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LOOMING CRISIS IN THE COURTS

On a day when Chief Justice Susan Denham announced that no more appeals could be entertained in the Supreme Court this term – there are already in excess of 90 appeals with priority status there – I suggest that it is time to pause and reflect on the burden that is currently being borne by all of us connected with, and engaged in, our courts system.

The Chief Justice has warned that the Supreme Court cannot accept any more emergency cases this term because of the "unprecedented" number of appeals and a surge in the number of parties seeking priority hearings. New figures reveal that close to 600 appeals were filed with the Supreme Court last year – almost double the number lodged in 2007. Delays in the Supreme Court for non-urgent cases are now running at up to four years.

Endemic delays in the courts have led to chronic backlogs and a series of findings against the Irish Government by the European Court of Human Rights. The Court of Criminal Appeal is also struggling to manage its list. Appeals in the CCA now take up to two years, leading to concerns that some convicted people are being denied an effective right of appeal.

Informed sources suggest that changes in the jurisdictional limits of the District and Circuit Courts are imminent. We have to question the sense in this when the courts are already unable to cope with the workload under the existing jurisdictional limits.

Family law cases around the country are not being dealt with in a timely manner due to the extent of delays in the system. Citizens are being denied their rights and entitlements as a result of these delays.

The answers do not appear to lie with the courts or the courts officers. A radical review of the entire system is required, and no amount of tinkering at the edges can, or will suffice.

"A radical review of the entire courts system is required and no amount of tinkering at the edges can, or will suffice"

Insufficient resources

Clearly, the introduction of a proper Court of Appeal is long overdue. It is something for which resources must be found. One cannot help but notice that the courts are slowly grinding to a halt, with an ever-increasing burden. This is notwithstanding the Trojan work undertaken on a daily basis by the staff of the courts, the Courts Service and all members of the judiciary – from the District Courts through to Circuit, High and the Supreme Court itself. We must reflect on the closure of so many courthouses when there is significant evidence that more, not less, are required.

On the same day as the Chief Justice's comments, the Courts Service issued a press release stating that the overall cost to the State for its judges had dropped by 31% from €2.4 million in 2008 to €1.7 million in 2012. It commented on "an ongoing general re-organisation of court venues in districts across the country – which continues to result in far less travel within large court districts and a freeing up of court time to hear more cases".

I would suggest that access to justice is always going to cost money. While the Courts Service is to be commended for cutting costs, this should never happen at the expense of access to justice.

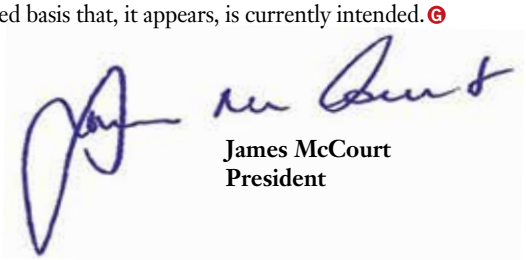
Concerns about restricted recruitment

A further concern of the Society is the pending appointment of specialised judges to deal with cases under the new *Personal Insolvency Act*, but whose appointments will apparently be made solely from the ranks of county registrars.

Why are practising solicitors, a great many of whom would have the ability to perform these new roles, excluded even from consideration for such appointments? How can it be in the public interest that lawyers, in every other way suitable but who do not happen to be already employed by the State as county registrars, should be excluded even from applying for these positions?

The Society has fought for many decades to bring about the current situation whereby any solicitor with the necessary experience, ability, independence of mind and good character should be eligible for appointment to any judicial position. Our principled position on this, in the public interest, remains as it has always been.

Finally, will these new judges, appointed only it seems to deal with cases under the *Personal Insolvency Act*, in the future be capable of being transferred to deal with crime, family law or the other greatly varied work of a judge of the Circuit Court? If so, the appointment of these new judges should not be made on the very restricted basis that, it appears, is currently intended.



James McCourt
President

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... 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

Wonderful, wonderful Copenhagen

DUBLIN

John Glynn is putting the final touches to the DSBA conference in Copenhagen where, as indicated on the website, the dates will be 18-22 September.

On the seminar front, the YDS kicked off the season with a seminar on 'Social media – a web of changes', at which social media concepts were discussed and advice proffered about creating online profiles and the risk of over-exposure to employers. Catherine O'Flynn of William Fry gave an overview in relation to social media policies, ownership of data, use of social media during and outside working hours, and case law in the area.

The Practice Management Committee of the DSBA held a seminar on regulation, where the speakers were Keith Walsh (DSBA vice-president), John Sexton and Seamus McGrath.

The fertile area of mental health law was addressed during an end-of-February seminar entitled 'Current capacity issues in practice'. Speakers included Jim Finn (wards of court), Anne Stephenson (solicitor) and Aine Hayes (DSBA Council member), who offered practical advice and guidance in dealing with current difficulties surrounding capacity issues.

Putting some spring into Galway's step

GALWAY

James Seymour is looking forward to spring after the drudgery of January and hopes that all colleagues will return to the CPD schedule with a spring in their step. Says James: "As you are all aware, the CPD requirement has increased to 14 hours. We will endeavour to provide 24 hours of CPD this year for the price of your annual membership of €50. We would be very much obliged for the prompt payment of your membership fee and would be interested in hearing from anyone interested in giving a talk to the Galway Bar Association"

Forthcoming events and notices include a free three-hour CPD management skills on Friday 15 February 2013 at Galway Courthouse. There will be a short presentation on the Law Society group income protection scheme for members and a presentation by Breon Manning on business protections for partnerships, section 785 cover, and inheritance tax reliefs.

James also draws members' attention to the following Courts Service messages:

a) "In the interest of correctness, please ensure all orders for the president [of the Circuit Court] have the correct title in the preamble: The Honourable Mr Justice Groarke."
b) "Please note that a file may not be requested to be brought to court for an application without something in writing for the file. Queries have arisen on cases that were brought to court for applications without any paperwork and the other side are unaware of the application or as to how a file ends up before the judge. No file will be presented before the court without a note from the applicant requesting it. No application should ever be made in court without the file, as the order will not be recorded."

In other news, VHI still requires undertakings. There's a plan to circulate a standard letter of complaint in the next bulletin to be used by colleagues to get existing undertakings lifted.

Also, AIB will now accept third-party cheques for lodgment to the solicitor's client account once they are endorsed on the rear and stamped with the solicitor's office stamp. While this is a step in the right direction, the GBA feels that the bank should not question the lodgment of any cheque to a solicitor's client account where accompanied by the written authority of a client. This is being followed up with AIB.

The Galway Bar Association is planning a dinner shortly to honour Mr Justice Raymond Groarke on his appointment as President of the Circuit Court.

"Also, we hope to honour several of our colleagues in the city and county shortly who are qualified for over 50 years," says James.

Captain Fantastic!

KERRY

Members of the Kerry Law Society made a presentation to Killarney-based solicitor Eoin Brosnan on 25 January 2013 to celebrate his nomination as captain of the Kerry senior football team for 2013. The presentation took place in Tralee and was attended by a large number of members and their children. The Dr Croke's man is the third member of the Kerry Law Society to have played for Kerry's senior football team (see story, p41)

Because they're worth it

KILDARE

Hair testing and DNA is certainly a new one on me, but those far-sighted colleagues outside the Pale were certainly, er, ahead of the game at their most recent seminar! The course provided an overview of the science behind blood alcohol and hair alcohol abuse testing, the benefits of such tests; and insight into what these might reveal about a person's lifestyle.

Hair alcohol testing can provide evidence of an individual's chronic, excessive alcohol consumption for a period of up to six months. The seminar went into great detail about such testing.

Any colleagues with a further interest in these issues should contact Andrew Cody.

New chairman for Arthur Cox

Arthur Cox has announced the appointment of Ciarán Bolger as chairman, with effect from 1 May. A partner in the corporate department, Ciarán joined the firm in 1992 and has been a partner since 1997. He replaces Eugene McCague, who has completed his two terms as chairman, having previously served as managing partner. Eugene will return to full-time client work on 1 May.

Managing partner Brian O'Gorman said that the firm was "very fortunate to have a partner of Ciarán's talent, integrity and commitment to replace Eugene" who, he said, had made an exceptional contribution to Arthur Cox.

In News this month...

NAMA rent reductions saved millions last year

Rent reductions approved by NAMA for 212 businesses led to an annual aggregate rent reduction value of €13.5 million in 2012.

In a written Dáil response to Fine Gael TD Nicky McFadden, Minister for Justice Alan Shatter confirmed that a further 56 applications were currently under review. "Of the 276 eligible applications received to date, only eight have been refused, representing a 97% approval rate by NAMA," he said.

Asked whether the minister had any plans to re-examine the upward-only rent reviews in the context of the Irish arm of DIY chain B&Q going into examinership, Mr Shatter replied that there was "a substantial concern that any legislative scheme involving interference in the contractual relationships of private parties would find it extremely difficult to survive a constitutional challenge".

The Government had been advised, he said, that "any model proposed would require the payment of compensation to landlords whose rights were infringed in order to ensure that the proposal would be compatible with the Constitution and with the *European Convention on Human Rights*".

In December 2011, the Government decided not to proceed with legislation to abolish upward-only rent review clauses in commercial leases.

Privacy from birth to death and beyond

The School of Law at NUI Galway will hold a seminar entitled 'Privacy from birth to death and beyond: European and American perspectives' on Friday 8 March 2013 at 9.30am in the Aula Maxima, NUI Galway.

Experts from the US, Europe and Ireland will explore topics such as the recent ECJ reference on the right to be forgotten, 'do not track' laws, children and online privacy, privacy after death, cyberbullying, defamation and data protection.

The conference is free for students and trainees, €25 for early career practitioners (five years or less) and €50 full rate (lunch will be provided). More information and registration details are available at www.conference.ie/conferences/index.asp?conference=211.

April AGM for SBA

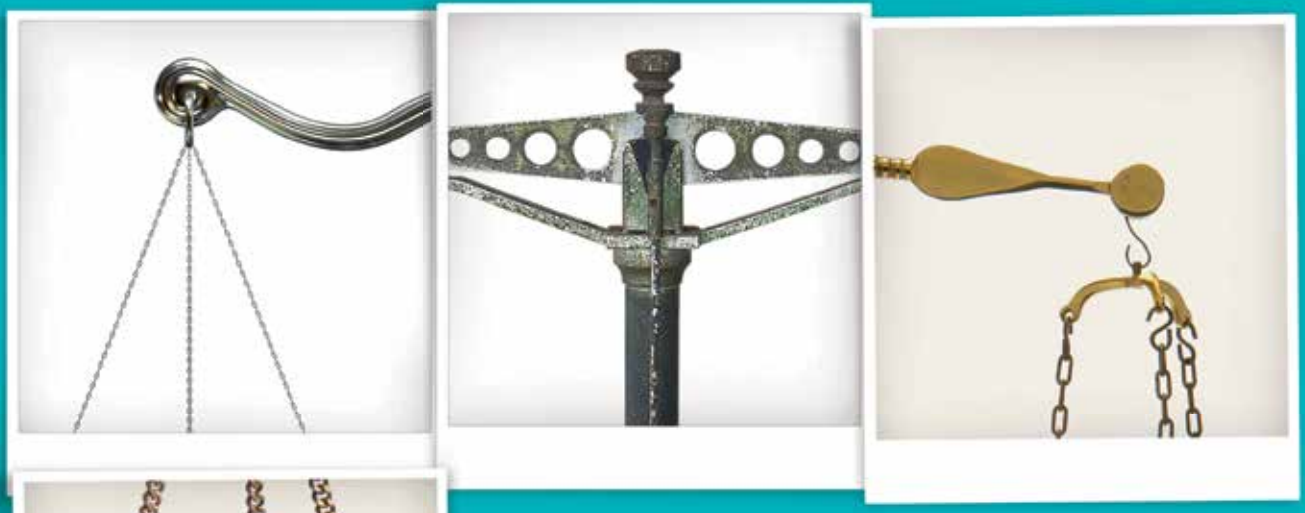
The 149th annual general meeting of the Solicitors' Benevolent Association will be held at the Law Society, Blackhall Place, Dublin 7, on Monday 15 April 2013 at 12.30pm, to consider the annual report and accounts for the year ended 30 November 2012, to elect directors, and to deal with other matters appropriate to a general meeting.

New ISIP chairman

Barry Cahir (partner in William Fry's Insolvency and Corporate Recovery Department) has been appointed chairman of the Irish Society of Insolvency Practitioners (ISIP). Cahir has been a partner at William Fry since 2006,

He said: "ISIP provides an invaluable forum whereby our members – those lawyers and accountants specialising in the areas of turnaround and insolvency – can share

experience, knowledge and expertise of both the practice and the law of insolvency in Ireland."



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Society demands public inquiry into murder of Pat Finucane

The Law Society has written to British Prime Minister David Cameron to add its voice to those of the Finucane family, the Irish Government and many others in demanding a public inquiry into the murder of Belfast solicitor Pat Finucane.

The Council decided to reiterate its call for a public inquiry into the murder of Pat Finucane, regardless of the detailed report issued in mid December, which was undertaken for the British Government by Sir Desmond de Silva QC.

The letter, which issued on 20 December 2012, was copied to Taoiseach Enda Kenny, Justice Minister Alan Shatter and to the chairman of the Society's Human Rights Committee, Michael Finucane, who is the son of Pat Finucane.

The brutal slaying of Pat Finucane in front of his wife and children, in the words of the de Silva report, dates from "an extremely dark and violent time in which a lawyer could so callously and tragically be murdered as a result of discharging his professional legal duties".

As de Silva finds elsewhere in the report, "a series of positive actions by employees of the state actively furthered and facilitated this murder and in the aftermath … there was a relentless attempt to defeat the ends of justice".

Negative response received to Society's letter to David Cameron

Shocking level of state collusion

The Society says that these findings are not new. The earlier reports of both retired Metropolitan Police Chief John Stevens and former Justice Peter Cory of the Supreme Court of Canada had made it perfectly clear that there was an utterly shocking level of state collusion in the murder and that, equally unacceptably, agents of the state also sought to frustrate the investigations of this heinous crime.

In the letter to the prime minister, Law Society President James McCourt said: "I readily acknowledge your utter condemnation of what occurred and your apology for it to the Finucane family in your speech in the House of Commons ... Nevertheless, in the view of the Law Society of Ireland, the investigation to date simply is not enough. A public inquiry is still required, as was recommended by the *Weston Park Agreement* in 2001 and recommended also by Judge Cory."

This is not the first time the Law Society has demanded that a public inquiry be carried out in order to reveal everything that happened in this appalling case. As long ago as April 1999 – almost 14 years ago – the Society made just such a public call.

In concluding his letter to the prime minister, President McCourt states: "On behalf of the solicitors' profession in this jurisdiction, I respectfully but insistently repeat that demand now. The full extent of the state's collusion in this murder can only be exposed by such an inquiry."

Negative response

The Society received a negative response in a letter from Secretary of State for Northern Ireland Theresa Villiers, dated 15 January 2013. In reply to the Society's request for a public inquiry, she states: "The government considered very carefully whether or not to hold a public inquiry. Given that we had already accepted that there was collusion in this case, our priority was to establish a full public account about what happened as quickly and effectively as possible.

"I strongly believe that Sir Desmond de Silva's review provided the best way of getting to the truth in this case and, in doing so, put into the public domain all that is known about the circumstances of Patrick Finucane's death. Experience has shown that public inquiries into the events of the Troubles take many years and can be subject to prolonged litigation, which delays the truth emerging. The prime minister has made clear that more costly and open-ended inquiries are not the right way to deal with Northern Ireland's past."

Irish ways and Irish laws

The PPCII elective Advanced Legal Practice Irish (ALPI)/Ardchúrsa Cleachtadh Dlí as Gaeilge (CDG Ardchúrsa) is open to practising solicitors who wish to be registered on the Irish Language Register (Law Society)/Clár na Gaeilge (An Dlí-Chumman).

In order to be entered on the Irish Language Register, a solicitor must take this PPCII elective course and pass all course assessment and attendance requirements.

The course contact hours will be delivered on six consecutive Thursday evenings from 6pm-8pm. Lectures in weeks one and two will be made available online. Final course dates will be made available once overall PPCII timetabling is completed.

This 'blended learning' course will include a mixture of direct contact time with online interaction and the completion of course tasks. Assessment will combine continuous assessment and an end-of-course oral presentation. This course will fulfil the full practitioner CPD requirement for 2013, that is, 14 hours of CPD, including one hour of regulatory matters and three hours of management and professional development skills.

It is recommended that course participants have a good level of IT skills and be familiar with web browsing, word processing, uploading/downloading files and watching online videos. A Leaving Certificate Higher Level standard of Irish is a minimum standard.

The Advanced Legal Practice Irish Course was awarded the European Language Label 2012 (see ec.europa.eu/languages/european-language-label/index_en.htm for more information).

The fee for 2013 is €625. The closing date for applications is Friday 15 March at 5pm. For further details and an application form, please contact Robert Lowney/Roibeard Ó Leamhna: r.lowney@lawsociety.ie; tel: 01 672 4952.

'Direct unsolicited approach' rule to be reviewed

A group has been established to review the rule banning the direct and unsolicited approach of non-clients by a solicitor. The move followed a heated debate at the Law Society's AGM in November on the proposed motion that the regulation be "abolished, as it has ceased to have any practical effect and is impossible to enforce in practice".

The rule in question is regulation 13 of the *Solicitors Acts 1954-2002 Solicitors (Advertising) Regulations 2002*.

The motion caused quite a stir among the large attendance on the night, particularly from the criminal law fraternity, who voiced their opinions loudly. It became obvious that it was an issue that particularly affected them. All agreed that while touting (that is, a direct unsolicited approach to non-clients) had always been around, all concurred that the problem had got a lot worse in recent years. After much debate, the Law Society's Council asked the motion's proposer and seconder whether they would consider allowing them to replace the word 'abolish' with 'review', to which they agreed – and so the Regulation 13 Review Group was born.

The review group consists of Aisling Kelly, James MacGuill (chairman), Emer O'Sullivan and Dara Robinson – all criminal law practitioners. Committee members include John Elliot (Registrar of Solicitors), Linda Kirwin (the Society's head of Complaints and Client Relations) and Simon Murphy (a former chair of the Complaints and Client Relations Committee).

The Regulation 13 Review Group met with members of the European Criminal Bar Association on 25 January

The ambit of the review group is to explore all aspects of the regulation, including how it might be enforced, or perhaps abolished altogether. The views of practitioners on the night were taken on board by the Law Society Council, which considered the issue a serious one. It asked the review group to report back to it within six months of its formation.

At its first meeting on 7 December 2012, an ambitious plan was laid out, to include meetings with the members of the judiciary, the Commissioner of An Garda Síochána, and criminal defence solicitors in other European jurisdictions.

On 25 January 2013, a meeting took place between the review group and several members of the European Criminal Bar Association. The meeting was hugely informative, with our European counterparts acknowledging the issues being faced in Ireland, and largely echoing similar problems within their own jurisdictions.

It was agreed by all that the issue of direct unsolicited approach to non-clients was to be found largely in four main areas:

- Outside courts and courthouses,
- Within police stations,
- Within prisons, and
- With, or involving, translator companies.

This meeting gave the review group much to ponder over. The group is most anxious to receive input from all interested practitioners no later than **Tuesday 19 March**. This can be done by emailing Linda Kirwan at l.kirwan@lawsociety.ie.

Still supporting our job seekers in 2013

The Law Society Skillnet and Finuas Networks have once again been successful in securing funding from Skillnets Ltd for the Job Seekers' Support Programme (JSSP).

An information evening will take place on Wednesday 6 March at 5pm at Blackhall Place.

The programme kicks off in April with onsite training, which will be followed by a facilitated work placement programme being run by the Law Society's Career Support service.

All courses funded under the JSSP are free for job seekers, subject to eligibility.

Courses available under the Law Society Finuas Network JSSP:

- **CIMA-accredited diploma in Islamic finance,**
- **Corporate governance, risk, compliance, investment funds and credit union law.**

Courses available under the Law Society Skillnet JSSP:

- **In-house legal officer,**
- **Litigation.**

If you are a job-seeker, you can register your interest in any of these programmes by emailing jssp@lawsociety.ie.

Sting in the tail for judicial appointees

The president of the Association of Judges of Ireland, Mr Justice Peter Kelly, has asked that members of the legal profession who are considering applying for appointment to judicial offices be made aware of changes in the manner of calculation of retirement benefits for the holders of such offices.

Mr Justice Kelly points out that the net effect of the provisions of section 22 of the *Public Service Pensions (Single Scheme and Other Provisions) Act 2012* "appears to be to extend from 15 to 20 years the reckonable service which future judges of the Circuit, High or Supreme Court must have in order to qualify for a full pension".

In addition, such appointees "will be obliged to make a 13% contribution to their pension. This provision is also new and represents a 9% increase on the 4% contribution which existing judges have to make".

Section 22 deals with the calculation of retirement benefits for the holders of judicial offices.

Justice and economy suffer from choked Supreme Court

"Appealing from the Commercial Court to the Supreme Court is like driving from a six-lane highway onto a narrow, winding boreen!"

This is how Law Society Director General Ken Murphy, in a radio interview, vividly illustrated the need to introduce a Court of Appeal following the publication of a report on the subject in May 2009.

The report was produced by the Working Group on a Court of Appeal, which was chaired by Chief Justice Susan Denham. Murphy was the Law Society's representative on that working group. He contributed to and fully supported the working group's conclusions.

The report has become very relevant again, due to the continuing and worsening delays in the Supreme Court. As Chief Justice Denham recently announced, delays are such that, with an excess of 90 appeals with priority status already listed for the Supreme Court this term, no further cases can now be listed. Delays in the Supreme Court for non-urgent cases are now running at up to four years.

Recognising the urgency of the problem at last, the Government

Ken Murphy: 'Referendum cannot come quickly enough'

is reported now to be considering holding the necessary referendum in autumn 2013, inviting the Irish people to approve the change in the Constitution that would be necessary to provide a legally sound basis for the creation of a Court of Appeal, which could be the final court for a great many High Court appeals. This would relieve the intolerable pressure on the Supreme Court, in that, in future, it would no longer be the final appellate court for all cases.

"That referendum cannot come quickly enough," Murphy says. "A Court of Appeal, interposed between the High Court and the Supreme Court and dealing with probably the majority of High

Chief Justice: 'No further cases can now be listed in the Supreme Court'

Court civil and criminal appeals, is a necessary and overdue upgrade of Ireland's justice system."

He points to the contrast with other jurisdictions, in which the final appellate court can choose its cases – constitutional cases and other cases of major public importance for example – and thereby give such cases the time necessary to develop a deeper and more consistent jurisprudence. Matters disposed of by courts of last resort in 2007 in other common law jurisdictions were: Canada (58), Britain (82), Australia (66) and the United States (74). In Ireland, the Supreme Court treadmill disposed of no less than 229 matters – more than three times the number dealt with by the US Supreme Court.

The negative impact on citizens and on the economy of this choking of our Supreme Court are set out well in the 2009 working group report.

Numerous other initiatives have been introduced in an attempt to deal with the problem, such as the introduction of case management in the superior courts, the greater use of technology by the High and Supreme Courts, and the encouragement of mediation and other processes for the resolution of disputes outside the courts system.

As the statistics demonstrate, none of these initiatives, although welcome in themselves, has proved adequate to address the infrastructural deficit that can only be properly resolved by the introduction of a Court of Appeal.

Between 1968 and 2008, the number of High Court judges expanded from seven to 36, with a consequent increase in the volume and complexity of High Court litigation.

"A consequent increase in appellate capacity is essential for citizens, for the economy and for the judges themselves," Murphy insisted, before quipping, "Free the Supreme Court Eight!"

Dramatic fall in judicial costs

The overall cost to the State for its judges has dropped by 31% from €2.4 million in 2008 to €1.7 million in 2012.

The decrease has been assisted by a reduction in the cost of travel and accommodation, where costs have fallen by one-third over the past five years. The savings in the cost of accommodation and subsistence amounted to 42% compared with 2008. Transport costs reduced by 14% in the same five-year period. According to the Courts Service, this is at a time of substantial increases in court workloads and an increase in the numbers of judges.

Irish courts dealt with "a general increase of 26%" in workload, with the number of judges rising from 131 in 2006 to 146 in 2011.

The cost of judicial attire rose last year by €18,000, but this reflected "the historically high appointment of almost 20 new judges to replace those who had retired. This figure is set to drop in coming years as the requirement for judges to wear ceremonial wigs has been removed.

The Courts Service says that these savings reflect a general 25% reduction in travel and subsistence rates and "an ongoing general reorganisation of court venues in districts across the country – which continues to result in far less travel within large court districts and a freeing up of court time to hear more cases".

Almost 98% of judicial travel and subsistence expenses are incurred where judges are required to attend courts away from their home locations.

Courts Service awards fee-franking contract

The Courts Service has awarded the contract to provide its fee-franking system for the legal sector to Neopost Ireland.

The company's technologically advanced fee-franking machine, the Neopost CS200, will offer solicitors an online re-crediting facility, eliminating the need for solicitors to attend a court office to have their machine re-credited.

The machine can also operate on a pay-as-you-go basis, allowing legal practitioners to manage cash flow by only spending what's needed on court documentation.

The managing director of Neopost, Cathal O'Boyle, says that their new system will offer solicitors "a faster and more convenient method of franking court documents.

"Our first priority is to ensure a smooth transition for customers from their current system to the Neopost CS200."

All customers will be managed by Neopost account managers located throughout the country and supported by their helpdesk, which is located at their Dublin head office, tel: 1850 33 44 55. See www.sea.neopost.ie.

No garda questioning without solicitors present in future?

Justice Minister Alan Shatter has established a working group to look at how Ireland might put into practice a requirement to have a lawyer present during garda questioning.

In response to the minister's invitation, the Council of the Law Society nominated former president James MacGuill as a member of this working group. Apart from his background as a very experienced criminal law practitioner, MacGuill has been closely following the European developments on this issue as the Society's representative on the Council of Bars and Law Societies of Europe.

Irish law does not currently allow a lawyer to be present during police questioning of persons in custody. However, given the trend in the case law of the European Court of Human Rights, and the fact that the presence of a lawyer is a central aspect of the proposed *Directive on the Right of Access to a Lawyer in Criminal Proceedings*, the minister is considering the possibility of a change in approach.

The proposed EU directive is under negotiation with the European Parliament, and it is hoped that it will be concluded during the Irish presidency. Although Ireland did not opt in to the measure, we can opt in later once the measure has been adopted. To opt in later, we would have to satisfy the Commission that our domestic legislation and procedures were sufficient to give effect to the directive in Irish law.

Against this background, the minister decided to set up a group to offer advice and recommendations in relation to a possible scheme that would provide for the presence of a legal representative during garda interviews with persons in custody. It is chaired by Dr Moling Ryan, Chief Executive of the Legal Aid Board.

Terms of reference

The working group's terms of reference are:

- To consider the content and requirements of the proposed draft *Directive on the Right of Access to a Lawyer in Criminal Proceedings*,
- To recommend one or more practical and cost-effective options for the establishment of a scheme to facilitate the implementation of the provisions in the draft directive in this jurisdiction,
- In making its recommendations, to have regard to arrangements in comparable jurisdictions,
- In making its recommendations, to take specific account of current budgetary constraints and to provide an estimate of potential costs that might accrue to the Garda Station Legal Advice Scheme, and
- To provide a written report incorporating recommendations within four months.

The group is not required to make recommendations on the role of the legal representative during interviews.

This very interesting development was discussed in detail at the most recent meeting of the Society's Criminal Law Committee. Members of the profession are invited to communicate any thoughts they may have on the issue by email to the committee's secretary, Joyce Mortimer, at j.mortimer@lawsociety.ie.

Diploma Programme launches spring schedule

The Law Society's Diploma Programme has launched its spring programme. Starting in April, the following courses will be on offer:

- Diploma in Technology Law,
- Diploma in Commercial Litigation,
- Diploma in Employment Law, and
- Certificate in District Court Advocacy.

The Diploma in Technology Law offers a detailed insight into the current framework of technology-related legislation in Ireland. It will expose practitioners to the latest trends in technology, explain criminal and civil liabilities and the enforcement of intellectual property and information technology rights.

The Diploma in Commercial Litigation will provide practitioners with a comprehensive knowledge of this legal field and its practical impact on the commercial landscape in Ireland.

The highly popular Diploma in Employment Law is now in its seventh year. Learning opportunities to enhance solicitor/client communication skills are also included. The Certificate in District Court Advocacy allows practitioners to analyse some of the key areas of District Court practice, as well as helping to make students more comfortable with their public presentation skills.

The Diploma in Technology Law and the Diploma in Employment Law both integrate the iPad in the delivery of the course, demonstrating its effectiveness as an educational and mobile learning tool, as well as being an invaluable device in everyday practice.

For further information on all our courses, check the Diploma Programme section of the Law Society's website at www.lawsociety.ie/diplomas' or email diplomateam@lawsociety.ie.

Hugh M Fitzpatrick lecture

The 28th Hugh M Fitzpatrick Lecture in Legal Bibliography, in association with the Irish Manuscripts Commission, will be delivered by Dr Thomas Mohr, School of Law, University College Dublin, on the topic of 'The oath in the Constitution of the Irish Free State – a history'.

The lecture will be held at 45 Merrion Square.

RSVP: Hugh M Fitzpatrick, Lectures in Legal Bibliography, 9 Upper Mount Street, Dublin 2. Tel: 01 269 2202; email: hmfitzpa@tcd.ie no later than 12 March 2013. Places on a first-come, first-served basis.

NEWS FROM THE LAW SOCIETY'S COMMITTEES AND TASK FORCES

The '4Cs' of social media policy

IN-HOUSE AND PUBLIC SECTOR COMMITTEE

The use of social media by employees was one of the topics covered at the last annual conference organised by the committee in November 2012. Andrea Martin of Eugene F Collins discussed employers' potential vicarious liability for website and social media postings by employees or contractors. Ms Martin recommended that employers have a clear internet and social media policy. A clearly drafted policy can assist an employer in the defence of vicarious liability claims and makes clear where violations of it by employees may constitute grounds for disciplinary actions against employees. She described what she called the '4Cs' of drafting an employer internal internet and social media policy:

1) *Consider* what you, as an employer, want to achieve with the internet usage and social media policy.
2) *Create:* articulate your policy and write it down, having taken advice as required – take marketing, PR, legal and insurance advice. See online samples at http://socialmediagovernance.com/policies.php, remembering to customise them for our jurisdiction and laws.
3) *Communicate* the policy to all employees; develop an active strategy for active buy-in; consider having employees sign an acknowledgement of receipt of the policy; communicate updates of the policy in a similar manner; and carry out in-house training and education about the policy.
4) *Comply:* Encourage and monitor compliance with the policy, spot check and keep records (for example, keep notice of take-down requests, take screen shots of any offending material, and keep copies of the steps taken to deal with any of the offending material).

In claims for defamation, breach of copyright/privacy/confidentiality/trademark rights, vicarious liability and unfair dismissals, the '4Cs' will provide supporting evidence of: (a) taking reasonable care in relation to online activities by employees, (b) communication of employer expectations and disciplinary issues to employees, and (c) an employee's actions not having been authorised by the employer.

Unacceptable Nice Class Headings

INTELLECTUAL PROPERTY LAW COMMITTEE

The Patents Office has published a list of Nice Class Heading General Indications (Class Heading Terms) that are unacceptable to the Patents Office. The list was complied by OHIM, European national offices (which includes the Irish office) and the Benelux office as an output from the Class Headings Harmonisation Project under the OHIM Convergence Programme.

The list and an explanatory note are on the Patents Office's website, www.patentsoffice.ie.

PROMOTING WOMEN IN CONFLICT RESOLUTION

Blackhall Place will be the venue for what promises to be a unique conflict resolution conference on 8 March 2013, write Anne-Marie Blaney and Maura Butler

Anne-Marie Blaney is a committee member of the Chartered Institute of Arbitrators (Irish Branch), and is solicitor with the Legal Aid Board

Maura Butler is chair of the Irish Women Lawyers' Association and liaison for Law Society Skillnets

Speakers from Ireland, Northern Ireland, England, Belgium, France, Switzerland and Russia will gather on 8 March at the Law Society's headquarters to exchange knowledge, debate and discuss developments nationally, at European level and globally.

The conference is the first collaboration between the Chartered Institute of Arbitrators (Irish Branch), the Irish Women Lawyers' Association and ArbitralWomen, with Law Society Skillnet.

The result is a conference that will engage, inform and provide an opportunity to celebrate women as contributors and leaders in conflict resolution and peace building on International Women's Day 2013. The collaboration is inspired by the desire to promote and enhance existing dispute resolution practice, update professional knowledge, renew networks and identify strategies to promote sustainable participation of women.

Programme detail

The conference gathers speakers who are accomplished and experienced practitioners, academics, policy makers and activists. The plenary speeches will deliver fresh perspectives on international peace building and dialogue, gender value in negotiation, the role of the ombudsman, and ethics and diversity in dispute resolution.

Whereas women are well represented at the higher levels in family dispute resolution, the field of international dispute resolution and arbitration is less even. The expert contributions at this conference in the field of international arbitration will come from ArbitralWomen.

Is it a bird, is it a plane? Eh, it's a bird

There will be a rich contribution to the debate around construction dispute resolution, focusing on adjudication, conciliation and arbitration.

The conference promises to highlight and promote the leadership role of women in conflict resolution. It will encourage discussion around gender balance and participation of women at all levels of conflict resolution in our global and local society. The themed panel sessions provide the chance for multidisciplinary engagement with the following aspects of alternative dispute resolution:

- National and international mediation practice and perspectives,
- Industrial relations and workplace mediation,
- Restorative justice – facilitated by the Association for Criminal Justice Research and Development,
- UNSCR 1325, Ireland's national action plan 2011-2014, gender research and conflict resolution,
- International arbitration facilitated by ArbitralWomen,
- Family and child issues dispute resolution mechanisms, including mediation and collaborative practice, and
- International peace mediation.

Goals

UN Security Council Resolution 1325 on women, peace and security calls for the involvement of women as mediators in all stages of peace processes, including mediation efforts.

It highlights the critical role of women and girls in conflict prevention, peace negotiations, peace building and post-conflict reconstruction and governance.

UN Secretary General Ban Ki-Moon states: "Engaging women and promoting gender equality as part of our work for peace and security is a daily responsibility and an unfinished mission for all of us. It is time for us to finally recognise the role and power of women to help us build a peaceful world."

LANGUAGE COULD BE TRUMP CARD IN PLANNING DISPUTES

Several controversial planning disputes in recent times have involved lands in whole or in part in Gaeltacht areas, writes Dáithí Mac Cárthaigh, but language choice could be key

Dáithí Mac Cárthaigh is a practising barrister

Although legal challenges have been a feature of many planning disputes in Gaeltacht areas, more often than not, a trump card was left unplayed: that is, the duty of the planning authorities to protect and promote Irish as the community language of the Gaeltacht.

The point of departure is, of course, our familiar friend, the development plan. Section 10 of the *Planning and Development Act 2000* provides, among other things, as follows: "10(1) A development plan shall set out an overall strategy for the proper planning and sustainable development of the area of the development plan and shall consist of a written statement and a plan or plans indicating the development objectives for the area in question;
(2) Without prejudice to the generality of subsection (1), a development plan shall include objectives for ... (m) The protection of the linguistic and cultural heritage of the Gaeltacht, including the promotion of Irish as the community language, where there is a Gaeltacht area in the area of the development plan."

Pursuant to sections 18-20, local authorities may, in consultation with Údarás na Gaeltachta, (the Gaeltacht development authority), draw up local area plans for Gaeltacht areas within their jurisdiction. Regional authorities, when making regional planning guidelines that affect the Gaeltacht, shall have regard to the need to protect the linguistic and cultural heritage (s23(4)(b)).

Such provisions are usually confined to mitigating the anglicising effect of housing estates/clusters – involving as they do an influx of English-speaking households, which leads to language shift from Irish to English in public spaces and a breakdown in intergenerational language transmission.

> ***"Where an application for planning permission is opposed on the grounds that it would, if granted, adversely affect the linguistic or cultural heritage of the Gaeltacht, one should conduct such an appeal in Irish in order to stress one's clients' bona fides"***

Statutory duty

Inadequacies in such development plans may provide a point of departure for community activists. Given the new time constraints for initiating judicial review under the *Rules of the Superior Courts*, the option of a complaint to the Official Languages Commissioner for this breach of statutory duty should be considered.

Even where the development plan is inadequate, the obligation remains on An Bord Pleanála to take certain policy matters into account, including the above imperative relating to the promotion of Irish as the community language in the Gaeltacht. The fourth schedule of the *Planning and Development Act 2000* includes among the reasons for refusal of planning permission that exclude compensation that "the proposed development would adversely affect the linguistic or cultural heritage of the Gaeltacht".

An Bord Pleanála has imposed language conditions on developments in various Gaeltacht areas. Of course, it can only consider such issues if asked to do so. The board is obliged to be able to deal with such issues through the medium of Irish. Section 120 of the *Planning and Development Act* provides that the board shall have "regard to the need to ensure that an adequate number of staff are competent in the Irish language so as to be able to provide service through Irish as well as English".

The board is also obliged to conduct oral hearings relating to lands within the Gaeltacht through Irish, unless all parties agree to an English hearing. Section 135(8), as amended, provides as follows:

a) An oral hearing may be conducted through the medium of the Irish or the English language,
b) Where an oral hearing relates to development within the Gaeltacht, the hearing shall be conducted through the medium of the Irish language, unless the parties to the appeal, referral or application to which the hearing relates agree that the hearing should be conducted in English,
c) Where an oral hearing relates to development outside the Gaeltacht, the hearing shall be conducted through the medium of the English language, unless the parties to the appeal, referral or application to which the hearing relates agree that the hearing should be conducted in the Irish language.

Default position

A hearing being conducted through Irish or English is without prejudice to the rights of parties and witnesses to conduct their side of the proceeding in their official language of choice. The section is silent as to the

"An influx of English-speaking households leads to language shift from Irish to English in public spaces and a breakdown in intergenerational language transmission"

medium of the hearing where the lands lie partly within and partly outside the Gaeltacht. In the absence of a provision giving the board the power to make such a determination, the default position would seem to be a bilingual hearing. In circumstances where the board seeks to proceed in English with an oral hearing relating to lands partly or wholly in a Gaeltacht area, judicial review would be an appropriate remedy.

Where an application for planning permission is opposed on the grounds that it would, if granted, adversely affect the linguistic or cultural heritage of the Gaeltacht, one should conduct such an appeal in Irish in order to stress one's clients' *bona fides*.

Clients who oppose applications on such linguistic grounds will also feel that they have had a full and fair hearing where they can make their point in Irish to officials, who should grasp the concept of language shift from Irish to English in the Gaeltacht as a result of inappropriate development.

'The most serious decision a court can make'

From: Diego Gallagher, Byrne Wallace, 2 Grand Canal Square, Dublin 2

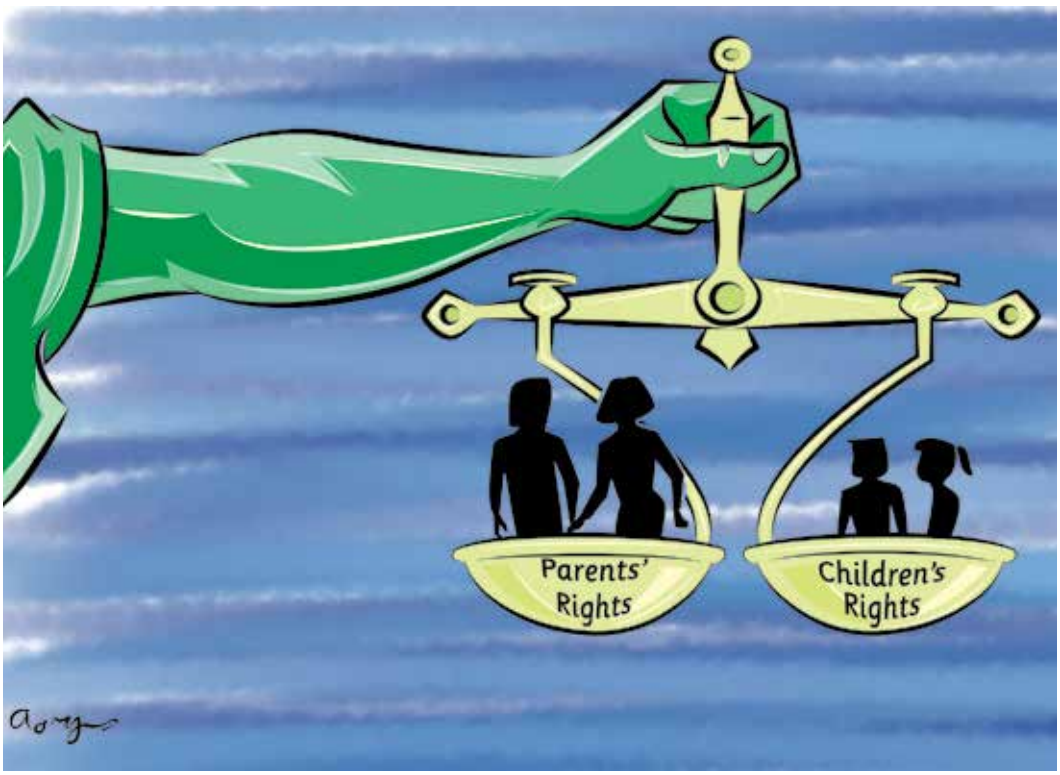
I refer to the article 'Proposed amendment is far from child's play', published in your November 2012 issue (p16). In his article, Malachy Steenson states: "Public law childcare proceedings are the only area of law in this country where rumour, suspicion and innuendo are treated as fact. Hearsay evidence is permitted, and the same evidence appearing month after month becomes the truth."

This is a statement that cannot go unchallenged. The granting of a care order in respect of a child is the most serious decision a court in Ireland can make – in my opinion, more serious than any criminal sanction.

There are numerous safeguards in public law childcare proceedings to ensure that parents are afforded full fair procedures. In Dolphin House, there are two dedicated courts specifically for childcare proceedings, which have benefited from the continuity of having, by and large, the same judges presiding over cases.

In District Court proceedings in Dublin, all parents are legally represented unless they choose not to avail of representation. Most parents are represented by Legal Aid Board solicitors (and, in a high proportion of cases, they are also represented by counsel) with specific expertise in this area. A dedicated Legal Aid Board childcare office providing advice and representation is available to parents in the Dolphin House courthouse.

A childcare practice direction, drawn up by District Court President Rosemary Horgan and Judge Brendan Toale, has been in operation since September 2012, which has detailed sections dedicated to ensuring that fair procedures are followed at all times. This benefits both the parents and the child. There are specific sections relating to representation, safeguarding the rights of parents, and ensuring a fair court process. The admission of hearsay evidence is highly regulated by both case law and statute. Section 23 of the *Children Act 1997* allows for the admission of statements made by children under strict conditions, and the court shall have regard to any risk that such admission will result in unfairness to any of the parties to the proceedings.



Further, the appointment of independent guardians *ad litem* in the vast majority of cases ensures that there is an independent voice advocating for the child in the proceedings. The State is the subject of a statutory obligation to consider whether reunification of families is possible. This encompasses an obligation on the State to ensure that all alternatives to a care order, including the provision of appropriate supports, must be considered before a care order is granted. The principle of proportionality is also at the heart of childcare proceedings, and European convention case law is regularly cited in court.

The proposition that rumour, suspicion and innuendo are treated as fact is absolutely incorrect. In my experience of appearing in the childcare courts in Dublin on a regular basis, I have never witnessed findings of fact being made, other than on evidence given *viva voce* in court, which is the subject of rigorous cross-examination, not only from practitioners but also from the bench. Where there is a dispute, the State is put on full proofs. It is right and proper that the evidence (professional opinion or otherwise) presented by the State is appropriately and robustly challenged. Fair procedures are at the very heart of the public law childcare court process – and this is borne out by the length of time given by the judges to hear difficult and complicated childcare applications – upwards of ten applications a year take in excess of six days.

Mr Steenson refers to a "system of secret courts". This description is not correct. The *in camera* rule exists for the protection of children and families. I wholeheartedly support the proposition that there is a need for greater openness and transparency in this area, while protecting the human rights of parents and children not to have their private lives broadcast to the public. In fact, the *Child Care (Amendment) Act 2007* permits reports to be drawn up in relation to childcare proceedings under strict conditions. Solicitors will be pleased to know that Dr Carol Coulter is currently undertaking a childcare law reporting project whose goal, among other things, is to promote public confidence in the justice system and permit debate that may be necessary.

There is no dispute that the State has seriously failed children in the past and that there is room for much improvement in the current child-protection system. Child protection in Ireland is a uniquely complex area. Child-protection work, by its nature, involves risk. No system or person will get the balance right all of the time. The goal of solicitors working in this area should be to support the child protection professionals who are at the frontline of protecting children from harm, while ensuring that the legal process is fair to all parties, not least the child.

'Gravy train' comments simply not justified

From: Una Gogarty, Bective, Navan, Co Meath

Is it just me, or does anyone else find the Taoiseach's and others' comments regarding lawyers, in the context of the Magdalene's compensation scheme, a bit hard to take?

I am sick of hearing that he doesn't want any compensation scheme to become "a gravy train for lawyers", or other representatives saying that they don't want victims to be "lawyered up". The very clear subtext is that lawyers are essentially amoral and vulturish, only too happy to capitalise on other people's misfortune, and that they get in the way of true justice.

While it does seem that a handful of firms approached victim/survivor groups for the redress board scheme, which is a practice not many agree with, the fact of the matter is that, even in those cases, the claims could not have been brought without the victims' active instruction and consent.

Also, it needs to be borne in mind that legal representatives are exposed to very distressing testimonies of these clients, which of its nature takes its toll. They advocate effectively for people who are often very compromised in communication competencies, having little or no self-esteem; steer their cases through the statutory scheme, marshalling professional and actuarial evidence; and usually provide ongoing moral support to the client over a lengthy period of time. It is not simply a matter of jumping on a bandwagon and hey-presto, here's your money!

I think the Law Society should strongly stand up to this kind of comment. It has become a trend over the last number of years for the legislature to berate us at every opportunity, which is a lamentable reflection on its members, who appear to pander to what they think washes with the public without ever according any modicum of respect to the many worthwhile functions of the legal profession.

FORGIVEN, NOT FORGOTTEN?

The proposal to introduce 'spent' convictions for those convicted of minor criminal offences is overly restrictive, argues Louise McQuaid

Louise McQuaid is a trainee solicitor at Mason Hayes & Curran, recently seconded to Mercy Law Resource Centre (MLRC) as part of the firm's corporate social responsibility programme. She thanks solicitor Rose Wall (MLRC) for reviewing this article

The *Criminal Justice (Spent Conviction) Bill 2012* is set to introduce a regime whereby certain convictions can be disregarded after a number of years have elapsed since they were imposed. It comes following recommendations of the Law Reform Commission in their *Report on Spent Convictions* published in 2007, which pointed out that Ireland is one of the few states that does not have a spent conviction scheme in place.

The aim of the bill is "to assist the rehabilitation of offenders, who often experience difficulties securing employment as a result of having a conviction".

Section 1 provides that all offences tried in the Central Criminal Court, all sexual offences, and all convictions that involve the imposition of a sentence exceeding 12 months' imprisonment are excluded from the scheme. Section 3 and schedule 2 of the bill outline a matrix of rehabilitation periods ranging from three to seven years, depending on the sentence imposed.

Restrictive and disproportionate

The Mercy Law Resource Centre has several concerns about the new bill. Firstly, certain provisions are restrictive and disproportionate to the aims of the bill.

The necessity of having a blanket exclusion of all offences tried in the Central Criminal Court and all sexual offences must be questioned. There are a number of safeguards in the legislation to justify the inclusion of all offences under the scheme. For example, convictions over the sentence threshold are excluded, thereby preventing persons who have committed more serious offences from availing of the scheme. In Britain, pursuant to the *Rehabilitation of Offenders Act 1974*, all types of offences are capable of becoming 'spent'. Following 40 years of experience, Britain passed the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*. This act extended the sentence threshold from 30 months to 48 months and reduced the rehabilitation periods. The adoption of a more liberal approach, similar to that of Britain, would aid the rehabilitation of a broader range of offenders.

Housing support

Secondly, the MLRC advocates the extension of the scheme to the provision of publicly funded housing by local authorities.

The purpose of such housing is to provide support for people who need housing but cannot afford to rent or buy their own homes, and is therefore vital in combating homelessness. In a survey conducted by the Central Statistics Office in 2011, it was revealed that there are 3,808 persons in homeless shelter accommodation or sleeping rough.

> **"The cycle of crime and homelessness is perpetuated by a housing policy that seeks to exclude individuals from publicly funded housing as a result of information received by gardaí, without regard to its seriousness, accuracy or relevance"**

Research by Focus Ireland and PACE has revealed that, for some, homelessness leads to crime, which in turn leads to imprisonment. For those who are homeless prior to imprisonment, 62% said that their crime had been committed to survive on the streets. These 'survivalist' crimes were minor in nature and included theft, begging and squatting. In addition, 16% reported that their street life led to drug misuse and their drug addiction led to committing crimes, including mugging, burglary and shoplifting.

Another study by PACE found that 33% of all Irish female prisoners in the Dóchas Centre and 35% of men would be homeless on release from prison. The majority of the sample also ranked accessing and securing accommodation as being in the top three difficulties they faced following release from prison.

The cycle of crime and homelessness is perpetuated by a housing policy that seeks to exclude individuals from public-funded housing as a result of information received by gardaí, without regard to its seriousness, accuracy or relevance.

The provision of social housing in Ireland is regulated by the *Housing (Miscellaneous Provisions) Act 1997*. Pursuant to section 15 of this act, local authorities are entitled to seek information from the gardaí and are entitled to defer or refuse a letting under section 14 of the same act on estate management grounds. Such information can include minor offences, cautions, investigations without charge, and dismissals under the *Probation Act 1907*, without regard to constitutional and ECHR principles of fairness and proportionality.

The MLRC acknowledges that the contribution that good estate management makes to communities is invaluable; however, the information disclosed by the gardaí must be

proportionate to the aim and in accordance with the law – in particular, the requirements of natural justice and fair procedures. The dissemination of information without regard to its seriousness, accuracy or relevance, and the failure to differentiate sufficiently between different types of behaviour, is a clear violation of the principle of proportionality as it applies to actions that interfere with a person's right to a home.

A just and fair approach with regard to vetting can be achieved by providing specifically in the bill that (1) where the vetting of people who seek positions of employment relating to children or vulnerable person is concerned, the *Spent Convictions Bill* should be read together with the *National Vetting Bureau (Children and Vulnerable Persons) Bill 2012*; (2) in all other cases, the gardaí should only disclose convictions that are 'unspent'; and (3) information relating to cautions, investigations without charge, and dismissals under the *Probation Act* should not be disclosed in any circumstances. This approach would protect the presumption of innocence and adhere to fair procedures.

"The bill is ineffective, as it does not address the main difficulties faced by ex-offenders"

Enforcement

Thirdly, the bill does not provide for any means of enforcement of the scheme.

Legislation without any means of enforcement is not always adhered to. For example, the *Probation Act 1907* does not contain any sanctions for non-compliance with its provisions. Information regarding dismissals under the *Probation Act* is often disclosed to local authorities pursuant to estate management checks. The benefit of a dismissal under the *Probation Act* is that a person avoids holding a criminal conviction and the stigma that attaches to such a conviction. The disclosure of such dismissals therefore defeats the purpose of this act.

In contrast, the *Data Protection Acts* established the Office of the Data Protection Commissioner. Individuals who feel their rights are being infringed can complain to the commissioner, who will investigate the matter and take whatever steps may be necessary to resolve it. This office ultimately ensures that data protection rules are observed and capable of being enforced.

The equivalent British legislation provides for criminal sanctions for the unauthorised disclosure of spent convictions. In order for the bill to be effective in practice, such sanctions should be incorporated into the bill. An independent body should also be set up to investigate any complaints made under the legislation.

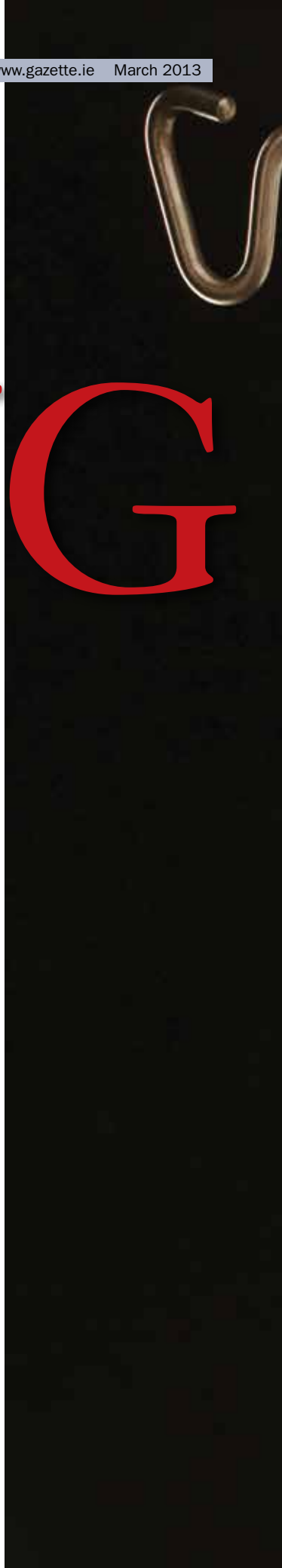
Discrimination on past conviction

Finally, under Irish equality legislation, there is no explicit prohibition on discrimination on grounds of conviction.

The bill states that its purpose is to remove barriers to employment for ex-offenders. But this aim does not appear to be met by the current bill.

Research by the Small Firms Association in 2007 indicated that an average of 76% of companies were unwilling to hire ex-offenders. Discrimination based on past conviction is not confined to the area of employment; it impacts on an individual's ability to obtain housing and their access to education, and it places restrictions on their travel. For this reason, it is imperative that the grounds of discrimination in the *Equal Status Act 2000* and the *Employment Equality Act 1998* be extended to include a broad prohibition on discrimination on grounds of convictions. Without this, the impact of the bill will be diminished.

In conclusion, the bill is ineffective, as it does not address the main difficulties faced by ex-offenders, such as obtaining housing. Consideration must be given to how the scheme will work in practice. For the bill to have the desired impact, it must be extended to the provision of publicly funded housing by local authorities, it must be linked with vetting practices in Ireland, it must establish a body to oversee the operation of the scheme, and it must extend equality legislation to include a prohibition on discrimination on grounds of convictions. G



PAYING the piper

Mary Hough is a partner in Hayes solicitors and specialises in the defence of clinical negligence claims, including claims for catastrophic injuries

We are about to see significant change in the way the courts deal with damages, particularly where an injured party has been awarded substantial damages for catastrophic injuries. Mary Hough calls the tune

The Government has approved proposals by the Minister for Justice to prepare legislation to give the courts power to make periodic payment orders (PPOs). The minister has said that it is his objective to ensure that this legislation – in the form of an amendment to the *Civil Liability Act* – is enacted during 2013, so the legislative framework for the introduction of PPOs in personal injuries actions will soon be in place.

In its first report in October 2010, the Working Group on Medical Negligence and Periodic Payments recommended that legislation should be enacted to empower the courts to make PPOs (whether consensual or otherwise) to compensate injured parties in cases of catastrophic injuries where long-term or permanent care will be required, subject to the courts being satisfied that the continuity of the periodic payments will be secured. It is anticipated that the legislation will closely mirror the working group's recommendations.

The introduction of PPOs will bring about a major change to the current method for awarding compensation in personal injuries actions. At present, compensation is by way of a single lump sum of damages, intended to compensate for all past and future losses.

The Irish courts apply the legal principle of *restitutio in integrum* in an attempt to put injured parties back,

FAST FACTS

- Legislation for the introduction of periodic payment orders in personal injuries actions should be in place this year
- It has long been considered that the single lump-sum award is inadequate and inappropriate in cases where an injured party has been catastrophically injured
- Periodic payment orders provide for a series of regular payments to be made to an injured party for certain heads of damage to meet their needs over their lifetime

"The introduction of legislation to empower the courts to make PPOs must be a very positive and significant change to the administration of justice in cases of catastrophic injury"

insofar as money can do, in the same position that they would have been in but for the injury. The new regime will change this in catastrophic injury cases, in that a substantial part of the award will be paid out over the life of the injured party rather than in a single lump sum.

It has long been considered that the single lump-sum award is inadequate and inappropriate in cases where an injured party has been catastrophically injured. It is almost impossible for a lump sum payment, however carefully calculated, to accurately compensate an injured party. In almost all cases the injured party will either be overly compensated or under compensated.

What are PPOs?

PPOs provide for a series of regular payments to be made to an injured party for certain heads of damage to meet their needs over their lifetime. A lump sum is also awarded for general damages, past and future loss of earnings, and items of past special damages, including past care.

The regular payments are typically made annually and are linked to an inflation index. There may be provision for stepped

HOW DO PERIODIC PAYMENT ORDERS WORK?

In the case of a catastrophically injured minor, for example, instead of a single lump sum award of, say, €5 million, a PPO award in such a case might look like this:

A lump sum payment of €1.28 million for:

- **General damages: €450,000**
- **Retrospective care costs: €130,000**
- **Loss of earnings: €350,000**
- **Special damages to date: €100,000**
- **Accommodation: €250,000**
- **Total: €1,280,000.**

Also, annual payments for future care, future medical and assistive aids and appliances:

- **To age 18: €125,000 per annum (indexed)**
- **From age 18: €150,000 per annum (indexed).**

The above figures do not necessarily make up an award of €5 million. Instead, what the PPO does is ensure that the injured party is accurately compensated for his needs as they arise during his lifetime. If the injured party survives beyond his expected life expectancy, he will continue to be compensated throughout his lifetime. In such circumstances, the ultimate size of the award may be considerably in excess of €5 million. On the other hand, if the injured party does not survive as long as expected, the compensation payments will end on his death.

payments to allow for adjustment, for example, on the injured party attaining a particular age when his care needs may change and the regular payments are adjusted up or down accordingly.

PPOs can apply to any future pecuniary loss, but the experience to date in Britain, which has had similar legislation in place for the past ten years, has been that they apply primarily to the future cost of care and the future provision of medical and assistive aids and appliances. The working group recommended that the court should have power to order PPOs in respect of the cost of future treatment, future care and the future provision of medical and assistive aids and appliances.

The working group recommended that, where the court considers it appropriate and in the best interests of the injured party, such an order should be made, provided that the parties have been given an opportunity by the court to make submissions and be heard in full on the relevant issues. The working group also proposed that the court should be empowered to make PPOs to compensate for future loss of earnings only with the consent of the parties to the claim. In other words, without such consent, the current method of compensating for loss of earnings by a lump sum will continue to apply.

Detailed calculations

Once the PPO legislation is in force, the legal teams for both parties will have to do detailed investigations and calculations, with the input of relevant experts, to accurately set out and agree the actual amounts required under the various heads to accurately compensate the injured party.

Negotiations between the parties will be far more sophisticated and detailed, as each heading of damage will need to be quantified and agreed. Practitioners will no longer be able make good any shortfalls for one head of damage by seeking greater figures under a different head of damage. PPOs will be substantial and detailed documents and may require input from financial advisers, as is now the norm in Britain. Complications will arise. Already a classic example of this is the difficulty in agreeing the cost of future accommodation for injured parties, as arose in *Barry v National Maternity Hospital* ([2011] IEHC 225). The decision of the Supreme Court is awaited in that case.

PROS AND CONS

Advantages of periodic payments for injured parties include:

- **The value of the annual payments is not eroded if linked to an appropriate index,**
- **Annual payments will last throughout the period of the loss, so there is no risk that the award will be exhausted,**
- **Payments are tax free and no tax is payable on the annual PPO,**
- **There is no investment risk as there is with a lump sum,**
- **Security and peace of mind for the injured party and their family.**

For defendants, the advantages are:

- **Annual payments result in better control of cash flow for the State, where it is the defendant,**
- **The risk of overpayment is limited,**
- **Arguments over life expectancy are minimised.**

There are some, but fewer, disadvantages for both parties, including the fact that they will have a continuing financial tie to each other for the injured party's lifetime.

For plaintiffs, there is not the same finality as with a lump sum.

For defendants, there is an increased administrative burden. If a defendant is unable to self-fund, they will need to demonstrate the ability to continue to make the payments into the future. This may necessitate purchasing annuities, which at present are in very scarce supply and are expensive to fund.

Until the legislation introducing PPOs is in force, the courts have no power to order PPOs. However, a number of catastrophic injury cases have been before the courts in recent years in which the concept of PPOs has been introduced. In these cases, the parties, with the approval of the court, have agreed a lump sum (for general damages, past and future loss of earnings, and items of past special damages) and also for two years' future care, and adjourned the main action for a period of two years in the hope that the legislation introducing PPOs would be enacted.

"The new regime will change this in catastrophic injury cases, in that a substantial part of the award will be paid out over the life of the injured party rather than in a single lump sum"

This agreement by the parties, approved of by the court, has essentially the same effect as what will be achieved when PPOs are in force. Many of these cases will be coming before the courts again soon, and it is likely that further adjournments of these cases will be agreed pending the introduction of the legislation. However, there seem to be signs of impatience: the mother of a man whose case was adjourned in 2010 in expectation of the introduction of the PPO legislation told the court on 19 February that they wanted to proceed with their assessment of damages as a lump sum, rather than continue to wait.

When the PPOs are in force, it is envisaged that plaintiff practitioners may seek similar interim arrangements for one or two year periods to see how accurately the PPOs cater for the injured party's actual needs. Defendant practitioners are, however, likely to want more certainty.

Across the water

The British courts have been empowered to order periodic payments since the *Damages Act 1996*, as amended by the *Courts Act 2003*. The *Courts Act 2003* provided for the amount of the payments to vary by reference to the retail prices index, but also made allowance for this to be disapplied or modified. In a series of seminal cases known as the *Thompstone* cases, the application of the retail prices index was successfully challenged. The court held that the indexation for future care costs should be linked to the Annual Survey of Hours and Earnings prepared by the Office for National Statistics. Unfortunately, there is currently no equivalent survey in Ireland and the issue of indexation is yet to be decided. The Central Statistics Office has, however, looked at this issue and identified the basis for a suitable index. We are awaiting the publication of this index.

The annual payments throughout the life of the injured party, which PPOs will introduce, will provide welcome security and peace of mind to injured parties and their families. In accordance with the principle of *restitutio in integrum*, PPOs, as opposed to lump sums, will undoubtedly provide far greater accuracy in compensating injured parties. As such, the introduction of legislation to empower the courts to make PPOs must be a very positive and significant change to the administration of justice in cases of catastrophic injury.

Patently OBVIOUS?

The EU has plans for a Unified Patent Court, but there are concerns about the proposal, particularly regarding the constitutional implications and the impact on Ireland's aspiration to be a 'knowledge economy'. Fiona O'Beirne and Aoife Murphy put on their thinking caps

Fiona O'Beirne is a partner in McCann FitzGerald specialising in intellectual property and commercial litigation and is a member of the Law Society's Intellectual Property Law Committee

Aoife Murphy is a partner in Whitney Moore specialising in intellectual property and litigation and is a member of the Law Society's Intellectual Property Law Committee

Plans to create a unitary patent that is valid in all EU member states and enforceable in a single court have been in the pipeline for more than 30 years – with no success. However, in December 2012, the European Parliament approved a package of plans relating to an EU-wide patent system, including the creation of a unitary patent under the enhanced cooperation procedure and a Unified Patent Court (UPC).

The intergovernmental agreement on a UPC will establish a new court with exclusive competence to deal with all disputes relating to both infringement and revocation of European patents and the new unitary patents – that is, patents granted under the provisions of the *European Patent Convention* that benefit from unitary effect by virtue of the Council of the EU implementing enhanced cooperation.

On the sidelines of the meeting of the council on 19 February, 22 member states signed the international agreement. Once the agreement enters into force, the signatory countries will form a unified area in terms of patent law. It will enter into force after it has been ratified by at least 13 member states, to include Britain, Germany and France, and when the necessary changes to the *Brussels I Regulation* have been implemented.

> *"The uniformity of patent judgments in Europe on foot of such an array of possible jurisdictions is questionable"*

The proposed UPC

Under the current proposal, the UPC is to be "a court common to the contracting member states", that is, member states that are parties to the agreement (article 1), and subject to the same obligations under EU law as any national court of the contracting member states. It will consist of a Court of First Instance, a Court of Appeal and a Registry (see article 6(1)).

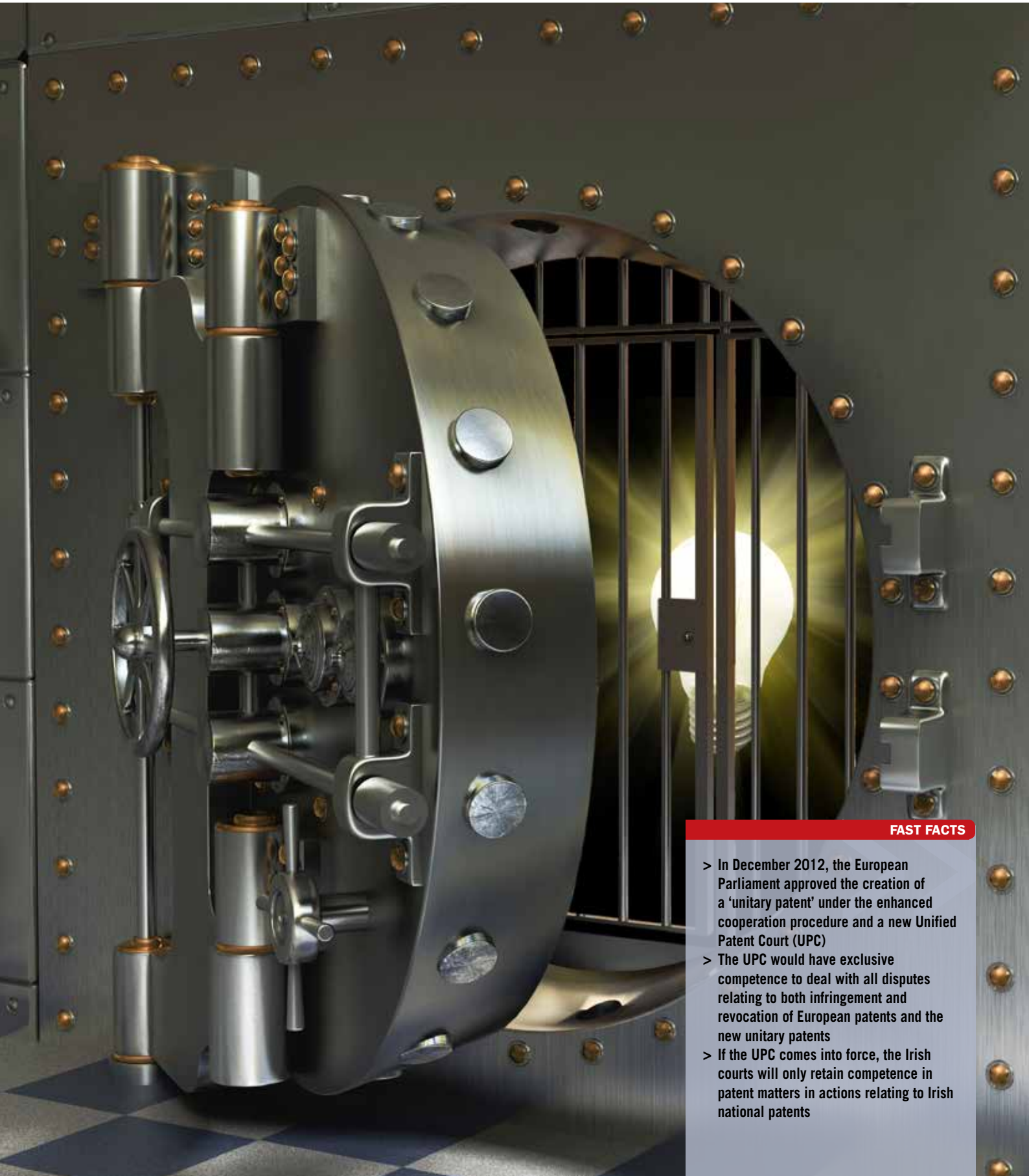
The Court of First Instance includes a central division and local and regional divisions.

The central division will have its seat in Paris, with subdivisions in London and Munich. The subdivision in London will hear cases related to chemistry, pharmaceuticals, biotechnology and human necessities, including medical devices. The subdivision in Munich will deal with cases related to mechanical engineering. Paris will hear other matters, including cases relating to electronics, software and physics.

A local division will be set up in a contracting member state upon request (see article 7(3)). A regional division will be set up for two or more contracting member states upon request. A regional division may hear cases from multiple locations. It seems that Ireland does not intend to request to host a local division of the court, but is likely to participate in a regional division, along with Britain and Portugal. The Court of Appeal will be in Luxembourg.

Where a party begins an action by seeking revocation or a declaration of non-infringement, these matters will be heard by the central division.

The local or regional division will hear actions for actual or threatened infringement, either where the infringement has occurred or where the defendant has his residence or place of business. These courts will be competent also to



FAST FACTS

- In December 2012, the European Parliament approved the creation of a 'unitary patent' under the enhanced cooperation procedure and a new Unified Patent Court (UPC)
- The UPC would have exclusive competence to deal with all disputes relating to both infringement and revocation of European patents and the new unitary patents
- If the UPC comes into force, the Irish courts will only retain competence in patent matters in actions relating to Irish national patents

hear related applications for provisional and protective measures, including injunctions, orders for seizure or delivery up of products, freezing or blocking of bank accounts and other assets. If an infringement action in respect of a patent is taken before the local or regional division and a counterclaim for the revocation of the patent is initiated, as often happens, the local or regional division will have the discretion to:

- Hear both the infringement and revocation actions together,
- Refer the revocation counterclaim to the central division and suspend or proceed with the infringement proceedings, or
- Refer the entire case to the central division if both parties agree.

Implications for Ireland

There are currently two types of patents with effect in Ireland: (a) Irish national patents that have been filed with the Irish Patents Office, and (b) European patents, filed through the European Patent Office based in Munich, which designate Ireland as a jurisdiction in which the patent is to have effect.

Litigation often arises in several European jurisdictions concerning the same European patent. Despite Ireland's small size, it has been a significant jurisdiction for patent litigation because many market-leading pharmaceutical and life sciences companies use Ireland as a manufacture and supply centre for Europe.

The Commercial Court's proactive case-management system has made Ireland a more straightforward and attractive place to litigate patents.

If Ireland ratifies the agreement, and it comes into force, the Irish courts will only retain competence in patent matters in actions relating to Irish national patents.

Because infringement cases will have to be brought in the local or regional division where the infringement occurred or the defendant has its seat, if Ireland does not host a local division of the court, then actions relating to actual or threatened infringing activity taking place in Ireland (and related applications for provisional and protective measures, including injunctions) may no longer be brought in Ireland.

Stand-alone revocation actions and actions seeking declarations of non-infringement can only be brought in the central division. The Irish courts will have no jurisdiction over claims to revoke a patent (other than a national patent), even in circumstances where a product in respect of which the patent provides protection is being manufactured in Ireland.

Issues of concern

There are significant areas of concern and uncertainty with this proposal, particularly in respect of the constitutional implications and its potential impact on Ireland's aspiration to be a 'knowledge economy'.

Impact on the knowledge economy: As a developing smart economy with a mission to attract foreign direct investment, Ireland must maintain a strong legal system for the development, exploitation and protection of intellectual property rights, including patent rights.

There is a serious question about the impact of Ireland's decision to divest its courts of jurisdiction over aspects of the legal system that fundamentally and directly affect important and valuable commercial activity and R&D being conducted in Ireland.

Ireland has invested heavily over many years in attracting and keeping multinational pharmaceutical and life sciences companies.

"Irish-based pharmaceutical and life sciences companies are likely to be the target of applications for injunctive relief in the future and these actions will be heard by the proposed UPC if, as anticipated, the agreement is ratified"

Under the proposed agreement, freedom-to-operate issues and other critical issues that arise for those companies in respect of patent rights and their ability to proceed with their activities in Ireland will not be determined by an Irish court but by a court in (most likely) London, or possibly Munich, Paris or Lisbon.

While the amount of patent litigation in Ireland is small relative to some of the larger countries in Europe, some very significant cases have been heard here in recent years. The risks of the implementation of this agreement by Ireland is that the country will become irrelevant in patent litigation terms and that patent litigation in Ireland will effectively disappear, along with the expertise to provide specialist advice in relation to patent matters required by multinational corporations operating or considering establishment in Ireland in the pharmaceutical and life sciences area.

In marked contrast to Ireland, British lobbying has ensured that it has secured a central role in the new system, which it has been estimated will confer benefits worth billions of pounds on the British economy.

Constitutional implications: The transfer of competence in respect of patent rights relating to Irish citizens and residents and activities taking place in Ireland from the Irish courts to the new contractually based court based outside Ireland has obvious implications, having regard to the Constitution of Ireland, and is likely to require a constitutional amendment.

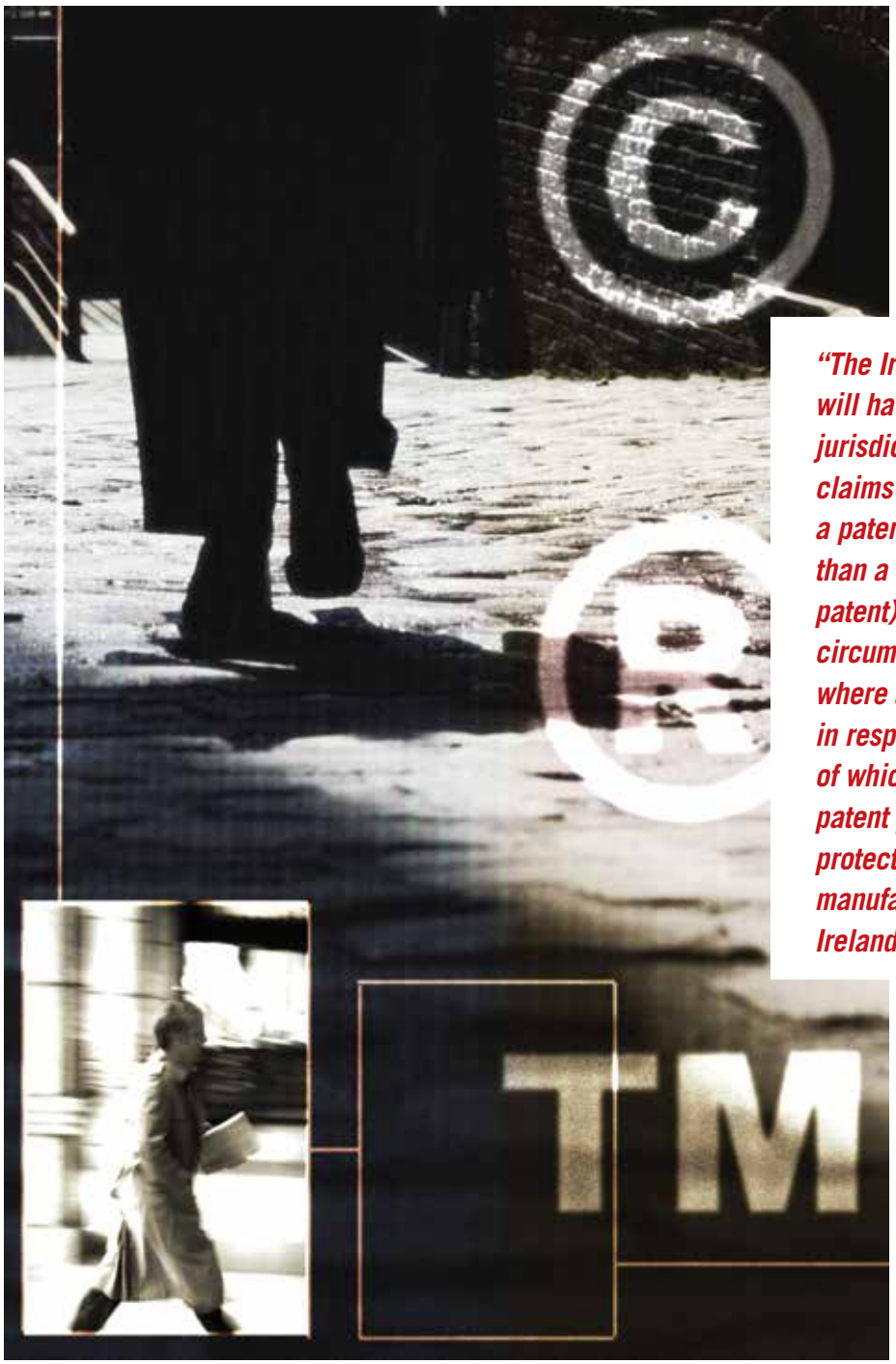
Implications for SMEs and 'forum' shopping: Apart from issues specific to Ireland, the agreement, as currently framed, gives rise to some significant areas of concern and uncertainty, particularly about the tactical use of 'forum shopping'. Actions for infringement will, in general, be brought before the local (or regional) division where the infringement has occurred or where the defendant has his residence or place of business. An Irish SME with trade across the EU may, therefore, find itself before the local division of any member state into which its goods have been sold. If it decides to counterclaim for revocation, before the local (or regional) division, that court may choose to bifurcate infringement and validity issues (as currently happens in Germany), where the local (or regional) division of the court would hear the infringement action and the central division would hear the action for revocation (see article 15 (a)). Moreover, these divisions could potentially hear these issues in different languages.

GREATER UNIFORMITY?

Under the new proposal, there would be five overlapping levels of patent protection in Europe, which would all co-exist alongside each other:

1) **National patents granted by national patent offices will be litigated before the relevant national court,**
2) **European patents will be litigated in the regional, local or central division of the UPC,**
3) **European patents that have opted out of the system of the agreement during the transitional period will be litigated before the relevant national court or other competent national authorities,**
4) **European patents designating one or more non-contracting member states outside the system of the agreement will be litigated before the relevant national court or other competent national authorities, and**
5) **European patents with unitary effect in respect of the participating member states will be litigated under the regional/local division or central division of the UPC.**

The uniformity of patent judgments in Europe on foot of such an array of possible jurisdictions is questionable.



If the SME loses in the local division or in the central division, wherever that may be, it may appeal. The Court of Appeal will be in Luxembourg. In those circumstances, the Irish SME would have to litigate in three different jurisdictions. This system would be particularly attractive to holders of vulnerable patents and patent trolls who might be able to secure an injunction, achieving their commercial aims, before the validity of the patent has ever properly been tested. While the SME may go on to try to have the patent revoked, in the interim, its product is off the market and the SME may well never be able to reintroduce it.

Bifurcation may have a further significant consequence. Some local divisions will be more likely than others to adopt this practice. Those divisions that allow bifurcation will naturally attract certain plaintiffs hoping to secure injunctions before the validity of the patent can be tested, which will encourage forum shopping.

Injunctions: An applicant for interlocutory relief in patent-infringement proceedings must satisfy the court that the actions of the defendant, if allowed to continue, will cause him irreparable harm and that he would not be adequately compensated by an award of damages at the full trial of the action. Well-established equitable principles apply in respect of such remedies. The impact of the proposed remedy on the party to be enjoined, and indeed third parties (such as workers in the plant in question), are among the significant elements to be weighed up by an Irish court.

While article 62(2) of the agreement provides that the UPC shall have "the discretion to weigh up the interests of the parties and in particular to take into account the potential harm for either of the parties resulting from the granting or refusal of the injunction", we do not know how the prospect of unemployment in regions in Ireland will be weighed by a centralised patent court having its seat in London, Paris or Munich. We can, however, be reasonably certain that Irish-based pharmaceutical and life sciences companies will be the target of applications for injunctive relief in the future and that these actions will be heard by the proposed UPC if, as anticipated, the agreement is ratified.

"The Irish courts will have no jurisdiction over claims to revoke a patent (other than a national patent), even in circumstances where a product in respect of which the patent provides protection is being manufactured in Ireland"

Costs and fees for the UPC

Very little consideration has been given to other fundamental issues, such as how the court is to be set up, administered and financed. How are the judges to be selected and trained? How will they retain their independence? How much will it cost to fight a case?

Under the current proposal, the UPC is to be subsidised by the contracting member states for the first seven years, in proportion to the number of European patents having effect in the territory of the respective state and to the number of infringement or revocation actions that have been brought before the national courts of that state in the three years preceding entry into force of the agreement (see article 37(3)).

After the initial transitional period of seven years, by which time the court is expected to have become self-financing, any necessary contributions by the contracting member states will be determined in accordance with the scale for the distribution of annual renewal fees for unitary patents applicable at the time (see article 37(4)). It seems clear that a significant share of the costs of running the UPC will need to be taken over by contracting member states.

school

AROUND THE CORNER

Dr Conor O'Mahony has lectured in constitutional law in UCC since 2005 and has published widely on constitutional law and rights enforcement, including his book, Educational Rights in Irish Law

Article 42 of the Constitution obliges the State to provide for free primary education – and to make provision for children whose parents either do not, or cannot, care for them. Dr Conor O'Mahony challenges the courts to ensure that the State lives up to its obligations

With the establishment of the Constitutional Convention and a host of recent and forthcoming referendums, there is a lot of focus on constitutional reform at present, and various interested groups are keen to press the case to incorporate economic and social rights into the Constitution. Currently, like most other Western liberal democracies, the fundamental rights provisions of our Constitution are focused on civil and political rights; that is, freedoms from state interference.

Protection is generally not provided for economic and social rights – entitlements to be provided with services by the state. Economic and social matters have traditionally been left to the discretion of the political organs of state, and are usually not the subject of enforceable constitutional provisions. The remedy for those who are left without basic services lies in political lobbying rather than in the courts.

The Irish Constitution makes one notable exception, however: article 42 obliges the State to provide for free primary education – and to make provision for children whose parents either do not, or cannot, care for them. These provisions have generated significant controversy regarding what exactly the courts are entitled to do to ensure that the State lives up to its constitutional obligations.

> ***"Far more was achieved on behalf of children with special educational needs through constitutional litigation than ever could have been achieved through political lobbying"***

Come up to the front

There are several reasons why economic and social rights tend not to be enforceable as constitutional rights. When compared with the political branches of government, courts are not well placed to make decisions on policy matters concerning the allocation of public resources. Since judges are unelected and therefore not accountable for how they might choose to distribute taxpayers' money, it would be undemocratic to decide on resource allocation through litigation rather than through politics. Courts hear individual cases one at a time, and must decide them by reference only to the parties before the court; they are not as well placed as elected officials to balance all of the competing claims that are made on public resources. Court orders to provide resources might well do more harm than good by taking resources from where they are needed more urgently.

Of course, each of the above arguments meets a counter-argument. It is questionable whether economic and social rights can be adequately protected through the political process. Elected governments tend to allocate resources based on short-term electoral considerations, and are reluctant to take a more long-term view of resource allocation.

Political minorities, such as the disabled, carry little voting power and are unable to effectively use the political process to secure adequate provision for their needs. Thus, the fact that judges are unelected can sometimes be an advantage. There is also the age-old argument concerning the interdependency of rights: in short, no one will care about their right to freedom of expression or right to vote if they do not have food on the table and a roof over their head.

In *O'Donoghue* and subsequent cases, the court had to compel the State to put in place a range of educational

FAST FACTS

- Economic and social rights tend not to be enforceable as constitutional rights
- The courts have been used to compel the State to put in place a range of educational services
- The courts have been reluctant to grant mandatory orders compelling the provision of necessary educational resources

services involving a large amount of policy work traditionally undertaken by the executive. To avoid effectively taking over the role of the executive, the court limited itself to making a declaratory order to the effect that the constitutional right to free primary education had not been vindicated. This ended the involvement of the court – responsibility now shifted to the executive to take the necessary steps to bring its actions into line with its constitutional obligations. In this way, the court confined itself to its constitutionally appointed role of interpreting the law, leaving the executive to undertake its appointed role of policy formation and resource allocation. Once the executive responds in good faith to a declaratory order, no further difficulties should arise.

It wasn't me

Problems arise when the executive does not respond, as occurred in a series of cases in the late 1990s concerning the State's obligation to provide secure educational facilities for children with severe behavioural disorders. In *FN v Minister for Education*, the court held that the State should honour its constitutional obligations "as soon as reasonably practicable" and adjourned the case to afford the minister the opportunity to take the necessary steps. Three years later, the minister still had not done so. A huge volume of litigation was underway involving children in identical circumstances, and eventually, the court lost patience in *DB v Minister for Justice*. Here, there was much evidence of avoidable delay caused by bureaucratic arguments between government departments. Kelly J characterised the situation as a "scandal" and stated that the matter was "bogged down in a bureaucratic and administrative quagmire".

Exasperated by the conduct of the minister and his officials, Kelly J granted a mandatory injunction compelling the minister to implement, within a specified timetable, the plans that he had previously laid before the court. A year later, in *TD v Minister for Education*, Kelly J repeated this step, and went on to set down four criteria to be considered by courts when deciding whether or not to grant such an order.

Can't touch me

Although these criteria were quite restrictive and made it clear that the court should only grant injunctions in the most extreme cases where other remedies had proven ineffective, the Supreme Court overturned the decision. A four-to-one majority held that the orders granted by Kelly J were a breach of the separation of powers, as they involved the court in the executive functions of policy formation and resource allocation.

The court relied on the distinction between 'commutative justice' and 'distributive justice'. Commutative justice relates to what is due

ECONOMIC AND SOCIAL RIGHTS

Economic and social rights are positive entitlements for the State to provide a minimum level of basic services, such as education, housing, healthcare and social security.

to one individual from another, pursuant to a wrong committed; this is a matter for the courts, which can ascertain what is properly due to the injured party and rectify the wrong. Distributive justice, on the other hand, is concerned with the distribution and allocation of common goods and burdens; that distribution can only be made by reference to the common good and by those charged with furthering it (that is, the Government). It cannot be made by any individual who may claim a share in the common stock, and no court can adjudicate on a claim that an individual has been deprived of his due. The Supreme Court held that the claim before the court was a matter of distributive justice and, accordingly, it was a matter for the executive and not the courts.

While this decision has been extensively criticised, the dominant view in the Supreme Court remains (for the time being at least) that the courts are confined to awarding damages for past breaches of article 42 rights and granting declaratory relief regarding the scope of future obligations. What we are left with is a form of 'light touch' enforcement of rights whose vindication requires large-scale public expenditure.

Sín amach do lámh

The cases discussed above show that constitutionally protected economic and social rights will only be as enforceable as the courts are willing to make them. Due to the separation of powers and the limited availability of public resources, the courts will inevitably take a cautious approach to the enforcement of rights in individual cases, even where the right in question is clearly intended to be enforceable. While they have been willing to establish a minimum core of the right to education, they have been reluctant to grant mandatory orders compelling the provision of the necessary resources to allow individuals to realise this minimum core.

Citizens will lose respect for constitutional rights that cannot be vindicated in practice, and this will undermine respect for the Constitution as a whole"

Weak enforcement in the form of damages and declaratory relief is not worthless – repeated awards of damages, and the accompanying political embarrassment, provide an incentive towards compliance. This may bring about longer-term vindication of economic and social rights for people in similar circumstances to successful litigants. Certainly, far more was achieved on behalf of children with special educational needs through constitutional litigation than ever could have been achieved through political lobbying. Even in the absence of mandatory injunctions, the large volume of cases passing through the courts served to focus public and political attention on the issue, leading to legislative reform and vastly improved resource allocation.

It remains the case that it is preferable for economic and social rights to be vindicated primarily through political rather than legal means. It also important that rights set out in the Constitution can be matched by the actual services provided on the ground. Citizens will lose respect for constitutional rights that cannot be vindicated in practice, and this will undermine respect for the Constitution as a whole.

It might therefore be preferable to only provide constitutional protection for economic and social rights that are already widely enjoyed by citizens, so that the Constitution will serve only to plug the gaps in the individual or minority cases where the right is not vindicated.

In a First World country like Ireland, housing is available to the overwhelming majority and a public healthcare system is in place, and therefore it is conceivable that constitutional protection of these rights could serve as a safety net to catch those that fall through the cracks – just as it did in the educational system. G

This is an abridged version of a paper delivered at the Amnesty International conference, 'A deficit of protection – economic, social and cultural rights in Ireland', 22 November 2012.

ECONOMIC AND SOCIAL RIGHTS IN THE IRISH COURTS

In the Irish Constitution, civil and political rights such as personal liberty, freedom of expression, and freedom of religion are protected – but economic and social rights, such as housing and healthcare, mostly are not. They are not completely omitted; they are referenced in article 45 under the heading 'directive principles of social policy'.

Article 45 stipulates, however, that it is for the guidance of the Oireachtas only – it cannot be relied on in the courts. There is one notable exception to this approach: the State is obliged by article 42.4 to provide for free primary education, and by article 42.5 (to be replaced by article 42A.2 once the 31st amendment is implemented) to "supply the place" of parents who cannot or will not look after their children. Both provisions have been interpreted as conferring corresponding rights on children to receive what the State is obliged to provide. The location of these obligations within the enforceable provisions of the Constitution rather than in article 45 signals that a child whose rights have not been vindicated can seek redress through the courts.

The willingness of the Irish courts to enforce these rights was put to the test in 1993 when Paul O'Donoghue, who is profoundly autistic, successfully sued the State for failing to provide him with education suitable to his needs. Apart from defining the scope of the State's obligation, the case raised the secondary issue of how the court could enforce his rights.

In the majority of cases concerning civil and political rights, the infringement comes in the form of State action (usually legislation), and the remedy lies in the court striking down the legislation that infringed upon the right. The court is saying that the Government cannot do something, and that its attempt to do so was invalid.

Enforcing an economic and social right is different, however: the State has done nothing. There is no legislation for the court to strike down. Damages can be awarded as compensation for a past breach of a right, but do not secure its future vindication. The court must find a way to compel the State to take the appropriate action to vindicate the right at issue.

LOOK IT UP

Cases:

- *DB v Minister for Justice* [1999] 1 ILRM 93
- *FN v Minister for Education* [1995] 1 IR 409
- *O'Donoghue v Minister for Health* [1996] 2 IR 20
- *TD v Minister for Education* [2000] 3 IR 62 (High Court); [2001] 4 IR 259 (Supreme Court)

Literature:

- Conor O'Mahony, *Educational Rights in Irish Law* (Thomson Round Hall, 2006)
- Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (Institute of Public Administration, 2002)

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Sam Collins is a barrister practising in Dublin. The author wishes to thank Declan McGrath SC and Dermot Hewson BL for their generous assistance with this article

Consumers need to educate themselves about what they are entitled to expect from their banks – and must make any complaint known to the bank before seeking to have the ombudsman investigate the matter. Sam Collins cashes up

"In my opinion, what we have experienced in Ireland as a result of the financial crisis is a paradigm shift. There was a time, not too long ago, when people treated their bank managers, their financial brokers, with a certain amount of deference, maybe awe, maybe fear. That is gone" – Bill Prasifka (Financial Services Ombudsman), *Morning Ireland*, 6 July 2012

Few doubt that the relationship between Irish people and their banks has soured. Aside from headlines of staggering debt and complex litigation in respect of huge facilities, however, a quieter evolution is taking place: consumers are making more complaints against banks and other regulated financial service providers (FSPs).

Such complaints may be ventilated before the Financial Services Ombudsman (FSO), established by part VIIB of the *Central Bank Act 1942* (as inserted by section 16 of the *Central Bank and Financial Services Authority of Ireland Act 2004*) to, among other things: "investigate, mediate and adjudicate complaints made … about the conduct of regulated financial service providers involving the provision of a financial service, an offer to provide such a service, or a failure or refusal to provide such a service".

The FSO's latest bi-annual review (published in January) shows that, in 2012, new complaints increased by 12% compared with 2011.

The total compensation of €1,734,218 awarded by the FSO in 2012 (of which investment accounted for €986,149, insurance €403,608, and banking €344,361) may seem relatively modest. However, it is important to note that the compensation that can be awarded in an individual complaint is substantial, with the FSO having power to award up to a maximum of €250,000.

"FSPs should take advantage of the clear guidance available as to how the ombudsman deals with complaints (sample decisions are set out in his annual reports)"

The process has teeth. The ombudsman may apply to the Circuit Court for a compliance order with respect to his statutory powers (such as the power to request that an FSP provide information) and may (as may the complainant) apply for an enforcement order in respect of one of his directions. Obstruction of the ombudsman in the exercise of his functions is an offence.

Beyond the resolution of a particular complaint, the ombudsman has a wider supervisory role. As noted by MacMenamin J in *Hayes v FSO*, the ombudsman may "make orders of a type that a court would not normally be able to make, such as directing a financial services provider to change its practices in the future. Thus, he possesses a type of supervisory jurisdiction not normally vested in court".

Making a complaint?

Persons entitled to make a complaint to the ombudsman are 'consumers' who are customers of an FSP or have sought or been offered financial services. Importantly, 'consumer' is broadly defined as including not only "a natural person when not acting in the course of, or in connection with, carrying on a business", but also incorporated bodies and

groups of persons (including partnerships, clubs, charities and trusts), provided they themselves (or, in the case of incorporated bodies, a group of which they are a member), do not have an annual turnover in excess of €3 million.

The complaint must be against a "regulated financial service provider" as defined in the 2004 act and the *Central Bank Act 1942 (Financial Services Ombudsman) Regulations 2005*. Most complaints relate to insurance (4,064 complaints received in 2012) followed by banking (3,087) and investment (840).

Before complaining to the ombudsman, a consumer must communicate the substance of the complaint to the FSP and give the FSP a reasonable opportunity to deal with it. Complaints must be in writing (though the ombudsman may dispense with this requirement) and the ombudsman will forward a copy of the complaint to the FSP as soon as practicable. It was held in the leading decision of *Davy v FSO* that both the complaint and accompanying appendices ought to be furnished.

The ombudsman's principal function is to resolve complaints "by mediation and, where necessary, by investigation and adjudication", and he must attempt mediation in the first instance, as confirmed by Finnegan J in the Supreme Court in *Davy*. However, mediation

FAST FACTS

- Consumers are making, and winning, more complaints against banks and other regulated financial service providers
- Most complaints relate to insurance (4,064 complaints received in 2012), followed by banking (3,087) and investment (840)
- The Financial Services Ombudsman has extensive powers in conducting investigations
- Beyond the resolution of a particular complaint, the ombudsman has a wider supervisory role

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DATE	EVENT	DISCOUNTED FEE*	FULL FEE	CPD HOURS
8 March	Conflict Resolution: Peace, Practice, Perspectives - Celebrating Women as ADR leaders (in partnership with Law Society Skillnet, IWLA, CIARB, NAWIC, Arbitral Women)	N/A	€165	6 General (by Group study)
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 General (by Group study)
16 April	Law Society Intellectual Property Law Committee in partnership with Law Society Professional Training: IP Law Conference – Patents, Trademark and Copyright in 2013	AM: €135 PM: €102 Full: €165	AM: €180 PM: €136 Full: €220	AM – 3.5 General (by Group study) PM – 2.5 General (by Group study) Full day: 6 General (by Group study)
18 April	Post-Graduate Certificate in Learning Teaching and Assessment in partnership with DIT and Law Society Skillnet	€896	€1,280	Full CPD requirement for 2013 (including M & PD and Regulatory Matters)
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CONSUMER PROTECTION CODE

As explained by Hogan J in *Koczan v FSO*, the ombudsman is required to have regard to "wider conceptions of *ex aequo et bono*, which go beyond the traditional limitations of the law of contract". In particular, as noted by White J in *Irish Life and Permanent plc v FSO*, the ombudsman will apply the provisions of the *Consumer Protection Code* (CPC 2012) when investigating complaints.

CPC 2012 is a substantial document that prescribes detailed standards for FSPs. Examples include strict limitations on personal visits and telephone contact with consumers, required font sizes for warnings required by CPC 2012 (which cannot be simply stuffed away in small print), and notice requirements when changing services offered or closing branches.

There are also specific provisions relating to issues commonly ventilated before the ombudsman. To take one high-profile example, payment protection insurance (PPI) – where complaints in 2012 increased by 216% compared with 2011 – is specifically dealt with in provisions 3.24 and 8.7.

Examples of breaches that may have occurred in the selling of PPI (including selling products that were not suitable to the customer, incorrectly treating sales of PPI as 'execution only', failing to provide key information on time or at all, failing to keep adequate records, and failing to observe the general principles of CPC 2012) were detailed in the Central Bank's well-publicised June 2012 letter to several firms involved in PPI sales.

The ombudsman observes in his bi-annual review that the main features of the PPI complaints before him concern the suitability of PPI for the consumer and the consumer's knowledge (or lack of same) when they agreed to, and paid for, PPI in the first instance.

is a voluntary process from which parties may withdraw, and experience suggests it has not been particularly fruitful in this context: in 2012, only five complaints were disposed of by agreement reached following mediation, while the ombudsman made 2,990 findings. In addition, of the 4,876 complaints closed prior to investigation in 2012, 26% settled.

Investigations are held in private. The ombudsman has extensive powers when conducting investigations, including powers to require that an FSP provide information and documentation, to summon officers, members, agents and employees of an FSP to attend before the ombudsman, and to enter an FSP's premises and inspect documents. He has the same powers with respect to the examination of witnesses as those of a High Court judge hearing civil proceedings, and may (of his own initiative or at the request of one of the parties) refer a question of law to the High Court.

"The ombudsman has extensive powers in conducting investigations, including requiring that an FSP provide information and documentation, to summon officers, members, agents and employees of an FSP to attend before the ombudsman, and to enter an FSP's premises and inspect documents"

Findings

The ombudsman may find that a complaint is substantiated, partly substantiated or not substantiated on one or more of seven exhaustive statutory grounds:

- The conduct complained of was contrary to law,
- The conduct complained of was unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant,
- Although the conduct complained of was in accordance with a law or an established practice or regulatory standard, the law, practice or standard is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant,
- The conduct complained of was based wholly or partly on an improper motive, an irrelevant ground or an irrelevant consideration,
- The conduct complained of was based wholly or partly on a mistake of law or fact,
- An explanation for the conduct complained of was not given when it should have been given, and
- The conduct complained of was otherwise improper.

Reasons for the finding must be given and, in *Davy*, the Supreme Court expressed the view that it is "most desirable" (though not mandatory) to specify the express statutory ground(s) upon which a complaint is substantiated or partly substantiated.

Parties enjoy a statutory right of appeal to the High Court in respect of the ombudsman's findings. While the authorities make clear that the court will adopt a deferential standard of review because of the ombudsman's expertise and the wide jurisdiction he has when making decisions, a number of appeals have succeeded recently on procedural grounds and, in particular, on the basis of failure to hold an oral hearing where the court considered it appropriate to do so. On appeal, the High Court may affirm the ombudsman's finding (with or without modification), set aside the finding or, as ordinarily occurs in the event of a successful appeal, remit the finding or any direction therein to the ombudsman for review. If the finding is remitted with directions (for instance, that an oral hearing is required), such directions are binding on the ombudsman.

The implications for all parties are straightforward. Consumers ought to educate themselves about what they are entitled to expect from their banks, in particular as explained in CPC 2012, and must make their complaint known to the bank before seeking to have the ombudsman investigate the matter.

FSPs should take advantage of the clear guidance available as to how the ombudsman deals with complaints (sample decisions are set out in his annual reports). Informing themselves as to trends in complaints ought to enable institutions to make better decisions about what to fight (and, perhaps, to appeal) and what to compromise. G

LOOK IT UP

Cases:

- *J & E Davy v FSO* [2010] 3 IR 324, [2010] IESC 30; [2008] IEHC 256
- *Hayes v FSO* (unreported, High Court, MacMenamin J, 3 November 2008)
- *Koczan v FSO* [2010] IEHC 407
- *Irish Life and Permanent plc v FSO* [2011] IEHC 439

Legislation:

- *Central Bank Act 1942* (as amended)
- *Central Bank and Financial Services Authority of Ireland Act 2004*
- *Central Bank Act 1942 (Financial Services Ombudsman Council) Regulations 2005* (SI 190/2005)
- *Central Bank Act 1942 (Financial Services Ombudsman) Regulations 2005* (SI 191/2005)
- *Consumer Protection Code 2012* (www.centralbank.ie/consumer/cpc/Pages/home1.aspx)

A road less TRAVELLED

Aonghus Kelly is a lawyer in the Special Prosecution Office at the European Rule of Law Mission in Kosovo

From Cork to Kosovo via a sojourn in the South, Aonghus Kelly has had a varied legal career, including time spent prosecuting war criminals in Bosnia and Herzegovina

Having spent three years studying law in UCC and then a year working as a legal assistant in O'Rourke Reid in Dublin, in the autumn of 2002, I set off for a sojourn abroad. I was headed to the Rugby World Cup in Australia via South America and New Zealand, happy in the knowledge that I would have a study-free time to see some of the world and let my hair down. However, little did I know that my arrival in Rio de Janeiro in October 2002 would not just be the start of a year abroad, but the start of my wanderings through strange places, funny incidents and an overseas legal career.

South America was traversed over a couple of months, from Rio to Santiago via the tip of the continent and many places in between. It was a wonderful experience but an eye-opening one: seeing the poverty of people, their lack of opportunities, and being struck by the stark realisation of how lucky I was.

I made it to Australia and the World Cup in 2003, but New Zealand's beauty pulled at me, and I ventured back there, working in door-to-door sales and an Irish bar, among other things. After a period of time in Wellington, during a late-night 'discussion' with my father, I set out before him with the bravado of youth that I wasn't coming home to complete my legal education and that, if needs be, I would do it in New Zealand.

A few days later, when serving a lady in the Wellington bar I worked in, I noticed that she paid with her Law Society-branded credit card. At the sight of this, I smiled and said: "You're a long way from Blackhall." We struck up a conversation and she told me she had sat the very New Zealand law exams I had muttered to my father about doing a few nights previously. Therese Singleton (now legal executive legal counsel at AMP New Zealand, the largest financial services company in Australasia) assisted me greatly and, in the summer of 2005, I was called to the bar in New Zealand as a barrister and solicitor.

Home again, home again

However, I was hearing the call of home, and part of me knew that if I didn't head home soon, I would never make it out of the windy city of Wellington – a place that I still hold close to my heart.

In the spring of 2006, I headed home and, later that year, sat the Qualified Lawyers' Transfer Tests in Blackhall Place and was admitted to the Roll of Solicitors. I also was lucky enough to find a job with Blake & Kenny in my home city of Galway, working for the esteemed Michael Molloy, to whom I owe a great deal. Working in general practice was a huge learning curve, but it was also a great opportunity to learn about the different areas of law and about oneself. Dealing with clients, the Land Registry, the courts and the Probate Office was a great education, and the lessons I learned there I use every day here in the Balkans.

> *"Working in general practice was a huge learning curve, but it was also a great opportunity to learn about the different areas of law and about oneself"*

The sights of South America still played on my mind, however, and having made a visit to Palestine in 2006, I decided to apply to do a master's in international human rights law at the Irish Centre for Human Rights in NUIG. I was especially lucky in that, even though I had some of my lectures during working hours, I was allowed time off by Michael to attend.

In late 2008, having completed my master's, I moved to England to work under Phil Shiner at Public Interest Lawyers in Birmingham, a firm that specialises in the judicial review of the actions (or inaction) of the British Government. In the main, I dealt with cases involving Iraq and Palestine. In my second year, I headed south to London to represent our clients, the survivors and the families of a

number of Iraqi men who were detained and tortured in September 2003 by the British Army in Basra.

The Baha Mousa Public Inquiry (named after Baha Mousa, who died with 97 injuries following days of torture) was announced by the British Government following legal action taken by our firm on behalf of our clients. The inquiry exposed me in many ways to the realities of what was going on in Iraq. Much of the tens of thousands of pages of documents we waded through were of particular interest to me, as they preceded, referred to, and followed on from internment in Northern Ireland in the 1970s and the case that Ireland took against Britain in the European Court of Human Rights regarding these events. Lessons we were told had been learned in those years, it seemed, had not, and the report of the inquiry by Sir William Gage made 73 recommendations, 72 of which were accepted by David Cameron and his government in 2011.

In 2010, after the conclusion of the oral hearings at the inquiry, I moved on to a new

FAST FACTS

- From student days in Cork to qualifying in New Zealand – and then to practising public-interest law in Britain
- The lessons of internment in the North were still not learned by the time of the occupation of Iraq
- Investigating and prosecuting the genocide, war crimes and crimes against humanity that took place during the war in Bosnia

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challenge at the War Crimes Section of the Prosecutor's Office of Bosnia and Herzegovina (BiH) in Sarajevo. The Prosecutor's Office was set up in 2002 by the Bosnian Parliament and Paddy Ashdown, when he was in Sarajevo as the High Representative overseeing the implementation of the *Dayton Peace Agreement* that ended the war in BiH. We investigated and prosecuted genocide, war crimes and crimes against humanity that took place during the war in BiH. I was involved mainly with cases concerning the events in and around Srebrenica in July 1995 and worked in a team with people of all ethnicities from BiH, as well as foreigners from abroad, such as myself.

"The European Union will soon have a border of over 1,000km with BiH when Croatia is admitted to the union in a few months. It does not bode well"

Red sky at night

BiH was, and is, an amazing place: the scenery is breathtaking and the mix of religions, peoples and customs is incredible. Flat fertile plains by the mighty Sava rise into deciduous forest, then high mountain peaks, and then on to the lunar aridness of Herzegovina, familiar to many Irish people from their trips to Medjugorje. Mosques, churches and synagogues stand side by side in Sarajevo and throughout the country.

However, the echoes of the war there between 1992 and 1995 still reverberate. Conversations on a night out invariably dip into it as, in many ways, the war has never ended in BiH – it has just continued by other means. The *Dayton Peace Agreement* has enforced and strengthened ethnic divisions and led to power being vested in those who fly the flag of nationalism most fervently. The intermarriage rate between the ethnicities has dropped from 40% in some places before the war to nearly zero now. The vast majority of the huge numbers of people in BiH who did not count themselves as Serb, Croat or Bosniak (Bosnian Muslim) have left for economic and other reasons; they do not now fit in a country where the first question on every application form for the few jobs that there are is what their ethnicity is.

What was once one language is now Bosnian, Croatian and Serbian, when all of them are no different than Munster Irish from Connacht Irish or Hiberno-English from BBC English. When buying a packet of cigarettes in BiH, one is given the same warning on the packet three times in three 'separate' languages, all of which state exactly the same thing using exactly the same words.

For want of a nail

The cases at the Prosecutor's Office were fascinating and heart wrenching: mass murder involving thousands of victims, opportunistic killings and torture. The full gamut of man's inhumanity to man passed my desk every day.

The differences between local lawyers' interpretations of the law, those of us from common law countries, and those from the civil law tradition were always interesting and sometimes fiery. The incredible love of stamps and the strength of the hierarchy in BiH were in many ways strange to me and, at times, infuriating. The first word I learned in Bosnian/Croatian/Serbian was *pecat* (stamp). It was a word I was to use daily in my time in BiH. It was understandable in a way: a country that was ruled by the Ottomans, the Austro-Hungarians, and then the communists was sure to be bound deeply to a need for forms, stamps and signatures.

Success and failure were familiar bedfellows. We convicted men for genocide, aiding and abetting genocide, and crimes against humanity. However, others walked free, who to my dying day I will know were guilty. Investigations on many suspects had to be closed due to insufficient evidence, threats to witnesses, witness fatigue and the suspects being in Serbia, from where we could not extradite them.

Sarajevo is a special place, though, and while I have hope still for BiH and I know it has massive potential, I also fear for it. A country with unemployment of over 40%, an education system that is failing, widescale and massive corruption, and in which the international community has lost interest is a dangerous place. As a foreigner, I got to see it all and would still recommend it highly as a place to visit and experience. It has it all: great summers, snowy winters, skiing, rafting, trekking, history and nightlife. It has a very low crime rate and is very cheap by Western European standards. However, the situation there in the long term is unsustainable, and the European Union will soon have a border of over 1,000km with BiH when Croatia is admitted to the union in a few months. It does not bode well.

Jack be nimble

In September 2012, I moved from Sarajevo to Pristina in Kosovo. I am working here as a lawyer in the Special Prosecution Office at the European Rule of Law Mission in Kosovo, investigating and prosecuting war crimes, terrorism, and organised crime cases involving everything from organ smuggling to gun-running to political assassination.

It is stimulating work and shares many of the ups and downs of BiH, but it is nothing if not interesting.

Louth Solicitors' Bar Association

The annual general meeting of the County Louth Solicitors' Bar Association took place on 12 February 2013 at Dundalk Courthouse. The meeting was joined by the Law Society's president and director general and proceeded to discuss the *Legal Services Regulation Bill*, changes to jurisdiction and structure of the courts, and the recent Council decision in respect of conflicts of interest in conveyancing. Conor MacGuill, John McGahon and Richard McDonnell were returned as president, treasurer and PRO respectively. The association was sad to note the decision of Elaine Connolly to step down from her role as honorary secretary. She has been replaced by Nicola Kelly. The business end of matters dealt with, the meeting adjourned to 23 Seats café where, to mark Shrove Tuesday, pancakes and other refreshments were provided. The bar association has an ambitious plan for CPD and social events for the remainder of the year. Attending the AGM were *(front, l to r)*: Fergus Mullen, John McGahon, Elaine Connolly, James McCourt (Law Society President), Ken Murphy (director general), Conor MacGuill, Nicola Kelly, Catherine McGinley and Catherine Allison. *(Second row, l to r)*: Sara McDonnell, Martin Mulligan, Una Lyons, Paul McArdle, Simon McArdle, Donal O'Hagan, Dermot Lavery, James Murphy, Paul Eaton, Thomas Hardy, Peter Lavery and Brendan Walsh. *(Third row, l to r)*: Gary Matthews, Richard McDonnell, Caroline Berrills, Francis Bellew, Stephen Reel, Seamus Roe, Barry O'Hagan, Evonne Finnegan, John Kieran, Olivia McArdle, Niall O'Hagan, Alison Quail, Ciara Maguire, Tim Ahern, Larry Steen, Roger McGinley, James MacGuill, Grainne Loughnane and Kieran Fitzpatrick

Monaghan Bar Association

The Central Criminal Court sat at Monaghan Courthouse for the week commencing 12 February, during which the Monaghan Bar Association hosted a dinner in honour of Mr Justice Paul Carney, who is seen here with: Frank Martin BL, Brian Carroll BL, Ken Connolly BL, Dan Gormley, Joe Smyth, Monica Lawlor BL, Bernie Smith, Pauline Barry, Lynda Smyth, Anne Dolan, Roisin Courtney, Emer Holohan, Barry Healy, Paul Boyce, Sandra Berg, Mary Feerick, Kevin Hickey, Justine, Pat McMorrow, Kevin McCann BL, Liam Mulholland and Gerry Jones

Kingdom celebrates Eoin's captaincy of senior football team

Killarney-based solicitor Eoin Brosnan has been named captain of Kerry's senior football team for 2013. To celebrate the great news, members of the Kerry Law Society clubbed together to make a special presentation to Eoin in Tralee on 25 January 2013, which was attended by cheering society members and their children.

The Dr Croke's clubman is the third member of the Kerry Law Society to have played for Kerry's senior football team. First was the late Gary McMahon, who won two All Ireland medals. He was followed by Paudie Lynch who played during the '70s and early '80s and holds five All Ireland medals. (Christy Ross has played for the Kerry hurlers in the past.) Eoin (32) plays in the half-back line and already has three All Ireland medals to his credit, but this is the first time he has been given the honour of leading out the Kerry team.

Kerry Law Society has expressed its fervent hope that Sam Maguire will be present at its annual dinner later in the year!

Our man in Singapore

Fergus McCarthy recently represented Kennelly Tax Advisers at the annual International Tax Specialist Group conference in Singapore, a global grouping of lawyers and other professionals from 26 countries who specialise in international tax planning. Pictured with Fergus, who is a consultant with Kennelly Tax Advisers, are Eoin Kennelly and Jane Florides

Healthy beginnings

The Law Society Diploma Programme's new Certificate in Healthcare Law and Practice was launched by Ms Justice Mary C Irvine on 17 January 2013. Judge Irvine underlined how practising in this area required special training and commented on the "stellar list of experts" who had volunteered to lecture. *(Front, l to r)*: Alice Lanigan (solicitor, Holmes O'Malley Sexton), Ms Justice Mary C Irvine and Freda Grealy (diploma manager). *(Back, l to r)*: Gail O'Keeffe (partner, O'Connor Solicitors), Simon Murphy (chairman, Education Committee), Roger Murray (head of medical negligence, Callan Tansey), Olive Doyle (partner, McDowell Purcell) and Ursula Byrne (acting director of the Regulation of Nursing and Midwifery Board)

Secrets and Shadows

The Law Society's Student Development Service has been supporting literacy in the local Dublin 7 area through its involvement in the 'One Book, One Community' project, which involves the community reading the same book and coming together to take part in a related quiz.

The book, *Secrets and Shadows*, was written by local man and novelist Brian Gallagher. Set in war-time during the 1940s, in the streets around Blackhall Place, it's a tale about an imagined spy, written though the eyes of children, and inspired by real-life events that the novelist heard recounted as folklore when he was a boy.

PICS: CIAN REDMOND

Grandparents and grandchildren, parents and teachers, local gardaí and community workers joined Law School staff at the interschool table quiz, based on the book, on 24 January. Finance director Cillian Mac Domhnaill proved to be an engaging and well-informed MC. It is hoped that the event, held in the Presidents' Hall at Blackhall Place, might encourage these bright young people to keep up their reading. Who knows? Perhaps some will choose to enter the legal profession in the years ahead!

A copy of the book is available for loan from the Law Society Library.

'Pop-up' law library proves popular

Ballymun Community Law Centre (BCLC) has launched its own law library. The idea behind the venture is to make the law more accessible to the general public.

Last November, as part of the first Community Law Festival in Ireland, the first ever 'pop-up' law library was opened in Ballymun – with books donated by the Law Society.

Now BCLC has joined forces with Griffith College, Dublin, which has agreed to contribute surplus legal books on an ongoing basis for lending to people in Ballymun. The new initiative will ensure a steady stream of up-to-date legal books.

Books are available for loan from Ballymun Community Law Centre, which is located at 165-166 Balbutcher Lane, Ballymun, Dublin 11.

For further information, contact Paula McCann, tel: 01 862 5805, or email: info@bclc.ie/www.bclc.ie.

At the launch of the new library were *(l to r):* Siobhán Leonard (head of law, Griffith College, Dublin), David Langwallner (dean of law faculty), Paula McCann (BCLC), Dr Claire O'Connor (law faculty) and Dr Tanya Ní Mhuirthile (law faculty)

PCS: LENSMEN PHOTOGRAPHIC STUDIO

Past-presidents and Council members of the Law Society gathered on 24 January 2013 to attend the outgoing president's dinner, held in honour of Donald Binchy. *(Front, l to r)*: John Costello, Philip Joyce, Geraldine Clarke, James McCourt (Law Society President), Donald Binchy, Elma Lynch and Michael V O'Mahony. *(Back, l to r)*: Judge Gerard Griffin, Frank Daly, Tony Ensor, John D Shaw, James MacGuill, Adrian Bourke, Michael Irvine, Laurence K Shields, Gerard Doherty and Owen Binchy

Attending the outgoing president's dinner were *(from l to r)*: Geraldine Kelly, Deirdre O'Sullivan, Michelle Ní Longáin and Sonia McEntee

ON THE MOVE

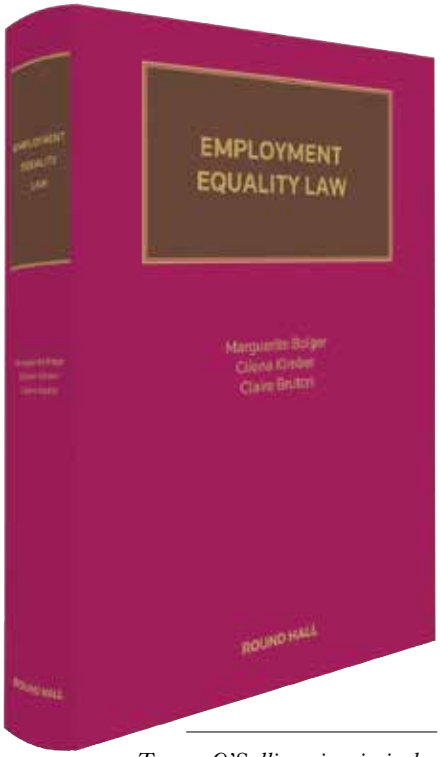
Susan Higgins has joined McDowell Purcell as an associate in the litigation and insolvency department. Susan has acted for lending institutions for many years and is pictured with Mark Woodcock, who heads up the department

Tanya Egan has moved to the commercial property and banking team at McDowell Purcell. Tanya is pictured with unit head Breen Purcell

Elizabeth McCann has joined the commercial and renewable energy team at McDowell Purcell. Elizabeth *(right)* is pictured with Feilim O Caoimh, who heads up the commercial and renewable energy unit, and Clair Hayes

Employment Equality Law

Marguerite Bolger, Clíona Kimber and Claire Bruton. Round Hall (2012), www.roundhall.ie.
ISBN: 978-1-85800-591-1. Price: €245.



Most employment lawyers will readily acknowledge that this is by far the most complex area of law affecting the relationship between employer and employee. In improving one's knowledge and understanding of equality law, this publication does not disappoint. The authors appear comfortable in their grasp of the subject matter and passionately committed to the aims of equality legislation too.

The book is well structured, including chapters coupling a consideration of gender with pregnancy issues, and discrimination on the ground of race with issues relating to membership of the travelling community.

I am pleased to recommend this publication on a number of bases. If you want to practise in the area of equality law, then your quest for answers to the inevitable questions that will arise should begin with consideration of this work. My understanding of equality law has been greatly improved in the course of my review. To put it in simple terms, there were many penny-dropping moments, when scales fell from eyes.

One such moment was the authors' explanation of how it has come to pass that the Circuit Court jurisdiction is unlimited in cases of gender discrimination, when there is little to suggest that the degree of harm suffered by victims of sexual discrimination is quantifiably greater than the degree of harm endured by victims of disability or race discrimination, or any of the other nine grounds.

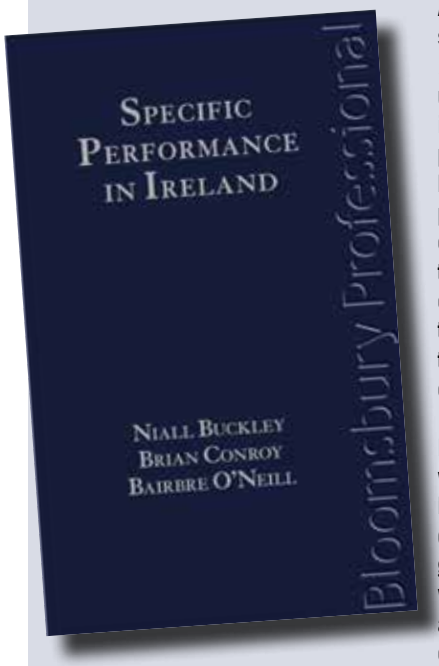
I must also commend the authors on the clarity of the language they use. One example suffices to illustrate: "Rights, no matter how radical or extensive they might be, are only as meaningful as the remedy for their breach is effective. Irish law clearly leaves much to be desired." No pulling punches there: the point is well made and difficult to oppose.

This is a must-have publication for anyone who has an interest in this most complex area of law, and it will be of considerable benefit to lawyers and non-lawyers alike. The authors must be commended for this most valuable contribution to this complex and constantly evolving area of law.

Terence O'Sullivan is principal of the firm Terence J O'Sullivan, Solicitors, based in Cork city. He is a member of the Employment Law Association of Ireland and the European Employment Lawyers' Association. He is also chair of the SLA's employment law committee.

Specific Performance in Ireland

Niall Buckley, Brian Conroy and Bairbre O'Neill. Bloomsbury Professional (2012), www.bloomsburyprofessional.com. ISBN: 978-1-84766-381-8.
Price: €185.



A practitioner rarely reads a work such as *Specific Performance in Ireland* for pleasure. More usually, the reader seeks illumination on a pressing problem. Most practitioners' knowledge of specific performance rests on the extent of their application as students to courses on contract law or equity. Here is an opportunity to consult an up-to-date Irish treatment of this most practical of legal issues.

This excellent work is logically structured, lucidly written and richly annotated. It explains the nature of this discretionary remedy and the grounds upon which a court would refuse it. The tricky areas of part performance and conditional agreements are examined at length. Specific performance most frequently arises in the context of the sale of land. The law in this area is organised and discussed. However, there are ranges of other contracts where the remedy is of relevance, and these are also elaborated upon. Of course, the performance of the contract is only one of the possible remedies available to the court. These others are canvassed very helpfully.

The nuts and bolts of bringing an action form an important part of this work. There are generous chapters on the procedural and evidentiary requirements and even a selection of sample pleadings.

One of the satisfactions in reading a book of this sort is that you find that issues may be current, but they are not new. The extent that hardship can be pleaded as defence is an issue that confronts the modern practitioner. But this was a question debated centuries ago in *Adams v Weare* (1784). However, the authors note that the law may be capable of development and point to interesting *dicta* in recent cases.

Any lawyer contemplating the enforcement of a contract governed by Irish law must consult this book and will even take pleasure in doing so.

Paul Keane is managing partner of Reddy Charlton Solicitors and chairman of the Business Law Committee of the Law Society of Ireland.

I heard it through the grapevine

Marvin Gaye famously sang "talk to me so you can see what's going on", but Mary Gaynor does the hard work so you don't have to

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

BookMyne, the library catalogue app, has been updated recently (version 3.0.1.1) to include book jacket covers, summaries of contents and links to judgments. When you open the app, the latest version automatically downloads to your phone or mobile device.

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FOCUS ON... Personal insolvency

Read the act: **www.irishstatutebook.ie/pdf/2012/en.act.2012.0044.pdf.**
Read the explanatory memorandum: **www.oireachtas.ie/documents/bills28/bills/2012/5812/b58112d.pdf.**
Read the commentary:

- **Baxter, Warren (2012) '*Personal Insolvency Bill* promises radical reform', *Accountancy Ireland*, 44(2), 54-55**
- **Bracken, Tim (2013) *The Practitioner's Personal Insolvency Handbook* (Clarus Press)**
- **O'Flaherty, Gavin and Cormac Brown (2012) 'Dawn of a new era? The *Personal Insolvency Bill 2012*', *Irish Tax Review*, 25(3), 108-114**
- **O'Sullivan, Patrick (2012) 'The proposed new *Personal Insolvency Bill:* a critical analysis of debt relief certificates', *Commercial Law Practitioner*, 19(3), 54-63**
- **Stafford, Jim (2012) 'Irish v UK bankruptcy', *Accountancy Ireland*, 44(3), 14, 16**

JUST PUBLISHED

New books available to borrow

- Bolger, Marguerite *et al, Employment Equality Law* (Round Hall, 2012)
- Bracken, Tim, *The Practitioner's Personal Insolvency Handbook* (Clarus Press, 2013)
- Cannon, Ruth *et al*, *Property Legislation Annotated 2009-2011* (Round Hall, 2012)
- Carolan, Eoin, *The Constitution of Ireland: Perspectives and Prospects* (Bloomsbury Professional, 2012)
- Chitty, Joseph, *Chitty on Contracts* (31st ed; Sweet & Maxwell, 2012)
- Flenley, William and Tom Leech, *Solicitors' Negligence and Liability* (3rd ed; Bloomsbury Professional, 2012)
- Goodman, Andrew, *Effective Written Advocacy: a Guide for Practitioners* (Wildy, 2012)
- Hanley, Donal Patrick, *Aircraft Operating Leasing: a Legal and Practical Analysis* (Kluwer, 2012)
- Higgins, Imelda, *Corruption Law* (Round Hall, 2012)
- Holohan, Bill and David Curran, *Lawyers' Professional Negligence and Insurance* (Round Hall, 2012)
- Jay, Rosemary, *Data Protection Law and Practice* (4th ed; Sweet & Maxwell, 2012)
- Killian, Sheila, *Corporate Social Responsibility: a Guide with Irish Experience* (Chartered Accountants Ireland, 2012)
- Matthews, Alison, *Anti-Money-Laundering Toolkit* (Law Society of England and Wales, 2012)
- Morgan, Richard, *Data Protection Strategy: Implementing Data Protection Compliance* (2nd ed; Sweet & Maxwell, 2012)
- Nagle, Eva, *Intellectual Property Law* (Round Hall, 2012)
- Steel, Gill, *Trust Practitioner's Handbook* (Law Society of England and Wales, 2012)
- Susskind, Richard, *Tomorrow's Lawyers: an Introduction to your Future* (OUP, 2013)

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

- Hagger, Lynn and Simon Woods, *A Good Death? Law and Ethics in Practice* (Ashgate, 2013)

DOMINIC DOWLING
1954 – 2013

It is frequently said of those who die unexpectedly that a gap is left behind that it will be impossible to fill. Never was that truer than of Dominic Dowling, who died recently at the age of 58.

He was a familiar figure at Mass in the Church of the Assumption in Dalkey each morning but, for Dominic, this was no empty routine.

He carried his convictions into action in the wider community in a myriad of ways. He was involved in the merger of De La Salle RFC and Palmerston FC when such mergers were neither popular or commonplace. He acted as trustee of the body that runs Rockbrook Park School in Rathfarnham and Hill House, and though taxed by what proved to be his final illness, he helped and supported the schools until weeks before his death. Many people in Dalkey had reason to value Dominic's commitment and it was fitting that, on the day of his funeral, the flag over Dalkey Castle flew at half mast.

Dominic was enrolled as a solicitor in 1976 and went into the practice founded by his father, before entering into partnership with Gerry Butler. It is nearly 20 years since he moved to Dalkey, where he was ably assisted by Jeanne Kelly who then went into partnership with him.

As is often the way, the tone of a practice is set by its principals. Jeanne and Dominic led a team that was characterised by courtesy and quiet efficiency in all that they did. Large-scale litigation and the requirements of clients, such as the Pharmaceutical Society, were served with the same determination and skill as the transactional and litigation needs of the community.

Many will recall Dominic's presidency of the Dublin Solicitors' Bar Association, during which he was given honorary citizenship of the City of New Orleans and made an Honorary State Senator for the State of Louisiana.

He served on the Education Committee and, later, the Public Relations Committee of the Law Society, and was a valued member and friend to many of those administering the profession. It reflected his desire to give back some of the good fellowship and support that he had enjoyed.

Professional fellowship was important to Dominic, but all other things were eclipsed by his family. He married his beloved Ruth Shanley in 1978. Peter Shanley, Ruth's brother, an accomplished senior counsel and then judge, was himself cut down suddenly and in his prime. It is a sad double blow for Ruth to have to shoulder.

Both Ruth and Dominic viewed their children, Mark, Emma, Gina, Ruthie, Dominic and Rebecca, as their crowning achievement and the children have grown into the fine young men and women that Dominic and Ruth had hoped they would become. Mark and Gina joined Jeanne and Dominic in the firm. Others have found or are finding their own course. There was seldom an occasion, when meeting Dominic for business or some other matter, that he didn't recount with pride and affection something that Ruth had done or the children had achieved.

Nothing became Dominic in life as the manner of his leaving of it. He bore an invasive and rapidly debilitating condition with fortitude.

Those of us who were privileged to know him were impressed and amazed to find him still cheerily discussing rugby or some other matter within a short time of learning of his latest challenge.

These things must come as little compensation now, both to Ruth and the children, but the fact that Dominic was able to smile through so much of that difficult time may yet prove to be another one of the gifts that this remarkable man gave us in his relatively short life.

BO'F

Law Society Council meeting 25 January 2013

Sympathy

The Council of the Law Society observed a minute's silence in memory of Mr Brian Overend and Mr Dominic Dowling.

Members' survey

The Council received a presentation from Millward Brown Lansdowne of the summary results of the members' survey conducted in autumn 2012. It was agreed that the survey represented an important element of the research being conducted by the Future of the Law Society Task Force. The survey results would inform the thinking of the task force, and the key findings would be included in the report of the task force, which would be presented to the Council at its meeting on 5 April.

Report of lay members

The Council noted the contents of the report of the lay members of the Complaints and Client Relations Committee.

Legal representation during Garda interviews

The Council approved the appointment of James MacGuill as the Society's representative on a working group to advise on a system providing for the presence of a legal representative during Garda interviews.

Letter from NI secretary

The Council noted with disappointment the contents of a letter received from the Secretary of State for Northern Ireland, Theresa Villiers, in response to the president's letter to British Prime Minister David Cameron calling for an independent public inquiry into the murder of Patrick Finucane. Villiers said: "Sir Desmond de Silva's review provided the best way of getting to the truth in this case and, in doing so, put into the public domain all that is known about the circumstances of Patrick Finucane's death. Experience has shown that public inquiries into the events of the Troubles take many years and can be subject to prolonged litigation, which delays the truth emerging. The prime minister has made clear that more costly and open-ended inquiries are not the right way to deal with Northern Ireland's past."

The Council agreed that the letter from Ms Villiers should be brought to the attention of the Taoiseach.

BRIEFING

Practice notes

Ethical barriers within a firm

GUIDANCE AND ETHICS COMMITTEE

These guidelines relate to those few situations where solicitors can properly and lawfully agree to act on behalf of two parties to a case or transaction. The guidelines address the extra precautions that firms should take in those circumstances to ensure that no conflict of interest arises and there is no breach of the duty of loyalty, the duty to make full disclosure, and the duty of confidentiality owed to each client.

Ethical barriers, sometimes referred to as 'Chinese walls', must be put in place. Each firm should take into account its own circumstances, and the particular circumstances of the clients and the transaction in question, to ensure that proper measures are in place.

Clearly, for practical reasons, it would not be possible to have effective ethical barriers in a sole practitioner/sole principal firm or in other small firms. Accordingly, these guidelines only have relevance for larger firms.

Internal overseeing committee

The solicitors' firm should have in place a person or committee to oversee conflicts of interest and the operation of measures to regulate them. Such a person or committee should have authority over all aspects of the operation of the ethical barriers. All appropriate cases should be referred to that person or committee and all decisions made by them should be formally recorded.

They should have power to rule that procedures are insufficient, generally or in a particular case, and direct that additional measures be taken. They also should have power to decide, in particular cases, that the measures that are in place are insufficient to protect the parties and that the firm should not act in the case or transaction being reviewed.

The person or committee should also be available to members of the firm for consultation and the provision of advice. Where such person or a member of such committee is one of the solicitors acting in a conflict situation, he/she should be replaced by another uninvolved person or, in the case of a committee, should withdraw from all discussions of, and rulings on, the conflict in question.

Access to confidential information

Arrangements should be put in place to ensure that no solicitor acting on behalf of either of the parties will have access to confidential information in relation to the interest of the other party to the conveyancing or other case or transaction. Files that are subject to such measures should be kept in a secure location under the control of the principal solicitor acting in the matter.

Clients should be consulted as necessary, and their specific authority in writing should be obtained. Where the particular situation is subject to regulation, there must be full compliance with the regulations.

Separate specialist advices/ separate secretarial support

To the extent that specialist experts and secretarial support are needed by the solicitor or team of solicitors, these should not be provided to both sides within the firm by the same individuals, firms or organisations.

New duties in the sale of properties with waste water treatment systems

CONVEYANCING COMMITTEE

The Conveyancing Committee would like to highlight the following obligations for vendors and purchasers, which affect the sale or purchase of properties in rural areas (for the most part) from 1 February 2013.

The *Water Services (Amendment) Act 2012* was introduced on the back of an ECJ ruling that Ireland was in breach of the *Waste Directive* (76/1442) for not having proper legislative provisions in place regulating the disposal of domestic waste water from septic tanks. Section 4 of the act introduces a new section after part 4 of the *Water Services Act 2007*. It provides for the introduction of a registration and inspection system for domestic waste-water treatment systems. The act came into operation on 26 June 2012.

Under the *Waste Water Treatment Systems (Registration) Regulations 2012* (SI 220 of 2012), 1 February 2013 was appointed as the prescribed date for the purpose of registration of waste-water treatment systems, for example, septic tanks, and so on.

Under section 70D of the act, a person who sells a property connected to a domestic waste-water treatment system (as defined in the act) including, but not limited to, a septic tank, will be obliged on the closing of the sale to furnish a valid certificate of registration in respect of the treatment system to the purchaser.

The purchaser is obliged to notify the water services authority of the change of ownership after the sale is completed.

Under section 70C, there is an obligation on property owners to ensure that a system does not constitute, and is not likely to constitute, a risk to human health or the environment and, in particular, does not create a risk to water, air or soil, or plants and animals. There is also a duty not to create a nuisance through noise and odours.

This matter will be the subject of an additional requisition on title in the new edition of the requisitions due out later in the year. Practitioners should include requisitions to clarify the position regarding the registration of any waste-water treatment system serving a property being purchased and the evidence that will be available on closing to verify this. Preferably this should be raised pre-contract.

New Land Registration Rules 2012 – clarification

The editor wishes to clarify a matter relating to the publication of a practice note by the Conveyancing Committee and an article by Liz Pope of the Property Registration Authority (PRA) at p50 of the January/February 2013 issue of the *Gazette*, on the topic of the *Land Registration Rules 2012*.

Only the text in the shaded panel in the top left corner of the page, less the fourth paragraph, was provided by the Conveyancing Committee. The layout and the insertion of the fourth paragraph may, however, have inadvertently given the impression that the adjacent article was approved by the Conveyancing Committee, when in fact it was an article by Liz Pope of the PRA.

The Conveyancing Committee was not aware that this article would be published in the Practice Notes section and was not aware of its content.

Apologies are extended for any confusion caused.

Architects' certificates of compliance with the *Building Regulations*: reliance on confirmations from other professionals

CONVEYANCING COMMITTEE

The Law Society published a practice note in the August/September 1997 issue of the *Gazette* to advise that, where a purchaser's solicitor is furnished with the Royal Institute of Architects of Ireland (RIAI) Form 1 Architects' Opinion on Compliance with the *Building Regulations*, this form (and indeed the other RIAI forms dealing with this topic) envisages the architect giving a certification of his/her opinion on compliance, in which the architect relies on a visual inspection and on confirmations from other professionals such as structural engineers, fire engineers, mechanical and electrical engineers, and so on, and that the solicitor should get copies of these confirmations in order to advise the client properly.

A number of solicitors have asked the committee to reconsider its guidance in that practice note for a number of reasons, short details of which are set out below:

1) Some architects refuse to give copies of the confirmations and say that it is a matter for them to assess the confirmations and they are not prepared to have them reviewed by solicitors who have no training in this area.
2) Increasingly, the confirmations have become more technical and would require a good understanding of building technology to assess and review them, which solicitors are not trained to do.
3) Some of the specified confirmations are missing from the suites of confirmations in relation to individual sales of second-hand properties, and purchasers' solicitors feel bound by the Law Society guidance that they must be furnished.
4) The architect is the professional person competent to exercise a professional judgement and assess the confirmations given and if, having carried out such assessment, the architect is prepared to confirm his/her opinion on compliance, this should be acceptable for title purposes.
5) There is the comfort of a statutory obligation on all parties involved in the construction of a building to carry out the work in accordance with the *Building Regulations*.

Having considered these submissions carefully, the committee is persuaded that its original guideline is no longer appropriate and that, where an architect's certificate of opinion on compliance confirms compliance with the *Building Regulations* and confirms that, in coming to this opinion on compliance, reliance has been placed by the architect on confirmations received from other professionals, it is not necessary for a purchaser's solicitor to see such confirmations and the solicitor may rely on the architect's certificate of compliance itself.

One of the RIAI forms refers to copies of the confirmations being attached, and the committee has requested the RIAI to remove these words, and solicitors acting for purchasers being furnished with certificates of opinion on compliance should seek to have these words deleted where confirmations are not being produced.

This is not to suggest that solicitors should object to being furnished with copies of the confirmations, but solicitors should not review the confirmations and, if appropriate, should make it clear that they are relying on the architect's expertise in that regard.

It continues to be very important for solicitors to carefully read any and all certificates of opinion on compliance furnished.

BRIEFING

Legislation update 27 December 2012 –1 February 2013

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

Circuit Court Rules (Appeals to Court of Criminal Appeal)
Number: SI 489/2012
These rules delete order 42 of the *Circuit Court Rules*, removing reference to the time limit for application for a certificate for leave to appeal in view of the repeal of the requirement for such a certificate, effected by section 31 of the *Criminal Procedure Act 2010*.
Commencement: 1/12/2012

Civil Registration (Amendment) Act 2012 (Commencement) Order 2013
Number: SI 16/2013
Appoints 23/1/2013 as the commencement date for all sections of the act.
Commencement: 23/1/2013

Personal Insolvency Act 2012 (Part 6) (Commencement) Order 2013
Number: SI 14/2013
Appoints 18/1/2013 as the commencement date for part 6 (appointment of specialist judges of the Circuit Court) of the act.
Commencement: 18/1/2013

Rules of the Superior Court (Affidavits) 2012
Number: SI 487/2012
These rules amend order 40 of the *Rules of the Superior Courts* by the insertion of a new rule 13A, the amendment of rule 14, and the insertion of new rules 14A and 14B to specify requirements in relation to the giving of affidavit testimony by deponents with insufficient competence in the Irish or English languages, or by illiterate deponents.
Commencement: 1/12/2012

Rules of the Superior Court (Funds in Court) 2012
Number: SI 488/2012
These rules amend order 67, rule 92; form no 18, appendix K; order 77, rule 43; and form no 13, appendix P of the *Rules of the Superior Courts* by increasing to €25,000 the amount that can be released to next of kin of deceased persons, including wards of court, without the need for letters of administration.
Commencement: 1/12/2012 G

Prepared by the Law Society Library

ONE TO WATCH

One to watch: Court decision

English High Court rules against employer in Facebook comment case

An employee in Britain who was demoted for a post on Facebook expressing his opposition to gay marriage has won his legal action for breach of contract.

Adrian Smith from Bolton lost his managerial position, had his salary cut by 40% and was given a final written warning by Trafford Housing Trust (THT) after stating that gay weddings in churches were "an equality too far". Mr Smith claimed that the THT had acted unlawfully in demoting him and brought breach of contract proceedings.

Mr Smith's comments on Facebook were not visible to the public and were posted outside of office hours. Mr Smith's Facebook profile had 45 work colleagues linked as friends.

When questioned on his profile about his statement, he replied: "I don't understand why people who have no faith and don't believe in Christ would want to get hitched in a church ... The Bible is quite specific that marriage is for men and women. If the state wants to offer civil marriage to same sex then that is up to the state; but the state shouldn't impose its rules on places of faith and conscience."

Disciplinary process

The THT's disciplinary process was invoked as a result of a complaint received about the postings. The trust argued that the comments were a serious breach of its disciplinary code of conduct, in that he had expressed religious or political views that could upset co-workers. The trust concluded that the Facebook comments had brought the THT into disrepute.

Mr Smith brought a breach of contract action to the High Court. Mr Justice Briggs ruled in his favour, holding that Mr Smith's actions did not amount to misconduct and the THT had no right to demote him. The court held that his demotion was a breach of contract.

The court stated its unease with the damages awarded, but stated it was limited due to legal technicalities.

The judge stated: "A conclusion that his damages are limited to less than £100 leaves the uncomfortable feeling that justice has not been done."

The judge added that if Mr Smith had commenced proceedings for unfair dismissal in the employment tribunal, he could have been awarded substantial compensation for the unfair way he was treated.

Breach of contract

The judge described the breach of contract committed by the THT as "serious and repudiatory". Mr Justice Briggs stated: "Mr Smith was taken to task for doing nothing wrong, suspended and subjected to a disciplinary procedure which wrongly found him guilty of gross misconduct."

There is minimal case law on this area in Ireland and so this British decision sheds some light as to how such a case might be dealt with by Irish courts.

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 Greg (otherwise John G) Casey, a solicitor formerly practising in the firm of Casey & Co, Solicitors, North Main Street, Bandon, Co Cork, and in the matter of the *Solicitors Acts 1954-2008* [5355/DT65/09]
Law Society of Ireland (applicant)
Greg (otherwise John G) Casey (respondent solicitor)
On 25 July 2012, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Up to the date of the swearing of the affidavit, failed to comply with the direction of the Complaints and Client Relations Committee on 1 April 2008 that he make a contribution of €3,000 towards the costs of the Society following his failure to answer the Society's correspondence in a timely manner and his failure to arrange for compliance with a notice pursuant to section 10 of the *Solicitors (Amendment) Act 1994*, dated 3 March 2008,
b) Failed to attend or to arrange to be represented at the meeting of the Complaints and Client Relations Committee on 25 June 2008, despite having been notified by letter dated 17 June 2008 that he was required to attend the said meeting.

The tribunal ordered that the respondent solicitor:

a) Do stand censured,
b) Pay a sum of €5,000 to the compensation fund,
c) Pay €5,000 to the Society as a contribution towards their costs.

In the matter of Mel Kilrane, solicitor, formerly practising as Mel Kilrane, Solicitor, Main Street, Bailieborough, Co Cavan, and in the matter of the *Solicitors Acts 1954-2008* [3506/DT99/11 and High Court record no 2012/59 SA]
Law Society of Ireland (applicant)
Mel Kilrane (respondent solicitor)
On 22 May 2012, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

1) Failed to maintain books of account to show the true financial position in relation to the solicitor's transactions with clients' money and other monies, in breach of regulation 12(1) and 12(2) of the *Solicitors' Accounts Regulations 2001*,
2) Deliberately recorded funds received for or on behalf of clients in the wrong client ledger accounts, in breach of regulation 12(3) and 12(4) of the *Solicitors' Accounts Regulations 2001*,
3) Made payments to clients and to others that were deliberately recorded in the wrong client ledger accounts, in breach of regulation 12(3) and 12(4) of the *Solicitors' Accounts Regulations 2001*,
4) Created a pattern of allowing debit balances to arise on the client ledger and rectifying them by the month end, in breach of regulation 7(2)(a) of the *Solicitors' Accounts Regulations 2001*,
5) Made personal payments on behalf of the solicitor from the client bank account to purchase properties, in breach of regulation 7(2)(b) of the *Solicitors' Accounts Regulations 2001*,
6) Lodged client funds such as party-and-party costs to the office account, in breach of regulation 4(2) of the *Solicitors' Accounts Regulations 2001*,
7) Transferred monies held to pay stamp duty for a named client to the office bank account, in breach of regulation 7 of the *Solicitors' Accounts Regulations 2001*,
8) Withdrew monies from the client account by way of cheques made payable to clients and re-lodged same to client account, recording these transactions to other client ledger accounts during 2007 and 2008, in breach of regulation 7 and regulation 12 of the *Solicitors' Accounts Regulations 2001*,
9) Drew cheques paid from the client account payable to cash and recorded them in the books of account as payments to clients, in breach of regulation 7 and regulation 12 of the *Solicitors' Accounts Regulations 2001*,
10) Borrowed €555,000 from two of his clients without advising those clients to obtain independent legal advice,
11) Failed to correctly maintain records of all office transactions, in breach of regulation 12(6) of the *Solicitors' Accounts Regulations 2001*,
12) Deliberately stamped deeds relating to his own property and to client properties by reference to an incorrect date of transfer (updating deeds), thereby avoiding interest and penalties arising or late stamping of deeds,
13) Conducted the acquisition of properties in his own name through the client account, in breach of regulation 5 of the *Solicitors' Accounts Regulations 2001-2006*,
14) Transferred monies from client to office account in respect of fees, without providing those clients with a bill of costs or making it clear to clients that monies were applied in satisfaction of fees, in breach of regulation 7(1)(iii) and regulation 11(1) of the *Solicitors' Accounts Regulations 2001*,
15) Allowed a deficit of clients' funds to arise on the practice, conservatively estimated to be in the region of €61,010,
16) Failed to comply with section 68 of the *Solicitors (Amendment) Act 1994*.

The tribunal ordered that the matter should go forward to the High Court, and the President of the High Court made the following orders on 8 October 2012:

1) That the respondent solicitor not be permitted to practise as a sole practitioner or in partnership, that he be permitted only to practise as an assistant solicitor in the employment and under the direct control and supervision of another solicitor of at least ten years' standing, to be approved in advance by the Society,
2) That the respondent pay the Society the sum of €5,000 plus VAT in respect of contribution to the costs of the Solicitors Disciplinary Tribunal,
3) That the respondent pay the Society the costs of the High Court proceedings, to be taxed in default of agreement.

NOTICE: THE HIGH COURT

Record no 2012 no 65 SA
In the matter of Michael Crawford, solicitor, practising as Michael Crawford, Solicitor, Lurganboy, Manorhamilton, Co Leitrim and in the matter of the *Solicitors Acts 1954-2011*
Take notice that, by order of the High Court made on 11 February 2013, it was ordered that:

1) Pursuant to section 20(1) of the *Solicitors (Amendment) Act 1960*, as amended by substitution by section 28 of the *Solicitors (Amendment) Act 1994*, as amended by section 22(1)(i) of the *Solicitors (Amendment) Act 2002*, that no bank shall, without leave of the court, make any payment out of an account in the name of the respondent solicitor or his firm,
2) The respondent solicitor shall be suspended from practising as a solicitor until further order of the court.

John Elliot, Registrar of Solicitors, Law Society of Ireland, 12 February 2013

BRIEFING

In the matter of Seamus P McConnell, solicitor, 56 Glendaniel, Tullamore, Co Offaly, and in the matter of the *Solicitors Acts 1954-2008* [6626/DT99/10]
Law Society of Ireland (applicant)
Seamus P McConnell (respondent solicitor)

On 7 June 2012, 3 July 2012 and 9 October 2012, the Solicitors Disciplinary Tribunal sat to consider a case against the respondent solicitor. The tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he failed to ensure there was furnished to the Society an accountant's report for the year ended 31 July 2009 within six months of that date, in breach of regulation 21(1) of the *Solicitors' Accounts Regulations 2001* (SI 421 of 2001).

The tribunal ordered that the respondent solicitor:

a) Do stand censured,
b) Pay the whole of the costs of the Society to be taxed by a taxing master of the High Court in default of agreement.

In the matter of James J Maher, solicitor, practising as James Maher & Co, Solicitors, 1 The Bookend, Essex Quay, Dublin 8 and in the matter of the *Solicitors Acts 1954-2008* [6676/DT137/11]
Law Society of Ireland (applicant)
James J Maher (respondent solicitor)

On 8 November 2012, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Failed to respond adequately or at all to the Society's correspondence and, in particular, letters dated 9 February 2011, 2 March 2011 and 15 March 2011, necessitating the Complaints and Clients Relations Committee, at its meeting on 23rd March 2011, to require a contribution of €500 from the respondent solicitor towards the costs of the Society's investigation,
b) Failed to respond adequately or at all to the Society's correspondence, necessitating an application by the Society to the High Court pursuant to section 10(A) of the *Solicitors (Amendment) Act 1994* (as amended by substitution),
c) Failed to comply with an undertaking given to the Complaints and Client Relations Committee at its meeting on 11 May 2011 to lodge the application for first registration by 1 July 2011,
d) Failed to provide regular updates regarding the progress of the registration to the Society, as directed by the Complaints and Client Relations Committee at its meeting on 6 July 2011,
e) Failed to respond adequately or at all to the Society's correspondence dated 8 July 2011,
f) Failed to attend a meeting of the Complaints and Client Relations Committee on 14 September 2011, despite being required to do so.

The tribunal ordered that the respondent solicitor do stand censured.

In the matter of Mark Potter, solicitor, formerly practising as Mark Potter Solicitors, no 1 Killoran Terrace, Catherine Place, Limerick, and in the matter of the *Solicitors Acts 1954-2008* [6361/DT22/12]
Law Society of Ireland (applicant)
Mark Potter (respondent solicitor)

On 8 November 2012, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that, up to the date of the referral to the tribunal, he:

a) Failed to comply with part or all of his undertaking dated 26 August 2005,
b) Failed to respond to directions by the committee for update reports in a timely manner.

The tribunal ordered that the respondent solicitor:

a) Do stand censured,
b) Pay a sum of €500 to the compensation fund,
c) Pay a contribution of €2,000 to the whole of the costs of the applicant.

In the matter of Pamela Wall, solicitor, formerly of 8 Carmody Street, Ennis, Co Clare, and in the matter of the *Solicitors Acts 1954-2008* [6728/DT88/11 and 2012 no 75 SA]
Law Society of Ireland (applicant)
Pamela Wall (respondent solicitor)

On 10th July 2012 the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in her practice as a solicitor in that she:

1) Failed to maintain proper books of account in respect of her practice, insofar as books were not kept written up to date, transfers between ledger accounts were backdated, and some ledger accounts did not show the true financial position, in breach of regulation 12,
2) Failed to maintain books of account sufficient to allow the true clients' funds position in her practice to be determined at the time of the Society's inspections in December 2007 and February 2008,
3) Caused or allowed clients' moneys of €312,429 to be improperly lodged to an account that was not designated as a client account, in breach of regulation 4, and instead caused or allowed the money to be held in a joint account bearing her name and that of a person who worked in her office,
4) Improperly caused or allowed the Society's investigating accountant to be presented with in or about 23 section 68(1) letters, which were created after notification of the investigation issued in July 2007 but which were backdated to dates between 12 September 2005 and 14 March 2007, thereby giving the misleading appearance of compliance with section 68(1),
5) Improperly caused or allowed up to €651 of clients' money from a named client ledger account to be drawn to the office account by way of transfers on 29 September 2005 and 10 November 2005,
6) Improperly caused or allowed in or about €111.04 of clients' money, which was received to pay for outlay, to be transferred from a named client ledger account to the office account on 10 November 2005, which money was not disbursed for outlay,
7) Improperly caused or allowed €8,000 of clients' monies to be drawn from the client account to the office account on 19 December 2005, creating a debit balance of €8,000 on a named client ledger account, in breach of regulation 7,
8) Improperly caused or allowed €140,500 to be drawn from a named client ledger account in round sum amounts from in or about 3 January 2006 to 28 July 2006 without having issued bills of costs or interim bills of costs to the client, in breach of regulation 11,
9) Improperly caused or allowed clients' money of €4,367.50 to be drawn from the client account to the office account on 4 September 2006, causing debit balances of €4,367.50 on three clients' ledger accounts, in breach of regulation 7,
10) Improperly caused or allowed up to €4,748 of clients' money received from deposits in sales to be drawn to the office account on 4 September 2006,
11) Improperly caused or allowed €4,098.59 to be drawn from the client account to the office account on 15 September 2006, causing debit balances on the clients' ledger accounts, in breach of regulation 7,
12) Improperly caused or allowed €1,439.78 of clients' money to be drawn from the client account to the office account on 21 November 2006, causing a debit balance of €1,439.78 on a named client ledger account, in breach of regulation 7,
13) Improperly caused or allowed €3,000 of clients' money to be drawn from the client account to the office account on 30 November 2006 and the debit balance on a named clients' ledger account to increase to €4,439.78, in breach of regulation 7,

14) Improperly caused or allowed €1,075.50 of clients' money to be drawn from the client account to the office account on 5 December 2006 and the debit balance on a named clients' ledger account to increase to €5,515.28, in breach of regulation 7,
15) Improperly caused or allowed €5,000 of clients' money to be drawn from the client account to the office account on 5 January 2007, increasing the debit balance on the deposit interest account in the clients' ledger to €8,383.54, in breach of regulation 7,
16) Improperly caused or allowed €6,955 of a named clients' money to be lodged to the office account over a period from 15 August 2005 to 5 December 2005,
17) Caused or allowed debit balances in the clients' ledger account and moneys to be incorrectly transferred to the office account, totalling €52,325.57 as at 30 May 2007,
18) Drew various round sum amounts totalling €148,500 from client account to office account over a period from December 2005 to July 2006, which were debited to a named clients' ledger account with no supporting documentation in the client's files, in breach of regulation 12,
19) Improperly caused or allowed monies to be drawn as fees from a named clients' ledger account for work that had not yet been carried out,
20) Furnished the Registrar of Solicitors with false or misleading information in a written response in October 2007 concerning a total of in or about €47,000 drawn from a named clients' ledger account, when she stated that the monies drawn were the repayment of a loan given to the named client by the respondent solicitor and her parents,
21) Caused or allowed false or misleading documentation to be created and retained on a named client file, namely a file memo dated 9 August 2005 stating that there was "a sum of €20,000 due to [named persons] re an historic loan" and "a sum of €30,000 due to P Wall re an historic loan"; a receipt stating that the amount of €19,810 drawn from the client account was the repayment of a loan; and a receipt stating that the amount of €27,150 drawn from the client account was the repayment of a loan,
22) Improperly caused or allowed transfers between clients' ledger accounts of €€5,833.30 and €19,810.53 to be backdated in the books of account from in or after April 2007 to September and October 2006, having the effect of concealing debit balances on a named clients' ledger account,
23) Improperly caused or allowed transfers between ledger accounts of €10,000 and €15,000 to be backdated in the books of account from in or after April 2007 to 7 November 2006 and 13 November 2006,
24) Improperly caused or allowed €5,942.36 of clients' money to be taken from the client account for her own benefit on 30 July 2007, when she caused a debit balance of that amount on a named clients' ledger account, in breach of regulation 7,
25) Improperly caused or allowed €20,000 of clients' money to be drawn from the client account on 28 January 2003 and created a debit balance in that amount on a named client ledger account, in breach of regulation 7, according to the books of account maintained by the respondent as detailed in the investigation report of 17 January 2008,
26) Improperly caused or allowed €25,394.76 of clients' money to be drawn from the client account on 11 March 2003 and created a debit balance in that amount on a named client ledger account, in breach of regulation 7, according to the books of account maintained by the respondent as detailed in the investigation report of 17 January 2008,
27) Improperly caused or allowed monies to be drawn from a deposit in a sale received in a named client's estate, causing a deficit of €18,668 on the client account on 30 June 2007,
28) Caused or allowed €32,991.21 to be drawn from client account to office account in the matter of a named clients' estate, in circumstances where her costs amounted to only €27,030.40 according to the executor's account and thereby improperly caused clients' money of in or about €5,960.81 to be drawn to the office account,
29) Improperly caused or allowed the recording of a figure of €145,200 for costs in a client matter to be backdated by in or about ten months on the debit side of the office ledger,
30) Improperly caused or allowed a debit balance of €13,851.61 on a named client ledger account, in breach of regulation 7, according to the books of account maintained by the respondent as detailed in the investigation report of 17 January 2008, over the period from 27 February 2001 to 7 December 2001, which debit balance included €7,259.73 of other clients' moneys drawn to the office account as fees,
31) Improperly failed to maintain any or adequate documentation in the clients' files to enable drawings of fees from a named client ledger account to be appropriately vouched,
32) Improperly caused or allowed a debit balance on a named client ledger account of €48,757.94 on 28 August 2002 and a debit balance of €47,814.10 on 22 May 2003, which increased to €76,846.84 on 20 June 2003, in breach of regulation 7, according to the books of account maintained by the respondent as detailed in the investigation report of 17 January 2008,
33) Improperly caused or allowed a debit balance on a client ledger account in her name of €1,234.02 between 23 October 2002 and 15 April 2003, in breach of regulation 7, which debit balance was concealed by a credit entry incorrectly dated 15 April 2002,
34) Failed to disclose relevant documentation during the investigation in December 2007, namely ledger cards for a named client,
35) Caused or allowed €14,520 of clients' money to be incorrectly drawn from client account to office account in a named clients' estate in May 2007, creating a deficit of €14,520 in the estate ledger account, which was cleared on or about 27 August 2007,
36) Caused or allowed two section 68(1) letters to be created in respect of a named client's estate on 4 September 2007, two days before the Society's investigation commenced, which were backdated to 24 November 2006 and placed on the client file between documents dated 22 November 2006 and 22 December 2006, thereby misleadingly appearing to have been created in November 2006,
37) Improperly caused or allowed a net debit balance to arise on a named clients' ledger accounts over a period, which amounted to €49,441.63 at 30 April 2002, according to the books of account maintained by her as detailed in the investigation report of 13 March 2008,
38) Improperly caused or allowed IR£5,000 of clients' money to be drawn from the client account on 17 May 2001 and created a debit balance in that amount on a named client ledger account, in breach of regulation 7(2)(a), according to the books of account maintained by her as detailed in the investigation report of 13 March 2008,
39) Improperly caused or allowed €19,001.81 of clients' money from a named client ledger account to be transferred from the client account to the office account on or about 11 February 2002, as part of a sum of

€20,000, as detailed in the investigation report of 13 March 2008,

40) Improperly used clients' money of IR£4,668.05 on 13 September 2000, when she paid a client account cheque for IR£5,250 to named piano retailers and caused a debit balance on her account in the clients' ledger, in breach of regulation 7(2)(a), according to the books of account maintained by the respondent as detailed in the investigation report of 13 March 2008,

41) Improperly caused or allowed the net debit balance on her clients' ledger accounts to increase from IR£4,668.05 to IR£12,668.05 on 18 September 2000 according to the books of account maintained by the respondent as detailed in the investigation report of 13 March 2008,

42) Misleadingly sent to a named client and a named bank in November 2001 a schedule of monies stating that she was holding a balance of IR£2,186.26 at that date, when the clients' ledger account showed a debit balance of IR£10,909.03 at that date,

43) Misleadingly informed a named bank in writing on 18 May 2004 that she was holding a balance of €73,000 relating to a named client, when some or all of that money had already been drawn to the office account, in breach of the regulations,

44) Caused or allowed €72,912 to be drawn as fees from a named client ledger account to the office account without furnishing bill(s) of costs in accordance with regulation 11,

45) Improperly caused or allowed a total of €114,154.87 to be drawn from a named clients' ledger account in circumstances where the final bill of costs subsequently prepared in respect of that client, dated September 2008, only totalled €99,201.59 – a difference of €14,953.28,

46) Caused or allowed a deficit on the client account of in or about €3,918.49 at 30 April 2001, as per the books of account detailed in the investigation report of 20 May 2008,

47) Failed to ensure that debit balances of in or about €20,624.05 that she caused or allowed to arise over a period of months leading up to 29 April 2001 were disclosed as a breach of the regulations in the accountant's report for year ended 30 April 2001,

48) Caused or allowed debit balances to arise on her account in the clients' ledger of in or about €13,769.48 at 29 April 2001, €4,804.69 in November 2000 and €9,989.19 in January 2001, in breach of regulation 7, as per the books of account detailed in the investigation report of 20 May 2008,

49) Caused or allowed a deficit of at least in or about €23,938.39 in the client account at 30 April 2002, as per the books of account detailed in the investigation report of 20 May 2008,

50) Improperly caused or allowed a round sum transfer of IR£10,000 to be made from the client account to the office account on 21 September 2001, which led to debit balances on the following accounts, in breach of regulation 7(2)(a): €279.47 on a named client ledger account, €385.85 on another named client ledger account, €177.78 on another named client ledger account, €759.30 on another named client ledger account, €1,767.48 on another named client ledger account, and €261.16 on another named client ledger account, as per the books of account detailed in the investigation report of 20 May 2008,

51) Caused or allowed a deficit of in or about €68,511.98 in the client account at 30 April 2003, as per the books of account detailed in the investigation report of 20 May 2008,

52) Improperly caused or allowed debit balances totalling at least in or about €111,557.53 and up to in or about €115,569.96 in the clients' ledger at 30 April 2004, in breach of regulation 7(2)(a), as per the books of account detailed in the investigation report of 20 May 2008,

53) Improperly caused or allowed €10,000 of clients' money to be drawn from the client account to the office account on 6 May 2003, as per the books of account detailed in the investigation report of 20 May 2008,

54) Improperly caused or allowed €10,000 of clients' money to be drawn from the client account to the office account on 12 May 2003, as per the books of account detailed in the investigation report of 20 May 2008,

55) Improperly caused or allowed €6,050 of clients' money to be drawn from the client account to the office account on 20 May 2003, as per the books of account detailed in the investigation report of 20 May 2008,

56) Caused or allowed a deficit on the client account of in or about €26,086 at 31 March 2005,

57) Improperly caused or allowed debit balances of in or about €99,843 to arise in the clients' ledger in the period up to 31 March 2005,

58) Improperly left client liabilities of in or about €26,086 unpaid as at 31 March 2005, when her then practice ceased with no remaining monies in her client account,

59) Improperly caused or allowed monies totalling in or about €146,956.99 to be drawn from a named client ledger account, in breach of the regulations, without having issued bills of costs, as per the books of account detailed in the investigation report of 20 May 2008.

The tribunal ordered that the matter go forward to the High Court, and the President of the High Court, on 10 December 2012, made the following orders by consent:

1) The respondent solicitor be suspended from practising as a solicitor indefinitely,
2) The respondent do pay the Society's agreed costs of the Solicitors Disciplinary Tribunal proceedings,
3) The respondent do pay the Society's agreed costs of the High Court proceedings;
4) Liberty to both parties to apply in respect of the question of costs.

In the matter of Greg (otherwise John G) Casey, formerly practising in the solicitors' firm of Casey & Co, Solicitors, at North Main Street, Bandon, Co Cork, and in the matter of Mairead Casey, a solicitor formerly practising as the principal of the solicitors' firm of Casey & Co, Solicitors, at North Main Street, Bandon, Co Cork, and in the matter of the *Solicitors Acts 1954-2002* [5355-8372/DT104/08 and 2012 no 76 SA]

Law Society of Ireland (applicant)
Greg (otherwise John G) Casey (first-named respondent solicitor)
Mairead Casey (second-named respondent solicitor)

On 27 June 2012, the Solicitors Disciplinary Tribunal found the first-named respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Misrepresented to a lending institution, in an undertaking given to that lending institution on his own behalf, dated 4 October 2001, that he was a partner in the practice of Casey & Co, Solicitors,
b) Subsequently failed to comply with his undertaking to the bank, in that he failed to complete the legal formalities in relation to the purchase of the property concerned so as to ensure that the bank obtained a good marketable title to the property free from any encumbrances,
c) He further failed to comply with his undertaking, in that he failed to secure that the bank obtained a valid first legal mortgage or charge on the property,
d) Failed to reply to multiple correspondence from the bank.

On 27 June 2012, the Solicitors Disciplinary Tribunal found the second-named respondent solicitor guilty of misconduct in her practice as a solicitor in that she failed to supervise the first named respondent solicitor, in that he gave the relevant undertaking to the bank without her knowledge.

The tribunal ordered that the matters go forward to the High Court, and the President of the High Court, on 3 December 2012, made the following orders on consent:

1) That the second-named respondent solicitor (Mairead Casey) not be permitted to practise as a sole practitioner or in partnership; that she be permitted only to practise as an assistant solicitor in the employment and under the direct control and supervision of another solicitor of at least ten years' standing, to be approved in advance by the Society,
2) That there be no order for costs made against the second-named respondent solicitor.

On 16 January 2013, the President of the High Court made the following orders:

1) That the name of the first-named respondent solicitor (that is, Greg (otherwise John G) Casey) shall be struck off the Roll of Solicitors,
2) That the Society do recover the costs of the High Court proceedings and the costs of the proceedings before the Solicitors Disciplinary Tribunal as against the first-named respondent, to be taxed in default of agreement.

In the matter of Margaret AM Casey and Greg (otherwise John G) Casey, solicitors, formerly practising as Casey & Co, Solicitors, at North Main Street, Bandon, Co Cork, and in the matter of the *Solicitors Acts 1954-2002* [8372-5355/DT41/08 and 2012 no 15 SA]

Law Society of Ireland (applicant)
Margaret AM Casey (first-named respondent solicitor)
Greg (otherwise John G) Casey (second-named respondent solicitor)

On 23 November 2011, the Solicitors Disciplinary Tribunal found the respondent solicitors guilty of misconduct in their practice as solicitors, in that they:

a) Breached the *Solicitors' Accounts Regulations*, whereby they retained the sum of €25,000 of the complainant's monies, ostensibly by way of a loan, until a further period of six weeks, pending payment of the party-and-party costs from a named County Council. The party-and-party costs were paid, but the respondent solicitors did not account to the complainant for these monies or at no point have ever issued a bill of costs in respect of these monies.
b) Provided inadequate professional services, in that they failed to act on the complainant's instructions in relation to taking an unfair dismissal action for constructive dismissal from a named employer.
c) Provided inadequate professional services, in that the respondent solicitors failed to communicate with their client:
   i) Failed to communicate, in particular failure to keep the complainant advised of progress in relation to proceedings brought by a named bank over a considerable period and, in particular, the respondent solicitor and the co-respondent solicitor had not communicated with the complainant since July 2007, when both proceedings brought by the named bank and the proceedings to set aside the judgment were listed for hearing. This was apparently adjourned until October 2007, when the Society was requesting updates in regard to the above without a response to date.
   ii) A cheque for €7,757.15 for interest relating to the compulsory purchase orders monies was forwarded to the co-respondent solicitor on 22 November 2004 by a local authority. He failed to forward this amount to the complainant despite requests and was obliged to obtain a replacement cheque in November 2006, subsequent to the making of the complaint to the Society.

The tribunal ordered that the matter go forward to the High Court, and the President of the High Court, on 3 December 2012, made the following orders on consent:

1) That the first-named respondent solicitor (that is, Margaret AM Casey) not be permitted to practise as a sole practitioner or in partnership; that she be permitted only to practise as an assistant solicitor in the employment and under the direct control and supervision of another solicitor of at least ten years' standing, to be approved in advance by the Society,
2) That there be no order for costs made against the first-named respondent solicitor.

On 16 January 2013, the President of the High Court made the following orders:

1) That the name of the second-named respondent solicitor (that is, Greg (otherwise John G) Casey) shall be struck off the Roll of Solicitors,
2) That the Society do recover the costs of the High Court proceedings and the costs of the proceedings before the Solicitors Disciplinary Tribunal as against the second-named respondent, to be taxed in default of agreement. G

BRIEFING

Brief cases

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BANKING

Guarantees

Company debt – guarantee and indemnity – error in guarantee – signature on guarantee – note or memorandum – liability – receivership – whether amount due – whether guarantees valid – whether enforceable – whether agreement in writing contained all essential terms – whether guarantee for particular facility or transaction.

Moorview Developments v First Active plc [2010] IEHC 275 (unreported, Clarke J, 9/7/2010); *Analog Devices v Zurich Insurance* [2005] IESC 12, [2005] 1 IR 274; *Investors Compensation Scheme Ltd v West Bromwich Building Society BS* [1998] 1 WLR 896 followed. *Boyle v Lee* [1992] 1 IR 555, *Triodos Bank NV v Dobbs* [2005] EWCA Civ 630 (unreported, 24/5/2005) and *Bank of Ireland v McCabe* (unreported, 19/12/1994) considered. *Statute of Frauds (Ireland) 1695* (7 Will 3, c12), s2 – *European Communities (Cross-Border Mergers) Regulation 2008* (SI 157/2008), regulation 19(1)(d).

Judgment granted (2010/900S – Finlay Geoghegan J – 30/3/2012) [2012] IEHC 131.

Bank of Scotland plc v Fergus

Guarantees

Personal guarantee – mortgage debenture – failure by company to make repayment – receiver and manager appointed – defence – duty of care to preserve and maintain asset – duties of mortgagee in possession – whether plaintiff negligent – whether receiver failed to adequately secure and maintain premises – whether mortgagee in possession liable for waste – whether defendant entitled to set off against liability arising out of waste.

Standard Chartered Bank Ltd v Walker [1982] 1 WLR 1410, *Holohan v Friends Provident and Century Life* [1966] IR 1, *Robertson v Norris* (1858) 1 Giff 421, *Jenkins v Jones* (1860) 2 Giff 99 and *Kennedy v De Trafford* [1896] 1 Ch 762 considered.

Judgment granted (2011/238S – Kearns P – 29/3/2012) [2012] IEHC 138.

Allied Irish Banks plc v Heagney

CONSTITUTIONAL

Administration of justice

Public – exception – practice and procedure – *in camera* hearing – reporting restrictions – applicant denying medical condition – whether hearing being urgent justified *in camera* hearing – whether reporting restrictions applied.

Courts (Supplemental Provisions) Act 1961, s45(1)(a) – *Civil Law (Miscellaneous Provisions) Act 2008*, s27 – *Constitution of Ireland 1937*, Article 3.1.

Reporting restrictions applied (2012/488JR – Hogan J – 8/6/2012) [2012] IEHC 224.

Y(X) v Clinical Director St Patrick's University Hospital

Legality of detention

Inquiry – jurisdiction – practice and procedure – whether application ought properly to have been made by way of judicial review – whether inquiry procedure only available where unlawfulness of detention obvious – whether distinction between patent and non-patent legal errors – whether court obliged to construe article 40.4.2 in light of guarantees to protect person and liberty – courts – *stare decisis* – precedent – whether Supreme Court authority subsequently followed – whether Supreme Court authority singular and exceptional – whether Supreme Court authority binding – fair procedures – notice – whether giving of notice fundamental to proper administration of justice – whether conviction without adequate notice a nullity.

Sheehan v Reilly [1993] 2 IR 81 and *McDonagh v Governor of Cloverhill Prison* [2005] IESC 4, [2005] 1 IR 394 applied. *McSorley v Governor of Mountjoy Prison* [1997] 2 IR 258 not followed. *In Re Haughey* [1971] IR 217, *DK v Crowley* [2002] 2 IR 744, *Dellway Investment Ltd v National Asset Management Agency* [2011] IESC 14 (unreported, 12/4/2011) and *The State (Royle) v Kelly* [1974] IR 249 considered. *The State (Quinn) v Ryan* [1965] IR 70 approved – *Constitution of Ireland 1937*, articles 34.1, 40.3.2, 40.4.1 and 40.4.2.

Preliminary issue decided for applicant (2012/1468SS – Hogan J – 31/7/2012) [2012] IEHC 366.

Bailey v Governor of Mountjoy Prison

CRIMINAL

Judicial review

Sentencing – imprisonment – credit for time in custody pending appeal – whether applicant should have been given credit for time in custody pending first trial – whether sentence in excess of six-month statutory maximum – whether sentencing judge required to give credit for time spent in custody – judicial review – *certiorari* – whether order challenged had been spent – whether appropriate to refuse *certiorari* on discretionary grounds – whether injustice from quashing valid conviction due to minor error in sentence.

People (DPP) v Fitzpatrick [2010] IECCA 2 (unreported, 26/4/2010) and *Barry v District Judge Fitzpatrick* (unreported, 20/12/1995) applied.

Relief refused (2011/296JR – Charleton J – 20/3/2012) [2012] IEHC 67.

Yeagar v Judge O'Sullivan

Prosecution

Decision not to prosecute – lack of reasons – proportionality – requirements of fairness and fair procedures – delay in garda investigation – duty of care – whether exceptional circumstances – whether requirement to give reasons – whether decision proportional – whether applicant deprived of fair procedures – whether arguable case – whether duty of care owed by gardaí to victim of crime –whether breach of fundamental right.

Meadows v Minister for Justice, Equality and Law Reform [2010] IESC 3, [2010] 2 IR 701; *Efe v Minister for Justice* [2011] IEHC 214, [2011] 2 IR 798; *Eviston v DPP* [2002] 3 IR 260; *E(G) v DPP* [2008] IESC 61 (unreported, 30/10/2008); *G(A) v K(A)* [2011] IEHC 65 (unreported, Hedigan J, 25/2/2011); *M(L) v Commissioner of An Garda Síochána* [2011] IEHC 14 (unreported, Hedigan J, 20/1/2011) and *L(B) v Ireland* (unreported, Kearns P, 10/12/2010) considered. *Rules of the Superior Courts 1986* (SI 15/1986), order 84.

Leave refused (2011/511JR – Peart J – 31/1/2012) [2012] IEHC 41.

H(H) v DPP

FISHERIES

Licences

Eel management plan – recovery measures – depletion in stock of European eel species – complete ban on eel fishing – fair procedures – proprietary rights – whether consultative process required – whether public inquiry should have been held – whether public inquiry necessary to determine cause and extent of decline in stock arrived at equitable and effective solution – whether decision to close fishery unreasonable and disproportionate – whether decision objectively justifiable – whether process reasonably fair – whether applicant given sufficient opportunity to make reasonable representations.

Needham v Western Regional Fisheries Board (unreported, Murphy J, 6/11/1999); *Director of Public Prosecutions v O'Connor* (unreported, Morris J, 22/7/1998); *Minister for Justice v Altaravicius* [2006] IESC 23, [2006] 3 IR 148; *Teahan v Minister of Communications, Energy and Natural Resources* [2009]

BRIEFING

IEHC 399 (unreported, Hedigan J, 18/8/2009); *International Fishing Vessels Ltd v Minister for Marine (No 2)* [1991] 2 IR 93; *East Donegal Co-operative Livestock Mart Ltd v Attorney General* [1970] IR 317; *Dunne v Minister for Fisheries and Forestry* [1984] IR 230 and *Maxwell v Minister for the Marine and Natural Resources* (unreported, McCracken J, 13/12/2000) considered. *Fisheries (Consolidation) Act 1959*, ss8, 9, 11(1)(d) and 67 – *Constitution of Ireland 1937*, article 10 – *Fisheries (Amendment) Act 1962*, s3(b) and 33 – *Eel Fishing Bye-Law* (no CS 303/2009) – *Eel Fishing (Prohibition on Issue of Licences) Bye-Law* (no CS 858/2009) – *Rules of the Superior Courts 1986* (SI 15/1986), order 93 – Council Regulation (EC) No 1100/2007, articles 2, 4, 5 and 9.

Relief refused (2009/705SP – Herbert J – 6/3/2012) [2012] IEHC 118.

McArdle v Minister for Communications, Energy and Natural Resources

LAND LAW

Property

Register – conclusive evidence of title – order for possession – liberty to apply – right of way – charge – burden – dominant and servient tenements in ownership of same person – whether order embraced appurtenant rights on folio at date on which charge created – whether plaintiff entitled to rely on conclusivity of register.

Donegal County Council v Ballantine (unreported, McCracken J, 20/3/1998) considered. *Registration of Title Act 1964*, ss31(1) and 62 – *Conveyancing Act 1881* (44 & 45 Vict), s6 – *Registration of Deeds and Title Act 2006*, s32(1).

Appurtenant rights reinstated (2009/423SP – Laffoy J – 30/3/2012) [2012] IEHC 139

Stepstone Mortgage Funding Limited v Tyrrell

Registration of title

Equitable charge – validity – unregistered right – judgment mortgage – solicitor's undertaking – whether equitable charge had priority over judgment mortgage – whether charge valid – whether compliance with s62(2) – whether unregistered right created.

Registration of Title Act 1964, ss62(2), 68(2) and 71(4) – *Land and Conveyancing Law Reform Act 2009*, s117(3) – *Conveyancing Act (Ireland) 1634* (10 Chas 1 sess 2 ch 3), s10.

Order to transfer proceeds of sale (2011/21SP – Laffoy J – 30/3/2012) [2012] IEHC 141.

Allison v Donald

NEGLIGENCE

Solicitors

Application to strike out – inherent jurisdiction – frivolous and vexatious – security for costs – onus of proof – claim for breach of contract, misrepresentation and negligence – professional negligence – barrister – immunity against suit – forfeiture of leasehold interest – non-payment of rent – equitable relief against forfeiture – public policy against re-litigation – whether claim disclosed reasonable cause of action – whether frivolous or vexatious – whether *prima facie* defence to claim – whether unable to pay costs if unsuccessful – whether negligence – whether pleadings defective.

Jack O'Toole Ltd v McKeown Kelly Associates [1986] IR 277; *SEE Company Ltd v Public Lighting Services Ltd* [1987] ILRM 255; *Campbell Seafoods Ltd v Brodrene Gram* (unreported, HC, Costello J, 21/7/1994); *Aer Rianta cpt v Ryanair Ltd* [2004] IESC 23, [2004] 1 IR 506; *Farley v Ireland* (unreported, SC, *ex tempore*, 1/5/1997); *Fay v Tegral Pipes Ltd* [2005] IESC 34, [2004] 2 IR 261; *Barry v Buckley* [1981] IR 306; *Riordan v An Taoiseach (No 5)* [2001] 4 IR 463; *Dykun v Odishaw* [2000] ABCA 528 (unreported, Alberta QB, 3/8/2000); *Re Lang, Michener & Fabian* [1987] 37 DLR (4th) 685; *Usk District Residents Association Ltd v EPA* [2006] IESC 1, [2006] 1 ILRM 363; *Interfinance Group Ltd v KPMG Peat Mar Wick* (unreported, HC, Morris, 29/6/1998); *Re Erris Investments Ltd* [1991] ILRM 377; *Campus & Stadium Ireland Developments Ltd v Dublin Waterworld Ltd* [2006] IEHC 200 (unreported, Gilligan J, 21/3/2006); *Behan v McGinley* [2008] IEHC 18, [2011] 1 IR 47; *Roche v Peilow* [1986] ILRM 189; *Arthur JS Hall v Simons* [2002] 1 AC 615 and *Murray v Budd* (unreported, HC, Clarke J, 22/11/2010) considered. *Companies Act 1963*, s390 – *Conveyancing Act 1881* (44 & 45 Vic c 41), s14 – *Rules of the Superior Courts 1986* (SI 15/1986), order 19, rules 27 and 28; order 29; order 49, rule 6; and order 99, rule 7.

Motions adjourned (2010/4539 – White J – 17/1/2012) [2012] IEHC 29.

Rayan Restaurant Ltd v Kean

PRACTICE AND PROCEDURE

Contempt

Leave to attach and commit – journalists and newspapers – freedom of speech – freedom of press – right of party to fair hearing – whether newspaper articles misrepresented events – whether articles created prejudice to administration of justice.

Wong v Minister for Justice [1994] 1 IR 223 and *Attorney General v Times Newspapers* [1974] AC 273 considered.

Motion dismissed (2007/52CA – Hedigan J – 30/3/2012) [2012] IEHC 145.

Kelly v National University of Ireland

PRISONS

Detention

Screen visits – *mandamus* – conditions – judicial review – whether imposing screen visits constituted extension of detention – whether proceedings involved performance of legal duty – whether performance demanded and refused – whether legal duty identified – whether court should treat as application for *certiorari* – whether applicant provided sufficient information to enable court to determine validity of decision of respondent – whether necessary facts or circumstances identified – whether ground of review identified.

Application refused (2012/54JR – Feeney J – 27/1/2012) [2012] IEHC 69.

Kirby v Governor of Limerick Prison

PROBATE

Administration of estates

Ultimate beneficiary of deceased – personal representative of deceased beneficiary – *locus standi* – entitlement to seek declarations – costs of administration – declaration that personal representative refer bill of costs to taxing master – whether entitled to bring claim as personal representative of deceased beneficiary – whether *locus standi* – whether executor exercising due diligence.

Moloney v Allied Irish Banks Ltd [1986] IR 67 considered. *Solicitors (Amendment) Act 1994*, ss2 and 68 – *Succession Act 1965*, ss20, 62 and 102 – *Rules of the Superior Court 1986* (SI 15/1986), orders 3 and 99.

Application refused (2007/945SP – Murphy J – 1/2/2012) [2012] IEHC 43.

McElearney v McElearney

PROFESSIONS

Solicitors

Improper interference with witness – attempt to discourage plaintiff in maintaining claim – offer of material advantage if witness intervened – whether evidence produced by improper means – whether attempt to suborn perjury – whether induced to give false evidence.

McMullen v Carty (unreported, SC, 27/1/1998), *Barry v Buckley* [1981] IR 306 and *McMullen v Clancy (No 2)* [2005] IESC 10, [2005] 2 IR 445 considered.

Claim dismissed (2000/1628P – Birmingham J – 6/2/2012) [2012] IEHC 28.

McMullen v Giles J Kennedy

Eurlegal

Edited by TP Kennedy, Director of Education

CA's first application to High Court for section 14B order

On 18 December 2012, the Irish Competition Authority applied to the High Court for an order under section 14B of the *Competition Act 2002* relating to an agreement between the authority and Double Bay Enterprises Limited, trading as Brazil Body Sportswear, dated 14 November 2012. Brazil Body Sportswear distributes the FitFlop brand of footwear in the island of Ireland. This was the first application made by the Competition Authority for an order under section 14B of the 2002 act. Cooke J in the High Court made the order on 18 December 2012, which comes into force 45 days after the date of the making of the order.

Section 14B of the 2002 act was inserted into the 2002 act by way of an amendment introduced by the *Competition (Amendment) Act 2012* and applies to agreements entered into by the authority with an undertaking following an investigation under section 30(1)(b) of the 2002 act, where the agreement requires the undertaking to do or refrain from doing such things as are specified in the agreement in consideration of the authority agreeing not to bring proceedings under section 14A in relation to any matter to which that investigation relates or any finding resulting from that investigation. Section 14A provides that the authority shall, in respect of any agreement, decision or concerted practice or abuse that is prohibited under sections 4 or 5 of the 2002 act or by article 101 or 102 of the *Treaty on the Functioning of the European Union* (TFEU), have a right of action for relief against either of the following:

a) Any undertaking that is or has at any material time been a party to such an agreement, decision or concerted practice or has done any act that constituted such an abuse,
b) Any director, manager or other officer of such an undertaking, or a person who purported to act in any such capacity, who authorised or consented to, as the case may be, the entry by the undertaking into or the implementation by it of the agreement or decision, the engaging by it in the concerted practice, or the doing by it of the act that constituted the abuse.

Section 14B(2) provides that the High Court may, upon the application of the Competition Authority, make an order if it is satisfied that:

a) The undertaking that is a party to the agreement consents to the making of the order,
b) The undertaking has obtained legal advice before giving its consent,
c) The agreement is clear and unambiguous and capable of being complied with,
d) The undertaking is aware that failure to comply with any order so made would constitute contempt of court, and
e) The authority has complied with the publication requirements in section 14B(3) (summarised below).

Where the authority proposes to make an application for an order under section 14B(2) in respect of an agreement, it is required, no later than 14 days before the making of the application, to publish the terms of the agreement on its website and to publish a notice in not less than two daily national newspapers stating that it intends to make the application, specifying the date it intends to make the application, and stating that the agreement to which the proposed application relates is published on its website and the address of the website (section 14B(3)).

Section 14B(4) specifies that an order of the High Court shall not have effect until the expiration of a period of 45 days from the making of the order or, where an application is made by a third party to the High Court under section 14B(5), until the making of a final determination relating to that application. The High Court may, on the application of any person (other than the competent authority or the undertaking to which an order under the section applies), make during the above 45-day period an order varying or annulling an order under section 14B(2) if it is satisfied that the agreement requires the undertaking to which the order applies to do or refrain from doing anything that would result in a breach of any contract between the undertaking concerned and the applicant, or that would render a term of that contract not capable of being performed (section 14B(5)). The High Court is required not to make an order under section 14B(5) if it is satisfied that the contract or term of the contract to which the application for such order relates contravenes section 4 or 5 of the 2002 act or article 101 or 102 of the TFEU.

With regard to the agreement between the Competition Authority and Double Bay Enterprises Limited dated 14 November 2012, the authority refers to it having formed the preliminary view that Double Bay Enterprises Limited had infringed section 4 of the 2002 act and article 101 of the TFEU in relation to resale price maintenance and the placing of restrictions on the making of passive sales. The agreement specifically provides that Double Bay Enterprises Lim-

ited undertakes as follows:

a) Not to enter into or enforce agreements with retailers that set minimum or fixed resale prices for the products,
b) Not to engage in practices and/or undertakings with retailers that set minimum or fixed resale prices for the products, save that Double Bay Enterprises Limited may recommend the selling price to retailers,
c) Not to restrict the ability of retailers to determine the selling price of the product, save that Double Bay Enterprises Limited may recommend a selling price, and
d) Not to restrict its retailers' freedom to supply the product to any customer, regardless of location, who sends unsolicited orders for the product to such retailers.

The agreement provides that, in consideration of Double Bay Enterprises Limited entering into the agreement and subject to it complying with the terms of the agreement, the authority agrees not to bring proceedings against Double Bay Enterprises Limited under either section 14B or 8(9) of the 2002 act in relation to any matter to which the investigation relates or any finding resulting from the investigation. Section 8(9) of the 2002 act empowers the authority to bring summary proceedings for breaches of section 4 or 5 of the 2002 act and article 101 or 102 of the TFEU.

Marco Hickey is head of the EU, Competition and Regulated Markets Unit at LK Shields Solicitors and is a member of the Law Society's International and EU Affairs Committee.

Recent developments in European law

LITIGATION

The Council has adopted a revision of the *Brussels I Regulation* on jurisdiction and the enforcement of judgments in civil and commercial matters. The most significant changes are that a judgment given in a member state will now be recognised in other member states without the need of any procedure in the state of enforcement. In Ireland, the procedure involves an application to the master of the High Court. This will no longer be necessary when the revised regulation takes effect. The revised regulation will mean that a judgment enforceable in one member state is enforceable in the other member states without any declaration of enforceability.

The recast regulation provides that no national rules of jurisdiction may be applied by member states in relation to consumers and employees domiciled outside the EU. This gives the provisions in the regulation that protect consumers and employees universal effect. The regulation will apply to parties domiciled outside the EU where the courts of a member state have exclusive jurisdiction under the regulation or where such courts have had jurisdiction conferred on them by an agreement between the parties.

The recast regulation will apply 24 months after it enters into force. This is likely to be in early 2015. G

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Spring 2013

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NOTICES

WILLS

Duffy, Thomas (deceased), late of Wolohan's Bridge, Ballinteskin, Wicklow, Co Wicklow. Would any person having any knowledge of the original will made by the above-named deceased, who died on 19 November 2011, please contact Patrick O'Toole, Solicitors, 5 Church Street, Wicklow Town, Co Wicklow; tel: 0404 68000, fax: 0404 68001, email: reception@patrickotoolesolicitors.ie

Fitzgerald, James, (deceased), late of The White House, Ballyconry, Lisselton, Co Kerry, formerly of The Paddocks, Bridge Road, Listowel, Co Kerry, and Torhaven, Warefield Road, Paignton, Devon TQ3 BJ, England, who died on 3 July 2010. Would any person have any knowledge of the whereabouts of a will executed by the above-named deceased please contact Ms Caitriona O'Connor of Kerin Hickman & O'Donnell, Solicitors, 2 Bindon Street, Ennis, Co Clare; DX 25002 Ennis; tel: 065 682 8712, fax: 065 684 0243, email: info@khod.ie

Harrison, Olive (deceased), late of 64 Hollybrook Grove, Clontarf, Dublin 3, who died on 13 April 1993. Would any person having knowledge of a will made by the above-named deceased please contact Martin Solicitors, 1 Elmfield Rise, Clarehall, Dublin 13; tel: 01 487 7180, fax: 01 686 5150, email: reception@martins.ie

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 April *Gazette*: 20 March 2013. For further information, contact the *Gazette* office on tel: 01 672 4828 (fax: 01 672 4877)

Leahy, Daniel (deceased), late of Templemichael, Caherconlish, Co Limerick. Would any person having knowledge of a will (or documents relating to a will) made by the above-named deceased, who died on 22 November 2012, please contact Connolly Sellors Geraghty, Solicitors, 6/7 Glentworth Street, Limerick; DX 3005 Limerick; tel: 061 414 355, email: isheehy@csg.ie

Lynch, Mary Bridget (deceased), late of Main Street, Clogherhead, Co Louth, who died on 17 September 2011. Would any person having knowledge of any will executed by the above-named deceased please contact Paul Smyth, solicitor, Smyth & Son Solicitors, Rope Walk, Drogheda, Co Louth; tel: 041 983 8616, email: psmyth@smythandson.ie

Lyons, Peter (deceased), late of Kylemore Nursing Home, Bray, Co Wicklow, and Queensboro, Baltray, Drogheda, Co Louth, who died on 9 November 2012. Would any person having knowledge of any will executed by the above-named deceased please contact Paul Smyth, solicitor, Smyth & Son, Solicitors, Rope Walk, Drogheda, Co Louth; tel: 041 983 8616, email: psmyth@smythandson.ie

O'Sullivan (otherwise Sullivan), Jeremiah (deceased), late of 45 St Agnes Park, Crumlin, Dublin, who died on 11 September 2012. Would any person having knowledge of the will executed by the above-named deceased and dated 21 January 1993 please contact David F McMahon & Co, Solicitors, 5/6 Upper O'Connell Street, Dublin 1; tel: 01 878 8000, fax: 01 873 3767

Queenan, Anne Marie (deceased), late of Carrowhubbock North, Enniscrone, Co Sligo, and latterly of Árd na Gréine Nursing Home, Enniscrone, Co Sligo. Would any solicitor holding or having knowledge of a will made by the above-named deceased, who died on 9 February 2012, please contact Denis M Molloy, Solicitors, Bridge Street, Ballina, Co Mayo; tel: 096 70660, email: molloylaw@eircom.net

Quinn, Norbert (deceased), late of 9 Highfield Avenue, Dublin Road, Newry, Co Down, BT35 8UG, and previously of Wyndways, Jenkinstown, Dundalk, Co Louth, Ireland. Would any person having knowledge of a will executed by the above-named deceased, who died on 1 October 2012, please contact ML White, Solicitors, 43-45 Monaghan Street, Newry, Co Down, BT35 6AY; tel 048 302 68144, fax: 048 302 60966, email: lawyers@mlwhitesolicitors.com

Sheerin, James (deceased), late of 57 Pembroke Cottages, Donnybrook, Dublin 4, who died on 16 October 2009. Would any person having knowledge of any will (or documents relating to a will) made by the above-named deceased please contact Joe Kelly of Cannons, Solicitors, Linden Court, The Plaza, Stillorgan, Co Dublin; tel: 01 497 6555, fax: 01 497 1409, email: cannons@securemail.ie

Tobin, Fr Edmond (deceased), late of Parochial House, Ballymacarbry, Clonmel, Co Waterford, and lately of Monroe, Ballylooby, Cahir, Co Tipperary. Would any person having knowledge of the whereabouts of any will executed by the above-named deceased please contact Brian H MacMahon, solicitor, of Arthur E MacMahon, Solicitors, Poplar Square, Naas, Co Kildare; tel: 045 897 936, email: michelle.collier@aemacm.ie

Walsh, James (deceased), late of 6 Rockview Apartments, Mill Road, Midleton, Cork, and Killeline Nursing Home, Cork Road,

NOTICES

Newcastle West, Co Limerick, and 2 Castle Close, Carrigtwohill, Co Cork, date of birth 27 October 1968, who died on 26 November 2012. Would any person having knowledge of a will executed by the above-named deceased please contact Margaret Mulpeter, Dunlea Mulpeter & Co, Solicitors, 6 Strand Street, Passage West, Cork; tel: 021 486 3626, email: mmulpeter@eircom.net

MISCELLANEOUS

Solicitor's practice for sale. Excellent general practice dealing with probate, conveyancing and litigation for sale in Midland area, servicing a number of Midland counties. It would suit an ambitious and committed solicitor seeking to work for him/herself. All applications of interest should be lodged in strictest confidence before 30 April 2013 to **box number 01/03/13**

Seven-day liquor licence for sale. Please contact Donncha O'Connor of Johnson & Johnson, Solicitors, Ballymote, Co Sligo; tel: 071 918 3304

Ordinary seven-day publican's licence for sale. Contact: DP Barry & Co, Solicitors, Bridge Street, Killybegs, Co Donegal; tel: 074 973 1174

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TITLE DEEDS

To whom it may concern: Will anyone with information as to the identity and whereabouts of the successors in title of Edmond Burke Roche of Trabolgan in the county of Cork, in or about the year 1854, who granted a lease of certain lands and premises, being Curate's House at Whitechurch in the county of Cork on 10 September 1854, please contact James J O'Donoghue & Co, Solicitors, Shournagh House, Tower, Blarney, Co Cork; tel: 021 438 1861, email: jamesjod@eircom.net

Property at Golden Grove Road, Roscrea, Co Tipperary. Would any person having knowledge of the whereabouts of title deeds relating to the above-mentioned premises please contact Start Mortgages Ltd, Trimleston House, Beech Hill Office Campus, Clonskeagh, Dublin 4; DX 152 Dublin; tel: 01 209 6300, fax: 01 209 6363, email: deeds@start.ie

Property at 23 Landsdowne Valley Park, Drimnagh, Dublin 12. Would any person having any knowledge of the whereabouts of title deeds relating to the above-mentioned premises please contact Start Mortgages Ltd, Trimleston House, Beech Hill Office Campus, Clonskeagh, Dublin 4; DX 152 Dublin; tel: 01 209 6300, fax: 01 209 6363, email: deeds@start.ie

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 the premises Carlingford Adventure Centre, Dundalk Street, Carlingford, Co Louth; applicants: Thomas McArdle and Mary McArdle

Take notice that any person having an interest in the freehold estate or any other estate of the following property: all that the piece or plot of ground being the premises situate at Dundalk Street, Carlingford, in the parish of Carlingford, barony of Lower Dundalk and county of Louth, being the property more particularly described in a lease dated 15 November 1915 between Mabel Grace Moore of the one part and Thomas Woods of the other part.

Take notice that the applicants, Thomas McArdle and Mary McArdle, intend to submit an application to the county registrar for the county of Louth for the acquisition of the freehold interest in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid property is called upon to furnish evidence of title to the aforementioned premises to the below-named within 21 days from the date of this notice.

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

Date: 1 March 2013

Signed: Gary Matthews (solicitor for the applicants), Oliver Matthews & Co, Quayside Business Park, Dundalk, Co Louth

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (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 Clerys, 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

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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 tenant 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 March 2013
Signed: William Fry (solicitors for the applicant), Fitzwilton House, Wilton Place, Dublin 2

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (No 2) (Ground Rents) Act 1978* (as amended) and in the matter of the premises formerly known as 17 Oak Terrace, North Circular Road, parish of Grangegorman, city of Dublin, and now known as 328 North Circular Road, Phibsborough, in the city of Dublin: an application by Kieran Montgomery

Take notice that any person having an interest in the freehold estate or any intermediate interests in the property formerly known as 17 Oak Terrace, North Circular Road, in the parish of Grangegorman and city of Dublin, and now known as 328 North Circular Road, Phibsborough, in the city of Dublin, being a portion of the lands and premises held under an indenture of lease dated 25 August 1877 and made between Sir Francis William Brady of the one part and William Martin of the other part, therein described as "all that piece of ground situate on the south side of the North Circular Road in the parish of Grangegorman and county of the city of Dublin, meared and bounded on the north by the North Circular Road aforesaid, on the south by premises in the tenancy or occupation of a Mr Armstrong, on the east by the house, piece of ground and premises known as 'Oak Lodge', another part of the property of the said Frances William Brady, now in the occupation of the said William Martin, and on the west by ground and premises in the tenancy of Mr William Lynch, and as more fully set out and delineated and described in and by the map hereon and containing on the north, south, east and west sides respectively the number of feet thereon mentioned or thereabouts be the said several admeasurements thereof any or either of them more or less", for the term of 200 years from 25 March 1874, subject to the yearly rent of Stg£10 (now €12.70) and to the covenants on the part of the lessee and conditions therein contained.

Take notice that the applicant, Kieran Montgomery, intends to submit an application to the county registrar for the county of Dublin for the acquisition of the freehold interest in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid property (or any of them) is called upon to furnish evidence of title in the aforementioned property to the below named within 21 days from the date of this notice.

In default of any such notice being received, the said applicant intends to proceed with the application before the county registrar for the county of Dublin at the end of 21 days from the date of this notice for directions as may be appropriate on the basis that the person or persons beneficially entitled to the intermediate and superior interest including the freehold reversion in the aforesaid property are unknown and/or unascertained.

Date: 1 March 2013
Signed: FH O'Reilly & Co (solicitors for the applicant), The Red Church, North Circular Road, Phibsborough, Dublin 7

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

Good grief!

A Brooklyn lawyer, a used car salesman and a banker were gathered by a coffin containing the body of an old friend.

In his grief, one of the three said: "In my family, we have a custom of giving the dead some money, so they'll have something to spend over there."

They all agreed that this was appropriate. The banker dropped a $100 bill into the casket, while the car salesman did the same. The lawyer took out the bills – and wrote a cheque for $300. (Thanks to Richard Hammond of Hammond Good, Mallow, for this one!)

Italian Mafia feels the pinch

Italy's organised crime networks take in around €10.5 billion a year, a fraction of previous estimates, the *Irish Independent reports*. In a government-funded report issued in mid January, Mafia revenues are stated to amount to around 0.7% of Italy's gross domestic product (GDP). According to a Transcrime research centre paper, this is much lower than a rival university study last year that put revenue from criminal activity at over 10% of GDP.

Transcrime, based at Milan's Cattolica University, used criminal justice statistics, money laundering and tax evasion data, law enforcement reports and figures on asset seizures.

Last year, however, another study by anti-crime group, SOS Impresa, estimated the annual turnover from organised crime at €140 billion – more than 13 times the Transcrime estimate.

The Mafia poses a significant challenge. It has been moving beyond its southern stronghold into the lucrative north, including Milan's Lombardy region, which accounts for about a fifth of Italian GDP.

"A bloodsucker goes where the blood is, and the money is here [in Milan]," said the deputy head of Italy's police, Alessandro Marangoni.

I hear that whistle blowin'

A whistleblower who tipped off Donegal County Council about allegations of illegal dumping by the county's biggest waste collection company will be allowed to remain anonymous, a judge has ruled.

Donegaldaily.com reported that Judge Paul Kelly made his decision at a sitting of Letterkenny District Court in a case being brought by the council against Jim Ferry, owner of Ferry's Refuse. Mr Ferry is facing 12 illegal dumping charges dating back to 2010 and 2011.

A barrister for Mr Ferry had asked the court for the identity of the person whose information led to the allegations. He also wanted to know if the person was a disgruntled former member of staff.

Patrick McMullin, solicitor for the council, said releasing the name of the whistleblower would damage the council's relationship with members of the public, who were the eyes and ears of the council.

Judge Paul Kelly agreed and ruled the identity of the informant should remain secret. He also refused to make comment on whether or not the person was an ex-employee of Ferry's Refuse.

20-member band murdered in Mexico

Police in northern Mexico ended their search for 20 members of the band Kombo Kolombia, after they had been reported missing, having played a gig in the city of Hidalgo on 24 January, BBC reports. The bodies of the 12 musicians and eight crew members were found in a well three days later in the town of Mina near the northern city of Monterrey.

Relatives got worried when the musicians, who play Colombian vallenato music, stopped answering their mobile phones. When relatives travelled to the concert venue, they found it abandoned and the band's cars empty.

Drugs gangs have killed several Mexican musicians in recent years. Most of those played *narcocorridos* – songs celebrating the lives of drug barons. Kombo Kolombia specialises in Colombian popular music, however, not normally associated with Mexican drug gangs. More than 70,000 people are estimated to have died in drug-related violence in Mexico over the past six years.

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Opportunities

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Banking Solicitor, Dublin

Our Client, a leading law firm is seeking a banking solicitor to join their highly regarded team. The role will entail a mix of mainstream banking work and capital markets transactions. The successful applicant will have achieved excellent academic grades and will have gained solid banking experience within the banking department of a leading law firm either in Ireland or overseas.

Insolvency Solicitor, Dublin

Our Client, a top law firm has an opening for an experienced Insolvency Solicitor. The successful applicant will specialise in insolvency, corporate recovery and enforcement matters. In particular, you will advise on liquidations and receiverships. You will also assist with litigation matters arising out of the corporate recovery practice including offences under the Companies Acts, injunctive relief, and bankruptcy. Top 20 firm experience a preference.

Competition Lawyer, Dublin

Our Client, an expert in the field of competition law, requires an experienced Lawyer to provide expert legal advice on all aspects of EU, Competition and Regulatory matters, including merger control, cartel and dominance cases, public procurement law, state aid rules, competition law audits and compliance, competition litigation and sectoral regulation. The ideal candidate will have solid experience in the field from a leading Irish or International law firm and will have impressive academics. This is a superb opportunity to join a dynamic environment, which offers huge variety in work and excellent career prospects

Litigation Solicitor, Dublin

Our Client, a top law firm, is actively seeking an experienced litigator to join their dedicated white-collar crime unit. This is a unique opportunity for a good litigator to specialise in the rapidly expanding field of corporate crime and fraud litigation. Relevant experience is preferred but not essential. Impressive academics and strong commercial litigation experience from a top 15 firm are a prerequisite.

IP/IT Lawyer, Dublin

Our Client, a top law firm, is actively seeking an experienced IP/IT Lawyer to join their growing team. The successful applicant will have top glass academic grades and will be a qualified Solicitor with experience in advising clients on technology transactions and IP matters. Excellent negotiation and drafting skills are required. This role offers a very attractive salary and benefits as well as a genuine opportunity to fast track your career.

To apply for any of the above vacancies, interested applicants should contact Yvonne Kelly in strict confidence on +353 18415614 or email your CV to ykelly@keanemcdonald.com. For a comprehensive list of our vacancies visit our website at www.keanemcdonald.com

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IT/IP: Assistant to Senior Associate

IP: Assistant

Insolvency/Restructuring: Assistant to Senior Associate

Project Finance: Assistant to Senior Associate

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For more information on these or other vacancies, please visit our website or contact Michael Benson bcl solr. in strict confidence at: Benson & Associates, Suite 113, The Capel Building, St. Mary's Abbey, Dublin 7.
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