Doctor in the house
Is mandating open disclosure of medical errors to be welcomed?

Out of the hat
Might the Brexit debacle drag international family law down the rabbit hole?

Google's greatest hits
Techno giant's residency at the European Commission continues with a third show

gazette

LAW SOCIETY

€4.00 **MAY 2019**

LITTLE PLOT OF HORRORS

Invasive species and property

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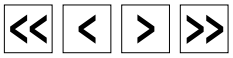

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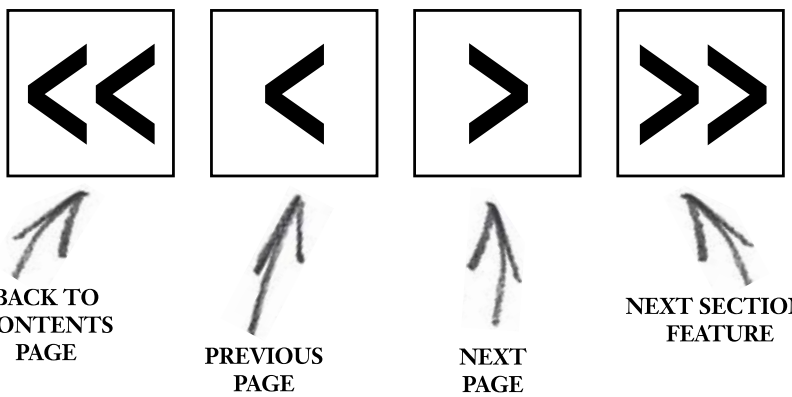

... enjoy

IMPORTANT NOTICE FOR ONLINE READERS

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LOST IN THE NOISE

As you read this, the 21st Calcutta Run will be only a few days away, on 18 May. 'Run' is a slight misnomer – you can run, sprint, walk, crawl, or indulge your Lycra fantasies and do the fantastic cycle – this year, both 50k and 100k routes are available. And for the second year, you can do it all again the next day in Cork.

It has been amazing to hear directly from those involved in the charities – the Hope Foundation and the Fr Peter McVerry Trust, and in Cork, SHARE – all primarily working to alleviate homelessness. The money raised goes directly to producing major improvements – often life changing – for those they help.

Christchurch atrocity

At the suggestion of Council member Liam Kennedy, originally from New Zealand, the Council unanimously agreed to write to the New Zealand Law Society, expressing the profession's shock and solidarity following the 15 March mosque attacks, and admiration for the reaction of the New Zealand people. We have just received a letter of acknowledgement, saying that "the rallying of the overseas community has been overwhelming, but we are particularly grateful for the support and consolation from our close colleagues and friends in other law associations around the world". Our friends in New Zealand remain in our thoughts.

Nebulous concept

Singer Kristin Chenoweth has a song called *The Girl in 14G*. It's all about her moving into an apartment and finding herself trapped between an operatic diva on the floor below and a salsa wannabe on the floor above. Overwhelmed by the noise from all sides, she screams 'STOP!' Check it out on YouTube – it's great fun. We are almost at screaming stage in frustration at the noise that has been generated by the insurance industry, politicians, and others about the cost of claims, fraudulent claims, generous judges, and excessive damages. These have all been conflated into a narrative that the only way to cut insurance costs is to cap damages. It's a simple, newsy line to describe what would be a one-way bet for the insurance companies, as no one is asking them for, and they certainly aren't offering, a matching commitment to cut premiums.

To be fair, it would be very hard to devise a way that would link a reduction in the level of damages to the nebulous concept of insurer profitability. It is highly significant (and completely lost in the noise) that, in the neighbouring jurisdiction, while damages are significantly lower than here (though not as low as some of the figures being trotted out would suggest), motor insurance premiums are, in fact, higher! So why would we bother taking away the right of a victim to redress just to further enrich some insurers?

If the business is so unprofitable, why are they all still writing it, and advertising furiously to get it? Answers on a postcard, please, to the Department of Finance.

As ever, if you have any queries, comments or issues, send me a postcard or even an email to president@lawsociety.ie.

> WHY WOULD WE BOTHER TAKING AWAY THE RIGHT OF A VICTIM TO REDRESS JUST TO FURTHER ENRICH SOME INSURERS?

PATRICK DORGAN,
PRESIDENT

gazette
LAW SOCIETY

PIC: SHUTTERSTOCK

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

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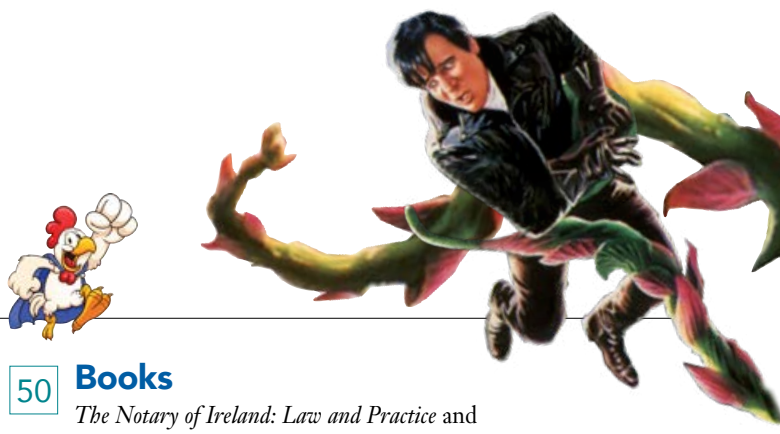
FEATURES



REGULARS

THE BIG PICTURE

PIC: EPA-EFE/JIM LO SCALZO

IT CAME FROM THE DEPTHS

A Clean Water Action activist, bearing an uncanny resemblance to the *Creature from the Black Lagoon*, scrutinises David Bernhardt during his testimony before a US Senate Energy and Natural Resources Committee hearing in Washington DC, on his nomination to head the Department of the Interior. Bernhardt, a one-time oil and mining lobbyist, has raised the ire of conservation groups that are opposed to his nomination. The Interior Department's Office of Inspector General is reviewing allegations that acting secretary Bernhardt may have violated his ethics pledge by weighing in on issues that affected a former client – though no formal probe has been launched

ROSY FUTURE FOR CONVEYANCERS

PIC: JOE HANLEY

Speakers at the Kerry Law Society seminar in the Rose Hotel, Tralee, on 4 April 2019 included *(front)* John Galvin (chairman, Kerry Law Society) and Padraig Shanahan (chartered tax adviser); *(back, l to r)*: Leona McMahon, Catherine O'Flaherty (Conveyancing Committee, Law Society), Patrick Mann, Barbara Liston and Deirdre Flynn

Peter Malone, Eoin Brosnan, Peter Naughton and Margaret Malone

Emmet McCann, Brian O'Regan and Alex Hoffman at the Kerry seminar

LILY WHITES LEAD THE WAY

ALL PICS: PKPICS

At the Kildare Solicitors' Bar Association (KSBA) conference at the Killashee House Hotel in Naas on 4 April were *(front, l to r)*: Rosemarie Hayden (student development advisor, Law Society), Patrick Dorgan (president, Law Society), Helen Coughlan (president, KSBA), Ken Murphy (director general, Law Society) and Tony Hanahoe (solicitor); *(back, l to r)*: Berna Hanahoe, Martin Callanan, Alisia Mulvany, Elaine Farrell, Catherine Webberley, Eva O'Brien, Eoin O'Connor, Elaine Cox, Frances Murtagh, Conor O'Toole, David Osborne, Seamus Taaffe, Tom Stafford, Niall O'Neill and Niall Farrell

Elaine Cox (Reidy Stafford Solicitors), Elaine Farrell (Patrick J Farrell Solicitors), Patrick Dorgan, Ken Murphy, Helen Coughlan and Eva O'Brien (Reidy Stafford Solicitors)

Niall O'Neill (Niall O'Neill Solicitors), Niall Farrell (Patrick J Farrell Solicitors), Rosemarie Hayden, Helen Coughlan, Patrick Dorgan, Ken Murphy and Catherine Webberley (Wilkinson and Price Solicitors)

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COX APPOINTS NEW HEAD OF LEGAL TECH

Arthur Cox has named Eileen Burns as the new head of its legal tech and innovation services group. Eileen has worked for 30 years in international consulting services and the tech industry.

She spent 20 years in senior leadership positions at Accenture CIO, focusing on digital transformation programmes, while ten years in the Accenture Management Consulting practice saw her working directly with clients in Britain, France and Germany.

Brian O'Gorman (managing partner) and Eileen Burns

Eileen said: "With the recent advances in legal tech, the explosive growth of data, and increased regulation for many industries and globalisation of business, there has never been a more important time to drive innovation and address client challenges in a new way that goes beyond the traditional law firm approach."

NEW CHAIR FOR A&L

Julian Yarr (managing partner), Eileen Roberts (newly announced chair) and Catherine Duffy (outgoing chair)

A&L Goodbody has appointed Eileen Roberts as its new chair. On 1 May, she succeeded Catherine Duffy, who continues in her role as a senior finance partner following her three years at the helm. Roberts is an experienced partner in litigation and dispute resolution. She will continue to work with her existing clients while fulfilling her role as chair.

Managing partner Julian Yarr said: "The chair of the partnership is an important role for the firm, and I look forward to working with Eileen in the years ahead."

LK SHIELDS' NEW INVESTMENT FUNDS PARTNER

David Naughton is the second senior partner to join the asset management and investment funds team at LK Shields in the past two months. His appointment follows that of Adrian Mulryan, who joined as new team head in March.

David has 17 years of experience specialising in investment funds. He delivered the first Irish collective asset-management vehicle authorised by the Central Bank of Ireland, as both an alternative investment fund and as an internally managed alternative investment fund manager.

Previously, he held senior roles at William Fry and Maples in Dublin and gained valuable in-house experience with Nomura and UBS in London.

YMC CONFERENCE

The fourth annual conference of the Younger Members Committee will take place on 10 October 2019 at the Law Society, Blackhall Place. This year's topic is 'Mindful work practices' – speakers will explore ways in which mindfulness can improve daily work life and long-term career prospects.

Attendance qualifies for 3.5 CPD hours and all are welcome. Further information will be available closer to the event on the committee's web page at www.lawsociety.ie.

ISIP ELECTS NEW COUNCIL MEMBERS

The Irish Society of Insolvency Practitioners has announced the recent election to its council of Robin McDonnell and Stephen Scott. Pictured are Robin McDonnell (Maples Solicitors), Stephen Scott (Smith & Williamson), Des Gibney (McStay Luby), Mark Woodcock (McDowell Purcell Solicitors), Shane McAleer (Somers Murphy & Earl), Judith Riordan (Mason Hayes & Curran), and Jim Stafford (Friel Stafford)

SOCIETY MEETS MINISTER TO RECTIFY IMBALANCE IN INSURANCE DEBATE

'Fraudulent claimants should go to jail' was the unambiguous message delivered by Law Society representatives to Minister of State Michael D'Arcy at a meeting on 17 April 2019.

Minister D'Arcy has responsibility for insurance matters and is currently leading the Government's campaign to reduce the cost of insurance for businesses and motorists. The Society had sought the meeting with him and his officials to discuss various aspects of the cost of insurance and the personal injuries litigation system. The Society believed it had information and insights to share with him that he might not hear from other quarters.

The Society representatives comprised director general Ken Murphy, past-president and member of the Personal Injuries Commission Stuart Gilhooly, and Council member Martin Lawlor.

They urged that the Society and the solicitors' profession should not be viewed falsely by Government as part of the insurance problem, but properly as part of the solution. There was no ambivalence in the profession about this. Solicitors utterly condemn all fraudulent claims. Those who bring them should be detected, prosecuted, and imprisoned. The same should apply to any solicitor knowingly assisting in the bringing of a fraudulent claim.

The question remained, however, what the true incidence of fraudulent claims was. The Society believed it was far lower than insurers and other defence vested-interests claimed constantly in the media.

Director general Ken Murphy, past-president Stuart Gilhooly, Minister of State Michael D'Arcy and Council member Martin Lawlor

People made judgements about this based on the publicity given to cases being 'thrown out' by judges. However, genuine cases of negligence causing injury – statistically the overwhelming majority of all cases – are rarely, if ever, reported in the media. This gives a false impression of the incidence of genuine versus fraudulent claims to the public.

As personal injuries cases are almost invariably brought by solicitors on a 'no-win, no-fee' basis, even apart from the ethical principles that should always prevail, solicitors had absolutely no economic incentive to carry the cost of bringing a case in whose merits they did not fully believe.

The Society questioned why the focus of attention was always on the levels of awards in Ireland in comparison to England and Wales. The true focus of attention should be on the levels of premiums in the two jurisdictions, and the Society had expert research to demonstrate that – when like was compared with like – insurance premiums in many, if not most, cases were actually higher in England and Wales than in Ireland. This demonstrated that the assumed direct link between award levels and the cost of insurance was highly questionable.

Innocent victims

In addition, the Society insisted that it was perfectly legitimate to urge that the perspective of accident victims should be heard. The innocent victims of the negligence of others had no organised voice, unlike other powerful vested interests, and their perspective should not be constantly ignored in the utterly one-sided public debate.

The Society is fully signed up to the recommendations of the unanimous Personal Injuries Commission report published in November 2018. This includes the recommendation that the new Judicial Council should review the levels of awards for various types of injuries, in particular soft-tissue ('whiplash-type') injuries, ultimately leading to judicial guidelines on *quantum* for such injuries.

Care should be taken by Government in such a process, however, to ensure that there would be no undermining of the separation of powers provided for in the Constitution. The State is most often a defendant in personal injuries cases, and its status as a vested-interest should not be ignored.

Cast-iron guarantee

Of vital importance, in the view of the Society, is the necessity of ensuring that, if there were to be a reduction in awards to accident victims, the Government must insist on a cast-iron and, if necessary, a statutory guarantee that premiums will reduce. In the absence of such an enforceable statutory guarantee (as mere assurances from the insurance industry would be worthless), insurance premiums would not reduce. Instead, the already excessive profits of insurance companies would simply increase, with reduced awards to victims but no benefit whatsoever to premium payers. That would be not merely unconscionable, but senseless.

In the course of what the Society representatives viewed as a very worthwhile meeting, Minister D'Arcy appeared to listen respectfully to the Society's views and arguments. He made no direct criticisms of the solicitors' profession, and indicated that he agreed with a great deal of what the Society had said to him.

In particular, as he had stated many times publicly, he was determined not only that what he viewed as "excessive awards for minor injuries" would have to be reduced, but that the full benefit of such reductions must be passed on by insurers to premium payers. He would make absolutely certain they were not retained by the insurers.

'BREXIT REFUGEES' NOW 14% OF IRISH ROLL

When the leaders of the law societies of Ireland, Northern Ireland, Scotland, and England and Wales met (as they do twice every year), on 19 February in Belfast, one topic inevitably dominated the agenda.

While a variety of matters to do with regulation, professional indemnity insurance, access to justice, mental-health issues for solicitors, and diversity and inclusion in the profession were given time on a busy agenda, the top item in Belfast was Brexit.

How will Brexit affect the four jurisdictions, their citizens, their solicitors and their clients? No certainty, of course, could be provided then or now in response to those fraught and contentious questions.

The phenomenon whereby enormous numbers, in comparative terms, of England and Wales solicitors have chosen to take out a second qualification in Ireland (all the while remaining at work in London, Brussels or elsewhere) was remarked on yet again.

While this was analysed in some depth on pages 22 and 23 of the December 2018 issue of the *Gazette*, the fact was noted that the influx had not in any way abated. In fact, perhaps driven by the chronic political uncertainty that continues to dominate Brexit, the numbers of transferring England and Wales solicitors had, in fact, accelerated sharply in the early months of 2019.

The *Gazette* can now provide the up-to-date statistics in this regard, accurate as of the date of going to press (25 April 2019).

A total of 2,772 England and Wales solicitors have registered on the Roll of Solicitors in Ireland since 1 January 2016. For comparison purposes, up to and including 2015, there were, on average, 50 such registrations annually.

There are currently 19,688 on the Roll of Solicitors in Ireland. Accordingly, the 2,772 new names from 2016 to date represent over 14% of that total.

Remarkably, there are also approximately 700 more applications currently being processed.

"With the extension of the article 50 process granted to Britain by the EU27, how many 'Brexit refugee' names will have appeared on the roll here by Halloween is anyone's guess," remarked director general Ken Murphy.

At a meeting of the four home law societies held in Belfast on 19 February 2019 were *(front, l to r)* Alison Atack (president, Law Society of Scotland), Christina Blacklaws (president, Law Society of England and Wales), Suzanne Rice (president, Law Society of Northern Ireland) and Patrick Dorgan (president, Law Society of Ireland); *(back, l to r)* John Mulholland (vice-president, Law Society of Scotland), Paul Tennant (CEO, Law Society of England and Wales), Lorna Jack (CEO, Law Society of Scotland), Alan Hunter (CEO, Law Society of Northern Ireland), Rowan White (junior vice-president, Law Society of Northern Ireland), Ken Murphy (director general, Law Society of Ireland) and Michele O'Boyle (senior vice-president, Law Society of Ireland)

PALM SUNDAY FOR IBA LEADERS IN THE HEART OF HARLEM

The International Bar Association (IBA), founded in 1947, is a bar association of international legal practitioners, bar associations and law societies. The IBA currently has a membership of more than 80,000 individual lawyers, and 190 bar associations and law societies.

Its global headquarters are located in London, and it has regional offices in Washington DC, Seoul, South Korea, and Sao Paulo, Brazil. The IBA is 'the global voice of the legal profession'.

The IBA's Bar Issues Commission (BIC) supports the interests of the IBA's member organisations from around the world. This includes arranging events to discuss issues that affect legal professionals globally, working groups that develop resources and guidelines for bar associations, and a policy committee advising the IBA council on key IBA resolutions and statements.

The IBA is an avowedly secular body as would be expected of a legal professional body – particularly one operating on a global scale. Nevertheless, at the end of an intense three days of business meetings, the IBA's president and senior officers accepted an invitation to a church service in the heart of Harlem, New York, on 14 April.

The entire three-day retreat of the BIC officers, which takes place annually, was hosted in New York by the vice-chair of the BIC, Deborah Enix-Ross. Although she is now a partner in the major international law firm of Debevoise & Plimpton, whose headquarters is on 3rd Avenue and 55th Street in New York, she grew up in and around her 'mother church' on 129th Street in the heart of Harlem. It was 'a million miles away' from the hallowed halls of Debevoise & Plimpton. She brought her IBA officer colleagues with her to an inspirational all-singing service on Palm Sunday, where they received the warmest of welcomes.

Director general Ken Murphy has been a senior officer of the BIC since 2016. Since 2014, he has served also as co-chair of the IBA Bar Executives Committee. "It provides me with the opportunity to remain completely in touch with high-level thinking about the legal profession worldwide and, indeed, to contribute to it," Murphy says.

At the IBA officers' retreat in New York on 14 April 2019 were *(front, l to r)* Becca Verhagen (head of BIC and support to the president, England), Berit Reiss-Andersen (BIC officer, Norway), Claudia Seibel (BIC officer, Germany), Deborah Enix-Ross (BIC officer, USA) and Alberto Navarro (BIC officer, Argentina); *(back, l to r)* Claudio Visco (immediate past-BIC chair, Italy), Kimitoshi Yabuki (BIC officer, Japan), Ken Murphy (BIC officer, Ireland), Peter Koves (BIC chair, Hungary), Horacio Bernardes Neto (IBA president, Brazil) and David W Rivkin (past-IBA president, USA)

NEW PRINCIPAL FOR MAYO FIRM

Laura Glennon is welcomed by Michael Brennan as the new principal solicitor of Maguire & Brennan, Ballinrobe and Claremorris, Co Mayo. The 103-year-old firm now boasts an enhanced range of legal and notarial services

ENDANGERED LAWYERS

MARIA SOL TAULE, PHILIPPINES

Maria Sol Taule (32) acted for Sr Patricia Fox, an Australian nun who was detained and deported for her alleged involvement in illegal political activities under the Duterte regime. Sr Fox (also a lawyer) had worked in the Philippines for 27 years and was finally deported in November 2018.

Sol worked with the National Union of Peoples' Lawyers from 2007 while studying, and qualified in 2017. She continues to work with the group, which provides free legal services to people unable to pay. The organisation has lost several members to assassination, including founder Benjamin Ramos (56) in November 2018, who had been involved on behalf of the victims of the 'Sagay 9 massacre' – sugar farmers killed the previous month in the Negros Occidental province. (On 31 March another 14 farmers were killed in a police massacre on Negros Island, the centre of the nation's sugar industry and home to some of the country's wealthiest landowners – and some of its poorest farm workers.)

In August of 2018, another lawyer, Raphael Atotubo, was shot; he had been working to defend people accused of drugs offences. It is believed that there have been at least 24 lawyers killed since 2016, when President Duterte came to power.

In the hard-line regime of President Duterte, lawyers risk being identified with the activities of their clients. Cases of political prisoners, suspected rebels, environmentalists, farmers asserting their rights to land, and various human-rights violations are particularly toxic to lawyers who get involved. They can be subjected to a range of attacks: harassment, surveillance, labelling as 'enemies of the state' or similar, intimidation, threats, prosecution on fabricated charges, and killings.

Rights group Karapatan recorded at least 216 cases of political killings from July 2016 to November 2018. The attacks on lawyers form part of a picture of a divided society without the strong institutions and political will to resolve conflicting interests without violence.

"What drives me to continue fighting and defending the rights of the poor is the same people I fight for and defend," said Sol.

Alma Clissmann is a member of the Law Society's Human Rights Committee.

CALCUTTA RUN GETS THE KEY OF THE DOOR

At the official launch of the Calcutta Run 's 'Key Campaign' were Joe Tomane (Leinster Rugby), Caroline Flynn (Hope Foundation), Gavin Duffy (entrepreneur), Miriam O'Callaghan (broadcaster), Seán Finn (Limerick hurler), Charlotte Nagle (Hope Foundation) and Ken Murphy (director general, Law Society)

Our front door key is something that many of us take for granted. But, for others, it's an unachievable goal. Thanks to the work of the Peter McVerry Trust and the HOPE Foundation, however, the dream of owning the keys to their own hall door is becoming a reality for many.

Calcutta Run – The Legal Fundraiser reached an amazing milestone last year, having raised €4 million over the past 20 years.

As the charity comes of age, the legal profession's help is being sought on Saturday 18 May to achieve a target of €300,000 for the homeless in Dublin and Kolkata in one of Dublin's largest charity fundraisers, while Cork will get in on the act on Sunday 19 May.

Participants can raise funds by running, walking or cycling. Joggers and walkers can choose between a 5k or 10k circuit that takes them from Blackhall Place through the Phoenix Park and back to Dublin 7, while the 'Calcutta Cycle Sportive' offers a 50k or 100k non-competitive route.

Goodie bags are on offer for fundraisers, including a quality technical t-shirt, free barbecue ticket to the Finish Line Festival, and other surprises.

This year's festival will feature a five-a-side soccer tournament, where spectators can cheer on teams from law firms, while enjoying a Teddy's ice-cream, coffee and cakes from Cocobrew, a DJ, and live music. Children can tire themselves out on bouncy castles or by taking part in a variety of mini-athletics events.

To sign up for the Calcutta Run 'Key Campaign', visit www.calcuttarun.com or email your interest to event coordinator Hilary Kavanagh at h.kavanagh@lawsociety.ie.

APPEALS BEFORE THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL

The chairperson of the International Protection Appeals Tribunal, in furtherance of ensuring the efficiency of the functions of the tribunal, has issued a note on administrative practices before the tribunal, which came into effect on 2 April 2019.

The administrative practice note shall be read in accordance with the provisions of the *International Protection Act 2015* and the *International Protection Act 2015 (Procedures and Periods for Appeal) Regulations 2017*, and in the case of any ambiguity or conflict, the legislation shall take precedence.

The tribunal is committed to carrying out its functions in line with its legislative remit and in accordance with best international practices. The administrative practice note is designed to ensure that the tribunal's functions are performed effectively and that decisions can be issued expeditiously and in a manner that is consistent with fairness and natural justice.

The administrative practice note may be amended from time to time as the need arises, and appellants and their legal representatives are advised to keep themselves apprised of any matters arising under the practice note.

By setting out the practice note, it is hoped that all parties appearing before the tribunal will be aware of the procedures before the tribunal, which can be accessed on the tribunal's website at http://protection-appeals.ie (search for the term 'administrative practice note').

CONNECT THE DOTS

A new Law Society initiative is helping non-practising solicitors to stay in touch with the legal world. The 'Stay Connected' service from Career Support aims to tackle the problems faced by solicitors who are not currently practising law, but who plan to return to work.

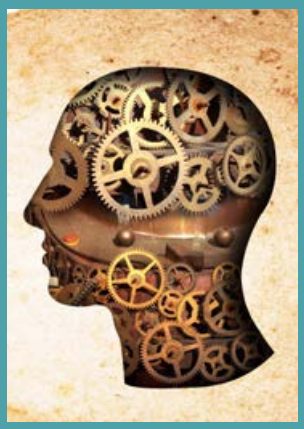
Solicitors on sabbatical – whether due to personal choice, family responsibilities, or working outside of law – can start to feel disconnected. Losing touch with colleagues, as well as a dulling of legal knowledge, can lead to a loss of confidence.

Participants in the Stay Connected programme will be able to network using a dedicated social media channel, and will be invited to attend meetings at Blackhall Place every quarter. Guest speakers will talk about their experiences of returning to work after several years away from law, and will present useful insights on flexible working, remote working, and returning to work. A fortnightly newsletter containing useful information will include profiles on participants who have taken career breaks.

To join, email your full name, preferred email address, solicitor number, and date of birth to stayconnected@lawsociety.ie. For further information, contact Mary Roche at m.roche@lawsociety.ie.

WORKPLACE WELL-BEING

MIND THE GAP!



A famous Indian yoga teacher was once asked by a student how he might give up smoking. The reply came as something of a shock: "Don't stop smoking – very bad for your health – the effort to stop creates tension in the mind. You must not stop smoking!

"But, if you are going to smoke, then smoke. Fill your lungs to capacity, feel the rush of the nicotine as it hits your bloodstream. You see, if you truly smoked – smoked with full awareness – it would be difficult to get through even one cigarette ever again!"

In other words, when we are fully aware, we will act in our (and others') best interest. Awareness, or mindfulness, is not a difficult idea to grasp. However, the daily practice of mindfulness can be quite a challenge. We live in an age of distraction and alienation from ourselves, from our bodies, from others and from our environment. It's not surprising then that mindfulness has become something of a buzzword (if not a bit of a cliché) in recent times.

Mindfulness is about creating a space to step back and observe our thoughts, feelings, and behaviours. Then we can choose our response, rather than constantly reacting to the daily pressures of work. We get to see the ingrained 'stinking thinking' of the mind and practice what I call 'emotional hygiene'.

In my clinical work as a psychotherapist, I am always struck by how most of my clients, many of them lawyers, have an extremely harsh inner dialogue 'running the show', one that is constantly judging and criticising, and which is too rarely compassionate and understanding. No wonder it is hard to sit quietly! Give me my phone, or my drink, or my work status, or … anything, rather than face myself honestly and compassionately.

Nowadays, there is a growing realisation of the need to attend to our mental and emotional health. Rather than wait for the stresses and strains of work to make us ill, how would it be if, instead, every office and workplace had a 'quiet room' where people could take some time to simply sit quietly – to literally take a breather – where the emotional/mental hygiene of daily mindfulness was as natural as brushing one's teeth?

To paraphrase the French philosopher Pascal: "All men's ills derive from not being able to sit quietly in a room alone."

Seán Ó Tarpaigh is a psychotherapist with the Law Society's Counselling Service. He has a private practice in Monkstown, Co Dublin. See www.cranncounselling.com or tel: 083 1662 783.

LIMITED LIABILITY PARTNERSHIPS TO BE COMMENCED

The Legal Services Regulatory Authority is preparing to commence a number of its functions in the second quarter of 2019, including the provisions of the act governing limited liability partnerships (LLPs).

The authority is currently finalising regulations under section 130 of the *Legal Services Regulation Act 2015* that will permit it to accept applications for partnerships seeking authorisation to operate as an LLP.

Once commenced, solicitor firms that are currently partnerships may make an application for authorisation to the authority to avail of the limited liability status.

The Law Society will issue guidance for solicitor firms who wish to make an application for authorisation to operate as an LLP once the regulations are finalised.

PIC: CIAN REDMOND

Ken Murphy (director general, Law Society) and Don Thornhill (chairman, Legal Services Regulatory Authority)

The authority is also finalising regulations under section 116 of the act that will allow the formation of legal partnerships. These are new structures that will, among other things, allow practising solicitors to enter partnership with practising barristers. Only practising barristers who are entered on the Roll of Practising Barristers and who are not members of the Law Library will be eligible to enter into legal partnerships. Legal partnerships will also be eligible to make an application to the authority for authorisation to operate as an LLP.

IRONLAW CHALLENGE PITS NORTH V SOUTH

The IronLaw Challenge will take place on 17 May. Starting at Lough Melvin, Co Leitrim, the finish line will be at Blackhall Place, Dublin.

The challenge sees three solicitors from the South vying against three colleagues from the North. Ivan Feran (South) and Peter Jack (North) will swim 3.86km before handing the baton to Stuart Gilhooly (South) and Darren Toombs (North) for a 180km cycle. The race will finish with a marathon run (42.2 km) from Maynooth to Blackhall, with Brian McMullin (South) pitted against Adam Wood (North).

Hope of the South – Brian McMullin, Stuart Gilhooly, Declan Branagan (Xpediate – sponsor) and Ivan Feran

The participants will traverse three provinces, six counties, and at least six border crossings in pursuit of victory.

Both teams are seeking donations, with all proceeds going to the Solicitors' Benevolent Association. Please give as generously as you can. To make a donation, contact Stuart (stuart.gilhooly@hjward.ie), Brian (bmcmullin@brianjmcmullin.com), or Ivan (ivanferan@feran.ie).

The IronLaw Challenge is kindly supported by Expd8/Thread Legal, O'Leary Insurance Group, and Willis Towers Watson.

TAG – YOU'RE IT!

The Society of Young Solicitors (SYS) is holding a charity tag-rugby tournament in Dublin on Saturday 8 June in aid of the Hope Foundation.

The venue is the pitch at Railway Union, Sandymount, Dublin 4, with registration at 12 noon and kick-off scheduled for 1pm. The entry fee is €500 for a team of 12 (just shy of €42 per player), which includes access to a barbecue.

Limerick conference

And, giving readers plenty of advance notice, the SYS annual conference takes place at the Strand Hotel, Limerick, on 11-13 October. Pre-sale tickets will be available on 29 August – this offer is open to solicitors only. General sale will open on 3 September.

Tickets are €210 (plus booking fee) and are sold on a room basis (twin, double or triple). Each ticket will cover two nights' B&B, the conference (offering three general CPD points), and a ticket to the black-tie gala ball.

Further details will be available on www.sys.ie, on Twitter @SYSIreland and on Instagram @societyofyoungsolicitors.

KIERAN T FLYNN 1930 – 2019

With Kieran T Flynn's death, Tipperary has lost a great solicitor. More than that, many of us have lost a friend, a mentor and a teacher, including those of us who were trained by him. In the old days, we were his apprentices, and he was the master. That title suited him well.

He was a master of his practice, careful and thorough in his understanding of the law, and professional and kind in the way that he applied it. He believed in being a solicitor. The best evidence of that was how he continued to work in his practice of 65-odd years until the month before he died.

From him, I learned respect for the law and – perhaps more importantly – respect for those who sought access to the law. He built up an excellent business in his home town, but I never saw or heard of anyone needing legal help turned away from his door for lack of funds. It was ingrained in him that the law was there for everyone.

While he was a man of strong opinions, and could indeed challenge a client, colleague – or apprentice with 'notions' – he was non-judgemental when it came to hearing the troubles and woes that brought someone reluctantly to a solicitor.

I was his first apprentice. At a time where he had an excellent practice that he was managing well, the last thing he needed was someone who knew nothing and had to be 'trained in'. However, he was persuaded by his mother and mine, but mainly his mother, whom we knew as Mother Flynn, to take me on. He took to teaching law to me and his other apprentices with the same full focus that he brought to all other aspects of his work. He tolerated my many mistakes, but I knew that I was expected to learn from them. Everything I did well was to be noted. Every error was to be noted, too, so as not to be repeated.

Kieran never discriminated on grounds of youth or gender. Occasionally, in his own office, someone would suggest that they'd prefer him to deal with a case rather than the young girl in the office (me). He wouldn't have it. Any client who insisted they didn't want their piece of land dealing or their case dealt with by a young woman was politely told that it was either me or, if they weren't happy with that, there were several other solicitors in town that they could go to. Most stayed; confident that, if he had confidence in me, then they could as well. That confidence and his loyalty were great gifts to me and all the young people that he subsequently taught and trained.

Some of Kieran's apprentices were his sons, and it is a credit to both him and his late wife Eileen that three of four of them successfully became solicitors; two to remain in the thriving practice, and the third to engage in international public service law with the UN.

The others of us were all encouraged by him to set up our own practices. We often discussed private practice, and it was a joy to realise that, in a practice extending over 65 years, he never wanted to do anything else.

More than anything, Kieran was a mentor and friend to me from the moment we met to the end of his life, and I will miss him. He remained interested in my career after I took what was, in his view, the inexplicable step of leaving private practice. When I went to work with the Free Legal Advice Centres, he encouraged all the local solicitors to set up a FLAC centre in Tipperary, still hugely supported by his sons in the practice.

He had even less understanding of what took me to work in the Dublin Rape Crisis Centre. We had several discussions about that in the last few years. Like everything and everyone in whom he had an interest, he wanted to understand. I was delighted when, during our last conversation in November, he likened young people speaking out today to a second generation of suffragettes. Those new suffragettes would, of course, have included his grandchildren, who featured in every conversation, as did all his children, of whom he was very proud.

One thing that never ceased to amaze me was his capacity to produce an apt quotation. It seems proper to end this tribute to a master with a piece from *The Village Schoolmaster* by Oliver Goldsmith, from which Kieran often quoted:

"Yet he was kind; or if severe in aught,
The love he bore to learning was in fault.
The village all declar'd how much he knew;
'Twas certain he could write, and cipher too…
And still they gaz'd and still the wonder grew,
That one small head could carry all he knew."

Like others, I benefitted mightily from all he knew. Rest in peace, master.

NB

STANDING FIRM IN THE FACE OF ATTACK

A recent conference in Dublin looked at cybersecurity from a different perspective: accepting that breaches will happen, but planning for recovery after attack. **Gordon Smith** looks at the lessons for law firms

GORDON SMITH IS A FREELANCE TECHNOLOGY JOURNALIST

IT'S IMPORTANT TO MAKE SURE THAT EVERYONE IN THE LEGAL SECTOR IS AWARE THAT THEY ARE A TARGET, THEY ARE HANDLING SENSITIVE INFORMATION, AND THEY NEED TO BE WARY OF THE LINKS THAT THEY'RE CLICKING ON

Resilience has become one of the biggest buzzwords in the cybersecurity field. It's not a brand-new product that will make your firm instantly secure, or a catchy codename for the latest computer virus that's sweeping the globe. It's a different way of approaching the issue of cybersecurity. Instead of focusing purely on protecting important systems and information from compromise, it's about having a robust, tested plan in place for how to keep going when the worst happens.

It's the natural – and arguably overdue – outcome for an industry that's increasingly coming to terms with cyber-attacks as a fact of life and business. When the Government's National Cyber-Security Centre published a security guide for businesses earlier this year, it started from this premise: "It's no longer a question of if your company will be breached, or even when – it's likely to have happened already. The real question is whether you will know – and are you prepared?"

We've been getting to this point for some time. In 2016, the Central Bank took a similar tack: "Firms should assume that they will be subject to a successful cyber-attack or business interruption."

It was in this context that the BSI International Cyber-Resilience Exchange 2019 took place. The day-long conference featured leading international and Irish security experts discussing global cybercrime trends – and how to deal with them. By 2021, industry figures estimate the cost of cybercrime damage will exceed €5 trillion globally.

Cybercrime on the rise

The event's keynote speaker, Brian Krebs, is one of the foremost investigative journalists covering cybercrime. A *New York Times* bestselling author, Krebs mapped out the current security landscape for the 250 in attendance. He described the growing

PIC: CHRIS BELLEW, FENNELL PHOTOGRAPHY

Leading the panel discussion were Siân John (chief security advisor, Microsoft EMEA), Brian Krebs (investigative journalist and founder of krebsonsecurity.com), Michael Bailey (director, BSI Professional Services EMEA, BSI Cybersecurity and Information Resilience), Dr Jessica Barker (Cygenta co-founder) and Dr Johnny Ryan, (chief policy and industry relations officer, Brave)


PIC: SHUTTERSTOCK

frequency of cyber-security incidents in recent years.

As someone who regularly breaks new security stories on his blog, Krebs spoke of the "depressing reality" that everything gets hacked. In February alone, there were 621 million accounts compromised from 16 different hacked websites, Krebs said. "It has become a daily occurrence that companies announce that cybercriminals have stolen intellectual property or customer data. We're talking about hundreds of millions of data points."

In a nod to the conference theme, Krebs said that companies needed to get better at detecting incidents faster, and at rehearsing their response procedures: "Getting breached is okay – I hope the stigma is coming off. It's not okay if you don't detect it in a short period of time, which is when the problem starts. How we get to [resilience] is only with practice, to stop a cut from metastasising to an infection of the entire body."

M&A risks

Krebs' next point may have made any commercial lawyers in the room sit up and take notice. From his extensive reporting, he has noticed a strong correlation between M&A activity and data breaches. For example, the Marriott Hotel group disclosed a major data breach in late 2018, which leaked personal details of an estimated 500 million guests. The company subsequently traced its breach back to when it acquired the Starwood Network, which itself suffered an intrusion in 2014.

Krebs also spotted breaches at several other organisations around the time when they acquired or sold stock in other companies. Adding the important caveat that correlation is not causation, Krebs nevertheless said: "There seems to be a connection, and the takeaway is, it's important that there be due diligence when there are acquisitions, but attention [to security] should not slacken after that due-diligence process."

Data breaches happen for a very simple reason: information is valuable to the right people. "Most of us have failed to fully grasp how much of our data is for sale," Krebs said. From researching underground criminal forums on the internet, he has seen how cybercriminals take the usernames and passwords from one breached database and try those combinations on dozens of other websites. "Every time there is a breach at one of these websites, it exponentially increases the amount of attacks against other websites," he said.

Threat to law firms

Law firms are a natural target for cybercriminals by nature of the files they handle and the sensitive

> GETTING BREACHED IS OKAY – IT'S NOT OKAY IF YOU DON'T DETECT IT IN A SHORT PERIOD OF TIME, WHICH IS WHEN THE PROBLEM STARTS

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Oliver Callan
Star of 'Callan's Kicks', Ireland's top impressionist and satirist

This October, the Law Society Gala 2019 will take place in the historic Shelbourne Hotel in the heart of Dublin. This black-tie dinner raises funds for the Solicitors' Benevolent Association (SBA) and is a social highlight for the solicitors' profession.

Guest speaker Oliver Callan is back by popular demand to entertain guests for the evening.

Table dinner package for 12 guests: €2,400 (plus VAT). Individual dinner seats: €200 (plus VAT) per person.

To book your place, visit **www.lawsociety.ie/gala**

Law Society Gala profits will be donated to the Solicitors' Benevolent Association, which provides assistance to members or former members of the solicitors' profession in Ireland and their wives, husbands, widows, widowers, families and immediate dependants who are in need.

nature of cases and clients, said Dr Jessica Barker, co-founder of Cygenta, a cybersecurity consultancy.

Speaking to the *Gazette*, she said: "Most organisations will be targeted by financially motivated cybercriminals and 'script kiddies' – and they're probably the biggest threat group for most organisations – but when you're looking at law firms, they may be more likely to be targeted by 'hacktivists' than other organisations, or by nation states, depending on the clients or areas that they're working in."

Barker specialises in the human side of cybersecurity, which is a major risk factor for many organisations, because attackers often use social-engineering techniques to lure or trick people into downloading a harmful file or giving away sensitive information without realising it. It's an element that many firms overlook, she said.

"We've seen organisations spending a lot of money on the technical defences – the cybersecurity industry is very focused on technical measures to defend against cybercrime. So the attackers have moved, of course, to targeting the human element, because this is what we haven't really concentrated on. So we're seeing a lot of law firms being targeted with spear-phishing emails that may look like they come from a client, from a supplier, or from someone else in the organisation – such as from a partner to an administrative assistant – asking for a particular file or to transfer funds. So that's a big issue for law firms to be aware of," she said.

Security awareness

Although there are technical measures to help protect against this sort of attack, one of the most effective tactics is for organisations to raise awareness about security among their staff. In order to have the right impact, these campaigns must be engaging and interesting, because security is such an abstract concept for many people, which makes it hard to understand the risks to themselves or their data.

"We often talk about cybersecurity in the theoretical sense, and if you've never seen behind the scenes of what happens when someone clicks on a link in a phishing email, then it kind of sounds like magic; it feels very intangible," Barker said.

Security awareness training needs to focus on the individual and clearly communicate the reason why they need to protect themselves – and, by extension, their firm. Showing 'safe' demonstrations of what can happen in an attack can be a powerful way to communicate a message about positive security behaviour. "It really helps people to understand how this operates and, as much as you can, gives people the experience of 'this is what happens' in a safe space, without actually hacking them," Barker said.

Human risks

In the past, she has conducted exercises to draw attention to the human risks in security. "That's looking at all of the open-source intelligence information that's out there on board members, whether it's at a bank or a law firm, and saying to the executives, 'we found all this information about you, and if we were cybercriminals, we would be looking to do a spear phish'," she said.

"An organisation needs to try and look at itself through the attacker's eyes and ask, what is the information that, if we lost it or didn't have access to it, would do us harm or stop our business? But also, what is the information that would be really valuable to a competitor or to cybercriminals?

"It's important to make sure that everyone in the legal sector is aware that they are a target: they are handling sensitive information, and they need to be wary of the links that they're clicking on," Barker said.

Resilience and response

Helping everyone in an organisation to understand cybersecurity risks feeds directly into the concept of resilience. Siân John (Microsoft's EMEA chief security advisor) gave the example a recent high-profile security incident to show the value of practising response plans. Norsk Hydro, one of the world's largest producers of aluminium, suffered a severe ransomware attack in March, but was able to maintain operations thanks to its recovery plan. This enabled the company to avoid paying the ransom and to give regular public updates about its operations during the incident.

Norsk Hydro's approach drew widespread praise in the security industry – but that may have been because it's still far from common practice. Stephen O'Boyle (global head of professional services at BSI's cybersecurity and information resilience division) said that advance preparation is a key part of incident response. That means conducting regular drills to test the plan, and this needs to involve all levels of a business beyond the technical team. For the incident response plan to be truly effective, senior management involvement is critical, O'Boyle said. "We are seeing people do mock incidents and run-throughs. And people often see how unprepared they are."

In other words, there's no magic bullet for a firm to become resilient – it needs resources, commitment, and time. g

> KREBS HAS NOTICED A STRONG CORRELATION BETWEEN M&A ACTIVITY AND DATA BREACHES … IT'S IMPORTANT THAT THERE BE DUE DILIGENCE WHEN THERE ARE ACQUISITIONS, BUT ATTENTION TO SECURITY SHOULD NOT SLACKEN AFTER THAT DUE-DILIGENCE PROCESS

WHY DID THE CARTEL CROSS THE ROAD?

A London conference considered cartels and competition law in the light of a century-old Irish case. **Michael Cross** gets to the other side

MICHAEL CROSS IS NEWS EDITOR OF THE *LAW SOCIETY GAZETTE OF ENGLAND AND WALES*. HE WRITES IN A PERSONAL CAPACITY

IF YOU WANT TO CREATE A CARTEL TO DO THE RIGHT THING, YOU NEED TO LET THE CARTEL REAP THE BENEFITS. BUT IF YOU LET THEM DO THAT, THE CONSUMER DOESN'T BENEFIT

Hungarian watermelons, Dutch power stations, and US web platforms were among the subjects of cases cited when some of Europe's leading experts in competition law met in London to debate what makes a cartel acceptable in law.

The event was held on 22 March 2019 to mark the centenary of a very Irish case, played out against the drama of the independence struggle. The House of Lords' 1919 decision in *McEllistrim v Ballymacelligott Cooperative Agricultural and Dairy Society* was one of the first to deal with the clash between the common law doctrine of restraint of trade and the requirements of long-term policy objectives – in this case, the need for investment in the dairy industry.

Competition law is still grappling with such problems today, the London workshop heard. It was organised by Prof Imelda Maher of University College Dublin and Dr Niamh Dunne of the London School of Economics.

A notable participant was Joseph Mannix, principal of Tralee firm Mannix & Co. He is a great-grandnephew of Richard McEllistrim, who brought the case against restrictive rules imposed by the Ballymacelligott Cooperative Society in 1915.

"I was introduced to the case as a third-year undergraduate at Trinity, studying European Community (as was) law under Prof Mary Robinson – a wonderful teacher," Mannix recalls. He remains fascinated by the case, especially by the involvement of Kerry solicitors all the way through, culminating in the instruction of Serjeant AM Sullivan KC for the appellant before five Law Lords, headed by Lord Birkenhead, the Lord Chancellor.

Buying the cow

In their ruling on 24 March 1919, the lords found four-to-one for the appellant, reversing the order of the Court of Appeal in Ireland. The judgment declared that the cooperative's rule barring members from selling milk elsewhere, in effect for life, was "illegal as in restraint of trade and *ultra vires* the society", and restored the first instance High Court judgment. The respondents were landed with the costs of the appeal, as well as the lower court actions.

Of course, the matter did not end there. In 1919, any clash between the cooperative movement – famously described as "applied Sinn Féinism" – and the British establishment was going to be highly charged. Five months after the judgment, one of the creameries that Richard McEllistrim had been supplying, Slattery & Sons in Tralee, was blown up with gelignite. A note posted at the gate said: "There is a higher tribunal than the House of Lords, and that tribunal decided that Slattery's Creamery no longer exists."

At the London seminar, economic historian Eoin McLaughlin (University of Cork) noted that the conflict divided the McEllistrim family itself. Richard McEllistrim's nephew was IRA commander Tom McEllistrim – Joseph Mannix's maternal grandfather – and founder of the Kerry political dynasty.

McLaughlin's research attributes the relative failure of Ireland's dairy industry from the end of the 19th century to the inability of Irish cooperatives to enforce vertically binding contracts. "This was an essential part of cooperation," he says, "since, without it, creameries could not be ensured a regular or sufficient supply of milk, and thus the capital investment by farmers to found the cooperative might not be made in the first place."

The obvious contrast is with Denmark, which successfully established cooperative creameries through contracts with member farmers that were enforced by the Danish courts.

After independence, McLaughlin noted, the picture changed. Binding contracts were introduced under the 1928 *Creamery Act*, which made it illegal for cooperative societies to accept milk from members of other societies without the permission of the Department of Agriculture. "The institutional problem was fixed, though the damage wrought by


PIC: SHUTTERSTOCK

the legal struggle on social capital in the countryside would take longer to heal."

I can't believe it's not butter

A century on, the idea that cartels can serve a higher public interest remains as controversial as ever, even in the Netherlands – a country with an historic tradition of collaboration to keep out the sea.

"The Dutch like cartels," Maarten Pieter Schinkel (professor of competition economics and regulation at the University of Amsterdam) told the event, relating how two attempts to set up cartels for the long-term good had clashed with competition law.

One was a horizontal agreement between energy utilities to cut polluting coal-fired generation. The competition authority ruled that consumers would suffer higher prices, while power stations over the border in Germany would have an incentive to increase their coal-fired output.

Another well-meaning effort was the 'chicken of tomorrow' cartel agreement between supermarkets and meat producers to improve poultry welfare standards. But this goal was worthy enough to merit an exception to competition law. The issue would best be tackled by regulation, Schinkel suggested: "The government should say: 'You can't torture chickens'." However, meat producers resist regulation because they still want to produce cheap 'exploding chickens' for export.

Collusion, even in the best of motives, is inherently dangerous, Schinkel concluded: experience has shown that once it is allowed for one purpose, it will spread to other things. "The paradox is, if you want to create a cartel to do the right thing, you need to let the cartel reap the benefits. But if you let them do that, the consumer doesn't benefit."

Magic beans

A case where regulators did step in was that of the Hungarian watermelon cartel. Dr Katalin Cseres, also of the University of Amsterdam, related how an attempt to set a 'fair' minimum price for watermelons, despite political backing, ran afoul of the country's competition authority. Here, politics triumphed, and the parliament took the domestic agricultural sector out of the competition law arena.

Georgio Monti, professor of competition law at the European University Institute, suggested that a public-good cartel must have both 'input' and 'output' legitimacy. On the input side, it has to be open and transparent, proportionate to the public interest. The problem with 'output legitimacy' is measuring it. And any cartel must be reviewed and revised periodically to ensure it is achieving the objectives.

On less desirable cartels, Dr Pieter van Cleynenbreugel of the University of Liege raised the possibility of using article 101 of the *EU Treaty* to regulate technology giants. He posited that, if web platforms amount to associations of undertakings, would decisions taken by the platform's governing algorithms amount to decisions by an association? "If so, that would give us a tool to decide whether that is acceptable or unacceptable behaviour." The suggestion prompted a debate on how an algorithm-run web platform could be distinguished from a department store.

All this may appear a long way from the dispute over the fairness of rules set by Ireland's embryonic cooperative movement. But, in his opening keynote address, David Foxton QC, of Essex Court Chambers, London, described a key lesson of the *McEllistrim* judgment. It was that "the difficulty with the doctrine of restraint of trade is that its operation should, and does, differ markedly between different types of contract and different contracting contexts. In addition, in determining what is an 'acceptable cartel', the extent to which the cartel is serving exclusively commercial or wider social objectives seems of obvious relevance."

Now, as in 1919, "the application of the doctrine of restraint of trade is highly context-specific".

Given the number of contexts created by developments in public policy and new technology, the arguments that took *McEllistrim* from Tralee to the House of Lords will be around us for a while yet. g

HOMEWARD BOUND

The 'mortgage-to-rent' scheme, introduced in 2012, has had a relatively low uptake. That may be set to change with the approval of 'Home for Life' – the only private-sector participant in the scheme, writes **Raymond Lambe**

RAYMOND LAMBE IS A SENIOR ASSOCIATE IN OSM PARTNERS

FROM THE INTRODUCTION OF THE SCHEME IN 2012 UP TO THE END OF THE FIRST QUARTER OF 2019, ONLY 459 MORTGAGE-TO-RENT CASES WERE COMPLETED BY THE VARIOUS AHBs (DESPITE TOTAL APPLICATIONS OF 4,475 DURING THE SAME PERIOD)

Significant changes have been made recently to the mortgage-to-rent scheme. Increased property valuation limits have been introduced, as well as greater flexibility in respect of household composition. In addition, the scheme has been opened up to private-sector participants who can deliver mortgage-to-rent at greater scale to thousands of homeowners in long-term and unsustainable mortgage arrears.

The changes made to the scheme mean that mortgage-to-rent is likely to be the predominant solution to mortgage delinquency. For the first time since the start of the mortgage arrears crisis, there is now a deliverable solution in place to assist homeowners in the greatest need of support.

The mortgage-to-rent scheme was introduced in 2012 following a recommendation in the *Keane Report*. Under the scheme, a homeowner in mortgage arrears would become a social-housing tenant of an 'approved housing body' (AHB), paying a differential rent based on their income.

The basic mortgage-to-rent model was sound. Homeowners gained certainty around their long-term housing needs. From the State's perspective, it allowed for the provision of alternative housing for homeowners at risk of losing their home in a period of acute supply difficulties.

The rate of uptake for mortgage-to-rent with AHBs to date has been low, but it has always been acknowledged that mortgage-to-rent should be a solution for a greater number of homeowners. From the introduction of the scheme in 2012 up to the end of the first quarter of 2019, only 459 mortgage-to-rent cases were completed by the various AHBs (despite total applications of 4,475 during the same period).

Shortcomings

The failure of the scheme in terms of numbers participating was often attributed to the multitude of stakeholders involved and excessive bureaucracy. However, there are more straightforward explanations for the scheme's shortcomings in this regard. A substantial number of mortgage-to-rent cases do not complete for the simple reason that none of the AHBs express an interest in acquiring the subject property.

There are limitations, for example, in the geographical areas covered by the AHBs. In addition, local authorities had not been progressing applications if the property was in an area with no future social-housing need. These limitations are not very satisfactory to homeowners seeking a resolution in difficult circumstances.

The number of completed mortgage-to-rent applications over the seven-year period referred to above (459) must also be viewed in the context of the latest mortgage arrears and repossession statistics published by the Central Bank.

As at the end of the fourth quarter of 2018, there were 27,998 mortgages in arrears of two years or more. Over the course of the final quarter of 2018, only 236 orders for possession were made by the courts. Long-term arrears cases continue to persist, quarter on quarter, despite the improving economy, and repossession cases are still getting mired in the courts system.

Suggested improvements

There has clearly been an enduring requirement to introduce proper measures to address the problem of long-term mortgage arrears. Debt write-downs and repossessions in the numbers required have not been a feature of the Irish experience, and this is unlikely to change. This was all identified in the Government's action plan for tackling the housing crisis, *Rebuilding Ireland*, which was published in July 2016. Improving mortgage-to-rent was an obvious and potentially high-yielding solution, and a review of the scheme was commissioned.

The Government's *Review of the Mortgage to Rent Scheme* was subsequently published in February 2017. The review recommended a number of changes to the scheme. The changes were aimed at mak-

PIC: SHUTTERSTOCK

ing the scheme quicker, more transparent, and easier to navigate and access.

The review also concluded that the financial model for the scheme might not be capable of delivering the number of successful cases that should benefit from the scheme over time. It was noted that alternative funding options were available and that the inclusion of private-sector participants could allow the scheme to operate at high volumes in order to meet the needs of more homeowners.

A number of the revisions recommended in the review in respect of broader eligibility criteria and higher valuation limits have been introduced. After taking account of capacity within the AHB sector, Home for Life was approved in July 2018 as the only private-sector participant in the expanded scheme.

New eligibility criteria

To take part in the expanded mortgage-to-rent scheme, homeowners must:

- Have completed the mortgage arrears resolution process with their lender,
- Be eligible for social-housing support in the local authority in whose area the property is located,
- Not own any other property,
- Live in a property that suits their needs,
- Have a property in negative equity, or positive equity of no more than 10% of the open market value of the property, to a maximum of €15,000,
- Not have cash assets worth in excess of €20,000, and
- Have a long-term right to remain in Ireland.

In addition, certain property valuation limits apply. The property must be of a value no more than €365,000 for a house and €310,000 for an apartment or townhouse in the areas of Dublin, Kildare, Meath, Wicklow, Louth, Cork and Galway. The maximum values for the remainder of the country are €280,000 for a house and €215,000 for an apartment or townhouse.

AFTER TAKING ACCOUNT OF CAPACITY WITHIN THE AHB SECTOR, HOME FOR LIFE WAS APPROVED IN JULY 2018 AS THE ONLY PRIVATE-SECTOR PARTICIPANT IN THE EXPANDED SCHEME

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In terms of income qualifications, the key criterion is that net household income does not exceed the income limit for social housing within the relevant local authority. The income limits vary by local authority, but are in a range from €25,000 to €35,000 for a single person (after deduction of taxes). Further allowances are in place for additional adults and children in the home. The maximum income allowed is €42,000 (net of tax).

Benefits

The social and economic benefits to be derived from mortgage-to-rent are obvious, and the scheme offers an effective solution to a complex issue. The scheme's aim is to prevent homeowners from losing their homes. Following the sale of a homeowner's property to an AHB or Home for Life, an income-based affordable rent is payable by the homeowner, who then becomes a tenant in the property. The proceeds of sale of the property go towards the outstanding mortgage debt. Subject to prior agreement with the lender, the residual debt will be written off. In addition, homeowners are granted an option to buy back the property. The property will be maintained and repaired by the landlord as part of the lease arrangements entered into.

Successful mortgage-to-rent applications also put a stop on costly enforcement actions taken by lenders, and avoids the social cost of a homeowner having to find alternative accommodation in an already crowded private-rental market.

It is over ten years since the mortgage arrears crisis first hit. The level of repossessions and debt write-downs has simply never materialised at the expected rates. The changes to the mortgage-to-rent scheme, and the benefits that private-sector participants can bring in terms of scale of operation, constitute the first meaningful actions to properly deal with the most persistent mortgage debt.

The focus of all stakeholders is now on mortgage-to-rent as the only viable solution that can be delivered at the level required. Thousands of homeowners at the most serious risk of repossession have finally been given an opportunity to make a fresh, mortgage-free start in their existing home.

> THE SOCIAL AND ECONOMIC BENEFITS TO BE DERIVED FROM MORTGAGE-TO-RENT ARE OBVIOUS

THE SEEDS OF DOOM

Invasive species are non-native species that are not naturally found in a given area or habitat. Unfortunately, they have caused significant problems for the surrounding countryside. **Kieran Cummins** gets his hands dirty

KIERAN CUMMINS IS A MEMBER OF THE LAW SOCIETY'S HUMAN RIGHTS COMMITTEE AND THE SECRETARY OF ECO ADVOCACY

PIC: SHUTTERSTOCK

In the past, many non-native species were sold as ornamental plants or as oxygenator plants for garden ponds. Around half of Ireland's flora is non-native, with close to 50% of those considered to be 'casuals' in our countryside – that is, that they do not form persistent self-sustaining populations in the wild. Of those that do establish in the wild, about 60 are problematic in some areas, with around 20 currently considered invasive.

Some estimates have put the cost of invasive plant species to the European economy alone at some €12 billion per annum, with estimates of €1.4 trillion a year to the world economy. The vast majority of non-native species in Ireland pose no threat to our wildlife or economy, and are not considered invasive species.

Swamp thing

The *European Communities (Birds and Natural Habitats) Regulations* (SI 477/2011) were enacted to combat the growing problem of invasive species. The regulations state that "the *Wildlife Act 1976*, the *Wildlife (Amendment) Act 2000*, the *Wildlife (Amendment) Act 2010* and these regulations shall be construed together as one".

Of note are sections 49 and 50. It is fair to say that the latest initiative has largely been as a result of Ireland's membership of the EU, and the various *Habitats* and related directives.

Section 49 places a "prohibition on introduction and dispersal of certain species", while section 50 imposes a "prohibition on dealing in and keeping certain species".

Some 35 species are then listed in the third schedule to the regulations (see Focal Point, p32), while a number of animals are listed separately. Schedule 3 also specifies a prohibition on the movement of 'vector material', with specific reference to "soil or spoil taken from places infested with Japanese knotweed (*fallopia japonica*), giant knotweed (*fallopia sachalinensis*) or their hybrid, Bohemian knotweed (*fallopia x bohemica*)".

Section 49 provides that (save in accordance with a licence), "any person who plants, disperses, allows or causes to disperse, spreads or otherwise causes to grow in any place specified in relation to such plant [in the third schedule] shall be guilty of an offence". The section also provides for a defence (if it can be proven) that the accused took "all reasonable steps and exercised all due diligence to avoid committing the offence".

Additionally, section 49 provides that, if the minister considers that a species poses a threat to the objectives of the *Birds and Habitats Directives*, including the protection of European sites, of habitats, and of species of flora and fauna (including birds), he or she may authorise the destruction by appropriate means.

Section 50 has yet to be enacted (as provided for by section 74). Notwithstanding, section 50 provides that "save in accordance with a licence … a person shall be guilty of an offence if he or she has in his or her possession for sale, or for the purposes of breeding, reproduction or propagation, or offers … for sale, transportation, distribution, introduction or release" certain specified animals, plants and materials.

Moreover, section 50 specifies that "a person shall be guilty of an offence if he or she imports or transports an animal or plant listed [in the third schedule]" – including "a vector material listed in part 3 of the third schedule" – into the State. Two vectors are referred to. One is blue mussel seed and the second is soil or spoil taken from places with Japanese knotweed, giant knotweed or their hybrid.

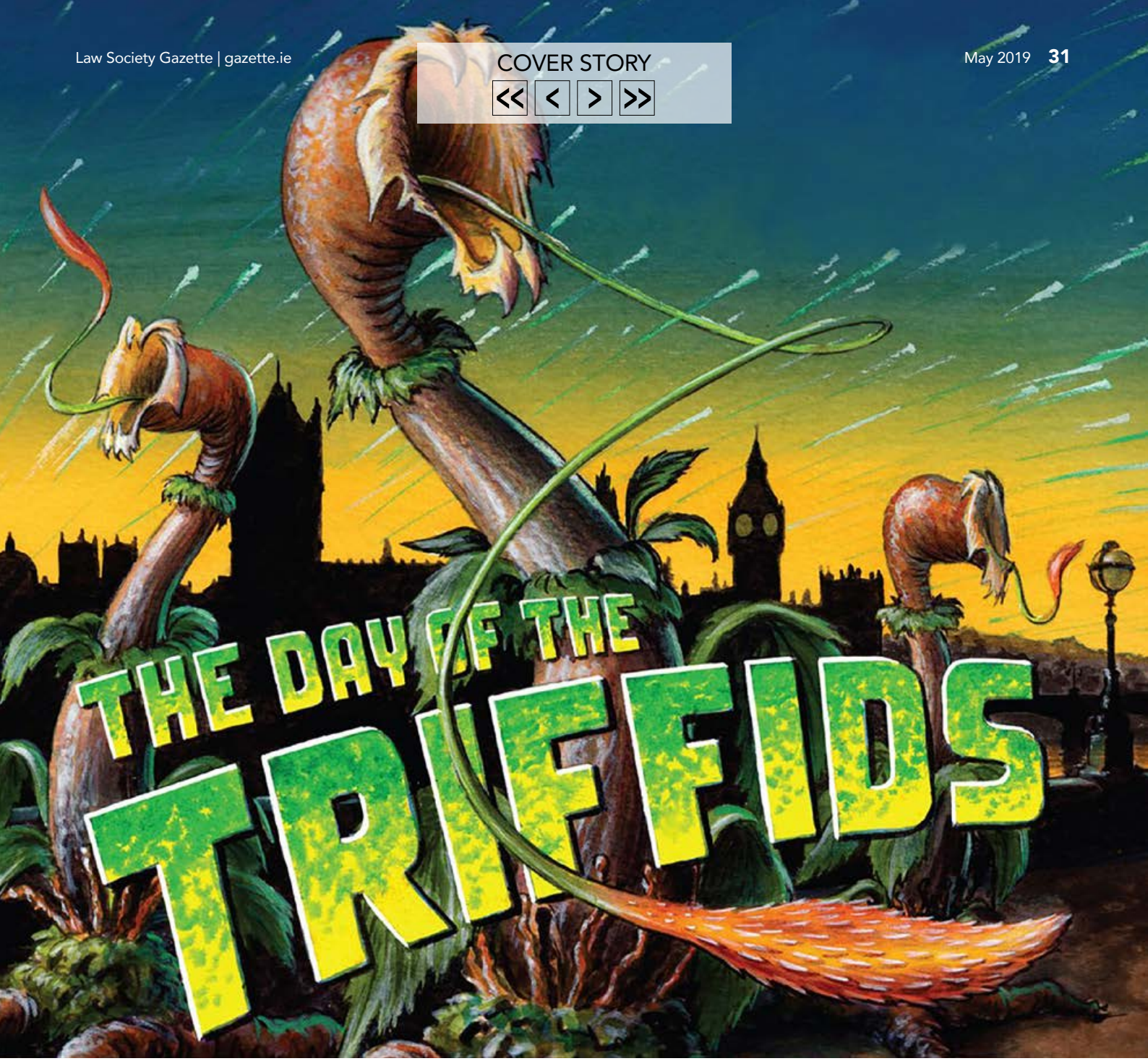
Day of the triffids

Persons within the sector should also be aware that section 50 is quite broad in its application, in that it includes an offence for any person who publishes or causes to be published, including on the internet, any advertisement, catalogue, circular or price list likely to be understood as conveying that such person imports into the State, buys, sells, distributes or provides for the introduction or release of a species specified in the third schedule. I am informed that the delay in enacting section 50 relates to Ireland's membership of the EU, and specifically to concerns regarding free trade. It is unclear whether section 50 can or will be enacted.

AT A GLANCE

- Estimates have put the cost of invasive plant species to the European economy at some €12 billion per annum
- SI 477/2011 aims to combat the growing problem of invasive species
- There has been significant case law in England and Wales on the impact of invasive flora
- The presence of such flora may have implications for grants of planning permission and mortgages

> LOCAL AUTHORITIES HAVE NO DIRECT ENFORCEMENT ROLE, THOUGH MOST LOCAL AUTHORITIES ARE NOW AWARE OF THE PROBLEM AND ARE ENDEAVOURING TO CONTROL OUTBREAKS WITHIN THEIR DISTRICTS



As regards penalties, section 67 provides that a person found guilty, on summary conviction, is liable to a class A fine or imprisonment for a term not exceeding six months, or both. Currently, a class A fine amounts to €5,000. For more serious transgressions – that is, on conviction on indictment – the penalty may be a fine of €500,000 or imprisonment for a term not exceeding three years, or both.

Section 40 of the *Wildlife Act 1976* (as amended by section 46 of the *Wildlife (Amendment) Act 2000*) states: "It shall be an offence to cut, grub, burn or otherwise destroy during the period beginning on 15 April and ending on 31 August in any year, any vegetation growing on land not cultivated or in the course of cultivation for agriculture or forestry."

Section 52(7) and (8) (as amended) make it an offence to plant or otherwise cause to grow in a wild state exotic species of plant.

Section 40 of the 1976 *Wildlife Act* was indirectly amended by section 12 of SI 355/2015 (the *European Communities (Birds and Natural Habitats) (Amendment) Regulations 2015*), which amended SI 477 of 2011 and which permits the minister to issue a licence for the destruction of a species where it "poses a threat to any of the objectives of the *Birds and Habitats Directives*" and "and that the destruction of that population is a practical, appropriate and proportionate measure to reduce that threat".

Local authorities have no direct enforcement role, though most local authorities are now aware of the problem and are endeavouring to control outbreaks within their districts. Readers may have seen notices along roadsides warning people that a specific plant stand is undergoing control and to avoid cutting, etc (for fear of spreading the problem species).

The National Parks and Wildlife Service is the primary regulatory and enforcement


Spanish Bluebell


Native Bluebell


Japanese Knotweed


Giant Rhubarb


Giant Hogweed


Rhododendron

FOCAL POINT

THE BOOK OF INVASIONS

While 35 plant species are currently listed in the third schedule to the regulations, this may be varied if and when section 50 is finally implemented. Some of the key species are:

- Giant hogweed (*heracleum mantegazzianum*) is highly dangerous to touch.
- Japanese knotweed (*fallopia japonica*) has been extremely problematic throughout the State.
- Giant rhubarb (*gunnera tinctoria*) is included. Curiously though, *gunnera manicata* (another form of giant rhubarb common to the Kerry area) is not in the schedule, though this may change, if and when section 50 is ever enacted.
- Spanish bluebell (*hyacinthoides hispanica*).
- Rhododendron (*rhododendron ponticum*) – rhododendrons out-compete native species and are regarded as 'ecosystem engineers', in that they alter the habitat and ecology of the whole area.
- The schedule also includes aquatic species such as curly waterweed (*lagarosiphon major*) and floating pennywort (*hydrocotyle ranunculoides*). The former has caused major issues in Lough Corrib, where large portions of the lake were inundated by this plant.

authority but, due to limited recourses, lacks the capacity to investigate outbreaks on private land.

Attack of the killer tomatoes

The issue of invasive species has not, insofar as I am aware, been litigated in Ireland. In law, control of invasive species is a matter for the landowner. There have, however, been two significant cases to date in Britain.

In *Williams v Network Rail Infrastructure Ltd* (B20YX969) and *Waistell v Network Rail Infrastructure Ltd* (B34YJ849) (together '*Waistell*'), the claimants each owned half of a pair of adjoining semi-detached houses. Network Rail owned an active railway line behind those houses, as well as an access path and an embankment between the houses and the railway line. Japanese knotweed had existed on the embankment for upwards of 50 years.

The claimants alleged nuisance in two ways: by physical encroachment onto the claimants' land, and by the presence of Japanese knotweed on the defendant's land. In the Court of Appeal, Etherton MR disagreed with the court of first instance, which had rejected the claim in nuisance based on the spread of the knotweed rhizomes on the claimants' properties.

The court held that Japanese knotweed and its rhizomes can be described as a 'natural hazard': "They affect the owner's ability fully to use and enjoy the land. They are a classic example of an interference with the amenity value of the land." While the claimants succeeded in damages, the Court of Appeal also disagreed with the court of first instance and was careful to state that the tort of nuisance "is not to protect the value of the property as an investment or a financial asset".

In other words, there was not an actionable nuisance "simply because it diminished the market value of the claimants' respective properties, because of lender caution in such situations".

In *Smith and Another v Line* (November 2017), the defendant owned a large tract of beachside land. She sold a house on it to the claimants in 2002 for £200,000 and retained the majority of the land for grazing and, in summer, public car parking. The claimants discovered Japanese knotweed on their land in 2003 and complained to Ms Line, who suggested that it had encroached from the claimants' land onto hers.

> IT WOULD BE PRUDENT TO CONSIDER THE INSERTION OF APPROPRIATE CLAUSES IN THE CONTRACT FOR SALE AND REQUISITIONS ON TITLE DOCUMENTS TO ESTABLISH FOR THE PURCHASER'S BENEFIT WHETHER THERE ARE ANY INVASIVE SPECIES PRESENT ON THE SUBJECT PROPERTY

By 2013, the claimants had successfully treated the Japanese knotweed on their land and requested Ms Line to take steps to remove it from hers, where it grew close to the boundary. Ms Line refused and repeated her assertion that it was encroaching from the claimants' land. The claimants issued a nuisance claim and successfully obtained a mandatory injunction requiring Ms Line to enter into a contract with a reputable contractor to treat the Japanese knotweed on her land. A *quia timet* injunction was sought and granted (where no wrong has yet been committed, although it is threatened). The court also ordered her to pay the claimants' costs.

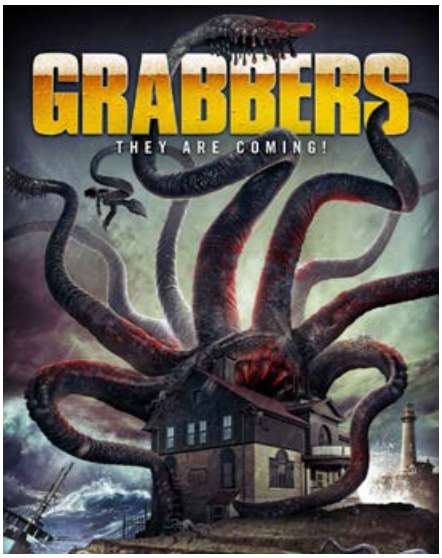
Judge Carr, giving judgment, said that he could not improve on the judgment in *Waistell* and so, unsurprisingly, found that the claimant's land had not been damaged but (having additionally found that Ms Line had failed to comply with her measured duty of care) that the Japanese knotweed on Ms Line's land interfered with the claimants' enjoyment of their land.

While neither *Waistell* nor *Smith v Line* are binding authorities in Ireland, any claim in nuisance based on encroachment of Japanese knotweed will not succeed in the absence of physical damage to a claimant's land. Therefore, potential claimants may have to rely on the loss-of-amenity approach based on the diminution in value of their land by reason of a reduced market.

Seedpeople

The spread of invasive species is monitored and recorded by Biodiversity Ireland, which maintains a website detailing the spread and distribution of a given species (see maps.biodiversityireland.ie). Likewise, the EU provides a species-mapping tool: (alien.jrc.ec.europa.eu/SpeciesMapper).

EU Regulation 1143/2014 envisages



three distinct types of measures: prevention, early detection and rapid eradication, and management. In 2017, the EU published its *List of Invasive Alien Species of European Concern*, which details 49 plant species. This is to be reviewed every six years. I understand that, in order to comply with European regulations, national regulations dedicated to invasive species have been drafted by the department. These have not yet been published or implemented. These will likely replace sections 49 and 50.

Most planning authorities in Ireland are now aware of the problem and will often bring up the matter of invasive species in a further information request for the applicants to put in place a plan of eradication. An Bord Pleanála likewise regularly imposes conditions dealing with invasive species. An Bord Pleanála imposed such a condition on to the Aldi site in Trim, Co Meath, that read: "Prior to commencement of development, details of spraying over a minimum of three successive years to result in the eradication of invasive alien species on-site, specifically Japanese knotweed, shall be submitted to and agreed in writing with the planning authority … If an alternative method of control is proposed, then a detailed method statement shall be submitted to, and agreed in writing with, the planning authority prior to commencement of any works."

In Britain, lending institutions are well aware of the structural damage that Japanese knotweed causes – and so the presence of this plant on a property is a well-known cause for refusal of a mortgage. The TA6 form of the Law Society of England and Wales require sellers to state whether the property is affected by Japanese knotweed.

It would be prudent for the Law Society Conveyancing Committee to consider the insertion of appropriate clauses in the contract for sale and requisitions on title documents to establish for the purchaser's benefit whether there are any invasive species present on the subject property. g

LOOK IT UP

CASES:

- *Network Rail Infrastructure v Williams & Waistell* [2018] EWCA Civ 1514
- *Smith and Another v Line* (CTR00216) WL 09565854, 6 November 2017)

LEGISLATION:

- EU Regulation 1143/2014
- *European Communities (Birds and Natural Habitats) (Amendment) Regulations 2015* (SI 355/2015)
- *European Communities (Birds and Natural Habitats) Regulations 2011* (SI 477/2011)
- *Wildlife Act 1976*
- *Wildlife (Amendment) Act 2000*
- *Wildlife (Amendment) Act 2010*

Mad Hatters' Tea Party

Brexit refuses to go away and, like Alice in Wonderland, its proponents have spotted a certain white rabbit and tumbled down a hole in search of it. **Jennifer O Brien** assesses its impact on international family law

JENNIFER O BRIEN IS PRINCIPAL AT IRISH FAMILY LAW CHAMBERS

Brexit – the somewhat moveable deadline – has been extended until Halloween, unless agreement on withdrawal is reached before that scary day. And not unlike the Mad Hatter's riddle –'why is a raven like a writing desk?' – we have our own riddle to solve: 'What will international family law look like, post-Brexit?'

The *European Union (Withdrawal) Act 2018* provides for repealing the *European Communities Act 1972* and for parliamentary approval of the withdrawal agreement being negotiated between the British Government and the EU. This legislation enables cutting off the source of EU law in Britain. It removes the competence of EU institutions to legislate for Britain. In order to provide legal continuity, it will enable the transposition of directly applicable already existing EU law into British law, which will be known as 'retained EU law'.

This act makes the future ratification of the withdrawal agreement as a treaty between Britain and the EU depend upon the prior enactment of another act of parliament for approving the final terms of withdrawal.

It is submitted that a body of retained law does not recreate the concepts of mutuality and reciprocity, as currently exists between member states. For instance, Irish-domiciled individuals who are currently litigating divorce proceedings in Britain run the risk that the ultimate divorce decree, granted by a British court, would not be recognised in Ireland, post-Brexit.

AT A GLANCE

- Brexit will have a particular impact on international family law cases
- *Brussels 2 bis* sets out the basis for jurisdiction in matters relating to divorce, legal separation or marriage annulment, and in relation to matters of parental responsibility
- Post-Brexit, there are very serious concerns regarding the status of Irish/British care orders, recognition of British divorces, maintenance, and jurisdiction

EU law and family law

First, one must consider the current impact of EU law on both British and Irish family law. EU regulations principally decide the jurisdiction in which a family law case is to be heard. The regulations ostensibly have no bearing on the result, albeit that every good family lawyer knows that venue matters.

Essentially, the regulations currently applicable to family law mirror many of the concepts found in regulations pertaining to general litigation, as contained in the original *Brussels I Regulation* (Council Regulation 44/2001).

Brussels 2 bis

Council Regulation 2201/2003 (known as *Brussels 2 bis*) sets out the basis for jurisdiction in matters relating to divorce, legal separation, or marriage annulment, such that jurisdiction lies with the courts of the member state:

- In whose territory the spouses are habitually resident, or


PIC: SHUTTERSTOCK

> THERE ARE CLEARLY VERY SERIOUS CONCERNS REGARDING THE STATUS OF IRISH/BRITISH CARE ORDERS, POST-BREXIT

- The spouses were last habitually resident, insofar as one of them still resides there, or
- The respondent is habitually resident, or
- In the event of a joint application, either of the spouses is habitually resident, or
- The applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
- The applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the member state in question or, in the case of Britain and Ireland, has his or her domicile there.

Parental responsibility

Brussels 2 bis also governs jurisdiction in relation to matters of parental responsibility, including custody, access, and child-abduction matters. The connecting factor is the child's habitual residence (article 8). This approach has worked well and is consistent with the provisions of the *Hague Convention on Child Abduction*. Article 21 of the regulation provides, for the purpose of divorce (separation and annulment) and also for the purpose of orders relating to children, that a judgment given in a member state shall be recognised in the other member states without any special procedure being required. There are clearly very serious concerns regarding the status of Irish/British care orders, post-Brexit.

The *Hague Convention on Parental Responsibility and Protection of Children 1996* – ratified by all EU member states (but which Britain could ratify again in its own right) – covers civil measures of protection concerning children, such as orders relating to parental responsibility, contact, and care. It also determines which countries' laws are to be applied and provides for recognition and enforcement between contracting states.

It is submitted that, where no *Hague Convention* applies, orders of a British court relating to parental responsibility, contact, or care of a child may be capable of recognition in Ireland on foot of the doctrine of comity, although a safer approach will likely involve obtaining mirror orders in both jurisdictions. Comity will not provide a solution for recognition of divorce.

The *Hague Child Abduction Convention* provides an expeditious method for the return of a child internationally abducted by a parent from one member state to another. The convention will operate instead of *Brussels 2 bis* for these cases, post-Brexit, where *Brussels 2 bis* does not apply.

Recognition of divorce

With regard to recognition of British divorces post-Brexit, it is submitted that, as Ireland is not signatory to the *Hague Convention on the Recognition of Divorces and Legal Separations*, we will revert to domestic law. Britain has ratified the convention, which will give a basis for recognition with other contracting states. Ireland should now immediately consider ratification of the convention (subject to EU consent), which includes a broader basis of recognition, including the concept of residence.

The *Domicile and Recognition of Foreign Divorces Act 1986*, as amended, provides for recognition of a foreign divorce (outside the EU), but only where one of the spouses is domiciled in the jurisdiction granting the divorce decree. This will severely curtail our ability to recognise British divorces and will potentially cause a whole generation of limping marriages, as of Brexit day.

EC Regulation 4/2009 relates to conflict-of-law issues regarding maintenance obligations (spouse and child maintenance). The regulation governs which courts have jurisdiction and which law should apply. It also covers the recognition and enforcement of decisions. The regulation grants jurisdiction in a variety of circumstances, based on the habitual residence of each party.

PIC: SHUTTERSTOCK

Post-Brexit maintenance

Preparations are in hand with regard to the enforcement of maintenance orders in a post-Brexit scenario, such that Britain has submitted instruments of accession to the 2005 *Hague Convention on Choice of Court Agreements* and to the *Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance 2007*. Post-Brexit, Britain plans to re-join these conventions in its own right.

Whether Britain adopts one of the *Hague Conventions*, the *Lugano Convention*, or some other international treaty, there will need to be a clear legal framework for the mutual recognition and enforcement of judgments across Britain and the EU, as currently exists under the *Maintenance Regulation* and the *Re-cast Brussels Regulation*.

For judgments falling outside the scope of the *Hague Conventions* or *Lugano Convention*:

- Enforceability of British judgments in EU member states would depend on the national law of each EU member state in which enforcement is being sought,
- Enforcement of EU member state judgments in England and Wales would be undertaken in accordance with common law rules, which would generally require fresh proceedings to be commenced in order to enforce the judgment as a debt.

MH v MH

Consider the *MH v MH* Court of Appeal decision of 24 January 2017, in which written reasons were set out for the dismissal of an appeal. The applicant/appellant husband married the respondent wife in 1982. The marriage had irretrievably broken down. For the purpose of the appeal, it was assumed that both parties were domiciled in Ireland and were, prior to September 2015, habitually resident in England. The Irish judicial separation proceedings were commenced on behalf of the husband by the issue of a special summons out of the central office of the High Court shortly after 2.30pm on 7 September 2015. It was served on the wife on 9 September 2015.

On behalf of the wife, an English divorce petition was issued by the Family Court Office in England on 11 September 2015. It was served on the husband on 15 September 2015. The evidence before the High Court was that the wife's divorce petition in its envelope was delivered by the Document Exchange to the Family Court Office at 7.53am on 7 September 2015.

There were two motions before the High Court – the husband's motion seeking a declaration that the Irish High Court had full and exclusive jurisdiction to deal with the proceedings, and consequential orders

> IRISH-DOMICILED INDIVIDUALS WHO ARE CURRENTLY LITIGATING DIVORCE PROCEEDINGS IN BRITAIN RUN THE RISK THAT THE ULTIMATE DIVORCE DECREE, GRANTED BY A BRITISH COURT, WOULD NOT BE RECOGNISED IN IRELAND, POST-BREXIT

restraining the wife from taking any steps in the English divorce proceedings. The wife's motion sought a stay of the judicial separation proceedings until such time as the jurisdiction of the court first seised was determined and, thereafter, declining jurisdiction in favour of that court pursuant to article 19 of the regulation.

The Court of Appeal upheld the finding of fact made in the High Court, but found that the overall question required a reference to the CJEU.

On 22 June 2016, the CJEU answered the request by making the following ruling: "Article 16(1)(a) of Council Regulation (EC) no 2201/2003 … must be interpreted to the effect that the 'time when the document instituting the proceedings or an equivalent document is lodged with the court', within the meaning of that provision, *is the time when that document is lodged with the court concerned* [emphasis added], even if under the national law lodging that document does not of itself immediately initiate proceedings."

Certainly, this case highlights in some detail the provisions of the regulation applicable to jurisdiction and the current mechanism available when a dispute arises as to 'which court' between the courts of Ireland and the courts of England and Wales. Imagine, if you will, precisely the same facts as *MH v MH* in a post-Brexit scenario. It is submitted that the Irish court would remain obliged to consider the provisions of the regulation when considering jurisdictional matters.

As a consequence of the 2005 European Court of Justice decision in *Owusu v Jackson*, pre-existing principles of private international law may not apply. The doctrine of *forum non conveniens*, perhaps a fairer approach in the context of family law, was specifically rejected in that case as not being compatible with the then *Brussels Convention*. Essentially, the court found that the application of that doctrine was likely to affect the uniform application of the rules on jurisdiction contained in the convention.

Of course, the real question is what would happen in the English High Court in this situation, as it would no longer be bound by the *lis pendens* rules with regard to stay of their proceedings. It could hear and determine the English divorce proceedings, perhaps applying the doctrine of *forum conveniens*, while a parallel action is being processed in an EU member state. Furthermore, where both parties are domiciled in Ireland, we are unlikely to recognise the English decree of divorce. Will they care?

Agreement on compliance

And, you say, what if the English courts and their parliament promise that they will still comply with the regulation, that they agree with the rules but just don't want to sign up to the whole EU/CJEU package? How then do we resolve a difference of opinion – will the English courts await a reference to the CJEU? Or will they just proceed with litigation in their own courts based on their interpretation of the regulation as a piece of retained EU law?

The regulation cannot be interpreted in a vacuum, without considering the nature of the EU legal system within which it operates and the myriad obligations created between member states, as things currently stand.

Irish legislators should now compile a list of useful *Hague Conventions* (having regard to all areas of law) and immediately seek pre-clearance from the EU for immediate ratification following any Brexit. We are in a unique position to seek assurances at this time.

So, I hear you ask: "Why is a raven like a writing desk?" Of course, when Alice finally gives up trying to guess why, the Hatter admits: "I haven't the slightest idea!" g

LOOK IT UP

CASES:

- *MH v MH* [2017] IECA 18
- *Owusu v Jackson*, Case C-281/02; [2005] ECR I-1383

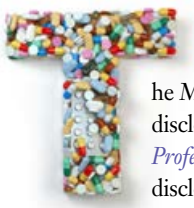
LEGISLATION:

- *Brussels I Regulation* (Regulation 44/2001)
- Council Regulation 2201/2003
- Council Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations
- *Domicile and Recognition of Foreign Divorces Act 1986*
- *European Communities Act 1972*
- *European Union (Withdrawal) Act 2018*
- *Hague Convention on Child Abduction*
- *Hague Convention on Choice of Court Agreements 2005*
- *Hague Convention on the Civil Aspects of International Child Abduction*
- *Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance 2007*
- *Hague Convention on Parental Responsibility and Protection of Children 1996*
- *Hague Convention on the Recognition of Divorces and Legal Separations*
- *Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*

Just what the doctor ordered

The cervical cancer scandal has raised significant public interest and political debate about open disclosure when things go wrong in a healthcare setting. **Maria Watson** checks the prognosis for mandatory disclosure

MARIA WATSON IS A BARRISTER WHO SPENT MANY YEARS WORKING IN HEALTHCARE. SHE IS THE CASE REPORTER FOR THE *MEDICO-LEGAL JOURNAL OF IRELAND*



The Medical Council has always encouraged open disclosure. In their 2016 edition of its *Guide to Professional Conduct and Ethics*, it provides: "Open disclosure is supported within a culture of candour ... Patients and their families, where appropriate, are entitled to honest, open and prompt communication about adverse events that may have caused them harm. When discussing events with patients and their families, you should: acknowledge that the event happened; explain how it happened; apologise, if appropriate; and assure patients and their families that the cause of the event will be investigated and efforts made to reduce the chance of it happening again."

The Health Service Executive and the State Claims Agency launched a policy on open disclosure in 2013, having piloted it at two hospitals – the Mater in Dublin and Cork University Hospital – from October 2010 until October 2012.

However, despite the policy and encouragement of open disclosure, many doctors practice defensive medicine. This can partly be explained by the legal position and the lack of safeguards in place, which leaves the medical profession vulnerable to claims of medical negligence.

Dear doctor

The long anticipatedd *Civil Liability (Amendment) Act 2017* sought to address this by, among other things, creating legislative safeguards for the medical profession by promoting a culture of open disclosure. The act provides that any open disclosure and/or apology within the provisions of the act shall not invalidate insurance, constitute admission of liability or fault, or not be admissible in proceedings.

Importantly, section 12 of the act states that a health-service provider 'may' make an open disclosure – however, there is no requirement to do so.

The act defines a 'patient safety incident' as "an incident which has caused an unintended or unanticipated injury or harm to the patient and which occurred in the course of the provision of a health service to that patient".

By contrast, the new *Patient Safety Bill 2018* – which more closely resembles British law – requires open disclosure of any serious patient-safety incident. According to the bill, 'mandatory open disclosure' requires the disclosure, by a health service provider, of a "serious patient safety incident [that] is any unintended or unanticipated injury or harm to a service user that occurred during the provision of a health service."

Such incidents include:

a) The death of the person,

b) A permanent lessening of bodily, sensory, motor, physical or intellectual functions (including removal of the wrong limb or organ or brain damage) ("severe harm"),

c) Harm that is not severe harm but results in:

i) An increase in the person's treatment,

AT A GLANCE

- Despite the policy and encouragement of open disclosure, many doctors practice defensive medicine
- This can partly be explained by the legal position and the lack of safeguards in place, which leaves the medical profession vulnerable to claims of medical negligence
- The first-ever empirical study evaluating mandatory disclosure laws in the US found that laws that protect doctors who apologise for errors may actually impel more patients to sue


PIC: SHUTTERSTOCK

> WHILE APOLOGY LAWS DO ENCOURAGE PHYSICIANS TO APOLOGISE, THE LAWS ACTUALLY APPEARED TO INCREASE THE NUMBER OF LAWSUITS AGAINST NON-SURGEONS AND HAD LITTLE EFFECT ON THE NUMBER OF LAWSUITS AGAINST SURGEONS

ii) Changes to the structure of the person's body,
iii) The shortening of the life expectancy of the person,
iv) An impairment of the sensory, motor or intellectual functions of the person that has lasted, or is likely to last, for a continuous period of at least 28 days,
v) The person experiencing pain or psychological harm that has been, or is likely to be, experienced by the person for a continuous period of at least 28 days,

d) The person requiring treatment by a health practitioner in order to prevent:
i) The death of the person, or
ii) Any injury to the person that, if left untreated, would lead to one or more of the outcomes mentioned in paragraph (b) or (c).

The bill also provides that "serious patient safety incidents shall include, but not be limited to, such serious patient safety incidents as may be prescribed by the minister".

Like the act, the bill retains safeguards to prohibit any adverse effect on civil liability or insurance cover arising from an apology or disclosure. Curiously, however, the bill's explanatory note, while referring to such protections, states that notifications of reportable incidents or other patient safety incidents would be admissible in evidence for other civil proceedings and in criminal proceedings. The bill does not, however, provide examples of 'other' civil proceedings, but one might question whether professional inquiries – including those by the Medical Council or Bord Altranais – would fall within the definition of such other civil proceedings.

I don't need no doctor

Finally, the bill defines a 'health-service provider' as a person other than a health practitioner who provides one or more health services and, for that purpose, employs a health practitioner for the provision of health services. In that regard, the 'registered health-service provider' – and not a registered 'health practitioner' – shall

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THE NEW *PATIENT SAFETY BILL 2018* – WHICH MORE CLOSELY RESEMBLES BRITISH LAW – REQUIRES OPEN DISCLOSURE OF ANY SERIOUS PATIENT-SAFETY INCIDENT

be guilty of an offence if the health-service provider fails to make a mandatory open disclosure or fails to notify a reportable incident in accordance with the apology and information provision. A registered health-service provider faces, on summary conviction, a fine not exceeding €5,000 or imprisonment not exceeding three months or both, or, on indictment, a fine not exceeding €7,000 or imprisonment for a term not exceeding six months or both.

It is noteworthy that *In Re Employment Equality Bill* (1997), the Supreme Court held that it was unconstitutional to impose criminal liability on employers of offences committed by employees. Furthermore, there is very little difference between a summary conviction fine of €5,000 versus a conviction on indictment of €7,000.

It will be very interesting to see whether the bill will be retained in its current form and enacted.

What is also not clear in the bill as it stands is who is required to make the mandatory open disclosure – the doctor, nurse, or service provider? The bill defines a 'registered health-services provider' as intended to cover public and private health services and those who operate in both private and public, whether providing health services through a company, partnership, or their own – for example, the HSE, section 38 service providers, private hospitals, general practitioners – with an exclusive practice mix of private and public patients. Therefore, who within this definition is actually required to make the mandatory open disclosure – the doctor or the service provider?

Whether the current act has (or the promised bill will) have an effect on improving medical care and reducing medical negligence is far from clear.

Doctor, doctor

The first-ever empirical study evaluating similar laws in the United States found that laws that protect doctors who apologise for errors may actually impel more patients to sue. Benjamin J McMichael found that the effect of the apology laws was mixed. There was evidence to suggest that malpractice claims against surgeons could be reduced by such laws, but they also had a perverse effect on patients' propensity to litigate, in particular against non-surgeons.

The study found that, while apology laws do encourage physicians to apologise, the laws actually appeared to increase the number of lawsuits against non-surgeons, and had little effect on the number of lawsuits against surgeons: "Assuming it is easier to detect the malpractice of a surgeon than a non-surgeon (which is likely, given that surgical errors are more obvious to patients than nonsurgical errors, like misdiagnosis or failure to refer), the increase in the probability of a lawsuit for non-surgeons and the absence of an increase for surgeons is consistent with apology laws encouraging apologies that contain a signal of malpractice."

The study found that "apologies may alert patients to errors they would not have discovered otherwise, encouraging them to file suit instead of settling or dropping their claims before filing in court".

The empirical analysis examined over 1.6 million hospital stays of heart-attack patients and found no evidence that apology laws reduced defensive medicine. Further, apology laws do not decrease the intensity of treatment received by patients but, rather, they actually increase the medical resources used to treat heart-attack patients, consistent with an increase in defensive medicine. If apology laws decreased malpractice pressure, physicians should be more comfortable sending patients home a little earlier. However, the reverse is true – physicians kept patients in longer in the presence of such laws.

Moreover, the lack of guidance about apologies could lead to confusion, with poorly executed apologies and 'botched' apologies blamed for an increase in the risk of patients suing.

In conclusion, while it is ethically the right thing for a medical practitioner to acknowledge and/or apologise where a mistake, error, or patient-safety incident has occurred, mandatory open disclosure within the Irish healthcare system – akin to the duty of candour in Britain – may be welcomed.

One could argue that it would be unwise to advise any medical professional to acknowledge and/or apologise where a patient-safety incident occurred without having safeguards in place, otherwise one would be effectively fuelling medical negligence claims. Apology laws that protect disclosure are more common internationally, and international experience indicates that open disclosure will happen when fostering the development of an open and honest culture, in line with the Medical Council's *Guide to Professional Conduct and Ethics* for medical practitioners, which refers to patients being entitled to honest, open, and prompt communication about adverse events that may have caused them harm, such as the cervical cancer scandal. g

LOOK IT UP

CASES:

- *In Re Employment Equality Bill* [SC no 156 of 1997]; [1997] 2 IR 321

LEGISLATION:

- *Civil Liability (Amendment) Act 2017*
- *Patient Safety Bill 2018*

LITERATURE:

- McMichael, Benjamin J (2017), 'The failure of "sorry": an empirical evaluation of apology laws, health care, and medical malpractice', *Lewis & Clark Law Review* (forthcoming)
- Medical Council (2016), *Guide to Professional Conduct and Ethics*

Who goes there?

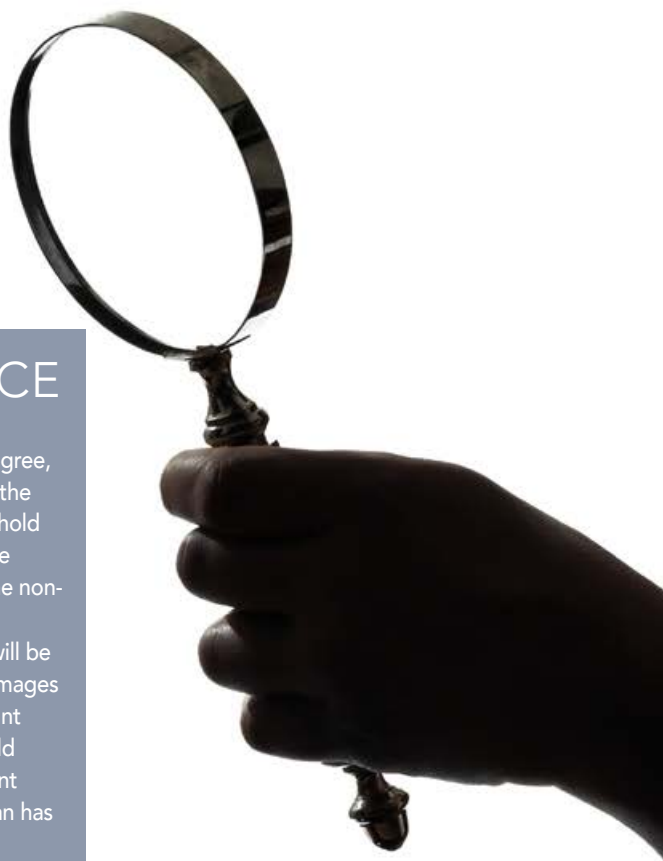
The possibility of a plea based on the identification provision in the *Civil Liability Act* means that, when bringing a claim for defamation, plaintiffs must carefully consider who to sue. **Conor O'Higgins** investigates

CONOR O'HIGGINS IS A DUBLIN-BASED BARRISTER, PRIMARILY FOCUSING ON CIVIL LAW MATTERS IN DEFAMATION, PRIVACY, DATA PROTECTION, PERSONAL INJURIES AND COMMERCIAL LAW

In *Kehoe v RTÉ*, Barton J held for the first time that the identification provision under section 35(1)(i) of the *Civil Liability Act 1961* applies in defamation proceedings – a point underlined by his *ex tempore* ruling in December 2018 in the much-reported case of *Coffey v Iconic Newspapers*.

Section 35(1)(i) provides that a plaintiff will be identified with (that is, held responsible for) the degree of liability of a concurrent wrongdoer whom they have chosen not to sue and against whom their cause of action has expired.

The possibility of a plea based on section 35(1)(i) is likely to have a significant impact on the way plaintiffs approach defamation proceedings. Moreover, observations made by O'Donnell J in *Hickey v McGowan* (a case involving sexual abuse), concerning the potential for the provision to operate harshly from the point of view of a plaintiff, are particularly apposite in the context of defamation cases.



AT A GLANCE

- Where two persons are found liable to a plaintiff to some degree, but only one of them is sued, the sued defendant is entitled to hold the plaintiff responsible for the wrongdoing attributable to the non-party
- The degree of responsibility will be reflected in the amount of damages recoverable from the defendant
- The range of people who could be considered to be concurrent wrongdoers may be wider than has been thought previously

The legislation

Section 35(1)(i) states: "Where the plaintiff's damage was caused by concurrent wrongdoers and the plaintiff's claim against one wrongdoer has become barred by the *Statute of Limitations* or any

PIC: SHUTTERSTOCK

> USERS OF ONLINE PLATFORMS ARE KNOWN TO ADOPT PSEUDONYMS SO THAT THEY ARE NOT READILY IDENTIFIABLE

other limitation enactment, the plaintiff shall be deemed to be responsible for the acts of such wrongdoer."

Section 11(5) of the act defines who may be considered a concurrent wrongdoer where defamation has occurred. It states: "Where the same or substantially the same [defamation] is published by different persons, the court shall take into consideration the extent to which it is probable that the statement in question was published directly or indirectly to the same persons, and to that extent may find the wrongdoers to be concurrent wrongdoers."

As a result of this, where two persons are found liable to a plaintiff to some degree, but only one of them is sued, the sued defendant is entitled to hold the plaintiff responsible for the wrongdoing attributable to the non-party. The degree of responsibility so ascribed to the plaintiff will be reflected in the amount of damages recoverable from the defendant.

The overall purpose of section 35 is to ensure fair treatment between plaintiff and defendants and between defendants themselves. In the specific context of section 35(1)(i), O'Donnell J remarked in *Hickey* that: "One of the main provisions of the 1961 act was to allow the allocation of liability (and consequently damages) between defendants and indeed other concurrent wrongdoers responsible for the damage suffered by the plaintiff. If a plaintiff did not sue one such wrongdoer (with the consequence then that such wrongdoer may not be available for a claim of contribution by other concurrent wrongdoers who have been sued), then the act, through section 35, requires that the plaintiff must bear that loss."

O'Donnell J also commented that, arguably, the provision "operates too harshly". At paragraph 67, he outlined that unfairness might arise, for example, where a plaintiff finds it difficult or impossible to identify a concurrent wrongdoer. Another possible shortcoming that he recognised was the failure of the provision to take account of a concurrent wrongdoer's ability to meet an award of damages. This, and other factors set out in this part of the judgment, suggested to him that the provision might benefit from further legislative scrutiny.

Kehoe v RTÉ

Kehoe is the first known judgment concerning the application of section 35(1)(i) in the context of defamation under the 2009 *Defamation Act* or the old torts of libel and slander. The case was brought as a result of seriously defamatory comments made by Joe Costello TD on the Claire Byrne radio show. The plaintiff – a senior member of Sinn Féin – opted to sue the broadcaster of the publication, but not its author.

RTÉ made the case that section35(1)(i) applies to defamation in precisely the same way as it would to any other tort. In choosing not to sue Mr Costello and permitting the statute to expire, the plaintiff had to be held accountable for Mr Costello's proportion of the wrongdoing arising from the publication. In response, the plaintiff argued that the provision should not apply, on the grounds that defamation is a tort of strict liability. This, they submitted, was the reason why no judgments could be found applying it in this context.

Barton J disagreed, finding that section 35(1)(i) applies to defamation. In so doing, he noted, among other things, that section 2 of the 1961 act defines a 'wrong' as a "tort, breach of contract or a breach of trust" and expressly includes wrongs, whether or not they are intentional. He emphasised also the significance of section 11(5) of the 1961 act, which (as outlined above) states that damage from defamation may be caused concurrently.

Likely impact

Kehoe underlines that, when bringing a claim for defamation, the plaintiff must consider very carefully who to sue. The failure to join Mr Costello was, on the plaintiff's own evidence, attributable to his view that RTÉ was the morally culpable party that had "let the statement out". Whatever the reason, it proved – by virtue of the jury's verdict that Mr Costello was 65% liable – to be a decision that deprived the plaintiff of the opportunity to recover damages for the majority of the injury caused to him. It is worth pointing out that it could also have had severe adverse costs implications.

Coffey v Iconic Newspapers is an even more recent example of the effective use of the provision by a defendant. In this case, the publisher of the *Kilkenny People* was sued by the former Minister of State for the Environment over an article that was critical of him. The article was, to a large degree, a reproduction of a press release that had been sent to the paper by another TD.

Barton J's ruling that the author of the press release was potentially a concurrent wrongdoer with whom the plaintiff should be identified ultimately did not have any effect, as the jury failed to reach a verdict. It is, however, notable – not just because it reinforces the importance of choosing who to sue, but also because it indicates that the range of people who could be considered to be concurrent wrongdoers may be wider than has been thought previously.

Does it operate fairly?

The lack of reliance on section 35(1)(i) until recently is probably less curious than it initially seems. A brief analysis of the relatively small number of libel and slander cases dating from around the coming into force of the 1961 act reveals, firstly, that cases would almost always be definitively disposed of well within the limitation period. By way of example, in Patrick Kavanagh's famous case against the magazine *The Leader*, the Supreme Court was able to order a retrial of the jury's original verdict with over

> IT PROVED TO BE A DECISION THAT DEPRIVED THE PLAINTIFF OF THE OPPORTUNITY TO RECOVER DAMAGES FOR THE MAJORITY OF THE INJURY CAUSED TO HIM

> THE WIDER QUESTION THAT ARISES IS WHETHER SECTION 35 CONTINUES TO STRIKE A FAIR BALANCE BETWEEN THE RIGHTS OF PLAINTIFFS AND DEFENDANTS, GIVEN THE MUCH STRICTER TIME LIMITS THAT NOW APPLY TO VARIOUS TORTS

half the time permitted by the statute still to run. Secondly, a great many of the libel and slander cases that have come before our courts have concerned defendants that are newspapers or similar publications. Such defendants tend to be, by their nature, vicariously liable for their journalists and columnists. For these reasons, in almost all instances, defendants could not have hoped to rely on section 35(1)(i).

There are grounds though for believing that things may be different now. As regards the first point, time limits have shortened, and cases take far longer to get on. In relation to the second point, many defamation cases that now come before the courts do not concern the traditional type of publisher/author relationship. One topical example is where defamation is carried out by an internet user on an online social media platform operated by an internet host – for instance, Facebook or Google. While it is beyond the scope of this article to analyse the extent of internet host liability in this area, it is submitted that it is possible for both host and author to be concurrently liable.

In such a scenario, it would seem essential for the plaintiff to sue the author of the defamatory publication – that is, the user – alongside the host. To do otherwise would expose the plaintiff to the grave risk that they would be identified with a portion of the wrongdoing attributable to the author.

This brings one back to the observations of O'Donnell J concerning the risk of unfairness associated with section 35(1)(i). Difficultly in identifying an online author within time could prove especially acute in cases of online defamation. Users of online platforms are known to adopt pseudonyms so that they are not readily identifiable. The host might itself be capable of providing the requisite information, but it is not always willing to divulge this in the absence of a court order. Indeed, tactically speaking, it may be more advantageous for it to resist giving it in order to have the benefit of the provision.

All this, of course, must be viewed against the background of the one-year time limit that now applies in respect of actions for defamation. Under such a tight time frame, it might be impossible for a plaintiff to sue the author inside the limitation period. Moreover, O'Donnell J's observation in respect of the relevance of the concurrent wrongdoer being a mark for damages carries particular importance in circumstances where little or nothing may be known about the author's amenability to the law in this jurisdiction or their financial position.

It must be stressed that this article gives the example of online defamation as a means to illustrate the scope for unfairness in the operation of section 35(1)(i). Naturally, problems of the kind mentioned above are not confined to cases involving social media. The wider question that arises is whether section 35 continues to strike a fair balance between the rights of plaintiffs and defendants, given the much stricter time limits that now apply to various torts. This highlights the wisdom of O'Donnell J's suggestion in *Hickey* that further consideration may need to be given to the effect of the provision.

Further issues

There are two further issues worth mentioning briefly as regards defamation.

The first concerns the relationship between section 35(1)(i) and the right of a plaintiff to apply for a direction under section11(2)(c)(ii) of the *Statute of Limitations 1957* (as amended) extending time for bringing a claim. The recent judgment in *O'Sullivan* clarified that, in allowing further time not exceeding two years, a court is exercising limited discretion to 'disapply' the normal one-year timeframe. Bearing this in mind, it would not appear open to a plaintiff to argue at hearing that a plea under section35(1)(i) should fail in circumstances where, although the one-year period had run, it remained theoretically possible to sue on the basis of an extension. However, this point has yet to be ruled on by the courts.

The final issue concerns how section 31(4) of the *Defamation Act 2009* would apply in a case where section 35(1)(i) of the 1961 act was pleaded successfully by a defendant. The former provision prescribes a list of matters that must be taken into account by a judge or jury when deciding on an award in damages – for instance, whether the defendant made an apology or offered to make amends under section 22 of the 2009 act. Consequently, a question that remains to be clarified is whether such a defendant could argue successfully that a plaintiff should be identified with the lion's share of liability in circumstances where they have taken steps in mitigation, but the un-sued defendant has not. g

LOOK IT UP

CASES:

- *Coffey v Iconic Newspapers*, High Court, (December 2018)
- *Hickey v McGowan* [2017] IESC 6; [2017] 2 IR 196 (paras 59-60)
- *Kehoe v RTÉ* [2018] IEHC 340
- *O'Sullivan v Irish Examiner Limited* [2018] IEHC 625

LEGISLATION:

- *Civil Liability Act 1961*
- *Defamation Act 2009*
- *Statute of Limitations 1957*, section 11(2)(c)

Pay it forward

While payment on account has been ordered occasionally by the High Court, little by way of guidance or precedence has existed until relatively recently. **Karl Shirran** looks for an advance

KARL SHIRRAN IS A PRACTISING BARRISTER WITH A BROAD CIVIL PRACTICE. THE AUTHOR WISHES TO THANK LIAM REIDY SC FOR HIS INVALUABLE ASSISTANCE AND GUIDANCE

A payment on account application can brought by a party where liability for costs has been admitted by the other party to litigation, or costs have been awarded against the other party, as a result of which part payment of costs is sought in advance of costs being dealt with through taxation. A practice direction, HC71, was introduced with special regard to medical negligence cases in which prohibitive upfront costs are routinely incurred.

While payment on account has been ordered occasionally by the High Court, little by way of guidance or precedence has existed until recent times. More recently, there have been a number of reported decisions dealing with payment on account. In addition, practice direction HC71 came into effect on 24 April 2017.

A number of issues should be noted in respect of the practice direction:

- Its justification lies in delay in the taxation system,
- A court 'may' award payment on account, as opposed to 'shall', and thus one would assume considerable judicial discretion pertains,
- 'A reasonable sum' should be awarded, which suggests nothing by way of a fixed percentage figure (this is consistent with recent case law on the matter), and
- A positive undertaking should be given by the successful party's solicitor that, in the event of taxation realising a smaller sum than that directed to be paid on account, such overpayment will be repaid.

AT A GLANCE

- Payment on account applications can be brought to the High Court where liability for costs has been admitted or costs have been awarded – and part-payment of costs is sought in advance of costs being dealt with through taxation
- Cases subsequent to practice direction HC71 detail some relevant considerations
- *Antecki* decided that a solicitor/plaintiff need not to evidence delay in the taxation system in order to obtain a payment on account order
- *Da Silva* dealt with the matter of when a plaintiff is precluded in bringing an application for payment on account

In *Heeney v Depuy International Limited*, the plaintiff brought a case against the replacement hip manufacturer. On the day of the hearing, time was allowed to facilitate negotiation, which proved fruitful – the defendant agreeing to a compensation amount and an order for the plaintiff's costs to be taxed in default. It seems that no agreement was reached as to costs and, before matters were referred to taxation, the plaintiff sought an order for payment on account, pursuant to practice direction HC71.

Given the nature of the application, argument focused on the appropriateness of the composition of the plaintiff's legal team. The plaintiff had retained two senior counsel, two junior counsel and solicitors, with one junior counsel solely responsible for discovery and documentation review. The plaintiff's argument was threefold:

1) This was the first case of its kind in the European Union, let alone Ireland. There was no guiding precedence, and additional work had to be undertaken in considering persuasive case law from the United States and Australia.
2) The 'state of the art' defence under section 6(e) of the *Liability for Defective Products Act 1991* was raised by the defendant, which is highly contentious and requires considerable preparation.
3) A total of 20,000 documents were provided through discovery, requiring a full-time junior counsel to consider them.

The defendant objected to the application, arguing that (a) a number of similar cases were in the courts system involving the plaintiff's lawyers

PIC: SHUTTERSTOCK

> THE COURT SEEMED TO ACCEPT THAT DELAY EXISTED IN TAXATION, HOLDING THAT IT WAS INAPPROPRIATE FOR IT 'TO GIVE ANY INDICATION AS TO WHAT LEVEL OF FEES SHOULD BE PROPERLY PAYABLE'

and, as a result, overlap of legal work occurred, and (b) despite one year passing before the defendant responded to the plaintiff's bill of costs, it was open to the plaintiff to submit a comprehensive bill of costs for taxation. In short, according to the defendant, the plaintiff had been guilty of delay.

The plaintiff sought a figure of approximately €644,000 in legal fees in his short-form bill of costs, while the defendant was prepared to pay approximately €143,000 after consulting a legal costs accountant. The defendant was not prepared to pay for a second junior counsel or second senior counsel. It is worth noting that the defendant was represented by three senior counsel.

The court seemed to accept that delay existed in taxation, holding that it was inappropriate for it "to give any indication as to what level of fees should be properly payable". This was squarely within the taxing master's domain and would involve detailed

submissions. The court also held that "a reasonably substantial payment" would be ordered, "while at the same time not exposing the defendant to the risk of a serious overpayment in respect of such costs".

The sum ordered to be paid on account was €200,000, which was just short of 33% of the legal costs claimed by the plaintiff. The court order included the caveat that payment on account was only due and owing within 21 days from receipt by the defendant's solicitor of a formal or final bill of costs from the plaintiff's solicitors.

Brennan v Depuy International saw the same application made, and was almost identical to that of *Heeney*, both in fact and the applicable law. The only additional ground proffered by the defendant was that the costs sought were excessive, on the basis that they exceeded the agreed compensation amount.

In *Brennan*, ultimately 42% of the sum sought in the plaintiff's bill of costs was ordered to be paid on account. It's worth being mindful that the practice direction refers to "a reasonable sum" whereas, in *Heeney*, Barr J suggests "a reasonably substantial sum" for payment on account. In *Brennan*, he suggests the appropriate payment on account be "a substantial payment on account", making no reference to 'reasonableness' at all.

The foregoing cases clearly show that payment on account operates on the basis of a spectrum, as opposed to a fixed amount, although recent judicial indications suggest that 50% of the plaintiff's costs may be likely awarded when such an order is made.

Evidence of delay

In the case of *Antecki v MIBI and Others*, the same application seeking payment on account pursuant to HC71 was successfully brought. The plaintiff sought approximately €93,000 in costs (a small additional figure for sundry expenses was included), with the defendant being prepared to pay approximately €46,000.

Importantly, the High Court accepted that, between settlement by the parties being reached in June 2016 and likelihood of payment in December 2018, a period of two-and-a-half years (and 18 months from the time of the application) would elapse, which amounted to a significant delay.

Disagreement arose between the parties as to the significance of a second taxing master having just been appointed at the time of the application, with the plaintiff suggesting that no tangible effect would be felt from the appointment, while the defendant suggested that the justification for the practice direction ceased to exist on the basis that the backlog in taxation would be reduced as a result.

In addition, matters in taxation were adjourned to a second day due to the taxing master citing concern with the bill of costs submitted. In essence, the argument had been put forward that part of the delay had been caused by the taxing master. Most importantly, the court held that a plaintiff's solicitor was not required to evidence to a court that delay exists in the taxation system.

The court ultimately ordered the sum of €45,000 (approximately 50% of costs sought) for payment on account to the plaintiff on the basis of the cause of action, the complexity, and the level of fees paid to counsel already, as only the solicitor's costs were in dispute.

Restrictions

It seems that the window of opportunity in bringing an application for payment on account is when costs are being dealt with immediately after a substantive hearing; where a hearing has been specifically commenced for the purpose of assessing liability for costs; or where liberty to apply is part of any direction by the trial court. Furthermore, it is normally a term of settlement that such an application can be brought. But, in cases where judgment is given after a hearing, application must be made by the plaintiff's counsel for such relief.

It is to be noted that, in *Da Silva v Rosas Construtores SA*, an issue arose as to whether or not the High Court had dealt with a matter finally, where the court had made its determination and awarded costs without granting liberty to apply. Incidentally, neither party sought liberty to apply. The net issue was whether the court could alter a judgment finally determined.

The court determined the matter on the basis of the 'slip rule', provided for under the *Rules of the Superior Court* (order 28, rule 11) and the 1994 Supreme Court decision in *Belville Holdings Ltd v Revenue Commissioners*. In *Belville*, Finlay CJ emphasised the need for not amending final judgment, save for exceptional circumstances. The exceptional circumstances only allow for an amendment to a judgment where the judgment was incorrectly recorded or where the record does not give effect to what was actually decided. The court held that neither of the exceptions occurred here and, as a result, it was precluded from hearing an application for payment on account.

Future implications

While it is not entirely clear what significance HC71 will have in the future, in some recent cases when payment on account has been ordered, parties have settled costs, preventing matters going to taxation.

Moneys due on foot of an order for payment on account are moneys due on foot of a court order. As per Collins, *Enforcement of Judgments* (Round Hall, 2014, p2), it seems that any order by a court that involves

> RECENT JUDGMENTS CLEARLY SHOW THAT PAYMENT ON ACCOUNT OPERATES ON THE BASIS OF A SPECTRUM, AS OPPOSED TO A FIXED AMOUNT, ALTHOUGH RECENT JUDICIAL INDICATIONS SUGGEST THAT 50% OF THE PLAINTIFF'S COSTS MAY BE LIKELY AWARDED WHEN SUCH AN ORDER IS MADE

> MOST IMPORTANTLY, THE COURT HELD THAT A PLAINTIFF'S SOLICITOR WAS NOT REQUIRED TO EVIDENCE TO A COURT THAT DELAY EXISTS IN THE TAXATION SYSTEM

one party to pay another party money shall not require "any demand thereof" and the "person so directed shall be bound to obey such judgment or order upon being duly served with the same without demand". Additionally, order 42, rule 17 of the *Rules of the Superior Courts* suggests that any costs to be paid by way of order can be enforced by way of one or more order(s), *fieri facias*.

It is submitted that *Antecki* could be read liberally, meaning that delay in the taxation system is not a prerequisite to an application being granted or, more restrictively, that the court was simply recognising the delay in taxation that existed in the system at the time of *Antecki* and, therefore, no longer required to be put on proof. Furthermore, there is no indication from the jurisprudence of what constitutes delay in taxation, apart from *Antecki* suggesting that a passing of two-and-a-half years from settlement to likely payment of costs is excessive.

Finally, despite the High Court stressing in *Heeney*, *Brennan* and *Antecki* that it was not the appropriate forum for deciding the issue of the level of costs, it is difficult to accept that, in reality, the court does not send a strong message to the taxing master of what must be the minimal acceptable level of costs associated with an action, particularly given the caution evinced by the court in not awarding payment on account of a sum greater than what costs will ultimately tax. g

LOOK IT UP

CASES:

- *Antecki v MIBI and Others* [2017] IEHC 503
- *Belville Holdings Ltd v Revenue Commissioners* [1994] 1 ILRM 29
- *Brennan v Depuy International Limited* [2017] IEHC 413
- *Da Silva v Rosas Construtores SA* [2017] IEHC 365
- *Heeney v Depuy International Limited* [2017] IEHC 355

LEGISLATION:

- High Court Practice Direction HC71
- *Liability for Defective Products Act 1991*, section 6(e)
- *Rules of the Superior Courts*, order 28, rule 11 and order 42, rule 17

LITERATURE:

- Sam Collins, *Enforcement of Judgments* (Round Hall, 2014)

CHILD LAW IN IRELAND

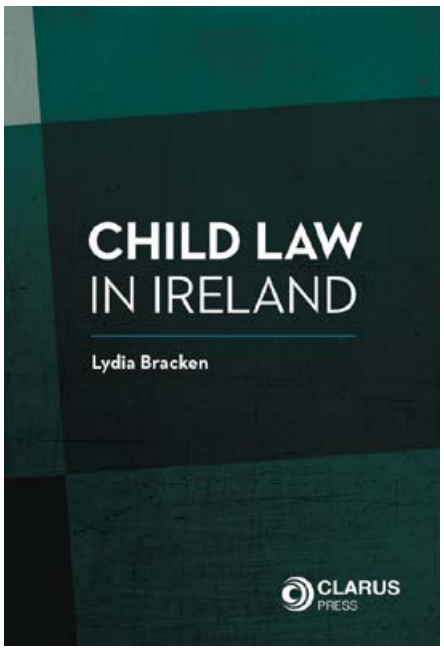
Lydia Bracken. Clarus Press (2018), www.claruspress.ie. Price: €49 (incl VAT)

I very much enjoyed reading Dr Bracken's book – in a 'busman's holiday' way.

Dr Bracken has, in a clear and accessible way, reviewed all aspects of the law concerning children, children's rights, parents' responsibilities, developments in parentage, including an analysis of the *Assistive Reproduction Bill of 2017* through to adoption, education, and children in the public law system. The book looks at all of this from the perspective of international obligations, as well as the Irish Constitution and the domestic legislative framework. Bracken ably analyses the law as it currently stands, including any prospective changes on the horizon, and provides an analysis of whether or not these changes will meet the needs of our modern society.

In Chapter 3, Dr Bracken deals with the new 'best interests' test and references section 32(1)(b) of the 1964 act, inserted by section 63 of the 2015 act. She notes the new powers vested in the court to appoint an expert to determine the child's views. Since this book was published, statutory instrument 587/2018 has been implemented, which sets the fee to be charged by the expert, pursuant to this section.

Chapter 6 looks at adoption and the new



developments, both in terms of the implementation of the *Adoption Amendment Act 2017* and the bill that deals with information and tracing. She carries out a helpful comparison with the law as it currently stands in England and Wales, where, once a person reaches the age of 18, they are entitled to certain documentation as a matter of course.

Chapter 7 deals with protecting children from harm and highlights the implementation of the new special-care provisions. Dr Bracken examines Children First and notes that the recommendation of the professionals in the area of passport-style vetting would achieve the desired result in a more efficient way.

This chapter also deals with the representation and participation of children in proceedings, and reviews international conventions and how representation and participation is now perceived in the context of the introduction of article 42(a).

In a thought-provoking way, she highlights the call for child-friendly judgments in family law matters, with reference to Judge Peter Jackson's judgment, which was delivered in letter format so that the child could understand his rationale and reasoning.

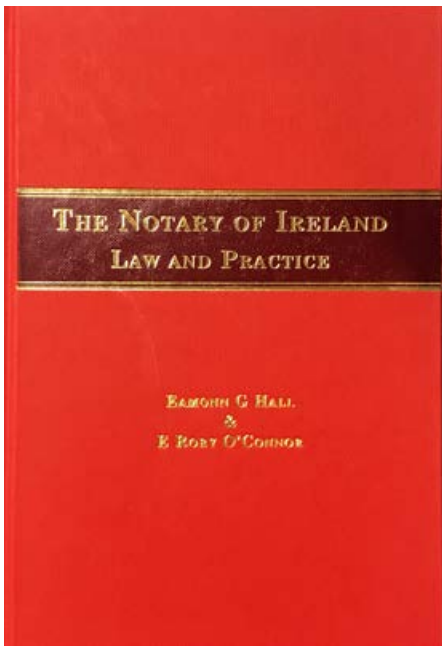
Child law has developed at a very rapid pace in recent years. This book is timely, as it encompasses all of these new developments.

All in all, I found this book very helpful.

Sinead Kearney is a partner and head of the health services team at ByrneWallace.

THE NOTARY OF IRELAND: LAW AND PRACTICE

Eamon Hall and Rory O'Connor. LawBooks Ireland (2018), www.lawbooks.ie. Price: €160 (incl VAT)



Eamon Hall and Rory O'Connor are both eminent lawyers and founder members of the Faculty of Notaries Public in Ireland. Eamon is a former chief solicitor of Eir. Rory was formerly the law agent and general counsel of the AIB group. Michael V O'Mahony (past-president of the Law Society) has brought his editing skills to bear on the work.

The authors address the evolution of the role of the notary, from Roman times right up to the modern era. Their chief focus, however, is to outline both the role and requirements of the modern notary, which, like all legal practitioners, are heavily influenced by EU law, international conventions, and Government regulation.

Separate chapters deal with data protection law, compliance with money-laundering regulations, electronic commerce, and compliance with company law generally – all issues that heavily influence the role of the modern notary.

Other chapters deal with specialist topics, such as bills of exchange and inter-country adoptions. Certainly, when notarising a document, one would be well advised to review the law and content of the relevant chapters in this work that deal with these topics. I found the chapter on the power of attorney very useful.

Of particular interest to the notary is the drafting of notarial certificates – a topic that is set out extensively in the seventh schedule to the book – and an essential skill for any notary. Hall and O'Connor's book underlines the fundamental importance to the notary of authenticating the *execution* of a document, as opposed to authenticating the content of the document itself. One must always differentiate between the extent of the work required to authenticate the execution of a document, separate to authenticating its content.

This book is an essential tool for the notary and trainee notary. It is a work of seminal importance and is set to become the reference manual for all notaries. Quite apart from appealing to notaries, it will also prove a valuable tool to commercial lawyers, given the inclusion of chapters on commercial law matters, data protection law, European law and company law.

The authors are to be commended for producing such a comprehensive work, which covers all aspects of notarial law and practice. I strongly recommend it.

Tom Marren is a partner and notary public at Reddy Charlton, Solicitors.

OOPS, I DID IT AGAIN

The European Commission has yet again fined Google for abusing its dominant position. **Cormac Little** puts it on repeat

CORMAC LITTLE IS HEAD OF THE COMPETITION AND REGULATION UNIT OF WILLIAM FRY AND A MEMBER OF THE LAW SOCIETY'S EU AND INTERNATIONAL AFFAIRS COMMITTEE

GOOGLE'S COMPETITORS WERE NOT ALLOWED TO PLACE THEIR SEARCH ADVERTS IN THE MOST VISIBLE AND 'CLICKED-ON' PARTS OF THE WEBSITES' SEARCH-RESULTS PAGES

News from the EU and International Affairs Committee. Edited by TP Kennedy, director of education, Law Society of Ireland

On 20 March, the European Commission decided that Google LLC (previously Google Inc) and its parent company, Alphabet Inc (collectively, 'Google') had abused its dominant position within the meaning of article 102 of the *Treaty on the Functioning of the European Union* (TFEU). The commission found that Google was using its online advertising brokering service, AdSense for Search, to impose restrictive clauses on website owners when selling them online search advertising. The commission fined Google €1.49 billion.

Previous infringements

Google's EU competition law problems are by no means limited to the AdSense for Search case.

In 2017, the California-based search giant was fined €2.42 billion for abusive behaviour that involved leveraging its dominance in the provision of internet search facilities to give an illegal advantage to the online comparison shopping service, Google Shopping (see December 2017 *Gazette*, p66).

Last year, the commission fined Google a record €4.34 billion for imposing restrictions on smartphone/tablet manufacturers and mobile network operators, each of whom supplies devices using the Android operating system (see 'Hit me baby one more fine', December 2018 *Gazette*, p56). The commission found that Google's conduct gave an illegal advantage to its widely used internet search engine/app, Google Search.

Abuse of dominance

Article 102 TFEU prevents the abuse of a dominant position in the EU (or in a substantial part of it) that affects trade between member states. Accordingly, before finding that an undertaking has infringed article 102, the commission must first establish that this entity has a dominant position. A dominant position is defined as a position of economic strength that allows an undertaking to hinder effective competition being maintained in the relevant market by allowing it to behave, to an appreciable extent, independently of its competitors, customers and, ultimately, consumers. Dominance *per se* is not illegal, but dominant entities are under a special responsibility not to hinder effective competition in the market place. Article 102 contains a non-exhaustive list of various types of abusive conduct. These include directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions. A dominant company may argue that its behaviour is objectively justified and thus does not infringe article 102.

The commission's fine regarding AdSense for Search represents the fruit of an investigation that lasted over eight years. In November 2010, the commission's DG Competition opened a formal investigation into alleged breaches of article 102 by Google regarding its conduct in relation to online searches. Ironically, given the fact that it was also the subject of a series of commission fines for abuses of a dominant position, the enquiry regarding online advertising brokering was triggered by a complaint from Microsoft.

Potential breaches

In 2013, the commission engaged with third parties regarding the commitments offered by Google to address the various potential breaches of article 102. The commission subsequently market-tested these remedies. Following negative feedback, the commission announced in February 2014 that Google had offered of a revised set of commitments.

The commission's initial view was that Google's amended package of remedies was potentially sufficient to address the relevant article 102 concerns. DG Competition subsequently invited views from the initial complainants by sending them 'pre-rejection' letters. However, the complainants responded with further negative observations. The commission therefore asked Google for further improvements to the commitments offered. In November 2014, Margrethe Verstager (former Danish Minister for Education)

succeeded Joaquín Almunia as Competition Commissioner. The appointment triggered a change of approach.

In April 2015, the commission duly sent Google a statement of objections (SO) regarding the favourable treatment of Google Shopping in its general search results page. Google responded to that SO in August 2015, stating publicly that its response to the SO demonstrated, through evidence and data, that the commission's allegations were incorrect and that the commission's preliminary conclusions were wrong as a matter of fact, law and economics. In July 2016, the commission sent Google a supplementary SO, again alleging that the advantages given to Google Shopping infringed article 102. At the same time, DG Competition sent Google a separate SO regarding the restrictions that the search giant placed on certain third-party websites' ability to display search advertisements from its competitors.

AdSense for Search

Many websites – including travel sites, news publishers, and blogs – have an embedded search function to let visitors conduct searches. The owners of such websites usually wish to profit from the space around the relevant search results. Therefore, when searches are made, the website delivers both search results and search adverts, which appear alongside each other. AdSense for Search is a Google product that allows third parties to place banner ads on their respective websites. Google acts as the intermediary between advertisers and the website operators by agreeing individually negotiated contracts with website owners who are availing of the AdSense for Search service.

The commission noted that Google has consistently held a high market share in several interrelated markets. In particular, since 2006, Google's share of the online search advertising intermediation/brokering market in the European Economic Area or EEA (the EU's 28 current member states plus Norway, Liechtenstein and Iceland) has exceeded 70%. It has thus maintained a dominant position in this market.

Furthermore, in 2016, Google held market shares generally above 90% in the national markets in the EEA for general internet search, and above 75% in most of the national markets in the EEA for online search advertising. Other players in online search advertising, such as Microsoft and Yahoo, are unable to sell advertising space in Google's own search-engine results pages. Therefore, third-party websites represent an important opportunity for these other suppliers of online search-advertising intermediation services to grow their business and compete with Google.

Contracts with the websites

The commission reviewed hundreds of such agreements during its investigation and found:

- *Exclusivity*. Beginning in 2006, Google included exclusivity clauses in its contracts with website operators. As a result, publishers were prevented from placing any search advertisements from Google's business rivals on their search

results pages. The commission's decision targets agreements with operators where Google required such exclusivity for their entire respective portfolio of websites.

- *Premium placement of a minimum number of Google search ads*. Starting in March 2009, Google began to substitute the exclusivity clauses with so-called 'premium placement' clauses. These obliged operators to reserve the most profitable space on their search results pages for Google's ads. Accordingly, Google's competitors were not allowed to place their search adverts in the most visible and 'clicked-on' parts of the websites' search results pages.
- *Right to authorise competing ads*. In the same month, Google also included provisions requiring publishers to seek written clearance before making changes to the way in which any rival adverts were displayed. This meant that Google could control how attractive, and therefore 'clicked-on', competing search ads would be.

Impact of Google's behaviour

The commission noted that the relevant clauses had imposed exclusive supply obligations on website owners. According to DG Competition, for most of the relevant period, Google's conduct affected over half the relevant market by turnover. The commercial impact of the operation of AdSense for Search was thus highly significant.

Based on a broad range of evidence, the commission found that Google's conduct harmed competition and consumers, while undermining innovation. Google's competitors were unable to grow and offer alternative online search advertising intermediation services. As a result, owners of websites had limited options for selling online advertising space and were forced to rely almost solely on Google. The commission also stated that Google did not demonstrate that the clauses created any efficiencies capable of justifying its practices. Accordingly, the search giant's conduct was not objectively justified.

The fine

The commission's €1.49 billion fine represents approximately 1.3% of Google's global turnover for 2018. This amount reflects the duration (ten years) and gravity of the infringement, and is based on the value of Google's revenue from online search advertising intermediation generated by AdSense for Search in the EEA.

The commission has ordered Google to stop the illegal conduct to the extent it has not done so already and to desist from any equivalent behaviours. However, this requirement is probably moot, given that Google ceased the relevant conduct a few months after receiving the commission's SO in July 2016.

As noted by the commission, the impact of Google's anti-competitive practices regarding AdSense for Search does not end with the imposition of fines. Aggrieved competitors and customers could take civil actions against Google under recently enhanced EU rules regarding competition-law damages claims.

Next steps

This decision marks the end of another chapter in the long-standing engagement between Google and DG Competition. The former's challenges to the Google Shopping and Android decisions are currently making their way through the EU's General Court. Interestingly, Google did not immediately announce its intention to seek a judicial review of the AdSense for Search decision.

The key issue of the commission's decision to fine Google is the extent of the responsibility a dominant undertaking has not to hinder competition when it develops new products and services. While gaining a dominant position is not illegal in the EEA, the clear lesson from this case is that a dominant undertaking needs to be very careful in how it tries to maintain/bolster its market share and/or offer new goods or services.

More broadly, it is interesting to contrast the differing approach of the US federal antitrust authorities, the Department of Justice and the Federal Trade Commission, with that of the commission/national competition authorities in the EEA. In recent years, other US-headquartered companies – Microsoft, Intel and Qualcomm – have each been heavily fined by the commission for abusing their respective dominant positions. Moreover, in February 2019, the Bundeskartellamt (the German federal cartel office) ruled that Facebook had abused its dominant position by combining data that it collected from users on Facebook-owned services such as WhatsApp and Instagram.

In contrast, the US antitrust authorities have been much more lenient. Critics of the commission would contend that DG Competition is fighting a proxy trade war against the major US tech corporations. However, others would say that the commission is one of the few regulators willing to use its powers to curb the alleged market excesses of such companies. g

CRITICS OF THE COMMISSION WOULD CONTEND THAT DG COMPETITION IS FIGHTING A PROXY TRADE WAR AGAINST THE MAJOR US TECH CORPORATIONS. OTHERS WOULD SAY THAT THE COMMISSION IS ONE OF THE FEW REGULATORS WILLING TO USE ITS POWERS TO CURB THE ALLEGED MARKET EXCESSES OF SUCH COMPANIES

TECHNOLOGY COMMITTEE

QUICK TIPS FOR ENSURING CONFIDENTIALITY IN THE USE OF TECHNOLOGY

Practitioners will be very aware of the current emphasis on privacy and security in communications and data arising in part from implementation of the GDPR. Here are a set of outline and basic issues to keep in mind to protect client data, and communications and to promote best practice in these areas. They are not intended as conclusive or comprehensive guidance, and practitioners should continue to keep themselves informed of emerging best practices in these areas.

Access controls

Access controls are the rules that govern an individual user's access to, or access within, document-management and email systems. Practitioners should consider implementing the following access controls in relation to sensitive data in 'highly-confidential' files.

Access to files:

- Should be siloed,
- Should only be granted on a need-to-know basis, with appropriate approval, and
- Should be managed by a nominated senior member of staff.

Where possible, periodic access-control audits should be performed on a frequent basis (monthly/quarterly) to confirm that only authorised employees have access to these restricted files.

Protection/encryption

Sensitive and confidential documents are often included as attachments to emails. One of the highest risks of data security breaches is emails being accidentally sent to the wrong individual. Auto-filling email addresses heightens this risk, and extra care is required when this feature is activated on your email server.

To mitigate the risks, all attachments should be encrypted, meaning the recipient would need a password to access them. Passwords must be sent in an out-of-bounds form (such as phone call, text message, or separate email).

Email

In addition, to avoid data breaches, extra security precautions need to be taken in relation to the content of emails:

- Internal correspondence should be encrypted through the use of 'transport layer security' (TLS). TLS provides cryptographic protocols that provide communications security over a computer network. TLS email encryption is an industry standard. For email to be secure, both ends (the sender and recipient/client) require TLS to be set up. Practitioners should ensure all clients have TLS set up and configured.
- A practitioner should check with all existing and prospective clients to ensure they have TLS configured on their email servers.
- External correspondence with attachments should have 'highly confidential' in the subject line.

Online file sharing

Online file-sharing services may not be secure enough for sensitive and confidential communications. All large files or data sets should be sent using applications that provide a number of security features, including:

- Encryption,
- Link-expiry settings,
- Number of allowed downloads, and
- Password protection.

(See also the Technology Committee practice note, 'Free public file-sharing sites – not recommended', *published in the Aug/Sept 2016* Gazette, *p56).*

Outside the office

Data breaches may also occur when electronic devices (laptops and mobile phones) and removable storage devices (USBs) are lost or stolen.

It is recommended that practitioners implement a security policy for electronic devices. At a minimum, devices should be password protected and locked at all times when not in use. Practitioners should also consider multi-factor authentication.

It is also recommended to deny the use of USBs by disabling USB ports.

'Follow-you printing'

'Follow-you printing' ensures that physical print jobs are protected. Follow-you printing works by holding documents in a secure print server until the user authenticates themselves at a printer of their choice. This mitigates the risk of data loss, theft, and unauthorised disclosure, as print jobs can only be collected from the printer by the user who sent them.

Local administration access

Within firms, users should be required to use IT assistance to install new software on their devices. This is necessary, as it prevents unauthorised or malicious software being installed on computers and will stop any potential malware from running with administrator rights.

Desktop encryption

Data encryption is necessary to ensure information confidentiality and integrity. This is accomplished by removing access to data without a private key.

All mobile devices – including laptops, removable storage devices, mobile phones, etc – should be encrypted to ensure all data that is stored locally on desktop computers is secured from unauthorised disclosure.

CONVEYANCING COMMITTEE

CONTENTS OF DOCUMENTS SCHEDULE IN CONDITIONS OF SALE – REVISION OF RECOMMENDATION

In light of the move to pre-contract investigation of title, reflected in the 2019 edition of the *Conditions of Sale*, the Conveyancing Committee has reviewed its previous recommendations regarding the contents of the documents schedule in the *Conditions of Sale*.

Previously, the committee recommended that the documents listed in the documents schedule should be limited to:

- The root of title being shown,
- Any document to which title is stated to pass under the special conditions,
- Any document that is specifically referred to in a special condition, and
- Planning documentation.

Given the provisions of the 2019 edition of the *Conditions of Sale*, and in particular general condition 6, the restriction regarding the documents to be listed in the documents schedule, previously recommended by the committee, is no longer appropriate.

Consequently, the committee has revised its recommendation, so that the documents listed in the documents' schedule **should now include**:

- The root of title being shown,
- Any documents to which title is stated to pass under the special conditions, and all documents of title to be deduced therefrom,
- Any document that is specifically referred to in the special conditions,
- All ancillary declarations and documentation,
- Planning documentation, and
- Requisitions on title in this transaction, with replies, and documentation vouching those replies.

GUIDANCE AND ETHICS COMMITTEE

TEN STEPS TO AVOID CONFLICT OF INTEREST

1) The *Solicitors (Professional Practice, Conduct and Discipline – Conveyancing Conflict of Interest) Regulations 2012* (SI 75/2012) prohibit a solicitor acting for both vendor and purchaser (with limited exceptions) from 1 January 2013.

2) The regulations supersede SI 85/1997, which prohibited acting for both builder/developer and purchaser of a newly built property.

3) There are four exceptions to the regulations:

- Voluntary transfers of the family/shared home from the owning spouse/civil partner into the names of both as joint tenants or, where held otherwise than as joint tenants, from the owner to themselves as joint tenants,
- Where vendor and purchaser are associated companies within the meaning of the legislation or where one of the parties is an individual and the other a company in which the parties are associated (see the regulations for definitions),
- Where the property being transferred is held under a bare trust by existing trustees and is being transferred to new trustees or by trustees to a beneficiary,
- The 'qualified parties exception' as set out in the regulations is unlikely to be met by other than the largest firms acting for large organisations.

4) The regulations do not apply where no beneficial interest is passing, for example, rectification. Therefore, generally such matters as a deed of surrender or a deed of family arrangement are not an exception, because more usually a beneficial interest passes.

5) Property is defined as any interest in land situate in Ireland.

6) The regulations apply to the transfer of any property (defined as any interest in land situate in Ireland) whether by sale, lease, voluntary transfer, conveyance, licence, assignment, surrender, or grant of an easement or otherwise.

7) Always be alert to the risk of conflict of interest and note that breach of the regulations may be regarded as professional misconduct.

8) Where the other party wishes to represent themselves, it is prudent for the acting solicitor to write to the non-represented party clearly setting out that they are not acting as the solicitor for that person.

9) Conflicts of interest can arise in the sale/disposal of a property where there are co-owners, most likely following a court order. Consideration should be given to agreeing joint carriage of sale. See the Conveyancing Committee's practice note (1 November 1999) that adopts the 1996 DSBA practice note regarding disposal of property in family matters.

10) Section 3(6) of the *Multi-Unit Developments Act 2011* prohibits a solicitor from acting for both the owners' management company and the developer in the transfer of common areas. The developer or other person who is the owner of the common areas concerned is legally obliged to pay the reasonable costs of independent legal representation of the owners' management company.

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 Peter TA Kenny, a solicitor formerly practising as Kenny Associates, College Street, Carlow, Co Carlow, and in the matter of the *Solicitors Acts 1954-2015* [8864/DT140/15]

Law Society of Ireland (applicant)

Peter TA Kenny (respondent solicitor)

On 16 June 2016, the tribunal found the respondent solicitor guilty of misconduct in that he:

1) Failed to account for the solicitor and client fees of €28,613.32 plus VAT and outlay of €1,500 deducted from the complainant's settlement of €300,000,
2) Failed to provide evidence of compliance with section 68(6) of the *Solicitors (Amendment) Act 1994*,
3) Failed to respond adequately or at all to the Society's correspondence and, in particular, letters dated 20 January 2014, 11 February 2014, 28 March 2014, 29 May 2014, 29 July 2014, 29 August 2014 and 6 October 2014,
4) Failed to attend the meeting of the Complaints and Client Relations Committee on 30 September 2014, despite being required to do so,
5) Failed to comply with the directions of the Complaints and Client Relations Committee given at its meeting on 20 January 2015.

The tribunal ordered that the respondent solicitor:

1) Stand censured,
2) Pay a sum of €15,000, which is the full extent of the tribunal's statutory jurisdiction, as part restitution to a named client, without prejudice to any of his legal rights,
3) Pay a sum of costs, measured by the tribunal, to the applicant.

In the matter of Martin Moloney, a solicitor practising as MP Moloney Solicitors at Grattan House, 1 Wellington Quay, Dublin 2, and in the matter of the *Solicitors Acts 1954-2015* [2018/DT62]

Law Society of Ireland (applicant)

Martin Moloney (respondent solicitor)

On 14 February 2019, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of professional misconduct in that he failed to ensure that there was furnished to the Society an accountant's report for the year ended 31 December 2017 within six months of that date, in breach of regulation 26(1) of the *Solicitors Accounts Regulations 2014* (SI 516 of 2014).

The tribunal ordered that the respondent solicitor:

1) Stand advised and admonished,
2) Pay the sum of €1,212 as a contribution towards the whole of the costs of the Law Society.

In the matter of Moya O'Donnell, solicitor, practising as Moya O'Donnell & Co, Solicitors, Elm Wood Terrace, Main Street, Killybegs, Co Donegal, and Glen Road, Glenties, Co Donegal, and in the matter of the *Solicitors Acts 1954-2015* [2018/DT34; High Court 2017/86 SA; High Court 2019/7 SA]

Law Society of Ireland (applicant)

Moya O'Donnell (respondent solicitor)

On 6 November 2018, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in her practice as a solicitor in that she:

1) Caused or allowed an incorrect reporting accountant's report for the financial year ending 31 March 2015 to be filed with the Society, which recorded a client deficit of €2,199, when there was a deficit in excess of €100,000 due to a large debit balance on a named client ledger,
2) Dishonestly caused or permitted a distribution/cash account(s) to be created and provided to the Society in respect of the estate of a named client, knowing it to falsely represent that a named client was a beneficiary of the estate, in an attempt to conceal a deficit on the named client estate of €32,831, which arose from the use of moneys from the named client estate to pay the named client moneys due to her from the estate of a different named client,
3) Dishonestly caused or permitted multiple deficits on her client account by payment of client moneys into her personal bank or credit card accounts and by payment of client moneys, held and/or due to particular clients, to other unrelated client matters, involving some 51 separate incidents of such activity,
4) Attempted to conceal deficits on her client account by causing or allowing false entries in the books of account to conceal the true destination of the payment(s),
5) Attempted to conceal deficits on her client account by engaging in a widespread practice of teeming and lading of client moneys,
6) Attempted to avoid detection by the Law Society of deficits and of the practice of teeming and lading of client moneys by use of false documentation, including in particular:
   - A letter dated 29 August 2012 purporting to vouch a payment of €58,890 (at appendix 9.3 of the investigation report of 10 November 2017) from a named client estate, and/or
   - Letters dated 30 January 2014 and 17 February 2014 purporting to vouch a payment of €80,000 (at appendix 9.4 of the investigation report) from the same named client estate, and/or
   - A letter dated 2 September

NOTICE: THE HIGH COURT

In the matter of Thomas D'Alton, a solicitor, and in the matter of the *Solicitors Acts 1954-2015* [2018 no 126 SA]

Take notice that, by order of the President of the High Court made on 26 March 2019, it was ordered that Thomas D'Alton, solicitor, previously practising as James J Kearns & Sons Solicitors, Portumna, Co Galway, be suspended from practice until 1 April 2020.

John Elliot, Registrar of Solicitors, Law Society of Ireland, April 2019

2015 purporting to vouch a payment of €63,028 (at appendix 9.6 of the investigation report) from the same named client estate, and/or
- A document purporting to vouch a payment of €86,000 (at appendix 9.7 of the investigation report) from the same named client estate, and/or
- A document purporting to vouch instruction of a payment of €76,000 (at appendix 12.2 of the investigation report) from the file of a named client, and/or
- A document purporting to record an electronic funds transfer of €5,000 (at appendix 13.3 of the investigation report) to another named client on 8 December 2016, and/or
- A letter dated 14 July 2017 purporting to be from the Revenue Commissioners purporting to vouch a payment of €14,050 on a named client estate, and/or
- A document (at appendix 14.5 of the investigation report) purporting to vouch an electronic funds transfer of a bequest of €4,361 to a named beneficiary.

7) Dishonestly furnished or permitted to be furnished to the Society further documentation in an attempt to conceal deficits and/or teeming and lading on her client account, and in particular:
- A copy questionnaire purportedly completed by a named client, falsely showing her to be a beneficiary to a named client estate, and/or
- A copy cheque payable to a named client with annotation falsely vouching a payment from the same named client estate, and/or
- A document of 25 August 2017 falsely vouching a payment of €5,000 to a named client, a beneficiary of the same named client estate, and/or
- An affidavit in the name of a named client signed 18 November 2017 purporting to vouch payments on another named client estate, and/or
- An affidavit in the name of a named client signed 18 November 2017 purporting to vouch payments on another named client estate, and/or
- Copy identification documents of two named clients with the same name, purporting to support her false claim that there was a beneficiary to a named client estate by the name of this named client.

The tribunal, in its opinion as to the fitness of the respondent solicitor to be a member of the solicitors' profession, expressed in its report the following recommendations:
1) The respondent solicitor was not a fit person to be a member of the solicitors' profession,
2) Her name should be struck off the Roll of Solicitors,
3) She should pay the measured costs of the Law Society.

The tribunal ordered and directed the Law Society to bring its findings and the recommendations in its report to the High Court. The matter came before the High Court and, on 18 February 2019, the High Court ordered that the name of the respondent solicitor be struck off the Roll of Solicitors.

In the matter of Patrick McGonagle, a solicitor practising as McGonagle Solicitors, 1 Main Street, Dundrum, Dublin 14, and in the matter of the *Solicitors Acts 1954-2015* [2018/DT60]

Law Society of Ireland (applicant)

Patrick McGonagle (respondent solicitor)

On 26 February 2019, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in that he failed to ensure that there was furnished to the Society an accountant's report for the year ended 31 December 2017 within six months of that date, in breach of regulation 26(1) of the *Solicitors Accounts Regulations 2014* (SI 516 of 2014).

The tribunal ordered that the respondent solicitor:
1) Stand admonished and advised,
2) Pay the sum of €1,000 towards the compensation fund,
3) Pay the sum of €1,212 costs of the Law Society.

In the matter of John BK Lindsay, a solicitor formerly practising as Lindsay & Co, Solicitors, formerly of 47 Wellington Quay, Dublin 2, and formerly of 15/17 Eden Quay, Dublin 1, 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* [2017/DT52]

Law Society of Ireland (applicant)

John BK Lindsay (respondent solicitor)

On 21 March 2019, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:
1) Failed to comply adequately or at all with an undertaking dated 10 November 2004 to the complainant in relation to a named client and in relation to a certain property, and/or
2) Failed to comply adequately or at all with an undertaking dated 28 June 2005 to the complainant in relation to a named client and in relation to a certain property, and/or
3) Failed to comply adequately or at all with an undertaking dated 28 June 2005 to the complainant in relation to a named client and in relation to a certain property, and/or
4) Failed to comply adequately or at all with an undertaking dated 16 November 2005 to the complainant in relation to a named client and in relation to a certain property, and/or
5) Failed to comply adequately or at all with an undertaking dated 29 June 2005 to the complainant in relation to a named client and in relation to a certain property, and/or
6) Failed to comply adequately or at all with an undertaking dated 29 November 2002 to the complainant in relation to a named client and in relation to a certain property, and/or
7) Failed to comply adequately or at all with an undertaking dated 13 June 2001 to the complainant in relation to a named client and in relation to a certain property, and/or
8) Failed to comply adequately or at all with an undertaking dated 31 August 2006 to the complainant in relation to a named client and in relation to a certain property, and/or
9) Failed to comply adequately or at all with an undertaking dated 2 August 2005 to the complainant in relation to a named client and in relation to a certain property.

The tribunal ordered that the respondent solicitor:
1) Stand censured,
2) Pay the sum of €4,000 to the compensation fund,
3) Pay the sum of €8,500 as a contribution towards the whole of the costs of the applicant. g

WILLS

Barry, Fionnuala (deceased), late of 67 Alden Road, Bayside, Dublin 13, who died on 22 January 2019. Would any solicitor or person having knowledge and details of a will made by the above-named deceased please contact her nephew, Karl Smith, tel: 086 892 4296, email: karlsmith8614@yahoo.com

Byrne, Mary (deceased), late of 20 Cullenswood, off Cullenswood Park, Ranelagh, Dublin 6, who died on 16 February 2019. Would any person having knowledge of the whereabouts of any will made or purported to have been made by the above-named deceased please contact Healy Crowley & Co, Solicitors, 9 O'Rahilly Row, Fermoy, Co Cork; tel: 025 32066, email: info@healycrowleysolrs.com

Delaney, Patrick (deceased), late of 25 Woodview, Lucan, Co Dublin, who died on 26 October 2018. Would any person having knowledge of any will made by the above-named deceased please contact Bernard Creavin, Creavin & Co, Solicitors, 18 Lower Kilmacud Road, Stillorgan, Co Dublin; tel: 01 283 2922, fax: 01 283 2847, email: edel@creavinco.com – ref: EM/BAC/4547

Flaherty, Brigid (Brid) (née Wallace) (deceased), late of Áras MacDara Nursing Home, Carroroe, Co Galway, and formerly of Pointe, Carroroe, Co Galway, who died on 22 July 2016. Would any person having knowledge of any will made by the above-named deceased, or if any firm is holding same, please contact Wilkie and Flanagan, Solicitors, Main Street, Castleblayney, Co Monaghan; DX 71001 Castleblayney; tel: 042 974 0064, email: gd@wilkieandflanagan.com

Kelly, Paddy (otherwise Patrick), (deceased), late of Bovinion, Newtown, Mountbellew, Co Galway, and also known as Newtown, Mountbellew, Co Galway, formerly of The Square, Mountbellew, Co Galway. Would any person having knowledge of the whereabouts of a will made by the above-named, who died on 1 January 2019, please contact Concannon & Meagher, Solicitors, Tuam, Co Galway; tel: 093 24115, email: info@conmeagher.ie

Loughrey, Oliver (deceased), late of 54 Saint Canice's Park, Wadelai, Ballymun, Dublin 9, and formerly of St Pappin's Road, Ballymun, Dublin 11, who died on 27 September 2018. Would any person having knowledge of the whereabouts of any will made or purported to have been made by the above-named deceased please contact Máire Teahan & Co, Solicitors, Main Street, Rathcoole, Co, Dublin; tel: 01 458 0035, email: maireteahansolicitor@gmail.com

Mullaly, Anthony (otherwise Anthony Mullally) (deceased), late of 36 Winehendon Road, Fulham, London SW6 5DR. Would any person holding or having knowledge of a will made by the above-named deceased, who died on 15 November 2018, please contact Messrs Gerard O'Shea, Solicitors, Meridian House, 13 Warrington Place, Dublin 2; tel: 01 661 9831, email: info@gosheasolicitors.ie

O'Loughlin, Linda (deceased), late of Mitchelstown, Trim, Co Meath, who died on 17 January 2017. Would any person having knowledge of the whereabouts of any will made or purported to have been made by the above-named deceased, or if any firm is holding same, please contact Cora Higgins, Regan McEntee and Partners, Solicitors, High Street, Trim, Co Meath; DX 92 002 Trim; tel: 046 943 1202, email: chiggins@reganmcentee.ie

Young, Mary (deceased), late of 58 Oakcourt Avenue, Palmerstown, Dublin 20, who died on 19 December 2018. Would any person having knowledge of the whereabouts of any will made or purported to have been made by the above-named deceased, or if any firm is holding same, please contact Early & Baldwin, Solicitors, 27/28 Marino Mart, Fairview, Dublin 3; tel: 01 833 3097, fax: 01 833 2515, email: info@baldwinlegal.com – ref: MOD/12281

TITLE DEEDS

Alexander, John (deceased), Milford House, Milford, Co Carlow. Would anyone having information in respect of a missing root of title please contact the below signed. The subject deed of conveyance is dated 30 March 1807 between Sir Richard Butler and Thomas Butler of the one part and John Alexander of the other part. The property conveyed therein is the mill and mill site situate at Clochristic, Milford, Co Carlow. Please contact Brody & Company, Solicitors, 35 Dublin Street, Carlow; tel: 059 919 3406, email: marie@brodyandco.ie

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978*

Take notice any person having any interest in the freehold estate or any intermediate interest in the property known as 27-29 Orwell Road, Rathgar, Dublin 6, which is held under a fee farm grant dated 5 February 1862 between Henry Coulson Beauchamps of the one part and Gerald Osbrey of the other part; a lease dated 4 July 1843 between Thomas Osbrey, Gerald Osbrey, George Bonynge Rochfort, Elizabeth Osbrey, Elizabeth L'Estrange, Charles Doherty Quinlan of the one part and Henry Littlewood of the other for a term of 287 years from 24 June 1843 at a yearly rent of 1 shilling; and a lease dated 10 September 1844 between Thomas

RATES

PROFESSIONAL NOTICE RATES

RATES IN THE PROFESSIONAL NOTICES SECTION ARE AS FOLLOWS:

- **Wills** – €150 (incl VAT at 23%)
- **Title deeds** – €300 per deed (incl VAT at 23%)
- **Employment/miscellaneous** – €150 (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.** Send your small advert details, with payment, to: *Gazette* Office, Blackhall Place, Dublin 7, tel: 01 672 4828, or email: gazettestaff@lawsociety.ie. **Deadline for June 2019 *Gazette*: 13 May 2019.** For further information, contact the *Gazette* office on tel: 01 672 4828.

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

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DATE	EVENT	CPD HOURS	DISCOUNTED FEE*	FULL FEE
8 May	**The Older Client: the Role of the Solicitor in Resolving Disputes** in partnership with Solicitors For the Elderly	3 General (by Group Study)	€160	€186
9/10 May	**Essential Solicitor Update Part I & II** Landmark Hotel, Carrick on Shannon, Co Leitrim	9 May - 4 Hours & 10 May - 6 Hours Total 10 Hours (by Group Study)*	9 May - €100 10 May - €135 9 & 10 May - €190 *Hot lunch and networking drinks included in price*	
16 May	**In-house Panel Discussion** in partnership with the In-house & Public Sector Committee	3 M & PD Skills (by Group Study)	€65	
17 May	**Midlands General Practice Update** Midland Park Hotel, Portlaoise, Co Laois	6 Hours (by Group Study)*	€135 *Hot lunch and networking drinks included in price*	
23 May	**Training of Lawyers on EU Asylum and Immigration Law (TRALIM 2)**	5.5 Hours General (by Group Study)	Complimentary	
24 May	**Enduring Powers of Attorney Masterclass** Execution and Registration	3 General (By Group Study)	€210	€255
13/14 June	**North West General Practice Update Part I & II** Solis Lough Eske Castle Hotel, Donegal	13 June - 4 Hours & 14 June - 6 Hours Total 10 Hours (by Group Study)*	13 June - €100 14 June - €135 13 & 14 June - €190 *Hot lunch and networking drinks included in price*	
21/22 June	**Personal Injuries Litigation Masterclass**	10 CPD Hours including 1 Regulatory Matters (by Group Study)	€350	€425
28 June	**Essential Solicitor Update** Inn at Dromoland, Dromoland Co Clare	6 Hours (by Group Study) *	€135 *Hot lunch and networking drinks included in price*	
20/21 Sept & 19 Oct	**Advising clients in Garda Custody** Application deadline 25 July 2019	Full General CPD requirement for 2019 (by Group Study)	€350	€425

*Please note our Finuas Skillnet Cluster Events are a combination of General, Management & Professional Development Skills and Regulatory Matters CPD Hours (by Group Study).

For a complete listing of upcoming events including online GDPR and Social Media Courses, visit **www.lawsociety.ie/CPD** or contact a member of the Law Society Professional Training team on

P 01 881 5727 **E** Lspt@lawsociety.ie **F** 01 672 4890 **Applicable to Law Society Finuas Skillnet members*

Osbrey, Gerald Osbrey, George Bonynge Rochfort, Elizabeth Osbrey, Elizabeth L'Estrange, Charles Doherty Quinlan of the one part and Henry Littlewood of the other for a term of 240 years from 10 September 1844 at a yearly rent of £1.

Take notice that O'Mahony Holding SPRL, being the party now entitled to the grantee's interest under the said fee farm grant and to the lessee's interests pursuant to each of the aforementioned leases, intends to submit an application to the county registrar for the county of Dublin for the acquisition of the freehold interest and any intermediate interests in the aforesaid property, and any party asserting that they hold the freehold or any intermediate interests are called upon to furnish evidence of such title to the below named within 21 days from the date of this notice.

In default of any such notice being received, O'Mahony Holding SPRL intends to proceed with the application before the county registrar at the end of the 21 days from the date of this notice and will apply for all directions as maybe appropriate on the basis that the person or persons beneficially entitled to any intermediate interest in the property are unknown or unascertained.

Date: 3 May 2019
Signed: CCK Law Firm (solicitors for the applicant), Newmount House, 22-24 Mount Street Lower, Dublin 2

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by Conneely Construction (New Road) Limited in respect of the premises known as 18 Old Kilmainham, Dublin 8

Any person having an interest in 18 Old Kilmainham, Dublin 8, the subject of an indenture of lease dated 17 September 1925 between Christopher Donaghy of the one part and Patrick V Muldowney of the other part, whereby "all that and those the house and premises known as no 18 Old Kilmainham, together with the spirit grocers' licence attached to the said premises and the trade fittings and fixtures therein, situate in the parish of Saint James and county borough of Dublin" was demised to Patrick V Muldowney for a term of 500 years from 11 September 1925 at a rent of £30 per annum.

Take notice that Conneely Construction (New Road) Limited intends to submit an application to the county registrar for the city of Dublin for the acquisition of the fee simple and any intermediate interest 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 their title to the below named within 21 days from the date of this notice.

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

Date: 3 May 2019
Signed: Plunkett Kirwan & Co (solicitors for the applicant), 175 Howth Road, Killester, Dublin 3

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of 16 Leinster Square, Rathmines, Dublin 6 – an application by Derek Ryan

Take notice that any person having an interest in the freehold estate of the following property: premises formerly known as no 10 Leinster Square, and now known as 16 Leinster Square, situate, lying, and being in the area formerly known as the Urban District of Rathmines and Rathgar in the parish of Rathmines, barony of Upper Cross, formerly in the county of Dublin but now in the city of Dublin, held under an indenture of lease dated 4 September 1928 between Godfrey Robert Wills Sandford and Howard Guinness of the first part, Amy Henrietta Wills-Sandford Wills of the second part, and Charles Joseph Priest, Frederick James Priest, Edward Percy Maybury Butler and Herbert Wood of the third part, for the term of 153 years from 25 March 1928 at the yearly rent of £59 and subject to the covenants and conditions therein contained.

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

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

Date: 3 May 2019
Signed: Compton Solicitors (solicitors for the applicant), 30 Pembroke Street Upper, Dublin 2

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by DOWB Limited in respect of premises known as 430 North Circular Road, Phibsboro, Dublin 7

Take notice any person having a freehold estate or any intermediate interest in all that and those the property 430 North Circular Road, Phibsboro, Dublin 7, being currently held by DOWB Limited, the applicant, under indenture of lease dated 16 September 1952 and made between Frances Harriet Grome of the one part and Mary Catherine Fortune of the other part for a term of 99 years from 29 September 1951 and subject to a yearly rent of £22 10 shillings (since apportioned to £11.25) as lessees under the lease.

Take notice that by DOWB Limited intends to apply to the county registrar in the city of Dublin for the acquisition of the freehold interest in all intermediate interests in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid property is called upon to furnish evidence of title to same to the below named within 21 days from the date of this notice.

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

Date: 3 May 2019
Signed: Griffin Solicitors (solicitors for the applicant), Gabriel House, 6 Cypress Park, Templeogue, Dublin 6W

In the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by the Kearns family: premises now known as 14 Gordon Place, South Richmond St, Dublin

Take notice any person having an

interest in the freehold estate or any intermediate interests of that part of the residential property now known as 14 Gordon Place, South Richmond Street, Dublin 2, subject to a lease dated 30 August 1928 between Frederick W Gilligan of the one part and James Scott of the other for a term of 99 years from 30 August 1928 at a rent of IR£23 per annum.

Take notice that Raymond Kearns, Brigid Kearns, Andrew Kearns, Peter Kearns, and Una Kearns, collectively the Kearns family, intend to submit an application to the Property Registration Authority for acquisition of the freehold interest of the aforesaid premises, and any party 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 default of any such notice being received, as aforesaid, the applicants intend to proceed with the application to the property registration authority at the expiration of 21 days from the date hereof and will apply to the property registration authority for directions as may be appropriate on the basis that the person or persons entitled to the superior interests, including the freehold interest in the premises, are unknown or unascertained.

Date: 3 May 2019

Signed: Arthur Cox (solicitors for the applicants), 10 Earlsfort Terrace, Dublin 2

In the matter of the *Landlord and Tenant Acts 1967-2005* and the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of property known as 4B Charlemont St, Dublin 2, and an application to acquire the freehold and all intermediate interests therein by Charledev Properties Designated Activity Company

Take notice any person having any interest in the freehold estate or any intermediate interest in the following property: all that and those the property known as 4B Charlemont Street, Dublin 2, being part of the property demised by a certain indenture of lease dated 26 March 1914 between Isobel M Holderness of the one part and Michael Honan of the other part, and described therein as "all that dwellinghouse, messuage, or tenement situate and lying and being at the corner of Richmond Street and the South Circular Road known as Harcourt Road, between Charlemont Street and Richmond Street, in the barony of Upper Cross, parish of St Peter, and county of the city of Dublin, together with the small yard or backside thereunto belonging, also with all that stable or shed situate at the uppermost end of the lane or passage that divides said premises from houses and premises in Charlemont Street, which said dwellinghouse is bounded on the east by the aforesaid land or passage, on the west by Richmond Street aforesaid, on the north by Harcourt Road aforesaid, and on the south by premises formerly leased by William Taylor Esquire to John McNamara and as now in the possession and occupation of the said Michael Honan and his undertenants, and described in the map annexed hereto".

Take notice that Charledev Properties Designated Activity Company intends to submit an application to the county registrar of the county of Dublin for acquisition of the freehold and any intermediate interest in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid property are called upon to furnish evidence of the title to the aforementioned property to the below named within 21 days from the date of publication of this notice.

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

Date: 3 May 2019

Signed: Arthur Cox (solicitors for the applicant), 10 Earlsfort Terrace, Dublin 2

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of the property known as 82 Ballymun Road, Glasnevin, Dublin 9, and in the matter of an application by Patrick Dunphy

Any person having a freehold interest or any intermediate interest in all that and those the property known as 82 Ballymun Road, Glasnevin, Dublin 9 (hereinafter called 'the property'), being part of the premises demised by lease dated 31 December 1934 between the Right Honourable the Lord Mayor Alderman and Burgesses of Dublin of the first part, the Minister for Local Government and Public Health of the second part, and Eugene Casey of the third part, and the subject of an indenture of sublease dated 21 September 1936 between Eugene Casey of the one part and Helen Beardsley O'Reilly of the other part.

Take notice that I, Patrick Dunphy, of 12 Clare Road, Drumcondra, Dublin 9, intend to submit an application to the county registrar for the city of Dublin for acquisition of the freehold interest in the aforesaid property, and any party asserting that they have a superior interest in the aforesaid premises are called upon to furnish evidence of the title to the aforesaid premises to the below named within 21 days from the date of this notice.

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

Date: 3 May 2019

Signed: FH O'Reilly & Company (solicitors for the applicant), The Red Church, Phibsborough, Dublin 7

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of the property known as 82b Ballymun Road, Glasnevin, Dublin 9, and in the matter of an application by Patrick Dunphy

Any person having a freehold interest or any intermediate interest in all that and those the property known as 82b Ballymun Road, Glasnevin, Dublin 9 (hereinafter called 'the property'), being part of the premises demised by lease dated 31 December 1934 between the Right Honourable the Lord Mayer Alderman and Burgesses

of Dublin of the first part, the Minister for Local Government and Public Health of the second part, and Eugene Casey of the third part, and the subject of an indenture of sublease dated 21 September 1936 between Eugene Casey of the one part and Helen Beardsley O'Reilly of the other part.

Take notice that we, Patrick Dunphy and Marian Dunphy, of 12 Clare Road, Drumcondra, Dublin 9, intend to submit an application to the county registrar for the city of Dublin for acquisition of the freehold interest in the aforesaid property, and any party asserting that they have a superior interest in the aforesaid premises are called upon to furnish evidence of the title to the aforesaid premises to the below named within 21 days from the date of this notice.

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

Date: 3 May 2019
Signed: FH O'Reilly & Company (solicitors for the applicants), The Red Church, Phibsborough, Dublin 7

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by Star Property Investment & Management Limited in respect of the premises known as 169 North Circular Road, Dublin 7

Take notice any person having an interest in the freehold estate or any intermediate interests of the property known as 169 North Circular Road, Dublin 7, and more particularly described in the lease dated 15 December 1898 and made between the Irish Civil Service (Permanent) Building Society of the first part, William Ellis of the second part, and Michael Treacy of the third part.

Take notice that Star Property Investment & Management Limited (the applicant) intends to submit an application to the county registrar for the city of Dublin for acquisition of the freehold interest in the aforesaid premises, and all intermediate interests in the aforesaid property, and any party asserting that they hold the fee simple or any intermediate interest in the aforesaid property are called upon to furnish evidence of title to same to the below named within 21 days from the date of this notice.

In default of any such notice being received, Star Property Investment & Management Limited intends to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the country registrar for the city of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the intermediate interests including the fee simple in the aforesaid property are unknown or unascertained.

Date: 3 May 2019
Signed: Hunter & Company (solicitors for the applicant), 61-63 Dame Street, Dublin 2

RECRUITMENT

Experienced property solicitor seeks part-time/locum position. Highly experienced Dublin-based solicitor seeks part-time/locum position practising conveyancing and property law in the Dublin area. Reply to **box no 01/04/19**

Solicitor wanted for general practice, mainly conveyancing and litigation in large provincial town, with view to succeeding principal. Principal is willing to stay on in practice on a part-time basis if required. Would suit someone with five to seven years' experience. Interested parties should write to **box no 02/04/19** enclosing their CV and giving their employment details to-date. Right candidate more important than financial arrangement for sale of practice

DE MINIMIS NON CURAT LEX

JUDGE, JURY, AND JOBSWORTHS

A judge was able to wriggle out of jury duty after finally managing to convince bureaucrats that he had another pressing engagement the same day – sitting as the judge in the very same case, *breakingnews.ie* reports.

Circuit Court Judge Keith Cutler told jurors in a separate case that he had been selected for jury service for a trial starting on 23 April. Judge Cutler said: "I thought I would be inappropriate, seeing as I happened to be the judge and knew all the papers."

But the Jury Central Summoning Bureau was having none of it. "They wrote back to me. They picked up on the fact I was the judge, but said, 'Your appeal for refusal has been rejected but you could apply to the resident judge'. I told them, 'I am the resident judge'."

The Jury Service eventually relented. Cutler said: "I would have liked to have done the jury service to see what it was like, and whether I would have liked the judge."

DEATH-PUNCH EARNS TEN-YEAR SENTENCE

Australia's first conviction under a 'one-punch' law has landed Joseph Esmaili (24) in prison for ten years, *ABC* reports.

In May 2017, a row broke out over smoking in a non-smoking area outside Melbourne's Box Hill Hospital, which resulted in the death of a cardiothoracic surgeon. Victoria's one-punch law covers a punch to the head or neck, and applies whether death resulted directly from the punch or from a fall after the victim was struck.

Dr Patrick Pritzwald-Stegmann, who treated lung-cancer patients, had seen Esmaili and others smoking just outside the hospital and told them it was a non-smoking area. They refused to leave, so the doctor went inside to call security. Minutes later, Esmaili, who had gone inside to use the toilet, overheard the surgeon talking about the group and began swearing at him. Esmaili then punched the 41-year-old doctor, who fell backward, hitting his head on a tiled floor. He suffered a catastrophic brain injury and was taken off life-support a month later.

"I wasn't trying to hit him hard," Esmaili told police. "I shouldn't have hit him in the first place, I know."

WIND IN THE WILLOWS

An Australian court has dismissed an AUS$1.8 million case brought by an engineer who accused a former supervisor of bullying him by breaking wind in his general direction, *theguardian.com* reports.

David Hingst said that the defendant would come into his small, windowless office and break wind "five or six times a day".

On 29 March, the Victoria Court of Appeal upheld a Supreme Court ruling that, even if Hingst's allegations were true, flatulence did not necessarily constitute bullying. Hingst (56) has vowed to take his case to a higher court.

THE WAY THE COOKIE CRUMBLES

An Ohio couple who made laxative-laced cookies for striking school employees were caught after they uploaded a video to Facebook, *AP* reports.

None of the cookies were actually eaten, but Bo Cosens and Rachel Sharrock were charged with food contamination. The pair had taken to social media to complain that they were sick of the noise of drivers honking in support of the striking bus drivers, cooks and cleaners on the picket line near their home. Investigators say they made a video showing the pills being mixed into the batter.

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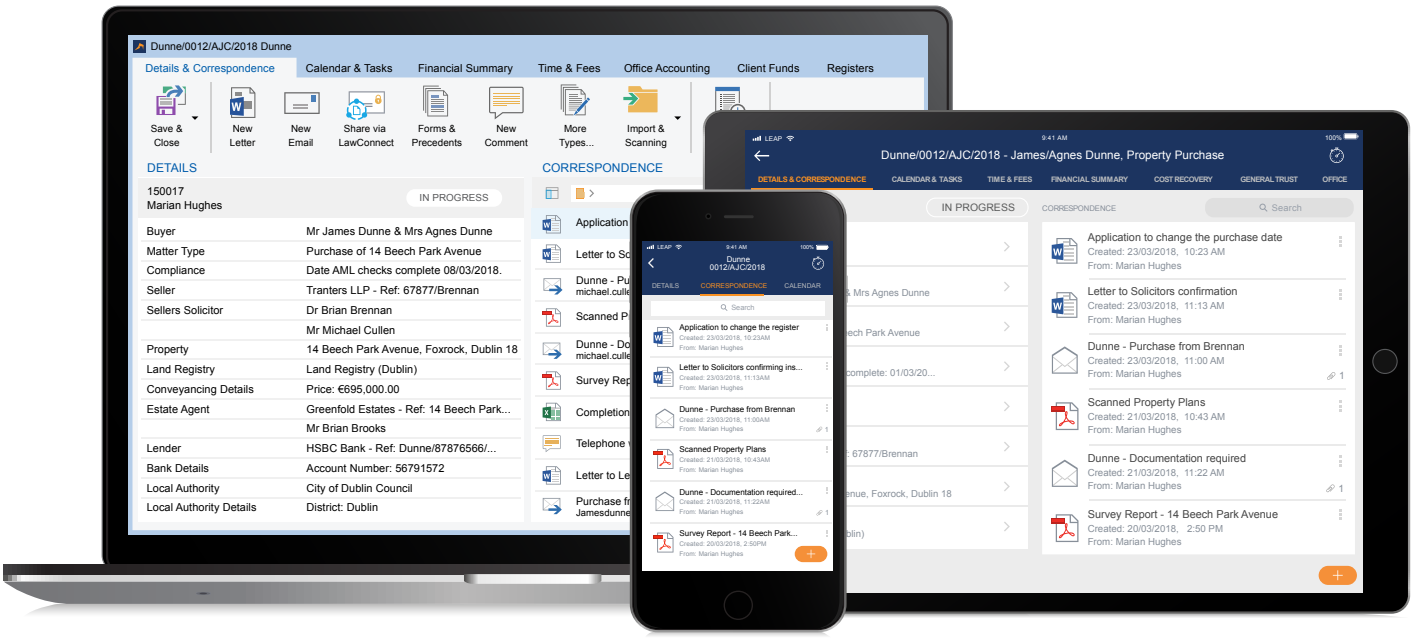

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