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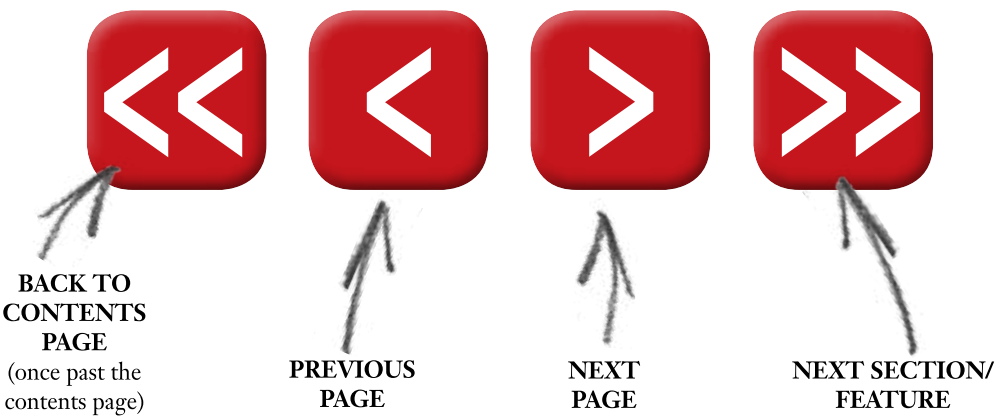

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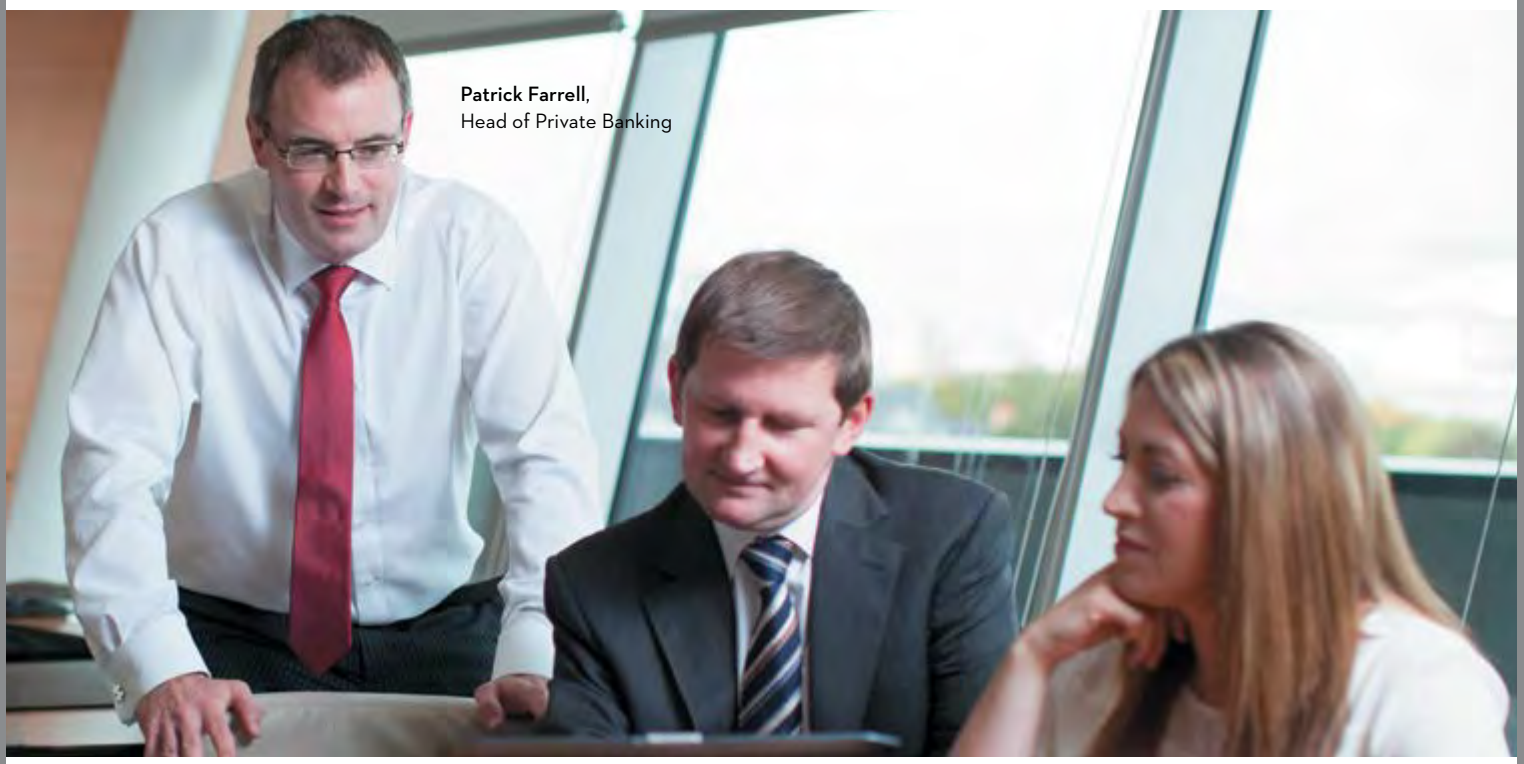

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PROFESSIONAL PRIDE AND PREJUDICE

Is Ireland's system of selection of judges of the High and Supreme Courts prejudiced against solicitor candidates and in favour of those from the Bar? Let's begin with some statistics. Since the *Courts and Court Officers Act 2002*, which made solicitors eligible for appointment as judges of the High and Supreme Courts, 41 appointments have been made to the High Court bench and eight to the Supreme Court. These are precise figures. A more approximate, but still accurate, figure is that 80% of the practising lawyers in this jurisdiction are solicitors and 20% are barristers.

Of the total of 49 High and Supreme Court appointments made since 2002, just four of those appointed were solicitors. That number increased to four only a couple of months ago. By common agreement, the solicitors who have served on the High Court bench have done so with distinction and have been of a calibre at least on a par with the best of the judges whose professional backgrounds were at the Bar. To save you the mental arithmetic, the percentage that four represents of 49 is 8%.

So, 80% of the legal profession has produced just 8% of the senior judicial appointments over the last 12 years, and solicitors were eligible for all such appointments.

> There is a genuine public interest at stake here

Shocking imbalance

So why this stark and even rather shocking imbalance? When the Society has raised this question with successive Ministers for Justice over the years, the only excuse we have been given has been that the solicitor candidates for the High Court have been insufficient in numbers and have not been representative of the highest calibre available in the solicitors' profession. Whether or not that was true in the past, I am absolutely satisfied it is not true today. Very high-calibre solicitor candidates have been passed over when High Court appointments have been made by the Government in recent times.

This is not to be understood as even the slightest criticism of the highly able barristers who have been appointed to the High Court bench. I have no reason whatsoever to doubt that every one of them is very well qualified and suited to the appointment they have deservedly received.

My only question is this: why was no equally well-qualified and suitable solicitor candidate appointed?

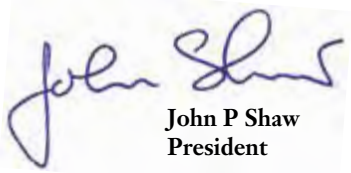
Residual prejudice?

Where does the problem lie? Is it at Judicial Appointments Advisory Board (JAAB) level? Perhaps not, if solicitor candidates are – as they are – being approved at that level and sent to Government. The problem seems to arise, primarily at least, between the JAAB and the cabinet and, perhaps, within the cabinet.

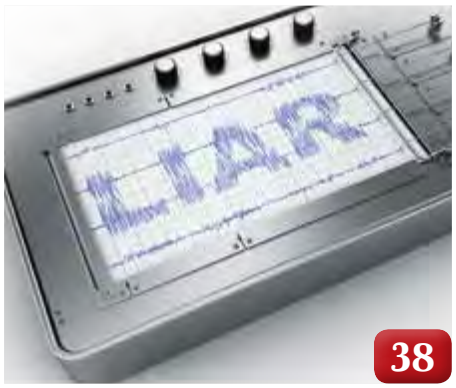
In reality, this is not simply a matter of 'division of spoils' between two branches of the legal profession. There is a genuine public interest at stake here. As has been recognised by successive governments since a 1999 report on the subject, the public would benefit from appointment to senior judicial office from a wider pool of talent with a more diverse set of relevant legal skills, together with a wider experience of the law and of life. Indeed, the Chief Justice reminded the current Government of its policy in this regard in correspondence recently.

The public interest needs high-quality solicitor candidates to be appointed to the High and Supreme Courts in far greater numbers than has been the case over the last 12 years. Why is it not happening? Is Ireland's system of selection of judges of the High and Supreme Courts prejudiced against solicitor candidates and in favour of those from the Bar?

All the evidence suggests to the Law Society that it is.



John P Shaw
President



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New judges nominated to the High Court

The Government nominated three new High Court judges on 12 March 2014 – Bernard Joseph Barton SC, Deirdre Murphy SC and Brian Cregan SC – for appointment by the President.

They will fill vacancies that arose from the recent retirements of Mr Justice John Cooke, Mr Justice Eamon de Valera and Ms Justice Maureen Harding Clark.

Bernard Joseph Barton SC was born in 1951. He was educated at University College Dublin, the Irish Management Institute and the King's Inns. He was called to the Bar in 1977 and to the Inner Bar in 1997.

Deirdre Murphy SC was born in 1953. Educated at St Patrick's College Maynooth, Trinity College Dublin and the King's Inns, she was called to the Bar in 1979 and to the Inner Bar in 1999.

The youngest of the three, Brian Cregan SC, was born in 1961. He was educated at St John's College, Oxford, and the King's Inns. He was called to the Bar in 1990 and to the Inner Bar in 2004. He is the author of *Competition Law in Ireland: Digest and Commentary*.

QUB launches new human rights prize

Queen's University Belfast has launched a new human rights prize open to law students from the North, the Republic, and Britain, *writes Caoimhe Harney*.

The prize offers a full-fees scholarship for the LLM at Queen's to undergraduate students in the international award category.

A second prize offers law students already studying at third level in Northern Ireland the opportunity of winning a two-month paid internship at human rights law firm KRW Law in Belfast.

To enter, students must write essays relating to human rights law and explain how it could be applied in particular situations. Specific rules and guidelines apply for each prize. Adjudicators will include Prof Susan Marks (London School of Economics), Mark Kelly (director, Irish Council for Civil Liberties), Owen Bowcott (legal affairs correspondent for *The Guardian*, and Joe McVeigh and Niall Murphy (KRW Law).

For more details, visit http://go.qub.ac.uk/hrprize.

Domain name sucks

The Internet Corporation for Assigned Names and Numbers (ICANN), which approves generic top-level domains, is currently considering whether to allow the domain name '.sucks' to be registered, *reports Bill Holohan*.

ICANN is currently rolling out hundreds of new generic, top-level domains over the course of several years. Words like '.faith' and '.camera' are being added to the current mix that includes '.com' and '.org'.

Several companies are arguing that ICANN should allow '.sucks' to be added to that list. The debate is just getting started, but the fact that it is even being considered for approval by ICANN suggests that it has already cleared the first hurdle. You can find out more on www.icann.org.

Library loan periods change!

Thanks to all who took part in the recent library survey, *writes Mary Gaynor (head of Library and Information Services)*. We asked you to rate our services under various headings, to tell us what you value about it and to make suggestions about how we can improve.

Members and students have indicated that they would favour longer loan periods and access to more materials. Providing members and students with key textbooks is central to our services. For instance, our postal/courier delivery to members is unique among professional organisation libraries.

As a result of your comments, we are changing the loan period as follows:

- **Member book loans – loans are being extended from ten days to 14 days, with a renewal of a further seven days subject to availability,**
- **Student book loans are being extended from two days to five days,**
- **CPD lecture papers over two years old will be available to borrow. Lecture papers under two years old are available to purchase from the CPD department.**

We buy books based on timeliness, relevance and likely usage. If you have a book purchase suggestion, please email m.gaynor@lawsociety.ie.

DATE FOR YOUR DIARY

25th/26th April 2014

Law Society of Ireland

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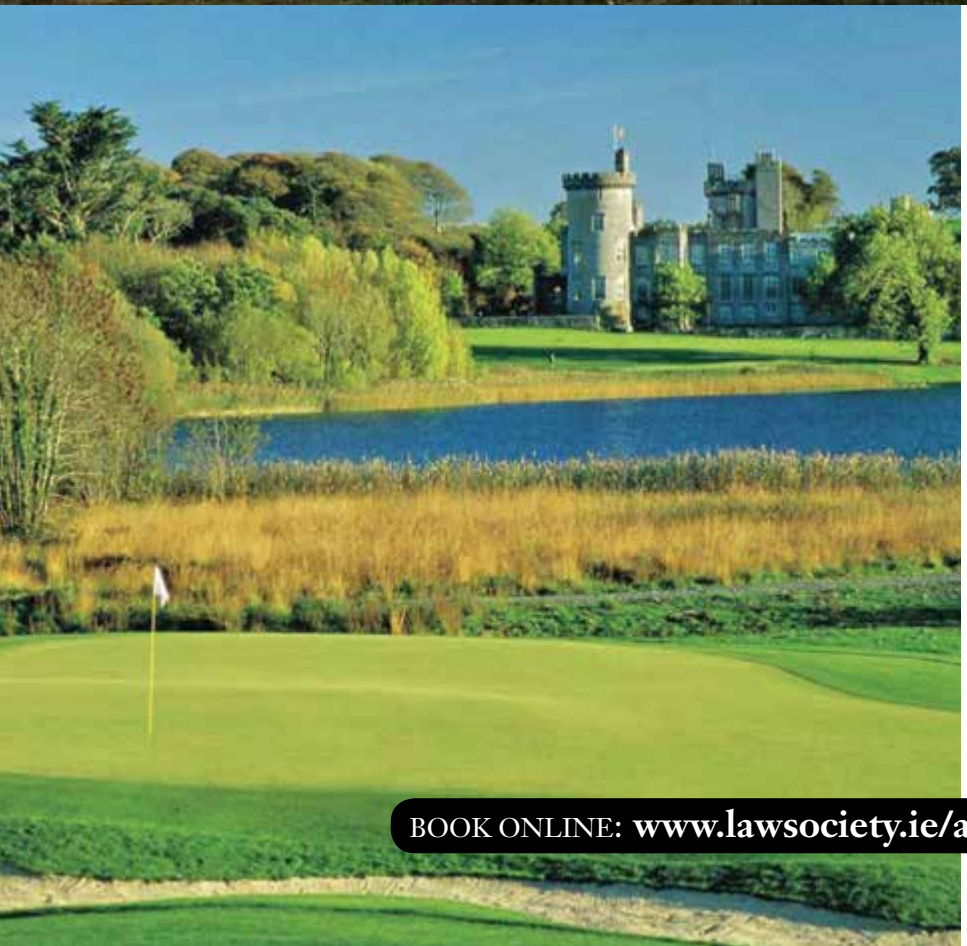
Dromoland Castle, Co Clare



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Full delegate package: €300
Access to full conference, Black Tie Gala Dinner on Friday, 25th April, B&B accommodation for one night sharing with another delegate or registered accompanying person and a light lunch on Saturday, 26th April, all in Dromoland Castle. If you will not be sharing and request a single room, a single supplement of €75 will be charged.

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Additional night: €200
B&B accomodation per room

BOOK ONLINE: **www.lawsociety.ie/annual-conference**

Society's concern over recording of garda station phone calls

Director general Ken Murphy has expressed the Law Society's concerns at the recording of incoming and outgoing telephone calls in garda stations.

Speaking on RTÉ's *Drivetime* on 25 March, three hours after the Government had announced it was to set up a statutory commission of investigation into the recording of incoming and outgoing telephone calls in a large number of garda stations, Murphy said that he had spoken with a number of members of the Society's Criminal Law Committee about the matter. The committee comprises solicitors who regularly counsel people in custody, "often advising them on the telephone from garda stations where these individuals are suspects in custody", he said.

"I can say that they and the Society, as a whole, are shocked by this," he said. "They did not suspect that these phone calls were being recorded. They had no knowledge of this fact. It's very, very disturbing that that is so. There is a special legal status that attaches to communications between solicitors and clients and, in this context, specifically people in custody who are seeking advice from their solicitors. It's an old-fashioned term, but it's called 'legal privilege'. In this context, it is associated with the individual citizen's right against self-incrimination, which is protected by the Constitution."

Mary Wilson: recordings might help gardaí with their enquiries

Murphy: certainly warrants a commission of investigation

The director general said that, while the Government's statement wasn't clear about whether such conversations were recorded or not, "it seemed to be implied that, potentially at least, conversations of this kind were being routinely recorded, listened into. Why else would they be recorded if they weren't to be subsequently listened into? This has been going on for decades."

Convictions worry

Asked by *Drivetime* presenter Mary Wilson if the concern was whether the content of those telephone conversations would ever become admissible in a court case, or that it might help gardaí in their investigations, the director general responded: "Well this is it: could it be that the information in relation to those calls was being used for the furtherance of investigations, possibly leading to evidence being uncovered, and subsequently contributing to the convictions of individuals in those circumstances?

"If it is so, then there is a very serious question to be asked as to whether some of these convictions are safe, and whether the potential exists at least for the finding to be made that there has been abuse of the criminal justice system by the gardaí.

"We don't know who was involved in, or who made, the decision to record conversations of this kind. We don't know that the particular privileged legal-advice conversations were being recorded, but if they were, and they were being used, then it is a matter of the utmost seriousness and certainly warrants a commission of investigation."

Matter of deepest gravity

He concluded: "The facts have to be established and ultimately published so that people can know whether or not there has been abuse of the administration of justice and whether constitutional rights have been trampled on. Because, if that is so, it is certainly a matter of the deepest gravity, and we can only agree entirely with the tone of the Government statement today in relation to the gravity of this matter."

As the *Gazette* goes to press, the revelations about the recordings have led to the first adjournment of a trial before the criminal courts. Lawyers for two men accused of IRA membership successfully applied to the Special Criminal Court on 26 March 2014 to have their trial adjourned "in light of recent events".

Lawyers for both men told the court that their clients had held telephone calls with their solicitors while in garda custody, before they were subsequently interviewed by garda officers.

Disclosure has been sought for any records of the phone calls that might exist. Prosecuting counsel Tara Burns said that gardaí were completely unaware of any recordings while the two men were in custody at Cahir and Clonmel garda stations.

Mr Justice Paul Butler agreed to adjourn the trial until 27 March 2014 to allow the State to investigate further.

Clio on 'Cloud 9' with $20m funding

Clio, a cloud-based practice management platform for the legal industry, has raised $20 million in so-called 'Series C' financing, bringing the total capital raised to $27 million (€20 million). The company, which has a 'remote office' in Arthur Cox Building, Earlsfort Terrace, Dublin 2, will use the funding to accelerate product development, sales and international expansion over the next 12 months.

The company claims to ease the process of practice management, billing, time-tracking and collaboration for law firms. There are no expensive servers to buy or rent and no need for technical staff to customise or maintain software.

The company recently released an iPhone application and "will continue to aggressively invest in mobile by introducing features to improve collaboration and efficiency".

Leasing and selling entitlements – what you should know

All current single farm payment (SFP) entitlements expire on 31 December 2014, including leased entitlements, *writes Aisling Meehan*. Whether entitlements sold or leased are lost or a payment right accrues under the new Basic Payment Scheme depends on a range of issues, such as whether the owner of the entitlements claimed SFP in 2013 and continues to make a claim in 2015, whether the entitlements are sold or leased, and when the sale or lease occurs.

Where all land and entitlements were leased out in 2013: as these farmers did not farm in 2013, they do not have an allocation right for the new system. They must review existing arrangements and enter into permanent transfer of SFP, ideally with the existing active farmer, before 15 May 2014. A permanent transfer involves transfer of ownership of entitlements by way of sale or gift. The transfer could give rise to adverse tax implications, including capital gains tax, capital acquisitions tax and VAT, and a Revenue concession is being sought for adverse tax implications arising from these forced sales.

Where part of land and entitlements were leased out in 2013: the owner has to have farmed in 2013 (to have an allocation right) and still farm in 2015. This means they can only lease out part of their holding and not 100%, as they must remain active in 2015. The lessee must be an active farmer in 2015, but does not have to have farmed in 2013.

Where part of farm and entitlements are sold before 31 May 2014: the value of the entitlements will be transferred to the buyer, who will carry this value forward into the new scheme in 2015. The land that is sold will not be included in the calculation of entitlements in 2015 unless the buyer had farmed more land in 2013.

Selling part of farm and entitlements after 31 May 2014 and before 15 May 2015: the entitlements will be established in the seller's name in 2015 and can then be transferred to the buyer. A private contract clause may be used in such circumstances.

If a farmer sells his entire holding after 31 May 2014 and before the 31 May 2015: the entitlements would be lost, as the seller would not be an active farmer in 2015 and could not establish entitlements in his/her own right. Therefore, the seller should remain an active farmer until 2015.

EU's new anti-piracy regulation in force since 1 January

Intellectual property (IP) rights holders are often involved in an ongoing battle against counterfeit, pirated and other infringing goods. European and Irish law provides effective remedies against offering and selling of these goods, *writes Bill Holohan.*

The new anti-piracy regulation (608/2013) came into force on 1 January 2014, repealing and replacing the previous anti-piracy regulation.

This new set of rules regulates the enforcement of IP rights by customs authorities and gives these authorities the power, among other things, to detain infringing goods at EU borders.

The scope of the new regulation has been broadened and several (procedural) changes have occurred. The principal changes are:

1) Extended scope of IP rights

The scope of the IP rights covered is extended to include trade names, topographies of semiconductor products (chips) and utility models, and devices enabling or facilitating the circumvention of technological measures. On the basis of the previous regulation, customs authorities could only act against counterfeit or pirated goods. On the basis of the new regulation, customs authorities currently can act against (for instance) confusingly similar trademarks.

2) Simplified procedure for the destruction of infringing goods

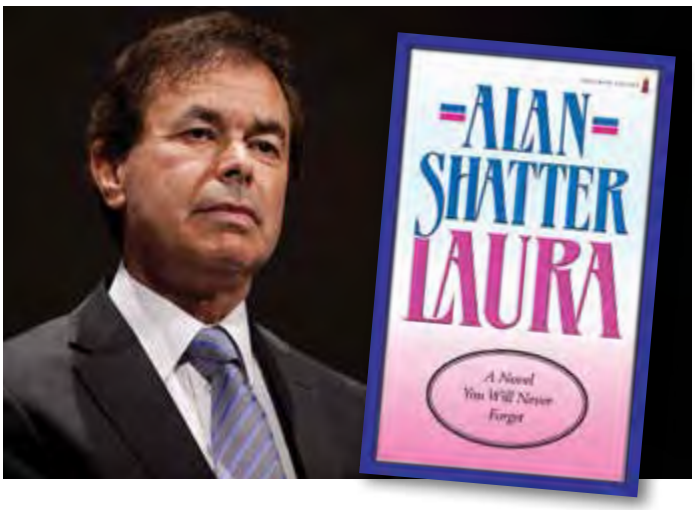
The previous regulation provided that EU countries could opt to offer a simplified procedure for the destruction of infringing goods without judicial interference. The new regulation stipulates that all member countries are obliged to offer this simplified procedure. This procedure states that customs authorities can destroy infringing goods if the holder of the goods has agreed to destruction or has not reacted in a timely fashion.

Please note that this procedure can only be followed after rights holders have submitted an application with the customs authorities.

3) Destruction of small consignments

A new procedure was introduced in the new regulation for small consignments (three units or less, or less than two kilograms) of counterfeit and pirated goods. This procedure allows customs authorities to destroy these goods without the explicit agreement of the rights holder. For the applicability of this procedure, an application also has to be submitted with the customs authorities.

McCarthy era returns – to deal with Shatter book!



Law Society Council member Shane McCarthy has been named by Minister for Arts Jimmy Deenihan as chairman of the Censorship of Publications Board, which has been convened to deal with a complaint about a book written by Minister for Justice Alan Shatter 25 years ago.

The board is convened only when it is required and was last assembled in June 2008. No publications have been banned by it since 2003.

Minister Shatter's 1989 novel, *Laura*, which is subheaded *A Novel You Will Never Forget*, is the only publication to be referred to the board in the past five years. A complaint lodged last summer alleged that the novel was obscene. The book contains sex scenes and centres around the troubled private life of an Oireachtas member who is having an affair with his secretary. At one point in the book, the fictional TD attempts to force the main character to have an abortion in order to save his political career.

The complaint prompted the Minister for Justice to transfer responsibility for censorship out of his department to the Department of Arts, Heritage and the Gaeltacht to head off any suggestion of a conflict of interest.

Laura was written by Mr Shatter in 1989 while he was still a backbencher. The controversial book sold 20,000 copies when it was first released. It was republished by Poolbeg Press last year.

Figures from Nielsen's Book Scan reveal that the novel sold only one copy in the week ending 15 March, and the same again in the week ending 1 March. In all, 1,600 copies of the book have been bought since it re-entered the market in 2013.

The chairman of the Censorship of Publications Board, Mr McCarthy, has a legal practice in Skibbereen, Co Cork. He holds a BCL, an LLB and a Masters in Criminology from UCC. He is a member of the Society's Regulation of Practice Committee, the Criminal Law Committee and the Human Rights Committee. He has been a member of the Garda Síochána Complaints Board since April 2002, and a member of the Parole Board since 2009.

He is expected to be joined on the Censorship of Publications Board by four proposed appointees: Dr Noëlle O'Connor (a senior lecturer at Limerick Institute of Technology), barrister Sinéad Prunty, former Garda superintendent Philip Moynihan and Georgina Byrne (South Dublin County librarian).

THERE'S AN APP FOR THAT

Take the pain out of presentations

APP: KEYNOTE **PRICE:** €8.99

Keynote for iPad (basically the iPad version of MS *Powerpoint*) is a paid for app at €8.99 with no free version available, *writes Dorothy Walsh.* It is quite simply the easiest app to use to create colourful and interesting presentations.

In an age where sharing our views with colleagues and clients using various devices is so common, *Keynote* offers a very effective medium through which we can share ideas and advice by way of a presentation in person, a presentation online, or by permitting the presentation to a accessed remotely by saving it to the cloud.

I use *Keynote* regularly to present information and advice to business clients. What I usually do is create an interesting-looking slideshow – unfortunately, the content itself can be quite boring, so it tends to help keep an audience's interest and attention if the slideshow is somewhat animated.

I plug my iPad into my projector (most hotels and conference centres will have projectors and screens as standard) and synchronise my iPad's presentation with my iPhone. A WiFi connection allows me to use the iPhone as a remote control, or clicker, to move through the slides.

I generally speak with my back to the screen, facing the audience, and instead of having to look behind me to the screen, or to the iPad to see which slide I am on, I can view it all on my iPhone's screen in my hand.

The iPhone also allows me to view any notes or prompts that I have attached to a particular slide. This is all seen on the iPhone while the presentation is running on the screen behind me. The iPhone also times the presentation as I am speaking, allowing me to stick to a timed agenda.

Prior to *Keynote* on my iPad, I was using a bulky Windows laptop with a traditional clicker. I would find myself having to constantly look backwards to the screen or walk back to the laptop to see which slide I was on. Now I know that what I see on my iPhone (except for my own notes and the timer!) is exactly what is on the screen behind me.

It has to be said that the slide templates, animation tools and creative options offered by *Keynote* in putting together a slideshow, and the fact that the iPad and iPhone are so light and user-friendly, is a real encouragement to use presentations to deliver information and to address clients in an interactive and innovative way.

Sharia wills practice note draws ire of British secularists

The president of the Law Society of England and Wales, Nicholas Fluck, has attacked as "inaccurate and ill-informed" press reports that his Society is promoting sharia law. He was responding to comments from the Lawyers' Secular Society, which has called for the withdrawal of a practice note that seeks to advise solicitors about how to draw up wills in compliance with Islamic law.

Fluck said: "We live in a diverse multi-faith, multicultural society. The Law Society [of England and Wales] responded to requests from its members for guidance on how to help clients asking for wills that distribute their assets in accordance with sharia practice. Our practice

Nicholas Fluck

note focuses on how to do that, where it is allowed under English law."

He added that the law of England and Wales would give effect to wishes clearly expressed in a valid will insofar as those wishes are compliant with the law of England. "The issue is no more complicated than that."

The secretary of the Lawyers' Secular Society, Charlie Klendjian, called for the note to be withdrawn: "By issuing this practice note the Law Society is legitimising and normalising – or at the very least being seen to legitimise and normalise – the distribution of assets in accordance with the discriminatory provisions of sharia law. This is a worrying precedent to set."

A solicitor quoted in the *Law Society Gazette* of England and Wales said that, from his perspective, the Law Society was not advocating sharia law, or encouraging solicitors to act in a discriminatory way, "but helping the profession understand how they can make wills that comply with this alternative religious law, if asked by a client to do so. It's dangerous territory, especially with the different forms of sharia law, but the Law Society is trying to help make sense of the provisions."

Another solicitor commented: "I think this is a very dangerous area. Most solicitors qualified in England (me included) would have little (if any) understanding of sharia law. Personally, even with the benefit of the Law Society's note, I would decline instructions on the basis of lack of competence."

So you want to beef up your negotiating skills?

The launch of the Certificate in Advanced Negotiation heralds the Law Society Diploma Centre's first joint collaboration with the internationally acclaimed Centre for Effective Dispute Resolution (CEDR).

The course begins on 9 May and will offer aspiring negotiators the opportunity to explore, develop and reflect on their skills by examining the principles and practices of negotiation.

This programme will be led by Mr Ranse Howell (head of the Negotiation and Leadership Academy at CEDR). Ranse regularly negotiates in commercial disputes, is an ADR specialist on CEDR's international development projects, and is a member of that centre's mediation skills training faculty.

The intensive six-day course will combine reflective learning, one-to one coaching and group learning. Participants will examine:

- **Principles and phases of negotiation,**
- **Negotiation framework, managing emotion, reflectiveness and exploration,**
- **Bargaining and closing,**
- **Your negotiation style, uncovering underlying interests, difficult conversations, and**
- **Breaking deadlock, risk and creativity.**

Participants will develop their knowledge of:

- **Influence and persuasion,**
- **Communication essentials, team negotiation and collaboration, and**
- **Consensus, dynamics, cross-cultural and electronic negotiations.**

This certificate course is designed around three on-site modules:

- **Module 1 (9/10 May) – negotiation principles,**
- **Module 2 (13/14 June) – psychology of negotiation, and**
- **Module 3 (11/12 July) – negotiation in the wider context.**

For further information, visit the Diploma Centre on the Law Society website, www.lawsociety.ie/Diplomas, or email: r.raftery@lawsociety.ie.

PIC: LENSMEN

At the launch of the Certificate in Advanced Negotiation were Ranse Howell (head of the Negotiation and Leadership Academy at CEDR), TP Kennedy (director of education) and Freda Grealy (head of the Diploma Centre)

Lady solicitors mark Moya's superlative service to Society

PIC: LENSMEN

At the presentation by women Council members to past-president Moya Quinlan were *(front, l to r)*: Geraldine Clarke, Mary Keane (deputy director general), Moya Quinlan and Elma Lynch. *(Back, l to r)*: Michele O'Boyle, Sonia McEntee, Áine Hynes, Michelle Ní Longáin, Bernadette Cahill, Rosemarie Loftus, Valerie Peart and Geraldine Kelly

The women solicitors on the Council of the Law Society hosted a lunch for Moya Quinlan on 21 March at the Shelbourne Hotel, Dublin, *writes Bernadette Cahill*. They were joined by past-presidents Geraldine Clarke and Elma Lynch, by current and former Council members and deputy director general Mary Keane.

Geraldine Kelly gave a brief outline of Moya's career. She qualified in 1946, one of just four women members at that time. She joined her father, Joseph H Dixon, in practice, becoming the third-generation of her family to do so. The recent qualification of her grandson brings the family into their fifth generation as legal practitioners!

Moya joined the Council of the Law Society in 1969 and continued to be elected to the Council by her colleagues for upwards of 40 years. She became president of the Society in 1980/1. She was instrumental in the move to Blackhall Place, among other major achievements. At Council meetings she sits opposite the president of the day and is a mine of information. The depth of her knowledge is immediately apparent to any newcomers.

Moya is someone who takes pride in being a solicitor and has never lost her enthusiasm for the profession. Her energy and drive is undiminished by age.

On behalf of the group, Mary Keane presented Moya with a piece of Waterford Crystal engraved with the Law Society motto *veritas vincet*. Maura Derivan (Council member and chairman of the Public Relations Committee), who was unable to attend due to a court commitment, marked the occasion by sending Moya a beautiful bouquet.

Valuing the in-house lawyer: upcoming panel discussion

'The in-house lawyer – how to get value and be viewed as valuable by your client' is the theme of a panel discussion to be hosted by the Law Society's In-house and Public Sector Committee, in partnership with Law Society Professional Training, on 14 May. It will deal with the following:

How to get value for your client:

- How and where to look for cost efficiencies, and
- Measuring the cost savings.

How to be viewed as valuable:

- What skills are needed to be an effective in-house lawyer?
- Importance of knowledge development,
- Understanding your organisation,
- Managing corporate and business expectations within your role, and
- Balancing professional independence and doing your best for your employer's business.

The discussion will be facilitated by a select panel: Joe Gavin (head of legal services, Central Bank), Thomas McNamara (Ryanair) and Rhona O'Brien (general counsel, Eircom). The panel members will offer their knowledge and insight of how they and their teams manage the relationship with their client so that they are able to demonstrate value.

Smaller break-out discussion groups will follow, providing an opportunity to learn and explore the issues raised by the panel with in-house colleagues.

To book, go to the Law Society Professional Training section at www.lawsociety.ie, email: lspt@lawsociety.ie, or tel: 01 881 5727.

Information about the committee and its work can be found on its section of the Society's website, www.lawsociety.ie.

Solicitors have final say in *The Irish Times* debate

The Solicitors' Apprentice Debating Society of Ireland (SADSI) has won *The Irish Times* debate, held in the Law Society's headquarters at Blackhall Place on 27 March. It is the first time that SADSI has won the prestigious national competition, *writes Genevieve Carbery*.

'That this house believes that the Irish political system has served the people well' was the motion for the 2014 debate.

Kieran O'Sullivan and Dearbhla O'Gorman, opposing the motion, took the team Demosthenes Trophy against opponents from TCD Law, UCC Philosophy and UCD L&H.

The team runners-up opposing the motion were UCD L&H speakers, Niamh Ní Leathlobhair and Aodhan Peelo.

The individual debater prize, the Christina Murphy Memorial Trophy, was won by William Courtney of UCD's Medical Society.

Opening the motion for the opposition in front of an audience that included lawyers, students, former competitors and parents, Rebecca Keating of TCD Law said the Irish political system "responds to the needs of the local people – that is unique".

"We are surrounded by lucky people … each of you are some combination of white, Irish, middle-class, straight, able-bodied and Catholic," Kieran O'Sullivan of SADSI said, as he opposed the motion. The failure of our system is not apparent to "lucky people like us" but the impact is felt "disproportionately" for those who are "at a disadvantage", he said.

Lucinda Creighton TD presents the winners of *The Irish Times* Demosthenes Trophy for best team to Kieran O'Sullivan and Dearbhla O'Gorman of SADSI

Ms O'Gorman, also opposing the motion for SADSI, said the proposition argued that the country was well served as "we are no longer at war. If your metric is being not at war … you need to be more ambitious".

The political system imposes "such strict party whips" that politicians can "never vote against" for fear of being thrown out", she said.

"As a proud Cavan man, I do love a bit of local politics," William Courtney of the UCD Medical Society said, with a mock thick accent as he opposed the motion.

Ministers are incentivised to serve the needs of the local and not the country, he said, such as a monorail to bring you from Ballina to Ballyhayes in less than 30 minutes. The heart of the problem was the Dáil, where "backbench TDs are like cattle being herded by farmer Enda into the field. We have a victim of that here," he said pointing to Lucinda Creighton.

Ms Creighton chaired the debate and the presiding adjudicator was Mr Justice Adrian Hardiman of the Supreme Court, who was an individual winner in 1970 and 1973. The other adjudicating panel members were Ken Murphy (director general, Law Society), Prof Brent Northup (chairman of communications, Carroll College, Montana), Seán O'Quigley BL (a winner in 2010) and Denis Staunton (deputy editor of *The Irish Times*).

This article is republished courtesy of The Irish Times.

John Dwyer (Ronan Daly Jermyn) and Past-President of the Law Society Frank Daly met the president of the European Commission, Jose Manuel Barroso, at University College Cork on the occasion of his receiving an Honorary Doctorate of Laws on 3 March 2014

At the launch of the Diploma in Child Law at Blackhall Place were: *(from l to r)*: Dr Aisling Parkes (lecturer in law, University College Cork), Yvonne Keating (Law Society), Judge Rosemary Horgan (president of the District Court), Carol Anne Coolican (chair, Family and Child Law Committee), Dr Geoffrey Shannon (Special Rapporteur on Child Protection) and Norah Gibbons (chairperson, Child and Family Agency)

PIC: LENSMEN

On 18 February, the Law Society hosted a dinner for the leader and members of Fianna Fáil: *(front, l to r)* Timmy Dooley TD, party leader Micheál Martin, Law Society President John P Shaw, Marina Keane and Sean Fleming TD; *(back, l to r)* Michael Quinlan (junior vice-president), James McCourt (past-president), deputy director general Mary Keane, director general Ken Murphy, Kevin O'Higgins (senior vice-president) and Cormac Ó Culáin (Law Society public affairs executive)

Midland meeting of minds

MIDLAND BAR ASSOCIATION

PIC: JOE RELIHAN NUJ

At the AGM of the Midland Bar Association (MBA) on 18 March 2014, which was held at the Sheraton Athlone Hotel, were *(front, l to r)*: Emily Mahon (treasurer, MBA), Martin Egan (president, MBA), John P Shaw (president, Law Society), Ken Murphy (director general) and Martin Reidy (secretary, MBA). *(Second row, l to r)*: Shane Johnston, John Wallace, Emeria Flood, Padraig Turley, Roisin O'Shea, Emer Kilroy, Mary Ward, Bernadette McArdle, Denise Biggins, Anne Marie Kelleher, Bernadette Owens, Orla Cummins, Claire Hickey, Veronica Ann Kelly, Kieran Nally and Brendan Irwin. *(Third row: l to r)*: Louis Kiernan, Patrick Martin, Joe Brophy, Raymond Mahon, Brian Mahon, Patrick Fox, Dermot Mahon and Marcus Farrell. *(Fourth row, l to r)*: Tony Henry, Denis Larkin, Charlie Kelly, Michael Joyce, Paul Kelly, John Reedy and Robert Marren

SLA ANNUAL DINNER

The Southern Law Association (SLA) held its annual dinner at the Maryborough House Hotel on 21 February 2014. The president of the Southern Law Association, Brendan Cunningham, welcomed special guests on behalf of the association, including: John P Shaw (president of the Law Society of Ireland), Richard Palmer (president of the Law Society of Northern Ireland, Paul Dyson (president of the Devon and Somerset Law Society), and Charles Gilmartin (president of the Mayo Solicitors' Bar Association). The *Gazette* presents a sample of photos taken on the night. More images can be found on the interactive version of this issue – click on the camera icon above.

PICS: DEE BAUMANN PHOTOGRAPHY

Solicitors from McNulty, Boylan and Partners attended the SLA annual dinner, including *(front, l to r)*: Linda O'Mahony and Shirley Fogarty. *(Back, l to r)*: Eoghan Murphy, Niall Daly, Brendan Cunningham (president, SLA), David Browne and John Boylan

Orla O'Connell, Christina O'Connor and Mary O'Callaghan (Eamonn Murray Solicitors)

(From l to r): Richard Palmer (president, Law Society of Northern Ireland, Charles Gilmartin (president, Mayo Solicitors' Bar Association), Brendan Cunningham (president, Southern Law Association), Paul Dyson (president, Devon and Somerset Law Society) and John P Shaw (president, Law Society of Ireland)

Teresa Murphy and Jennifer Dorgan

International final beckons for Telders winners

A Law Society team won the national round of the prestigious Telders International Law Moot Court Competition on 8 March. They now go forward to represent Ireland at the international final at the Peace Palace in The Hague, from 22 to 25 April.

The Law Society team comprised Hannah Shaw (Michael Houlihan, Ennis), Shane O'Neill (McCann FitzGerald, Dublin) and Caolán Doyle (Doyle & Co, Dublin). They competed against teams from the King's Inns and UCD and won on both written memorials and oral rounds. They were coached by course manager Eva Massa, with valuable input during the practice rounds from staff and former students. We wish them well at the international final.

PIC: LENSMEN

Winners of the Telders International Law Moot Court Competition, with Eva Massa

PICS: JASON CLARKE PHOTOGRAPHY

Attending the Law Society's parchment ceremony on 13 March were *(from l to r)*: Ken Murphy (director general), guest speaker Padraig MacLochlainn TD (Sinn Féin spokesperson on justice, equality and defence), John P Shaw (president of the Law Society) and Mr Justice Nicholas Kearns (president of the High Court)

A&L Goodbody has been named 'Ireland's Intellectual Property Law Firm of the Year 2014' at the Managing Intellectual Property Awards in London. Attending the prize-giving ceremony were *(l to r)*: Mark Rasdale and John Cahir (IP and technology partners with A&L Goodbody)

Guests at the Law Society's parchment ceremony on 13 March included *(from l to r)*: Deirdre O'Sullivan (Council member), Judge William GJ Hamill (District Court) and guest speaker Padraig MacLochlainn TD (Sinn Féin spokesperson on justice, equality and defence)

Powerscourt in sight for lady golfers

The spring outing of the Lady Solicitors' Golf Society takes place on Friday 16 May at Powerscourt, Enniskerry, Co Wicklow. The event is open to all lady solicitors and their guests. It will comprise an 18-hole competition, with a separate guest prize.

The lady captain, Mary Fenelon, says that new members are always welcome and she is encouraging younger colleagues to join the Society and take part in this year's event, alongside regular supporters.

The annual subscription for the Lady Solicitors' Golf Society is €10. The lady captain asks that participants or would-be members would inform her of their intention to attend, so that she can keep track of numbers. Mary can be contacted at m.fenelon@lawsociety.ie.

The autumn outing has been booked for Friday 5 September at Glasson Golf and Country Club in Co Westmeath.

Trainees fly the Society's flag abroad

PIC: JASON CLARKE PHOTOGRAPHY

Winning ways – the PPC I (2013) winning teams with their trophies at the competitions awards reception on 25 February. *(From l to r)*: Jane Moffatt (competitions convenor), Emer Cullinane, Sarah O'Meara, Ciara McPhillips (winners, mediation competition); Seán O'Connor and Emma Farrell (winners, client consultation competition); Aoife McDermott and Paula Deasy (winners, negotiation competition); and Robert Lowney (course administrator)

Two trainees' teams (PPC II) represented the Law Society with gusto at the 14th annual International Law School Mediation Tournament from 5-8 March, *writes Robert Lowney*. In Chicago, Olivia Higgins, Christine O'Sullivan (Fagan Bergin) and Aoife Redmond (Lavelle Coleman) took ninth place in the team advocate/client category, while Thomas Ryan and Fiachra Cork (Byrne Wallace) were awarded eighth place in the individual advocate/client category, out of a total 156 advocate/client pairs.

The PPC I Law Society Mediation Competition concluded in February. The winners were Emer Cullinane (Whelan Solicitors), Ciara McPhillips (Barry Healy Solicitors) and Sarah O'Meara (Matheson).

The Law Society Client Consultation Competition was won by Emma Farrell and Seán O'Connor (Matheson), who beat 24 teams.

Clarkes on top of the world!

Two brothers, William and Victor Clarke – both solicitors who work for Carlow firm Clarke, Jeffers & Co – will soon don their specialist training shoes to take part in the UVU North Pole Marathon, one of the world's most extreme runs. The brothers are heading for the North Pole to raise awareness and funds for young people with mental-health issues, *writes Caoimhe Harney*.

The brave duo will take part in the coldest marathon on earth on 9 April to fundraise for the 'Walk In My Shoes' campaign for St Patrick's Mental Health Foundations.

William and Victor step it out

Participants from various parts of Europe attended the second of three training modules at the Central European University, Budapest, Hungary, 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 and coordinated the event. Among those who attended were specialist judges of the Circuit Court: Judge Verona Lambe, Judge Mary O'Malley Costello, Judge Mary Enright and Judge Susan Ryan. Speakers included Michael Quinn (partner, William Fry), Raquel Agnello QC (Erskine Chambers, London), Arnoud Noordam (Noordam Advocatuur, Amsterdam), Antonio Fernandez Rodriguez (partner, Garrigues, Madrid), Randall Plunkett (head of case management, Insolvency Service of Ireland), Bill Holohan (partner, Holohan Solicitors, Cork), John Kennedy BL, John O'Keeffe (principal, John O'Keeffe & Co, Cork), William Leo Murphy (principal, Leo Murphy & Co, Cork), Brian J O'Regan (partner, Cadogan O'Regan, Tralee), Dr Petra Bard (CEU, Budapest), various members of the Hungarian judiciary and Deirdre Flynn (solicitor, Diploma Centre)

viewpoint

APPEAL COURT WELCOME, BUT POSSIBLE COST TO HIGH COURT

The President of the High Court has said that nine impending judicial appointments to the new Court of Appeal may have significant implications for the High Court. Here, Mr Justice Nicholas Kearns amplifies his remarks, which were made at a Law Society parchment ceremony on 13 March

Mr Justice Kearns is President of the High Court

I welcome and support the establishment of the new Court of Appeal. In particular, I wish to extend my congratulations and support to its nominated incoming president, Mr Justice Sean Ryan, a judge of the High Court and a much-valued and experienced colleague. He has a daunting task ahead of him, as focus now shifts to the requirement to provide appropriate premises and support staff in the months ahead, if the new court is to commence operations as promised in October of this year.

Given the straitened state of our public finances, this timeline poses significant challenges, but I believe they are manageable and will, with the assistance of the Courts Service, be addressed in an urgent and efficient manner. A far greater challenge, however, will be that of filling the remaining nine judicial appointments envisaged for the new court with candidates of appropriate calibre and ability.

Up to now, there has been surprisingly little focus on the problems that this will present for the High Court. There should be such a focus, if one court's gain proves to be another court's loss. One must therefore ask at the outset: from where will the ranks of the new Court of Appeal be drawn?

> **'What I would characterise as the 'mid-flight' creation of a new court – with its requirement for ten judges in one fell swoop – is unprecedented. Alarm bells are in consequence ringing for me as President of the High Court'**

Alarm bells

For a start, it is unlikely that serving members of the Supreme Court will opt to drop down to the Court of Appeal (where, presumably, its members will be remunerated at a lower rate of pay), so the most obvious and natural gene pool for appointments to the new court will be the High Court.

In normal circumstances, this would raise no problems, because it is an entirely appropriate ambition and progression for a High Court judge to move to an appellate court. Indeed, between 2004 and 2009, I did so myself. But what I would characterise as the 'mid-flight' creation of a new court – with its requirement for ten judges in one fell swoop – is unprecedented. Alarm bells are in consequence ringing for me as President of the High Court.

If all ten appointments to the Court of Appeal are drawn exclusively from the High Court, it would have the consequence – given the rates of attrition in the High Court in recent years – that 75% of the 36 members of the High Court will be judges of less than three years standing by the end of the year. Further, to the extent that appointments to the Court of Appeal are so drawn, it must be likely that they will be from the senior ranks of the High Court, leaving newly appointed judges with an even greater burden to bear.

Such a loss of expertise in the face of the challenges being addressed on a daily basis in the High Court would, if it occurs, be deeply worrying. I am gravely apprehensive that the proper administration of justice might well suffer in such circumstances. It would be akin to a surgical hospital losing most of its experienced specialists overnight, with all that that entails.

High Court workload

The High Court of today is vastly different from that which existed when I commenced in legal practice in 1968. There were then six High Court judges and five Supreme Court judges. [Currently, there are 11 Supreme Court judges, including the *ex officio* President of the High Court, and 36 ordinary judges of the High Court.] The High Court, in those times, did not have to address the range and volume of cases that now arise in areas such as asylum, competition, European arrest warrant, *Hague Convention*, and the important work of the Commercial Court.

This comes on top of greatly expanded volumes of work in areas of criminal law, judicial review, constitutional law, family law and personal injury. In that last category, the increased volume of medical negligence cases poses particular problems for the courts. Newly appointed judges require a considerable period of mentoring and training in order to adjust and settle in.

There are many members of the High Court with excellent qualifications for appointment to the Court of Appeal. They are not to be discouraged from seeking appointment to the Court of Appeal, and it would be very wrong to seek to do so. All I can do is give expression to my wider long-term concerns and hope that others will


PIC: CIAN REDMOND

> Up to now, there has been surprisingly little focus on the problems this will present for the High Court. There should be such a focus, if one court's gain proves to be another court's loss

ensure that the appointment process will be a careful and calibrated one that takes the needs and requirements for a well-qualified High Court into account.

Options available

I believe that there are options open that might reduce the requirement to appoint judges exclusively from the High Court to the Court of Appeal, even though I recognise that the majority will probably be so drawn. However, every judge 'saved' to the High Court will be of critical importance.

One option may lie in the extension by the government of the 'grace period' under the *Haddington Road Agreement*. This might persuade certain judges with a retirement deadline of July in mind to hold on. I read with interest in recent days reports in the national newspapers that both ICTU and the HSE have proposed an extended grace period to prevent a major loss of expertise in the public service. This concern applies also to the High Court, with this added complication: our difficulties are compounded by the creation of the new court and its likely demands for personnel from the High Court.

Another option might be to extend, as a once-off transitional measure, the retirement age of judges who reach retirement age in the present year by one or two years, a measure that might provide one or two further candidates and have the incidental benefit for the public purse of deferring lump-sum retirement sums for that period.

I have discussed my concerns with both the Chief Justice and the incoming President of the Court of Appeal, both of whom are equally alert to them, but wish to stress that the options for dealing with them – only some of which I have articulated here – are mine alone, though I know that the concerns are widely felt in the [legal] professions also.

It is thus a time, I believe, for both the Bar and the solicitors' profession to reflect on the significant milestone moment that we are approaching and to reflect on how their members might best contribute to ensuring that the Court of Appeal and the High Court may continue to be comprised of the brightest and the best.

viewpoint

FARMERS MAY BE BOUND BY WIND-FARM AGREEMENTS

Wind-farm option agreements legally bind farmers and their farms to wind-farm projects prior to planning permission being obtained. Nora Fagan knows which way the wind blows

Nora Fagan is a commercial in-house solicitor. In a personal capacity, she has been working as an advocate on behalf of certain farmers who have signed wind-turbine options

While the recent announcement by the Government that its energy export project may not come to fruition prior to 2020 may have generated relief among those concerned about the impact of wind-farm development on their communities, farmers who have already signed options in favour of wind-farm companies over their farms are now re-evaluating their position.

The option agreements are the precursors to the lease agreements. The options legally bind the farmer and his farm to the wind-farm project prior to planning permission being obtained. Whatever legal comment may be made about the severity of the wind-farm lease agreements on the farmers' lands, the same concerns exist in relation to the options.

Firstly, the options have a minimum term of five years, which can, in certain cases, be extended up to ten years. The effect of signing such an option essentially places the farm within a legal vacuum for this time period. Many farmers who understood they were only pledging one hectare of land for wind-farm development have now discovered the following inhibition registered on their entire folio: "No registration under a disposition by or transmission from the registered owner is to be made during the period specified in instrument 1234567 without the consent of ABC Wind-Farm Ltd."

> **When we consider that many of the wind-farm companies are multinational companies that trade their options and wind-farms with other global speculative investors, the farmer's individual lack of control prior to any such assignment to an unknown third party is causing understandable concern**

When we consider that, often, the entire folio on a farmer's land is affected by this inhibition, the legal severity and the effect of these options becomes apparent. As we know, a disposition or transmission covers a wide ambit of legal transactions and includes, among other matters, a lease or mortgage. Indeed, as one farmer recently discovered, the transmission of a site to one of his children was prohibited.

Assignment clause

A further concern for farmers is the assignment clause on the options. The options are fully assignable without the prior consent of the landowner. Again, when we consider that many of the wind-farm companies are multinational companies that trade their options and wind-farms with other global speculative investors, the farmer's individual lack of control prior to any such assignment to an unknown third party is causing understandable concern.

Furthermore, farmers are also realising that the indemnity clause on their options is not, in fact, a full indemnity to protect them from personal liability from legal claims/actions. The indemnity clause on their options is, in most cases, a basic public and employer's liability clause, which would cover the eventuality of any personal harm/property damage should an accident occur on the farm – however, it does not cover liability from class actions nor the farmer's personal liability under the *Civil Liability Act 1961*.

Again, if we put this scenario in context, the London School of Economics has recently reported that all properties within a 1.2 mile radius of an average wind-farm may lose up to 11% of their value by virtue of their proximity to wind farms. Should a community institute an action against a farmer for the devaluation of their properties, the indemnity clause in the agreements will not protect the farmer from personal exposure in tort or under the terms of the *Civil Liability Act 1961*.

Questionable financial benefit

However, perhaps the most significant assessment of both the lease agreements and the antecedent options must be their financial worth and benefit to the farmers. Many farmers have received a payment of €1,000 from the wind-farm company as the consideration for the execution of their options over their farms. The option payments are fully taxable and do not qualify as income that can be set off against ordinary agricultural reliefs. Their net benefit after tax relative to the personal restrictions they impose on the farmer and his farming activities is undoubtedly questionable.

Similarly, the payments on the actual lease agreements – which in some cases do not actually materialise until the construction commences on the wind farm or until such time as the wind farm begins to generate electricity – can mean that the larger payments offered on the lease agreements may not now materialise for ten to 15 years. Again, these payments are fully taxable as rental income, which cannot be set off against ordinary agricultural costs.

Some lease agreements indicate that the wind-farm companies will

PIC: THINKSTOCK

> As one farmer recently discovered, the transmission of a site to one of his children was prohibited

indemnify farmers from the loss of certain farm reliefs. However, it identifies the particular farm reliefs that exist at the moment. It does not identify the subsequent or amending farm reliefs that may be introduced in the future. Again, when we consider that some of the lease agreements have a term of up to 60 years, many farmers now accept that the loss of future farm reliefs and payments, coupled with the fully taxable nature of the wind-farm payments that they will receive, will mean that they will be in a financially worse position than they occupy at the moment.

Agricultural relief

Furthermore, Revenue has recently indicated that farmers may no longer qualify for the significant agricultural relief on their lands should they wish to transfer their lands by gift or inheritance. By virtue of the industrial nature of the wind farms, farmers themselves may not satisfy the definition of 'farmers', as their lands may fail to satisfy the definition of 'agricultural land' under the capital acquisitions tax legislation.

While business relief may be still available as a relief on their farms, this is a more restricted capital acquisitions tax relief, as the family home does not qualify for business relief. When we consider that most farms and homes are passed through generations of farming families, using the vehicle of the substantial agricultural reliefs available, farmers will undoubtedly face the scenario that their families simply will be unable to afford to remain on their farms if these taxation reliefs are threatened.

In the last analysis, farmers are now in a more informed position than ever to assess whether the implications of these wind farms can be really counterbalanced by the elaborate promises of financial largesse they received at their doorsteps. Those farmers with shorter terms on their option agreements can, perhaps, wait and allow the passage of time to remedy their problems, as their option agreement will naturally expire after five years, should the wind-farm company fail to obtain planning permission.

However, those farmers who are seeking to withdraw from the longer-term options are now facing the prospect of protracted arbitration processes, which are imposing further costs and stress on farmers who can ill-afford such cost or legal confrontation. Those farmers must now be supported as they seek to withdraw from these options. Their national representative association surely cannot stand idly by.

ALL FOR ONE; ONE FOR ALL

At a recent ICTU conference, John Hendy QC argued that a "trilogy" of Supreme Court judgments have "all but destroyed the Irish system of industrial relations". Lorcan Roche reports

Lorcan Roche is an award-winning writer and freelance journalist

Attending an Irish Congress of Trade Unions (ICTU) conference on the topic of collective bargaining, one does not rationally expect to experience anger – or dread. Cynicism at the musings of well-paid officials, perhaps.

However, the appalling vista described by ICTU guest speaker John Hendy QC in relation to recent Supreme Court rulings, the steady erosion of workers' rights, of "ravages" being implemented, Europe-wide, by the Troika, was such that, just moments into his TCD address, the audience was shifting uncomfortably, then nodding in agreement. Then in anger.

"On 9 May 2013, the Supreme Court delivered judgment in the case of *McGowan & ors v The Labour Court, Ireland & ors*. In doing so, it struck down a vital collective bargaining mechanism that had been in force for over 70 years. Its effect has been devastating for the Irish workers concerned; it is bad for the Irish economy and it has placed Ireland in breach of international law" (see panel).

McGowan, says Hendy, is the third in a "trilogy" of cases that have "all but destroyed the Irish system of industrial relations" (the other cases are *Ryanair v The Labour Court* [2007] and *John Grace Fried Chicken Ltd & Others v Catering Joint Labour Committee & Others* [2011]).

The *McGowan* judgment contains a "number of major flaws", according to Hendy, who fully intends to expose these – and not just in his TCD address. Under the auspices of ICTU, the supremely energetic 66-year-old has already instigated a challenge in Europe to the 2013 Irish ruling.

> **Under the auspices of ICTU, the supremely energetic 66-year-old has already instigated a challenge in Europe to the 2013 Irish *McGowan* ruling**

Freedom of association

Mocking himself as a "mere Englishman", Hendy opines that the Supreme Court's appreciation of Irish industrial relations history was "curiously ill-informed". It either wilfully or ignorantly ignored historical precedents. Further, it circumvented obligations of international law, asserted incorrectly the uniqueness of Irish legislation, and failed utterly to appreciate the societal benefits of collective bargaining.

It was "striking" to note that the Supreme Court made no reference to the freedom of association provision of the Irish Constitution (article 40.6.1.iii, which provides: "the State guarantees liberty for the exercise of the following rights, subject to public order and morality: the right to form associations and unions"). More striking still, the failure by the court to even refer to its obligation to construe the law so as to comply, so far as possible, with the *European Convention on Human Rights* (in particular, with article 11 of the ECHR, which guarantees not just freedom of assembly and association, but also that "no restrictions shall be placed on the exercise of these rights"). "It is conceivable that the Supreme Court was not aware of the relevant ECHR provisions … it if was aware, it ignored them," he says.

At times during his impassioned, hour-long address, Hendy's voice was laced with bitterness: "It is a curiosity that the courts, no doubt unconsciously, have achieved in Ireland precisely the strategy that we find has been applied by the Troika elsewhere in Europe".

Grecian 'earn'

In Greece, he says, the Troika has demanded decentralisation and fragmentation of collective bargaining, away from national and sectoral levels to enterprise level. "Part of the effect of decentralising collective bargaining in this way is, of course, that many employers take the opportunity to opt out. In consequence, collective agreement

FOCAL POINT

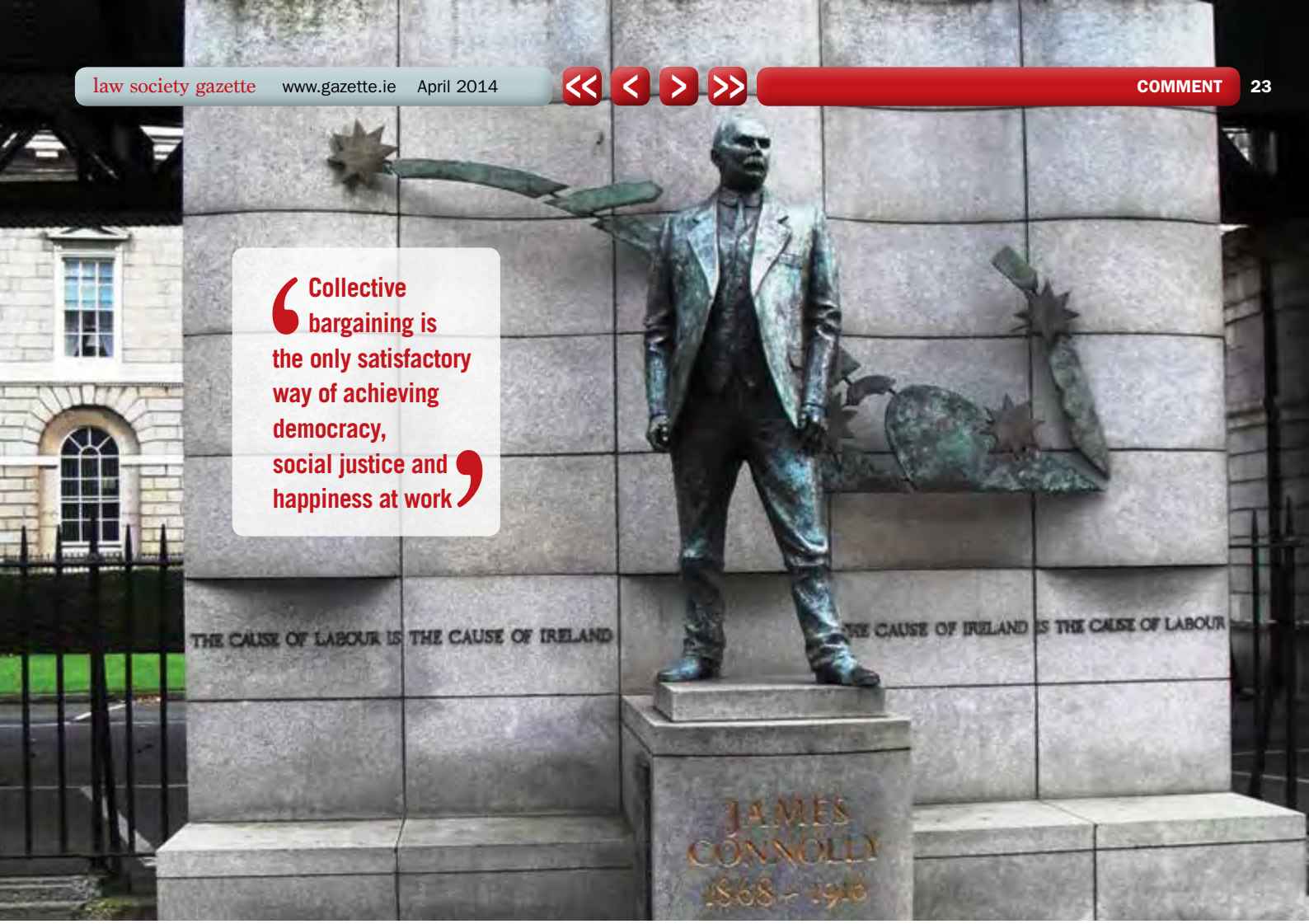
impact of *mcgowan*

In *McGowan*, the Supreme Court struck down the third part of the *Industrial Relations Act 1946*, which had effectively created the Registered Employment Agreements (REAs).

The Supreme Court said that REAs were effectively devising laws, and that law-making was "the exclusive privilege of the Oireachtas". The 1946 act was thus in conflict with article 15.2.1 of the Constitution, which states: "The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas; no other legislative authority has power to make laws for the State."

The court held that law-making could not be delegated by the Oireachtas unless the latter had imposed "sufficient limitation on the regulation-making power granted by the statute to render the regulation no more than filling of gaps in a scheme established by the parent statute".

Such limitation was not apparently to be found in the process of registration of an REA by the Labour Court, something that Hendy finds "baffling". While the Supreme Court recognised that part IV of the 1946 act could be traced back to the *Trade Boards Act 1909*, it also asserted that "it appears part III is unique to the Irish code of industrial relations and cannot be traced back to any pre-existing body of legislation". Hendy says that this assertion is "simply wrong" – the precursor was the *Conditions of Employment Act 1936*.



> Collective bargaining is the only satisfactory way of achieving democracy, social justice and happiness at work

coverage has haemorrhaged."

In Greece, the Troika has also sought opportunities for bargaining to be conducted by non-union based employee representatives. These strategies effectively mean that the entire foundation of collective bargaining in Greece may be "vulnerable to collapse under the new framework" (note: here, Hendy is quoting an International Labour Organisation High Level Mission report).

Similar initiatives have been "sought and achieved" by the Troika in Romania, Spain and Portugal. In Romania, the national collective agreement was abolished and sectoral level agreements much restricted in coverage: "The effect on collective bargaining coverage has been catastrophic – a reduction from 98% in May 2011 to 36% in 2012."

Showing the way

Hendy feels that Germany, Sweden, Norway and Denmark can show the way. "It is no coincidence that strong and efficient economies have extensive sectoral collective bargaining, underpinned by strong trade-union rights … Notwithstanding the ravages of the Troika and the insidious influence of the dogma of neo-liberalism, which flourishes despite the overwhelming economic evidence demonstrating its perniciousness, it remains the case that sectoral-level bargaining remains a common and thriving feature of the northern and western European states."

On average across the EU, 62% of workers continue to be covered by collective bargaining. (Several countries maintain collective bargaining coverage of around 80% or more – France (98%), Belgium (96%), Austria (95%), Portugal (92%), Slovenia (90%), the Netherlands (81%), Italy (80%). Ireland has 44% coverage.)

Hendy argues that widespread collective bargaining is the key to raising wages and reducing inequality. Such collective bargaining is the only satisfactory way of achieving democracy, social justice and happiness at work.

The man is committed, well prepared, clever, persuasive – and not easily intimidated. He concludes with a parting shot: "Ireland will find its own solution to the triple blows of the trilogy of cases, but restoration of sector-level *erga omnes* [towards all] collective agreements must surely be a feature, as must conformity to Ireland's international obligations."

Hendy's address 'McGowan and collective bargaining in Ireland', at Trinity College Dublin was the first in a series organised by ICTU and Merchants' Quay Chambers.

SLICE OF LIFE

john hendy qc

John Hendy QC is a barrister practising in London, and will soon be called to the Bar in Ireland. He is visiting professor of law at both King's College London and University College London, chair of the Institute of Employment Rights and is president of the International Centre for Trade Union Rights.

He is standing counsel to, among others, the Train Drivers' Union, the Communication Workers' Union, the National Union of Journalists, UNITE and the National Union of Mineworkers.

In 2011, *The Lawyer* dubbed him "barrister champion of the trade union movement". His father, whom he describes as the greatest influence in his life, was "a communist electrician trade unionist". His mother was the youngest daughter of the sixth Baron Wynford.

human rights watch

CAUTION URGED ON DNA DATABASE PROPOSALS

On 4 March, the Society made a submission to the Department of Justice on the *DNA Database Bill.* Helen Kehoe and Emma-Jane Williams take a sample

Helen Kehoe is a policy development executive at the Law Society

Emma-Jane Williams is a policy development executive at the Law Society

The *Criminal Justice (Forensic Evidence and DNA Database System) Bill 2013* introduces a substantial change in the importance of DNA to the criminal justice system. It moves DNA from the status of an evidentiary tool to an investigative one, and it proposes a statutory basis for the creation of a DNA database. There is currently no Irish DNA database, and forensic samples are taken for purely evidential purposes to prove or disprove a person's possible involvement.

While welcoming the potential benefits the bill will introduce, the Society has urged extreme caution and reflection on the practical ramifications for privacy rights. In the context of making its submission to the Department of Justice, the Society highlighted the remarks of Dr David O'Dwyer in his analysis of the bill in the *Irish Law Times*: "In theory, the concept of a DNA database is a phenomenal tool for the criminal process, ranging from its ability to rapidly include and exclude individuals in an investigation, to its ability to provide a genetic silent witness to an otherwise seemingly unsolvable case, to its increasing ability as a 'liberator' in exonerating those who have been a victim of miscarriage of justice. However, it is vital that we do not let this phenomenal potential 'overbear' or 'steamroll' the serious issues that are concomitant with the expanded use of DNA profiling within the Irish criminal process."

The 'CSI effect'

The Society cautioned against the potential 'CSI effect', whereby public opinion conflates a DNA match with guilt. In light of this and the potential for miscarriages of justice, the use of DNA database evidence must be pursued carefully.

O'Dwyer warns: "While a match does not automatically imply guilt, it indicates that the person whose profile was matched to the database could potentially have been present at the scene of the crime, thereby creating a useful lead for the police. However, it is imperative that the value of a match is subject to extensive scrutiny: thus it is important that a match should not be allowed to be automatically subsumed by the growing phenomenon of the 'CSI' effect."

O'Dwyer suggests that it will be very difficult for an accused to dispute DNA evidence "given the infallibility surrounding DNA profiling". O'Dwyer identifies the possibilities for human error that have been evidenced to date as arising in coincidental/adventitious matches, false positives, chain of custody issues, the contamination of samples, pre-analytical errors, errors in data handling and misinterpreting DNA profiles.

For example, in New Zealand, the Sharman Inquiry discovered that accidental contamination of samples in the laboratory during early-stage processing resulted in a person who had supplied the sample as the victim of an assault being matched to the DNA profile from a murder scene. The victim was arrested, and it was later discovered that they had never travelled to the area where the murder had occurred.

In Australia, the *Vincent Report* found that contamination of, and a lack of checks and balances in, DNA sampling procedure resulted in the wrongful conviction of an individual for rape.

> **'In Australia, the *Vincent Report* found that contamination of, and a lack of checks and balances in, DNA sampling procedure resulted in the wrongful conviction of an individual for rape'**

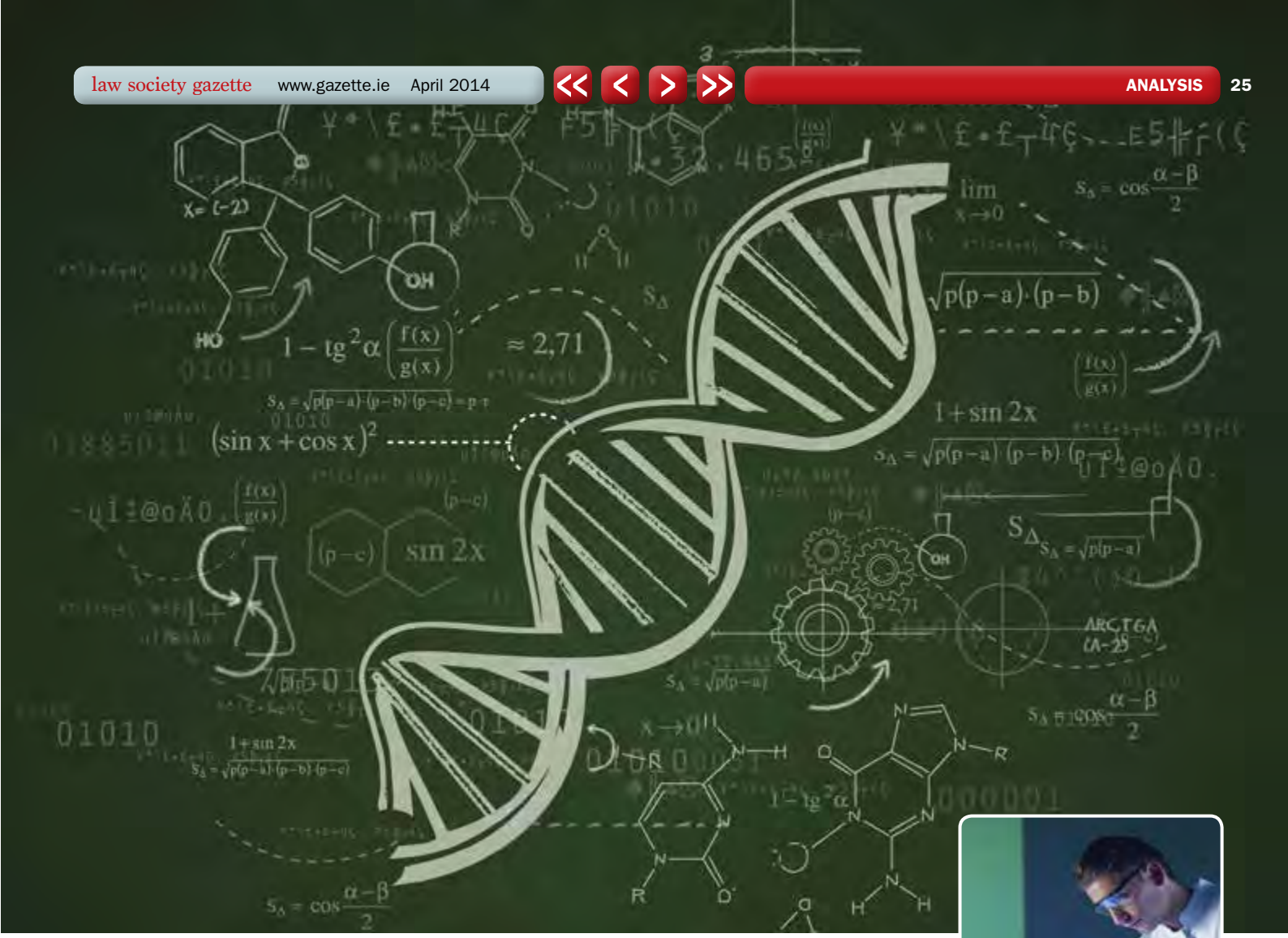
Procedural rights

A DNA database must preserve the constitutional, due process and procedural rights of individuals. Any deviation from the current criminal investigative and prosecutorial model must consider the following issues:

- Changes to the rights of individuals (including suspects, former and current offenders, and 'volunteers' for the purposes of being eliminated from enquiries).
- The extent to which a person is advised of their privacy rights throughout the process of the State collecting DNA evidence through to retention and to removal. Due to the potential lifetime ramifications for an individual who consents to or is statutorily obliged to provide a sample, or who voluntarily provides a DNA sample for profiling, it may be that a person should receive legal advice prior to consent.
- The introduction of a new model must ensure that there is no potential damage to the constitutionally protected rights of any individual.

Population of the database

A DNA database is dependent upon being populated with profiles of people so that trace evidence collected at



scenes of crimes can be cross-referenced with data stored on the database.

The proposed database type is a limited database as opposed to a comprehensive one that contains the DNA profile of all individuals. The limited database model takes samples from "persons who fulfil certain criteria", according to the regulatory impact analysis of the bill. In summary, the proposed database will contain DNA profiles from three different sources: crime scene profiles (DNA profiles gathered from crime scenes), comparator profiles (collected from individuals such as volunteers, individuals detained by the gardaí, convicted offenders, and so on), and elimination profiles (based on those who work at crime scenes, such as gardaí, crime scene investigators, and prescribed persons).

Caution should be exercised when defining the sample threshold. Furthermore, the threshold for placement and retention of volunteer profiles on the database must be carefully considered in the context of proportionate interference with privacy rights. Mechanisms and oversight must be in place to measure that the rationale for the selection of classes of persons for sampling and to ensure selection is non-discriminatory.

> **The establishment of the database must be accompanied by safeguards around the taking of samples**

The Society also made detailed submissions in respect of the following issues:

- Samples from detained suspects where of no relevance to the current investigation,
- Statutory power to take samples by reasonable force,
- The destruction of samples and the removal of profiles from the database,
- Retention of samples and/or profiles of cleared suspects,
- International exchange of DNA samples/profiles,
- Children's rights,
- *Ex parte* applications,
- Adequate resources,
- Legal advice/representation, and
- The need for an awareness campaign.

The regulatory impact analysis made the following important observation: "DNA samples are personal data, and the taking and retention of such data is an interference with the right to bodily integrity and privacy rights. Any such interference must be proportionate to the public policy aim sought to be achieved. Accordingly, the establishment of the database must be accompanied by safeguards around the taking of samples, including the circumstances in which reasonable force may be used, restrictions on the use that can be made of the samples and the related profiles, restrictions on who may access the data, and the length of time for which they may be retained."

PICS: THINKSTOCK

The Society's submission can be accessed on the members' area of the website at www.lawsociety.ie/Policy-Documents.

slip of the LIP

Recent Supreme Court judgments have far-reaching implications for the rights of detained people to have access to legal advice if being questioned. Jenny McGeever buttons her lip

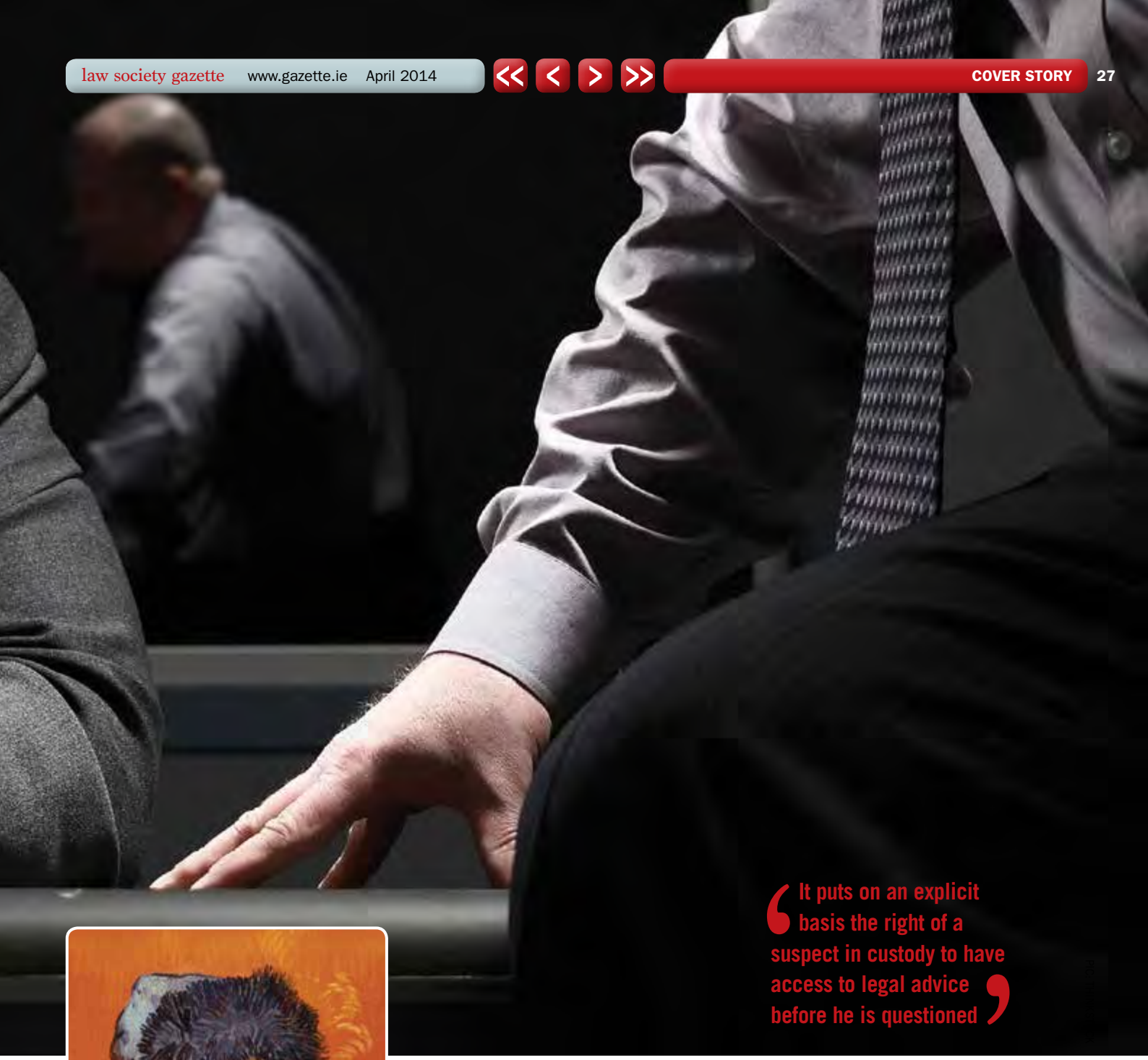
Jenny McGeever qualified as a solicitor in 1994 and is a founding partner in the specialist human rights and criminal law firm Fahy Bambury McGeever

In July 2007, the *Gazette* published an article entitled 'The sound of silence' by barrister Diarmuid Collins. This aimed to inform readers – especially those who would be advising suspects detained in garda stations – of the provisions of the then freshly minted *Criminal Justice Act 2007*. The author quite correctly predicted that the act would take some years to bed in and to be glossed by the courts.

On 6 March 2014, the Supreme Court gave judgment in the cases of *DPP v Raymond Gormley* and *DPP v Craig White*. These cases have far-reaching implications for the rights of detained persons to access to legal advice if being questioned (but not if simply being required to provide mandatory samples). The judgments also discuss the rapidly developing common law and European convention law on the rights of detained persons, which seem likely to ensure that there will be further developments in the near future.

Background

Raymond Gormley was arrested in Co Donegal at 1.47pm on Sunday 24 April 2005. He was informed of his rights to legal advice, and he gave the name of two solicitors. The gardaí made efforts to contact one of the solicitors and, to that end, attended at his parents' home. They directed the gardaí to the solicitor's own home, where they left a message with his wife. All this happened in the period after 2.15pm. At 3.06pm, the solicitor contacted the garda station. Unfortunately, there was a dispute as to when the solicitor said he would arrive at the station, but it was recorded at the time



> It puts on an explicit basis the right of a suspect in custody to have access to legal advice before he is questioned

PIC: THE BRIDGEMAN ART LIBRARY/GETTY IMAGES

as being "as soon as possible after 4pm". However, Mr Gormley was interviewed at 3.10pm and was alleged to have made a number of inculpatory statements before the solicitor's arrival at 4.48pm.

In the second case, Mr White had been arrested under section 42 of the *Criminal Justice Act 1999* at 7.45am on 13 February 2008. He was taken to Raheny Garda Station. At 7.58am, he made a request for a named solicitor. A phone call to her number shortly afterwards was answered by a recorded message, providing an emergency number. At 8.15am, a message was left on the emergency number, which was responded to within one minute. The solicitor arrived at the garda station at 9.42am. Meanwhile, at 8am, permission had been granted by the appropriate garda authority for the taking of various samples

at a glance

- Recent Supreme Court judgments put on an explicit basis the right of a suspect in custody to have access to legal advice before he is questioned
- The court gave a strong indication that the right to legal advice in the future may be held to extend to a right to have a lawyer present during questioning
- The conditions of detention must be such as to respect the suspect's rights and not to undermine the independence of that person's decision whether or not to seek legal advice

from Mr White under the *Criminal Justice (Forensic Evidence) Act 1990*. This request was granted at 8.05am. The samples had all been taken by 8.30am.

Single judgment

The Supreme Court gave a single judgment in these two cases, as a good deal of the background material was similar. This was delivered by Mr Justice Clarke and was concurred with by all members of the court (Denham CJ, Murray J, Hardiman J, Mc Kechnie J). In addition, a separate concurring judgment was delivered by Hardiman J.

The Supreme Court emphasised that "issues of this type have been the subject of legal debate in many jurisdictions for some time. The fact that these issues would ultimately come to be considered as a matter of Irish constitutional law can have come as no surprise."

The Supreme Court summarised existing Irish case law in paragraph 5 of the main judgment. It considered that: "The position to date has been that, while a constitutional right to legal advice in custody has been recognised, it has not yet been held that evidence-gathering might be suspended until legal advice becomes available."

By contrast, European Court of Human Rights case law, analysed in paragraph 6 of the judgment, "makes clear that the conviction of a person by placing significant reliance on admissions made during questioning, *which occurred without the benefit of requested legal advice*, is impermissible" (emphasis added).

The Supreme Court also summarised the case law of countries with legal systems similar to ours, including the United States, Canada, Australia and New Zealand (see panel below). It concluded that "the overall picture is that questioning is required to cease after a request for a lawyer has been made until legal advice is available".

> There are questions as to what a suspect must do to invoke the right to fair process, the circumstances (if any) in which the right may be waived, and the conditions in which the suspect should be held while awaiting legal advice

The court held, as a matter of Irish Constitutional law (after surveying authorities going back to the due process cases starting with the 1976 case of *State (Healy) v Donoghue*), that due process involves a right to have legal advice (at least where requested) before custodial questioning.

Raymond Gormley's case was the more straightforward of the two. It was held that "as a consequence of his clear request, he was entitled to legal advice before being questioned".

This is the nub of the case – and its main innovation. It is set out at paragraphs 9.1 and 9.2 of the main judgment. The right to fair process recognised by the Irish Constitution is similar to that recognised in the *European Convention on Human Rights* and in the other constitutional regimes mentioned. The judgment points out that there are further questions that will have to await other cases, concerning the precise parameters of that right. In particular, there are questions as to what a suspect must do to invoke the right, the circumstances (if any) in which the right may be waived, and the conditions in which the suspect should be held while awaiting legal advice.

Rationale

The rationale of this decision is set out at paragraph 8.8, beginning by emphasising the status of the detainee as an arrested person: "I am persuaded that the point at which the coercive power of the State, in the form of an arrest, is exercised against the suspect represents an important juncture in any potential criminal process. Thereafter, the suspect is no longer someone who is simply being investigated by the gathering of whatever evidence might be available."

The Supreme Court gave a strong indication that, although no such claim was made in these cases, the right to legal advice in the future may be held to extend to a right to have a lawyer present during questioning.

The court said: "Likewise, the question as to whether a suspect is entitled to have a lawyer present during questioning does not arise on the facts of this case, for the questioning in respect of which complaint is made occurred before the relevant lawyer even arrived. However, it does need to be noted that the jurisprudence of both the ECHR and the United States Supreme Court clearly recognised that the entitlements of a suspect extend to having the relevant lawyer present."

As noted above, it was held that, in the case of Mr White, because he had, in law, no option but to give the samples required, there was no obligation to wait for his lawyer before taking them in a minimally invasive manner and without force. In fact, Mr White had been wrongly advised by the gardaí that his consent was necessary, and the court expressed surprise that the gardaí would get this wrong. However, in principle, there is no entitlement to prior consultation with a lawyer before the taking of samples on a mandatory basis.

Separate concurring judgment

The separate concurring judgment of Mr Justice Hardiman agrees with the judgment of Mr Justice Clarke. However, it approaches the principles laid down in the leading judgment in a manner more rooted in the actual practices of custodial questioning. It also addresses some questions that will arise when (under legislation not yet in force) a period of detention may be extended to take account of the delay caused by waiting for a solicitor.

REFERENCE POINT

international case law

- *Salduz v Turkey* (2009, 49 EHRR 19)
- *Amutgan v Turkey* (2009, application 5138/04; 5th section)
- *Cimen v Turkey* (2009, application 19582/02; 2nd section)
- *Dayanan v Turkey* (2009, application 7377/03; 2nd section)
- *Panovits v Cyprus* (2008, application 4268/04; 1st section)
- *Trymbach v Ukraine* (2012, application 44385/02; 5th section)
- *Ambrose v HM Advocate* (2011, UKSC 43)
- *Cadder v Her Majesty's Advocates* (2010, UKSC 43)
- *Saunders v UK* (1996, 23 EHRR, 313)
- *Boyce v Ireland* (2012, application 8428/09; 5th section)
- *Jalloh v Germany* (2006, 44 EHRR 67)
- *Miranda v State of Arizona* (1966, 384 US 436)
- *Dickerson v US* (2000, 530 US 428)
- *Berghuis v Thompkins* (2010, 560 US 370)
- *R v Sinclair* (2011, 3 SCR 3)
- *R v Taylor* (1993, 1 NZLR 647)
- *R v Etheridge* (1992, 9 CRNZ 268)


PIC: THINKSTOCK

> The right to fair process recognised by the Irish Constitution is similar to that recognised in the *European Convention on Human Rights* and in the other constitutional regimes

This judgment emphasises that many arrests and detentions take place in the very early morning. It makes the point that this will, of necessity, lead to a delay in the arrival of a solicitor and discusses the reasons for this in some detail. It questions whether the price of the garda preference for early morning arrests should be paid by an extended period of detention for a suspect, who has no say in the timing of the arrest.

The separate concurring judgment will be welcomed by many practitioners for its understanding of the practicalities of advising a client in custody. It makes the point that such a person may be disturbed or upset by the manner and suddenness of his arrest, and may be in a poor condition to absorb complex advices. It suggests (very importantly, in the author's view) that the important formal features of detention, especially the application to detain, the decision to detain, the cautioning of the suspect, the administration of any new or different caution (such as the inference caution), and other matters of the same sort should be audiovisually recorded. This is important, in particular, in the communication of the right to legal advice and allows the person detained to choose a solicitor of their choice rather than one who has been foisted on them.

Conditions of detention

Hardiman J's separate concurring judgment takes up a point made by Mr Justice Clarke, that the conditions of detention must be such as to respect the suspect's rights and not to undermine the independence of that person's decision whether or not to seek legal advice. The concurring judgment specifically states what many practitioners will know from experience: that the conditions in which suspects are held, especially in cells, are often less than ideal and can be extremely disturbing.

Finally, the separate concurring judgment expressly acknowledges that the work of a solicitor called to advise a suspect in custody is specialised, complex and demanding work. It requires not merely qualifications, but wide experience of operating the statues involved, especially the *Criminal Justice Act 2007*. It also points out something that many gardaí appear not to know – that, in order to give meaningful advice after an 'inference' caution has been given, a practitioner needs to know the factual content of the allegation(s) against his client and his client's reaction to this.

Information and instructions

Section 30 of the *Criminal Justice Act 2007* provides that, where a person "fail(s) to mention any fact relied on in his or her defence, being a fact which in the circumstances existing at the time (that is, the time of questioning), clearly called for an explanation from him or her", the court or jury may "draw such inferences from the failure as appear proper" and, in particular, the failure may be treated as corroboration.

It seems quite impossible for a solicitor to advise a person in custody of the effect of this section on his individual case without knowing what precisely is alleged against him and what is the thrust of the evidence supporting that allegation, so that he can decide what matters he requires to mention in order to avoid triggering the section. Having ascertained this information, if he or she can, the solicitor must then enquire as to the outlines, at least, of his client's defence in order to advise him properly. None of these points, however, arose in the present cases.

In summary, this is an important Supreme Court judgment for criminal lawyers. It puts on an explicit basis the right of a suspect in custody to have access to legal advice before he is questioned. It clearly anticipates a day (not eagerly awaited by many solicitors) when there will be an express right to the presence of a lawyer during questioning.

The Supreme Court decision does not mention anything about an obligation of the questioning gardaí to put the case against the prisoner fairly to him. This seems very important, especially if reliance is to be placed at trial on the suspect's failure to mention matters that he might reasonably be expected to mention. It is difficult to know how a layman can approach this question, or how a solicitor can advise him about it, without knowing the substance of the allegation against him or matters he is invited to explain. But that, perhaps, is for another day.

look it up

Cases:

- *DPP v Buck* (2002) 2 IR 268
- *DPP v Conroy* (1986) IR 460
- *DPP v Creed* (2009) IECCA 90
- *DPP v Gormley, White* (2014) IESC 17
- *DPP v Healy* (1990) 2 IR 73
- *DPP v Madden* (1977) IR 336
- *DPP v O'Brien* (2005) 2 IR 206
- *DPP v Ryan* (2011) IECCA 6
- *Lavery v Member in Charge, Carrickmacross Garda Station* (1999) 2 IR 390
- *State (Healy) v Donoghue* (1976) IR 325

Legislation:

- *Criminal Justice (Forensic Evidence) Act 1990*
- *Criminal Justice Acts 1999, 2007*

Direct links to all these resources can be found in the interactive digital version of the magazine at www.gazette.ie.

LIEN on me

Andrew Cody is managing partner of Reidy Stafford and a member of the Law Society's Litigation Committee

The law in relation to a solicitor's retaining lien has evolved, if not changed considerably, over the last few years. Andrew Cody surveys the landscape

A retaining (or common law) lien gives solicitors the right to retain a client's money, documents or other property in their possession until all outstanding fees are paid. This includes fees, charges and disbursements, subject to certain exceptions, for any matter in which the solicitor was retained – but these must arise in a professional capacity as a solicitor.

A solicitor's lien only entitles the solicitor to hold the papers; it confers no other right on the solicitor. It is personal and cannot be assigned. However, the personal representatives of a deceased solicitor can continue to exercise a lien over a file.

A lien cannot be enforced against property that came into a solicitor's possession if the solicitor did not have authority from the client to accept that property, nor can he enforce a lien against property held in trust or for a third party. A lien cannot be exercised where the property is held on accountable trust receipt or subject to an undertaking. In *Martin v Colfer*, Finnegan P held: "In these circumstances, I am satisfied that at the time the plaintiff claimed a lien on the defendant's title deeds, the deeds were held by her subject to the trust created by the accountable receipt of 1999 and not as agent of the defendant."

> **'If the retainer was terminated by the client (otherwise than for neglect or misconduct), the court is generally not willing to interfere with the exercise of a retaining lien'**

Wills and damages

A lien cannot be claimed over books of account or statutory registers of a registered company.

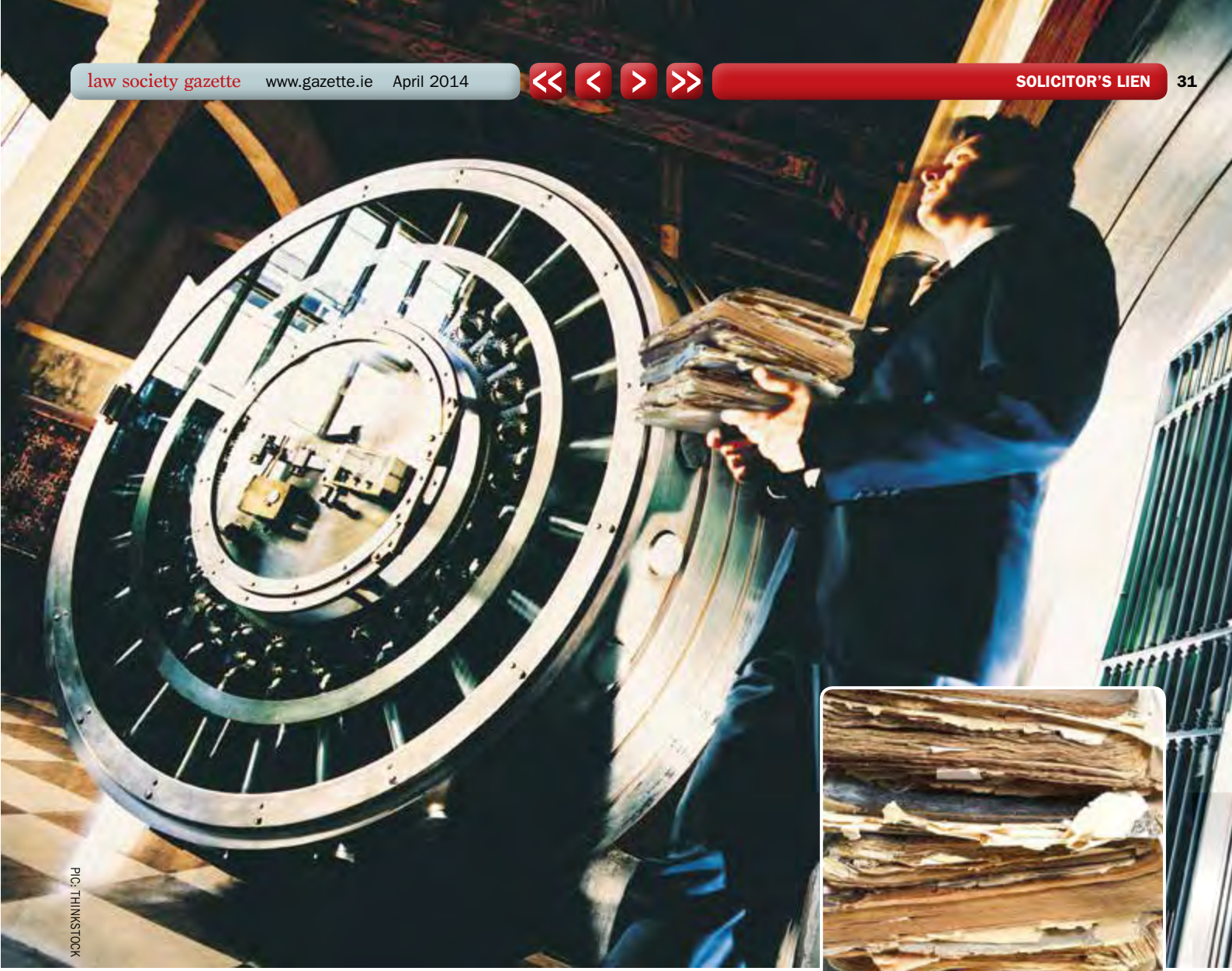
It has long been held that a lien cannot be held over a will. In my view, however, the situation changes when a solicitor is instructed by the executors, as they now become clients of the solicitor, and they have accepted their appointment as executors. A solicitor in those circumstances ought to be able to exercise a lien over the entire file, including the original will.

Section 68(3) of the *Solicitors Amendment Act 1994* limited a solicitor's lien over the proceeds of damages arising out of contentious business, in that a solicitor is not allowed to deduct charges from damages arising out of contentious business.

A lien has no limitation period and may continue to be exercised even after the debt becomes statute barred. However, a lien cannot arise or be created over a debt that is already statute barred. The lien crystallises on the termination of the retainer. In general, a lien does not arise until the work is completed, but if the client prevents the work being completed, then a lien arises for the work already done.

A solicitor's right to a retaining lien may be waived or deemed to be waived in certain situations, such as a solicitor voluntarily parts with retained documents without reserving a lien; a solicitor takes security that is inconsistent with the lien; a company goes into liquidation; the solicitor receives payment of his costs in full; following a complaint to the Law Society; or a solicitor enters into a credit agreement with a client.

Where a client is legally aided in a criminal case, normally no issue of a lien will arise, as there is no obligation on the client to discharge fees and costs. Where they are not legally aided, the interests of justice points heavily in favour of an order for production.



PIC: THINKSTOCK

Complaints can be made to the Law Society of inadequate professional services that are "inadequate in any material respect and were not of the quality that could reasonably be expected".

If a finding of inadequate professional services is made, the Society may determine that the solicitor is not entitled to any costs, or is only entitled to a specified amount, and direct that the file be handed over, even where a lien exists. Where a complaint of excessive fees is upheld, the Society may direct the solicitor to refund or waive the fees, either wholly or to any specified extent.

There can be no retaining lien against a liquidator. As against an examiner, the solicitor can take no action to realise a lien, presumably by retaining the file, but one would presume that the file could be handed over subject to the solicitor's lien continuing. As a company receiver is the agent of the company supplanting the existing directors and management, it appears that any lien against the company will continue against any receiver. A property receiver, once appointed, acts as an agent for the borrower, but owes a duty to the lender who appoints him. However, as the deeds would almost certainly be held on accountable trust receipt or subject to an undertaking, a solicitor would not be entitled to exercise his lien.

Solicitor terminates retainer

In *In re Faithfull* (1868), the court stated "if a solicitor chooses to discharge himself, he cannot leave his client in the lurch in the middle of a matter, because his client cannot supply him with money … if he does, he must produce (but not give up) to the new solicitor all papers necessary to enable him to prosecute or defend the matter in litigation".

In *Mulheir v Gannon*, *Ahern v Minister for Agriculture*, and *Treacy v Roche*, the solicitors had argued that the relationship between the solicitor and the client had deteriorated

at a glance

- A retaining lien gives solicitors the right to retain a client's money, documents or other property until all outstanding fees are paid
- A lien cannot be claimed over books of account or statutory registers of a registered company
- A lien cannot be enforced against property that came into a solicitor's possession if the solicitor did not have authority from the client to accept that property

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owing to the client's behaviour, and they were left with no alternative but to terminate the retainer. Laffoy J held that it was impossible to resolve that conflict on the basis of affidavit evidence, but she proceeded to deal with the cases on the basis that it was the former solicitors who had terminated the retainer, but they did so for good cause, and ordered the solicitor to hand over the client's papers to the client's new solicitor, provided the new solicitor undertakes to preserve the former solicitor's lien and to return the papers to the former solicitor at the end of the litigation.

The English courts have had a more flexible approach, as set out in by Moore-Bick J in *Ismail v Richards Butler*. Having found on the facts that there was no basis for criticising the solicitor, the court ordered the solicitors to hand over the documents to the client, subject to the client providing security for the entire sum allegedly owed. The security could be by way of payment into court, bank guarantee, or by any other means agreed by the parties. In effect, even though the solicitor terminated the retainer, the client was required to put in place security for the entire account before the file was to be handed over.

Ms Justice Laffoy referred to *Ismail* in *Treacy v Roche* and did not expressly follow or reject the rationale, but found that it was a "context far removed from that of these proceedings". One could assume that *Ismail* may be followed in a particular case where the client is a wealthy commercial entity.

Mr Justice Ryan in *Reilly and Kidd v O'Ceallaigh*, in a judgment delivered in 2013, accepts that the solicitor can by his conduct and lack of diligence implicitly terminate the relationship. He held: "A solicitor can be held to have implicitly terminated the retainer where the circumstances give rise to the implication. One of those circumstances is where the solicitor has not carried out his work with due diligence on behalf of his clients ... It follows that the plaintiffs are entitled to consider that he has by neglect implicitly terminated his retainer."

Client terminates retainer

If the retainer was terminated by the client (otherwise than for neglect or misconduct), the court is generally not willing to interfere with the exercise of a retaining lien, even where the documents concerned are needed by the client for pending litigation. Just as the courts have found that a solicitor can implicitly terminate a retainer, so too can a client. Ms Justice Laffoy addressed the issue of a client failing to accept the advice of a solicitor in *Treacy* and found that it did not amount to constructive termination. She went on to say that it was not possible to form any view as to whether it was in the client's interest or the solicitor's interest that she follow the advice given to her; even if it were possible, she would be extremely reticent to express a view on the quality of the advice, given that the proceedings were ongoing.

> The solicitors argued that the relationship between the solicitor and the client had deteriorated owing to the client's behaviour, and they were left with no alternative but to terminate the retainer

However, in the English case *Richard Buxton v Mills-Ownes*, the client sought to advance points that were wholly unarguable. The court held that the solicitors had good reason to terminate the retainer and were entitled to rely on their lien, as the solicitors were, "as officers of the court ... under a professional duty (i) not to include in court documents ... any contention which they did not consider to be properly arguable, (ii) not to instruct counsel to advance contentions which they did not consider to be properly arguable".

If a solicitor was asked to do something that could amount to misconduct, it is difficult to see a court coming to any other conclusion than that the client had in effect terminated the retainer.

When a dissatisfied client terminates the relationship without proper grounds and instructs a new solicitor, the original solicitor is not bound by a 'no foal, no fee arrangement' and is entitled to reasonable remuneration for the work done on the client's behalf.

Transfer of files

On receipt of an authority from another solicitor to take over the file, while a solicitor is not obliged to accept an undertaking from the second solicitor, it may well be in the first solicitor's interest, the client's interest, and the second solicitor's interest that the file is handed over by agreement and without delay, so that they can all recover whatever charges or damages each are lawfully entitled to.

Where the file relates to the defence of a claim or some other non-contentious business where it is unlikely that any damages or costs will be recovered, it is not unreasonable to insist on payment of your costs prior to transferring the file.

I would suggest that the solicitor furnish to the client a detailed bill outlining the fees, charges and disbursements, and details regarding the work completed, if necessary complying with the *Rules of the Superior Courts*, allowing the costs to be taxed. The solicitor should make it clear to the client and the second solicitor that he is exercising a retaining lien, and he should attempt to reach agreement on the transfer of the retained property or documents and consider the immediate payment of all disbursements or perhaps payment of a certain percentage of fees, charges and disbursements.

He should also seek to agree what percentage of the recovered costs would be payable to the first solicitor or reach agreement that, upon resolution of the proceedings, the file would be submitted to an independent solicitor or cost accountant to determine what percentage of fees, charges and disbursements are due to each solicitor. He should also consider the acceptance of an undertaking from the second solicitor not to disburse any settlement or costs until his entitlement has been determined, and consider what might happen in the event of the second solicitor being discharged. He should also submit his bill for costs for taxation if requested.

look it up

Cases:

- *Ahern v Minister for Agriculture* [2008] IEHC 286
- *In re Faithfull* [1868] LR 325
- *Ismail v Richards Butler* [1996] 3 WLR 129
- *Martin v Colfer* [2006] IEHC 124
- *Mulheir v Gannon* [2009] 3IR433
- *Reilly and Kidd v O'Ceallaigh* [2013] IEHC 565
- *Richard Buxton v Mills-Ownes* [2008] EWHC1831 (QB)
- *Treacy v Roche* [2009] IEHC 103

Legislation:

- *Solicitors Amendment Act 1994*

Direct links to all these resources can be found in the interactive digital version of the magazine at www.gazette.ie.

california DREAMING

If you're going to San Francisco, be sure to wear flowers in your hair. Or at least spruce up your CV. Kate Ahern describes her year spent living and working in the City by the Bay

Kate Ahern is a litigation solicitor at GJ Moloney Solicitors, Dublin and Cork

I had spent many summers visiting friends in San Francisco but had no intention of working in the USA until I attended a wedding in California in 2012 and thought how novel it would be to live and work where the sun shines. I had travelled to various hot climes, but never settled in a way that meant it was not a holiday but real life. My firm supported my enthusiasm by encouraging the idea, authorising my sabbatical and even facilitating my visa application.

The next hurdle was not so easily cleared. I thoroughly researched the various US visa options and quickly discovered how impenetrable the country is for prospective workers. Without having a position secured in advance of arrival, the options are limited. However, the J1 appeared to be available to me and was therefore the most appealing. The US Embassy had previously allowed those with professional qualifications to apply for this graduate visa, but had since confined applicants to recent university graduates only. The J1 requires you to travel within 12 months of qualification, so with ten months already under my belt, I was under a severe time constraint in which to solve the problem.

I approached travel agencies and the US Embassy helpline with a view to persuading them to allow me make an application for the J1 visa, but I was met with steadfast refusal. I contacted the Law Society, who told me that they had made several attempts to convince the embassy to reconsider the ban and had all but given up hope. I nevertheless persevered and, in a last ditch attempt, wrote a somewhat cringeworthy letter to the then visa consul, explaining my intention with the hope of changing his mind. Much to the surprise of the Law Society, the travel agency and indeed myself, I succeeded: the visa consul overturned the ban, allowing me to apply. Within a couple of weeks, I attended my interview at the US Embassy and without any difficulty or interrogation was granted my J1.

> **'The US is the home of the class action and, when the defendants to litigation number in the hundreds, organisation is key. The volume of documentation is phenomenal'**

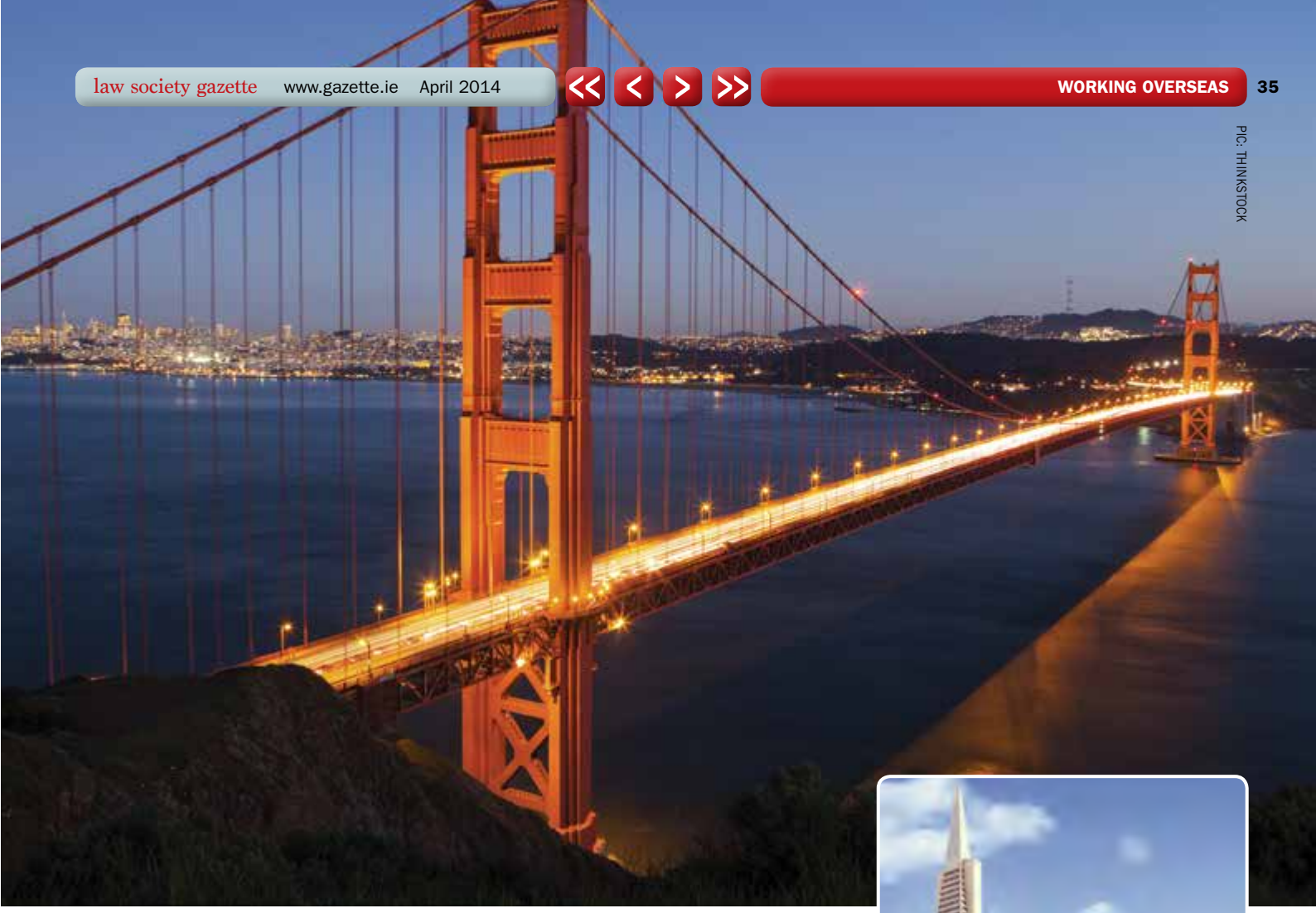
PIC: THINKSTOCK

Route 66

The following few weeks were spent in a flurry of transferring files, packing my belongings, distributing Christmas presents, and saying my goodbyes. I spent my last day in court, that evening at my work Christmas/going away party, and left the following morning. By the time I got to the US, I was well and truly ready for 'The Holidays'.

With so many "Oh you're Irish? *I'm* Irish!" on the East Coast and more clement weather on the West Coast, I was headed to Nor Cal – more particularly, San Francisco.

SF ('San Fran' only to out-of-towners) is a transient city where transplants outnumber locals and dogs outnumber children. The Bay Area (SF and its surrounds, including



PIC: THINKSTOCK

Silicon Valley) is the tech hub of the world, and the energy there is palpable.

Being surrounded by such innovation is infectious, and it was such a drastic change to the doom and gloom I had left behind in Ireland. The tech community's presence is quite tangible – for instance, the billion-dollar SF company Salesforce provided free keynotes at their Dreamforce event by such tech magnates as Marissa Meyer (Yahoo CEO) and Sheryl Sandberg (Facebook COO). Shuttle buses filled with techies commute from SF to Silicon Valley daily so as to encourage the best and the brightest to relocate to the Bay Area. And I bumped into Bill Gates at my local coffee shop!

California girls

Twelve months is not a long time, so in order to give myself a head start, I had asked my American friends, who in turn had asked their attorney friends, to review my CV (résumé) in order to 'Americanise' it, which was of great benefit.

Unfortunately, as the J1 is officially an 'intern visa', this meant it was at odds with my qualification. However, I was determined not to be underutilised. Yanks are notoriously suspicious of foreign qualifications and, as California is the State that employs the most foreign workers (mostly tech engineers), they are reluctant to employ any more non-US workers. The job search therefore takes time. In a thriving city like SF, there are hundreds of applicants for each job, and having foreign experience on your résumé is an easy excuse for them to filter you out of the process.

The upside of this is that, once it is clear that employers have accepted your experience as set out on the résumé, from that point onward it is an even playing field, and I was offered jobs after each of my four interviews.

I had applied for jobs online with such scant success that finally I took the inverse approach and advertised myself on Craigslist in a succinct line or two, so that I knew anyone who contacted me accepted my unusual circumstances. I was contacted on a Sunday by a tech startup in Silicon Valley that was seeking a contracts manager. I was interviewed the following day and started work the next. The job search may be lengthy, but it's concluded very swiftly.

Hotel California

Law in California is an entirely different story. While it is not quite as dramatic as we see on TV, the reality is that it is not that far

PIC: KATE AHERN

at a glance

- The US Embassy previously allowed those with professional qualifications to apply for the graduate J1 visa, but has since confined applicants to recent university graduates
- Americans are notoriously suspicious of foreign qualifications and are often reluctant to employ non-US workers. The job search therefore takes time
- The Irish diaspora in SF is well connected and effective. They are eager to help all Irish immigrants with advice

Law Society of Ireland

EU & International Affairs Committee

Stage in Paris 2014

October – November 2014

Every year, the Paris Bar organises an International Stage in Paris and invites one lawyer from each jurisdiction to participate. The stage is a fantastic opportunity for lawyers to discover and practice French law in the heart of Paris.

The stage takes place during the months of October and November and entails: one month attending classes at the l'Ecole de Formation du Barreau and one month of work experience in a law firm in Paris. The programme also includes a visit to Brussels to know the European Institutions.

The Irish participant will be selected by the EU and International Affairs Committee of the Law Society of Ireland. Candidates must:

- Be qualified in Ireland and registered in the Law Society.
- Have a good knowledge of French.
- Be under 40 years old.
- Have insurance cover (for accidents and damages).

Tuition is fully covered by the Paris Bar; candidates must be willing to cover other expenses (travel, accommodation, meals)*

If you are interested, please email Eva Massa (e.massa@lawsociety.ie) with your Curriculum Vitae and a letter explaining your interest in the stage (both documents in French and English)

Deadline for applications: **Friday 9 May 2014**

** The EU & IA Committee will sponsor the participant with €2,000; applications for a grant can be made to the French Embassy in Dublin.*

PIC: KATE AHERN

> The emotive and evocative language used in court documentation contrasted wildly with my Blackhall training and made my eyes bulge. A mediation brief stated that 'liability in this case is a slam-dunk'

from it. It was quite the eye opener.

As a qualified solicitor, it was open to me to take the California Bar Exam in order to practise as an attorney. The process consists of three steps: the Bar exam, the moral character determination (background check), and the Multistate Professional Responsibility Exam (MPRE). Should you wish to practise in California, you should note that the background check is extremely thorough and can take up to six months, and so may delay the taking of the oath of administration once both the Bar and MPRE have been passed. New York and California have the toughest Bar exams in the country, and California requires the highest passing score in the MPRE, at 86% (with the lowest being 75%).

As my visa was for only 12 months, it seemed unwise to spend the year qualifying and then not be in a position to avail of the qualification. So, without a license to practise, I set my sights on paralegal work.

My first stop was with a personal injuries attorney who needed help catching up with a backlog resulting from time off. The emotive and evocative language used in court documentation contrasted wildly with my Blackhall training and made my eyes bulge. A mediation brief stated that "liability in this case is a slam-dunk". I wondered how our esteemed judges would appreciate such sporting analogies.

Dock of the bay

When I applied for my visa, I envisaged working at a boutique defence litigation firm on Montgomery St – and, sure enough, that's where I ended up: adjacent to the Transamerica Pyramid, with panoramic views of the bay where, once the notorious fog cleared, we watched the America's Cup boats training and racing in the world's most famous sailing competition.

The firm specialises in 'toxic tort litigation', which involves asbestos and product liability claims. The US is the home of the class action and, when the defendants to litigation number in the hundreds, organisation is key. The volume of documentation is phenomenal. Everything's bigger in the States! All pleadings may be filed online, which eliminates time wasted queuing and filing and means all defendants have instantaneous access to their co-defendants' papers. Also, discovery is usually shared between the parties, which makes the process efficient and reduces the potentially enormous costs.

Back from Cali

I note that there are proposals in gestation about the implementation of an e-filing system in Ireland, and I am all for it. (That being said, I do think practitioners can benefit from a face-to-face grilling about their papers by the staff of the Courts Service.)

It was not all work and no play. The Bay Area is a naturally beautiful and vibrant place, and I would encourage anyone who has the opportunity to visit. Highlights for me included Christmas day on the beach, Bay to Breakers (40,000 people running across the city in fancy dress), gigs, the many museums and parks (free to SF residents), sailing, volunteering with the dogs at SF Animal Care and Control, the Fourth of July fireworks viewed from a boat on the bay, surfing in Bolinas, Santa Cruz, Half Moon Bay, Big Sur, Monterey, Napa, Vancouver, work trips to Ann Arbor, and the world-renowned SF fog, which is anthropomorphised as 'Karl the Fog' on social media.

I achieved everything I had set out to do within the year and was eager to return to Ireland with the benefit of my US experience. Americans, particularly those in Silicon Valley, are very effective networkers, and taught me a lot about talking to everyone you meet, as it may be the person you least expect who will offer an invaluable nugget of advice or direct you to a helpful contact. The Irish diaspora in SF is well connected and effective. They are eager to help all Irish immigrants with advice and seminars on visa options and networking and will go out of their way to help you in a bind, even sorting me out with an AIB code card reader.

I left Ireland in December 2012 and returned 12 months later. I was relieved and encouraged to find a very different atmosphere here. The Ireland I left had an air of helplessness and dejection; the one I returned to had not quite the arrogance of the 'Celtic Tiger' years, but had an assurance that all was not lost, and there was a hope for the future that had been absent for some time. I skipped the worst of it, but I will never hear the end of the outstanding Irish summer I missed!

REFERENCE POINT

useful contacts

- **Craigslist – your first port of call for jobs, accommodation, furniture, everything:** www.craigslist.com
- **State Bar of California:** www.calbar.ca.gov
- **Irish Immigration Pastoral Center, San Francisco:** www.sfiipc.org
- **Irish Lobby for Immigration Reform:** http://irishlobbyusa.org
- **USIT:** www.usit.ie
- **Irish Network Bay Area:** www.irishnetworksanfrancisco.com
- ***Gazette* article on US visas (June 2009, p35):** www.lawsociety.ie/Documents/Gazette/Gazette%202009/June2009.pdf
- **Karl the Fog:** www.twitter.com/karlthefog

TRUTH will set you free

Ernest J Cantillon is the managing partner of Ernest J Cantillon Solicitors in Cork. He has a special interest in the area of medical negligence

When a patient places his life in his doctor's hands, he expects the doctor to be candid and truthful – both in the clinic and the courtroom. Ernest J Cantillon checks his blood pressure

The doctor/patient relationship is based on trust. Mutual trust is essential. Patients place their lives in their doctors' hands. In turn, a patient expects his doctor to be candid and truthful.

If there are adverse outcomes, it is axiomatic that the patient is entitled to be informed truthfully of events. Arguably this is simply good manners.

However, the medical profession seems to believe that they cannot, and should not, admit to errors – in case it creates a legal liability. This rationale does not stand up to scrutiny. The fact that a doctor apologises and expresses sympathy for a non-negligent unintended outcome does not equate to negligence. No ruling has ever been cited that so concluded.

This coyness regarding candour and apologising has prompted calls from patient advocacy organisations for the introduction of a statutory duty of candour.

Developments in Britain

In the last decade, numerous problems were discovered with the medical service provided at the Mid-Staffordshire Hospital in England. Following a number of patient deaths and countless injuries due to negligent treatment, an inquiry was set up under Robert Francis QC. Mr Francis believed the failure of the hospital authorities and doctors to be candid with the patients had contributed, in no small way, to the problems that arose. Faced with evidence of deliberate concealment and recklessness towards patients, Mr Francis was moved to make some 290 recommendations in his detailed report.

He defined candour as: "The volunteering of all relevant information to persons who have or may have been harmed by the provision of services, whether or not the information has been requested and whether or not a complaint or report about that provision has been made."

This is an apt definition. Its operation is not dependent upon a request or a complaint being made as to what happened. Once there is harm, the obligation to be candid automatically kicks in.

Mr Francis advocated a statutory obligation of candour where there is a belief or a suspicion that any treatment or care provided to a patient has caused death or serious injury. He further recommended that the provision of the information should not, of itself, be evidence or an admission of civil or criminal liability, but that not disclosing information should entitle the patient to a remedy.

Mr Francis went further, recommending that it be a criminal offence to deliberately obstruct the duty of candour or to provide intentionally misleading or untruthful information.

> **It is counter-intuitive to think that admitting one's mistake could save money, but the experience of the University of Michigan Health Service has been to that effect … Many patients decided not to sue at all, once they received a frank admission**

Developments in the USA

Pioneering work has been undertaken by Dr Tim McDonald at the University of Michigan Health Service. Dr McDonald is a professor of anaesthesiology and paediatrics at the University of Illinois. He is also their chief safety and risk officer for health and, in addition, a lawyer.

He has long advocated for a duty of candour to be

PIC: THINKSTOCK

imposed on healthcare professionals. He believes it is good for the patient, healthcare professionals and society.

When Dr McDonald introduced a duty of candour in Michigan, the number of notifications of adverse incidents shot up from about 1,500 to 9,000 per annum. One would expect that the cost to the hospital would have risen significantly. It is counter-intuitive to think that admitting one's mistake could save money, but their experience has been to that effect. Damages payments per case were reduced by 47%, and the average settlement time reduced from 20 to six months. Many patients decided not to sue at all, once they received a frank admission. Insurance costs tumbled.

Medical Council

In 2009, the Irish Medical Council changed its guidelines in the *Guide to Professional Conduct and Ethics for Registered Medical Practitioners*. A doctor who fails to adhere to the guidelines may be guilty of professional misconduct.

Regarding 'adverse events', guideline no 18.3 states: "Patients and their families are entitled to honest, open and prompt communication with them about adverse events that may have caused them harm. Therefore, you should:

- Acknowledge that the event happened,
- Explain how it happened,
- Apologise, if appropriate, and
- Give an assurance as to how lessons have been learnt to minimise the chance of this event happening again in the future."

While purist advocates of the duty of candour might quibble with the strength of this rule, it nonetheless goes some significant way towards introducing a duty of candour.

Health Service Executive

In November 2013, the HSE, in collaboration with the State Claims Agency, launched national guidelines – *Open Disclosure: Communicating with Service Users and their Families Following Adverse Events in Healthcare*. The document is replete with references to honesty and transparency and aims to engender a culture of open disclosure, essentially candour, throughout the HSE.

Open disclosure is defined as: "An open, consistent approach to communicating with service users when things go wrong in healthcare. This includes expressing regret for what has happened, keeping the patient informed, providing feedback on investigations, and the steps to be taken to prevent a recurrence of the adverse event."

The guidelines take care to highlight that an expression of regret or apology is not an admission of liability or fault. This should, in some way, allay concerns that candour could result in a legal liability.

How these guidelines will operate in practice remains to be seen. They mirror, to some extent, the Health Information and Quality Authority (HIQA) standards that have been in place since May 2012.

Most large hospitals have risk-management departments, run at considerable expense. Honest assessment of medical care can only give rise to clinical improvement.

State Claims Agency

The SCA manages claims of medical negligence against the HSE. Hospitals are obliged to report all adverse incidents promptly to the SCA. Thereafter, "the SCA assumes ownership of claims from the point of first notification of adverse incidents right through to final resolution".

at a glance

- In adverse outcomes, patients are entitled to be informed truthfully of events
- The fact that a doctor apologises and expresses sympathy for a non-negligent unintended outcome does not equate to negligence
- In November 2013, the HSE and the State Claims Agency launched national guidelines on 'open disclosure'. The obligation on the doctor, according to HSE/SCA guidelines, is to be candid

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9 April	Wind Turbines – Opportunities and Pitfalls. *Tullamore Court Hotel, Co. Offaly*	€102	€136	3 General (by Group Study)
10 April	Judicial Review - Recent developments and challenges	€102	€136	3 General (by Group Study)
25 & 26 April	Law Society Annual Conference: Working on your Practice – Not in it! Presented in partnership with Law Society Skillnet – *Dromoland Castle, Co. Clare*	For full details and to register Contact lawsociety@ovation.ie		6 CPD Hours (by Group Study)
14 May	Inhouse and Public Sector Committee – Panel Discussion: *How to get value and be valued (by your client).*	–	€25	2 General (by Group Study)
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29 May	Anti – Money Laundering seminar presented by the EU and International Affairs Committee	–	€85	2 Regulatory Matters (by Group Study)
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Online	Facebook for Lawyers: The "How to" Guide	€55		Approx. 5 hours M & PD Skills (by eLearning)
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Online	Responding to a Regulatory Investigation & Data Protection – the current regulatory position	€45		Approx. One Hour Regulatory Matters (by eLearning)
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Online	Microsoft Word – All Levels, PowerPoint - All levels, Excel	From €40		Approx. 5 Hours M & PD Skills (by eLearning)

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FOCAL POINT

candour in pleadings

Currently, a plaintiff must set out the relevant circumstances in pleadings. By contrast, a defendant pleads only to the allegations made against him.

What is wrong with requiring a defendant to set out fully the circumstances and to plead candidly what happened? By upholding the principles of 'he who asserts must prove' and that the defendant should only plead to the allegations made against him, we risk failing to do justice to both parties. Most right-thinking people wrongly assume that, if a case comes to court, the full facts come out. Where is the justice when a defendant can conceal his wrongdoing? Is it a just system when the wrongdoer is under no legal obligation to, as it were, 'fess up'?

Practitioners hoped the introduction of the *Civil Liability and Courts Act 2004* might impose an obligation on a defendant to plead the full circumstances of an event. The 2004 act obliges a plaintiff to set out his stall with some particularity in the personal injuries summons. Unfortunately, notwithstanding sections 12 and 13 of the 2004 act, defendants continue to put in defences that are, in reality, mere traverses. If there was an obligation (backed up by sanctions) on a defendant to plead with the same degree of particularity as a plaintiff, this would cause a defendant (and his advisors) to focus on the reality of the situation far earlier.

Of course, in general terms, a defendant should only be obliged to plead to the case made against him. However, in a medical negligence action, the plaintiff often has no awareness of what happened. A defendant is entitled, currently, to refuse to reveal wrongdoing. Would an obligation to plead candidly not better serve the interests of justice?

The present position – which, in effect, gives a defendant a right against self-incrimination with impunity – is far from satisfactory. That right seems to be put above the plaintiff's right to justice. The principle is valuable, but has come at a cost. Should we not learn from the *Francis Report*, instead of perpetuating a system in Ireland of which the judiciary and patients alike are critical?

On 8 February 2014, Minister Shatter announced that the Government had started work on open disclosure legislation. Hopefully, this will go some way towards addressing the concerns raised in this article. It is an indictment of our system that the most obvious approach – namely to tell the truth – has to be legislated for.

Defences routinely adopt a 'defend and deny' approach. The SCA rejects that such a policy exists and states that, in fact, its policy is to admit liability where there is a medical report supporting medical negligence. The experience of practitioners (including this author) has been to the contrary.

Thus, although the SCA cannot interfere in a patient's clinical management, nonetheless its actions may well have that effect. The obligation on the doctor, according to the Medical Council guidelines and HSE/SCA guidelines, is to be candid. The SCA appears to ignore that obligation. The appropriateness of this interference is questionable.

> **'It is an indictment of our system that the most obvious approach – namely to tell the truth – has to be legislated for'**

Where liability is not in issue, the SCA's stated approach is to "settle such claims expeditiously, insofar as it is possible to do so on reasonable terms". In contrast, where liability is fully disputed, "all necessary resources are applied to defending such claims robustly". It might be more appropriate to robustly apply all necessary resources to deal with patients who have been the victims of medical misadventure.

The statutory objective of the SCA is to "manage claims so as to ensure that the State's liability and associated legal and other expenses are contained at the lowest achievable level". From a purely financial viewpoint, this seems appropriate. However, from a societal viewpoint, is it appropriate to compensate victims of medical negligence merely at the 'lowest achievable level'?

One further questions the compatibility of this objective with the *European Convention on Human Rights*. The State is required to perform its functions in a manner consistent with the convention. The fact that a principal goal of the SCA (part of the National Treasury Management Agency) is the reduction in awards of payments seems at odds with a person's ECHR rights and, in particular, article 6.

Judges have been critical of the SCA's handling of medical negligence claims. Ms Justice Mary Irvine, in particular, recently criticised the SCA's delay in admitting liability where liability was clear-cut. This delay, she observed, causes further unnecessary distress to the victims of medical negligence and their families.

While a statutory duty of candour requires legislative change, there is no legislation required and no reason why the SCA cannot admit liability far earlier.

Costly processes

Our current system is too expensive and time-consuming. Medical misadventure cases can involve a coroner's inquest, judicial inquiries, and HIQA investigations. These costly processes are followed by lengthy litigation. Meanwhile, the doctor and/or HSE can sit back and invoke the right against self-incrimination.

Justice would be achieved and money saved by requiring a defendant to plead honestly and candidly. It is heartening to see moves within the medical profession to generate candidness in the doctor/patient relationship.

The legal system needs to catch up and look critically at the way these cases are defended. The 'defend-and-deny' approach has not worked. Proposal for change in pleadings to a candid approach is not without difficulty. We need to focus on solutions for those difficulties rather than perpetuate an inadequate system.

Given the welcome moves in the clinical arena to introduce candidness, it is disappointing that candidness does not continue when the relationship changes from patient/doctor to plaintiff/defendant. g

look it up

Legislation:

- *Civil Liability and Courts Act 2004*

Literature:

- Mid-Staffordshire NHS Foundation Trust Public Inquiry (*Francis Report*), February 2013, www.midstaffspublicinquiry.com/report
- Irish Medical Council, *Guidelines for Professional Conduct and Ethics for Registered Medical Practitioners* (7th ed, 2009)
- HSE and SCA national guidelines, *Open Disclosure: Communicating with Service Users and their Families Following Adverse Events in Healthcare*

Direct links to all these resources can be found in the interactive digital version of the magazine at www.gazette.ie.

The concept of finality in family law is of central importance to litigants, and the desire to disconnect from the financial obligations to a former spouse is high on their wish list. Ann FitzGerald cuts the ties

family TIES

Ann FitzGerald is a Cork-based barrister

Two recent judgments have considered the issue of 'proper provision' in divorce cases. In the 2011 case of *G v G*, the Supreme Court moved away from the earlier view – expressed in the leading case of *T v T* (2002) – that it was entirely a matter for the court to determine what amounts to 'proper provision' on divorce.

In *G*, the court allowed the parties a measure of self-determination, to freely and voluntarily bind themselves to a settlement at judicial separation (JS) stage and to be permitted to express same as being in 'full and final settlement'. It is the court's constitutional and legislative imperative to assess 'proper provision' on divorce and to protect the family unit as expressed in article 41 of the Constitution. However, in examining the factors that influence that assessment, the court held that the parties have a degree of freedom to contract in reaching a JS settlement, with a clean break clause included.

The court ruled that provision on divorce cannot amount to a redistribution of the parties' assets and, in appropriate cases, the court will merely engage in an exercise in measuring the allocation made at the time of separation to see if it requires readjustment. If the provision made at the time of the JS is deemed proper, then it may not require to be revisited on divorce. The fact that one of the parties has had a windfall increase in assets in between may not of itself require the court to make additional provision if the same is deemed to be proper in all of the circumstances.

Mork and Mindy

In *G*, Chief Justice Denham delivered the judgment of the court and addressed the issue head-on as to whether the 'full and final settlement clause' included in a 1996

PICS: THINKSTOCK

> A separation agreement is an extant legal document, entered into with consent by both parties, and it should be given significant weight

at a glance

- Two recent judgments address the issue of the finality of financial arrangements with a former spouse: *G v G* (Supreme Court) and *BC v MC* (High Court)
- In *G*, the court allowed the parties to freely and voluntarily bind themselves to a settlement at judicial separation stage and to be permitted to express same as being in 'full and final settlement'
- In *BC v MC*, while applying the principles laid down in *G*, the court refused to grant an order because it was not satisfied that a sufficient level of security for ongoing spousal maintenance was in place for a dependant ex-wife
- The outcome in this case did not permit the husband to disconnect from his maintenance obligations to his ex-wife, even on death

separation agreement could be revisited on divorce, in circumstances where the husband had obtained a windfall increase in his asset worth in between. The Chief Justice laid down the following questions for the court:

- What weight is to be given to the previous separation agreement?
- Was the previous settlement a full or partial estoppel?
- What happens if there has been a change in circumstances? A windfall? A financial disaster? A serious illness? A change in needs?
- How relevant is it if a party has mismanaged his or her provision made in an earlier agreement?

The use of the word 'estoppel' in this context is critical to the court's view, having regard to the wording of section 20(3) of the *Family Law (Divorce) Act 1996*, a stand-alone provision underlining the court's obligation "in determining the provisions of any ancillary order, to have regard to the terms of any separation agreement entered into by the parties and still in force".

In the space available here, I will give a brief synopsis of the main findings in the judgment, which is itself essential reading for practitioners. *G* attempts to give answers to some troubling questions, including:

- A separation agreement is an extant legal document, entered into with consent by both parties, and it should be given significant weight, especially where the parties agreed that it was intended to be a full and final settlement of all matters arising between the parties.
- If the circumstances are the same as when the separation agreement was signed, then *prima facie* the provision made by the court on divorce would be the same, as long as it was considered to be 'proper provision'.
- If the circumstances of the spouses, one or both, have changed significantly, then the court is required to consider all the circumstances carefully. The requirement is to make 'proper provision', and it is not a requirement for the redistribution of wealth.
- Relevant changed circumstances may include the changed needs of a spouse. If there is a new or different need, that may be a relevant factor. Such a need may be an illness.
- If a spouse acquires wealth after a separation, and the wealth is unconnected to any joint project during their married life, then that is not a factor of itself to vest in the other spouse a right to further monies or assets.
- If one party obtains a windfall after separation, the other party is not entitled as of right to part of it, unless such an application addressed a need of a party.
- Assets that are inherited will not be treated as assets obtained by both parties in a marriage. Their treatment will depend on the circumstances of each case.
- The standard of living of a dependant spouse should be commensurate with that enjoyed when the marriage ended.

> The lemming-like approach to the universal inclusion of section 18(10) blocking orders is well and truly over

The judgment makes it abundantly clear that, in making 'proper provision', the court shall have regard primarily to accommodation needs, income and maintenance, to include security therefor, as opposed to any free-range redistribution of assets on some arbitrary basis. The emphasis has moved away from the broader 'proper provision' based on the effective division or redistribution of assets, to the lower standard based on reasonable and adequate need. Very considerable weight – approaching a cast-iron certainty – was afforded by the court to the terms of the separation agreement, in particular the 'full and final settlement' clause, and this undoubtedly heavily influenced the outcome of the appeal in the Supreme Court. (The case was remitted to the High Court for assessment of provision based on the principles enunciated by the Supreme Court).

While there are limited circumstances where a party may successfully sidestep the effect of *G*, this may be confined to maintenance and established need. It is important to note that the judgment will have application in all JS and divorces in the treatment for example, of need, inherited and windfall assets.

Who's the boss?

By contrast, in *BC v MC*, while applying the principles laid down in *G*, the court refused to grant a section 18(10) blocking order under the 1996 act because it was not satisfied that a sufficient level of security for ongoing spousal maintenance was in place for a dependant ex-wife.

This occurred in the very category of circumstances envisaged by the anti-divorce lobby at the time of the 1996 divorce referendum, where an impoverished spouse might otherwise be left without a secure income in old age. It seems likely that the intention behind the inclusion of a section 18-type relief may well have been to eliminate or reduce the negative impact of the introduction of divorce where a breadwinner had remarried and the first spouse, often the wife, remained unmarried and dependant.

This is a notable judgment of Peart J, where the court refused to grant a section 18(10) blocking order on divorce. It is the first judgment delivered concerning section 18 of the 1996 act and demonstrates the court's novel approach to provision, in ensuring that security for maintenance is in place both during the lifetime of the paying spouse and after his death. From the introduction of divorce in 1997 until the current recession, section 18(10) blocking orders were almost universally included in all in divorce decrees and settlements. Application of section 18 was invariably excluded, such that many practitioners had forgotten what the original intention of the section had been.

In *BC*, the couple were married for 30 years, with two children, neither dependant. An order for JS had been granted in 1997 and there was no 'full and final settlement clause'. The husband ran a successful and profitable caravan park business, and the wife worked part time. The husband paid €200 weekly maintenance to the dependant wife. There were no other significant assets of the parties. The husband applied for a divorce

FOCAL POINT

section 18 of the *family law (divorce) act*

Section 18(1) of the 1996 act provides that, on the death of a spouse or former spouse, as the case may be, an application to the court may be made for provision where the court is satisfied that proper provision was not made for that spouse during the lifetime of the deceased spouse. The equivalent provision on JS is Section 15 of the *Family Law Act 1995*.

FOCAL POINT

drafting wills

Practitioners drafting a client's will should be mindful of the ongoing nature of a client's maintenance obligation to an ex-spouse, in that they will not necessarily cease on death.

It would be wise to discuss what measures might be put in place to secure an ex-spouse's future maintenance, so as to avoid the possibility of a section 18 application being made against the deceased's estate.

in the Circuit Court and the wife appealed, in particular due to her concerns around the granting of a section 18(10) blocking order.

Diff'rent strokes

Peart J described the wife's disquiet in the following terms: "A great concern to the wife is her security in the event of the [husband's] death. In view of the 'blocking order' made under section 18(10) of the act of 1996, she sees a situation where, upon his death, she will have no maintenance and no right to any share in his estate in order to provide her with any financial security … If it were possible now to have some lump sum provision of sufficient size to enable the wife to have some security or means of maintenance after his death, the court might readily make an order in that regard. If the husband's employment carried with it a pension upon retirement or upon death, or if any other pension plan existed, the court would be in a position to make some form of pension adjustment order in order to secure part of it for the benefit of the wife. But there is none. As things stand, the wife would have no maintenance once [the husband] has died."

> If a spouse acquires wealth after a separation, and the wealth is unconnected to any joint project during their married life, then that is not a factor of itself to vest in the other spouse a right to further monies or assets

The court first addressed how the wife's maintenance would be met if the husband decided to retire or sell his business and considered it "fair and reasonable that the wife be notified by the [husband] of his intention to retire from the business and/or dispose of same by sale lease or otherwise by one month's notice in writing and the court's order to be registered as a caution or inhibition on the folio." This stipulation was not intended to create a charge in favour of the wife, but simply to put her on notice so that she could take appropriate advice to enable her to take such steps as may be reasonably necessary to protect her interests in regard to future maintenance.

Addams family

Mr Justice Peart then considered the issue of provision in the context of section 20 of the 1996 act and found that it "includes proper provision for the wife after the husband has died and not simply during his lifetime". In taking into account the judgment in *G*, Peart, J declared: "Where a mechanism exists for post-death maintenance to be secured in some reasonable way, or at least protected so that the surviving spouse may take some steps to address those changed circumstances and its effect on her maintenance, then the court should not make a blocking order against the wife under section 18(10). That will enable the wife in this case to avail of section 18(1) of the act, should her circumstances justify it, and make an application for provision of maintenance in some form from the [husband]'s estate, whatever it may comprise at that point."

The outcome in this case did not permit the husband to disconnect from his maintenance obligations to his ex-wife, even on death. On divorce, *Succession Act* rights may be automatically ended. *BC*, however, demonstrates the far-reaching effect of section 18, beyond the grave.

Mr Justice Peart in *BC* adopts a protective approach to the dependant wife's need for security for maintenance in the peculiar circumstances of that case. Unless sufficient evidence of provision is in place to secure maintenance, both during the lifetime of the paying spouse and even after his/her death, then arguably a court should not grant such a blocking order, and nor should practitioners advise their clients to agree to it in reaching settlement.

The lemming-like approach to the universal inclusion of section 18(10) blocking orders is well and truly over.

look it up

Cases:

- *BC v MC* [2012] IEHC 602
- *G v G* [2011] 3 IR 717
- *T v T* [2002] 3 IR 334

Legislation:

- *Family Law Act 1995*
- *Family Law (Divorce) Act 1996*

Direct links to all these resources can be found in the interactive digital version of the magazine at www.gazette.ie.

Foundation Stone: Notes towards a Constitution for a 21st Century Republic

Theo Dorgan (ed). New Island Books (2013), www.newisland.ie. ISBN: 978-1-84840-259-1. Price: €17.99 (incl VAT).

Foundation Stone is a collection of essays by well-regarded politicians and academics on constitutional and political reform, centred around the establishment of the Constitutional Convention in 2012. Its subtitle, 'Notes towards a Constitution for a 21st Century Republic', hints at its central theme: the notion of republicanism – and whether Ireland can truly be considered a republic in the absence of radical constitutional reform.

In essence, the essays are a sort of wish list for reform in general and for the Constitutional Convention in particular. Now that the convention has concluded its programme of work, it is apposite to measure its achievements against the aspirations expressed by the contributors to this collection.

Republican theory dominates the essays by Eoin Daly and Tom Hickey. Daly offers a striking critique of what he calls the undue legalisation and mystification of the Irish Constitution. Part of the root cause for this may be the lack of constitutional literacy in Ireland, which is a key theme of Donncha O'Connell's essay: O'Connell compares the Constitution to Joyce's *Ulysses* – "Everyone knows about its existence, but few people know anything about it."

Hickey presents an attractive picture of how government could be more effectively held to account through parliamentary scrutiny and the individual vote. He acknowledges, however, that political culture may be a bigger issue here than constitutional text.

On the convention itself, perspectives range from highly critical to more optimistic. Eoin Ó Broin neatly captures the essential weakness of the convention: a lack of ambition in its initial design – and this point is echoed by Donncha O'Connell and Niamh Puirséil.

As against this, Ivana Bacik argues that the convention actually has the potential to bring about a range of constitutional reforms that could, in their totality, represent a radical reform and make Ireland a more republican country.

While Bacik may have somewhat overstated her case, the actual experience of the convention has certainly been more positive than predicted at first, and many sceptics (myself included) have been pleasantly surprised by one feature in particular. It has lived up to Maura Adshead's call for "a positive experience of political engagement – to let people see that there is something that can be learned by the conduct of good politics".

It has also made recommendations that have addressed several (if not all) of the issues raised by Orla O'Connor in her call for a feminist constitution. It remains to be seen whether the Government will follow through on its recommendations, but as we reflect on the successes and failures of the Constitutional Convention, *Foundation Stone* provides an interesting yardstick against which it can be measured.

Dr Conor O'Mahony is director of graduate studies at the Faculty of Law, University College Cork.

The Private Enforcement of Competition Law in Ireland

David McFadden. Hart Publishing (2013), www.hartpub.co.uk. ISBN: 978-1-8494-641-30. Price: Stg£50 (incl VAT).

Solicitors may, on behalf of their clients, sue undertakings, associations of undertakings and the State for breaches of competition law. Surprisingly, after 20 years of Irish competition law and 40 years of EU competition law being applicable in Ireland, there are relatively few cases.

David McFadden's book on the subject is therefore very welcome on several levels. He brings enormous practical experience as a legal advisor to the Competition Authority. His book is not only practical but learned, as the product of a PhD thesis. It is also extraordinarily well timed, as the EU grapples with introducing a directive to facilitate the private enforcement of competition law.

The book poses the question of the purpose of private competition litigation and asks why there has been a dearth of such litigation in Ireland. The author concludes that the right to sue in Ireland for most consumers and SMEs who have suffered competition damage is, at best, theoretical.

The author puts it bluntly when he writes that Ireland recognises the right to sue, but does not create the mechanisms that make that right of action either real or enforceable for all but the wealthiest claimants. He sees the EU proposal on this area as shining a mirror on the Irish regime and showing up the deficiencies of that regime (and, presumably, the *Competition Act 2002*, which was championed by its advocates to cure the deficiencies of the *Competition Act 1991* and the *Competition (Amendment) Act 1996*).

He makes a number of suggestions for reform to enable and encourage private competition litigation. He suggests, in particular, that there should be an 'opt-out' class action regime that would allow an award of damages to plaintiffs with small claims.

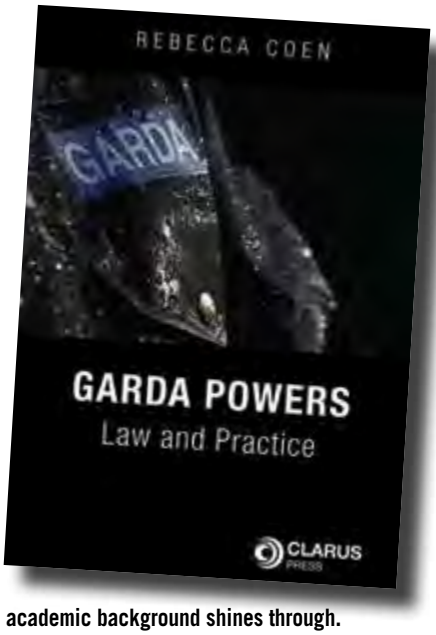
He also suggests reform of the laws on litigation funding. The enactment of the *Competition (Amendment) Act 2012*, stimulated by the Troika, is welcomed by the author for various reasons, including its *res judicata* provision, which should assist plaintiffs in follow-on damages actions.

This is a lucid, erudite and accomplished work. It is tightly written and eminently readable. It is essential reading, not only for those interested in competition law, but also consumer law and mass litigation claims in Ireland.

***Dr Vincent J G Power is head of the EU, Competition and Procurement Law Unit at A&L Goodbody Solicitors and is author of* Competition Law and Practice *and co-author of* Irish Competition Law: the Competition Act 2002.**

Garda Powers: Law and Practice

Rebecca Coen. Clarus Press (2014), www.claruspress.ie. ISBN: 978-1-9055-365-73 (HB); 978-1-9055-366-03 (PB). Price: €99 (PB); €149 (HB) (incl VAT).



Garda powers are sanctioned interferences into the lives of individuals in the interests of the common good. So says the author of this comprehensive manual in her introduction. She then proceeds to demonstrate just how many and various are those intrusions into the lives of citizens, as well as analysing their origins, practical applications and limitations.

A staff member of the DPP's office, Ms Coen brings an impressive academic rigour and neutrality to her analysis. It is almost as much an academic as a practical work, scoring highly in both areas. Extensive footnotes, statutory and case references bear witness to the breadth of the author's trawl in search of international comparative best practice. It is notable that relatively little serious research into criminal justice topics takes place here, the most honourable exception being the Law Reform Commission.

The work covers all of the standard garda powers – entry, arrest, search, seizure – comprehensively. There is much criticism of the piecemeal provision of the "numerous and overlapping" powers, obliging her to "cobble together" the "unwieldy array of legislation and case law", while noting the confusion it must cause for non-lawyer policemen trying to master it. The author wishes aloud for consolidation and codification, as in Britain's *Police and Criminal Evidence Act* and its accompanying *Codes of Practice*. She is not alone in her view.

As to the rights of suspects generally, Ms Coen notes their inferior position "in marked contrast" to Britain, having less access to lawyers and information about the case under enquiry, and is generally critical of Ireland's opting out of European measures to strengthen those rights.

In an extremely useful chapter on (mainly covert) surveillance, the author, as well as analysing the relevant statutes, sets out an excellent local and international background, suitable for the general reader, into another controversial area of police work. It is in her discourses on the debates surrounding police operations and policy that her academic background shines through. Her training as a barrister brings a sound grasp of the law to the fore.

Two short closing chapters touch on matters not normally covered in this type of manual: dealing with vulnerable complainants, and language rights. The former identifies victims of crime generally, and of domestic violence specifically, as warranting special treatment. In the latter chapter, mention is made of the increasing requirement for gardaí to be both linguistically and culturally aware in a new Ireland, with its multilingual population.

This book is fluent and readable, well laid out, and thoroughly accessible. The index leaves a little to be desired, but cases and statutes are thoroughly annotated. Succeeding both as a handbook for lawyers and gardaí, and as a theoretical manual that should be compulsory reading at Templemore, no criminal lawyer's library should be without it.

Dara Robinson is partner in the Dublin firm Sheehan & Partners.

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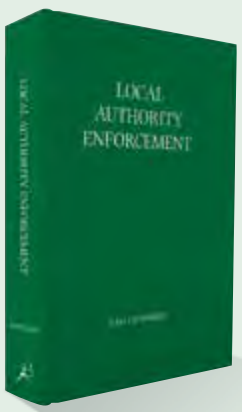

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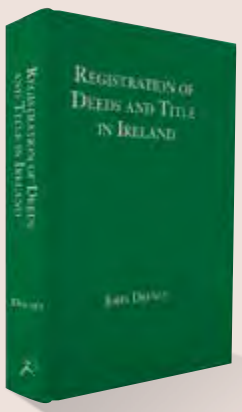

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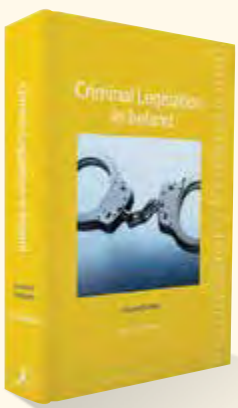

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Council meeting – 21 February 2014

Legal Services Regulation Bill

The Council noted the contents of the Society's latest submission in relation to the minister's proposed amendments to sections 71 to 123 of the bill. The president noted that, in the course of the debate on the committee stage amendments, the minister had referred to the "helpful and constructive submissions" from the Society and had undertaken to give them very close consideration. In addition, the minister had made a public commitment to meet with the Society.

The director general confirmed that there was no clear indication of a likely time frame for report stage, as a number of significant issues were still under consideration by the minister. However, at the most recent parchment ceremony, the Attorney General had indicated that the target for enactment of the bill was end-July 2014.

Procedures for appointing judges

The Council noted the Society's final submission in relation to the procedures for appointing judges. The Council also approved a proposal from the minister inviting the Society to consider providing a judicial studies course that would be aimed at practitioners who might, at some point in their career, be interested in a position as a judge.

PII – unrated insurers

The Council noted that the Solicitors Regulation Authority in England and Wales had issued a consultation paper entitled, *Introduction of a Minimum Financial Strength Rating Requirement for Participating Insurers*, which suggested the introduction of a minimum 'B' rating for all providers of professional indemnity insurance to the solicitors' profession. It was noted that many of the insurance providers in England and Wales also provided cover in the Irish market and were subject to the same EU laws in both markets. The Council agreed that the Society should monitor closely the consultation process and any other developments in England and Wales.

Submissions on plain packaging

The president referred to two submissions by the Society in relation to plain packaging on tobacco products. The first submission had been made in February 2013 as part of a consultation process on an EU *Tobacco Products Directive*. The second submission had been made in December 2013 as part of a consultation process on the Irish Government's proposals for plain packaging of tobacco products.

He noted that the Society had been invited to attend before the Oireachtas Committee on Health to discuss its views. Regrettably, it had become clear that suggestions were being made in the media that the Society was "in the pocket of the tobacco companies".

The president noted that, at the outset of the Society's appearance before the Oireachtas committee, the Society had made a number of statements to clarify the following:

- The Society is not in the pocket of the tobacco companies or anyone else,
- The Society has no expertise on health issues,
- The Society has no objection to the underlying principles of the bill,
- The Society accepts that the Oireachtas committee has a difficult job to do in balancing the various competing rights,
- Neither the director general nor the president has intellectual property law or Australian law expertise.

Following the Society's appearance before the Oireachtas committee and the consequent media coverage, the Society had received correspondence from some members of the profession who were most unhappy that the Society had made any submission on the matter, believing that, by doing so, the Society was taking sides in favour of the position of the tobacco companies.

The president reported that, at its meeting held on the previous day, the Coordination Committee had approved new guidelines for the preparation of policy submissions by Society committees, which would apply in relation to all future submissions.

Practising certificate numbers

The chairman of the Finance Committee, Michelle Ní Longáin, reported that the final number for practising certificates in 2013 was 8,895, which was an increase of 127 or 1.4% on 2012.

The membership number was 10,157, which was an increase of 195 or 2% on 2012.

For 2014, practising certificate numbers to date were at 8,527, which was in line with expectations. The expected year-end practising certificate figure for 2014 was 9,096 – an increase of 170 or 2.5% on 2013.

Fourth Anti-Money-Laundering Directive

Mary Keane outlined the content of three separate submissions made by the Society in relation to three separate aspects of the draft directive:

- The requirement to identify the beneficial owners of companies,
- The requirement to identify the beneficial owners of trusts, and
- The removal of simplified customer due diligence from solicitors' client accounts.

Representations on all three issues had been made both at national and at EU level.

practice notes

TECHNOLOGY COMMITTEE

Microsoft to cease providing support for Windows XP from 8 April 2014

As of 8 April 2014, Microsoft will no longer provide support for the Windows XP operating system, which means that users of computers with that operating system will no longer receive new security updates or technical support from Microsoft.

Any new vulnerabilities discovered in Windows XP after 8 April 2014 will not be addressed by new security updates from Microsoft.

Microsoft has stated that computers using XP after 8 April 2014 should not be considered protected and have urged users to migrate to a current operating system such as Windows 7 or Windows 8.1, with Windows 7 being favoured now in the business space.

While your practice will still be able to use computers with Windows XP as their operating system after 8 April 2014, support and updates for XP will no longer be provided by Microsoft. Therefore, a layer of protection against hacking threats and malware infection has been taken away and will not be replaced.

Further practical matters to be considered by users of XP are that developers of applications (for example, case-management software) that use Microsoft as their platform of choice will no longer be required to focus on compatibility with Windows XP for any new upgrades. In addition, hardware manufacturers will no longer be obliged to provide XP-compatible drivers for new printers, for example.

As well as computers directly connected to your practice, consideration must also be given to any outside computers (personal laptops) that might have confidential or personal data that is exchanged with your network.

Solicitors are required to take all reasonable actions to safeguard client data.

As a matter of urgency, firms should seek guidance from their IT providers to:

- **Identify XP machines directly or indirectly connected to their network,**
- **Analyse the current safety measures in place to address the threats posed to their network post 8 April 2014, and**
- **Identify whether the XP computers identified require to be upgraded or replaced.**

BUSINESS LAW COMMITTEE

Obligations on solicitors to keep insider lists under the *Market Abuse Directive*

Practitioners should note the provisions of the *Market Abuse Directive* (2003/6/EC) (MAD) and the *Market Abuse Directive Regulations 2005* when advising on a matter in respect of an issuer listed on, or an issuer that has made an application to list on, a regulated market within the EU (relevant issuers). MAD encompasses a number of elements, but this note relates specifically to 'inside information' and the obligations on solicitors to keep insider lists.

Inside information

'Inside information' is information of a precise nature relating directly or indirectly to one or more issuers of financial instruments, or to one or more financial instruments that have not been made public, and which, if it were made public, would be likely to have a significant effect on the price of those financial instruments or on the price of related derivative financial instruments.

Obligation to maintain lists

Relevant issuers and solicitors working on their behalf (who have access to the inside information) must maintain a list of persons working for them who may have access to the inside information. It is not possible for a solicitor to assume or discharge these responsibilities for its client. Any list maintained by a solicitor's practice should outline the identity of the staff members who have access to the information, the reason they have access to the information, and the date on which the list was created and updated. If any of the factors on the list change, it should be updated promptly.

Relevant employees (and partners) of a solicitor's firm should certify that they understand the obligations placed on them under MAD; and the firm should have clear documentation of this for each matter. Lists must be submitted to the Central Bank upon request and must be maintained for a period of five years.

The MAD is currently under reform, with an expected transposition date in mid 2015. This is planned to coincide with the new *Markets in Financial Instruments Directive* (MiFID II). The changes are intended to strengthen confidence in European markets by developing a wider range of sanctions on a European level to keep pace with the rapid development of financial markets.

CONVEYANCING COMMITTEE

Additional precedent clauses/ covenants for deeds of easement

The Conveyancing Committee has recently been advised of the following matters by Bloomsbury, publishers of *Laffoy's Irish Conveyancing Precedents*:

- Issue 47 of *Irish Conveyancing Precedents* included additional materials for 'Division G: Easements'.
- The precedents in Division G provide for circumstances that are typically presented and that would, most generally, give rise to the necessity to prepare a grant of right of way/easement. They set out the recommended minimum content for such deeds and contain a set of core clauses.
- Practitioners should note the addition to this division by the provision of a set of useful additional clauses/covenants in Section G.5. These are intended to be used in addition to the core clauses set out in the precedents.
- The introductory note to this division includes an explanatory note as to their usage.

Practitioners should therefore check the additional clauses/covenants in Section G.5 if they wish to make variations to the typical precedent deed of grant of right of way/easement contained elsewhere in Division G of the precedents.

CONVEYANCING COMMITTEE

Update on *Building Control (Amendment) Regulations 2014*

New building regulations – the *Building Control (Amendment) Regulations 2014* (SI no 9 of 2014) – were signed by the Minister for the Environment on 15 January and came into operation on 1 March 2014. The regulations apply to any development where a commencement notice is filed after 1 March 2014. They were followed by the *Building Control (Amendment) (No 2) Regulations 2014* (SI no 105 of 2014), signed on 28 February 2014. The latter are of limited application, relating only to buildings intended for use in first, second, or third-level education or hospitals or primary care centres. All the following refers to SI no 9 of 2014.

The *Building Control (Amendment) Regulations 2013* (SI no 80 of 2013) have been revoked, partly because they contained an error, but also because changes were negotiated by the architects', engineers' and builders' representative bodies to the forms of certificate that have been incorporated into the 2014 regulations. The 2013 regulations should be disregarded.

The regulations will apply to:

- The design and construction of a new dwelling,
- To any extension to a dwelling involving a floor area of more than 40 square metres, and
- Works where a fire safety certificate is involved (this means virtually any type of commercial building, including retail, industrial, office, and so on).

Compliance with the provisions of the new regulations will be of great importance for building owners, purchasers, or prospective tenants because the regulations prohibit the opening, occupation or use of a building until a Certificate of Compliance on Completion has been filed and registered by the building control authority.

The principal changes introduced by the new regulations are as follows:

1. There is a new form of Commencement Notice, which must be filed electronically on the Building Control Management System and must be accompanied by a substantial amount of documentation. The documents required include all plans, drawings, and calculations, which will demonstrate that the building will comply with the standards imposed by the *Building Regulations*. In addition, completed certificates in a specified form, whereby the building owner appoints the builder, the designer certifies the design, and the builder undertakes to build in accordance with the regulations, must be filed. More importantly, an inspection plan must be filed, setting out the program of inspections that the assigned certifier (who must be an architect, a chartered engineer or a building surveyor) will carry out for the purpose of monitoring key aspects of the construction. It is intended that the public will have access to the website containing this documentation, subject to certain restrictions to protect the copyright of the professional designers.

2. The form of Commencement Notice sets out:

- The name of the building owner and his contact details,
- The project particulars,
- The builder and his contact details,
- The designer and his contact details, and
- A schedule of all the documents.

The notice must be signed by the building owner.

3. The Certificate of Compliance (Design) is a certificate confirming that the documentation included in the schedule of the Commencement Notice complies with the *Building Regulations*. The form provides for (where appropriate) the certifier relying on certificates from parties who designed specialist areas of the building and is based on the certifier having used reasonable skill, care and diligence.

4. The form of Notice of Assignment of Person to Inspect and Certify Works (Assigned Certifier) is a form to be signed by the building owner, nominating to the building control authority the person who is going to carry out the inspections in the course of the work and certify compliance on completion. There is a significant provision where the building owner states that he is satisfied, having regard to the *Code of Practice for Inspecting and Certifying Buildings and Works*, that the person so assigned is competent to inspect the building or works and to coordinate the inspection work undertaken by others and to certify the works for compliance with the requirements of the second schedule of the *Building Regulations*, insofar as they apply to the building or works concerned. While the architects, engineers, surveyors and builders all engaged with the Department of the Environment on the forms, it is not clear whether there was anyone representing owners who might commission the construction of a building.

5. The form of Certificate of Compliance (Undertaking by Assigned Certifier) contains an undertaking to use reasonable skill, care and diligence to inspect the building or works and to coordinate the inspection work of others and, following the implementation of the inspection plan by himself and others, to certify on completion compliance with the requirements of the second schedule of the *Building Regulations*, insofar as they apply to the building or works.

6. The Notice of Assignment of Builder is the form to be signed by the building owner, giving notice to the building control authority of the person he has appointed to undertake the building work, and again includes a statement that he is satisfied that the person appointed is competent to undertake the work on his behalf and gives details of the person so appointed.

7. It would appear that the intention of the department is that only registered builders will, in future, be able to undertake building works, and it seems reasonable to assume that only persons with some know-how in relation to building technology and/or actual experience as a builder will be permitted to register as builders. The CIF is compiling a register at the moment, which will operate on a voluntary basis, with the intention that the department will put it on a statutory footing in 2015.

8. The Certificate of Compliance (Undertaking by Builder) includes a confirmation that he is commissioned by the building owner to undertake the works and confirms that he is competent to do so and to ensure that any persons employed or engaged by him to undertake any of the works will be competent to undertake such works. It then goes on to give an undertaking to construct the building or works in accordance with the plans, calculations, specifications, and so on, listed in the schedule of the Commencement Notice or as subsequently issued and certified and submitted to the building control authority. It also goes on to include an undertaking to cooperate with the inspection schedule set out in the inspection plan prepared by the assigned certifier and to take all reasonable steps to ensure that he would be able to certify that the building or

practice notes

works are in compliance with the requirements of the second schedule to the *Building Regulations*.

9. A code of practice in relation to the operation of the new regulations has been published by the department after lengthy consultation with the RIAI, the EI and the SCSI.

10. When a building is completed, a two-part Certificate of Compliance on Completion must be completed – Part A by the builder and Part B by the assigned certifier. These certificates must be submitted to the building control authority, which is obliged to keep a register of such certificates. The Certificate of Compliance on Completion must be accompanied by the inspection plan as implemented by the assigned certifier in accordance with the code of practice and any documentation necessary arising out of changes in the building. The building control authority will record the date of receipt of the certificate and has 21 days to query it, failing which it must register it.

11. Solicitors for purchasers of new houses or apartments will require a copy of the Certificate of Compliance on Completion. Solicitors are likely to be satisfied to accept a copy of the Certificate of Compliance on Completion as signed and registered, together with proof of its registration as sufficient compliance of the building with the *Building Regulations*, so long as it clearly applies to the property being acquired. It is anticipated that, in a housing estate, individual certificates will be lodged in relation to individual houses. Solicitors for purchasers are likely to be concerned to ensure that the individual unit that they are concerned with is properly identified on the certificate and, if not, the assigned certifier/architect will be required to certify that it applies to the subject property. The purchasers or tenants of more substantial retail/office/industrial buildings may require additional certification. Certificates of compliance with planning permission will, of course, continue to be required in relation to planning matters, but all references to compliance with the *Building Regulations* such as appeared in the old forms of certificates will, in future, be omitted.

12. No provision has been made for a situation where, for whatever reason, the final Certificates of Compliance on Completion are not registered. The regulations prohibit the opening, occupation or use of a building until a Certificate of Compliance on Completion has been filed and registered by the building control authority. Murphy's Law dictates that this will happen sooner or later and probably in circumstances that no one has yet foreseen. In such a situation, the occupation or use of the building will be a breach of the regulations.

13. All documentation filed with the building control authority will be retained for at least six years.

What are the likely results from the new regulations?

- It will no longer be possible for spec builders or persons building their home by direct labour to build without an architect, chartered engineer, or building surveyor designing the structure, monitoring it being built in accordance with the inspection plan submitted with the Commencement Notice, and certifying on completion that the building complies with the *Building Regulations*.
- This should result in better buildings, albeit at an extra cost.
- The new regulations should have less effect on the construction of commercial property, because they are invariably designed and built with the aid of a full design team who also monitor the works from time to time.

Self-building

The department, in a press release announcing the new regulations, has said that there was nothing new in the regulations that would prevent people building their homes with direct labour. It went on to say that the people who engage in direct labour or self-build will be able to continue to do so, because there has been no change in the act or in the statutory obligations under the *Building Control Act 1990*. The department pointed out that it was expecting a professional to sign off on the work, to the effect that it is actually done in accordance with the papers that are lodged and that it is up to a high standard, and that this would cost something between €1,000 and €2,000. The department indicated that this was a small cost to make sure that things are done right for a home that might cost €100,000 or €150,000.

This statement needs to be considered in the light of the new regulations. It is certainly correct to say that a competent professional needs to be involved and needs to certify the design, monitor the building at specified stages, in accordance with the inspection plan submitted with the Commencement Notice, and also certify the completion of the building in accordance with the *Building Regulations*.

Under the *Building Regulations*, the building owner has to certify the appointment of a person as builder of the building and has to say that he is satisfied that they are competent to undertake the works so assigned on his behalf. He then has to provide the builder's name, address and contact details, and the Construction Industry Register Ireland registration number (where applicable).

As mentioned above, there is as yet no Construction Industry Register. Until such a register is in place, it seems that an owner could nominate him/herself as the builder, provided that he/she is prepared to say that he/she is satisfied that he/she is competent to undertake the work. A self-build owner would then have to sign the form of undertaking by the builder, confirming to the building control authority that he/she was competent to undertake the work concerned, and further undertaking to ensure that any persons employed or engaged by him to undertake any of the works involved would be competent to undertake such works. It is unlikely that most of the people who self-build would be able to correctly say that they were competent to undertake the work. The main contribution they would be providing would be a lot of hard labour rather than expertise in building technology and, generally, they would rely on friends, neighbours and contacts with expertise, such as electricians, block-layers, plasterers, roofers, and so on, to provide the necessary expertise in these specialist areas.

As mentioned above, it seems clear that the intention of the department is that, in due course, it will only be possible for an owner to appoint a registered builder under these regulations. It therefore seems inevitable that, from the date the register of builders is put on a statutory basis, it will no longer be possible to self-build as we know it.

In the meantime, however, a self-build owner will have to be willing to complete forms as indicated above and to find an architect, engineer or surveyor that is willing to undertake the task of acting as an assigned certifier – in most cases for a person with no experience acting as a 'builder'. Doing so will clearly increase the risk for the architect, engineer or surveyor, and such professionals would be best advised not to undertake such a role in this sort of situation.

The department's statements need to be read in the context of what is required by the regulations.

The committee wishes to thank Rory O'Donnell, solicitor, the main author of this practice note, which is endorsed by the committee.

Warning: six-month time limit to make a claim on the compensation fund

A claim on the Law Society Compensation Fund must be received by the Society within six months of the loss coming to the attention of the claimant.

The *Solicitors (Compensation Fund) Regulations 2013* (SI 442/2013) came into operation on 1 December 2013.

The new regulations replace provisions of the *Solicitors (Compensation Fund) Regulations 1963* (SI 115/1963) relating to the time limits for making what are commonly called claims on the Law Society's Compensation Fund (or to use the statutory terminology, applications for grants from the compensation fund), and the form in which an application is made.

The regulations now provide that an application for a grant is made by way of a single claim form, in place of two claim forms (CF.1 and CF.2) that were previously required.

The new compensation fund claim form and explanatory booklet can be obtained from the 'consumer interest' section in the public area of the Society's website, www.lawsociety.ie.

The regulations provide that an application must be received by the Law Society **within six months** of the loss for which the claim is made coming to the attention of the claimant. Previously, a CF.1 form had to be submitted within three months of a claimant becoming aware of his or her loss.

Upon an application being made, the Law Society's Regulation of Practice Committee may extend the six-month time limit where it deems there to be exceptional circumstances that merit an extension being granted.

Solicitors acting for intending claimants are recommended to place no reliance on the discretion to extend the time limit. If an application is made after the expiry of the time limit, and the Regulation of Practice Committee is of the opinion that there are not exceptional circumstances that merit an extension, then the claim will not be accepted, even if it is otherwise valid.

The Regulation of Practice Committee will deem the time at which the claimant became aware of his or her loss to be the time at which the claimant became aware that a loss had been sustained, even if there is uncertainty as to its quantification or the loss has not yet fully crystallised. If it is not possible to fully quantify a loss at the time the Law Society is notified of a claim, this should be stated in the claim form and complete details of the loss should be provided when they are known.

Particular attention is drawn to the time limit of six months to make a claim on the compensation fund, which will be strictly enforced. **Failure to make a claim within the time limit on behalf of a client may put professional indemnity insurance at risk**, as professional indemnity insurance will then be the only source of redress for the client because they will no longer be able to make a claim on the compensation fund. Solicitors are strongly advised to ensure that claims are made in a timely manner in the interests of clients and to protect solicitors from claims against professional indemnity insurance. To sum up, there is a risk that a claim based on the dishonesty of a client's former solicitor could become a claim based on the negligence of the client's new solicitor.

There is an obligation on solicitors, not the Law Society, to regularly ensure that they are familiar with the rules of the compensation fund. Reference may be made to the explanatory booklet *Guide to Claiming Refunds of Money Paid to a Solicitor* and to the legislation in both section 21 of the *Solicitors Act 1960*, as substituted by section 29 of the *Solicitors (Amendment) Act 1994* and amended by section 16 of the *Solicitors (Amendment) Act 2002* and the *Solicitors (Compensation Fund) Regulations 2013* (SI 442/2013). All these sources can be accessed at www.lawsociety.ie/Pages/Consumer-Interest/Compensation-Fund/.

John Elliot, Registrar of Solicitors and Director of Regulation

CONVEYANCING COMMITTEE

Precedent letter of undertaking re mortgage on title

The Conveyancing Committee has had a number of queries about the wording of solicitors' undertakings given on closing to redeem a mortgage/charge on the title. In these circumstances, the committee thought it would be useful to prepare a sample letter of undertaking that should satisfy solicitors on both sides of a transaction. The text of the proposed letter is set out below.

SAMPLE LETTER OF UNDERTAKING

Our ref:
Our clients:
Your client:
Premises:

Dear Sirs,

In consideration of you closing the sale of the above mentioned property, we hereby undertake to immediately redeem the mortgage(s) in favour of _____ bank affecting the above mentioned property from that portion of the proceeds of sale provided for that purpose and to furnish you with one of the following together with the appropriate property registration fees (if any) as soon as possible:

1) Original Deed of Mortgage with vacate endorsed thereon,
2) Deed of Release,
3) Deed of Discharge, or
4) Evidence of e-discharge, for example, copy folio showing the relevant charge removed.

Residential property

In the event that the bank does not furnish us with one of the documents mentioned above, within the time limits agreed between the IBF and the Law Society under the Certificate of Title system for Residential Mortgage Lending, we confirm that we will promptly commence the consumer complaints process provided for in the *Guidelines to the Certificate of Title* system under Provision 10.9 of the *Consumer Protection Code 2012* issued by the Central Bank of Ireland, and in accordance with the sample letters published by the Law Society.

Yours faithfully

Restrictions and limitations on solicitors' advertising

This notice is intended as general guidance in relation to the subject matter and does not constitute a definitive statement of law. Reference to a solicitor includes a reference to a firm of solicitors in this context.

Introduction

Specific restrictions are in place with regard to advertising by solicitors, in particular in relation to personal injury and contentious matters, as provided for in section 4 of the *Solicitors (Amendment) Act 2002* and the *Solicitors (Advertising) Regulations 2002* (SI no 518 of 2002).

It is the responsibility of the solicitor to ensure that any advertisement published or caused to be published by the solicitor complies with the act and the regulations.

The solicitor must keep a copy of any advertisement published or caused to be published by him or her, together with written instructions given for the publication of that advertisement, for a period of at least 12 months from the date of publication, and furnish the Society on request with a copy of that advertisement and relevant instructions.

The following questions and answers are designed to assist practitioners in complying with their obligations per the legislation.

What constitutes an advertisement?

An advertisement is any communication that is intended to publicise or otherwise promote a solicitor in relation to the solicitor's practice, whether that communication is in oral, written, or in any other visual form and whether produced by electronic or other means.

For the avoidance of doubt, websites are considered to be advertisements for the purposes of the legislation.

An advertisement is said to be published when there is a communication or intended communication of words to another person, which are intended to publicise or otherwise promote a solicitor in relation to the solicitor's practice.

What are the general restrictions on solicitors' advertisements?

A solicitor's advertisement may not:

- Be in a form that brings the solicitors' profession into disrepute,
- Be in bad taste,
- Reflect unfavourably on other solicitors, or
- Be false or misleading in any respect.

An advertisement cannot contain an express or implied assertion that the solicitor has specialist knowledge in an area of law or practice superior to other solicitors. Further information and exceptions can be found on this subject in the practice note 'Advertising specialisms: notice to all solicitors' (April 2007 *Gazette*, p51), accessible at www.lawsociety.ie/Pages/Practice-Notes/Advertising-SpecialismsNotice-to-all-Solicitors/.

An advertisement cannot be published in or on any form of transport, in a newspaper on the same page on which death notices appear, on the radio immediately preceding or following death announcements, or in any other inappropriate location, including hospitals, clinics, doctors' surgeries, funeral homes, cemeteries, crematoriums or other locations of a similar character.

An advertisement may not include any cartoons, dramatic or emotive words or pictures, make reference to calamitous events or situations such as train or bus crashes, or refer to the willingness of the solicitor to make hospital or home visits.

An advertisement published or caused to be published by a solicitor shall be of the size appropriate to the medium in which, or the location in which, it is published. Where an advertisement includes factual information on the services provided by the solicitor or the areas of law to which those services relate, the words relating to any practice area or service should not be given prominence by reference to appearance, size, context or location over another in the same advertisement.

An advertisement may not be contrary to public policy.

Are there restrictions specific to personal injuries and contentious business?

There are specific additional limitations and restrictions in place on advertising relating to personal injuries and contentious business.

An advertisement cannot refer expressly or impliedly to claims or possible claims for damages for personal injuries, the possible outcome of claims for damages for personal injuries or the provision of legal services by the solicitor in connection with such claims. Furthermore, an advertisement cannot expressly or impliedly solicit or induce a person or class of persons to make such claims. However, any advertisement that contains factual information on the legal services provided by the solicitor and on any areas of law to which those services relate may include the words 'personal injuries'.

The same limitations on the use by a solicitor of the words 'personal injuries' also extend to the use of any other words that may be more specifically descriptive of categories of cases where claims for damages for personal injuries may arise including 'motor accidents', 'workplace accidents', 'public place accidents' or other words or phrases of a similar nature.

In relation to any contentious business (including personal injuries), it is prohibited to include in the advertisement words or phrases that suggest that the legal services relating to the contentious business will be provided at no cost or at a reduced cost, including 'no win, no fee', 'no foal, no fee', 'free first consultation', 'most cases settled out of court', 'insurance cover arranged to cover legal costs', or words or phrases of a similar nature.

Where an advertisement refers to personal injuries or other contentious business in circumstances that are not in contravention of the legislation, such advertisements must clearly refer to the prohibition on percentage charging in connection with contentious business. In the context of 'personal injuries', this is effected by placing an asterisk after the words 'personal injuries' and the following words should be shown adjacent thereto, except in connection with proceedings seeking only to recover a debt or liquidated demand:

"* *In contentious business, a solicitor may not calculate fees or other charges as a percentage or proportion of any award or settlement.*"

An advertisement may not list different types of personal injury actions in a list of services provided.

What prohibitions exist in respect of certain advertisements by unqualified persons?

Section 5 of the *Solicitors (Amendment) Act 2002* prohibits a person who is not a solicitor from publishing an advertisement that undertakes to provide a service of a legal nature that could otherwise be provided by a solicitor, for or in expectation of a fee, gain or reward that is directly related to the provision of that service, and if that advertisement were published by a solicitor, it would be in breach of the legislation.

A solicitor who is found to have a direct or indirect connection with a person who is acting in contravention of section 5 as outlined above may be found guilty of misconduct.

What is the consequence of a breach of the legislation by a solicitor?

A solicitor who breaches the legislation may be found guilty of professional misconduct.

The Society will take appropriate action against a solicitor who commits a breach of the legislation. Such actions may include taking proceedings under section 18 of the *Solicitors (Amendment) Act 2002* by way of application by the Society to the High Court for an order prohibiting a solicitor from contravening the regulations. Furthermore, breaches may be referred to the Solicitors Disciplinary Tribunal for an inquiry into the conduct of a solicitor on the grounds of alleged misconduct. A solicitor who is found guilty of misconduct is exposed to the normal range of sanctions, to include censure, fines and strike off.

How can the Law Society assist?

The Law Society can assist in the following ways:

- Guidance – any solicitor seeking guidance about any advertisement or proposed marketing scheme is advised to contact the Society,
- Prior approval – any solicitor seeking prior approval of any advertisement or proposed marketing scheme is advised to contact the Society,
- Complaints – any person who has concerns regarding a particular advertisement and wishes to make a complaint in this regard can contact the Society,
- Further information – further information on what information may be included in advertisements, where advertisements may be published, size and context of advertisements, and what communications are not considered to be an advertisement can be found on the Society's website at www.lawsociety.ie/Pages/Public-Make-A-Complaint-CMS/Rules-Applying-to-Solicitors/.

Jack Kennedy is the Society's advertising regulations executive and is contactable at 01 672 4800 or j.kennedy@lawsociety.ie.

John Elliot, Registrar of Solicitors and Director of Regulation

legislation update

11 February – 10 March 2014

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. The links below are to the web page for the various stages of the bill; the PDF for the final version of the act appears at the end of each web page. Recent statutory instruments are available in PDF at www.attorneygeneral.ie/esi/esi_index.html

ACTS PASSED

Road Traffic Act 2014
Number: 3/2014
Provides for a number of measures to improve safety on the roads. Amends and extends the *Road Traffic Acts 1961-2011*, amends section 20 of the *Road Safety Authority Act 2006*, section 16 of the *Road Transport Act 2011* and the *Road Safety Authority (Commercial Vehicle Roadworthiness) Act 2012* and provides for related matters.
Commencement: commencement order to be made as per s1(2) of the act

SELECTED STATUTORY INSTRUMENTS

Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (Competent Authority) Order 2014
Number: SI 79/2014
Prescribes the Central Bank of Ireland as a competent authority for the class of designated persons specified in the schedule, including trust or company service providers, which by virtue of s25(1)(e) of the *Criminal Justice (Money Laundering and Terrorist Financing) Act 2010* are designated persons and are subsidiaries of a credit institution or a financial institution.
Commencement: 3/3/2014

Criminal Justice Act 2013 (Sections 15 and 16) (Commencement) Order 2014
Number: SI 80/2014
Appoints 3/3/2014 as the commencement date for ss15 and 16 of the act.
Commencement: 3/3/2014

Local Government Services (Corporate Bodies) Act 1971 (Designation of Bodies) Order 2014
Number: SI 83/2014
Specifies the Minister for Jobs, Enterprise and Innovation, in addition to the Minister for the Environment, Community and Local Government and local authorities, for which the Local Government Management Agency may provide the services set out in its establishment order, or services of a similar nature.
Commencement: 4/2/2014

European Arrest Warrant Act 2003 (Designated Member States) Order 2014
Number: SI 84/2014
Designates, for the purposes of the enabling act, the Republic of Croatia as an EU member state that has, under its national law, given effect to the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between the member states.
Commencement: 12/2/2014

Nursing and Midwifery Board of Ireland Rules Specifying Criteria to be Considered for Applications for Restoration to the Register
Number: SI 88/2014
Specify criteria for the Nursing and Midwifery Board when considering whether to restore the registration of a nurse or midwife whose registration has been cancelled.
Commencement: 14/2/2014

Superannuation (Designation of Approved Organisations) Regulations 2014
Number: SI 89/2014
Section 4 of the *Superannuation and Pensions Act 1963* provides for the transfer of pensionable service in the case of staff transfers between the civil service and 'approved organisations' and between one 'approved organisation' and another. These regulations designate the organisation set out in the schedule as an 'approved organisation'.
Commencement: 17/2/2014

European Communities (Infant Formulae and Follow-on Formulae) (Amendment) Regulations 2014
Number: 92/2014
Transpose into Irish law Commission Directive 2013/46/EU of 28 August 2013, amending Directive 2006/141/EC with regard to the protein requirements for infant formulae and follow-on formulae. These regulations amend the *European Communities (Infant Formulae and Follow-on Formulae) Regulations 2007* (SI 852 of 2007).
Commencement: 11/2/2014

Social Welfare and Pensions Act 2012 (Section 19) (Commencement) Order 2014
Number: SI 93/2014
Section 290 of the *Social Welfare Consolidation Act 2005* provides for a household budgeting facility for social welfare recipients who receive their weekly payments through An Post, which facilitates them in having a portion of their payment deducted at source and paid over to various utility companies. This facility enables social welfare recipients to make a fixed weekly payment in respect of electricity, gas and telephone bills. Section 19 of the *Social Welfare and Pensions Act 2012* extends the list of utility companies that may participate in this scheme to include licensed energy companies.
Commencement: 19/2/2014.

European Union (Citizens' Initiative) (Amendment) Regulations 2014
Number: SI 94/2014
Amend the *European Union (Citizens' Initiative) Regulations 2012* (SI 79 of 2012) by revoking the statement of support form for use in Ireland, set out in the schedule to those regulations. The form for use in Ireland will be the Statement of Support Form – Part A, as set out in annex II of Commission Delegated Regulation (EU) no 887/2013 of 11 July 2013. The regulations also modify the nature of the correspondence that may arise between the competent authority and a signatory of a statement of support.
Commencement: 18/2/2014

Electoral Act 1997 (Commencement) Order 2014
Number: SI 95/2014
Brings into operation section 78(c) of the *Electoral Act 1997*, which amends rule 22(1) of the *European Parliament Elections Act 1997* to provide that candidates at European Parliament elections may send one piece of election material free of charge for postage to each household rather than each person on the register of European electors for the constituency.
Commencement: 19/2/2014

Water Services (No 2) Act 2013 (Transfer of Other Liabilities) Order 2014
Number: SI 96/2014
Gives effect to the decision of the Minister of the Environment, Community and Local Government to transfer the contracts listed in the schedule to the order from the water services authorities to Irish Water in accordance with section 14 of the *Water Services (No 2) Act 2013*.
Commencement: 21/2/2014

Central Bank Act 1942 (Financial Services Ombudsman Council) Complaint Information Regulations 2014
Number: SI 97/2014
Make provision for the form and manner in which information may be published concerning financial service providers who have at least three complaints against

them found to be substantiated or partly substantiated, and allows for sector-specific information to be included.
Commencement: 25/2/2014

Credit Union and Cooperation with Overseas Regulators Act 2012 (Commencement of Certain Provisions) Order 2014
Number: SI 99/2014
Provides for the commencement of subsections of sections 15, 24 and 27 of the act, which were not commenced in October 2013. These include provisions relating to the composition of the board of directors, the method of election of members of the board, their term of office, and the re-election of retiring directors. They also include a reduction in board numbers from 15 to 11, exclusions from the board of directors, the requirement by a credit union to submit an annual compliance statement to the bank, and procedural provisions of the Board Oversight Committee. Also provides for the commencement of a consequential amendment to the *Credit Union Act 1997* in schedule 1.
Commencement: 3/3/2014

Local Elections (Forms) Regulations 2014
Number: SI 100/2014
Prescribe the forms to be used by candidates, national agents, designated persons and third parties for furnishing statements of donations and election expenses at local elections in accordance with section 13 of the *Local Elections (Disclosure of Donations and Expenditure) Act 1999*. Revoke SI 116/2009 and SI 180/2009, which prescribed the forms used in respect of the 2009 local elections.
Commencement: 26/2/2014

Electricity Regulation Act 1999 (Water) Levy Order 2014
Number: SI 101/2014
Imposes a levy on a certain specified class of water service undertaking, for the purpose of meeting expenses properly incurred by the Commission for Energy Regulation in the discharge of its functions under the act, the *Water Act* and the act of 2013.
Commencement: 1/3/2014

National Lottery Act 2013 (Commencement) Order 2014
Number: SI 102/2014
Commencement: 27/2/2014 is the commencement date for all sections of the act

Housing (Adaption Grants for Older People and People with a Disability) (Amendment) Regulations 2014
Number: SI 103/2014
Amend the *Housing (Adaptation Grants for Older People and People with a Disability) Regulations 2007* to include the income of all adult household members in the assessment of means for grant purposes; reduce the number of income bands from nine to six for the housing adaptation grants for older people and people with a disability and adjust the reckonable percentage of costs accordingly; reduce from €65,000 to €60,000 the amount of income over which no grant is payable in respect of the housing adaptation grants for older people and people with a disability; and decrease the maximum amount of grant payable by local authorities under the Housing Aid for Older People Scheme from €10,500 to €8,000.
Commencement: 27/2/2014

Prepared by the Law Society Library

REGULATION

NOTICES: THE HIGH COURT

In the matter of Ruairi O'Ceallaigh, formerly practising as Sean O'Ceallaigh and Company, and in the matter of the *Solicitors Acts 1954-2011* and in the matter of the Solicitors Disciplinary Tribunal [2013 no 106 SA]
Take notice that, by order of the High Court made on 13 January 2014, it was ordered that the name of Ruairi O'Ceallaigh be struck off the Roll of Solicitors.
John Elliot,
Registrar of Solicitors,
11 March 2014

In the matter of James O'Mahony, a solicitor previously practising as James O'Mahony Solicitors at 16 Stoneybatter, Dublin 7, and in the matter of the *Solicitors Acts 1954-2011* [2013 no 86SA; 2013 no 102SA]
Take notice that, by orders of the High Court made on Friday 31 January 2014, it was ordered that the name of James O'Mahony, solicitor, be struck off the Roll of Solicitors.
John Elliot,
Registrar of Solicitors,
25 February 2014

In the matter of Gregory F O'Neill, a solicitor formerly practising as Greg O'Neill Solicitors, Suite 109, The Capel Building, Mary's Abbey, Dublin 7, and in the matter of the *Solicitors Acts 1954-2011* [2014 no 2 SA; 2014 no 3 SA; 2014 no 4 SA; 2014 no 5 SA; 2014 no 6 SA; 2014 no 7 SA; 2014 no 11 SA]
Take notice that, by orders of the President of the High Court made on 3 March 2014, it was ordered that the name of Gregory F O'Neill, formerly practising as Greg O'Neill Solicitors, Suite 109, The Capel Building, Mary's Abbey, Dublin 7, be struck off the Roll of Solicitors.
John Elliot,
Registrar of Solicitors,
11 March 2014

eurlegal

Edited by TP Kennedy, Director of Education

ENERGY AND CLIMATE – THE EU'S 2030 GOALS

On 22 January 2014, the European Commission proposed energy and climate goals to be reached by 2030 (http://ec.europa.eu/energy/2030_en.htm). Included in the suite of published documents is a communication setting out a policy framework for climate and energy from 2020 to 2030 (the *2030 Framework*) (COM(2014) 15 final); a communication on energy prices and costs in Europe (COM(2014) 21), with an associated report; an *Energy Economic Report*; a proposal for a decision concerning the establishment and operation of a market stability reserve for the EU emissions trading system (ETS) to commence in 2021 (COM(2014) 20/2) and a related communication (COM(2014) 0020); and a recommendation for shale gas.

Attention is also brought to the commission's guidance on state intervention in electricity markets. In essence, more detail is revealed regarding the route towards 2050, the year selected for realisation of the EU's decarbonisation objective and commitment to reduce greenhouse gas emissions (GHG) to 80-95% below 1990 levels.

Moving targets

A key component of the *2030 Framework* is the setting of targets for 2030. The EU is currently on track to meet its 2020 target, set in 2008, of 20% reduction in GHG compared with 1990 (30% if international conditions are right). However, the 2020 target of 20% share of renewable energies in EU energy consumption by 2020 is not as easily within sight, and greater effort is needed from member states, particularly as the trajectory grows steeper.

With respect to the 2020 target of 20% saving of EU energy consumption compared with projections for 2020, significant progress has been made, even though this 20% target is not legally binding on member states.

For 2030, the proposed goals are a 40% reduction in GHG compared with 1990 (spread across the ETS and non-ETS sector), and a European renewable energy target of at least 27% energy consumption above 1990 levels. Attainment of this latter target is to be ensured by a new governance system based on national energy plans, details of which are to be provided in forthcoming commission guidance.

The energy efficiency component will be examined later in 2014, in the context of a review of the *Energy Efficiency Directive* (2012/27/EU). With respect to transport, no new target is set, although it is considered that a range of alternative renewable fuels and a combination of focused policy measures building on the *Transport White Paper* (COM(2011) 144) are needed. The commission has also proposed key indicators (for example, supply diversification) for assessing progress towards the targets.

> Compared with other major economies, EU energy prices tend to be higher

Affordable energy for consumers

The commission's communication on energy prices and costs in Europe, along with its related report, are in response to the European Council's request to the commission, in May 2013, to examine the evolution of energy prices and costs in Europe and to look at the EU's competitiveness.

Energy prices impact on Europe's global competitiveness. The communication gives the context of recent price increases and their impact on energy consumers. It also provides information on price developments in an international setting. In the main, the communication considers electricity and gas prices, examining the possible consequences of future price rises. Lack of major discrepancies between oil and coal prices globally means that these are less of a concern, and thus not examined in depth.

Three elements comprise an energy bill, that is:

- The energy element (reflecting the cost of fuel purchase/production, shipping and processing, as well as construction, operation and decommissioning of power stations, and sale of energy to final customers),
- Network costs, and
- Taxes and levies (for example, VAT or more energy-specific levies).

These three elements vary across member states, depending on market conditions and government policy. Compared with other major economies, EU energy prices tend to be higher. While price differences between other major economies have existed for decades, the gap has increased more recently due, in part, to the US's cheaper domestic shale gas resources and the fact that some European long-term gas supply contracts are at fixed higher prices or at prices fixed to rising oil prices. It is therefore expected that energy prices will continue to increase in the short term.

The commission's key recommendations to keep on top of energy bills are:

- Completion of the internal energy market in 2014,
- Increased energy efficiency and renewable energy production,
- Development of European energy infrastructure and diversification of energy supplies and supply routes,
- Sharing best practice in implementing energy policies, and
- Convergence in network practices (for example, tariff regimes, network codes, and integration of renewables).

Energy economic report

The report, *Energy Economic Developments in Europe*, assesses the development of the EU energy system as a whole, and also at member state level, and provides a comparison with selected international competitors.

In particular, the report examines energy costs and competitiveness, energy and carbon prices (assessing the impact of energy and climate policies), as well as renewables (energy and equipment trade developments in the EU).

While the report reveals EU manufacturing has been successful in reducing energy intensity and that market opening in electricity and natural gas has brought significant downward price effects, it also warns that high energy prices should remain a concern, given the increase in the EU/US energy price gap.

Ensuring competition

As noted above, a competitive and integrated internal energy market is seen as providing the foundations for achievement of the EU's energy policy objectives. Consequently, when publishing the energy and climate goals on 22 January 2014, the commission also brought attention to its guidance to member states on state intervention in electricity markets, which it had previously announced in November 2013 (http://ec.europa.

> Energy prices impact on Europe's global competitiveness

Optimus Prime was very, very bored

eu/energy/gas_electricity/internal_market_en.htm).

The guidance deals with the design and reform of national support schemes for renewables, the design of adequate generation capacities to ensure continuous electricity supply, and enhancement of the role of consumers in the electricity market.

Reform of EU ETS

The proposed EU ETS market stability reserve (MTS) is to complement the existing rules governing the ETS that were established to deliver the EU emission reduction goal in a harmonised and cost-effective manner.

Under the ETS, companies may purchase allowances to cover emissions or sell leftover allowances if they have been successful in reducing emissions.

The current ETS rules also fix the supply of auctioned emission allowances for years in advance, leading to the prevention of changes to react to major adjustments in demand for allowances. The result is that, when a major adjustment occurs, an imbalance is created and continues indefinitely. This undermines and/or postpones innovation and investment in new low-carbon technologies needed to transition to a low-carbon economy.

The recent economic crisis resulted in an imbalance in supply and demand of allowances, leading to a surplus in the region of two billion allowances (not needed for compliance), which is expected to exist for a decade or more. The purpose of the proposed MTS is to ensure a more balanced market going forward; one that has a carbon price more strongly driven by mid and long-term emission reductions, and with stable expectations encouraging low carbon investments.

Companies having made, or making, low-carbon investments are expected to benefit. Whether or not allowances are placed on the MTS is determined by the total number of allowances in circulation. Allowances put in the MTS are deducted from the allowances due to be auctioned by member states. When allowances are released from the MTS, they are auctioned by member states in the usual manner under the current ETS rules.

Securing supply – shale gas

The commission's recommendation on shale gas seeks to ensure that proper environmental and climate safeguards are in place for 'fracking' – a high volume hydraulic fracturing technique used particularly in shale gas operations. Fracking may be more particularly described as involving injection of high volumes of water, sand and chemicals into a borehole to crack rock and facilitate gas extraction.

Member states are invited to apply the principles set out in the recommendation within six months. In summary, the principles include:

- Planning ahead before granting licences,
- Careful assessment,
- Ensuring integrity of the concerned well,
- Quality checks on the local water, air and soil,
- Controlling air emissions,
- Informing the public, and
- Ensuring that operators apply best practices.

While shale gas may help in the transition to a low-carbon economy, the related air emissions, including GHG emissions, must be appropriately mitigated – gases must be captured, flaring minimised and venting avoided. The recommendation is accompanied by a commission communication on the opportunities and challenges of using fracking to extract hydrocarbons.

The proposed *2030 Framework* was due to be considered by the European Council at its meeting in March 2014.

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

SBA report and accounts

Solicitors' Benevolent Association

150th report, 1 December 2012 to 30 November 2013

This is the 150th report of the Solicitors' Benevolent Association, which was established in 1863. It is a voluntary charitable body, consisting of all members of the profession in Ireland. It assists members or former members of the solicitors' profession in Ireland and their wives, husbands, widows, widowers, family and immediate dependants who are in need. It is active in giving assistance on a confidential basis throughout the 32 counties.

The amount paid out during the year in grants was €479,420, which was collected from members' subscriptions, donations, legacies and investment income. Currently there are 65 beneficiaries in receipt of regular grants, and approximately half of these are themselves supporting spouses and children.

There are 17 directors, three of whom reside in Northern Ireland, and they meet monthly in the Law Society's offices at Blackhall Place. They meet at the Law Society in Belfast every other year. The work of the directors, who provide their services entirely on a voluntary basis, consists in the main of reviewing applications for grants and approving of new applications. The directors also make themselves available to those who may need personal or professional advice. The directors have available the part-time services of a professional social worker who, in appropriate cases, can advise on State entitlements, including sickness benefits.

The directors are grateful to both law societies for their support and, in particular, wish to express thanks to James B McCourt (past-president of the Law Society of Ireland), Michael Robinson (past-president of the Law Society of Northern Ireland), Ken Murphy (director general), Alan Hunter (chief executive) and the personnel of both societies.

I wish to express particular appreciation to all those who contributed to the association when applying for their practising certificates, to those who made individual contributions and to the following: the Law Society, Law Society of Northern Ireland, Ashville Media Group Ltd, Dublin Solicitors' Bar Association, Faculty of Notaries Public in Ireland, Kilkenny Solicitors' Association, Limavady Solicitors' Association, Local Authorities Solicitors' Bar Association, Meath Solicitors' Bar Association, Medico-Legal Society of Ireland, Midland Solicitors' Bar Association, Monaghan Bar Association, Roscommon Solicitors' Bar Association, Sheriffs' Association, Wexford Bar Association.

Only 78% of solicitors, when applying for their practising certificates in 2013, paid their membership to the Solicitors' Benevolent Association. I would appeal to the remaining 22% of solicitors to support the association, which is our only professional charity, so that the directors can assist the increasing number of beneficiaries applying for assistance.

I would also appeal to those solicitors who are applying for membership only of the Law Society to pay the subscription to the association, which is only €50 per year. The demands on our association are rising due to the present economic difficulties and, to cover the greater demands on the association, additional fund-raising events are necessary. Additional subscriptions are more than welcome, as of course are legacies and the proceeds of any fundraising events. Subscriptions and donations will be received by any of the directors or by the secretary, from whom all information may be obtained, at 73 Park Avenue, Dublin 4. Information can also be obtained from the association's website at www.solicitorsbenevolentassociation.com. I would urge all members of the association, when making their own wills, to leave a legacy to the association. You will find the appropriate wording of a bequest at page 33 of the *Law Directory 2013*.

I would like to thank all the directors and the association's secretary, Geraldine Pearse, for their valued hard work, dedication and assistance during the year.

Thomas A Menton, chairman

RECEIPTS AND PAYMENTS A/C FOR THE YEAR ENDED 30 NOV 2013

	2013	2012
RECEIPTS	€	€
Subscriptions	**385,755**	385,553
Donations	**251,948**	140,062
Investment income	**42,861**	39,574
Bank interest	**3,000**	1,851
Currency gain	**3,928**	1,486
Repayment of grants	**500**	40,000
	687,992	608,526
PAYMENTS		
Grants	**479,420**	480,276
Bank interest and charges	**918**	908
Administration expenses	**43,390**	36,075
	523,728	517,259
OPERATING SURPLUS FOR THE YEAR	**164,264**	91,267
Profit on disposal of investments	**84,484**	41,465
Provision for write down of quoted investments in prior periods no longer required	**12,871**	23,000
SURPLUS FOR THE YEAR	**261,619**	155,732

DIRECTORS AND INFORMATION

Directors
Thomas A Menton (chairman)
Brendan Walsh (deputy chairman)
Caroline Boston (Belfast)
Thomas W Enright (Birr)
Felicity M Foley (Cork)
William B Glynn (Galway)
John Gordon (Belfast)
Colin Haddick (Newtownards)
Dermot Lavery (Dundalk)
Anne Murran (Waterford)
John M O'Connor (Dublin)
John TD O'Dwyer (Ballyhaunis)
Colm Price (Dublin)
James I Sexton (Limerick)
John Sexton (Dublin)
Andrew F Smyth (Dublin)
Brendan J Twomey (Donegal)

Trustees
(*ex-officio* directors)
John Gordon
John M O'Connor
Brendan Walsh
Andrew F Smyth

Secretary
Geraldine Pearse

Auditors
Deloitte & Touche, Chartered Accountants and Statutory Audit Firm, Deloitte & Touche House, Earlsfort Terrace, Dublin 2

Financial consultants
Tilman Brewin Dolphin Limited, 3 Richview Office Park, Clonskeagh, Dublin 14

Bankers
Allied Irish Banks plc, 37 Upper O'Connell Street, Dublin 1

First Trust, 31/35 High Street, Belfast BT1 2AL

Offices of the association
Law Society of Ireland, Blackhall Place, Dublin 7

Law Society of Northern Ireland, Law Society House, 96 Victoria Street, Belfast BT1 3GN

Charity number: CHY892

professional notices

WILLS

Corcoran, Mary (deceased), late of Cadamstown, Birr, Co Offaly. Would any person having knowledge of any will made by the above-named deceased, who died on 23 September 1996, please contact Noonan & Cuddy, Solicitors, 12 Society Street, Ballinasloe, Co Galway; tel: 09096 42344, fax: 090 964 2039, email: info@noonancuddy.com

Edward Dyas (deceased), late of 33 Mount Drummond Avenue, Harold's Cross, Dublin 6; died on 1 July 1982. Would any person having knowledge of a will made by the above-named deceased, or if any firm is holding the same, please contact Darren Murphy of Neville Murphy & Co, Solicitors, 9 Prince of Wales Terrace, Bray, Co Wicklow; tel: 01 286 0639, email: dmurphy@nevillemurphysolicitors.ie

Fay, Ann (deceased), late of 45 Glasanaon Road, Finglas East, Dublin 11, who died on 20 November 2012. Would any person having knowledge of a will made by the above-named deceased, or any firm holding same, please contact Joseph McNally, Solicitors, Unit 3, The Maieston, Santry Cross, Ballymun, Dublin 11; tel 01 960 2047, email: info@jmsolicitors.ie

Fields, Maureen (deceased), late of 22 Harman Street, Dunore Avenue, Dublin 8. Would any person having knowledge of the whereabouts of the original will of the above-named deceased, who died on 3 January 2006, please contact Anne Stephenson, solicitor, 55 Carysfort Avenue, Blackrock, Co Dublin; tel: 01 275 6759, email: stephensonsolicitors@eircom.net

Guest, Richard James (deceased), late of Rathganly, Kilcock, Co Meath. Would any person having any knowledge of the whereabouts of any will made by the above-named deceased, who died on 20 December 2013, please contact Philip Clarke, Solicitors, 7 Adelaide Street, Dun Laoghaire, Co Dublin; tel: 01 280 8088, email: philip@philipclarke.ie

Gumbleton, James (deceased), late of Kilcredan, Ladysbridge, Co Cork, who died on 27 May 2013. Would any person having knowledge of the last will made by the above-named deceased or its whereabouts please contact O'Shea & Co, Solicitors, Youghal, Co Cork; tel: 024 85501, fax: 024 85501, email: karenaoshea@eircom.net. Reward offered

Kelly, Thomas J (deceased), late of 76 Newtown Lawns, Mullingar, Co Westmeath, and formerly of 'Dunroamin', Lynn Avenue, Mullingar, Co Westmeath. Would any person having any knowledge of the whereabouts of any will made by the above-named deceased, who died on 28 August 2012, please contact Messrs Larkin Tynan & Company, Solicitors, Blackhall Street, Mullingar, Co Westmeath; DX 35011; tel: 044 934 8318, email: info@larkintynan.ie

Martin, Robert Peter (deceased), late of Lismirranne, Inch, Blackwater, Enniscorthy, Co Wexford. Would any person having knowledge of a will executed by the above-named deceased, who died on 24 August 2013, please contact Ensor O'Connor, Solicitors, 4 Court Street, Enniscorthy, Co Wexford; tel: 053 923 5611, fax: 053 923 5234

O'Gorman, Carmel (deceased), late of 5 Cahergal Lawn, Ballyvolane Road, Cork. Would any person having knowledge of a will made by the above-named deceased, who died on 26 May 1987, please contact Gail Enright, Michael Enright & Co, Solicitors, 9 Sheares Street, Cork; tel: 021 427 8200, email: gail@michaelenright.ie

RATES

professional notice rates

RATES IN THE PROFESSIONAL NOTICES SECTION ARE AS FOLLOWS:

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

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

ALL NOTICES MUST BE PAID FOR PRIOR TO PUBLICATION. CHEQUES SHOULD BE MADE PAYABLE TO LAW SOCIETY OF IRELAND. Deadline for May 2014 *Gazette*: 16 April 2014. For further information, contact the *Gazette* office on tel: 01 672 4828 (fax: 01 672 4877).

No recruitment advertisements will be published that include references to years of post-qualification experience (PQE). The *Gazette* Editorial Board has taken this decision based on legal advice, which indicates that such references may be in breach of the *Employment Equality Acts 1998* and *2004*.

professional notices

O'Shea, Kathleen (deceased), late of 22 Lower St Columbus Road, Drumcondra, Dublin 9. Would any person having knowledge of any will made by the above-named deceased, who died on 18 November 2013, please contact McCullagh Higgins & Company, Solicitors,1/2 Cois Mara, Dungarvan, Co Waterford; tel: 058 44166, fax: 058 44162, email: info@mccullaghhiggins.com

Rourke, Margaret (née Hayes) (deceased), late of 31 Supple Hall, Dunshaughlin, Co Meath, who died on 30 August 2013. Would any solicitor holding or having knowledge of a will made by the above-named deceased please contact Michael Moore and Company, Solicitors, Unit 3 Stokes Court, Rear 7 Main Street, Dundrum, Dublin 14; tel: 298 8956, fax: 01 298 8931, email: moorelaw@eircom.net

TITLE DEEDS

Anyone knowing the whereabouts or holding title documents on behalf of the late Barbara Faherty (ob: 2 September 2011), late of Kilroe West, Inverin, Co Galway, and Claremont, Oughterard, Co Galway, with respect to property at Claremont, Oughterard, Co Galway, please contact Padhraic Harris & Company, Solicitors, Merchants Gate, Merchants Road, Galway; tel: 091 562 062, email: cirwin@harrissolicitors.ie

In the matter of the *Landlord and Tenant (Ground Rents) Acts 1967-2005* and in the matter of those lands, hereditaments and premises known as no 11 Gerard Griffin Avenue, otherwise no 1 St Mary's Road, in the city of Cork, and in the matter of an application by Lorraine Kennedy

Take notice any person having any interest in the freehold estate of the property known as 11 Gerard Griffin Avenue, otherwise known as 1 St Mary's Road, Cork, being part of the property more particularly described in an indenture of lease dated 5 February 1791 and made between John Exham of the one part and Timothy Connell of the other part, and by another indenture of lease dated 7 June 1802 and made between Harriet Exham of the one part and John Sheehy of the other part, and by yet another indenture of lease dated 9 September 1809 and made between John Exham of the one part and David Sheehy of the other part, certain lands, hereditaments and premises including, among other things, the above-mentioned premises, being no 11 Gerard Griffin Avenue, also known as no 1 St Mary's Road in the city of Cork (and hereinafter called 'the premises') were demised unto the aforesaid lessees for the terms respectively of 200 years, 390 years and 400 years, subject to the yearly rents and to the covenants on the part of the lessees and conditions therein respectively reserved.

Take notice that Lorraine Kennedy intends to submit an application to the county registrar for the county/city of Cork for the acquisition of the freehold interest in the foresaid property, and any party asserting that they hold a superior interest in the foresaid premises are called upon to furnish evidence of the title to the aforementioned premises to the below named within 21 days from the date of this notice.

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

Date: 4 April 2014

Signed: Kevin Hegarty (solicitors for the applicant), Brian Dillon House, Dillons Cross, Cork

In the matter of the *Landlord and Tenant (Ground Rents) Acts 1967-1994*: an application by Re-Financing Holdco Limited

Take notice that any person having any interest in the freehold estate of the property known as 2 Grand Parade and 19a and 19-25 Dartmouth Road, Dublin 6, being the premises demised by fee farm grant on 26 May 1899 and made between Henry Sharpe and William Henry McLoughlin, forever subject to the yearly rent of £100 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: 4 April 2014

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 Hurstgreen Limited and in the matter of 51 Upper Leeson Street, Dublin 2

Take notice that any person having any interest in the freehold or leasehold estate of the following property: all that and those the hereditaments and premises known as 51 Upper Leeson Street in the city of Dublin, held under lease dated 15 February 1957, made between John Berkeley Knox Moses and Henry Derek Hurley of the one part and Harold Spiro of the other part for a term of 94 years at a rent of £20 per annum.

Take notice that Hurstgreen Limited, being the person currently entitled to the lessee's interest under the said lease, intends to apply to the county registrar of the county of Dublin for the acquisition of the freehold interest and all intermediate interests in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid property

is called upon to furnish evidence of their title to same to the below named within 21 days from the date of this notice.

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

Date: 4 April 2014

*Signed: Dundon Callanan (solicitors for the applicant), 17 The Crescent, Limer*ick

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of the premises known as 11 South William Street, Dublin 2, and an application by Maria Madigan

Take notice that any person having any interest in the freehold estate or any superior leasehold estate of the following property: all that and those that portion of the house and premises known as 11 South William St in the parish of St Bride and city of Dublin, held under lease dated 1 November 1965 made between JJ Nicholl Limited of the one part and Francis V Heavey and others of the other part and therein described as "all that portion of the house and premises known as 11 South William Street in the parish of St Bride and city of Dublin consisting of the area in the basement thereof, portion of the basement, the ground floor, including portion of the return at the rear thereof, the three floors over the ground floor and the return at the rear of the first floor, all of which said premises are more particularly delineated and described on the sectional drawing thereof annexed to the lease" for the term of 7,500 years from 1 September 1965, subject to the yearly rent thereby reserved and to the covenants on the part of the lessee and conditions therein contained.

Take notice that Maria Madigan intends to submit an application to the county registrar for the city of Dublin for acquisition of the freehold interest in the aforesaid properties, and any party asserting that they hold a superior interest in the aforesaid premises (or any of them) are called upon to furnish evidence of the title to the aforementioned premises to the below named within 21 days from the date of this notice. In default of any such notice being received, Maria Madigan 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 city of Dublin for directions as may be appropriate on the basis that the persons beneficially entitled to the superior interest including the freehold reversion in each of the aforesaid premises are unknown or unascertained.

Date: 4 April 2014

Signed: Mason Hayes & Curran (solicitors for the applicant), South Bank House, Barrow Street, Dublin 4 (CFE/AGN)

Res ipsa loquitur

Bless me, Father, for I am stupid

A Nashville man who made a dramatic deathbed murder confession – only to ultimately survive – is now serving 50 years in jail.

James Washington had a heart attack while in jail for an unrelated crime and thought he was about to die. Lying in his hospital bed, he desperately looked for a confessor, and found one in guard James Tomlinson.

"He kind of got as best as he could, motioned, and said 'I have something to tell you. I have to get something off my conscience and you need to hear this.' He said, 'I killed somebody. I beat her to death'," Tomlinson said.

Washington had always been considered a person of interest in the 1995 murder of Joyce Goodener, as he knew the victim and admitted he saw her the day she died. But there was never any real evidence – until Washington provided it himself.

More crafty than any other beast of the field

Comedian Jimmy Faillia, who taped taxi passengers' reaction to a 14-foot Burmese python, says the passengers all signed releases afterward.

The comedian and former cab driver's video shows New York passengers screaming and cursing when they see the snake, either as they enter the cab or as they are driving in it.

The Taxi Commission failed to see the humour in the prank, saying it was "monumentally poor judgement on the driver's part" and that the driver's suitability to continue holding a TLC licence would be questioned.

Failla still has a cab licence, though he doesn't regularly drive a cab. He says he's not worried about losing his licence because it's "the worst job in the world". Failla's publicist told *The Gothamist* that the snake was real and that nothing was scripted.

Scam for dinner, scam for supper: it's a dog-eat-dog world

A scammer seeking to con an Arizona attorney into cashing a fake $198,000 (€143,740) cheque was foiled when the pitch wound up in a law firm email account for the lawyer's dog.

Scottsdale lawyer Mark Goldman had set up an email account as a joke for his bull terrier Walter, who has an honorary law degree and his photo on the firm's website. Someone apparently didn't get the memo about Walter's true persona. The terrier received an email recently, asking the dog to represent a foreign client in a collection matter. In exchange for serving as an instrument, he could take a cut of the proceeds before forwarding the bulk of the money from a fake cashier's cheque to the 'client'. Goldman publicised the scam attempt in order to warn others. Reportedly, tens of millions of dollars have been lost through similar fraud attempts on other attorneys.

Judge, Judy and executioner

Famed television judge Judith Scheindlin says she has never filed a lawsuit before. However 'Judge Judy' said she felt she had no choice but to do so when a Connecticut law firm used her name and photo on television and internet advertising – despite her long-standing decision not to endorse products and services.

Scheindlin is suing Haymond Law Firm and personal injury attorney John Haymond for misappropriation of her likeness, right of publicity and violation of the Connecticut *Unfair Trade Practices Act*. Scheindlin also asserts a claim for false endorsement under federal law in her complaint, according to the *New York Daily News*.

The TV star said that in her 50-year career she had never filed a lawsuit. Yet she felt the unauthorised use of her name, image and reputation was so outrageous that it required action. She remarked that Mr Haymond was a lawyer, who "should know better".

Judge Judy – TV's highest-paid personality, with earnings of $47 million – said that any damages she obtains from the suit will go to a charity that provides college scholarships for women.

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- Corporate Commercial
- Commercial Litigation
- Commercial Property
- Construction
- Employment
- Energy & Renewables
- Funds
- Regulatory/Compliance

Associate to Senior Associate level

- Asset Finance & Leasing
- Banking
- Corporate Commercial
- Funds
- Insurance & Reinsurance
- Litigation/Professional Indemnity
- Litigation/Financial Services
- Litigation/Insolvency

Partner Level

- Asset Finance & Leasing
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- Corporate Commercial
- Funds
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For more information on these and 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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