FAMILY MATTERS
Legal clarity on various surrogacy arrangements is sorely needed

TAKING A BREATHER
Examining the statutory powers of the gardaí to stop and breathalyse

IN THE NAVY
Part 2 of the profile of Naval Service Legal Officer Pat Burke

LAW SOCIETY
GAZETTE

€4.00 **November 2013**

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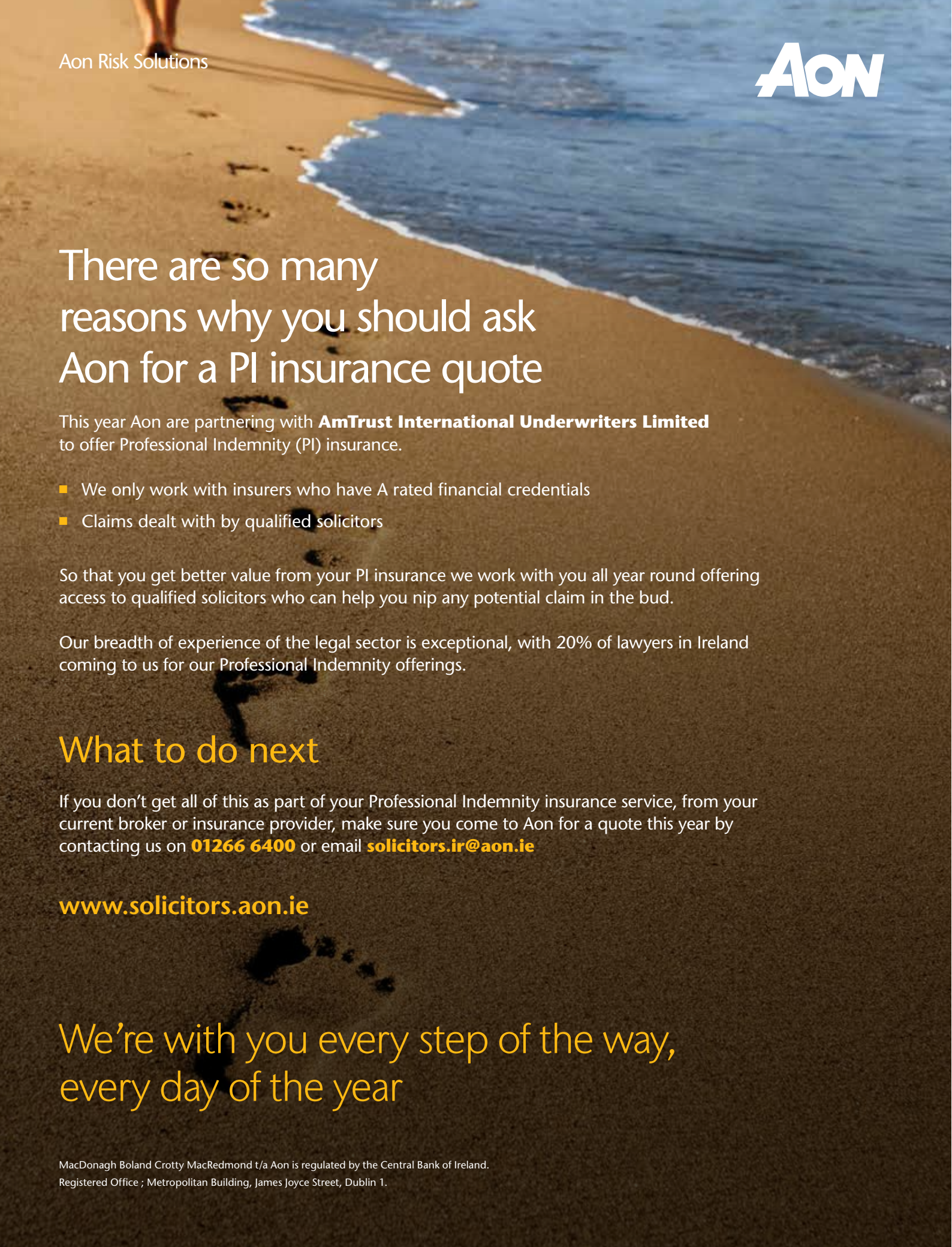

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REINFORCING THE SOCIETY'S CONNECTIONS WITH MEMBERS

As the November meeting of the Council looms – and with it the end of my term of office as your president – you could be forgiven for thinking that I have been winding down. Nothing could be further from the truth, however! As the deadline approaches, I am inundated with commitments, and I look forward to fulfilling them with the same enthusiasm as I hope I have displayed from the start of my year.

It is appropriate at this time for me to accord huge thanks to all of you who have been so supportive of me over the past 12 months and in the preparatory phase of my tenure.

I was particularly pleased that bar associations around the country were so welcoming. Further, they were constructive in any criticisms that they delivered to those of us who visited. I believe that the new director of representation and member services, Teri Kelly, will reinforce the connection between the members and the Society.

I am particularly grateful to director general Ken Murphy and deputy director general Mary Keane for their unwavering support and assistance throughout the year. Indeed, it would be remiss of me not to extend those thanks to the loyal and hard-working staff of the organisation that is the Law Society of Ireland.

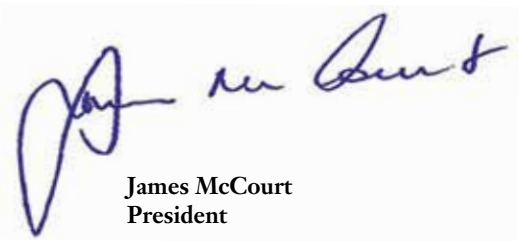
A better place

I want to thank the hardest-working Council that it has been my pleasure to work with. Such debates as were had were robust, but always honest. The profession needs industrious people if it is to be assisted in meeting the forthcoming challenges that the economy and the market will visit upon it. I am satisfied that the impending implementation of the recommendations of the Future of the Law Society Task Force will leave the entire profession in a better place.

"I am satisfied that the impending implementation of the recommendations of the Future of the Law Society Task Force will leave the entire profession in a better place"

I wish my successor, John P Shaw, and his officer team the very best for the coming year. I have no doubt that they will meet, head on, all of the challenges that will face them in 2013/14. They will have my full support in so doing.

I leave the office of president having been honoured and privileged to occupy it. I have given it my very best shot – I could not have done it any other way – and bring with me many happy memories of a memorable year.



James McCourt
President

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LAW SOCIETY GAZETTE

REGULARS

4 News

12 Analysis
12 **News feature:** Protecting whistleblowers and the *Protected Disclosures Bill 2013*
14 **Human rights watch:** President Higgins on the meaning and nature of human rights

16 Comment
16 **Viewpoint:** Assessing the proposed *Gambling Control Bill*

38 People and places

45 Obituary
Francis Brian Geary

46 Books
46 **Book reviews:** *The Trade Union and Industrial Relations Acts* (4th edition); *Managing Litigation for Your Business*; and *Lawyers' Professional Negligence and Insurance*
46 **Reading room:** Updates from the Law Society Library

48 Briefing
48 **Practice notes**
55 **Legislation update:** 12 August – 7 October
56 **Regulation:** Solicitors Disciplinary Tribunal
58 **Eurlegal:** Berlin bear makes his mark; recent developments in European law

61 Professional notices

63 Recruitment advertising

64 Captain's blawg

COVER STORY

18 Password protected?
Can employers ask you for your Facebook password? Clíona Kimber and Hannah Lowry O'Reilly look at the rationale behind such requests, the US position, and the risks such a practice brings for employers

FEATURES

22 In the navy
In the second part of his interview with the Naval Service's Legal Officer, Pat Burke, Mark McDermott learns about the legal conundrums faced on the night of the *Dances With Waves* drugs bust

26 Take my breath away
How much personal liberty must be sacrificed to ensure road safety? Deirdre Manninger examines the statutory basis of garda powers to stop motorists and demand a specimen of breath

30 The parent trap
Advances in science are giving rise to questions about surrogacy that demand changes in legislation. What can Ireland learn from other countries when framing its own laws? Kathy Irwin investigates

34 Time's up
The High Court's attempt to clear the backlog of asylum and immigration cases with their '30-30-10' direction is keeping lawyers on their toes. Shannon Michael Haynes starts his stopwatch

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

Get more at gazette.ie

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

- Current news
- Forthcoming events, including an **information session by the Forensic Science Laboratory in the Ashling Hotel, Dublin, on 19 November**
- Employment opportunities
- The latest CPD courses

... as well as lots of other useful information

Nationwide

Compiled by Kevin O'Higgins

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

Edward O'Driscoll announces retirement

CORK

The partners in PJ O'Driscoll's, Bandon and Kenmare, have announced the retirement of Edward O'Driscoll as consultant. Edward is the longest-serving solicitor in the county and the third-longest-serving in the country.

He qualified in 1948 and has held 65 successive practising certificates up to 2013. He has decided not to renew his certificate for 2014.

He has been a member of the Southern Law Association (SLA) throughout his career. He never held office in the SLA, but was the longest-serving president of the West Cork Bar Association, a position he held for 25 years (until 1987). On behalf of the SLA, president Jonathan Lynch wishes Edward well in his retirement.

Members of the legal profession throughout Cork city and county were saddened to hear of the recent death, following a short illness, of sole practitioner Jo O'Herlihy. Her warm and vivacious personality will be missed.

The AGM of the Southern Law Association will be held on Tuesday 19 November in the Pegasus Suite, Clarion Hotel , Lapps Quay, Cork at 5.30pm.

Meath meeting

MEATH

At the recent meeting of the Meath Solicitors' Bar Association (MSBA) were *(front, l to r)*: Ken Murphy (director general), James McCourt (president, Law Society), Oliver Shanley (president, MSBA) and Elaine Byrne (honorary secretary); *(back, l to r)*: Joseph Curran, Aileen Dempsey, Hugh Thornton, Pat O'Reilly, Adrienne Bowen, Kevin Martin and Sophie Brookes

Free CPD events in Galway

GALWAY

James Seymour advises me of a series of free seminars – if you have paid your GSBA subscription of €50 (per solicitor). Subscription can be sent to James (c/o Berwick Solicitors; DX 4534 Galway) or to treasurer Cairbre O'Donnell (John C O'Donnell & Sons; DX 4502 Galway). Says James: "Such is the demand for a seminar on costs and taxation of costs that we have organised two separate speakers on the subject at our next two seminars." For details on forthcoming CPD events, visit www.gsba.ie.

Walsh assumes DSBA mantle

DUBLIN

John Glynn's year as DSBA president has reached its conclusion. He has been succeeded by Keith Walsh, with Aaron McKenna in the role of vice-president. Julie Doyle continues as honorary secretary. Aine Hynes and Eamonn Shannon complete the officer board. Newly elected council members include Vicky Pigott, continuing the proud tradition set by her grandfather David R Pigott, and Susan Martin, elected after a few years knocking at the door. Law Society President James McCourt and director general Ken Murphy attended and took part in a lively discussion.

The profession has been greatly saddened to note the passing of Fr Martin Clarke, parish priest in Donnybrook, and an eminent solicitor of several years' standing with Eugene F Collins. Fr Martin will be sadly missed.

Mount Falcon dinner-dance

MAYO

The annual dinner-dance of the Mayo Solicitors' Bar Association will take place at the splendid Mount Falcon Hotel, outside Foxford, on Saturday 7 December. Tickets are limited on a first-come, first-served basis and can be obtained from bar association president Charles Gilmartin (Claremorris).

Date for Kildare diaries

KILDARE

The Kildare Bar Association is holding its biannual dinner dance in the Keadeen Hotel, Naas, on Friday 15 November 2013 at 7.30pm (end of term). The event will be black tie. Tickets are available at a subsidised rate of €75 per head. Bookings and payments should be forwarded to Eva O'Brien, c/o Reidy Stafford, Kilcullen; DX 50001 Newbridge.

Meath's tempting CPD offering

MEATH

The Meath Solicitors' Bar Association is organising a CPD afternoon on Friday 6 December at the Newgrange Hotel, Navan, from 1pm to 5.15pm. Three management points and one regulatory point are on offer.

For queries and bookings, contact honorary secretary Elaine Byrne at tel: 046 943 1202 or committee member Declan Brooks at tel: 01 802 7050. Separately, congratulations to Elaine on the safe arrival of baby Michael.

Press Council elects Pat as vice-chair

At its meeting on Friday 4 October, the Press Council of Ireland elected Patrick O'Connor as vice-chairman. Mr O'Connor is a past-president of the Law Society (1998 to '99) and the Mayo Solicitors' Bar Association.

He serves on a number of professional and regulatory bodies and associations, including the Chartered Institute of Arbitrators, the Superior Court Rules Committee, Brabazon Park Trustees, the Mental Health Tribunal, and the IRB, ERC, Six Nations and IRFU Disciplinary panels.

Patrick has previously served as member, chairman or director of the Judicial Appointments Advisory Board, the Courts Services Board, the Board of Management of St Louis Community School, Hope House, the Irish Association of Suicidology and the O'Dwyer Forestry Foundation.

Ten barristers take silk

Ten barristers have been elevated to senior counsel in ceremonies conducted by the Chief Justice in the Supreme Court: Tara Burns, David Conlon Smyth, Colman Cody, Patrick Dillon-Malone, Seán Guerin, Conor Halpin, John Johnston McCarroll, Patrick Leonard, Sara Phelan, Siobhan Stack.

In News this month...

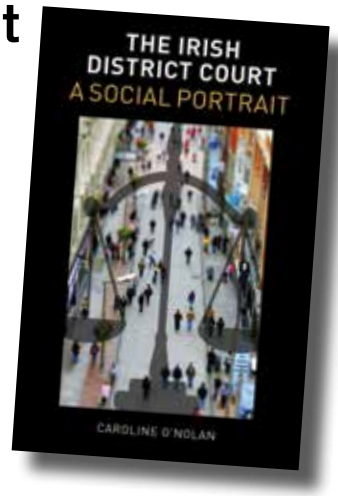
6 New director for representation appointed by Law Society
6 Digital edition Annual Report is a Law Society first
7 Court of Appeal now – 'without any stinting on resources'
8 Inaugural EU judicial training event in Dublin

The Irish District Court: A Social Portrait

Cork University Press will soon publish *The Irish District Court: A Social Portrait*. Written by Caroline O'Nolan, adjunct assistant professor in the School of Social Work and Social Policy, Trinity College Dublin, the book presents courtroom-based research that unveils the largely hidden decisions and processes of the District Court, while providing valuable insights into Irish policing priorities and practices.

Cork University Press is offering Law Society members 20% off the list price of €39.

The promotional code is COURT (in capitals). Members can order the book from www.corkuniversitypress.com.



Committee for Judicial Studies – conference dates

The *Gazette* has been notified of dates for conferences held under the auspices of the Committee for Judicial Studies:

- **The 2013 national conference will take place on Friday 15. November 2013. No cases should be listed for any court on Friday 15 November 2013, save on the instruction of the judiciary.**
- **The 2014 Circuit Court conference has been provisionally set for Friday 9 May 2014 and Saturday 10 May 2014. No cases should be listed for the Circuit Court on Friday 9 May 2014, save on the instruction of the judiciary. Dates will be confirmed as soon as possible.**
- **A date for the 2014 Supreme and High Courts conference has not been fixed yet.**
- **The 2014 District Court conference has been provisionally set for Friday 23 and Saturday 24 May 2014. No cases should be listed for the District Court on Friday 23 May 2014, save on the instruction of the judiciary. Dates will be confirmed as soon as possible.**
- **The 2014 national conference will take place on Friday 21 November 2014. No cases should be listed for any court on Friday 21 November 2014, save on the instruction of the judiciary.**
- **The 2015 national conference will take place on Friday 20 November 2015. No cases should be listed for any court on Friday 20 November 2015, save on the instruction of the judiciary.**
- **The 2016 national conference will take place on Friday 18 November 2016. No cases should be listed for any court on Friday 18 November 2016, save on the instruction of the judiciary.**

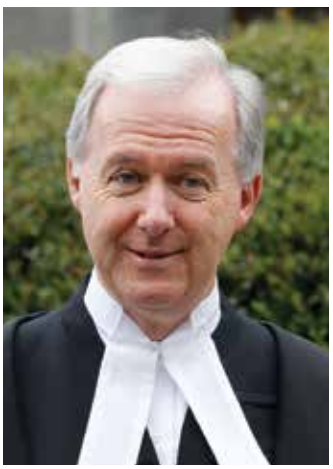
Accreditation for Diploma in Mediation

The Diploma Centre's new Diploma in Mediation has received accreditation from the Mediators' Institute of Ireland (MII). The new course began on 10 October.

Accreditation means that, on successful completion of the course, participants will be eligible to apply for associate or certified membership of the MII.

With the upcoming *Mediation Bill* due in early 2014, mediation will be promoted as an alternative to more traditional, adversarial methods, so attaining this skill should prove beneficial to any practice. For full details and an application form, visit the Diploma Centre's section at www.lawsociety.ie. Numbers are limited on this course.

New Justice for Special Criminal Court



At its meeting on 8 October 2013, the Government formally made a decision to appoint Mr Justice Paul McDermott to the Special Criminal Court, with effect from that date. He will replace Ms Justice Elizabeth Dunne, who was nominated by the Government on 11 September 2013 for appointment to the Supreme Court.

New director for representation appointed

Teri Kelly has been appointed to the new position of director of representation and member services. The creation of this position was one of the key recommendations of the report of the Task Force on the Future of the Law Society.

In accordance with the wishes of the members and the unanimous decision of the Council when it adopted the report earlier this year, additional resources and new strategies are being put in place to seek to strengthen the profession's standing, credibility and reputation generally. In addition, the Society is seeking to enhance the services and support it provides for members.

One of the new strategies is the creation of two stand-alone high-profile departments. These will be created from the existing Policy, Communication and Member Services Department with additional recruitments, of which Teri Kelly is just one.

One of the two new departments will be responsible for policy and public affairs. It will be led by deputy director general Mary Keane. The other department, the Department of Representation and Member Services, will be led by Teri Kelly who will report directly to the director general, Ken Murphy.

PIC: LENSMEN

New director of representation and member services, Teri Kelly

The creation of the two new departments will come into effect on 1 January 2014.

Teri Kelly is a corporate communications professional with ten years' experience leading strategic internal and external communications planning and execution. She is joining the Society having spent the last year as corporate affairs manager at IBRC. Before that, she was media manager at Ulster Bank and, prior to that, she was communications manager at Bank of America Merrill Lynch.

Teri is Canadian and holds a master of arts from the University of British Columbia in Vancouver, although she studied previously in the University of Limerick. She has lived in Ireland since 2008.

Law Society of Ireland
Diploma Centre

Diploma learning app

The Diploma Centre has launched a new learning app that builds on its 'anywhere, anytime' philosophy. It will provide maximum flexibility for 'time-poor' solicitors wishing to access courses and learn on the move.

The *LSIDiplomaMobile* app is available for download from the iTunes store. It allows course participants to download lectures from Moodle (the online learning management system) to iPads or iPhones – very useful for viewing later, especially when internet connectivity might be a problem. The system integrates with Moodle and is password controlled. Its use is limited solely to students enrolled on particular courses.

Access to substantive lectures is available for enrolled students only.

To find out more about the app, contact the Diploma Team at: diplomateam@lawsociety.ie.

Digital edition *Annual Report* is a Law Society first

A little bit of history was made in the Law Society on 24 October, when it emailed its first-ever digital edition of the *Law Society's Annual Report 2012/13* to its members. The report can be viewed at www.lawsociety.ie/annualreport.

Until now, the *Annual Report* has been produced as a hard-copy document and sent to members via post or DX. The fact that the *Annual Report* is being communicated and distributed electronically this year illustrates not only the theme of change within the Law Society and the profession, but also the Society's responsiveness to members' views.

In the survey conducted for the Future of the Law Society Task Force by market research firm Millward Brown, members stated a preference for a digital format *Annual Report*. Their reasons? A digital report would be more reflective of a modern Law Society, it would be more cost effective, and it would be more efficient. The Society listened, and hence the advent of the digital version.

Added value features

Readers now have the ability to select content from bookmarks at the left or right of their screens (depending on the type of computer or mobile device they use and their 'reader' settings, such as 'Acrobat Reader'). These bookmarks act like a live table of contents at the side of the screen, giving readers the ability to navigate swiftly through the document.

A hyperlinked full table of contents is offered early in the document, with further hyperlinked tables of contents preceding directors' reports, standing and non-standing committees reports, and the all-important financial pages at the back.

The real value of this year's report will become apparent, however, when reading through it. Members will encounter video messages from President James McCourt and director general Ken Murphy, interviews with the media, links to practice notes, submission documents to Government, and links to relevant *Gazette* articles and websites referred to in the numerous reports. This makes the *Annual Report* not only an extremely useful publication of record, but a very practical publication for business and reference purposes.

The Society is excited by this development and is interested in hearing from members with their comments, so that it can take such comments on board when producing next year's annual report. You should email g.ralph@lawsociety.ie.

Court of Appeal now – 'without any stinting on resources'

"There is nothing for which the Government has a stronger, clearer, more direct mandate from the people of Ireland than this. It must proceed immediately to put in place a Court of Appeal as a new and necessary piece of infrastructure in our justice system. This should now happen without delay and without any stinting on the resources necessary to make it effective."

So said director general Ken Murphy, on behalf of the Law Society, when warmly welcoming the 65% vote of approval from the Irish electorate for the proposition, in the referendum on 4 October 2013, to amend the Constitution to provide for a Court of Appeal to be introduced between the High Court and the Supreme Court.

Murphy paid tribute to the many people who had been involved in the success of this project to date, but he singled out two, the first being Chief Justice Susan Denham, who chaired the Working Group on a Court of Appeal (of which Murphy himself was a member). It published a comprehensive report in 2009 establishing the reasons why a Court of Appeal was necessary and desirable. The second was Minister for Justice Alan Shatter who took up this cause within the political sphere and led the successful referendum campaign.

Minister for Justice: led the successful referendum campaign

Chief Justice: chaired the working group on the Court of Appeal

Director general: 'Court of Appeal should now happen without delay'

Active campaign

The Society itself, having been enthusiastically committed to the idea of a Court of Appeal even before 2009, also campaigned more actively than it had ever done in any previous referendum. With the unanimous approval of the Society's Council, President James McCourt wrote to every solicitor urging not only that they should vote 'yes' in the Court of Appeal referendum, but also that they should urge others, including clients, to do so as well. This was considered such a major Society initiative that it was reported as the top news story on the front page of *The Irish Times*.

In broadcast news terms, Ken Murphy advocated a 'yes' vote in lively debates on the issue on RTÉ radio current affairs programmes *This Week* and *Today with Sean O'Rourke*.

In addition, junior vice-president Stuart Gilhooly engaged in the cut-and-thrust of debate on the issue with barrister Paul Anthony McDermott (who was advocating a 'no' vote) on the Newstalk *Breakfast* programme.

30th Hugh M Fitzpatrick Lecture in Legal Bibliography

In association with RDS Speaker Series

A lecture will be delivered by James H Murphy, professor of English, DePaul University, Chicago, entitled 'Lungs of leather and a ready tongue': lawyers, judges and courts in Irish victorian fiction.

The venue is the RDS Concert Hall, Royal Dublin Society, Merrion Road, Ballsbridge, Dublin 4, at 6pm on Wednesday 27 November 2013.

Refreshments will be provided after the lecture.

- Chairman: Michael M Collins, SC
- Welcome: John Holohan, Chairperson, RDS Speaker Series
- Parking: The Royal Dublin Society has kindly offered free parking to those who wish to attend the lecture.

Invitations will issue at the end of October 2013. For further information, contact: Hugh M Fitzpatrick, Lectures in Legal Bibliography, 9 Upper Mount Street, Dublin 2, tel: 01 269 2202, email: hmfitzpa@tcd.ie.

Inaugural EU judicial training event in Dublin

Judges from Hungary, Germany and Ireland gathered at Blackhall Place in October as part of the European Judicial Training Collective. The Law Society Diploma Centre was awarded the grant to provide judicial training in the European Commission's Civil Justice Programme. This initiative has the support of Chief Justice Susan Denham.

The aim is to promote judicial cooperation and foster engagement between member states in civil law matters. The project runs from October 2013 to October 2014.

The first of three modules focused on family law. It took place on 19 October at Blackhall Place. The second module, which focuses on insolvency, will take place in Budapest in February 2014. The third and final module will take place in Dublin in October 2014.

The key topics in the Civil Justice Programme include:

- Key issues in cross-border child and family law matters,
- Cross-border divorce: jurisdiction, recognition and enforcement,
- Interaction of *Brussels II Bis* with other EU legal instruments: legal aid, service of documents and alternative dispute resolution,
- Cross-border cooperation in civil matters (other than family law),
- Emerging issues in parental responsibility, child abduction and cross-border child care matters,
- Cross-border maintenance, and
- Pending developments.

Participants from various parts of Europe attended the first of three training modules at Blackhall Place as part of the European Judicial Training Collective

A total of 47 judges were involved, including members of the Irish judiciary from all levels, including District, Circuit and High Courts.

Speakers included Mr Justice Michael Peart, Judge Rosemary Horgan, Mr Justice Michael White, Judge Ruth Feldkemper-Bentru, Mr Justice Colm MacEochaidh, Judge Petria McDonnell, Juliane Hirsch, Mr Justice Henry Abbott, Dr Ildikó Figula (president, Debrecen Court of Public Administration and Labour) and Dr Geoffrey Shannon (solicitor).

For further information, contact Freda Grealy by email at f.grealy@lawsociety.ie.

Registration invitation by Caranua for survivors of institutional abuse

Perhaps you remember the passage of the *Residential Institutions Statutory Fund Act* through the Houses of the Oireachtas in 2012? It provided for a new body to help survivors of institutional abuse, using funds of €110 million committed by religious congregations. The body is now in place and is inviting survivors to register to apply to it.

'Caranua' is the service name of the Residential Institutions Statutory Fund. It offers survivors:

- **Support, information, advice and advocacy,**
- **Enhanced access to publicly provided services, and**
- **Grants to avail of services in health, education and housing.**

It will also work with statutory bodies in Ireland to improve their capacity to understand, recognise and address the particular needs of survivors arising from their adverse childhood experiences.

The process of application for services and grants will have individual survivors at its heart. It will be simple to use, and applications will be accepted online or by post. Personal assistance in making applications will also be available by telephone, or face to face by Caranua staff. The new body will reach out to survivors in their communities and ensure that interventions are tailored to individual needs.

Caranua is hoping that solicitors who come into contact with former residents will encourage them to register with it, so that they can avail of assistance through it.

Registrations can be made online at www.caranua.ie; by post to Caranua, 24-27 North Frederick Street, Dublin 1; or by phone at 01 874 5708.

Injuries Board reports number of claims up 10%

On 1 October 2013, the Injuries Board published its six-month analysis to June 2013. The number of claims in this period was up 10% and the average award was up 4%, *writes Richard Lee*.

Commenting on the figures, Patricia Byron, CEO of the Injuries Board, said: "Despite double-digit increases in the first half of 2013, claims volumes slowed in the third quarter and a continuation of that trend could see full year volume increases being pared back to about 5% – on par with prior years. On this basis, and given a 30% reduction in the board's processing fee to respondents (mainly insurers), we see no basis for insurance premium hikes at this time."

Patricia Byron, CEO of the Injuries Board

A reason given for the 10% increase in the number of claims is a higher volume of motor claims "sparked by the recessionary environment and promotional activity by claims-farming firms".

Lawyers should be uncomfortable with the phrase 'claims-farming firms'. These so-called 'claims-farming firms' do not create accidents. Rather, law firms inform accident victims of their rights and encourage them to make claims, if and when appropriate. The Injuries Board is "the official State authority responsible for personal injury awards". Its mission statement is "to be the independent facilitator in the delivery of compensation entitlements in a fair, prompt and transparent manner for the benefit of society".

Its reports, therefore, should be detailed and neutral in all respects. This is debatable.

The Injuries Board six-month analysis gives useful and important figures but omits other relevant figures – in particular the number of applicants who use a solicitor in making an application to the board.

In legal circles, it is estimated that 90% of applicants retain a solicitor to give them advice on the process, in addition to advice on whether any award made is reasonable for the particular circumstances of the applicant.

Other relevant figures would be the number of awards refused by applicants, in addition to the number of awards refused by respondents, together with the total number of authorisations issued.

The figure for the number of applications made and not completed is also relevant, particularly if the reason for non-completion is caused by a failure to understand the process.

In 2011, the Injuries Board received 27,669 applications and made 9,833 awards. Approximately one award was made for every three applications received. What happened to the other applications?

Previous indications from the board would suggest that another one-third would have settled before an award was made. But that still leaves approximately one-third, which would include authorisations issued and applications not pursued.

Detailed figures, whether favourable or unfavourable to the legal profession and insurance companies, should be published to give a clear picture of the statutory workings of the Injuries Board.

At the publication of its six-month analysis, the Injuries Board also launched its new 'Injuries Board App' for smartphones, commenting that it "features an interactive claim estimator and information on how to access and navigate its public services".

THERE'S AN APP FOR THAT

The sum of all fears

APP: SUMUP **PRICE:** FREE

At a recent CPD event, solicitor Neil Butler gave a presentation on an app to solve the age-old problem of a client asking if we have a laser/credit card machine to take payment. Up to now, we have had to reply in the negative, *writes Dorothy Walsh*.

However, the *SumUp* app quite literally allows your smartphone or tablet to become a credit card/laser card terminal. You set up an account with *SumUp* by registering the bank account details into which the payments are to be made. When you sign up with *SumUp*, a free card reader is sent out to you, which actually attaches to the phone or tablet, and into which the credit or debit card is inserted to allow payment.

According to *SumUp*, there is a simple and low fee structure attaching to the service, with a 1.95% per transaction with the card reader. They claim that there are no set-up, monthly or hidden fees with the payments.

Anyone can create an account quite quickly and easily, can enter a fee with various VAT options for payment, and call for a payment from the client's card. The client actually signs the receipt on screen and *SumUp* sends an email or text-message confirmation of payment to both the solicitor and client.

On downloading the app, one is guided through the set-up process, money laundering is checked off, and an account is set up, with a free card reader ordered for delivery. A decent customer service system seems to be in place (which, I must admit, I have yet to test) that appears to be well equipped to deal with changes to account details, receipt duplication, refunds and error corrections.

To sum up (sorry!), this is one of those apps that really solves a tricky problem, about which we can be most enthusiastic and very happy to use.

Don't be inured – ensure you're sure before you insure

While the concept of Greeks bearing gifts may have been rendered somewhat redundant given their current parlous financial state, the time has come for us to bring similar levels of wariness to the even more unusual sight of insurance companies offering early Christmas presents, *writes Stuart Gilhooly*.

Over the last five years, we have been become so inured to high professional indemnity insurance premiums, come the end of each November, that the cost of Christmas pales into insignificance. Thus, when prices tumbled in last year's PII reductions, some of us tackled these bargains like yummy mummies in a Brown Thomas handbag sale. The result was a very large portion of solicitors' firms (in the region of 30%) finding themselves insured with a company that had no financial rating.

Now, if the last global economic crisis – and indeed our own banking catastrophe – has taught us anything, it's that being a blue-chip behemoth doesn't insulate you from the vicissitudes of economic strife. But, equally, it would be an act of extreme folly to believe that a financial rating has no meaning at all.

Insurance companies pay rating agencies a lot of money to obtain these ratings, and there are quite a few hoops to be jumped through in order to obtain one with an A in it. While it doesn't guarantee financial stability, of course, it does and must give comfort that it's a safer bet than one without.

Because that's what placing insurance in this market is. It's a gamble. A little like any investment that we make. We pays our money and we takes our chances. The law says that we must have insurance and, in any event, it's in the best interests of both our clients and ourselves that we do. However, we can't be sure that the company in which we have invested our hard-earned money will necessarily be in a position to discharge any claim that may fall our way, or that they will still be in business before our next premium falls due 12 months later.

Don't let a bad decision about PII insurance rain on your parade

When assessing the investment decision, it's sensible to reduce the risk as much as possible. Yes, price is a factor and, for some, it will be a determining one. Finances will dictate that call. But for those for whom price isn't the difference between paying the bills and not, then reviewing the financial stability of the company must be your number one criterion.

It's easy to forget when large bills have to be paid (and few are bigger than this one, in fairness) that if the insurance company goes under during the indemnity period then, first, claims will not be fully covered, leaving a potentially large shortfall, and second, you will be required to take out a further policy with another insurer whom, you may be certain, will not break the habit of a lifetime of wrangling as much out of you as possible.

Insurers are in the market to make money. Period. If their insurance is cheaper than others in the same market, ask yourself why. Then think about why you buy insurance and how much of a gambler you are. Take a close look at the practice note 'Financial rating of participating insurers' on page 50 of this *Gazette*. Then make your decision.

Junior vice-president Stuart Gilhooly is chairman of the Society's Professional Indemnity Insurance Committee. (All practice notes in this Gazette *relating to PII can be found on pp48-51.)*

Invest in knowledge now

Now is a good time to invest in knowledge. In recognition of this fact, more firms are appointing CPD coordinators to identify education/training needs, plan training, and ensure compliance by their firms' solicitors with CPD obligations. These responsibilities may often be taken on by an existing employee.

Practitioners should also check that they are on target to complete the CPD 2013 requirement by 31 December 2013. This requirement is for 14 hours of CPD, including the minimum three hours of 'management and professional development skills' and the minimum one hour of 'regulatory matters'.

The current *CPD Scheme Booklet*, regulations and record card are available to download from the CPD Scheme section on the members' area of the Society's website, www.lawsociety.ie.

For advice on the CPD Scheme generally, contact the CPD Scheme unit at tel: 01 672 4802 or by email: cpdscheme@lawsociety.ie.

Debt be not proud

On foot of a number of enquiries received by the *Law Society Gazette* in relation to the bankruptcy article published in the *Gazette* in 2012, we would refer readers to the article written by Bill Holohan (solicitor), 'Debt be not proud', on the subject of bankruptcy and dealing with creditors. This was published in the August/September 2012 issue, pp26-29.

On a separate note, one of the most useful resources on the *Gazette's* website is the 'indices' section, which gives information on all articles, subjects and authors that have been published in the *Gazette* since 1999. The indices can be found at www.lawsociety.ie/Gazette/Gazette-Indices. This will save readers countless hours when trying to locate elusive articles.

NEWS FROM THE LAW SOCIETY'S COMMITTEES AND TASK FORCES

Do you know your in-house bodies?

IN-HOUSE AND PUBLIC SECTOR COMMITTEE

The Society's In-House and Public Sector Committee wishes to draw the attention of solicitors to the Association of Corporate Counsel (ACC), the International Bar Association (IBA) and the Corporate and Public Lawyers' Association (CPLA). These useful organisations can be of great assistance to in-house solicitors seeking professional assistance or looking to network.

The ACC is a global bar association that promotes the common professional and business interests of in-house counsel who work for corporations, associations and other private-sector organisations through information, education, networking opportunities and advocacy initiatives.

With more than 30,000 members employed by over 10,000 organisations in more than 75 countries, ACC connects members and resources. Contact the ACC's Irish representative Michael Shea by tel: 087 051 8715, email: mike.shea@elavon.com, or visit ACC's website: www.acc.com.

Readers of the *Gazette* will be familiar with the IBA, which caters for the interests of bar associations, private practitioners, corporate counsel, lawyers in the public service, academics, judges and other lawyers. The IBA consists of four principal units:

- The Bar Issues Commission, which deals with issues from bar associations around the world,
- The Human Rights Institute, which works on global human rights projects,
- The Section on Public and Professional Interest, which includes the Law Practice Management Committee, and
- The Legal Practice Division (LPD), which deals with substantive legal issues and holds conferences around the world each year.

To join the IBA, visit www.ibanet.org. Queries should be addressed to the LPD chairman, Michael Greene, tel: 01 649 2316.

The CPLA was founded in Ireland in 1997 to promote a networking forum for solicitors working in the public sector, in industry and commerce. Membership is also available to barristers who work in these sectors. The association holds regular seminars on current issues of concern to in-house practitioners and provides a social forum for members to network. For the past five years, the CPLA has held a fundraising lunch each September on behalf of the Irish Guide Dogs Association, raising vital funds for that organisation.

For more information on the CPLA, tel: 01 222 3211 or email: orlahastings@dublincity.ie.

LEGISLATING TO PROTECT THE WHISTLEBLOWERS

The *Protected Disclosures Bill 2013* is a welcome addition to existing whistleblowing legislation in Ireland. Lauren Kierans argues that it will greatly strengthen the protections offered to workers if, and when, enacted

Lauren Kierans is a Dublin-based barrister

On 3 July 2013, Minister Brendan Howlin published the *Protected Disclosures Bill 2013*. The bill is a welcome addition to the existing sectoral approach to whistleblowing law in Ireland. The sectoral approach was formally adopted in 2006 following the dropping of the *Whistleblower Protection Bill 1999*, which had languished on the order paper for seven years – through two parliaments – without being enacted. The sectoral approach to whistleblower protection required the passing of legislation to protect potential whistleblowers in selected State, private or professional sectors. However, this approach did not offer protection to everyone. The introduction of the *Protected Disclosures Bill 2013* recognises the fact that whistleblowers are essential for uncovering wrongdoings in both the public and private sectors, as they have access to up-to-date information concerning their workplaces' practices and are usually the first to recognise ethical or legal violations.

The international anti-corruption organisation, Transparency International, has determined that early disclosure of wrongdoing or the risk of wrongdoing can protect human rights, help to save lives and safeguard the rule of law. Furthermore, the introduction of the bill recognises the fact that whistleblowers often face severe personal and professional repercussions for blowing the whistle and, as such, need to be protected. These repercussions can include workplace retaliation or dismissal, psychological damage, threats or physical harm.

The provisions of the bill extend protection to 'workers' in all sectors of the economy who make a disclosure of information that, in their reasonable belief, tends to show one or more relevant wrongdoings. This information must come to the worker's attention in connection with his employment.

What qualifies as 'wrongdoing'

The bill sets out what qualifies as a relevant wrongdoing, and this covers a wide range of acts, such as:

- An offence that has been, is being, or is likely to be committed,
- Failure to comply with a legal obligation (excluding the worker's terms of employment),
- A miscarriage of justice,
- Health and safety breaches,
- Environmental damage,
- Unlawful or improper use of public monies,
- Oppression, discrimination, gross negligence or gross mismanagement by or on behalf of a public body, or
- Concealment or destruction of information relating to a relevant wrongdoing.

A breach of the worker's terms and conditions of employment are excluded to prevent the bill being used as an alternative to existing grievance procedures for disputes on employment contracts.

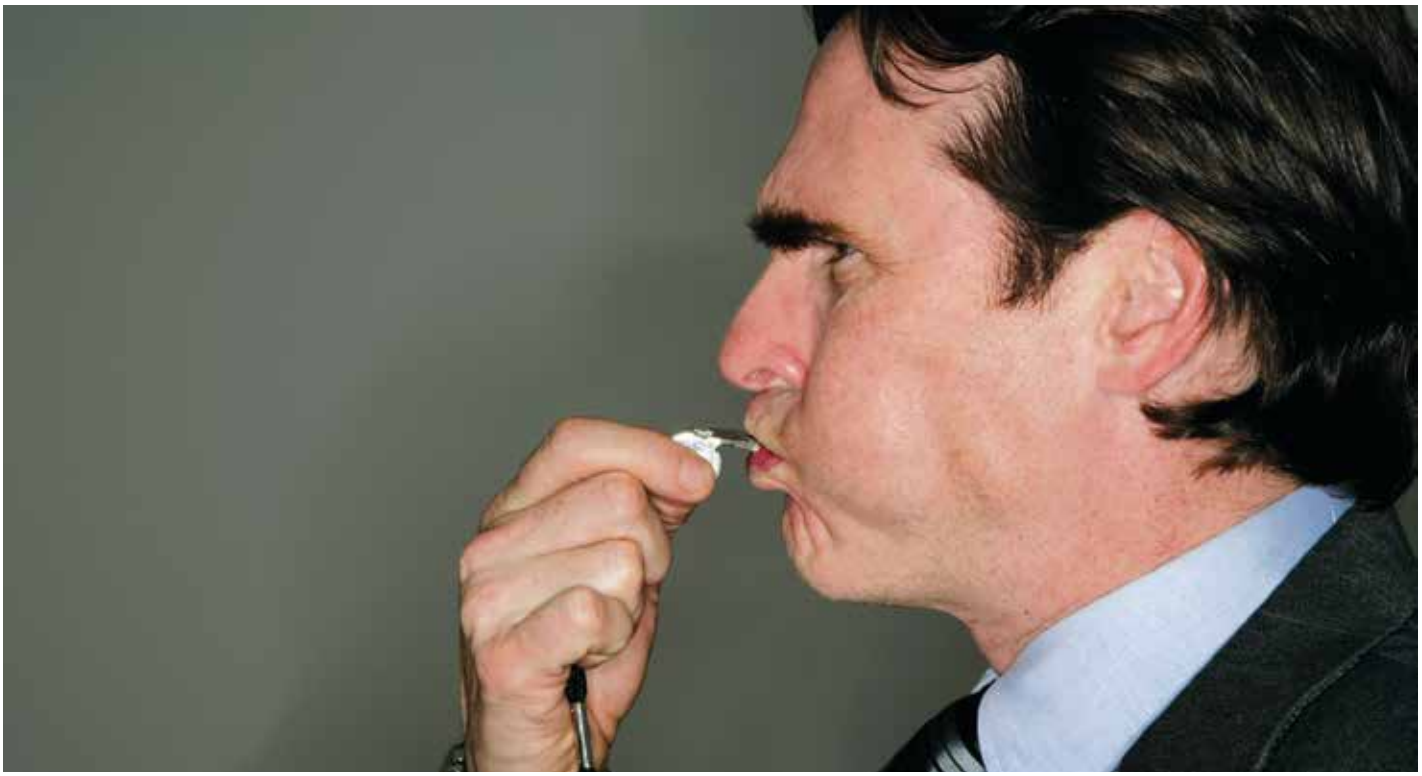
The definition of 'worker' is quite broad and includes employees, contractors, consultants, agency staff, former employees, temporary employees, and interns/trainees. A broad definition of 'worker' is essential, as it ensures that a wide range of persons can avail of the protection under the legislation, thus encouraging whistleblowing. Volunteers, however, were left out of the definition of 'worker', having regard to the lack of a contractual relationship between persons providing voluntary services and employers.

> ***"Quite notably, workers will be protected from dismissal under the Unfair Dismissal Act 1977 from the first date of their employment, thus recognising the fact that new employees are often the ones who blow the whistle"***

'Good faith' disclosure

There is no requirement that the disclosures be made in good faith. Britain recently abolished the test of good faith for disclosures made under the *Public Interest Disclosure Act 1998* due to a history of legal and practical difficulties for the courts, employers and workers, in absence of a definition of 'good faith' under the legislation.

Now, under the British legislation, if a disclosure is not made in good faith, an award for unfair dismissal for those who make a protected disclosure will be reduced by 25%. A similar provision has been included in the Irish legislation that will allow for compensation to be reduced by up to 50% where the investigation of the relevant wrongdoing was not the sole or main motivation for making the disclosure by the worker. However, as protection is afforded to 'reasonable belief' disclosures, disclosures that ultimately prove to be wrong will be covered. This protection will not apply, however, to false disclosures



deliberately made, thus protecting employers from malicious claims – a provision that will, no doubt, be welcomed by employers' groups.

The bill provides for a stepped disclosure regime, whereby the worker must comply with certain requirements before a disclosure is made externally. The purpose of such provisions is to incentivise workers to raise concerns, in the first instance, with their employer. If, having made a disclosure to their employer, the employer fails to act on the information disclosed – or the worker does not wish to avail of the internal disclosure channel – alternative channels are provided for under the bill, such as disclosure to a prescribed person. This stepped disclosure regime ensures that workers do not disclose information directly to the media unless they have fulfilled certain requirements, thus allowing the employer to address the wrongdoing privately.

Range of protections

A range of protections are included in the bill for workers who are penalised for making a protected disclosure. An employer is prohibited from carrying out any act or omission that affects a worker to the worker's detriment and covers a range of acts such as suspension, demotion, injury, threats, unfair treatment, and dismissal.

Quite notably, workers will be protected from dismissal under the *Unfair Dismissals Act 1977* from the first date of their employment, thus recognising the fact that new employees are often the ones who blow the whistle. Compensation of up to a maximum of five years' remuneration may be awarded to the worker for an unfair dismissal. This provision may prove to be controversial. On the one hand, it will be welcomed by workers' groups, as it exceeds the normal maximum 104 weeks' remuneration for unfair dismissal, but on the other hand, it does not take into consideration that, given the potential loss of career and livelihood, the maximum award of five years' remuneration could serve as a deterrent to prospective whistleblowers.

> **"In any proceedings involving a dispute as to whether the disclosure made by the worker is a protected disclosure, the presumption lies in favour of the worker"**

A provision that will be welcomed by workers' groups, however, is that an employer will also be vicariously liable for such acts or omissions by any other person where the employer caused or permitted such penalisation against the worker.

The worker will also have a cause of action in tort for detriment suffered as a result of making a protected disclosure. This protection extends to third parties, such as family members, who may suffer a detriment due to the worker having made a protected disclosure. Further protection exists under the bill to the extent that the worker will be immune from civil and criminal liability for the making of a protected disclosure. This includes benefitting from qualified privilege under the *Defamation Act 2009*.

In any proceedings involving a dispute as to whether the disclosure made by the worker is a protected disclosure, the presumption lies in favour of the worker. The worker enjoys this presumption on the basis that the drafters considered it critical for promoting a necessary change in workplace culture. The aim of its inclusion was to ensure that workers are not inhibited significantly from disclosing information on account of having to shoulder the burden of proof.

The bill is due to be enacted in late 2013. The OECD has advised the Irish Government that this whistleblowing law could be the strongest in Europe. With the implementation of a robust legal regime, it is hoped that this will encourage those who have information relating to alleged wrongdoing to disclose this information in the confidence that they will not face severe personal and professional repercussions. The disclosure of such information will undoubtedly lead to the prevention, investigation and prosecution of wrongdoings that would not be unearthed except for the disclosures made by whistleblowers.

DEMANDING HUMAN RIGHTS

"Human rights discourse is not best served by being restricted within the boundaries of legalism." So said President Michael D Higgins during the Law Society's ninth Annual Human Rights Lecture in September. Joyce Mortimer reports

Joyce Mortimer is the Law Society's human rights executive

The title of this year's Annual Human Rights Lecture might not have seemed the most riveting at first glance, but it certainly delivered on content. Entitled 'The human rights discourse: some issues of source and prospects for achievement', the lecture was delivered by none other than the President of Ireland, Michael D Higgins. The President began by calling attention to what he described as "little less than an intellectual crisis in the discourse of human rights".

"In the end," President Higgins said, "the debate about human rights is tested by its ability to deliver emancipatory release from their conditions for those communities who are suffering the deprivation of such rights. Such communities on the ground, sometimes within nations, sometimes within the guarantees of citizenship, sometimes without, which creates special problems, should be real sources of our concern. They are not abstract moral communities."

Moving on to the issue of implementation and the possibility of using indicators as essential tools in the realisation of human rights, the President spoke of how such indicators are generally of more interest to those working in the field of social advocacy, social work, and social planning than for those in the mainstream legal profession. "I believe there is a great opportunity for human rights activists within the human rights legal profession to make a real contribution in this area," he said, "while remaining participants in the larger debate."

At the ninth Annual Human Rights Lecture at Blackhall Place on 27 September were *(l to r)*: Ken Murphy (director general), President Michael D Higgins and Mary Keane (deputy director general)

Boundaries of legalism

His long-standing view is that human rights discourse is not best served by being restricted within the boundaries of legalism: "However one assesses it, the origins of the contemporary human rights discourse come from a political background, a complex set of circumstances, that may be interpreted differently." He went on to speak of the need to deal with the philosophical issues and also to deliver a set of practical measures to ensure the actual experience of human rights.

President Higgins spoke of a reference to the experience of the residents of the Seven Towers in North Belfast in a manual published by the United Nations, *Human Rights Indicators – A Guide to Measurement and Implementation*. Solicitor Michael Farrell had drawn the attention of the President to the fact that the residents had, with the assistance of the Practice of Rights Project, used indicators to advance their case. A press release said that the residents "linked their recurrent and serious housing problems to a set of core 'right-to-adequate-housing' indicators to monitor progress or lack thereof".

In that regard, President Higgins referred to a quote from renowned economist JK Galbraith: "If it is not counted, it tends not to be noticed."

The President stated that those advocating for indicators claim that they create specific obligations that assist in clarifying the terms of treaties. "Indicators operationalise the treaties by translating general principles into specific requirements," he said.

> ***"Human rights claims are political claims in the broadest sense. They are normative claims – claims about how things should be"***

"There are obvious lessons for advocacy groups in this most recent turn to enumeration. Not to address the issue of appropriate measurement would exclude from the discourse," the President continued.

"We do not have to choose between philosophical, ethical and measurement issues. Intellectual rigour simply demands that we indicate how assumptions must be stated, instruments specified, and the contingent conditions constructed; scholarship requires that. If not achieved, description replaces analysis and, even with the assistance of measures that cannot at first view be dismissed, quickly descends into propaganda, often ideologically driven."

Economic and social rights

The President referred to the work of political scientists Daniel Whelan and Jack Donnelly, who have challenged the dominant contemporary narrative in the history of human rights, which suggests that it was only under strong pressure that the West agreed to

Members of the Law Society's Human Rights Committee with President Higgins *(l to r)*: Michael Finucane, Joyce Mortimer and Grainne Brophy

"The debate about human rights is tested by its ability to deliver emancipatory release from their conditions for those communities who are suffering the deprivation of such rights"

incorporate a number of economic and social rights. "Donnelly and Whelan argue that economic and social rights had, in fact, become central to the thinking of Western welfare states and to the Western vision of the post-war economic order by 1945, and thus it is a distortion to suggest that those states who, after all, had initiated proposals and policies that addressed the issue of poverty, were automatically the opponents that the dominant narrative suggest."

Researcher Sally-Anne Way was also cited in support of Donnelly and Whelan's view. Way highlights that the papers relating to the founding moments of the *Universal Declaration of Human Rights*, including a text entitled 'United States suggestions for articles to be incorporated in an international bill of rights', provide a key piece of missing historical evidence of official US support for economic, social and cultural rights in early 1947.

The President pointed out that substantial parts of the latter document's wording and provisions on socioeconomic rights were closer to the final text of the 1966 *International Covenant on Economic, Social and Cultural Rights* than to the 1948 *Universal Declaration of Human Rights*. He stated: "A number of concepts and phrases to be found in the 1966 covenant – including the concepts 'progressive realisation', 'maximum use of resources' and the specific formulation of rights such as the 'right to the highest attainable standard of health' – have roots in this 1947 text."

Despite the efforts of Eleanor Roosevelt at this time, the position of the US delegation evolved over the course of the drafting process and it was agreed in the end that economic, social and cultural rights should be pursued within the context of a non-binding declaration.

Indivisibility

The President moved on to the concept of indivisibility. Although, at the international level, rights are recognised as equal and indivisible, he said that it had become 'normal' to accept a distinction between two sets of rights: "Civil and political rights are customarily understood as 'negative' rights that protect individuals against intrusion by the state, whereas socioeconomic rights are regarded as 'positive' rights, requiring the state to step in and take action in order to protect its citizens against want and need."

Oxford law professor Sandra Fredman notes that this distinction is based on fundamental disagreements about the role of the state in society, the President continued, quoting Fredman: "Civil and political rights grew out of an assumption of the state as potentially hostile, which should be restrained from interfering in individual liberties. By contrast, socio-economic rights proponents regarded the state as essential to the achievement of individual liberty."

The debate among legal practitioners was not so much about whether socioeconomic rights are human rights, the President said, but rather about the role of the courts and the mechanisms to ensure the accountability of the state in fulfilling such rights. He referred again to Prof Fredman, who argues that both civil and political rights and socioeconomic rights give rise to a cluster of obligations on the state – the "duties to respect, promote and fulfil".

Fredman acknowledges that the function of holding decision-makers accountable lies primarily with legislatures, but claims that there is room for the courts to provide a complementary forum for democratic accountability.

The President commented that judges "have neither the legitimacy nor the competence to be the final arbiters on how the authorities should fulfil their obligations, but … they are well placed to elicit and assess a deliberative explanation against a background of human rights".

President Higgins closed his lecture with a quote from political theorist Prof Michael Goodhart, who wrote: "Human rights claims are political claims in the broadest sense. They are normative claims – claims about how things should be – but that is not the same as saying they are claims about moral truths – to invoke human rights is to challenge the order of things".

The President concluded that this was where the members of the Human Rights Committee of the Law Society – and those who will support them – come in.

TAKING A PUNT ON PROPOSED *GAMBLING CONTROL BILL*

The Government has published the General Scheme of its *Gambling Control Bill 2013*. Dr Max Barrett assesses the legal landscape and places his chips

Dr Max Barrett is a practising solicitor. Any views expressed in this article are personal

"People who have a problem with their gambling lose an average of $21,000 a year… Hard-earned money that would otherwise be used to pay bills, pay off the mortgage or take holidays with the kids. But it's not just the money ... Problem gamblers suffer mental and physical health problems, find it difficult to hold down a job, and struggle to maintain relationships. For many families, perhaps the biggest loss is the quality of time together, which can never be recovered" (Government of Australia, www.problemgambling.gov.au).

On 15 July, Minister Shatter announced the Government's intention to reform Ireland's existing gambling regime. In place of decades-old laws rooted ultimately in the notion of gambling as a vice, Ireland will adopt new legislation that recognises gambling as a legitimate form of entertainment – albeit one that entails serious risks.

Under the proposed *Gambling Control Bill*, casinos will be permitted, major changes to bingo rules will be adopted, there will be some amendment to the lotteries regime, certain games and machines will or may be prohibited, online/remote betting will be regulated, a gambling inspectorate will be established, and gambling debts will become enforceable.

Tumbling dice

Although the proposed bill will liberalise the gambling sector, it will also seek to protect vulnerable adults and young people. In this respect, the bill can be seen as something of a gamble – offering easier gaming to the many, at a risk to the welfare of a few.

However, it is never just a few problem gamblers who are affected by gambling. A British charity, GamCare, estimates that each problem gambler may have an adverse effect on ten to 15 other people, including partners, children, parents, siblings, employers and co-workers.

> **"The experience of Ireland's nearest neighbour suggests that combating the allure of gambling to the vulnerable will be a major exercise that requires sustained effort from Government and significant cash contributions from the gambling industry"**

The Australian government adopts a more conservative five-to-ten-person impact, yielding the conclusion that, under Australia's relatively benign gambling regime, up to 5 million Australians are affected by problem gambling, resulting in social costs of AUS$4.7bn (€3.3bn) a year.

There is no reason to believe that the Irish experience of liberalised gambling will be particularly different from that of other countries. So there is a risk that the proposed *Gambling Control Bill* will, in practice, offer easier gaming to many and bring misfortune to many. It remains to be seen whether the protections that the proposed bill will contain are sufficient to allay the dangers that a liberalised gambling regime seems naturally to present.

Poker face

Under the proposed bill, the minister will be the regulator for gambling and will also be responsible for general gambling policy. The minister's licensing, compliance and enforcement activities will be performed by a new body, provisionally called the Office of Gambling Control Ireland (OGCI).

It is currently intended that OGCI will be based within the minister's department and that it will be self-financing, through the imposition of fees and other charges on industry actors.

Given that OGCI is expected to function at no cost to the taxpayer, it is unclear why the Government would elect not to have an independent gambling inspectorate that would sit independent of central government, offering a detached but informed view of gambling policy, while also vigorously policing the gaming sector.

The ace of spades

One notable feature of the proposed bill is the intended establishment of a 'social gambling fund'. This will be financed by a levy on gambling industry operators and will assist with gambling treatment services, as well as providing education and information on the risks of gambling.

Although it is intended that the social gambling fund will be financed by the gambling sector, the multiplier effect of problem gambling (whereby the number of people affected is significantly greater than the number of problem gamblers) suggests that a risk of underestimating the true cost of problem gambling may arise. This raises the possibility that the State will ultimately bear some of the cost in combating any excesses that a liberalised gambling regime engenders.

Of course, it could be contended that the State should be liable for some of the costs arising. After all, it is the Government that is electing to enact liberalised gambling legislation, and it is the State that will derive a tax benefit from any increase in gambling. Viewed

"It seems almost incongruous that the State should not itself be subject to an express obligation within the proposed bill to fund treatment and other services for problem gamblers and other affected persons"

in this light, it seems almost incongruous that the State should not itself be subject to an express obligation within the proposed bill to fund treatment and other services for problem gamblers and other affected persons.

Three-card trick

Other social requirements to be included in the proposed bill include the introduction of age restrictions, controls on advertising, promotions and sponsorship, a new complaints procedure for consumers, and new provisions for consumers seeking compensation from licence-holders. It is intended that the complaints and compensation processes will be funded by the gambling industry. It remains to be seen whether these further social-responsibility provisions will be adequate to address the multiplicity of issues presented by a rising tide of problem gambling.

The scale of the problem that can be anticipated is evidenced by the British Gambling Prevalence Survey 2010. That survey, conducted by the British Gambling Commission, followed the enactment of the landmark *Gambling Act 2005* and built on the results of a similar survey in 2007. Among its many findings, the 2010 survey showed that, in Britain:

- 73% of the adult population had gambled in the previous year, compared with 68% in 2007,
- Problem gambling prevalence was higher in 2010 than in 2007; 1.8% of the population (over 900,000 people) were at 'moderate' risk of becoming problem gamblers, and 5.5% (over 2.7 million people) displayed some risk factors,
- An (astonishing) 2% of 12 to 15-year-olds were problem gamblers in 2009, though the scale of such gambling appeared to be reducing, and
- Students were a particularly exposed group, both for 'peer pressure' reasons and also because gambling offered, or appeared to offer, cash-strapped students a potential source of income.

Obviously, the Irish experience may not exactly mirror that of Britain. Even so, the experience of Ireland's nearest neighbour suggests that combating the allure of gambling to the vulnerable will be a major exercise that requires sustained effort from Government and significant cash contributions from the gambling industry. Yet central Government and the gambling industry seem conflicted in this regard. After all, the State will derive increased revenue from increased gambling – and the industry will likely want its contributions kept to a manageable level.

Viva Las Vegas

The proposed bill will allow the establishment of small-scale casinos that have a maximum of 15 tables and 25 gaming machines. There will be location controls to ensure, for example, that there are no casinos near schools. Sales of alcohol in casinos will be allowed, but restricted to generally applicable bar hours.

Although the type of casinos currently contemplated will be small in nature, it could be argued that having crossed the Rubicon from prohibition to permission and allowed small-scale casinos, the case against larger resort-style casinos is necessarily weakened.

That said, concerns about casinos may be somewhat misdirected. Of potentially greater concern are the provisions in the proposed bill that will allow limited gaming in betting shops and a limited presence of gaming machines in bars and take-away restaurants, measures that seem certain to lead to a surge in gaming at an array of new venues.

The Government's proposed *Gambling Control Bill* represents a commendable effort to liberalise a dynamic area of commercial activity that generates both employment and tax revenue. However, the experience of other jurisdictions suggests that, along with those who benefit from a liberalised gambling regime, there are many whose lives are seriously damaged – sometimes destroyed – by the curse of problem gambling.

In the proposed bill, the Government will, in effect, be betting that it can legislate for easier gambling while containing problem gambling. Although the odds seem unfavourable, one can only hope that Government will be successful in realising these disparate goals. G

LOOK IT UP

- General Scheme of the *Gambling Control Bill*, see http://www.justice.ie/en/JELR/Pages/PR13000297
- GamCare: www.gamcare.org.uk
- British Gambling Prevalence Survey: www.gamblingcommission.gov.uk
- Gamblers Anonymous: www.gamblersanonymous.ie

PASSWORD protected?

Can an employer ask you for your Facebook password? Clíona Kimber and Hannah Lowry O'Reilly look at the rationale behind such requests, the US position, and the risks such a practice brings for employers

Clíona Kimber is a Dublin-based barrister specialising in employment and equality law

Hannah Lowry O'Reilly is a practising barrister

In the last couple of years, there have been increasing reports of employers seeking passwords for personal social media from their employees and prospective employees. These stories spread across newspapers in Ireland and – perhaps to a greater extent – in the United States, and people reacted incredulously and scornfully.

That said, to some this idea may seem practicable: it protects employers' interests, it helps employers to find the most suitable job applicant, it could prevent actions of vicarious liability, and it arguably boosts competition in the workplace. To others, however, this looks like a simple breach of privacy.

Most social media sites are aware of the importance of privacy for their users and make clear that users should keep their passwords private. For example, Facebook states that "you will not share your password … let anyone else access your account, or do anything else that might jeopardise the security of your account" at paragraph 4.8 of their statement of rights and responsibilities. Another well-known site used by employees, LinkedIn, has a similar requirement in their privacy policy. LinkedIn states that users have an obligation to "keep your username and password confidential and not share it with others".

It is therefore a surprising development that employers would seek to evade these built-in safeguards and seek passwords for social media sites used by their employees. It is clear that there must be compelling reasons why they would seek to do so.

Seek and ye shall find

Employers are seeking passwords at interview stage, during disciplinary processes, and are even requiring passwords from long-serving employees.

At interview stage, employers want to know the real person, not just who they are on paper. By requesting passwords,

FAST FACTS

- There have been reports of employers seeking personal social media passwords from their employees and prospective employees
- Some US states have enacted legislation to prevent employers asking job applicants or current employees for the passwords or usernames of their personal social media sites
- While social media password protection legislation is not in existence in Ireland, nor is there much public debate calling for legislation to be enacted, it cannot be said that it is acceptable for Irish employers to request passwords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"If employees are unwilling to give their passwords in order to comply with the investigation, employers alternatively seek to engage in a process known as shoulder surfing"

employers can log on and get a real insight into who the applicant really is. However, this can cause problems for the employer, such as discrimination complaints.

In disciplinary investigations, employers are requesting passwords to try and resolve incidents in the workplace such as cyberbullying. If employees are unwilling to give their passwords in order to comply with the investigation, employers alternatively seek to engage in a process known as 'shoulder surfing'. This involves directing the employee to flick through photos, messages and wall posts while the employer watches. However, it is debateable as to whether this process infringes employees' privacy. Irish MEP Phil Prendergast has described the request by employers for their employees' passwords as "workplace harassment".

Some reports say that employers are seeking passwords from long-serving staff members to ensure that they are remaining loyal and that they are not bad mouthing their workplace online, to check employees' updates and photos while they are on supposed sick leave, to check that their employees are not seeking alternative employment, or that they are not uploading private company information. Interestingly, in the British case of *Hays Specialist Recruitment (Holdings) Ltd v Ions*, an employer successfully secured an injunction to force an employee to disclose LinkedIn content so that they could remove confidential information that he had uploaded to his profile from a work database. This case could be seen by employers as legitimising the practice of requesting passwords.

Land of the free

Due to privacy concerns, a number of US states have enacted legislation to prevent employers asking job applicants or current employees for the passwords or usernames of their personal social media sites. These states include Arkansas, Maryland, California, Colorado, Michigan, Illinois, Oregon, Utah, New Jersey, Vermont and Washington. Employers will face penalties if they are found to have breached the new laws. There is considerable debate among US lawyers about the legitimacy and advisability of either seeking passwords, or legislating to prevent employers seeking them.

New Jersey Governor Chris Christie recently vetoed that state's version of the social media password protection law.

Governor Christie objected to parts of the bill, and he opened up discussion about the proposed law. While the governor acknowledged the positive elements of the bill, which were designed to protect employees from over-aggressive investigations from employers, he highlighted the fact that the privacy concerns must be balanced against an employer's need to hire appropriate personnel, manage its operations, and safeguard its business assets and proprietary information. He also raised the issue of a potential inundation of cases being taken against employers.

Lawyers have also made general criticisms of the state laws, complaining that many of the restrictions imposed are too extensive or drafted in too broad a way. For example, in the Colorado, Maryland, Michigan and Utah statutes, employers are prevented from requesting usernames as well as passwords. This has been criticised as blurring the lines of distinction between public and private, and it is argued that usernames are the least private of social media information, in that they are generally publicly available. Furthermore, it can be seen as a restriction that would greatly impede workplace investigations. California's statute (preventing an employer from requesting an employee to "divulge any personal social media content") is also criticised for preventing an employer from even requesting to see publically available material.

These laws further muddy the water in relation to social media accounts that could be regarded as work-related or personal. On their face, the laws appear to be pro-employee by treating these pages as private, even where the content may be heavily work related and therefore should be accessible by employers.

Risky business

While social media password protection legislation is not in existence in Ireland, nor is there much public debate calling for legislation to be enacted, it cannot be said that it is acceptable for Irish employers to request passwords. Employers may face challenges under other legislation, such as equality or data protection. There is also the issue of the human right to privacy.

Article 8 of the *European Convention of Human Rights* relates to a person's privacy. This right was reinforced in Ireland with the enactment of the *European Convention of Human Rights Act 2003*. Article 8.1 states: "Everyone has the right to respect for his private and family life, his home and his correspondence."

It is possible that a legal argument could be made by an employee that a social media page could be classed as a person's online 'home' and should therefore remain inviolable. Alternatively, it could be argued that social media postings and uploads may be capable of being classed as 'correspondence'. By handing over a password, not only does it allow the employer to gain access to snoop around the employee's personal online home and correspondence, it also gives the employer the possibility of impersonating them online and hijacking their privacy. *Halford v United Kingdom* emphasises that article 8 of the ECHR extends to the workplace.

It is also important to remember that, under the *Employment Equality Acts 1998-2011* and the *Equal Status Acts 2000-2011*, discrimination is unlawful in the workplace. Under the acts, discrimination arises when it is based on gender, civil status, family status, sexual orientation, religion, age, disability, race or membership of the Traveller community. Employers run the risk of opening themselves up to a discrimination claim if they ask for a job applicant's password. Take, for example, an applicant who is a member of a private religious group on Facebook who fails to get a job after handing over their password. They could potentially bring a case against the employer, arguing that the reason they didn't get the job was because the employer saw that they were a member of this religious group on Facebook and, on that basis, discriminated against them by failing to hire them.

> ***"It is a surprising development that employers would seek to evade these built-in safeguards and seek passwords for social media sites used by their employees"***

Data day

Furthermore, data protection has always been a major concern within employment. According to section 2 of the *Data Protection Act 1988*, as amended by the *Data Protection Act 2003*, information can only be obtained if certain conditions are complied with. The employer must:

- Obtain and process information fairly,
- Keep it only for one or more specified, explicit and lawful purposes,
- Use and disclose it only in ways compatible with these purposes,
- Keep it accurate, complete and up to date,
- Ensure that it is adequate, relevant and not excessive, and
- Retain it for no longer than is necessary for the purpose or purposes.

In addition, the employer must comply with one of the conditions in section 2A of the *Data Protection Act*, that the processing of data is necessary either:

- For the performance of a contract to which the data subject is a party, or
- For compliance with a legal obligation to which the data controller is subject, other than an obligation imposed by contract, or
- To prevent injury or other damage to the health of the data subject, or serious loss of or damage to property of the data subject.

There are additional hurdles for sensitive information under section 2B.

These are a lot of boxes for an employer to tick. It is difficult to see how employers could meet the threshold of 'relevant and not excessive' in requesting passwords from prospective employees or from long-serving employees. However, this may be different in a workplace investigation scenario where, for example, an employee has been bullied online by a colleague. In that case, it may well be considered relevant and reasonable to ask the alleged perpetrator for his password to establish whether he was in fact guilty of the alleged acts. However, it would not be possible to force an employee to hand over a personal password without their consent.

To conclude, there are significant legal obstacles to an employer obtaining a social media password, and the law would seem to prevent an employer from forcing an employee to hand over their private password. It could perhaps be seen as victimisation of an employee, under some of the employment law statutes, if the employer penalises an employee for refusing to reveal their password.

The privacy of the employee must be respected, so it is not clear under the present law that there is any legal basis for an employer to request their employees' private passwords. G

LOOK IT UP

Cases:

- *Halford v United Kingdom* [1997] ECHR 32
- *Hays Specialist Recruitment (Holdings) Ltd v Ions* [2008] EWHC 745 (Ch)

Legislation:

- *Data Protection Act 1988*, section 2, as amended by the *Data Protection Act 2003*
- *Employment Equality Acts 1998-2011*
- *Equal Status Acts 2000-2011*
- *European Convention of Human Rights*
- *European Convention of Human Rights Act 2003*

in the NAVY

In the second part of his interview with the Naval Service's Legal Officer, Pat Burke, Mark McDermott learns about the legal conundrums faced on the night of the *Dances With Waves* drugs bust, protecting Ireland's fisheries economy, and sharing knowledge to work smarter

Mark McDermott is editor of the Law Society Gazette

No sooner had Commander Pat Burke taken command of his first ship when the legal officer's job came up. Pat took the decision to "sail a desk" and hasn't looked back. As the Naval Service's Legal Advisor, his role is to advise the Flag Officer commanding the Navy, Commodore Mark Mellett.

"I can remember the time when my daughter was born – just two weeks after I had finished the exams in King's Inns. My wife Miriam probably thought she was going to see more of me … but she started seeing less," he comments. "Once I joined the Defence Force's Legal Service, I was suddenly prosecuting courts martial up and down the country. I was training, attending conferences and meetings.

"Then I was assigned to a unit in Bosnia as deputy legal adviser to the EU Force Commander. This unit was tasked with the pursuit of persons indicted for war crimes by the International Criminal Tribunal for Yugoslavia. I was also advising the Irish battalion commander there on everything from the law of armed conflict, to rules of engagement, to host support for an Irish unit based there, and disciplinary matters." Pat deals with disciplinary cases for the Defence Forces also, "because the same *Defence Act* applies to sailors, soldiers and airmen".

"The navy has discovered an average under-recording of 300% in the amount of hake caught on boarded boats, and an average valuation of fish species of €55,000 per vessel per inspection

The naval service has eight ships, four of which are at sea at any one time, and these have to patrol the largest sea-to-land-mass ratio (12:1) of any northern European country. Why only four ships – and not eight?

"It's purely down to numbers," says Pat. "We only have a 1,000-strong complement of personnel in the Naval Service. There's crew turn-around and then there's the requirement to keep engines maintained."

In the 1990s, a Pricewaterhouse report recommended eight ships as being the minimal requirement for the Irish Naval Service. Despite talk of a 12 or 16-ship fleet, in the current economic climate the Naval Service has to do more with less.

One of the ways it is doing this is through a highly effective liaison between Ireland and six other EU member countries – Britain, France, Italy, Netherlands, Portugal and Spain – who signed a *Maritime Analysis Operations Treaty* in 2007.

Pat explains: "Basically, the treaty gave Ireland's eight ships 'dial-in' access to equipment and technology we wouldn't otherwise have had. It allowed us access to what's called the 'recognised maritime picture'. So, for instance, my radar picture might show me 20 boats or 'contacts'. I might know who 19 of them are, but the 20th could be an unknown entity. On the basis of that information, you can target your boarding strategy, so you're getting more bang for your buck."

In trimming its sails, the Naval Service cooperates closely with a number of other State agencies to achieve more with less. Back in 1994, there was a realisation that a joint task force should be established comprising the gardaí, Customs and Excise and the Naval Service. The senior officers in each agency, namely the Garda Commissioner, Flag Officer commanding the Naval Service, and the head of Customs delegated their three most senior operations personnel to that task force.

"Essentially," says Pat, "the task force operates on a highly confidential basis, to the extent that, sometimes, the Flag Officer, the Garda Commissioner or the head of Customs, individually, might not be aware of a specific operation until it has begun – depending on the operation."

Operation Seabight

Asked about any tensions between the various agencies, Pat replies in the negative: "No, it has worked extremely well. The best example we have of that was in November 2008 with Operation Seabight, where we intercepted an ocean-going yacht, *Dances With Waves*, coming from Trinidad with 1,875 kilos of cocaine on board, worth in the region of €700 million.

"The yacht was picked up first by the Drug Enforcement Agency in America who monitored it. There was satellite monitoring also and, at that stage, it was picked up by the Maritime Analysis and Operations Centre – Narcotics (MAOC) in Lisbon, which involves the combined customs, police and navies of Ireland, Britain, France, Spain, Italy, The Netherlands and Portugal – the Atlantic rim nations. All this information was being shared, with cross-pollination of data. The Serious Organised Crime Agency (SOCA) in Britain was monitoring this yacht because

FAST FACTS

- **Assigned to a unit in Bosnia, Commander Burke found himself advising the Irish battalion commander on the law of armed conflict, rules of engagement and host support for an Irish unit**
- **The *Maritime Analysis Operations Treaty* of 2007 gave Ireland's eight ships 'dial-in' access to equipment and technology they wouldn't otherwise have had**
- **The 1,875 kilos cocaine drugs-bust that was Operation Seabight**
- **The peaks and troughs of fisheries protection**

they had certain intelligence – and there were three British nationals on board.

"The yacht was British-registered and, under the *Vienna Convention* of 1988, other nations can hand over jurisdiction. Now, there's a very tight protocol – it goes through the Minister for Foreign Affairs and is covered by our *Criminal Justice Act 1994*. This legislation gives the Naval Service the jurisdiction to act. The fact that a warship is a legal entity means that the people on board have legal powers.

"So, we had SOCA giving intelligence, which was coming through Lisbon, where we have a senior garda and a senior customs officer, and this information was being relayed to Naval Service HQ in Haulbowline.

"We had two naval ships in the area because the commander in charge of fleet operations Eugene Ryan, had tasked two of them to be on stand-by. The Air Corp had over-flown the yacht earlier at a height where they couldn't be detected.

"We'd had satellite data and, from Britain, we had been told it was a British-registered vessel and that their foreign minister had consented to it being boarded.

"All of this was happening instantaneously, thanks to the protocols in place. The head of the drugs squad was happy. The commander of fleet ops was happy. Now, it was over to the legal advisor. I was referring to the *Vienna Convention '88* and the *Criminal Justice Act 1994*, which gave us the authority to board.

"The recognition is slowly dawning at Government level that every illegal catch that leaves Irish waters is gone from the Irish economy for good."

"At this stage, the commander of fleet ops was on what we call the 'bat phone' – a secure encrypted phone between him and the captains of the two ships – ordering them to prepare their boarding teams. We didn't know whether there were armed people on board, so we went in with an armed boarding team. I would have conducted use-of-force briefings in the background on that aspect of the operation."

No longer British

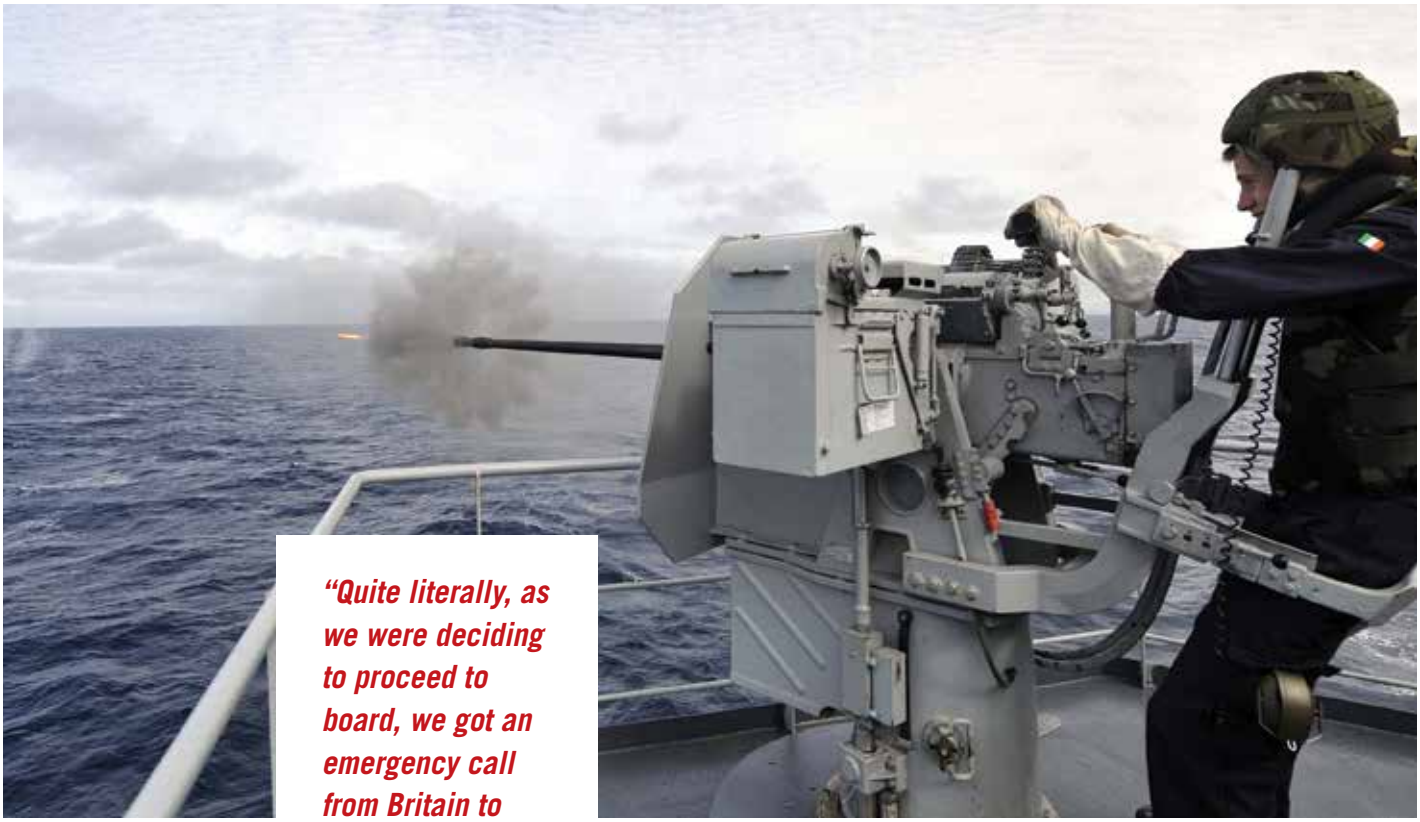
"Quite literally, as we were deciding to proceed to board, we got an emergency call from Britain to say that *Dances with Waves* was deregistered. In other words, it was no longer a British vessel! This is where the legal officer really earns his corn because, now, I had to make the call. Everybody is turning to the legal officer asking, 'Are we go or no-go here? Do we wait to see if it will come inside Irish waters?'

"At this stage, it has become a stateless vessel. Under the law of the sea, every vessel must fly a flag of a nation.

"Legally, the line I took was that this was untested, but that a line in our *Criminal Justice Act 1994* says we have jurisdiction if a vessel is stateless. At the time, my advice to the ops officers was, look, we are going to say it's stateless. We are going to say it's subject to our jurisdiction. We have the act to back us up, so that, if it's thrown out in court afterwards, it won't be our fault. Under the law of the sea, of course, if you exceed your jurisdiction, you pay compensation – apart from the international incident you could create and the diplomatic row that could go with it.

"The head of the drugs squad, Tony Quilter, looked at me and said, 'Are you sure?' Which was the last thing I needed! To be fair, though, that's how the dynamic of the group worked. We were all able to air our opinions and reservations. Literally, it came down to the agency with the assets in the area at the time – which was the Naval Service.

"When I look back on it now, it showed the value of the Naval Service having a legal advisor, because having been a ship's captain and having been a boarding officer, I knew the reality of the conditions, and the fact that the weather conditions were deteriorating. However, had we been on shaky ground, legally speaking, we would have had to let it go rather than risk getting involved in an arrest that was a wrongful arrest."



"Quite literally, as we were deciding to proceed to board, we got an emergency call from Britain to say that Dances with Waves was deregistered. In other words, it was no longer a British vessel! This is where the legal officer really earns his corn because, now, I had to make the call"

Despite the media's focus on high-profile drugs interdiction cases, the majority of the Naval Service's work is focused on fisheries protection – "because of the value to the economy", says Pat. In 2012, for instance, the Naval Service carried out 20 detentions.

Such detentions are carried out for good reason. The navy has discovered an average under-recording of 300% in the amount of hake caught on boarded boats, and an average valuation of fish species of €55,000 per vessel per inspection (that works out at €1.1 million across the 20 vessels detained).

The biggest offenders are Spanish trawlers – but certain EU regulations are also playing into the hands of these offenders. For instance, Pat cites the abuse of EU Regulation 404/11, article 47(2), which allows for the master of a vessel to legitimately correct 'errors' in the e-log book on board. One boat, the *FV Patricia Marta*, which was inspected on 12 May 2013, had a recorded catch of 25,193kg on board. The master took the option of correcting 'errors' in the e-log book – which he is allowed to do according to recently revised EU legislation – so that the new figures then recorded a corrected catch of 46,241kg, giving a total correction of 21,060kg. Pat says that such corrections are highly frustrating for the Naval Service and make a farce of its fisheries protection work.

"Fisheries is a huge, huge boon to the Irish economy that, as a nation, we're only starting to realise. We have the lowest GDP for a nation with the biggest amount of water. The net value of Ireland's fisheries to Europe runs into billions of euros. The recognition is slowly dawning at Government level that every illegal catch that leaves Irish waters is gone from the Irish economy for good."

Pat guestimates that approximately 90% of the Naval Service's time is spent on fisheries protection duties, but adds, "It's practically impossible to give a figure on it because it's all about multi-tasking. For example, the two ships that were involved in intercepting *Dances with Waves* were both on fishery patrols at the time and were zoned into that area by the commander of fleet ops.

"Our ships must be able to respond to all situations, which is why we train our members to very high levels so that they can go quite suddenly from fisheries protection to dealing with a pollution-control incident, to a maritime disaster, to narcotics interdiction. Everyone has to be able to adapt."

He points to the fact that Ireland has made the case successfully that our continental shelf extends under the sea. "Under article 76 of the UN *Convention on the Law of the Sea*, we were able to claim it. Irish jurisdiction is extending from 200 nautical miles to nearly 600 nautical miles, to include our continental shelf. Jurisdiction-wise, if you claim it, you have to be able to look after it. You have to maintain the fence and you have to keep others out of it!"

As someone who has given his life to the Naval Service, is he angry that it isn't being given the proper assets to do its job properly?

"I wouldn't be angry. I think I'm more sanguine at this stage. When I joined the Naval Service in 1986, two army officers interviewed me at the preliminary interview and asked me why I wanted to join the navy. At the time, I remember saying, 'They've got this new ship and they are getting into all of these new areas and I think it's a very exciting time.' Now, 27 years later, we are getting a new ship and we're getting into new areas and I'm still very excited about our future!"

take my BREATH away

How much personal liberty must be sacrificed to ensure road safety? Deirdre Manninger examines the statutory basis of garda powers to stop motorists and demand a preliminary specimen of breath, and the parameters of that power

Deirdre Manninger is a prosecution solicitor in the office of the Director of Public Prosecutions

It was a long hot summer. And with the sundrenched summer bank holidays came the inevitable headlines about road deaths. Although Irish attitudes to road safety and drunken driving have been transformed in the last number of years – thanks largely to the work of the Road Safety Authority – there is still some ambivalence to road-traffic offences. The question is, how much of our personal liberty must we sacrifice to ensure safety on our roads? This question has arisen in several cases involving the power of the gardaí to stop motorists and demand a preliminary breath specimen.

> *"The superior courts have yet to consider the extended powers conferred on An Garda Síochána to investigate road traffic offences under the Road Traffic Acts"*

In the air tonight

Section 9(1) of the *Road Traffic Act 2010*, as amended by the *Road Traffic Act (No 2) 2011* (formerly section 12 of the *Road Traffic Act 1994*), sets out the circumstances in which a member of An Garda Síochána can require a preliminary breath specimen from a motorist to test for the presence of alcohol. The breath specimen can be required if the motorist is in charge of a vehicle in a public place, and the garda is of the opinion that he/she:

a) Has consumed intoxicating liquor, or
b) Is or has committed an offence under the *Road Traffic Acts*, or
c) Is or has been with the vehicle involved in a collision, or
d) Is or has been with the vehicle involved in an event in which death occurs or injury appears or is claimed to have been caused, which requires medical assistance for the person at the scene of the event or that the person be brought to hospital for medical assistance.

It should be noted in the circumstances described at (a) and (d) above, the garda is obliged to require a breath specimen, unless the garda decides to arrest the driver.

Section 9(2) sets out the manner in which the specimen may be provided. A garda may require a person, to whom section 9(1) applies, to:

a) Provide, by exhaling into an apparatus for indicating the presence of alcohol in the breath, a specimen of his or her breath in the manner indicated by the garda,
b) Accompany him or her to a place (including a vehicle) at or in the vicinity of the public place concerned and there to provide, by exhaling into such an apparatus, a specimen of his or her breath in the manner indicated by the garda, or
c) Where the garda does not have such an apparatus with him or her, to remain at that place in his or her presence

or in the presence of another member of the Garda Síochána until such an apparatus becomes available to him or her (for a period that does not exceed one hour) and to provide, by exhaling into the apparatus, a specimen of his or her breath in the manner indicated by the garda.

Section 9(3) makes it an offence, punishable by a fine of up to €5,000 and/or six months in prison, to refuse or fail to comply, immediately, with a requirement of a garda to provide a breath sample under section 9. Section 9(4) provides a power of arrest to the gardaí.

Careless whisper

Section 9(2)(c) is particularly interesting, as it provides for a type of pre-arrest detention by requiring motorists to remain at the roadside for up to one hour while the investigating garda waits for a breath-testing apparatus to become available. Section 9(c) puts the decisions of the High Court in the cases of *DPP v Stewart*, *DPP v Xavier Lovett*, and *DPP v MacMathuna* on a statutory footing. Although there have not been any superior court decisions on this particular provision, it is likely that the courts will interpret section 9(2)(c) strictly.

Subsections 9(6) and 9(7) remove the power of a garda to demand a preliminary breath specimen in cases where such a requirement would be prejudicial to the health of the driver in the circumstances described at (a) and (d) above.

Furthermore, section 9(10) allows for a defence to a charge of failing or refusing to provide a preliminary breath specimen under section 9(3) that the garda did not make a valid requirement under section 9 of the act.

Interestingly, section 9(10) states that it is not a defence to substantive charges under sections 4, 5 and 12 of the act to show that the

FAST FACTS

- **It is an arrestable offence to refuse or fail to comply, immediately, with a requirement of a garda to provide a breath sample under section 9 of the *Road Traffic Act 2010***
- **Section 9(2)(c) provides for a type of pre-arrest detention by requiring motorists to remain at the roadside for up to one hour while the investigating garda waits for a breath-testing apparatus to become available**
- **Section 9(10) states that it is not a defence to substantive charges under sections 4, 5 and 12 of the act to show that the garda did invoke section 9 when making the requirement for a preliminary breath specimen**

garda did not invoke section 9 when making the requirement for a preliminary breath specimen, prior to arrest. One may ask: how could a failure to invoke the section be a defence to a charge of failing to provide a preliminary breath specimen, but not to a charge of drunken driving, if the requirement for a breath specimen, which forms the basis for the arrest, was made incorrectly? In order to answer this question, one must look to the case law.

"When prosecuting a charge under section 9(3) of the 2010 act, as amended, the prosecution must prove that a valid requirement was made under section 9"

Danger zone

In *DPP v MacMathuna*, Morris J held that an arrest for drunken driving under section 49 of the 1994 act was valid even though the arresting garda had referred to the wrong subsection when making a requirement for a preliminary breath specimen, which formed the basis of the arrest.

Morris J held: "The failure of the garda to invoke section 12(1)(c) of the *Road Traffic Act 1994* did not render the requirement of the defendant to remain at the scene unlawful and in violation of article 4)(4)(1) of *Bunreacht na hÉireann 1937* so as to taint the arrest under section 49(a) with unconstitutionality and render it invalid."

The *MacMathuna* decision and the wording of section 9(10) of the 2010 act are consistent with the decisions of the superior courts in relation to arrest and the admissibility of evidence generally. In the cases of *Cash* and *Bullman*, the superior courts have held that a member of An Garda Síochána may rely on evidence to form a reasonable belief or suspicion, sufficient to ground a valid arrest, even though that same evidence may not be admissible to prove the substantive charges at the trial.

In *Cash*, Charleton J said: "It has never been held that what would be found a reasonable suspicion in law requires to be based on the kind of evidence that would be admissible under the rules of evidence during a criminal trial."

When examining the proposition that the prosecution must prove the evidence upon which a reasonable belief grounding an arrest is formed, Charleton J stated that "this argument seeks to import the rules of evidence into police procedures. It has no place there."

Thus a charge under section 9(3) of the 2010 act, as amended, may be differentiated from charges under sections 4, 5 and 12 because making a lawful requirement to provide a sample under section 9(2) is, of course, a requisite proof for the offence of failing to provide a preliminary breath specimen under section 9(3). However, the lawful requirement under section 9(2) grounds only the arrest in a prosecution for an offence under sections 4, 5 or 12 of the 2010 act, as amended. The evidence to prove the charge of drunken driving comes from analysis of the blood, urine or breath sample taken in the station following arrest.

It is, of course, accepted that section 9(10) may be open to a narrower interpretation – namely, that it is not a defence to a prosection under sections 4, 5 or 12 that the garda simply did not invoke the section at all, and the defendant was never asked to provide a roadside breath specimen.

Living on a prayer

Previous arguments concerning whether the preliminary breath test must be carried out in a public place (see *Joyce*, *Stewart*, and *Xavier Lovett*) have been closed by the enactment of section 9(2)(a) of the 2010 act, as amended, which allows the test to be carried out at or in the vicinity of the public place concerned, and section 9(2)(b), which allows an investigating garda to require that the motorist accompany him/her to a place, including a vehicle, at or in the vicinity of the public place to provide a preliminary sample. The courts have yet to interpret the meaning of the phrase 'at or in the vicinity'. However, the case of *DPP v Davenport* suggests that a common sense approach will be taken. When considering whether section 12 of the 1994 act must be strictly interpreted, so that the preliminary breath test may only be administered by the detaining garda, Hedigan J stated: "The courts should not readily interpret legislation in a way that would lead to an artificial or absurd result. It would be an artificial and absurd interpretation of the relevant section if it meant that the sergeant in charge at the scene of an accident could not detain a person under section 12(2)(c) and then require another member to conduct the alcometer test."

He went on to say that "a minor flaw of no significance on complying with a statutory provision is not fatal to the prosecution of an accused where it cannot cause prejudice of itself or work an injustice to the accused".

When prosecuting a charge under section 9(3) of the 2010 act, as amended, the prosecution must prove that a valid requirement was made under section 9. However, when determining whether a breach of the provisions of section 9 may provide a defence to a charge under sections 4, 5 or 12 of the 2010 act, as amended, I would argue that, for the defence to succeed, it is essential to show how and why that breach caused prejudice or caused an actual injustice to the motorist concerned. A *de facto* breach of the provision should not be sufficient to merit dismissal of such charges.

The superior courts have yet to consider the extended powers conferred on An Garda Síochána to investigate road traffic offences under the *Road Traffic Act 2010*, as amended by the *Road Traffic Act 2011*. However, when the time comes to do so, they will be called upon to balance the rights of the individual citizen to privacy, privilege against self-incrimination, and freedom of movement against the wider interests of society in maintaining safety on the roads. G

LOOK IT UP

Cases:

- *DPP v Bullman* [2009] IECCA 84
- *DPP v Cash* [2007] IEHC 108, [2010] IESC
- *DPP v Davenport* [2009] IEHC 506
- *DPP v Joyce* [1985] ILRM 2006
- *DPP v MacMathuna* (High Court, 24 July 1998)
- *DPP v Stewart* [2001] 3 IR 103
- *DPP v Xavier Lovett* (High Court, 22 February 2010)

Legislation:

- *Road Traffic Acts 1994, 2010, 2011*

THE *Parent Trap*

Kathy Irwin is head of private client and family law at Beauchamps Solicitors

Advances in science are giving rise to intricate questions in surrogacy relationships that demand changes in legislation. What provisions prevail on other countries and can Ireland learn from these when framing its own laws? Kathy Irwin investigates

For as long as many of us can remember, the only traditional method of having a child in Ireland outside natural conception has been adoption. As with everything else in the world, though, this is rapidly changing, with advances in science allowing for numerous ways to have longed-for children. These new methods are given the generic name of 'assisted human reproduction'. Included under this umbrella term are *in vitro* fertilisation and surrogacy.

The development of these alternatives has brought up questions that are only matched in intricacy by the science that has resulted in their possibility.

In recent years, and particularly over the last few months, surrogacy has been hitting the headlines once again in Ireland. The legal uncertainty around surrogacy is plain, as can be seen in the September opinion given by the European Court against an Irish woman whose child was born through a surrogacy arrangement and was denied adoptive or maternity leave (see panel).

It is estimated that there are several hundred children living in Ireland born to surrogate mothers whose legal status is uncertain.

> ***"The legal uncertainty around surrogacy is plain, as can be seen in the September opinion given by the European Court against an Irish woman whose child was born through a surrogacy arrangement and was denied adoptive or maternity leave"***

Burning questions

There are two types of surrogacy: traditional and gestational.

The traditional method is where the surrogate mother is inseminated with sperm from the commissioning father.

The gestational method is where a fertilised embryo from both commissioning parents is implanted into the gestational mother's womb. In this case, the gestational mother has no genetic connection with the child she is bearing.

The purpose of this article is to examine the provisions prevailing on other countries around the world and to reflect on what we, as a nation, might learn and take into consideration when framing our own laws. It has been widely accepted that this is an area that requires legislation.

The main questions that arise in connection with surrogacy are:

- Who should be recognised as the parents of the child?
- How should parentage be recognised – adoption, declaration of guardianship?
- Should the surrogate mother be paid compensation as well as expenses?
- Should a contract for surrogacy be enforceable? Is it essentially exploitative of the woman carrying the child for compensation?
- How do you protect women from being exploited for the purposes of surrogacy?
- Is it better to provide regulations rather than to pretend that such arrangements will never be entered into?
- How do you protect potential parents who have gone through a surrogacy procedure from having the child returned to the surrogate mother?
- Does the child have the right to learn the identity of the commissioning parents?

Many of these questions came to be considered in 1986 in New Jersey in the famous *Baby M* case. This resulted in custody of the child being awarded to the commissioning family – but only after the Supreme Court in New Jersey ruled that no legal contract could alter the position of a mother who bears a child as that child's mother, and

FAST FACTS

- Advances in science allow for numerous ways to have children
- It is estimated that there are several hundred children living in Ireland born to surrogate mothers whose legal status is uncertain
- New Jersey's famous *Baby M* case led to custody of the child being awarded to the commissioning family – and laid down specific ground rules for legal contracts
- India's *Baby Manji* case ruled that commercial surrogacy is legal there

declaring that surrogacy contracts were invalid as contrary to public policy. The case, however, was remitted to the family court to decide on the "best interests of the child". On weighing up considerations of the best interests of the child, the commissioning family was eventually awarded custody.

The ruling in *Baby M* was extended to gestational surrogacy contracts, the technology for which was developed after the decision.

The various states in the US have differing laws. In states where surrogacy contracts are not recognised, a surrogacy contract can be made with surrogate mothers in countries or states where such contracts are recognised.

The states considered to be 'surrogate friendly' are California, Arkansas (where the law recognises the commissioning parents as a child's legal parents from birth), Michigan and New York.

In some states, such contracts are illegal and punishable by fine or imprisonment. In other states, the view is taken that such arrangements are legal as long as there is no 'compensation' offered, other than legitimate expenses.

The pursuit of 'the American dream' is, therefore, interpreted in varying ways in different states.

The main countries recognising surrogacy contracts are India, Ukraine, Russia, Georgia and Thailand.

To go to the other extreme, the pursuit of the 'Indian Dream' has led to the proliferation of surrogacy arrangements in India, where the opportunity to avoid a life of poverty by bearing a child for parents from a Western country proves irresistible for many women.

Ireland's stance

The making of detailed laws governing the enforceability of surrogate contracts seems to provide the best protection for the child, the commissioning parents and the surrogate mother. Such laws provide for the welfare of the surrogate mother and address concerns about the child being born into a situation of certainty.

"The making of detailed laws governing the enforceability of surrogate contracts seems to provide the best protection for the child, the commissioning parents and the surrogate mother"

There is scope for debate, obviously, on the many shades of opinion as to how much importance should be given to any of these considerations. Inevitably, views will be coloured by religious beliefs and ethical considerations.

In Ireland, we have a tradition of dealing with social problems that may have an ethical or quasi-religious aspect by a time-tested method that often involves taking no action and hoping that the problem will solve itself.

Legal clarity around surrogacy arrangements has been long-needed. In 2005, the Department of Health commissioned a comprehensive report on all areas of assisted human reproduction.

RECENT EUROPEAN DECISIONS

Simultaneous CJEU decisions contradict each other

Joyce Mortimer is the Law Society's human rights executive

The issue of surrogacy has become a much debated one in modern Ireland as our courts try to grapple with the rights of all those involved, *writes Joyce Mortimer*. In September, the Court of Justice of the European Union (CJEU) handed down two diverging opinions regarding the legal position of mothers whose children are born through surrogacy and their access to maternity leave. In both cases, the women claimed that they had equal rights under the EU *Pregnant Workers Directive* (Council Directive 92/85/EEC of 19 October 1992) to women who actually give birth to their babies.

The first opinion was delivered by Attorney General AG Wahl in *Z v A Government Department and the Board of Management of a Community School* (Case C-363/12). This case involved an Irish woman (Z), a schoolteacher who, for medical reasons, could not personally support a pregnancy and therefore arranged for a surrogate. During the pregnancy, Z applied for adoptive leave. Z's employer agreed to give her unpaid parental leave but refused her paid leave. At present, there is no express legislation dealing with the issue of leave for the mother of a child born via a surrogate. Z brought a complaint to the Equality Tribunal claiming she had been discriminated against on grounds of sex, family status and disability. The Equality Tribunal referred the matter to the CJEU.

The second opinion (*CD v ST*) was delivered by Attorney General Kokott and relates to a British woman (CD) who arranged for surrogacy and applied for maternity leave. CD initiated legal proceedings when she was denied paid maternity or adoptive leave because her child was born via a surrogate.

In the Irish case, AG Wahl stated: "I do not believe that a woman undertaking surrogacy can be compared to a woman who, after being pregnant and having endured the physical and mental constraints of pregnancy, gives birth to a child."

He added that the purpose of maternity-leave entitlements for pregnant workers was to allow female workers to recover from the "physical and mental constraints of enduring pregnancy and the aftermath of childbirth". AG Wahl held that Z's situation was more comparable to that of an adoptive mother.

However, the AG pointed out that Z could not benefit from the rights of an adoptive mother because member states had not yet passed legislation harmonising the right of leave for adoptive parents. He held "where national law foresees the possibility of paid adoptive leave, the national court ought to assess whether the application of differing rules to adoptive parents and to parents who have had a child through a surrogacy arrangement constitutes prohibited discrimination, contrary to that national law".

AG Wahl concluded that the refusal to grant Z maternity leave did not constitute discrimination.

On the same day as AG Wahl's decision, AG Kokott released a decision on the same issue in the case of a British woman. AG Kokott held that the applicant mother had the right to receive maternity benefit provided for under EU law. The AG held that the protection provided by the directive in terms of leave should be split between the two mothers. It was held that they are both entitled to a minimum of two weeks' leave each, and the remaining ten weeks must be shared, taking into account "the protection of the woman who has recently given birth and the child's best interests".

The decision by AG Kokott was given on the same day as that of AG Wahl – the two decisions stand in contrast. This highlights the complexity of the area and the uncertainty within which the national courts are trying to function. With regards to the future for paid adoptive leave for parents who have had a child via surrogacy, there is an opportunity for the Irish courts to provide clarity.

THE BABY FARM ISSUE

In 2008, in the case of *Baby Manji*, the Supreme Court of India ruled that commercial surrogacy is legal. There is an upcoming assisted *Reproductive Technology Bill* that will regulate the surrogacy business and promote increased confidence among 'surrogacy tourists'. A UN-backed study in July 2012 estimated the worth of the surrogacy business at more than $400 million a year, with over 3,000 fertility clinics across India.

In Ireland, the Minister for Justice has reacted by issuing guidelines on how to bring a child born to surrogate parents into the country, where neither of the parents is registered as parent. In these instances, an emergency travel certificate can be issued on the undertaking of the father to make an application for a declaration of parentage, and further undertaking to notify the local health centre of the child's presence within two days of the baby's arrival in the country.

Some countries in the world, such as Ukraine, take into consideration whether the surrogate mother has had children previously, prescribe minimum physical and psychological standards to be met, and further stipulate that the commissioning parents be married.

Other jurisdictions, such as Switzerland and Sweden, expressly prohibit surrogacy, and contracts are therefore not enforceable.

Our own High Court has recently ruled on the registration of the birth of a baby born by way of a gestational surrogacy arrangement. In that case, the registrar had refused to register the commissioning (genetic) mother as the mother, because of the maxim '*mater semper certa est*', that is, that the women who bears the baby is always deemed to be the mother. On examining genetic evidence, Judge Abbott ruled that the certificate could read that the genetic mother could be recorded as mother on the birth certificate.

The current Minister for Justice, Alan Shatter, is due to publish a *Family Relationships and Children Bill* that will address the situation relating to surrogacy. In reply to a question in the Dáil on February 12 of this year, the minister said: "I am also reviewing existing legislation worldwide addressing the issues of parentage, assisted human reproduction, and surrogacy and considering the recommendations contained in the *Report of the Commission on Assisted Human Reproduction*, published by the Department of Health in 2005. Those reforms must ensure that children in lesbian or gay family units are able to form a legal connection with their non-biological parent and that kindred relationships flow from such legal connection. In particular, reform of the law is needed in the areas of guardianship, custody and access, and to ensure maintenance and inheritance rights for the children of civil partners."

The implications for parents who rely on surrogacy for a child are far-reaching. The social implications are important in providing certainty for prospective parents so that children are born into a framework that is not clouded by disputes over guardianship and custody.

The importance of these issues to a sophisticated, cosmopolitan society, cannot be overestimated. The transformation in our society over the past 30 years creates a demand for the issue of surrogacy to be addressed in 'grown-up' fashion – and not just left to chance. G

LOOK IT UP

Cases:

- *Baby Manji Yamada v Union of India (UOI) & Anor* [2008] INSC 1656
- Case C-363/2, *Z v A Government Department and the Board of Management of a Community School*, Court of Justice of the European Union
- *In the Matter of Baby M*, 109NJ 396, 537 A2d 1227 (1988, New Jersey Supreme Court)
- *MR v An tArd Chlaraitheoir* [2013] IEHC

Legislation:

- *Reproductive Technology Bill* (India)
- *Family Relationships and Children Bill* (Ireland)

TIME'S up

The High Court is displaying a real capacity for reform as it attempts to clear the immense backlog of asylum and immigration cases. The court's '30-30-10' direction is keeping lawyers on their toes. Shannon Michael Haynes starts his stopwatch

Shannon Michael Haynes is a practising barrister

It is encouraging that one of the most novel reforms in judicial case management has emerged from one of the most hopelessly overburdened courtroom environments in the Irish legal system. The High Court's asylum and immigration bench has been experimenting since Hilary Term 2013 with judicial review hearings on what has become known as the '30-30-10 basis'. Simply put, the applicant is afforded 30 minutes to present his case, the respondent has 30 minutes to respond, and the applicant has a further ten minutes to reply.

The 30-30-10 reform has coincided with a newfound judicial preference for telescoped hearings. The default position now is that both the leave application and the substantive hearing will take place together, whereas, up until very recently, the *inter partes* leave application would have been followed by the full hearing some considerable time later. Such simple developments should serve to dramatically reduce the average waiting time for asylum and immigration cases.

> ***"There must be some cause for concern that the '30-30-10' model of case presentation could lead to injustice. For instance, counsel might be unable, for whatever reason, to impress the importance and particular nuance of a point on a judge in the allocated time"***

Breaking point

The pace at which judicial review applications are supposed to proceed is reflected in the timetable for regular cases set out in order 84 of the *Rules of the Superior Courts:*

- Three months from the impugned decision to move the application for leave,
- If leave is granted, seven days to serve the papers on the respondent,
- Three weeks to file opposition papers, and
- Three weeks for the exchange of submissions.

The 14-day limitation period in which asylum and immigration cases must be issued would seem to suggest an even greater degree of urgency.

The reality is that 'regular' judicial review cases beyond asylum and immigration will have the *ex parte* leave application heard on any Monday and, if successful, the case will proceed to the substantive hearing within five months on average (or two months where the hearing will last under two hours).

In the asylum and immigration area, however, once a case was transferred to the list to fix dates (which usually takes months in itself), the average waiting time during 2012 was 33 months for the leave application and four months for the substantive hearing.

A recent article in the *Bar Review* by practitioners in the area warned that the system for asylum and immigration judicial review is "stretched to breaking point" and riddled with "systemic failures".

Clarke J, delivering judgment for the Supreme Court in *Okunade v Minister for Justice*, explored the current state of the judicial review process as it relates to asylum and immigration cases. Clarke J considered the statutory regime to be "cumbersome" and proposed the abolition of the requirement that the leave application be made on notice. It was stated that the current status of the system was a "function of the lack of a coherent system and sufficient resources".

Clarke J in *Okunade* suggested that the High Court could grant leave "after a very short hearing", whereby the grounds upon which leave is granted could be narrowed

so as to lead to "more focused, and thus shorter, substantive hearings". The concept of accelerated hearings was thereby presented with a sense of momentum.

The champion behind the 30-30-10 reform in the High Court has undoubtedly been Sunniva McDonagh SC. Credit is due, also, to the asylum and immigration bench for agreeing to the experiment. The first such case, in fact, proceeded on a 20-20-10 basis before McDermott J in *SA v Refugee Appeals Tribunal*. Judgment was delivered, quashing the impugned decision within almost a year to the date upon which it was made.

The concept of allocating set periods of time for oral submissions is by no means novel. The United States Supreme Court, the European Court of Human Rights and the Court of Justice of the European Union all use the model. Students at Blackhall Place and the King's Inns nowadays learn the trade through the format of time-based advocacy sessions and examinations. The Irish Supreme Court directed time periods in *Pringle v Ireland* in recognition of the urgency of that case. The model stems from a realisation that time is precious and that filibuster-type speeches are an indulgence that a modern courtroom environment can ill afford.

Cause for concern

There must be some cause for concern that the '30-30-10' model of case presentation could lead to injustice. For instance, counsel might be unable, for whatever reason, to impress the importance and particular nuance of a point on a judge in the allocated time. Clarke J returned to the theme of delay in *Smith v Minister for Justice* and added the caveat that the process should not be expedited to the extent that it becomes unfair. It is imperative that matters are adequately explored by the High Court, as its decision will be final by virtue of section 5(3)(a) of the *Illegal Immigrants (Trafficking) Act 2000*. Leave to appeal to the Supreme Court is restricted to cases certified as involving a point of law of exceptional public importance.

The experience in a judicial review case will often see the judge steering the direction of proceedings and using the hearing to explore issues and curiosities of the case with counsel. Thus, an overly interventionist judge could exhaust the time allocated to counsel on matters other than those that counsel intended to address. The safeguard offered to counsel in such circumstances is to apply for more time, on the basis that the justice

FAST FACTS

- **The High Court's asylum and immigration bench has begun to impose time limits for oral submissions on a trial basis**
- **The leave application and substantive hearing are now heard together as a matter of course in most cases**
- **These reforms – coupled with the dramatic fall-off in new applications for judicial review – should spell the end to the delays of four years and upwards that are common in asylum and immigration cases**

Law Society of Ireland Technology Committee Seminar

NEW WAYS TO WORK:
Putting your office in the Cloud

Horse & Jockey Hotel, Horse & Jockey, Co. Tipperary
Friday 6th December 2013, 2.00pm – 5.30pm

Fee: €95.00
CPD Hours: 3 hours Management & Professional Development Skills

The business of running a practice has never been more challenging. The pressure to reduce costs and increase efficiencies continues to affect all law firms, big and small. Does cloud computing offer the solutions that suppliers claim? What are the real benefits of the cloud in relation to server overheads and maintenance, cash flow and back-up support? Are there hidden problems that cloud users need to be aware of?

This seminar will provide practitioners with an understanding of what's happening in the wider business environment and will offer some practical oversights from within the legal sector. In addition, the group of speakers will address questions from the floor in a panel discussion.

- ***Registration***
- ***Opening Remarks***
- ***Cloud concerns for solicitors***
  To set the scene, we will start with a brief description of issues a practitioner might be concerned with when considering migrating office systems to the cloud.
- ***The impact of the cloud on a legal office***
  This session will give a practitioners view on how cloud technology is going to affect the practice of law and how the implementation could disrupt the day to day running of the office.
- ***Tea/Coffee***
- ***The legal aspects of cloud computing***
  The session will look at contractual, data protection and other legal and practice issues that affect the use of cloud computing in a law firm environment.
- **The practical aspects of implementing cloud based solutions in a legal office**
  What is available in the marketplace and how can it impact the day to day workings of a legal office? What are the practical issues that need to be considered? Is it more cost effective? What are the main security challenges and how can they be addressed? This session will consider what the technology sector can offer today in relation to cloud computing, what firms can gain from a cloud strategy, as well as the risks and how to address these in practical terms when moving to the cloud.
- ***Panel Discussion***
  The presenters will address and discuss questions that attendees might have arising from the presentations.

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Please return to Veronica Donnelly, Law Society of Ireland, Blackhall Place, Dublin 7.

A REVIEW OF THE NUMBERS

Year	Asylum and immigration judicial reviews	'Regular' judicial reviews
2005	758	661
2006	909	632
2007	1,024	706
2008	785	594
2009	749	568
2010	936	645
2011	703	490
2012	440	558

of the case requires it. The High Court's stated position is to enforce the time limits with a certain degree of 'elasticity'. It is also important to remember that the 30-30-10 direction was originally envisaged for cases that had a distinct net point, and so time limits should not be imposed as a matter of course in every case.

The nature of the 30-30-10 model inevitably calls for more detailed and persuasive written submissions. With 30 minutes to present your case, it is an essential prerequisite that the arguments are elaborated in greater detail on paper. It should be preferable to everyone that generous quotations from legislation and case-law should be consigned to the written submissions and not tediously aired, verbatim, in court. However, the fundamental premise of the 30-30-10 model is that the judge must have the opportunity to read the papers in advance.

Interest in the 30-30-10 model has fluctuated since it was first introduced at the beginning of the year. The experience at the call-over of cases for hearing varies week-on-week, from every case being considered for an accelerated hearing, to judge or counsel sporadically proposing the 30-30-10 basis, to the direction not being mentioned at all. An important factor is that conduct of the asylum and immigration list rotates every six weeks, and some judges are evidently more enthusiastic about the initiative than others.

The experiment with 30-30-10 hearings, at the very least, has demonstrated that there is the capacity for two cases to be heard per judge per day, thus doubling the work-rate experienced up until now. However, far more cases even than that could realistically be listed – to cater for the eventuality that cases settle prior to hearing, or a hearing date needs to be vacated for whatever reason.

Telescoping

Ordinarily, judicial review leave applications are made *ex parte* and, if leave is granted, the matter proceeds to a contested hearing. However, most leave applications for judicial review in the asylum and immigration area must be made on notice to the respondent by virtue of section 5(2)(b) of the 2000 act. Consequently, the leave application is a fully contested hearing. If leave is granted, the matter proceeds to another fully-contested hearing, which is often little more than a repetition of the arguments that took place at the leave stage.

There is a provision in the new order 84 rule 24(2) of the *Rules of the Superior Courts* for the leave application to be treated as if it were the hearing of the application for judicial review in what is known as a 'telescoped' or 'truncated' hearing. Prior to the commencement of the new rule on 1 January 2012, a case could only proceed on a telescoped basis with the consent of the parties, and so the provision was rarely, if ever, used in asylum and immigration cases.

> ***"The long-term desirability of time-restricted hearings should be assessed once the court is in control of the backlog. However, it should serve a real purpose in the meantime to bring cases on for hearing within a much more acceptable time frame, and so, it is a trade-off that all parties should readily accept in most cases"***

The asylum and immigration bench has seized upon the new amendment and adopted the default position that all matters on the asylum and immigration list will proceed by way of a telescoped hearing, unless exceptional circumstances are advanced to justify the old two-stage approach. Thus, the court's caseload should be dramatically reduced if telescoped hearings remain the default position. It should serve, also, to reduce the legal costs incurred during the currency of a judicial review challenge.

The way ahead

The 30-30-10 initiative was proposed to the High Court as an interim measure to deal with the immense backlog of cases awaiting a hearing date. The long-term desirability of time-restricted hearings should be assessed once the court is in control of that backlog. However, it should serve a real purpose in the meantime to bring cases on for hearing within a much more acceptable time frame, and so, it is a trade-off that all parties should readily accept in most cases. The bottom line is that the initiative offers a far more palatable solution to the other conceivable alternative of a papers-only assessment.

The light at the end of the tunnel is that the volume of judicial review cases in the asylum and immigration area is on a serious decline. The number of applications peaked in 2007 with 1,024 new cases, whereas only 440 such applications were made in 2012. The landscape has changed dramatically since asylum applications plummeted after 2002 and net inward migration reversed severely after 2007. With an evaporating caseload of new applications and concerted efforts to attend to old cases, there is every reason to be hopeful that the protracted delays can eventually be consigned to history.

If the telescoped 30-30-10 regime continues, it should mean that far more cases can be listed for hearing, and so the typical experience should eventually see cases going from impugned decision to substantive judgment in a matter of months. That would be a considerable result for all parties concerned and a situation more likely to comply with section 5(4) of the 2000 act: "The High Court shall give such priority as it reasonably can, having regard to all the circumstances, to the disposal of proceedings" that are subject to the statutory framework for asylum and immigration judicial reviews. G

LOOK IT UP

Cases:

- *Okunade v Minister for Justice, Equality and Law Reform* [2013] ILRM 1; [2012] IESC 49
- *SA v Refugee Appeals Tribunal* [2013] IEHC 277
- *Smith v Minister for Justice and Equality* [2013] IESC 4

Legislation:

- *Illegal Immigrants (Trafficking) Act 2000*

Literature:

- Courts Service, *Annual Report 2012*
- McDonagh, Costello and Kelly, 'Challenging times in asylum and immigration judicial review: is the system stretched to breaking point?' *Bar Review* (2012) 17(6) 127-130
- Practice Direction HC56 – Judicial Review: Asylum, immigration and citizenship list (19 December 2011)

CLARE BAR ASSOCIATION

On 4 June 2013, the Clare Bar Association (CBA) welcomed Law Society President James McCourt and director general Ken Murphy to Ennis, Co Clare, along with Ennis-based senior vice-president John P Shaw. At the meeting, held at the Old Ground Hotel, the topics discussed included the *Legal Services Regulation Bill 2011*, professional indemnity insurance and the referendum to introduce a Court of Appeal. Those attending included *(front row, l to r)*: John Callinan, Brian McMahon, John P Shaw (senior vice-president), James McCourt (president, Law Society), Gearoid Howard (president, CBA) Ken Murphy (director general), Mary Cashin and Paul Tuohy. *(Back, l to r)*: Mairead Doyle, William Cahir (vice-president, CBA), Mary Nolan, Sinead Noonan, John McNamara, John Halpin, Aisling Meehan, Siobhan McMahon (treasurer, CBA), Lorraine Burke, Sheila Lynch (secretary, CBA), Helen Rackard and Anne Walsh

LONGFORD BAR ASSOCIATION

PIC: MICHELLE GHEE, GPHOTOS

Law Society President James McCourt and director general Ken Murphy were the special guests at a well-attended meeting of Longford Bar Association held on 9 September 2013. President Frank Gearty welcomed both visitors on behalf of the association. Up for discussion were the topics of professional indemnity insurance and the Court of Appeal referendum, proposed changes to the jurisdiction of the courts, and the obligations of the profession in relation to accounts and the handling of clients' funds

IBA BREAKFAST

At the Irish Breakfast during the International Bar Association conference in Boston were *(from l to r)*: Aidan F Browne (partner, Sullivan & Worcester), Frank Bailey (US federal bankruptcy chief justice for Massachusetts), James McCourt (Law Society president), David Nolan SC (chairman, Bar Council), Breandan Ó Caoillaí (Irish Consul General of Boston) and Ken Murphy (Law Society director general)

Matheson internship winner

PIC: JASON CLARKE PHOTOGRAPHY

Andrew Norry has been announced as winner of the Matheson internship. He is seen here with Elizabeth Grace (head of knowledge development) and Prof Michael Doherty (head of the Department of Law, NUI Maynooth)

At the recent launch of the Diploma Centre's Certificate in Higher Court Civil Advocacy were *(l to r)*: Elaine Grier BL, John Lynch (solicitor), John Kennedy BL, Garret Flynn BL, Freda Grealy (diploma manager), Paul Anthony McDermott BL, Fiona Donnelly (solicitor, associate director, Institute of Professional Legal Studies, Queen's University Belfast), David Irwin (Law Society) and Stephen Scott (solicitor, Institute of Professional Legal Studies)

Anyone for tennis?

Elm Park Golf and Sports Club played host to the DSBA's annual tennis event during the summer. This was a collaboration between the DSBA, Law Society Skillnet and Ann Neary Consultants. Attending the event were *(from l to r)*: Attracta O'Regan (head of Law Society Skillnet), section winners Ultan Bannon and Patricia Crosbie (both Malcomson Law Solicitors, Dublin) and Anne Neary (Anne Neary Consultants)

Sarria to Santiago benefits Guardian Children's Project

On 28 September, 17 volunteer walkers left Dublin Airport for Spain to take part in a fundraising walk from Sarria to Santiago in aid of the Guardian Children's Project in Arklow, Co Wicklow. The non-profit organisation was established by solicitor Deirdre Burke and her friend Michelle Gaffney to provide support services to children and young people experiencing parental separation and bereavement. Their centre in Arklow has been up and running since 2010 and helps children to deal with loss arising out of separation or the death of parents. They also offer a contact centre for access and mediation services. The immediate aim for the fundraising walk was to open a centre in Dublin and subsequently to go nationwide. Support is always welcome. To find out more or to donate, visit the website at www.guardianproject.ie or email: enquiries@guardianproject.ie

Marie claims Moya Quinlan Trophy

Winner of the Moya Quinlan Trophy, Marie McManus, receives her prize from Moya Quinlan, with Mary O'Connor (captain of the Lady Solicitors' Golf Society). Moya was one of the founders of the golf society 33 years ago and was the first woman to become president of the Law Society

Probate class inspires solicitor's best-seller

Jennifer Burke got the idea for her first novel while sitting in a wills and probate class during her PPC I course. She was taken aback by the sheer volume of cases involving feuding relatives and estranged families, all of which seemed to stem from disagreements over wills. The idea came to her of a will that went one step further than the cases she was studying. Rather than just dividing up moneys in an unexpected way, Jennifer conceived of a will that revealed a dark secret from the past.

Writing a novel while training and practising as a solicitor involved a lot of early mornings and late evenings, but it paid off. In July 2013, a year after completing the novel, Jennifer won TV3's 'Write a Best-seller' competition, securing a three-book deal with Poolbeg Press. *The Secret Son* was published in August 2013 and has remained solidly in the Irish best-seller list for paperback fiction since then.

In *The Secret Son*, Seán Murtagh returns from America to Wicklow for his father's funeral and is horrified to discover that his father's will disinherits his family and leaves everything to a secret son, Andrew Shaw – the result of a one-night stand 20 years previously.

The Shaw family are equally shocked when they learn of the will, but it offers them a potential lifeline as Andrew is in desperate need of a kidney transplant. The Shaws move from their home in Kerry to Wicklow to stake their claim under the will, while the Murtagh's take steps to contest. Thrown together, the families struggle to cope with their separate and intertwined tragedies, as yet more secrets from the past are uncovered.

Jennifer also writes shorter fiction. In 2012, having been shortlisted in the 'From the Well' competition (sponsored by Cork County Council), her short story was published in the resulting anthology. She was also shortlisted for the 'Fish Flash Fiction' competition in both 2012 and 2013.

Jennifer continues to practise as a solicitor while writing her second book, which will be published in 2014. Visit her website at www.jenniferburke.ie or follow her on Twitter: @JenniferRyBurke.

ON THE MOVE

Conor Fottrell has been appointed partner by Mason Hayes & Curran in its public and administrative team. Conor is a specialist childcare lawyer, advising on childcare proceedings in all courts, mental health issues for children, adoption and juvenile justice. He acts for State agencies and local authorities on all aspects of childcare law.

Alan O'Doherty qualified in Ireland and England, specialises in commercial property. He has jointly founded McCarthy Denning, a new full-service international law firm based in London. The firm focuses on partner-only advice, flexible fee arrangements and no chargeable hours targets. It aims to redefine the law firm model to "meet the needs of clients in the 21st century".

William Fry has appointed Ian Dillon as partner to its asset management and investment funds department. Ian joins the funds department from Campbell's, the Cayman Island's leading independent law firm, where he was a partner heading up its mutual funds practice. He previously worked with William Fry from 1998 to 2004. Since then Ian has cultivated an impressive resume of experience within the asset management industry.

LK Shields has appointed Gerard Brady as partner to its commercial property team. Gerard has 12 years' experience in commercial property and has been with the firm for three years. Before joining LK Shields, he spent seven years in practice elsewhere in Dublin and three years in Britain. He has considerable experience in relation to large commercial property portfolio acquisitions.

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Challenges for Human Rights in 21st Century Ireland

The 11th Annual Human Rights Conference, entitled 'Challenges for Human Rights in 21st Century Ireland', proved very topical, with the issues discussed testing the scope of human rights standards. The event was organised jointly by the Law Society and the Irish Human Rights Commission on 12 October 2013.

Expert speakers discussed surrogacy, end-of-life issues, on-line hate speech and the impact of austerity on economic, social and cultural rights. The keynote speakers were Mr Justice Gerard Hogan and Prof Michael O'Flaherty, co-director of the Irish Centre for Human Rights, National University of Ireland, Galway.

More than 20 speakers from the Irish judiciary, the Bar, the Law Society, the Irish Human Rights Commission, the London School of Economics, Tallaght Hospital and Facebook offered their perspectives on human rights protection in a modern Ireland.

ALL PICS: LENSMEN

Dr Geoffrey Shannon

Alma Clissmann, Judge Colin Daly and Judge Rosemary Horgan

Brian Murray SC

Hilkka Becker and Noeline Blackwell

The participating speakers and session chairs

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DATE	EVENT	DISCOUNTED FEE*	FULL FEE	CPD HOURS
5 Nov – May 2014	Certificate in Adjudication (Law Society of Ireland Certified Adjudicator)	€1,695	€2,260	Full CPD Requirement for 2013 and 2014 *(provided relevant sessions attended)*
11 & 18 Nov 2 & 9 Dec	Managing your Organisation's Carbon Footprint – Accredited ISO14064. *Places are limited – early booking advised*	€495	€660	Full CPD Requirement for 2013 (by Group Study)
12 Nov	Effective Business Writing - in collaboration with MaST Ireland. *Places are limited – early booking advised*	€165	€220	6 Management & Professional Development Skills (by Group Study)
15 Nov	Essential Solicitors' Update for 2013 – Clarion Hotel, Cork *Hot Lunch & Evening Networking Reception included*	€102	€136	5 General plus 1 Regulatory Matters (by Group Study)
19 Nov	How to make time work better for you - in collaboration with MaST Ireland. *Places are limited - early booking advised*	€165	€220	6 Management & Professional Development Skills (by Group Study)
20 Nov	Annual In-house and Public Sector Conference 2013	€135	€180	2 General plus 1 Regulatory Matters (by Group Study)
22 Nov	General Practice Update 2013 – Hotel Kilkenny, Kilkenny *Hot Lunch & Evening Networking Reception included*	€102	€136	5 General plus 1 Regulatory Matters (by Group Study)
26 Nov	Managing Effective Meetings - in collaboration with MaST Ireland *Places are limited - early booking advised*	€165	€220	6 Management & Professional Development Skills (by Group Study)
27 Nov	Wind Turbines – Opportunities & Pitfalls in Practice - *Midlands Location - tbc*	€102	€136	3 General (by Group Study)
29 Nov	Annual Family & Child Law Conference 2013	€180	€240	4.5 General plus 1 Regulatory Matters (by Group Study)
5 Dec	Cross Border insolvency proceedings - Recent developments and case-law on the European Insolvency Regulation (in partnership with the ERA)	€165	€220	6 General (by Group Study)
5 Dec	Tactical Negotiation Skills *Places are limited – early booking advised*	€105	€140	3 Management & Professional Development Skills (by Group Study)
10 Dec	How to use Blogging, Facebook, LinkedIn and Twitter in the legal sector. *Places are limited – early booking advised*	€180	€240	7 Management & Professional Development Skills (by Group Study)
11 Dec	Efficient Reading Techniques - in collaboration with MaST Ireland. *Places are limited – early booking advised*	€165	€220	6 Management & Professional Development Skills (by Group Study)
12 Dec	Tactical Negotiation Skills *Places are limited – early booking advised*	€105	€140	3 Management & Professional Development Skills (by Group Study)
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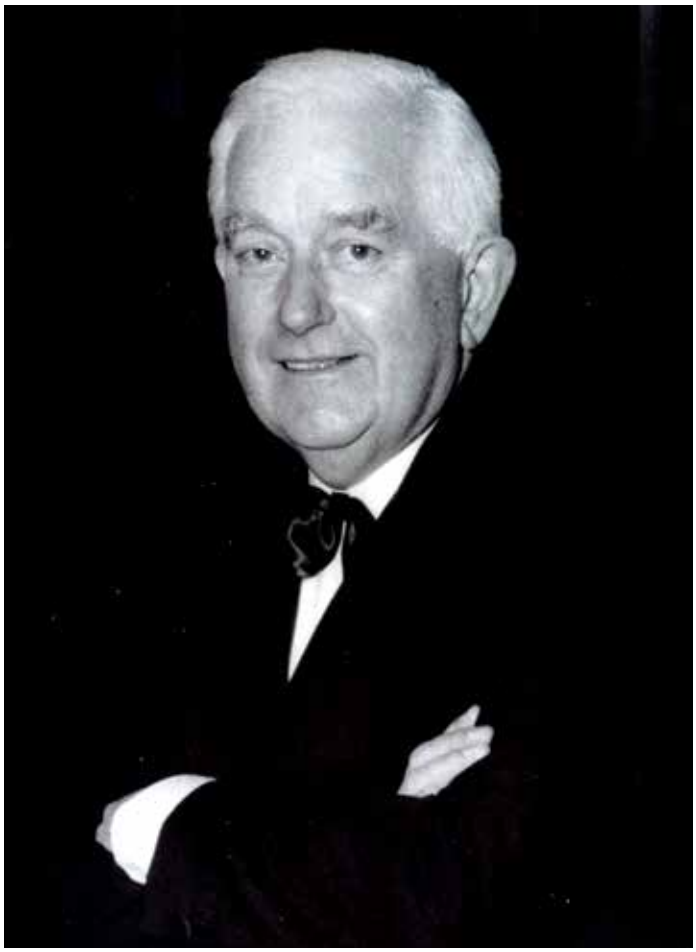
FRANCIS BRIAN GEARY 1930 – 2013

Francis Brian Geary (Proinsias Brian O'Gadhra), solicitor and former Limerick country registrar, died on 1 February 2013, aged 82.

Born in 13 May 1930, he grew up beside Geary's Sweet and Biscuit Factory in Merchants Quay, Limerick. He was schooled at the Model School and CBS Sexton Street, Limerick, and Clongowes Wood College, Co Kildare, where he won the Palles medal for mathematics. He graduated with an LLB in law from University College Dublin and was admitted to the Roll of Solicitors in 1952.

On completing his apprenticeship with O'Connor & Company in Dublin, he returned to Limerick in 1953 and opened his practice FB Geary & Co. He became the first solicitor on the criminal defence list in Limerick and earned a reputation as a skilled and knowledgeable criminal defence lawyer. He was appointed county registrar for Limerick in September 1971 and is fondly remembered by the courthouse staff and legal colleagues.

Throughout his life, he was keenly interested in the political life of the country. On being appointed county registrar, his interest in politics continued as returning officer for Limerick. He oversaw the voting and counts for 29 elections and referenda during the 1970s, 1980s and 1990s. An expert on proportional representation and the organisation of elections,



he served as a UN monitor in South Africa's first fully democratic elections in 1994.

Following his retirement in February 2000, his advice and counsel was often sought, including by the Council of Europe, to which he reported on the enforcement of court decisions in Armenia in 2003.

An avid reader and a scholar, he had many interests outside of the law. A fluent Irish speaker, he was a member of *An Chomhchaidreamh* (an organisation of young, progressive language activists) and was present at the founding of Gael Linn in the Imperial Hotel in Cork in 1953. He was a member of Gael Linn from 1963 to 2007 and served as the appointee of *An Chomhchaidreamh* to the board from 1965 to 1969. His interest and participation in the national language continued throughout his life.

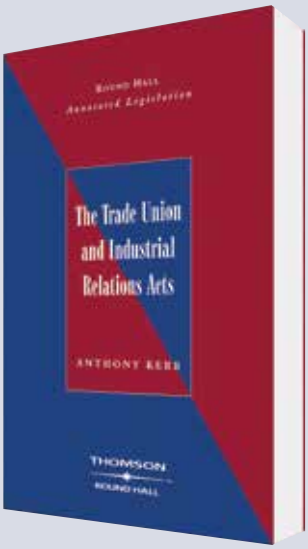
In his younger days, he was well known as a leading rally-driving navigator and competed in many of the rallies held in Ireland during the 1950s and 1960s, navigating in the Circuit of Ireland on six occasions.

Brian was also involved in many different voluntary organisations, including chairing the Limerick branch of An Taisce and assisting with the campaign for a university for Limerick in the late 1960s. He was committed to the preservation of Ireland's historical heritage. As a committee member of the Thomond Archaeological Society, he campaigned for many years to save historical monuments under threat.

He suffered a stroke in 2006, and although his physical movement was greatly restricted, he bore his illness with his customary good humour. He is greatly missed by his wife Mary, son David and daughter Mary, relatives and by colleagues in Limerick and in the Courts Service.

DG

The Trade Union and Industrial Relations Acts (4th edition)



Anthony Kerr. Round Hall (2013), www.roundhall.ie. ISBN: 978-1-8580-068-64. Price: €125 (incl VAT).

In the preface to his fourth edition of the *Trade Union and Industrial Relations Acts*, Anthony Kerr notes that, since the 2007 third edition, there have been "a number of significant developments". This is certainly correct and, indeed, to anyone less knowledgeable of the area than Kerr, the task of putting together all of the relevant legislation in one edition would be daunting.

Dividing this paperback book into two parts, Kerr deals separately with trade union legislation and industrial relations legislation, starting with the *Trade Union Act 1871*. He presents all of the legislation in its most up-to-date form, ensuring that readers can easily extrapolate the current legal position in respect of any area.

All the statutes are fully annotated, and Kerr adeptly cross-references each legislative provision with previous enactments, relevant case law, articles and parliamentary debates. Kerr's commentary is practical and informative. In dealing with the *Industrial Relations (Amendment) Act 2001*, Kerr includes a useful analysis of the Supreme Court decision in *Ryanair v the Labour Court* ([2007] 4 IR 199) and, indeed, includes a separate section on matters arising from that decision.

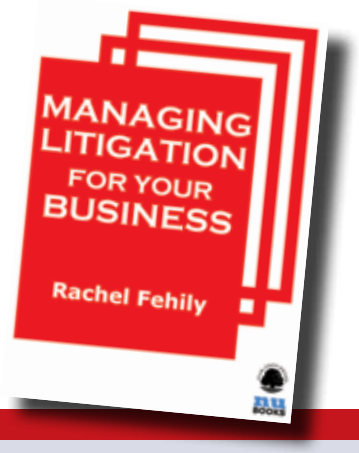
This fourth edition sees the inclusion of the *Industrial Relations (Amendment) Act 2012*, the legislative response to the decision of Feeney J in *John Grace Fried Chicken Limited v Catering Joint Labour Committee* ([2011] 3 IR 211), which had declared certain sections of the *Industrial Relations Acts 1946 and 1990* unconstitutional.

In addition to the legislation, Kerr includes a section on the rules and guidelines of the Labour Court, and even includes a copy of the new Workplace Relations Complaint Form.

Kerr's knowledge of the topic is unrivalled and, to his credit, he manages to provide the reader with a book that is as accessible to non-lawyers and students as it is to experienced practitioners. In this ever-changing area of the law, this edition is an invaluable tool to anyone with even a passing interest in the area.

Janice Walshe is an associate solicitor with Byrne Wallace.

Managing Litigation for Your Business



Rachel Fehily. Oak Tree Press (2013), www.oaktreepress.com. ISBN: 978-1-8462-115-91.
Price for e-book: €6.14 (incl VAT).

Most litigators suffer frustration on seeing clients enduring the agonies of costly litigation, compounded when the lawyer representing the other side is obstructive or, worse, less than competent. Good litigators will always try to achieve the best outcome for their clients.

This inexpensive e-book, by a prolific writer, barrister and mediator, has much to commend it, as it provides practical advice to businesses on how to avoid unnecessary litigation, such as defusing situations where litigation is threatened, effective use of ADR, hiring the right lawyer, and instructing a lawyer to resolve potential litigation by negotiation in a timely and cost-effective manner. When litigation is unavoidable, it discusses how to run a case effectively and control legal costs.

It is written in a straightforward style, which will engage the busy business manager. Far from being a lawyer-bashing tome, it advises on how to engage with lawyers, drawing attention to the many principled lawyers (as well as to the thankfully rare, less scrupulous ones).

Should lawyers read this guide? Certainly; it contains a few nuggets of wisdom that will interest the experienced litigator (for example, on seating positions at meetings and how not to look bored or disbelieving!). For less experienced lawyers, it includes many truisms that lawyers constantly impart to clients, so it provides an accelerated learning opportunity. It is worth adding to a solicitor's collection, if only to pass to a client who needs some encouragement.

No short book can meet every need. For this reviewer, the only real reservation related to the lawyer's role during a negotiation. The author correctly highlights that a client's wishes and objectives should be made clear to the lawyer but, for my taste, more direct emphasis could have been placed on the obvious wisdom of considering the advice of the lawyer. Every litigation matter belongs to the client, but a correctly chosen lawyer should never be simply an instrument of litigation, but an essential advisor.

Eamon Harrington is chairman of the Society's Litigation Committee.

READING ROOM

Your comments please!

During the last 12 months, the library has lent out almost 6,500 books and handled a further 2,500 legal research queries.

Over 700 members and trainees subscribed to the weekly *Judgment Alerter*. We are interested in hearing your comments on the service.

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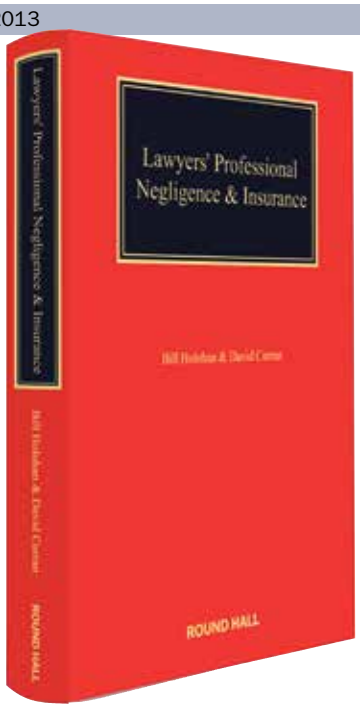
If you have never used the library, or if you haven't used it in a while, you might like to check out the online catalogue, located in the members' area of the website at www.lawsociety.ie, where you'll find information on new books, document delivery, precedent service, judgments archive and subject resources.

A new 'your comments' button has been added on the online catalogue menu. The library welcomes any feedback you might care to leave.

Lawyers' Professional Negligence and Insurance



Bill Holohan and David Curran. Round Hall (2012), www.roundhall.ie. ISBN: 978-1-8580-067-03. Price: €245 (incl VAT).

The authors point out that their initial intention was to produce a practical handbook, but it became clear that a comprehensive legal text book was required. This they have produced.

The regulation of professional indemnity insurance in Ireland has changed rapidly in different stages since 2009, when a crisis occurred and there was a danger of insurance not being available.

This text deals comprehensively with the current regulatory framework and, in particular, the complex arrangements regarding succeeding firms, the Special Purchase Fund, run-off cover and commercial undertakings.

It goes on to deal with the more general issues affecting claims against solicitors, including the *Statute of Limitations*, the vexed question of when actionable damage occurs, the duty of care, and the measure of damages.

The authors deal with the issue of the retainer of the solicitor and point out that the solicitor's liability can extend to those with whom he has made no arrangement to act, but whom he knows (or ought to know) will rely on his skill.

Difficulties sometime arise between solicitors against whom a claim has been made and their insurers regarding the handling of the claim. This text deals with the dual retainer of the defending solicitor and the legal relationships that ensue. This is very useful reading for anybody against whom a claim is being made.

Practitioners will be aware that, since 2009, there has been a huge range of claims in respect of conveyancing matters – and an entire chapter has, quite rightly, been dedicated to this subject.

The timing of this book is particularly appropriate, given the extensive new case law in this area since 2009 and the substantial change in the regulatory framework since then. It is a wide-ranging book that will be of help particularly to any solicitor against whom a claim has been made, their defending solicitors, and those acting for claimants. G

Niall Farrell is a former chairman of the Professional Indemnity Committee of the Law Society.

New books available to borrow from the library

- Allen, Tony, *Mediation Law and Civil Practice* (Bloomsbury Professional, 2013)
- Brennan, Gabriel (ed), *Landlord and Tenant Law* (6th ed; OUP, 2013)
- Crew, Anna, *Solicitors' Claims: a Practical Guide* (Sweet & Maxwell, 2013)
- Dowling, Karl and Robert Grimes, *Succession Law* (Round Hall, 2013)
- Kenneally, Allison and John Tully, *The Irish Legal System* (Clarus Press, 2013)
- Larkin, Felix and NM Dawson (eds), *Lawyers, The Law and History: Irish Legal History Discourses and Other Papers 2005-2011* (Four Courts Press, 2013)
- McPeake, Robert, *Advocacy* (16th ed; Bar Manuals, 2012)
- Megarry, Robert and William Wade, *The Law of Real Property* (8th ed; Sweet & Maxwell, 2012)
- Newsom, George L, *Preston and Newsom's Restrictive Covenants Affecting Freehold land* (10th ed; Sweet & Maxwell, 2013)
- Thullier, Anthony, *Company Law in Ireland* (Clarus Press, 2013)

BRIEFING

Practice notes

Professional indemnity insurance renewal

PROFESSIONAL INDEMNITY INSURANCE COMMITTEE

The mandatory professional indemnity insurance (PII) renewal date is 1 December 2013. This date is not negotiable. All cover under the current indemnity period will expire on 30 November 2013.

Confirmation of cover

Confirmation to the Society of PII cover must be provided within three working days.

Therefore, confirmation of cover in the designated form must be provided to the Society on or before **5 December 2013**.

Guide to Renewal

The *Guide to Renewal* for the 2013/2014 indemnity period is published on the Society's website to assist the profession with renewal. The guide includes information such as tips for renewal, important points to note and a guide to insurers and brokers. This guide will be updated frequently with new information received by the Society, in particular with regard to what insurers will be in the market in the next indemnity period.

2013/2014 renewal resources

Renewal resources for the 2013/2014 indemnity period are available to download from the Society website (at www.lawsociety.ie/Pages/PII/) and currently include:

- The common proposal form for the 2013/2014 indemnity period,
- The *Guide to Renewal*, and the
- Participating Insurers Agreement.

This area will be updated frequently as more documentation becomes available.

Disclosure of financial ratings

Financial ratings are obtained by insurers following assessment of their financial strength through an independent process by a rating agency. While a financial rating is an indication of the financial strength of an insurer, it does not guarantee an insurer's financial solvency.

The Society has changed the title of 'qualified insurer' to 'participating insurer' for the 2013/2014 indemnity period to more accurately reflect and emphasise the Society's limited role regarding insurers in the solicitors' PII market and to dispel the mistaken impression of approval or financial strength that may have been incorrectly inferred from the title 'qualified insurers'.

Participating insurers are required to disclose their financial rating, or absence thereof, to firms when issuing quotations. This requirement was introduced in the 2011/2012 indemnity period and remains in place for the 2013/2014 indemnity period in order to:

- Allow firms to make a more fully informed decision on their choice of insurer,
- Ensure full transparency for the profession in relation to participating insurers meeting, or not meeting, generally accepted standards of financial strength, and
- Do so in a way that will not restrict firms' choice of insurer.

It should be noted that all participating insurers in the market are permitted to write insurance in this jurisdiction under the supervision of the Central Bank. The Society is not responsible for policing the financial stability of any insurer. The Society does not vet, approve or regulate insurers.

More in-depth information on financial rating of insurers can be found on the Society's website at www.lawsociety.ie/Pages/PII/ and in the *Guide to Renewal*.

Notification of claims by 30 November 2013

All claims made against solicitors' firms and circumstances that may give rise to such a claim should be notified to the firm's insurer as soon as possible. In particular, claims made between 1 December 2012 and 30 November 2013 (both dates inclusive) should be notified by the firm to their insurer by 30 November 2013.

It is proper practice for firms to notify insurers of claims or circumstances during the year as they arise, not at the end of the indemnity period. Notifying all claims and circumstances at the end of the indemnity period is referred to as 'laundry listing' by insurers, and is not looked on favourably. Firms should also ensure that their claims and circumstances notifications meet the notifications requirements set out in the insurance policy terms and conditions.

The minimum terms and conditions for PII were amended in the *Solicitors Acts 1954 to 2008 (Professional Indemnity Insurance) Regulations 2011* (SI no 409 of 2011) to permit firms to report claims or circumstances of which they are aware prior to expiry of cover to their insurer within three working days immediately following the end of the coverage period. Therefore, a three-working-day grace period from 30 November 2013 is in place with regard to notification of claims and circumstances to your insurer.

Quotes

Insurers are required to leave quotes to firms open for a period of not less than ten working days. This requirement was introduced in the 2012/2013 indemnity period and remains in place for the 2013/2014 indemnity period.

Amendments for 2013/2014 indemnity period

The definition of 'legal services' has been amended to include 'acting as a personal insolvency practitioner'.

The definition of 'succeeding practice' has been broadened. Any firm conducted by a partnership where half or more of the principals are identical to those persons who were principals of any partnership that conducted the previous practice will be considered to be a succeeding practice. Any practice conducted by a sole practitioner who was one of the principals conducting the preceding practice will be considered to be a succeeding practice.

The double trigger (the requirement that claims be made and notified in the same indemnity period) provisions have been amended so that, for claims or circumstances arising after 1 December 2013, the requirement to notify the claim or circumstance in the same indemnity period as it was made will not apply if your firm has continuous cover with that insurer (has not changed insurer between the indemnity periods). The self-insured excess for the claim shall be the higher of the applicable self-insured excesses between the two indemnity periods, and the limit of liability shall be the lower of the two indemnity periods. Where a firm has changed insurer between indemnity periods, the double trigger applies and the claim or circumstance must be notified in the same indemnity period in which it was made. Again, firms should ensure that they notify claims and circumstances to their insurer as soon as they arise and that they meet the notification requirements as set out in the firm's insurance policy terms and conditions.

With regard to the common proposal form, it has been made clear that insurers may only request supplemental information from firms after submission by the firm of a completed proposal form for the purpose of clarifying information contained in the completed proposal form.

Insurers are required to provide the Society with information on their financial rating (if any), their country of registration, and their home state regulator as at the date the Participating Insurers Agreement is signed, and this information will be published by the Society in the *Guide to Renewal*.

Run-off fund

The run-off fund provides run-off cover for firms ceasing practice:

- That have renewed their PII for the current indemnity period, and
- Subject to meeting eligibility criteria, including that there is no succeeding practice in respect of the firm.

Any firm intending to cease practice after 30 November 2013 is required to renew cover for the 2013/2014 indemnity period.

Further information on run-off cover and succeeding practices can be found on the Society's website at www.lawsociety.ie/Pages/PII/Run-off-Cover/.

PII helpline

The Society continues to operate the PII Helpline to assist firms in dealing with PII queries. The helpline is open Monday to Friday from 10am to 4pm and can be contacted on tel: 01 879 8707, email: piihelpline@lawsociety.ie.

PII common proposal form

PROFESSIONAL INDEMNITY INSURANCE COMMITTEE

The professional indemnity insurance common proposal form for the 2013/2014 indemnity period is available to download from the Society's website at www.lawsociety.ie/Pages/PII/, under the 2013/2014 renewal resources section. The form will also be circulated by insurers, directly or through brokers.

This common proposal form ensures that each firm will have to complete only one proposal form at the next renewal, thereby simplifying the renewal process for the profession and making it easier for firms to obtain multiple quotes.

Points to note

1) Ultimately, the principals/partners of each firm are responsible for obtaining PII for the firm before the renewal date.
2) The proposal form should be submitted early, be **completed fully and correctly**, have all required documentation attached and be clear, accurate, well-presented and comprehensive. Try to avoid submitting hand-written proposal forms.
3) **Firms are not required to provide certificates of good standing with the common proposal form,** and insurers did not seek to have a requirement to provide this certificate included in the common proposal form. Please note that the fee for obtaining a certificate of good standing from the Society within ten working days is €100, to be paid in advance of the certificate issuing. Certificates of good standing issued later than ten working days are free of charge.
4) Answer all questions – if you are unsure of any question, answer what you think the insurer is looking for and provide additional information to clarify. Check and recheck the form to ensure that all questions have been answered correctly.
5) Check that all additional documentation has been attached to the form and is correctly cross-referenced.
6) Make sure that the figures add up. For example, ensure that gross fee income figures add up to 100%.
7) The insurer must accept a fully-completed proposal form as a duly completed application for a policy and must not require the firm to complete or submit any other proposal form or application for a policy.
8) An insurer cannot require a firm seeking a policy to provide it with supplemental information until such time as the insurer has received and reviewed a proposal form, fully completed by that firm.
9) The insurer can only request a firm to provide it with supplemental information where the insurer reasonably requires such information in order to decide whether to insure the firm. In this case, the insurer must make a statement to that effect and request that the firm provide such supplemental information within a reasonable timescale.
10) It is proper practice for firms to notify insurers of claims or circumstances arising during the year as they arise, not at the end of the indemnity period. Notifying all claims and circumstances at the end of the indemnity period is referred to as 'laundry listing' by insurers and is not looked on favourably.
11) Firms must notify their current insurer of all claims and circumstances before the end of the indemnity period.
12) The common proposal form is an application for normal PII, not for run-off cover. Firms should contact the special purpose fund manager, Capita Commercial Insurance Services, with regard to obtaining run-off cover through the Run-off Fund. The special purpose fund manager can be contacted on tel: 0044 207 397 4539, email: spf@capita.co.uk. More information on the Run-off Fund can be found on the Society's website at www.lawsociety.ie/Pages/PII/Run-off-Cover/.
13) Claims information must be provided by your current insurer and be attached to the common proposal form. If you have a poor claims history, provide the insurer with further information on how the claim arose and what procedures are now in place to ensure that, henceforth, as far as possible, such claims will not arise. Failure to provide a claims history, or provision of an incomplete claims history may indicate to insurers that something is being hidden. Claims information is used by insurers to compare your previous loss experience against improvements to risk management you may have implemented, or changes you may have made to your work type activities.
14) Firms should ensure to redact any information in any documentation provided to insurers that may breach legal privilege or client confidentiality.
15) The risk-management section of the common proposal form has been significantly amended for the 2013/2014 indemnity period to make the section simpler and clearer. Insurers are focusing on risk management, and it would be to the benefit of firms to demonstrate to insurers that they have robust risk-management procedures in place.
16) Ensure that the form is signed and dated, otherwise the proposal form is invalid.
17) With regard to 'yes'/'no' questions in the form, where the answer is some variation of 'yes' or 'no', expanded answers should be provided for such questions in the covering letter submitted with the form.

BRIEFING

Financial rating of participating insurers

PROFESSIONAL INDEMNITY INSURANCE COMMITTEE

The Society has issued this practice note to raise the profession's awareness of the importance of considering whether their insurer will be able to meet claims under their professional indemnity insurance policy when making the business decision of which insurer to choose. Firms should be under no illusions regarding the potential serious personal and financial consequences that can result from that decision. It should be noted that a financial rating does not guarantee the solvency of an insurer, but it does provide an independent indication of the financial strength of an insurer.

What is a participating insurer and who regulates them?

The Society has changed the title of 'qualified insurer' to 'participating insurer' for the 2013/2014 indemnity period to more accurately reflect and emphasise the Society's role regarding insurers in the solicitors' PII market and to dispel any mistaken impression of approval or financial strength that may have been incorrectly inferred from the title 'qualified insurer'.

With regard to the regulation of participating insurers and the Society's role, the following should be noted:

1) The Society does not vet, approve or regulate insurers.
2) Insurers are supervised and regulated by the Central Bank of Ireland.
3) In accordance with EU law, the Central Bank of Ireland is obligated to permit insurers regulated in other EU member states to trade in Ireland through the 'passport system'. Where an insurer from another jurisdiction is passported into the Irish system, the insurer is regulated by the financial regulator in their home jurisdiction and subject to the minimum standards and requirements of that jurisdiction.
4) For reasons relating to EU competition law, it is not possible for the Society to require insurers have a minimum level of financial security, a minimum financial rating, or indeed any financial rating at all for participation in the solicitors' PII market.
5) The Society is not responsible for policing the financial stability of any insurer and does not undertake any solvency checks on insurers.
6) Participating insurers are not required to have a minimum financial rating or any financial rating at all.
7) The Society is obliged to permit any insurer who meets the following requirements to become a participating insurer: (a) the insurer is authorised by the Central Bank of Ireland to write non-life insurance in Ireland; (b) the insurer has signed the Participating Insurers Agreement for the relevant indemnity period in a timely manner. (Formerly known as the 'Qualified Insurers Agreement', the Participating Insurers Agreement is a contract that insurers enter into with the Society each year that requires participating insurers to offer solicitors' PII policies in accordance with specified minimum terms and conditions.)

What is a financial rating and how do I find out the financial rating of a participating insurer?

Financial ratings are obtained by insurers following assessment of their financial strength through an independent process by a rating agency, and it is therefore an objective measure and indication of the financial strength of the insurer. The two major rating agencies for insurers are Standard & Poors and AM Best. A financial rating does not guarantee an insurer's financial solvency.

While insurers, both unrated and rated, are subject to regulation and oversight by the home state regulator, different states have different liquidity requirements and levels of scrutiny and oversight. Participating insurers may be passported in from states with lower regulatory standards or requirements. Therefore, firms are advised not to depend on the assessment of the insurance regulator, but to also seek an independent, objective indication of the financial strength of the insurer.

A financial rating can be thought of as a 'health warning', giving an indication of the financial strength and stability of an insurer and, therefore, its likely ability to meet claims under the PII policy. Key factors assessed by the rating agencies include the insurer's liquidity, risk, operating performance, capitalisation, and financial performance, management and flexibility.

Not all insurers obtain or seek to obtain a financial rating and are therefore considered to be 'unrated insurers'. If an insurer is unrated, there is no independent indication of the financial strength of that insurer, other than the judgment of the home state regulator, which, therefore, makes such insurers an unknown quantity and risk for firms.

Participating insurers are required to disclose their financial rating, or absence thereof, to firms when issuing quotations. This requirement was introduced in the 2011/2012 indemnity period and will continue to be a requirement for participating insurers. Participating insurers are required to make such a disclosure in order to:

- Allow firms to make a more fully informed decision on their choice of insurer,
- Ensure full transparency for the profession in relation to participating insurers meeting, or not meeting, generally accepted published standards of financial strength, as assessed by an independent rating agency, and
- Do so in a way that will not restrict the firm's choice of insurer.

For the 2013/2014 indemnity period, the Society has introduced a requirement for participating insurers to provide the Society with details of their financial rating, and the jurisdiction in which they are regulated, as at the date the Participating Insurers Agreement is signed, together with a requirement to notify the Society in writing immediately if any of this information changes. The Society will publish this information in the *Guide to Renewal* for the 2013/2014 indemnity period to enable firms to take such information into account when choosing their insurer. It should be noted that the guide will only reflect an insurer's financial rating, or lack thereof, at a specific date, and therefore firms are advised to check the financial rating on any quotes provided and to seek confirmation of the insurer's rating from their broker.

Why should I care about the financial strength of my insurer?

The financial strength of your participating insurer will ultimately determine whether claims made against your firm will be paid and should, therefore, be one of the most important factors when choosing an insurer.

Each principal and partner in private practice is responsible for their own business decisions, including choice of insurer, and must accept the consequences of those decisions for their firm. Each principal and partner of the firm should also consider their duty of care to each employee of the firm and, in the case of succeeding practices, former principals and partners, who will also be exposed to the consequences of loss of indemnity due to the insolvency of the firm's insurer, should it occur.

What are the consequences if my insurer becomes insolvent?

The immediate consequences of the insolvency of an insurer for firms are set out in regulation 13 of the *Solicitors Acts 1954 to 2008 (Professional Indemnity insurance) Regulations 2011* (SI no 409 of 2011) as follows:

- Any firm insured by the insolvent insurer will be required, within 30 working days of the insolvency, to obtain and pay for insurance with another participating insurer in the market or with the Assigned Risks Pool (ARP) if the firm is an ARP eligible firm, and
- If the firm fails to obtain alternative cover within 30 working days, they will be obliged to close.

There are a number of serious financial consequences for the firm that can arise out of this:

1) Firms will require access to substantial funds at short notice to continue in practice.
2) There is no guarantee that any participating insurer in the market will offer the firm replacement cover.
3) Firms that are unable to afford the premium for replacement cover will be unable to obtain replacement cover from the market.
4) Firms that are unable to obtain replacement cover in the market may apply to the ARP only if they are ARP eligible firms, as defined in the abovementioned regulations. ARP cover will be at a lower level than that available in the market, including no cover for claims by financial institutions and an aggregate limit of €1.5 million.
5) If a firm is accepted by the ARP, it will be required to pay the ARP premium in full. The ARP premium is calculated according to the ARP premium schedule, which is available on the Society's website at www.lawsociety.ie/Page/PII. The ARP premium will normally significantly exceed normal market rates, reflecting the high level of risk attached to a firm unable to obtain cover in the market. Any firm unable to afford market rates is, therefore, unlikely to be able to afford the ARP premium.
6) Any firm that does not obtain replacement cover from the market, or any firm accepted by the ARP that does not pay the ARP premium in full, will be declared a defaulting firm and will be required to close.
7) If the firm does not close, the Society will apply to the High Court for an order compelling the firm to close.
8) Claims made against the firm will not be fully covered, with potentially devastating financial consequences for the principals of the firm, who will be directly liable for any uncovered claims, with possible consequential judgments and bankruptcy. It should be noted that the practising certificates of bankrupt solicitors are immediately and automatically suspended in accordance with the provisions of section 50 of the *Solicitors Act 1954*.

If my insurer goes insolvent, won't the Law Society or the Insurance Compensation Fund pay the claims?

The Society does not vet, approve or regulate insurers and has absolutely no legal responsibility for unpaid claims by either an insurer or an uninsured firm. The Society will not provide any compensation or meet the claims of insurers or firms that are unable to honour their claim payments. The choice of insurer is a business decision for the principals and partners of each firm, and they alone are responsible for the consequences of that decision.

The Insurance Compensation Fund was established under the *Insurance Act 1964* for the purpose of providing a fund from which certain liabilities of insolvent insurers can be met. Should a participating insurer become insolvent, Irish policyholders should be able to benefit from the Insurance Compensation Fund should the need arise, subject to certain limitations. These limitations include:

- A cap per claim on the amount of any payment, which must not exceed 65% of the amount due under the policy or €825,000, whichever is the lesser, and
- Normally, no compensation where the client is a body corporate.

Consideration should be given to the restrictions in place on payments from the fund when considering the protections that may be afforded to your firm and clients in the event of an insolvency of a participating insurer, in particular due to the direct liability of each partner and principal of the firm for any unpaid claims.

Have such difficulties arisen in other jurisdictions?

In England and Wales over the past five years, a number of unrated insurers have experienced difficulties including insolvency, administration and withdrawal from the market, with resulting serious personal and financial consequences for some firms covered by such insurers, including serious financial losses, bankruptcy, closure of firms and loss of livelihood. The fact that the dangers being warned of have already occurred a number of times in a neighbouring jurisdiction should highlight the dangers of failure by firms to conduct financial due diligence on insurers and the dangers of relying solely on the view of the insurance regulator regarding the solvency of insurers.

What factors should I consider when choosing an insurer?

Firms should obtain quotes from all insurers willing to offer cover and then assess these quotations based on a range of factors, including the following:

1) *Financial rating of insurer* – this is an indication of the financial strength of the insurer, which determines the ability of the insurer to meet its obligations to pay claims against your firm. This should be one of the foremost factors when choosing an insurer, due to the devastating financial and personal consequences of your insurer becoming insolvent and the recent financial collapses of unrated insurers in England and Wales. While financial ratings are not a guarantee of solvency, they do give an indication and objective measure of the financial strength of the insurer. The financial stability of an unrated insurer is unknown and untested.
2) *Price* – the Society understands that there are commercial pressures on firms to choose the 'cheapest' quote for their PII. While the price of insurance is an important factor, firms are strongly advised to weigh the cost of a quote against the financial stability of the insurer, given the grave consequences of insurer insolvency for a firm. Opting for a lower premium is false economy if the insurer becomes insolvent and the firm is required to pay a second premium for the year.
3) *Fitness for purpose* – firms should consider, and obtain advice from their broker, whether any insurer, both rated and unrated, has the required level of knowledge of the specialised requirements of the solicitors' PII market.
4) *Advice from brokers* – Firms should have a robust discussion with their broker regarding the insurers they are proposing to place your business with and, in particular, the capacity of that insurer and their willingness to pay claims that, in many cases, may take years to resolve. Firms should ask brokers to provide some guidance on the insurer's financial condition and ability to meet its obligations. In the case of unrated insurers, firms should be extremely diligent in their dialogue with their broker and pay particular attention to any disclosure or disclaimers by the broker in relation to advice provided and the placement of your cover. Firms should be wary of any attempt by brokers to provide reassurance by reference to an insurer's reinsurance arrangements, in particular in relation to unrated insurers, as the firm will not have direct access to these reinsurers in the event of the insurer's insolvency. In most cases, reinsurance arrangement simply constitute an asset for distribution to creditors in the event of an insolvency.

Solicitors acting as personal insolvency practitioners

REGULATION OF PRACTICE COMMITTEE

Under the *Personal Insolvency Act 2012* (PIA), a personal insolvency practitioner (PIP) is defined as a person authorised by the Insolvency Service of Ireland (ISI) to act as a PIP. The ISI is an independent statutory body established under the PIA to oversee and regulate all matters pertaining to personal insolvency in Ireland. Solicitors with a current practising certificate may act as PIPs once approved by the ISI.

'Legal services' are defined in section 2 of the *Solicitors (Amendment) Act 1994* (as substituted by section 45(b) of the *Investment Compensation Act 1998*) as services of a legal or financial nature provided by a solicitor arising from that solicitor's practice as a solicitor, includes any part of such services, and includes any investment business services provided by a solicitor who is not an authorised investment business firm.

'Solicitor' is defined by section 3 of the *Solicitors Act 1954*, as substituted by section 3(1)(a) of the *Solicitors (Amendment) Act 1994*, as a person who has been admitted as a solicitor and whose name is on the Roll of Solicitors.

Provision of PIP services is not a reserved legal service and can, therefore, be carried out by solicitors and non-solicitors. However, under the definitions of 'legal services' and 'solicitor' in the *Solicitors Acts 1954 to 2011*, work done by solicitor PIPs constitutes provision of legal services by a solicitor and, as such, the Society has a statutory obligation under the acts to regulate such services, at least in certain respects. The Society does not have the power to ignore or divest itself of this obligation or delegate such regulation of solicitors to another body.

Consequently, under the acts currently in place, the ISI will remain responsible for regulating solicitor PIPs' obligations as PIPs under the PIA and any regulations arising therefrom, and the Society will remain responsible for regulating solicitor PIPs in respect of their obligations as solicitors under the *Solicitors Acts 1954-2011* and the regulations arising therefrom.

For solicitor PIPs, this means:

1) As a PIP, the solicitor has an obligation to comply with the provisions of the PIA, any regulations arising therefrom, and the requirements of the ISI,
2) As a solicitor PIP, the solicitor must also simultaneously comply with the provisions of the *Solicitors Acts 1954-2011*, any regulations arising therefrom, and the requirements of the Society,
3) Solicitor PIPs will be entitled to avail of their firm's existing professional indemnity insurance and provide services as solicitor PIPs through their firm,
4) Solicitor PIPs will not be required to set up a separate and distinct legal firm for the provision of PIP services, but are free to do so if they wish. If a separate legal firm is set up for the provision of PIP services, separate professional indemnity insurance must be obtained,
5) A type of solicitor/client relationship will exist between the solicitor PIP and the debtor, albeit one limited by the statutory responsibilities of the PIP to the creditors and the ISI, as well as the debtor,
6) Clients of solicitor PIPs may be able to make claims on the Society's compensation fund in the event of dishonesty by a solicitor PIP,
7) Debt agreement monies held by a solicitor PIP will be subject to investigation by the Society, be included in the firm's annual reporting accountant's report, and be subject to the requirements of the *Solicitors' Accounts Regulations*, as well as any accounts regulations published by the ISI,
8) Solicitors on the Roll of Solicitors are prohibited from providing services as a PIP through a limited company or setting up in partnership with a non-solicitor, in accordance with the *Solicitors Acts 1954-2011*.

Bankruptcy, judgments and debt arrangements

Under section 50 of the *Solicitors Act 1954*, adjudication in bankruptcy of a solicitor operates to immediately and automatically suspend his or her practising certificate (if any) until:

a) The practising certificate expires,
b) The adjudication in bankruptcy is annulled and an office copy of the order annulling the adjudication is served on the Registrar of Solicitors, or
c) The suspension is terminated under section 51 of the *Solicitors Act 1954*, whichever first occurs.

A solicitor whose practising certificate has been suspended by virtue of section 50 may, in accordance with section 51 of the *Solicitors Act 1954*, at any time before the certificate expires and the adjudication in bankruptcy is annulled, apply to the Society to terminate the suspension. The Society may terminate the suspension unconditionally or subject to such terms and conditions as the Society thinks fit, or refuse the application.

Where the Society refuses such an application or terminates the suspension subject to any terms and conditions, the solicitor may appeal to the President of the High Court.

Where a solicitor has been adjudicated bankrupt and then applies for a practising certificate, the Society may issue the solicitor with an unrestricted practising certificate, a practising certificate subject to specified conditions, or refuse to issue the solicitor with a practising certificate, in accordance with the provisions of section 49 of the *Solicitors Act 1954*, as substituted by section 61 of the *Solicitors (Amendment) Act 1994*, as amended by section 2 of the *Solicitors (Amendment) Act 2002*. The solicitor also has the right to appeal the decision of the Society to the President of the High Court under this section.

Solicitors who are faced with the prospect of bankruptcy should prepare a wind-down plan and contact the Society regarding the cessation obligations, which include, but are not limited to:

a) Divesting of client files,
b) Submitting a closing reporting accountant's report,
c) Contacting the special purpose fund manager and dealing with requirements relating to run-off cover from the Run-off Fund, and
d) Providing an address for the purpose of future correspondence.

Useful guidance in relation to cessation obligations and run-off cover can be found in the 'closing a practice' section in the members' area of the Society's website (www.lawsociety.ie/Pages/PII/Run-off-Cover/).

The provisions of the professional indemnity insurance regulations pertaining to run-off cover apply to firms that have ceased to carry on practice as a result of its principal or all its partners becoming bankrupt in the same way as to any other firm that has ceased to carry on practice.

By reason that a third party will be dealing with the clients' affairs, the solicitor must ensure that the

BRIEFING

books of account of the practice, in particular the client and office ledgers, are completely up to date and that recent transactions are recorded in these ledgers.

Judgments

Where a solicitor has a registered or unregistered judgment against them, they should immediately notify the Society in writing and include the following information:

a) A list of all judgments against the solicitor, including those registered and unregistered,
b) Details of the circumstances leading to the judgments,
c) Confirmation as to whether each judgment has been satisfied or remains outstanding,
d) In the case of satisfied judgments, documentary evidence of the satisfaction of the judgments,
e) In the case of unsatisfied judgments, the solicitor should provide details as to how he or she proposes to now satisfy the judgment or appeal the judgment, and
f) In the case of a judgment in relation to which the solicitor is entitled, as respects the whole effect of the judgment on him or her, to indemnity or relief from any other person, documentary evidence of this indemnity or relief.

The Society reserves the right to require a solicitor with unsatisfied judgments against them to appear before a regulatory committee at any time regarding these matters.

Where a solicitor with unsatisfied judgments is applying for a practising certificate, the Society may issue an unrestricted practising certificate, a practising certificate subject to specified conditions, or refuse to issue a practising certificate, in accordance with the provisions of section 49 of the *Solicitors Act 1954*, as substituted by section 61 of the *Solicitors (Amendment) Act 1994*, as amended by section 2 of the *Solicitors (Amendment) Act 2002*. The solicitor has a right of appeal to the President of the High Court under the same section.

Where a solicitor with unsatisfied judgments already holds a current practising certificate, the Society may impose conditions on the solicitor's practising certificate, in accordance with the provisions of section 59 of the *Solicitors (Amendment) Act 1994*. The solicitor has a right of appeal to the President of the High Court under this section.

It should be noted that all solicitors are required to disclose any judgments against them in the annual practising certificate application. An applicant solicitor who knowingly furnishes information that is false or misleading in a material respect in this application form shall be guilty of misconduct.

Debt arrangements

In accordance with the *Personal Insolvency Act 2012*, solicitors may enter into personal insolvency arrangements or debt settlement agreements. Similar to judgments, any solicitor that enters into such debt arrangements should immediately notify the Society in writing with the details of the debt arrangement, the details of their personal insolvency practitioner, and the date on which the arrangement was entered into.

Where a solicitor who has entered into a debt arrangement is applying for a practising certificate, the Society may issue an unrestricted practising certificate, a practising certificate subject to specified conditions, or refuse to issue a practising certificate, in accordance with the provisions of section 49 of the *Solicitors Act 1954*, as substituted by section 61 of the *Solicitors (Amendment) Act 1994*, as amended by section 2 of the *Solicitors (Amendment) Act 2002*. The solicitor has a right of appeal to the President of the High Court under the same section.

Where a solicitor who has entered into a debt arrangement already holds a current practising certificate, the Society may impose conditions on the solicitor's practising certificate, in accordance with the provisions of section 59 of the *Solicitors (Amendment) Act 1994*. The solicitor has a right of appeal to the President of the High Court under this section.

It should be noted that all solicitors will be required to disclose any debt arrangements entered into in the annual practising certificate application from 2014 onwards. An applicant solicitor who knowingly furnishes information that is false or misleading in a material respect in this application form shall be guilty of misconduct.

Regulatory committee

The power to deal with bankruptcy suspension appeals under section 51 of the *Solicitors Act 1954* and to make decisions on whether to issue a solicitor with a practising certificate, issue a practising certificate subject to specified conditions, or refuse to issue a practising certificate rests with the Regulation of Practice Committee. The committee will deal with such matters on a case-by-case basis, taking account of the facts applicable to each individual case.

Without in any way limiting the exercise by the committee of its powers, but in order to be of assistance, conditions the committee may consider placing on practising certificates include the following:

a) The solicitor shall practise only in the name of a specific practice,
b) The solicitor shall not be a partner or principal of the practice and shall practise only as an assistant or consultant under the supervision of a partner or principal of a practice being a solicitor of at least ten years' standing, to be approved in advance by the Society,
c) The solicitor shall not be the sole signatory of any client account cheque, or electronic equivalent, all of which shall be signed, or the electronic equivalent, by a third party to be approved in advance by the Society,
d) The solicitor shall not sign or otherwise give any solicitor's undertaking, other than an undertaking that shall be signed by a solicitor to be approved in advance by the Society.

Any solicitor appearing before the committee in relation to bankruptcy suspension appeal, judgments or debt arrangements is advised to ensure that any submission to the committee includes strong proposals on how client moneys would be protected, should the solicitor be permitted to practise.

Further information

If you require further information with regard to the consequences of bankruptcy, judgments or debt arrangements for a solicitor, for either yourself or on behalf of a colleague, please contact the Practice Regulation Section. The Society can deal with such queries on a confidential, no-name basis if requested.

LawCare's freephone helpline (1800 991 801) offers free, independent, confidential and personal help with health issues, such as stress, depression, addiction and related emotional problems. It is available 365 days a year, Monday to Friday from 9am to 7.30pm and weekends/English public holidays from 10am to 4pm. LawCare can also be contacted by email at help@lawcare.ie for pastoral care. Further information is available at www.lawcare.ie.

John Elliot
Registrar of Solicitors and Director of Regulation

Bank of Ireland – electronic transfer of loan funds

CONVEYANCING COMMITTEE

The Conveyancing Committee has recently been advised by Bank of Ireland that the bank hopes to move to electronic issue of loan funds in residential mortgage lending by the end of October 2013.

Christmas at Blackhall Place

Celebrate Christmas in the historic settings of Blackhall Place and experience exclusivity and warmth when you walk through the 17th century doors.

- €60.00 per person -

Christmas Dining Package
Minimum numbers of 100 people

- Mulled Wine Reception on arrival
- 3 Course Dinner Menu
- Exclusive Venue Hire
- Festive Decoration
- Full Bar Facilities
- Bar Extension
- Security

- €50.00 per person -

Christmas Buffet Dining Package
Minimum numbers of 30 people

- Mulled Wine Reception on arrival
- Christmas Buffet Dinner Menu
- Exclusive Venue Hire
- Festive Decoration
- Full Bar Facilities
- Bar Extension
- Security

- €35.00 per person -

Christmas Reception Package
Minimum numbers of 30 people

- Mulled Wine Reception on arrival
- Bowl Food Menu
- Exclusive Venue Hire
- Festive Decoration
- Full Bar Facilities
- Bar Extension
- Security

Optional Extras: Sparkling Wine on arrival €5.00 per person | Canapés from €9.50 per person | Christmas DJ from €500.00

Nollaig Shona Duit

Contact us; Tel: 00353 (0) 1 672 4918 | **Email:** events@lawsociety.ie
Web: www.lawsociety.ie/venuehire

Blackhall Place

CHRISTMAS CARDS

IN AID OF THE SOLICITORS' BENEVOLENT ASSOCIATION

Card A
MADONNA AND CHILD
Antonio Correggio

This is an opportunity to support the work of the Solicitors' Benevolent Association, whose needs are particularly acute at Christmas time

GREETING PRINTED INSIDE EACH CARD:

With Best Wishes for Christmas and the New Year

Card B
THE CHRISTMAS EVE BALL

ORDER FORM

Firm: _____ Contact: _____

Address: _____

DX: _____ Tel: _____ Fax: _____

Each card sold in packets of 50 costing €125 (including overprinting of your firm's name). Minimum order 50 cards. Add €7.00 for postage and packaging for **each** packet of 50 cards.

I wish to order _____ pack(s) of card A @ €125, _____ pack(s) of card B @ €125. _____

Text to be overprinted: _____

SAMPLE OF OVERPRINTED TEXT WILL BE FAXED FOR CONFIRMATION BEFORE PRINTING.

I enclose cheque for € _____ payable to Santry Printing Ltd **(€132 per pack)**.

SEND ORDER FORM AND CHEQUE TO:
SBA Christmas Cards, Santry Printing Ltd, Unit 5, Lilimar Industrial Estate, Coolock Lane, Dublin 9. Tel: 842 6444. Contact: Paul.

Legislation update 12 August – 7 October

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 on a link to electronic statutory instruments from www.irishstatutebook.ie

SELECTED STATUTORY INSTRUMENTS

Circuit Court Rules (Personal Insolvency) 2013
Number: SI 317/2013
Amends the interpretation of terms and incorporates a new order 73 in the *Circuit Court Rules* and new forms 52A to 52H in schedule B to regulate the procedure to be employed in proceedings in the Circuit Court under the *Personal Insolvency Act 2012*, as amended by the *Courts and Civil Law (Miscellaneous Provisions) Act 2013*.
Commencement: 9/8/2013

Personal Insolvency Act 2012 (Prescribed Protective Certificate Personal Insolvency Arrangement Application Form) Regulations 2013
Number: SI 331/2013
Prescribes the form to be used when making an application to the Insolvency Service of Ireland for a protective certificate in respect of a proposal for a personal insolvency arrangement.
Commencement: 30/8/2013

Personal Insolvency Act 2012 (Prescribed Fees) Regulations 2013
Number: SI 329/2013
Sets out the fees applicable in respect of an application for a debt relief notice, an application for a protective certificate in relation to a debtor settlement arrangement, and an application for a protective certificate in relation to a personal insolvency arrangement.
Commencement: 30/8/2013

Personal Insolvency Act 2012 (Additional Information to be Contained in the Registers) Regulations 2013
Number: SI 356/2013
Prescribes the information that is to be recorded in the Register of Debt Relief Notices, the Register of Protective Certificates, the Register of Debt Settlement Arrangements, and the Register of Personal Insolvency Arrangements, in addition to such information as is required under part 3 of the act to be recorded in these registers.
Commencement: 16/9/2013

Personal Insolvency Act 2012 (Written Statement Disclosing All of the Debtor's Financial Affairs) Regulations 2013
Number: SI 312/2013
Prescribes the information to be contained in the written statement of a debtor who wishes to become a specified debtor or, as applicable, a party, as a debtor, to a debt settlement arrangement or personal insolvency arrangement, disclosing all of his or her financial affairs, including information in relation to his or her creditors, debts and assets.
Commencement: 9/8/2013

Personal Insolvency Act 2012 (Value Above Which a Debtor Must Not Transfer, Lease, Grant Security Over, or Otherwise Dispose of Any Interest in Property) Regulations 2013
Number: SI 330/2013
Prescribe the amount of €650 as the value above which a debtor in respect of whom a debt settlement arrangement or, as applicable, a personal insolvency arrangement is in effect shall not transfer, lease, grant security over, or otherwise dispose of any interest in property otherwise than in accordance with the terms of the debt settlement arrangement or, as applicable, the personal insolvency arrangement.
Commencement: 30/8/2013

Personal Insolvency Act 2012 (Prescribed Debt Relief Notice Application Form) Regulations 2013
Number: SI 333/2013
Prescribe the form to be used when making an application to the Insolvency Service of Ireland for a debt relief notice.
Commencement: 30/8/2013

Personal Insolvency Act 2012 (Schedule of Creditors) Regulations 2013
Number: SI 334/2013
Prescribes the additional information to be included in the schedule of creditors in connection with an application for a protective certificate for a debt settlement arrangement or a personal insolvency arrangement.
Commencement: 30/8/2013

Personal Insolvency Act 2012 (Procedures for the Conduct of Creditors' Meetings) Regulations 2013
Number: SI 335/2013
Prescribes procedures relating to the conduct of creditors' meetings called pursuant to the *Personal Insolvency Act 2012*, ss70, 82, 106 and 119.
Commencement: 30/8/2013

Personal Insolvency Act 2012 (Prescribed Protective Certificate Debt Settlement Arrangement Application Form) Regulations 2013
Number: SI 332/2013
Prescribe the form to be used when making an application to the Insolvency Service of Ireland for a protective certificate in respect of a proposal for a debt settlement arrangement.
Commencement: 30/8/2013 G

Prepared by the Law Society Library.

BRIEFING

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 Jacqueline M Durcan, solicitor, formerly practising as Durcans Solicitors, 1 Hazel Grove, Spencer Park, Castlebar, Co Mayo, and in the matter of the *Solicitors Acts 1954-2008* [7083/DT86/11 and 2012 no 70 SA]
Law Society of Ireland (applicant)
Jacqueline M Durcan (respondent solicitor)
On 12 July 2012, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in her practice as a solicitor in that she:

a) Failed to comply with an undertaking given by her on 5 July 2005, in respect of named clients, over properties in Co Mayo to AIB Bank plc, expeditiously or within a reasonable time or at all, whereby she, among other things, undertook to stamp and register the documents of title to give AIB Bank plc a first legal mortgage/charge over the properties and to forward documents of title and certificates of title to AIB Bank plc duly registered,
b) Failed to correspond adequately or at all to the complainant's correspondence, in particular letters dated 23 April 2009 and 1 September 2009,
c) Failed to respond adequately to the Society's correspondence, in particular letters dated 16 March 2010, 31 March 2010, 23 April 2010, 10 May 2010, 31 May 2010, 28 June 2010, 27 July 2010, 3 August 2010, 12 August 2010, 27 September 2010, 26 October 2010 and 29 October 2010,
d) Failed to comply adequately or at all with the directions of the committee meeting on 26 May 2010.

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

a) That the name of the respondent solicitor shall be struck from the Roll of Solicitors,
b) That the Society do recover the costs of the Solicitors Disciplinary Tribunal proceedings, to include witness expenses and the costs of the High Court application against the respondent, to be taxed in default of agreement.

In the matter of Katherine MA Ryan, a former solicitor previously practising under the style and title of Ryan & Company, Solicitors, at 42 Woodley Park, Kilmacud, Dublin 14, and in the matter of the *Solicitors Acts 1954-2008* [6970/DT97/11]
Law Society of Ireland (applicant)
Katherine MA Ryan (respondent solicitor)
On 5 March 2013, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in her practice as a solicitor in that she:

a) Failed to comply with an undertaking dated 12 August 2002 given to Bank of Ireland Mortgages in respect of a named property in Santry, Dublin 9, and the named borrowers in a timely manner or at all,
b) Failed to comply with an undertaking dated 7 January 2003 given to Bank of Ireland Mortgages in respect of a named property in Chapelizod, Dublin 20, and a named borrower in a timely manner or at all,
c) Failed to comply with an undertaking dated 3 June 2003 given to Bank of Ireland in respect of a named property in Dublin 7 and the named borrowers in a timely manner or at all,
d) Failed to comply with an undertaking dated 8 December 2004 given to Bank of Ireland in respect of a named property in Bray, Co Wicklow, and the named borrowers in a timely manner or at all,
e) Failed to comply with an undertaking dated 4 May 2005 given to the Bank of Ireland in respect of a named property in Donabate, Co Dublin, and a named borrower in a timely manner or at all,
f) Failed to comply with an undertaking dated 6 June 2007 given to Bank of Ireland in respect of a named property in Stillorgan Road, Co Dublin, on behalf of the named borrowers in a timely manner or at all,
g) Failed to comply with an undertaking dated 22 August 2007 given to Bank of Ireland in respect of a named property in Blackrock, Co Dublin, in respect of named borrowers in a timely manner or at all,
h) Failed to comply with an undertaking dated 20 February 2006 given to ICS Building Society in respect of a named property in Naas, Co Kildare, and the named borrowers in a timely manner or at all,
i) Failed to comply with an undertaking dated 12 March 2008 given to ICS Building Society in respect of a named property in Malahide, Co Dublin, and the named borrowers in a timely manner or at all,
j) Failed to respond to the Society's correspondence in connection with the complaint, and in particular the Society's letters of 28 July 2010, 20 August 2010, and 2 September 2010, in a timely manner or at all,
k) Failed to attend the meeting of the Complaints and Client Relations Committee on 1 October 2010, despite being required to do so by letter dated 22 September 2010.

The tribunal ordered that the respondent solicitor:

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

The solicitor had previously been struck off the Roll of Solicitors on 24 October 2011 by order of the High Court.

In the matter of Alexander M Gibbons, a solicitor previously practising as Gibbons & Company, Solicitors, Riverside, Kent Street, Clonakilty, Co Cork, and in the matter of the *Solicitors Acts 1954-2011* [5839/DT56/12 and High Court Record no 2013 no 57SA]
Law Society of Ireland (applicant)
Alexander M Gibbons (respondent solicitor)
On 27 November 2012, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Attempted to mislead the Society by sending letters to the Society on 30 May 2011 and 28 July 2011 purporting to be from a named assistant solicitor in the practice, when these letters emanated from the solicitor himself,
b) Failed to respond to the Society's correspondence, and in particular the Society's letters of 17 December 2010 and 3 March 2011, in a timely manner or at all,
c) Failed to comply with the direction of the Complaints and Client Relations Committee made at its meeting of 2 June 2011 that the solicitor make a contribution of €500 towards the costs incurred by the Society in dealing with this matter.

The tribunal ordered that the matters go forward to the President of the High Court and, on 24 June 2013, the President of the High Court made the following order:

a) That the name of the respondent solicitor be struck from the Roll of Solicitors,

b) That the respondent solicitor do pay to the Society the costs of the proceedings before the High Court and the costs of the proceedings before the Solicitors Disciplinary Tribunal, to include all witness expenses to be taxed in default of agreement.

In the matter of Edward McGarr, solicitor, of McGarr Solicitors, 12 City Gate, Lower Bridge Street, Dublin 8, and in the matter of the *Solicitors Acts 1954-2011* [3619/DT68/12]
Named client (applicant)
Edward McGarr (respondent solicitor)

On 18 July 2013, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in respect of the following complaints as set out in the applicant's affidavit:

a) "Failing to supply [the applicant] with an estimate of his costs at a crucial time when an 'all in' settlement offer was made, so that [the applicant] might determine how much of the sum would come to [him] (check emails 9 and 10). The offer was put to [the applicant] on 12 March 2008, and [the respondent solicitor] repeatedly refused to supply [the applicant] with a written cost estimate until 28 November 2008, and he only supplied it then in response to a registered letter that [the applicant] was forced to send him demanding [the applicant's] rights (see item page 17)."
b) "Failing repeatedly to respond to [the applicant's] correspondence (check sample of 68 emails and letters, which clearly illustrate this grievance and give an overall picture of [the respondent solicitor's] egregious behaviour towards [the applicant] since [the applicant] hired him)."
c) "As part of [the applicant's] complaint to the Law Society against [the respondent solicitor], [the applicant] stressed the original terms of [the applicant] taking him on back in early 2001 was on a verbal 'no win, no fee' basis and, in the light of his denying this, [the applicant] accused [the respondent solicitor] in that complaint of not complying with section 68 of the *Solicitors Act* regarding costs. In his initial response letter to the Law Society regarding this accusation, [the respondent solicitor] focused on the estimate of November 2008 as his key line of defence that he had complied with s68. When the Complaints Department showed some dissatisfaction with [the respondent solicitor's] first letter, [the respondent solicitor] responded by sending them an earlier estimate that he purported to have sent [the applicant] at the outset of the case. [The applicant] flatly denied ever receiving this estimate. If it had any basis in reality, [the respondent solicitor] would surely have referred to it in his earlier letter of defence to the Law Society, and he most certainly would have referred [the applicant] to it in response to countless requests [the applicant] made to him over the years to supply [the applicant] with a cost estimate. And finally, the fact that [the respondent solicitor] never approached [the applicant] for a portion of the fee that is part of the concocted estimate during the long term of [their] association speaks for itself."

The tribunal ordered that the respondent solicitor:

a) Do stand censured,
b) Pay the sum of €7,500 as part restitution to the applicant without prejudice to any of his legal rights,
c) Pay the sum of €600 as a contribution towards the expenses of the applicant.

Eurlegal

Edited by TP Kennedy, Director of Education

Knut the Berlin bear makes his (trade) mark

Knut the polar bear was arguably Berlin Zoo's most famous resident. The trademark associated with his name will remain property of the zoo, the EU General Court ruled in September 2013 in Case T-250/10, *Knut IP Management v OHMI – Zoologischer Garten Berlin (Knut – Der Eisbär)*.

Knut captured the imagination of the world in 2006 after he was apparently abandoned by his mother at the Berlin Zoo. He was one of the few polar bears ever to have been born in captivity. Zoo officials applied for a trademark of his name as 'Knud' and – before his death – the bear generated over €5 million in profits for the zoo from the sale of Knut-themed merchandise. Even after his death in 2011, his fame continued, and his stuffed remains now form part of the collection of the Berlin natural history museum.

In April 2007, a British company, Knut IP Management, attempted to register 'Knut – der Eisbär' ('Knut – the polar bear') with the EU's trademark office, OHIM. It had planned to sell various goods, toys, games and clothing themed on Knut. This was the same month that Knut appeared on the cover of *Vanity Fair* alongside Leonardo DiCaprio.

'Rowr! I am bear!'

Berlin Zoo understandably opposed the application, citing the obvious likelihood of confusion between Knut der Eisbär and the real Knut, especially in Germany, where he was most famous. There was an already registered trademark for 'Knud', to which it held a license. The zoo argued that a likelihood of confusion existed where the public could believe that the goods or services with respect to which the trademarks at issue are used come from the same undertaking or from economically linked undertakings. This is a core element of trademark law, that of a trademark being a 'badge of origin' of goods or services, which is central to many countries' trademark system and is present both in the CTM system and national trademark law.

The bear necessities

OHIM upheld the zoo's opposition and rejected Knut IP's application.

The decision was appealed, and the General Court of the European Union agreed. In its opinion – so far published in German and French only – the court decided that the two 'bear' offerings were not only similar, they were in fact identical. This is a comparatively rare finding in EU trademark law, where generally the focus is on whether marks are confusingly similar.

The court's reasoning was that, in light of the fact that (a) the goods and services at issue are in part identical and in part similar and (b) the disputed signs, considered as a whole, have major similarities as a result, among other things, of the fact that the relevant public will remember in particular the identical beginning of the trademarks, in this case, the elements 'knud' and 'knut', OHIM could validly conclude that there does not exist, on the part of the relevant public, a sufficient difference between those signs allowing any likelihood of confusion between the earlier mark and the mark applied for to be avoided.

Knut IP Management may well appeal the decision of the General Court before the Court of Justice of the EU, and it has two months within which it may do so. It may well be that Knut's days of fame, at least in trademark law, are not yet over.

Jeanne Kelly is a technology and IP law Partner in Mason Hayes & Curran.

Recent developments in European law

CONSUMER LAW

Case C-59/12, *BKK Mobil Oil Köperschaft des öffentlichen Rechts v Zentrale zur Bekämpfung unlauterne Wettbewerbs eV*, 3 October 2013

The respondent is a German association for the prevention of unfair competition, and the applicant is a health insurance fund established by statute. In 2008, the respondent published on its website the claim that its members risked financial losses if they were to leave that fund for another. The German court found this to be a misleading practice within the meaning of the *Unfair Commercial Practices Directive* (2005/92). It was uncertain whether the directive was applicable to BKK, as a public law body charged with a task of public interest.

The CJEU held that the directive applies to a public law body charged with a task of public interest, such as the management of a statutory health insurance fund. Despite its public status and its task of public interest, such a body must be considered a 'trader' within the meaning of the directive, to which the prohibition on unfair commercial practices applies. The directive does not expressly exclude such bodies from its scope. Its aim of achieving a high level of consumer protection against unfair business-to-consumer commercial practices and, in particular, from misleading advertising, require that protection to be ensured independently of the public or private status of the body at issue or of its specific task.

Case C-32/12, *Soledad Duarte Hueros v Autociba SA, Automóvils Citroën España SA 3*, October 2013

In July 2004, Ms Duarte Hueros purchased a car from Autociba. As water leaked through the roof,

she returned the car. After several unsuccessful attempts to fix the problem, she requested that the car be replaced. Autociba refused to do so. Ms Duarte Hueros then started proceedings seeking to have the contract rescinded and the repayment of the purchase price. The Spanish court held that, as the defect in the vehicle was minor, rescission of the contract could not be granted. She was entitled to a reduction in the sale price but, under Spanish procedural rules, this could not be given, as she did not request such a reduction in her application. The court was limited to the issues pleaded before it, and the applicant could not seek such a remedy in subsequent proceedings as, under Spanish law, the principle of *res judicata* extends to all claims that could already have been made in earlier proceedings. It referred the matter to the CJEU, asking whether this procedural legislation is compatible with the directive on the sale of consumer goods and associated guarantees (1999/44/EC).

The Court of Justice noted that the purpose of the directive is to ensure a high level of consumer protection. However, it merely requires member states to adopt such measures as are necessary to enable consumers to exercise their rights effectively, without indicating the processes under which those rights are to be asserted in judicial proceedings. National procedural rules must not make it, in practice, impossible or excessively difficult to exercise the rights conferred by EU law. In this case, Spanish procedural law made it impossible to obtain a reduction in the price of the goods due to a minor defect in them. Such procedural rules are liable to undermine the effectiveness of the EU's consumer protection legislation. The Spanish legislation does not comply with the EU principle of effectiveness.

EMPLOYMENT LAW

Joined Cases C-335/11 and C-337/11, *Ring and Skouboe Werge*, 11 April 2013

Directive 2000/78 on equal treatment in employment and occupation creates a general framework for combating, in particular, discrimination on grounds of disability. The directive was transposed by the Danish legislation on the prohibition of discrimination in the labour market. Danish employment law provides that an employer may terminate an employment contract with a "shortened period of notice" of one month if the employee has been absent because of illness, with his salary being paid, for 120 days during the previous 12 months. In this case, a Danish trade union, HK Danmark, brought two actions for compensation on behalf of Ms Ring and Ms Skouboe Werge because of their dismissal with a shortened notice period. The union argued that, as the two workers were suffering from a disability, their employers were required to offer them a reduction in working hours. It also argued that national legislation on the shortened notice period cannot apply to those two workers, since their absences due to illness were caused by their disability. The Danish court asked the CJEU to clarify the concept of disability. The court asked whether a reduction in working hours may be regarded as reasonable accommodation and whether the Danish legislation on the shortened notice period is contrary to EU law. 'Disability' is not defined in the *Directive on Equal Treatment in Employment and Occupation* (2000/78/EC).

In Case C-13/05, *Chacon Navas*, the CJEU held that the concept is distinct from illness and must be understood as referring to a long-term limitation that results in particular from physical, mental or psychological impairments and hinders the participation of the person concerned in professional life. Subsequently, the EU ratified the UN *Convention on the Rights of Persons with Disabilities*. The directive must be interpreted, as far as possible, in a manner consistent with that convention. The court stated that the concept of disability must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable, provided that the illness entails a long-term limitation on the effective participation of the person in professional life on an equal basis with other workers. The concept of disability does not necessarily imply complete exclusion from work or professional life. A finding that there is a disability does not depend on the nature of the accommodation measures to be taken by the employer, such as the use of special equipment. It will be for the national courts to assess whether, in this case, the workers were persons with a disability. The directive requires the employer to take appropriate and reasonable accommodation measures, in particular to enable a person with a disability to have access to, participate in, or advance in employment. Even if it were not covered by the concept of "pattern of working time" expressly mentioned in the directive, a reduction in working hours may be regarded as an appropriate accommodation measure in a case in which the reduction makes it possible for the worker to continue in his employment. It is for the national court to assess whether a reduction in working hours, as an accommodation measure, represents a disproportionate burden on the employers. The court then stated that the directive precludes national legislation under which an employer can terminate the employment contract with a shortened period of notice if the disabled worker has been absent because of illness, with his salary being paid, for 120 days during the previous 12 months, where those absences are the consequence of the employer's failure to take appropriate and reasonable accommodation measures in order to enable the disabled person to work. The court finally considered whether the national legislation concerning the shortened notice period is liable to produce discrimination against persons with a disability. The national legislation applies in the same way to disabled and non-disabled persons who have been absent for more than 120 days because of illness. Thus, it does not discriminate directly. A worker with a disability is more exposed to the risk of application of the shortened notice period than a worker without a disability, since he has the additional risk of contracting an illness connected with his disability. The legislation is liable to place disabled workers at a disadvantage and brings about a difference of treatment indirectly based on disability. The directive precludes such legislation, unless the legislation, as well as pursuing a legitimate aim, does not go beyond what is necessary to achieve that aim. G

Law Society of Ireland

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Contact details
Email: diplomateam@lawsociety.ie Tel: 01 672 4802 Fax: 01 672 4803 Web: www.lawsociety.ie/diplomas

NOTICES

WILLS

Carwood, James (otherwise Jim) (deceased), late of Ashley Lodge Nursing Home, Tully East, Kildare, and formerly of 6 Merville Court, Finglas, Dublin 11, and 36 St Helena's Court, Finglas, Dublin 11. Would any person having knowledge of a will made by the above-named deceased, who died on 25 January 2011, please contact Vincent & Beatty, Solicitors, 67/68 Fitzwilliam Square, Dublin 2

Condra, Mairead (née Dempsey) (deceased), late of 49 The Walled Gardens, Castletown, Celbridge, Co Kildare. Would any person having knowledge of a will made by the above-named deceased, who died on 16 September 2013, please contact Kilroys Solicitors, 69 Lower Leeson Street, Dublin 2; tel: 01 439 5600, fax: 01 439 5601/02, email: lkeating@kilroys.ie

Cooke, Eileen (deceased), late of 106 Lissadel Drive, Drimnagh, Dublin 12, who died on 2 December 1995. Would any person having knowledge of the whereabouts of any will made by the deceased please contact Robert Twomey of Niall Murphy & Company, Solicitors, 3 Greenhills Centre, Greenhills Road, Walkinstown, Dublin 12; tel: 01 450 6626, email: info@niallmurphysolicitors.ie

Corcoran, Vincent (deceased), late of Honeymount, Roscrea, Co Tipperary. Would any person having knowledge of a will made by the above-named deceased, who died on 25 July 1946, please contact Joseph P Kelly, James J Kelly & Son, Solicitors, Patrick Street, Templemore, Co Tipperary; tel: 0504 31278, fax: 0504 31983, email: info@jjkellylaw.ie

Doyle, Ellen (deceased), late of 4 Parnell Terrace, Arklow, Co Wicklow, who died on 3 April 1998. Would any person having knowledge of any will executed by the above-named deceased contact Frizelle O'Leary & Co, Solicitors, Slaney Place, Enniscorthy, Co Wexford; tel: 053 923 3547, email: postmaster@folco.ie

Dunleavy, Philomena (deceased), late of 18 Annadale Crescent, Marino, Dublin 3. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, found dead on 7 June 2013, please contact Byrne & Company, Solicitors, 11 Malahide Road, Swords, Co Dublin; tel: 01 840 4346, email: reception@byrnesolicitors; DX 91005 Swords

Gilna, Teresa (deceased), late of Ballawley House, Sandyford, Dublin 18. Would any person having knowledge of a will made by the above-named deceased, who died on 16 May 2013, please contact Peter Duff & Co, 34 Main Street, Blackrock, Co Dublin; tel: 01 278 2903, email: info@peterduff.com

Hayes, Maurice (deceased), late of Leamybrien, Kilmacthomas, Co Waterford. Would any person having knowledge of a will made by the above-named deceased please contact David Burke & Co, Solicitors, 24 Mary Street, Dungarvan, Co Waterford; DX 75 005 Dungarvan; tel: 058 44533, fax: 058 44848, email: info@dermotobrien@davidburke.ie

Hodnett, Nora 'Noni' (deceased), late of Knockeyoolihan, Cappoquin, Co Waterford. Would any person having knowledge of a will made by the above-named deceased please contact David Burke & Co, Solicitors, 24 Mary Street, Dungarvan, Co Waterford; DX 75005 Dungarvan; tel: 058 44533, fax: 058 44848, email: dermotobrien@davidburke.ie

Kelly, Bernard (deceased), late of Upper Mullaghmore, Cliffoney PO, Co Sligo, and latterly of Gurteen, Ballina, Co Mayo. Would any solicitor holding or having knowledge of a will made by the above-named deceased, who died on 20 November 2011, please contact Denis M Molloy, Solicitors, Bridge Street, Ballina, Co Mayo; tel: 096 70660, email: molloylaw@eircom.net

McSweeney, Denis Francis (deceased), late of East Ferry Nursing Home, Co Cork, formerly of 7 St Mary's Road, Midleton, Co Cork, and formerly of 'The Commons', Cloyne, Co Cork, who died on 29 May 2013. Would any solicitor holding or having knowledge of a will made by the above-named deceased please contact Jeremiah Healy, Healy Crowley & Company, Solicitors, West Street, Tallow, Co Waterford; tel: 058 56457, email: info@healycrowleysolrs.com

Murphy, Brendan (deceased), late of 102 Kickham Road, Inchicore, Dublin 8. Would any person having knowledge of a will (or documents relating to a will) made by the above-named deceased, who died on 29 March 2013, please contact Mooney O'Sullivan, Solicitors, 7 Orchardstown Park, Rathfarnham, Dublin 14; DX 154006 Templeogue; tel 01 493 431, email: harry@mooneyosullivan.ie

O'Sullivan, Mortimer Joseph (deceased), late of 2 Knocknaveagh Close, Seskin, Bantry, Co Cork, and Ardra East, Bantry, Co Cork, who died on 8 September 2013 at Cork University Hospital. Would any solicitor holding/having knowledge of a will made by the above-named deceased please contact Mary Buckley, solicitor, Patrick Buckley & Co, Solicitors, 5/6 Washington Street West, Cork; tel: 021 427 3198, fax: 021 427 5207, email: mbuckley@pbuckley.ie

RATES

Professional notice rates

RATES IN THE PROFESSIONAL NOTICES SECTION ARE AS FOLLOWS:

- **Wills** – €147 (incl VAT at 23%)
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ALL NOTICES MUST BE PAID FOR PRIOR TO PUBLICATION. CHEQUES SHOULD BE MADE PAYABLE TO LAW SOCIETY OF IRELAND. Deadline for December *Gazette*: 20 Nov 2013. For further information, contact the *Gazette* office on tel: 01 672 4828 (fax: 01 672 4877)

NOTICES

Shine, Maureen (deceased), late of Curraghmore, Kiltoom, Athlone, Co Roscommon. Would any person having knowledge of the personal representative and/or next of kin of Maureen Shine, deceased, please contact Byrne Carolan Cunningham Solicitors, 39/41 Mardyke Street, Athlone, Co Westmeath; tel: 090 647 8433, fax: 090 647 8455, email: info@bccsolicitors.ie

MISCELLANEOUS

Statutory notice to creditors

In the estate of Ronald Ringrose, late of 11 Avoca Road, Blackrock, in the county of Dublin

Notice is hereby given pursuant to section 49 of the *Succession Act 1965* that particulars in writing of all claims against the estate of the above-named deceased, who died on 25 July 2011 (probate of whose will was granted to the executor on 11 November 2011), should be furnished to the undersigned solicitors for the executors on or before 20 December 2013, after which date the assets will be distributed having regard only to the claims furnished.

Eamonn Greene & Company, Solicitors, 19 Clanwilliam Square, Dublin 2

Date: 1 November 2013

TITLE DEEDS

Anyone holding title documents on behalf of the late Jeremiah Finbarr O'Mahony (deceased), late of 17 Cedarwood Close, Highfield Park, Galway, please contact Diarmaid Falvey, Solicitors, Church Street, Cloyne, Co Cork; tel: 021 465 2590, fax: 021 465 2868, email: info@diarmaidfalvey.ie

In the matter of the *Landlord and Tenant (Ground Rents) Acts 1967-1994*: an application by the Dublin Loft Company Limited

Take notice that any person having any interest in the freehold estate of the property known as 6, 7 and 8 Hendrick Street, in the parish of St Paul and city of Dublin, being the premises demised by indenture of lease dated 6 September 1965 and made between Eva Stanley Dowling and Olivia Pamela Beaujolois Mills of the one part and Joseph Anthony Delmar of the other part for a term of 100 years from 1 July 1965, subject to the yearly rent of £50 thereby reserved, should give notice of their interest to the undersigned.

Further take notice that the applicant intends submitting an application to the county registrar for the city of Dublin for the acquisition of the freehold interest in the aforesaid property, and any party asserting that they hold a superior interest in such property are called upon to furnish evidence of title to the same to the below signed within 21 days from the date of this notice.

In default of any notice as referred to above being received, the applicant intends to proceed with the application before the county registrar at the expiry of the said period of 21 days and will then apply to the county registrar for the city of Dublin for such directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interests including the freehold reversion in the said premises are unknown or unascertained.

Date: 1 November 2013

Signed: Sheehan & Company (solicitors for the applicant), 1 Clare Street, Dublin 2

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 David Merrigan

Any person having a freehold estate or any intermediate interest in all that and those part of the lands at Brockagh, Laragh, Co Wicklow, containing 0.139 hectares or thereabouts statute measure and more particularly set out in the map annexed to an indenture of assignment dated 20 December 2000 between John Merrigan of the one part and David Merrigan of the other part, and thereon surrounded by a red verge line and marked with the letter 'C', being part of the premises the subject of a lease dated 1 February 1957 between Hubert Briscoe and John G Byrne for a term of 99 years from 29 September 1956 at a rent of £50 per annum and applicable to lands at Brockagh, Co Wicklow, lying and being in the parish of Derrylossory, barony of North Ballinacor, and county of Wicklow, containing two acres, one rood and three perches Irish plantation measure, or three acres, three roods and 27 perches including the above premises.

Take notice that David Merrigan, being the person currently entitled to the lessees' interests in the said premises, intends to apply to the county registrar for the county of Wicklow for the acquisition of the freehold interest and all intermediate interests in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid property is called upon to furnish evidence of title to same to the below-named within 21 days from the date of this notice.

In default of any such notice

NOTICES

being received, the said David Merrigan intends to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the county of Wicklow for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interests including the freehold reversion in each of the aforesaid premises are unknown or unascertained.

Date: 1 November 2013

Signed: Mark Cassidy & Company (solicitors for the applicant) St Peter's Hill, Drogheda, 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

Any person having any interest in the fee simple estate or any intermediate interest or interests in all and singular that piece or part of Clerys Department Store, Lower O'Connell Street, in the parish of St Thomas and city of Dublin, bounded at the rear on the east by Earl Place, on the north and south by what is or was formerly known as 5 and 6 Earl Place respectively, and on the west by the rear of what is or was formerly known as 24, 25 and 26 Lower O'Connell Street aforesaid, held under a lease dated 31 January 1811 made between (1) George Duff and (2) Luke Duff for a term of 882 years from 25 March 1811, subject to the yearly rent of £22.15.0 (subsequently adjusted to £20.0.6/€25.42) and which said premises along with an adjoining piece of ground then intended to form a passage and both now comprising an integral part of Clerys Department Store building were demised or subdemised for the residue of the said term and at the same yearly rent as the aforesaid lease of 31 January 1811, by virtue of a lease dated 4 December 1830 made between (1) John McDonnell and Eleanor Duff (executors of the said Luke Duff) and (2) Nicholas Walsh.

Take notice that OCS Properties Limited, being the body entitled to the lessee's interest or interests in the said term or terms demised and subdemised as aforesaid, intends to apply to the county registrar for the city of Dublin for the acquisition of the fee simple estate and any intermediate interest or interests in the said property, and any party claiming that they hold the fee simple or any such intermediate interest in the aforesaid property is called upon to furnish evidence of the title thereto to the under-mentioned solicitors within 21 days of 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 November 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 (Ground Rents) (No 2) Act 1978* and in the matter of an application by John Foley

Any person having a freehold estate or any intermediate interest in all that and those 48 Garville Avenue, Rathgar, being portion of the premises the subject of two fee farm grants dated 18 October 1850 between Hervey Francis de Montmorency of the one part and Maxwell McMaster of the other part, amounting to £92.50 and £27.84 per annum, take notice that John Foley, being the person currently entitled to the fee farm grantee's interest in the said premises, intends to apply to the county registrar for the county of Dublin for the acquisition of the freehold interest and all intermediate interests in the aforesaid properties, and any party asserting that they hold a superior interest in the aforesaid properties (or any of them) are called upon to furnish evidence of title to same to the below-named within 21 days from the date of this notice.

In default of any such notice being received, John Foley intends to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the county of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interests including the freehold reversion in each of the aforesaid premises are unknown or unascertained.

Date: 1 November 2013

Signed: Keans (solicitors for the applicant), 2 Upper Pembroke Street, Dublin 2

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

Death drugs shortage gets compounded

Several US states are turning to lightly regulated pharmacies for lethal injection drugs due to a shortage. This has prompted a host of court battles and at least one stay of execution because of concerns that tainted or impure drugs could inflict cruel and unusual punishment on inmates, NBC reports.

Major pharmaceutical companies have clamped down on the sale of drugs for executions in recent years in order to avoid association with the punishment. At least five states where the death penalty is legal – South Dakota, Texas, Ohio, Georgia and Colorado – are looking to 'compounding' pharmacies to provide alternatives to the shortage. Compounding pharmacies mix drugs for prescriptions and are mostly exempt from federal oversight.

Bryan Stull, a lawyer specialising in capital punishment for the American Civil Liberties Union, says: "The lack of transparency around the form and source of the drugs puts our clients at an unjustified risk of being executed with drugs that either will not work as planned or will cause excruciating pain and suffering."

Man's sterilisation is legal first

A High Court judge in England has sanctioned the sterilisation of a man with learning disabilities "in his best interests". It is the first time in England and Wales that a court has sanctioned a man's sterilisation, the BBC reports.

The case came to court because of undisputed evidence that the man, DE, does not have the capacity to decide whether or not to consent to sterilisation, meaning a judge had to make the decision.

He has a three-year-old son already with his girlfriend, who also has learning disabilities, but of a less severe nature.

Mrs Justice Eleanor King concluded that another pregnancy would cause "further and probably more serious psychological distress and consequences for DE". She ruled that a vasectomy could take place after hearing that another child could cause the man "psychological harm".

Orange you glad to see me?

One day, in contract law class, Prof Jepson asked one of his better students a question: "Now, if you were to give someone an orange, how would you go about it?"

The student replied, "Here's an orange."

The professor was livid. "No! No! Think like a lawyer!"

The student then recited: "Okay, I'd tell him, 'I hereby give and convey to you all and singular, my estate and interests, rights, claim, title, claim and advantages of and in, said orange, together with all its rind, juice, pulp, and seeds, and all rights and advantages with full power to bite, cut, freeze and otherwise eat, the same, or give the same away with and without the pulp, juice, rind and seeds, anything herein before or hereinafter or in any deed, or deeds, instruments of whatever nature or kind whatsoever to the contrary in anywise notwithstanding…"

(From Richard Hammond)

Thousands of obsolete laws are to face the chop

Thousands of obsolete regulations and laws are to be cut from the Irish statute book as part of an ongoing programme to consolidate legislation and cut away the legal 'dead wood', *TheJournal.ie* reports.

Public Expenditure and Reform Minister Brendan Howlin said that four new *Statute Law Revision Bills* would "further reduce the outdated and unnecessary legislation cluttering our statute book and pave the way for further modernisation measures".

One of the first to be axed will be an order from King George III proclaiming that "a general fast and humiliation" be observed throughout Great Britain and Ireland to celebrate the coming of the Union in 1801, so that his subjects may avoid God's "wrath and indignation" for their sins.

Another passage destined for the chop is a 1764 proclamation "seeking the apprehension of a Kilkenny-based gang known as the 'White Boys'." The group was convicted of "committing the most violent outrages", only to be freed by an angry mob "while en route to the county gaol".

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Opportunities

Banking Partner, Dublin

Our Client has a top Dublin banking practice. An opportunity has arisen at Partner level for a highly experienced transactional banking Lawyer. General banking with structured finance experience is essential. Further experience in Asset Finance is an advantage but not a necessity. This role is offering a superb remuneration package and the autonomy to grow your own team.

Banking Solicitors x 2, Dublin

Our Client, a leading law firm is seeking banking solicitors to join their highly regarded team. The role will entail a mix of mainstream banking work and structured Finance transactions. The successful applicants 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.

Corporate Lawyers x 2, Dublin

Our Client, a leading Irish law firm, is seeking two corporate lawyers to join the firm. The candidates will have big-ticket transactional experience and have gained solid experience in negotiating and drafting agreements. Attention to detail is essential as is the ability to use one's initiative. This is a superb opportunity to join a dynamic environment, which offers huge variety in work and excellent career prospects.

Senior Insurance Defence Solicitor, Dublin

Our Client is a highly regarded litigation law practice with a reputation for excellence in the field of insurance litigation. You will specialise in professional negligence defence litigation, acting for professional indemnity insurers and the insured's in a variety of claims. The successful applicant will have substantial experience in the field of insurance defence litigation and be capable of 'hitting the ground running' with a large number of files.

Commercial Litigation Solicitor, Dublin

Our Client, a top tier law firm, is urgently seeking an experienced commercial litigation Solicitor to join their thriving litigation and dispute resolution team. You will work mainly on financial services, professional negligence and shareholder litigation matters as well as boardroom disputes and investigations. This is an exciting opportunity to join a growing practice offering a superb career opportunity and attractive salary.

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Banking: Assistant to Senior Associate

Corporate: Assistant to Senior Associate

Commercial Property: Associate to Senior Associate

Energy & Natural Resources: Associate to Senior Associate

IT/IP: Assistant to Senior Associate

Insolvency/Restructuring: Assistant to Senior Associate

Private Client/Commercial (Munster): Associate to Senior Associate

Regulatory/Compliance: Associate to Senior Associate

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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