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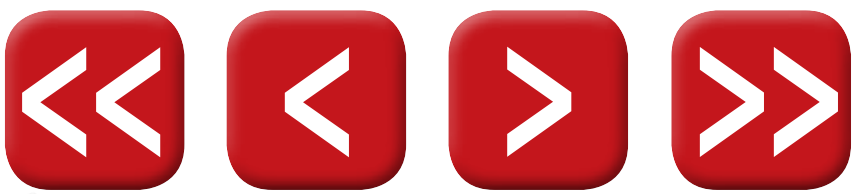

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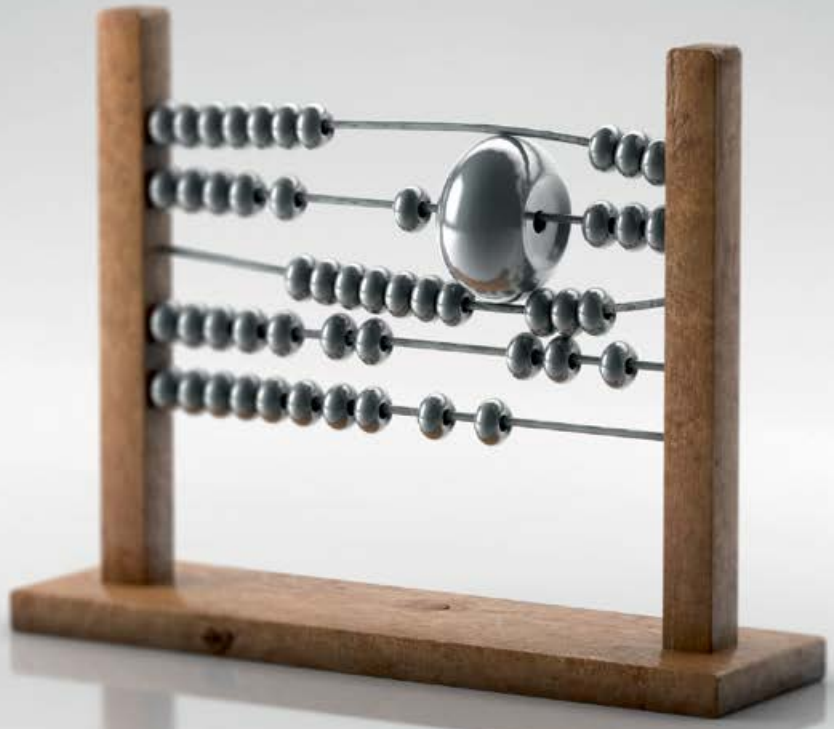

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KEEPING AN EYE TO THE FUTURE

LAW SOCIETY OF IRELAND

I had been warned that my year as president would fly by – it has passed in the blink of an eye. My agenda for the year was well laid out in the report of the Future of the Law Society Task Force. We began the implementation of the report in earnest in November 2013, and I can now report to you that all of the major recommendations in it have been considered and acted upon. The thrust of the report is towards more and better representation and in improving communications with members, the media, Government departments and the Courts Service, among others.

With the August/September *Gazette*, you will have received the Society's strategy statement for 2014-2018. It sets out the strategic objectives that will drive all the operations of the Society throughout the next four years. The aim is to provide you, the members of the Society, with the type of representative body that the majority has asked for. Hopefully, when the objectives of the strategic plan are implemented, many more steps will have been taken in that direction.

The recent campaign against the proposal to close District Courts in Tallaght, Dun Laoghaoire, Swords and Balbriggan is the sort of strong evidence-based representation that these changes were intended to bring about.

Thorny issues

The Future of the Law Society Task Force was set up to look at the future of the profession in the light of the *Legal Services Regulation Bill*. As it happens, the task force report has issued and its recommendations will have been implemented before the bill has been enacted. The Law Society has contributed in the fullest possible way to the debate on this bill and various matters of public interest that will be affected by it.

Not least in this regard, is the potential of sections 15 and 17 of the bill to interfere with the citizen's right to legal professional privilege.

There are a whole host of issues raised by the thorny issue of multi-disciplinary practices, not least of which is who should be allowed to participate in such practices. The Society's position is that if they are allowed, they should only be allowed among those professions that are already regulated. To do otherwise would be to impose an additional regulatory burden on the new Legal Services Regulatory Authority, and on the people who are paying for that authority under the bill – the legal profession.

There is also the issue of the potential transfer of staff from the complaints section of the Law Society to the new complaints section of the Legal Services Regulatory Authority. These are all issues that the current Minister for Justice is grappling with and are not easy to resolve. There might be a sense of frustration at the apparent lack of progress on this bill, but it is far more important that reforms to the legal system are made properly rather than hurriedly.

There are, of course, a plethora of people to whom I owe a great debt of gratitude for getting me through this year relatively unscathed. To the management and staff of the Law Society, I am deeply grateful for the amount of support they have given me during the year.

My partners at Michael Houlihan & Partners in Ennis, Co Clare, have been generous in indulging my absence. My wife, Mary Nolan and my daughters, Hannah, Ellen and Julie, have been hugely supportive and have added a touch of glamour and style wherever we have gone.

Finally, I wish to thank the profession for giving me the opportunity and privilege to lead it during the past year. I know that my replacement, Kevin O'Higgins, will not want for energy, enthusiasm and ideas. I have no doubt that the members of the profession will provide him with the same courtesy and goodwill that I have received and for which I am extremely grateful.

John P Shaw
President

> The strategy statement will drive all the operations of the Society throughout the next four years

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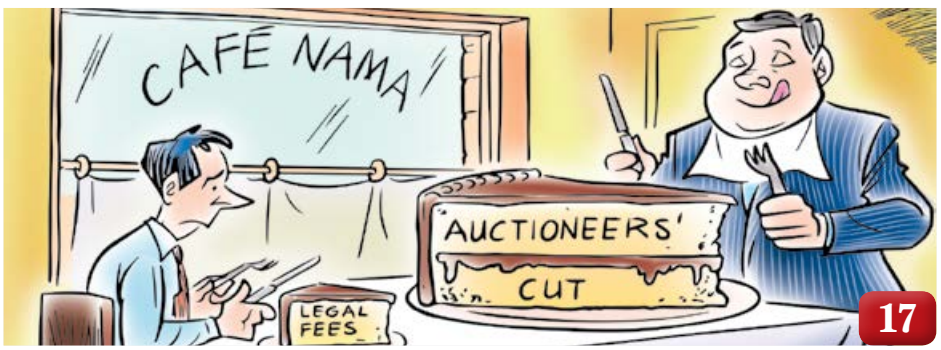

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nationwide

News from around the country

Keith Walsh is principal of Keith Walsh solicitors, where he works on civil litigation and family law cases

MONAGHAN

Drumlin County welcomes Miriam

Over 250 solicitors from all over the country travelled to Castleblayney to take part in the Monaghan Bar Association's major CPD event on 17 October. Organised by Justine Carty (Barry Healy & Co), the impressive array of presenters included broadcaster Miriam O'Callaghan. Special guests included District Court Judge Sean McBride and Cavan and Monaghan county registrar Joe Smyth. Seven CPD points were available, and all profits from the day go to the Solicitors Benevolent Fund. Dinner followed in the Glencarn Hotel, with dancing afterwards to country-and-western singer Robert Mizzell.

GALWAY

From Buffalo to Barna

The Galway Solicitors Bar Association (GSBA) welcomed a group of lawyers from Buffalo, New York, recently. There was a great turnout for the event, held in O'Connell's Bar, Eyre Square, on 4 October 2014. Lord Mayor of Galway Donal Lyons was a special guest.

The association was delighted with the turnout of 80 colleagues at the CPD seminar held at Galway Rowing Club on 16 October 2014 and organised by David Rowe.

Another four seminars, totalling 14 hours of CPD, will take place right up to Christmas. These are free to paid-up members, who are invited to suggest potential seminar topics by contacting James Seymour at jamesseymour@berwick.ie. Seminars are as follows:

- **Friday 24 October 2014 at 2pm (four hours' general) at Galway Courthouse, featuring George Maguire BL on employment law, Brendan Glynn BL on special needs education, and Karl Dowling BL on probate practice,**
- **Friday 14 November 2014 at 2pm (four hours' general) at Galway Courthouse, on the topic of medical negligence,**
- **Friday 21 November 2014 at 2pm (four hours' general) at Galway Courthouse, featuring Michael Kinsley BL on employment injunctions, Peadar O'Maolain BL on civil litigation, Gary McDonald BL (topic to be confirmed), and Marian Chambers Higgins (county registrar),**
- **Friday 5 December 2014 (two hours' general) incorporating the AGM and a presentation on costs by Shane O'Donnell (legal cost accountant). This will be followed by the Christmas social.**

DUBLIN

Sole practitioners' Mansion House meeting of minds

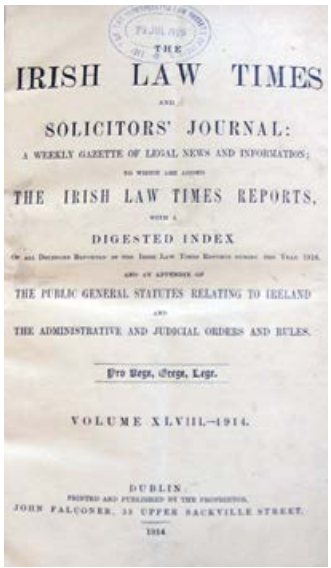
A coalition of sole practitioners under the leadership of Sonia McEntee and Neil Butler, with the assistance of local bar associations and Law Society Skillnet, presented a top-class Practice and Regulation Symposium on 3 October at the Mansion House, Dublin. Terence O'Sullivan (Cork) gave a master class on the pros and cons of sharing office facilities with other solicitors, while Seamus McGrath (investigating accountant, Law Society) dispensed some tips on preparing for Law Society investigations. The inimitable Richard Hammond (Mallow) shared his knowledge of ethics, regulations and complaints, while Richard Brown (Finex Global) examined the trips and traps associated with insurance renewal.

The highlight of the morning session was a panel discussion chaired by Kevin O'Higgins with Sonia McEntee (Law Society Taxation Committee), Suzanne Bainton (Conveyancing Committee) and Stuart Gilhooly (Litigation Committee) who dealt with a variety of practitioner queries and questions.

Sabina Hogan and Diane Donegan (Expd8) informed the symposium about using software for effective practice management and had some excellent tips on the use of VOIP in reducing telephone costs. Martin Molony (School of Communications, DCU) led a very interesting discussion on the use of technology in legal offices.

Neil Butler (Thurles) and Sonia McEntee launched 'Connect', which permits discussions and so much more.

Further details from the Sole Practitioner Network or directly from Sonia or Neil.



Irish Law Times at war

The Courts Centenary Commemoration Committee will host its second lecture in the Round Hall of the Four Courts on Thursday 13 November at 5pm.

The lecture – '*The Irish Law Times* goes to war: 1914-1918' – will be given by Dr Myles Dungan, with light refreshments to be served afterwards. The event will conclude at 7pm.

Places at this free event are limited so booking is essential. To reserve a place, email courtscentenaryevents@courts.ie.

UNHCR Ireland has moved

UNHCR Ireland has moved to new offices. Since 10 October 2014, its new address is 102 Pembroke Road, Ballsbridge, Dublin 4. All UNHCR Ireland email addresses and telephone numbers remain the same.

Knowledge investment

A focused approach to life-long learning can directly benefit a solicitor's career and practice. By undertaking continuing professional development (CPD), solicitors keep their professional knowledge, skills and abilities up to date. CPD events also provide valuable opportunities for members to network and share experiences with colleagues.

This is a good time for members to check that they are on target to complete the 2014 CPD requirement by 31 December 2014. The 2014 CPD requirement is 15 hours of CPD, including a minimum three-hour requirement for management and professional development skills, and a minimum of one hour on regulatory matters. The current CPD Scheme Booklet, regulations and record card are available to download from the CPD scheme at www.lawsociety.ie.

For advice on the scheme, tel: 01672 4802 or email: cpdscheme@lawsociety.ie.

Views sought on compulsory first registration

The statutory remit of the Property Registration Authority (PRA) includes the promotion and extension of the registration of ownership of land. Since the extension of compulsory first registration of title to the counties and cities of Dublin and Cork from 1 June 2011, leases, conveyances and assignments on sale of property within the entire 26 counties are now subject to compulsory first registration (CFR).

The PRA is currently examining how CFR can be further extended and has decided to engage in a consultation process. A questionnaire – now available on the PRA's website at www.surveymonkey.com/s/CFR-Survey – has been prepared in order to ascertain stakeholders' views in relation to three types of property transactions that could operate as additional CFR triggers: voluntary conveyances, assents by personal representatives, and appointments of trusts.

The PRA says that the responses it receives will prove extremely beneficial when examining the type of property transactions that could operate as additional CFR triggers. The deadline for responses is 21 November 2014. More information is available at www.prai.ie.

Finance scheme

Are you making preliminary tax and pension contributions before the electronic filing date of 13 November 2014? The Law Society has again put in place a very attractive financing scheme to finance these payments. Bank of Ireland is offering a very competitive rate of 6.74%, repayable in 12 monthly instalments.

Further details can be obtained from the Bank of Ireland credit line at 1890 365 222, email: businesslending@boi.com, or from Yvonne Burke at the Law Society, tel: 01 672 4901 (email: y.burke@lawsociety.ie).

Law Directory changes

The Law Society is writing to all solicitors and firms in early November in relation to entries for the 2015 *Law Directory*. If you have any amendments, please submit them by Friday 14 November 2014 to ensure their inclusion in the 2015 directory.

The quickest and easiest way to review current details and amend individual entries is to visit www.lawsociety.ie/lawdirectory. Each member will need to log in with their solicitor number and password (a link to this page is available in the 'News' section of the Society's website).

If you require any changes to the details for your firm, please note them on the form sent to all firms and return them to the Law Society. Queries should be emailed to lawdirectory@lawsociety.ie.

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Law School makes its mark with negotiation competition

PIC: JASON CLARKE PHOTOGRAPHY

The Law School is to host the 18th annual International Negotiation Competition for law students (INC) from 6 to 10 July 2015.

This will be the third large-scale international competition that the Law School has hosted in four years – including the International Mediation event in March 2013 and the International Client Consultation Competition in April 2012.

In all, 20 teams from around the world – Europe, North America, Asia and Australasia – are expected to travel to Dublin.

The INC is a competition in which a team of two trainee solicitors representing a client negotiates either a transaction or the resolution of a dispute with an opposing team of two trainee solicitors.

In the competition's rounds, each participating team receives in advance a set of common facts and confidential facts. They then prepare to negotiate an agreement with another team of trainees who will have received the same common facts – and the confidential information for the other side.

The judges address the apparent preparedness of a team, their flexibility in deviating from plans or adapting a strategy, the outcome of the negotiation and how it serves the client's interests, teamwork, the relationship between the negotiating teams, ethics and self-evaluation.

The Law School has compiled a busy programme that will see participants taking part in a number of events where they will learn from international negotiators and teachers and interact on a social level with fellow law students.

If you are a practitioner with experience of negotiation or alternative dispute resolution and would like to volunteer your time to judge a round or two, please email the competition organiser, Jane Moffatt, at j.moffatt@lawsociety.ie. Further information is available at www.lawsociety.ie/inc2015.

The implications of the *ADR Directive*

A seminar on the *ADR Directive* was held on 30 September in collaboration with the European Consumer Centre Ireland, the Law Society ADR Committee, the EU and International Affairs Committee and Law Society Professional Training. At the event were *(from l to r)*: Prof Christopher Hodges (University of Oxford), Rachael Hession (Law Society Professional Training), James Kinch (vice-chair, ADR Committee), Mary Casey (chair, EU and International Affairs Committee), Brian Hutchinson (UCD), Minister of State Gerard Nash, Christoph Decker (European Commission), Ann Neville (European Consumer Centre), Peter Tyndall (ombudsman and information commissioner), Ken Murphy (director general)

Practice and collaboration all around the nation

Pictured at the very successful Practice and Regulation Symposium, a collaborative event between the Sole Practitioners Network, the DSBA and Law Society Skillnet at the Mansion House on 3 October, were *(from l to r)*: Neil Butler (Neil J Butler & Co), Katherine Kane (Law Society Skillnet), Richard Hammond (Hammond Good Solicitors), Sonia McEntee (Sole Practitioners Network), Kevin O'Higgins (senior vice-president, Law Society), Attracta O'Regan (Law Society Skillnet), Keith Walsh (DSBA), Suzanne Bainton (Liston & Co), Terence O'Sullivan (Terence J O'Sullivan Solicitors), Susan Martin (Martin Solicitors) and Deirdre Fox (Deirdre Fox & Associates)

And you can quote me on that!

The Guidance and Ethics Committee is finalising plans for the launch of the so-called 'Quotations Project'. The project is being facilitated by the Law Society to make it easier for consumers to get a quote for legal services and to encourage new business for participating firms.

The legal services focus on four areas:

- Purchase of a residential property,
- Sale of a residential property,
- Making a will, and
- Probate.

Questionnaires have been developed in each of these areas to ensure that firms offering quotes will have a sufficient level of detail to determine whether the case or transaction is likely to be straightforward. Once satisfied that it is, they will be in a position to offer a quote.

If any case or transaction looks likely to be more complex, indicating that additional legal work will be required, it will be clearly flagged that this will attract additional professional fees.

The project will be launched to the profession before the end of the year. Firms will be invited to contact the Law Society if they wish to take part in the project. The participating firms will then be sent the relevant questionnaires and other material.

Those firms who decide to take an active part in the scheme's pilot phase will return an opt-in form to the Society. Such firms will be encouraged to establish internal systems to ensure that, when questionnaires are received from potential clients, requests for quotes will be processed quickly, thus giving firms the opportunity to promote themselves to those seeking legal services.

The launch of the project to the public will follow early next year. Potential clients seeking a quotation through this service will find a list of participating firms who have opted in on the Law Society's website. Contact details and the web address of these firms will be provided.

This will be a significant business opportunity for firms that see participation in the scheme as a good business choice, enabling them to explore and compete for business within the wider online market.

Public Interest Law Alliance pro bono roundtable

At the PILA pro bono roundtable event were *(from l to r)*: Noreen Maguire (Maguire Muldoon), Rebecca Keatinge and Orla Hubbard (both Brophy Solicitors), Matthew Kenny (Sheehan & Co), Diego Gallagher (Byrne Wallace), Geoff Moore (Arthur Cox), Niall Michel (Mason Hayes & Curran), Aine Flynn (KOD Lyons), Aisling Byrne (Eversheds), Adam Synnott (William Fry), Elaine Nerney (Hewlett-Packard), Paul Newdick (LawWorks), Eithne Lynch (PILA), Sinead Smith and Eamonn Conlon (A&L Goodbody)

The Public Interest Law Alliance (PILA) held a pro bono roundtable event on 13 October. The meeting was attended by PILA's partner law firms to discuss how they are using pro bono work to promote public-interest law and access to justice. They also examined how a pro bono culture could be developed.

In November, PILA will be conducting a survey to determine how much pro bono work is being carried out by solicitors, barristers and trainees. If you are interested in completing the survey, or in taking on pro bono work through PILA, visit www.pila.ie.

In-house committees share common ground

On Saturday 11 October, the Society's In-House and Public Sector Committee hosted a meeting of representatives from each of the in-house committees/divisions from the four Law Societies of Ireland, England and Wales, Scotland and Northern Ireland. The aim of the meeting was to understand how the in-house sector in each jurisdiction operates and to forge links and make connections with counterparts in the other jurisdictions

Don't be a monkey – try out your glorious *Gazette* online!

Readers of the *Law Society Gazette* will know that the magazine launched a brand new interactive version last January (see www.gazette.ie). Statistics have only been available since June, but it would appear that the new format is proving very popular with iPad and tablet users.

The total number of visits to the 'latest issue' of the *Gazette* rose from 303 in June to 763 in September. The 'top three' PDF clicks grew from 528 in June to 1,045 in September, revealing an encouraging uptake in the interactive version.

Visits to the *Gazette's* website are also encouraging. The total number of visitors from June through September stayed largely static each month – the uptake in June was 2,503 compared with 2,550 in September.

The most popular part of the website is the 'Search Archive' section, with numbers in September reaching 2,177 searches. Next in line were visits to the *Gazette's* indices – one of the most useful features of the site, since it allows visitors to search articles by year, by subject matter and by author.

In order to enhance your enjoyment of the online, interactive version of the *Gazette*, readers are strongly advised to download the magazine first to their computer or device before opening it. Trying to view the *Gazette* through a browser without first downloading it will lead to navigation problems and could prove as off-putting as monkey fleas.

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FOCUS ON MEMBER SERVICES

Shedding light on Support Services

Support Services' best known initiatives are 'Job Ads' (formerly 'Legal Vacancies') and 'Career Support'. These provide solicitors with the acknowledged leading source of information on legal opportunities, one-to-one career consultations, CV reviews, twice weekly opportunity updates, and interview preparation assistance.

The section also offers members a great deal more, for instance, the Law Society Retirement Trust Scheme. A recent survey of the profession found that 67% of members did not feel they had made adequate provision to support a comfortable standard of living in retirement. Anyone sharing those concerns should consider joining the Law Society Retirement Trust Scheme.

The mentor programme for solicitors setting up in practice facilitates solicitors who are considering setting up their own firm. The programme assists them in establishing contact with more senior and experienced practitioners. Mentors provide guidance on an informal and voluntary basis. This has proven to be the perfect sounding board for solicitors setting up new firms.

If you're thinking of selling or buying a practice, then 'Buy, Sell, Merge' is a user-friendly online forum for solicitors to anonymously advertise their interest in buying, selling or merging a practice or, indeed, anything else relevant to running a firm.

Precarious entitlements – practitioners beware

Conveyancers and drafters of wills dealing with farmland and single payment entitlements should be aware of a rather precarious current situation regarding 'entitlements', *writes Oliver Ryan-Purcell*.

Practitioners should pay particular attention where there is:

a) A death between 15 May 2014 and 15 May 2015, and
b) The will specifies or operates in such a way that the land goes to one person and the entitlements to another.

Because single payment entitlements come to an end in December 2014, the beneficiary receiving the entitlements will not get anything.

The person inheriting the land on the other hand, will receive an 'allocation right' with it. From that allocation right, that person will be able to apply for a corresponding number of basic payment entitlements in 2015. So, to this extent, it can loosely be said that, in such situations, 'entitlements' 'attach' to land.

The same principle applies to a death that takes place after 15 May 2013 – the only difference being that the estate had the opportunity to transfer the entitlements under the 2014 scheme year. Even where the entitlements are transferred out in 2014, the allocation right must still be transferred to the beneficiary and, as above, will be attached to the land.

The statutory basis for this is article 14 of Commission Delegated Regulation (EU) no 639/2014 of 11 March 2014, supplementing Regulation (EU) no 1307/2013 of the European Parliament and of the Council establishing rules for direct payments to farmers under support schemes within the framework of the Common Agricultural Policy and amending annex X to that regulation.

Concerning leases and sales of land and entitlements between 15 May 2013 and 15 May 2015, in these cases:

a) A separate document drafted by the Department of Agriculture and called a 'private contract clause' needs to be completed by the parties, and
b) The vendor or lessor needs to retain a hectare at least (no need to retain an entitlement any more), so as to prove his status as an 'active farmer'.

The reason for (b) above is that, in reality, an allocation right is being assigned or transferred from one active farmer to another. Also, having got the allocation right, the acquiring farmer would then apply in May 2015 for entitlements under the new basic payment scheme, based on the number of allocation rights he has – and, of course, he or she must continue to have a hectare for each entitlement applied for.

Practitioners should note that, for the purposes of the private contract clause, both parties may specify the number of entitlements that will be transferred to the transferee, based on the number of hectares being transferred by sale/lease. The value of the entitlements, however, will be based on the '2014 value' carried forward by the transferor to the new scheme in 2015. This is of particular importance for parties who have an existing lease agreement of land and entitlements in place under the Single Payment Scheme. While the same number of entitlements may be made available to the transferee, the 'value' of those entitlements under the Basic Payment Scheme may vary significantly from the value of entitlements leased out under the Single Payment Scheme.

Examples would be gifts, mergers, scissions and changes of legal entity. Where such transfers or changes to a holding take place after 31 May 2013, then the allocation right is held by the original holding and should be transferred to the new holding.

Such transfer is processed by way of the 2015 Transfer of Allocation Right application form (which replaces the standard Transfer of Entitlements application form for the purposes of establishing entitlements in 2015).

A private contract clause is not necessary in these cases. However, like inheritances, without sorting it out, a person or legal entity may well *not* end up with the expected basic payment entitlements, if such transactions occurred between 15 May 2013 and 15 May 2015.

The period 15 May 2013 to 15 May 2015 is really the period for establishing basic payments. The emphasis will be on *establishing* allocation rights. After that period, the new regime will be in place. People will know what entitlements they have, that is, *number* and *value*. They will then be able to lease them or sell such entitlements without the corresponding land.

This is being drafted by the Department of Agriculture at present. It will essentially be a transfer of allocation rights as opposed to a transfer of entitlements. There will be a number of very important terms and conditions attached, to which detailed attention should be given by anybody concerned.

(This article has been reviewed by an appropriate Department of Agriculture representative.)

Joe Schmidt celebrates Ronan Daly Jermyn expansion

PIC: MIKE SHAUGHNESSY

Maeve Joyce (Galway Chamber), Patrick Brennan (Ronan Daly Jermyn), Joe Schmidt (Ireland rugby coach) and Frank Greene (president of Galway Chamber of Commerce) at the event

Ronan Daly Jermyn celebrated the expansion of its Dock Street offices in Galway by hosting an evening with Ireland rugby coach Joe Schmidt at the Hotel Meyrick on 23 October 2014.

At the event, held in conjunction with the Galway Chamber of Commerce, the firm announced a name change from 'RDJ Glynn' to 'Ronan Daly Jermyn' – just in time for the milestone opening of its Dublin office in November. At that juncture, the firm will boast offices in Galway, Cork, Dublin and London. It currently employs 170 staff.

Padraic Brennan (partner-in-charge, Galway), said that the investment in its Galway offices was a reflection of its thriving local, national and international client base.

"Now with a national footprint, we feel the time is right to harmonise the name of the firm across our four offices. This is an exciting time for Ronan Daly Jermyn as we realise our strategic development plans and our vision of becoming Ireland's leading national law firm," he added.

Stephanie Coughlan, Patrick Ahern, Marie Gavin and Muriel McCabe of Ronan Daly Jermyn at the event

THERE'S AN APP FOR THAT

Or you could just use your watch...

APP: 30/30 **PRICE:** €0.49

We've all had one of those days or weeks where time seems to run away with itself and we feel like we just didn't get a tap done all day, *writes Dorothy Walsh*. Despite our iPad and iPhone diaries being synchronised to our desktops, we can still end up procrastinating.

If order to discipline myself and put some structure around my precious time, I sought out an app that would help keep me to my schedule. That app is *30/30*, a paid for app at – wait for it – €0.49. Who said you can't buy time!

This is a very simple app with no real gimmicks or tricks. The app is extremely basic and user-friendly. Setting up tasks, and times in which to complete them, couldn't be simpler. You can boost productivity and put yourself under pressure to complete tasks within a given timeframe.

Simply open the app on your tablet, set up a new tasks list by double-clicking in the space beneath the countdown clock, name the task, and give it a time within which it must be completed. Click the save button and you're off! You can create a list of tasks, with timers on each – a large clock on screen tells you what the next task is and how long you have to get it done.

When you're ready to get going, tap on the clock, which will then start to time your first task. If you complete the task before the end of the allotted time, tap the tick icon on the clock and the app will automatically move to the next task. Click on the clock to start task number two, and so on.

If you find that you're making good progress, but need an extra five or ten minutes to complete a particular task, tap the clock on the '+5' icon to buy some time. You can also deduct time where the task is not taking as long as expected. If you overrun, *30/30* will let you know by sounding an alarm. The app will then move on to the next task on the list. Managing your time in this way is very useful, since the task list you create can be reactivated on another occasion.

I just love this app. It is so simple and effective and does it all with a minimum of fuss. The bad news is that time flies, but with this app, to paraphrase Michael Altshuler, "the good news is, you're the pilot"!

MAYO SOLICITORS' BAR ASSOCIATION

PICS: JUNE WALSH PHOTOGRAPHY

There was a great turnout at the recent AGM of the Mayo Solicitors' Bar Association, held on 13 October in the Harlequin Hotel, Castlebar. Special guests included Law Society President John P Shaw, senior vice-president Kevin O'Higgins and director general Ken Murphy. The meeting elected Brendan Donnelly (FG Phelan & Co, Swinford) as the association's new president

At the AGM of the Mayo Solicitors' Bar Association on 13 October, the outgoing president Charlie Gilmartin congratulates incoming president Brendan Donnelly

Three new partners for ByrneWallace

ByrneWallace has announced the appointment of three new partners to the firm. Diego Gallagher has been appointed partner in the health and regulatory law team. Louise Forrest becomes a partner in the construction and procurement team. Gerry Beausang has joined the firm as a new partner in the firm's corporate team.

MONAGHAN BAR ASSOCIATION

Members of the Monaghan Bar Association welcomed RTÉ broadcaster Miriam O'Callaghan to their major CPD event in Castleblayney on 17 October

LK Shields' alumni celebrate recent successes

Over 60 of LK Shields' alumni gathered at The Cliff Townhouse, Dublin, to celebrate recent successes of the corporate and commercial law firm. The alumni were welcomed by managing partner Ed Butler.

Grainne Murphy and Laura Daly

Alan Browning and Claire Ryan

Olwyn Downey and Laurence Shields

Marco Hickey and David Williams

Shane Neville and Ide O'Neill

Gabrielle Hannon and Justin McKenna

Trevor Dolan and Olwyn Downey

Jennifer O'Neill, Ed Butler and Rachel Murphy

Meath golfers drive forward despite the elements

(Front, l to r): Jimmy Cummins, Judge Patrick McMahon, Judge Mary O'Malley, Pat O'Reilly (president, Meath Solicitors' Bar Association) and Mairead Ahern (county registrar). *(Back, l to r)*: Breda Cummins, Ronan O'Reilly, Elaine Byrne, Oliver Shanley, Ann McMahon, John Costello, Theresa O'Reilly and Tim Ahern

Thirty golfers braved the elements on 19 September to take part in the annual County Registrar's Golf and Dinner, which was held in the Knightsbrook Hotel and Golf Resort in Trim, Co Meath, *writes Elaine Byrne*.

Unfortunately, play was abandoned earlier than planned, due to poor weather conditions.

A large crowd attended the presentation dinner, where guests included Judge Mary O'Malley and her husband Kevin Costello, retired Judge Patrick McMahon and his wife Anne, Mairead Ahern (county registrar) and her husband Tim Ahern, James Cummins (retired service officer, Trim Courthouse) and his wife Breda, and Oliver Shanley (past-president, Meath Solicitors' Bar Association) and his wife Geraldine.

The bar association was also delighted to welcome Judge Dermot Dempsey and his wife Doreen, retired Judge Matthew P Smith and his wife Margaret, and retired county registrar Maire Tehan.

Ciaran Lalor and Julie Hurley BL

John Costello and Judge Mary O'Malley

Maire Tehan and Paul Smyth

Ann Nowlan coffee morning raises €5k for cancer research

The staff of Burns Nowlan Solicitors, Newbridge, Co Kildare, who organised a very successful coffee morning for cancer research in memory of their colleague, the late Ann Nowlan

Colleagues and friends of the late Ann Nowlan came out in strength to support a coffee morning in aid of cancer research in Newbridge, Co Kildare, on 17 October. The fundraiser was organised by the staff of Burns Nowlan Solicitors, in memory of Ann, who sadly passed away in September at the age of 44.

A native of New Ross, Co Wexford, Ann was an extremely popular and highly regarded solicitor in Co Kildare, where she was a partner in Burns Nowlan for many years. She had an extensive practice, with a particular emphasis on medical negligence and family law. She was a founder member of the Kildare and West Wicklow Collaborative Lawyers Group and a qualified mediator. She will be sadly missed by her colleagues and friends. She is survived by her husband Tom and daughters Ella and Alice.

The coffee morning raised €5,000 for cancer research, and donations are still pouring in. Colleagues can make a donation by visiting www.justgiving.com/remember/150001/Ann-Nowlan.

At the coffee morning for cancer research, organised by Burns Nowlan Solicitors, Newbridge, were Tammy O'Rourke (Burns Nowlan) and Helen Coughlan (solicitor, Patrick J Farrell & Company), Newbridge

Complaints and Client Relations retains ISO certification

PIC: CIAN REDMOND PHOTOGRAPHY

Complaints executive Martin Clohessy – one of the main drivers behind the retention of ISO certification in the Law Society's Complaints and Client Relations section

The Law Society's Complaints and Client Relations section has, once again, successfully retained its ISO certification. It first obtained the internationally recognised management standard in 2003 for the processes it uses in investigating, resolving and determining complaints made against solicitors. In order to obtain ISO certification, rigorous surveillance inspections take place, on site, each year. The certification confirms that the Complaints and Client Relations Section has implemented and maintains a quality management system that fulfils the requirements of IS EN ISO 9001:2000.

This global quality benchmark is based on core principles such as customer focus, factual decision-making and staff involvement. The standard is administered by the National Standards Authority of Ireland.

New Solicitors at O'Brien Lynam Solicitors

Photographed at the announcement are (l-r): Margaret Rowley, Michael Lynam (Head of Banking and Commercial Property Divisions) and Bernie Coleman

O' Brien Lynam Solicitors are pleased to announce the appointment of Bernie Coleman and Margaret Rowley as Associate Solicitors to their Commercial Property and Banking Divisions

Bernie Coleman

Bernie brings a wealth of experience to enhance the firm's existing Commercial Property Division. She has practised extensively as a Commercial Property/ Banking lawyer both in house, with a financial institution and in private practice. She has advised developers, investors and banks in relation to all aspects of commercial transactions.

Margaret Rowley

Margaret's extensive Banking expertise will strengthen the firm's existing Banking Division. She advises leading Banks in relation to Banking and Finance matters, including secured and unsecured lending transactions, restructuring, acquisition and asset finance and enforcement related matters.

15 Upper Fitzwilliam Street, Dublin 2. Tel: 01-6787446, www.obrienlynam.ie

Bernie Coleman Email: bcoleman@obrienlynam.ie Direct Dial: 01-9060041
Margaret Rowley Email: mrowley@obrienlynam.ie Direct Dial: 01-9060042

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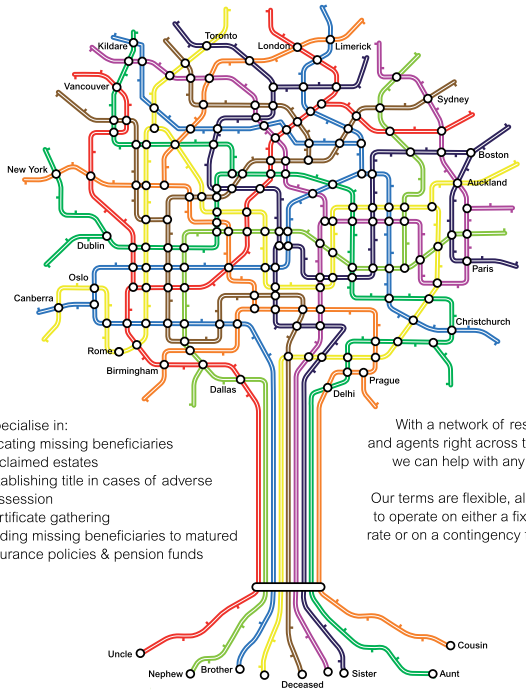

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Irish connection:

Tom McGrath is a retired Irish Solicitor and is now a Consultant with *Spanish Legal Services*. He has many years experience in practice assisting Irish people with their problems, investments and business transactions in Spain.

Edmund Sweetman is a practising Spanish Lawyer, a partner in a law firm in Spain and is legally qualified in Ireland. He is highly experienced in advising Irish clients on Spanish legal matters.

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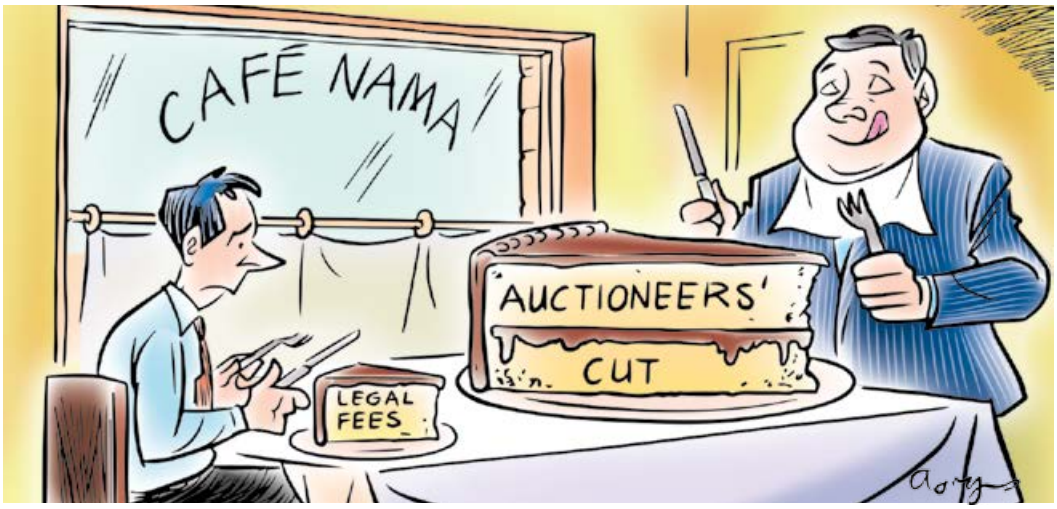
letters

Auctioneers' NAMA fees 'beggar belief'

From: Bernadette Glynn, solicitor, Bluebell Woods, Oranmore, Co Galway

Will someone please explain to me the reasoning behind the fees paid by NAMA, in sales of property, to auctioneers as opposed to solicitors, which, quite frankly – leaving aside the fact that the fee structure appears to have no grounding in logic, nor take into account the work carried out by both professionals – beggar belief.

In several transactions I have been involved in, the auctioneers' fees were 1.25% of the gross sales price (plus VAT), whereas we, as solicitors who draft the contracts for sale and deal with all legal matters pertaining to it (which, thanks to the introduction of the NPPR, LPT and registration of septic tanks, are never ending) only receive a fee of €1,200 (plus VAT and outlay), regardless of the sale price?



I have queried this fee structure on several occasions, but on each occasion I am told that these are the "standard NAMA legal fees guidelines". I have then requested sight of these guidelines but have not received them because, I was informed, the guidelines contained "confidential information"!

Needless to say, I am at a total loss to understand this extremely inequitable and discriminatory situation and would welcome anyone's explanation and clarification, as I have failed miserably to obtain it from NAMA.

Grade inflation correlation lacks substance, says student

From: Adam Casey, DCU BCL graduand 2014, Dublin City University

I will soon become an alumnus of the School of Law and Government and the relatively new BCL Law and Society degree at Dublin City University, and I look forward to my graduation in early November.

In a piece on *The Irish Times* website recently entitled 'DCU, UCC award more firsts in new indicator of grade inflation', by Joe Humphries (13 October 2014), I was dismayed when DCU was used as one of the examples in terms of grade inflation. I particularly noted the narrow-minded outlook that "a 2.1 in one university would not equate to a 2.1 in another university".

From my research into the content of the various law degrees offered by universities throughout the country, nothing has convinced me otherwise that DCU's BCL programme is just as academically challenging and engaging as those offered by the likes of Trinity or UCD.

True, the DCU School of Law and Government may not share the same historic grandeur as the likes of Trinity or UCD, nor does it have a similar line of well-heeled and well-connected citizens who have set the foundations for the law as it currently stands. Nonetheless, its lecturers and tutors are as capable as those within these institutions – and just as firm with their marking and grade awarding. Moreover, there is no doubt in my mind that DCU law graduates will go on to have an impact on the Irish legal system as future senior counsel, managing partners, highly renowned legal academics and talented practitioners.

It is clear to me that Humphries' views are rather disjointed, given the academic talent that has stemmed from the School of Law and Government at DCU. This academic talent is evident from the volume of students (including myself) who have received internships and traineeships at some of Ireland's largest law firms.

In my opinion, the headline was sensationalistic and the content of the article was lacking in any real substance. This is inexcusable, as it has the potential to devalue a DCU law student's qualification and taint the views of law firms when it comes to offering traineeships to such candidates. One can imagine that, over time, this could have a negative impact on DCU graduates in the future, should such insensitive and careless journalism continue.

News reporters and client-confidentiality obligations

From: Caroline Fanning, solicitor, Foxrock Avenue, Foxrock, Dublin 18

I have been reading the *Code of Conduct for the Bar of Ireland* adopted by a general meeting of the Bar of Ireland on 23 July 2014, in particular, section 6.2, which states:

"Barristers may not contact or engage with the press or other media on behalf of their client. However, when a matter has been at hearing before a court, barristers may, at their discretion, show the pleadings to a news reporter unless either the court has directed otherwise, or their client has expressly instructed them not to do so, or there has been an agreement between barristers or the parties not to do so."

It would be advisable for solicitors to expressly instruct a retained barrister (where applicable) not to show any pleadings to a news reporter unless the client has instructed otherwise, so as not to fall foul of our client-confidentiality obligations.

viewpoint

WEIGHING UP THE COSTS OF MEDICAL NEGLIGENCE

There have been proposals for the introduction of pre-action protocols and case management in Ireland, but Karen Bohane suggests that medical negligence cases have led to public accountability of our health service

Karen Bohane is a solicitor in the medical negligence department of Ernest J Cantillon Solicitors, Cork

At present, medical negligence cases are managed by the court in the same manner as other personal injury cases. While reform and improvement of this system is overdue and largely welcomed, the proposed reforms of the High Court Working Group on Medical Negligence and Periodic Payments, based on the British model of pre-action protocols and case-management systems, should not be seen as the ultimate panacea. Lessons must be learned from the British experience, and we must ensure that we do not jeopardise the benefits of the current system.

The problems identified by Lord Woolf prior to the introduction of the *Civil Procedure Rules* (CPR) in England and Wales in 1999 – namely, costs, delay and uncertainty – are the same problems currently complained of in this jurisdiction. Therefore, it is no surprise that the High Court working group has similarly proposed the introduction of pre-action protocols and case management in Ireland.

Protocols, procedures, payments

Pre-action protocols encourage a full exchange of information to ensure that parties have the clearest possible view of each other's position at an early stage, to enable parties to agree a settlement before proceedings begin, thereby avoiding litigation. The protocols provide for a letter of claim, response, exchange of essential documentation, negotiation, alternative dispute resolution, and costs penalties. For pre-action protocols to be workable, a corresponding extension to the *Statute of Limitations* and/or stopping of the clock at the pre-action stage (akin to the Injuries Board) would be required.

Case-management procedures entail prescriptive rules regarding the running of a split liability/quantum trial, cost-containment measures (for example, limiting the number of experts), and new rules on offers to settle.

The working group also recommended the introduction of periodic payment orders (PPOs). A PPO is a structured settlement, whereby the plaintiff periodically receives index-linked damages to meet the plaintiff's needs as they arise over their lifetime. This system provides certainty and security for victims that their future care needs will be catered for. In the past few years, a number of plaintiffs obtained interim PPOs, usually for a period of two years. However, pending legislation, the current consensus of the judiciary is that PPOs are consuming too much court time, and lump sums are awarded.

In January 2013, former Justice Minister Alan Shatter announced that drafting of the *Civil Liability (Amendment) Bill* was set to begin shortly and would take into account the recommendations of the High Court working group. However, the legislative programme published by the Government this autumn indicates that the heads of bill have yet to be approved by the Government and is due in 2015.

Woolf reforms

The introduction of pre-action protocols in Britain has resulted in a decrease in claims proceeding to trial. Between 2005 and 2010, 67% of British cases were resolved in the pre-action phase, compared with only 22% in Ireland.

Most British practitioners regard the CPR as a success, in that they provide a clear structure to litigation, encourage openness, and have made settlements easier to achieve. Nevertheless, the picture of success is qualified by some key limitations.

The success of the Woolf reforms in reducing the costs of litigation – which was a major objective of the reform process – has been mixed. Complainants observe that each potential saving by virtue of the reform is offset by other changes that bring work forward to an earlier stage, therefore 'front-loading' costs. Moreover, decreased costs overall are mostly seen in smaller, lower-value cases, and not in complex medical negligence cases, which are arguably the bulk of the problem.

> **'The adversarial litigation process allows for an exposition and investigation of the alleged wrongs in open court. This provides public vindication of the successful victim, or public exculpation of the defendant'**

In Ireland, the vast majority of plaintiffs and/or their solicitors have to fund the investigation and running of medical negligence cases themselves. The costs are extensive, and front-loading those costs will create an additional financial burden.

Open disclosure

We are all acutely aware of the criticisms of the current system, which primarily centre on delay and costs. However, there are some benefits. The adversarial litigation process allows for an exposition and investigation of the alleged wrongs in open court. This provides public vindication of the successful victim – or public exculpation of the defendant.

Litigation has a societal benefit.


PIC: ISTOCK

The public nature of proceedings and consequent media reports add to public accountability of our health service, potentially providing an invaluable service and exposing unacceptable medical practice and risk-management issues. Medical negligence cases have resulted in greater safety procedures being put in place in hospitals (including written protocols) and have raised the tide in favour of patients. Will this occur if justice is administered behind closed doors and if those deficiencies are not highlighted in public?

There is increasing evidence from the United States, and in particular from Dr Timothy McDonald (co-executive director for the University of Illinois at Chicago's Institute for Patient Safety Excellence) that a policy of openness and candour results in financial savings due to a reduction in the number of claims taken, and, where claims are pursued, a reduction in the settlement times and level of damages.

In this jurisdiction, the *Guide to Professional Conduct and Ethics for Registered Medical Practitioners* (18.3) sets out a duty to be candid to patients. In November 2013, the HSE introduced a national policy on open disclosure. However, there is no statutory duty of candour.

In February 2014, it was announced that the forthcoming *Health Information Bill* would contain a number of measures to promote patient safety, including provision to encourage open disclosure and consideration of a statutory provision that would allow medical practitioners to make an apology and explanation without these being construed as an admission of liability in a medical negligence claim.

> **Litigation has a societal benefit. The public nature of proceedings and consequent media reports add to public accountability of our health service**

Why can this move towards candidness not be extended to pleadings and, in particular, defences? Section 13 of the *Civil Liability and Courts Act 2004* does not go far enough.

Limited benefits

Reform is clearly necessary, as the current system is flawed. However, there are benefits to the present system, and we need to be careful not to throw the baby out with the bath water.

Pre-action protocols and case management, once in place, aim to decrease time and costs; however, the experience in Britain has been that the benefits are limited. An increasing number of cases settle at the pre-litigation stage. With regard to cost savings, it seems that the decreased costs have been largely confined to smaller, lower-value cases.

The benefits to the administration of justice and the public in affording public vindication for victims (and their families) – and the public accountability of health professionals and systems in exposing unacceptable medical practices and governance issues – should not be jettisoned in favour of merely obtaining faster systems.

Litigating medical negligence costs – but if it results in a safer healthcare system, the cost is worth it.

APPEAL COURT OPENS DOOR TO JUDICIAL APPOINTMENTS

The establishment of the Court of Appeal on 28 October has led to an abundance of new judicial appointments. Mark McDermott reports

Mark McDermott is editor of the Law Society Gazette

The new Court of Appeal has been described by Chief Justice Susan Denham as "the most important development in the structure of the courts since the foundation of the State".

Set between the High and Supreme Courts, the Court of Appeal will hear cases that have been appealed from the High Court, thus speeding up the appeals process and allowing the Supreme Court to concentrate on cases of significant importance.

A total of 327 appeals certified as ready for hearing will be retained by the current Supreme Court. A further 258 will transfer to the new court (see panel).

Mr Justice Sean Ryan has been announced as President of the Court of Appeal. In addition, seven judges of the High Court and one judge of the Circuit Court were appointed on 29 October: Mr Justice Peter Kelly, Ms Justice Mary Finlay Geoghegan, Mr Justice Michael Peart, Mr Justice George Birmingham, Ms Justice Mary Irvine, Mr Justice Garrett Sheehan, Mr Justice Gerard Hogan and Judge Alan Mahon. A ninth vacancy remains to be filled.

Three of these judges are former solicitors, namely Mr Justice Michael Peart, Ms Justice Mary Finlay Geoghegan and Mr Justice Garrett Sheehan.

> **These appointments go some way to begin to correct the imbalance of judicial appointments in the past**

Knock-on effect

The establishment of the Court of Appeal has had a knock-on effect, with the appointment of new judges to the High Court in order to fill vacancies left by those moving to the new court.

The Law Society has welcomed the news that two members of the solicitors' profession, Donald Binchy (president of the Law Society in 2011/2012) and Robert Eagar (former member of the Law Society's Criminal Law Committee) have been named as judges of the High Court. Others nominated to the High Court include Judge Tony Hunt, Judge Margaret Heneghan and Robert Haughton SC.

On 14 October, four serving judges of the Circuit Court were nominated to the High Court: Carroll Moran, Mary Faherty, Raymond Fullam and Carmel Stewart. On 23 July, Caroline Costello SC and Aileen Donnelly SC were also nominated. The Government also decided to appoint Ms Justice Deirdre Murphy to the Special Criminal Court, with immediate effect. Judge Murphy has replaced Mr Justice Paul McDermott, who was removed by

Donald Binchy

Robert Eagar

PIC: PETER CAVANAGH PHOTOGRAPHY

PIC: PHOTOCALL IRELAND

The new Court of Appeal judges were appointed on 29 October

consent from this court and remains a member of the High Court.

Commenting on the appointment of two solicitors to the High Court, Law Society director general Ken Murphy said: "This is superb news, and my colleagues and I wish Donald Binchy and Robert Eagar every happiness and success in their new roles.

"These appointments go some way to begin to correct the imbalance of judicial appointments in the past," he added. "Solicitors make up more than 80% of the legal profession but, prior to this announcement, produced less than 8% of the senior judicial appointments in the last 12 years. Solicitors offer a more diverse set of relevant legal skills, together with wider experience of law and of life. This is welcome news that is clearly in the public interest."

FOCAL POINT

transfers to the court of appeal

The Chief Justice, with the agreement of the other judges of the Supreme Court, gave a direction on 29 October 2014 specifying the class of appeals pending in the Supreme Court that will transfer to the Court of Appeal.

As a result of the direction, 327 appeals certified as ready for hearing (certified appeals) will be retained by the Supreme Court. A total of 258 certified appeals will transfer to the Court of Appeal.

COURT OF CRIMINAL APPEAL

Appeals from the Court of Criminal Appeal to the Supreme Court remain with the Supreme Court. Appeals pending in the Court of Criminal Appeal that were not fully or partly heard as of 28 October 2014 now transfer to the Court of Appeal. There are 142 sentence appeals ready for hearing, 75 appeals from conviction ready for hearing, and 346 uncertified appeals. Appeals that have been fully or partly heard in the Court of Criminal Appeal – and remain to be determined – will be determined by the Court of Criminal Appeal, which will continue in existence until those appeals are disposed of. There are 26 such appeals.

NEW REFORMED COURT

As a result of the amendment of the Constitution, a reformed appellate jurisdiction exercisable by the Supreme Court came into operation on 28 October 2014. A general right of appeal from the High Court to the Supreme Court will now be replaced by a general right of appeal to the Court of Appeal.

An appeal to the Supreme Court will lie from decisions of the Court of Appeal and the High Court where the Supreme Court is satisfied that the relevant jurisdictional thresholds set out in article 34.5.3 and article 34.5.4, respectively, are met.

human rights watch

NGOS AND THE EUROPEAN COURT OF HUMAN RIGHTS

The legal standing of NGOs appearing before the ECtHR came under scrutiny in July in the case of *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania*, writes Helen Kehoe

Helen Kehoe is policy development executive at the Law Society

Valentin Câmpeanu was a young man of Roma ethnicity who died at the age of 18, having spent most of his life in the care of the Romanian state. He was abandoned at birth and later diagnosed with "profound intellectual disability, an IQ of 30 and HIV". He also developed associated medical conditions such as pulmonary tuberculosis, pneumonia, and chronic hepatitis.

A team of monitors from the Centre for Legal Resources (CLR) visited him on 20 February 2004, a few hours before he died. The CLR is a Romanian NGO that monitors residential centres for people with disabilities. After his death, the CLR initiated various proceedings on his behalf in Romania, and later lodged a complaint with the European Court of Human Rights on his behalf on 2 October 2008. A central question before the court was whether the complaint was admissible.

Did the CLR have the capacity or the right to bring this action before the ECtHR?

> **The case demonstrates the crucial role that can be played by NGOs in facilitating and ensuring greater access to justice**

Background

Valentin Câmpeanu spent most of the first seven years of his life in a state orphanage. Then, in 1992, he was transferred to the Craiova Centre for Disabled Children.

In September 2003, a local county child protection panel ordered that he should no longer be cared for by the state, as he had recently turned 18. He was not present at this hearing held by the panel, nor had he any legal representation. Various medical and welfare assessments followed, with varying results. The first institution chosen for his transfer (Poiana Mare Neuropsychiatric Hospital – PMH) refused to admit him, as he had both HIV and a mental disability; the hospital stated that they lacked the facilities to cater for individuals with such a diagnosis. Other institutions were contacted between October 2003 and January 2004, and eventually he was admitted to a medical and social care centre on 5 February 2004.

According to a report issued by the care centre, Câmpeanu was in an advanced stated of "psychiatric and physical degradation" upon admission, without antiretroviral medication or information about his medical condition. He was medically assessed as suffering from "severe intellectual disability, HIV infection and malnutrition". It also noted that, the day after his admission, he became "violent" and assaulted other patients.

On 9 February 2004, he was taken to the nearest psychiatric establishment – which, incidentally, was the PMH, the first institution that had refused him admission the previous October. He was assessed as having a "severe intellectual disability", but he was not considered to be a "psychiatric emergency"; he was prescribed medication and sent back to the care centre that same day. His condition worsened. By this stage, the care centre had received a supply of antiretroviral medication and resumed this treatment; however, he continued to be "violent" and "agitated". The care centre considered that they lacked the facilities to treat Câmpeanu and, on 13 February 2004, it transferred him to the PMH for psychiatric treatment. On 19 February 2004, Câmpeanu stopped eating and refused to take his medication.

On 20 February 2004, a team of monitors from the CLR visited the PMH and noticed Câmpeanu's desperate condition. (A report by CLR staff from that visit noted that he was alone in an isolated, unheated, locked room, containing only a bed with no bedding. At the time, he needed assistance eating and going to the toilet, but the staff refused to help him, allegedly for fear that they would contract HIV – his only nutrition was through a glucose drip.) They requested that he be immediately transferred to an infectious diseases hospital, but the hospital manager at PMH refused the request. Câmpeanu died on 20 February 2004. Following his death, the CLR lodged various complaints with the prosecutor general of Romania, requesting criminal investigations into the circumstances leading up to and surrounding the death.

Complaint lodged

In 2008, the CLR lodged a complaint with the ECtHR, stating that Câmpeanu had been unlawfully deprived of his life as a result of various state agencies' actions and failures to act, that he had been subject to inhuman and degrading treatment, and that there had been no effective mechanism to safeguard the rights of people with disabilities placed in long-stay institutions, including by initiating investigations into suspicious deaths (that is, articles 2, 3 and 13 of the *European Convention on Human Rights*).

In this particular case, the CLR did not fit within the categories entitled to bring an action before the court, as it was not a victim of any violation of the convention (that is, a direct, indirect, or potential victim). Its legal standing had to be first determined before the merits of the case could be considered by the court.

The Romanian government argued that the CLR had no *locus standi* to lodge the complaint and that the case was

PIC: iSTOCK

therefore inadmissible, as it was incompatible with article 34 of the convention: "The court may receive applications from any person, non-governmental organisation, or group of individuals claiming to be the victim of a violation by one of the high contracting parties of the rights set forth in the convention or the protocols thereto."

The government argued that the CLR did not have victim status and that the CLR had not shown that it was the "valid representation of the direct victim".

The CLR argued that the case presented exceptional circumstances that had to be considered. These were that it was impossible for Valentin Câmpeanu to have access to justice and that the domestic courts had acknowledged the CLR's ability to act on this behalf. It also argued that its *locus standi* to act on behalf of Câmpeanu should be accepted by the court because of the court's principle of flexible interpretation of its admissibility criteria when this was required by the interests of human rights and because of the need to ensure practical and effective access to its proceedings.

Another unusual feature of these proceedings was the number of *amicus curiae* briefs received (for example, Human Rights Watch and MDAC), demonstrating the increasing influence and importance of such third-party submissions. In particular, the Council of Europe Commissioner for Human Rights (Nils Muižnieks) exercised his right to intervene in the proceedings (a rare occurrence) in relation to the issue of CLR's *locus standi*. The court noted the commissioner's view that "a strict approach to *locus standi* requirements concerning people with disabilities (in this case, intellectual) would have the undesired effect of depriving this vulnerable group of any opportunity to seek and obtain redress for breaches of their human rights, thus running counter to the fundamental aims of the convention".

Decision of the court

On the issue of the CLR's *locus standi*, the court concluded that, given the exceptional circumstances and the serious nature of the allegations being made, "it should be open to the CLR to act as a representative of Mr Câmpeanu, notwithstanding the fact that it had no power of attorney to act on his behalf and that he died before the application was lodged under the convention. To find otherwise would amount to preventing such serious allegations of a violation of the convention from being examined at an international level, with the risk that the respondent state might escape accountability under the convention."

The concurring opinion of Judge Pinto de Albuquerque was scathing in its criticism of the approach adopted by the court majority, and warrants consideration: "My point of discontent lies in the fact that the majority chose to approach the legal issue at stake in a casuistic and restricted manner, ignoring the need for a firm statement on a matter of principle, namely the requisites for representation in international human rights law. The judgment was simply downgraded to an act of indulgence on the part of the court ... To use the words of Judge Bonello, this is yet another example of the 'patchwork case law' to which the court sometimes resorts when faced with issues of principle."

On the merits of the case, the court agreed unanimously that there was a clear violation of articles 2 and 13 by the Romanian state.

The case demonstrates the crucial role that can be played by NGOs in facilitating and ensuring greater access to justice for some of the most vulnerable in society.

Following the lure of public-interest law, Eamonn Maguire took the opportunity of a summer fellowship in Seattle that fulfilled many heartfelt desires

100 days of SUMMER

Eamonn Maguire is advertising regulations executive at the Law Society of Ireland

I always try to avoid stereotyping. It kind of goes with the territory of being a 32-year-old, second-careering, full-time working, part-time studying law student. I regularly feel as though I'm teetering on my expiry date, so my life is a constant forward motion. There is just so much to be done.

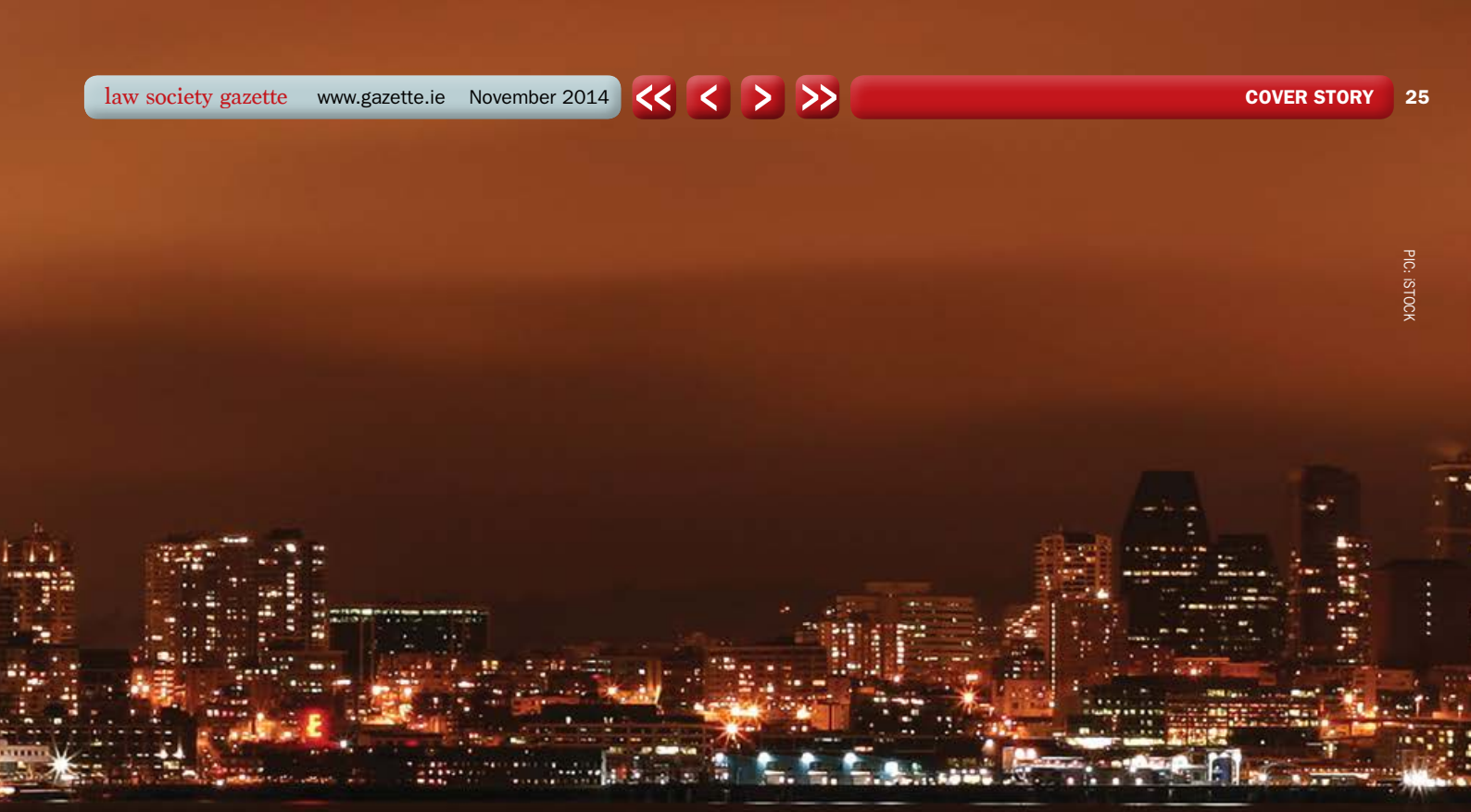
Unfortunately, and with much hilarity, not everybody is as personally invested in avoiding stereotyping what someone should look, behave and sound like – at any particular age. In fact, my summer was, in many ways, one long instruction inside the trenches of one of the last frontiers of discrimination – ageism. Mercifully, however, such ageism was not that of Seattle, my host city for the summer, but my own – brought with me to America following many years of heavy lifting across Europe.

When I first touched down in Seattle, two days in advance of the 4 July fireworks this year, the immediate strop I threw over my accommodation quickly saw me arrive and exit my digs. Of my three remaining flatmates, Flatmate No 2 subsequently told me (I ultimately moved back in and ended up loving the place) that, the instant I closed the front door behind me, the conversation ran:

Flatmate No 4: "I think he's gay."

at a glance

- Embarking on a legal journey
- The lure of public-interest law
- Opening doors with the Thomas Addis Emmet Fellowship
- A crash-course in the American legal system
- Considering a career in the public-interest sector



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Flatmate No 3: "Dude. He's not gay. He's just European."

Flatmate No 2: "Actually, he's both."

Since embarking upon my legal journey in 2008 with a BA in law from the Dublin Institute of Technology, after an indulgent and ostensibly pointless four-year undergrad in English literature in Trinity and a moderately more useful one-year postgrad in PR and marketing, the more I learned about law, the more I felt an automatic compulsion to give away any legal information I accrued. And it is to the non-profit sector that I would rather give it back because, without its continued support, guidance and instruction, I wouldn't have got this far – although I might be richer. But so runs the age-old dilemma.

Opening doors

As anyone who is qualified in law will know, the path is long, arduous, expensive and sacrifice-demanding. Unluckily for me, I had no idea how to get there, so I was often making it up as I went along. Luckily, however, my employers in the Law Society have been incredibly sympathetic and supportive. So, determined to move on, I concentrated my extra-circular efforts on gaining real experience as an assistant at various FLAC clinics across Dublin. Despite an initial baptism of fire one wet September night on Meath Street, it became instant, life-affirming stuff.

That was in 2012 and is, at least, one reason why I feel so rooted to Dublin. If you are reading this and are unsure of which area to go for – or, indeed, are already qualified and want to make a switch in the professional sector – and wish to dip your toe before you dive in, sign up as a FLAC volunteer . Even if altruism isn't necessarily your bag, it opens doors.

Such doors come in various guises, and the particular one that opened for me came in the form of the Thomas Addis Emmet Fellowship, run through FLAC and its sister organisation the Public Interest Law Alliance. I spent Valentine's night, sick and feeling sorry for myself, filling in an application form that very quickly became a statement of intent.

The opportunity to work for Washington Appleseed, which specialises in public interest law in Seattle, and with flights and accommodation paid for, as well as a stipend for living expenses, was too good a chance to pass up.

Following a rigorous application process, adjudicated by Justice Catherine McGuinness, I was offered the role. I applied immediately to the Law Society for two months' unpaid leave and called the bank. I fastened my seatbelt and fired up the jets – it was time to crack America.

Crash course

Since 1997, FLAC and the University of Washington, Seattle, have run a fellowship programme that commemorates the lives of two lawyers – Thomas Addis Emmet and William Sampson – both born in Ireland in 1764. They went on to have high-profile, successful legal careers in the United States.

The fellowship programme sees two law students – one from Ireland and the other from University of Washington – switch places for the summer and experience working in public-interest law in their respective jurisdictions.

From day two, I attended lectures in public-interest law hosted by the university's law school. Entitled 'External perspectives', the bi-weekly lecture series was a fascinating tour of public-interest law, hosted by members of the judiciary, legislature and, somewhat sexily, the FBI.

Week two, when I began my fellowship proper with Washington Appleseed, consisted of a crash-course in the American legal system where, from my downtown office, I was given a niche project to concentrate on for my

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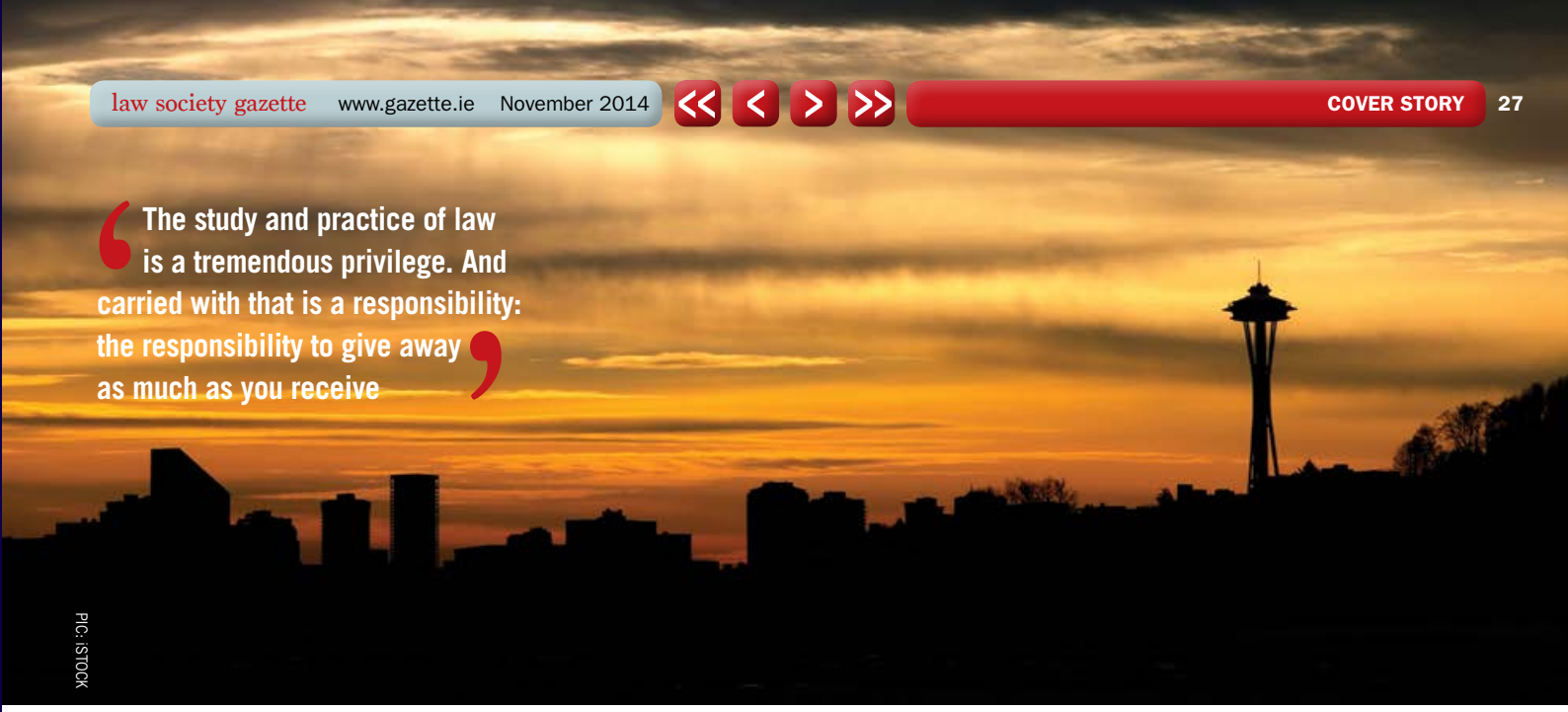

> The study and practice of law is a tremendous privilege. And carried with that is a responsibility: the responsibility to give away as much as you receive

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tenure. This consisted of a drive for legislative change so that it would be made mandatory for all schools in Washington State to make a nutritionally balanced breakfast available to all students. (The state has a student population of more than 70% who are eligible for free or reduced-price food at school.)

Intensive analysis of cross-state jurisdictional law followed, regular meetings with various stakeholder coalition charities, sourcing, organising, conducting and transcribing a series of interviews with key players in the educational arena that are invested in such programmes (including teachers, principals, wellness coordinators and nutritional directors). And just as FLAC tied me instantly to the heart of Dublin, the 'Breakfast-after-the-Bell' programme plugged me instantly into Seattle life. I thrived.

Home-coming

I did make loose plans to see Toronto, and maybe pop down to Vegas to see Britney, but I was enjoying my work and life in Seattle so much that I decided I didn't want to go anywhere else. As a result, the summer became a homecoming of sorts. And it was with that in mind that I began meeting with various leaders of the non-profit sector, from the *pro bono* counsel of Foster Pepper, to sole practitioners in family law practices, to the newly appointed (and friend of the *Gazette*) Chief of Police Kathleen O'Toole (former chief inspector of the Garda Inspectorate). It was a fascinating insight into how the law operates in practice, how much in common both jurisdictions have, and how, although the differing routes to qualifying may seem quite pronounced, that which we have in common outweighs that which keeps us apart.

So if you are reading this and are thinking that your current job is no longer fulfilling – or you would simply like to try something new – your first port of call should be the public-interest sector in Ireland.

Organisations like FLAC and PILA are just two members of what is a thriving and supportive community. From the Irish Council for Civil Liberties, Mercy Law Resource Centre, Community Law & Mediation, and the LGBT Lawyers' Association, to the newly established Peacebuilders Ireland, there are many organisations and associations out there – and one of them might just be for you.

In my opinion, the study and practice of law is a tremendous privilege. And carried with that is a responsibility: the responsibility to give away as much as you receive. As we move closer to the dawn of what appears to be a more inclusive and amorphous profession, it makes sense to diversify and enrich our professional skillset. Placing greater value and import on the more compassionate (and thus inevitably voluntary) areas of law and your contribution towards it – enabling a realisation of potential for both – is the best way towards achieving that aim.

FOCAL POINT

survival packs

As the summer rumbled on, my work became more nuanced. I began to understand the fiscal notes associated with various acts, to learn from experience how to refine best practices – but, most importantly, to have as my motive for working the nutrition and well-being of children. Is there a better motive for a summer project?

And although both Ireland and America are developed countries, the level of poverty that we see here was poor preparation for a summer spent addressing the invisible inequalities of wealth and corresponding depravation in Seattle. For instance, there are some areas of Washington State where, on a Friday, teachers give some of their pupils 'survival packs' of food to see them through the weekend. In recounting this, I am in no way painting myself as some sort of Padre Pio type, but you can't unsee things.

The timing of such work could not have been better. I wanted to be useful, but I also wanted to use my strengths in the most efficient way possible. I'd stuff envelopes, copy files, answer phones until 6pm, but to be exposed to work that acted as a blueprint to a career consisting of meaningful, policy-based, systemic change was the greatest gift I have ever been given.

Seattle itself is one of the worst-kept secrets in America, but beyond Meg Ryan's terrible bout of insomnia, is a location I had never considered. So it was much to my surprise that the city, straddling the pacific north-west, is a harmonious fusion of art, commerce and public-interest work.

Resident in the city's university district, I didn't need to venture far for my day-to-day needs. On my doorstep were coffee shops, cinemas, water sports, roller discos – and the law library. But weekends were spent at block parties, festivals and sailing Puget Sound with a friend on his small yacht. It was glorious.

WHO'S next

Tom, Mary and Jo are all 64 and work in the public sector at the same grade, in the same job. Tom can stay working for as long as he wants, but Mary must retire at 65, and Jo at 70. What's the difference? Elaine and Peter Dewhurst explain

Elaine Dewhurst lectures in the School of Law at Manchester University

Peter Dewhurst is a chartered accountant at Taxation Solutions in Cork

In a strange quirk of the public sector maximum retirement rules, the date of entry to the public sector will determine the age at which they can retire. Those who joined prior to 2004 (like Mary) must retire at 65. Those who joined after 2013 (like Jo) must retire at 70. Anyone who joined the public service between 2004 and 2012 has a free choice as to his/her age of retirement. The question is whether, as a result of these rules, a substantial proportion of the approximately 280,000 existing public sector workers in Ireland are being discriminated against on grounds of age.

The time monster

Both direct and indirect discrimination on grounds of age are prohibited by the *Employment Equality Act 1998* (section 6 as amended). While compulsory retirement is normally considered to be a form of direct discrimination, section 34(4) of the 1998 act provides that compulsory retirement ages do not constitute discrimination. However, developments in EU law, most notably Council Directive 2000/78/EC, which prohibits age discrimination in employment, indicate that compulsory retirement ages are a form of direct discrimination that can only be justified if the employer has a legitimate aim and the imposition of a mandatory retirement age is a proportionate means of achieving that legitimate aim. The High Court in *Donnellan v Minister for Justice* has confirmed that this objective justification test should be read into Irish law in order

at a glance

- Date of entry to the public sector will determine the age at which workers can retire
- While there may be certain legitimate aims identified, the imposition of a compulsory retirement age must be a proportionate means of achieving those aims
- Redressing the incoherence of Government strategy will require a holistic re-examination of the approach to retirement in the public sector as a whole and what appears to be a conflation of the rules relating to retirement age with those relating to pension age


POLICE
PIC: WIKIMEDIA COMMONS

to ensure compatibility with the directive. Therefore, in order for a compulsory retirement provision to be compatible with Irish and EU law, it must have a legitimate aim and it must be a proportionate means of achieving that legitimate aim.

The Court of Justice of the European Union has given a broad margin of discretion to member states in their choice of legitimate aim and objectives under the directive, such as maintaining a balance between the generations in organisations (*Petersen*, *Georgiev*), promoting access to employment for younger workers (*Palacios de la Villa*), workforce planning (*Fuchs and Kohler*) and avoiding unseemly disputes over fitness to work (*Rosenbladt*). However, purely individual interests such as cost reduction or improving competitiveness within an organisation will not be accepted (*Age Concern*, *Fuchs and Kohler*).

The Irish Government has expressly identified three legitimate aims for maintaining compulsory retirement in the public service:

- Encouraging the recruitment and promotion of younger workers,
- Ensuring the effective implementation of performance management systems, and
- Reducing public service numbers (in Dáil debates and in *Civil Service Conciliation and Arbitration Scheme: General Council Report 1481*).

PIC: WIKIMEDIA COMMONS

Damned hip! Regeneration trumps retirement every time

While the first and second aims have been held by the CJEU to constitute legitimate aims (*Commission v Hungary*, *Fuchs and Kohler*, *Seldon*), cost and staffing reductions are generally not considered to be legitimate aims (*Fuchs and Kohler*), due to the fact that a similar result could be achieved through the implementation of other measures, such as redundancy schemes.

Spearhead from space

While there may be certain legitimate aims identified (workforce planning and performance management), the imposition of a compulsory retirement age must be a proportionate means of achieving those aims. The CJEU has held that it is important to look at a variety of factors in determining whether a measure is an appropriate and necessary means of achieving a legitimate aim.

> Given the wide spectrum of jobs available in the public sector and the fact that many public sector workers retire at pension age in any case, the imposition of compulsory retirement for some workers and not others does seem inappropriate

One of the most important factors is whether the measure is appropriate in the specific economic sector in which it is invoked. So, if it is claimed that compulsory retirement is necessary to encourage the recruitment and promotion of younger workers in the public service, it must be determined that there is a particular difficulty in recruiting or promoting such younger workers in the first instance.

In this respect, factors such as the type of work involved and the number of available positions within the public sector are relevant considerations. Where job-blocking is an issue (due to the permanent nature of the employment contracts), this will also be a relevant consideration. Where the work is particularly skilled and only a limited number of jobs are available, then the CJEU has been more inclined to determine that compulsory retirement may be an appropriate means of achieving the aim of encouraging the recruitment and promotion of younger workers (*Petersen*, *Fuchs and Kohler*, *Georgiev*). Given the wide spectrum of jobs available in the public sector and the fact that many public sector workers retire at pension age in any case, the imposition of compulsory retirement for some workers and not others does seem inappropriate. Even with the existing compulsory retirement measures in place for certain workers, recruitment and promotion of younger workers has not been widespread. Less than 3% of the public sector employees are under the age of 30.

Similar considerations will be relevant in relation to the gradual imposition of performance management systems. Where such systems are already in place and operational for other workers (and there would appear to be such a system in place for the majority of public sector workers already), reliance on this legitimate aim may not be considered appropriate. Lady Hale in *Seldon* specifically noted that "avoiding the need for performance management may be a legitimate aim, but if in fact the business already has sophisticated performance management measures in place, it may not be legitimate to avoid them for only one section of the workforce".

Another central element of assessing whether a measure is proportionate is whether the measure is consistent with the legitimate aims pursued. Even if the measure has a legitimate aim, if it is not consistently applied, it may not be proportionate and therefore not absolutely necessary. As noted above, there are different rules on maximum retirement ages across the public service. If it is argued that compulsory retirement is necessary to encourage the

recruitment and promotion of younger workers, for example, then the fact that a certain percentage of workers (those hired between 2004 and 2012) are not subject to a compulsory retirement age undermines this objective. Similarly, if the aim is to ensure the smooth transition to performance management, the fact that a majority of the public sector are already subject to this system without difficulty again undermines the necessity of the measure.

The case of *Petersen* provides a clear application of this rule. The CJEU held that, while a compulsory retirement age of 68 for panel dentists in Germany was objectively justifiable on the grounds of the protection of health, it would not be proportionate where many dentists outside of the panel system could practice beyond the age of 68 years, as this was inconsistent with the legitimate aim pursued.

In the Irish public sector, the broad nature of the exception to the compulsory retirement measure (anyone hired from 2004-2012 is exempt) clearly is not consistent and potentially undermines the overall objectives cited – namely, the encouragement of the recruitment and promotion of younger workers and the development of the performance management system.

The seeds of doom

Retirement is a life-changing event and one that requires planning for the many social, psychological and financial effects it may have. While many individuals choose to retire when they reach their pension age, many individuals have expressed a desire to continue in work, to share their skills and experience, to maintain social networks and to ensure their financial security. Research also suggests that extending working life, where desired, enhances the psychological and physical health of older workers. An increased life expectancy, combined with reduced migration and low birth rates, also presents significant economic challenges which an extension to working life can address to a certain extent. Freedom of choice with respect to retirement can, therefore, have many societal benefits.

However, such choice is not a feature of employment for many public sector workers, and they may well be able to successfully invoke the age discrimination rules in Ireland. This is because certain aims expressed by Government may not be considered legitimate or – even if legitimate – may not be considered appropriate or necessary, particularly given the lack of consistency in the application of the existing rules.

The situation of Tom, Mary and Jo highlights not only the discriminatory nature of the rules, but a lack of coherent strategy in the management of retirement in the public sector. In order to redress the discriminatory nature of the rules, compulsory retirement ages should be applied consistently to all public sector workers (as long as this is a proportionate means of achieving some legitimate aim).

Redressing the incoherence of Government strategy might be more difficult, however, and will require a holistic re-examination of the approach to retirement in the public sector as a whole and what appears to be a conflation of the rules relating to retirement age with those relating to pension age. Failure to resolve this issue, while not only undermining the morale of the public sector workforce, may also ultimately lead to costly age discrimination claims by public sector workers like Tom and Mary. How soon will it be before such claims emerge?

look it up

Cases:

- C-411/05 *Palacios de la Villa* [2007] ECR I-8531
- Case C-159/10 *Fuchs and Köhler* [2011] ECR I-6919
- Case C-250/09 *Georgiev* [2010] ECR I-11869
- Case C-286/12 *Commission v Hungary* [2012] ECR I-0000
- Case C-341/08, *Petersen* [2010] ECR I-0047
- Case C-388/07, *Age Concern* [2009] ECR 1-1569
- Case C-45/09, *Rosenbladt* [2010] ECR I-9391
- *Donnellan v Minister for Justice, Equality and Law Reform* [2008] IEHC 467
- *Seldon v Clarkson, Wright and Jakes* [2012] UKSC 16

Legislation:

- *Civil Service Regulation Act 1956*
- *Directive 2000/78/EC*
- *Employment Equality Act 1998*, section 34(4)
- *Employment Equality Acts 1998-2011* (section 6 as amended)
- *Public Service Pensions (Single Scheme and Other Provisions) Act 2012*
- *Public Service Superannuation (Miscellaneous Provisions) Act 2004*

INSOLVENT solution

Richard Hammond is a partner in Hammond Good Solicitors in Mallow

Over the last few years, the legislature has continued to struggle with a move from the formerly heavily punitive bankruptcy regime to a more rehabilitative one. Richard Hammond gives an overview of contemporary personal insolvency

It is over 180 years since Justice Joseph Story of the US Supreme Court described bankruptcy as "a law for the benefit and relief of creditors and their debtors, in cases in which the latter are unable or unwilling to pay their debts". Though the practical operation of bankruptcy law in Ireland has, for many years, defied this definition – being rarely of benefit to either creditor or debtor – the principle espoused by Justice Story has nonetheless continued to be the objective of our laws.

The bulwark of Irish law in relation to bankruptcy has, for a generation, been the *Bankruptcy Act 1988*, which consolidated the law in the area and repealed a number of old statutes. The focus of the 1988 act was punitive rather than rehabilitative. Most citizens and many lawyers suffered the illusion that the 1988 act provided for a set 12-year period of bankruptcy. In fact, the 1988 act provided for an open-ended bankruptcy that could persist without limit, unless the debtor could avail of one of six options to discharge the bankruptcy. Each of these options was onerous, but the most attainable one was that, once 12 years had passed and the debtor's estate had been realised in full, the court then had to be persuaded that it was reasonable and proper to grant a discharge.

Compared with many neighbouring countries, our period of bankruptcy was considered draconian. As an interim measure, the *Civil Law (Miscellaneous Provisions) Act 2011* made a number of important adjustments to bankruptcy law. The first was to reduce from 12 years to five years the period after which a debtor could apply for discharge where their estate had been realised in full. The second was to introduce an upper limit on the length of the period of bankruptcy, stipulating that, if not already disposed of, every bankruptcy should stand discharged on the 12th anniversary of the adjudication order. As a direct consequence of this provision, the number of bankruptcy discharges jumped from four in 2010 to 339 in 2011, before falling back to four again in 2012 as hundreds of longstanding bankruptcy cases were washed out of the system.

> There are professions where adjudication as a bankrupt is an automatic bar to practising. This is not the case in the solicitors' profession

The power of three

Further improvements arose from the *Personal Insolvency Act 2012*. The main amendments to the 1988 act were not commenced until 31 July 2013 and, as of November 2014, have only been in effect a mere 16 months. The key amendment was to reduce the ordinary period of bankruptcy to three years. Debtors continue to be able to exit bankruptcy in a shorter period of time, but the conditions for such discharge remain onerous.

Despite this improvement, the legislature continued to struggle with the move from a punitive to a rehabilitative bankruptcy regime. This is starkly illustrated by the introduction, from the 2012 act, of two new sections to the 1988 act. Section 85A allows for interested parties (for example, the official assignee in bankruptcy; a creditor) to object to the automatic discharge from bankruptcy after three years. The objection ought to be grounded on some *mala fides* on the part of the debtor and, if upheld, could result in the period of bankruptcy being extended for up to another five years, that is, up to eight years in total.

While section 85A might be understandable on the basis of the *mala fides* of the debtor, the new provisions found in section 85D are of far greater concern. This section allows the court to order that payments continue to be made to the official assignee in bankruptcy for up to five years after the

PIC: ISTOCK

debtor's bankruptcy has been discharged. The court must have regard to the reasonable living expenses calculated by the Insolvency Service of Ireland (ISI), and the bankruptcy payment order may be varied if circumstances change. There are no criteria specifying when a bankruptcy payment order ought to be made. Accordingly, it is conceivable that, in any bankruptcy situation, even with the debtor providing full disclosure and cooperation, the debtor could be entangled with the bankruptcy process for up to eight years.

Mechanical man

The 2012 act also introduced three new procedures for dealing with personal insolvency. These are:

- A debt relief notice (DRN),
- A debt settlement arrangement (DSA) and
- A personal insolvency arrangement (PIA).

The DRN applies to overall indebtedness up to €20,000. The DSA relates to unsecured debt on a limitless basis. The PIA deals with secured debt and unsecured debt, with the secured debt capped at €3 million, unless increased with the consent of all of the secured creditors. Each of these mechanisms aims to assist the debtor in reducing and managing their indebtedness so as to be restored to solvency, while assisting the creditors in achieving a reasonable outcome relative to the provisions of each mechanism and the means of the debtor.

The new mechanisms have had some success. The ISI reports that, where a protective certificate has issued, four in five DSAs are successful, while two in three PIAs are successful. Any success in restoring a debtor to solvency is to be lauded. However, the numbers of unsuccessful outcomes are

at a glance

- Compared with many neighbouring countries, our period of bankruptcy was considered draconian
- The *Civil Law (Miscellaneous Provisions) Act 2011* made a number of important adjustments to bankruptcy law. The first was to reduce from 12 years to five years the period after which a debtor could apply for discharge where their estate had been realised in full
- The *Personal Insolvency Act 2012* has significantly improved the personal insolvency and bankruptcy landscape for debtors

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higher than may have been anticipated, and the numbers of applicants are lower than may have been expected.

A protective certificate is a key step in the process of a DSA or a PIA, and provides a hiatus in relation to proceedings against the debtor to allow for proposals for an arrangement to be developed. Since commencing full operations, from October 2013 to 30 September 2014, there have been a total of 402 protective certificates issued – that is, 106 for DSAs and 296 for PIAs. When the 2012 act was working its way through the legislature, a flood of applications for mechanisms that would be 'manna from heaven' to the debt-laden populace was expected. Instead, the level of applications has been more of a steady spring stream.

Many reasons may be offered to explain the statistics. Among the most germane is that the ISI calculated reasonable living expenses to be preserved in any arrangement to ensure that debtors would not be left utterly impoverished by the mechanisms; yet many debtors' incomes were already below this level, resulting in no excess income to generate payments for creditors.

In relation to the higher than imagined level of unsuccessful outcomes, particularly in relation to PIAs, some responsibility must be levied in this respect on financial institutions, certain of which have been reluctant to embrace the new mechanisms and have refused to allow reduction of secured debt on otherwise worthwhile circumstances for a PIA. The omission of an independent review mechanism in these circumstances, akin to the Credit Review Office for withdrawn or refused credit, is a defect in the 2012 act.

Notwithstanding that the new and improved bankruptcy laws could undoubtedly be improved further to reflect a more rehabilitative outlook, it is clear that many debtors see the reduced term of bankruptcy as bearable in their straitened financial position. In the past, it would have been rare and unusual for a solicitor to advise a client to apply for self-adjudication as a bankrupt (that is, volunteer for bankruptcy rather than being compelled into bankruptcy by a creditor) when the period of bankruptcy persisted for at least 12 years. Now that there is, ordinarily, a discharge from bankruptcy after three years, over nine out of every ten applications are for self-adjudication.

Finding Nemo

While many solicitors will be advising clients on the merits and demerits of self-adjudication as a bankrupt, there will also be solicitors considering that option for themselves. The potential for involvement with the bankruptcy process for eight years is an undoubted disincentive, while the possibility of being restored to solvency after three years is a clear incentive.

The Law Society of Ireland's practising certificate application contains a questionnaire that requires, among other things, a solicitor to disclose whether they have been adjudicated bankrupt and to disclose whether they have entered into an arrangement with creditors, including arrangements under the 2012 act. There are professions where adjudication as a bankrupt is an automatic bar to practising. This is not the case in the solicitors' profession, and the question of issuing a practising certificate to a bankrupt solicitor or a solicitor who has availed of the new mechanisms under the 2012 act will be considered by the Law Society on a case-by-case basis. It is to be expected that, where a practising certificate is granted in such circumstances, clear protective measures in relation to client account moneys will be required.

Now that the 2012 act has had an opportunity to be tested in practice, it is clear that there are a number of kinks in the system to be ironed out. Nevertheless, the 2012 act has significantly improved the personal insolvency and bankruptcy landscape for debtors, both clients and solicitors alike.

FOCAL POINT

isolated by debt

Earlier this year, the Insolvency Service of Ireland (ISI), an independent Government body set up to help tackle personal debt problems, researched the behaviour and attitudes of people struggling with problem debt. Through this research, it became clear that people were not aware of the available supports.

At a recent town-hall event in Cork, Cathy Clarke (head of regulation at the ISI), said: "It is important that people know that there are debt solutions available for every type of debt problem and that the solutions provided by the ISI will give individuals protection from their creditors, will provide them with a reasonable standard of living, and will be a permanent, sustainable solution to their debt problems. A debt solution from the ISI means no more phone calls, letters or visits from your creditors."

The ISI is taking a two-pronged approach in an attempt to inform debtors of the debt solutions available. The first approach is new, debtor-friendly publications, a new website www.backontrack.ie, and media advertisements. The second approach involves nationwide speaking events directed at important community representatives (elected representatives and professionals working in the area) in order to inform them of the options available to people struggling with debt who may come to them for help.

For more information about these solutions and to hear the stories of debtors who have availed of them, visit www.backontrack.ie or tel 076 106 4200.

FOCAL POINT

bankruptcy tourism

In recent years, there have been a number of high-profile cases of 'bankruptcy tourism', with people availing of shorter bankruptcy periods in other jurisdictions. The mobility required militated against this option for most debtors, who instead waited for the period of bankruptcy in Ireland to be reduced by the 2012 act. This reduction and the inability of low-income debtors to avail of the new mechanisms have resulted in a phenomenal increase in the number of bankruptcy applications in Ireland. Throughout the economic downturn, the number of bankruptcy adjudications increased steadily from four in 2007 to 33 in 2011 and 67 in 2013. In the first quarter of 2014, there were twice as many bankruptcy adjudications than in 2011. In the nine months to the end of September 2014, there have been 301 people adjudicated bankrupt.

look it up

Legislation:

- *Bankruptcy Act 1988*
- *Civil Law (Miscellaneous Provisions) Act 2011*
- *Personal Insolvency Act 2012*

THE HITCHHIKER'S GUIDE TO SECTION 49

Andrew Cody is managing partner of Reidy Stafford Solicitors in Kildare

In certain circumstances, the Law Society can refuse to issue a solicitor's practising certificate – or issue it with conditions. Andrew Cody finds that the answer to life, the universe and everything is, in fact, 49

It's that time of year again, when solicitors are starting to contemplate applying for their indispensable practising certificates. Most solicitors will be aware of the provisions contained in section 49 of the *Solicitors Act 1954*, as amended by section 2 of the *Solicitors (Amendment) Act 2002*. These provisions apply where a solicitor makes an application for a practising certificate in a number of circumstances, which include:

- Where the solicitor has not held a practising certificate within the previous 12 months, or
- Has failed to exercise supervision over each office,
- Has had a judgment or decree given against him,
- Has been adjudicated a bankrupt,
- Has been sentenced to a term of imprisonment,
- Has failed to comply with a determination of the Law Society,
- Has failed to satisfy the Society that he is fit to carry on the practice of a solicitor, having regard to the state of his physical or mental health.

Other such circumstances include the financial state of the solicitor's practice and the nature and number of complaints against him in the preceding two years.

Space is big

The circumstances set out in section 49 that can lead to a practising certificate being withheld have been described as "a curious conglomerate" – but all of them explainable. These circumstances should be interpreted as instances in which "the issue of a practising

at a glance

- If a solicitor fails to satisfy the Society that he should be issued with a practising certificate, or a practising certificate not subject to specified conditions, the Society may direct the Registrar of Solicitors to refuse to issue the solicitor's practising certificate, or to issue it with conditions
- The Society must take account of all the circumstances, including, where appropriate, the number and nature of complaints made to the Society either alleging misconduct by the solicitor or complaints alleging inadequate services and excessive fees within the preceding two practice years

> Section 49 should be exercised 'only where there is a demonstrable probability that a practising certificate issued will be abused'

PIC: ISTOCK/GAZETTE STUDIO

FOCAL POINT

i am the law

The provisions that deal with complaints are contained in section 49(1)(q) as follows:
"(q) The solicitor has failed to satisfy the Society that he or she should be issued with a practising certificate or a practising certificate not subject to specified conditions, having regard to all the circumstances, including, where appropriate:
i) The financial state of the practice,
ii) The number and nature of complaints made to the Society, either alleging misconduct by the solicitor or under section 8 or 9 of the *Solicitors (Amendment) Act 1994* within the preceding two practice years, or
iii) The need adequately to protect or secure the interests of the solicitor's clients."

Section 49(2)(a) states: "Where this section applies, the Society shall, as soon as practicable, consider the application (including such submissions as may have been made by or on behalf of the applicant) and shall thereafter direct the registrar to do one of the following things:
i) Issue a practising certificate unconditionally,
ii) Issue a practising certificate subject to such specified conditions as the Society thinks fit, including conditions requiring the solicitor concerned to take any specified steps the Society considers necessary for his carrying on an efficient practice as a solicitor and notwithstanding that any such specified steps may result in expenditure being incurred by the solicitor concerned,
iii) Refuse to issue a practising certificate."

certificate would involve the danger of inadequate or dishonest service being given to the public or of the continuance of unprofessional conduct" (Kingsmill Moore J in *Re: Crowley* [1964])

So the provision is not to be regarded as a disciplinary matter, but rather as a 'protection' for the clients of solicitors. Accordingly, section 49 should be exercised "only where there is a demonstrable probability that a practising certificate issued will be abused".

If a solicitor fails to satisfy the Law Society that he should be issued with a practising certificate, or a practising certificate not subject to specified conditions, the Society may direct the Registrar of Solicitors to refuse to issue the solicitor's practising certificate, or to issue it with conditions.

> As the conditions to be imposed by the Law Society are to be imposed as a necessary precaution against the likelihood of future misdoing, those conditions must be aimed at reducing the nature and number of complaints being made against the solicitor

The Society must take account of all the circumstances, including, where appropriate, the number and nature of complaints made to the Society either alleging misconduct by the solicitor or complaints alleging inadequate services and excessive fees within the preceding two practice years (covered by sections 8 or 9 of the *Solicitors (Amendment) Act 1994*), or having regard to the need to adequately protect or secure the interests of the solicitor's clients.

Time is an illusion

Solicitors against whom multiple complaints have been made within the preceding two years may receive a letter from the Regulation Department in mid-December informing them that the Complaints and Client Relations Committee intends to consider their application for a practising certificate under section 49.

The solicitor is furnished with a summary of all complaints made within the last two years (but is advised that any complaints that were rejected or withdrawn will not be taken into account). The solicitor is also advised that he or she is not expected to prepare a detailed response to each individual complaint; rather, they are being asked to explain what steps they are taking to prevent further complaints occurring. Section 49 imposes a positive obligation on the solicitor to satisfy the Society that he is a person to whom a practising certificate, or a certificate not subject to conditions, should be issued.

The solicitor is invited to make submissions as to why he should be issued with a practising certificate, or a certificate without conditions attached, having regard to the nature and number of complaints against him within the preceding two years and the need to adequately protect or secure the interests of the solicitor's clients. The solicitor is invited to attend the committee meeting, which normally takes place during the last week in January, if they wish to make submissions in person. Any solicitor who appears before the committee can be legally represented.

Thanks for all the fish

Devitt P in *Re: D* outlined the factors to be taken into account by the Law Society in exercising its discretion: "When considering whether a certificate should or should not be issued, the Society should, however, take into account all the relevant circumstances existing at the time the decision has been made, having due regard to the interests of the public, the interests of the profession, the interests of the clients of the solicitor in question, and the interest of the solicitor himself. No attempt should be made to lay down a rule which would be applied to all cases irrespective of individual circumstances … each case must be decided on its own particular merit."

FOCAL POINT

condition critical

The act does not specify the conditions that may be imposed on a practising certificate, but examples of conditions include:

- **To act only as an assistant solicitor in employment to a solicitor of ten years' standing, to be approved by the Law Society,**
- **Not to hold, receive, or have responsibility for any client moneys,**
- **To put in place specified procedures to deal with particular types of complaints,**
- **Not to act as a signatory on any client or office account cheques,**
- **To deliver accountants' reports more frequently,**
- **Not to undertake a particular type of work,**
- **Not to be appointed as an executor, trustee or personal representative in relation to any matter involving the administration of estates,**
- **To attend a course approved by the Law Society.**


PIC: WIKIMEDIA COMMONS

In arriving at its decision, the Society must be satisfied that there is a demonstrable probability that, if the certificate is issued, it will be abused. It follows that the Society should discharge its functions in a fair manner that is proportionate – that is, it should impose the least intrusive restrictions on the solicitor that are consistent with achieving the Society's statutory obligations in the circumstances of a particular case before it.

As the conditions to be imposed by the Law Society are to be imposed as a necessary precaution against the likelihood of future misdoing, those conditions must be aimed at reducing the nature and number of complaints being made against the solicitor.

In making their decision, the committee will be cognisant of a number of factors, such as:

- The number of complaints made within the last two years,
- The nature, outcome, and gravity of the complaints,
- The likelihood of further complaints,
- The risk to clients and the public,
- Whether there was any delay on the part of the solicitor in responding,
- Whether it was necessary to refer the matter to the committee because the solicitor did not respond,
- Whether it was necessary to make an application to the High Court to secure the solicitor's cooperation,
- Whether the committee make any formal direction under sections 8 or 9 of the *Solicitors (Amendment) Act 1994*,
- Whether the complaint was referred to the Solicitors Disciplinary Tribunal,
- The findings of the tribunal, and
- The findings or directions of the High Court, if applicable.

The committee will pay particular attention to compliance with previous conditions, directions, or undertakings, and also whether or not the frequency of complaints is increasing or decreasing.

With infinite majesty and calm

The solicitor's submission to the committee should set out what steps have been taken, or are being taken, to ensure that complaints will be minimised or eliminated in future. These should aim to satisfy the committee that the solicitor should be issued with a practising certificate.

Many solicitors who have been invited to attend this meeting in recent years have been asked to do so because of complaints relating to undertakings. In such cases, common conditions imposed on practising certificates require that:

- The solicitor sets up a register of undertakings and certifies that it is a complete and accurate record,
- They be independently audited by a risk-management auditor,
- They put in place a complaints register, and
- The register of undertakings and the approved risk-management auditor's report be furnished to the Society within a specified date.

Following the making of a decision by the committee, the solicitor concerned must be notified in writing as soon as possible. The solicitor can appeal the decision to the President of the High Court within 21 days of notification.

FOCAL POINT

life, the universe, and everything

In *Kennedy v The Law Society*, Judge Barron stated the following in his decision: "The jurisdiction under section 49(2) is not disciplinary … Each decision must be made in the light of the need, if any, to protect the interests of the public, the interests of the profession, the interests of the clients of the solicitor in question, or the interests of the solicitor himself".

It was further explained by Kingsmill Moore in *Re: Crowley*: "The circumstances set out in section 49, subsection (i), in which the issue of a practising certificate may be withheld, are a curious conglomerate, but all of them may, I think, be explained, and should, I think, be interpreted as cases in which the issue of a practising certificate would involve the danger of inadequate or dishonest service being given to the public or of the continuance of unprofessional conduct.

"The fact that a solicitor has misbehaved himself in the past may indeed be an element in arriving at the conclusion that he is likely to misbehave himself in the future and so, subject to the provisions of section 49, may form a ground for withholding a practising certificate or issuing it subject to conditions; but in such a case the certificate is not to be withheld or conditions imposed as a discipline for past misdoing. Such action is only justified as a necessary precaution against the likelihood of future misdoing reasonably to be inferred from past misconduct."

In the same judgment, Kingsmill Moore went on to explain that this provision is not for disciplinary purposes but with a view to "protection" and, accordingly, it should be exercised "only where there is a demonstrable probability that a practising certificate issued, will be abused".

look it up

Cases:

- *Kennedy v The Law Society* (1999 2 IR5 83)
- *Re: Crowley* [1964] IR 106
- *Re: D* [1958] 95 ILTR

Legislation:

- Section 49 of the *Solicitors Act 1954*, as substituted by section 61 of the *Solicitors (Amendment) Act 1994* and as amended by section 2 of the *Solicitors (Amendment) Act 2002*

house RULES

Clare Naughton is a solicitor at Community Law & Mediation. She wishes to thank managing solicitor Rose Wall for reviewing the article

Amendments to section 62 of the *Housing Act* provide an overdue opportunity for local authority tenants to be heard in court before an order is made granting or refusing an application to recover possession of their home. Clare Naughton gets the key of the door

The *Housing (Miscellaneous Provisions) Act 2014* amends three principal aspects of housing law. The main amendments include a repeal of section 62 of the *Housing Act 1966* and replacement provisions (see part 2 of the act), an amendment to the rent supplement scheme (see part 4), and amendments to social housing purchase schemes (see part 3).

The area of most concern, as a lawyer working in the area of housing law, is the amendment to section 62. Section 62 is the current provision utilised by local authorities to recover possession of a person's home. The procedure – similar to section 86 of the *Landlord and Tenant Law Amendment Act Ireland 1860* ('Deasy's Act'), which was used to provide speedy eviction procedures for cottier tenants, caretakers, servants and herdsmen – does not afford a tenant a hearing in the District Court. Currently, a local authority is required to prove:

- The tenancy agreement,
- The due issue of the notice to quit,
- The due service of the notice to quit,
- The form of the notice to quit,
- The form of the summons, and
- That under the notice to quit, the tenant was given the appropriate notice.

Section 62 does not allow for any judicial enquiry into whether there are sufficient grounds to end the tenancy. The procedure is used in most situations where local authorities seek to recover possession, including allegations of antisocial behaviour, arrears of rent, or where, on the death of the tenant, an application by a resident in the household to succeed has been refused.

There has been a plethora of case law before both the Supreme and High Courts querying whether tenants' rights were being breached by the absence of a fair and independent tribunal. In 2012, the Supreme Court issued a declaration that the provisions of section 62 were incompatible with Ireland's obligations pursuant to article 8 of the *European Convention on Human Rights* (ECHR), as enacted by the *European Convention on Human Rights Act 2003*. Due to the manner in which the ECHR has been enacted in Ireland, section 62 continues in operation until it is amended or repealed by the Oireachtas. The provision continues to be utilised, and tenants continue to be served with notices to quit that threaten proceedings pursuant to section 62.

Overdue opportunity

Certain provisions of the act have not yet been commenced, including part 2. The amendments to section 62 provide a very necessary, welcome, and long-overdue opportunity for tenants to have their voices heard in court before an order is made granting or refusing the local authority's application to recover possession of their home.

at a glance

- The *Housing (Miscellaneous Provisions) Act 2014* introduces a 'tenancy warning procedure' that allows a local authority to issue a tenancy warning where, "in the opinion of the authority, the tenant or a member of his or her household has breached a specified term of the tenancy agreement"
- The tenancy warning must set out the term breached and the specifics of the breach. It will also set out how the person accused of the breach can remedy their behaviour
- If a tenant does not accept that a breach of tenancy has occurred in the manner set out in the tenancy warning system, the tenant may request a review

PIC: iSTOCK

The act provides for different recovery methods, depending on whether:

- The property has been abandoned,
- There are allegations of antisocial behaviour,
- There are alleged rent arrears on the account, or
- Where, on the death of the tenant, an application by a resident in the household to succeed has been refused.

The act introduces a new process, namely a 'tenancy warning procedure'. In short, this process, which is prescribed in sections 7, 8 and 9 of the act, and which varies depending on the nature of the alleged breach, allows a local authority to issue a tenancy warning where, "in the opinion of the authority, the tenant or a member of his or her household has breached a specified term of the tenancy agreement".

The tenancy warning must set out the term breached and the specifics of the breach. The tenancy warning will also set out how the person accused of the breach can remedy their behaviour. The tenancy warning must also include notice to the tenant that, if there is a repeated action within 12 months, the local authority can make an application either for an order for possession or for an excluding order.

If a tenant does not accept that a breach of tenancy has occurred in the manner set out in the tenancy warning system, the tenant may request a review, pursuant to section 10 of the act. The tenant must also be advised in the tenancy warning of the right to this review (see sections 7(3), 8(2)(g) and 9(2)(d) of the act).

Following a request for a review, the chief executive of the local authority involved "shall appoint as the reviewer of the tenancy warning concerned an officer or employee of a local authority who was not involved in the decision to issue the tenancy warning, and who is senior in rank to the officer or employee who has decided to issue that warning". It is not entirely clear whether the legislators intend that the reviewer is from the same or a different local authority, as the act refers to 'who' rather than 'which'. However, given that the legislators refer to 'a' local authority rather than 'the' local authority, one may assume that the intention is that the reviewer appointed will be from a different local authority. The act specifies the role of the reviewer in section 10.

> **'Practitioners should consider the implications and risks of any potential evidential anomalies and whether the considerations in the act are sufficient to ensure procedural fairness'**

Pros and cons

There are benefits to this process. Firstly, if a tenant or a member of the household is engaging in any type of offending behaviour, there will be an opportunity for the relevant people to remedy their behaviour. Second, and more crucially, generally possession proceedings will be a last resort.

However, even though the tenant will be advised of the impact of similar offending behaviour within a 12-month timeframe, the act also states that, where an application for possession is made within a five-year period of the tenancy warning issuing, the District Court judge must be informed of the fact of

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27 Nov	Workshop 2 – Delegating Effecting & Performance Feedback Dublin	€100	€125	3 M&PD Skills (by Group Study)
15 Jan	Workshop 3 – Coaching as a Management Style, giving developmental feedback & managing underperformance. Dublin	€100	€125	3 M&PD Skills (by Group Study)
29 Oct	Workshop 1 - Defining Roles & Realising Expectations Tipperary	€100	€125	3 M&PD Skills (by Group Study)
18 Nov	Workshop 2 - Delegating Effecting & Performance Feedback Tipperary	€100	€125	3 M&PD Skills (by Group Study)
21 Jan	Workshop 3 - Coaching as a Management Style, giving developmental feedback & managing underperformance Tipperary	€100	€125	3 M&PD Skills (by Group Study)
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14/15 Nov, 23/24 Jan, 6 & 7 Feb	Attend all three property transactions workshops	€968 price includes iPad mini €792 (without iPad mini)	€1,000 price includes iPad mini €900 (without iPad mini)	
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P: 01 881 5727 E: Lspt@lawsociety.ie F: 01 672 4890 *Applicable to Law Society Skillnet members.*

FOCAL POINT

the rental accommodation scheme

The Rental Accommodation Scheme is a scheme in which private landlords contract with both the local authority and a tenant to provide a lease. The tenant pays rent to the local authority at similar rates to that paid by tenants in standard local authority accommodation. The local authority pays the landlord a larger sum relative to market rates. Generally, other than the manner in which rent is paid, the landlord and tenant have a similar contractual relationship to that in standard private landlord and tenant relationships.

the previous tenancy warning – even if the tenancy warning was not upheld following a review process (see section 12 (4)b).

Furthermore, the review is not independent of local authorities. There is no opportunity for a District Court judge to look behind the fact of that previous tenancy warning – and even if that opportunity existed, given the passage of time that would have elapsed, there would be issues of procedural fairness. As the original tenancy warning lacks true independence and potentially damages the reputation of the tenant, the District Court process where it refers to such a tenancy-warning process may lack the procedural fairness, proportionality, and protections that it should be affording.

From a human rights perspective, there are concerns over the lack of independence in the tenancy-warning process. It will be very difficult for a reviewer to act in an independent manner, as they will naturally hold a bias towards local authorities, given their familiarity with the role, responsibilities and challenges facing local authorities. If the reviewer is from the same local authority, there are even greater concerns regarding the lack of independence.

An option for an alternative review process could involve a three-party tribunal that would include one member who is an employee of a local authority, but not of the local authority involved. This would address the desire of local authorities to require someone familiar with the challenges and complexities of running a local authority to deal with the review. There could also be a tenants' rights representative on the tribunal, as well as a neutral person.

Throughout the provisions relating to both the tenancy-warning process and the proceedings for recovering possession, there is an obligation on local authorities to "have due regard to protecting the identity of persons who informed it of the breach in circumstances where, in the opinion of the housing authority, not to do so:

a) Could render those persons or persons associated with any of them liable for violence, threat or fear as a consequence of so interfering, or

b) Might otherwise have prevented those persons from so informing because of such violence, threat or fear" (see sections 7(5), 9(5), 10(15), 12(5) and 13(3)).

> **There is a clear difference in treatment between different types of tenants, which raises the question as to whether Ireland is breaching other ECHR obligations as in the case of *Larkos v Cyprus*, a case involving discrimination of different types of tenants**

The protection of whistleblowers occurs frequently and is necessary to ensure that people will be protected when disclosing issues of concern. This type of protection is open to abuse. The act is silent about the weight to be placed on such information during the tenancy-warning process, and this should be of concern to practitioners from a procedural fairness perspective.

Possession proceedings

As already noted, tenants will have the right to an independent hearing regarding their right to remain in their home. The possession proceedings application requires a District Court judge to make an order for possession if it appears to the court that the housing authority has grounds for recovering possession "and that it is reasonable having regard to all of the circumstances of the case".

The act has a list of factors to be considered in deciding what is reasonable, including "the proportionality of making a possession order, having regards to the grounds for the possession application".

One would be hopeful that, in deciding cases where they have not heard evidence from the informant, a judge would be mindful of the limitations of what they have heard. Similarly, where tenancy warnings have issued in the absence of all information being provided to a tenant, again, when being told this information, a judge would be wary of the manner in which the tenancy warning has issued and afford it the appropriate weight that it deserves. Practitioners should consider the implications and risks of any potential evidential anomalies and whether the considerations in the act are sufficient to ensure procedural fairness.

Landlord and tenant law has come a long way since the introduction of the *Residential Tenancies Act 2004*. Tenants in private rented accommodation are afforded a very different set of protections to those in local authority accommodation. Tenants who fall within the protection of the *Residential Tenancies Act 2004*, which include tenants in receipt of social-housing support, such as rental accommodation scheme tenants and tenants currently receiving rent supplement (and who will, in future, receive housing assistance payment), have an accessible forum in the Private Residential Tenancies Board – for example, to have repairs addressed.

There are proposals to include voluntary housing associations within this process. There is a clear difference in treatment between different types of tenants, which raises the question as to whether Ireland is breaching other ECHR obligations as in the1999 case of *Larkos v Cyprus*, which involved discrimination of different types of tenants. This act is an opportunity missed to balance these rights. It is hoped that this will be addressed in future legislation.

look it up

Cases:

- *Byrne v Scally*, unreported, High Court, 12 October 2000
- *Donegan and Gallagher v Dublin City Council* [2012] IESC 18
- *Larkos v Cyprus*, 29515/95, 18 February 1999

Legislation:

- *European Convention on Human Rights Act 2003*
- *Housing (Miscellaneous Provisions) Act 2014*
- *Housing Act 1966*
- *Landlord and Tenant Law Amendment Act Ireland 1860*

Company Law in Ireland

Anthony Thuillier. Clarus Press (2013), www.claruspress.ie. ISBN: 978-1-9055-365-97. Price €49.

Company law has been centre stage in Irish commerce over the past two decades and will continue to be over the next few years, particularly given the enactment later this year of the long-awaited *Companies Act 2014*, which will consolidate and reform the *Companies Acts* of the past half century. Given the likelihood that the act will result in a plethora of enquiries from clients as to what, if anything, is required to adjust their companies to the new era, Mr Thuillier's book is timely.

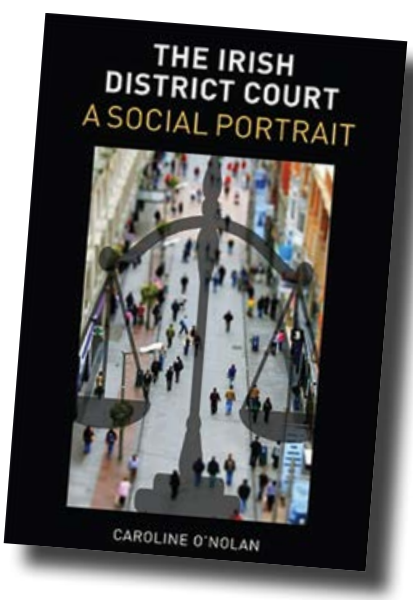
While it is aimed primarily at those studying company law for the first time, this book provides a very clear guide to the core principles, which will also be of immense value to those who work in this area and require instant access to the current statutory and case law position. As Ms Justice Finlay Geoghegan notes in the forward, company law is often regarded as being overly technical and legally dry. Against this backdrop, the author presents a refreshing and readily accessible approach to the subject that will be of great value, not only to students and lawyers, but also to those working in areas such as the charitable and not-for-profit sectors, which have not, until of late, been affected by the strictures of company law.

Many company law text books have traditionally tended to focus on the law as it applies to high-profile companies. This book, however, draws heavily on cases involving readily identifiable situations in commercial life. As the author puts it: "What is different … in this book is that it brings the people and situations involved in the cases to the fore, to make it easier to understand that the law is what it is."

This aspiration manifests itself throughout the book, often by way of presenting the facts of a case, then posing various questions and possible outcomes, and then proceeding to summarise the court's approach and decision. This somewhat novel approach is particularly helpful in developing the reader's legal problem-solving skills and keeping the reader engaged, while getting to grips with what can be technical and complex issues. For those new to the subject, the book contains a very helpful glossary on the meaning of certain words and concepts that are frequently encountered in company law. In summary, this is a highly recommended book.

Sean Nolan is a partner in the commercial department of Kerman & Company Solicitors, Dublin.

The Irish District Court: A Social Portrait



Caroline O'Nolan. Cork University Press (2013), www.corkuniversitypress.com. ISBN: 978-1-7820-504-83. Price: €39.

This is an in-depth look at the workings of the District Court, and is first and foremost a presentation of research more directed towards the academic than the practitioner. However, it does paint the true atmosphere of the court she spent some considerable time in.

O'Nolan's main focus is on the contemporary environment and challenges that face the court. She is particularly concerned with the increase in foreign defendants and the adaptations the court has had to make to accommodate them. While the profile of offenders appears to be similar irrespective of nationality, the court has found itself dealing with more immigration issues, and

this is explored in detail. The stated purposes of the research are to explore if fair procedures are applied to all, to establish if there are structural biases that contribute to the criminalisation of foreign nationals, and to assess the sentencing decisions of the lower-tier court.

What sets this book aside from the current body of academic literature is the author's grasp and presentation of the business of the District Court. Her depth of insight is reflective of someone who has experienced, lived and understands its workings. The non-academic reader is engaged, as the chapters are peppered with anecdotes of proceedings she herself has witnessed. Anyone who knows the District Court will recognise that these are not just highlights but are the norm for a system that has developed over the last century.

While the book is essentially academic, it is written in an accessible manner by somebody who has taken the time to really understand the environment within which her research was conducted. While it will obviously appeal to the more studious among us, it should not deter those less enthused by discussion of methodology and data analysis. If you have ever set foot in the District Court, you can engage with it as a 'social portrait' – and it might even coax you to peep outside your comfort zone to more carefully examine what else is going on.

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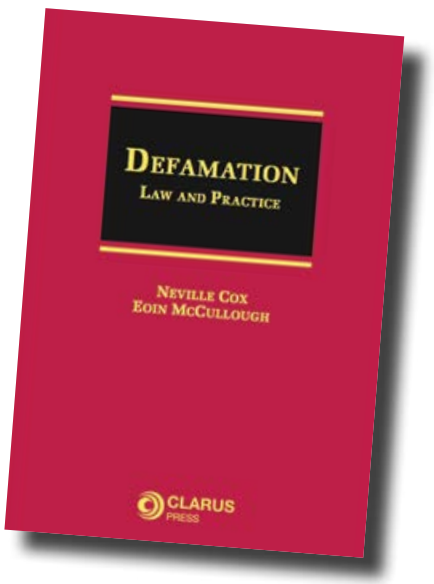
Defamation Law and Practice

Neville Cox and Eoin McCullough. Clarus Press (2014), www.claruspress.ie. ISBN: 978-1-9055-366-41. Price: €249.



The *Defamation Act 2009* will shortly celebrate its fifth birthday, having come into effect on 1 January 2010. The legislation provides for a review of the operation of the act by the Minister for Justice after five years of operation, and that makes the publication of this excellent book all the more timely.

The book benefits greatly from a mix of academic analysis and practical insight. Eoin McCullough SC is an enormously experienced defamation practitioner, while Neville Cox is associate professor of law in TCD. I am not privy to the exact division of labour between the authors, but an educated guess would suggest that it is Prof Cox who draws together the sometimes disparate strands of thinking of the European Court of Human Rights on freedom of expression.

It is, I think, a justified criticism of that court that its decisions tend to be overly fact – rather than principle – based. This is exemplified by the analysis of *Delphi AS v Estonia* (2013). Faced with serious issues of principle on the liability of internet portals for unmoderated commentary, the court seemed more influenced by the relatively low level of damages awarded by the local court than the precedent effect of its judgment on websites throughout Europe.

A counterpoint to this commentary is the approximately 150 pages given over to Irish practice and procedure. They include detailed information on pleadings and useful precedents. It is a 'must have' for all who practice in this area, and it is written with the clarity and conciseness one associates with Mr McCullough.

To paraphrase a comment once made about a Balkan crisis, only three people ever understood it: one was dead, the other went mad thinking about it, and the third wasn't telling. I have long felt this way about the case law on whether a defendant is entitled to plead the truth of meanings other than those pleaded by the plaintiff. However, having read Mr McCullough's analysis, the scales fell from my eyes.

The book is not perfect. There are some proofing or editing issues. For example, an editor's 'note to the author' remains in place in a quotation on p509. However, this is a minor quibble.

This is a substantial and comprehensive text. It will, I suspect, be the first port of call for defamation practitioners and academics for years to come.

Michael Kealey is in-house counsel at Associated Newspapers.

NORA WHITE 1959 – 2013

It is hard to believe that the first anniversary of the passing of our friend and colleague Nora White occurred on 22 September last. Nora died all too young, following a long battle with cancer.

Nora was born, raised, and educated in Cork and, although she relocated to Dublin in her early 20s, she never lost sight of the fact that she was a true Rebel Corkonian. Indeed, she was the first woman to attend the Cork Chamber of Commerce annual dinner. As the oldest of nine children, she became 'mother in Dublin' to a succession of siblings.

Having obtained her BCL from UCC, Nora was apprenticed in the firm of Guest Lane Williams in Cork. Throughout her career, she ascribed her vast knowledge of property law to this apprenticeship and, in particular, to the guidance of the legendary Donnie Williams. In later years, if some arcane or abstruse point of property law was raised, she would produce the papers acquired in Guest Lane Williams for research.

Nora ultimately relocated to Dublin, joining Stephen McKenzie & Company, where she worked for a number of years, before joining William Fry as an assistant solicitor. At that time, the property department comprised only four solicitors. She would lead its expansion so that, by 2006, the department boasted 32 solicitors.

Quickly demonstrating her abilities, Nora was elected a partner of William Fry in 1994 and became head of the property department in 1995. Once in charge, she showed her great ability to lead and encourage others in their careers. She quickly became a focal point in William Fry as a person who would always listen to any problem and give an honest and direct response (even if not that which was hoped for!). She provided encouragement, with the best interests of the individual and the firm always at heart. She never regarded colleagues as competitors, but rather as people to be encouraged, to achieve collective success.

Throughout the 'Celtic Tiger' era, Nora led the property department of William Fry in continued growth. Aside from her legal knowledge and capacity for hard work, she had a tremendous ability for focusing on the essentials of a transaction. Many were the occasions when, as increasingly complex solutions were being proposed to resolve an issue, she would halt the entire debate with the words: "Maybe I am being a bit simple, but …" and then reduce the issue to its basics, usually with a solution that, after the event, seemed obvious.

She frequently said that, had she not been a lawyer, she would like to have been an artist. She gave free reign to her artistic interests in the last years of her life, pursuing a number of extra-mural courses in the arts in Trinity.

As with all other aspects of her life, Nora, with typical vigour and good spirits, faced up to her long illness with a clear-eyed view of her prospects, but equally a determination to fight to the end. Her approach to the final months of her life epitomised her spirit and the rigour she had brought to her career as a lawyer.

She left behind, not only her husband Pat (McLoughlin), children Kate, JJ and Florence, but also her dad Jeremiah, mother Mary, sisters Margaret, Catherine, Lizzie and Muireann, and brothers Dan, Pat, Jerome and Robbie, their respective husbands, wives and children, and a host of friends and colleagues.

Sadly, her mother Mary (née Murray) passed away in October 2013, a further blow to the family.

Ar dheis Dé go raibh a n-anamacha.

LMcC/PO'S/IR/ES

Council meeting – 12 September 2014

Motion: professional indemnity insurance regulations

"That this Council approves the Solicitors Acts 1954-2011 (Professional Indemnity Insurance) Regulations 2014."

Proposed: Stuart Gilhooly
Seconded: Michael Quinlan

Stuart Gilhooly noted that the amending regulations made some changes in respect of the definitions of 'ROF eligibility criteria', 'Run-off Fund' and '2011 Regulations'. In addition, a new regulation 8(b) had been included, which introduced the requirement for a firm to cease practice on the date specified in its notice of intention to cease practice. The Council approved the regulations as circulated.

Legal Services Regulation Bill

The director general reported that the department had indicated that the report stage of the bill would resume in the Dáil in the third week of October, and it was still hoped that the bill would be enacted by Christmas. However, given the number of delays to date, the actual likelihood of achieving those targets was quite uncertain.

Dublin District Courts

The Council considered the Society's submission to the Courts Service on the reorganisation of the Dublin District Courts. The director general noted that there were ramifications for the entire country from the proposed reorganisation in Dublin. If the Courts Service believed that it could close four Dublin courts, with the consequent impact on such a significant proportion of the population, then it would believe that it could close courts in any location throughout the country.

Shane McCarthy said that the fact that the Society was now engaging with the issue because of the proposed closures in Dublin might be seen by members as evidence of the fact that the Society was mainly Dublin-centric, and he asked what would be done by the Society at a practical level in relation to the proposed closures outside Dublin.

The president said that the numbers affected by the Dublin proposals were significantly more substantial than any other part of the country. If the Society could not win this battle, then it would not successfully oppose closures anywhere in Ireland. The director general noted that the Society was of the view that rationalisation of the courts had now "gone beyond the rational" and that the Society should object in principle to any further courthouse closures, with a focus on the incremental damage that had been done to the legal system by the closures to date. There had simply been too many courthouse closures at this stage, and the Society should oppose in principle any further closures.

Maura Derivan said that, as the numbers affected by any court closure were significantly different in Dublin from other parts of the country, the basis for the battle against rural courthouse closures was also quite different. She welcomed the fact that the Society was prepared to support local bar associations in their opposition to proposed closures. While it would be a hard battle, it was a fight that had to be taken on.

James Cahill complimented the Society on its submission in relation to the proposed closures in Dublin and, in particular, on its alternative suggestions. The Society's campaign presented an opportunity to get other court users involved as allies, and they should be very happy to support the Society's case. Martin Lawlor said that, having been through the process of opposing the closure of his local courthouse, he was satisfied that the Courts Service had absolutely no interest in the impact on other court users or in the consequent transfer or increase in costs for other parties in the legal process.

The director general noted that the actual savings that would be achieved by the closure of many courts was quite small, and the court-closure proposals were part of a larger strategic plan. While the Courts Service ostensibly engaged in a consultation process, this had not resulted in the reversal of a decision to close a courthouse to date. The president noted that the department officials had suggested that court closures were not a matter for the minister, but the Society had resisted this attempt at deflection and had emphasised that the proposals were a direct consequence of cutbacks in funding to the Courts Service. Richard Hammond noted that, while the closure of three courthouses might save the travel costs of one judge and one law clerk, it would increase costs for all court users. He suggested that the Society might seek a meeting with the relevant minister to emphasise that, while savings might be made by the Courts Service, their decisions would increase costs elsewhere.

Judicial review of taxing master

The Council noted that the Society had been joined as *amicus curiae* in judicial review proceedings against taxing master Mulcahy.

Collapse of Setanta Insurance

The Council discussed the ramifications for clients insured with Setanta Insurance and the fact that the MIBI was now asserting that it had no liability.

Memorandum of understanding between IBF and the Society

The Council approved a memorandum of understanding between the IBF and the Law Society, the purpose of which was to 're-set' the relationship between the IBF and the Law Society and to express a new spirit of cooperation in seeking solutions to long-standing issues. It was proposed that four separate working groups would be established to deal with the four principal strands of issues arising. The director general noted that there had been positive feedback from the IBF and from the chief executives of the four main banks to the proposed new system of engagement.

PII renewal

Stuart Gilhooly reported that the common proposal form would issue within the next ten days, with the guidelines issuing shortly thereafter. In relation to the renewal period itself, the Society was expecting all current providers to stay in the market, and some interest had been shown by another insurer. The Society remained concerned that colleagues would consider the rating of their proposed insurer very carefully before purchasing cover.

'Know your Council'

Maura Derivan reported that the 'Know your Council' facility, with photographs and a brief bio of each Council member, was now live on the Society's website.

practice notes

TECHNOLOGY COMMITTEE

Use of file-sharing sites by solicitors

The almost universal use of virtual or electronic documents in legal transactions has seen a consequent surge in the demand for facilities to easily share these documents through online file-sharing facilities. Online sharing of documents allows for a centralised depository, concurrent editing rights, and easy access to the most recent drafts or copies.

In the context of legal transactions, online file-sharing requires measures that provide for the security, integrity and confidentiality of the documents. Users of online file-sharing facilities must ensure that there are adequate controls on access to enable the practitioner to comply with his/her legal, professional and ethical obligations. They should have clear editing and version protocols. Online file-sharing facilities should have satisfactory back-up and archiving arrangements to enable a solicitor to comply with all Law Society requirements in respect of client files and documents.

Some file-sharing sites are more secure than others. The solicitor's primary objective in using file-sharing sites should be to maintain the security and integrity of their clients' documents. While appreciating the benefits of online file-sharing facilities, the Technology Committee would advise as follows.

Public file-sharing sites

The Technology Committee does not recommend the use of free services provided to the public by file-sharing sites such as Dropbox, Google Drive, Fileserve or similar for the sharing or distribution of client information. If clients insist on the use of such sites, they should be made aware that such free services generally do not provide sufficient contractual assurances to enable practitioners to discharge their obligations to clients and that they are not recommended by the Law Society's Technology Committee.

A number of such file-sharing sites also offer paid versions for use by businesses. These versions may offer better contractual conditions, but they should be used with caution and only after solid evaluation and a robust examination of their capabilities prior to professional use. The evaluation should be similar to that recommended below for virtual dealing-room sites, and the client should be made aware, through a letter of engagement or standard conditions of engagement or otherwise, that use of such a site is proposed.

Private secure 'virtual dealing room' sites

Solicitors should seek details from their IT providers in relation to any virtual dealing-room sites prior to use. These details should specify the facilities and measures in place with regard to security and access, backup and archiving. They should inform a solicitor as to the adequacy of such measures with regard to duties owed to a client, and ensure compliance with Law Society requirements. Solicitors intending to use such facilities should inform their clients, and also advise clients of any identified risks, preferably in writing, and should seek the client's consent or authorisation as appropriate to use of such facilities.

Professional indemnity insurance renewal

The mandatory professional indemnity insurance (PII) renewal date for all firms is **1 December 2014**. This date is not negotiable. All cover under the current indemnity period will expire on 30 November 2014.

Confirmation of cover

All firms must ensure that confirmation of their PII cover is provided to the Society within three working days of 1 December 2014. Therefore, confirmation of cover in the designated form must be provided to the Society on or before **Thursday 4 December 2014**.

Confirmation of cover should be provided by your broker through the Society's online PII confirmation system. Such confirmation must include your policy number, and confirmation of cover cannot be provided until the policy is actually in place. As your firm has a statutory obligation to ensure such confirmation of cover is provided to the Society on or before Thursday 4 December 2014, you are responsible for ensuring that your broker provides the Society with confirmation of cover by that date. You should also ensure that your broker has familiarised themselves with the online confirmation system and has the necessary information to confirm cover online (such as their login and password) in advance of 4 December 2014.

It is noted that some firms who have confirmed PII cover to the Society during 2014 have a coverage period that extends past 30 November 2014. Such firms are still required to reconfirm cover for 2014/2015 with the Society by 4 December 2014. Please note that your firm will not be reflected as having PII in place on the Society's 'Find a Firm' online search facility until such time as the Society has received the required online confirmation of cover.

Guide to renewal

The *Guide to Renewal* for the 2014/2015 indemnity period is published on the Society's website to assist the profession with renewal. The guide includes information such as tips for renewal, important points to note, and a guide to insurers and brokers. This guide will be updated frequently with new information received by the Society, in particular with regard to what insurers will be in the market in the next indemnity period.

2014/2015 renewal resources

Renewal resources for the 2014/2015 indemnity period are available to download from the Society website at www.lawsociety.ie/PII and currently include:

- The common proposal form for 2014/2015 indemnity period and relevant guidelines,
- The PII *Guide To Renewal 2014/2015*,
- The PII regulations and minimum terms and conditions for 2014/2015,
- The Participating Insurers Agreement for 2014/2015, and
- Relevant PII practice notes.

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

Disclosure of financial ratings

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

The Society changed the title of 'qualified insurer' to 'participating insurer' for the 2013/2014 indemnity period and has kept this change in place for the 2014/2015 indemnity period to more accurately reflect and emphasise the Society's limited role regarding insurers in the solicitors' PII market and to dispel the mistaken impression of approval or financial strength that may have been incorrectly inferred

from the title 'qualified insurer'.

Participating insurers are required to disclose their financial rating, or absence thereof, to firms when issuing quotations. This requirement was introduced in the 2011/2012 indemnity period, and remains in place for the 2014/2015 indemnity period in order to:

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

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

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

Notification of claims by 30 November 2014

All claims made against solicitors' firms, and circumstances that may give rise to such a claim, should be notified to the firm's insurer as soon as possible. In particular, claims made between 1 December 2013 and 30 November 2014 (both dates inclusive) should be notified by the firm to their insurer by 30 November 2014.

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

The minimum terms and conditions for PII were amended in the 2011 PII regulations, and the change is retained in the minimum terms and conditions for 2014/2015, to permit firms to report claims or circumstances of which they are aware prior to expiry of cover to their insurer within three working days immediately following the end of the coverage period. Therefore, a three working day grace period from 30 November 2014 is in place with regard to notification of claims and circumstances to your insurer.

Quotes

Insurers are required to leave quotes to firms open for a period of not less than ten working days. This requirement was introduced in the 2012/2013 indemnity period and remains in place for the 2014/2015 indemnity period.

Amendments for 2014/2015 indemnity period

The 2014 PII regulations consolidate the PII regulations for 2011 with the 2012 and 2013 amending regulations. These regulations contain the minimum terms and conditions, and are available on the Society's website at www.lawsociety.ie/PII.

A new regulation 8(b) has been included in the 2014 regulations, which introduces the requirement for a firm to cease practice on the date specified in the firm's notice of intention to cease practice, even if that firm's PII cover extends beyond the notified date of cessation. This is ensure that firms actually cease on their nominated date of cessation and cannot provide legal services past that date. Firms are advised, if possible, not to have a nominated closing date earlier than the date of cessation of their PII cover. Firms may close their doors and refuse any new business earlier than the date of cessation of their cover, and take the extra time to thoroughly and properly wind-down their practice with PII in place. If firms wish to change their notified date of cessation, this must be done in advance of the date of cessation, not retroactively.

Run-off Fund

The Run-off Fund provides run-off cover for firms ceasing practice:

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

Any firm intending to cease practice after 30 November 2014 is required to renew cover for the 2014/2015 indemnity period.

Any applications to the Run-off Fund for cover must be made directly to the Special Purpose Fund manager, not the Society. Further information on run-off cover and succeeding practices, including the contact details of the Special Purpose Fund manager, can be found on the Society's website at www.lawsociety.ie/Solicitors/Practising/PII/Run-off-Cover/.

PII helpline

The Society continues to operate the PII Helpline to assist firms in dealing with PII queries. The Law Society's PII helpline is available Monday to Friday, 10am to 4pm, to assist firms with PII queries at 01 879 8707 or piihelpline@lawsociety.ie.

John Elliot, Registrar of Solicitors and Director of Regulation

GUIDANCE AND ETHICS COMMITTEE

Taking over undertakings from closed practices

Many firms have closed in recent months and, in this context, the issue of whether undertakings given by a firm that is now closed can, or should, be taken over by the new solicitors nominated by clients of the former practice often has to be considered.

When a firm closes, the original undertakings furnished on behalf of that firm fail, because the solicitor or solicitors who gave those undertakings no longer have control of the matter and cannot achieve compliance.

A solicitor should be aware that the view of the Guidance and Ethics Committee is that, when a file is transferred in any circumstances from one firm to another, a solicitor should not take over any undertaking given on behalf of the first firm without as full an investigation of the matter as they would carry out if they themselves had been giving the undertaking in the first place. This is even more important where the undertaking was given by a solicitor who has now ceased to practise, particularly where the practice closed following regulatory action taken by the Law Society.

In conveyancing transactions, where the undertaking relates to a mortgage and the second solicitor cannot immediately satisfy him/herself in respect of the title, a better option might be for the deeds on the file to be returned to the lender. The lender itself always has the option of calling for the deeds on foot of the original undertaking.

The second solicitor cannot be forced by the lender, or any other recipient of an undertaking, to assume the burden of work left unfinished by another solicitor, nor can (s)he be forced to give a straight replacement undertaking in substitution for the undertaking given by the first solicitor. The first solicitor may have done something in relation to the title that makes it impossible for the new solicitor to certify the title or to give an unqualified undertaking in respect of it.

practice notes

Financial rating of participating insurers

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

What is a participating insurer and who regulates them?

The Society changed the title of 'qualified insurer' to 'participating insurer' for the 2013/2014 indemnity period, and this change remains in place for the 2014/2015 indemnity period, to more accurately reflect and emphasise the Society's role regarding insurers in the solicitors' PII market and to dispel any mistaken impression of approval or financial strength that may have been incorrectly inferred from the title 'qualified insurer'.

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

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

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

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

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

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

Not all insurers obtain, or seek to obtain, a financial rating and are therefore considered to be 'unrated insurers'. If an insurer is unrated, there is no independent indication of the financial strength of that insurer, other than the judgement of the home state regulator, which therefore makes such insurers an unknown quantity and risk for firms. Participating insurers are required to disclose their financial rating, or absence thereof, to firms when issuing quotations. This requirement was introduced in the 2011/2012 indemnity period and will continue to be a requirement for participating insurers for the 2014/2015 indemnity period. Participating insurers are required to make such a disclosure in order to:

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

In the 2013/2014 indemnity period (and this change remains in place for the 2014/2015 indemnity period), the Society introduced a requirement for participating insurers to provide the Society with details of their financial rating and the jurisdiction in which they are regulated, as at the date the Participating Insurers Agreement is signed, together with a requirement to notify the Society in writing immediately if any of this information changes. The Society will publish this information in the *Guide to Renewal* for the 2014/2015 indemnity period to enable firms to take such information into account when choosing their insurer. It should be noted that the guide will only reflect an insurer's financial rating or lack thereof at a specific date, and therefore firms are advised to check the financial rating on any quotes provided and to seek confirmation of the insurer's rating from their broker.

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

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

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

What are the consequences if my insurer becomes insolvent?

The immediate consequences of the insolvency of an insurer for firms are set out in regulation 13 of the 2014 PII regulations as follows:

- Any firm insured by the insolvent insurer will be required, within 30 working days of the

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

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

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

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

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

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

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

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

Have such difficulties arisen in other jurisdictions?

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

What factors should I consider when choosing an insurer?

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

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

John Elliot, Registrar of Solicitors and Director of Regulation

legislation update

9 September – 13 October 2014

Details of all bills, acts and statutory instruments since 1997 are on the library catalogue – www.lawsociety.ie (members' and students' area) – with updated information on the current stage a bill has reached and the commencement date(s) of each act. All recent bills and acts (full text in PDF) are on www.oireachtas.ie and recent statutory instruments are on a link to electronic statutory instruments from www.irishstatutebook.ie

SELECTED STATUTORY INSTRUMENTS

Occupational Pension Schemes (Sections 50 and 50B) Regulations 2014
Number: SI 392/2014
Set out the procedure to be followed when the Pensions Authority is considering making a unilateral direction under section 50 of the *Pensions Act* to restructure the benefits of a pension schemes or a direction to wind up a pension scheme under section 50B of the *Pensions Act*.
Commencement: 2/10/2014

European Union (Protection of Consumers in Respect of Timeshare, Long-term Holiday Product, Resale and Exchange Contracts) (Amendment) Regulations 2014
Number: SI 400/2014
Amend regulation 17(3) of the *European Union (Protection of Consumers in Respect of Timeshare, Long-term Holiday Product, Resale and Exchange Contracts) Regulations 2011*, which give effect to Directive 2008/122/EC.
Commencement: 8/9/2014

Circuit Court Rules (Family Law Reporting) 2014
Number: SI 408/2014
Amend the *Circuit Court Rules* by the substitution a number of sub-rules and rule 6 in order 59, the substitution of rule 21 of order 59A, and by the insertion of a new sub-rule 5(13) in order 59 to provide for the reporting of family law proceedings following amendment of the *Civil Liability and Courts Act 2004* by the *Courts and Civil Law (Miscellaneous Provisions) Act 2013*.
Commencement: 4/9/2014

District Court (Criminal Justice Act 2013) Rules 2014
Number: SI 409/2014
Amend the *District Court Rules* to provide for procedures to apply for an order under section 17(2) of the *Criminal Justice (Money Laundering and Terrorist Financing) Act 2010*, as amended, and to allow for the service of notice of applications for and orders made under sections 17, 19 and 20 by the means prescribed in section 110 of the act, as amended by the *Criminal Justice Act 2013*.
Commencement: 10/9/2014

Circuit Court Rules (Provision of Transcripts of Sentencing Hearings) 2014
Number: SI 410/2014
Amend order 67A of the *Circuit Court Rules* to provide for the release of transcripts of sentencing hearings in criminal proceedings for the Parole Board and to the parole authorities of a foreign administration receiving a sentenced person under the 1995 and 1997 *Transfer of Sentenced Persons Acts*, and those of a designated country in which the convicted person is serving a sentence or remainder of a sentence in accordance with the *Transfer of Execution of Sentences Act 2005*.
Commencement: 25/9/2014

Housing (Miscellaneous Provisions) Act 2009 (Commencement of Section 32(5A)) Order 2014
Number: SI 429/2014
Brings section 32(5A) of the *Housing (Miscellaneous Provisions) Act 2009* into operation on the date of the signing of the order. Section 32(5A) empowers the minister to make regulations in respect of information, including additional information, that a qualified household seeking housing assistance must supply to a housing authority and the period within which such information must be supplied.
Commencement: 29/9/2014

Employment Permits (Amendment) Act 2014 (Section 34) (Commencement) Order 2014
Number: SI 435/2014
Appoints 3 October 2014 as the date on which section 34 of the *Employment Permits (Amendment) Act 2014* came into operation. This section amends section 5 of the *Illegal Immigrants (Trafficking) Act 2000*, which makes provision for applications for judicial review in relation to decisions taken in the asylum/immigration area that may give rise to a person's exclusion or removal from the State.
Commencement: 1/10/2014

Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No 4) (Prescribed Employment Schemes) Regulations 2014
Number: SI 440/2014
Extend the programmes of employment and work experience to which sanctions will apply for failure to participate, without good cause, to include the Youth Development Internship scheme, which is being introduced with effect from 6 October 2014.
Commencement: 2/10/2014

Social Welfare (Consolidated Supplementary Welfare Allowance) (Amendment) (No 4) (Prescribed Employment Schemes) Regulations 2014
Number: SI 441/2014
Extend the programmes of employment and work experience to which sanctions will apply for failure to participate, without good cause, to include the Youth Development Internship scheme, which is being introduced with effect from 6 October 2014
Commencement: 2/10/2014

A list of all recent acts and statutory instruments is published in the free weekly electronic newsletter Law-Watch. *Members and trainees who wish to subscribe please contact Mary Gaynor at m.gaynor@lawsociety.ie.*

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 Niall O'Kelly, a solicitor previously of 19 Fortfield Square, Terenure, Dublin 6, and in the matter of the *Solicitors Acts 1954-2008* [5202/DT73/11; DT74/11; DT75/11; DT76/11; DT77/11; DT78/11; DT79/11; DT80/11; DT81/11; DT38/12 and High Court record 2014 no 24SA]
Law Society of Ireland (applicant)
Niall O'Kelly (respondent solicitor)

On 6 November 2012, 28 February 2013, and 8 October 2013, the Solicitors Disciplinary Tribunal heard ten complaints against the above solicitor.

5202/DT73/11

The Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Failed to comply with an undertaking given to Allied Irish Banks on 23 July 2013 in respect of his named clients and the premises in Dublin 2 in a timely manner or at all,
b) Failed to comply with the direction made by the Complaints and Client Relations Committee at its meeting on 27 October 2010 that he confirm to the Society within 14 days that a named solicitor was in possession of files and was taking steps to furnish the deed and certificates of title to Allied Irish Banks,
c) Failed to respond to the Society's letters of 3 August 2010, 13 August 2010, and 13 September 2010 within the time specified in those letters.

5202/DT74/11

The Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Failed to comply with an undertaking given to the complainants on 14 August 2003 in a timely manner or at all,
b) Failed to respond to letters from the Society, including the Society's letters of 22 January 2010 requiring a report within 21 days, the reminder of 12 February 2010, and the letters of 13 April 2010 and 1 November 2010 in a timely manner or at all,
c) Failed to comply with the Society's directions and, in particular, the directions of the Complaints and Client Relations Committee made at its meetings on 13 April 2010, 26 May 2010, 7 July 2010, and 27 October 2010,
d) Misled the Society in relation to the whereabouts of his file by letter dated 7 January 2010 and at the committee meeting of 13 April 2010, indicating at that stage that the file was in his possession when in fact the original file had been mislaid.

5202/DT75/11

The Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Failed to comply with an undertaking given to the complainants on 30 May 2003 in respect of his named clients and property in Dublin 24 in a timely manner or at all,
b) Failed to respond to the Society's letters of 22 January 2010, 12 February 2010, and 1 November 2010,
c) Failed to comply with the directions made by the Complaints and Client Relations Committee at their meetings on 13 April 2010, 7 July 2010, and 27 October 2010 in a timely manner or at all.

5202/DT76/11

The Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Failed to comply with an undertaking given on 23 July 2003 to the complainants in connection with property in Dublin 6 on behalf of his named clients in a timely manner or at all,
b) Failed to respond to correspondence from the complainants in relation to the outstanding undertaking,
c) Failed to respond to the Society's letters and, in particular, the letters dated 5 July 2010, 15 July 2010, 4 August 2010, 13 August 2010, and 1 November 2010 in a timely manner or at all,
d) Failed to comply with the direction of the Complaints and Client Relations Committee made at its meeting on 27 October 2010 that the solicitor write to the Society within 14 days confirming that the file was in the possession of a named solicitor and that that solicitor was taking steps to furnish the deeds and certificate of title to the complainants.

5202/DT77/11

The Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Failed to return his client's title deeds in respect of property in Ashbourne, Co Meath, to Permanent TSB in a timely manner or at all,
b) Failed to respond to correspondence from the complainant solicitor on behalf of his former client,
c) Failed to respond to the Society's letters and in particular the Society's letters of 21 April 2010, 6 May 2010, 3 June 2010, 29 June 2010, and 12 August 2010 in a timely manner or at all,
d) Failed to comply with the direction issued by the Complaints and Client Relations Committee at its meeting on 7 September 2010 that he obtain a letter confirming that the deeds had been returned to Permanent TSB,
e) Failed to comply with the direction of the Complaints and Client Relations Committee made at its meeting on 27 October 2010 that he furnish the file in the matter to the complainant solicitor within 14 days and confirm the position to the Society.

5202/DT78/11

The Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Failed to comply with an undertaking dated 3 April 2002 furnished to the complainants in respect of his named clients and the property in Dublin 6W in a timely manner or at all,
b) Failed to respond to the Society's correspondence and, in particular, the Society's letters of 22 June 2009, 7 July 2009, 1 September 2009, 30 September 2009, 30 October 2009, 18 December 2009, 1 March 2010, 9 July 2010, and 1 November 2010,
c) Failed to comply with the directions made by the Complaints and Client Relations Committee at their meetings of 30 September 2009, 16 December 2009, 26 February 2010, 7 July 2010, and 27 October 2010 in a timely manner or at all.

5202/DT79/11

The Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Failed to comply with an undertaking furnished to the complainants and dated 21 May 2003 in respect of property in Dublin 18 in a timely manner or at all,
b) Failed to respond to the Society's correspondence and, in particular, the Society's letters of 22 January 2010, 12 February 2010, 13 April 2010, 9 July

2010, 1 November 2010 in a timely manner or at all,
c) Failed to comply with the directions of the Complaints and Client Relations Committee and in particular those of the Complaints and Client Relations Committee at their meetings of 13 April 2010, 26 May 2010, 7 July 2010 and 27 October 2010 in a timely manner or at all.

5202/DT80/11

The Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:
a) Failed to comply with an undertaking dated 27 March 2001 furnished to the complainants in respect of his named clients and a property in Stillorgan in a timely manner, having only completed the registration of the complainant's charge on 16 February 2010,
b) Failed to respond to the Society's correspondence and, in particular, the Society's letters of 22 June 2009, 7 July 2009, 15 July 2009, 1 September 2009, 30 September 2009, 30 October 2009, 18 December 2009, 1 March 2010, 9 July 2010, and 1 November 2010 within the time set out in those letters or at all,
c) Failed to comply with the direction made by the Complaints and Client Relations Committee at their meetings of 30 September 2009, 16 December 2009, 26 February 2010, 7 July 2010 and 27 October 2010 in a timely manner or at all.

5202/DT81/11

The Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:
a) Failed to comply with an undertaking given to the complainants on 27 August 2004 in a timely manner or at all,
b) Failed to respond to the Society's correspondence and, in particular, the Society's letters of 22 January 2010, 9 July 2010, and 1 November 2010,
c) Failed to comply with the directions of the Complaints and Client Relations Committee made at its meetings of 13 April 2010, 7 July 2010, and 27 October 2010 in a timely manner or at all,
d) Misled the Society by letter dated 7 January 2010 and at a meeting of the Complaints and Client Relations Committee on 13 April 2010, when he indicated that he was dealing with the file and subsequently informed the Society by letter dated 4 June 2010 that he could not locate the file in question.

5202/DT38/12

The Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:
a) Having mislaid the title deeds, he failed to take the necessary steps to rectify the matter,
b) Did not respond to correspondence from his clients or their new solicitor in relation to the whereabouts of the original title deed,
c) Failed to respond to the Society's correspondence.

The Solicitors Disciplinary Tribunal, having heard the ten complaints and made those findings of misconduct, referred the matter forward to the President of the High Court and, on 7 April 2014, the President of the High Court made the following order: that the respondent solicitor not be permitted to practise as a sole practitioner or in partnership and should be permitted only to practise as an assistant solicitor in the employment and under the direct control and supervision of another solicitor of at least ten years' standing, to be approved in advance by the Society.

In the matter of Michael Enright and Gail Enright, solicitors, practising as Enright & Co, Solicitors, Sheares Street, Cork, and in the matter of the *Solicitors Acts 1954-2008* [2788-7745/DT146/11 and High Court record no 2013/114 SA]

Law Society of Ireland (applicant)
Michael Enright and Gail Enright (first and second-named respondent solicitors)

On 22 May 2013, 13 June 2013, 15 July 2013, and 23 October 2013, the Solicitors Disciplinary Tribunal sat to consider a complaint against the respondent solicitors and found the first-named respondent solicitor guilty of misconduct in his practice as a solicitor in that he caused a deficit in the amount of approximately €30,000 to €35,000 to arise on the client account, which arose from in or around January 2009 to in or around November 2010, due to the withdrawal of client moneys from one or more client accounts and, in doing so, acted in breach of regulation 11(3) and/or regulation 7(1) of the *Solicitors Accounts Regulations*.

The tribunal found the second-named respondent solicitor guilty of misconduct in her practice as a solicitor in that she:
a) Caused a deficit in the amount of circa €90,875 to arise on the client account of a named person on or around 31 August 2010, which was due or partly due to the withdrawal of moneys from her client account in breach of regulation 11(3) and/or regulation 7(1) of the *Solicitors Accounts Regulations*,
b) Caused a deficit in the amount of approximately €30,000 to €35,000 to arise on the client account, which arose from in or around January 2009 to in or around November 2010, due to the withdrawal of client moneys from one or more client accounts and, in doing so, acted in breach of regulation 11(3) and/or regulation 7(1) of the *Solicitors Accounts Regulations*,
c) In respect of a named client, transferred €86,035.50 from the client account prior to the issue of the grant of probate, in breach of regulation 8(4) of the *Solicitors Accounts Regulations*.

The tribunal ordered that:
a) The first and second-named respondent solicitors do stand censured,
b) The first-named respondent solicitor pay a sum of €1,000 to the compensation fund,
c) The second-named respondent solicitor pay a sum of €4,000 to the compensation fund,
d) The first and second-named respondent solicitors jointly and severally pay the whole of the costs of the Society, as taxed by a taxing master of the High Court in default of agreement.

On appeal by the first and second-named respondent solicitors, the President of the High Court made an order on 23 June 2014 substituting the following wording for the aforementioned paragraph (d): "(d) The first and second-named solicitors jointly and severally pay the costs of the Society as agreed between the parties in the amount of €10,000."

In the matter of Colm Burke, a solicitor practising as Colm Burke & Company, Washington House, 33 Washington Street, Cork, and in the matter of the *Solicitors Acts 1954-2011* [4301/DT22/13]

Named client (applicant)
Colm Burke (respondent solicitor)

On 1 July 2014, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in respect of the following complaints as set out in the applicant's affidavit:
a) The respondent solicitor should not have led the applicant to believe he was acting for the applicant if he was of the view he was unable to carry out instructions. The respondent solicitor therefore misled the applicant. The respondent solicitor did not at any time, in writing, inform the applicant he was unable to carry out instructions of pursuing the case until after the time bar came into place.
b) The respondent solicitor misled

the applicant to believe her case was one of the six to seven categories of cases the respondent solicitor was pursuing.
c) The telephone conversation the applicant had with the respondent solicitor on 19 February 2010 regarding the case and senior counsel's opinion sought was never conveyed to her.

The tribunal ordered that the respondent solicitor:
a) Do stand censured,
b) Pay a sum of €3,000 to the compensation fund,
c) Pay a sum of €500 towards the expenses of the applicant in connection with the proceedings.

In the matter of James G Doody, solicitor, practising as Doody Solicitors, 21 South Mall, Cork, and in the matter of the *Solicitors Acts 1954-2008* [6285/DT36/12]
Law Society of Ireland (applicant)
James G Doody (respondent solicitor)
On 26 February 2013, 4 July 2013, 22 October 2013, and 8 July 2014, the Solicitors Disciplinary Tribunal sat to consider an application against the respondent solicitor and found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:
a) Failed to comply with part of his undertaking dated 24 July 2001 to a named financial institution in a timely manner or at all,
b) Failed to reply to some or all of the correspondence sent to him by the complainant either in a timely manner or at all.

The tribunal ordered that:
a) The respondent solicitor do stand censured,
b) The respondent solicitor pay a contribution of €3,000 towards the whole of the costs of the Society and witness expenses.

In the matter of Declan Mc Evoy, solicitor, formerly practising as principal of William Early Solicitors, 1 Haymarket, Carlow, and JM McEvoy & Co, Solicitors, The Avenue, Gorey, Co Wexford, and in the matter of the *Solicitors Acts 1954-2011* [6228/DT186/12; 6228/DT187/12 and High Court record no 2014/84 SA]
Law Society of Ireland (applicant)
Declan McEvoy (respondent solicitor)
On 21 November 2013, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he, in relation to the Wexford practice:
a) On or around 31 July 2011, permitted a deficit of in or around €133,000 to arise on the client account, which was due or partly due to the withdrawal of client moneys from one or more client accounts without authority and not for the benefit of clients, in contravention of regulation 7(1) of the *Solicitors Accounts Regulations 2001-2006* (SI 421 of 2001 as amended),
b) In or around the period September 2010 to 31 July 2011, withdrew moneys from client accounts other than as permitted, in contravention of regulation 8(4) of the *Solicitors Accounts Regulations*,
c) In or around 31 July 2011, failed to maintain, as part of his accounting records, proper books of account that showed the true financial position in relation to his transactions with clients moneys and/or with moneys transacted by him through the client account, in breach of regulation 12(1) of the *Solicitors Accounts Regulations*.

In relation to the Carlow practice:
a) As of 31 July 2011, permitted a deficit of in or around €501,878 to arise in the client account, which was due or partly due to the withdrawal of clients moneys from one or more client accounts without authority and not for the benefit of clients, in breach of regulation 7(1) of the *Solicitors Accounts Regulations*,
b) Withdrew moneys from the client account other than moneys permitted and in breach of regulation 8(4) of the *Solicitors Accounts Regulations*,
c) As of 31 July 2011, permitted debit balances to occur on the client side of client ledger accounts of in or around the sum of €525,302, in breach of regulation 7(2)(a) of the *Solicitors Accounts Regulations*,
d) Failed to maintain proper books of account, in breach of regulation 12(1) of the *Solicitors Accounts Regulations*.

The tribunal ordered that the matter go forward to the High Court and the President of the High Court, on 14 July 2014, made the following orders:
a) That the name of the respondent solicitor be struck from the Roll of Solicitors,
b) That the respondent solicitor make restitution to the Society, being the amount in respect of payments made by the compensation fund arising from the respondent solicitor's practice,
c) That the Society do recover the costs of the proceedings before the High Court and the Solicitors Disciplinary Tribunal as against the respondent solicitor when taxed or ascertained.

In the matter of John F Condon a solicitor practising as McMahon & Tweedy Solicitors, Merchant's House, 27/30 Merchant's Quay, Dublin 8, and in the matter of the *Solicitors Acts 1954-2011* [3127/DT/56/13]
Law Society of Ireland (applicant)
John Condon (respondent solicitor)
On 21 January 2014 and 15 July 2014, the Solicitors Disciplinary Tribunal sat to consider a complaint against the respondent solicitor and found him guilty of misconduct in his practice as a solicitor in that he failed to ensure there was furnished to the Society an accountant's report for the year ended 31 July 2011 within six months of that date, in breach of regulation 21(1) of the *Solicitors Accounts Regulations 2001* (SI 421/2001).

The tribunal ordered that the solicitor:
a) Do stand censured,
b) Pay a sum of €1,000 to the compensation fund,
c) Pay a contribution of €1,000 towards the whole of the costs of the Society.

In the matter of Eoin Lysaght, a solicitor formerly practising as Eoin Lysaght & Co, Solicitors, 42 Tonlegee Road, Coolock, Dublin 5, and in the matter of the *Solicitors Acts 1954-2008* [4617/DT19/12]
Law Society of Ireland (applicant)
Eoin Lysaght (respondent solicitor)
On 23 April 2013, 9 October 2013, and 22 July 2014, the Solicitors Disciplinary Tribunal sat to consider an application against the respondent solicitor and found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:
a) Caused a deficit of €10,394.85 to arise on the client account of the estate of a named person, which was due to the withdrawal of client moneys (i) in respect of professional fees and/or interim professional fees and/or outlays not properly payable to the respondent solicitor at the time of such withdrawal, in breach of regulation 11(3) of the *Solicitors Accounts Regulations*, and/or (ii) in satisfaction of professional fees payable by the client concerned where it had not been made clear to such client that client moneys held by the respondent solicitor for the client were being or were to be applied by the respondent solicitor in satisfaction (in whole or in part) of such professional fees, in breach of regulation 7(1)(a) of the *Solicitors Accounts Regulations*,
b) Failed to furnish a bill of costs in respect of the purported fees transferred by the respondent solicitor into his office account, in breach of regulation 11(1) of the *Solicitors Accounts Regulations*.

The tribunal ordered that:
a) The respondent solicitor do stand censured,

b) The respondent solicitor pay a sum of €1,000 to the compensation fund.

In the matter of John J Reid, solicitor, of O'Rourke Reid Solicitors, Pepper Cannister House, Mount Street Crescent, Dublin 2, and in the matter of the *Solicitors Acts 1954-2011* [4492/DT104/13]
Law Society of Ireland (applicant)
John J Reid (respondent solicitor)
On 15 April 2014 and 22 July 2014, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of professional misconduct in his practice as a solicitor in that he:
a) Breached regulation 7(2)(a) of the *Solicitors Accounts Regulations* by the creation of debit balances on client account in the sum of €470,286.83. He had already withdrawn the funds standing to his credit relating to a sale of property.
b) Breached regulation 8(4) by the withdrawal of client moneys other than as permitted.
c) Allowed a deficit to occur on general clients' funds by the withdrawal of the sum of €470,286.83, which was not available to him and which related to his other clients. The *Solicitors Accounts Regulations* at paragraph 7(1) state that "the moneys so withdrawn should not exceed the total of the moneys held for the time being in client account on behalf of the client concerned where a controlled trust or non-controlled trust concerned".

The tribunal ordered that the respondent solicitor:
a) Do stand censured,
b) Pay a sum of €15,000 to the compensation fund,
c) Pay the whole of the costs of the Society as taxed by a taxing master of the High Court in default of agreement.

In the matter of Jacqueline M Durcan, solicitor, formerly practising as Durcan's Solicitors, No 1 Hazel Grove, Spencer Park, Castlebar, Co Mayo, and in the matter of the *Solicitors Acts 1954-2008* [7083/DT14/12 and 2014 no 80 SA]
Law Society of Ireland (applicant)
Jacqueline M Durcan (respondent solicitor)
On 17 September 2013 and 25 March 2014, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in her practice as a solicitor in that she:
a) Caused/allowed a deficit of €259,816 in the client account as of 11 March 2011 to exist,
b) Caused/allowed funds of €90,000 from the client account to be used to finance/pay for interest and penalties on clients' unstamped and updated deeds,
c) Caused/allowed funds of €24,500 from the client account to be used to part finance/pay the firm's PI insurance cost, at €25,223 for 2010,
d) Caused/allowed funds of €51,500 from the client account to be used to finance/pay stamp duty arising from the purchase of the respondent solicitor's principal private residence,
e) Caused/allowed funds of €42,500 from the client account to be used to finance/pay the firm's PI insurance for 2011, and
f) Caused/allowed funds from the client account to be used as general working capital for her practice.

The tribunal ordered that the matter go forward to the High Court, and the President of the High Court, on 28 July 2014, made the following orders by consent:
a) That the name of the respondent solicitor shall be struck from the Roll of Solicitors,
b) That the Society do recover the costs of the Solicitors Disciplinary Tribunal proceedings as against the respondent when taxed or ascertained,
c) That the Society do recover the costs of the costs of the High Court application against the respondent when taxed or ascertained.

In the matter of Paul O'Mahony, solicitor, practising as principal of Edward O'Mahony & Company, Solicitors, 22 Tuckey Street, Cork, and in the matter of the *Solicitors Acts 1954-2011* [11160/DT184/12 and High Court record no 2014/43 SA]
Law Society of Ireland (appellant)
Paul O'Mahony (respondent solicitor)
On 23 January 2014, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:
a) Caused a deficit in the amount of circa €34,489 to arise on the client account on or around 31 March 2012, which was due or partly due to the withdrawal of client moneys from one or more client accounts, in breach of one or more of regulation 11(3) and/or regulation 7(1) of the *Solicitors Accounts Regulations*,
b) Wrongly appropriated stamp duty in the sum of €11,187 in relation to named clients,
c) Transferred round sums from the client account to the office account, which resulted in deficits arising in client funds, in breach of regulation 8(4) of the *Solicitors Accounts Regulations*,
d) Transferred, in the probate file of a named person, in three separate amounts the sum of €14,965 as fees, prior to the issue of a grant of probate in an estate, in breach of regulation 8(4) of the *Solicitors Accounts Regulations*,
e) Withdrew funds of €12,300 between 11 April 2012 and 3 May 2012 when there were no fees available in the client ledger, in breach of one or more of regulation 11(3) and/or regulation 7(1) of the *Solicitors Accounts Regulations*.

The tribunal ordered that the respondent solicitor:
a) Do stand censured,
b) Pay a sum of €7,500 to the compensation fund,
c) Pay a contribution of €7,500 towards the whole of the costs of the Society.

On appeal by the Society to the High Court, the President of the High Court, on 21 and 28 July 2014, in addition to the aforementioned sanctions, ordered on consent that:
a) The respondent solicitor be only permitted to practice as a solicitor under the control and supervision of another solicitor of at least ten years' standing, to be approved in advance by the Law Society of Ireland,
b) The Society recover the costs of the appeal from the respondent solicitor, to be taxed in default of agreement.

In the matter of John F Condon, a solicitor practising as McMahon & Tweedy Solicitors, Merchant's House, 27/30 Merchant's Quay, Dublin 8, and in the matter of the *Solicitors Acts 1954-2011* [3127/DT/34/13]
Law Society of Ireland (applicant)
John Condon (respondent solicitor)
On 21 January 2014, 15 July 2014, 22 July 2014, and 29 July 2014, the Solicitors Disciplinary Tribunal sat to consider a complaint against the respondent solicitor and found him guilty of misconduct in his practice as a solicitor in that he failed or refused to comply with a direction of the Complaints and Client Relations Committee, made on 16 April 2008 pursuant to section 12(1)(a)(i) of the *Solicitors (Amendment) Act 1994*, as amended by substitution by section 14 of the *Solicitors (Amendment) Act 2002*, that he make a contribution towards the costs of the Society in the sum of €1,500.

The tribunal ordered that the respondent solicitor:
a) Do stand censured,
b) Pay a sum of €1,000 to the compensation fund,
c) Pay the whole of the costs of the Society, to be taxed by a taxing master of the High Court in default of agreement.

In the matter of Edmond Dillon, solicitor, 62 Church Street, Listowel, Co Kerry, and in the

matter of an application by the Law Society of Ireland to the Solicitors Disciplinary Tribunal, and in the matter of the *Solicitors Acts 1954-2011* [7964/DT111/13]
Law Society of Ireland (applicant) Edmond Dillon (respondent solicitor)

On 29 July 2014, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in that he had:

a) On one or more occasions between January 2012 and April 2012 inclusive, acted as a solicitor when not a solicitor qualified to practice under section 54 of the *Solicitors Act 1954*, as substituted by section 62 of the *Solicitors (Amendment) Act 1994*, by reason of a practising certificate in respect of him not being in force,
b) On 29 March 2012, when there was no practising certificate in force in respect of him, practised as a solicitor in breach of section 56 of the *Solicitors (Amendment) Act 1994*, and/or wrongly held himself out as a practising solicitor, at Listowel Circuit Court in respect of named proceedings and, in particular, moved an adjournment application before the presiding judge and engaged in discussions with the legal representative(s) for Kerry County Council,
c) On 19 April 2012, when there was no practising certificate in force in respect of him, practised as a solicitor in breach of section 56 of the *Solicitors (Amendment) Act 1994*, and/or wrongly held himself out as a practising solicitor, at Ennis Circuit Court in respect of identified family law proceedings and, in particular, appeared before the presiding judge at a call-over and engaged in settlement discussions with legal representative(s) for the opposing party,
d) On one or both of the occasions detailed above at (b) and (c), practised as a solicitor in respect of proceedings without professional indemnity insurance.

The tribunal ordered that the respondent solicitor:

a) Do stand censured,
b) Pay a sum of €500 to the compensation fund,
c) Pay a contribution of €2,500 towards the whole of the costs of the Law Society of Ireland.

eurlegal

News from the EU and International Affairs Committee
Edited by TP Kennedy, Director of Education, Law Society of Ireland

AIR RIGHTS ERUPTION

This year sees the tenth year in force of Regulation (EC) no 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights. As such, it is a timely opportunity to look back at some of the main features of the regulation, some of the more high-profile associated litigation of the past decade, and preview some proposed changes to the regulation.

Principally, the regulation establishes passengers' rights if:

- They are denied boarding against their will,
- Their flight is cancelled, or
- Their flight is delayed.

In the event of flight cancellation or denied boarding, the passengers concerned have rights relating to reimbursement, care (including transport and accommodation), and compensation in amounts varying between €250 and €600 according to the distance of the planned flight. In relation to delays, passengers have similar rights without an express right to compensation.

Detailed provisions are set out at article 5 of the regulation relating to the rights of passengers in the event of a flight cancellations; article 6 regarding passengers who have suffered delay; while article 7 sets out compensation amounts due to passengers in certain cancellation circumstances.

The entry into force of the regulation was met by a legal action by airline representative bodies seeking to have it declared invalid as a community act. In case C-344/04, *IATA and ELFAA* ([2006] ECR I-403), the airlines challenged the validity of articles 5, 6 and 7 of the regulation. The reference to the Court of Justice of the EU, under what is now article 267 of the *Treaty on the Functioning of the European Union*, was made in proceedings brought by the International Air Transport Association (IATA) and the European Low Fares Airline Association (ELFAA) against the Department for Transport in Britain. As the judgment noted, IATA was at that time an association comprising 270 airlines from 130 countries, while ELFAA was established as an unincorporated association in January 2004 and represented the interests of ten low-fare airlines from nine European countries. The challenge, if successful, would have rendered invalid the key articles of the regulation. In brief, the challenge was that the impugned articles were inconsistent with international law, invalidly adopted having regard to the *EC Treaty*, and conflicted with the principles of legal certainty, proportionality and non-discrimination. Ultimately, the European Court of Justice held that the arguments in support of invalidity were not well founded and the regulation was upheld

Since that judgment, there have been numerous cases involving this regulation, consideration of which is well beyond the scope of this article. Instead, we focus on a few cases that relate to particularly contentious points and then go on to mention some aspects of the proposed amendment to the regulation. Three points of contention are mentioned below: the concept of extraordinary circumstances that may exempt a carrier from paying compensation, compensation for delay, and the limitation period within which to bring a claim.

> **The fact that an air carrier has complied with the minimum rules on maintenance of an aircraft cannot in itself suffice to establish that that carrier has taken 'all reasonable measures'**

Extraordinary circumstances

In case C-549/07, *Wallentin-Hermann* ([2008] ECR I-11061), the ECJ found that article 5(3) of the regulation must be interpreted as meaning that a technical problem in an aircraft that leads to the cancellation of a flight is not covered by the concept of 'extraordinary circumstances' within the meaning of that provision, unless that problem stems from events that, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control. It stated that the *Convention for the Unification of Certain Rules for International Carriage by Air*, concluded in Montreal on 28 May 1999, is not decisive for the interpretation of the grounds of exemption under article 5(3). It went on to state that the frequency of the technical problems experienced by an air carrier is not in itself a factor from which the presence or absence of 'extraordinary circumstances' within the meaning of article 5(3) can be concluded. In addition, the fact that an air carrier has complied with the minimum rules on maintenance of an aircraft cannot in itself suffice to establish that that carrier has taken 'all reasonable measures' within the meaning of article 5(3) and, therefore, to relieve that carrier of its obligation to pay compensation provided for by articles 5(1)(c) and 7(1).

Case C-12/11, *Denise McDonagh v Ryanair Ltd*, also dealt with the concept of 'extraordinary circumstances'. In that matter, the court found against Ryanair's argument and ruled that article 5 must be interpreted as meaning that circumstances such as the closure of part of European airspace as a result of the eruption of the Eyjafjallajökull volcano constitute 'extraordinary circumstances' within the meaning of that regulation that do not release air carriers from their obligation laid down in articles 5(1)(b) and 9 to provide care. It stated that those articles must be interpreted as meaning that, in the event of cancellation of a flight due to 'extraordinary circumstances' of a duration such as that in the main proceedings, the obligation to provide care to air passengers laid down in those provisions must be complied with, and the validity of those provisions is not affected. It went on to find that an air passenger may only obtain, by way of compensation for the failure of the air carrier to comply with its obligation referred to in those articles to provide care, reimbursement of the amounts that, in the light of the specific circumstances of each case, proved necessary, appropriate and reasonable to make up for the shortcomings of the air carrier in the provision of care to that passenger, a matter which is for the national court to assess.

Delays

Possibly the most controversial judgment over the past decade regarding the regulation was that in relation to the treatment of delay set out in joined cases C-402/07 and C-432/07, *Sturgeon and Others* ([2009] ECR I-10923). The Sturgeons booked return tickets with Condor from Frankfurt to Toronto. They suffered a delay of more than 25 hours. Importantly, by reference to the express text of the regulation, if the flight was regarded as cancelled, they would be entitled to compensation pursuant to article 5, but not so if it was regarded as delayed under article 6 of the regulation. They took an action claiming compensation, and Condor argued the case should be

PIC: iSTOCK

The Eyjafjallajökull volcano caused ructions in 2010

dismissed as the flight had been delayed not cancelled.

In the joined case, Mr Böck and Ms Lepuschitz booked return tickets with Air France from Vienna to Mexico City via Paris. They were told at the airport that their flight was cancelled. They agreed to travel on another flight, operated by another air carrier the following day. They arrived in Vienna almost 22 hours after the scheduled arrival time. They claimed compensation in relation to the flight cancellation. In Austria, the court held that their original flight, which ultimately actually departed the next day, in addition to the regular flight scheduled by Air France on the same day, was not cancelled but rather delayed, and thus compensation did not arise having regard to the contents of the regulation. They appealed that decision.

Having joined the cases, the Court of Justice ruled that articles 2(l), 5 and 6 of the regulation must be interpreted as meaning that a flight that is delayed, irrespective of the duration of the delay, even if it is long, cannot be regarded as cancelled where the flight is operated in accordance with the air carrier's original planning. However, it went on to state that articles 5, 6 and 7 must be interpreted as meaning that passengers whose flights are delayed may be treated, for the purposes of the application of the right to compensation, as passengers whose flights are cancelled and they may thus rely on the right to compensation laid down in article 7 where they suffer, on account of a flight delay, a loss of time equal to or in excess of three hours – that is, where they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier. Such a delay does not, however, entitle passengers to compensation if the air carrier can prove that the long delay was caused by extraordinary circumstances that could not have been avoided even if all reasonable

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Headquarters of the Law Society of Ireland

measures had been taken, namely circumstances beyond the actual control of the air carrier.

The controversial element of this decision is that nowhere in the text of the regulation is there language that expresses the entitlement to compensation for passengers subject to long delays. The court decided that, given that the damage sustained by air passengers in cases of cancellation or long delay is comparable, passengers whose flights are delayed and passengers whose flights are cancelled cannot be treated differently without the principle of equal treatment being infringed. The court stated that this is *a fortiori* the case in view of the aim sought by the regulation, which is to increase protection for all air passengers.

This judgment had a sequel in which the airlines sought to have it overturned – joined cases C-581/10 and C-629/10, *Nelson v Deutsche Lufthansa AG* and *TUI Travel plc, British Airways plc, EasyJet Airline Company Ltd, International Air Transport Association v Civil Aviation Authority*. In this case, the Grand Chamber of the Court of Justice found against the airlines and IATA and reaffirmed the earlier judgment.

Limitation periods

Case C-139/11, *Moré v KLM* ([2012] ECR) deals with the limitation period within which to bring a claim under the regulation. Mr Moré had reserved a seat with KLM on a flight from Shanghai to Barcelona, scheduled for 20 December 2005. The flight was cancelled. On 27 February 2009, Mr Moré brought an action against KLM before the Commercial Court in Barcelona, claiming compensation. In response, KLM contended that the action was time-barred, on the ground that the two-year period specified in article 29 of the *Warsaw Convention* within which actions for damages against air carriers must be brought had expired.

The ECJ rejected the KLM argument and reiterated that it is settled case law that, in the absence of provisions of EU law on the matter, it is for the domestic legal system of each member state to lay down the detailed procedural rules governing actions for safeguarding rights that individuals derive from EU law, provided that those rules observe the principles of equivalence and effectiveness (see, to that effect, case C-429/09 *Fuß* ([2010] ECR I12167), paragraph 72). The court stated that it follows that the time limits for bringing actions for compensation under articles 5 and 7 are determined by the national law of each member state, provided that those rules observe the principles of equivalence and effectiveness. The ECJ also reiterated that the compensation measure laid down in articles 5 and 7 falls outside the scope of the *Warsaw* and *Montreal Conventions* (see, to that effect, joined cases C-581/10 and C-629/10, *Nelson and Others* ([2012] ECR), paragraph 55).

Proposed amendments

A proposal amending the regulation has been published by the commission – COM/2013/0130 final – 2013/0072 (COD). It contains a number of revisions of the regulation worth noting.

In relation to the concept of 'extraordinary circumstances', the proposal introduces a non-exhaustive list of circumstances to be regarded as extraordinary and as non-extraordinary. Furthermore, in certain circumstances, an air carrier may limit the total cost of accommodation provided to €100 per night and per passenger and to a maximum of three nights. In addition, it is proposed that the obligation to offer accommodation shall not apply where the flight concerned is of 250km or less and scheduled to be operated by an aircraft with a maximum capacity of 80 seats or less, except where the flight is a connecting flight.

The proposal explicitly introduces the right to compensation in case of long delays. However, the time threshold after which the right to compensation arises is proposed to be increased from three to five hours for all journeys within the EU.

The time limits for bringing actions for compensation remain to be decided in accordance with the national rules of each member state.

When and if this proposal becomes law, and how these provisions survive the legislative process remains to be seen. However, this 2013 proposal appears to be proceeding through the stages and was most recently on the agenda of the Transport Council's meeting held in June 2014.

David Hodnett is legal adviser at the Commission for Aviation Regulation. Any views expressed are the author's own and do not represent the views of the commission.

FOCAL POINT

cjeu ruling on personal data and scope of subject access requests

In joined cases C-141/12 and C-372/12, *YS v Minister voor Immigratie, Integratie en Asiel* and *Minister voor Immigratie, Integratie en Asiel v M and S*, the Court of Justice of the European Union has concluded that, in a context where an administrative agency produces analysis to inform and support its formal decisions, that analysis is not of itself personal data under Directive 95/46/EC. This is even true where the analysis contains personal data such as a person's name, nationality, date of birth and gender. The decision clarifies the form in which personal data must be provided to a data subject who makes a subject access request.

The case was referred for a preliminary ruling by the Dutch courts. The Dutch immigration ministry had been considering applications for residency permits from certain third-country nationals. To inform their decision, the ministry carried out legal analysis of the applications, which was contained in internal documents. The document was one used to support a decision, and was not communicated to the third-party nationals. They then made a subject access request to obtain a copy of the analysis.

The applicants argued that, as the analysis contained personal information about the data subjects, it then was their personal data. The CJEU rejected this argument, holding that the analysis related to the ministry's processes as applied to the applicants, albeit containing some of their personal data.

Neither did the applicants secure a right to the analysis document itself, as the CJEU found that their access request could have been adequately responded to by the provision to the applicants of a summary of the analysis "in intelligible form". That summary had to be sufficient to allow the applicant to determine whether the details in it were accurate and had been fairly processed.

The decision may positively affect (from a data controller's perspective) the handling of subject access requests, as the provision of redacted copy documents, a method often used to deliver data to requesters, may no longer be required.

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

professional notices

WILLS

Coyne, Thomas (deceased), late of St Brigid's Hospital, Ballinasloe, and formerly of Lowtown, Ballydangan, Athlone, Co Westmeath, and born in the Maam Valley, Connemara, Co Galway. Would any solicitor holding or having knowledge of any will made by the above-named deceased, who died on 4 April 2014 at University College Hospital, Galway, please contact Messrs Padhraic Harris & Company, Solicitors, Merchants Gate, Merchants Road, Galway; tel: 091 562 066, fax: 091 566 653, email: aharris@harrissolrs.ie

Kavanagh, Michael (deceased), late of 45 St Albans Road, South Circular Road, Dublin 8, who died on 12 July 2014. Would any person having knowledge of a will made by the above-named deceased, or if any firm is holding same, please contact Delahunty O'Connor & Co, Solicitors, 2 Bangor Drive, Dublin 12; tel: 01 454 0766, email: cdelahunty@delahuntyoconnor.net

Maher, John (deceased) and Maher, Mary (May) (née Lowry) (deceased), late of 22 Windmill Avenue, Crumlin, Dublin 12. Would any person having knowledge of wills made by both of the above-named deceased, who died on 18 June 2009 and 2 January 2014 respectively, please contact Lyons Dermody Solicitors, 43 Parnell Square West, Dublin 1; DX 26001; tel: 01 873 3000, fax: 01 873 3167, email: info@lyonsdermody.ie

RATES

professional notice rates

RATES IN THE PROFESSIONAL NOTICES SECTION ARE AS FOLLOWS:

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

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ALL NOTICES MUST BE PAID FOR PRIOR TO PUBLICATION. CHEQUES SHOULD BE MADE PAYABLE TO LAW SOCIETY OF IRELAND. Deadline for December 2014 *Gazette*: 19 November 2014. For further information, contact the *Gazette* office on tel: 01 672 4828 (fax: 01 672 4877).

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

O'Callaghan, Michael P (deceased), late of Ard Mhuire, Scarteen Lower, Charleville Road, Newmarket, Co Cork, and 3 Emma Villas, Castleview Avenue, Thomondgate, Limerick. Would any person having knowledge of a will made by the above-named deceased, who died on 16 September 2014 at Ard Mhuire, Scarteen Lower, Charleville Road, Newmarket, Co Cork, please contact Don O'Connor & Co, Solicitors, Percival Street, Kanturk, Co Cork; DX 114003 Kanturk; tel: 029 51237, fax: 029 51239, email: donoco@eircom.net

O'Donoghue, Niall A, otherwise Niall A Donnchadha (deceased), late of Castledrum, Castlemaine, Co Kerry, and formerly of 25 Mitchelscourt, Mitchelstown, Co Cork, who died on 10 October 2014. Would any solicitor holding or having knowledge of a will made by the deceased please contact John Molan & Sons, Solicitors, Mitchelstown, Co Cork; tel: 025 24543

O'Sullivan, Paddy (Patrick/Paudie/Padraig) (deceased), late of Lough Avoul, Glengarriff, Bantry, Co Cork, who died on 30 April 2014. Would any person having knowledge of a will made by the above-named deceased please contact John O'Sullivan, Rainbow Restaurant, Glengarriff, Co Cork; tel: 086 606 7785, email: rainbowrestaurant@eircom.net

Redmond, Christopher (deceased), late of 5 Albert College Park, Glasnevin, Dublin 11, who died on 9 February 2002. Would any person having knowledge of any will made by the above-named deceased, or if any firm is holding same, please contact Patrick F O'Reilly & Company, Solicitors, 9/10 South Great Georges Street, Dublin 2; tel: 01 679 3565, fax: 01 679 3421, email: info@pforeilly.ie

TITLE DEEDS

Would any person knowing the whereabouts or holding title documents on behalf of the late Ms Stella Ryan (deceased), late of 101 Johnstown Avenue, Cabinteely, Dublin 18, with respect to property at Unit 16, Clarendon Centre (otherwise known as Unit 16, Westbury Mall) in the parish of Saint Anne in the city of Dublin, please contact JJ Lennon Solicitors, 38-39 Fitzwilliam Square, Dublin; tel: 01 234 3110, email: reception@jjlennon.com

In the matter of the *Landlord and Tenant Acts 1976-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of the premises known as no 30 Nelson Street, Dublin 7: an application by Isaac Van Nierkerk

Take notice that any person having any interest in the freehold estate of the following property: no 30 Nelson Street, Dublin 7, held under an indenture of sublease dated 18 July 1980 between Anne O'Malley of the one part and Sean Tunney of the second part, subject to the yearly rent of £8 and the covenants and conditions contained therein, the sublease having been carved out of a superior lease dated 10 October 1917 between John Bereford of the one part and Frank Stokes of the second part for a term of 500 years from 1 July 1917.

Take notice that the applicant, Isaac Van Nierkerk, being the person currently entitled to the lessee's interest, intends to submit an application in the county registrar for the city and county of Dublin for the acquisition of the freehold interest in the aforesaid property. Any person asserting that they hold a superior interest in the aforesaid premises are called upon to furnish evidence of the title to the aforementioned premises to the below named within 21 days from the date of this notice.

In the default of any such notice

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

Dated: 7 November 2014

Signed: O'Gradys Solicitors (solicitors for the applicant), Fourth Floor, 3-34 Percy Place, Dublin 4

In the matter of the *Landlord and Tenant (Ground Rent) Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of the property known as the dwellinghouse, butcher's stall, slaughterhouse, garden, and premises situate in the village of Borris-in-Ossory in the barony of Upperwoods and county of Leix: an application by Sean Egan

Take notice that any person having an interest in the freehold estate or any superior interest in the following property: all that and those the dwellinghouse, butcher's stall, slaughterhouse, garden, and premises situate in the village of Borris-in-Ossory in the county of Laois, and as more particularly described in indenture of assignment dated 5 February 1927 and made between one Norah Shelly of the one part and Thomas F Egan, held under yearly tenancy to the estate of W Holmes Esquire at the yearly rent of five pounds and five shillings.

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

In default of any such notice being received, Sean Egan intends to proceed with this application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the county of Laois for such directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversions in the aforementioned are unknown or unascertained.

Date: 7 November 2014

Signed: Devitt Dooley (solicitors for the applicant), The Valley, Roscrea, Co Tipperary

contra bonos mores

Beer Wars Episode IV: a New Hops

The owners of the rights to *Star Wars* are suing a New York brewery over a beer named 'Empire Strikes Bock'.

Lucasfilm has filed a motion in an effort to stop the tiny Empire Brewing Co marketing the German bock-style lager under that name, arguing that it could be confused for an official product.

Opposing the brewery's attempt to trademark the name, Lucasfilm's complaint reads "the applicant's 'Empire Strikes Bock' mark is virtually identical in sound, appearance, and connotation to Lucasfilm's 'The Empire Strikes Back' mark, differing by only one letter in the respective last words 'bock' and 'back,' and the initial word 'the'.

"Lucasfilm has a long history of using such marks for food and beverages, including wine. The fact that consumers have been exposed to and accustomed to seeing Lucasfilm's *Star Wars* film franchise marks in connection with food and beverages, including wine, increases the already existing likelihood of confusion."

The brewing company has released a video statement saying that the name is simply a homage to the film and should be regarded as parody. The video certainly supports the 'parody' defence. May the froth be with you.

Judge raps teacher's knuckles

A juror who received a text message stating that the defendant was guilty prompted the judge to take matters into his own hands.

The alternate juror told Judge Joseph Fahey and lawyers in Onondaga County Court, New York, that a fellow teacher had sent her a text message, saying that the defendant had once attended their school and that he was "guilty as sin".

The juror told the judge that she felt it was her duty to share the message with the court. Taking the phone, the judge typed in his message, which he then read into the court record: "This is Judge Fahey. Do not send any more text messages about this case or there will be consequences."

No response was recorded.

Actor sues *Simpsons* 'for using his likeness'

Frank Sivero, who played mobster Frankie Carbone in *Goodfellas*, claims that *Simpsons*' writers living next to him in 1989 imitated his character for the animated hoodlum Louie.

The $250 million lawsuit claims that Sivero was familiar to *Simpsons* producer James L Brooks, and that he lived next to writers of *The Simpsons* in 1989 as he was preparing for *Goodfellas*: "They saw each other almost every day ... they were aware the entire character of Frankie Carbone was created and developed by Sivero, who based this character on his own personality."

Sivero claims the Carbone character entirely as his own and says he wasn't working from a script. Apparently quoting *The Simpsons* wiki page for Louie, the suit then claims: "Louie's appearance and mannerisms are strongly evocative of character actor Frank Sivero."

Sivero is claiming the money on the grounds of the producers appropriating his "confidential idea" for the character, as well as for "loss of likeness" and being subsequently typecast.

The actor, who also appeared in the *Godfather Part II*, hasn't been seen on screen since 2008's crime B-movie *Hotel California*, but has kept busy with other extracurricular litigation. In July, he sued a deli in El Cajon, California, for creating a 'Frankie Carbone' sandwich without his permission.

Red Bull gives you ...oh, wait

Red Bull has just settled a major lawsuit in the US over false advertising, and anyone who drank the drink at any time in the past 12 years is in line to share in the payout. Unfortunately, it only applies in the United States.

Benjamin Careathers' lawsuit argued that the slogan 'Red Bull gives you wings' and claims of enhanced performance in terms of reaction, energy and concentration were a lie.

The drinks giant decided to "settle the lawsuit to avoid the cost and distraction of litigation". The proposed settlement, worth a little over $13 million, needs to be approved by the US District Court of New York, and several commentators have suggested that the entire situation will likely be a marketing coup for the company.

The class action lawsuit covers anyone who bought a can of Red Bull in the US between 1 January 2002 and 3 October 2013. Just tell Red Bull you bought the drink and – so the settlement says – a payment is yours: a $10 cheque or $15 worth of Red Bull, no questions asked.

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Opportunities

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Our Client is seeking an experienced litigation Solicitor to join the team. You will represent international and domestic clients across a range of commercial disputes with a focus on contentious regulatory matters. Solid commercial court experience from a top 15 law firm is essential as are impressive academic achievements.

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We have a number of opportunities for top calibre corporate lawyers from recently qualified level upwards. You will have the opportunity to work on cutting edge projects in a dynamic and driven environment. Excellent transactional, drafting and communication skills are essential. Top 20 law firm background is preferred.

Employment Law Solicitor, Dublin

Our Client has a highly respected employment law practice. They wish to add an experienced solicitor to the team. This is an excellent opportunity for an ambitious candidate to work with an enviable client base. The role will entail reviewing and drafting employment policies and contracts, representing clients in relation to general employment matters such as bullying and harassment, absence management, performance management, disciplinary and grievance processes and managing claims on behalf of clients. The ideal candidate will ideally have solid experience from a top 10 law firm.

Risk & Compliance Lawyer, Dublin

Our Client, a leading Irish law firm, has a new vacancy for a Risk & Compliance Lawyer. The successful applicant will work closely with the Risk Partner to promote best practice in the area of risk and compliance management across the firm and will assist in aligning the firm's risk and compliance standards across all areas of the business. The ideal candidate will have solid experience in a litigation or risk and compliance position within a large organisation or law firm.

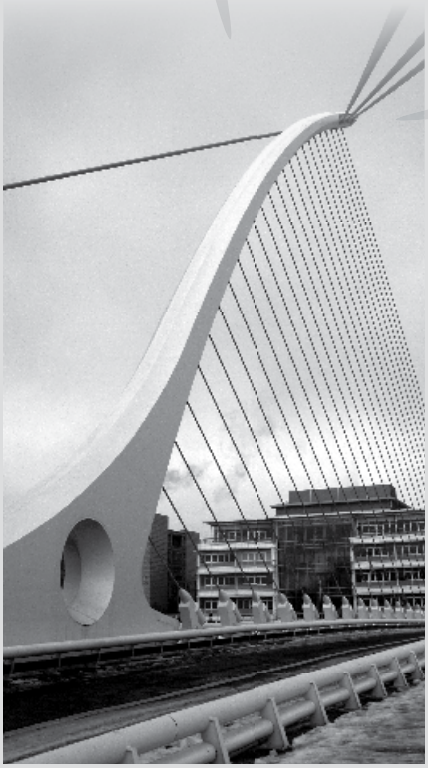
Projects Lawyers, Dublin

Our Client who has a leading Energy and Projects team in Ireland has immediate openings for outstanding commercial lawyers. The team offers a fully integrated end-to-end project delivery service, being able to draw on experts with specialist skills designed to facilitate every stage of project delivery. The successful candidate will work on all aspects of high-end projects ranging from PPPs and regulatory matters to energy and natural resource projects. This is an outstanding opportunity to join one of the best teams in the projects sector. Projects experience is not essential but a solid commercial law background is necessary for this position.

Commercial Property Solicitors, Dublin

Our Client's Property Department is at the forefront of commercial property law in Ireland. They are currently recruiting for a number of Commercial Property Solicitors. The successful applicant will advise clients on every aspect of commercial property law in particular on commercial land acquisitions, commercial property developments and tax based property acquisition/ development. Excellent drafting & negotiation skills are essential as is property experience from a large, medium or boutique Commercial Property firm.

To apply for any of the above vacancies, interested applicants should contact Yvonne Kelly in strict confidence on +353 16401988. Alternatively please email your CV to ykelly@keanemcdonald.com.
For a comprehensive list of our vacancies visit our website at www.keanemcdonald.com



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Banking Solicitor – Associate to Senior Associate – J00466
A leading Dublin based law firm requires a highly motivated banking practitioner. Candidates will be experienced in structured finance, project finance and securitisation transactions and will also be comfortable providing regulatory advice to banks and other financial services institutions.

Commercial Property – Assistant to Associate – PP0313
Our client is searching for an experienced commercial property lawyer to advise both domestic and international clients on the full range of property matters including multi-jurisdiction sales and acquisitions, sale and leasebacks, re-financings and investments.

Company Secretary – Associate – J00272
Our client, a front ranking practice, is seeking an experienced Company Secretary to join their busy Company Secretarial Department. You will be ICSA qualified with excellent know-how and IT skills.

Construction – Assistant to Associate – PP0134
A leading Irish law firm is searching for strong Construction lawyers. You will be dealing with contract drafting and advisory matters as well as litigation and all forms of alternative dispute resolution.

Corporate Finance Solicitor – Assistant to Associate – J00424
Advising financial institutions, government bodies and regulators as well as domestic and international companies, the successful candidate will have exposure to a broad range of financial services including asset finance, insolvency, regulation and secured/ unsecured loans.

Energy & Renewables – Associate – J00486
This is an excellent opportunity to join a highly respected legal practice whose client base includes banks, commercial lenders and government agencies. The department advises on the full range of energy transactions and the successful candidate will be dealing with significant project and debt finance related matters.

Environmental & Planning Solicitor – Assistant to Associate – PP0190
This top flight Dublin firm seeks a Planning and Environmental Solicitor. Appropriate candidates will demonstrate a strong knowledge of current legislation and have experience in planning applications. Experience of judicial review cases will be an advantage.

Investment Funds – Assistant to Associate – J00478
A market leading firm is looking to recruit an experienced funds lawyer to advise investment managers, custodians, administrators and other service provider of investment funds on establishing operations in Ireland. A first rate remuneration and benefits package is on offer.

Knowledge Management Lawyer (Corporate/Commercial Contracts) – Associate – J00367
Our client is seeking a qualified lawyer to join its Knowledge Team supporting the Corporate Department and assisting with other knowledge projects. Reporting directly to the Director of Knowledge, you will be a qualified solicitor or barrister with experience in a top firm. Excellent academics with strong communication skills are essential.

Professional Support Lawyer – Finance/Regulatory – PP0386
A top 5 firm is seeking a professional support lawyer to support the work of practitioners in their Financial Services Regulatory Practice. The successful candidate will report to the Group Leader of the Banking and Financial Services Group and the Head of Know-How. You will be qualified as a solicitor or barrister in Ireland or another common law jurisdiction with an excellent academic background. You will have experience in financial services legal practice.

Tax Lawyer – Senior Associate – J00337
A Top 5 Dublin law firm is looking to recruit a Senior Tax Assistant with solid general tax experience to slot into a fast growing partner led team. You will advise Irish and European clients on structuring transactions, such as complex cross-border acquisitions, real-estate investment, private equity public offerings of debt and equity securities and joint ventures. The tax group also advises on executive compensation and share incentive schemes, VAT and international tax planning.

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