



Level playing pitch

Acts committed on the playing field aren't immune from criminal sanctions



Accounting for taste

The preparation of administration accounts is essential in probate



Blowing the whistle

How does the *Protected Disclosures Bill* protect whistleblowers?

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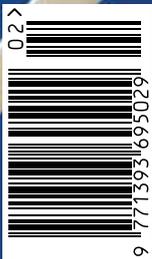
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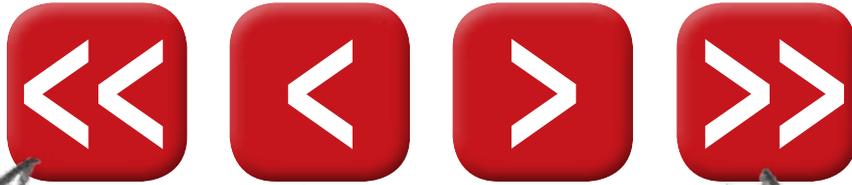
TILTING AT WINDMILLS

What landowners and their advisors need to know





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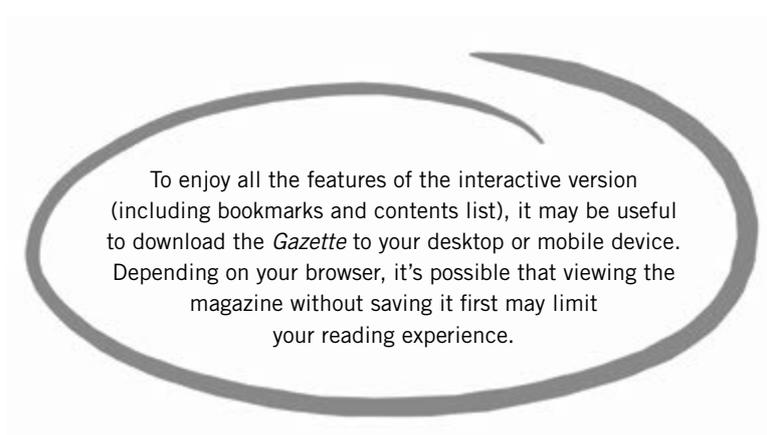
**BACK TO
CONTENTS
PAGE**
(once past the
contents page)

**PREVIOUS
PAGE**

**NEXT
PAGE**

**NEXT SECTION/
FEATURE**

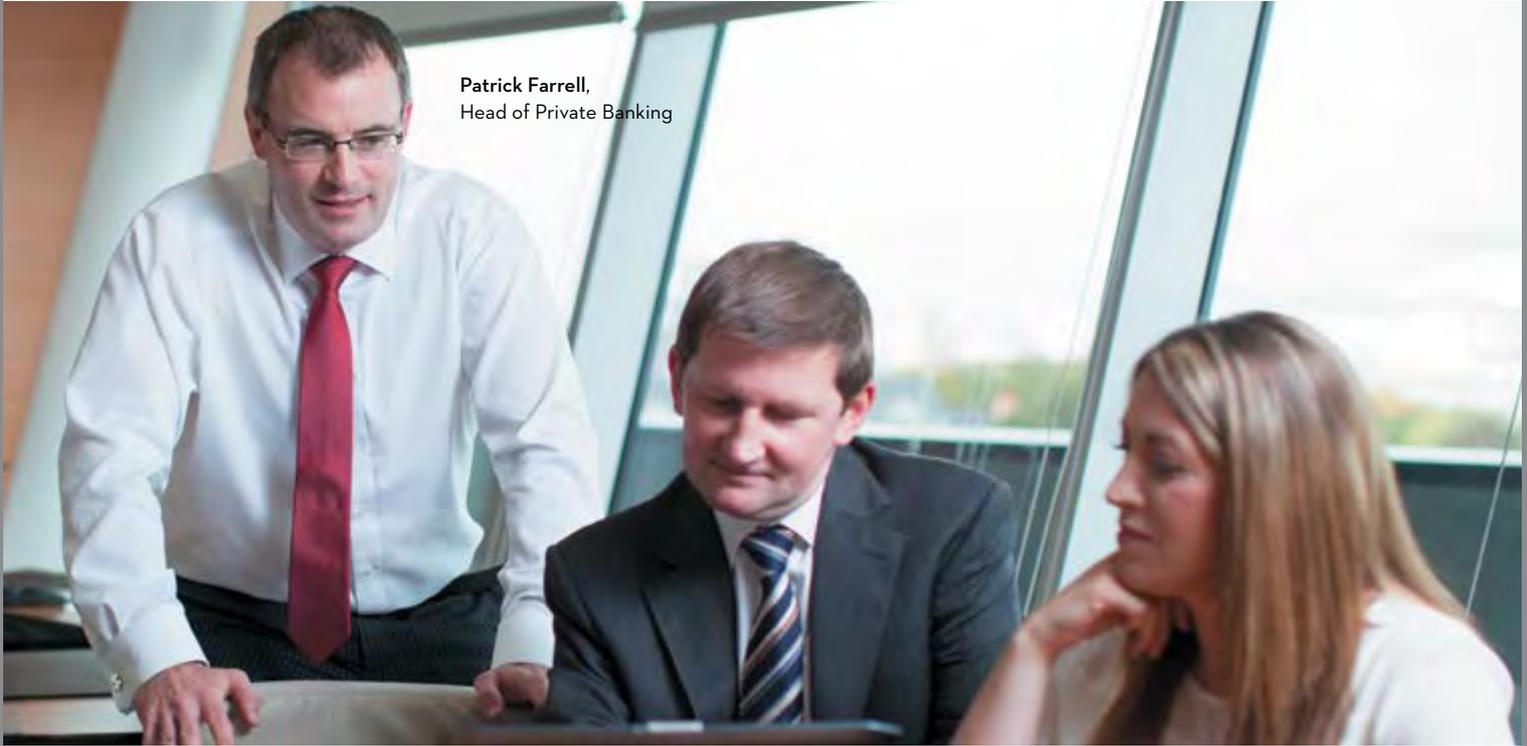
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Patrick Farrell,
Head of Private Banking

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Patrick Farrell: Telephone 01-6417634 or email patrick.a.farrell@aib.ie

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SETTING THE RECORD STRAIGHT

The regulatory impact assessment to the *Legal Services Regulation Bill* makes for interesting reading. Importantly, it provides an insight into the quality and type of information relied upon by policymakers. That the data be accurate, representative and current is a significant challenge – a challenge of fundamental importance.

The assessment quotes extensively from the latest Smith and Williamson survey of Irish law firms for the profession's outlook. While positive – were it true for all – it fails to communicate the experience of the various 'layers' and 'types' of firms that make up the profession. It only surveyed 101 firms – two-thirds of them Dublin based – and included 16 of the biggest 20 firms in the State. This deserves more than a mere footnote.

It is not rocket science that, consequent to the economic collapse, particularly in asset values, there would be a comparable impact on the income of solicitors' offices. This is especially true for those relying on conveyancing, family law and probate.

Not alone have legal fees been reduced, but the receipt of payment and therefore cashflow, has been significantly delayed.

Reports suggesting that legal fees remain 'sticky' or on the rise is not the reality for the vast number of practices throughout the country.

The National Council for Competitiveness, in its submission to the Action Plan for Jobs 2014, stated that "the cost of most services had fallen to, or below, 2006 levels. The exception is the 'legal, accounting, PR and business management' category, where recorded prices remain 1.5% above 2006 levels".

A wide category and a long span, you'll agree.

Fall in legal services costs

The CSO's Services Price Index indicates that there has been, in fact, a fall in the cost of legal services since 2010 – by approximately 2% – as opposed to an increase of 2% in the overall economy.

CSO data also shows that:

- The wider legal sector contributes almost €1.5 billion to the

The legal sector contributes almost €1.5 billion to the national economy, in cities and towns the length and breadth of the country



national economy, in cities and towns the length and breadth of the country,

- The legal profession is a major employer, employing almost 19,000 people directly,
- While, anecdotally, there may be some

improvement in remuneration, the CSO confirms that wages and salaries in the wider legal sector have fallen by 20% since 2008.

Relentless downward pressure on fees from private and commercial clients is a daily reality. However, other pressures experienced by our members require further examination, including:

- The impact of the cost of professional indemnity insurance,
- The increase in rates, rent and other costs and levies,
- The impact of cuts in civil and criminal legal aid, and
- Continued reductions in publicly tendered contracts.

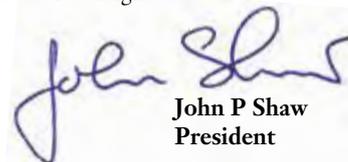
It is hardly surprising, then, that we have decided to commission our own research in relation to the contribution of the solicitors' profession to the legal sector and the wider economy.

Relevant research – analysed and published to show the true position of the profession in all its various 'types' and 'layers' – is one part of the Society's mandate to better meet its members' needs.

Our profession is dynamic in responding to new challenges and creating new opportunities.

It is time to set the record straight.




John P Shaw
President



30



34



42

gazette

LAW SOCIETY

cover story

26 Winds of change

Ireland plans to produce 40% of its electricity from renewable resources by 2020. This will require significant expansion of the wind-farm network. Aisling Meehan looks at the legal implications for landowners and the IFA's recent proposals

features

30 Suffer little children

The question of State liability regarding pupil safety in public education has proved to be a contentious one. Ireland was recently found to be in violation of the ECHR. Helen Kehoe considers the judgment in *O'Keeffe v Ireland*

34 Cat's cradle

Terminating a property contract can be complicated – even when using the standard form of contract. Kevin Hoy tries to unravel the ball of string



38 Perfect pitch?

It is a common misconception that acts committed on the field of play enjoy a form of immunity from the impact of criminal sanction. This is not so. Patrick Carroll finds the back of the net

42 Holding to account

Thorough administration accounts will ensure that clients and beneficiaries retain full confidence in the solicitor administering an estate. Richard Hammond crunches the numbers

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regulars

4 Frontline

- 4 Nationwide
- 5 Representation

7 News

14 People

19 Comment

- 19 Letters
- 20 Viewpoint:
The forthcoming
Protected Disclosures
Bill

22 Analysis

- 22 Changes to the jurisdictions of the District and Circuit Courts and new *District Court Rules*
- 24 What to do if a complaint is made against a solicitor in a family law matter



46 Books

- 46 Book review: *Lawyers, the Law and History*
- 47 Reading room: updates from the Law Society Library

49 Obituary

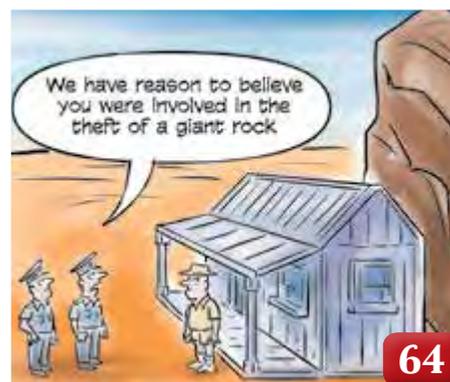
51 Briefing

- 51 Council report: 24 January 2014
- 52 Practice notes
- 53 Regulation
- 55 Legislation update:
10 January – 10 February 2014
- 56 Eurlegal: High Court rules on use of domain names; *Construction Regulations 2014*; recent developments in European law

61 Professional notices

63 Recruitment advertising

64 Final verdict



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nationwide

New from around the country



*Kevin O'Higgins
is the Law
Society's senior
vice-president*

MONAGHAN

Crank up those CPD points!

Monaghan Bar Association has organised a CPD evening on 12 March at the Hillgrove Hotel, Monaghan, from 5-8pm. Three CPD points will be available (two general and one regulatory).

The Law Society's Sinead Travers will speak on minimising the risk of complaints and associated consequences. Brendan Watchorn SC will speak on the registration of easements and *profits a prendre* acquired by prescription (SI 559/2011) and Des Ferguson (Maurice Johnson & Partners) will cover rights of way that are required to be registered.

A fire engineer will focus on fire safety certificates and regularisation certs for domestic and commercial applications, followed by chartered engineer Peter Coyle (Coyle & Associates) on the *Building Control Regulations (Amendment) 2014*.

Contact Justine Carty (Barry Healy & Co) for details: tel: 047 71556, email: justinec@healylaw.ie.

KILDARE

District Court Rules. Yeah, it does!

Newbridge solicitor Niall Farrell was elected president of the Kildare Bar Association at its AGM on 13 February. Prior to the election, outgoing CPD officer Andrew Cody gave an informative talk on the new *District Court Rules*. Also elected at the AGM were David Osborne (secretary), Mark Stafford (treasurer), Helen Coughlan (CPD and PRO), and Luke Hanahoe (social secretary).

LEITRIM

Making a mountain out of a Mohill



Mohill, last Tuesday

PICT: NATIONAL LIBRARY OF IRELAND

My first job when I qualified in the early 1980s brought me to the town of Mohill in Co Leitrim, where the good townspeople soon clipped the city swagger from me, and I learnt much about country life – especially the love that people have for the land and the unlimited measures they are prepared to go to in order to assert their rights, as they see them.

About 31 years since I left, it was somewhat surreal to return to Mohill. I called into Delaney Gannon on Main Street, encountering some of the secretarial staff still there, and caught up

with my old friend Noel Quinn. Nine miles down the road is Carrick-on-Shannon, a place virtually unrecognisable. Mohill was just like it was then – no more or less prosperous than before. Still the same legal firms of Gannon and Kilrane (albeit with different personnel, bar Noel, who has been ever present).

I was delighted to hear from Noel that Kieran Ryan of Manorhamilton has succeeded him as president of the bar association, with Aoife McDermott serving as secretary.

DUBLIN

Shape up for the Calcutta Run

As we emerge into spring, it's heartening to see so many athletes and fun-runners meandering along the parks and roadsides. It would be great to think that many of them have the *Calcutta Run* in their sights – a 10k event

that is very much part of the legal calendar and one that your Law Society has generously supported over the past 16 years. Note the date now, and come along to Blackhall PACE on Saturday 17 May. Last year, €120,000 was raised and shared between both *GOAL* and the *Peter McVerry Trust*. In all, over €2.75 million has been raised by the *Calcutta Run* since its inception.

Lord Mayor of Dublin Oisín Quinn SC administers the Lord Mayor's Coal Fund and is holding a black-tie fundraising dinner for that charity on 27 March. It's an event that's dear to both wings of the legal profession. If interested, consult the Law Society and DSBA websites for information.

As we go to press, Blackhall

Place is the prestigious venue for the 54th *Irish Times* debate, which is being fought out by various universities, the Law Society's SADS team, and the King's Inns. Chaired by a certain L Creighton TD, the motion for the debate is: 'This house believes the Irish political system has served us well'. The prize for the winning team is a fantastic trip across the US, debating from city to city.

It seems we just can't have enough seminars on the personal insolvency legislation. For those still craving their PIP fix, the latest instalment (a half-day seminar) takes place on 27 March in the Camden Hotel, entitled 'Personal insolvency in practice'. (For bookings, email denise.maguire@ashvillemediagroup.com.)

representation

News from the Society's committees and task forces



LITIGATION COMMITTEE

Pitfalls in filing of affidavits

The Litigation Committee is aware that, increasingly, affidavits presented for filing in the courts offices are being rejected for failing to meet the basic requirements for successful filing.

Order 40 of the *Rules of the Superior Courts 1986* deals with affidavits. The main amendments to order 40 are:

- **Order 40, rule 14 (SI 95 of 2009)** came into operation on 16 April 2009 and deals with the swearing of the affidavit and the different formats of jurat to be used,
- **Order 40, rule 2 (SI 2 of 2011)** came into operation on 1 February 2011 and specifies the correct offices for filing affidavits relating to different types of proceedings, in particular, where a winding-up order has been made, or where a notice to proceed has issued in accordance with order 55 rule 11, directing an account or inquiry be taken by the examiner of the High Court,
- **Order 40, rule 13A and 14A (SI 487 2012)** came into operation on 28 December 2012 and addresses foreign language affidavits.

To avoid delays and the rejection of papers, practitioners should ensure full compliance with order 40 of the *Rules of the Superior Courts* when drafting and swearing affidavits for the High Court.

The most common reasons for affidavits to be rejected by the High Court Central Office are as follows:

- The affidavit does not set out a description or place of abode of the deponent (order 40, rule 9),
- The opening paragraph of the affidavit does not state that the deponent is aged 18 years and upwards,

- Alterations, interlineations or erasures within the affidavit are not authenticated by the initials of the person taking the affidavit (order 40, rule 13).
- The jurat does not comply with order 40, rule 14 as amended, as the commissioner for oaths/practising solicitor does not clearly certify (a) that they personally know the deponent, or (b) that the deponent has been identified to them by some person personally known to them and named in the jurat who certifies their personal knowledge of the deponent, or (c) that the identity of the deponent has been established by them by reference to a relevant document containing a photograph of the deponent before the affidavit was taken,
- The jurat does not set out the complete address of where the affidavit was taken (order 40, rule 6),
- There is no record number or an incorrect record number sited on the affidavit,
- There is no filing clause or an incomplete filing clause at the end of the affidavit (order 40, rule 11),
- The jurat should not appear on a single or separate page where there exists sufficient space for the jurat to be typed immediately underneath the last paragraph of the affidavit. When this occurs, the affidavit will be rejected. Such gaps should be avoided. Where they occur, a line should be drawn through the blank space and the commissioner or solicitor taking the oath should, at the time of swearing, place their initials alongside the top and bottom of the line drawn (order 40, rule 13).

HUMAN RIGHTS COMMITTEE

EU Small Claims Procedure: extended to larger claims?

The EU Commission published a [proposal](#) to extend the European Small Claims Procedure from €2,000 to €10,000 in November 2013, writes *Alma Clissmann* (member of CCBE Access to Justice Committee). This would extend the benefits particularly to SMEs and enable 30% of SME claims to be litigated in this way, up from 20% with the €2,000 limit.

The perceived advantages are that it is paper based, has strict time limits, does not require legal representation, limits costs to be proportionate to the value of the claim, uses electronic communication and standardised forms, and eliminates the intermediary procedure for declaration of enforceability of the judgment (*exequatur*). Oral hearings may be held if it is considered necessary, but should aim to be done using technology. On a level playing field, all of this makes sense, and the initiative is leading the way in trying to streamline decisions and keep costs down.

The context is that many cross-border claims (45%) are never pursued because the cost of a remedy is disproportionate and because of the delay (27%).

In January, the Irish Government confirmed its support for the proposal.

A number of jurisdictions represented in the CCBE are unhappy about this proposal because they consider that €10,000 is not a small claim

when viewed against the average monthly income in member countries, and should therefore not benefit from the simpler formalities of this procedure. They are concerned that there is no provision for legal representation for parties who may need it and that people may be disadvantaged by the need to conduct the case on paper, cope with another language, and use electronic communications. The options of telephone and videoconferences are not always viable or suitable for the taking of evidence or defending a claim.

There is also a proposal to cap court fees at 10%, which is a high level for larger claims, and this also is considered unsatisfactory.

Further information

- **COM(2013) 794:** Proposal for a regulation of the European Parliament and of the council amending Regulation (EC) no 861/2007 of the European Parliament and of the council establishing a European Small Claims Procedure.
- **COM(2013) 795:** Report from the commission to the European Parliament, the council and the European Economic and Social Committee on the application of Regulation (EC) no 861 /2007 of the European Parliament and of the council establishing a European Small Claims Procedure.

representation

CRIMINAL LAW COMMITTEE

Effect of Garda vetting procedure on privacy rights of individuals raised with Irish Human Rights Commission

The Law Society's Criminal Law Committee (CLC) recently raised with the Irish Human Rights Commission (IHRC) the extent to which the current procedure for Garda vetting may interfere with the privacy rights of individuals who have not been convicted of an offence. The CLC has agreed to explore the issue and to consult again with the IHRC on the issue later in 2014.

The current procedure

The **Garda Vetting Unit** does not currently operate pursuant to any specific statutory power. The current non-statutory procedure for the release of information is a process whereby an individual seeking to obtain employment with an organisation registered with the Garda Vetting Unit is required to consent to the disclosure of information currently contained in the unit's disclosure policy. The current disclosure policy is to "release, on consent, details of all convictions and/or prosecutions, successful or not, pending or completed, in the State or elsewhere, as the case may be".

Privacy rights concerns

The CLC is concerned that the current non-statutory procedure may interfere with

the privacy rights of individuals, in particular those pursuant to article 8 of the ECHR. This was also a matter of concern in previous IHRC observations on the draft vetting legislation.

The Court of Appeal case of *T, R (on the application of) v Greater Manchester Chief Constable & Ors* ([2013] EWCA Civ 25) is of particular relevance. The Master of the Rolls allowed the appeals of T and JB (but not AW), finding that a statutory vetting procedure that facilitated the release of some information was incompatible with article 8 of the ECHR. The case of T concerned the release of information about a police caution received when a person was a child of 11 years of age in connection with the stealing of bicycles. The case of JB concerned the release of information about a police caution of an individual for shoplifting, which the individual maintained was, in fact, an honest mistake.

The CLC is exploring whether – in light of the case of *T, R* – the current policy for disclosure may be too broad, in particular as regards the release of information about unsuccessful and pending prosecutions. While this case

concerns article 8 ECHR privacy rights, in Ireland there may also be other Irish constitutional rights of relevance, for example, due process and fair procedure rights, such as the presumption of innocence.

Uncommenced statutory procedure

While the *National Vetting Bureau (Children and Vulnerable Persons) Act 2012* may resolve the current issues, it has not yet commenced. The commencement of this statutory procedure may resolve the potential privacy and other rights breaches posed by the current procedure. The new statutory procedure, if commenced, would facilitate the disclosure of information relating to criminal offences and criminal records regarding non-successful prosecutions only where such information is specified by statute. 'Specified information' is defined by section 2 of the act and may be a more proportionate approach than the current *ad hoc* procedure.

Could you help?

The CLC would like to explore the practical effect that the current non-statutory procedure has on the privacy rights of individuals. Do you

know of an individual whose privacy rights may have been disproportionately interfered with by the current vetting procedure? If so, please write to the CLC to share your practical knowledge, but please be mindful not to include any information that would identify individuals. The CLC and indeed the IHRC would be particularly interested to ascertain the extent and effect of disclosure of information relating to unsuccessful prosecutions for offences of a minor nature.

Please write to: Criminal Law Committee, Law Society of Ireland, Blackhall Place, Dublin 7; clc@lawsociety.ie.

TAXATION COMMITTEE

Budget 2014 submissions invited

The Taxation Committee invites practitioners to make submissions regarding Budget 2014 by emailing r.hession@lawsociety.ie before 15 March 2014.



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DNA testing firm opens office in Dublin

The company that carries out exclusive DNA testing for the *Jeremy Kyle Show* has opened a Dublin office at Harcourt Road, Dublin 2.

AlphaBiolabs Ltd is offering its DNA service to the Irish legal sector for €425, a price it claims is “significantly cheaper than anything available to the market until now – and with a much quicker turnaround time”. It boasts ISO17025 accreditation.

Chief executive David Thomas says: “We are proud to confirm that this represents a major enhancement to the value that legal professionals



are receiving at present.”

Next day test results are available. The company can be

contacted at tel: 01 402 9466, email: info@alphabiolabs.ie, or visit: www.alphabiolabs.ie.

‘A decade of centenaries’



The Four Courts will host a series of lectures over the coming three years on the great moments, movements and struggles involved in the foundation of the modern Irish State during the decade between 1913 and 1923.

The series begins on Thursday 10 April 2014 with a lecture by Mr Justice Gerard Hogan on ‘The Four Courts in time of war: 1916 to 1922’.

- **Date:** Thursday 10 April 2014,
- **Time:** 5pm,
- **Venue:** Round Hall, Four Courts, Inns Quay, Dublin 7.

Free entry with ticket. Apply via email to courtscenaryevents@courts.ie.

MIA – missing in administration

Stephenson Solicitors are hosting their 25th bi-annual probate seminar in the Westbury Hotel on Friday 4 April 2014 from 9.15am to 5.15pm. The seminar, entitled ‘MIA – missing in administration’, will cover four hours of general matters and one hour each of management and regulatory matters of solicitors’ CPD requirements.

The seminar will cover probate matters, missing bodies, wills,

LPRs, trustees, spouses, civil partners, beneficiaries, deeds, and grants, including those ‘missing millions’ – when should an LPR trace same?

The seminar will provide practitioners with a step-by-step guide to what to do when key elements are missing, in order to ensure that their absence does not delay the administration of an estate, including providing precedent notices of motion,

affidavits and oaths applicable to any one or more missing element.

Speakers will include Anne Stephenson, Teresa Pilkington SC and Declan O’Reilly (Criminal Assets Bureau) who will be advising on ‘gangland probate’.

The seminar will end with an extensive Q&A session. For more information and a booking form, see the www.stephensonsolicitors.com.

Government announces President of new Court of Appeal

Mr Justice Seán Ryan is set to become the President of the new Court of Appeal. The court is being established following the successful passing of the Court of Appeal Referendum on 4 October 2013.

This means that Mr Justice Ryan will become the second most senior judge in the State after the Chief Justice. He also becomes an *ex officio* judge of the Supreme Court and the High Court. He will be formally appointed once the legislation establishing

the Court of Appeal has been enacted.

Mr Justice Ryan was born in 1948. He was educated at UCD and King’s Inns. He was called to the bar in 1972 and to the inner bar in 1983 and practised as a barrister on the South Eastern Circuit. He was appointed as a judge of the High Court in 2003 and served as chairman of the [Commission to Inquire into Child Abuse](#) the same year. He also served as chairman of an [expert group](#) to examine options

for the implementation on the European Court of Human Rights judgment in *A, B and C v Ireland* in 2011.

Four-year appeals backlog

The new ten-judge Court of Appeal will sit between the High Court and the Supreme Court. It will deal with the majority of appeals that currently go from the High Court to the Supreme Court and will focus on clearing the current four-year backlog of such cases.

The general scheme of

the *Court of Appeal Bill* was published on 25 February. The scheme confirms that the new court will have a president and nine ordinary judges.

The scheme also provides for the abolition of the Court of Criminal Appeal and the Courts-Martial Appeal Court.

The Government will have more than 15 judicial vacancies to fill this year, including the positions on the new court and positions left vacant following expected retirements from the High Court in 2014.



Ireland's General Anti-Avoidance Rule and the Rule of Irish Law

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- > A detailed look at statutory interpretation
- > Section 811 and s811A explained
- > Navigating GAAR in other jurisdictions – Canada and UK

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Dr Gerardine Doyle, UCD

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Julie Burke, Solicitor



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How many hats?

Approximately 15% of solicitors who hold a practising certificate are employed as in-house solicitors. The role has evolved, and indeed is still evolving, from a traditional 'head of legal' role to a more dynamic, high-level and business-oriented position.

An in-house solicitor will encounter varied, challenging and stimulating work and has to be able to:

- Manage the expectations of business,
- Juggle competing interests of various stakeholders,
- Grasp the various risk-management issues that arise in business situations,
- Deal with a number of substantive legal areas that confront in-house counsel on a daily basis, and
- Appreciate when to seek advice from external counsel.

If you are interested in moving in-house or wish to gain a qualification in this area, the [Diploma Centre](#) is offering the [Diploma in In-House Practice](#) again this year, beginning in March. Full details can be found at www.lawsociety.ie.

Emer highly commended at European *Lawyer* awards



Emer Gilvarry of [Mason Hayes & Curran](#) was 'highly commended' in the 'European Managing Partner of the Year' category at *The Lawyer European Awards* in London on 20 February. The awards recognise top professionals in the legal sector across different

countries, ranging from small corporate boutiques to some of Europe's biggest firms.

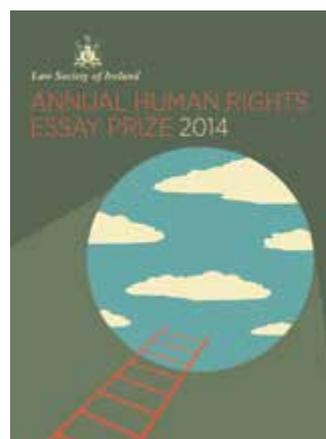
A total of five leading managing partners were shortlisted from law firms throughout Europe. The overall winner was Manuel Martin of Spanish firm Gómez-Acebo & Pombo.

Human Rights Essay Prize

The Law Society's Human Rights Committee is inviting entries for the [Annual Human Rights Essay Prize 2014](#). Law students, including trainee solicitors and barristers, are invited to submit an essay identifying a particular aspect of human rights law that they believe will have importance in the application or interpretation of Irish law.

Entries should be typed and be between 2,000 and 3,500 words in length. They may be co-authored. First prize is €500; the second prize is €250.

All entries must be received no later than 2 May 2014 and should be emailed to h.kehoe@lawsociety.ie or posted to Helen Kehoe, human rights executive,



Human Rights Committee, Law Society of Ireland, Blackhall Place, Dublin 7.

For more details, see the [competition poster](#) at www.lawsociety.ie.

Holiday pay judgment awaited

Bill Holohan (Holohan Solicitors) has informed the *Gazette* of an interesting employment law case in Britain. Following a reference from an employment tribunal there, the advocate general (AG) of the European Court recently provided his opinion to the judges of the court in relation to the question of an issue that had arisen on the calculation of holiday pay. The matter will be coming before the judges later this year for decision.

The AG's view is that commission earned by an employee in his role as a salesman was intrinsically linked to his role and therefore the employee's holiday pay should include not only his basic salary, but also a sum equivalent to the commission he would have earned while ordinarily at work. The AG suggested using a 12-month representative period to complete the calculation.

The AG's opinion is not binding on the Court of Justice. However, if the opinion is followed when the case is heard later this year, this could give rise to a fundamental change in the basis of calculation of holiday pay where remuneration regularly includes additional elements or allowances.

150th SBA AGM

The 150th annual general meeting of the [Solicitors' Benevolent Association](#) will be held at the Law Society, Blackhall Place, Dublin 7, on Monday 14 April 2014 at 12.30pm, to:

- Consider the annual report and accounts for the year ended 30 November 2013,
- Elect directors,
- Deal with other matters appropriate to a general meeting.

Single Farm Payments at risk in new CAP changeover

Around €40 million of Single Farm Payment (SFP) entitlements held by 7,000 farmers who did not farm in 2013 – but leased out 100% of their land and SFP entitlements – are at risk of becoming lost in the changeover to the new Common Agricultural Policy, which is being introduced in 2015, *writes Aisling Meehan*.

Where a farmer leased out only part of his entitlements and submitted an SFP application in 2013, he should not be caught by the adverse provision in the changeover but should be entitled to the Area Based Payment (ABP) under the new scheme.

A private contract clause



PICTURE: THINKSTOCK

within a lease agreement can provide that the ABP will be established by the lessee in 2015 and returned to the lessor at the end of the lease. However, an issue arises where farmers leased out entitlements and did not

farm in their own right in 2013. The Department of Agriculture, Food and the Marine has indicated that it is confident that a solution can be agreed with the EU that will see the lessee establish entitlements for the

lessors. One solution tabled by the Department of Agriculture is for the lessor who owns the entitlements to sell them to the lessee (the active farmer who establishes them) and pays the money back to the lessor over the period of the lease. At the end of the lease, the entitlements are then sold back to the lessor.

However, this may cause undue tax implications. Farmers leasing entitlements have been advised by the Department of Agriculture not to try and take back entitlements this year until a decision on the issue is clear. It is hoped that such a decision will be made in the coming months.

Survey will establish practitioners' career requirements

All solicitors are being asked to take part in a short survey by the Society's Support Services section. The survey aims to establish the exact numbers of employed and unemployed solicitors, the kind of work they are involved in, and their levels of work satisfaction.

The survey is currently being distributed and can be completed in less than three minutes online. It aims to establish what categories of members are most in need of career support services and the kind of supports required.

All solicitors, including sole practitioners and partners of large firms, are being asked to complete the survey, so that a representative response is received and a good understanding of the career support requirements of all members is arrived at.

■ SUPPORT SERVICE TEAM

The Society has consolidated its career support, practitioner support and employer support services into the newly formed 'Support Services' section. All previous services will continue to be provided by Support Services.

Members can avail of a wide range of different career support services, including one-to-one consultations and coaching, CV reviews, job-seeking-skills training workshops, online videos

and weekly updates on job market opportunities and developments.

Practitioner Support's initiatives include a discreet online marketplace available to solicitors who are interested in exploring the selling, buying or merging of a practice.

The Employer Support service assists employers to hire staff in a variety of ways, including advertising vacancies, facilitating selection and keeping employers updated on job market activation initiatives.

Ar mhaith leat cleachtadh an dlí as Gaeilge?

The PPC II elective Advanced Legal Practice Irish course will run from 17 April until 19 June 2014. Lectures and workshops will be delivered on Thursday evenings from 6-8pm at the Law Society (lectures in weeks 1 and 2 will be made available online, so physical attendance on those particular Thursday evenings is not required).

The fee for 2014 is €625. The closing date for applications is Friday 14 March at 5pm. Further

information is available on the Law Society website.

For further details and an application form, contact: Robert Lowney by email: r.lowney@lawsociety.ie or tel: 01 672 4952.



Burren Law School focuses on '21st Century Justice'

The Burren Law School 2014 will take place from Friday 2 May to Sunday 4 May at Ballyvaughan, Co Clare, *writes Caoimbe Harney*.

The theme will be '21st Century Justice?' The programme will include: 'Brehon Law aspects of access to justice' (Prof Donnchadh Ó Corráin, UCC); the Binchy Memorial Lecture, by Emily O'Reilly (European Ombudsman); 'Justice across borders' by Robert Fisk and Dr Fatima

Hamroush (former Minister for Health, Libya, from 2011-12); presentations on 'Systems of Justice' by Prof Richard Susskind and Bill Prasifka (Financial Services Ombudsman); and 'Access to justice' by Pat Leahy (journalist, *Sunday Business Post*) and Dr Mary Rogan (Chairperson of the Irish Penal Reform Trust).

For further information, visit: www.burrenlawschool.org, or email: julia@burrencollege.ie.

Skibbereen courthouse judicial review to proceed



PIC: EMMA JERVIS PHOTOGRAPHY

Access to justice for the people of West Cork being denied, claims West Cork Bar Association

The [West Cork Bar Association](#) (WCBA) has been granted leave by the High Court to bring judicial review proceedings against the Courts Service, in an attempt to force it to set aside its decision to close Skibbereen courthouse.

In recent years, the West Cork area has suffered the loss of seven local courthouses – the most recent being Kinsale District Court, which sat for the last time on 19 December 2013.

If Skibbereen courthouse closes, only four District Court venues will be available to cover the entire West Cork area, which extends from Kinsale as far as Castletownbere in the west.

The bar association maintains that the decision by the Courts Service to close Skibbereen Court was taken “apparently for economic reasons” – but the bar association has established that the cost of keeping the court open would be just €8,000 per annum.

‘Considerable costs’

“It is believed that there will not be any real savings to the State by closing the court,” the association said in a statement. “On the contrary, the WCBA believes that there will be considerable additional costs to be borne by other state agencies such as an

Garda Síochána, the HSE and others in having to travel to another court some miles away to deal with matters previously dealt with by their local court. And, of course, all of this is being done in the backdrop of a proposed €25 million project to build a new courts complex at Anglesea Street, Cork, which it is suggested in some quarters is unnecessary and unwanted.”

Not taken lightly

The West Cork Bar Association said that before deciding to initiate judicial review proceedings, it had considered the matter “fully and comprehensively” and “this course of action was not taken lightly”.

It added that it had engaged fully with the Courts Service during the consultation process, making two separate submissions after having consulted with all the relevant stake holders. The association said that it had flagged to the Courts Service that “a stand would be made against further court closures in West Cork given the previous closures to date”.

The WCBA said that it was concerned that access to justice for the people of West Cork was now being denied, or at the very least seriously eroded, for what appeared to be purely economic reasons.

THERE'S AN APP FOR THAT



Pictures speak a thousand words

APP: PDF TO IMAGE PRICE: €4.99

I have been writing a collection of client newsletters over the past number of months and usually issue them to clients via email, writes *Dorothy Walsh*. This method of sharing is quite effective, but is obviously limited to those clients for whom I have email addresses.

I recently set up a Facebook page for my firm (101 followers so far!) and was hoping to be able to share articles, information and, in particular, my client newsletters with the general public. It is hoped that the articles would be ‘liked’ and ‘shared’ by friends of the Facebook page.

Publishing the newsletter on the Facebook page would allow for a simple and quick ‘like’ and ‘share’ of the newsletter by friends of the page and allow content to be seen by a potentially large group of people. I did, however, encounter some difficulties.

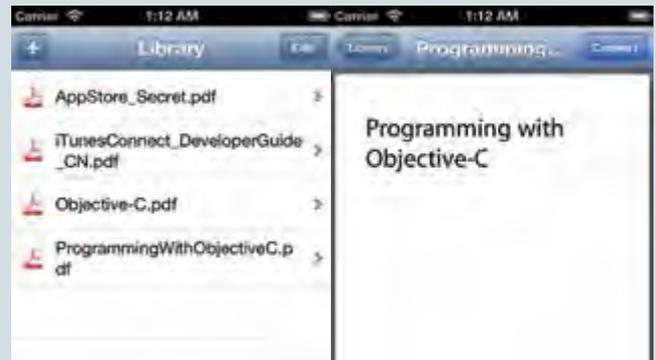
Generally, when I create a newsletter in *Pages* on my iPad, I save it as a PDF document and attach that document to an email to clients. The difficulty I had with posting the newsletters to Facebook was that the Facebook page only allows you to attach photos, web links and such like, so my newsletters, being in a PDF format, were not capable of being posted. This prompted a search online to find a solution to this and, of course, to find ‘an app for that!’

The app I found is called, funnily enough, *PDF to Image* and costs €4.49. Quite simply, it converts the PDF document to an image – a photo, essentially, which I can then save to the iPad’s photo gallery.

I start off by creating my newsletter in my *Pages* app. When the newsletter is finished, I click on the ‘open in another app’ button and choose the *PDF to Image* app. This brings me into the *PDF to Image* app, whereupon I click on the document that has to be converted and click ‘save’.

This action saves the document (now an image) to my photo gallery. I can then go to my Facebook page, click on ‘write post’, click on the ‘camera’ button and select my new image. This attaches the image of the newsletter into the post in Facebook and is clearly visible as an image that can be opened, enlarged for reading, liked and shared.

The process is extremely simple and allows a reader or friend to view and share content with their friends on Facebook in the quickest and simplest of methods. That is, of course, assuming that the content is interesting and topical enough to be liked and shared in the first place. Unfortunately, there is still no app to solve that particular problem!



Society elaborates IP law concerns over *Plain Packaging Bill*

On 13 February 2014, the President of the Law Society John P Shaw and director general Ken Murphy represented the Society at a meeting of the Joint Oireachtas Committee on Health and Children. They had been invited to contribute to the committee's pre-legislative consultation on the *Public Health (Standard Packaging of Tobacco) Bill 2013*.

The Society had previously made a submission expressing concern at the Irish and international intellectual property law implications of such a measure. They made an opening statement and then answered questions from the TDs and senators for about half an hour.

The following is a *précis* of the president's opening remarks:

"The Law Society welcomes the opportunity to come before this Oireachtas Committee to elaborate on its intellectual property law concerns regarding the proposed bill.

"For the avoidance of doubt, we are not here to defend the



The President and Director General of the Law Society presenting the Society's concerns to the TDs and senators

tobacco industry and are not, to use the expression 'in the pocket' of anyone. We fully accept that tobacco has had a disastrous

impact on people's health.

"On this point, it should be noted, for the record, that the Law Society constantly participates

in public consultations on a wide range of issues that affect the public and the profession. Indeed, the director general and I were here in Leinster House yesterday for the conclusion of the committee stage of the *Legal Services Regulation Bill*.

"We are concerned with the legal implications of the concept of plain packaging as such, and how it might affect the standing of intellectual property rights here in Ireland and abroad. That is to say, we have no issue with the policy objectives underpinning the bill, but do have concerns regarding its impact on the intellectual property regime in this country.

"The basis of our appearance here today is to draw attention to the potential impact of the bill in the regard in which Ireland is held internationally in respect of intellectual property and to set out, generally, some key legal concerns for the committee to consider. The general scheme of the bill gives rise to unavoidable legal concerns of both an Irish and EU character."



A full transcript of the relevant part of the Oireachtas Committee's hearings is available on the Society's website. On the day following the hearings, the Society placed the full transcript of the president's opening statement of 13 February 2014 on its website. Listen to the interview, on the subject of plain packaging, which director general Ken Murphy gave to George Hook on Newstalk 106 that afternoon, in the interactive *Gazette* online.

A helping hand for solicitors in difficulty with the Society



The annual workshop for members of the panel of solicitors that assists solicitors in difficulty with the Law Society was held recently. Carol Ann Casey gave an overview of the regulatory regime, from her perspective as the independent adjudicator

of the Law Society.

The workshop also focussed on the issue of legal costs. Noel Guiden (managing partner of Behan & Associates, legal costs accountants) highlighted legal costs issues that led to difficulties and complaints against solicitors.

Linda Kirwan (head of the complaints and client relations) analysed the complaints the Society receives about costs. She outlined good practice that would help solicitors avoid such complaints.

Brendan Dillon, chairman of the Guidance and Ethics Committee,

which facilitates the panel's work, emphasised the importance of the panel for all members of the profession. While many panel members received few calls, the fact that they had volunteered and were always available to assist was crucial to its success.

Society calls for 'de-politicised' judicial appointments process



“Even the perception that the exercise of political patronage by the government of the day is a factor in the appointment of judges is completely inappropriate in the 21st century. Indeed, it always was,” director general Ken Murphy told interviewer Claire Byrne and the audience of RTE’s *Morning Ireland* on 6 February 2014.

The Society chose Ireland’s highest-audience radio programme to announce the 38-page submission it had made the previous week to Justice Minister Alan Shatter. The key objectives of the reforms recommended by the Society are that the choices of new judges should be objectively ‘merit based’ and that the process itself should be ‘de-politicised’ to minimise the potential for party political affiliations to play any part in selections.

In terms of the lack of merit-based assessment, Murphy said:



Claire Byrne: why would a shortlist of three be better?

“The Judicial Appointments Advisory Board does the best job it can, but there is not a truly rigorous objective merit-based assessment. I mean, they don’t even have interviews. For any other job in the country there would be an interview, but there are no interviews here. We don’t think it in any way displays the depth that, for example, is exhibited in England and Wales, in



Murphy: three would limit the discretion of the cabinet

Victoria in Australia, and other places. We can learn from the experience and the way in which other jurisdictions assess the qualities sought in a judge.

“There is testing of how it could be done,” Murphy continued. “Currently what happens, essentially, is that a judicial candidate fills out a form and sends in their CV. And there are some references as well and that’s as far as it goes really.

The Judicial Appointments Advisory Board has a very tough job. All it can really do is screen out, one hopes, the completely unsuitable. A lengthy list of names is then produced. We think that the system is susceptible to political lobbying and, in fact, political favouritism. The judiciary that we have is superb, and I emphasise again there is no criticism of the existing judiciary, but the system that produces them is flawed. It needs to be reformed.”

“So why would a shortlist of three be better?” Claire Byrne pressed the director general.

“A shortlist of three is better than, at times, 50 or more (for the District Court), or for every senior judicial position you might have ten or 15 names, going to Cabinet. A shortlist of three would limit the discretion of the Minister for Justice and the Cabinet. It should be the product of a truly objective merit-based assessment, an independent assessment. Much less political, much better in the public interest.”

Community Courts ‘deserve examination’

The Law Society believes that the concept of ‘community courts’ deserves to be examined with an open mind. The community court model began in New York in 1993, and its success as an anti-crime mechanism and resolution model has resulted in its adoption in a number of other jurisdictions over the past number of years.

However, the Society says that, in Ireland, they would need to be adequately resourced, unlike other similar initiatives such as the Drugs Court and the Community Restorative Justice initiative.

Director general Ken Murphy addressed the Joint Oireachtas Committee on Justice, Defence

and Equality on 28 January 2014. He informed Minister Shatter and the members present that the Society commends the Joint Oireachtas Committee for its initiative in dusting down the 2007 report of the National Crime Council, *Problem Solving Justice: The Case for Community Courts in Ireland*. He pointed to the success of community courts in parts of the US and in England and Wales which, he said, justifies a serious examination of whether community courts could also be successful in Ireland.

However, he continued, while the Society welcomes debate as to community courts, which both tackle the crime problem and offer alternative sanctions,

nevertheless, the Society has concerns about the introduction of a new court system.

“Such an initiative could interfere with the rights of people who are suspected of criminal activity, albeit of a minor nature,” Murphy said. “Accordingly, the Society welcomes the consideration of a community court model provided it is:

- Based on an analysis of the impact of any such changes to criminal procedure in Ireland and the avoidance of any potential weakening of the constitutional rights of the accused,
- Designed on the basis of evidence-based research, and
- Adequately resourced.”

Neopost seeks new customers

In late 2012, Neopost Ireland was awarded the tender to provide a new Courts Service fee-franking machine, writes *Caoimhe Harney*.

Solicitors have reported improved office efficiency as a result, with easier stamping of court documents. Flexible payment options are on offer and the new CS-200 machine can download credit from the internet as you need it – there’s no need to buy credit in bulk – which helps to maintain cash flow.

Neopost Ireland is expanding the roll-out of its CS200 fee-franking machine to new customers and can be contacted at tel: 1850 33 44 55.

MONAGHAN BAR ASSOCIATION



At Monaghan Bar Association's recent CPD event, Brendan Hennessy BL addressed the topic of judicial review as a remedy for social welfare recipients who have had their payments stopped by the Department of Social Protection. Karl Dowling BL spoke about probate practice, while Michael Monaghan and Nick Portch (Abacus Legal Cost Accountants) tackled the topic of the recovery of legal costs in light of recent judicial decisions. They also covered best practice in file maintenance and time recording in order to maximise revenue. To be added to the mailing list for upcoming CPD events by Monaghan Bar Association, email Justine Carty (Barry Healy & Co) at justinec@healylaw.ie



Three generations of Quinlan solicitors appear in this photo from the parchment ceremony of 19 February 2014. (*Seated, l to r*): former president of the Law Society Moya Quinlan and guest speaker Attorney General Máire Whelan. (*Standing, l to r*): Sarah Quinlan, new solicitor Michael Quinlan, Law Society President John P Shaw and junior vice-president Michael Quinlan



(*From l to r*): director general Ken Murphy, the first Romanian lawyer ever to qualify as a solicitor in Ireland, Christina Stamatescu, and Attorney General Máire Whelan



The son also rises: (*l to r*): former president of the Law Society Gerard Doherty, Attorney General Máire Whelan, new solicitor Ronan Doherty and Law Society President John P Shaw



Now you see me! The son of new solicitor Valerie Kirwan, nine-month-old Adam, in the act of grabbing the Attorney General's glasses

Law Society team celebrates Jessup national title win



Judge George Bowden (Washington DC) presents the Jessup national trophy to the Law Society's team (from l to r): Michael Dyulgerov (William Fry), Donncha Ó Conmhúí (Arthur Cox), Rebecca Russell Carroll (McCann FitzGerald), Jessica Lacey (ByrneWallace) and Sean O'Connor (Investec Bank plc)

In April, a Law Society team will travel to Washington DC to compete in the international rounds of the Phillip C Jessup International Moot Competition. The Jessup is the world's largest moot court competition, with 550 law schools from more than 80 countries taking part each year.

The competition simulates a fictional dispute between countries before the International Court of Justice, the judicial organ of the United Nations. Each team is judged on their written memorials and oral arguments. The 2013/14 Jessup problem concerns the conflict between maritime development and conservation, criminal jurisdiction and maritime salvage rights.

The Law Society took the laurels in the national rounds against teams from the King's Inns and University College Dublin. The Society's team also won best written memorials, while Donncha Ó Conmhúí was awarded best oralist jointly with Ruth McGuinness (UCD). They were presented with their awards by Judge George Bowden, who travelled from Washington DC to judge the national rounds.

Practitioners put a PIP in their step with popular cert



Personal Insolvency Practitioner Certificate courses are proving popular, so the Diploma Centre is running another one, beginning Friday 9 May. To celebrate the completion of three such courses in 2013, a reception was held for all participants: (front, l to r): Valerie Peart (vice chair, Education Committee), Cathy Clarke (head of regulation, Insolvency Service of Ireland), Olga Gaffney (solicitor and course leader, Diploma Centre), Freda Greally (head of Diploma Centre); (back, l to r): course participants and lecturers, including Anne Neary (solicitor), Elaine Grier BL and John Kennedy BL

SYS GOLDEN ANNIVERSARY



ALL PICS: LENS MEN PHOTOGRAPHIC AGENCY

Jimmy McCourt's last formal occasion as President of the Law Society was to host a historic dinner on 2 November 2013 to celebrate the 50th anniversary of the founding of that still vibrant institution, the [Society of Young Solicitors \(SYS\)](#). All previous chairs of the SYS were invited and the great majority attended to mix with members of the current SYS committee. The very first chair of the SYS when it was founded in 1964, Bruce St John Blake, was the guest of honour on a unique, nostalgic and very special evening



(Seated, l to r): Claire Connellan (chair in 1985), Jimmy McCourt (1991), Bruce St John Blake (1964) and Maeve Breen (1972). (Standing, l to r): Derek Greenlee (1976), John F Buckley (1966) and Michael Carrigan (1974)



(Seated, l to r): Fidelma McManus (2000), Jimmy Mc Court (1991), Wendy Hederman (1998) and Jane McCluskey (2011). (Standing, l to r): William Aylmer (2001) and Richard Willis (2004)



(Seated, l to r): Walter Beatty (1996), Jimmy McCourt (1991), Catherine Delahunt (1989) and Declan O'Sullivan (1997). (Standing, l to r): Terence McCrann (1988), Gavin Buckley (1994) and Paul White (1993)



(Seated, l to r): Claire Callanan (1985), Jimmy McCourt (1991), Carol Fawsitt (1984) and Michael Quinlan (1987). (Standing, l to r): Ken Murphy (1986), Tom O'Connor (1981) and Terence Dixon (1979)

Tanzanian Chief Justice leads the way in arbitration training



Participants and facilitators of the week-long arbitration and mediation training programme included (*front, l to r*): Mr Justice Fauz Twaib (judge of the High Court, Tanzania) Mr Justice Dr Faustin Ntezilyayo (Rwandan judge, East African Court of Justice), David Barniville SC, Noel Rubotham (head of Reform and Development Directorate, Courts Service), Mr Justice Harold Nsekela (president, East African Court of Justice), the Chief Justice Susan Denham, Chief Justice of Tanzania Mohamed Chande Othman, Ms Justice Aishiel Nelson Summari (judge of the High Court, Tanzania); (*back, l to r*): Colm Ó hOisín SC, Emma Dwyer (IRLI coordinator), Michael Irvine (IRLI director), Michael Carrigan (partner, Eugene F Collins, Solicitors), Brendan Ryan (CEO, Courts Service), Mr Justice Nial Fennelly (Supreme Court) and Mr Justice William M McKechnie (Supreme Court)

Tanzanian Chief Justice Mohamed Othman and senior members of the Tanzanian judiciary and East African Court of Justice visited Dublin early in the New Year to take part in a week-long arbitration and mediation training programme, at the invitation of [Irish Rule of Law International \(IRLI\)](#).

The programme, supported by the Law Society, Bar Council and the Courts Service, was developed by Michael Carrigan

(partner, Eugene F Collins Solicitors) and Colm Ó hOisín SC, and utilised the expertise of speakers across a broad spectrum of the legal and arbitration community. The judges also visited the Dublin Dispute Resolution Centre, which caters for arbitrations, mediations and other forms of ADR.

The IRLI training programme was developed in partnership with the Tanzanian judiciary to assist the judges in their

critical tasks of overseeing and supporting alternative dispute resolution regimes in their countries.

During their visit, the judges met with Chief Justice Susan Denham, who facilitated meetings with members of the Irish judiciary. They also met President of the Law Society John P Shaw and Bar Council chairman David Nolan.

This exchange of knowledge and experiences is central to the

achievement of international development goals. Tanzania is one of Ireland's nine development priority partner countries, and Irish Aid has been providing development assistance to Tanzania since 1975.

The January arbitration training programme highlighted the strong role that the Irish legal profession plays in strengthening capacity and building partnerships internationally.

BRINGING LAW TO THE STREET



On 30 January, Mr Justice Colm Mac Eochaidh presented certificates to the graduates of the inaugural Street Law programme run by the Diploma Centre in collaboration with Georgetown University Law Centre, Washington DC, and the Trinity Access Programme (TAP).

From over 70 applicants, 34 PPC I students were chosen to participate in this Diploma Centre initiative. In conjunction with the TAP trainees partnered with

11 secondary schools in Dublin. The programme required that the selected volunteers teach a six-week 'Street Law' course to transition year classes.

Trainees who volunteered with the Street Law initiative were provided with training ahead of their school placements from Prof Richard Roe and Prof Sean Arthurs (both of Georgetown University). They were also required to maintain a reflective journal and to create and share



Graduates of the inaugural Street Law programme received their certificates from Mr Justice Colm Mac Eochaidh (above)

what is street law?

Street Law began in 1972, when a small group of Georgetown University Law Centre students developed an experimental curriculum to teach District of Columbia high school students about law and the legal system. Due to its practical nature, the course was labelled 'Street Law'. Over time, the Street Law curriculum has evolved from a binder of loose-leaf lesson plans to a range of programmes that

now operate in over 40 countries worldwide.

Street Law has the dual purpose of contributing to the professional development of law students and introducing second-level students to the legal system. Focusing on areas of the law that are of interest and relevance to them, the course aims to develop their advocacy and public-speaking skills and provide a foundation in the principles of democracy.

unique teaching resources with the group.

PPC I trainees Damien Coffey (Sheehan & Partners) and Katie Haberlin (Eversheds) were two of the participants. They were assigned to teach a transition year group in Pobailscoil Iosolde in Palmerstown, Co Dublin.

Damien describes his experience: "Regardless of the topics we were discussing, the students displayed an acute awareness of some of the most pressing legal issues that have prevailed in the last few years. Cases such as Savita Halappanavar, Phoebe Prince and Marie Fleming were all cited by the students and they showed an impressive understanding of, and sensitivity to, the main issues presented by these complex cases."

Katie adds: "In classes where we

asked students to draft legislation to criminalise cyber-bullying, we were impressed by their ability to define it using keywords and also to incorporate core issues into their definitions.

"At all times we tried to maintain a practical emphasis. We did this by facilitating discussions in small groups and by getting the students to act out hypothetical scenarios."

A particular highlight of the programme was an organised trip to the Criminal Courts of Justice. As part of this visit, the transition year group took part in a mock trial in Court 14. Students were assigned roles in advance – from judge to court reporters to jury service. The students engaged fully with their roles, which helped to make the trial more realistic.

letters

Taking issue with the Society's 'plain packaging' submissions

From: *Rossa McMabon, Rita Martin, Joe Noonan, Tony Layng, Elizabeth Fitzgerald, Simon McGarr, Eamonn Carroll, John Molyneaux, Andrew Sheridan, Micheál O'Dowd (solicitors)*

We were astonished to read of the submissions made by the Law Society to the Oireachtas Health Committee on the *Public Health (Standardised Packaging of Tobacco) Bill*. We believe that, in general, the Society should only make submissions in relation to measures that directly affect its members. Exceptions to this position should be limited, for example, to making submissions on matters of exceptional public importance where there is otherwise little or no advocacy being carried out.

The submissions made by the Society and its Intellectual Property (IP) Law Committee are unacceptable. They are an argument in favour of rights' holders. They are highly debatable and by no means reflect



settled law. It has been widely noted that the submissions made by the Society reflect very similar points made by the tobacco industry and its lobbyists. The tobacco industry is perfectly capable of lobbying and making submissions on its own part. In fact, it has done so. The Society, and the entire profession, have

been accused of lobbying on behalf of the tobacco industry and representing the interests of particular clients.

We believe that a debate must be had by the Society in relation to the role and function of committees. A number of intellectual property organisations exist in the State,

and many solicitors are members of them. The IP Law Committee should not, under the auspices of the Society, behave as an intellectual property organisation that lobbies in the interests of rights' holders. Its function should be the discussion of intellectual property law issues in the interests of members of the profession.

As concerned members of the profession, we require that the Society confirm:

- 1) Whether the role and functions of committees (other than those performing regulatory functions) have been specified by the Society,
- 2) Whether the Society has a policy on lobbying and making submissions in the name of the Society and its committee, in relation to matters of policy, and
- 3) What the policy of the Society and its committees is in relation to conflicts and declarations of interest when making submissions on behalf of the Society.

The President of the Law Society responds

From: *John P Shaw, President, Law Society of Ireland*

I wanted to ensure that the above letter from our colleagues was published in the *Gazette*. I do not for a second doubt the very genuine and sincere motives of the writers. I hope they, equally, do not doubt mine.

It is painful to the writers of this letter, and it is also painful to me, that the Society's motives in making its submissions on this issue have been vilified. The Society has indeed been accused of "lobbying on behalf of the tobacco industry" – even of "being in the pocket of the tobacco industry".

These accusations are totally false. They are completely baseless and, for anyone who

takes the time to think about them, utterly absurd. I was very pleased to be invited to represent the Society at a meeting of the Oireachtas Committee on Health and Children on 13 February. The director general and I took the opportunity to nail the lie that the Society was acting as some sort of front for the tobacco industry. On the contrary, we recognised unreservedly that tobacco has a disastrous impact on public health, and we made clear that we supported the Oireachtas committee's policy objective of reducing smoking to the greatest extent possible.

However, I must respectfully differ with anyone who contends that it is not proper for the Law Society to be concerned about the

Irish and international intellectual property law implications of plain packaging, as such. It is perfectly proper for the Society to have such well-reasoned concerns and to express them. Indeed, the Society's recent and extensive consultation with the profession, not least through the Millward Brown survey of opinion in the whole profession, revealed a desire of solicitors to have the Society express its voice on a wider range of legal issues than in the past.

The three questions raised are easily responded to:

- 1) The role and functions of committees have always included preparing submissions on legal matters,
- 2) All Society submissions

should be made in the name of the Society, even though they may be drafted by an expert committee, and they inevitably deal with matters of legal policy, and

- 3) No solicitor should act in a conflict-of-interest situation when dealing with Law Society business, any more than in client work.

Nevertheless, as I said to my colleagues at the Council meeting on 21 February, the Society must learn lessons from this completely unprecedented reaction to a Law Society submission. We are, with the help of concerned colleagues in the profession, both open and determined to do so.

viewpoint

PROVIDING COMFORT FOR WHISTLEBLOWERS

Whistleblowers have been all over the news recently. **Remy Farrell** looks at the forthcoming *Protected Disclosures Bill*, which seeks to protect those who disclose confidential information in certain circumstances



Remy Farrell is a senior counsel

The events of the last few weeks have focused much public attention on the plight of various whistleblowers.

It has also focused much-needed attention on a very important forthcoming piece of complex legislation currently before the Oireachtas – the *Protected Disclosures Bill*.

While the legislation is very complex, this is for the simple reason that the issue of whistleblowing is, of itself, highly nuanced and delicate. It is important to remember that what is really at issue is whether a person should be protected for having done something that is otherwise wrong and possibly unlawful – namely the disclosure of confidential information.

This is something that perhaps gets lost in popular debate on the issue. The media have a somewhat slanted view of what a whistleblower is – a person who feeds the media confidential information, which they can present to the public on an exclusive basis. However, this is to ignore other equally important channels of disclosure that can be as effective, if not more so.

The *Protected Disclosures Bill*, as the title suggests, revolves around the idea of protecting those who disclose otherwise confidential information in certain circumstances. The concept of a ‘protected disclosure’ is the cornerstone of the legislation. In short, those who make protected disclosures receive the protections offered by the legislation, while those who make disclosures that don’t come within the relevant definition do not.

Most important protections

The most important protections afforded to a whistleblower are a protection from victimisation by an employer and an entitlement to sue if victimised, and also a qualified privilege in the event of the whistleblower being sued for defamation. It is therefore probably best to regard the *Protected Disclosures Bill* as, first and foremost, a piece of employment legislation.

It will be immediately apparent that the protections that are offered by the bill arise after the fact of the disclosure. As such, there is nothing in this legislation that could be regarded as substantially altering the landscape so as to actively encourage whistleblowers. Rather, its purpose is to provide some comfort for those who do blow the whistle.

Inevitably, the question of whether a given disclosure is a protected disclosure will be a question for lawyers rather than laymen. This becomes obvious from even a cursory reading of the legislation. This is because the definition of a ‘protected disclosure’ is the subject of various statutory exceptions, hedges, conditions, and exceptions to conditions. In short, it is unlikely that a layman reading this legislation could ever conclude that a given disclosure is a protected one. Indeed, it will also be difficult for lawyers to be definitive on this.

Employment legislation

The first requirement of the bill is that the disclosure is made by a ‘worker’. Happily, this phrase is very broadly defined and includes those working on a contract or subcontract basis, those undergoing work placements, and work experience. The information disclosed must also have come to the attention of the worker in connection with his or her employment – again underlining the idea that this legislation is essentially a piece of employment legislation.

The information disclosed must relate

to what the bill describes as a ‘relevant wrongdoing’. Again, this is generously defined as covering criminal offences, failures to comply with legal obligations, miscarriages of justice, health-and-safety risks, environmental damage, improper

use of public funds, oppressive conduct, discrimination, and gross negligence or mismanagement of a public body. It also covers information tending to show that information relating to any of the foregoing categories is likely to be destroyed.

Expressly excluded from the definition of a ‘relevant wrongdoing’ is information in relation to a failure to comply with a legal obligation that arises under the

worker’s contract of employment or engagement – in other words, contractual disputes between the employer and the whistleblower are not capable of amounting to ‘relevant wrongdoing’.

Where the job of the employee is to detect, investigate, or prosecute various forms of wrongdoing, then the information they come across in the context of their employment is excluded – otherwise regulators, police, and prosecutors could leak with impunity.

By implication, the restriction of information concerning mismanagement and gross negligence to public bodies would seem to exclude similar information relating to private enterprises.

Specific disclosure channels

One of the most significant aspects of the bill is that it goes on to describe a number of specific disclosure channels

It is unlikely that a layman reading this legislation could ever conclude that a given disclosure is a protected one. Indeed, it will also be difficult for lawyers to be definitive on this



PIC: THINKSTOCK

Those who make protected disclosures receive the protections offered by the legislation, while those who make disclosures that don't come within the relevant definition do not

that become of great importance in the context of other provisions. For example, there can be an internal disclosure to an employer, a disclosure to a prescribed person (presumably a confidential recipient of some sort), disclosure to a minister, and disclosure to others – that is, the media or civil society bodies.

It is this latter unofficial channel of disclosure that is most heavily qualified by exceptions of various sorts. It is this aspect of the legislation that will give rise to the greatest complexity and controversy, as this sort of disclosure is what is generally understood by the term 'whistleblowing'.

Section 10 of the bill sets out a number of cumulative preconditions that must be satisfied before an unofficial disclosure becomes a protected disclosure.

Firstly, the worker must reasonably believe the information to be true. The elision between subjective and objective criteria here is all but an invitation to litigate.

Secondly, the disclosure must not be made for personal gain. The exception provided for in the case of

rewards payable under statute can be ignored for practical purposes, as such rewards are all but non-existent.

Thirdly, in all of the circumstances, it must be reasonable for the worker to make the disclosure. Again the loose terminology here renders definitive advice difficult, if not impossible. There is some guidance given in section 10(3) as to the various factors to be taken into account when deciding if something is reasonable:

- The identity of the person making the disclosure,
- The seriousness of the wrongdoing,
- Whether it is continuing,
- The existence of a duty of confidence,
- Whether the worker has complied with internal whistleblowing procedures, and
- Whether the worker has availed of one of the official disclosure channels.

Fourthly, the worker must satisfy one of the following alternative preconditions set out in section 10(1)(c):

- The worker believes he or she might be penalised if one of the official channels is used,
- There is a concern over destruction of evidence if an official channel is used,
- The worker has previously made a disclosure by means of an official channel, or
- The wrongdoing is of an exceptionally serious nature.

Official channels

The foregoing is very much a simplified, and perhaps simplistic, summation of the checklist that has to be gone through before a determination can be made as to whether a given disclosure will be a protected disclosure. It is, obviously, highly complex.

More importantly, much of the scheme of the bill is geared towards ensuring that disclosures are made, first and foremost, through official channels – that is, to the employer, to confidential recipients, or to sectoral regulators.

This is very important from the practising lawyer's point of view. While all of these matters will have to be taken account of when advising an intending whistleblower,



it must be anticipated that large organisations will need to be advised as to what steps they should take in light of this legislation.

Given the scheme of the legislation, there is much to be said for such organisations putting in place real and effective internal whistleblowing procedures that comply with the requirements of the legislation. By doing so, they may considerably reduce the risk of a disclosure being made through an unofficial channel, such as to the media.

Whatever criticisms one might make of the complexity of the legislation, it does at least represent a potentially rich seam of work for those advising both whistleblowers and those on whom the whistle might be blown. 

PILING ON THE PRESSURE?

The changes to the jurisdictions of the District and Circuit Courts – and new *District Court Rules* – should ease pressure on the High Court. But could they cause fractures in the lower courts? **Derek Elliott** eyes the gauges



Derek Elliott is an assistant principal solicitor with the Chief State Solicitor's Office and is a member of the Society's Litigation Committee

It's probably fair to say that the Minister for Justice is not afraid to court controversy. The very fact that other stakeholders have doubts about whether the changes to the jurisdictions of the District and Circuit Courts will achieve what they are intended to achieve does not seem to have undermined his conviction. One would imagine that when those on the ground – such as the legal profession and the insurance industry – express concern that the increasing of the jurisdictions is untimely, it would cause him to think twice. It hasn't.

The commencement order relating to part 3 of the *Courts and Civil Law (Miscellaneous Provisions) Act 2013* was signed by the minister before Christmas. The new monetary jurisdictions of the District and Circuit Courts came into effect on 3 February 2014.

The new jurisdiction limits will not affect proceedings instituted in any court prior to 3 February 2014.

The jurisdictions of the courts have not changed since 1991. The minister, in presenting the bill to the Oireachtas, argued that too much court business, including personal injuries, was

commenced in the High Court and, as a result, unnecessary legal costs were being incurred at that level.

A substantial body of the work formerly in the jurisdiction of the High Court will now be dealt with in the Circuit Court. Minister Shatter argues that the added pressure on the Circuit Court will be relieved by the increased jurisdiction of the District Court, resulting in some of the cases currently dealt with at Circuit level being dealt with in the District Court. We will just have to wait and see.

Beware new rules

In order to coincide with the increase in jurisdiction, the minister signed new *District Court Rules*, which also took effect on 3 February 2014. The new rules are extensive, and we can expect to see an increase in the volume of civil proceedings being initiated in the District Court.

It is important that those practising in

the District Court make themselves aware of the changes. Any civil proceedings already in being in the District Court before 3 February 2014 shall be continued and determined as if these rules had not taken effect.

Changes in the *District Court Rules* will see proceedings being run more akin to those in Circuit Court, although certain refinements are included.

The District Court civil summons has been replaced by a notice of claim that issues in a manner similar to a civil bill in the Circuit Court, and is similarly valid for service for one year from the date of issue. This period can be extended by order of the court in certain circumstances.

The originating claim notice must include a statement of claim, the contents and format of which are set out in the rules (order 40, rule 5).

A respondent who intends to defend civil proceedings must give, or send by post, to the claimant or his or her solicitor, an appearance and defence not later than 28 days after service of the claim notice and must, at the same time, file a copy of his or her appearance. The defence should not be filed.

While the new rules provide for a notice of intention to proceed, where no steps have been taken in proceedings for 12 months or more (order 39, rule 3), rule 4 provides that, in a dormant case, the court may list the proceedings for the parties to explain the failure to proceed.

In relation to the service of documents in the State (order 41, rule 4(b) of the *District Court Rules*), there is a requirement to demonstrate that due and diligent efforts have been made to serve the person to be served before personal service can be effected by leaving a copy

The new District Court Rules are extensive and we can expect to see an increase in the volume of civil proceedings being initiated in the District Court

FOCAL POINT

pressure points

It is worth mentioning some of the relevant figures contained in the Courts Service's *Annual Report 2012*. In the High Court in 2012, of the 375 cases in which awards were made, just over half (191) were between €38,000 and €99,999.

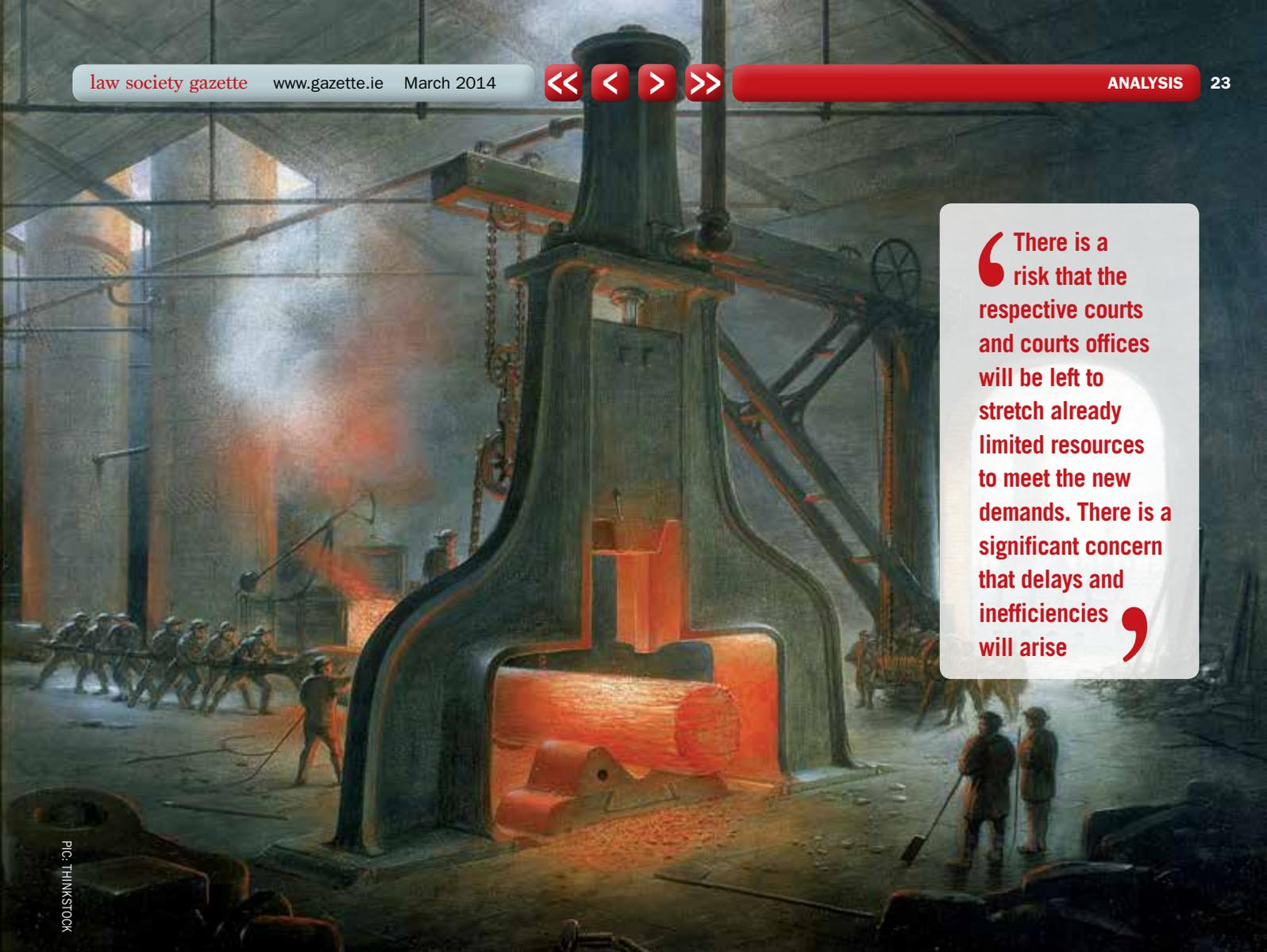
Given the new Circuit Court jurisdiction personal injuries limit of €60,000, it is fair to say that a large number of cases that would have been commenced in the High Court will now be issued in the Circuit Court. Of course, most cases are settled and, anecdotally, in a large number of these, compromises were reached below the new limit.

A look at the awards made in the Circuit Court shows that, of 1,485 civil cases recorded in 2012, a

very significant 1,315 (88%) were between €0 and €19,999.

The minister argues that it is reasonable to predict that the District Court might take pressure off the increased capacity of the Circuit Court. This may or may not occur, as any case valued close to the new limit of €15,000 is still likely to be commenced in the Circuit Court, and it is not known how many (up to now) fall into this category.

Either way, there is a risk that the respective courts and courts offices will be left to stretch already limited resources to meet the new demands. There is a significant concern that delays and inefficiencies will arise.



PIC: THINKSTOCK

There is a risk that the respective courts and courts offices will be left to stretch already limited resources to meet the new demands. There is a significant concern that delays and inefficiencies will arise

of the document with the various categories of person referred to in rule 4(b)(i) to (vi).

Change to discovery rules

A change in the rules in respect of discovery and further particulars can be found in order 42. In an attempt to reduce the need for costly discovery, relevant documents that are listed may be requested. A respondent may, before or at the time of delivery of a defence, apply to the claimant in writing for copies of all or any documents listed in the statement of claim and/or require the claimant to provide further particulars that are reasonably necessary (see order 42). Similarly, a claimant may, within 28 days after delivery of a defence, apply to the respondent for copies of documents listed in the defence and/or require further particulars.

Of particular note is the provision that, unless otherwise

ordered by the court, the costs of requesting particulars may only be allowed where, and only where, the particulars are certified as necessary by the court. The cost of replying to particulars may be recovered by the unsuccessful party where the particulars are not certified as necessary by the court.

Traditionally, solicitors presented their own cases in the District Court. So the question now arises

as to whether the new increased jurisdiction will lead to counsel making more appearances at District Court level. Certainly, the new fees orders provide for such fees for counsel in the District Court. Practitioners should be aware of the need to obtain a certificate in order to recoup counsel's fees, which only applies to cases valued over €2,000. Ultimately, the decision rests with the solicitor, and many would hope

that we will continue to see solicitors utilising their advocacy skills.

Clearly the attempt to reduce legal costs is welcome. One concern that remains is whether the court offices will have the necessary resources to ensure the smooth running of both courts, particularly the Circuit Court, where there is likely to be a huge influx of cases. Ironically, it comes at a time when the High Court personal injuries list runs so smoothly that a case will now get a hearing date within a matter of weeks of being requested.

The minister has indicated that he will monitor the effects of the changes introduced and will resource as necessary. This is welcome. Ultimately, it is only over time that the effects of the increased jurisdictions will be known. In the meantime, solicitors should make themselves aware of the new rules and fees orders. 

FOCAL POINT

new jurisdiction limits

- The jurisdiction of the District Court in civil proceedings is limited to €15,000,
- The jurisdiction of the Circuit Court in civil proceedings (other than personal injuries claims) is limited to €75,000,
- The jurisdiction of the Circuit Court for personal injury actions as defined in section 2 of the *Civil Liability and Courts Act 2004* is limited to €60,000.

COMMUNICATION IS KEY TO KEEPING COMPLAINT FREE

If a complaint is made against a solicitor in a family law matter, what should you do? **Keith Walsh** shares some professional advice



Keith Walsh is a member of the Society's Family and Child Law Committee

Most solicitors never come into contact with the complaints system. Regular communication with clients appears to be the best way of avoiding complaints. If a complaint is made against you in your role as solicitor, however, it is recommended that you seek assistance from a colleague immediately. You should not act for yourself, nor be a judge in your own cause.

The *Legal Services Regulation Bill 2011*, which is due to be passed into law later this year, will introduce a new system of complaints-handling by the Legal Services Regulatory Authority that is different to the current system, but based partly on it.

The new system of costs in the bill will place more onerous duties on solicitors with regard to furnishing detailed initial estimates to clients, as well as keeping them updated as the nature of the case and legal costs change during a litigation case.

Many solicitors have systems in place already to update clients in relation to costs as cases progress. This is best practice and something that should be

done sooner rather than later if it is not part of a firm's case management process.

So, if a complaint is made against you, how should you deal with it?

Complaints the Society can investigate

The Law Society can investigate complaints by or on behalf of clients (which includes beneficiaries under a will) alleging:

- Misconduct,
- Inadequate legal services,
- Excessive fees

The withdrawal of a complaint or allegation may not end the matter, as the Society may, in the public interest, continue the procedure.

Once a solicitor has been notified by the Society that a complaint of excessive fee charging has been made against him or her, the solicitor is not permitted to issue

or cause to be issued civil proceedings without the written consent of the Society.

If civil proceedings are already extant, the solicitor cannot proceed further without the written consent of the Law Society or until such time as it has completed its investigation (see section 9(5) of the *Solicitors (Amendment) Act 1994*).

Other complaints

The Law Society cannot:

- Interfere with court proceedings to have a decision of a court overturned.
- Deal with complaints about the Garda Síochána, barristers, court officials, judges, and so on.
- Deal with complaints – particularly complaints of negligence – where legal action is a more appropriate remedy.
- Only in exceptional circumstances can it deal with complaints about a

solicitor where the complainant is not the client of that solicitor. If the person is complaining about the behaviour of a solicitor who is acting for someone on the other side of a case or transaction, the Society will require the person's solicitor to endorse the complaint.

- Deal with a complaint that does not relate to the professional services provided by a solicitor.
- Deal with a complaint of excessive fees arising out of a bill of costs that issued more than five years ago.
- Deal with complaints of inadequate professional services that were provided more than five years ago.
- Deal with a complaint that is based on how the person's solicitor presented their case in court.

(Source: *Independent Adjudicator's Annual Reports*)

Family law

Figures for 2012/13 in relation to complaints of excessive fees dealt with by the Law Society's Complaints and Client Relations Committee (CCRC) show that 25% (21 of 84) of all complaints in relating to excessive fees arose from family law cases. There was a total of 314 complaints in relation to inadequate professional services, and a total of 1,718 complaints in relation to misconduct (neither of these two categories are broken down by practice area), of which 1,288 complaints related to undertakings.

Over 91% of all referrals to the Solicitors Disciplinary Tribunal by the CCRC were in relation to misconduct related to undertakings, leaving less than 5% for everything else, including family law.

Costs

In November 2013, Noel Guiden of Behan & Co (cost accountants) highlighted the most common problems arising in relation to costs as follows:

Many solicitors have systems in place already to update clients in relation to costs as cases progress. This is best practice and something that should be done sooner rather than later

REFERENCE POINT

useful websites

- Consult a colleague: www.consultacolleague.ie
- Lawcare: www.lawcare.ie
- The office of the Independent Adjudicator of the Law Society: www.independentadjudicator.ie
- Solicitors Disciplinary Tribunal: www.distrib.ie
- Law Society of Ireland: www.lawsociety.ie

‘The best way of avoiding complaints is through regular communication with clients’

‘No, Madam, I’m *not* Dave Allen’

- If you state that you will charge a client on an hourly basis, then you must keep time records,
- Revisit your initial estimate of costs in writing as the proceedings progress and as things change, which they very often do,
- Clients are very often unaware of the amount of work being done on their behalf – so tell them,
- If there is no evidence of the work having been done on the file, then you will not get paid for it on taxation,
- Inaccurate estimates that are not updated cause problems,
- Lack of communication with clients in relation to fees is an ongoing problem for solicitors.

Direct applications

While the Complaints and Client Relations Section of the Law Society will normally refuse to accept a complaint by a spouse against the other spouse’s solicitor in the context of a separation or divorce, the dissatisfied complainant can still apply directly to the Solicitors Disciplinary Tribunal to complain about a solicitor on the opposing side, even though they might have no

standing and no grounds to make a complaint of misconduct.

The Solicitors Disciplinary Tribunal has to establish whether there is a *prima facie* case – this will filter out all the inadmissible complaints. However, there is still a considerable amount of stress and worry attached to being on the receiving end of such a complaint.

According to the tribunal’s 2011 annual report, 156 people made enquiries for information about making a direct complaint to the tribunal, and 40 people made direct applications. Unfortunately, this mechanism is being availed of by unhappy spouses who frequently apply directly to the tribunal to complain against their spouse’s solicitor.

General points of assistance

(*Not to be confused with the situation if you are referred to the Solicitors Disciplinary Tribunal by a Law Society committee.*)

- Realise that, if handled properly, this matter will be resolved without any long-term damage to you or your reputation, but will result in short-term irritation.
- Seek the assistance of a colleague competent in this area.

- The format is straightforward. You will be furnished with a copy of the affidavit setting out the complaints made against you and must respond to this within 28 days on affidavit.
- Ensure that a concise affidavit is drafted on your behalf and, if possible, this should comply with the time prescribed. If it is not possible to comply with this time limit, an increase in the time permitted to file your affidavit can be sought and will be granted on formal application to a sitting tribunal.
- As the tribunal simply sends your affidavit to the complainant and asks for a response (the Solicitors Disciplinary Tribunal acts like a post-box during this phase of the inquiry), it may be wise not to permit the complainant to widen the complaint against you, as affidavits can go over and back.
- Once the affidavits are closed, the tribunal will adjudicate whether there is a *prima facie* case or not. If no *prima facie* case of misconduct is found, then the matter rests there unless the complainant appeals the finding to the High Court. In 2011, there

were seven such appeals to the High Court, none of which were successful; that is, the High Court in every case agreed with the tribunal that there was no *prima facie* case of misconduct proven on affidavit.

- End of process.

Two important maxims

- *The lawyer who acts for himself has a fool for a client.* If you have a possible complaint, ask a colleague for advice. Listen to the advice. Deal with it immediately.
- *De-escalate the complaint.* If possible (and it is not always possible, nor advisable), permit the complaint to be resolved or adjudicated at the earliest possible opportunity.

Remember, most solicitors never come into contact with the complaints system. The best way of avoiding complaints is through regular communication with clients. If you haven’t already done so, put systems in place to update clients on costs as their case progresses. It will save a lot of grief in the long run. Finally, if a complaint is made against you, seek the assistance of a trusted colleague immediately.



WINDS of change

at a glance

- 18% of Ireland's electricity is being generated from 205 wind farms across the island
- Communications between landowners and local communities by wind developers have been haphazard and in some instances non-existent
- The IFA has proposed minimum terms that should be included in the legal documentation between the landowner and the wind-farm development company
- It is vital that the landowner has competent legal and tax advice prior to signing up to these agreements



Aisling Meehan is a solicitor, tax consultant and qualified farmer who specialises in agricultural law and tax, and who practises under the style and name of Aisling Meehan Agricultural Solicitors

Ireland plans to produce 40% of its electricity from renewable resources by 2020. This will require significant expansion of the wind-farm network. **Aisling Meehan** looks at the implications for landowners and the IFA's recent proposals

Arising from an EU commitment to a 25% target for renewable energies in the EU's overall energy consumption by 2020, the Department of Communications, Energy and Natural Resources has set a target that Ireland will produce 40% of electricity needs from renewable resources by 2020. According to a Deloitte report in 2009, this will result in the installed wind capacity on the island of Ireland rising to circa 7,800 megawatts (MW) to achieve these targets. Currently, 18% of Ireland's electricity (2,542 MW) is being generated from 205 wind farms across the island of Ireland.

Accordingly, we have a long way to go to achieve the targets set for 2020.

Communications between wind developers and landowners and local communities have been haphazard and in some instances non-existent. Acknowledging this, the Irish Farmers' Association (IFA) set out specific proposals to support landowners and local communities in their discussions with wind developers in September 2013.

The wind cries Mary

In a document entitled *Harnessing Ireland's Wind Resource for Renewable Energy Production*, the IFA has proposed that all wind development companies establish a community fund for each wind project, which would last for the duration of the wind project. They have recommended the value of the fund should be 1% of the annual revenue generated by the project or €2,500 per MW, whichever is the greater. When one considers that the Greenwire project creating up to 40 wind farms across Kildare, Meath, Westmeath, Offaly and Laois is expected to provide 3,000 MW of renewable electricity to the British market when fully operational, this translates to a cumulative community fund of €7.5 million.

It recommends also that the community funds should be administered by a board of trustees that is representative of the local communities. Given the potential funds involved, it is important that an appropriate legal structure be put in place to ensure transparency and fairness in the administration of these funds at a local level.

Like a hurricane

The IFA negotiated arrangements with two major wind farm development companies (Element Power Ltd and Mainstream Renewable Power Ltd) in November 2012, which can serve as a benchmark for landowners in their

dealings with wind farm development companies.

These outcomes were as follows:

- Annual payment during the option period of €1,000,
- Minimum annual lease payment of €6,000/MW or €18,000 per turbine,
- Payment of 3% of energy price and green credits up to year 15, rising to 5% thereafter,
- With regard to forestry, (a) full compensation be paid for grants/premia paid and remaining to be paid, (b) the wind development company takes on full replanting obligations, and (c) landowners will receive full crop rotational value for any felled forestry,
 - With regard to agricultural schemes, full compensation for any losses in REPS, Area Aid and/or Single Farm Payment,
 - Consultation regarding location of access roads, and
 - Payment on receipt of planning of €10,000 to €18,000.

The IFA has negotiated arrangements with two major wind farm development companies, which can serve as a benchmark for landowners in their dealings with wind farm development companies

Call me the breeze

The IFA document *Wind Farm Option and Lease Agreements* sets out minimum terms that should be included in the legal documentation between the landowner and the wind-farm development company.

There are essentially two legal agreements covering the transaction incorporated into one document – the option agreement that is signed up at the outset. It gives the wind-farm development company the option to require the landowner to enter into a pre-agreed lease. The payment to the landowner for granting the option can vary from between €1,000 to €10,000. The terms of the option agreement and the lease agreement are normally negotiated at the same time, with the proposed



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lease being attached to the option agreement.

The option agreement essentially confirms the landowner's acceptance in principle to having a wind turbine or turbines erected on their land. It allows the wind-farm development company to enter the landowner's property to carry out research, including environmental impact studies that will be required for planning applications. The wind-farm development company may also require the installation of a meteorological mast on the landowner's property, which is essentially a guyed pole, 70-100 metres high, equipped with wind vanes to measure wind speed and temperature sensors.

The option is normally granted for a term of five to seven years with a right of renewal, and the landowner should ensure that there is provision in the agreement for a further payment for extending the option agreement. Given that the total period from application to full grid access can take up to 20 years, according to [Meitheal na Gaoithe](#), it is likely that the option term may have to be renewed. The option is generally triggered when the wind-farm development company obtains planning permission for a minimum number of turbines and obtains a connection into the national grid. If the development cannot go ahead, the option is not exercised and the lease does not become operative. Consequently, the option payment may be all that is received by a landowner.

Having obtained planning and grid connection, it is common for the wind-farm development company to assign the benefit of the option agreement and the lease to a third party, who can then enter onto the landowner's land and develop the wind farm. The term of the lease is normally for a period of 25 to 35 years, with rent fixed as a proportion of the gross payment received per turbine, typically 5% of turnover. Landowners should ensure that turnover figures are independently verified, and the lease should stipulate that an auditor's certificate should be produced on an annual basis to back up these figures. It is important to limit the amount of land to be taken by the wind-farm development company on foot of the lease. It is generally accepted that an area of two hectares is required per wind turbine. A landowner should insist on a clause to protect their right to continue to use the remainder of their land for farming. The lease



Tilting at windmills requires sound legal advice

agreement should also contain provision to indemnify the landowner against any loss that may arise as a result of the Department of Agriculture refusing or seeking a clawback of any payments such as Single Farm Payments, REPS, AEOS, and Forestry Payments and so on.

It is also important to ensure that the wind-farm development company has relevant insurance, and the lease agreement can oblige the wind-farm development company to produce certificates of insurance to the landowner on an annual basis.

In year one, the type of cover that a company provides may include marine cover, advance loss of profits, unloading and transit of turbines, build-again cover and public liability. After installation and commissioning are complete, the type of insurance cover one would expect to have on an annual basis would include material damage, operational damage and public liability.

Stormbringer

It is not uncommon for additional poles or wayleaves to be required on adjoining landowner's properties, who may

not have a turbine on their lands, in order to connect the wind-farm development to the electricity network. The IFA negotiated compensation levels – which can serve as a benchmark in agreeing compensation for adjoining landowners – at €2,600 for poles with stays and a wayleave rate of €71 per linear metre for a 14 metre permanent wayleave. Further, wind companies are required to have a setback distance of at least two rotary blade diameters from

adjoining properties, unless an agreement is secured with the adjoining property owners. Currently, annual payments of up to €3,300 are being paid to adjoining landowners where over-sail occurs.

Most leases will have termination rights in favour of the wind-farm development company. A clause should be included to the effect that the wind-farm development company is obliged to reinstate the land at the expiration of the lease, to include removal of the turbines, foundation and roads if necessary. Consideration should be given to ensuring that there is a bond in place that will pay for the reinstatement costs in the case of the wind-farm development company becoming insolvent or refusing to carry out the reinstatement work.

Blow away

The option and lease agreements are complex legal documents. The way in which payment is calculated can often be difficult to interpret and subject to finer details contained in small print. For this reason, it is vital that the landowner has competent legal and tax advice prior to signing up to these agreements. It is common that the wind-farm development company will pay the costs of this professional advice to an agreed amount. While it is important not to get too bogged down in the legalities at the risk of the landowner losing out on a commercially advantageous contract, it is important that the landowner is fully apprised of the consequences of what is provided for in the legal agreement being offered by the wind-farm development company.



look it up

Literature:

- Deloitte (2009), *Jobs and Investment in Irish Wind Energy – Powering Ireland's Economy*
- IFA (2010), *Wind Farm Option and Lease Agreements*
- IFA (2013), *Harnessing Ireland's Wind Resource for Renewable Energy Production*
- Meitheal na Gaoithe (2013), *Embedding Sustainability – The Business Case for Small Wind Energy*

Websites:

- Irish Farmers' Association website, www.ifa.ie
- Irish Wind Energy Association website, www.iwea.com

It is important that the landowner is fully apprised of the consequences of what is provided for in the legal agreement being offered by the wind-farm development company

SUFFER



Helen Kehoe is policy development executive at the Law Society and a qualified solicitor

little children

The question of State liability regarding pupil safety in public education has proved to be a contentious one. The European Court of Human Rights recently found Ireland to be in violation of the ECHR for failing to ensure student safety. Helen Kehoe considers the judgment in *O’Keeffe v Ireland*

The case of *O’Keeffe v Ireland* dealt with the difficult question of whether the Irish State was responsible for the sexual abuse of a young schoolgirl by a lay teacher in a national school in the early 1970s.

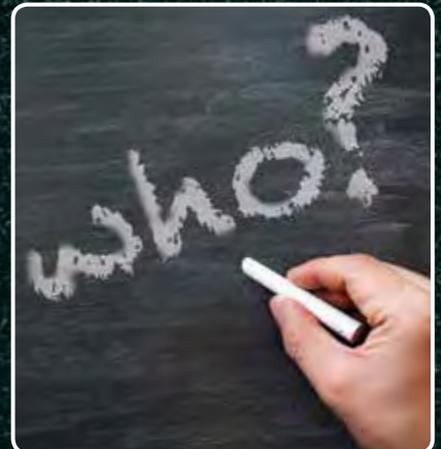
On 28 January 2014, the Grand Chamber European Court of Human Rights delivered its long-awaited judgment, stating that Ireland had violated article 3 (prohibition of inhuman and degrading treatment) and article 13 (right to an effective remedy) of the *European Convention on Human Rights* through its failure to protect Louise O’Keeffe from sexual abuse while in primary education – and because of the lack of an effective remedy for Ms O’Keeffe regarding the State’s failure to protect her.

The question of State liability regarding pupil safety in public education is often a contentious issue. In an Irish context, it is an issue that has particular historic resonance, given the religious patronage system in primary education and in light of past revelations of widespread child sexual abuse.

In fact, the Grand Chamber itself demonstrated the challenging nature of this issue as it was divided in its judgment, holding by 11 votes to six that there was a violation of articles 3 and 13, in addition to which three separate opinions were annexed to the judgment, two of which were dissenting.

The facts of this case date back to the early 1970s when the applicant, Ms O’Keeffe, was a pupil at Dunderrow National School in Co Cork. The national school was owned by the Diocese of Cork and Ross, and was managed by a local priest.

Ms O’Keeffe was born in 1964 and attended Dunderrow NS from 1968. From January to mid-1973, she was subjected to a number of sexual assaults by one of the school’s two teachers, who was also the school’s principal, LH, during music lessons in his classroom.





at a glance

- At the heart of *O'Keefe v Ireland* was liability and pupil safety in public education
- Legal proceedings begin in September 1998 against the sexual abuser, the Department of Education, the State, and the Attorney General
- In March 2004, the State defendants apply for a direction striking out the case on the basis that there is no evidence of negligence on the part of the State defendants
- The High Court accepts the application and dismisses the claims of direct negligence against the State defendants – but considers that evidence should be heard on the questions of vicarious and constitutional liability
- In January 2006, the High Court holds that the State defendants are not vicariously liable and dismisses the constitutional claim
- The case is appealed to the Supreme Court, which dismisses the appeal by a majority verdict
- On 28 January 2014, the Grand Chamber states that Ireland has violated articles 3 and 13 of the ECHR

Two years prior to Ms O'Keeffe suffering these assaults, a complaint of sexual abuse had been made by a parent in respect of this teacher to the manager of the school – a local parish priest. This complaint, however, was not acted upon by the manager. Neither was it reported to the gardaí, to the Department of Education or to any other State authority.

In September 1973, other parents made similar allegations of sexual abuse to the manager of the school, which led to a meeting of parents being held and chaired by the school manager. After the parents' meeting in September, LH went on sick leave, and very shortly afterwards resigned from the school.

In January 1974, the manager notified the Department of Education that LH had resigned and named his replacement. Once again, the Department of Education, the local authorities and gardaí were not informed of these complaints. LH went on to teach in another national school and taught there until his retirement in 1995.

Criminal proceedings

Ms O'Keeffe was contacted in 1996 by the gardaí who were investigating a complaint by a former pupil of Dunderrow National School against LH. Ms O'Keeffe made a statement to the gardaí in early 1997 and began to attend

counselling around that time. The criminal investigation led to LH being charged with 386 offences of sexual abuse involving some 21 former school pupils of the school over a period of approximately ten years. In 1998, he pleaded guilty to 21 sample charges and was sentenced to imprisonment.

Up until the criminal investigation, Ms O'Keeffe had suppressed the sexual abuse. However, in or around June 1998, she realised that the psychological problems she had experienced in the past were connected to the abuse. In October 1998, Ms O'Keeffe made an application to the Criminal Injuries Compensation Tribunal and was later awarded approximately €54,000, in late 2002.

Civil proceedings

In September 1998, Ms O'Keeffe began civil proceedings against LH, the Department of Education, Ireland and the Attorney General, claiming damages for personal injuries suffered as a result of the abuse. In respect of the three State defendants, the Grand Chamber summarised the claim

against them as follows:

- “(a) Negligence by the State arising out of the failure of the State defendants in relation to the recognition, examination and supervision of the school and in failing to put in place appropriate measures and procedures to protect from, and to cease, the systematic abuse by LH since 1962,
- (b) Vicarious liability of the State defendants for the acts of LH since, *inter alia*, the true relationship between them and the State was one of employment, and
- (c) Liability given the applicant's constitutional right to bodily integrity, the responsibility of the State defendants to provide primary education under article 42 of the Constitution, and the measures put in place to discharge that responsibility.”

The court considered that systems that allowed over 400 incidents of abuse to occur over such a long period had to be considered ineffective

LH did not defend the civil proceedings and, in October 2006, he was ordered to pay Ms O'Keeffe approximately €305,000 in damages. Enforcement proceedings followed, as he later claimed insufficient means to pay this award. He was subsequently ordered to pay €400 a month to Ms O'Keeffe by way of an instalment order.

In March 2004, the State defendants' applied for a direction striking out the case on the basis that, among other things, there was no evidence of negligence on the part of the State defendants. The High Court accepted the application and dismissed the claims of direct negligence against the State defendants, but it considered that evidence should be heard in relation to questions of vicarious and constitutional liability.

In January 2006, the High Court gave its judgment in this respect and held that the State defendants were not vicariously liable for the sexual assaults perpetrated by Hickey, given the relationship between the State and the denominational management of national schools. It also found that no action lay for a breach of a constitutional right where existing laws (in this case, tort) protected that right.

Ms O'Keeffe appealed the High Court's finding in relation to vicarious liability. The Supreme Court, by a majority judgment, dismissed the appeal, holding that the Irish primary education system had to be understood in the context of early 19th century Irish history. It stated that the relationship between Hickey and the State was “a triangular one with the Church” and was “entirely *sui generis*, a product of Ireland's unique historical experience”.

GRAND CHAMBER JUDGMENT

Lessons learned

The court summarised its interpretation of a state's obligations under article 3 as follows: “In sum, having regard to the fundamental nature of the rights guaranteed by article 3 and the particularly vulnerable nature of children, it is an inherent obligation of government to ensure their protection from ill-treatment, especially in a primary education context, through the adoption, as necessary, of special measures and safeguards.”

Therefore, the *O'Keeffe* judgment emphatically declares that the state must protect children when providing public primary education by adopting, where necessary, special measures and safeguards to protect their health and well-being. It is also apparent that the state cannot absolve itself of this responsibility by relying on an assertion that the day-to-day provision and/or management of this education has been delegated to private bodies or other individuals.

What remains unclear from the court's judgment is the exact nature and scope of this positive and inherent obligation. How far

should this obligation to protect extend?

The joint partly dissenting opinion annexed to the Grand Chamber judgment stated that the reasoning adopted by the majority was flawed, as it was based on the “implicit assumption that educational systems with a strong state role or state participation offer better protection to children”. It also considered that the imposition of such a broad positive obligation on the state promotes “a model of the state that restricts the scope of freedom and individual responsibility”.

It would seem likely that the idea of a state bearing such a robust obligation of protection in the provision of public primary education will require further clarification by the European Court of Human Rights. One such instance that could test the extent of these obligations could be a complaint regarding a lack of anti-bullying measures. Another possibility could be a complaint of discriminatory treatment of minorities in public primary education (Prof Renáta Uitz, *ECHR Blog*, 12 February 2014).

PIC: THINKSTOCK



The Grand Chamber concluded that there was an inherent positive obligation of Government in the 1970s to protect children from ill-treatment

The application was lodged with the European Court of Human Rights on 16 June 2009 and was heard by the Grand Chamber on 6 March 2013. The lengthy judgment of 28 January 2014 appears to have taken some academic commentators by surprise as “the construction of positive obligations in public education under article 3 arguably amounts to a departure from previous case law” (Prof Renáta Uitz, *ECHR Blog*, 12 February 2014).

The court acknowledged that it had to “assess any related State responsibility from the point of view of facts and standards of 1973 and, notably, disregarding the awareness in society today of the risk of sexual abuse of minors in an educational context”.

In the application of article 3 to the facts of the case (where article 3 requires the state to take measures to ensure that individuals in their jurisdiction are not subjected to torture or inhuman or degrading treatment), the court stated that this is a positive obligation to protect individuals and should be interpreted so as not to impose an excessive burden on state authorities. Nevertheless, the court stated that its case law made it clear that this positive obligation to protect assumes particular importance in the context of primary education, as an important public service is being provided and school authorities are obliged to protect the health and well-being of pupils – “young children who are especially vulnerable and under the exclusive control of those authorities”.

The case concerned the responsibility of the State and whether the State ought to have been aware of the risk of sexual abuse of minors in national schools at the time and whether it adequately protected children from such treatment through the State’s legal system.

The court examined in detail a number of reports resulting from public investigations relating to child protection and/or sexual offences involving children. On the basis of this evidence, the court considered that the State

was aware of the level of sexual crime by adults against minors.

Violation of article 3

The Grand Chamber concluded that there was “an inherent positive obligation of Government in the 1970s to protect children from ill-treatment”, and that this obligation was not fulfilled “when the Irish State, which must be considered to have been aware of the sexual abuse of children by adults through, *inter alia*, its prosecution of such crimes at a significant rate, nevertheless continued to entrust the management of the primary education of the vast majority of young Irish children to non-State actors (national schools), without putting in place any mechanism of effective State control against the risks of such abuse occurring”.

The State had argued that certain mechanisms of detection and reporting had been in place at the time. The court, however, considered that any such systems that allowed over 400 incidents of abuse to occur over such a long period had to be considered ineffective.

Ultimately, the court held that the State must be considered to have failed in its positive obligation to protect Ms O’Keeffe from the sexual abuse she suffered in national school in 1973 and that there was a violation of her rights under article 3 of the convention.

Violation of article 13

Ms O’Keeffe also argued that she was entitled to, but did not have, an effective domestic remedy against the State regarding the State’s failure to protect her from sexual abuse. The State argued that Ms O’Keeffe should have pleaded the State’s vicarious liability for the patron and/or manager of the school. It was also contended that a constitutional tort action ought to have been taken (that the primary education system as provided for by article 42 of the

Constitution had breached her unenumerated right to bodily integrity), and that the claim of direct negligence of the State should have been appealed to the Supreme Court.

The Grand Chamber was not persuaded that any of these remedies could be considered to be effective. It stated that the Supreme Court had rejected the State’s vicarious liability for the acts of LH, a lay teacher with a salary funded by the State, so it considered that the State’s vicarious liability for the patron and/or manager, who were clerics who were not paid by the State, must be considered to have been even less likely to succeed.

A claim of direct negligence against the State would have required the recognition of a relationship between the State and the applicant of such proximity so as to give rise to a duty of care on the part of the State. However, the very structure of the primary education system with “the interposition of the denominational managers to the exclusion of State control ... would appear to be incompatible with the existence of any such duty of care”.

Finally, the court considered that the State had not demonstrated, with relevant case law, how the State could be held responsible for a breach of a constitutional right to bodily integrity through the primary education system.

Therefore, the Grand Chamber concluded that, as it had not been demonstrated that Ms O’Keeffe had an effective domestic remedy as regards her complaints under article 3 of the convention, her rights under article 13 had been violated.

Despite specifically relating to a past failure of the State to meet its obligation to protect pupils from ill-treatment in the early 1970s, the judgment is significant regarding the responsibility of the State in the provision of primary education today.

It remains to be seen how the case law will develop in the wake of this judgment when interpreting this positive and inherent obligation of the State to protect children in providing public primary education.

look it up

Cases:

- *O’Keeffe v Hickey* (Supreme Court record no 174/06) [2008] IESC 72
- *O’Keeffe v Ireland* (application no 35810/09) European Court of Human Rights

CAT'S cradle



Kevin Hoy leads the real estate practice in *Mason Hayes & Curran*

Terminating a property contract can be complicated – even when using the standard form of contract. Kevin Hoy tries to unravel the ball of string

Selling and acquiring land is a complicated business. The standard form of contract for sale issued by the Law Society (2009 edition) contains 51 standard conditions. Even a document of this detail will not capture every possible eventuality. The Supreme Court in *Kiely (née Phelan) v Delaney & anor* considered two of the general conditions, 18 and 33.

The vendor sold land in North County Dublin at auction in May 2002. The vendor's solicitor and the auctioneer told the purchaser that the land benefited from a right of way. Afterwards, the purchaser's solicitor discovered that the right of way stopped short of the public road. Efforts to obtain a right of way proved unsuccessful, and the purchaser triggered condition 33. The purchaser had offered to reduce the purchase price by 30% and to complete on that basis.

Almost three years after the problem emerged, new solicitors acting for the vendor wrote to the purchaser, substantially altering the vendor's original position. The vendor claimed that there was a *de facto* right of way in place and that, if the purchaser continued to insist on the objection, then the vendor would exercise her rights under condition 18 of the Law Society standard contract for sale. Condition 18 enables a vendor to terminate the contract if a purchaser insists on an objection or a requisition and it would cost too much for the vendor to comply. Proceedings issued in

November 2005, and the High Court gave judgment on 14 March 2008.

MacMenamin J decided that the vendor had tried to frustrate the arbitration. She had changed her position on a number of occasions, to the detriment of the purchaser, and she had engaged in "delay of the most substantial kind". The High Court judge set out two general principles of law, namely that:

- The condition 18 rescission right could not be abused and had to be exercised in a reasonable manner and not "capriciously or arbitrarily", and
- The court would stop a party from exercising the right of rescission if that party had been guilty of 'recklessness' in entering into the contract. The judge defined this as "indifference towards the purchaser as regards whether he would obtain the title contracted to be sold".

General condition 18 allows the vendor to terminate a contract in certain circumstances. General condition 33 enables

a purchaser to get compensation for an error made in the contract. What happens if a vendor wishes to withdraw but a purchaser wants to enforce?

In the High Court, the judge decided that general condition 18 allowed a vendor to end the contract, even if the purchaser was seeking specific performance. However, where the purchaser was willing to rely on compensation rather than specific performance, then the court would

“The Supreme Court decided that the vendor's solicitor's failure had amounted to imprudence, but also found that it was not reckless”



assess the compensation under general condition 33.

The vendor lost the case on both grounds and appealed to the Supreme Court.

Right to rescind

The Supreme Court noted paragraph 15.30 of Wylie's *Irish Conveyancing Law* (second edition). Prof Wylie said that, because the right to rescind a contract was a considerable restriction on the rights that a purchaser would otherwise have, the courts had always made sure that such a right would not be used improperly. He set out some restrictions: the vendor had to use the right in a reasonable manner, the vendor could not act "capriciously or arbitrarily" and, therefore, a vendor could not trigger condition 18 simply to enable the vendor to sell the property to another purchaser for a higher amount of money. Prof Wylie made a link between the provisions of condition 18 and the requirements in the case law.

The Supreme Court also examined the judgments of a number of previous Irish cases,

including the 1986 High Court decision in *Lyons v Thomas*, where there was damage to a property after execution of the contract. The purchaser had requested a reduction in the sale price and, before the completion date, the vendor offered to close the sale and to reserve £10,000 out of the sale proceeds, pending litigation on the matter. The purchaser did not accept this and issued a plenary summons claiming specific performance of the contract.

The vendor gave notice to the purchaser of his intention to rescind the contract in pursuance of clause 10 of the then general conditions of sale and returned the deposit paid by the purchaser. Murphy J decided that the vendor could not rescind the contract and that the purchaser was entitled to compensation. The judge commented that it would be unreasonable for a vendor to be able to extract themselves from a contract where they had

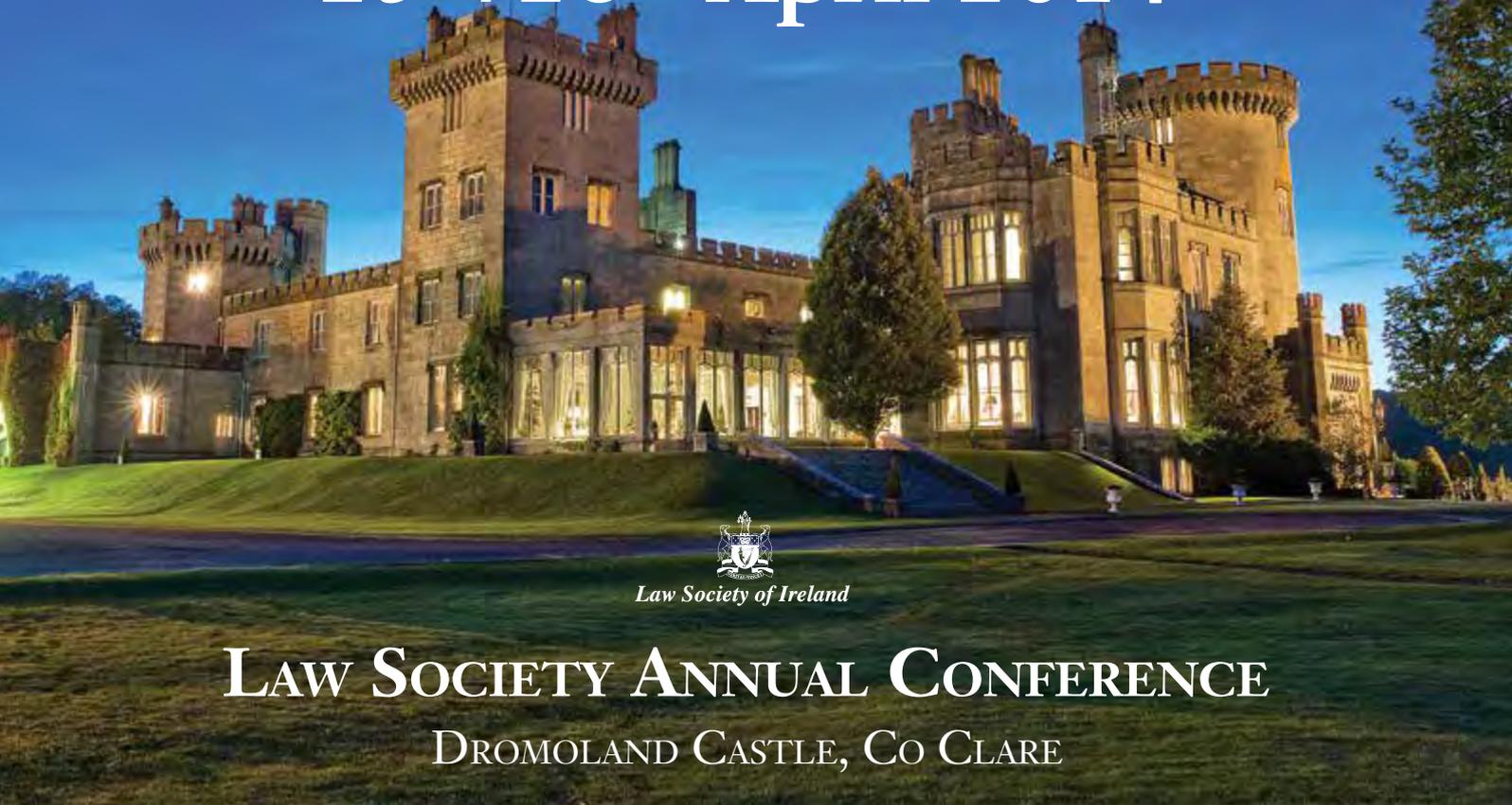
at a glance

- The Law Society's standard form of contract for sale (2009) contains 51 standard conditions, but not even this level of detail can capture every possible eventuality
- General condition 18 allows the vendor to terminate a contract in certain circumstances. General condition 33 enables a purchaser to get compensation for an error made in the contract
- What happens if a vendor wishes to withdraw but a purchaser wants to enforce?
- The High Court test is one of the vendor being unable to rescind if the purchaser has limited his claim to compensation
- Will solicitors endeavour to adopt this interpretation – or change it through special conditions?



DATE FOR YOUR DIARY

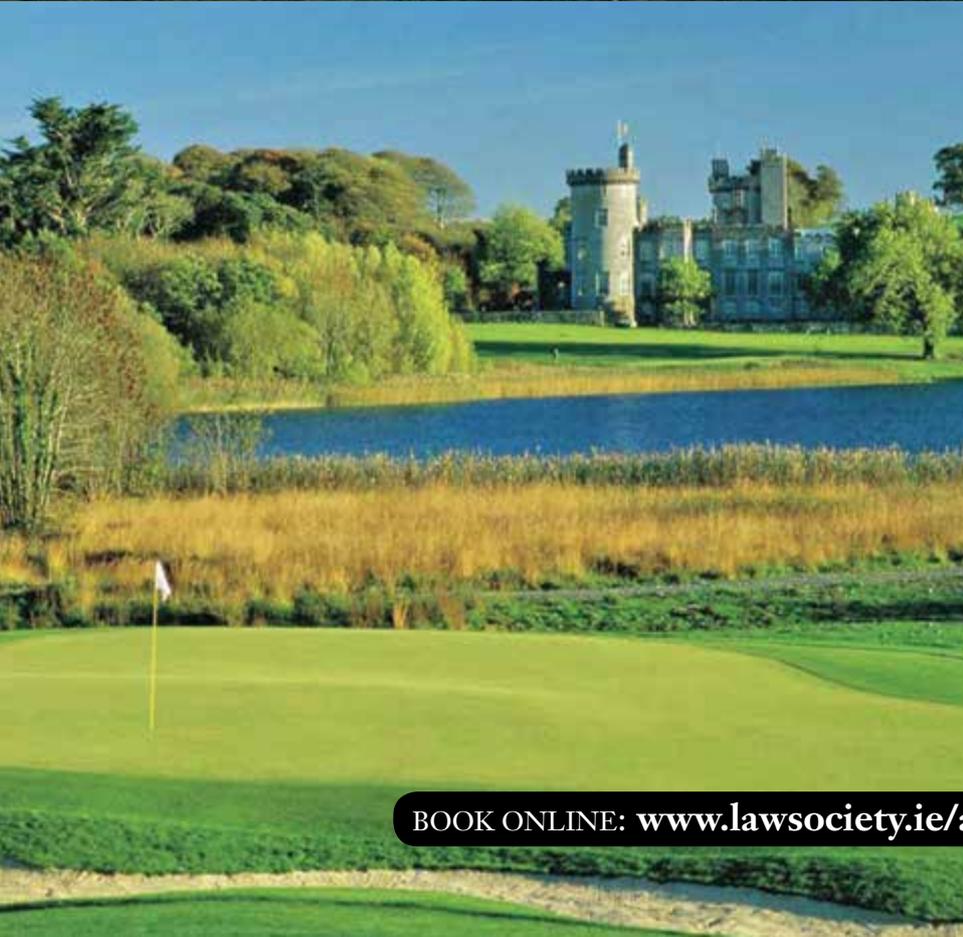
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either caused the problem or it resulted from their default.

In *Selkirk v Romar Investments Limited*, the House of Lords had said that a vendor could not act in bad faith in purporting to rescind a contract. The Irish Supreme Court had adopted some of the *Selkirk* language in *Williams and Another v Kennedy* by including an obligation on the vendor to act “reasonably not arbitrarily, not capriciously”.

The Supreme Court in *Kiely* did distinguish between ‘reasonable grounds’ and ‘reasonable behaviour’. ‘Reasonable grounds’ is the criterion in condition 18 and ‘reasonable behaviour’ is the emphasis in the equitable jurisdiction cases. The Supreme Court commented that, in practical terms, there was little difference between reasonable grounds and reasonable behaviour. This is interesting, because it would seem that, rather than the wording under general condition 18 giving contractual status to the equitable principles as expressed in the case law, what in fact we have ended up with is a requirement under the contract for reasonable grounds, and a requirement in addition under the case law of reasonable behaviour in relying on any such grounds.

The Supreme Court decided that the vendor’s delay, numerous changes of position, and overall conduct deprived her of any right to rescind this contract. She acted unreasonably and, therefore, could not rescind.

Imprudence and recklessness

The Supreme Court could have concluded the matter on that basis, but it proceeded to consider the status of the High Court judgment in relation to imprudence and recklessness.

In the High Court, there was evidence from an independent expert conveyancer who stated that the vendor’s solicitor should have obtained the file plan from the Land Registry to clarify the extent of the supposed right of way. In the High Court, the judge had decided that the mistake by the solicitor was sufficiently serious in itself to prevent the vendor from rescinding the contract. The judge decided that there was a “very high degree of imprudence sufficient on the facts [to] bar rescission”.

The Supreme Court noted that the High Court had found that the vendor’s solicitor acted recklessly. The Supreme Court pointed out that the vendor’s solicitor was not given an opportunity to be heard in relation to this matter and, therefore, it set aside the High Court judgment in that respect.

The Supreme Court also made general

comments about the necessary standard required before a mistake will displace the right to rescind. The Supreme Court decided that the vendor’s solicitor’s failure had amounted to imprudence, but also found that it was not reckless. The court quoted from Wylie’s *Irish Conveyancing Law* (second edition, paragraph 15.31) and stated that, in this context, ‘recklessness’ means “an indifference towards the purchaser as regards whether he will obtain the title contracted to be sold. Thus, the vendor must not induce the purchaser to enter into the contract by making some misrepresentation which he had little or no grounds for believing was true and then purport to exercise his right of rescission when the purchaser raises an objection or requisition about the same matter.”

The concept of absence of reckless behaviour was also noted by the Supreme Court in the

Williams case mentioned above.

The mistake in *Williams* had been to include a warranty in the contract that planning permission was available. Both the High Court and the Supreme Court decided that this was not reckless even though mistaken.

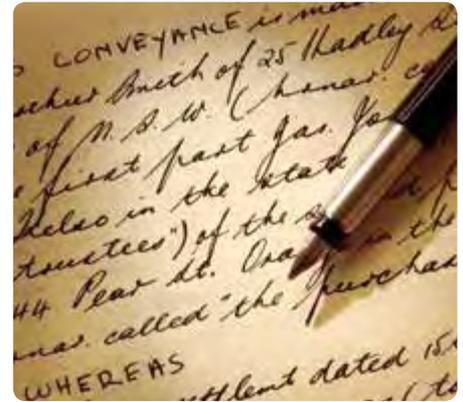
Considerable risk

There are examples in case law of where the court decides that conduct is sufficient to bar the vendor from rescinding. In

the 1959 English case of *Baines v Tweddle*, the vendor went ahead with selling the property, even though it was affected by two mortgages and even though he had not found out from the mortgage holders whether they would consent to the sale.

The vendor was in arrears on his payments, and he knew that his solicitor had not enquired about the matter with the mortgage holders. The English Court of Appeal held that the vendor had decided to take a considerable risk and that he was not entitled to rescind. Various cases have attempted to define what the test is, but without much success (for example *re Jackson and Hayden’s Contract*) cited by Lord Evershed in *Baines* and cited also by the Supreme Court in *Kiely*: “It seems to me that, in every case where the vendor was allowed to avail himself of a stipulation like this, there was always absent that element of shortcoming on his part which, though falling short of fraud or dishonesty, might be described as ‘recklessness’.”

While the *Jackson and Hayden’s Contract* test is not very illuminating, it is accepted by judges in numerous cases as being the basic test in this area. The Supreme Court clarified that *Kennedy v Wrenne* was not departing from the *Jackson*



and *Hayden’s Contract* test. The Supreme Court noted that Murphy J in *Lyons v Thomas* had cited the relevant passage from *Jackson and Hayden’s Contract* case.

The finding of fact at the High Court level had been that there was “a very high degree of imprudence”. However, the Supreme Court decided that this was neither ‘recklessness’, as referred to in *Jackson and Hayden’s Contract*, nor the “unacceptable indifference to the situation of a purchaser” referred to by Lord Radcliffe in the *Selkirk* case. Unfortunately for practitioners, the Supreme Court did not explain in detail why it disagreed with the High Court decision. We get the conclusion rather than the analysis.

The Supreme Court did not decide what the interrelationship of general condition 18 and general condition 33 was. We have the High Court determination that the test is one of the vendor being unable to rescind if the purchaser has limited his claim to compensation. It remains to be seen whether solicitors will endeavour to either adopt this interpretation or change it  through special conditions.

look it up

Cases:

- *Baines v Tweddle* [1959] Ch 679
- *Kennedy v Wrenne* [1981] ILRM 81
- *Kiely (née Phelan) v Delaney & anor* [2012] IESC 41; [2008] IEHC 69
- *Lyons v Thomas* [1986] IR 666
- *re Jackson and Hayden’s Contract* [1906] 1 Ch 412 at 422
- *Selkirk v Romar Investments Limited* [1963] 1 WLR at 1422
- *Williams and Another v Kennedy* (Supreme Court, unreported, 19 July 1993, Finlay CJ)

perfect PITCH?

It is a common misconception that acts committed on the field of play enjoy a form of immunity from the impact of criminal sanction. This is not so. **Patrick Carroll** finds the back of the net



Patrick Carroll is a practising barrister and accredited mediator

Media intrusion into the lives of public figures is often met with criticism. However, 'red top' reportage of the lives of luminaries can be of critical public importance in rebutting myths that preference is afforded by the law to those of influence.

Criminal convictions pertaining to the private lives of sports stars fill large amounts of column inches, and this makes the public aware that the law will impact on those of sporting stardom, as much as those who do not know one end of a hockey stick from the other. Convictions handed down by courts in various jurisdictions demonstrate that, regardless of whether you own a Super Bowl Ring like **Plaxico Burress** or were the World Heavyweight Boxing Champion like **Mike Tyson**, the law will not discriminate, and any criminal activity committed off the field will be subjected to its full rigours.

However, it is a common misconception that acts committed on the field of play enjoy a form of immunity from criminal sanction. This is not so.

In response to an incident that took place during an All-Ireland Club Semi-Final between Finuge of Kerry and Cookstown of Tyrone, All-Ireland medal winner **Eoin Mulligan** stated on Twitter his belief that "what happens on the pitch should stay on the pitch". It could be argued that there's a generally held view that the sports field can offer players *carte blanche* to act as they please, and without regard to the rigours of the law. Players like **Roy**

Keane and **Harald Schumacher** have been condemned for some infamous acts on the sports field. However, as no law enforcement authority has ever considered these or similar incidents, it understandably becomes clear how this misconception becomes a widely held belief among the public.

In spite of this, all sportspeople and spectators must appreciate that acts committed on the sports field may form the subject of a criminal action and sanction. The commonplace nature of violent reactions (as proffered by former Welsh rugby international **Mervyn Davies** in *R v Billingham*), or that the victim consented to the illegal violence will not necessarily constitute a defence. Recognition should also be given to the fact that the courts have handed down custodial sentences for criminal acts on the sports field. Furthermore, players will not be entitled to take the law into their own hands with regard to other players or taunting spectators; nor will emotional spectators

be given an amnesty for acts committed in response to something that has taken place on the pitch.

Ultimately, Eoin Mulligan's statement that 'what happens on the field stays on the field' is wrong in fact and in law

Hurler on the ditch

In November 2013, Dublin Circuit Criminal Court gave **Derek Sweetman**, a GAA player, a 2½-year suspended sentence for **breaking an opponent's jaw** during a hurling match. The incident took place after the final whistle had been blown, and a brawl ensued. During the brawl, Sweetman kicked the victim in the face as he lay on the



PIC: REX FEATURES

Ooh, ah, Cantona

ground. In convicting Sweetman of assault causing harm, Judge Mary Ellen Ring stated: “It does not allow that [act] in any of the GAA rules.”

Judge Ring’s pronouncement is reflective of the jurisprudence in relation to criminal liability for acts committed on the sports field. The strongest judicial pronouncements for what constitutes criminal liability for such acts were made in the cases of *R v Bradshaw* (1878) and *Ferguson v Normand*.

In *Bradshaw*, the judge established a standard for what would constitute criminal liability for on-field behaviour: “The act would be unlawful if it was intended to cause serious harm, and ... no rules of sport could make lawful that which the law of the land deemed unlawful.”

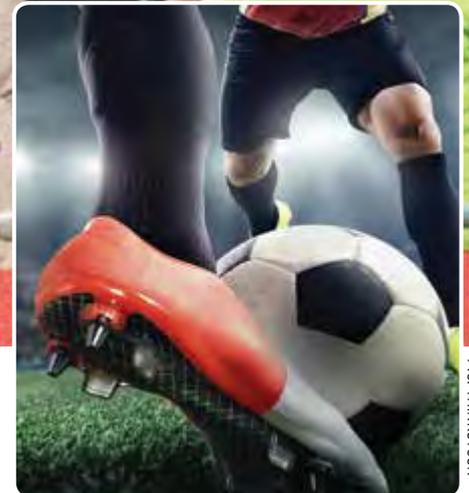
In *Ferguson v Normand*, the former Glasgow Rangers striker *Duncan Ferguson* was jailed

for an assault on *John McStay* during a match between Rangers and Raith Rovers in 1994.

The presiding judge stated: “When acts are done which go well beyond what can be regarded as normal physical contact and an assault is committed, the court has a duty to condemn and punish such conduct.”

These decisions are rooted in public policy and the fact that the courts intervene when sportspeople go beyond the stated rules of the sport and transgress the law of the land. Although determined by the British courts, the spirit of these decisions influenced Judge Ring in her decision in *Sweetman* and has influenced the minds of other Irish judges who have presided over such cases.

In 2011, a GAA player named Noel O’Donovan was convicted of assault following an *altercation* with former Cork footballer James Masters. The defendant punched the



PIC: THINKSTOCK

at a glance

- Courts around the world have demonstrated that sporting stars are not accorded preferential treatment in criminal prosecutions for acts committed both on and off the field
- Acts committed on the sports field may form the subject of a criminal action and sanction
- British courts have taken a strict view on over-zealous tackling that falls outside the rules of the game and transgresses the criminal law



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victim in the face and kicked him in the jaw, causing him to require a number of stitches. Referring to his act as “outrageous and cowardly”, the judge fined the defendant €1,000.

Although Sweetman, in the case referred to earlier, received a suspended sentence, and O’Donovan was fined, Irish judges have seen fit to impose custodial sentences for criminal acts on Irish sports pitches. In January 2014, Judge James McNulty of Macroom District Court sentenced a Gaelic footballer named Sean O’Sullivan to two months in prison for **assault causing harm** after O’Sullivan struck the victim in the face, causing him to suffer two fractures to his jaw. In sentencing O’Sullivan, Judge McNulty noted that, if sporting organisations failed in their duty to prevent acts of “savage violence” on the pitch, “the courts will deal firmly with such incidents”.

Criminal tackling

British courts have also taken a strict view on over-zealous tackling that falls outside the rules of the game and transgresses the criminal law. In 2010, an amateur footballer named **Mark Chapman** was jailed for causing grievous bodily harm, after a tackle on an opposing player that ended the victim’s footballing career and interrupted his ability to work. Prosecuting counsel noted that the tackle involved “a stamping motion with a raised right foot, with the studs showing, on the back and side of his right foot”, and that the referee deemed it “a callous, deliberate attack with intent to cause injury”. In sentencing Chapman to six months in jail, Judge Orme stated: “This was a deliberate, a premeditated act. A football match gives no one any excuse to carry out wanton violence.”

Thus, if a tackle goes beyond the stated rules of the game and has the requisite criminal elements to constitute an assault, then the courts may be willing to punish the aggressor and attach criminal liability.

Verbal attacks

Verbal attacks may also be prosecuted if the words used go beyond acceptable banter and amount to a form of incitement to hatred. This became most apparent during the **John Terry** trial in 2012, when the Chelsea captain was prosecuted for purportedly

racist remarks made to QPR’s **Anton Ferdinand** during a match at Loftus Road in November 2011. The incident took place in close proximity to the stands at Loftus Road, and Terry’s words were audible to a spectator who subsequently complained to the Metropolitan Police. Terry was acquitted in July 2012, in circumstances where Judge Riddle determined that, while Terry had used words considered racist in nature, he could not resolve whether Terry was simply challenging Ferdinand as to what was said

or whether he was directing the remarks at Ferdinand. In spite of his acquittal, the case makes it clear that the law will not tolerate inter-player abuse if the abuse amounts to a form of incitement to hatred.

Attacks on spectators by players

An over-zealous reaction to the taunts or catcalls of supporters in the grandstand or pitchside will also be capable of prosecution if the incident is serious enough as to transgress the criminal law. The most famous case occurred in 1995, when Manchester United’s **Eric Cantona** was convicted for an attack on spectator **Matthew Simmons** during a match at Crystal Palace. While Cantona was making his way to the dressing room following

a red card, Simmons made his way from his seat to the perimeter barrier of the pitch to verbally abuse Cantona. In response, Cantona vaulted the barrier in a ‘kung fu’ style **kick**, before punching Simmons repeatedly. For the incident, Cantona was sentenced to two weeks’ imprisonment.

In 1999, **Gerard Lavin** of Bristol City responded to supporter’s taunts by violently kicking the match ball into a section of spectators supporting Reading FC. A spectator was struck by the ball and suffered a broken hand as a result. Lavin was convicted of assault and fined. In 2003, Liverpool striker **El Hadji Diouf** was convicted of assault for spitting at a Glasgow Celtic supporter who touched his head while retrieving a football that had crossed the touchline. For the incident, Diouf was fined Stg£5,000.

Attacks by spectators

Spectator disappointment or resentment will not provide a defence to a criminal charge in circumstances where a spectator assaults

or injures a player or an official. This was demonstrated when Dublin District Court convicted two men for their assault on GAA umpire **Martin Sludden** after a controversial ending to the Leinster Football Final in 2010. At the final whistle, the men entered the field and attacked Sludden. RTÉ television cameras captured the attack, and the **footage** was used to convict the perpetrators.

In convicting the men, Judge Bridget Reilly accepted that, while Sludden’s decision to award a dubious match-winning goal left the Louth fans “heartbroken and angry”, the umpire is “the most immediate authority figure on the field and he or she must be respected” and that the behaviour of the defendants had been inexcusable. The judge fined the defendants €1,000 each.

Rules of the game

Ultimately, Eoin Mulligan’s statement that “what happens on the field stays on the field” is wrong in fact and in law. A sportsperson does not have to emulate enigmatic Columbian goalkeeper **René Higuita**’s off-field activities (Higuita was jailed for crimes while acting as a ‘go-between’ for two Colombian drug cartels) to land themselves in jail. The litany of successful prosecutions for criminal acts that have taken place on the sports field demonstrates that.

No matter how strongly one feels about sport, it would be contrary to public policy to provide an immunity to sportspeople from the law for acts committed on the field of play, simply based on the cut-and-thrust nature of competition. The rules of the game will provide proper guidance as to the extent to which physicality will be indulged. However, when these acts go beyond the consent of the participants and go so far as to transgress the criminal law, then the perpetrators may find themselves before the courts. It is advisable that all involved in sport learn from the experiences of sportspeople who have fallen foul of the criminal law for acts committed on the field of  play, before it is too late.

‘The rules of the game will provide proper guidance as to the extent to which physicality will be indulged. However, when these acts go beyond the consent of the participants and go so far as to transgress the criminal law, then perpetrators may find themselves before the courts’

look it up

Cases

- *Ferguson v Normand* [1995] SCCR 770
- *R v Billingham* [1978] Crim LR 553
- *R v Bradshaw* (1878) 14 Cox CC 83

Though undoubtedly somewhat cumbersome, ensuring that thorough administration accounts are available will ensure that clients and beneficiaries retain full confidence in the solicitor administering an estate.

Richard Hammond crunches the numbers

holding to ACCOUNT



at a glance

- The necessity to prepare and maintain administration accounts derives from section 64 of the *Succession Act 1965*
- The executor/administrator and the residuary legatees/intestate beneficiaries are entitled to receive the administration accounts
- Failure or delay in producing the accounts to residuary legatees/intestate beneficiaries can be a source of disquiet, potentially leading to complaints



Richard Hammond is a partner in Hammond Good Solicitors in Mallow and vice-chairman of the Probate, Administration and Trusts Committee of the Law Society

When working on an administration of estates file, there are a number of key documents handled or drafted by the solicitor, including the will (or, in intestacy, a chart of

the family tree from the deceased to the beneficiaries), the Inland Revenue Affidavit, the various proofs for the Probate Office (oath of executor/administrator and so on), the grant of representation, and the administration accounts.

This final document, the administration accounts, regularly appears to be a source of strife for solicitors, with the requirement to produce accounts in the administration of any estate perceived to be an unwelcome burden. Alternatively, a solicitor may labour under the mistaken impression that copies of her office and client account ledgers for the matter can double-job as the administration accounts. While it is important that the office and client account ledgers are kept in good order to ensure compliance with the *Solicitors' Accounts Regulations*, these ledgers do not account for costs paid in the estate other than through the solicitor's bank accounts, nor do they account for assets distributed to beneficiaries that have not been converted to money and processed through the solicitor's bank accounts.

True account thereof

The necessity to prepare and maintain administration accounts derives from a number of factors. In the oath of executor/administrator, the legal personal representative swears, among other things, to "exhibit a true inventory of the said estate and render a true account thereof, whenever required by law so to do".

This is not a redundant formula of words, but recognition of a statutory obligation imposed by section 64 of the *Succession Act 1965*, which provides: "The personal representatives of a deceased person shall, when lawfully required to do so, exhibit on oath in the court a true and perfect inventory and account of the estate of the deceased, and the court shall have power to require personal representatives to bring in inventories."

While section 64 refers to exhibition of the administration accounts in court, it should be remembered that the executor/administrator, as the primary client, and the residuary legatees/intestate beneficiaries are entitled to receive the administration accounts. The former, in keeping with their oath, will wish to ensure that the entire estate has been fully and properly accounted for, while the latter are entitled to know how the benefit they ultimately receive is calculated.

Failure or delay in producing the accounts to residuary legatees/intestate beneficiaries can be a source

of disquiet, potentially leading to complaints where, though all might otherwise be in order, the reluctance or inability to provide accounts promptly raises understandable misgivings on the part of the client and/or beneficiaries.

Component parts

The administration accounts comprise an estate account (mirroring the details from the Inland Revenue Affidavit), noting the assets and liabilities at the date of death; a cash account, noting payments and receipts in the course of administration; and a distribution account, showing the assets remaining in the estate at the conclusion of the administration as disbursed to the beneficiaries. The accounts may be more complex than this in appropriate circumstances (for example, a cash income account and a cash capital account). However, such additional accounts are unnecessary in the administration of most estates. Undoubtedly, it lessens the bookkeeping burden on the practitioner if the administration accounts are commenced when the Inland Revenue Affidavit is completed and updated regularly as the matter progresses.

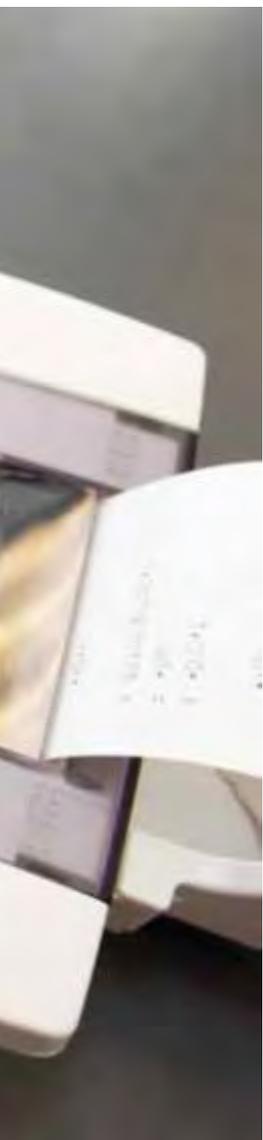
The estate account is the snapshot as of the date of death. It contains all the sole assets and liabilities of the deceased passing in the administration of the estate. If there are joint assets that are not passing by survivorship, but are instead passing through the estate on the basis of a resulting trust, then these should also be included in the estate account. The net estate should be carried forward to the distribution account.

The cash account provides details of payments and receipts (that is, incomings, outgoings, gains and losses in the course of the administration). Items recorded in outgoings include, among other things, outlays, professional fees and so on. Incomings would include items not included in the

estate account (for example, the Bereavement Grant) and/or income to the estate (such as rent(s) received). In the section for 'gains', one might find uplifts in share or property values from date of death to date of realisation (or valuation date if vesting the asset in a beneficiary) or interest achieved on bank accounts since the date of death. Finally, losses will be the converse of gains, with any losses in value to property or shares from date of death to the date of realisation (or valuation date if vesting the asset in a beneficiary) set out at that point in the accounts.

If assets have fallen in value between the date of death and the valuation date and are being vested in the beneficiaries rather than sold, the loss should still be recorded for consistency with the beneficiaries' Capital Acquisition Tax returns. Some practitioners

The executor/administrator, as the primary client, and the residuary legatees/intestate beneficiaries are entitled to receive the administration accounts



include general legacies (gifts of money) in the cash account. This is an acceptable approach; however, it is preferable that no legacies appear in the cash account. Instead, if all legacies appear in the distribution account, this account can be easily cross-checked with the contents of the will or with the chart of the family tree from the deceased to the beneficiaries.

The cash account balance (usually a negative balance) should be carried forward to the distribution account and be added to or deducted from the estate account balance to determine the estate remaining for distribution. The distribution account will then record the distribution of the estate in full, including liquid and fixed assets, until it is demonstrable that the estate has been fully administered.

An example of how administration accounts might be prepared is illustrated in the fictitious example for the estate of Mary Mulcahy (below). At the conclusion of the administration of an estate, the three accounts ought to be approved by the executor/administrator, who should be provided with a copy for their own records. The solicitor should retain a copy, and the residuary legatees/intestate beneficiaries should each be provided with a copy.

A fictitious example:

Mary Mulcahy, a widow and retired clerical officer, died on 5 January 2014. She was survived by four children: Andrew, Brendan, Catherine (each of whom have their own homes) and Deirdre, who lived with her mother. The grant of probate was extracted on 24 March 2014.

Mary Mulcahy's will provided, among other things, as follows:

- Her sons Andrew Mulcahy and Brendan Mulcahy to be her executors (Brendan subsequently reserved his right to act as executor),
- €1,000 to Saint Vincent de Paul,
- €5,000 to her (adult) goddaughter and niece Eileen Moriarty,
- €5,000 to her (adult) godson and grandson Finbarr Mulcahy,
- Her home and her Vodafone shares to her daughter Deirdre Mulcahy,
- The residue of her estate to be divided equally between her children Andrew, Brendan, and Catherine.

Her assets at the date of death were as follows:

- Her home worth circa €200,000,
- Account with Bank of Ireland worth €50,100 (including interest accrued to the date of death),
- Account with An Post worth €37,650 (including interest accrued to the date of death),

FICTITIOUS EXAMPLE: ESTATE OF MARY MULCAHY

estate account

Date of death: 05/01/2014

Date of grant: 24/03/2014

Assets:	Liabilities €	Assets €
Deceased's home property		200,000.00
Account 12345671 with Bank of Ireland		50,100.00
Account 12345672 with An Post		37,650.00
Vodafone shares		150.00
Prize bonds		100.00
Liabilities:		
Direct Route Undertakers	6,000.00	
Bank of Ireland Visa card	600.00	
Bright Light Opticians	400.00	
Total liabilities/assets	7,000.00	288,000.00
To balance (net estate)	281,000.00	
Total (gross estate)	288,000.00	

Signed: _____

Andrew Mulcahy

Date:

1 April 2014

FICTITIOUS EXAMPLE: ESTATE OF MARY MULCAHY

cash account

Payments €	Receipts €
Losses	Gains
Devalue of Vodafone shares 50.00	Interest from Bank of Ireland 252.75
Devalue of home 10,000.00	Interest from An Post 189.75
Outgoings	Incomings
Legal fees for admin of estate 5,535.00	Prize Bond win 250.00
Probate Office scale and copy fees 309.00	
Commissioner's fees (CA24, oath) 32.00	
Property Smart Auctioneers 123.00	
Local Property Tax 315.00	
Commissioner's fees (Form 35) 10.00	
PRA fees(registration and copy folio) 170.00	
Total payments 16,544.00	Total receipts 692.50
Balance to distribution account -15,851.50	

Signed: _____

Andrew Mulcahy

Date:

1 April 2014

FICTITIOUS EXAMPLE: ESTATE OF MARY MULCAHY

distribution account

	€	€
Net estate c/f from estate account		281,000.00
Balance c/f from cash account		-15,851.50
Estate remaining for distribution		265,148.50
Deirdre Mulcahy – specific bequest of house		
Folio registered 28/03/14	190,000.00	
Deirdre Mulcahy – specific bequest of shares		
Shares transferred 28/03/14	100.00	
Saint Vincent de Paul – pecuniary bequest		
Cheque 000371 Dated 31/03/14	1,000.00	
Eileen Moriarty – pecuniary bequest		
Cheque 000372 Dated 31/03/14	5,000.00	
Finbarr Moriarty – pecuniary bequest		
Cheque 000373 Dated 31/03/14	5,000.00	
Sub-total distributed	201,100.00	-201,100.00
Residue		64,048.50
Andrew Mulcahy – residuary legatee		
Cheque 000374 Dated 31/03/14	21,349.50	
Brendan Mulcahy – residuary legatee		
Cheque 000375 Dated 31/03/14	21,349.50	
Catherine Mulcahy – residuary legatee		
Cheque 000376 Dated 31/03/14	21,349.50	
Total residuary distribution	64,048.50	-64,048.50
Total legatee distribution	265,148.50	0.00

Signed: _____

Andrew Mulcahy

Date: 1 April 2014

- Prize Bonds worth €100,
- Vodafone Shares worth €150.

Her liabilities at the date of death were as follows:

- Account with Direct Route Undertakers for funeral and headstone €6,000,
- Bank of Ireland Visa Card €400,
- Bright Light Opticians €600.

In the course of the administration of the estate, there were receipts to the estate:

- Interest from Bank of Ireland of €252.75 from date of death to date of account closure,
- Interest from An Post worth €189.75 from date of death to date of account closure,
- Prize Bond win of €250.

In the course of the administration of the estate there were costs in the estate:

- Professional fees to Bloggs & Co, Solicitors, of €4,500 plus VAT at 23%, totalling €5,535,
- Probate Office scale fee – €279,
- Two additional sealed and certified copy grants at €15 each,
- Commissioner's fees CA24 – €20,
- Commissioner's fees oath of executor – €12,
- Property Smart Auctioneers for probate valuations – €123,
- Local Property Tax – €315,
- Commissioner's fees PRA Form 35 – €10,
- PRA registration fees €130 plus €40 for certified copy folio and filed plan,
- At the date of the grant of probate, the Vodafone shares had reduced in value to €100 and the house has reduced in value to €190,000.

The estate as described would be illustrated in administration accounts in terms identical or similar to these administration accounts (estate account, cash account and distribution account).



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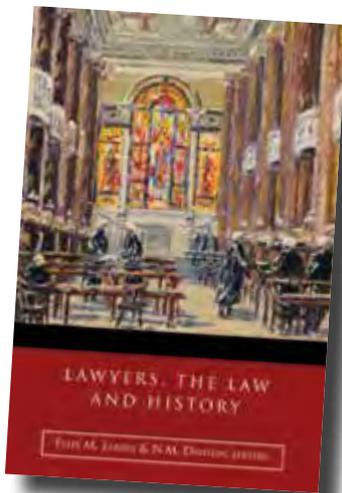
Lawyers, the Law and History

Felix M Larkin and NM Dawson (eds). Four Courts Press (2013), www.fourcourtspress.ie. ISBN: 978-1-8468-224-45. Price: €55.

Prof Nial Osborough – the principal guiding spirit of the Irish Legal History Society – encouraged the society and its members to advance the knowledge of the history of Irish law. Frequently, scholars of Irish legal history say that so much remains to be done. I say, so much has already been done in the 25 years of the society. There are now 22 publications in the legal history series, of which this book is the latest. This is an occasion for celebration.

Lawyers, the Law and History is edited by Felix M Larkin, historian and a former office holder of the society, together with Prof Norma Dawson of the School of Law at Queen's University, Belfast, and a former president of the society. The book contains discourses and other papers produced during the period 2005-2011.

Restrictions on space confine me to informing the reader what is in the book in general terms. The first part contains essays that are biographical in nature. The



first essay, by James McGuire, one of the joint editors of the celebrated *Dictionary of Irish Biography*, considers biographical subjects of the dictionary who were judges, barristers, solicitors or litigants of some significance. In fact, many of the contributors to this book have memorialised the lives of lawyers of all hues in the dictionary. Readers will enjoy the comments of the living on the dead.

The contributors include many of the legal luminaries of our time. Mr Justice Geoghegan (retired judge of the Supreme Court) writes on the three judges of the Supreme Court of the Irish Free State, 1925-36, namely Chief Justice Hugh Kennedy, Mr Justice Gerald FitzGibbon and Mr Justice James Murnaghan. Lord Carswell, a former Lord Chief Justice of Northern Ireland, writes on the early judiciary of Northern Ireland. 'Law, crime and punishment in Bloomsday Dublin' is the title of a fascinating essay written by Mr Justice Adrian Hardiman of the Supreme Court. *Ulysses* contains interesting insights into lawyers of Dublin circa 1904. 'Sir Edward Carson KC and the *Archer-Shee* case' – the subject of Terence Rattigan's play *The Winslow Boy* – is written by Lord Hutton, a former Lord Chief Justice of Northern Ireland. The current president of the society, Robert D Marshall, a solicitor in holy orders of the Anglican tradition, writes on 'Lieutenant

WE Wylie KC, the soldiering lawyer of 1916'.

Patrick M Geoghegan, of the Department of History at TCD and the author of a two-volume biography on Daniel O'Connell, writes on O'Connell – often regarded as the greatest lawyer in Irish legal history.

Under what may be termed 'part two' of the book, 'The Law and History', Mr Justice Gerard Hogan of the High Court provides perceptive reflections on the origins of the 1937 Constitution, and Prof Colum Kenny writes on the obligations of lawyers and the Cicero collection at King's Inns Library. There are, also, other distinguished contributors.

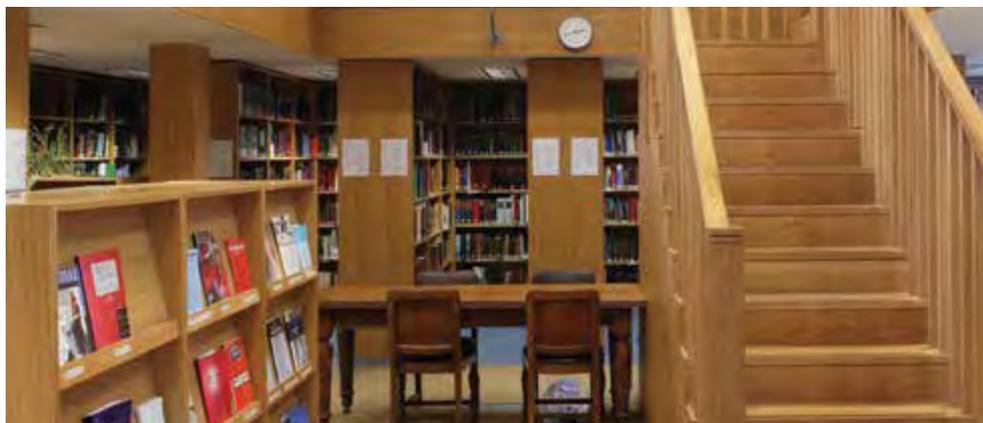
The stellar cast of authors tackle fascinating topics full of drama and human interest with impressive scholarship. This collaborative account of our history is a book for anyone interested in the law.

Dr Eamonn G Hall is a solicitor and notary public.

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Mairead O'Sullivan is deputy librarian

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LawWatch

LawWatch is a new weekly newsletter from the library. Issue 1 was published electronically on 23 January, and back issues are available in the archive, which is linked from each new issue.

This is a free service for members and trainees. It includes recent judgments with short abstracts, recent legislation, and a list of selected articles from a range of Irish, British and European journals. If you wish to subscribe to this current awareness service, please email library@lawsociety.ie.



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- Bohan, Brian and Fergus McCarthy, *Capital Acquisitions Tax* (4th ed; Bloomsbury Professional, 2013)
- Bond, Robert, *Negotiating Software Contracts* (5th ed; Bloomsbury Professional, 2013)
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- Byrne, Raymond and William Binchy, *Annual Review of Irish Law 2012* (Round Hall, 2013)
- Byrne, Raymond, *Safety and Health Acts: Annotated and Consolidated* (Round Hall, 2013)
- Coen, Rebecca, *Garda Powers: Law and Practice* (Clarus Press, 2014)
- Goldberg, Richard, *Medicinal Product Liability and Regulation* (Hart, 2013)
- Holohan, Bill and Keith Farry, *Consolidated Bankruptcy and Personal Insolvency Legislation* (Round Hall, 2013)
- Igoe, Pat, *Buying and Selling Property in Ireland: Estate Agents and the Law* (Blackhall Publishing, 2013)
- Kowalski, Mitchell, *Avoiding Extinction: Reimagining Legal Services for the 21st Century* (American Bar Association, 2012)
- Orange, Garnet, *Police Powers in Ireland* (Bloomsbury Professional, 2014)

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In anticipation of the enactment of the Companies Bill later this year, **Bloomsbury Professional** invite you to express your interest by registering now.

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As the Companies Bill weaves its way through the legislative process, it continues to be amended. Committee stage saw 143 amendments made to the Bill as initiated and hundreds more have been flagged for Report Stage. At Bloomsbury Professional we understand that timing is everything and that when learning something new, you do not have time to unlearn it. This is an advertisement for a seminar with a difference: there is no date because the seminar will not be scheduled until after the Companies Bill has been enacted but before it has been commenced.

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FRANK O'DONNELL

1942 – 2014

Patrick Frank O'Donnell, solicitor, judge, former president of the Law Society (1983/84) passed from our midst on 21 January 2014 at the age of 72.

In this brief encomium, one can but try to capture the real Frank as his many friends knew him. To start at the end rather than the beginning, it is related that shortly before he died, a hospital nurse came by seeing Frank apparently asleep. Then she heard him call her and, as she moved towards him, he opened one eye and whispered: "I suppose a kiss is out of the question?"

How typical! A man with the verbal directness that befits a true Donegal man, but never too far away from the quirky, deadpan sense of fun and concern for others. Frank never lost his Donegal accent, despite his early migration to Dublin – from secondary school at Castleknock, to college at UCD and the Law Society, and on to many years in professional practice. Even his year in Harvard (1965/66) and his follow-up year in a Chicago law firm, or his marriage to a good Clare woman, Dr Maeve Maurer, did not lessen it.

Donegal was, however, never far away and August invariably meant Burtonport with the family and a recharging of the spirit of the Rosses, epitomised by his father before him – Pa O'Donnell, in his time a TD and government minister and, like father like son, a solicitor and a president of the Society. Frank's local moniker going back to his youth was 'Frankie Pa' both to distinguish himself and to identify him with Pa Senior. Frank particularly liked to relate anecdotal tales of his father vigorously defending his clients in court. Frank, too, inherited that vigour during his own years of practice in the criminal courts.



When his father died in 1970, Frank declined the opportunity of standing as a candidate in the resulting bye-election. By then he was an elected member of the Society's Council, following the other electoral route his father had taken a generation earlier. Although he was, by paternal association, part of the Donegal Fine Gael 'tribe', in his time doing his bit for the party, Frank was never an overly partisan member of the tribe, and his friends and his clients (many from and of Donegal) came from all political directions.

His career as a practising solicitor started with John S O'Connor and then with David Bell (also ex-Castleknock), which in turn became Bell, Brannigan, O'Donnell and O'Brien. Ironically, on the front door of the office was a panel reading 'Push', which was so positioned that it could have been an additional name on the already long title of the firm!

'Push' was not entirely misplaced as descriptive of Frank, both in his ability to argue and in sport. In the latter context, when he first entered UCD in autumn 1959, he was a rugby jock who had been a prop forward on the Castleknock senior cup team, which, that year, had won the Leinster Schools' Senior Cup, and Frank had also been that year's captain of the Leinster Schools' team. Not surprising that rugby and the well-being of his Castleknock *alma mater* became a lifetime interest.

In July 1996, Frank (together with John Buckley and Michael White) became the first solicitors to be appointed to the Circuit Court Bench. He took on this role, conscious of the need to show that a solicitor was as qualified as a barrister for such a judicial office. After about 15 years of service, in the main presiding at criminal trials, it was disappointing that, just weeks before his statutory retirement date on reaching 70 in

March 2011, what was to become his terminal illness (vasculitis) first seriously manifested itself and caused him to miss his valedictory last sitting.

Among his contemporaries on the Society's Council, Frank will be especially remembered as a passionate debater on issues that concerned him, but also as a character who brought conviviality to any social occasion. To Frank, a stranger was only a friend he had not yet met. He had that admirable capacity to approach anyone, anywhere, anytime and introduce himself and immediately a mutual rapport was created.

For Maeve, his wife, his children David, James, Philip, Fiona and Deirdre, his ever-young stepmother Joan and his siblings Terry, Donal and Clodagh our sincere sympathy. Goodbye old friend,  your like is rare.

MV O'M



Law Society of Ireland

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Certificate in Banking Law, Practice and Bankruptcy	Friday 16 May	€1,200
Certificate in Intellectual Property Rights Management	Monday 9 June	€1,200

Contact details

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Council meeting – 24 January 2014

council report

Legal Services Regulation Bill

Michael Quinlan reported that the proposed committee stage amendments to sections 30-70 of the bill had been published late on Thursday 9 January and were dealt with by the Oireachtas committee on Wednesday 15 January. He expressed his appreciation to everyone in the Society who had worked through the night and over the weekend to produce the Society's detailed submission in relation to the proposed amendments.

A number of core issues had been identified by the minister as being adjourned to report stage, including the Society's concerns in relation to sections 15 and 17, the issue of multidisciplinary practices, and the issue of the transfer of staff. In advance of report stage, there would be further committee stage amendments dealing with the remainder of the bill.

Changes to jurisdictions

Stuart Gilhooly reported that the changes in jurisdictions and new

District Court scales would operate from 3 February 2014. The draft new District Court scales were with the minister for approval.

Submission on the procedures for the appointment of judges

The Council considered and approved a submission to the Minister for Justice on the procedures for the appointment of judges. The submission addressed the four items specified in the notice from the department, that is:

- Eligibility for appointment,
- The need to ensure and protect the principle of judicial independence,
- Promoting equality and diversity,
- The role of the Judicial Appointments Advisory Board, including its membership and its procedures.

For further details on the content of the Society's submission, see article at page 13 of this issue of the *Gazette*. 



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Solicitors (Advertising) Regulations

All practising solicitors are reminded that the *Solicitors (Advertising) Regulations 2002* (SI no 518 of 2002) particularly restrict personal injuries advertising.

The definition of 'advertisement' is wide and includes any communication that "is intended to publicise or otherwise promote a solicitor in relation to the solicitor's practice". Websites are covered by the definition. In addition, the definition covers websites that are published by a third party, if the intention of the website is to promote a solicitor's practice – for example, a claims service with a particular solicitor's name mentioned.

An advertisement published by a solicitor must make clear on its face that it is that solicitor's advertisement. For example, a website that contains only a telephone number and/or an email address does not comply with the regulations.

The regulations prohibit advertisements that refer to claims or possible claims for damages for personal injuries, the outcome of such claims, or the provision of services by solicitors in conjunction with such claims, and advertisements that solicit, encourage or offer any inducement to make such claims. Any advertisement that contains factual information on legal services provided may include the words 'personal injuries'.

If a solicitor decides to refer in an advertisement to personal injuries or other contentious business, the advertisement must clearly refer to the prohibition on percentage charging in connection with contentious business.

Any words or phrases that suggest that legal services relating to contentious business will be provided at no cost or at a reduced cost are not permitted. The regulations set out examples of prohibited expressions, such as: 'no win no fee', 'no foal no fee', 'free first consultation', 'most cases settled out of court', 'insurance cover arranged to cover legal costs'. These are just examples. Other expressions with the same or similar meaning are equally prohibited. Such expressions include: 'complimentary consultation', 'complimentary case evaluation', 'no bill until you win', 'our service won't cost you a penny', 'we will fund your case', and 'a solicitor cannot

advertise to act on a no-win, no-fee basis – however, solicitors can act on this basis – this can be discussed by phone, email or in a meeting'.

Advertisements cannot contain cartoons, dramatic or emotive words or pictures, nor can they refer to calamitous events, such as train or bus crashes. Solicitors cannot advertise their willingness to make home or hospital visits.

Where an advertisement contains factual information on the legal services provided, no one category may be given prominence. The practice of listing different types of personal injury actions in a list of services provided has been deemed by the Law Society to be a prima facie breach of the regulations.

Section 5 of the *Solicitors (Amendment) Act 2002* prohibits a person who is not a solicitor publishing advertisements, that, if published by a solicitor, would be in breach of the legislation. The act extends the definition of misconduct to include a solicitor having any direct or indirect association with a person who is acting in contravention of section 5. Consequently, accepting direct or indirect referrals of personal injury claims that emanate from a 'claims harvesting' website operated by a third party may constitute misconduct.

Appropriate action will be taken against solicitors committing a breach of the regulations. Such action may include proceedings under section 18 of the *Solicitors (Amendment) Act 2002* by way of an application by the Law Society to the High Court for an order prohibiting a solicitor from contravening the regulations, and an application by the Law Society to the Solicitors Disciplinary Tribunal for an inquiry into the conduct of a solicitor on the grounds of alleged misconduct.

This notice relates to aspects of the regulations that are particularly relevant to personal injuries advertising and is not intended as a comprehensive guide to the regulations. This notice is intended as general guidance in relation to the subject matter and does not constitute a definitive statement of the law.

John Elliot,
Registrar of Solicitors and Director of Regulation

CONVEYANCING COMMITTEE

Amendments to solicitor's undertaking (residential) to comply with SEPA regulations

The Conveyancing Committee wishes to advise practitioners that two small amendments have been made to page 5 of the standard Law Society form of *Solicitor's Undertaking for Residential Mortgage Lending* (2011 edition) in order to comply with the new SEPA (Single Euro-

pean Payments Area) regulations. These amendments are:

- 1) The insertion of 'BIC' instead of 'bank sort code', and
- 2) The insertion of 'solicitor's client account IBAN' instead of 'solicitor's client account number'.

The revised form of undertaking has been sent to the Irish Banking Federation for distribution to its members for inclusion in future 'packs' being sent out by the lending institutions to borrowers' solicitors in residential lending cases.

GUIDANCE AND ETHICS COMMITTEE

Ten steps to improve productivity

- 1) Plan ahead. Compile a 'must do today' list at the end of each day – for the following day – so that you are ready to start what is important when you arrive at your desk.
- 2) Arrive early. Try and get to the office at least 15 minutes before opening/the phone starts to ring, in order to make a good start.
- 3) Remember the 'urgent/important matrix' – what is important is seldom urgent, and what is urgent is seldom important.
- 4) Use time effectively. Work expands to fill the time available to complete it.
- 5) Do not re-invent the wheel. Contact a colleague who may have dealt with a similar matter to get advice, precedents and know-how.
- 6) A problem shared is a problem halved. Share a difficult file with a colleague: an objective eye might help solve the problem.
- 7) Sort files into batches according to their work type and deal with similar files at the same time to increase efficiency for you and your support staff.
- 8) Take breaks. A ten-minute walk can help you think clearly. Leave your smart phone behind!
- 9) Get money on account from your clients – we always work better with a full tummy!
- 10) Issue interim bills –  cash flow is king.

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Solicitors Disciplinary Tribunal

Reports of the outcomes of Solicitors Disciplinary Tribunal inquiries are published by the Law Society of Ireland as provided for in section 23 (as amended by section 17 of the *Solicitors (Amendment) Act 2002*) of the *Solicitors (Amendment) Act 1994*

In the matter of Ruairi O'Ceallaigh, a solicitor formerly practising in the firm of Sean O'Ceallaigh, Solicitors, and in the matter of the *Solicitors Acts 1954-2011* [9022/DT120/12 and 2013 no 115SA]

Law Society of Ireland (applicant) Ruairi O'Ceallaigh (respondent solicitor)

On 23 May 2013 and 15 October 2013, the Solicitors Disciplinary Tribunal sat to consider a case against the respondent solicitor. The tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

- a) Instructed a solicitor in his practice to furnish an undertaking to ACC Bank dated 3 May 2007 in respect of a named property for the solicitor's private borrowing and failed to ensure that same was complied with in a timely manner or at all,
- b) Instructed a solicitor in his practice to furnish an undertaking to ACC Bank dated 3 May 2007 in respect of a further property for the solicitor's private borrowing and failed to ensure that same was complied with in a timely manner or at all.

The tribunal directed the Society to bring the matter before the President of the High Court and, on 13 January 2014, the President made an order striking the name of the respondent solicitor off the Roll of Solicitors and made an order for the costs of the proceedings, to be taxed in default of agreement.

In the matter of Sean Foy, a solicitor practising as Sean Foy & Company at 2 Cuil D'Ean, Altamont Street, Westport, Co Mayo, and as Foy Murphy & Company, Solicitors, at Glebe Street, Ballinrobe, Co Mayo,

and in the matter of the *Solicitors Acts 1954-2008* [4668/DT01/12]

Law Society of Ireland (applicant) Sean Foy (respondent solicitor)

On 22 October 2013, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

- a) Failed to comply in a timely manner with an undertaking given to provide an Ulster Bank mortgage discharge in circumstances where he drew the sum of €53,132.25 out of €81,346.31 held in the client account after he was informed that the bank would not provide the discharge without being paid the €81,346.31,
- b) Caused or allowed an undertaking to be given to ACC Bank in 2002 to lodge the title documents of a property on completion of registration when he did not have the written authority of the owner of the property to give the undertaking and he failed to comply with the undertaking in a timely manner, as set out in paragraph 4.2 of the investigation report on his Ballinrobe practice,
- c) Failed to lodge for registration an ACC Bank mortgage on a property at any time since giving an undertaking to the bank in 2004, despite having informed the bank in September 2007 that he would "now do so", as set out in paragraph 4.4 of the investigation report on his Westport practice,
- d) Allowed approximately 150 section 68(1) letters with fake dates to be created in the period between the issue of the investigation letter in July 2010 and the commencement of the investigation in October 2010 by failing to exercise adequate supervision over an employee,

NOTICES: THE HIGH COURT

In the matter of Greg (otherwise John G) Casey, solicitor, and Margaret (otherwise Mairead) AM Casey, formerly practising in Casey & Company, North Main Street, Bandon, Co Cork, and in the matter of the *Solicitors Acts 1954-2008* and in the matter of the Solicitors Disciplinary Tribunal [2013 no 53 SA]

Take notice that, by order of the High Court made on 10 June 2013, it was ordered that the names of Greg (otherwise John G) Casey and Margaret (otherwise Mairead) AM Casey, formerly practising in Casey & Company, North Main Street, Bandon, Co Cork, be struck off the Roll of Solicitors.

In the matter of Robert Sweeney, practising as Robert Sweeney, solicitor, First Floor, Crossview House, High Road, Letterkenny, Co Donegal, and in the matter of the *Solicitors Acts 1954-2011*

[2012 no 61 SA]

Take notice that, by order of the President of the High Court made on 30 January 2014, it was ordered that the respondent solicitor shall be suspended from practising as a solicitor until further order of the court.

In the matter of Heather Perrin, solicitor, formerly practising as Heather Perrin at 54 Fairview Strand, Fairview, Dublin 3, and in the matter of the *Solicitors Acts 1954-2011* [2014 no 8 SA]

Take notice that, by order of the High Court made by consent before Mr Justice O'Neill on Monday 3 February 2014, it was ordered that the name of Heather Perrin, formerly practising as Heather Perrin, 54 Fairview Strand, Fairview, Dublin 3, be struck off the Roll of Solicitors.

John Elliot,
Registrar of Solicitors

- e) Incorrectly caused or allowed the Revenue Stamps Branch to be informed that a purchaser was a first-time buyer when there was documentary evidence on the client's file that this was untrue,
- f) Failed to comply with an undertaking to Bank of Ireland in respect of the property at Moorehall, Claremorris, in a timely manner.

The tribunal ordered that the respondent solicitor:

- a) Do stand censured,
- b) Pay the sum of €1,000 to the compensation fund,
- c) Pay the whole of the costs of the Society as taxed by a taxing master of the High Court in default of agreement.

In the matter of John Kilraine, a solicitor previously practising as Kilraine & Company, Solicitors, at Nile Lodge Corner, Galway, and in the matter of the *Solicitors Acts 1954-2011*

[6868/DT81/12 and 2013 no 103SA]

Law Society of Ireland (applicant) John Kilraine (respondent solicitor)

On 28 February 2013, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

- a) Misappropriated client moneys over a period of two years,
- b) Misappropriated trust moneys from the client account in the file of a named client totalling €63,812,
- c) Improperly cleared out the client account in June 2007 and left an overdraft thereon,
- d) Improperly cleared out the client account again by 6 May 2008,
- e) Allowed a deficit of €110,005 on the client account as of 8 June 2007,
- f) Allowed a minimum deficit of €154,407.45 on the client account as of 6 May 2008,
- g) Failed to stamp a deed, notwith-

regulation

standing that €51,450 was received from clients in December 2007 for that purpose,

h) Failed to keep proper books of account, having failed to write up same post 28 February 2006.

The tribunal directed the Society to bring the matter forward to the President of the High Court and the President of the High Court, on 13 January 2014, ordered that the name of the respondent solicitor be struck from the Roll of Solicitors.

In the matter of Michele O'Keeffe, a solicitor previously practising as Michele O'Keeffe & Company, 1 Cornmarket Street, Ennis, Co Clare, and in the matter of the Solicitors Acts 1954-2011 [8246/DT151/12 and 2013 no 109SA]

Law Society of Ireland (applicant) Michele O'Keeffe (respondent solicitor)

On 10 October 2013, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in her practice as a solicitor in that she:

- a) Allowed a deficit of €339,499 in her practice as of 30 January 2012,
- b) Allowed a situation where interest and penalties in the region of €40,000 could be levied on unstamped deeds,
- c) Wrote client account cheques for €80,345 for personal and office expenses between 9 December 2011 and 20 January 2012,
- d) Allowed debit balances of €39,072 on the client ledger balances,
- e) Misapplied funds of €55,442 on a probate file,
- f) Allowed outstanding lodgements of €9,915 on the client account, which covered debit balances on the client ledger, in circumstances where the cheques were written on the of-

- g) Diverted €15,000 of a loan cheque of €170,000 to cover deficits on two ledger accounts,
- h) Failed to account for a deposit received of €25,000 in a conveyancing transaction,
- i) Allowed stamp duty of €36,000 received in July 2003 to be directed to other uses, including paying a Law Society levy of €6,000 arising from an investigation in March 2011,
- j) Paid stamp duty of €6,590 and penalties from an unrelated client ledger on unstamped deeds discovered during a previous investigation,
- k) Paid €8,955 stamp duty and penalties from an unrelated client ledger on unstamped deeds discovered during a previous investigation in July 2009,
- l) Diverted €4,000 of a receipt of €75,486 in a probate file to a ledger account that had a debit balance,

- m) Allowed a further €33,500 of unrelated payments to be made on the same probate file,
- n) Left unstamped deeds with a liability in excess of €50,000 and estimated interest and penalties of €40,000.

The tribunal directed the matters be referred forward to the President of the High Court and the President of the High Court, on 13 January 2014, ordered that:

- a) The name of the respondent solicitor be struck off the Roll of Solicitors,
- b) The respondent solicitor make restitution to the compensation fund in respect of all sums paid out by the fund in respect of her former practice, totalling €358,410.42, and
- c) The Society recover the costs of all the proceedings, to be taxed in default of agreement. 

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10 January – 10 February 2014

legislation update

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 http://www.attorneygeneral.ie/esi/esi_index.html

ACTS PASSED*European Parliament Elections (Amendment) Act 2014***Number:** 2/2014

Revises the European Parliament constituencies; provides for the number of members to be elected for such constituencies (total number 11); amends the *European Parliament Elections Act 1997*, and provides for related matters.

Commencement: 5/2/2014*Local Government Reform Act 2014***Number:** 1/2014

Provides for a reorganisation of the structures of local government at county, sub-county and regional levels. Merges six city and county councils in Limerick, Tipperary and Waterford into three local authorities. Dissolves 80 town councils and replaces them with municipal districts. Formulates a new integrated

county/sub-county relationship, with the establishment of a comprehensive and modern system of municipal governance. Dissolves county and city development boards and provides for the establishment of local community development committees. Amends the *Local Government Act 1991* by substituting a new s43 for the establishment of regional assemblies for the purpose of promoting or supporting strategic planning and sustainable development and promoting effectiveness in local government and public services. Enables (subject to certain preconditions) a plebiscite to be held in the administrative areas of the local authorities in the Dublin area in respect of a directly elected mayor for that area. For those and other purposes amends the *Local Government Acts 1925-2013*, the *Local Elections Acts 1974-2012* and other enactments relating to elec-

tions, the *Housing Acts 1966-2013* and the *Planning and Development Act 2000*. Amends other acts in relation to the above and provides for related matters.

Commencement: This act, other than section 28 and parts 11, 12 and 13, comes into operation on such day or days as the minister may, by order or orders, appoint either generally or with reference to any particular purpose or provision, and different days may be so fixed for different purposes and different provisions and for the deletion, repeal, revocation and amendment effected by schedules 1 and 2 of different enactments or of different provisions of those enactments

SELECTED STATUTORY INSTRUMENTS*Health (Amendment) Act 2013 (Section 11(a))**(Commencement) Order 2014***Number:** SI 74/2014

The purpose of section 11(a) is to extend the application of section 53A of the *Health Act 1970* to public nursing homes. This provision will enable the HSE to charge the average cost of long-term residential care in public nursing homes in cases where a person enters a public nursing home for services other than long-term residential care, for example, respite or re-

habilitation, and has subsequently been deemed by a registered medical practitioner to require long-term residential care. This is an enabling provision and will only apply where a person refuses to cooperate with the application process for the Nursing Homes Support Scheme.

Commencement: Appoints 7/2/2014 as the commencement date for ss22 and 23, part 5 (other than s41) and s44

*Health Act 1970 (Fifth and Sixth Schedules) Regulations 2014***Number:** SI 75/2014

This order deletes four hospitals from the fifth schedule of the *Health Act 1970*, as added to that act by schedule 2 of the *Health Amendment Act 2013*, and adds those hospitals to the sixth schedule of the *Health Act 1970*, as added to that act by schedule 3 of the *Health Amendment Act 2013*.

Commencement: 5/2/2014*Water Services (No 2) Act 2013 (Commencement) Order 2014***Number:** SI 76/2014

Commencement: Appoints 7/2/2014 as the commencement date for ss22 and 23, part 5 (other than s41) and s44 

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HIGH COURT RULES ON USE OF DOMAIN NAMES

In *BMW v Ronayne t/a BMW-Care* (High Court, 19 December 2013), Ryan J interpreted provisions of the *Trade Mark Directive* and the *Trade Marks Act 1996*.

Like many car companies, BMW's business is carried on in Ireland through a network of authorised dealers and service/repair agents. BMW exercises strict control over these businesses and approves and supervises their premises, equipment, training of staff, advertisement and marketing. BMW owns different trademarks such as the roundel logo, the word mark 'BMW' itself and 'Original BMW care products natural care', which is registered for cleaning products but is also a member of a family of BMW marks.

The defendant was a mechanic and an admirer of the BMW brand. He operated a garage in the west of Ireland and decided to specialise in BMW cars in his business. He purchased the internet domain name 'BMWcare.com' and assembled a website with the help of a web designer. The page went live in late 2006, using the name BMWCare, providing a hyperlink to the original BMW website and using different meta tags to be found on online search engines. The website also included phrases like "independent advice and assessment", "we are proud to be independent" and "beholden to no one". The defendant asserted that he wished to make it clear he was not affiliated to BMW.

BMW claimed that the defendant used its name, trademarks and devices in a confusing and parasitic way on his website, stationary, business cards and materials and took unlawful advantage thereof in breach of section 14 of the *Trade Marks Act 1996*. They

sought a range of reliefs, including orders restraining the defendant or his servants or agents from using the roundel logo (which was not subject to the decision because the defendant took it down from his website) and word mark, preventing the use of the domain name or business name with BMW, and restraining from the use of any of the plaintiff's intellectual property.

The defendant considered his use of the name BMWCare as lawful and non-infringing under section 15(2) of the *Trade Marks Act 1996* and counter-claimed for a decision that the mark 'Original BMW care products natural care' was invalid pursuant to article 7(1) of the *Trade Mark Regulation* for being descriptive and/or devoid of distinctive character.

The High Court found that BMWCare is a use of the plaintiff's trademark, as it included the well-known BMW word mark, which was the distinctive and dominant part of the domain name. According to the court, the suffix 'care' was only descriptive and subordinate, while the focus was on the BMW word mark. The trademark 'Original BMW care products natural care' was not invalid. It contained descriptive words but, once 'BMW' is introduced into the string of descriptive words, it transformed them into a registrable brand. Therefore, BMW was distinctive and important for identifying the trademark as a member of a family of trademarks.

In the court's view, the trademark and the defendant's busi-

ness name are at the very least similar within the meaning of section 14(2) of the *Trade Marks Act 1996*, if not identical within the meaning of section 14(1). Therefore, the court found that the defendant's use of 'BMW-Care' constituted an infringement of the trademarks, which was not justified or excused under section 15(2) as a use of the trademark necessary to indicate the intended purpose of the service. In this regard, the court also held that, by the use of his website, the defendant engaged in passing off his service as those of the plaintiff.

The court found that the defendant's use of 'BMWCare' constituted an infringement of the trademarks

Supporting case law

The court referred to different judgments that reinforce its conclusion. The first of these was the US case of *Toyota v Tabari*. The Federal Appeals Court (9th Circuit) ruled that the Tabaris, two car brokers from Texas operating a business selling second-hand Lexus cars, were allowed to use the domains 'buy-a-lexus.com' and 'buyorleaselexus.com' to describe their business and in order to identify their services. The Tabaris had placed a very prominent disclaimer on their website stating "we are not an authorised Lexus dealer or affiliated in any way with Lexus; we are an independent auto broker." Therefore, the court held they did not falsely suggest they were sponsored by Lexus and only used the trademark to an amount necessary to promote their business of selling second-hand Lexus cars.

In the CJEU case of *BMW v Deenik*, Mr Deenik used the BMW trademark in expressions like 'repairs and maintenance

of BMWs', 'BMW specialist' or 'specialised in BMWs' on his website without being part of the BMW dealer network. The court held that Mr Deenik was entitled to use the BMW trademark to advertise the information that he was a BMW specialist mechanic who also sold second-hand BMWs. In the court's opinion, he did this without creating the impression of a commercial connection between BMW and his business. The use was within the meaning of article 5(1)(a) of the *Trade Mark Directive*, which is similar to section 14(1) of the *Trade Marks Act 1996*.

In a Hague Appeal Court case, *Porsche v Van Den Berg*, Mr Van den Berg was the owner of the domain 'www.porschespecialist.nl' and he used the expression 'Porsche specialist' in capitals under the logo on his website and also the words 'Porsche specialist Van den Berg' appeared on every page of his website. In the opinion of that court, the expression 'Porsche specialist Van den Berg' gave the public the impression that there was a commercial connection between Porsche and the defendant. The court also found that a disclaimer that was placed very close to the bottom of the website was not sufficient to prevent the confusion, because it would not be perceived by the average website user.

Step further

The High Court found that Mr Roynane went a step further than Mr Van den Berg when he took the trademark BMW and only added a word in common use and of general meaning as 'care' to it. The name 'BMW-Care' was not specific to his business type but of general application, whereas at least people would know 'Porsche specialist



Van den Berg' was Mr Van den Berg's business. The defendant's use of 'BMWCare' was not legitimate under section 15(2) because this only allows use of a trademark to describe a person's business. However, it does not permit a person to create a business out of another's name and trademark, which the court found the defendant did. The defendant's business plan was to establish his own business under the name BMWCare, which would operate as a franchise. He therefore wanted to make sure to make his website look as close to the BMW website as possible,



but to distinguish it by applying expressions like 'independent' and 'beholden to no one'. These statements were not, in the view

of the court, placed prominently enough and did not actually disclaim a connection, as the stylistic presentation on his website indicated the very opposite. The defendant's name 'BMWCare' asserted a commercial connection and, even if the expressions concerning his 'independence' were to be regarded as disclaimers, the damage was already done before the user would read them. The court also found that it was unsafe to assume the sophistication of the customer will make the distinction that the website and business name of the defendant fail to do.

The court ruled that Mr Ronayne was not allowed to use the name 'BMWCare' in his business or on his website and was ordered to restrain from the use of the domain 'BMWCare.com' and various other domain names (including typographical variants) that he used or acquired that included the name BMW in them.

At the time of writing, it is not known if the decision will be appealed.

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

BRINGING IT ALL BACK HOME: CONSTRUCTION REGULATIONS

On 7 October 2010, the European Court of Justice ruled that the *Mobile Sites Directive* (92/57/EC) applied to the owner of a private dwellinghouse carrying out works on her house. The case concerned a prosecution taken by an Italian health and safety authority against the home owner in respect of her failure to appoint the equivalent of a project supervisor for the design process. Italian law did not require her to do so at the time, and the Italian court had referred the case to the European Court of Justice for guidance on whether the Italian legislation was in breach of the *Mobile Sites Directive*. The European Court of Justice ruled that the directive did not allow national legislation to provide a derogation for domestic clients.

The directive was first implemented in Ireland through the *Safety, Health and Welfare at Work (Construction) Regulations 1995* and subsequently updated in the 2001 and 2006 regulations and associated amendments. None of these regulations applied to domestic clients, as the definition of a 'client' meant a person for whom a project was carried out "in the course or furtherance of a trade, business or undertaking, or who undertook a project directly in the course or furtherance of such trade, business or undertaking". Obviously this was at odds with the European Court of Justice's decision, and it was clear that the *Mobile Sites Directive* had not been correctly transposed into Irish law.

On 1 August 2013, the *Safety, Health and Welfare at Work (Construction) Regulations 2013* came into effect. The 2013 regulations replace and revoke the 2006 regulations (and all amending regulations) and their main ob-

jectives are to fully transpose the requirements of the *Mobile Sites Directive* and to reduce the regulatory and administrative burdens while maintaining health and safety standards.

Definition of 'client'

The regulations define a 'client' more broadly as a "person for whom a project is carried out". This is in line with the terms of the *Mobile Sites Directive* and means that the 2013 regulations apply to a person having construction work carried out on their own home.

The client's key duties under the 2013 regulations include:

- Appointing competent persons to carry out the design and construction work,
- Appointing competent project supervisors for the design process (PSDP) and for the construction stage (PSCS), where necessary,
- Keeping a safety file,
- Sending notification of the works to the Health and Safety Authority where necessary.

Certain of these duties are slightly eased for the domestic client. For example, with a domestic client, the responsibility will sit with the designer, contractor or project supervisor (as the case may be) to establish that they are competent. Likewise, the obligation on clients to provide copies of safety and health plans to persons being considered for or tendering for the role of PSCS does not apply to work on domestic dwellings until a PSCS is appointed.

The derogation from the requirement to appoint project supervisors has been extended for all clients. In the 2006 regulations, the duty to appoint competent project supervisors did not apply to "routine maintenance, cleaning, decoration or repair within a structure", unless the work involved particular risk, there was more than one contractor, or the work involved was expected to exceed 30 working days or 500 person days. This derogation now applies to all simple work of short duration, that is, where no particular risks arise, there is only one contractor, and the work does not last longer than the stated period.

New duties

As noted above, where a client appoints project supervisors, designers or contractors for construction work on their domestic dwelling, regulation 6(7) now provides that it is for the project supervisors, designers or contractors to demonstrate to the client that they are competent to complete the work and will allocate adequate resources to complete it safely and in accordance with their duties under the 2013 regulations. In effect, the appointees must be able to demonstrate that they can work safely and can manage the risks to their employees and to the homeowner and their family.

The PSDP is no longer required to keep a copy of the safety and health plan for a period of five years after its preparation.

However, the PSDP continues to be under a duty to keep a copy of the safety and health plan available for inspection by an inspector for the duration of the project.

Many of the duties of the PSCS remain unchanged. Similar to the position with the PSDP, the PSCS is no longer required to keep records or documents for five years after the date of their preparation. Further, the PSCS is now only required to provide relevant extracts from the safety statement insofar as they are likely to affect the safety, health or welfare of any person at work on the construction site, or might justify a review of the safety and health plan.

As before, regulation 15 sets out the duties of designers, and it is worth noting that the duty of designers to inform clients of their obligation to appoint project supervisors under regulation 6 now extends to home owners carrying out work on their domestic dwellings. A similar duty has now been introduced for contractors, who must promptly inform the client of the client's duties to appoint project supervisors if the contractor is not aware of the appointment of project supervisors by the client. This can be seen as a means of ensuring that domestic clients are advised of their duties, as they may not be aware of the application of the 2013 regulations to the proposed works to their dwellings.

True intention

The introduction of the 2013 regulations is to be welcomed for their accessibility and clarity on the duties of commercial and private clients, project supervisors, designers and contractors.

With a domestic client, the responsibility will sit with the designer, contractor or project supervisor to establish that they are competent



Extensions: they're deathtraps! Deathtraps, I tells ya!

There has been some criticism about the increased financial and regulatory burden that the 2013 regulations will likely create for home owners. Nevertheless, it is worth highlighting that the 2013

regulations merely implement the true intention of the *Mobile Sites Directive* and, whether on a domestic dwelling or on a commercial site, the safety and health of people involved in construc-

tion work should always be paramount. The HSA has produced two useful guidance documents, one for [homeowners](#) and the other for [contractors and project supervisors](#), and these are avail-

able to download from the HSA's website (www.hsa.ie).

Martin Cooney is an associate with the Construction and Engineering Group in Arthur Cox

Recent developments in European law

CONTRACT

Case C-184/12, *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, 17 October 2013



The case concerned the law applicable to a dispute arising out of the termination of a commercial agency agreement between a Bulgarian and a Belgian undertaking. The agreement provided that it was to be governed by Bulgarian law, and any disputes

were to be resolved by arbitration in Bulgaria. While the *Rome Convention* on choice of law in contracts respects freedom of choice, it also requires in article 7 compliance with mandatory rules of the another country with which the situation has a close connection. In this case, the *Commercial Agency Directive* (86/653) had been implemented in a minimal fashion in Bulgaria, but implemented in Belgium in a manner that went further than the requirements of the directive. The issue was whether the choice of a national law that gave

the minimum protection required by the directive could be overridden by a national statute that had gone farther than required by the directive.

The court held that it is for the national court to assess whether the national law of the other state can be considered as a 'mandatory rule'. In doing so, it must take account of the exact terms of the law, but also of its general structure and the circumstances of its adoption. This is done to decide whether it is mandatory in nature, insofar as it appears that the legislature

adopted it in order to protect an interest judged to be essential by the member state concerned. This may be the case where a member state offers greater protection to commercial agents than a directive requires by virtue of the particular interest that the member state pays to that category of nationals. Account must be taken of the fact that the law to be rejected is that of another member state that had correctly transposed the directive. The balancing exercise this represents is to be undertaken by the national court.





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WILLS

Clifford, Yvonne (otherwise Iobhainne Ní Chlumahain) (deceased), late of Lisheencanna, Ballyhar, Killarney, Co Kerry, and formerly of St Finan's Hospital, Killarney, Co Kerry, and formerly of 27 Castlewood Avenue, Charleston, Co Dublin. Would any person having knowledge of any will made by the above-named deceased, who died on 11 July 2012, please contact O'Leary & Co, Solicitors, Countess Road, Killarney, Co Kerry; email: info@olearysolicitors.ie

Collins, Maria (deceased), late of 12 Merton Park, South Circular Road, Dublin 8. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, who died on 27 June 2013, please contact C Grogan & Co, Solicitors, 3 Isolde's Tower, Essex Quay, Dublin 8; tel: 01 872 6006, fax: 01 837 0295, email: dublin@crogansolicitor.com

Copinger, Anne Teresa (or se Nancy) (deceased), late of An Cuan, Creagh Road, Ballinasloe, Co Galway, and formerly of 51 Glenmore Road, Hampstead, London NW3 4DA, England. Would any person having knowledge of any will made by the above-named deceased, who died

on 3 January 2014, please contact Noonan & Cuddy Solicitors, 12 Society Street, Ballinasloe, Co Galway; tel: 090 964 2344, fax: 090 964 2039, email: info@noonancuddy.com

Corcoran, Esther (deceased), late of Meath Community Unit, 1-9 Heytesbury Street, Dublin 8, and formerly of Friarstown Lodge, Bohernabreena, Dublin 24, who died on 22 October 2012. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Feeney Millar & Co, Solicitors, 2 College View,

Main Street, Tallaght, Dublin 24; DX 104021 Tallaght; tel: 01 451 6661, email: info@tallaghtlaw.com

Cox, James (deceased), late of St Anthony's, 19 Dalcassian Avenue, Turnpike, Ennis, Co Clare, who

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professional notices

died on 21 January 2014. Would any person having knowledge of a will made by the above-named deceased please contact Ruth Casey at Messrs John Casey & Company, Solicitors, Bindon House, Bindon Street, Ennis, Co Clare; DX 25007 Ennis; tel: 065 682 8159, fax: 065 682 0519; email: ruth.casy@caseylaw.biz

Crean, Edmond (aka Edward) (deceased), late of UCD Lyons Farm, Newcastle, Co Dublin, formerly resident in Liverpool, England. Would any person having knowledge of any will made by the above-named deceased, who died on 25 March 2013, please contact Bernadette Barry & Co, Solicitors, 1 Castle Crescent, Monastery Road, Clondalkin, Dublin 22, Ireland; tel: 01 244 4410, fax: 01 244 7267, email: info@bernadettebarry.com

Dunne, Frances (deceased), late of 142 Curlew Road, Drimnagh, Dublin 12. Would any person having knowledge of the whereabouts of a will executed by the above-named deceased on 26 May 1977, who subsequently died on 3 December 1981 or any information on Richard Maguire or James Maguire, formerly practising under the style and title of James Maguire & Co, Solicitors, 19/20 Fleet Street, Dublin 2, both of whom held the last known will of the deceased, please contact Compton Solicitors, 30 Pembroke Street Upper, Dublin 2; tel: 01 234 2678, fax: 01 234 2587, email: lawyer@comptonsolicitors.ie

Hanniffy, Patricia Josephine, (otherwise known as Patty) (deceased), late of St Kieran's, Kilgarve, Ballinasloe, Co Galway. Would any person having knowledge of any will made by the above-named deceased, who died on 23 October 2013, please contact Noonan & Cuddy, Solicitors, 12 Society Street, Ballinasloe, Co Galway; tel: 090 964 2344, fax: 090 964 2039, email: info@noonancuddy.com

Kelly, Mary Winifred (Maureen), late of Cregga, Strokestown, Co Roscommon, who died on 25 November 2013. Would any person having the knowledge of any will made by the above-named deceased please contact Mary Rose McNally, Pádraig Kelly, Solicitors, Farnbeg, Strokestown, Co Roscommon; tel: 071 963 3666, fax: 071 963 3182, email: pksohrs@iol.ie

Kenny, William (deceased), late of Churchview Nursing Home, Terenure, Dublin 6W and formerly of 34 Darling Estate, Navan Road, Dublin 7, who died on 2 August 2012. Would any person having knowledge of a will made by the above-named deceased, or if any firm is holding same, please contact Claire Reilly, Crowley Millar, Solicitors, 15 Lower Mount Street, Dublin 2; tel: 01 676 1100, fax: 01 676 1620, email: claireireilly@crowleymillar.com

Maguire, Mary Patricia (otherwise known as Patsy) (deceased), late of 7 Grange Cottages, Ballymahon Road, Mullingar, Co Westmeath, and Fortbrown, Lavally, Tuam, Co Galway, who died on 5 August 2013. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Field Solicitors of Office Unit 4, Manor Mills Centre, Maynooth, Co Kildare; tel: 01 629 1155, email: info@fieldsolicitors.ie

Mahon, Edward (deceased), late of Baskinagh, Athboy, Co Meath. Would any person having knowledge of the whereabouts of a will executed by the above deceased on 29 May 1967, who subsequently died on 18 June 1967, please contact O'Mara Geraghty McCourt, Solicitors, 51 Northumberland Road, Dublin 4; tel: 01 660 6543

O'Connor, Margaret (deceased), late of Ramsgrange,

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New Ross, Co Wexford, Ireland, and formerly of Willingham, Cambridgeshire, United Kingdom. Would any person having any knowledge of any will made by the above-named deceased, who died on 20 November 2013, please contact MW Keller & Son, Solicitors, 8 Gladstone Street, Waterford; DX 44004; tel: 051 877 029; email: sharon@mwkeller.ie

O'Neill, James (deceased), late of 145 Finglas Park, Dublin 11. Would any person have any knowledge of a will made by the above-named deceased, who died 19 May 2005, please contact O'Reilly Doherty & Company, Solicitors, 6 Main Street, Finglas, Dublin 11; tel: 01 8433 255, email: sheilawilliams@reilly.ie

O'Reilly, Ellen (deceased), late of 17 Pairc Mhuire, Tullow, Co Carlow, and formerly of Castlemore, Tullow, Co Carlow, who died on 5 May 1995. Would any person having knowledge of a will made by the above-named deceased please contact O'Flaherty & Brown, Solicitors, Greenville, Athy Road, Carlow; tel: 059 913 0500, fax: 059 913 0501, email: fof@fof.ie

Quinn, Marie (deceased), late of Rinnahulty, Manulla, Castlebar, Co Mayo. Would any per-

son having knowledge of a will executed by the above-named deceased please contact Egan, Daughter & Co, Solicitors, Castlebar, Co Mayo, within three weeks of the date of publication of this advertisement; tel: 094 902 1375, email: law@egansolicitors.com

Tierney-Byrne, Mary (deceased), late of 47 Patricia Villas, Stillorgan, Co Dublin, who died on 13 June 1989. Would any person having knowledge of will made by the above-named deceased, or if any firm is holding same, please contact Kelly Colfer Son & Poyntz, Solicitors, Declare House, South Street, New Ross, Co Wexford; DX 37001; email: info@kellycolfer.ie; ref: Tie008/001

MISCELLANEOUS

Solicitor's practice in south Monaghan town for sale or merger. Premises also available. Conveyancing, litigation and probate. Expressions of interest to Ryan & Company, Accountants, Shercock Road, Carrickmacross, or to tryan@cmx.ie will be treated in strictest confidence. FAO Mr Tom Ryan

TITLE DEEDS

Anyone knowing the whereabouts or holding title documents on behalf of the late Dr William (Bill) Linehan (ob:

11/10/2013) or Maeve Linehan (ob: 29/11/2013), both late of 15 College Park, Castleknock, Dublin 15, please contact David M Murphy of Corrigan & Corrigan, Solicitors, 3 St Andrew Street, Dublin 2; tel: 01 677 6108, fax: 01 679 4392, email: david.murphy@corrigan.ie

In the matter of the Landlord and Tenant Acts 1967-2005, and in the matter of the Landlord and Tenant (Ground Rents) (No 2) Act 1978, and in the matter of premises situate at 65 Cabra Park, in the manor of Grangegorman, barony of Coolock and county of Dublin: an application by Kuaile Touzi Limited, having its registered office at 23 Ashleigh Grove, Ballymonee Road, Galway

Take notice that any person having any interest in the freehold or leasehold estate of the following property: all that and those the premises known as 65 Cabra Park, Phibsboro, Dublin 7, the premises being part of the premises comprised in and demised by indenture of lease dated 30 August 1900 between Charles Coates of the one part and Theresa M Farrell of the other part, and therein described as "48 and 49 Cabra Park, North Phibsborough, situate in the manor of Grangegorman, barony of Coolock and county of Dublin"

for the term of 199 years from 25 March 1900, subject to the yearly rent thereby reserved and to the covenants and conditions on the part of the lessee therein contained.

Take notice that Kuaile Touzi Limited intends to submit an application to the county registrar for the county of the city of Dublin for the acquisition of the freehold interest of 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 solicitors within 21 days of the date of this notice.

In default of any such notice being received, Kuaile Touzi Limited 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 registrar for the county of the city of Dublin for directions as may be appropriate on the basis that persons beneficially entitled to the superior interest including the freehold reversion in each of the aforesaid premises are unknown or unascertained.

Date: 7 March 2014

Signed: John M Ford & Son (solicitors for the applicant), 2 Mountpelier Terrace, Sea Road, Galway (DF/12238)

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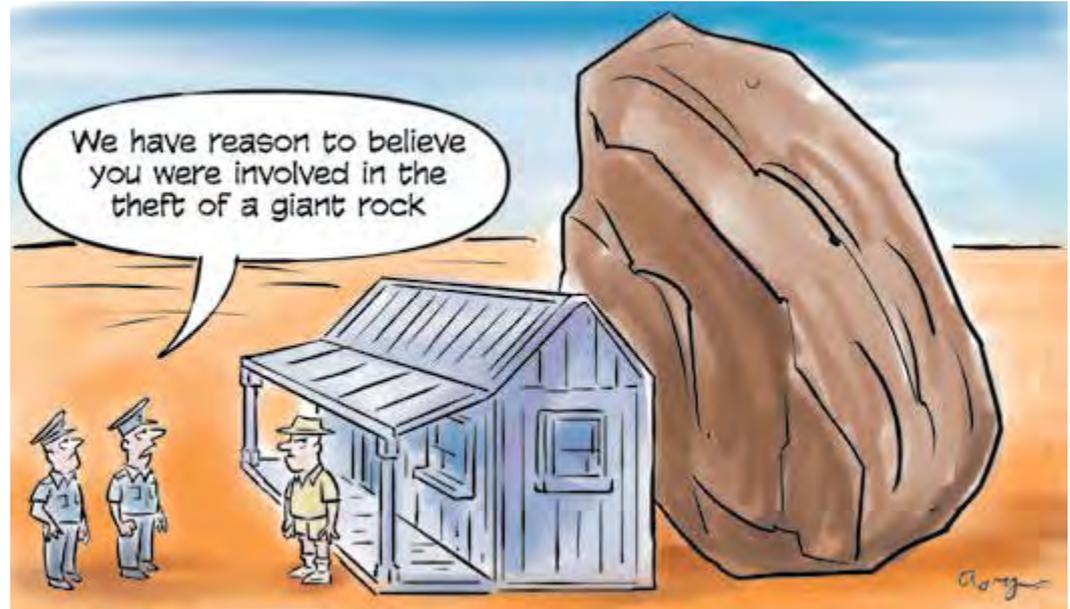
Wei oh wei?

A Florida artist is facing criminal charges after deliberately dropping a vase by dissident Chinese artist Ai Weiwei in an apparent protest, reports the BBC. Maximo Caminero (51) was charged with criminal mischief after breaking a \$1 million (€727,000) vase in Miami.

Mr Caminero told police he broke the art work in protest because the Perez Art Museum in Miami failed to exhibit work by local artists. He said he had no idea the vase was so valuable, adding that he thought it was “a common clay pot like you would find at Home Depot, frankly”.

The 16 vases in the exhibition, each dipped in bright paint by Ai, are about 2,000 years old, dating back to China’s Han Dynasty. The artist has long used ancient vases and artefacts in his work, drawing criticism that painting them defaces the original work. Ironically, the Chinese artist’s exhibition includes photos depicting Mr Ai dropping a Han Dynasty urn.

Mr Ai said he disagreed with artists destroying other artists’ work and pointed out that his own work is never shown in China.



Rock, paper, scissors, lizard, spock

Police in Australia have launched an appeal for witnesses after “not very smart” thieves made off with a practically worthless two-tonne rock from the National Rock

Garden in Canberra.

Officers said it would have taken specialist lifting equipment to remove the giant 450-million-year-old stone from its perch on a larger rock.

Despite its impressive appearance and visible veins of gold, the rock is not worth a whole lot, as the cost of crushing it would be more than the resale price of the gold it contains.

How not to make an American quilt

Quilt shops and volunteer fire departments that auction quilts in fundraisers in Pennsylvania’s Lancaster County, USA, are being told they can no longer sell quilts featuring a specific design, reports the *ABA Journal*.

Internet company Almost Amish issued a ‘cease and desist’ notice claiming that ‘its’ design was copyright. The design creates an optical illusion with a three-

dimensional effect (but we’re ‘under the duvet’ about showing it here!).

The company’s owner told Lancaster Online that it had bought the copyright from an Amish woman who created the pattern and registered the copyright, but didn’t enforce it.

This ‘blanket ban’ could certainly lead to cold feet among the quilting confraternity.

Wake up and smell the free coffee ... and other stuff

Intellectual property law is all the rage these days – and Comedy Central comedian Nathan Fielder has been ‘dipping his toes in the coffee’, reports CBS News.

Fielder admitted to being the person behind a parody coffee shop called ‘Dumb Starbucks’ that appeared to exactly replicate the Starbucks Coffee chain – but which gave away coffee and other beverages for free.

Keeping a straight face, the

Canadian comic told a crowd he was pursuing the ‘American dream’ – before acknowledging that the stunt was part of his TV show *Nathan for You*.

A spokeswoman for Seattle-based Starbucks Corp said: “While we appreciate the humour, they cannot use our name, which is a protected trademark.”

At the front counter, a sheet of FAQs said that the store was shielded by “parody law”. By

adding the word ‘dumb’, we are technically ‘making fun’ of Starbucks, which allows us to use their trademarks under a law known as ‘fair use’,” the sheet said.

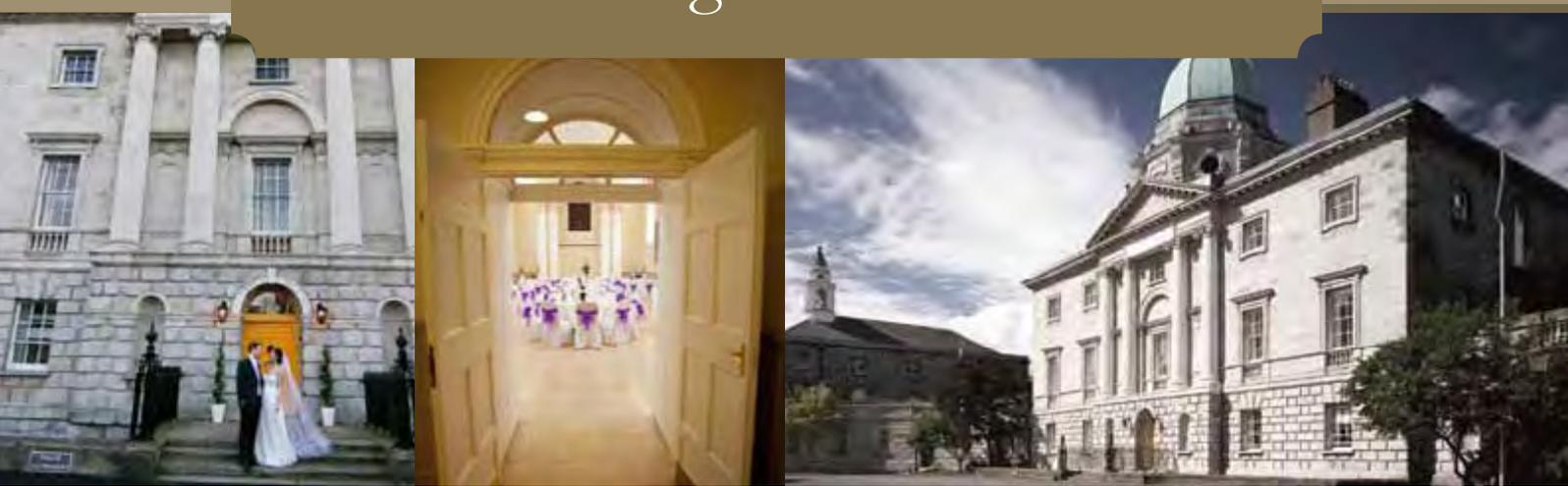
“In the eyes of the law, our ‘coffee shop’ is actually an art gallery and the ‘coffee’ you’re buying is considered art. But that’s for our lawyers to worry about.”

One law professor suggested Dumb Starbucks needed to sharpen its legal theory.





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