friday 17 May 2013, should be confirmed shortly.**

BRIEFING

# Legislation update 10 November – 26 December 2012

**Details of all bills, acts and statutory instruments since 1997 are on the library catalogue – www.lawsociety.ie (members' and students' areas) – with updated information on the current stage a bill has reached and the commencement date(s) of each act. All recent bills and acts (full text in PDF) are on www.oireachtas.ie, and recent statutory instruments are available in PDF at www.attorneygeneral.ie/esi/esi_index.html**

## ACTS PASSED

***Appropriation Act 2012***
**Number:** 42/2012
Appropriates to the proper supply services and purposes sums granted by the *Central Fund (Permanent Provisions) Act 1965*, makes provision in relation to deferred surrender to the central fund of certain undischarged appropriations by reference to the capital supply services and purposes as provided for by s91 of the *Finance Act 2004*, and makes provision in relation to the financial resolutions passed by Dáil Éireann on 5/12/2012.
**Commencement:** 21/12/2012

***Civil Defence Act 2012***
**Number:** 51/2012
Repeals the *Civil Defence Act 2002*, dissolves the Civil Defence Board and transfers its functions and other responsibilities back to the Department of Defence, where they previously lay from when the organisation was founded in 1950 up until the board was established in 2003.
**Commencement:** Commencement order(s) to be made as per s18 of the act

***Civil Registration (Amendment) Act 2012***
**Number:** 48/2012
Amends the *Civil Registration Act 2004* so as to extend the categories of bodies and organisations that may apply to the Registrar General for the registration of members of that body or organisation to solemnise marriages. At present, only the Health Service Executive and religious bodies can apply for registration. This act provides for secular bodies, as defined in the act, to apply for such registration.
**Commencement:** Commencement order(s) to be made as per s10(3) of the act

***Credit Union and Cooperation with Overseas Regulators Act 2012***
**Number:** 40/2012
Amends certain provisions of the 1997 and 2001 *Credit Union Acts*, in particular, to amend the prudential requirements for credit unions, to change the governance requirements for credit unions by removing certain management functions from boards of directors of credit unions and providing for a separate management structure and to improve the oversight and general policy functions of such boards of directors; to provide for the restructuring of credit unions and for stabilisation support to credit unions, to provide for a fund to be known as the Credit Union Fund for the purposes of such restructuring and stabilisation and to provide for levies in respect of that fund; to amend certain provisions of the *Central Bank Act 1942*, to provide for miscellaneous matters relating to credit unions and to provide for related matters.
**Commencement:** Commencement order(s) to be made as per s2(1) of the act; 19/12/2012 for ss1, 2, 3 and 5, part 3, part 4, part 5, s35 insofar as it relates to items 59 and 81 of schedule 1 and items 59 and 81 of schedule 1 of the act (per SI 557/2012)

***Equal Status (Amendment) Act 2012***
**Number:** 41/2012
Amends the *Equal Status Act 2000* to provide in Irish law for the mandatory introduction within the European Union of unisex premiums and benefits in insurance as from 21/12/2012. This amendment gives effect to the judgment in Case C-236/09 of 1/3/2011, which found that article 5(2) of Council Directive 2004/113/EC, implementing the principle of equal treatment between men and women in the access to and supply of goods and services, was invalid with effect from 21/12/2012. This directive was transposed into Irish law by the *Equal Status Acts 2000-2008*. The provision declared invalid by the court had allowed an exception from the principle of equal treatment enunciated in the directive, so that insurance companies could price insurance products differently for men and women, where this difference is reasonable and supported by actuarial or statistical data.
**Commencement:** 20/12/2012

***Europol Act 2012***
**Number:** 53/2012
Gives effect to Council Decision 2009/371/JHA of 6/4/2009 establishing the European Police Office (Europol). Repeals the *Europol Act 1997*. Extends the application of the *Official Secrets Act 1963* and provides for related matters.
**Commencement:** Commencement order(s) to be made as per s21(2) of the act

***Finance (Local Property Tax) Act 2012***
**Number:** 52/2012
Provides for the imposition of an annual tax, to be called 'local property tax', in respect of certain residential properties and for the establishment and maintenance of a register of residential properties in the State by the Revenue Commissioners. The household charge, provided for by the *Local Government (Household Charge) Act 2011*, shall cease to apply from 1/1/2013, subject to the collection of arrears.
**Commencement:** Commencement order(s) to be made as per s1(2) of the act

***Fiscal Responsibility Act 2012***
**Number:** 39/2012
Makes provision for securing that the rules in article 3 of the *Treaty on Stability, Coordination and Governance in the Economic and Monetary Union* take effect in the law of the State in accordance with paragraph 2 of that article and that the rule in article 4 of that treaty takes effect in the State. Makes provision in accordance with article 3 of that treaty in relation to a medium-term budgetary objective and a correction mechanism. Establishes the Irish Fiscal Advisory Council and provides for its functions.
**Commencement:** Commencement order(s) to be made as per s11 of the act

***Health and Social Care Professionals (Amendment) Act 2012***
**Number:** 46/2012
Amends the *Health and Social Care Professionals Act 2005* in relation to membership of the Health and Social Care Professionals Council, in relation to the recognition of professional qualifications obtained outside the State, including the implementation of certain provisions of Directive 2005/36/EC on the recognition of professional qualifications, and provides for related matters.
**Commencement:** Commencement order(s) to be made as per s20(2) of the act

***Health Insurance (Amendment) Act 2012***
**Number:** 45/2012
Amends the *Health Insurance Act 1994* to ensure that, in the interests of the common good and across the health insurance market, access to health insurance cover is available to consumers of health services with no differentia-

tion made between them (whether effected by risk-equalisation credits or stamp duty measures or other measures, or any combination thereof), in particular as regards the costs of health services, based in whole or in part on the health risk status, age or sex, or frequency of provision of health services to any such consumers. Provides for risk-equalisation credits to enable the less healthy, including the old, to have access to health insurance cover. Provides for a means whereby any overcompensation to registered undertakings arising from such risk-equalisation credits shall be repaid, and provides for related matters.
**Commencement:** 26/12/2012

***Houses of the Oireachtas Commission (Amendment) (No 2) Act 2012***
**Number:** 50/2012
Amends the *Houses of the Oireachtas Commission Act 2003* in relation to funding and provides for related matters.
**Commencement:** 1/1/2013 as per s5(3) of the act

***National Vetting Bureau (Children and Vulnerable Persons) Act 2012***
**Number:** 47/2012
Provides a legislative basis for the vetting of persons who seek positions of employment relating to children or vulnerable persons. Currently persons applying for such positions are vetted on a non-statutory basis.
**Commencement:** Commencement order(s) to be made as per s1(2) of the act

***Personal Insolvency Act 2012***
**Number:** 44/2012
Provides for the reform of personal insolvency law and introduces the following new non-judicial debt resolution processes, subject to relevant conditions in each case: a debt relief notice, to allow for the write-off of qualifying unsecured debt up to €20,000, subject to a three year supervision period; a debt settlement arrangement, for the agreed settlement of unsecured debt; a personal insolvency arrangement, for the agreed settlement of secured debt up to €3 million and unsecured debt. Reforms the *Bankruptcy Act 1988*, including the introduction of automatic discharge from bankruptcy, subject to certain conditions, after three years, in place of the current 12 years. Provides for the establishment of an Insolvency Service to operate the new insolvency arrangements and provides for related matters.
**Commencement:** Commencement order(s) to be made as per s1(2) of the act

***Social Welfare Act 2012***
**Number:** 43/2012
Gives effect to a range of social welfare measures announced in the budget of 5/12/2012, which are due to come into effect in early 2013, and a number of miscellaneous amendments to the social welfare code. Provides for the following: (a) charges in relation to certain pay-related social insurance contributions, (b) reduction in the maximum duration of jobseeker's benefit, (c) changes in the assessment of income from farming and fishing for means-tested social assistance payments, (d) reduction in the monthly rate of child benefit, (e) reduction in the respite care grant, (f) abolition of the employer rebate in respect of statutory redundancy lump-sum payments paid to employees, and (g) facilitation of the recovery of a greater amount of overpayments through weekly deductions from social welfare payments. Changes to the social welfare code arise mainly as a consequence of the Budget 2012 measure to provide a new structure of reduced rates in the case of contributory pension schemes.
**Commencement:** Various commencement dates, see act for details; commencement order(s) to be made as for s13 as per s1(4) of the act

***Transport (Córas Iompair Éireann) and Subsidiary Companies Borrowings) Act 2012***
**Number:** 49/2012
Increases CIÉ's borrowing powers for non-capital purposes under the *Transport Acts* from €107 million to €300 million. Includes a provision allowing CIÉ to charge any borrowings of the group to property held by it or its subsidiaries. Streamlines CIÉ borrowing powers into a single enabling provision for all forms of borrowing undertaken by CIÉ for non-capital purposes. Amends the provisions of the *Transport Act 1950*, the *Transport (Reorganisation of Córas Iompair Éireann) Act 1986* and the *Transport Act 1987* insofar as they relate to the borrowing powers of CIÉ, Iarnród Éireann, Bus Éireann and Bus Átha Cliath, amends the *Minister and Secretaries (Amendment) Act 2011* and provides for connected matters.
**Commencement:** 26/12/2012 G

*Prepared by the Law Society Library*

ONE TO WATCH

# One to watch: new legislation

***Personal Insolvency Act 2012***

The *Personal Insolvency Act* represents a thorough reform of Ireland's insolvency laws, providing a modernised system addressing the situation of insolvent debtors. Two significant changes being introduced are the reduction of the discharge period from 12 years to three years and the introduction of three out-of-court debt relief processes. The act also introduces a State-run Insolvency Service to operate the new non-judicial insolvency arrangements.

**The arrangements**

The 2012 act allows for the following three forms of non-judicial debt settlement arrangement that allow (subject to certain conditions) the write-down or restructuring of both secured and/or unsecured debt owed by certain eligible individuals:

- Debt relief notices (DRNs),
- Personal insolvency arrangements (PIAs) (the only arrangement applicable to secured debt), and
- Debt settlement arrangements (DSAs).

**Debt relief notices**

The first new non-judicial resolution process is the debt relief notice. This applies where a debtor has qualifying debts that amount to €20,000 or less. To be eligible for a DRN, the debtor must have a net disposable income of less than €60 per month, assets or savings worth €400 or less, and be domiciled or have ordinary residence in the State. The debtor must be insolvent and show no likelihood of becoming solvent within the period of three years commencing on the application date, while also maintaining a reasonable standard of living for himself or herself and his or her dependants. A debtor shall not be eligible for a debt relief notice where 25% or more of his or her qualifying debts were incurred during the period of six months ending on the application date.

**Debt settlement arrangements**

DSAs are available to debtors with unsecured creditors over €20,000. Section 49 of the act provides that the debtor must apply in writing to a personal insolvency practitioner including details of his financial affairs. Following receipt of this information, the personal insolvency practitioner shall hold a meeting with the debtor. The personal insolvency practitioner will then advise the debtor of his/her options for addressing his/her financial difficulties. The debtor is required to complete a prescribed financial statement in accordance with section 50 of the act. The personal insolvency practitioner shall then complete a statement that he/she is of the opinion that:

- The information contained in the debtor's prescribed financial statement if completed and accurate,
- The debtor is eligible to make a proposal for a debt settlement arrangement or personal insolvency arrangement, as the case may be,
- There is no likelihood of the debtor becoming solvent within the period of five years commencing on the date on which the statement is made, and that
- It is appropriate for the debtor to apply for a DSA.

The Insolvency Service will, if satisfied that the application is in order, issue a certificate to that effect and furnish that certificate, together with a copy of the application and supporting documentation, to the appropriate court. The court will then consider the application and documentation and either issue a protective certificate or hold a hearing to gather further information or evidence. A protective certificate shall be in force for a period of 70 days, with the possibility of an extension of a further 40 days. A debt settlement arrangement will then be put forward to creditors for agreement. Creditors representing not less than 65% in value of the debts due must participate in a meeting and approve the DSA for it to move forward. If approved, the arrangement will be registered in the Insolvency Register. A DSA will last for five years, and the debtor will be discharged from the debts specified in the DSA once it expires.

**Personal insolvency arrangement**

This is the final debt settlement resolution process. It is available to debtors with secured debt up to €3,000,000 and unsecured debt over a six-year period (with a possible one-year extension). A debtor may enter into a personal insolvency arrangement only once. Following discussions with the debtor and the completion of a prescribed-form financial statement, the insolvency practitioner will make an application to the Insolvency Service. The insolvency practitioner will provide a statement that the information in the debtor's financial statement is correct, that the debtor satisfies all the eligibility criteria, and that there is no likelihood of the debtor becoming solvent in the next five years. The debtor will also provide a statutory declaration. The Insolvency Service, if satisfied, will then issue a certificate to that effect and forward it, the application and any supporting documentation to the appropriate court. The court will either issue a protective certificate or hold a hearing to gather further information or evidence. The insolvency practitioner will notify relevant creditors of the protective certificate and proposed PIA and seek submissions. If the PIA is approved, it must be sent to the Insolvency Service, who must notify the appropriate court. Fourteen days will be allowed for creditor objections. If no such objection is received or if such objection is not approved, the court must notify the Insolvency Service, which will register the PIA in the Register of Personal Insolvency Arrangements, following which it will come into effect. G

NOTICE: THE HIGH COURT

**Record no 2012 no 73 SA**
**In the matter of Christopher Lynch, solicitor, practising as Christopher Lynch & Co, 99 O'Connell Street, Limerick, and in the matter of the *Solicitors Acts 1954-2011***
Take notice that, by order of the High Court made on Monday 26 November 2012, it was ordered that Christopher Lynch, solicitor, shall be suspended from practice until further order of the court.
*John Elliot, Registrar of Solicitors, 27 November 2012*

# 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 Seamus P McConnell, solicitor, 56 Glendaniel, Tullamore, Co Offaly, and in the matter of the *Solicitors Acts 1954-2008* [6626/DT72/11]**
***Law Society of Ireland (applicant)***
***Seamus McConnell (respondent solicitor)***

On 9 October 2012, 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 furnished to a named credit union and dated 13 December 2007 in a timely manner or at all,
b) Failed to respond to the Society's correspondence and, in particular, the Society's letters of 4 June 2010 within the time specified and the Society's letters of 28 September 2010 and 11 October 2010 in a timely manner or at all,
c) Failed to comply with the direction of the Complaints and Client Relations Committee issued at its meeting of 4 November 2010 to make payment to the Society of €450 in a timely manner or at all.

The tribunal ordered that the respondent solicitor:

a) Do stand censured,
b) Pay a sum of €550 to the compensation fund,
c) Pay the sum of €450 to the Society as directed,
d) Pay the whole of the costs of the Society as taxed by a taxing master of the High Court in default of agreement.



INFORMATION ON COMPLAINTS

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

IN RELATION TO COMPLAINTS RECEIVED BY THE SOCIETY FROM 1 SEPTEMBER 2011 TO 31 AUGUST 2012

**Allegations of misconduct**

| | |
|---|---|
| Delay | 3 |
| Failure to communicate | 50 |
| Failure to hand over | 80 |
| Failure to account | 70 |
| Undertaking | 1,732 |
| Conflict of interest | 11 |
| Dishonesty or deception | 7 |
| Witnesses' expenses | 4 |
| Advertising | 4 |
| Other | 86 |
| Counsels' fees | 40 |
| **Total** | **2,087** |

**Allegations of inadequate professional services**

| | |
|---|---|
| Delay | 98 |
| Failure to communicate | 56 |
| Shoddy work | 83 |
| Other | 29 |
| **Total** | **266** |

**Allegations of overcharging**

| | |
|---|---|
| Conveyancing | 11 |
| Probate | 11 |
| Litigation | 39 |
| Matrimonial | 28 |
| Other | 11 |
| **Total** | **100** |
| **GRAND TOTAL** | **2,453** |

NUMBER OF COMPLAINTS REFERRED TO THE SOLICITORS DISCIPLINARY TRIBUNAL

| | |
|---|---|
| Undertakings | 101 |
| Dishonesty/deception | 1 |
| Conflict of interest | 1 |
| Counsels' fees | 3 |
| Failure to carry out client's instructions | 3 |
| Failure to comply with direction of Complaints and Client Relations Committee | 4 |
| Failure to cooperate with professional indemnity insurers | 1 |
| Rescinded | 2 |
| **Total** | **116** |

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

| | |
|---|---|
| Misconduct, penalty adjourned | 1 |
| Censure, €500 fine, €2,000 costs | 1 |
| Censure | 1 |
| Censure, €1,000, costs to be taxed in default | 1 |

**The remaining cases await hearing**

BRIEFING

# Brief cases

**Judgment abstracts are compiled by the Incorporated Council of Law Reporting and are reprinted with kind permission**

## COMPANY

### Examinership

Appointment of examiner – jurisdiction – proofs – group of companies – opposition by creditor – receivership – whether reasonable prospect of survival of company – whether underlying business capable of generating profit – whether examinership more advantageous to members and creditors as a whole – whether interests of employees relevant – management of company – whether business badly run – whether purpose of examinership to save shareholders from unsuccessful investments – whether purpose of examinership to allow existing shareholder to retain control of company – whether threshold requirement met – alternative proposal – receiver manager – whether appointment of receiver manager to be preferred over examinership – whether opposing creditor considered that company had reasonable prospect of survival – whether court should exercise discretion – whether opinion of another significant creditor to be taken into account – whether experience of other significant creditor with examinership and managing receivership relevant – whether real prospect that investors could be found – whether appointment of receiver manager designed to meet advantage of appointing creditor only – whether receivership would protect jobs and enterprise – whether exclusion from examinership of some companies in group prejudicial to creditor.

*In re Traffic Group Ltd* [2007] IEHC 445, [2008] 3 IR 253; *In re Atlantic Magnetics Ltd (in receivership)* [1993] 2 IR 561; *In re Gallium Ltd t/a First Equity Group* [2009] IESC 8, [2009] 2 ILRM 11; and *In re Vantive Holdings* [2009] IEHC 384, [2010] 2 IR 108 followed. *Companies (Amendment) Act 1990*.

Examiner appointed (2011/621 COS – Clarke J – 21/12/2011) [2011] IEHC 494.

***In re McSweeney Dispensers 1 Ltd***

### Liquidation

Insolvency – fraudulent preference – mortgage – intention – application to declare mortgage void – test to be applied – whether company insolvent at time of entering into mortgage – whether company and bank knew company was insolvent – whether effect of mortgage was to give bank preference over unsecured creditors – whether dominant intention of mortgage was to give bank preference over unsecured creditors – whether intention of mortgage to enable company to continue trading – evidence of intention – whether letter indicative of intention of directors – whether necessary to show dishonesty – whether necessary to show moral blameworthiness.

*Station Motors Ltd v AIB Ltd* [1985] IR 756 and *Corran Construction Company v Bank of Ireland Finance Ltd* [1976 – 1977] ILRM 175 followed. *In re M Kushler Ltd* [1943] Ch 248 and *In re Patrick and Lyon Ltd* [1933] Ch 786 considered. *Companies Act 1963*, s286.

Application refused (2011/ 416 COS – Gilligan J – 14/12/2011) [2011] IEHC 508.

***In re O'Connor's Nenagh Shopping Centre Ltd (in liquidation)***

## CONSTITUTIONAL

### Children

Paternity – registration of birth of minor – claim of paternity – application for entry of name on registration details of birth – inquiry into correctness of registration details – proceedings by registered parents to restrain inquiry – whether jurisdiction to hear proceedings without child being put on notice – refusal of registered parents to inform child – whether jurisdiction to direct someone other than registered parents to inform child – constitutional right of claimant to have proceedings determined within reasonable timeframe – constitutional right of child to be informed – fair procedures – entitlement of child to have views taken into account – primary right and duty of registered parents to ensure constitutional right of child protected – entitlement of State through courts to step in where registered parents fail in duty – consideration of expert evidence in relation to child.

*FN v CO (Guardianship)* [2004] 4 IR 431; *Re Article 26 and the Adoption (No 2) Bill 1987* [1989] IR 656; *North Western Health Board v HW* [2001] 3 IR 622; *S v S* [1983] 1 IR 68; *Northern Area Health Board v An Bord Uchtála* [2002] 4 IR 252 and *N v Health Service Executive* [2006] IEHC 278, [2006] IESC 60, [2006] 4 IR 374 considered. *Civil Registration Act 2004*, s22 – *Constitution of Ireland 1937*, arts 40.3 and 42.5.

Declaration that proceedings not proceed without notice to child and that jurisdiction to direct somebody other than parents to inform child (2004/3876P – Laffoy J – 23/5/2008) [2008] IEHC 472

***Z v Y***

### Statute

Validity – equality – gender discrimination – sexual offences – sexual intercourse with child under 17 years – immunity from prosecution afforded to female children – whether discrimination on grounds of gender constitutionally permissible – whether discrimination justified by reason of differences of physical or moral capacity or social function – social policy within power of Oireachtas – entitlement of Oireachtas to have regard to danger of pregnancy for teenage girls – prosecutorial discretion.

*Michael M v Superior Court of Sonoma County* (1981) 450 US 464 considered; *JMcD v PL* [2008] IEHC 96, [2009] IESC 81, [2010] 2 IR 199 followed. *Criminal Law (Sexual Offences) Act 2006*, ss3 and 5 – *Constitution of Ireland 1937*, articles 38.1 and 40.1 – *European Convention on Human Rights 1950*, articles 6, 8 and 14.

Appeal dismissed (176/2010 – SC – 23/2/2012) [2012] IESC 10

***D(M) (A Minor) v Ireland***

## CRIMINAL

### Road traffic offence

Drink driving – arrest – grounds of arrest – case stated – whether failure of arresting garda to recite specific statutory section for arrest rendered arrest unlawful – whether technical or precise language must be used – whether arrested person knew in substance reasons for arrest – whether sufficient for reasons for arrest to be conveyed in ordinary language – evidence – intoxyliser – statement – presumption – whether evidential burden on accused capable of discharge based upon prosecution evidence, answers given in cross-examination and statutory presumptions – whether question in cross-examination posed in general form admissible – whether rebuttal of presumption of sufficiency of statement resulted in deprivation of evidential effect of statement of fact therein.

*Director of Public Prosecutions v Mooney* [1992] 1 IR 548, *Director of Public Prosecutions v Kemmy* [1980] IR 160 and *O'Broin v District Judge Ruane* [1989] IR 214 followed. *Road Traffic Act 1961*, ss49(4) and (6) – *Road Traffic Act 1994*, ss13, 17 and 21 – *Road Traffic Act 1994 (Section 17) Regulations* (SI 326/1999), rules 4 and 5.

Questions answered (201/2007 – SC – 6/12/2011) [2011] IESC 46.

***Director of Public Prosecutions v Ennis***

## LAND LAW

### Mortgage

Code of conduct – proceedings for possession – repayment arrangement – non-compliance – application to transfer to chancery special summons list – no

further repayment arrangement – decision by lender no right to appeal – finding by master plaintiff in breach of code – whether master correct to refuse to transfer – whether defendant entitled to appeal decision of plaintiff – whether plaintiff in compliance with code – whether plaintiff entitled to order for possession.

*Rules of the Superior Courts 1986* (SI 15/1986), order 38, rule 6 – *Central Bank Act 1989*, s117.

Possession refused (2009/1550SP – Laffoy J – 30/3/2012) [2012] IEHC 142.

***Stepstone Mortgage Funding Ltd v Fitzell***

### Mortgage

Equity of redemption – foreclosure – vesting order – duty on mortgagee – best price – whether position of NAMA similar to that of traditional mortgagee.

*Land and Conveyancing Reform Act 2009*, ss92 and 96 – *National Asset Management Agency Act 2009*, ss7, 69, 80, 84, 87, 101, 103, 139, 145, 152, 153 and 155.

Appeal allowed (396/2010 – SC – 12/4/2011) [2011] IESC 14.

***Dellway Investments Ltd v National Asset Management Agency***

### Title

Multiple proceedings – whether plaintiff owner of lands – claim that lands purchased from deceased brother – fact of sale contested by executor for estate – injunctive proceedings – committal to prison for contempt – *habeas corpus* proceedings – judicial review proceedings – title proceedings – testamentary proceedings – reconsideration of title action despite previous determination on issue – absence of document of title – cheque – principal proof incapable of acceptance by court – separate lands identified in contract for sale – inconsistencies – failure to assert ownership – withholding of documents – abusive conduct by plaintiff.

Claim of plaintiff dismissed (2005/2267P, 2008/1443SS, 2008/1110JR – McKechnie J – 11/6/2010) [2010] IEHC 534.

***Kennedy v Harrahill***

## PROFESSIONS

### Medical

Professional misconduct – disciplinary inquiry – fair hearing – delay of 14 years in making complaint – whether substantial unfairness in allowing matter proceed to full rehearing. *Medical Practitioners Act 2007*, s75.

Appeal allowed (2011/87SP – Kearns P – 19/7/2011) [2011] IEHC 352.

***Dr T v Medical Council***

### Medical

Nursing – fitness to practise – professional misconduct – suspension from register pending hearing of allegations of professional misconduct – jurisdiction – *audi alterem partem* – prior participation – whether statute implied meaningful participation by party against who order sought during consideration process – whether statute required higher threshold – whether threshold met – whether public interest in suspending nurse pending hearing – whether right to participate – whether obligation to give prior notification of intention to seek suspension – whether statutory section enacted to prevent immediate danger to public – whether fitness to practise hearing should have granted adjournment – whether sufficient reason given for non-attendance at hearing – whether withdrawal undertaking of nurse not to practise relevant – whether order for suspension proportionate – whether disproportionate to suspend nurse from general nursing and not simply domiciliary midwifery – liberty to apply – whether appropriate to refuse liberty to apply in respect of suspension order.

*Ó Ceallaigh v An Bord Altranais* [2000] 4 IR 54 followed. *Nurses Act 1985*, s44.

Appeal dismissed (202/10 – SC – 12/12/2011) [2011] IESC 51.

***An Bord Altranais v Ó C(A)***

### Solicitors

Appeal against financial ombudsman – whether significant error or series of errors – title deeds not provided to bank by solicitor – failure of bank to notify plaintiffs of non-provision of title deeds – extent of bank's duty of care to customers – redress from Law Society limited to five years after service provided – whether egregious behaviour by solicitors – whether bank had duty to go behind solicitor/client relationship and communicate directly with clients – whether evidence that sale fell through due to problems with title deeds.

*Ulster Bank v Financial Services Ombudsman* (unreported, Finnegan P, 1/11/2006) [2006] IEHC 323, *Orange v Director of Telecommunications* [2000] 4 IR 159 and *ACC Bank PLC v Fairlee Properties Ltd* [2009] IEHC 45 followed. *Central Bank Act 1942*, ss57.

Appeal refused (2011/15MCA – Hedigan J – 20/7/2011) [2011] IEHC 299.

***Clark v Financial Ombudsman***

### Solicitors

Lien – arbitrator's award – whether precondition that costs be taxed – whether making of charging order under s3 merely declares right to charge – whether entitled to party to party or solicitor to client costs.

*Legal Practitioners (Ireland) Act 1876*, s3 – *Arbitration Act 1954*, s32 – *Arbitration Act 2010*, s4.

Application allowed (2010/120 MCA – Laffoy – 25/7/2011) [2011] IEHC 317.

***J&G McGowan Roofing v Manley***

## TORT

### Conspiracy

Building contract – subcontractor – conspiracy to deprive subcontractor of contract monies – application for direction – test to be applied – whether *prima facie* case made out – whether circumstantial evidence of conspiracy sufficient – whether conspiracy made out as a matter of probability – whether equally probable explanation available – whether acts and declarations of alleged conspirators admissible against each other – whether documents and circumstances allegedly evidencing conspiracy sufficient to establish *prima facie* case that conspiracy existed – whether plain wording of documents inconsistent with alleged unlawful purpose – contract – whether nature of dispute grounded in contract – company law – directors – personal responsibility – whether directors assumed personal responsibility so as to create special relationship.

*James Elliot Construction Ltd v Irish Asphalt Ltd* [2011] IEHC 269 (unrep, Charleton J, 25/5/2011) followed; *Taylor v Smith* [1991] 1 IR 142 and *Pacific Associates Inc v Baxter* [1990] 1 QB 993 considered.

Direction granted (2010/10074P – Charleton J – 13/12/2011) [2011] IEHC 490.

***Mero-Schmidlin (UK) plc v Michael McNamara & Co***

### Personal injuries

Fraud – false or misleading evidence – exaggeration – future care – psychological *sequelae* – affidavit of verification – application to dismiss proceedings – test to be applied – onus of proof – whether onus of proving applicability of statutory section fell on defendant – standard of proof – whether standard of proof for application to dismiss claim for false or misleading evidence was proof on the balance of probabilities – whether claim for future care false or misleading – whether claim exaggerated – whether false or misleading evidence adduced where claim for future care abandoned – whether evidence was knowingly false or misleading – whether plaintiff had deliberate intention to mislead – whether *sequelae* alleged were subjectively believed by plaintiff – whether plaintiff was honest witness – whether Supreme Court could interfere with findings of trial of judge in relation to honesty of plaintiff.

*Hay v O'Grady* [1992] 1 IR 210 followed. *Civil Liability and Courts Act 2004*, s26(1) and (2).

Appeal dismissed (201/2006 – SC – 2/12/2011) [2011] IESC 44.

***Abern v Bus Éireann*** G

BRIEFING

Eurlegal

Edited by TP Kennedy, Director of Education

# The *Energy Efficiency Directive*

Energy efficiency is recognised as a valuable means to address the unprecedented challenges facing the EU in terms of increased dependence on energy imports, scarce energy resources, climate change, and the economic crisis. Directive 2012/27 EU on energy efficiency establishes a common framework of measures to ensure that the EU reaches its 2020 20% target on energy efficiency. It also amends Directives 2009/125/EC (ecodesign for household washing machines) and 2010/30/EU (energy labelling for household refrigerating appliances) and, on a staged basis, repeals Directives 2004/8/EC (cogeneration) and 2006/32/EC (energy end-use efficiency and energy services). Dated 25 October 2012, the directive follows on from the commission's Energy Efficiency Plan 2011, which confirmed that the EU is not on track to meet the 2020 20% target, despite progress in the area.

The directive defines energy efficiency as "the ratio of output of performance, service, goods or energy, to input of energy" and requires each member state to set its own indicative national energy efficiency target, which will be reviewed by the commission by 30 June 2014. Energy itself is defined as "all forms of energy products, combustible fuels, heat, renewable energy, electricity, or any other form of energy, as defined in article 2(d) of Regulation (EC) no 1099/2008 on energy statistics". The measures outlined to achieve the targets may be examined in terms of "efficiency in energy use and efficiency in energy supply". To bolster the framework, the directive also sets out horizontal provisions.

### Efficiency in energy use

Renovation of buildings, public bodies' buildings, the purchasing approach of public bodies, as well as energy efficiency obligation schemes, energy audits and energy management systems are all primed to play a role in efficiency in energy use, along with metering, billing information and consumer information.

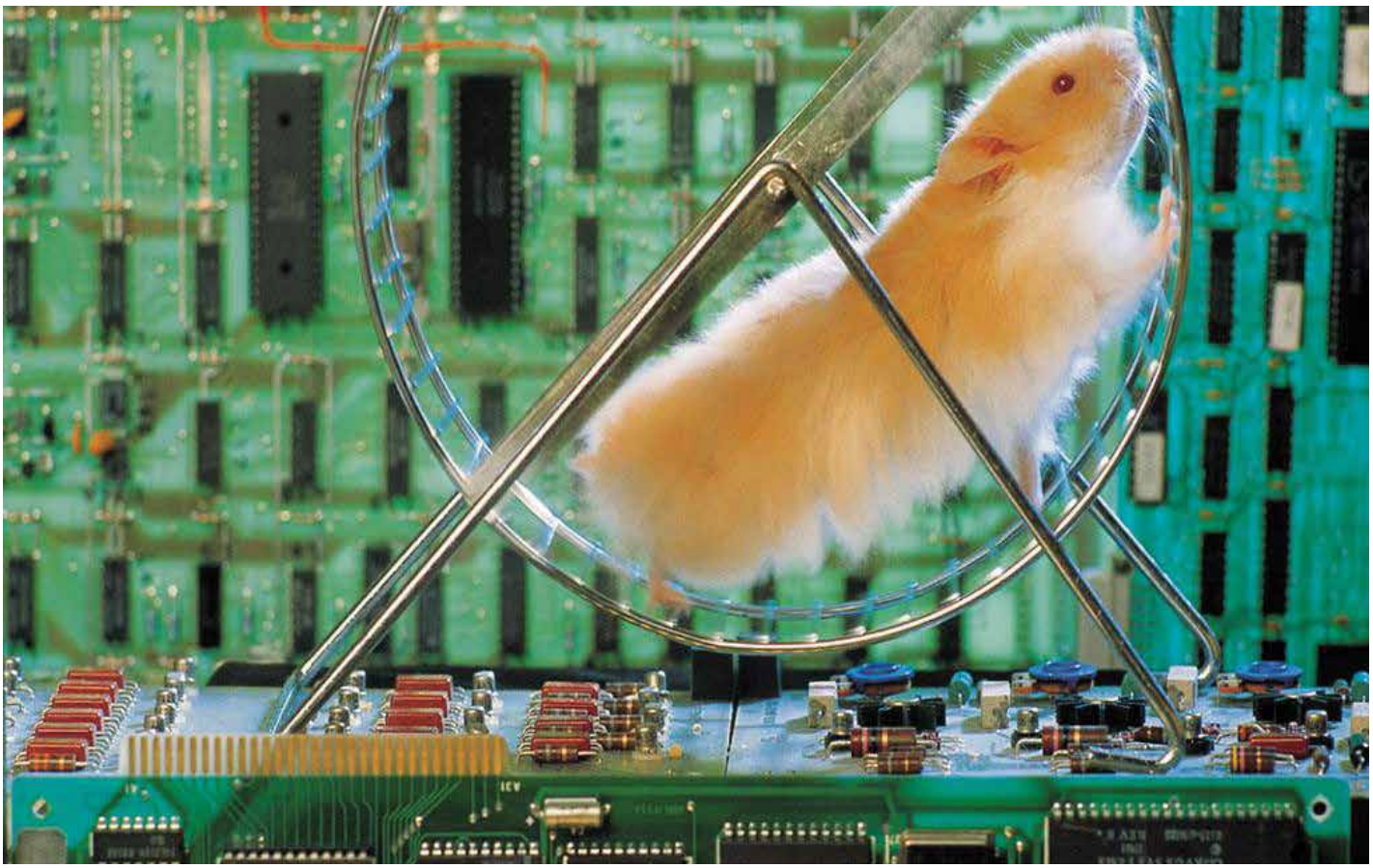
A positive point for the construction sector is that member states are required to establish a long-term strategy to mobilise investment in the renovation of the national stock of residential and commercial buildings, both public and private. Among other things, the strategy is to guide investment decisions of individuals, the construction industry, and financial institutions. The strategy has to be published by 30 April 2014 and updated every three years. From 1 January 2014, 3% of the total floor area of heated and/or cooled buildings with a total useful floor area over 500m$^2$, owned and occupied by central government, must be renovated each year to meet at least the minimum energy performance requirements set in relation to article 4 of Directive 2010/31/EU (energy performance of buildings). The total floor area threshold becomes 250m$^2$ from 9 July 2015. Central government is defined as "all administrative departments whose competence extends over the whole territory of a member state". Member states may require the renovation obligation to apply to administrative departments below central government. Exceptions to the renovation requirement are provided for officially protected buildings, buildings serving national defence purposes, and places of worship. By 31 December 2013, member states have to establish and publish an inventory of heated and/or cooled central government buildings having the above floor-area thresholds. As an alternative, member states may take other cost-effective measures, including deep renovations and measures for behavioural change of occupants. These have to be notified to the commission by 31 December 2013, demonstrating how they would achieve equivalent improvement. In addition, member states have to encourage public bodies to adopt an energy efficiency plan, put in place an energy management system and, where appropriate, use energy service companies and energy performance contracting to finance renovations.

Purchasing by public bodies is another focus area. Member states are obligated to ensure that central governments purchase only products, services and buildings with high energy-efficiency performance, with reference to annex III of the directive. The obligation relates to contracts having a value equal to or greater than the thresholds laid down in article 7 of Directive 2004/18/EC (public procurement). Exception is made for contracts of the armed forces in certain circumstances. Regional and local-level public bodies are encouraged to follow the 'exemplary role' of central government.

An energy efficiency obligation scheme must be set up by each member state. The scheme has to ensure that energy distributors and/or retail energy sales companies that are designated as obligated parties by the member state achieve a cumulative end-use energy savings target by 31 December 2020. The amount of energy savings required of each obligated party is expressed in terms of either final or primary energy consumption. Member states will publish annually the energy savings achieved by each obligated party or subcategory of obligated party. As an alternative to setting up such an energy efficiency obligation scheme, member states may take other policy measures to achieve energy savings among final customers – however, they must meet the criteria set out in article 7(10) and (11) of the directive. Such measures include energy or $CO_2$ taxes that have the effect of reducing end-use energy consumption, and they have to be notified to the commission by 5 December 2013.

Member states are also tasked with promoting the availability to all final customers of high-quality energy audits that are cost effective, carried out by qualified and/or accredited experts, and implemented and supervised by independent authorities under national legislation. They have to establish transparent and non-discriminatory minimum criteria for energy audits based on annex VI of the directive, as well as develop programmes to encourage SMEs to undergo energy audits and implement their recommendations. Member states are called on to develop programmes to raise awareness among households about the benefits of audits and to encourage training programmes for the qualification of energy auditors. Enterprises that are not SMEs are subject to an audit by 5 December 2015 and every four years subsequently from the date of the previous energy audit. Those that implement an energy or environmental management system are exempted, provided the management system includes an energy audit based on annex VI.

It falls to the member states, insofar as it is technically possible, financially reasonable, and proportionate regarding potential energy savings, to ensure that final customers for electricity, natural gas, district heating, district cooling and domestic hot water are provided with competitively priced individual meters that reflect actual energy consumption and time of use. Where final customers do not have smart meters – as referred to in Directives 2009/72/EC (internal electricity market) and 2009/73/EC (internal gas market) – by 31 December



Hamster-powered PCs weren't all they were cracked up to be, as Finance and Admin finally realised

2014, billing information has to be accurate and based on actual consumption. Bills, billing information for energy consumption, and consumption data received by final customers have to be free of charge. Member states are expected to take appropriate measures to promote and facilitate efficient use of energy by small energy customers, including domestic customers.

### Efficiency in energy supply

Efficiency in energy supply is couched in terms of promotion of efficiency in heating and cooling, as well as energy transformation, transmission and distribution.

Regarding promotion of efficiency in heating and cooling, in addition to adopting policies, by 31 December 2015, member states have to notify the commission regarding the potential for the application of high-efficiency cogeneration and efficient district heating and cooling. The assessment has to be updated and notified to the commission every five years. Where the potential demonstrates that benefits exceeds costs, member states are required to take adequate measures for development of efficient district heating and cooling infrastructure and/or high-efficiency cogeneration and use of heating and cooling from waste heat and renewable energy sources.

The provisions on energy transformation, transmission and distribution, among other matters, call on the national energy regulatory authorities to have due regard to energy efficiency when performing regulatory tasks described in Directives 2009/72/EC and 2009/73/EC. Moreover, network regulation and tariffs have to fulfil the energy efficiency criteria in annex XI of the directive. By 30 June 2015, an assessment of energy efficiency potentials of network infrastructure has to be undertaken by member states and concrete measures and investments for introduction of cost-effective improvements identified.

### Horizontal provisions

The horizontal provisions of the directive concern not only availability of qualification, accreditation and certification schemes by 31 December 2014, but also wide dissemination of information and promotion of training initiatives. Furthermore, promotion of the energy services market and access for SMEs to this market is demanded. Model contracts for energy performance should include the items listed in annex XIII of the directive. Other measures to promote energy efficiency are called for, for example, in relation to the split of incentives between landlord and tenant. Importantly, member states have to facilitate the establishment of financing facilities, or use of existing ones, for energy efficiency improvement measures. They may also set up an Energy Efficiency National Fund.

### Next steps

To help foster practical implementation of the directive at local, national and regional levels, the commission is tasked with establishing an online platform to support exchange of experiences, benchmarking, networking, and innovative practices. Save for certain exceptions set out in article 28, deadline for transposition of the directive into national law is 5 June 2014. G

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*Diane Balding is a member of the Law Society's EU and International Affairs Committee.*

# Recent developments in European law

## CRIMINAL

**Case C-399/11, *Melloni*, opinion of Advocate General Bot, 2 October 2012**

In 1996, a Spanish Court held that Stefano Melloni could be surrendered to Italy to be tried there. When he was released on bail, he fled and could not be found. In 1997, the Italian court gave notice to his lawyers and then proceeded to try the case. He was sentenced to ten years' imprisonment for bankruptcy fraud. In 2004, the Italian Supreme Court of Cassation dismissed the appeal lodged by his lawyers. He was arrested in Spain, where he argued that he should not be surrendered to Italy. He argued that, under Italian procedural law, it is impossible to appeal against sentences imposed *in absentia*. In September 2008, a Spanish court authorised his surrender to the Italian authorities to serve his sentence. The Spanish court held that his rights of defence had been respected, as he had been aware from the outset of the forthcoming trial. He had deliberately absented himself and appointed two lawyers to represent and defend him. They acted, in that capacity, at first instance and in the appellate proceedings, thus exhausting all remedies. The final court of appeal in Spain asked the CJEU whether the *Framework Decision on the European Arrest Warrant* (2002/584) and surrender procedure precludes the Spanish courts from making the surrender of Melloni conditional on the right to have his conviction reviewed.

Advocate General Yves Bot proposed that the court answer in the affirmative. He looked to the wording of the provision but also the objectives pursued by it. The EU had provided an exhaustive list of the situations in which the execution of a European arrest warrant issued in order to enforce a decision given *in absentia* must be regarded as not infringing the rights of the defence. This in incompatible with any retention of the possibility for the executing judicial authority to make that surrender conditional on the conviction being open to review in order to guarantee the rights of the defence of the person concerned, in circumstances such as those in the present case. The advocate general also considered that the provision is compatible with the right to a fair trial and observance of the rights of the defence recognised by the *Charter of Fundamental Rights of the EU*. The provision lays down the conditions in which the person concerned must be deemed to have waived, voluntarily and unambiguously, his right to appear at his trial, so that he cannot claim the benefit of a retrial. Article 53 of the charter also provides that it is not to adversely affect human rights recognised by the member states' constitutions. That provision cannot be relied on to give primacy to national constitutional law over the framework decision and thus to make the execution of a European arrest warrant conditional upon the right to a retrial in the issuing member state. That follows from observance of the principles of primacy of EU law and its uniform and effective application within the member states. The level of protection of fundamental rights must be fixed not in the abstract, but rather in a manner adapted to the requirements connected with the objectives to be attained by the EU. In order to achieve the objective of the construction of an area of freedom, security and justice, the EU has sought to increase the mutual confidence between the member states by approximating the laws of the member states concerning the rights of individuals in criminal proceedings in order to facilitate and accelerate judicial cooperation. The EU wished to protect fundamental rights without undermining the effectiveness of the European arrest warrant mechanism, avoiding a situation where procedural guarantees are used only in order to place oneself outside the reach of the law. G

NOTICES

## WILLS

**Carroll, Peter (deceased),** late of Cartonkelly, Fevagh, Dysart, Co Roscommon. Would any person having knowledge of a will (or documents relating to a will) made by the above-named deceased, who died on 29 September 2012, please contact Fair & Murtagh, Solicitors, Society Street, Ballinasloe, Co Galway; DX 62002 Ballinasloe; tel: 09096 50000, email: aoifebl@fair-murtagh.ie

**Dorgan, Sheila (deceased),** late of 26 Clare Road, Drumcondra, Dublin 9, and formerly of St Clare's, Griffith Avenue, Dublin 11. Would any person having knowledge of a will made by the above-named deceased, who died on 2 November 2011, please contact Gerard Hanley, solicitor, Frank Buttimer & Company, Solicitors, 19 Washington Street, Cork

**Farrell, Joseph (orse Joey) (deceased),** late of 30 Dooley's Terrace, Athy, Co Kildare, and latterly of St Vincent's Hospital, Athy, Co Kildare. Would any solicitor holding or having knowledge of a will made by the above-named deceased, who died on 7 May 2012, please contact HG Donnelly & Son, Solicitors, 5 Duke Street, Athy, Co Kildare; reference: RP/FAR015-1

**Fleming, Martin (deceased),** late of Laharn, Lombardstown, Co Cork, and latterly of St Stephen's Hospital, Sarsfield Court, Glanmire, Cork. Would any solicitor holding or having knowledge of a will made by the above-named deceased, who died on 25 October 2012, please contact HG Donnelly & Son, Solicitors, 5 Duke Street, Athy, Co Kildare; reference: RP/KIR012-3

**French, Eleanor (deceased), also known as Elsie or Ellen,** late of Ironhills, Suncroft, Co Kildare. Would any person having knowledge of a will made by the above-named deceased, who died on 31 May 2012, please contact Thomas A Walsh & Co, Solicitors, 23 James Street, Kilkenny; tel: 056 776 4355, email info@thomasawalsh.com

**Kelleher, Kathleen (Catherine),** late of Cahersherkin, Ennistymon, Co Clare; Ennis, Co Clare and New York, who died on 25 September 2012. Would any person having knowledge of the whereabouts of a will executed by the above-named deceased on or after 1 October 2004 please contact M Petty & Co, Solicitors, Parliament Street, Ennistymon, Co Clare; tel: 065 707 1445, fax: 065 707 1785, email: mpettysols@eircom.net

**Meagher, Michael (deceased),** late of 46 Kinvara Road, Navan Road, Dublin 7, who died on 2 November 2012. A retired Guinness employee. Would any person having knowledge of the whereabouts of any will made by the above-named deceased person please contact Joan Meagher, tel: 087 231 9207, email: meagherjoan9@hotmail.com; or Francis Downes and Co, 57 Blessington Street, Dublin 7; tel 01 830 7587, fax: 01 8303872

**Moore, Kevin (deceased),** late of McGiff's Cross, Moydow, Kenagh, Co Longford, and formerly at 2 Newbury Park, Clonshock, Dublin 17, who died on 20 October 2012. Would any person having knowledge of the whereabouts of a will executed by the above-named please contact Hugh J Campbell & Co, Solicitors, of Shannon House, Custume Place, Athlone, Co Westmeath; tel: 090 647 2015

**O'Brien, Elizabeth (deceased),** late of 127 Botanic Avenue, Glasnevin, Dublin. Would any person having knowledge of a will made by the above-mentioned deceased, who died on 17 January 2012, please contact John O'Brien, Moortown, Oldtown, Co Dublin

**O'Toole, Annie (née Murray) (deceased),** late of St John's Ward, Ely Hospital, Wexford, Co Wexford and, prior to that, 16 Whiterock View, Wexford, Co Wexford, who died on 8 November 2012. Would any person having knowledge of any will executed by the above-named deceased (or documents relating to a will) executed by the above-named deceased please contact Boland & Co, Solicitors, Patrick's Court, Patrick Street, Kilkenny; tel: 056 776 3434, fax: 056 776 5003

**Quirke, Martin (deceased),** late of Flat 1, 5 St Vincent Street, Dublin 7 in the county of Dub-

RATES

## Professional notice rates

**RATES IN THE PROFESSIONAL NOTICES SECTION ARE AS FOLLOWS:**

- **Wills** – €147 (incl VAT at 23%)
- **Title deeds** – €294 per deed (incl VAT at 23%)
- **Employment/miscellaneous** – €147 (incl VAT at 23%)

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

**ALL NOTICES MUST BE PAID FOR PRIOR TO PUBLICATION. CHEQUES SHOULD BE MADE PAYABLE TO LAW SOCIETY OF IRELAND.** Deadline for March *Gazette*: 13 February 2013. For further information, contact the *Gazette* office on tel: 01 672 4828 (fax: 01 672 4877)

# NOTICES

lin, who was born on 26 September 1951 and died on 1 October 2010. Would any person having knowledge of any will executed by the above-named deceased please contact Mairead Moriarty of KOD Lyons, Solicitors, 4 Arran Quay, Dublin 7; tel: 01 872 3944, email: mairead.moriarty@kodlyons.ie

**Roantree, Seamus (deceased),** late of Sunhill, Killorglin, Co Kerry (formerly of Rathgar and Dartry in Dublin 6/14), who died on 20 November 2011. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Sherry McCaffrey, Solicitors, 2 Green Park, Orwell Road, Rathgar, Dublin 14; tel: 01 496 2184, mobile: 087 919 8097, email: info@sherrymccaffery.com

**Sherlock, Thomas (deceased),** late of 31 Verschoyle Court, off Mount Street, Dublin 2, who died on 2 November 2012. Would any person having knowledge of a will executed by the above-named deceased please contact Wilkinson & Price, Solicitors, South Main Street, Naas, Co Kildare; tel 045 897 551

## TITLE DEEDS

**In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by John Finegan and Philomena Finegan**

Take notice that the applicants, being the persons entitled under the above-mentioned acts, propose to apply to the county registrar in the county of Cavan to purchase the fee simple in the property described in paragraph no 1. Any party asserting that they hold a superior interest in the said property are called upon to furnish evidence of title to the below-named within 21 days from the date of this notice. In default of any such notice being received, the said applicants intend to proceed with the application before the said county registrar for such directions as may be appropriate on the basis that the person or persons beneficially entitled to all superior interests up to and including the fee simple in the property are unknown and unascertained.

1. Description of land to which this notice refers: all that and those the tenement messuage and dwellinghouse with the yard backhouse and garden in the rear thereof and attached to the said house or tenement situate, lying and being at Main Street in the town of Bailieborough, townland of Tanderagee, barony of Clankee and county of Cavan. Held under indenture of lease for three lives renewable forever dated 10 October 1854 and made between Sir John Young of Bailieborough Castle in the county of Cavan, baronet, member of parliament for the said county of Cavan, and Henry Maxwell of Bailieborough in the county of Cavan, subject to a yearly rent of £15.
2. Particulars of applicants' fee farm grant: the applicants hold a conversion fee farm grant interest in the said property under the said indenture of lease for three lives renewable forever dated 10 October 1854 and made between Sir John Young of Bailieborough Castle in the county of Cavan, baronet, member of parliament for the said county of Cavan, and Henry Maxwell of Bailieborough in the county of Cavan, whereby the lands and hereditaments as therein described.

*Date: 1 February 2013*
*Signed: Joanne Kangley, Solicitors (solicitors for the applicants), Anne Street, Bailieborough, Co Cavan*

**In the matter of the *Landlord and Tenant (Ground Rents) Act 1967-2005*: notice of intention to acquire fee simple (section 4) – an application by Whitfield Limited (the applicant)**

Notice to any person having any interest in the freehold interest of the following property: all that and those the lands more particularly described in and demised by an indenture of assignment dated 29 October 2002 and made between John Agar of the first part and the applicant of the second part and therein described as all that and those the ground floor of the premises known as 133A Morehampton Road, Donnybrook, situate in the city of Dublin, consisting of a lock-up shed, shed premises and more particularly delineated and described on the map annexed to an indenture of assignment dated 10 March 1995 and between Comhlucht na hÉireann um Árachas CPT of the one part and John Agar of the other part and thereon outlined in blue.

# NOTICES

Now known as 133A Morehampton Road, Donnybrook, Dublin 4.

Take notice that the applicant, being the party entitled to the lessee's interest under the lease, intends to submit an application to the county registrar for the city of Dublin for the acquisition of the freehold interest and all intermediate interests in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid property are called upon to furnish evidence of title to the aforementioned property to the solicitors for the applicant, details of which are provided below, within 21 days from the date of this notice.

In default of such notice being received, the applicant intends to proceed with the application before the county registrar for the city of Dublin for directions as may be appropriate on the basis of the person or persons beneficially entitled to the superior interest including the freehold reversion in the above premises are unknown or unascertained.

*Date: 1 February 2013*

*Signed: Eugene F Collins (solicitors for the applicant), Temple Chambers, 3 Burlington Road, Dublin 4*

**In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by OCS Properties Limited, whose registered office is at First Floor, Fitzwilton House, Wilton Place, Dublin 2**

Any person having any interest in the fee simple estate or any intermediate interest in all and singular the hereditaments and premises situate at the corner of Earl Place (formerly Nelson's Lane) and Sackville Place (formerly Tuckers Row) in the parish of Saint Thomas and city of Dublin, known or formerly known as 6 Earl Place (and now forming part of the rear of Clery's, O'Connell Street, Dublin, department store), held under a lease dated 6 June 1835 from John McDonnell and Eleanor Duff to Peter Purcell for 31 years from 29 March 1835, subject to the yearly rent of £250, with the right of renewal thereof for successive periods of 31 years until the expiration of 999 years from 25 March 1754, the last renewal of which said lease was a renewal lease dated 14 July 1934 from Charles Ryan, Alice Stephenson, John Philip Purcell McDonnell, Randal Vivian McDonnell, Patrick McDonnell, Arthur Edward Cronin, Mary A Cronin and Christina M Burke to Clery and Company Limited for 31 years from 25 March 1928, subject to the yearly rent of £250 (now equivalent to €317.43).

Take notice that OCS Properties Limited, being the company now holding the said property as a yearly rent since the expiration of the said renewal lease dated 14 July 1934, intends to apply to the county registrar for the city of Dublin for the acquisition of the fee simple estate and all intermediate interests in the said property, and any party claiming that they hold the fee simple or any intermediate interest in the aforesaid property is called upon to furnish evidence of their title thereto to the under-mentioned solicitors within 21 days from the date of this notice.

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

*Date: 1 February 2013*

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

## RECRUITMENT

### NOTICE TO THOSE PLACING RECRUITMENT ADVERTISEMENTS IN THE *LAW SOCIETY GAZETTE*

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

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

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


# Sticks and stones may break my bones...

The use of insulting language will no longer be illegal in cases in which a specific victim cannot be identified, *The Guardian* reports.

The *Public Order Act* covers speech and writing on signs and states: "A person is guilty of an offence if he uses threatening, abusive or insulting words or behaviour." In a climbdown by the British government, the legislation will be changed to remove the word 'insulting'.

The push to change section 5 of the act followed a series of headline-grabbing arrests and prosecutions, ranging from an Oxford student asking a police officer: "Do you realise your horse is gay?" – which Thames Valley Police described as homophobic and "offensive to people passing by" – to a 16-year-old holding up a placard that said "scientology is a dangerous cult".

Christian and secular campaigners had complained the clause had been used by police as a 'catch-all' offence to arrest people on trivial matters. It will continue to be illegal to use insulting language when a victim is clearly identifiable, however.

## Hold your horses

**A woman has been convicted of driving without due care and attention as she carried her husband in the boot of their car while he led a horse through Athy town, the Carlow *Nationalist* reports.**

**Heather Josiah (29), of Ardrew Court, Athy, Co Kildare, admitted the offence before Judge Desmond Zaidan at Athy District Court, who was so surprised by the evidence that he asked Inspector Jim Doyle to repeat it.**

**The judge said that the "unusual" incident, which occurred on Fortbarrington Street in Athy on 20 March 2012, was like something from 1890. Gardaí who approached Josiah's Peugeot 406 at the front of a long line of slow traffic were equally surprised to see her husband sitting in the open boot, leading a horse by a rope. Gardaí brought the horse to the family home. Judge Zaidan said the situation could have "gone horribly wrong" if one of the queuing drivers had honked their car horns.**

**The judge convicted Josiah of the road traffic offence and fined her €400 for driving without due care and attention.**

## Pixie the parrot pinched

**A Dublin man who tried to steal a €2,000 parrot who entertains a Co Meath village has been given a choice of donating €200 to charity or face a conviction and fine of €500 at Navan District Court, RTÉ reports.**

**Conor Grall, from Portland Row, Dublin 1, pleaded guilty to two charges – one of theft of the bird and the second relating to criminal damage of a birdcage in Dunshaughlin on 13 December.**

**The court had heard that the accused had stolen Pixie, an eight-year-old African Grey parrot, from the street where he normally perched but was caught shortly afterwards. Pixie's cage is now secured with a lock and**


**chain to the outside wall of the shop.**

**The defendant admitted that he already had Pixie sold when he stole him, as he knew someone who wanted the bird. The case is due back before the court early in February.**

# Easter Island eggs on Chile

Easter Island, a Pacific paradise only 164 square km in size, has seen demonstrations in recent months. The indigenous Rapa Nui – the Polynesian name for the island and people – assert that Chile has robbed them of their ancestral lands.

According to the *Guardian Weekly* and *Le Monde*, they are threatening to declare independence and lodge a complaint against the government at the international Court of Justice in The Hague.

The island, famous for the moai (its mysterious giant heads), beaches and volcanic landscape, is a Unesco World Heritage site. Discovered by a Dutch ship on Easter Sunday 1722, it was annexed by Chile in 1888. Almost 4,000km from Santiago, or five hours' flight, it attracts more than 65,000 tourists every year.

The Rapa Nui have made repeated appeals to the international community, demanding that Chile upholds human rights. "We could ask to become part of Polynesia, which is closer," says Leviante Araki, the speaker of the Rapa Nui assembly, "given that Chile has not fulfilled its obligations."

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