LAW SOCIETY
Gazette
€3.75 July 2009

IT COULD BE YOU:

Navigating the Lotto syndicate minefield

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INSIDE: DEBT IMPRISONMENT JUDGMENT • ACCOUNTS REGULATIONS COMPLIANCE • NEW MIBI AGREEMENT

Sound regulation is good representation

I meet some solicitors who tell me that they only see the Law Society as a regulatory rather than a representative body. I usually reply by saying two things. Firstly, do not underestimate the value of effective regulation from the point of view of promoting the profession. One of the very best ways of representing the interests of the profession is by regulating it well.

Secondly, bearing in mind the essentially voluntary contribution of the individual members, the Society's advisory committees provide a hugely valuable resource for all of us in dealing with queries and keeping the profession up to date with relevant professional information. At times, the work of the advisory committees may go unnoticed but, this year, we made a special effort to try and promote recognition of the value of this work under the theme of 'excellence in representation'. Already we have seen this bear fruit.

For example, the Practice Management Task Force organised a successful seminar in February. The PR Committee has just signed off on a new advertising campaign to promote the solicitor as an invaluable source of help to the public in these difficult times, and this will be coming on stream shortly. Each advisory committee is working hard, particularly to contribute to the *Gazette*, e-zine and CPD programmes and, later this month, our new careers development advisor Keith O'Malley will be launching a series of evening seminars focused on 'strategies for career success' to take place in Cork and Dublin. The feedback from colleagues has generally been very positive.

> *"One of the very best ways of representing the interests of the profession is by regulating it well"*

CPD training costs reduced

One issue that also is raised regularly with me is the cost of CPD, and I am delighted to say that we have also made significant advances in this area. The June issue of the CPD Focus e-zine announced that the cost of the Law Society's CPD training will be substantially reduced, so that solicitors should be able to get all their CPD requirements this year for under €350. The Society has secured additional grant funding from the FINUAS Training Network Programme and this grant, together with the Skillnet training grant, will enable us to pass on substantial savings to the profession for 2009. We are also exploring additional grant assistance programmes. This will allow us to further reduce prices and offer the profession the opportunity to reskill in growth areas of practice. In line with the rest of the economy, we have reduced our costs – but we will not be compromising on the quality of training.

There is, of course, always more that we can do, and it is encouraging to see solicitors offering to help out now that they have more time on their hands. It is sometimes a thankless task and therefore I do believe it is important to acknowledge the efforts of all those involved – keep up the good work!

The director general Ken Murphy and I are continuing to meet, brief and listen to the views of colleagues across the whole profession. In early July, we are scheduled to visit and meet separately with the Donegal, Sligo and Cavan bar associations. We are also visiting and meeting with the managing partners of many of the largest law firms. In addition, we will meet with representatives of solicitors who have come on the Roll in 2009, many of whom, very sadly, are currently without work.

Finally, as we pass the halfway point of what has been a very tough year so far for the profession, I hope that you will enjoy a break from it all during the summer and get a chance to recharge the batteries and spend some quality time with your family and friends.

John D Shaw
President

On the cover

"What's yours is mine." Romantic sentiments in the context of a wedding, perhaps, but you don't get married to the guys in your Lotto syndicate, do you? So what should syndicate members know about the legalities of sharing their jackpot?

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REGULARS

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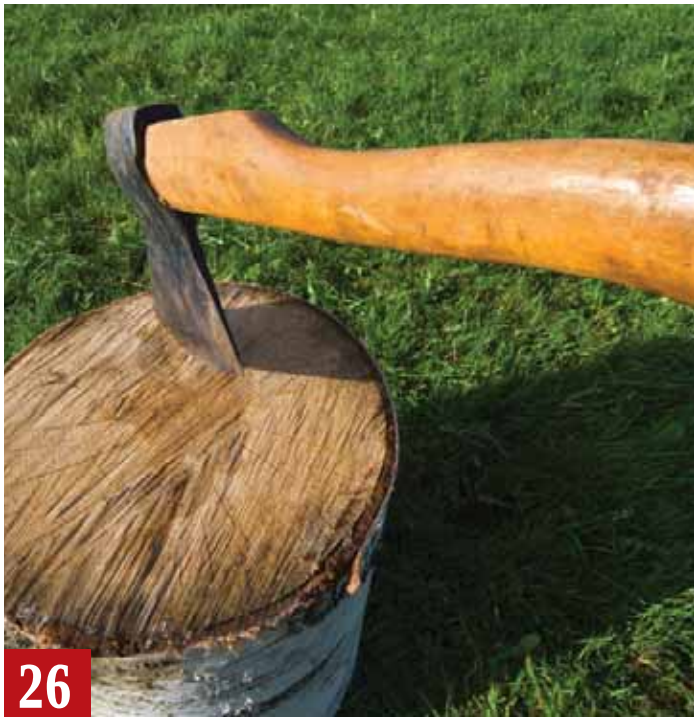

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CARLOW

As part of a series of locally run CPD courses, the Carlow Bar Association recently organised a lecture on the topic of 'Stress recognition and management training', presented by Mary Jackson of Lawcare and kindly supported by the Law Society.

Two local solicitors, Michelle Treacy and Aoife Brown, recently completed the Focus Ireland Four Peaks Challenge. The team raised over €8,000 for this worthy cause from the proceeds of a locally held table quiz (won by a team from Ronald J Cleary Solicitors) and generous donations from a number of local firms.

DONEGAL

The Donegal Bar Association and Inishowen Bar Association have protested to the Courts Service over the closure of Carndonagh Courthouse, which was temporarily closed earlier this year so that exploratory works could be carried out prior to refurbishment and the provision of an extension. The works appear to have been postponed due to cutbacks, but the perfectly serviceable courthouse remains closed, and business has been transferred to Buncrana, 12 miles away. The Courts Service has apparently embarked on another review of court venues (there was one a few years ago).

Donegal Bar Association is also seeking the transferral of sittings of Falcarragh District Court from Letterkenny to another venue, such as Dunfanaghy, where perfectly good premises are available. The association continues to press for more sittings of the Circuit Court to clear what is still a large backlog of civil and family law cases, particularly in Letterkenny.

The successful CPD programme continues, administered by CPD coordinator Alison Parke. Seminars on vulnerable clients and e-conveyancing are planned for 8 July and 9 September respectively.

Don't forget the DSBA annual conference, which takes place in Chicago from 16-20 September. Organised in conjunction with the Chicago Bar Association, it represents great value for money. Full programme and online registration form are available at: www.dsba.ie

CORK

The SLA has various events planned over the summer months, both legal and social. The annual mixed soccer tournament took place on 26 June 2009 in Garryduff Sports Centre. Weekly hill walks take place on Tuesday nights to a variety of wonderful Munster destinations. Summer is cricket time, and the big fixture of the year between the SLA and the Cork bar is scheduled for 17 July next at the Mardyke grounds of Cork County Cricket Club.

A social night was held on 28 May 2009 at Bob Fox's pub for all SLA members.

SLA president Mort Kelleher travelled to Exeter to attend the annual legal service of the Devon and Exeter Bar Association. He also made a courtesy call, with the SLA council, to the Lord Mayor of Cork on 19 May as part of his policy of closely liaising with both 'town and gown'!

WATERFORD

Waterford Law Society and the local bar got together for their annual football challenge match on 1 July, corresponding with the High Court sessions. The match was followed by a seaside barbecue in Dunmore East, which was jointly organized by Gareth Hayden BL and the dynamic trio of Jill Walsh, Rosa Eivers and Fiona FitzGerald.

SLIGO

The bar association invited the neighbouring members of the Leitrim, Roscommon, Mayo and Donegal bar associations to a seminar on 29 June 2009 from 12-3 pm in the Glass House Hotel, Sligo, where the topic was 'Staying viable in the recession – management, marketing and financial strategies', by Anne Neary.

The bar association's AGM will be held on 8 July 2009. Incumbent president Seamus Monaghan and secretary Trevor Collins will be stepping down after almost two-and-a-half years of dedicated service to the association.

ROSCOMMON

Roscommon Bar Association recently held two successful seminars. In a fascinating presentation, genealogist Eileen Ó Dúill recounted various case studies from Ireland and abroad and is willing to present to other bar associations. The dynamic duo that is Richard Grogan (solicitor and employment law expert) and Tony Bregazzi (rights commissioner) gave a step-by-step guide to how to present a case before the Labour Relations Commission. Both seminars were well attended by colleagues from the north-west. The bar association's next outing will be its AGM (date to be decided).

DUBLIN

The DSBA hosted a lunch recently for colleagues who qualified over 50 years ago, including Kenneth Armstrong, Richard J Black, Laurence J Brannigan, Con Clancy, Fionnuala Duane, Michael Fitzsimons, Maire Neasa Gibbons, Kevin McGilligan, Gerard A Walsh and Rosaleen Walsh. These distinguished colleagues were joined by several others who have already reached this milestone. G

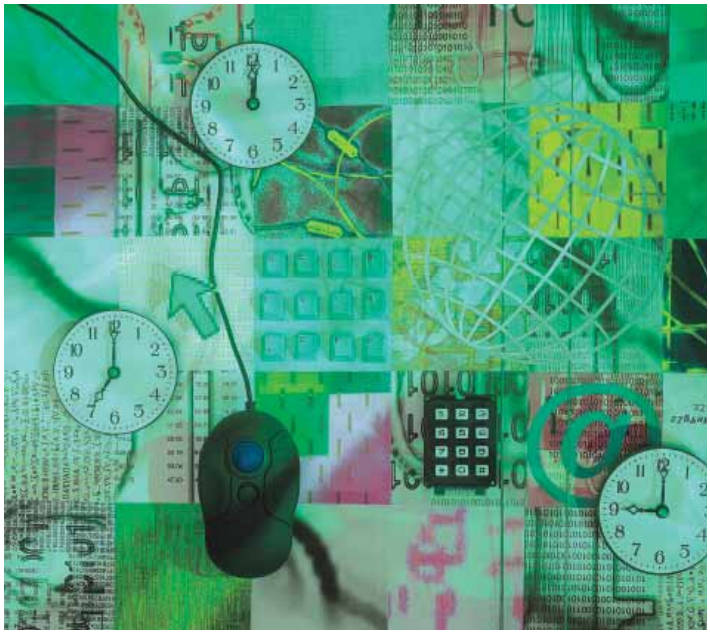
'Nationwide' is compiled by Kevin O'Higgins, principal of the Dublin law firm Kevin O'Higgins.

Slashed training costs for CPD Focus

CPD Focus is delighted to announce good news in the midst of the current doom and gloom, *writes James O'Sullivan, chairman, Education Committee*. It has secured additional grant funding from the FINUAS Training Network Programme. This grant, together with the Skillnet training grant, will enable CPD Focus to pass on substantial savings to the profession for 2009.

Solicitors should be able to meet all their CPD scheme requirements for under €350. The unit is also exploring additional grant assistance programmes that would allow it to further reduce prices and offer the profession the opportunity to reskill in growth areas of practice.

The CPD Focus team is currently designing a teatime series due to start in August, with prices starting from as little at €35 for Skillnet and public sector members; and €55 for all other members of the profession. Full details of the series will be sent to the profession in July.



In line with the rest of the economy, costs have been reduced, but there will be no compromise on the quality of training.

In response to research obtained from members, new half-day training events are being developed to reduce time spent out of the office. Examples of the sizeable discounts available are outlined below, with 2008 comparisons.

For the latest CPD Focus training events, visit www.lawsociety/cpdfocus or contact a member of the team at: cpdfocus@lawsociety.ie.

Event	2008	2009	2009 Skillnet / public sector workers	2009 Out-of-work solicitors
CPD Focus annual conference	€395	€198	€99	€99
Full-day skills training	€525	€236	€157	€157

Career path points onwards and upwards

The Law School held an intensive career seminar on 9 June 2009 for almost 200 enthusiastic trainees, *write Eva Massa and Emma Cooper*. Aware of the challenging times that solicitors are facing and the concern among trainees about their future careers, the aim of the seminar was to provide practical support and guidance to help them take control of their careers, to identify options upon qualification, and to develop clear strategies and plans in order to achieve their goals.

The seminar and the selection of topics was primarily based on feedback received directly from trainees and student reps over the past year. The first address in the Education Centre lecture theatre was given by Robert Connolly, a senior consultant from Abrivia recruitment specialists, who gave a very helpful and realistic overview of the current areas of demand for solicitors and alternative career paths for solicitors outside of the profession.

The second presentation was by Deborah Flood (a current trainee on the PPCII course and author of a two-part article on working abroad in the *Gazette*) and Niamh Connery, legal advisor at ComReq and vice-chairman of the EU and International Affairs Committee. They provided students with a highly practical, step-by-step guide to working and qualifying as a solicitor overseas, including points of contact and websites, the transfer/qualification process, benefits and challenges, and an entertaining description of their own experience working in other jurisdictions.

Laura Monk and Emmet Butler (Butler Monk Solicitors) gave an interesting and frank account of their personal experiences in setting up in practice, having qualified in the past last year. They gave their audience much food for thought and provided a helpful and practical overview of the key challenges and opportunities they encountered, along with their top tips for success.

Towards the end of the day, the Law Society's newly appointed careers development advisor, Keith O'Malley, gave a highly engaging and interesting talk on 'how to market yourself' to prospective employers. Keith talked about the challenges facing newly qualified solicitors, including coping with change, increased competition and the need to differentiate oneself. He identified the skills and attributes that employers find most attractive and the key transferable skills that newly qualified solicitors possess. Finally, he outlined the key 'next steps' for trainees, both now and when their training comes to an end. This included practical advice on how to improve their CVs, identify 'hidden jobs', networking and other valuable job-seeking strategies and tips.

Due to popular demand, the Law School, in conjunction with Keith O'Malley, is planning a further follow-up with interactive, small group workshops for trainees on topics such as effective interviewing techniques and how to write attractive CVs and cover letters, among other topics.

2008 SAW LOWEST NUMBER OF APPLICATIONS, SAYS ORAC

The 2008 annual report of the Office of the Refugee Applications Commissioner (ORAC) reports that the total number of applications received was 3,866, down 3% on 2007. This is the lowest annual number of applications since 1997. During the year, 4,581 decisions and determinations were made, up 10% on the previous year. At year-end, some 1,200 cases were on hand – only 116 cases of which were over six months old. The annual report is available at: www.orac.ie.

UDHR 60TH – 30 PERSPECTIVES

Former dean of law at NUI Galway, Donncha O'Connell, has edited a book to mark the 60th anniversary of the *Universal Declaration of Human Rights* (UDHR) for Amnesty International. *60 Years, 30 Perspectives: Ireland and the UDHR*, which is published by New Island Books, is a collection of essays by 30 influential social commentators examining the relevance of the *Universal Declaration of Human Rights* to modern Irish society. The book can be purchased in bookshops or ordered online at: www.amnesty.ie/60years.

ELECTRONIC DISCOVERY

Wood Printcraft is hosting a talk on the theme of electronic discovery, by Andrew Harbison of Grant Thornton, at 4pm on 9 July 2009 in the Residence Members' Club, 41 St Stephen's Green, Dublin 2. The talk, by strict invitation only, will be limited to 30 places. Wood Printcraft is launching itself as a provider of electronic document storage and retrieval services for electronic discovery purposes. For further information, contact Clara Rogan, Wood Printcraft Docstore at 01 245 4800 or crogan@wpg.ie.

Human rights certificate leads the way

A new Certificate in Human Rights, the first course of its kind run by the Law Society, will be launched this autumn, starting on 10 October 2009, *writes Elaine Dewhurst*.

The certificate will be offered by way of 'blended learning', which combines on-site lectures and workshops (held on two Saturdays to facilitate those travelling from outside Dublin), together with online sessions. The course aims to introduce participants to the international, regional and national human rights framework and will provide practical guidance on enforcing human rights in the legal arena. The overall objective of the certificate is to encourage participants to develop the skills necessary for pursuing human-rights-based arguments through the courts in Ireland. It will be taught through the use of case studies and will provide a very practical approach to human rights education.

Take five

The course will see students undertake five modules. The first module will introduce participants to the international, regional and national human rights framework. The second will concentrate on litigating constitutional rights, while the third will focus on litigating the rights guaranteed by the *European Convention on Human Rights* in the Irish courts and in the European Court of Human Rights. The fourth module will focus more specifically on international convention rights. The final module will examine human rights in context. Through the use of a case study, participants will have the opportunity in this module to identify the human rights issues and the applicable legal arguments in a particular case and examine effective litigation strategies.

On completion of an assessment of 1,500 words, participants will be awarded a Certificate in Human Rights. The objective of the assessment is for participants to analyse and identify legal issues in a given factual scenario and explain likely legal outcomes.

The course welcomes participants with an open-minded approach to learning, who are willing to interact and share knowledge with colleagues. It is suitable for practitioners, trainees and students. It will also appeal to NGO non-lawyers with a human rights background or others suitably qualified with relevant experience who work, or aspire to work in, the human rights area. The course will be delivered by highly qualified legal professionals who have recognised experience in human rights litigation.

For further information on these and all other diploma programme courses, refer to the diploma programme pages at www.lawsociety.ie; email: diplomateam@lawsociety.ie; or tel: 01 672 4802.

€8.7M COURT JUDGMENTS IN FIRST QUARTER

The number of court judgments (CJs) against companies in Ireland for the recovery of unpaid debt has increased significantly, reaching €8.7 million in the first quarter of 2009, according to ICC Information. This is an increase in value of 96% on the same period in 2008, despite the fact that the actual number of CJs decreased from 369 to 286 for these periods. The construction sector accounts for 20% in value of all CJs in the first quarter of 2009, followed closely by telecommunications and business activities – both on 17%. The number of CJs against manufacturing companies more than trebled, reaching the €1 million mark.

Prepare for the Canadian invasion!

Dublin will be a hub of debate for lawyers at the Canadian Bar Association's (CBA) 2009 Canadian Legal Conference from 14-18 August, *writes Yves Faguy*. The invitation to the CBA to hold its annual legal conference in Dublin was issued by the Law Society of Ireland. For Irish lawyers, this will be a unique opportunity to connect with Canadian and international colleagues, in-house counsel, judges and others to exchange views on how law is practised in a complex and changing world.

The themes of the conference will focus on how the law is evolving, with presentations from legal luminaries such as the former justice of the Supreme Court of Canada, Peter Cory, former Irish president Mary Robinson and Canada's Federal Minister of Justice Rob Nicholson.

The economic downturn is accelerating the pace of change in the legal marketplace and many will be interested to hear what speakers like Richard Susskind and Leonard Brody will have to say on the topic of where business and the law are headed. Susskind, a legal technology specialist, professor and author, has a respected track record as a trend-spotter. Susskind's new book, *The End of Lawyers?* has ignited fierce debate in Britain and drawn him into lively discussions about where the law may be headed in Canada. Citing recent developments in both technological advancements and client demands, he forecasts nothing less than a fundamental shift in how legal services will be prepared and delivered in the future.

Leonard Brody demonstrates just how rapidly technological and economic changes are affecting clients and lawyers. A venture partner at one of Canada's largest national technology funds, Brody will join GEM Communications managing director Gary Mitchell in stressing the value of legal innovation. They'll provide valuable insights into how law firms and lawyers can move ahead of the pack by becoming more entrepreneurial in times of turbulence.

Future leaders in the law

The keynote speaker on 16 August will be former Irish president Mary Robinson, who will discuss international law and human rights. In a special panel presentation intended for future leaders in the law, Peter Cory will discuss winning advocacy before Canada's highest court. Justice minister Rob Nicholson will bring the perspective of the federal government to a 'dialogue' with the CBA, where he will answer questions from members on 17 August.

Immigration strategies in Canada, Ireland and Britain will be compared in a cutting-edge panel discussion featuring Canadian lawyers Catherine Sas and Lorne Waldman, and Peter Fitzmaurice of the Office of the Refugee Applications Commissioner. These panellists will examine the equitable aspect of global movement and how discretion works in the mobility process.

There will also be opportunities for leading in-house counsel and private practitioners to meet and assess the legal marketplace from a corporate perspective. The emphasis will be on the tricky navigation of international law and on innovative strategies being adopted by corporate legal departments to streamline legal services delivery.

Networking

There will be extensive opportunities to network during the conference, including the welcome reception on 15 August, the elegant opening at the National Concert Hall and an exclusive performance of *Riverdance* on Sunday 16 August, reception-style dining at Dublin Castle on 17 August, and an evening of fun at the Guinness Storehouse on 18 August.

Specially priced registration fees are available to Law Society of Ireland members. Full registration is offered at €450. Day passes are available at €275. For more information, visit www.cba.org/dublin2009. To register at these special rates, go directly to: www.cba.org/dublin2009/eu.

Webcasting – a first for the diploma programme

On 18 June as part of the Diploma in Commercial Litigation, a number of lectures were webcast and streamed live to the web from the lecture theatre in the Education Centre. The evening began with a lecture by Eileen Roberts (partner with A&L Goodbody) on the subject: 'Commercial Court – what is expected of practitioners?'

The education sector has witnessed many technological advances and the advent of new learning tools that can lead to more effective methods of learning – making it more accessible and attractive. The beauty of webcasting is that students can watch the lectures live from their PCs or else 'catch up online' and play the lectures on demand at any time during the course.

This is a positive development in meeting the needs of the profession, providing solicitors with alternative ways of accessing diploma courses. Freda Grealy (diploma manager) and Caroline Kennedy (IT coordinator for education) hope to introduce this feature on a trial basis on a number of diploma courses in the autumn. The facility is also likely to be used to webcast seminars and conferences in the future.

The **Psychological Society of Ireland** (PSI) is the learned and professional body for the profession in Ireland, with the primary objective of advancing psychology as a pure and applied science in Ireland and elsewhere. The PSI is a limited company with charitable status based in Dublin with 2,300 members.

PSI requires a range of legal advice and expertise, on an ad-hoc basis, in the following areas:

- PSI as a company including advice on compliance with the Companies Act (including advice on amendment of Memorandum and Articles of Association, including codes of ethics), Charities Act, relevant tax legislation, employment, property law, competition law
- PSI as a professional body including regulation of the profession, data protection and freedom of information, international co-operation with other professional bodies
- Legislation and regulations
  - relevant mental health and human rights legislation
  - the regulation of Health & Social Care Professions (specifically the Health & Social Care Professionals Act (2005))
  - EU directives

If your legal firm has experience in working with similar professional bodies on some or all of these issues we would like to hear from you. Please submit your company profile, CVs of relevant solicitors or barristers and a brief summary of relevant experience/work and particular area of expertise.

PSI will compile a list of interested law firms and approach each individually when a need arises. Please note that this does not guarantee that you will get work from the PSI.

Please email info@psihq.ie; post to CX House, 2a Corn Exchange Place, Poolbeg Street; or for queries call Katherine Venier, 01 474 9167.

Legal 'sea-gles' ensure smooth sailing for Volvo Ocean Race stopover

The seven boats in the Volvo Ocean Race arrived in the City of the Tribes on 24 May on the penultimate leg of their round-the-world race. Official legal advisor to the Ocean Race during its Galway stopover was Galway firm, RDJ Glynn, *writes David Naughton*.

The Volvo Ocean Race is the blue riband event of world yachting, which started life as the Whitbread Round-the-World Yacht Race in 1973.

This was the first time the race visited Ireland and, fittingly, when the Irish-Chinese entry Green Dragon arrived in Galway in second place, the crew was greeted by a 10,000-strong dockside welcome. Cue the commencement of two weeks of festivities in the city from 24 May to 6 June. Festival highlights included in-port racing on Saturday 30 May and nightly music in a specially created race village.

The superb organisation of the two-week stopover was testimony to the ambition, energy, skill and hard work of the local organising 'Let's Do It Galway' committee, capably led by businessman John Killeen. Putting the event together required an awareness of the issues, good advance planning, focused management and the ability to seek advice from relevant experts at the appropriate time.

Padraic Brennan *(right)* of RDJ Glynn with Dave Hassett of the Green Dragon team, on board the racing yacht, moored at Galway Harbour during the Volvo Ocean Race stopover

Events like this tend to be a one-off and 'Let's Do It Galway' understandably wished to obtain robust legal advice. RDJ Glynn provided their legal know-how to ensure the following:

- Necessary licences – organisers can be subject to fines or imprisonment or both if the proper licences aren't in place. Before advising on the staging of any event, legal firms should check to see if their clients need licences, otherwise someone could end up in jail!
- Contracts – whatever the nature or size of an event, organisers need to enter into a variety of contractual relationships. These may be with sponsors, performing artists, venue owners, security firms, catering companies or, indeed, the owner of a 30-foot green puca dragon! Of course, the main benefit of a robust contract is the ability to allocate risk, particularly in respect of insurance cover.
- Venue – the venue is key to the event. It's important to make provision for any damage to the venue. Again, by dealing with the issue before the event, both venue owner and event organiser can save themselves heartache further down the line.
- Rights and copyright issues – these can be a minefield for anybody involved in organising an event because if someone's rights are breached, the financial cost can be punitive. In this case, it was important that the Volvo Ocean Race logo was adequately protected from misuse.

This gives a flavour of some of the legal issues that staging an event of this scale entails – and RDJ Glynn was delighted to be a part of this major success story for the country.

'Strategies for career success' seminars

'Strategies for Career Success' is a series of evening seminars being organised by the Law Society's Career Support Service in partnership with CPD Focus. The series will be launched in Dublin in late July and will run throughout the month of August in the capital and in Cork.

These seminars will also be made available in Waterford, Galway, Donegal and Portlaoise over subsequent autumn months in co-operation with local bar associations.

The first seminar in the series: 'Succeeding in the current market' will be relevant to all solicitors, regardless of the stages they are at in their careers and whether they are employed, in practice, or out of work.

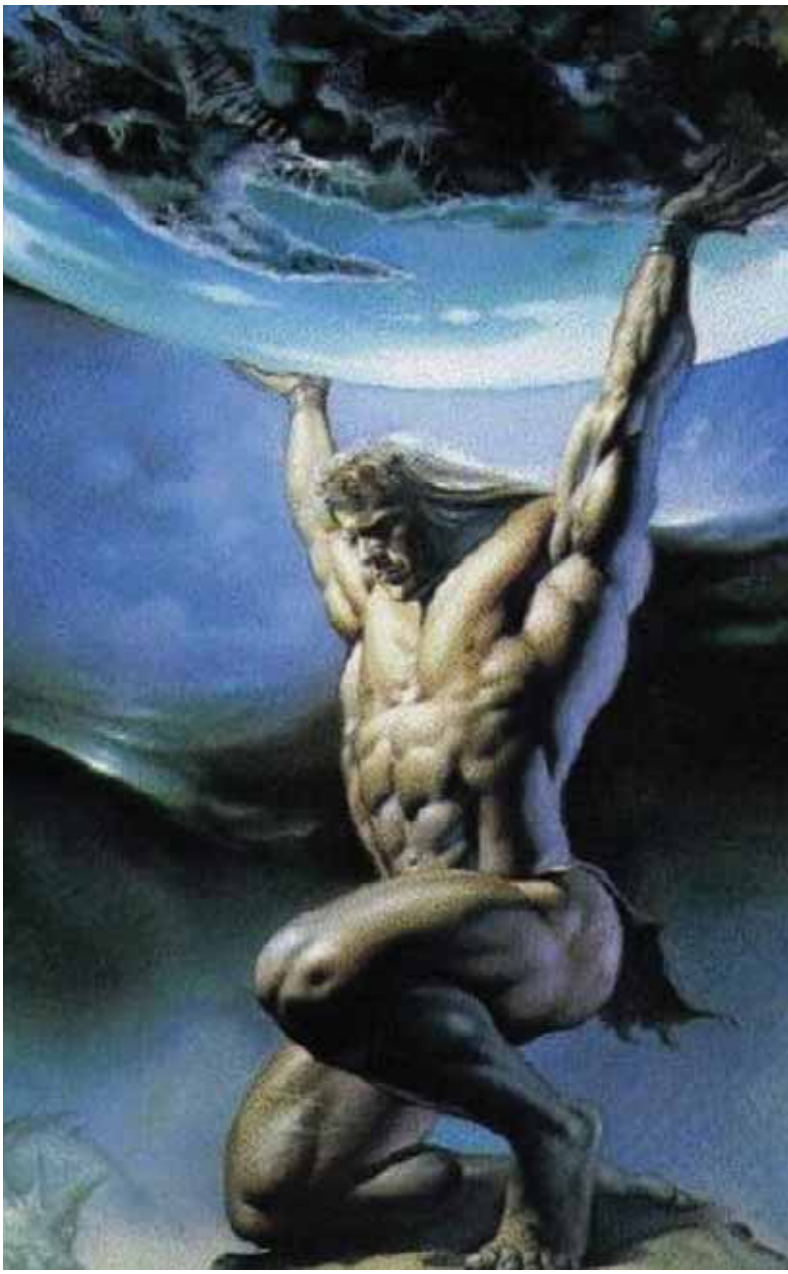
Other seminars will focus on job-seeking challenges, such as how to draft an effective CV, the hidden job market, networking and how to optimise interview performance. All events will be interactive and will incorporate an opportunity to network and to hear how colleagues in similar circumstances are getting on.

All seminars will qualify for CPD group study credits and are being priced at just €55 – with a further discounted price of €35 available to members of CPD Focus Skillnet and the public sector subscription schemes, as well as members who are out of work. Career support is an important initiative of the Society, set up in early 2009 as a resource for solicitors faced with career challenges. Career development advisor Keith O'Malley and Sharon Hanson provide wide-ranging information and practical support to members of the profession.

For full details on all of these events and to book your place, visit www.lawsociety.ie/cpdfocus or contact: careers@lawsociety.ie or cpdfocus@lawsociety.ie.

New guidelines for lo

A revised and expanded *Guide to Locum Arrangements* has just been published by the Law Society's Guidance and Ethics Committee. Therese Clarke and Louise Campbell highlight the main issues for locums – and those seeking them



The Guidance and Ethics Committee of the Law Society recently launched a revised and expanded *Guide to Locum Arrangements*. In many situations, the use of locum solicitors can be ideal for the owners of a firm and for the locum solicitor. In these recessionary times, firms are reviewing their overheads to ensure that all expenditure represents good value. The biggest expense of any firm is the wage bill, and the main element of that bill is solicitors' salaries. Firms cannot afford to staff beyond the immediate needs of the firm at any particular time.

A firm may have a clear need for additional solicitor resources, but does not wish to commit to the expense of an additional permanent employee. A locum arrangement can be a good solution if any of the following situations occur:

- Maternity leave,
- Solicitor's illness,
- Holidays,
- Heavy workload, backlog or problem files.

The advantages for solicitors doing locum work are also clear. Some locums work on a locum basis by choice, because they are not available for full-time employment. Other solicitors may be unemployed. They may have no wish to set up on their own in practice, or of incurring the significant overheads associated with setting up and – if the firm proves unsuccessful – of closing.

If firms use locum solicitors on a regular basis, the marketplace becomes more flexible and employment opportunities will occur more frequently.

Contract of engagement

When filling a locum position, employers should take the same, if not more, precautions as they would for any other position. Some locums are experienced – some are not.

The employer should satisfy themselves about the following:

- Competence,
- Experience,
- Computer skills,
- References.

As with any contract, it is important that all the terms of the locum's contract are agreed, and recorded in writing to facilitate proof of those terms.

The expectations of both parties must be realistic. It is reasonable for the employer to expect that the locum will adapt to the firm more quickly than a new employee would and that the locum will be productive immediately. Essentially, the locum is offering flexibility and adaptability.

It is important for both parties to be clear about whether the locum is being retained as a *self-employed contractor* under a contract for services, or as an *employee* under a contract of service.

If the locum is self-employed, the necessary annual tax returns should be made.

If the locum is an employee, the employer will deduct tax on a PAYE basis in the normal way. Solicitors who wish to stay in the PAYE tax payment system, and who are not prepared to move to be taxed on a self-employed basis, should not accept positions on that basis. If they fail to register with the Revenue as self-employed, and arrange payment of their own tax, then they are tax defaulters and subject to the usual penalties.

As soon as they enter into each new contract, locums should write to the Registrar of Solicitors at the Law Society, notifying the Society of the date the solicitor is leaving the employment of a firm and the date the solicitor is joining a new firm.

The pay

Employing a locum is a significant expense for a firm. However, a good locum is

cum arrangements

Every office needs a good Atlas

worth paying well. It is a matter for the locum to negotiate their charges or salary on a contract-by-contract basis. Before negotiating, the locum could ascertain, from recruitment agencies or public-sector pay scales, the going rate for a solicitor of their qualifications and experience – and negotiate from there.

If the locum takes on extra responsibilities due to a sole practitioner being absent, this may be a point on which to negotiate an increased salary.

> *"Employing a locum is a significant expense for a firm. However, a good locum is worth paying well"*

The work

The locum should be informed at interview about the areas of practice that will be involved. Both parties should be clear about the role of the locum. If the principal in a sole practice is to be absent, will the role include a general supervisory role in relation to the running of the practice? Locum solicitors who do not have experience of being a principal, a partner, or at least a manager in a firm, may not be suitable to take on a supervisory role. If, on arrival at a firm, a locum discovers that the responsibilities are greater than agreed, the locum solicitor would be entitled to refuse to take on the extra responsibility.

On the job

An appropriate induction should be planned, outlining the general office procedures and policies. If the locum is to report to other solicitors, the reporting lines should be fully clarified.

The issue of undertakings should be clear. Locums will generally seek to avoid giving undertakings. Once the locum's contract is terminated, the matter of compliance is completely outside the locum's control. If the locum is signing undertakings, they should always sign clearly 'per pro' the firm, so that there is no confusion.

Professional indemnity insurance

Both the employer and the locum should be satisfied that the firm is covered for the legal services the locum will provide.

Finding a locum position or recruiting a locum

The 'Jobs seekers register' is a self-maintained register on the Society's website, where solicitors seeking employment full time, part time, or as locums can make their contact details and/or CVs available, free of charge, to members looking for relevant staff. A solicitor can also indicate where they would like to work in Ireland, their areas of expertise, and their dates of availability. Employers can contact candidates directly for interview. The details stay on the register for up to a month at a time. To keep the details live on the register, the user should select the 'activate' option once a month.

A list of vacancies is also posted on the 'employment opportunities' area of the website, free of charge, advertised by solicitor members and others, and updated at least weekly.

By producing guides such as the *Guide to Locum Arrangements*, the Society aims to assist solicitors to make informed decisions about their various employment options. G

Therese Clarke is secretary to the Guidance and Ethics Committee. Louise Campbell is the Law Society's support services executive.

MORE INFO...

- Access the *Guide to Locum Arrangements* in the members' area of the Law Society website, www.lawsociety.ie: select 'Guidance and Ethics Committee'.
- Queries about the 'Jobs register' should be addressed to the Law Society's web editor, Carmel Kelly, email: c.kelly@lawsociety.ie.
- Enquiries about the 'Employment opportunities register' should be emailed to Triona Murphy or Cathriona Barry at t.murphy@lawsociety.ie or c.barry@lawsociety.ie.
- For enquiries about practising certificates or professional indemnity insurance for locum solicitors, contact Rosemary Fallon or Nicola Darby at: r.fallon@lawsociety.ie or n.darby@lawsociety.ie.
- See also the practice note 'Planning for emergencies in a sole practitioner's/principal's firm', including a precedent practice management agreement, in the August/September 2007 *Gazette*, p59.

Law Society launches spent

The Law Society collaborated in the production of a recently launched report on a spent convictions scheme. Elaine Dewhurst looks at the detail

"Is this confidential?" the client asks, as they look warily around your office. It's slightly unnerving, because there's nobody there but the two of you and yet, to them, it's as if there's someone else in the room. "Do you have to write this down?" they ask, as you go to take your usual note, and then they pause. Trained to keep a record, you reluctantly put the pen down and listen. "It's about the job." More employment law, you think – there's a lot about these days, and the many dismissal/redundancy scenarios flash through your mind. "No," they reply bluntly when you ask if there's a difficulty. You pause, confused. They glance around the office again. "What if someone had something in their past?" they say, and look at you for an answer as you wonder who is the someone with something in their past – and it slowly dawns on you that it's the person in front of you. There they are, working in their job every day, but silently fearing every phone call that comes in, every envelope that drops through the letterbox, everyone who goes into the manager's office for the quiet word – fearing that this may be it. They fear that their manager will be informed of their 'something in the past' – their conviction and sentence many years ago – and they will lose their job. This fear permeates their daily life, waking and sleeping, and – surprisingly enough to many – there is nothing whatsoever that can be done about it.

These were the opening words of solicitor Frank Murphy, of the Ballymun Community Law Centre, as he presented a summary of the proposals of the Spent Convictions Group in their recent report entitled *Disclosure of Criminal Convictions: Proposals on a Rehabilitation of Offenders Bill*. The report was the result of collaboration between the Human Rights Committee of the Law Society and community groups, including Ballymun Community Law Centre, Ballymun Local Drugs Task Force, Business in the Community, Northside Community Law Centre and Northside Partnership.

Public interest

The report calls for the introduction of a spent convictions scheme that would ensure that, after certain safeguards have been met, offenders would not have to disclose their criminal

ONE TO WATCH: NEW LEGISLATION

***Copyright and Related Rights (Proceedings before the Controller) Rules 2009* (SI no 20 of 2009)**

New rules relating to the procedures to be observed before the Controller of Patents, Designs and Trade Marks under the *Copyright and Related Rights Act 2000* (no 28 of 2000) have been introduced. The rules refer, among other things, to the procedures to be followed in making or contesting a reference to the controller or appealing the decision of the controller in certain cases. Some of the most important procedures described by the new rules are outlined below.

Making a reference (rules 4-5)

A petitioner who makes a reference shall furnish the following items to the controller:

- The name and address of the petitioner and the respondent,
- An original and one copy of a signed statement that contains a reference to the section of the act to which the reference or the application is being made, the material facts upon which the petitioner relies in making the reference or application, and the relief sought,
- An original and one copy of certain documents required (detailed in schedule 2),
- The fee payable (detailed in schedule 1).

As soon as all these are received, the controller shall furnish a copy to the respondent of:

- The original signed statement, and
- Each of the documents required by virtue of schedule 2.

Contesting a reference (rules 6-7)

If a respondent wants to contest a petition, they must furnish the controller, within 28 days of the receipt of the documents relating to the petition from the controller, with:

- A counter-statement replying to the statement made by the petitioner and setting out the extent to which that statement is admitted or disputed, together with a copy of the counter statement,
- The fee payable (detailed in schedule 1).

Once these documents have been received, the controller must send a copy to the petitioner.

If the respondent does not furnish these documents within the 28 days, he shall be deemed not entitled to furnish them, unless the controller otherwise directs. The controller shall be entitled to presume that the respondent does not intend to participate in the application or reference, and the controller can proceed accordingly.

Request for further information (rules 8-10)

The controller can request, from either the petitioner or the respondent, within a certain period of time:

- Further statements or counter-statements,
- Books, records, or other documents, or
- The work to which the reference or application refers.

Copies can be furnished to the other side, where the controller sees fit to do so.

If the information is not furnished within the time frame, the person who should have furnished them will be deemed not entitled to furnish them, and the controller shall be entitled to presume that the person does not intend participating in the application or reference, and the controller can proceed with the application or reference accordingly.

human rights watch

convictions report

conviction when applying for certain jobs. "This is an area that has previously been considered by the Law Reform Commission, but the Society was keen to further the debate through consultation with interest groups, as it is a matter that is clearly in the public interest," commented Human Rights Committee chairman Colin Daly.

The report aims to balance the injustice of requiring an ex-offender to suffer the consequences of an offence indefinitely and the need to ensure public safety. The existence of a criminal record can affect an ex-offender in a number of ways, including access to accommodation, entry to certain professions, applications for various licences, and general employment prospects. The primary focus of the report was to limit the negative effect of a criminal conviction on employment prospects, as research indicates that failure to obtain employment is one of the most significant barriers to integration faced by offenders upon their release from prison. A survey conducted by the National Economic and Social Forum found that only 52% of Irish employers would consider employing someone

Pictured at the launch of the report were Frank Murphy (Ballymun Community Law Centre), President of the Law Society John D Shaw and Mountjoy governor John Lonergan

Hearings (rules 11-14)

An oral hearing will only be conducted in circumstances where:

- It is considered necessary,
- The controller consents to one after an application by the petitioner, respondent or a third party.

If the controller decides to hear the application or reference orally, the controller must give the requisite party at least ten days' notice of the date of the hearing. If the party intends to appear, they must pay the requisite fee and send notice of intention to attend no later than seven days after receiving notice of the date of the hearing. If no notice or fee is received, the controller is entitled to presume that the party is not going to attend and may act accordingly.

The controller will decide the rules relating to the procedure at the hearing. The controller has the power to postpone or adjourn a hearing as he or she thinks fit. The controller shall make his/her decision in a timely manner and shall inform the parties involved

Interested third parties (rules 17- 23)

A person or organisation ('applicant'), who is neither a petitioner nor respondent, may apply to the controller to be made a party to the proceedings and shall furnish the following to the controller:

- Name and address,
- Name of the relevant proceedings,
- A statement (the original and two signed copies) relating to the material facts relied upon in claiming that the applicant has a substantial interest in the matter and the reasons why they should be made a party to the proceedings,
- The fee.

A copy of the statement must also be furnished to the relevant parties to the proceedings. If any of the parties object, they shall notify the controller within 14 days of their objection, along with the fee payable and a statement (including a copy) outlining the reasons for their objection. If no objection is received within the time limit, it will be presumed that there are no objections. Once all the statements and relevant objections have been taken into consideration, the controller may decide the join the applicant to the proceedings.

This decision shall be made within a timely manner and all the relevant parties shall be informed of the decision.

Appeals (rule 26)

An appeal on a point of law can be brought no later than four weeks after the date of the decision. The person appealing the decision shall notify the controller and furnish a copy of the appeal. The controller shall at this point suspend the operation of any order made by him/her. The controller shall inform all the relevant parties of the suspension of the order and publish this in the *Patent Office Journal*.

Schedules 1 and 2

The fees payable under the rules (schedule 1) and the documents that the parties are required to produce, depending on which section of the *Copyright and Related Rights Act 2000* the parties are relying on (schedule 2), are set out in the schedule attached to the new rules.

A copy of the rules and further information are available to view on the Irish Patents Office website, www.patentsoffice.ie. G

Elaine Dewhurst is the Law Society's parliamentary and law reform executive.

with a criminal record. In welcoming the report and the opportunity for debate on the issue, Mountjoy governor John Lonergan noted that the "prospects of getting a job if you are totally honest with an employer is nil, unless the employer is very generous".

The report proposes the introduction of a comprehensive scheme, open to all offenders, irrespective of the nature of the offence and the sentence imposed. The conviction-free periods recommended by the report are two years or four years post release, depending on the length of sentence. Convictions for which a mandatory life sentence is imposed will automatically be excluded from the scheme. The time periods chosen are based on research undertaken and models currently operating successfully in other jurisdictions and are supported by findings that indicate that the rates of reoffending are highest during the two years immediately after release.

Need for balance

"The Law Society was keen to meet the legitimate and well-founded concerns relating to public safety, and the report concludes that it is crucial that such safeguards be put in place. The recommendations provide for a rigorous but fair system by which ex-offenders can have their conviction spent only after the ex-offender can prove that they are no longer a threat to public safety and order," said Colin Daly.

The report recommends that ex-offenders will have to apply to a central authority, which would have discretion to grant or refuse an application to have a conviction spent. The ex-offender would be required to take an active role in the process and to demonstrate to the central authority that he has been effectively rehabilitated and earned the right to avail of the scheme. The authority would have an opportunity to hear submissions from the ex-offender and the providers of any rehabilitative programme undertaken either in prison or post release. The application process would act as a filtering mechanism for those offenders or types of offences that are deemed unsuitable to being declared spent.

The report also recommends that certain sensitive posts, positions and professions should be excluded from the scheme, including those where the individual would be working with vulnerable members of society. Further, the report proposes that the issue of extending the grounds of discrimination contained in the *Employment Equality Act 1998* to include the ground of discrimination on the basis of criminal record should be given serious consideration and should be the subject of further research. It also proposes that supports, both within prisons and post release, to assist the reintegration of prisoners and to assist prisoners in availing of the spent conviction scheme should be addressed.

Second chance?

In launching the report, John Lonergan posed a question to the audience: "Do people really deserve a second chance?" The response: "We all get one … if you are in the gutter, you can't get out unless someone gives you a helping hand and gives you a second chance … The rewards will be huge."

The report is available to download from the Law Society website, www.lawsociety.ie. G

Elaine Dewhurst is the Law Society's parliamentary and law reform executive.

letters

Send your letters to: *Law Society Gazette*, Blackhall Place, Dublin 7, or email: gazette@lawsociety.ie

Disposal of court papers – warning!

From: Valerie Peart, Pearts, 24/26 Upper Ormond Quay, Dublin 7

At a recent meeting of the Supreme and High (Civil) Court Offices, Customer Service, User-Group Meeting, the growing difficulty of court papers being left in courtrooms was brought to our attention.

In an attempt to raise awareness about this issue, I agreed to circulate all solicitors to advise them about the problem.

The Courts Service has advised that there is an increasing number of court papers, Lever Arch files and other bulky court papers being left in courtrooms after a case has concluded. The volumes of papers now lying around in courtrooms is causing a difficulty and, indeed, could amount to being a health and safety issue should it continue.

To date, the Courts Service has dealt with this problem by shredding such papers. However, they are no longer in a position to meet the cost of this shredding. Although the Courts Service is conscious of the sensitive nature of much of the material in these papers, the extent of the problem is such that we are advised that registrars will soon be instructed to remove these papers from court for normal disposal. This means that they will be placed in refuse bins or a skip for removal.

As with any client papers, the issue of confidentiality is paramount and so I thought it prudent to notify all solicitors of the potential risks, were papers simply to be placed in an open skip, as is proposed.

All solicitors, therefore, are being requested to promptly remove all court papers and files as soon as a case comes to an end.

As town agents, when asked to do so, we already collect such papers and arrange for delivery to solicitors for whom we act. We would be happy to accept instructions from anyone who might need help in this regard.

In any case, the purpose of this letter is to let all solicitors know about the problem, in the hope of soon arriving at a solution and thereby preventing further problems.

If anyone needs further information, please feel free to get in touch with us.

Cost of obtaining photocopied hospital medical records on behalf of clients

From: Manus Sweeney & Co, Suite 226, Capel Building, Mary's Abbey, Dublin 7

It has come to this writer's attention that certain Dublin hospitals have been charging anything between 60 cent and €1 per page for 'photocopying, including post and packaging' when sent a standard request for copy medical records from solicitors, with the usual signed authority of the client accompanying same.

Where photocopies of records are released under the *Freedom of Information Act*, the act allows for the photocopying costs to be charged to the requester. The standard rate per page is 4 cent. The schedule of charges is set out in the CPU Notice, number 11, which is available on www.foi.gov.ie.

I would respectfully suggest that, where copy medical records are sought, formal application for same be made under the *Freedom of Information Act* and that reference is made to the 'standard rate per page' and 'schedule of charges', as cited above. G

Judging women

If she is confirmed, Sonia Sotomayor will be the third woman to serve as a US Supreme Court justice. Max Barrett looks at the record in Ireland and Britain and wonders what common features are to be found in the backgrounds and careers of Sotomayor and her sister judges

On 26 May, President Obama nominated Judge Sonia Sotomayor to the US Supreme Court. If confirmed, Sotomayor will be the third woman to serve as a US Supreme Court justice. Though women are under-represented within the Irish judiciary, three women have already been appointed to Ireland's Supreme Court. In Britain, by contrast, only one woman has been appointed a law lord. Given the relative rarity of women judges on the supreme court benches of the United States, Ireland and Britain, it is interesting to consider whether there are common features in the background or careers of Sotomayor and her sister judges.

Sonia Sotomayor (born 1954) – nominated (USA)

Sotomayor was born in the Bronx to Puerto Rican immigrants. Her father, a factory worker, could not speak English. Her mother worked six days a week to support her children. If confirmed, Sotomayor will be the sixth member of the present US Supreme Court from a Catholic background and is also likely to be its first Hispanic member. 'Likely', because some contend this distinction belongs to former Justice Benjamin Cardozo, a descendant of Sephardic Jews from Portugal, who was appointed to the Supreme Court in 1932.

Sotomayor studied at Yale Law School, achieving the highest grades. Five years as an assistant district attorney and eight years in private practice as an intellectual property lawyer followed.

In 1991, Sotomayor was nominated to the US District Court by the elder President Bush. In 1997, she was nominated to the US Court of Appeals by President Clinton. She is considered a moderate judge with liberal leanings.

Sandra Day O'Connor (born 1930) – retired (USA)

O'Connor grew up on her family's ranch in Arizona. At Stanford Law School, she graduated third in her class in 1952 – future US Chief Justice William Rehnquist came first. After graduation, O'Connor could not find employment as a lawyer in private practice. (One firm offered her employment as a legal secretary.) Undeterred, O'Connor took employment as a county attorney in California, then as a US Army attorney, then did a two-year stint in private practice before being appointed Arizona's assistant attorney general.

Politically active, O'Connor eventually became Republican leader in the Arizona Senate. In 1976, she supported Ronald Reagan in his unsuccessful effort to wrest the presidential nomination from Gerald Ford. Four years later, Reagan won the nomination and presidency on a platform that included a pledge to appoint a woman to the Supreme Court. When a court vacancy arose, Reagan nominated O'Connor, then an Arizona appeals court judge. On the court, O'Connor's centrist swing vote was often the decider in divisive cases.

Ruth Bader Ginsburg (born 1933) – serving (USA)

Ginsburg is the sole woman on, and one of two Jewish members of, the present US Supreme Court. A Brooklyn native, Ginsburg commenced her legal studies at Harvard Law School. When her husband took a job in New York, Ginsburg transferred to Columbia, graduating joint first in her class in 1959.

After graduation, Ginsburg clerked for the US District Court, then pursued an academic career. She became the first woman to be a tenured professor at Columbia Law School. She was also a renowned rights activist, arguing numerous gender discrimination cases before the US Supreme Court.

In 1980, Ginsburg was appointed to the US Court of Appeals by President Carter. On the Court of Appeals she was considered a centrist judge. However, it took another Democrat – President Clinton – to appoint her to the US Supreme Court, though only after New York governor Mario Cuomo declined the position. Ginsburg is a highly regarded moderate-to-liberal Supreme Court justice.

Susan Denham (born 1943) – serving (Ireland)

Denham was the first woman appointed to the Irish Supreme Court. She is now its longest-serving member.

The daughter of a newspaper editor, Denham was schooled at Alexandra College, then studied law at Trinity College and Columbia University. After returning to Ireland, Denham became a barrister and spent 20 years in practice, having a particular expertise in judicial review cases. In 1991, Denham was appointed a High Court judge. The following year, she was appointed to the Supreme Court.

A Church of Ireland member, Denham's appointment could perhaps be seen as a continuation of Ireland's tradition of appointing a Protestant to the Supreme Court, much like there was long a 'Catholic seat' on the US Supreme Court. However, the appointment of Catherine McGuinness – another Church of Ireland member – to serve alongside Denham suggests that Supreme Court appointments are now based solely on merit, without regard to religion. Denham's suitability for high judicial office in any event is unquestioned.

Catherine McGuinness (born 1934) – retired (Ireland)

McGuinness is the daughter of a Church of Ireland clergyman. Born in Northern Ireland, she went to school in Belfast before attending the Dublin school that Denham later attended. Following school, McGuinness studied languages at Trinity College.

McGuinness had direct experience of political and public life before becoming a judge. She

viewpoint

Judge Sonia Sotomayor could become only the third woman to serve as a US Supreme Court justice – and the first Hispanic

was a senator for Trinity College, a member of various public bodies and a vigorous rights campaigner.

Called to the bar in her 40s, McGuinness had a large family law practice. She became a senior counsel in 1989, was appointed to the Circuit Court in 1994, the High Court in 1996 and the Supreme Court in 2000. On the Supreme Court, McGuinness was particularly noted for her judgments in family law cases. She is currently president of the Law Reform Commission.

Fidelma Macken (born 1945) – serving (Ireland)

Macken's father was a college president. Her mother was an international athlete. Macken – like Denham and McGuinness – studied law at Trinity College (where she came second in her class) and the LSE. After qualifying as a barrister, Macken spent six years working in a patents and trademarks firm before commencing full-time practice at the bar. She also taught law for a time at Trinity College.

At the bar, Macken had a substantial general practice. National prominence came when Brian Cowen, then minister for health, commissioned Macken to report on the state's defence of a controversial case in which a woman contracted hepatitis C following a blood transfusion. Macken became a senior counsel in 1995. In 1998, she was appointed a High Court judge. In 1999, she was appointed to the European Court of Justice, becoming that court's first woman member. In 2004, she returned to the High Court and, the following year, joined the Supreme Court.

Brenda Hale (born 1945) – serving (Britain)

Baroness Hale is the only woman ever appointed a law lord. The daughter of two headteachers, Hale studied law at Cambridge, taking a double-starred first and coming first in her class. As a law lecturer at Manchester University, Hale for 18 years combined a career as part-time barrister and full-time lecturer.

In 1984, Hale became the first woman appointed a law commissioner. In 1994, she was appointed a judge of the English High Court. In 1999, she became the second woman appointed to the Court of Appeal. In 2004, she was raised to the House of Lords as one of 12 law lords.

As a law commissioner, Hale was harshly criticised by some among the British media, who also decried her as a 'hard-line' feminist when she was elevated to the House of Lords. Hale has reportedly described herself as a 'soft-line' feminist who simply believes in equality for men and women.

Common factors?

Are there common factors in the background or careers of the seven judges considered in this article? Yes. All come from middle-class backgrounds. (If her nomination is confirmed, Judge Sotomayor will buck this trend.) Membership of a minority group is not uncommon: four of the seven hail from cultural or religious minority groups in their respective nations. At university, all did extremely well, typically coming top or near-top in their class. In terms of family life, all are married and all but one are mothers. Direct involvement in the political process is not usual among the seven – only two have held elective office. Experience of work within, or for, the executive branch is not untypical. Four of the seven have such experience. Each enjoyed a judicial career before nomination to her nation's highest judicial body. All are demonstrably capable lawyers whose suitability for high judicial office is readily apparent. G

Dr Max Barrett is head of legal affairs at National Irish Bank and author of The Law Lords *(Palgrave). Any views expressed in this article are entirely personal.*

It could be YOU

Do informal Lotto syndicate agreements bind all players, despite the absence of a written agreement and a situation where one player has not fully paid up? Majella Twomey checks if her numbers have come up

Since its inception, a myriad of Irish people play the Lotto each week, and syndicates are ubiquitous. Such syndicates can be made up of groups of friends, family members, work colleagues or even sports teams. There are no rules for who can or cannot be a member of a syndicate, and therefore it can sometimes be difficult to establish who exactly the members are and, indeed, what type of an agreement has actually been made.

Up until the recent Supreme Court case of *Horan v O'Reilly*, the law was unclear in relation to the rules of Lotto syndicates and the legal consequences of certain informal arrangements between members. This case, however, serves to clarify the rights of National Lottery syndicate members and, indeed, gives some guidance to people who wish to embark upon setting up such arrangements in the future.

Money for nothing

The case first came before the High Court in 2004, Clarke J giving judgment in December of that year. The facts were that a syndicate was set up by a group of friends, and the fourth-named defendant, Mr O'Brien, operated the system for a period of time. The plaintiff, Mr Horan, was carried by the syndicate at times, despite the fact that he was in arrears. It was established from the facts that, for some period of time, there was a process whereby tickets were bought when the plaintiff had not paid up front, but the fourth-named defendant bore that expense. Mr O'Brien would then recoup the monies at a later date from the plaintiff. It appeared from the facts that this happened on at least one occasion.

The plaintiff stated that he was in arrears from time to time but, when he was approached for payment in October 2000, he had made the payment requested. The winning ticket was bought in January 2001, at which stage the plaintiff was still in arrears, but not to any greater extent than the custom and practice had been allowed to develop. The sum of the winnings amounted to £1,577,578. The defendants stated that the plaintiff owed a significant amount of money and that he refused to pay a sum of money in October 2000 to clear those arrears.

Clarke J found that the syndicate operated in

MAIN POINTS

- Intention to create legal arrangements and the rights of members of Lotto syndicates
- *Horan v O'Reilly*
- Custom and practice

such a way as to vest in the fourth-named defendant the authority to carry out all practical matters. He stated that the fourth-named defendant permitted a system whereby the plaintiff would be in arrears, as he was trustworthy. He stated that the plaintiff paid his arrears at the request of the fourth-named defendant in late October 2000 and, at the time the winning ticket was drawn, he was not in any greater arrears than in the past. It was held that there was no evidence before the court that the plaintiff had refused to pay arrears, nor was there evidence that he had removed himself from the syndicate. Clarke J concluded that he remained in the syndicate up to the date when the winning ticket was drawn. As a consequence, an order was made that the plaintiff was therefore allowed his share of the winnings. In his judgment, Clarke J relied on the concept of the 'custom and practice' that had been allowed to develop.

Can't buy me love

Inevitably, and because of the considerable financial gain involved, the defendants in the case were disgruntled with the outcome in the High Court, and they immediately appealed the decision to the Supreme Court. Judge Fennelly delivered judgment in December 2008. He said that the crucial and determinative issue, so far as the trial judge was concerned, was the practice regarding payment that Mr O'Brien operated in the case of Mr Horan.

In his analysis and conclusion, Fennelly J stated that there was no doubt that the original agreement was that each syndicate member was to pay his contribution weekly to Mr O'Brien so that he could purchase the lottery tickets twice weekly. He further stated that it was not part of that agreement that members could pay in arrears and nonetheless remain a part of the syndicate.

The Supreme Court referred to the 1989 Australian decision in *Cole v Crain*, where a similar issue arose. Fennelly J observed that he was struck by the remark in that case that a person seeking to share in a syndicate, when he has not paid up his share, travels "a hard road".

Fennelly J stated that there was only one real question in the present case, and that was whether the parties agreed to vary their original agreement to the intent that Mr Horan would remain in the syndicate and would be entitled to a proportionate share in any winnings, even though in arrears in payment. It was stated that any variation would have to have been agreed by all members of the syndicate, and there was no evidence that it was. Fennelly J stated that he was satisfied that it would not be obvious to any innocent bystander that an obligation to purchase tickets for the plaintiff was imposed on Mr O'Brien on behalf of the other syndicate members.

Hey big spender

It is of interest that the Supreme Court placed much emphasis on the fact that only £6, and not £7.50, was invested on 6 January 2001, and it was stated that this fact indicated strongly that Mr O'Brien bought tickets for only four – and not five – members in the syndicate. As a result, it was held that Mr Horan was not a member of the syndicate on 6 January 2001, and therefore not entitled to a share of the winnings.

The divergence between the High Court and the Supreme Court in this case is interesting, and the contrasting views in the judgments only serve to highlight the complexities and confusion that surrounds syndicate agreements and the concept of intention to create legal relations.

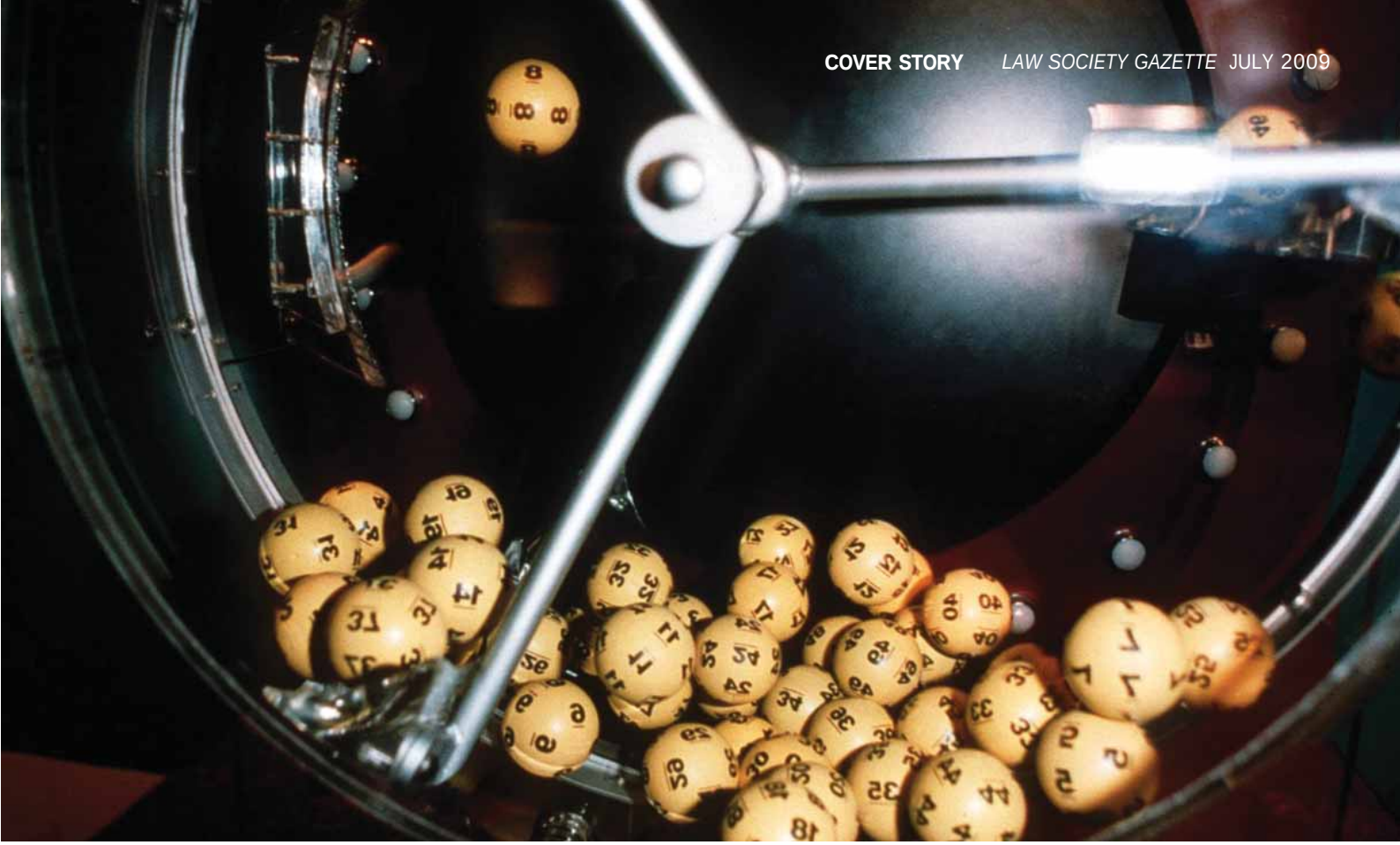
"It is indeed 'a hard road' to travel for one who alleges that they are a member of a syndicate in circumstances where there is little or no written evidence to back this up"

At the time of writing, there is an ongoing lottery dispute that came before the courts in January of this year, which concerns a deceased woman, Ms Ellison, who won €450,000 in the Lotto two years ago. Her nephew and brother are both contesting their right to a share in her winnings, which she kept in a bank account until her death in 2007, when her brother became the main beneficiary of her will. Both the deceased's brother and nephew allege that they were part of an 18-year syndicate with Ms Ellison. Judgment in this case is reserved until a later date, but it is a useful example of a situation where a written legal agreement would have clarified and narrowed the issues involved.

Too tight to mention

While the decision of the Supreme Court in *Horan* gives some guidance in relation to the rules that should apply to syndicates and the legal consequences for members in situations of arrears, the Supreme Court failed to give any specific guidelines in relation to how a syndicate should be properly run. In the absence of any specific guidelines from the courts, this is a matter that could be legislated for in the future, as Lotto windfalls increase and syndicates become more ubiquitous.

At present, there are no detailed guidelines issued by the National Lottery in relation to how a syndicate should be set up. However, they do suggest that syndicates should agree a set of rules that suit their particular group regarding, for example, the collection of monies and what to do if someone leaves the syndicate or dies. Further, they advise that it's a good idea to decide, and let everyone know, what



the syndicate is going to do if one of the members of the group cannot pay for a particular draw. They also state that it is advisable to generate a syndicate agreement in advance in order to avoid disputes.

In the absence of any concrete guidelines and legislation – and taking into account the far-reaching consequences for the plaintiff in *Horan v O'Reilly* – for the avoidance of doubt, all syndicate agreements should be in writing. A syndicate could circumvent the problem that arose in *Horan* by creating a bank account for the syndicate and insisting that every member set up a standing order to pay the required amount of money into the account. The organiser could use a bank card to withdraw the cash every month and then complete the draws. Of course, this could create its own problems, if one member, for example, is overdrawn or if the organiser's role and duties have not been properly agreed. It would also be prudent to include a catch-all condition saying that, in the event of a disagreement, the majority would decide on what would happen. Another term that a syndicate might find useful would be a condition exonerating the organiser from any legal action if winnings were missed due to his mistakes.

LOOK IT UP

Cases:

- *Cole v Crain* (unreported, Supreme Court of New South Wales, 16 August 1989)
- *Horan v O'Reilly* [2008] IESC 65
- *Simpkins v Pays* [1955] 3 All ER 10 (intention to create legal relations in gaming agreements)
- *Welsh v Jess* (1976) NZRec Law

Legislation:

- *Gaming and Lotteries Act 1956* (section 36 states that every contract by way of gaming or wagering is void)
- *National Lottery Act 1986* (section 32 exempts the National Lottery from section 36 of the 1956 act, and therefore members of syndicates can sue on foot of breach of contract)

Life in the fast lane

It is abundantly clear that a failure to create a written agreement in the context of a syndicate arrangement can have precarious consequences for people claiming to be a member. The strict approach of the Supreme Court in *Horan* serves to accentuate the fact that, in order to protect themselves and their future winnings, it is incumbent upon syndicate members to take the time to discuss and draft up a detailed agreement in relation to how any monies would be dealt with and distributed. Unfortunately, all too often, people take the view that 'it could not be them' and are reluctant to tempt fate by entering into such an agreement. If anything is to be learned from the Fennelly judgment, it is that it is indeed "a hard road" to travel for one who alleges that they are a member of a syndicate in circumstances where there is little or no written evidence to back this up. G

Majella Twomey is a barrister and mediator who lectures in contract law at Griffith College, Dublin.

HOLDING TO

Recent high-profile disciplinary proceedings taken against solicitors show the importance and relevance of compliance with the *Solicitors' Accounts Regulations*. Eugene Smith shines a light on other compliance issues that would appear to constitute relatively common, innocent or unintentional breaches of the regulations

MAIN POINTS

- Complying with the *Solicitors' Accounts Regulations*
- Maintaining proper books of account
- The reporting accountant's report
- Reportable breaches

Incidents involving the lack of compliance with the handling of client funds in accordance with the *Solicitors' Accounts Regulations 2001* (SI 421), as drawn up by the Law Society of Ireland, were prominently reported in the media in late 2007 and into 2008. While some of these cases regrettably involved deliberate malfeasance, the complexities of commercial life for practitioners can often lead to innocent or unintentional breaches, which have potentially serious consequences for the relevant practices.

This article aims to highlight numerous other breaches that can potentially attract the attention of the Society, even if there is compliance with the requirement of agreeing clients' bank account balances with liabilities owed to clients. It does not intend to explore or comment on the already well-documented breaches involving the personal use of, and deficit in, clients' funds, but rather to concentrate on other compliance issues that would appear to constitute relatively common breaches of the regulations.

Regulation 12(1) requires that a solicitor must "at all times … maintain (as part of his or her accounting records) proper books of account and such relevant supporting documents as will enable clients' moneys handled and dealt with by the solicitor to be duly recorded".

The regulations

The regulations set out the accounting and related record-keeping requirements with which solicitors are required to comply and came into effect on 1 January 2002, applying to any accounting period after that date. Regulation 3(1) provides that these rules, subject to exceptions specified therein, apply to every solicitor who is engaged in the provision of legal services. For the Society to satisfy itself that the regulations are being adhered to, provision is made for the annual submission of a reporting accountant's report by each firm of solicitors. The reporting accountant follows a work programme, developed by the Institute of Chartered Accountants, to assist in the planning and performance of the examination of client records in order to arrive at a conclusion on whether the solicitor's accounting records comply with the regulations. The work performed by reporting accountants, while extensive, does not constitute an audit.

The reporting accountant may also, subject to agreement with the member firm, carry out additional work (if requested) in addition to the responsibilities of acting as reporting accountant to the Society (for example, preparation of financial statements, taxation and advisory work).

Let's look at some of the more common breaches that can easily arise.

Debit balances

Regulation 7 specifies that the money may be withdrawn from a client account but provides that, under no circumstances, can withdrawals from a client account exceed the balance of money held in that account on behalf of the particular client.

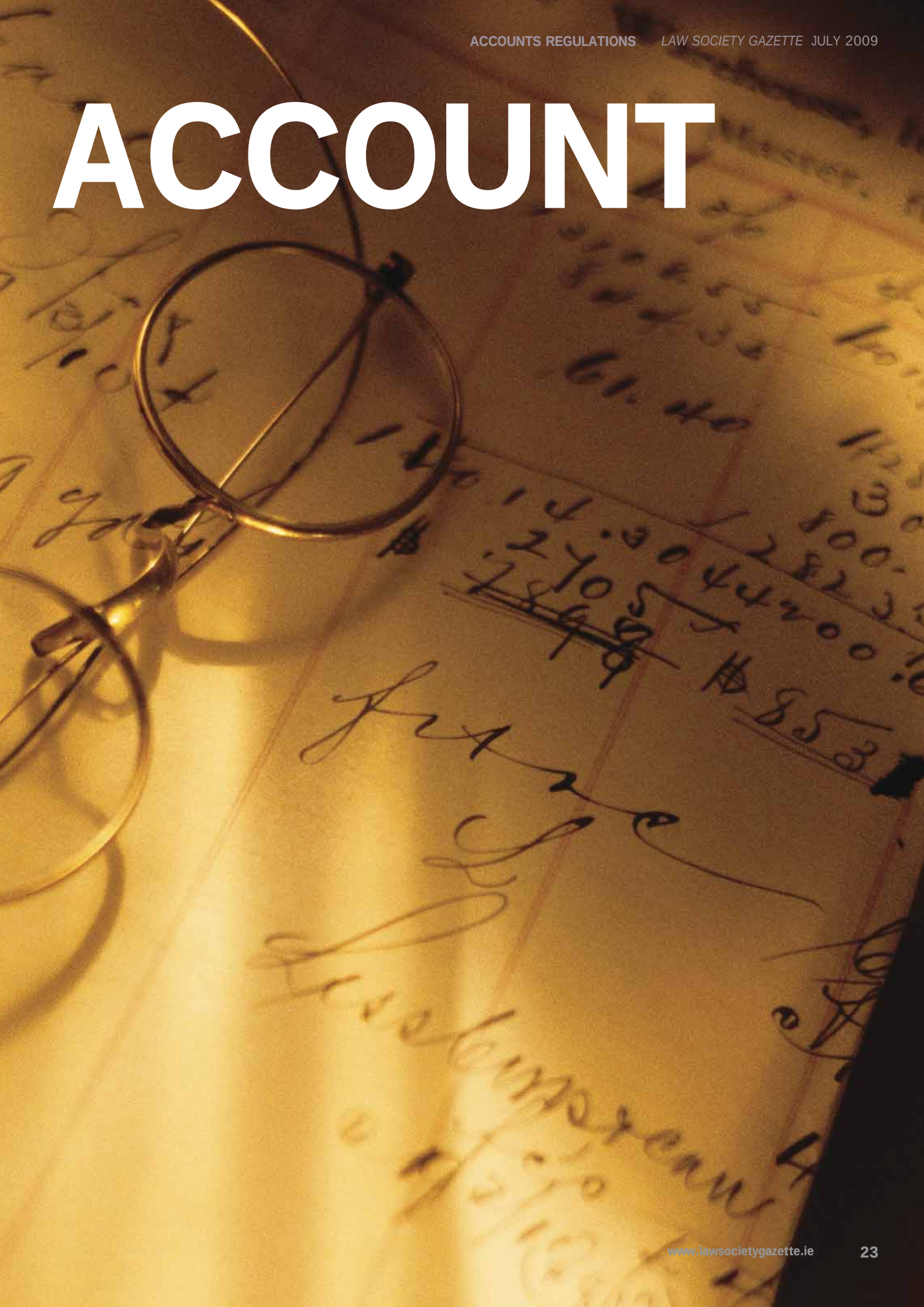
Withdrawing money against lodgements not yet cleared in the client's bank account, while not a breach in itself, is not recommended, given the possibility that the lodgement could be subsequently dishonoured. The consequence of this happening would be that other clients' funds may be used to meet the cheque issued, and the possibility that a breach would then occur. As a consequence, the solicitor must, without delay, pay the appropriate amount from his or her own resources into the client account.

Balances for any one client should never, in aggregate, be allowed to run into debit. Balances held on behalf of the same client may be offset against each other to ensure that a credit balance remains; however, consideration should be made for any undertakings given by the solicitor for part of the funds used to offset such a debit balance. In addition, balances to/from members of a group of companies cannot be offset.

Designation of bank accounts

The term 'client accounts' refers to accounts maintained with a bank that are designated for the purpose of holding or transacting clients' moneys.

ACCOUNT



All other accounts maintained with the bank by the practice are termed 'office accounts'.

Failure to properly designate an account (that is, ensure that 'client' appears in the bank account title) could mean that client or trust money deposited to such an account could be seized by a financial institution in settlement of liabilities due to that financial institution by the solicitor's practice.

Money held in joint account by two firms of solicitors is not clients' moneys, since it is not under the sole control of either firm.

Location of client funds

Regulation 2 requires that funds may only be deposited into financial institutions/banks located in the state. Where funds are being handled in currencies other than Euro, designated foreign currency bank accounts should be opened with a financial institution/bank in the state as opposed to outside of the state.

Recording of deposit interest on general client deposit bank accounts

The regulations state that interest received by a solicitor on an interest-bearing general client account (that is, not a specific client account), does not constitute clients' moneys.

This interest earned should be transferred on receipt to an office bank account held by the firm, as required by regulation 5(2), within three months. Regulation 7(4) further states that the transfer time frame can be extended from three months to the next accounting date (if later) – "the last date of his or her solicitor's practice accounting period in each practice year".

However, each practice should be mindful of their requirements under the *Solicitors (Interest on Clients' Moneys) Regulations 2004* (SI 372) to account for deposit interest payable to clients, on interest earned on general client funds, where that amount exceeds €100 as set out therein.

> ***"Recent high-profile breaches and ongoing court and disciplinary proceedings taken against solicitors show the importance and relevance of compliance with the regulations"***

Outstanding cheques

Steps should be taken to ensure that no stale cheques (that is, cheques that are six months old) are included on the clients' records. Each firm should review the listing of outstanding cheques at the end of each month to ensure all cheques issued are up to date. If a cheque is out of date, the cheque should be cancelled and reissued to the payee without delay.

The issue has arisen in respect to what action firms should take if they are unable to track down recipients of old cheques or they have no forwarding address for the original payee. All attempts to reissue the cheque to the original payee should be pursued.

Timely reconciliations

As mentioned earlier, regulation 12 places an obligation on the solicitor to ensure proper books of account are maintained. In addition to recording the transactions on an ongoing basis, it requires the solicitor to ensure that balancing and controlling procedures are performed within two months of the relevant balancing date in relation to:

- Client bank and ledger accounts at six-monthly intervals, and
- Office bank and ledger accounts on an annual basis.

In order to demonstrate that the above exercises have been performed within the specified time frame, the solicitor or a designated member of his or her staff should sign and date the relevant reconciliations and supporting schedules.

REPORTABLE BREACHES

The reportable breaches can be categorised as follows:

- Matters in respect of which the reporting accountant has not been able to satisfy him/herself. These would be considered serious matters, as not only has a breach occurred, but a satisfactory explanation could not be obtained as to the reason for the breach (for example, deficit on funds, missing records, misappropriation).
- Trivial breaches due to minor clerical errors or mistakes in accounts keeping. For a breach to be classified as 'trivial', the reporting accountant must be satisfied that the breach:
  i) Is trivial in amount, and
  ii) Must be due to clerical error or a mistake in bookkeeping, and
  iii) Not due to an error in principle, and
  iv) Must have been rectified on discovery, and
  v) Did not result in loss to any client.
- Matters in respect of which the provisions of the *Solicitors' Accounts Regulations* have not been complied with. This final category focuses on matters that are reportable breaches, which often occur in practice, but can be easily rectified. It should be noted that, despite correction of such breaches, the reporting accountant has a duty under the regulations to report these matters to the Society.

LOOK IT UP

Legislation:

- *Solicitors Act 1954*
- *Solicitors (Amendment) Act 1994*
- *Solicitors (Interest on Clients' Moneys) Regulations 2004*
- *Solicitors' Accounts Regulations 2001 – 2006*

Literature:

- ICAI's *Miscellaneous Technical Statement M38: Solicitors' Accounts Regulations*
- Institute of Chartered Accountants of Ireland website: www.icai.ie

The aggregated balances in the clients' bank accounts (current and deposit) may exceed, but never be less than, the total balances due as shown on the client ledger accounts.

Suspense accounts

A suspense account is a common term that refers to a temporary resting place for an amount of money that will end up somewhere else, once its final destination is determined. There are several reasons why a suspense account could be opened, the two main reasons being:

- The bookkeeper is unsure where to post an item and enters it to a suspense account, pending instructions, or
- There is a difference arising and a suspense account is opened with the amount of the difference so that the trial balance/ledger agrees.

There should be no suspense accounts in any of the accounting records maintained, as this would automatically be in breach of regulation 12(1), which states that proper books of account must be maintained at all times. This includes 'interest suspense' accounts/ledger cards.

Regulations 5 and 6 prohibit a solicitor from holding monies to which he or she is beneficially entitled in a client account for longer than three months. This prohibition extends to professional fees and outlays, which the solicitor is entitled to transfer from the client account to the office account, as well as interest earned on the client bank account that is not due to clients in accordance with the *Solicitors' (Interests and Clients' Moneys) Regulations 2004*.

Office ledger balances

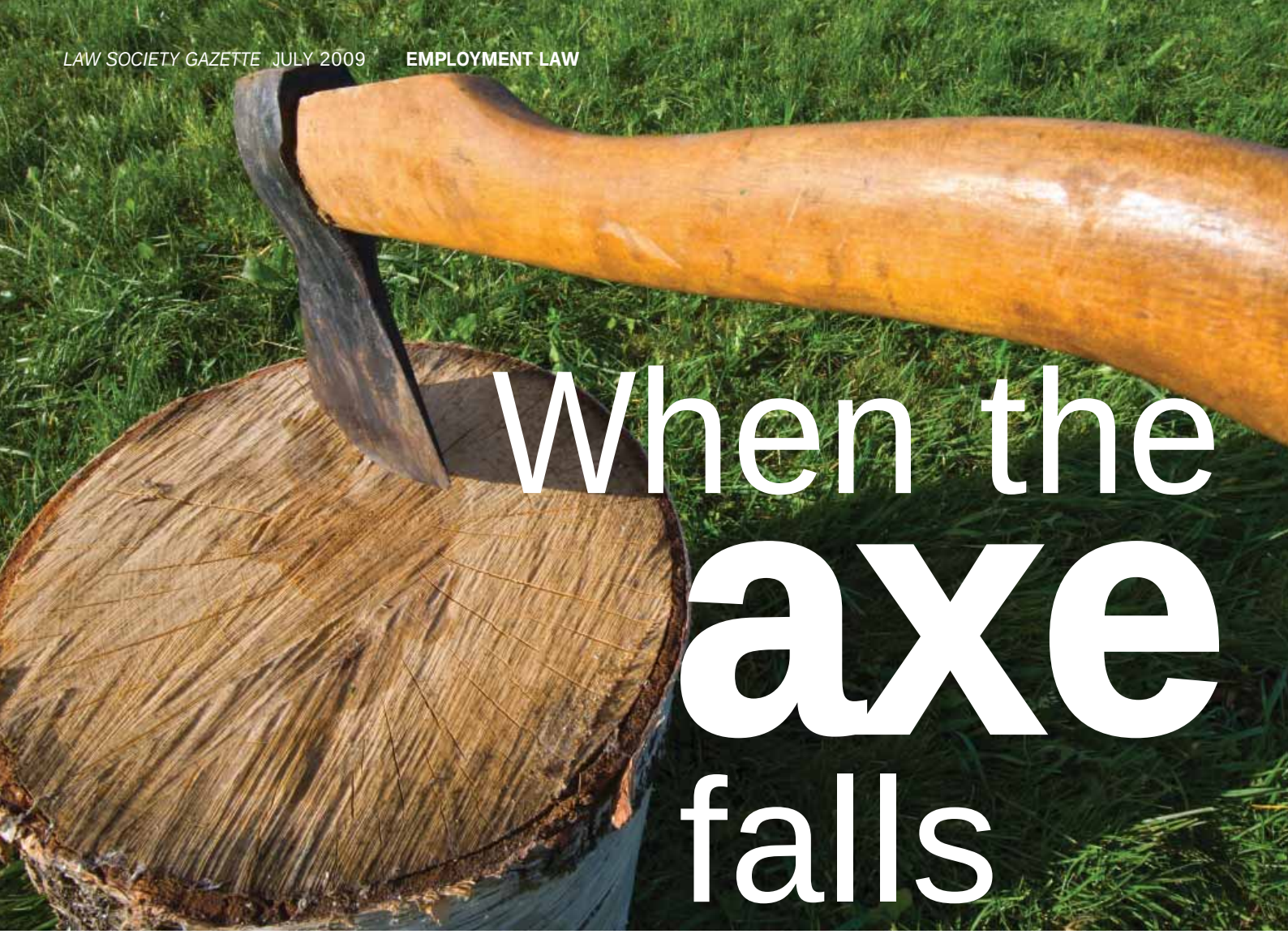
Credit balances should not arise on the office side of the client's ledger (fees, outlays and disbursements), with the exception of circumstances where such a credit balance is totally offset by a debit balance(s) arising on the office side of one or more client ledger accounts in respect of the same client.

The Disciplinary Tribunal: failure to keep your accounts in order may lead you to the big red door

The above examples are not exhaustive, and those who handle client funds should be familiar with the regulations and the requirements.

Recent high-profile breaches and ongoing court and disciplinary proceedings taken against solicitors show the importance and relevance of compliance with the regulations – and the financial and, more importantly, reputational implications for those who decide to disregard their obligations. The issue and criticism of regulation that arises when breaches are publicised highlight the onus on each and every solicitor to comply in order to retain the integrity and reputation of the profession. G

Eugene Smith is a manager in Mazars, chartered accountants specialising in the solicitors' regulations and financial advice to professional services clients. *While the author has made every attempt to ensure the accuracy of the information contained within this article, it should not be relied upon without further consultation.*



When the axe falls

In these economically straitened times, every prudent solicitor needs to be familiar with redundancy legislation to be able to advise clients about the procedures to be followed, the common pitfalls in redundancy selection – and the alternatives. Janice Walshe sharpens the axe

The turbulent economic times we are facing have ensured that redundancy queries are now among the most frequent being put to any general practice. Long gone are the days when these queries would be referred to more specialist colleagues or counsel. Nowadays, every prudent solicitor needs to be familiar with complex redundancy legislation – and should be in a position to advise clients not just about the procedures to be followed, but also about the common pitfalls in redundancy selection and about creative alternatives to redundancy.

The Employment Appeals Tribunal provided a very helpful analysis of the concept of redundancy in the *St Ledger* case, where it said: "Impersonality runs throughout the five definitions in the acts [see panel, next page]. Redundancy impacts on the job and only as a consequence of the redundancy does the person involved lose his job."

In addition, the tribunal pointed out that "change also runs through all five definitions. This means change in the workplace. The most dramatic change of all is a complete closedown. Change may also mean a reduction in needs for employees, or a reduction in number. Definitions (d) and (e) [see panel] involve change in the way the work is done or some other form of change in the nature of the job. Under these two definitions, change in the job must mean qualitative change. Definition (e) must involve, partly at least, work of a different kind, and that is the only meaning we can put on the words 'other work'. More work or less work of the same kind does not mean 'other work' and is only quantitative change."

The tribunal's words are helpful in terms of identifying when a redundancy situation has arisen. However, what may seem simple in theory is rarely so straightforward in practice. While it is one thing to demonstrate that a genuine redundancy situation exists, it is quite another to prove that employees

MAIN POINTS

- Advising clients on redundancy
- What the Employment Appeals Tribunal says
- Implementing redundancies, selection, and alternatives

have been fairly selected for redundancy. Many unfair dismissal cases are lost because the employer cannot show that he or she used a fair procedure in implementing a genuine redundancy.

Implementing redundancies

From the outset, it is important to identify the areas of work where redundancies will potentially be made.

Consultation with employees should take place at the earliest possible stage. While there are statutory rules regarding consultation periods in collective redundancies (at least 30 days before the first notice of dismissal is given), it is a matter for the employer to decide whether and what way to conduct consultation where the number of potential redundancies falls below the collective redundancy threshold. (At least five in an establishment normally employing more than 20 and less than 50 employees; at least ten in an establishment normally employing at least 50 but less than 100 employees; at least 10% of the number of employees in an establishment normally employing at least 100 but less than 300 employees; at least 30 in an establishment normally employing 300 or more employees.)

However, an employer will have a much stronger defence to an unfair dismissal claim if he can show that he consulted in a meaningful way with his employees. If it is the practice of the employer to negotiate with a trade union, this should, of course, also take place as soon as possible.

It is vital that the employer decides upon objective selection criteria prior to making any redundancies. These should be written down and adhered to strictly. Documents should be retained that show how each employee was marked in relation to these criteria (see panel, next page)

Alternatives to redundancy

When employers need to reduce costs, the temptation to simply make large-scale redundancies is obvious. However, alternatives to redundancy should be given serious consideration. Alternative measures are not only effective at reducing costs, but can also ensure that employers retain key skills and resources – and maintain staff morale. In addition, imposing non-redundancy cost-cutting measures is far less likely to lead to litigation where employees are aware that the alternative is redundancy.

Employers can be creative in terms of deciding upon alternatives to redundancy, and such creativity has been seen recently in this country, particularly in the financial sector. Here are some of the more commonly used alternatives.

Redeployment

Redeployment arises where an employee is moved from one area of work to another or from one employer to an associated employer, either because there is an insufficient need for their services in the area where they formerly worked, or because there is an urgent need for additional staff in the area to which they are being transferred. Redeployment can be permanent or temporary, and it is one of the most common and effective alternatives to redundancy.

Before proposing redeployment, an employer should consider:

- The implications for the business, both now and into the future. If the business is struggling financially, can it withstand the inevitable 'teething' period as the redeployed employees find their feet in new positions?
- Is the redeployment intended to be temporary or permanent? Is there to be a probation or trial period for the redeployed employee? Will the employee require retraining?
- What effect will the redeployment have on the employee's long-term career, training and promotional prospects? Will there be a feedback or 'buddy' system for the employee to report back his or her progress or concerns?

Pay cuts

While it is reported that a vast number of pay cuts have been made in the past 12 months, the fact remains that, if pay cuts are imposed without consent, they are unlawful. In that situation, the employer is at risk of litigation, particularly by way of a claim that the pay cut is an unlawful deduction from wages,

REDUNDANCY – WHAT DOES IT MEAN?

The statutory definition of redundancy is found in the *Redundancy Payments Act 1967*. A 'redundancy' occurs where:

a) An employer has ceased or intends to cease to carry on the business for the purposes of which the employee was employed by him, or has ceased or intends to cease to carry on that business in the place where the employee was so employed, or

b) Where the requirements of that business for employees to carry out work of a particular kind in the place where he was so employed have ceased or diminished or are expected to cease or diminish, or

c) Where an employer has decided to carry on the business with fewer or no employees, whether by requiring the work for which the employee had been employed (or had been doing before his dismissal) to be done by other employees or otherwise, or

d) Where an employer has decided that the work for which the employee had been employed (or had been doing before his dismissal) should henceforth be done in a different manner for which the employee is not sufficiently qualified or trained, or

e) Where an employer has decided that the work for which the employee had been employed (or had been doing before his dismissal) should henceforth be done by a person who is also capable of doing other work for which the employee is not sufficiently qualified or trained.

SELECTION CRITERIA – WHO'S FOR THE CHOP?

Irish legislation does not provide any specific guidance to an employer in terms of selection criteria. However, the Employment Appeals Tribunal tends to closely scrutinise the criteria used. It is essential that the employer is able to objectively justify the criteria chosen and the manner in which those criteria were applied.

Criteria should be based on measurable data rather than on individual opinion, and might include:

- **Length of service.** 'Last in, first out' (LIFO) has fallen out of favour somewhat in recent years. It is seen now as being a somewhat crude means of selection, which does not take into account the requirements of the role or the attributes of the candidates. However, length of service may be useful as one of the selection criteria, although employers need to be conscious of the possibility of LIFO infringing rules regarding age discrimination, as set out in the *Employment Equality Acts 1998 to 2007*.
- **Performance rating.** Employers often seek to use performance ratings as a basis for selection. However, unless it can be shown that the performance ratings were applied as part of a fair and consistent appraisal process, with supporting documentary evidence, it is doubtful that this criterion would satisfy the requirement of objectivity and impersonality.
- **Attendance records.** If attendance records are being considered, care must be taken to ensure that poor attendance is not because of a reason that could leave the selection open to a claim of discrimination under the *Employment Equality Acts*. For example, have frequent absences been caused by an ongoing disability or illness, or because of childcare issues or maternity leave?
- **Qualifications and training.** The qualifications or training being examined should be relevant to the role in question and should be verified.
- **Relevant experience.** Similarly, the employer must determine what is the most relevant experience for any new role and assess all employees equally.

Disciplinary records should **not** be used as a means of selection, and nor should poor performance that has never been addressed with the employee, notwithstanding that many employers will often want to rely on such matters.

"While it is one thing to demonstrate that a genuine redundancy situation exists, it is quite another to prove that employees have been fairly selected for redundancy"

contrary to the *Payment of Wages Act 1991*. Similarly, removing benefits such as payment for overtime or guaranteed bonuses could fall foul of that act.

It has surprised many lawyers that, to date, there has been very little litigation arising out of the recent pay cuts and contract changes, notwithstanding that written consent to the changes has not usually been obtained. It may be that most employees are willing to accept a reduction in benefits in order to retain the job and help the business survive. However, an island ferry operator in Co Cork recently had to reverse pay cuts following the threat of strike action by employees. It may be that there will be similar industrial relations trouble in other sectors in the coming months.

Terminating non-permanent contracts

Non-renewal of fixed-term contracts of employment is one way of reducing headcount as an alternative to redundancy. However, great care must be taken to ensure that employers do not breach the *Protection of Employees (Fixed Term Work) Act 2003* and the obligation in that act not to treat fixed-term employees less favourably than comparable permanent employees. In the context of redundancy, this obligation will be particularly relevant in terms of selection for redundancy.

Many employers operate on the mistaken assumption that it is easier to renew successive fixed-term contracts than to make an employee permanent – and then make that employee redundant if it is ultimately necessary. However, the non-renewal of a fixed-term contract at the end of the contract period can fall within the definition of redundancy. Therefore, if the fixed-term employee has more than 104 weeks of continuous service, he will be entitled to a statutory redundancy payment. If there is a more generous redundancy package on offer to permanent employees, this will also have to be paid to the redundant fixed-term employee.

It is inevitable that we will see more redundancy and recession-related litigation in the coming months. Employers need to be given careful guidance throughout the redundancy process to ensure that their chances of defeating such litigation are enhanced. In addition, in what can be an emotionally difficult time for employers and employees alike, creative but lawful alternatives to redundancy need to be considered. G

Janice Walshe is an associate at BCM Hanby Wallace.

LOOK IT UP

Cases:

- *St Ledger v Frontline Distributors Ireland Limited* [1995] ELR

Legislation:

- *Employment Equality Acts 1998 to 2007*
- *Payment of Wages Act 1991*
- *Protection of Employees (Fixed Term Work) Act 2003*
- *Redundancy Payments Act 1967*

Till debt us do part

A recent High Court decision has struck down the District Court debt-collection regime as being in breach of constitutional rights. Genevieve Coonan does hard labour and examines the reasoning underlying that decision

MAIN POINTS

- Imprisonment to enforce the payment of debts
- District Court debt-collection regime
- Articles 34, 40.3.1 and 40.4.1 of the Constitution
- ECHR (article 1 of protocol 4) and article 11 of the *International Covenant on Civil and Political Rights*

In recent times, both opposition parties and independent bodies have called for an end to the use of imprisonment as a mechanism to enforce the payment of debts. It has been argued that the District Court debt-collection regime breaches a number of constitutional and ECHR rights and is intimidating, costly and, where the debtor is impecunious, ineffective. The need to address these arguments has become ever more pressing in light of the current economic downturn. The 2006 Irish Prison Service annual report indicated that, of those committed to prison in that year, 194 (3% of the total prison population) were committed as debtors. As the chairman of the Irish Human Rights Commission has quite rightly pointed out, those figures were always set to rise during the recession. However, the recent decision of Laffoy J in *McCann v Judge of Monaghan District Court* has put paid to many of the concerns regarding debt collection in the District Court. This article seeks to examine the grounds underlying that decision, as well as its implications for the future.

Debt collection in the District Court

The crux of Laffoy J's decision was that section 6 of the *Enforcement of Court Orders Act 1940* breached a number of constitutional rights and was, therefore, invalid. In order to obtain a real understanding of the

SO WHAT'S THE STORY WITH THE ECHR?

Interestingly, Laffoy J did not address the issue of whether the regime complied with the *European Convention on Human Rights* or other international norms. Article 1 of protocol 4 to the convention (which is almost identical in wording to article 11 of the *International Covenant on Civil and Political Rights*) seems particularly relevant, as it states: "No-one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation." However, despite considering in detail much convention and international case law on the issue of imprisonment for debt, Laffoy J held that, as section 6 had been found to be invalid having regard to the provisions of the Constitution, it was not appropriate to consider whether a declaration of incompatibility with the convention should be made. This was due to the fact that section 5 of the *ECHR Act 2003* confers jurisdiction on the High Court to make a declaration of incompatibility "where no other legal remedy is adequate and available".

"Laffoy J quashed the warrant and held that section 6 was unconstitutional as it breached the plaintiff's constitutional right to fair procedures, as protected by articles 34 and 40.3.1, as well as her right to liberty under article 40.4.1"

reasoning underlying her decision, it is first necessary to take a look at the procedures that arise where a creditor wishes to enforce a debt in the District Court.

The *Enforcement of Court Orders Acts 1926-1940* provide that, once judgment has been obtained in the District Court, a creditor may obtain an instalment order against a debtor. The creditor may then apply for a committal warrant pursuant to section 6 where the debtor subsequently fails to comply with this order. This can occur because of a change in the debtor's means or because his means were not properly assessed in the first instance. The debtor's presence in court is not necessary in order for the warrant to issue. Rather, order 53, rule 8(5) of the *District Court Rules 1997* merely requires that the court be satisfied that the instalment order has been served upon him, that he has failed to comply with that order, and that he has been served with the summons on foot of which the warrant is sought. Although the debtor must be notified of the application for a warrant, this cannot guarantee his appearance in court, particularly in cases where he is afraid, does not understand the court process, or simply feels disillusioned and does not believe there is anything he can do to prevent a warrant from issuing.

Bringing debtors to court

Moreover, the *District Court Rules* do not provide for a procedure whereby a debtor can be brought to court. This is in spite of the fact that order 46B allows for the issuing of an attachment order to bring a person before the court where they fail to abide by a court order. Where an attachment order is sought under this provision, the court order in question must carry a penal endorsement and the notice of the application to attach must be served personally in all cases, unless the court has good cause to order otherwise. This provision does not apply, however, where an order for the payment of money has not been complied with.

Furthermore, there is no requirement that the debtor's means be assessed before the committal warrant issues, nor must his failure to pay be attributed to either wilful refusal or culpable neglect. Section 6(b) states that a District Court judge may issue a committal warrant "if he so thinks proper", albeit subject to the requirements of section 6(c). Section 6(c) makes it clear that any considerations regarding wilful refusal or culpable neglect only come into play where the debtor appears in court: "the justice shall not order the arrest and imprisonment of the debtor under the next preceding paragraph of this section if the debtor (if he appears) shows, to the satisfaction of such justice, that his failure to pay was due neither to his wilful refusal nor to his culpable neglect".

Finally, it should be noted that section 9(1) of the 1940 act confers on the Minister for Justice the power to direct the release of a debtor forthwith or after the payment of a specified part of the sum of money. Section 87(6) of the *Bankruptcy Act 1988* also provides for the release of a debtor where he petitions the High Court for protection under the act.

Fair procedures and the right to liberty

In the *McCann* case, the plaintiff had gotten into debt to her local credit union and the latter had obtained, in her absence, a committal warrant for her arrest and imprisonment. Laffoy J quashed the warrant and held that section 6 was unconstitutional as it breached the plaintiff's constitutional right to fair procedures, as protected by articles 34 and 40.3.1, as well as her right to liberty under article 40.4.1.

Laffoy J was satisfied that section 6 breached a debtor's right to fair procedures, as:

a) It allowed a District Court judge to order the imprisonment of a defaulting debtor even where they are not present in court (thus preventing the judge from being able to determine "whether the absence of the debtor is due to a conscious decision"),
b) It allowed for the imprisonment of an impecunious debtor without there being in place a legislative or administrative scheme under which legal aid could be granted to them, and
c) It shifted the burden of disproving that the failure to pay the debt was due to wilful refusal or culpable neglect onto the debtor, a procedure that she was satisfied was unconstitutional having regard to the fact that a failure on the debtor's part to discharge that burden could result in imprisonment.

She was also satisfied that the regime constituted a disproportionate interference with the right to liberty, as:

a) It was not rationally connected to its objective (that is, enforcing the payment of debts), as there was no procedure in place to ensure that the District Court judge be satisfied that the debtor was, in fact, capable of discharging the debt, and
b) It did not impair the right to liberty "as little as possible".

In regard to this second point, she noted that, in *Saadi v United Kingdom*, the European Court of Human Rights reasoned that the detention of an individual is such a serious measure that it can only be justified as a last resort. In fact, this approach has long been adopted in England. For example, in *R v Doncaster Justices*, Collins J said that "the time has come to try to make it abundantly clear to justices that, in the view of this court, it is difficult to conceive that there will be circumstances which justify the making of a committal order when the defendant fails to appear before the court".

Laffoy J concluded that section 6 did not impair the right to liberty as little as possible, as it did not allow for the attachment of earnings/social welfare benefits and it did not impose an obligation on the creditor to go through an order 46B type process, including personal service of an order with the penal endorsement contained therein.

She was also satisfied that section 6 was arbitrary and unfair, as there was no mechanism for re-entering the application for the warrant before the court once it was made, and the procedures that allowed for the debtor's release, once committed, were inadequate. She considered it highly unlikely that the plaintiff or any debtor in similar circumstances would seek the protection of the High Court under section 87 of the *Bankruptcy Act* and said that section 9 of the 1940 *Enforcement of Court Orders Act* did not confer any right upon a debtor, but rather merely endowed the minister with a discretion to order their release, a discretion that extended to requiring the prisoner to pay so much of the sum owed "which appears to [the minister] sufficient". Indeed, the usefulness of section 9 may also be questioned by the fact that, out of the 1,138 instances of committal to prison for non-payment of debt in the five years from May 2003, the minister had never exercised this power.

LOOK IT UP

- *McCann v Judge of Monaghan District Court* (unreported, High Court, 18 June 2009)
- *Saadi v United Kingdom* (unreported, 29 January 2008)
- *R v Doncaster Justices ex parte Christison and Jack* (1999) 164 JP 52

Legislation:

- *Bankruptcy Act 1988*, s87(6)
- *Constitution of Ireland*, articles 34, 40.3.1 and 40.4.1
- *District Court Rules 1997*, order 53, rule 8(5)
- *Enforcement of Court Orders Acts 1926-1940*
- *European Convention on Human Rights*, article 1 of protocol 4
- *European Convention on Human Rights Act 2003*, s5
- *International Covenant on Civil and Political Rights*, article 11

Looking to the future

The implications of Laffoy J's decision are at once both obvious and momentous. Now that section 6 has been declared unconstitutional, there is a serious 'gap' in the procedures usually followed in the District Court to enforce the payment of debts. Although a creditor may still obtain an instalment order against a debtor, in many cases that order will be virtually ineffective, as there is no way of ensuring that the debtor will abide by it. In light of the *McCann* decision, as well as the continuing economic slump, the pressure on the government to come up with a solution to this problem is likely to increase.

There are a number of options open to it in that regard. In the first instance, it seems that (having particular regard to that part of the *McCann* decision that relates to the right to liberty) the government should introduce a new system whereby those who refuse to pay fines or debts will, over a period of time, have a specified amount deducted directly from their wages or social welfare payments. Any other measure would simply fail the proportionality test, as it would impair the right to liberty more than "as little as possible". The government already has access to the blueprints for such an approach, as Fine Gael proposed the *Enforcement of Court Orders Bill* for precisely this purpose in 2004.

On the other hand, the government could reintroduce the possibility of imprisonment against debtors who are guilty of wilful refusal or culpable neglect (a course of action that is not closed off to it by Laffoy J's decision), provided the debtor is brought before the court before the committal warrant issues. This could perhaps be achieved through the introduction of an order 46B type procedure. However, in such circumstances, the creditor would have to bear the burden of proving the existence of wilful refusal/culpable neglect and it also seems that some form of legal aid scheme would have to be introduced for such cases. Although it remains to be seen what approach the government will adopt, one thing is certain: time is of the essence in this area, and whatever solution is adopted will have to be implemented quickly. G

Genevieve Coonan is a Dublin-based barrister.

Nought to

In January, the Motor Insurers' Bureau of Ireland introduced a new agreement, completely out of the blue. Having finally recovered from the shock, Stuart Gilhooly explores the changes

MAIN POINTS

- New MIBI agreement
- Conditions precedent to liability
- Summary of changes

It was all going too well. Declan O'Brien had put PIAB to the sword, who in turn had started to improve their own operations and, lo and behold, insurance companies were even beginning to treat claimants and their solicitors with a modicum of respect. I'd actually started to relax and had considered not writing an article for a month or so.

Then, like a little Jaws rising from the depths (ok, slightly over-dramatic), the new MIBI agreement lands on my desk. The thing is, it's March when this happens, and the agreement has been in being since 30 January. No advance warning, no subsequent notice, no nothing. A straw poll of colleagues at a litigation seminar in late March revealed that less than 5% of them were aware of its existence.

Par for the Corsa

Why does this matter? Well, this new agreement, like its predecessors, is an important document because it provides the framework for victims of uninsured and untraced motorists to receive compensation for injuries and material damage. Without it, they are whistling in the dark. The problem is that it contains a large amount of detail and many conditions precedent to liability. And if you don't comply with the conditions or are not familiar with the rest of the document, the claimant may lose the right to compensation and/or a solicitor may get sued.

To add insult to injury, not only was the Law Society and every other stakeholder of which I'm aware ignored, the agreement looks like it was drafted on the back of an envelope. It really is a strange piece of work. Along with what look like 'cut and paste' additions, it also contains strange syntax and an utterly bizarre addition that I'll deal with later.

Having got all of that off my chest, I can now summarise the changes.

In order to update the agreement to include reference to the *Campbell* decision in the Supreme Court, it finally expressly allows for the MIBI to be named as a respondent in a PIAB application (paragraph 2.2 and 2.4).

sixty

It also officially allows proceedings to be issued where an authorisation (or 'release', as it is rather strangely called by the agreement) is provided. The Supreme Court had affirmed the 2005 High Court decision of Mr Justice Finnegan that all MIBI claims must first go to PIAB before proceedings could be issued (in other words, treated in the same manner as all other personal injury claims). This is merely a housekeeping exercise and changes nothing in practice.

Keep your Focus

The restriction on notification in respect of property damage has been removed (paragraph 3.1). Previous agreements had made notification of property damage within one year a condition precedent to liability.

It now appears that all claims must be merely notified within the time limit prescribed in the *Statute of Limitations* either by registered post or electronically, as specified by the MIBI website. This presumably means that property-damage-only claims may have a six-year notification period. All injury claims must, of course, be notified within two years.

Of greater significance is the requirement for the claimant to make himself available for interview following application to the Injuries Board in untraced motorist cases (paragraph 3.3). This provision already existed in general terms in the 2004 agreement, but it now specifically states that a claimant must make himself available within 30 days of the application to the Injuries Board in order to allow a decision to be made by the MIBI as to whether to consent within the statutory 90-day period as set down by the *PIAB Act 2003*. As this is a condition precedent to liability, it is very important that claimants make their availability known within this time period.

Civic duty

Paragraph 3.6 is a relatively minor change, but it can't be ignored. It extends the time period for notification following the initial demand for insurance particulars to three months, unless written confirmation of non-insurance is provided by the gardaí or the owner and/or user of the vehicle.

In paragraph 3.8, a small but totally unclear change appears to add that a requirement for notice of proceedings or application to the Injuries Board must

also be sent to the owner and/or user of a traced vehicle before such proceedings or application. Of more consequence is that the requirement to provide notice to the MIBI or insurer of proceedings is extended to applications to the Injuries Board, and must be by registered post in all instances.

A new provision means that any dispute relating to compliance with any of the clauses in the agreement can be sent to an arbitrator to decide in the event of a dispute (paragraph 3.10.1). This appears to replace the previous provision, which gave such authority to the minister. Now, the minister has such authority only on an appeal from a decision of the appointed arbitrator.

The obligation upon the MIBI to satisfy judgments not already satisfied extends to Injuries Board orders to pay (paragraph 4.1). In addition, a new provision states that they must satisfy any judgments pursuant to proceedings issued against the MIBI as soon as reasonably possible.

"For every MIBI case, read the agreement, comply with the relevant conditions precedent and you can't go wrong"

Swift response

The MIBI has now crystallised the time in which it will take action following a claim for compensation (paragraph 4.5). Previously, it was as soon as reasonably practicable, but it now must be done within two months, unless the insurance company or its claims representative has done so before that.

Paragraph 5.1 contains a fairly nebulous change. It appears to arise from the decision of the High Court in *Farrell v Whitty* and effectively waters down the knowledge requirement when travelling in a stolen vehicle. Previously, the requirement was that a claim against the MIBI could not succeed where the claimant was a person who stole the vehicle or was in collusion with the person who stole the vehicle or knew it was stolen. Now, it merely rules out a claimant who voluntarily entered the vehicle and where it could be proven by the MIBI they knew it was stolen.

Paragraph 5.2 has a change that is less subtle and more important. Before, a claimant entering an uninsured vehicle, which itself caused the injury, would not have been compensated where the claimant knew, or ought reasonably to have known, that there was no policy in place. The new section now requires the claimant to prove that they actually knew that there was none in place. This is clearly a much higher onus of proof.

Lost in Transit

Paragraph 5.3 has been completely removed. It originally said that a claim could not be made where the claimant was the driver or passenger in an uninsured vehicle, even if that vehicle was not responsible for the accident – that is, if one uninsured vehicle claimed against an uninsured wrongdoer, the failure to have insurance on the part of the vehicle not at fault for the accident would be fatal to the claim. The original provision was clearly contrary to the European directive from which it derived, and several cases had been taken or threatened in relation to this issue. The result is complete omission of the section, which is a welcome development.

Paragraph 7.1 really has come from left field. I'm sure whoever came up with this idea had a very good reason, but it's certainly not obvious to me. Previously, the MIBI would not pay for property damage caused by an untraced vehicle in any circumstances. It will now pay for it if the damage exceeds €500 and, somewhat bizarrely, compensation has also been paid for "substantial personal injuries" involving a hospital stay of five days or more – so if a claimant wants car damage in future, he better not be discharged from hospital on the fourth day!

In all previous agreements, different excesses applied to property damage depending on whether the offending vehicle was uninsured or stolen (paragraph 7.3 and 7.4). This distinction is now gone, and the excess is €220 in both instances. Any PIAB award is subject to this excess, so it can be deducted from the award if not already done by PIAB.

Reaching Accord

If you practise in this area, it really is essential to read the agreement in full. The MIBI has recently begun to focus much more closely on the conditions precedent to liability in seeking to defend proceedings and they are often seen pleaded in defences. While the number of cases that have fallen due to these pleas remain few, it is inevitable that some High Court judge will dismiss a case on a MIBI agreement technicality, which will leave you with a very long and nervous wait for a Supreme Court judgment that may or may not save your bacon. The lesson is, for every MIBI case, read the agreement, comply with the relevant conditions precedent and you can't go wrong. Oh, and don't leave hospital too early! G

Stuart Gilhooly is the chairman of the Law Society's Litigation Committee.

Callan Tansey celebrates paper anniversary

Over 100 people attended Callan Tansey Solicitors' first anniversary party in the Glasshouse Hotel, Sligo on 22 May – one year after the merger of CE Callan & Company of Boyle, Co Roscommon, with Damien Tansey & Associates of Sligo. Commenting on the challenge of the past year, managing partner, Christopher Callan said: "The merger provided us with the opportunity to create new structures for the firm that would ensure flexibility and responsiveness to client and market issues. This allowed us to allocate the right resources to, and build on the strengths of, the new firm, especially in key areas of litigation.

PIC: JAMES CONNOLLY/PICSELL8

Damian Tansey and Christopher Callan of Callan Tansey Solicitors celebrating the merged firm's first anniverary

"It has certainly been a challenging and exciting year for everyone and we are grateful to have exceeded even our own expectations. This has been thanks to exceptional teamwork, partner leadership and a terrific contribution from our three new partners."

Callan Tansey is now the largest law firm in Connacht, employing 55 people in its offices in Boyle and Sligo.

Legal experience for legal studies students

In May, Waterford Law Society teamed up with the Waterford Institute of Technology's legal department to provide a work experience programme for the students in the Institute's Legal Studies and Criminal Justice courses. Under the programme, students were placed with solicitors firms in Waterford City to give them an opportunity to see the internal workings of a legal practice and the everyday realities of being a solicitor. It is hoped that this initiative will give the students a practical grounding in the nature of legal practice, should they choose to pursue a career in the legal profession. The initiative was the brainchild of Jennifer Kavanagh, law lecturer at WIT.

Celebrating the legal work experience programme at WIT are *(front, l to r)*: Agnes Slye, Dr John Ennis (head of School of Humanities, WIT), Bernadette Cahill (president, Waterford Law Society), Claire Cogley and Jennifer Kavanagh (law lecturer, WIT). *(Middle, l to r)*: Jack Purcell (chief clerk, Waterford District Court), Niamh Carroll, Lisa Maher, Aoife Dunne, Steven Jacob and Gerard Kelleher. *(Back l to r)*: Rosa Eivers (Dobbyn & McCoy Solicitors), Gillian Sweeney and Jill Walsh (Nolan Farrell & Goff Solicitors)

Sean Twomey named new managing partner at Eugene F Collins

Sean Twomey has been named the new managing partner of Eugene F Collins Solicitors, effective 1 May 2009. Sean was previously head of the firm's property department. He replaces David Cantrell, who completed three three-year terms as managing partner. David will continue with Eugene F Collins as a partner in the litigation department. Sean graduated from UCD in 1987 with a BA in pure economics. In 1990, he became an apprentice solicitor with George D Fottrell & Sons and qualified in 1993.

Daragh Bohan appointed partner at Mason Hayes & Curran

Mason Hayes & Curran has appointed Daragh Bohan as a partner in its financial services department. Prior to joining the firm, Daragh worked as a senior partner in the financial services section of another large Dublin corporate law firm. He has acted for large domestic and international banks and other financial services organisations in providing legal and regulatory advice on major transactions. He has substantial experience in public/private partnership financing and in debt capital markets work.

Newly qualified solicitors at the presentation of their parchments on 20 November 2008

President of the High Court Mr Justice Richard Johnson, President of the Law Society John D Shaw, Chief Executive of the Courts Service PJ Fitzpatrick and Director General of the Law Society Ken Murphy were guests of honour at the 20 November 2008 parchment ceremony for newly qualified solicitors: Patrick Ambrose, John Barry, Joanna Beausang, Ailbhe Burke, Emmet Butler, Suzanne Cleary, Naomi Clohisey, Elaine Connolly, Garrett Cormican, Eimear Coughlan, Marie Darcy, Robin Donagh, Peter Downey, Emer Doyle, Brian Dunleavy, Ronan Dunne, Jennifer Fitzgibbon, Eamonn Freyne, Brian Gallagher, Damien Glancy, Barbara Gubbins, Nicola Heskin, Rachel Hickey, Cheryl Irwin, Deborah Kearney, Catherine Kelly, Niamh Kennedy, Stephen Keogh, Derek Lawlor, Philip Lea, Niamh Lomasney, Joanna Long, Bernadette Lydon, Eithne Lynch, Deirdre McCarthy, Meadhbh McClean, Oonagh McCormack, Stephen McGuinness, Rory McPhilips, Michael Moriarty, Emer Mulry, Susan Murphy, Eamonn Murray, Aoife Nagle, Áine Ní Chualáin, Mairéad Ní Laoire, Éamonn Ó Cuív, Jacqueline O'Farrell, Catherine O'Grady, John O'Shea, Robert Owens, Lorraine Power, Ramona Quinn, Paul Scullion, Enda Treacy, Anna Van Buehren, Orla Veale-Martin, Robert Walls, Caroline Williams and Paul Wymes

Newly qualified solicitors at the presentation of their parchments on 11 December 2008

Mr Justice Brian McGovern of the High Court, President of the Law Society John D Shaw, Charles Flanagan TD and Director General of the Law Society Ken Murphy were guests of honour at the 11 December 2008 parchment ceremony for newly qualified solicitors: Stephen Coppinger, Sharon Cunningham, Kadija Duiri, Raymond Fitzpatrick, Elaine Gallagher, Grainne Gleeson, Anne Marie Guinan, Robert Haniver, Brian Hunt, Paul Johnson, Tadgh Kelly, Eimear Kenny, Markus Ludwig, Aoife Manning, Helen Martin, Aoife McCann, Sarah McDaid, Susan McHale, Niamh McKenna, Brian Moloney, Doireann Ni Riain, Patrick Nyhan, Amelia O'Beirne, Cillín O'Connell, Ronan O'Grady, Barbara O'Neill, Hannah O'Neill, Patricia Quigley, Andrew Sheridan, Amy Shorten and Paraic Walsh

Newly qualified solicitors at the presentation of their parchments on 26 February 2009

President of the High Court Mr Justice Richard Johnson, President of the Law Society John D Shaw, Attorney General Paul Gallagher and Director General of the Law Society Ken Murphy were guests of honour at the 26 February 2009 parchment ceremony for newly qualified solicitors: Maire Barr, Olwyn Beatty, Robert Boyle, Eoin Brady, Kate Campbell, Pamela Campion, Barry Carolan, Lorraine Clarke, Orla Cleary, Siobhan Corbett, Michelle Corcoran, Sean Cryan, Ciara Daly, Avene Dempsey, Tina Dolan, Catherine Dowling, Neil Dunne, Peter Feeney, Lucia Fernandes, Mary Fitzgerald, Gemma Fox, Diana Geraghty, Maria Gleeson, Fionnuala Grace, Naomi Harty, Edel Haughton, Orlaith Higgins, Eadaoin Hinchey, Catherine Hyland, Fiona Kearns, John Keogh, Donna Kerrigan, Helen Lyster, Deirdre MacNamara, Ciara Maguire, Eimear Maguire, Patrick McDermott, Louise McDonnell, Audrey McGinley, Aoiffe Moran, Gary Mulchrone, Niamh Murray, Elaine Murtagh, Andrew Nagle, Shane Neville, Jean Ann Norton, David O'Connor, Ide O'Neill, Wynter O'Shea, Juliana Quaney, Alison Quinn, Hazel Ruane, George Ryan, Gabrielle Samuel, Margaret Smith, Lorraine Stephens, Frank Sugrue, Alice Tennyson, Aoife Tuite and Tara Woulfe

Newly qualified solicitors at the presentation of their parchments on 12 March 2009

President of the High Court Mr Justice Richard Johnson, President of the Law Society John D Shaw, Labour Party spokesperson on justice, equality and law reform Pat Rabbitte, and Director General of the Law Society Ken Murphy were guests of honour at the 12 March 2009 parchment ceremony for newly qualified solicitors: Angela Bradley, Jennifer Brett, Mary Byrne, Karina Carty, Collete Cassidy, Caroline Connolly, Evelyn Doherty, Jimelle Gallagher, Niall Geaney, Kara Groarke, Amanda Guinan, Rory Higgins, Clair Jones, Gerard Kelleher, Yvonne C Kelly, Johanna Kennedy, Cliona Kenny, Shane MacNamara, Avril Mangan, Bernard Mannering, Rebecca Matthews, Neil McCole, Anne McGarry, Ann McGilly, Claire Miller, Alan Mullin, Aideen Neylon, Barry O'Donoghue, Aisling O'Sullivan, Claire Anne Phelan, Claire Phelan, Patrick Quinn, Maureen Synnott and Paul Tynan

Newly qualified solicitors at the presentation of their parchments on 16 April 2009

President of the High Court Mr Justice Richard Johnson, President of the Law Society John D Shaw, Mark Kelly (Director, Irish Council for Civil Liberties) and Director General of the Law Society Ken Murphy were guests of honour at the 16 April 2009 parchment ceremony for newly qualified solicitors: Matthew Austin, Caroline Berrills, Eilish Bradshaw, Niamh Carragher, Sinead Carrigy, John Dallas, Elaine De Courcey, Niamh Dennehy, Lana Doherty, Patrick Dore, Marian Fogarty, Patrick Gaffney, Elaine Grills, Jennifer Henry, Jessica Hickey, Stacey Hogan, Marcella Kilbane, Susan Lannigan, Tanya Layng, Emer Lyons, Jane McCarthy, Naomh MacManus, Niamh Matthews, Gillian Morrow, Carol Moxham Wynne, Paul Naughton, Sinead Nea, Una O'Brien, Mary O'Connell, Colm O'Connor, Kieran O'Donovan, Sarah O'Dowd, Noelle O'Dwyer, Margaret O'Flaherty, Emmet O'Gorman, Frances O'Rourke, Colm O'Shaughnessy, Karen Outram, Vivienne Perry, Christina Reilly, Noel Reilly, Mary Anne Scanlon, Linda Scanlon, Kathleen Sweeney, Martin Travers and Olivia Treanor

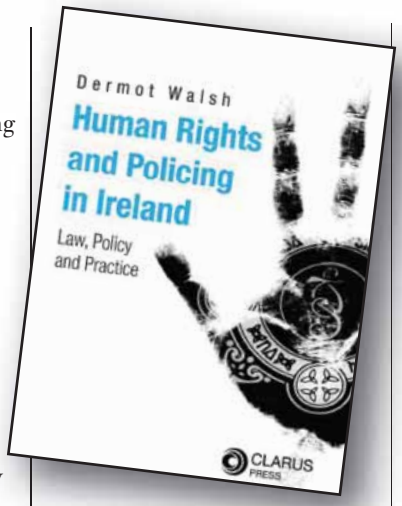
books

Human Rights and Policing in Ireland: Law, Policy and Practice

Dermot PJ Walsh. Clarus Press (2009), Griffith Campus, South Circular Road, Dublin 8. ISBN: 978-1-905536-23-8 (HB); 978-1-905536-20-7 (PB). Price: €185 (HB); €99 (PB).

"We cannot emphasise too strongly that human rights are not an impediment to effective policing but, on the contrary, vital to its achievement." So said the *Patten Report*, which led to the transformation of policing in Northern Ireland and has become a blueprint for police reform in many countries.

By that yardstick, Professor Dermot Walsh's new book *Human Rights and Policing in Ireland* is both timely and vitally important.



A series of devastating reports over the last five years has told an extraordinary tale of dishonesty, ill-treatment of suspects, fabrication of evidence, mismanagement, and institutional racism by some members of An Garda Síochána (the *Morris Reports* into events in Donegal, the *Barr Report* into the shooting of John Carthy, the Supreme Court judgment in the case of Frank Shortt and the *Ionann Human Rights Audit Report* of An Garda Síochána).

While the majority of gardaí try to do a difficult job to the best of their ability, major changes were and are needed to root out bad practices and make the Garda Síochána a human-rights compliant service. Against this background, Professor Dermot Walsh has written a monumental study of where the Garda Síochána stands today.

In the first section of the book, he looks at the human rights standards that should govern policing and to which the state is already committed, drawing on the Constitution, the *European Convention on Human Rights* and UN human rights standards.

The second section examines how these standards have been observed in practice in areas like arrest, interrogation, stop and search, and public order. In the course of this survey, Professor Walsh provides a masterly overview of domestic, British and European case law and reports, which will be invaluable to practitioners.

His assessment of garda practice over the years is not encouraging. And he makes the point that more powers and more discretion are nowadays being given to gardaí without the need for court sanction – to issue search warrants, fixed-penalty notices and behaviour orders for antisocial behaviour, to extend detention for questioning, and possibly to give opinion evidence that someone is a member of a criminal gang. In these circumstances, he argues that it is more than ever necessary for a culture of respect for human rights to infuse garda practice and for effective sanctions to be in place when human rights are breached.

Reforms have been introduced in the wake of the recent reports and the final section of the book assesses these measures – the *Garda Síochána Act 2005* and the establishment of the Garda Ombudsman and Inspectorate and a Strategic Human Rights Advisory Committee. While Professor Walsh welcomes these measures and credits the ombudsman and inspectorate in particular with making significant changes, he cautions against a tendency to measure progress by the number of working groups established rather than actual changes on the ground.

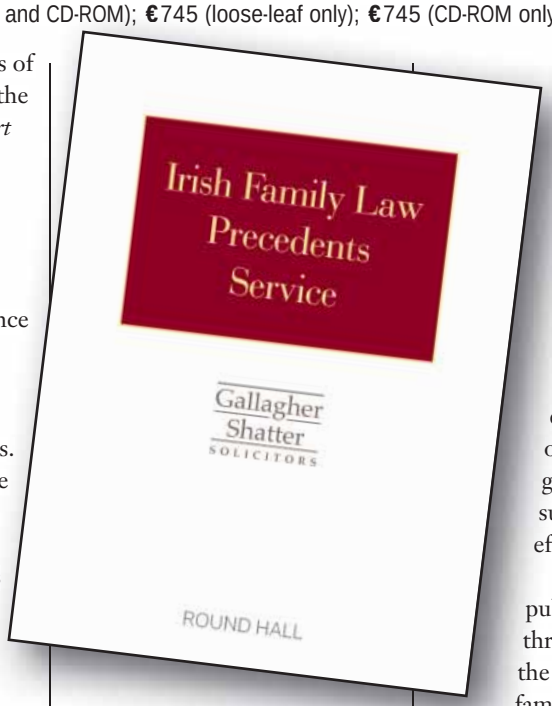
Overall, his verdict would seem to be: some good work done, a lot more to do.

This is a book that every practitioner who has dealings with the gardaí, every member of the gardaí, and everybody interested in good policing in a democratic society should have on their desks – and consult regularly! G

Michael Farrell is the senior solicitor with Free Legal Advice Centres and a member of the Irish Human Rights Commission and the Law Society Human Rights Committee.

Irish Family Law Precedents Service

Ciara Matthews, Gallagher Shatter Solicitors. Round Hall (2009), 43 Fitzwilliam Place, Dublin 2. ISBN: 978-1-85800-516-4 (loose-leaf); 978-1-85800-517-1 (loose-leaf and CD). Price: €1,240.40 (loose-leaf and CD-ROM); €745 (loose-leaf only); €745 (CD-ROM only).



Irish Family Law Precedents Service, prepared by Ciara Matthews and leading family law firm Gallagher Shatter, provides an invaluable resource to family law practitioners in Ireland. This manual, which is divided into three parts, is clearly comprehensive as to breadth. It identifies practically every issue and contingency that can arise in a family law context.

The comprehensive nature of this work is reflected in the fact that it not only includes pleadings applicable to divorce and judicial separation proceedings, but also contains a treasure trove of draft agreements and related documents. Moreover, part 1 of the service contains 163 documents of precedent correspondence, ranging from letters to clients, to a client's spouse or partner or various third parties.

Irish Family Law Precedents Service provides a comprehensive set of proceedings for family law actions. The applicable rules are provided where necessary and an explanation of the purpose of the document. This product will ensure a faster turnaround of documents in family law cases.

There are three types of documents and all scenarios are covered under each of the following headings:

- Correspondence,
- Agreements and related documents, and
- Pleadings.

The templates provided mean that you can avoid dictating the same letter or drafting the same document over and over again. Detailed direction on how each document should be used is provided, and when and how to serve it. This loose-leaf publication also offers a series of useful appendices, including the *High Court Rules*, *Circuit Court Rules* and practice directions.

This work provides substantial annotation and guidance notes. In fact, each precedent is supported by detailed notes offering guidance on identifying the correct document. The notes also advise on alternative avenues to deal with specific situations. They are both comprehensive and nuanced, ably demonstrating the various advantages and shortcomings of each approach. For example, the section dealing with divorce proceedings contains a comprehensive discussion on the grounds for divorce and precedents for the variety of orders that can be pleaded in a divorce case. This work also contains useful guidance on the fraught issue of discovery.

Detailed commentary and precedent documentation are included on parenting agreements for both the marital and non-marital family. It also makes reference to the recognition of foreign maintenance orders. The law in this area will change from 18 June 2011. Article 76 of Council Regulation (EC) no 4/2009 provides that the 2007 *Hague Protocol* will apply from that date.

Irish Family Law Precedents Service is available in both loose-leaf format and electronically. That said, the electronic version is a must for the busy family law practitioner, in that it saves you time, as you can search for a particular document, download it on to your PC and amend as required.

A notable feature of this product is the fact that it will be updated annually, adding new precedents to take account of relevant legislative developments. Given the imminent publication of civil partnership legislation and the recent publication of the *Adoption Bill 2009*, this is a welcome development.

Ciara Matthews, in the preface to this work, makes reference to the fact that future updates will include comprehensive coverage of the recognition of foreign divorces. This is very much to be welcomed, given the different jurisdictional rules applying in the context of international divorce proceedings.

Commentary in this area will be most welcome in light of the new requirements for effective service under Regulation (EC) no 193/2007. It is important to comply with the new service regulation, as defective service may cost an applicant his or her jurisdictional advantage. For example, if the enforcing court requires it, a translation of documents must be furnished. Practitioners have little margin for error in relation to service requirements.

Irish Family Law Precedents Service will also assist in managing your family law files. In addition to suggesting effective strategies, one also receives guidance as to how such strategies can be effectively managed.

In summary, this publication walks you through, 'step by step', the preparation of family law documents. It is an excellent product, indispensable to all involved with or connected with family law. It provides a detailed and comprehensive precedent library for the family law practitioner. This loose-leaf also gives, with admirable clarity, expert guidance on the complex issues that family law practitioners now face.

Irish Family Law Precedents Service is a major contribution to family law and is a work that no solicitor, barrister and judge should be without. The author, Gallagher Shatter Solicitors and the publishers are to be congratulated on their achievement. G

Geoffrey Shannon is the Law Society's deputy director of education.

(To celebrate the launch of this new *Irish Family Law Precedents Service*, solicitors can avail of a special introductory offer. Save 30% on the list price. Contact the publisher (Round Hall) directly on 01 662 5301 for more details.)

council report

Law Society Council meeting, 3 April 2009

Motion: regulations on secured loan transactions

'That this Council approves the Solicitors (Professional Practice, Conduct and Discipline – Secured Loan Transactions) Regulations 2009.'

Proposed: John O'Connor

Seconded: John P Shaw

The Council considered the latest draft of the proposed regulations and noted that, in principle, the vast majority of those colleagues who had ngaged in the consultation process had recognised that regulations in relation to secured loan transactions were required. A proposal that the regulations should provide for a consent provision, which would permit solicitors to give undertakings on their own behalf where the consent of the financial institution had been obtained, was outlined. In addition, submissions on the definition of 'beneficial interest', the definition of 'undertaking', the definition of 'connected person' and the definition of 'partner' were considered. The motion was adjourned for further discussion at the Council meeting on 22 May.

Reduction in legal fees

The Council noted the provisions of section 10 of the *Financial Emergency Measures in the Public Interest Act 2009*, which would result in an 8% reduction in fees for legal services paid by the state. It was noted that, at a recent meeting with the Department of Justice, Equality and Law Reform, representations in relation to the long-standing issue of criminal legal aid fees had been made. While the department had indicated that it did not intend to reverse the decision in relation to a reduction in criminal legal aid fees, they had given a commitment to seek to eliminate delays in payments.

Recruitment of career development advisor

The director general reported that 78 applications for the position of career development advisor had been received and ten applicants had been interviewed, with a shortlist of four being invited for second interview. It was hoped that the preferred candidate would commence with the Society on 5 May 2009.

Moot court competition

The Council extended congratulations to a team of students from the Law Society who had won the International Environmental Moot Court Competition in Florida, USA. In addition to winning the overall prize, the Society had also won the best speaker award, the third-best speaker award and second place for their written submission. The final 16 teams had been chosen from a total of 80 global teams who had participated in earlier regional rounds. This was the most prestigious moot court honour ever won by students of the Law Society.

Legal Services Ombudsman Bill 2008

The Council noted that President McAleese had signed the bill into law on 10 March 2009.

Calcutta Run

The president encouraged all Council members to attend or to support the Calcutta Run, which would be held on 16 May. G

practice notes

ADVISING A MENTALLY DISORDERED CLIENT

The passage of the *Criminal Law (Insanity) Act 2006* represented a significant modernising of the law relating to mentally disordered offenders. As a consequence, there is an increased awareness of such persons within the criminal justice system and increased reliance on the thinking contained within the act, although obviously only certain parts of the act came as completely novel concepts.

Perhaps surprisingly, the passage of the act – a major legislative development – was not accompanied by any significant proposals for updating the awareness and training of the most directly affected professionals, in particular, in this context, gardaí and legal advisors. While concepts such as 'diminished responsibility' and 'insanity' form part of the trial process, the question of mental disorder and similar disabilities has, in fact, monumental significance at a much earlier stage of the criminal justice process. The purpose of this article is to seek to give some guidance to solicitors as to how best to deal with these issues when they arise early in the process.

Statistically, it is an undeniable truth that the incidence of mental illness/disorder is higher in the prison population (and in particular in the remand population) than in the population as a whole, indeed significantly higher. Accordingly, for reasons both of legality and humanity, it is axiomatic that the earlier that mental illness or disorder, as a significant factor in an offender or offence, is identified, the better.

The likely first point of contact between a solicitor and such a client is at the garda station. In broad terms, such clients will be at the garda station for one of three purposes. Firstly, they will be en route to a hospital through civil process (under the terms of the *Mental Health Act 2001*), which is not a major concern for the purposes of this guidance. Secondly, very much our responsibility, they may be on their way to court. Thirdly, and this is of very substantial concern, they may have been arrested and detained for an investigative process (usually interview under caution) in respect of some relatively serious offence.

Although regulations made pursuant to the *Criminal Justice Act 1984* in relation to the treatment of persons in custody in garda stations make express reference to the requirement for medical treatment for detainees appearing to be suffering from a mental illness (regulation 21(1)), the detection of mental illness, or indeed many other medical conditions, risks becoming a random event. Two recent High Court cases (referred to in more detail below) make this point eloquently, referring as they do to examinations by doctors at garda stations in varying circumstances. Solicitors and gardaí lack the training even of a GP, much less the specialist training that is often required to detect mental disorder. That being said, it is incumbent on solicitors at least to have an outline game plan in mind for the eventuality when they attend at a garda station to deal with a client who appears to be mentally unwell. In this regard, it might be noted that all of the common law jurisdictions that the committee has looked at in the course of the preparation of this guidance acknowledge the vulnerability of mentally disordered suspects and the desirability of medical intervention and the presence of an independent third party (variously identified and described) during questioning. It should be noted that the committee does not recommend that a solicitor act as that third party, as the purpose of attendance at the garda station is to offer legal advice, as opposed to social-work-type support.

The fundamental problem, of course, is recognition of illness. All practising solicitors will have seen at one time or another relatively disturbed people in custody whose illness has either gone unnoticed or unacknowledged by the gardaí, through, no doubt, benign oversight. On the other hand, some clients will be well known to their advisors as mental health sufferers, and the only issue will be whether or not the illness is active at the time in question.

Bearing in mind their lack of formal training in medicine, solicitors should be alert to symptoms exhibited in thought, speech or action of the detained person. If concerns arise, instructions should be taken from the detainee as to whether they are currently under medical care or on medication. It is perhaps advisable to be as diplomatic as possible in this questioning, as many such detainees are not anxious that their disability comes either to the attention of their advisor or indeed the gardaí.

Having said that, the committee believes that if a solicitor is concerned about the mental health of a detainee, they should so advise the detainee and recommend that the client instruct them to alert the gardaí and seek medical intervention. Guidance from the Law Society of England and Wales suggests that, in certain extreme cases, if the solicitor is strongly of the view that the police should be advised about the position and the client refuses to consent to it, the solicitor should consider withdrawing from the case for a possible conflict of interest. The client should be advised that it is not proposed to discuss the *case* with the gardaí, merely their state of health. The obligation will then be on the gardaí to organise a medical examination.

The client should be advised that, if they are to be examined by a medical practitioner, they should not discuss the reason for their current detention, but merely the state of their health. Case law throughout the common law world suggests that admissions made to a doctor during such an examination might be admissible in evidence against the client. For that reason, it might be useful for the solicitor to be present during any medical consultation, to ensure that the history/examination by the doctor is confined to a 'mental state' examination, rather than intruding upon the alleged or suspected offence. Similarly, if a third-party adult is brought in by the gardaí to assist the detainee, the client should be likewise advised.

Two recent High Court cases are of interest here. In *Z v Khattak & Another* ([2008] IEHC 262), Peart J endorsed, less than overwhelmingly, the quality of a 'mental state examination' carried out at the garda station by a GP. In *C v St Brigid's Hospital* ([2009] IEHC 100), Dunne J reviewed events where a solicitor had requested a psychiatric examination of a section 4 detainee. Nei-

ther of the cases touches directly on the material that is the subject matter of this article, but the High Court in the *C* case endorsed the solicitor's "genuine and proper concerns" in relation to his client, which had resulted in his removal to a psychiatric hospital from the garda station.

It is essential, for a number of reasons, that careful records be kept. In particular, if the gardaí are requested, and decline, to secure a medical examination or treatment for the client, that must be noted. Further down the line, as is now well established, the possibility exists that an issue at trial of contentious exchanges during the detention phase will fall to be ruled upon. That being so, it is incumbent upon the solicitor, not only for the sake of the client, but also for him/herself, to have a clear, accurate, dated and timed, contemporaneous record of events at the garda station.

The complexity of the role of the solicitor is highlighted by having firstly to identify (at least as a suspicion) a relevant illness or disorder; secondly, to react appropriately; thirdly, to advise the client appropriately; and fourthly, at all times, to bear in mind the short, medium, and long-term aims for the best outcome for the client. Consequently, a clear understanding of one's role, obligations and duties is essential. A solicitor in this situation is there only for the client, and to assist them in what may very well be a difficult and stressful time. Maintaining that stance may be difficult in the teeth of many conflicting and varied imperatives, but often in such a pressurised situation, the only source of solid support available to the client is their legal advisor.

It is worthy of mention at this stage that only in the rarest of cases is the personal safety of the solicitor likely to be at issue. The incidence of likely violence in the mentally unwell population is, statistically, no greater than that in the population as a whole. However, prudence should dictate that, in certain circumstances, the solicitor should ask the gardaí to have sight of the consultation, but of course be out of hearing. Under no circumstances, and this is probably true as a general proposition, should a solicitor be locked in a room with a potentially unpredictable detainee, for perfectly obvious reasons.

The aspirational document *Vision for Change – 2006*, which set out a programme for mental health services nationally, proposed that every person with mental illness coming into the criminal justice system should have access to the mental health care system in a civil setting. Quite clearly, this does not happen. Resources are a significant problem, and indeed the legal provisions at present are wholly inadequate. For example, when a case gets to court, there is no power, such as exists in England and Wales under the *Mental Health Act 1983*, to remand an accused to hospital for a "report on his mental condition". This is not the same as the 'fitness to be tried' provisions contained in section 4 of our 2006 act. It is in fact a much wider power, and, depending on the report, current prosecution guidelines for the DPP and police forces of England and Wales suggest that the results of the report might have a significant input into whether the prosecution continues, depending, of course, on the gravity of the offence.

The nearest this jurisdiction has got to such a situation is an *ad hoc* scheme founded (and funded) by the Central Mental Hospital (CMH) at Cloverhill Prison, where a finding by medical staff there (on secondment from the CMH) of the combination of 'major illness and minor offence' will frequently result in the discontinuance of the prosecution and the placement of the accused within the civil mental health services, as indeed was the aspiration in *A Vision for Change*. For all that, practitioners should recognise that a remand in custody, ostensibly for reasons of mental ill health, signifies, at least *prima facie*, a committal to the prison system – an outcome that will have only by chance a beneficial result for the client, and which accordingly should be, subject of course to instructions, resisted.

It should be noted that, in this jurisdiction, with the exception of the 'fitness' provisions referred to above, there are no specific provisions in the bail law relating to allegedly mentally disordered offenders. Accordingly, objections to bail can only be sustained on the basis of ordinary *O'Callaghan/Bail Act* principles. Subject, of course, to instructions, any application to "remand in custody for a psychiatric assessment" is without merit, although some distressed clients might be content to consent to such an application. Really, from that point on, ordinary principles of criminal litigation experience apply.

The critical factor in all of this is that the interests of the client are paramount. In only a tiny minority of cases is a solicitor entitled to withdraw from the case, not to follow instructions, or to divulge instructions. That minority of cases relate primarily to highly disturbed people who pose a threat of serious physical harm or worse to themselves or third parties. There is a useful discussion of the principles in the famous *Tarasoff* case (*Tarasoff v University of California* [1976 17 Cal 3d 425]). Although that case refers to the duty/entitlement of a therapist to disclose alleged threats to a third party, the committee is satisfied that such an entitlement, which is unlikely to arise in the lifetime of a practising solicitor, is fully endorsed by the Law Society. A further issue that might occasionally arise is where a client expresses suicidal ideas or intent. Suicide is not, of course, a crime, and this situation opens up a minefield of ethical considerations. Clearly, any such person should ideally be the subject of an early psychiatric referral. In the event that the client declines, the solicitor is, in the view of the committee, entitled – but not obliged – to withdraw from the case.

However, outside of the extraordinary and exceptional category of cases, the mentally disordered client is to be treated by a solicitor without any dilution of the principles that apply to the client/solicitor relationship in the ordinary way. The sense of trauma and isolation often felt by such clients, will, additionally, require a devotion to duty that underlines the vocational nature of the work that solicitors engaged in defence practice undertake.

Criminal Law Committee
Mental Health Subcommittee

NEW VERSION OF ENDURING POWERS OF ATTORNEY PRACTICE NOTE

An incomplete draft of a practice note prepared by the subcommittee dealing with financial aspects of elder abuse was inadvertently published in the May 2009 issue of the *Gazette*. The final version is now available on the Law Society website: www.lawsociety.ie.

It can be found in the 'Practice notes' section of the members' area of the website. This final version will be published in the August/September 2009 issue of the *Gazette*.

Subcommittee on Financial Aspects of Elder Abuse, Guidance and Ethics Committee

SOLICITORS (PROFESSIONAL PRACTICE, CONDUCT AND DISCIPLINE – SECURED LOAN TRANSACTIONS) REGULATIONS 2009 (SI NO 211 OF 2009)

These regulations will come into force on 1 September 2009.

Background

The Lynn and Byrne cases have caused damage to public confidence in solicitors' undertakings, and it was considered by the Council of the Law Society that appropriate action should be taken to address legitimate public concerns in this regard and to do what can reasonably be done to restore confidence. The Council decided to introduce regulations creating a restriction on the giving of undertakings to mortgagees in secured loan transactions in which the solicitor or a person closely connected is beneficially interested.

Text of new regulations

Please refer to the members' area of the Law Society's website, www.lawsociety.ie, under 'Latest news' or 'Practice notes' for the full text of the new regulations.

Purpose of new regulations

The purpose of the regulations is to prohibit solicitors from giving undertakings to, or for the benefit of, a bank or other persons in relation to a secured loan transaction in which the solicitor or a connected person has a beneficial interest, unless the solicitor has given specified notice and the bank or other person has both acknowledged receipt of such notice and consented to the solicitor providing the undertaking.

Exceptions

The prohibition will not apply:

1) To an undertaking given prior to the coming into force of the regulations, which remains to be honoured in whole or in part after the coming into force of the regulations, or
2) To a statement of fact or declaration of intention made by a person who is a solicitor as a necessary requirement of that person's application to a bank as part of a secured loan transaction, provided that the making of such a statement or declaration would be a similar requirement for another applicant who is not a solicitor and that that person in doing so is not acting as a solicitor in the course of his or her legal practice, or
3) In respect of an undertaking given by a solicitor who is a sole principal or a partner in a firm in relation to a secured loan transaction in which another solicitor in the firm, who is not a partner, has a beneficial interest but where neither the solicitor giving the undertaking nor a connected person has a beneficial interest.

Undertaking

The introduction to the definition of 'undertaking' in the regulations tracks directly the language of 'undertaking' in paragraph 6.5.1 of the second edition of *A Guide to Professional Conduct of Solicitors in Ireland*. The specific items listed in the definition of 'undertaking' in the regulations include certain items that form part of the new certificate of title arrangements agreed between the Law Society and the Irish Banking Federation in respect of residential mortgage lending, but not all the specific items listed in the definition (for example, undertakings in relation to the execution of guarantees) are included in the new certificate of title arrangements. The last subset of the definition is a 'catch-all' to ensure that, for example, if a transaction is effected by means of a corporate structure, undertakings that a bank might seek in relation to filings to be made in the Companies Registration Office are captured.

Connected person

The definition of 'connected person' in relation to the interested solicitor covers his or her spouse or life partner or fiancée, and a sole principal or partner in the same firm.

Beneficial interest

A solicitor cannot avoid the requirements of the regulations by arranging his or her interests so that they are held through the means of a company, a partnership (or similar arrangement) or a trust. The definition of a company controlled by a solicitor for this purpose is taken from the *Companies Act 1990*. This definition is used widely as a test for ascertaining control of a company. The application of a threshold of 25% is in recognition of the fact that, in any co-ownership arrangement, an individual with an interest of less than that amount should have minimal influence or control over the affairs of the partnership and therefore minimal means of exercising undue influence on their solicitor. Co-ownership agreements customarily require 75% approval of any matter to be undertaken by that group.

Continuing obligations

Nothing in the regulations is to be construed as lessening the obligations of:

1) Solicitors to honour undertakings given by them, and
2) Banks engaged in the funding of secured loan transactions to engage in appropriate due diligence before placing reliance on undertakings.

John Elliot,
Registrar of Solicitors and
Director of Regulation

PROHIBITION ON UNSOLICITED APPROACHES TO PROSPECTIVE CLIENTS

The Complaints and Client Relations Committee reminds all colleagues that the *Solicitors (Advertising) Regulations 2002* prohibit direct unsolicited approaches to any person who is not an existing client, where such an approach is likely to bring the solicitors' profession into disrepute.

The regulations specifically provide that such unsolicited approaches may not be made "in, at, or adjacent to a garda station, prison or courthouse".

Any solicitor who approaches a person in the vicinity of a garda station, prison or courthouse with a view to obtaining instructions to provide legal services is in breach of the advertising regulations. The *Solicitors Acts* provide that a breach of any provision of the *Solicitors Acts* or regulations made thereunder constitutes professional misconduct and, consequently, any solicitor who fails to observe the provisions of the regulations is at risk of referral to the disciplinary tribunal.

Complaints and Client
Relations Committee

PROFESSIONAL INDEMNITY INSURANCE: IMPLICATIONS OF TAKING OVER AN EXISTING PRACTICE

The new professional indemnity insurance regulations (SI 617 of 2007) ('the regulations') are designed to prevent situations whereby a client's valid claims are not covered by any professional indemnity insurance cover. Provisions in the regulations relating to succeeding practices and preceding practices, discussed further below, are among the mechanisms put in place to achieve this objective. The regulations change the cover that insurers were formerly required to provide for solicitors ceasing practice and for solicitors taking over an existing practice.

This practice note explains the effect of the regulations in circumstances where there is a succession to a firm's practice. A succession can occur, among other circumstances, where one firm acquires the practice of another. The possibility of acquiring a practice often presents a very worthwhile opportunity for the acquiring firm. However, it is important for all solicitors to be aware of the impact of the regulations in such a situation and, in particular, of a firm's obligations in relation to the coverage of claims that may in the future be made against the acquired firm.

Background to recent changes

Professional indemnity insurance cover is on a 'claims made' basis. This means that the insurance policy that will meet a claim is the insurance policy that is in place when the claim is made (or the insurance policy that was in place at the time the insurer is properly notified of circumstances that may give rise to a claim), and not necessarily the insurance policy that was in place when the alleged negligence occurred. For this reason, solicitors who were proprietors of firms who were ceasing practice were previously required to continue their professional indemnity insurance cover for a period after ceasing practice. The period required by the old regulations was two years.

The old regulations were found to be inadequate in two respects. Firstly, the period of cover was too short. There was no cover for claims made after the two-year period. Secondly, the availability of cover relied on the solicitor ceasing practice arranging the necessary cover. Some solicitors did not do so. While the Law Society could, and did, take regulatory action against these solicitors, there was no means of guaranteeing that the matter would be rectified and that cover was put in place. Accordingly, there were occasions when clients who had a legitimate claim against their former solicitor could not recover because their solicitor had no means and was not insured at the time the claim was made.

The regulations provide for a scheme whereby claims made by clients of a firm that has ceased practice will be covered in situations where this might not have previously been the case. The regulations rectify this shortcoming of the previous system by:

- Requiring the insurers of the firm ceasing practice to continue insuring that firm for a prescribed period, or
- For the insurance of any succeeding practice to cover the risk.

All qualified insurers must provide fixed minimum terms and conditions as part of their policies. The regulations expand the minimum terms and conditions to include the new requirements. In cases where cover must continue, it will do so whether or not the premium is paid by the firm ceasing to practice. The payment of the premium will be a matter to be resolved by the insurer and the proprietor of the firm ceasing to practice.

Requirement for insurance to cover preceding practice and succeeding practice

Under clause 2.4 of the minimum terms and conditions, a firm's existing insurance must indemnify against civil liability to the extent that such liability arises from any provision of legal services in connection with what is defined as a preceding practice.

Under clause 2.5 of the minimum terms and conditions, where there is a succession to a firm's practice, the firm's existing insurance must indemnify against civil liability arising from any provision of legal services in connection with what is defined as a succeeding practice to the firm's practice.

In both cases, the requirement is subject to the proviso that:

a) A claim in respect of such liability is first made against the insured during the coverage period, or
b) A claim in respect of such liability is made during or after the coverage period and arises from circumstances first notified to the insurer during the coverage period.

Definitions of 'succeeding practice' and 'preceding practice'

The minimum terms and conditions provide a broad but detailed definition of 'succeeding practice'. This includes a wide variety of situations, including situations where the composition of a partnership is changing.

'Succeeding practice' means a practice that satisfies any one or more of the following conditions in relation to another practice (such other practice being a 'preceding practice' for these purposes):

a) It is held out as being a successor to the practice or part thereof of the preceding practice, by whatever means such holding out occurs, or
b) It is conducted by a partnership that has a majority of principals that are identical to those persons that were principals of any partnership that conducted the preceding practice, or
c) It is conducted by a sole practitioner who was the sole practitioner conducting the preceding practice, or
d) It is conducted by a partnership in which the sole practitioner conducting the preceding practice is a partner and where no other person has been held out as a successor to the preceding practice, or
e) It is carried on under the same name as the preceding practice or a name that substantially incorporates the name of the preceding practice, or
f) It is carried on from the same premises as the preceding practice, or
g) The partnership that, or sole practitioner who, conducts the practice has acquired the goodwill and/or assets of the preceding practice, or
h) The partnership that, or sole practitioner who, conducts the practice has assumed the liabilities of the preceding practice;

but a practice will not be treated as a succeeding practice pursuant to paragraphs (b), (c), (d), (e), (f), (g) or (h) of the definition if another practice is or was

held out by the owner of that other practice as the succeeding practice.

Scenarios in which files are transferred

There are different scenarios in which files are transferred from one practice to another practice. The following are examples:

- The firm ceasing to practice transfers all files, current and closed, and the acquiring firm assumes all liabilities.
- The firm ceasing to practice transfers current files, wills and deeds, but the acquiring firm does not assume any of the liabilities.
- The firm ceasing to practice agrees with two or more different firms that they will divide the current files.
- No firm acquires all or part of the practice. The clients choose their own new solicitors.
- A firm acquires the current files of the practice, but some or all individual clients choose a different solicitor.

Possibility of more than one firm being a succeeding practice

Depending on the precise circumstances, more than one firm can be a succeeding practice, and the destination of the files handled by a prior practice is only one of a number of factors that may need to be taken into account to identify these succeeding practices under the definition above. Paragraph (a) of the definition refers to "the practice or part thereof". In this context, 'part' may mean a recognisable part of a practice, such as all the conveyancing or litigation or probate files, or all the residential conveyancing or personal injury or debt collection or family law files, or all the files of a branch office, depending on the context and structure of the practice. However, this is not an exhaustive list.

Determination of whether a firm will be a succeeding practice

It is clear from the above that the determination of whether a firm will be a succeeding practice depends on the particular circumstances in question. While the Law Society will seek to assist firms in determining, on the particular facts provided, whether a particular firm might be considered a succeeding practice for the purposes of the regulations, it will not and cannot provide a declaration or ruling to this effect. The Law Society would also consider that it is best practice for the relevant firm to liaise with its broker and/or insurer with a view to ascertaining its views on whether the firm would be considered to be a succeeding practice and to discuss generally the impact on its professional indemnity insurance.

Insurance policy of succeeding practice must respond to claims made against preceding practice

A significant practical implication of the system introduced by the regulations is that the insurance policy of a succeeding practice will be required to respond to claims made against a practice that falls within the definition of a preceding practice, and any excess due in respect of such claims may (depending on the terms of the policy) be payable by the succeeding practice. Claims made under the succeeding practice's insurance policy may also affect the succeeding practice's claims record, with possible consequences for future premiums, as well as the succeeding practice's reputation.

Need for due diligence

The system introduced by the regulations highlights the need for firms considering the acquisition of another firm to carry out comprehensive due diligence. This is common practice in the business world and should be undertaken in any event, regardless of the effect of the regulations. An important aspect of due diligence ought to relate to the previous claims history of the practice. A properly conducted due diligence process will identify risks that can be notified to the target practice's existing insurer. The acquiring solicitor may also have the opportunity to negotiate a term of the acquisition agreement to require the acquired practice to obtain specific run-off cover for specific identified potential risks.

Possible additional premium

The insurance policy may permit the insurer to charge an additional premium in respect of coverage for a preceding practice provided pursuant to clause 2.4 and in respect of coverage for a succeeding practice provided pursuant to clause 2.5, but the insurance may not provide that the insurer can decline to indemnify the insured or cancel, terminate or avoid the insurance due to non-payment of any such additional premium when due.

Possible cancellation

The insurance of the preceding practice may be cancelled if a firm's practice is merged into a succeeding practice, provided that the succeeding practice has insurance in compliance with the minimum terms and conditions. Such cancellation may not prejudice the accrued rights and obligations of the parties as at cancellation. If such a cancellation does not take place, there may be more than one insurer liable to cover a particular claim.

Insurer liability where more than one insurance applies

In a situation where more than one qualifying insurance covers a claim or circumstance, the insurance may provide that the contribution between insurers shall be determined in accordance with the relative numbers of principals or owners of the respective constituent practices immediately prior to the relevant succession.

Liabilities for files taken over

The regulations govern the extent to which professional indemnity insurance is provided by existing insurance. The regulations do not necessarily definitively determine the underlying liability for a particular file, which may be influenced by factors other than the existence of insurance cover, such as the contractual terms that apply between the firms involved in an acquisition or merger and any representations that have been made to clients. The holding of insurance cover for a claim does not necessarily make a firm liable for the claim. The holding of insurance cover for a claim for which a firm is not liable is of benefit to the firm, since the insurance may meet the defence costs of a claim that is ultimately not upheld.

Run-off cover

The regulations provide that run-off cover is required for a firm that has ceased to carry on practice only where there is no succeeding practice. Run-off cover is provided automatically by the last insurer (with the run-off cover premium terms being set out in quotations and renewal notices for normal cover) for a firm that has ceased to carry on practice where there is no succeeding practice. The insurance policy must provide that, where there is a succeeding practice in relation to a firm's practice, run-off cover will not be activated, provided that the succeeding practice has insurance in place in compliance with the minimum terms and conditions.

In a situation where the files of a closed practice, to the extent that they are distributed, are distributed to many different firms without any of the factors in paragraphs (a) to (h) above being present, it is likely that there will be no succeeding practice and therefore that run-off cover will come into force.

A solicitor ceasing practice can always decide, or agree with an acquiring solicitor, to take out run-off cover, notwithstanding that this may not have been triggered automatically under the terms of his insurance policy.

In setting up a new firm, it should be borne in mind that, if the firm later ceases practice without there being a succeeding practice, the principal or principals of the firm will be liable to the last insurer for premium payments in respect of the whole run-off period of six years. The run-off cover must be for the first six calendar years from the date on which the firm's last coverage period expires.

Rationale for new system

The intention of the new system is to minimise the application of the run-off cover provisions and to maximise the application of the succeeding practice provisions. Run-off cover is considered to be a solution especially tending to produce problems. The insurance industry is inherently uneasy about being obliged to provide run-off cover for a prolonged period, due to the associated difficulties in assessing risk. Minimising reliance on run-off cover should tend to reduce the premiums and increase the stability of the market. In addition, run-off cover is a significant financial burden for retired solicitors, and it is to the advantage of retired solicitors to reduce reliance on run-off cover to a minimum. A system for covering ceasing practices based solely on run-off cover might well be unobtainable in the market, but even if it was, it would place a significant financial burden on all retiring solicitors without offering them any alternative option to reduce that burden.

Summary

In summary, mandatory insurance must cover claims arising from a preceding practice or a succeeding practice. Whether or not a firm is a preceding practice or a succeeding practice in relation to any other firm will depend on a detailed analysis taking account of the facts of the particular case. No generalised practical guidance can be given: each case must be individually examined with reference to paragraphs (a) to (h) of the definition of 'succeeding practice' as set out above.

Further information

Please refer to the Society's website, www.lawsociety.ie, under 'Society committees', 'Professional Indemnity Insurance' for the full text of the regulations.

Any queries relating to the regulations should be addressed to the Law Society executive responsible for professional indemnity insurance, Rosemary Fallon, tel: 01 672 4856 or email: r.fallon@lawsociety.ie.

John Elliot,
Registrar of Solicitors and
Director of Regulation

PROHIBITION ON PRACTISING AS SOLICITOR WITHOUT A PRACTISING CERTIFICATE: SOLICITORS CANNOT BE 'LEGAL EXECUTIVES' OR 'PARALEGALS'

Section 56(1) of the *Solicitors (Amendment) Act 1994* provides that no solicitor shall practise as a solicitor unless a practising certificate in respect of him or her is in force.

Section 56(2) of the *Solicitors (Amendment) Act 1994* provides that a solicitor shall be deemed to practise as a solicitor if he or she engages in the provision of legal services, whether as a sole practitioner or as a partner in a solicitor's practice, or as an employee of any solicitor or of any other person or body, or as a solicitor in the full-time service of the state.

The prohibition in section 56(1) does not apply to a solicitor in the full-time service of the state or to a solicitor who is employed to provide conveyancing services for a non-solicitor employer.

'Legal services' are services of a legal or financial nature provided by a solicitor arising from that solicitor's practice as a solicitor.

Solicitors cannot be 'legal executives' or 'paralegals'

The attention of the profession is particularly drawn to the fact that a solicitor shall be deemed to practise as a solicitor if he or she engages in the provision of legal services as an employee of any solicitor. This means that all persons who are on the Roll of Solicitors who are employed in a solicitors' firm and provide legal services are required to hold a practising certificate. In particular, it is not permissible for a firm to classify a solicitor employed by the firm as a 'legal executive' or 'paralegal', with a view to avoiding the requirement to hold a practising certificate, if the solicitor is engaged in the provision of legal services. It is professional misconduct and a criminal offence for a solicitor who does not hold a practising certificate to act as a solicitor.

Further information

Any queries relating to practising certificate requirements should be addressed to the Law Society executive responsible for practising certificates, Rosemary Fallon, at 01 672 4856 or r.fallon@lawsociety.ie.

John Elliot, Registrar of Solicitors and Director of Regulation

VIDEO LINK CONFERENCING WITH PRISONERS

The Irish Prison Service has advised that, following the success of the recent pilot videoconferencing scheme, it has been decided to launch the scheme as a permanent facility. This means that any suitably equipped legal practice anywhere in the country will be able to consult with clients in Cloverhill Prison, using videoconferencing technology. Applications to join the scheme and to obtain technical data sheets and further general information on the operation of the scheme should be addressed to: Ms Susan Kane, Estates Management, Irish Prison Service, IDA Business Park, Ballinalee Road, Longford, or by email to smkane@irishprisons.ie.

Criminal Law Committee

CERTIFICATE OF TITLE FOR FORESTRY GRANTS

The Conveyancing Committee had been in ongoing correspondence with the Legal Services Division of the Department of Agriculture and Food (and previously the Chief State Solicitor's Office) concerning the format of documentation requested by the department and to be given by solicitors on behalf of clients in relation to forestry grants obtained by clients from the department. Unfortunately, the correspondence has not resulted in any agreement. Notwithstanding this, the department has gone ahead and has produced documentation that it has put into use and that is furnished to applicants for forestry grants to be completed by their solicitors.

The committee is not satisfied with the documentation in question. Furthermore, it believes that it exposes any solicitor who signs such documentation to potential risks. It is the view of the committee that such documentation should not be signed in its present format.

Practitioners should please note:

1) The department requests an undertaking to furnish evidence of title. No such undertaking should be given. If the land is registered in the Land Registry, a copy folio should be furnished. If the land is registered in the Registry of Deeds, a copy of the last assurance to the grant recipient should be furnished. An undertaking should not be given, because it is open ended and could impose liabilities on a solicitor that cannot ever be satisfied.
2) The documentation asks the solicitor to certify that "all the lands indicated on the attached map which I have signed and stamped with boundaries marked in red are registered in folio number..." A solicitor is not qualified or competent to certify anything in relation to maps or boundaries. A solicitor can only furnish a folio or deed and certify that the applicant for the grant is one and the same person as the registered owner of the folio or the grantee in the deed.
3) The solicitor is asked to certify that the lands are not subject to turbary or grazing rights or rights of way. A solicitor is not in a position to certify that. A statutory declaration from the grant applicant can so confirm if that is the case, but it is neither proper nor prudent conveyancing practice for a solicitor to certify it. The subject matter of rights of way, grazing rights or turbary rights may be registered on and be apparent from the folio or they may appear on the Registry of Deeds title. On the other hand, they may not appear on title, but they may still exist. Establishing whether they exist or not requires enquiry and investigation, and to certify the position without undertaking such investigation would be imprudent on the part of a solicitor.
4) The documentation goes on to ask the solicitor to confirm that professional indemnity insurance is held. It is in all ways expressed as if it was a certificate of title transaction. Great care must be taken to ensure that the impression is not given that the property has a "good marketable title". Great care must be taken to ensure that no impression is given that the property, for instance, "complies with planning or complies with environmental legislation or regulation". The view of the committee is that a solicitor should furnish the documents to evidence the fact that the applicant for the grant is the registered owner of the folio or the holder of the lowest interest in the land under a Registry of Deeds title, but nothing further. Such documents evidencing the title of the grant applicant should be furnished to the department contemporaneously with the grant documentation, and no undertakings should be given to furnish evidence of title at a later date.

Unfortunately, therefore, solicitors must be cautioned against completing the documentation in the form being circulated by the department at present.

Conveyancing Committee

REVISED SCHEDULE OF COURT SITTINGS IN THE DUBLIN METROPOLITAN DISTRICT FOR 2009

AUGUST 2009 – REGULAR VACATION SITTINGS

Court no 44, Chancery Street, shall sit each Monday, Tuesday, Wednesday, Thursday, Friday and Saturday, commencing at 10.30am to 5pm each day – criminal business.

Court no 46, Chancery Street, shall sit each Monday (except Monday 3 August 2009), Tuesday, Wednesday, Thursday and Friday, commencing at 10.30am to 5pm each day – criminal business.

The Court at Cloverhill shall sit each Tuesday, Wednesday, Thursday and Friday, commencing at 10.30am each day – criminal business.

Court no 41, Dolphin House, shall sit each Monday (except Monday 3 August 2009), Tuesday, Wednesday, Thursday and Friday, commencing at 10.30am each day – family law business.

Court no 45, Chancery Street, shall sit for the hearing of criminal business from Tuesday 4 August to Friday 28 August 2009.

Court no 55, Smithfield, shall sit for juvenile business each Tuesday and Thursday, commencing at 10.30am.

Court no 56, Smithfield, shall sit for criminal business (cancelling warrants) on Monday 31 August 2009, commencing at 10.30am.

Court no 50, the Richmond Courts, shall sit on Thursday 13 August 2009 and Thursday 27 August 2009 for the hearing of drug court business.

Court no 51, the Richmond Courts, shall sit from Monday 10 August to Friday 28 August 2009 (to deal with a backlog of summonses).

Dun Laoghaire District Court shall sit from Tuesday 4 August to Friday 14 August 2009 (to deal with a backlog of summonses).

SEPTEMBER 2009

From Tuesday 1 September to Wednesday 30 September 2009, two additional criminal courts shall sit for the hearing of criminal business.

Notice of possible sitting dates: from Monday 14 September to Friday 25 September 2009 – an additional court sitting for the hearing of drink driving cases (to be confirmed).

MONDAY 5 OCTOBER 2009

To enable judges of the District Court to attend church service on Monday 5 October 2009, no cases are to be scheduled until 2pm in any of the Dublin Metropolitan Courts, and this includes Chancery Street and all outlying Dublin courts.

NATIONAL CONFERENCE OF JUDGES – FRIDAY 20 NOVEMBER 2009

The following courts will sit in the Dublin Metropolitan District for urgent business on that day:

- Court no 44, Chancery Street,
- Court no 41, Dolphin House.

MONDAY 21 DECEMBER 2009

No cases are to be scheduled for the DMD and all outlying Dublin courts, with the exception of the following courts sitting for urgent business:

- Court no 44, Chancery Street,
- Court no 46, Chancery Street,
- Court no 41, Dolphin House,
- Court no 55, Smithfield,
- Cloverhill,
- Blanchardstown,
- Dun Laoghaire,
- Court no 56, Smithfield, for the cancellation of warrants.

TUESDAY 22 DECEMBER 2009

- Court no 44, Chancery Street,
- Court no 46, Chancery Street,
- Court no 41, Dolphin House,
- Court no 55, Smithfield,
- Cloverhill,
- Blanchardstown,
- Dun Laoghaire.

CHRISTMAS VACATION

Wednesday 23 December to Thursday 31 December 2009 – nine consecutive days commencing on 23 December: to be advised.

legislation update

20 May – 15 June 2009

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

ACT PASSED

Finance Act 2009

Number: 12/2009

Contents note: Provides for the imposition, repeal, remission, alteration and regulation of taxation, of stamp duties and of duties relating to excise, and otherwise makes further provision in connection with finance, including the regulation of customs.

Date enacted: 3/6/2009

Commencement date: 1/1/2009 for part 1 (ss1-14, 'Income levy, income tax, corporation tax and capital gains tax'), except where otherwise expressly provided in part 1 (per s32(8) of the act); 3/6/2009 for other sections, except where otherwise expressly provided or where commencement order(s) are to be made. See act for details

SELECTED STATUTORY INSTRUMENTS

Courts-Martial (Legal Aid) (Amendment) Regulations 2009

Number: SI 153/2009

Contents note: Prescribe the fees payable under the Courts-Martial Legal Aid Scheme to solicitors assigned to any particular case pursuant to a legal aid certificate in certain cases to persons charged with, or convicted of, offences against military law; to solicitors assigned pursuant to a legal aid certificate or certificates in respect of essential visits to a prison, detention barrack or other custodial centre; and for fees payable to solicitors assigned pursuant to a legal aid certificate that the Minister for Defence, after consultation with the Attorney General, decides is an exceptional case.

Commencement date: 27/4/2009

European Communities (Assessment of Acquisitions in the Financial Sector) Regulations 2009

Number: SI 206 /2009

Contents note: Give effect to directive 2007/44 amending directives 92/49, 2002/83, 2004/39, 2005/68 and 2006/48 as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector.

Commencement date: 10/6/2009 (day after the day on which notice of the making of the regulations was published in *Iris Oifigiúil*) (per reg 2 of the regulations)

Health Insurance (Amendment) Act 2001 (Commencement) Order 2009

Number: SI 212/2009

Contents note: Appoints 9/6/2009 as the commencement date for sections 5 and 13 (insofar as they are not already in operation) and sections 6 and 7 of the *Health Insurance (Amendment) Act 2001*. These sections amend the *Health Insurance Act 1994* in relation to health insurance contracts.

Patents (Amendment) Act 2006 (Certain Provisions) (Commencement) Order 2009

Number: SI 196/2009

Contents note: Appoints 21/5/2009 as the commencement date for sections 6, 8, 9, 26, 27, 28 and 30 of the act. These sections amend the *Patents Act 1992* in relation to aspects of the procedure for patent applications.

Patents (Amendment) Rules 2009

Number: SI 194/2009

Contents note: Amend the *Patents Rules 1992* (SI 179/1992).

Commencement date: 21/5/2009

Road Traffic (Driving Instructor Licensing) (No 2) Regulations 2009

Number: SI 203/2009

Contents note: Provide for the licensing of driving instructors. Revoke the *Road Traffic (Driving Instructor Licensing) Regulations 2009* (SI 146/2009).

Commencement date: 3/6/2009 (day after the day on which notice of their making was published in *Iris Oifigiúil*) for all regulations, other than regulation 25, which comes into operation on 2/11/2009 (per reg 2 of the regulations). Regulation 25 deals with the keeping and inspection of an approved driving instructor's training records

Solicitors (Professional Practice, Conduct and Discipline – Secured Loan Transactions) Regulations

Number: SI 211/2009

Contents note: Provide that a solicitor shall not give an undertaking to, or for the benefit of, a bank, credit union or other financial institution or person in relation to a secured loan transaction in which the solicitor or a connected person has a beneficial interest, unless the solicitor has given specified notice and the bank, credit union or other financial institution or person has both acknowledged receipt of such notice and consented to the solicitor providing the undertaking. Specify certain circumstances in which the regulations shall not apply.

Commencement date: 1/9/2009

Voluntary Health Insurance (Amendment) Act 2008 (Commencement) Order 2009)

Number: SI 213/2009

Contents note: Appoints 1/1/2010 as the commencement date for s21 and the provision in the schedule providing for the repeal of paragraph C of the definition of 'health insurance contract' (inserted by s2 of the *Health Insurance (Amendment) Act 2001*) in s2(1) of the *Health Insurance Act 1994*. Subject to the above, appoints 10/6/2009 as the commencement date for all sections of the *Voluntary Health Insurance (Amendment) Act 2008* not already in operation. G

Prepared by the Law Society Library

District Court (Intoxicating Liquor Act 2008) Rules 2009

Number: SI 174/2009

Contents note: Substitute new orders 68, 71 and 72 and corresponding forms in the *District Court Rules 1997* (SI 93/1997) in accordance with provisions in the *Intoxicating Liquor Act 2008* relating to applications for a certificate for a new retailer's off-licence, special exemption orders and general exemption orders.

Commencement date: 25/5/2009

NOTICE: THE HIGH COURT

Record no: 2009 no 52 SA
In the matter of Michael Mooney, a solicitor formerly practising under the style and title of Osborne MacGettigan & Co, Solicitors, Milford, Co Donegal and in the matter of the *Solicitors Acts 1954-2002*

Take notice that, by order of the High Court made on Monday 18 May 2009, it was ordered:

1) That the name of the respondent solicitor shall be struck from the Roll of Solicitors,
2) That the respondent solicitor do cooperate fully in any further application that might have to be made to the Circuit Court on behalf of named clients in order to cancel the original registration of them as full owners as of 28 July 2005 of folio 4296F Co Donegal, grounded as it was on the admitted forged deed of transfer dated 22 December 2004, in order that the named clients are again registered as full owners of the said folio on foot of their beneficial interest deriving from other named clients, whose interest derived from the purchase transaction closed by the respondent solicitor on behalf of those other named clients on 22 August 1995 and the deed of transfer delivered on that date from a named third party (as legal personal representative of another named third party, deceased, the then registered full owner) to the said other named clients, whose resulting legal entitlement to be registered as full owners has never taken place or, apparently, noted in any way by the Property Registration Authority, formerly the Land Registry,
3) That the respondent solicitor pay the sum of €10,000 as compensation to the Compensation Fund of the Law Society of Ireland,
4) That the Law Society recover the costs of the proceedings herein and the costs of the proceedings before the Solicitors Disciplinary Tribunal as against the respondent when taxed or ascertained.

John Elliot, Registrar of Solicitors, June 2009

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 Greg (otherwise John G) Casey, solicitor, practising in the firm of Casey & Co, North Main Street, Bandon, Co Cork, 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 1954-2008* [5355/DT88/08]
Law Society of Ireland (applicant)
Greg (otherwise John G) Casey (respondent solicitor)

On 24 March 2009, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Failed to pay a contribution of €500 towards the Society's costs, levied by the Complaints and Client Relations Committee against the respondent solicitor on 28 March 2007,
b) Failed to pay the increased levy of €1,000 towards the costs of the Society's investigation as levied by the Complaints and Client Relations Committee on 26 September 2007.

The tribunal ordered that the respondent solicitor:

a) Do stand admonished and censured,
b) Pay a sum of €1,000 in restitution to the Law Society of Ireland, allowing a period of 12 months in which to pay.

In the matter of Peter Gerard McDonnell, a solicitor practising under the style and title of Peter McDonnell & Associates at Fitzwilliam Hall, Suite GO2, Fitzwilliam Place, Dublin 2, and in the matter of the *Solicitors Acts 1954-2002* [4103/DT82/06]
Law Society of Ireland (applicant)
Peter Gerard McDonnell (respondent solicitor)

On 21 April 2009, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Lodged clients' monies to the office account, in breach of regulation 4,
b) Caused a deficit of approximately €300,000 on clients' accounts as of 30 April 2006 because of his failure to lodge clients' monies to clients' accounts,
c) Wrote cheques on office accounts in payment of third-party outlays, but these cheques were not released for payment, so these amounts due on behalf of clients were not obvious from a review of clients' ledger accounts,
d) Placed letters on clients' files, which gave the impression that the amounts had been paid to various barristers, engineers, etc, in breach of regulation 12,
e) Failed to keep proper books of account, as required by regulation 12,
f) Failed to have the original of each paid cheque drawn on clients' accounts, in breach of regulation 20(f),
g) Failed to have available copies of the balancing statements for the client account, in breach of regulation 12.

The tribunal ordered that the respondent solicitor:

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

firstlaw update

News from Ireland's online legal awareness service
Compiled by Bart Daly for FirstLaw

CRIMINAL LAW

Evidence

Missing evidence – destruction of motor car – deprived of opportunity to examine vehicle – serious road traffic incident – whether appellant had established a real and serious risk of an unfair trial.

The appellant contended that the destruction of the remains of a motor car driven in a road traffic incident prejudiced his right to a fair trial in respect of the road traffic accident. The High Court had rejected the application for judicial review. The appellant contended that he had been deprived of the opportunity to have the wreck of the car professionally examined and that, immediately before the accident, the steering of the car had locked.

The Supreme Court (per Fennelly J; Denham, Hardiman JJ concurring) held that the appellant had not discharged the burden of showing that he faced a real and serious risk of an unfair trial. The appellant had not demonstrated how the car was affected prior to the accident. The appeal would be dismissed and the order of the High Court affirmed.

***Perry (appellant) v Director of Public Prosecutions & others* (respondents), Supreme Court, 28/10/2008** [FL15771]

EMPLOYMENT LAW

Disciplinary procedures

Pre-Universities Act 1997 officer – *tenured – incident – alleged assault – fair procedures – whether broad range of disciplinary procedures could be invoked against pre-*Universities Act 1997 *appointee.*

An appeal was brought from a decision of the High Court, which had held that the defendant was precluded from implementing its disciplinary procedures against the plaintiff arising from an incident that occurred in the staff car park of UCC in 2001, where the plaintiff was alleged to have assaulted a staff member. The plaintiff alleged that he was unable to obtain fair and impartial treatment and that the disciplinary procedures being invoked against him were not possible in light of his appointment prior to the *Universities Act 1997*, which entailed that limited disciplinary measures could be invoked against him, whereas after the 1997 act, wider disciplinary measures could be invoked against academic staff. A Statute N had been adopted by UCC in 2008 to deal with pre-*Universities Act* officers, unless otherwise agreed.

Supreme Court (per Kearns J; Hardiman, Geoghegan JJ concurring) held that the plaintiff was at all times an officer appointed prior to the *Universities Act 1997* and was thus subject to a very limited disciplinary regime. He was bound only by statutes or regulations of a college related to his duties, and no further measures had been enacted that would enable disciplinary action against him. It was never open to the university to discipline the plaintiff in the omnibus manner suggested by the defendant. Statute N was an acknowledgment of the position of officers such as the plaintiff. They could be dealt with only on the basis of pre-1997 statutes where the action interfered with their rights of tenure or conditions of service. The decision of the High Court would be upheld.

***Fanning (plaintiff/respondent) v University College Cork (defendant/appellant),* Supreme Court, 28/10/2008** [FL15785]

IMMIGRATION LAW

Judicial review

Leave – extension of time for good and sufficient reason – Angola – attacked by army – Illegal Immigrants (Trafficking) Act 2000.

The applicant from Angola sought leave to review a decision of the respondent refusing his application for refugee status. The appellant contended that the RAT decision was flawed on the basis that there was a failure to take account of documentation submitted relating, among other things, to membership of a political group; that a medical report had not been adequately considered indicating that he had been stabbed; and that the assessment of credibility by the respondent was flawed.

Hedigan J held that leave would be refused. The court was not satisfied that substantial grounds had been established. The failure to consider a medical report was not probative of any fact. It was open to the tribunal member to make the findings of credibility made. Any error that occurred as to the identity card matter was not fatal to the decision.

***J(A) (applicant) v Refugee Appeals Tribunal & Others (respondents),* High Court, 15/10/2008** FL15775

JUDICIAL REVIEW

Certiorari

Oral hearing – discovery – whether the decision of the respondent was arrived at in a fair manner and whether the request for discovery and an oral hearing ought to have been granted – Central Bank Act 1942 – Central Bank and Financial Service Authority of Ireland Act 2004.

The applicant sought to have quashed, by way of *certiorari*, the order of the first-named defendant directing the applicant to refund the notice party €500,000 for three perpetual bank bonds purchased by the notice party and also to refund all fees and commissions paid by the notice party in connection with the purchase of those bonds. The applicant alleged that the first-named respondent misconstrued his powers under the statute and fell into unconstitutional procedures. The order sought to be impugned arose out of a complaint made by the notice party to the effect that the applicant never properly or adequately explained the perpetual nature of the bonds to them. The deputy ombudsman initially determined the complaint in favour of the notice party, and the applicant unsuccessfully appealed that decision to the first-named respondent. The applicant challenged the procedures used by the first-named respondent, particularly its decision refusing discovery and declining to hold an oral hearing. The applicant also complained that the deputy ombudsman was not properly authorised to act and, further, that the matter should have been dealt with by mediation prior to investigation and adjudication. The first-named respondent, in his decision, failed to indicate on which statutory ground he was holding against the applicant.

Charleton J quashed by *certiorari* the order of the first-named defendant made on 21/1/2008 and remitted the matter to him for the purposes of the complaint of Enfield Credit Union

again being investigated and adjudicated upon, holding that, in the circumstances of this case and for the fair determination of the dispute as to what explanation was provided in relation to the nature of the bonds, there should have been an oral hearing. The first-named respondent erred in failing to provide the documentation sought by the applicant. The first-named respondent had a discretion whether to hold mediation prior to investigation and adjudication. Mediation need only be embarked upon when it carries a reasonable prospect of achieving results. The remedy provided by the first-named respondent, consisting of an appeal from the deputy ombudsman to the respondent himself, was impermissible. Finally, the first-named respondent was required to stipulate what parts of the relevant legislation constituted his findings.

***J&E Davy, trading as Davy (applicant) v Financial Services Ombudsman & Others (respondent)*, High Court, 30/7/2008** [FL15799]

LAND LAW

Trespass

Adjoining premises – damage to rock – possessory title – injunction – nuisance – damages – whether sufficient evidence adduced to support the claim.

The plaintiffs and defendants lived in adjoining coastal properties. The plaintiffs claimed that the defendants had commenced building works that removed a quantity of rock, which was alleged to be a trespass and constituted nuisance. The plaintiffs claimed, among other things, that they were the legal and beneficial owners of the area and that they were entitled to damages for trespass and nuisance and an injunction restraining the defendants from further trespass and an order restoring the natural rock cliff face. The defendants claimed that they owned the disputed area, pursuant to the title documents.

Hedigan J held that no evidence had been adduced to support the claim for possessory title. A special condition as to the uncertainty of the boundary precluded a claim in adverse possession. No evidence had been established as to any damage. The claim for trespass in respect of parking overnight was not an issue and no finding as to trespass would be made. The plaintiffs' claim would be dismissed.

***McCoy (plaintiff) v McGill (defendant)*, High Court, 6/10/2008** [FL15804]

LEGAL AID

Statutory interpretation

Dependents – literal approach – purposive approach – intention of the Oireachtas – whether Legal Aid Board had misinterpreted legislation – whether Legal Aid Board had fettered its discretion – Civil Legal Aid Act 1995 – Interpretation Act 2005.

The plaintiff, who sought to obtain legal aid in respect of a landlord and tenant dispute, exceeded the income threshold for legal aid by €217, the income eligibility level being €18,000. The plaintiff alleged that the Legal Aid Board had fettered its discretion in s29 of the *Civil Legal Aid Act 1995* to provide aid without regard to financial resources. The plaintiff sought to challenge the validity and constitutionality of s29 of the *Civil Legal Aid Act 1995* and alleged that the board had misinterpreted the definition of 'dependents' by concluding that her nephew did not constitute a dependent because he had independent means. The issue arose as to the operation and interplay of ss29 and 37 of the act, which provided that the minister could enact regulations to give effect to the act, and whether the literal or purposive approach was to be applied to the sections.

Edwards J dismissed the applicant's claim against the first-named respondent, holding that, until such time as the minister provided for a grant of legal aid irrespective of financial resources, the board did not have further powers to provide such resources. The board thus did not have any power or discretion to grant legal aid and, if a purposive approach was adopted, the correct interpretation of s29 was that it conferred a power on the board to grant legal aid without regard for financial resources only where such provision was made in the regulations.

***Monahan (applicant) v Legal Aid Board (respondents)*, High Court, 6/10/2008** [FL15814]

PRACTICE AND PROCEDURE

Costs

Instruction fee of solicitors – rehearing – repetitious – Hepatitis C Tribunal to High Court – reduction – taxing master — order 99, rule 38(3) of the Rules of the Superior Courts – *whether taxing master correct in consideration of instruction fee.*

The respondents sought to appeal a decision of the taxing master in respect of a general instruction fee of €51,000 allowed by him in respect of the taxation of a bill of costs. The dispute arose in respect of a one-day appeal to the High Court, where an *ex tempore* decision was delivered immediately thereafter. The High Court had increased substantially the damages awarded by the Hepatitis C Compensation Tribunal. The solicitors claimed that the appeal to the High Court was particularly complicated and required the carrying out of research and investigative work. The issue arose as to the repetitious nature of the appeal carried out by the solicitors and whether the instruction fee was to be reduced accordingly.

Herbert J held that justice required that the general instruction fee be reduced to take account of the factors identified by the taxing master. A 50% reduction would be appropriate, to take account of the straightforward rehearing. The percentage reduction on a sliding scale thereafter would take account of the number of similarities between the appeal and hearing. Lesser degrees of repetition would reflect lesser reductions. The matter would be remitted back to be reassessed by a different taxing master.

***D(C) (appellant) v Minister for Health & Children (respondent)*, High Court, 23/7/2008** [FL15784] G

This information is taken from FirstLaw's legal current awareness service, published every day on the internet at www.firstlaw.ie.

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

New European Commission guidelines on abuses of a dominant position

The European Commission has recently published its enforcement priorities regarding the application of EC rules on an abuse of a dominant position contained in article 82 of the *EC Treaty*. These guidelines (OJ C45/7, 24 February 2009), while not a statement of the law, are an attempt by the commission to give greater predictability and consistency regarding the enforcement of certain infringements of article 82. The new guidance details the commission's willingness to intervene regarding abusive exclusionary conduct – that is, where dominant undertakings abuse their position in the market by excluding competitors. These guidelines are thus of major importance to businesses wishing to challenge the conduct of an alleged dominant competitor, customer or supplier. In addition, the commission's guidance will also be crucial to a potentially dominant company in determining its business strategies.

Background and scope

Article 82 investigations are notoriously complex. They usually involve a wide variety of questions, ranging from what is the appropriate market definition, to whether a company is dominant, to whether particular conduct is abusive. Over the years, the commission has interpreted the scope of article 82 on a case-by-case basis, sometimes with the support of the European courts, sometimes without.

The new guidance does not, however, cover every possible abuse of article 82. It purely deals with exclusionary conduct. It does not cover either exploitative abuse where consumers are directly affected, for example, predatory or discriminatory pricing. The guidelines apply to cases of single dominance only and do not consider collective dominance.

Framework

In an article 82 investigation, the commission will first consider whether the relevant undertaking has a dominant position by assessing the extent of its market power. After deciding that a particular company has a dominant position, the commission will then examine whether the relevant undertaking's conduct forecloses competitors in an anticompetitive manner. Special considerations apply to price-based exclusionary conduct. If the commission decides there is a potential abuse issue, the dominant undertaking will have the opportunity of justifying its behaviour. The new guidelines also contain specific additional provisions regarding particular forms of abuse, such as exclusive dealing, tying/bundling, predation and refusals to supply. Overall, the commission commits both to focusing on the types of conduct most harmful to consumers and to ensuring that dominant undertakings compete on the merits.

Market power

The European courts have consistently defined dominance as being a position of economic strength enabling an undertaking to act independently of its competitors, customers and, ultimately, of consumers. Put another way, dominance entails holding substantial market power over a period of time. In assessing the question of dominance, the commission will analyse the competitive structure of the market by focusing on the position of the dominant undertaking and that of its competitors, the threat of future expansion by actual competitors or entry by potential competitors, and countervailing buyer power (that is, the bargaining strength of the undertaking's customers). An undertaking with a relevant market share of less than 40% is unlikely to be regarded as dominant.

Foreclosure

The commission will seek to ensure that dominant undertakings do not impair competition by foreclosing rivals. Foreclosure occurs where a dominant undertaking restricts or eliminates access to supplies or markets with a view to increasing prices profitably or limiting quality to the detriment of consumers. The commission does not need to establish that the dominant undertaking's conduct actually harms competition – evidence that harm is likely is sufficient.

The commission will take the following criteria into account in determining whether particular conduct is likely to lead to foreclosure:

- The strength of the dominant undertaking's market position,
- Characteristics of the relevant market, including conditions of entry and expansion,
- The position and any potential counterstrategies at the disposal of the dominant undertaking's competitors, customers and suppliers,
- The extent, duration and frequency of the alleged abusive conduct, and
- Possible evidence of actual foreclosure and direct evidence of any exclusionary strategy.

If, however, it appears that the conduct under investigation (for example, paying a customer to delay the introduction of a rival's product) raises obvious competition concerns, the commission will not perform a detailed examination of whether the relevant behaviour gives rise to foreclosure.

Price-based exclusionary behaviour

Specific guidelines apply to price-related exclusionary behaviour. The commission will investigate whether the relevant price-related conduct is likely to prevent competitors that are just as efficient as the dominant undertaking from expanding on or entering the market. The commission will also examine whether the dominant undertaking is engaging in below-cost pricing. This is likely to involve a close analysis of cost and sales data. The commission will

usually only intervene where the conduct concerned has or is capable of hampering competition from rivals considered to be as equally efficient as the relevant dominant undertaking.

Objective justification

The commission will give a dominant undertaking the opportunity of justifying its allegedly anticompetitive behaviour. A dominant company may thus argue that its conduct is objectively necessary or, alternatively, show that its behaviour produces efficiencies outweighing any anticompetitive effects.

The issue of whether its relevant behaviour is objectively necessary must be based on factors outside of a dominant company's control. For instance, exclusionary conduct may be justified on the basis of health and safety reasons regarding the relevant product. However, any such claims must take account of public health and safety standards: a dominant company should not take unilateral action to exclude a competitor's products that it unilaterally regards as giving rise to health and safety concerns.

A dominant undertaking may also justify its exclusionary behaviour on the basis of efficiencies, provided no net harm to consumers is likely to arise, and by satisfying the following conditions:

- Efficiencies have been or are likely to be realised as a result of the conduct (for example, technical improvements in the quality of goods),
- The conduct is indispensable to the realisation of the efficiencies and no suitable alternatives exist,
- The likely efficiencies outweigh any likely anticompetitive effects, and
- The conduct does not eliminate competition by removing all or most existing sources of competition so that a monopoly is created, maintained or strengthened.

Pussycat mauls: not a particularly dominant position, but certainly a good attempt

Regarding any alleged abuse, the onus is on the dominant undertaking to assemble the evidence supporting a claim that its allegedly exclusionary conduct is objectively necessary or generates efficiencies. Ultimately, the commission will decide whether the relevant behaviour is justified.

Specific infringements

When examining a case, the commission will consider whether the relevant undertaking is dominant and, if so, whether its behaviour is abusive on the basis of the general guidelines described above. Regarding certain infringements of article 82, the commission will also examine particular additional criteria.

Exclusive dealing – a dominant undertaking may attempt to foreclose its competitors by preventing them from selling to customers through the use of purchasing obligations or rebates. These exclusive-dealing obligations may require or persuade a customer on a particular market to purchase the entirety (or the vast bulk) of its relevant supplies from the dominant undertaking. If competitors can compete on equal terms for a customer's entire supply requirements, exclusive purchasing obligations are unlikely to give rise to foreclosure concerns. If, however, the dominant undertaking is an unavoidable trading partner for all or most customers, an exclusive purchasing obligation may lead to competition issues.

Conditional rebates are favourable terms (for example, discounts) granted to customers as a reward for a particular form of purchasing behaviour. Retroactive rebates (that is, those granted on all purchases) may foreclose the market significantly, as they make it less attractive for customers to switch small amounts of demand to a different supplier if this would lead to the loss of the relevant rebate. The commission will examine whether the rebate system is capable of hindering the expansion or entry of competitors of equal efficiency by making it more difficult for them to supply individual customers. This enquiry will require a complex analysis of pricing and cost data.

Tying and bundling – a dominant undertaking may also seek to foreclose its competitors by 'tying' or 'bundling'. Tying occurs where a customer that purchases one product is required to purchase another from the dominant undertaking. Bundling is where products are only sold jointly in fixed proportions or where the products are available separately but are subject to a higher price than if sold together. Tying or bundling may often provide customers with more cost-effective products. However, undertakings dominant in one product market, that is, the tying market, may foreclose the market for the other product(s), that is, the tied market (and also indirectly for the product market in which they are dominant/tying market) by tying or bundling the products.

The commission will intervene where an undertaking is dominant in the tying market, the tying and tied products are distinct products, and the tying practice is likely to lead to competition concerns.

The following additional factors are relevant when considering whether tying is likely to lead to foreclosure:

- Whether the tying or bundling strategy is a lasting one,
- Where the undertaking is dominant in the market for more than one product in the bundle (especially if the bundle is difficult for a competitor to replicate),
- Where there is an insufficient number of customers who will buy the tied product alone to sustain competitors of the dominant undertaking in the tied market,
- If the tying and tied products are to a degree substitutable, the customer may increase demand for one over the other in reaction to price increases – by tying the products, the dominant company may avoid such substitution and raise prices,
- If the prices in the tying market are regulated, tying may allow the dominant undertaking to raise prices in the tied market to compensate for loss of revenue in the tying market,
- If the tied product is an important complementary measure for customers of the tying product, a reduction of alternative supplies of the tied product and a reduced

availability of this product may make entry to the market alone more difficult.

Predation – the commission will also intervene where a dominant undertaking engages in predatory behaviour by deliberately sacrificing profits/incurring losses in the short term with a view to foreclosing one or more of its competitors. Such sacrifices may include charging lower prices for its products or expanding output and in so doing incurring avoidable losses. In order to show predation, the commission will analyse the dominant undertaking's pricing and cost data. It may also rely on internal documents showing the dominant company's predatory strategy.

Furthermore, the commission will generally investigate whether the relevant conduct reduces the likelihood that rivals will compete. It is not necessary to show that competitors have exited the market in order to prove anticompetitive foreclosure. A dominant undertaking may more easily engage in predatory behaviour where it targets a limited number of customers with low prices, since this will limit its overall losses. Predation is less likely to occur where the conduct involves price discounting over a significant period of time.

Refusal to supply and margin squeezes – the commission recognises the importance of an undertaking's right to decide how or with whom it wishes to do business. The commission will thus carefully consider whether applying article 82 would lead to imposing an unreasonable obligation on a dominant undertaking. Such an imposition may undermine investment and/or innovation, resulting in consumer harm.

Competition problems arise where the dominant undertaking competes on the same market as the buyer it refuses to supply. Examples include refusal to sell products, refusal to license intellectual property rights, and refusal to grant access to essential facilities. The refused product does not need to have been already available; it is sufficient if there is demand from potential purchasers and a potential market for the input at stake can be identified. Actual refusal is not necessary – constructive refusal is sufficient.

The commission will seek to investigate potential abuse issues where the following circumstances exist:

- The refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market,
- The refusal is likely to lead to the elimination of competition on the downstream market, and
- The refusal is likely to lead to consumer harm.

Instead of refusing to supply, a dominant undertaking may seek to 'squeeze' a competitor's margins by charging a price for the product on the upstream market that, when compared to the price it charges on the downstream market, does not allow an 'as efficient' competitor to trade profitably on the downstream market. The commission will target situations where the refused input is objectively needed for operators to be able to compete more effectively. If there is no alternative input on which competitors could rely, then the refused input will be considered indispensable. Competition is more likely to be eliminated where particular circumstances exist in the downstream market, including where the dominant undertaking has strong market presence, the closer the substitutability between the dominant undertaking's output and that of its competitors, and the greater the proportion of competitors that are affected.

In considering consumer harm, the commission will weigh the likely negative consequences of the refusal to supply in the relevant market against the negative consequences of imposing an obligation to supply. Consumer harm may arise where the competitors of the dominant undertaking are prevented from bringing innovative goods or services to the market.

Conclusion

While the new guidance is not legally binding, it provides welcome assistance on the forms of exclusionary conduct that will be pursued. From now on, potential complainants will have a much better idea of the types of exclusionary behaviour that are likely to interest the commission. In addition, allegedly dominant companies now have stronger guidance on the type of activity they should avoid. We wait with interest to see the extent to which the new guidelines will influence the decisions of the European courts, national competition authorities and national courts. G

Cormac Little is a partner with the Competition and Regulation Unit of William Fry.

Recent developments in European law

CRIMINAL LAW

Case C-297/07, *Staatsanwaltschaft Regensburg v Klaus Bourquain*, 11 December 2008. Mr Bourquain was a German national who had served in the French Foreign Legion. In 1961, he was tried for desertion and homicide by a French military tribunal in Algeria and found guilty in his absence. The tribunal found that, while attempting to desert, he shot dead another legionnaire who tried to stop him. He then took refuge in the German Democratic Republic. No other criminal proceedings were instituted against Bourquain in either France or Algeria. In 2002, the public prosecutor in Regensburg took steps to bring Bourquain to trial in Germany for the crimes committed in Algeria. When the new proceedings were opened in Germany, the penalty imposed in 1961 could not be enforced in France for two reasons – it was time-barred, and France had passed an amnesty law in respect of the events in Algeria. The regional court before which the case was brought had doubts regarding the lawfulness of the new criminal proceedings. It referred a question to the ECJ on the lawfulness of the new proceedings in the Schengen Area. The ECJ was asked to rule on the principle that a person whose trial has been finally disposed of in one state in the Schengen Area cannot be prosecuted for the same acts in another state when the penalty can no longer be enforced – '*ne bis in idem*'. The ECJ ruled that the bar on being tried twice for the same acts also applies to a conviction that could never, on account of specific features of procedure, have been directly enforced. A conviction *in absentia* can constitute a procedural bar to the opening of new criminal proceedings in respect of the same acts. The court rejected the argument that the *ne bis in idem* principle requires the penalty to be directly enforceable at the time when it is imposed. What is decisive is that the penalty can no longer be enforced when the new criminal proceedings are begun. This interpretation was reinforced by the objective of the Schengen *acquis*. This is to ensure that no-one is prosecuted for the same acts in several member states on account of his having exercised his right to free movement. To guarantee the right of free movement, a person must be sure that, once he has been convicted and the penalty imposed on him can no longer be enforced under the laws of the sentencing state, he may travel within the Schengen Area without fear of prosecution in another member state.

DATA PROTECTION

Case C-521/06, *Heinz Huber v Germany*, 16 December 2008. Germany operates a centralised register that contains certain personal data relating to foreign nationals who are resident in Germany for a period of more than three months. The Federal Office for Migration and Refugees is responsible for maintaining that register. It is used for statistical purposes and by the police and judicial authorities in exercising their powers in relation to the prosecution and investigation of criminal activities or threats to public security. Mr Huber is an Austrian national who moved to Germany in 1996 in order to carry on business as a self-employed insurance agent. He argued that he was discriminated against, as there is no similar database for German nationals. The German court asked the ECJ whether the processing of personal data of the kind undertaken in the centralised register is compatible with EC law. The ECJ held that the data in question is personal data within the meaning of the *Data Protection Directive*. The directive provides that such data may lawfully be processed only if it is necessary to do so for the performance of a task carried out in the public interest or in the exercise of official authority. The right of residence of a union citizen in a member state of which he is not a national may be subject to limitations. It is in principle legitimate for a member state to have relevant particulars and documents relating to foreign nationals available to it and to use a register for the purpose of providing support to the authorities responsible for the application of the legislation relating to the right of residence. However, there must be compliance with the requirement of necessity laid down by the *Directive on the Protection of Personal Data*. The German system will only comply with EC law if it contains only the data necessary for the application by the authorities of that legislation and if its centralised nature enables that legislation to be more effectively applied as regards the right of residence of EU citizens who are not nationals of that state. The court then turned to consider the storage and processing of this data for statistical purposes. EC law does not exclude the power of member states to adopt measures enabling national authorities to have an exact knowledge of population movements affecting their territory. Those statistics presuppose that certain information will be collected by those states. The exercise of that power does not, of itself, mean that the collection and storage of individualised person information of the kind undertaken in the German register is necessary. Such processing of personal data does not satisfy the requirement of necessity laid down by the directive. The final issue addressed was that of the use of the data in the register for the purposes of fighting crime. This objective involves the prosecution of crimes and offences committed, irrespective of the nationality of their perpetrators. The register does not contain personal data relating to German nationals. Consequently, use for the purposes of fighting crime is contrary to the principle of nondiscrimination and hence contrary to EC law. G

PROFESSIONAL NOTICES

LOST LAND CERTIFICATES

Registration of Deeds and Title Acts 1964 and 2006

An application has been received from the registered owners mentioned in the schedule hereto for an order dispensing with the land certificate issued in respect of the lands specified in the schedule, which original land certificate is stated to have been lost or inadvertently destroyed. The land certificate will be dispensed with unless notification is received in the registry within 28 days from the date of publication of this notice that the original certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the certificate is being held.

Property Registration Authority, Chancery Street, Dublin 7 (published 3 July 2009)

Regd owner: James Sheridan, Drumkeeran Black, Cornafean Post Office, Co Cavan; folio: 5239F; lands: Drumkeeran Black; **Co Cavan**

Regd owner: Mary Fennessy (deceased); folio: 11433; lands: Clonmoher and Lisbarreen and barony of Tulia Upper; **Co Clare**

Regd owner: Keith Walker and Tanya Walker; folio: 15245F; lands: townland of Cappagh South and barony of Bunratty Lower; **Co Clare**

Regd owner: Bluestream Properties Limited; folio: 33276F; lands: Athlunkard and barony of Bunratty Lower; **Co Clare**

Regd owner: Eileen Walsh; folio: 1670L; lands: townland of Tullyglass and barony of Bunratty Lower; **Co Clare**

Regd owner: Patrick Hickey; folio: 52584; lands: property situate in the townland of Glengoura Upper and barony of Kinatalloon; **Co Cork**

Regd owner: Seán King, Cornelius Murphy, John O'Connell and Dermot O'Brien; folio: 62123F; lands: plot of ground situate in the townland of Carrignafoy and barony of Barrymore; **Co Cork**

Regd owner: John Deasy; folio: 30718F; lands: property situate in the townland of Gortagrenane and barony of Ibane and Barryroe; **Co Cork**

Regd owner: Timothy J O'Mahony and Carmel O'Mahony; folio: 12181; lands: property situate in the townland of Farranhavane and barony of Kinalmeaky; **Co Cork**

Regd owner: Margaret Mary Harkin, Glenmakee, Carndonagh, Co Donegal; folio: 32257; lands: Glenmakee; **Co Donegal**

Regd owner: Charles E Martin, Dunmore, Carrigans, Co Donegal; folio: 29758F; lands: Carrick West; **Co Donegal**

Regd owner: Michael McGee, Carrownamaddy, Creeslough, Letterkenny, Co Donegal; folio: 24795; lands: Carrownamaddy; **Co Donegal**

Regd owner: Daniel Kelly, Castlereagh, New Mills, Post Office, Letterkenny, Co Donegal; folio: 5932; lands: Cashelreagh; **Co Donegal**

Regd owner: Teresa Kean (deceased), Sandy Road, Rush, Co Dublin; folio: 4844; lands: townland of Rush and barony of Balrothery East; area: 0.089; **Co Dublin**

Regd owner: Pauline O'Connor, 68 Fairways Estate, Rathfarnham, Dublin 14; folio: 7323L; lands: townland of Butterfield and barony of Rathdown; area: 0.038 hectares; **Co Dublin**

Regd owner: Thomas Flood; folio: DN6275F; lands: property situate in the townland of Newpark and barony of Castleknock; **Co Dublin**

Regd owner: Mark Fleming, Glenamaddy, Co Galway; folio: 422; lands: townland of Carrowntober West and barony of Tiaquin; **Co Galway**

Regd owner: Patrick Fahy (deceased), Ballindooley, Galway, Co Galway; folio: 19553; lands: townland of Carrowbrowne and barony of Galway; area: 1.6339; **Co Galway**

Regd owner: James Hynes; folio: 14759; lands: townland of Lissanard, Kilcorban and Moannakeeba East and barony of Leitrim; **Co Galway**

Regd owner: Robert Gannon and Siobhan Gannon; folio: 28222F; lands: townland of Oldtown (Salt North By) and barony of North Salt; **Co Kildare**

Regd owner: Daniel Ryan; folio: 13053; lands: townland of Moanduff and barony of Coonagh; **Co Limerick**

Regd owner: Mary Heavey; folio: 5506F; lands: townland of Skagh and barony of Coshma; **Co Limerick**

Regd owner: John Lane; folio: 26614, part 227 Co Limerick; lands: townland of Shanid Lower and barony of Shanid; **Co Limerick**

Regd owner: Martin Fitzgerald; folio: 3898 Co Limerick; lands: townland of Caherconlish and barony of Clanwilliam; **Co Limerick**

Regd owner: Fergus McArdle, Crow Street, Dundalk, Co Louth; folio: 4885; lands: Marsh South; **Co Louth**

Regd owner: Peter Donnelly; folio: 4568F; lands: townland of Sheean and barony of Burrishoole; **Co Mayo**

Regd owner: Gerard Brady, Cruicetown House, Nobber, Co Meath; folio: 17981F, 11180F; lands: Brittas; **Co Meath**

Regd owner: Stella Murray, Hayes House, Navan, Co Meath; folio: 5328; lands: Ardmulchan; **Co Meath**

Regd owner: Joseph Murray, Gortnacloy, Elphin, Co Roscommon; folio: 6722; lands: townland of Gort-

nacloy and barony of Frenchpark; **Co Roscommon**

Regd owner: James Curley; folio: 12921; lands: townland of Bellanamullia and barony of Athlone South; area: 37 acres, 26 perches; **Co Roscommon**

Regd owner: Martin Phelan, 20 St Joachim's Avenue, Sligo; folio: 945F; lands: townland of Cornageeha and barony of Carbury; **Co Sligo**

Regd owner: John Conlon, Riverstown, Co Sligo; folio: 15528; lands: townland of Coolemoneen and barony of Tirerrill; area: 4.0443; **Co Sligo**

Regd owner: Anne Fallon (deceased); folio: 3690F; lands: townland of Doonshaskin and barony of Carbury; **Co Sligo**

Regd owner: Thomas Ryan; folio: 11486 and 16479; lands: townland of Galbooly and Lahardan and barony of Eliogarty; **Co Tipperary**

Regd owner: Mary Casey; folio: 39210; lands: townland of Tullow and barony of Owney and Arra; **Co Tipperary**

Regd owner: John Leonard, Robinstown, Delvin, Co Westmeath; folio: 15859; lands: Moyleroe; **Co Westmeath**

Regd owner: Patrick Berry (deceased) and Frederica Berry; folio: 9035F; lands: Ballycorboys Little and barony of Forth; **Co Wexford**

Regd owner: John Redmond and Breda Redmond; folio: 14790; lands: Ballina Upper (Ed Kilmallock) and barony of Ballaghkeen South; **Co Wexford**

Regd owner: William Ambrose and Hazel Langrell; folio: 23520; lands: Annagh Central and barony of Gorey; **Co Wexford**

Regd owner: Barbara Bowman, 9 Rockfield Park, Brittas Bay, Co Wicklow; folio: 1531L; lands: townland of Ballynacarrig and barony of Arklow; **Co Wicklow**

Regd owner: the Glencree Centre for Reconciliation, Glencree, Enniskerry, Co Wicklow; folio: 7027; lands: townland of Aurora and Powerscourt Mountain and barony of Rathdown; **Co Wicklow**

WILLS

Brennan, John (Jack) (deceased), late of Dawn View, Balscadden Road, Howth, Co Dublin, and of Brennan Law Searchers, 101-103 Richmond Road, Dublin 3. Would any solicitor holding or having knowledge of a will made by the above-named deceased, who died on 29 March 2009, please contact Bryan F Lynch, solicitor, Marcus Lynch Solicitors, 12 Lower Ormond Quay, Dublin 1; tel: 01 873 2134, email: bryan.lynch@lynchlaw.ie

Dolan, William (deceased), late of 88 Heskin Court, Elm Park, Merrion Road, Dublin 4, and previously of 7 Macken Villas, Dublin 2. Would any person having knowledge of a will made by the above-named deceased, who died on 20 December 2008 at St Vincent's Hospital, please contact Hammond & Associates, Solicitors, 1B Killiney View, Lower Albert Road, Glenageary, **Co Dublin**

Kelly, Michael (deceased), late of Bleanmore, Knock, Kilrush, Co Clare, and 105 Hollybank Road, Drumcondra, Dublin 9. Would any person having knowledge of a will made by the above-named deceased, who died on 30 August 2008, please contact Patrick F Molony & Company, Solicitors, 5 Bindon Street, Ennis, Co Clare; tel: 065 682 8361 or email: enquiries@pfmolony.ie

O'Donoghue, Donal (deceased), late of Graceland, 2 Kennedy Road, Dunboyne, Co Meath (formerly of Glenbeigh, Co Kerry). Would any person having knowledge of a will made by the above-named deceased, who died on 8 April 2009, please contact Rochford Gibbons, Solicitors, 16/17 Upper Ormond Quay, Dublin 7; tel: 01 872 1499, fax: 01 872 1654

Quinn, Mary (deceased), late of no 96 Whitecliff, Whitechurch Road, Rathfarnham, Dublin 16, who died on 14 May 2008. Would any person having knowledge of a will made by the above-named deceased please contact DM O'Connor & Co, Solicitors, Cross Street, Galway; DX 4515 M Street, Galway; tel: 091 569 170, fax: 091 569 172, email: breege@dmoconnor.com; file reference: KEN3948/DOC/BMC

Rowland, Thomas (deceased), late of Tudenham Park, Mullingar, Co Westmeath, who died on 26 December 2008. Would any person having knowledge of a will made by the above-named deceased please contact OH Parsons & Partners, Solicitors, 3rd Floor, Sovereign House, 212-224 Shaftesbury Avenue, London WC 2H 8PR; tel: 0044 207 0395 8591

Wirsching, Roland (deceased), late of Tullyvealnaslee, Oughterard, Co Galway, and also of Goethestrabe 5, 69221 Dossenheim, Germany. Would any person having knowledge of a will made by the above-named deceased, who died on 17 December 2008, please contact Feeney Solicitors, 1st Floor, Lismoyle House, Merchants Road, Galway; tel: 091 534 200, fax 091 564 691, email: info@feeneysolicitors.com

MISCELLANEOUS

Pristine offices to let, Fitzwilliam Place. Contact: Felix McTiernan, Cusack McTiernan, 6 Fitzwilliam Place, Dublin 2; tel: 01 676 2833, email: felix@cusackmctiernan.com

Rosemary Connolly Solicitors, employment and equality law specialists. Established over 15 years and recognised as expert providers in our field. Available for agency work in all employment law related matters in Northern Ireland. Please contact us directly or see our website for further details; 2 The Square, Warrenpoint, Co Down, BT34 3JT; tel: 0044 0284 1753 121, fax: 0044 0274 1753 141, website: www.solicitorsni.net

TITLE DEEDS

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 Joseph O'Reilly

Any person having any interest in the fee simple estate or any intermediate interest in all that and those the hereditaments and premises known as 1 Moore Street in the parish of Saint Mary and city of Dublin, being part of the property comprised in folio DN173129F and held under a fee farm grant dated 28 December 1863 from George Sams, Emily Gould Sams, Fanny Susanna Shury Daniel and Eliza Stanton Daniel to Mary Anne Hendrick, subject to the perpetual yearly rent of £14.15.4.

Take notice that Joseph O'Reilly, being the person entitled to the grantee's interest in the said grant, intends to apply to the Dublin county registrar for the acquisition of the fee simple estate and all intermediate interests in the said property, and any party assert-

ing that they hold the fee simple or any intermediate interest in the aforesaid property is called upon to furnish evidence of their title thereto to the under-mentioned solicitors within 21 days from the date of this notice.

In default of any such notice being received, the said Joseph O'Reilly intends to proceed with the application before the said county registrar at the end of 21 days from the date of this notice and will apply to said registrar for such directions as may be appropriate on the basis that the person or persons beneficially entitled to all superior interests up to and including the fee simple in the said property are unknown and unascertained.

Date: 3 July 2009

Signed: William Fry (solicitors for the applicant), Fitzwilton House, Wilton Place, Dublin 2

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by Joseph O'Reilly

Any person having any interest in the fee simple estate or any intermediate interest in all that and those the hereditaments and premises known as 2 Moore Street in the parish of Saint Mary and city of Dublin, being part of the property comprised in folio DN173129F and held under a fee farm grant dated 31 July 1889 from Emily Gould Sams to Daniel Murphy, subject to the perpetual yearly rent of £14.15.4.

Take notice that Joseph O'Reilly, being the person entitled to the grantee's interest in the said grant, intends to apply to the Dublin county registrar for the acquisition of the fee simple estate and all intermediate interests in the said property, and any party asserting that they hold the fee simple or any intermediate interest in the aforesaid property is called upon to furnish evidence of their title thereto to the under-mentioned solicitors within 21 days from the date of this notice.

In default of any such notice being received, the said Joseph O'Reilly intends to proceed with the application before the said county registrar at the end of 21 days from the date of this notice and will apply to said registrar for such directions as may be appropriate on the basis that the person or persons beneficially entitled to all superior interests up to and including the fee simple in the said property are unknown and unascertained.

Date: 3 July 2009

Signed: William Fry (solicitors for the applicant), Fitzwilton House, Wilton Place, Dublin 2

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by Joseph O'Reilly

Any person having any interest in the fee simple estate or any intermediate interest in all that and those the hereditaments and premises known as 6 Moore Street in the parish of Saint Mary and city of Dublin, comprised in folio DN174476F, the subject to a perpetual yearly rent of £23.13.10, created by a fee farm grant dated 19 July 1872 made between William Atkins, Fanny Susannah Shury Atkins, George Sams and Emily Gould Sams of the one part and Catherine Plant of the other part.

Take notice that Joseph O'Reilly, being the person entitled to the grantee's interest in the said fee farm grant, intends to apply to the Dublin county registrar for the acquisition of the fee simple estate and all intermediate interests in the said property, and any party asserting that they hold the fee simple or any intermediate interest in the aforesaid property is called upon to furnish evidence of their title thereto to the under-mentioned solicitors within 21 days from the date of this notice.

In default of any such notice being received, the said Joseph O'Reilly intends to proceed with the application before the said county registrar at the end of 21 days from the date of this notice and will apply to said registrar for such directions as may be appropriate on the basis that the person or persons beneficially entitled to all superior interests up to and including the fee simple in the said property are unknown and unascertained.

Date: 3 July 2009

Signed: William Fry (solicitors for the applicant), Fitzwilton House, Wilton Place, Dublin 2

In the matter of the *Landlord and Tenants Acts 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by Patrick Joseph O'Reilly

Take notice that any person having an interest in the freehold estate or any intervening estate in the property known as '88 Main Street, Cavan', situate at 88 Main Street, Cavan, in the county of Cavan, and the subject of a lease dated 2 May 1949 and made between Christina Radcliffe of the one part, Mary Elinor French, Margaret Grant Sargent and John Webster Sargent of the second part, and Frederick William Swan of the third part for a term of 99 years from 1 November 1948 (hereinafter referred to as 'the premises') should give notice of their intentions to the under-signed solicitors.

Take notice that Patrick Joseph O'Reilly, the said applicant, intends to submit an application to the county registrar for the county of the acquisition of the freehold interest in the aforesaid premises, and any party asserting that they hold a superior interest in the aforesaid premises are called upon to furnish evidence of title to the aforementioned premises to the below named within 21 days of the date of this notice.

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

Date: 3 July 2009

Signed: George V Maloney & Co (solicitors for the applicant), 6 Farnham Street, Cavan, Co Cavan

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 Joseph O'Reilly

Any person having any interest in the fee simple estate or any intermediate interest in all that and those the hereditaments and premises known as 7 Moore Street in the parish of Saint Mary and city of Dublin, comprised in folio DN65422F, subject to a perpetual yearly rent of £18.46, created by a fee farm grant dated 6 June 1855 made between George Sams, Emily Gould Sams, Fanny Susanna Shury Daniel and Eliza Stanton Daniel of the one part and John Lyons, Catherine Lyons, Robert Montgomery and Mary Louisa Montgomery of the other part.

Take notice that Joseph O'Reilly, being the person entitled to the grantee's interest in the said fee farm grant, intends to apply to the Dublin county registrar for the acquisition of the fee simple estate and all intermediate interests in the said property, and any party asserting that they hold the fee simple or any intermediate interest in the aforesaid property is called upon to furnish evidence of their title thereto to the under-mentioned solicitors within 21 days from the date of this notice.

In default of any such notice being received, the said Joseph O'Reilly intends to proceed with the application before the said county registrar at the end of 21 days from the date of this notice and will apply to said registrar for such directions as may be appropriate on the basis that the person or persons beneficially entitled to all superior interests up to and including the fee simple in the said property are unknown and unascertained.

Date: 3 July 2009

Signed: William Fry (solicitors for the applicant), Fitzwilton House, Wilton Place, Dublin 2

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the

matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by Aidan Nevin and Maeve Keenan of Ashley, 122 Upper Glenageary Road, Co Dublin, and 5 Carriglea Walk, Firhouse, Dublin 24, respectively

Any person having an interest in the fee simple estate or any intermediate interest in all that and those the property known as 37 Silchester Park, Glenageary, situate in the borough of Dun Laoghaire, barony of Rathdown and county of Dublin, the subject of a lease dated 10 May 1954 made between AJ Jennings & Company Limited of the one part and James Brendan Nevin of the other part for a term of 150 years from 1 May 1945, subject to the yearly rent of £15 thereby reserved.

Take notice that Aidan Nevin and Maeve Keenan, being the persons entitled to the lessee's interest in the said lease, intend to submit an application to the Dublin county registrar at Áras Uí Dhálaigh, Inns Quay, Dublin 7, for the acquisition of the freehold/fee simple interest and all intermediate interests in the aforesaid property, and any person asserting that they hold a superior interest in the property are called upon to furnish evidence of title to the property to the undermentioned solicitors within 21 days from the date of this notice.

In default of any such notice being received, the said Aidan Nevin and Maeve Keenan intend to proceed with the application before the said registrar at the end of the 21 days from the date of this notice and will apply to said registrar for such directions as may be appropriate on the basis that the person or persons beneficially entitled to all superior interests up to and including the fee simple in the said property are unknown and unascertained.

Date: 3 July 2009
Signed: Fanning & Associates (solicitors for the applicant), 49 Foxrock Avenue, Dublin 18

In the matter of the *Landlord and Tenants 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 Ciaran Hickey

Any person having a freehold estate or any intermediate estate in all that and those the premises known as 2 Lower Rathmines Road, Rathmines, Dublin 6, being part of the premises comprised in and held under an indenture of lease dated 3 December 1839 made between Christopher Edward Wall of the one part and William Moorehouse of the other part, portion of which said premises was demised for a term of 1,000 years from 29 September 1839 at a rent of £10 per annum, and portion of which said premises was demised for a term of 170 years from 29 September 1839 at a rent of £6 per annum.

Take notice that Ciaran Hickey, being the person currently entitled to the lessee's interests under the said lease, intends to apply to the county registrar of the county of Dublin for the acquisition of the freehold interest and all intermediate interests in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid property is called upon to furnish evidence of their title to same to the below named within 21 days from the date of this notice.

In default of any such notice being received, the said Ciaran Hickey intends to proceed with the application before the Dublin county registrar at the end of 21 days from the date of this notice and will apply for such directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the aforesaid premises are unknown and unascertained.
Date: 3 July 2009
Signed: FX Rowan & Co (solicitors for the applicant), 14 Upper Pembroke Street, Dublin 2

Lost title deeds – Quinn, Mary, of no 96 Whitecliff, Whitechurch Road, Rathfarnham, Dublin 16. Property at no 96 Whitecliff, Whitechurch Road, Rathfarnham, Dublin 16, being part of the lands of Ballybowden, parish of Whitechurch, barony of Rathdown and county of Dublin. Anyone with information regarding the whereabouts of the title documents relating to the above property, purchased by James Quinn (who died on 25 May 1982) and Mary Quinn (who died on 14 May 2008) pursuant to a deed of conveyance dated 18 January 1982 and made between Abbey Properties Limited of the one part and James Quinn and Mary Quinn of the other part, and after James Quinn's death, the said property was vested in Mary Quinn pursuant to a deed of assent dated 26 April 1984, please contact DM O'Connor & Co, Solicitors, Cross Street, Galway (DX 4515 M Street Galway)

In the matter of the *Landlord and Tenant Acts 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of premises known as 13 Arran Road, Drumcondra, Dublin 9 and an application to be made by Niall Campbell and Cathrine Burke

Any person having any interest in the freehold estate of the following property: 13 Arran Road, Drumcondra, Dublin 9, held under an indenture of lease of 10 February 1922 made between Joseph John Flanagan of the one part and Kathleen Neary of the other part for the term of 168 years from 29 September 1921, subject to the rent reserved thereby, the covenants on the part of the lessee and the conditions therein contained.

Take notice that Niall Campbell and Cathrine Burke, being the persons entitled to the lessee's interest in the said lease, intend to submit an application to the county registrar for the county of Dublin for acquisition of the freehold interest in premises 13 Arran Road, Drumcondra, Dublin 9, and any party asserting that they hold a superior interest in the aforesaid premises are called upon to furnish evidence of his/her title to the aforementioned premises by notice in writing to the solicitors named below within 21 days from the date of this notice.

In default of any such notice being received, the said Niall Campbell and Cathrine Burke intend to proceed with the application before the said county registrar at the end of 21 days from the date of this notice and will apply to the said county registrar for the county of Dublin for directions as may be appropriate on the basis that the persons beneficially entitled to the superior interest including the freehold reversion in the aforesaid premises are unknown or unascertained.
Date: 3 July 09
Signed: Law Plus, Clifford Sullivan & Co (solicitors for the applicants), Carlisle House, Adelaide Road, Bray, Co Wicklow

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

PROFESSIONAL NOTICES

by Pat Hayes and Frances Anne Crean, Eimear Bruen and Denis Finn as attorneys for Eileen Hayes

Take notice that any person having any interest in the freehold estate or any superior interest in property known as all that and those the premises known as 59 South Circular Road, Dublin 8, formerly known as the house and premises number 32, South Circular Road, Portobello, held pursuant to an indenture of lease dated 12 March 1930 and made between Christopher M Gore Grimes of the one part and Mary Jane Taylor of the other part for the residue of the term of 100 years from 1 January 1930 and subject to a yearly rent of £15.

Take notice that the applicants, Pat Hayes, Frances Ann Crean, Eimear Bruen and Denis Finn, intend to submit an application to the county registrar for the county of Dublin for the acquisition of the freehold interest in the aforementioned property, and any party asserting that they hold a superior interest in the aforementioned property is called upon to furnish evidence of the title to the aforesaid property to the below named within 21 days from the date of this notice

In default of any such notice being received, the applicants, Pat Hayes, Frances Ann Crean, Eimear Bruen and Denis Finn, intend to proceed with the application before the county registrar for the county of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion of the aforesaid property are unknown and unascertained.

Date: 3 July 2009

Signed: Denis I Finn Solicitors (solicitors for the applicant), 5 Lower Hatch Street, Dublin 2

RECRUITMENT

Solicitor's training contract sought. Passed FE1s at first sitting (including joint first place in EU law). Extensive legal work experience in both private and public sectors. Eligible to begin PPCI programme in 2009 once suitable contract confirmed. Please contact 085 707 4919

Life continues, despite recession! If you are planning on spending time away from the office due to maternity leave, holiday, intend taking that sabbatical or you simply need assistance and you require experienced locum cover – look no further. Nationwide locum service available. Any period of cover considered, whether short or long. Alternatively, if you would like to lighten your caseload, I am available to work on files from home. References and CV available on request. Contact 087 240 9750 or email: seawood@o2mail.ie

Need tax advice? Specialist tax lawyer available for all queries. Solicitor, AITI and TEP qualified. General practice and 'Big 5' experience. Call Peter on 087 225 0488

MBA chartered scientist (CSci), fellow of the Institute of Food Science and Technology (FIFST) (UK). Expertise in manufacturing technology (chemicals and food), laboratory analysis (chemical and microbiological), quality control systems. Experience with 'blue chip' multinational. Just completed FE1 exams. Seeks apprenticeship; any location. Phone Brendan at 087 284 1434

NOTICE TO THOSE PLACING RECRUITMENT ADVERTISEMENTS IN THE LAW SOCIETY GAZETTE

Please note that, as and from the August/September 2006 issue of the *Law Society Gazette*, **NO recruitment advertisements will be published that include references to years of post-qualification experience (PQE)**.

The *Gazette* Editorial Board has taken this decision based on legal advice, which indicates that such references may be in breach of the *Employment Equality Acts 1998* and *2004*.

MAKO Search,
Alexandra House,
The Sweepstakes,
Ballsbridge, Dublin 4.

T: 01 631 9126
F: 01 631 9001
E: admin@makosearch.ie
W: www.makosearch.ie

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SENIOR FUNDS — 120k+Bonus+Benefits

An excellent opportunity has arisen for a senior lawyer to join a leading financial group. Reporting directly to the general counsel you will be an Irish qualified solicitor at senior associate level with experience gained either in the funds team of a top tier private practice or in an in-house funds role. This is a broad role covering a range of fund documentation; including fund establishment, issuing new share classes and broader distribution agreements. You will benefit from working in collegiate and proactive environment and will be rewarded by a competitive salary and good bonus potential. **Ref: S2014**

CORPORATE / INSOLVENCY PARTNER — 140k+Bonus+Benefits

This firm is looking to recruit an ambitious lawyer who has experience in the corporate/insolvency market. You will be interested in further developing this area of practice over the next few years. You will have gained experience within a well established accountancy/law firm. As an experienced corporate/insolvency lawyer with a proven skill for client management and business development, you will be given full autonomy to develop your own reputation in the market alongside securing the reputation of the team as a whole. **Ref: S2001**

IT / IP COMMERCIAL ROLE — Negotiable

Operating broadly within the technology sector our client is uniquely placed with exposure to multiple markets. Their continued success has led to the creation of a new position within their commercial legal team. The work is varied and includes everything from advising on, drafting and negotiating a wide range of purchasing, licensing and services agreements to dealing with all related issues including ongoing advice on compliance with contract terms. You will provide general advice and assistance on all aspects of intellectual property, including patents, trademarks and copyright. **Ref: S2008**

LITIGATION — Negotiable

Our client, a leading firm is now seeking to recruit a litigation lawyer. You will be responsible for dealing with litigation matters including the defence of all types of claims against professionals including professional negligence, corporate/commercial and employment. You will be interested in further developing this area of practice over the next few years; therefore it would be advantageous for an individual to have had experience in business development. You will have very strong communication skills as well as the ability to work under minimal supervision. Competitive remuneration commensurate with experience. **Ref: S2009**

CONSTRUCTION LITIGATION — Negotiable

The contentious construction team of this firm are committed to delivering a comprehensive service in all aspects of disputes in construction and engineering projects. This opportunity although dispute based offers exposure to dispute avoidance and resolution for contractors, developers and others, principally within the infrastructure and property development sectors. It will involve contract risk analysis, arbitration and litigation. Undertaking business development and marketing activities are also a key part of this role. Excellent terms on offer with this position. **Ref: S2015**

BANKING LAWYER — Negotiable

Our client is looking to recruit a banking lawyer who has insolvency experience and has worked on high risk loan portfolios in the past. You will provide general legal advice and assist in litigation matters which may arise and be able to liaise with external counsel as and when required. The position will be well suited to an individual who has a high level of interpersonal, negotiation and technical skills, is a team player, is able to recognise objectives and strategies and provide solutions to commercial decisions. You will be proactive and self-motivated. **Ref: S2016**

GOVERNANCE — 75k+Bonus+Benefits

As a team member, you will provide legal support to all aspects of the business and ensure that advice given accurately reflects the prevailing law and practice. You will identify and mitigate legal risk particularly regarding new or existing territories, assist with regulatory and compliance issues and manage external counsel. You will be proficient in drafting commercial contracts. You will be able to work effectively under pressure and deliver results working to tight deadlines. Managerial experience is beneficial. You will coach and professionally develop other lawyers within the business unit. **Ref: S2017**

LITIGATION — Negotiable

A mid sized practice is now seeking a senior associate/partner to join their ever expanding team. You will have a general insurance litigation background with expertise in contentious matters and professional indemnity work. You will have familiarity with Insurers and Court processes. In addition you will be a key member of the management team and will be involved in the business development side of the firm. You will be able to work as part of a team while at the same time demonstrate shrewd commercial judgement coupled with entrepreneurial flair. An excellent remuneration package and terms are on offer. **Ref: S2018**

For opportunities in Ireland or overseas, please contact carolmcgrath@makosearch.ie on 01 631 9132 or sharonswan@makosearch.ie on 01 631 9127 or visit www.makosearch.ie

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Construction Litigation - Associate level
Insolvency - Associate level

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