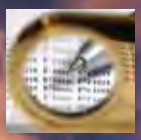

Undertakings alert
Practice note warns about the receiving and giving of undertakings

Clamping down
The shaky legal basis of clamping on private land

Legal illiteracy
President McAleese – level of citizens' legal ignorance 'worrying'

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FORWARD EVER, BACKWARD NEVER

I write this message before the result of the general election is known. However, the Fine Gael manifesto was published recently. Under the topics of the judiciary, the courts and law reform, there are the following suggestions:

1) *Family law:* a constitutional amendment is proposed to allow for the establishment of a distinct and separate system of family courts to streamline family law court processes and make them more efficient,
2) *Mediation:* to encourage and facilitate the use of mediation to resolve commercial, civil and family disputes,
3) *Commercial disputes:* to provide a Civil Commercial Court to facilitate speedy resolution of disputes at Circuit Court level,
4) *Structured settlements:* to facilitate courts making provision for structured settlements in catastrophic injury cases,
5) *Legal profession:* to establish independent regulation of the legal professions to improve access and competition, to make costs more transparent and ensure adequate procedures for addressing consumer complaints.

Once the result of the election has been decided, the Law Society will seek an early meeting with the new Minister for Justice to raise the serious issues of concern that face the profession at present, and to discuss any of the issues above that might be contained in the Programme for Government.

Survey of the profession

Preliminary results have been received from the independent market research company, Behaviour and Attitudes, regarding the survey of the profession on professional indemnity insurance. Over 750 responses have been received and there have been a huge number of detailed comments on this crisis issue. The detailed results will be available at the Council meeting on 25 March next and available for the profession after that. I thank all those firms who have replied to the survey.

The PII Task Force is now investigating in detail all the complexities associated with a 'master policy', that is, one insurance policy for the whole profession. Scotland and Northern Ireland have such a master policy and, already, we have met the chairman of the Northern Ireland PII Committee. He spoke very favourably of the scheme as it applies in Northern Ireland. However, we have a completely different set of circumstances and challenges to both Scotland and Northern Ireland. We will contact the profession again when the task force has completed its research, which is being carried out urgently at present. I must stress, however, that the task force has made no decision whatsoever regarding the PII issue.

Perspective

President McAleese spoke at the annual dinner of the Law Society recently. She said: "Chastened by the economic crisis, we need to find a perspective – individually and collectively – as members of families, professions, organisations, communities and as a nation … As we face up to the magnitude of our current economic challenges, there is a long, difficult journey ahead of all of us. Though we will not all bring exactly the same thing to that journey, the shape we are in when we reach our destination will depend on how well we use all the resources, internal and external, that are available to us, as well as how many people we accompany on the way."

"You may not be responsible for being down, but you must be responsible for getting up. Don't let anything break your spirit. Forward ever, backward never"

This message must be taken on board as we try to solve the huge challenges with professional indemnity insurance. Any solution or improvement in the present regime must be taken on board by the whole of the solicitors' profession, as any action we take collectively creates a stronger profession.

However, despite the economy, the number of solicitors practising at the end of 2010 was 8,335 – an increase of about 115 on the previous year. The number is predicted to increase very slightly in 2011.

Jesse Jackson was in Dublin recently and he encouraged us to dream beyond the present circumstances. He said: "You may not be responsible for being down, but you must be responsible for getting up. Don't let anything break your spirit. Forward ever, backward never."

We must remember these words in 2011.

John Costello
President

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Editor: Mark McDermott FIIC
Deputy editor: Dr Garrett O'Boyle
Designer: Nuala Redmond
Editorial secretaries: Catherine Kearney, Valerie Farrell

Commercial advertising:
Seán Ó hOisín, tel: 086 811 7116,
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HAVE YOU MOVED? Members of the profession should send change-of-address details to: IT Section, Blackhall Place, Dublin 7, or to: customerservice@lawsociety.ie

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Gazette readers can access back issues of the magazine as far back as Jan/Feb 1997, right up to the current issue at lawsociety.ie.
You can also check out:

- Current news
- Forthcoming events, including the **Law Society's annual conference in Powerscourt, Co Wicklow on Friday 6 and Saturday 7 May 2011**
- Employment opportunities
- The latest CPD courses

... as well as lots of other useful information

Nationwide

Compiled by Kevin O'Higgins

Kevin O'Higgins is junior vice-president of the Law Society and has been a Council member since 1998

Griffin wins bursary

WEXFORD

President of the Wexford Solicitors Association, Helen Doyle, attended an event in Waterford Institute of Technology to present a bursary, at the invitation of Dr Michael Howlett of the Law Faculty. The award was presented to student Alison Griffin for her essay 'Freedom of speech requires limitations – a paradoxical concept'.

John Garahy arranged a CPD event in mid February, at which Gavin Ralston SC spoke on easements and prescriptive rights under the 2009 act. Other speakers spoke on a wide range of matters and the full day of seminars was well supported.

Rights of children raised

DONEGAL

The Donegal Bar Association held a recent CPD session on the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*. Róisín Doherty gave a thought-provoking presentation highlighting the changes brought in by the act. She raised issues about the rights of children in the context of any disputes between civil partners or cohabitees. The next planned event is due to take place on 26 March 2011 in Letterkenny. This will be a joint workshop between solicitors and GPs on 'Legal capacity and the scheme of the *Mental Capacity Bill*.'

Kildare elects new president

KILDARE

Following the welcome appointment of Paul Kelly as a judge of the District Court, a bar association meeting was held in mid February, where Naas-based solicitor Bernadette Hanahoe was elected as president. In addition, Conal Boyce, a member of the Criminal Law Committee, agreed to be the District Court nominee to the District Court Users' Group in Naas.

Southside solicitors meet

DUBLIN

PIC: DERMOT BYRNE PHOTOGRAPHY

Solicitors from the southside of Dublin convened for their annual dinner at the Royal St George Yacht Club on 21 January 2011. Enjoying proceedings are the Partners at Law team *(from l to r)*: Cilian McKenna, Aimee Dillon, Susan Gray, Rory O'Riordan, Julia Hussey, Jacinta Enright, Justin McKenna, Ethna Ryan and Karen Brennan. (See 'People and Places', pages 44-45)

The 'low down' on regulation

MAYO

Bar association president Evan O'Dwyer presided over a recent CPD seminar on regulatory matters in Claremorris on 25 February. The speakers included the head of the Law Society's Complaints and Client Relations Section, Linda Kirwan, who dealt with consideration being given to the establishment of a voluntary complaints process. The model being examined is one where complaints might be resolved locally in advance of a direct complaint being made to the committee by a colleague about a colleague.

The Law Society's senior investigating accountant, Seamus McGrath, spoke about audits by the Society, contentious and non-contentious reports, and money-laundering obligations.

The chairman of the Regulation of Practice Committee, Michael Quinlan outlined the work of the committee, which deals with reports received from investigating accountants. He outlined the number of matters dealt with by the committee, opportunities given to solicitors to address the problems raised during audits, and the level of penalties imposed, depending on the circumstances.

Tom hits a century

WATERFORD

Tom Kiersey is celebrating his 100th birthday this year. Waterford Law Society recently marked the occasion by holding a lunch in Tom's honour at La Palma Restaurant.

Tom was the principal of T Kiersey & Co for many years. The practice is now run by his daughter, Gillian, who qualified in 1975.

PII challenge discussed

DUBLIN

President of the bar association Stuart Gilhooly is to be commended for rising early to this year's insurance challenge with the convening of an open-forum meeting of the principal players in the professional indemnity area.

A group of over 190 solicitors were briefed on the critical issues of concern to colleagues, such as whether there can be a standardised proposal form; dealing with a claims notice on the form and how to quantify a claim or notification; the effect a collapse in fee income has for the underwriter and what conclusions might be drawn; common renewal dates versus staggered dates; issues around risk management audits; the recent survey commissioned by the Law Society on colleagues' experience of the recent insurance round; the need for limited liability partnerships; the Assigned Risks Pool; and the pros and cons of the master policy.

The DSBA is resolved to hold further information briefings on this critical area so that colleagues have optimum information, well in advance of the insurance period.

In other news, the now annual get-together of Southside practitioners (Dublin areas 6, 12, 14, 16 and 24) took place on 24 February.

SBA AGM

Notice is hereby given that the 147th annual general meeting of the Solicitors' Benevolent Association will be held at the Law Society, Blackhall Place, Dublin 7 on Friday 15 April 2011 at 12.30pm:

1) To consider the annual report and accounts for the year ended 30 November 2010,
2) To elect directors,
3) To deal with other matters appropriate to a general meeting.

New Masters launched

NUI Galway has launched an LLM in International and Comparative Disability Law and Policy, one of the first of its kind in the world. This area of law is experiencing significant growth, with the introduction of the *UN Convention on the Rights of Persons with Disabilities*, which has resulted in the development of disability strategies at international, regional and national level. The LLM will be provided in the Centre for Disability Law and Policy in NUI Galway. The one-year programme will run from September to August each year. Applications through www.pac.ie (PAC code: GYL11).

Skillnet news

The Society is pleased to announce that it will be offering continued membership of Law Society Skillnet until the end of 2011. This means that all those who paid for Skillnet membership in 2010 will continue to receive a 25% discount on all Law Society Skillnet training events in 2011. In addition, we are in a position to continue offering a 25% discount to all *new* members of Law Society Skillnet in 2011. For full details on membership visit www.lawsociety.ie/lspt or contact professionaltraining@lawsociety.ie.

In News this month...

Rule of law Malawi fundraiser

Join 'Pamodzi – Promoting Rule of Law' and the 'Rule of Law Malawi Project' on Thursday 7 April at 5.30pm in The Distillery Building, 145-151 Church Street, Dublin 7, for an evening of cheese and wine. All donations will go directly to assisting the work of the project in providing legal aid to prisoners on remand in Malawi.

For more on the project, visit www.pamodzi.ie. If you are unable to attend the event, you can donate at www.mycharity.ie/event/rule_of_law_malawi_event.

CPD hours for 2011

Solicitors should note the **new** requirement for the 2011 CPD cycle (1 January-31 December 2011). The 2011 CPD requirement is **12 hours'** CPD to include a minimum of three hours management and professional development skills, and a minimum of one hour regulatory matters. While the total CPD requirement has increased by one hour to 12 hours, the management and professional development skills requirement and the regulatory matters requirement remain the same as in 2010.

The CPD scheme continues to allow for modifications of the CPD requirement in the following cases: a newly-admitted solicitor; a senior practitioner; maternity/ parental/ carers/ adoptive leave; illness/ retirement/ unemployment/ substantive reasons cases; part-time practice; and part-year practice.

Full and detailed information on the scheme is set out in the CPD scheme booklet.

For further information, contact the CPD scheme unit at 01 672 4802 or email cpdscheme@lawsociety.ie.

Hickey named as new Irish Film Board CEO

Respected media lawyer James Hickey has been named as the new chief executive of Bord Scannán na hÉireann/Irish Film Board (IFB). Mr Hickey will replace outgoing chief executive Simon Perry on 1 June 2011. He will be working on a consultative basis with the board prior to taking up his full-time post.

James is a partner at Matheson Ormsby Prentice and is head of its media and entertainment law group. He is recognised internationally as a leading expert in legal matters relating to film and television production. He qualified as a solicitor in 1977 and worked as theatre director of the Project Arts Centre (1982-1988) and the Abbey Theatre (1993-2002). He joined Matheson Ormsby Prentice in 1992. His involvement with the Irish Film Board dates back to that period. He is a member of the European Film Academy and of the Audiovisual Federation of IBEC.

New chief executive of Bord Scannán na hEireann, James Hickey

At the Irish Film and Television Awards on 12 February last, Irish producer Morgan O'Sullivan, during his acceptance speech for his 'Outstanding Contribution to Industry Award', paid tribute to James, referring to him as 'everybody's lawyer'.

James has worked on major productions like *Once*, starring Glen Hansard; *King Arthur*, starring Clive Owen and Keira Knightly; *Intermission*, with Colin Farrell and Colm Meaney; *Dancing at Lughnasa*, starring Meryl Streep; and *My Left Foot*, directed by Jim Sheridan. His legal work in television production includes the international TV series *The Tudors* and *Camelot*. (The *Gazette* hopes to feature a profile article on James in a forthcoming issue.)

Regret as numbers force closure of Law School in Cork

The Council of the Law Society, at its meeting on 18 February 2011, with regret accepted the reluctant recommendation of the Society's Education Committee that the Society's Law School in Cork should be closed as a Professional Practice Course training centre, with effect from July 2011.

The decision was necessary for both educational and economic reasons. If the numbers in the Law School in Cork had dropped any further, as was expected, the educational experience of trainees there would have begun to deteriorate. In addition, in economic terms, the projections were that losses in the region of €1 million would have resulted over the next three years unless the Law School in Cork was closed now.

The Cork Professional Practice Course I (PPCI) began in 2006. At the time, the numbers attending the PPCI had grown from 346 in 2001 to 647 in 2005 – an increase of almost 89%. It was decided to open a centre in Cork for Munster-based students and to relieve the pressure in Dublin. In 2005, a total of 109 trainees were taken on from Munster-based firms. The Cork course was planned on the assumption that in excess of 100 students would attend on an annual basis.

The building containing the law school in Washington Street, Cork

The total number of training contracts, however, has been declining since 2007 and has fallen by 38% – from 671 in 2007 to 414 in 2010. The decline in numbers resulted in just 44 students embarking on the PPCI in Cork in 2010. Numbers were likely to fall again this year. The table (below) shows the number of training contracts since 2003 and, since 2006, the split between the Dublin and Cork PPCI programmes.

This fall in numbers is reflected in the numbers sitting the Final Examination – First Part, which have fallen by 45% from the spring sitting in 2008 to the spring sitting in 2011.

Providing a PPCI course for between 30 and 40 students would pose difficulties from an educational perspective. It is such a small number that it is very difficult to mix students in diverse groups, as is done in Dublin. The boundaries between large and small-group teaching become blurred. It could also result in a feeling of isolation from the larger group in Dublin.

In order to be self-financing, the Cork course required 100 student participants or more per year. From 2008 onwards, the course in Cork has been subsidised by other educational activities.

There has been a programme of cost-cutting in Cork, with four staff redundancies. There have also been attempts to increase revenue through room hire, seminars and a diploma course. Unfortunately, the revenue brought in by student fees has fallen much more dramatically than anticipated and has resulted in the Cork Professional Practice Course generating a significant loss.

Future students who would have attended in Cork will now attend in Dublin (as was the case until 2006).

Venue	2003	2004	2005	2006	2007	2008	2009	2010
Dublin	436	546	640	599	565	520	389	370
Cork	-	-	-	73	106	76	66	44
Total	**436**	**546**	**647**	**672**	**671**	**596**	**455**	**414**

Employer support at the touch of a button

The employer support facility on the Law Society's website has been extended. Employers can now access a wide range of information on hiring staff and other supports available – all at one convenient location. The employer support facility is accessed through the 'Careers and employment' button. Only members have access to this section and must log on using their member username and password. The new facility will allow members to access online details of recently published salary surveys and employer information, including the level of employer PRSI that is payable. Up-to-date information is given on a variety of incentives available for employing staff. A wide selection of precedent documentation, as well as sample recruitment and hiring documents, are offered, such as job descriptions, staff hiring specifications and adverts. Links are provided to the various facilities the Society has in place to help link out-of-work solicitors with available jobs, including:

- Legal vacancies
- Job seekers' register
- New trainee CV register
- Secondment CV register.

The legal vacancies facility, with over 2,000 visits every day, is acknowledged as one of the best places currently for employers to list legal job vacancies. There is no charge for advertising and all types of legal vacancies can be included, from senior solicitor roles to trainee and paralegal roles.

Optional services are available at a modest cost to employers who use the legal vacancies facility. This includes the option to receive a shortlist of applicants according to skill requirements, saving the employer time by honing potential job candidates.

Employers can also list their staff requirements quickly on the legal vacancies section by completing a simple on-line form. The job seekers' register provides the fastest possible way of hiring a solicitor, for a locum or contract position. Details of available solicitors can be reviewed, and contact details are provided. As a result, employers can make direct contact with people of interest to them and can hire as quickly as they need to.

Two trainee CV registers are available for employers to view. One features people seeking new training contracts. The other shows people who have contracts but are now seeking a secondment. Of course, employers also have the option of advertising for trainees in the legal vacancies section.

Extensive information on other recruitment sources is provided in the employer support facility.

Lenihan confirms PC fees not affected by BIK changes

The outgoing Minister for Finance, Brian Lenihan TD, has confirmed in writing the correctness of the Society's view that recent legislative measures have not caused a benefit-in-kind liability for employee solicitors on whose behalf the employer firm has paid their annual practising certificate fee.

The legislative measures in question are *Financial Resolution No 26* (passed by the Dáil on 7 December 2010) and section 7 of the *Finance Act 2011*.

A solicitor's firm requires a practising certificate for each of its employed solicitors. The employed solicitor does not derive any personal benefit from the holding of a practising certificate, as he or she is unable to make any personal use of, or thereby derive personal benefit from, the practising certificate.

No benefit-in-kind liability

The Society's director general Ken Murphy wrote to Minister Lenihan on 21 December 2010, seeking confirmation from him of the intention of the legislation. In a letter of 8 February 2011, the minister authoritatively confirmed the Society's understanding of the position by saying, in relation to the query regarding subscriptions to professional bodies:

"Section 7 of the *Finance Bill 2011* cancels the benefit-in-kind exemption that previously applied to payment of annual membership fees of a professional body. As the legislation being repealed only applies to the 'annual membership fees of a professional body', it would not apply to a practising certificate required by law by a person in order to exercise a profession."

The practising certificate payment required by statute for the year ending 31 December 2011 is in the total sum of €2,148 for solicitors admitted three years or more (registration fee €1,448 plus €700 compensation fund contribution), and for solicitors admitted less than three years it is €1,842 (€1,142 registration fee and €700 compensation fund contribution). It is now clear that none of this has been subjected to a benefit-in-kind tax payment by the new measures.

Annual membership query

Separately from payment of the practising certificate fee, a solicitor may voluntarily choose to (and in the Society's view should) pay an annual subscription for membership of the Society, which this year (as for many years) is in the sum of €85. For solicitors admitted less than three years on 1 January 2011, the membership subscription is €55; and for solicitors admitted in the course of 2011, the membership subscription is €20.

It appears that the impact of the recent changes on the law on benefit in kind *does* submit to tax the payment made on behalf of an employed solicitor of this membership fee of €85, €55 or €20 (depending on length of time admitted as a solicitor). However, the Society is seeking further clarification in this regard.

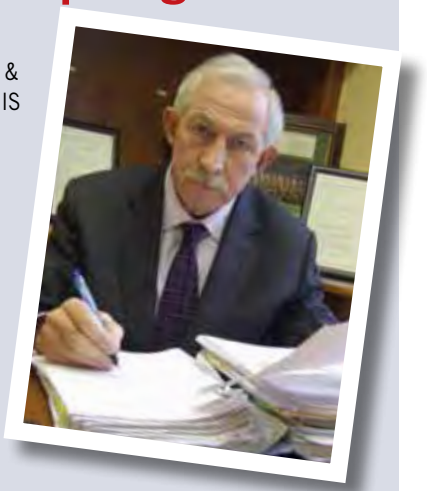
Valuable objective

The Society believes it is in the public interest for as many solicitors as possible to be members of the Society, in addition to holding practising certificates. It is through the collegiality of membership, involving among other things receipt of the Society's *Gazette* on a monthly basis and the *Law Directory* on an annual basis, that solicitors remain in communication with the Society about all issues to do with standards and best practice. The maintenance of the highest level of technical competence and of professional standards set down by the Society is a matter of public interest, and membership of the Society contributes greatly to achieving this valuable objective.

MEDIA

In the media spotlight

JOHN CALLINAN
PRINCIPAL, JOHN CALLINAN & COMPANY, SOLICITORS, ENNIS



Case summary
Eight members of the Shannon Estuary and Tributaries Net Fishermen Association were convicted and fined on 14 February 2011 for salmon fishing with a net in the Shannon estuary on 28 June 2010 during the course of a protest at the Government ban.

Your background
I have been a solicitor for 33 years. I qualified in 1978. There was no history of law in my family. I am a publican's son. What made me decide on law? Probably because around the time I was 12, a local ground landlord tried to evict my mother and the law saved her. A solicitor called Kevin Smith of Smith Foy & Partners, a well-known solicitor in Dublin, acted for my mother and won a great victory. It's the only reason I can think of.

Thoughts on the case
These eight men represent a fairly loose grouping of licensed or former licensed salmon fishermen who fished the Shannon Estuary, the Fergus and some of the rivers that flow into the Shannon. They have done so – themselves and their fathers, uncles, grandfathers – for hundreds of years.

Over the years, Inland Fisheries Ireland has been reducing the number of days that these men could fish and, indeed, the hours they could fish.

In 2007, the Salmon Hardship Scheme was put in place, whereby the traditional net fishermen could have their rights bought out forever. I would say 90% of the fishermen took it.

These eight men are part of about 20 altogether – from Kerry, through Limerick, to Clare – that wouldn't and didn't take the compensation because they didn't want to sell out, as they see it, their birth rights and the birth rights of their children. They have been doing this for hundreds of years in their own families and they have felt very frustrated as a result.

In their frustration, these particular men got a solicitor in Limerick to write to the Fisheries Board that they were going to exercise their rights to fish. Some four or five days later, on 28 June, they went out on the evening in question. They were subsequently charged, fairly extensively.

Their case was that they were protesting and that they wanted their plight highlighted.

Judge Lucey in the District Court said he recognised that the fisherman had "lost something very ancient and I know that goes very deep with them. They are very well-intentioned people and it is unfortunate that they are here. I hope things change for them and that the stocks will improve."

Judge Lucey fined each of the men €100 and ordered each to pay €150 towards Inland Fisheries Ireland's costs.

Ramifications
It was somewhat extraordinary that there were eight fishermen ranging in age from 42 to 81 that had no previous fisheries convictions. I think this case will be used to highlight the effects the current situation is having on these men, who still see themselves as fishermen and who want to be licensed fishermen.

Westport to stage inaugural US/Ireland legal symposium

Announcing the inaugural US/Ireland Legal Symposium are *(l to r)*: Evan O'Dwyer (president, Mayo Bar Association), Gavin O'Reilly (Recruit Legal), John O'Malley (Brehon Law Society), Joseph T Kelley (president, Brehon Law Society), Judge Seamus Hughes, Kevin Kent (Brehon Law Society), Ward McEllin (past-president of the Law Society) and Katie Cadden (solicitor)

The inaugural US/Ireland Legal Symposium will take place in Westport, Co Mayo, from 11-13 May 2011, *writes Katie Cadden*. The international symposium is being hosted by the Brehon Law Society of Philadelphia and supported by the Western Development Commission, Mayo County Council and Temple University Beasley School of Law in Philadelphia.

CPD hours will be awarded to those attending and the following topics will be discussed:

- Accessing capital and starting up a business
- Conducting business/comparative analysis, and
- Litigation and dispute resolution – Ireland as a forum for ADR.

A total of 250-300 participants are expected to attend and will include Irish, British and US lawyers, as well as local and international venture capitalists, representatives from the financial services sector, accountants and tax professionals.

For registration details, including very attractive early-bird and trainee options, visit www.brehonsymposium.com. The registration fee includes access to all seminars, lunches, coffees, drinks receptions and admission to the gala dinner per delegate.

Anti-begging laws enacted

The new *Criminal Justice (Public Order) Act 2011* has been signed into law by the President. The new act, brought through the Dáil by former Minister for Justice and Law Reform, Dermot Ahern, before his retirement, establishes a new general law for the control of begging.

Current minister Brendan Smith said: "Under the new law, a person who begs in an aggressive, intimidating or threatening manner will be guilty of an offence. New powers will enable An Garda Síochána to direct anyone begging near ATMs, night safes or shop entrances to leave the area."

Two new offences are created by the act – one on the organising and directing of begging, the other on living off the proceeds.

The new offence carries penalties of up to five years' imprisonment, or a fine of €200,000, or both.

OUTLAWS

Life outside the profession

SEAN ORMONDE
Entrepreneur

Seán qualified as a solicitor in 2002 and spent two years getting post-qualification experience in his native Waterford before moving into sales and marketing in a number of health, wellness and fitness businesses.

His main involvement within the fitness sector now is as a director and shareholder of Énergie Fitness Clubs (Ireland) Ltd. This company owns the master franchise for the Énergie Fitness Clubs brand and operation in Ireland.

Énergie featured extensively in the media recently when they took over nine gyms that had operated under the Jackie Skelly brand. This acquisition established Énergie as the largest gym operator in the country.

In 2009, Sean set up a consultancy business in Waterford that provides specialist services in the area of employment law, called Employment Matters. He is involved full time within Employment Matters and is also an accredited mediator. More information at www.employmentmatters.ie.

CLIODHNA GUY
Disciplinary regulations officer

Cliodhna trained with ByrneWallace and qualified in January 2009. She joined the FAI in 2010 as disciplinary regulations officer, reporting to FAI legal director Sarah O'Shea.

She has been involved with athletics and sports regulation for over ten years. She was a doping control officer in Ireland with IDTM, a Swedish company that conducts doping controls for major sporting organisations, worldwide.

She was awarded the post of honorary disciplinary officer of Paralympics Ireland in September 2009.

In her role with the FAI, her knowledge about football has grown exponentially. She has a varied role, dealing with amateur football clubs right through to the top Irish clubs in the Airtricity League, as well as international tournaments.

Her main focus as disciplinary regulations officer is to ensure that the FAI rules and procedures are properly interpreted and upheld.

KIERAN CUMMINS
Planning and environmental consultant

Before Kieran Cummins ever became a solicitor, he was a horticulturist and maintains a strong interest in, and a commitment to, environmental matters.

Kieran did his legal training in DJ Reilly and Co in Trim, Co Meath. He qualified in 2005 but increasingly got involved in environmental and planning submissions. In January 2010, he was elected to the Meath Planning and Economic Strategic Policy Committee to represent the interests of community and voluntary groups.

His expertise now is in drafting submissions that go to the planning authorities. These submissions have become increasingly complex and often are beyond the capacity of community and concerned groups.

"Preparatory work alone requires a review of the planning application, the county development plan, environmental impact surveys and wide-ranging other documentation," says Kieran.

In autumn 2010, he established a planning and environmental consultancy that focuses on environmental defence work. View his website at www.kierancummins.com. He can be contacted at 086 785 3333.

President urges profession to challenge citizens' legal illiteracy

President Mary McAleese has issued a challenge to the legal profession and the citizens of Ireland to consider whether the level of general, economic, financial and risk-taking illiteracy, whose "terrible consequences are being borne by our citizens and which call for serious public education, do not also point up worrying levels of similar ignorance or illiteracy when it comes to things legal".

Speaking at the Law Society's Annual Dinner on 18 February 2011, the President dared citizens to make law their concern. She threw down the gauntlet, too, to the legal profession: "Tonight I ask what fresh perspective can the legal profession bring to bear on the new Ireland we hope will emerge from these troubled and troubling times."

Critical thinking

The President said that she was issuing this challenge as "an open-ended question, not designed in any way to provoke or promote a rush to judgment over perennial questions about whether we are overly litigious, whether our adversarial system is too costly or cumbersome, how much we might gain from greater use of alternate modes of dispute resolution, though all of those preoccupations and others are important for us to debate.

"I want to posit something broader tonight and leave it to either fester or grow or disappear around these tables."

President McAleese then urged Irish citizens to become more critical about the level of trust they placed in "the professional elites".

"To some extent at least, the conferring by the public of uncritical, non-probative trust on professional elites does not help either those elites or the public. Both, it seems to me, would benefit enormously from a public significantly better educated, significantly more literate about matters of fundamental importance to their lives – like law, like finance, like economics, like the values underpinning them, like the ethics and philosophies which energise their outworkings.

"Law is your concern as lawyers. It is also your concern as citizens. Every single citizen from the youngest to the oldest lives within a complex legal context – with rights, responsibilities, transactions, standards, processes, procedures, the implications of which are often very imperfectly understood, left to the experts."

Conspiracies against the laity

Quoting from George Bernard Shaw, who said that "all professions are conspiracies against the laity", the President countered, saying that the professions were "rightly the gatekeepers to the more scholarly, detailed, practised and profound understanding of their discipline that its practice to a high standard demands".

"However, if the corollary of that is a public awareness that is stunted or skewed by limited knowledge, by limited opportunities for growing in awareness, by limited dialogue between public and professions – then we all lose. Now we need to find new strengths, fresh pockets of resource and inspiration so that what we do today, we can do better tomorrow.

"A legally aware and literate public is essential to that tomorrow: not a public whose thinking of the law is restricted to the rules about traffic rules or pub closing times, or the murder case that is all over the papers, but a public confident and articulate in the moral, ethical and philosophical underpinnings of our systems and structures, who trust, but with an educated scepticism and a vigilance that is justice aware, risk aware and, where necessary, sensibly risk averse."

Pilgrimage

Concluding, the President said: "As we face up to the magnitude of our current economic challenges, there is a long and difficult journey ahead of all of us … We look for leadership on that journey, not simply from our politicians, but from our people and our professions. I hope my profession will be remembered by a future generation for how it brought down the walls between profession and public in a unique and game-changing dialogue and flooded our civic space with an enlightenment, a consciousness that let a 'blessed' future in, the future once spelt out in the Proclamation which envisioned a republic in which all the children of the nation were cherished equally.

"A long journey is a good starting place to tease out the implications of a republic infused in its very core with the ethic of cherishing, the philosophy of equality – and childhood is where we need to begin our personal journey to full civic literacy."

UCD LAW SOCIETY CELEBRATES 100TH SESSION

The UCD Law Society is celebrating its 100th session this year. To mark this important milestone in the society's history, a centenary dinner will be held in O'Reilly Hall, Belfield on Saturday, 2 April 2011. We cordially invite any former auditors, members or friends of the society to join us for the evening.

A history of the society is also to be published and we are seeking contributions in the form of written memoirs, photos and other items of historical interest.

- **Key-note speaker: (to be confirmed)**
- **Single tickets: €100**
- **Tables of ten: €900**

For more information, please email: law.society@ucd.ie. The event is being sponsored by McCann FitzGerald.

NEWS FROM THE LAW SOCIETY'S COMMITTEES AND TASK FORCES

Views sought on case progression rules

FAMILY LAW COMMITTEE

The Family Law Committee endeavours to monitor and consider all relevant developments in the area. As well as significant developments, such as the recent civil partnership and cohabitation legislation, the committee focuses on issues that may be of concern to the profession at large, on an ongoing basis.

For instance, the committee has been actively considering the operation of the *Circuit Court Case Progression Rules* since their introduction. As part of our work, we would very much appreciate if colleagues could let us have their comments, opinions and experiences on how these rules are operating in practice.

We wish to hear from colleagues in the different circuits about their experiences, including how different county registrars operate the rules. This information can then be fed back to the county registrars and the Courts Service, with a view to seeing how the operation of the rules may be refined or improved, as required.

Over the course of the year, the committee will be looking at a range of other issues and we will, in future issues of the *Gazette*, be inviting practitioners to provide their own experiences, comments and reform proposals on those issues.

Please address any relevant correspondence regarding the *Circuit Court Case Progression Rules* by email to c.farrell@lawsociety.ie.

Managing legal privilege

IN-HOUSE AND PUBLIC SECTOR COMMITTEE

The matter of legal professional privilege is a topic of interest to many members. With this in mind, the committee invited Dr John Temple Lang to discuss 'Managing legal privilege and avoiding the pitfalls' at its annual conference on 26 November 2010. If you missed the conference but would like to obtain copies of the papers, you should contact the Law Society Professional Training team at professionaltraining@lawsociety.ie or call 01 881 5727. The committee is continuing to work with the European Company Lawyers' Association on this important matter.

Recognising the desire of some solicitors who work in-house and in the public sector to become more familiar with the work of the accountants in their organisations, the committee is discussing the possibility of a joint collaboration with one of the leading professional accountancy organisations this year. The committee is interested in hearing from members about what they would most like to achieve from this collaborative effort.

The committee also wishes members to share their recommendations or suggestions on topics for a proposed diploma course for in-house and public sector solicitors. The timeframe is short, so please make contact by **15 March 2011**, by emailing committee secretary Louise Campbell at l.campbell@lawsociety.ie.

The committee welcomes three new members to its ranks: Brian Connolly, Eleanor Keogan and Lucinda Roche.

Civil partnership and file-and-pay deadlines

PROBATE, ADMINISTRATION AND TRUSTS COMMITTEE

In light of the rushed nature of the passing of the *Finance Act 2011*, the taxation provisions for the civil partnership legislation were deferred, as per the attached note published on the Revenue website:

"To facilitate the accelerated timeframe for the passing of the 2011 *Finance Bill*, the legislative changes to give effect to the taxation changes arising from the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* have been deferred until after the formation of a new government. The draft legislation has already been *largely* prepared and includes all necessary changes, together with the proposed date or dates on which such changes take effect. In general, all changes will have effect for the year of assessment 2011. However, it is important to note that *until the legislation is passed*, existing provisions continue to apply. The Revenue website will continue to be updated as more information becomes available."

Also, as noted in the February e-zine, the *Finance Bill* moved the file-and-pay deadline forward from 31 October to 30 September. Originally, the file-and-pay deadline for both income tax and CAT were to be moved to the new deadline, but no change was made to the deadline for income tax, following representations by independent TDs.

"The Finance Bill moved the file-and-pay deadline forward to 30 September"

It was hoped that a similar reversion to the old deadline would take place for CAT, following representations made by the Probate, Administration and Trusts Committee. Unfortunately, given the time constraints, this did not occur. The committee is keeping this matter to the forefront and will argue for appropriate amendments to be made in the forthcoming *Civil Partnership Finance Bill*.

Multi-unit developments law enacted

CONVEYANCING COMMITTEE

The new *Multi-Unit Developments Act 2011* was signed into law on 24 January 2011. If you act for a developer, this is a piece of legislation that you will need to get to grips with. It is anticipated that the act will be commenced in March. Regulations are required to be made under certain sections of the act, and these are being worked on by the Department of Justice.

At the request of the department, the Conveyancing Committee is working with other stakeholders with a view to drafting a precedent agreement between the developer and the owners' management company as contemplated by the act. This precedent will be made available to the profession on the Society's website in due course. There will be a further announcement when it is ready for publication.

In other news, the committee is actively working on new and expanded family law declarations to deal with the impact on the conveyancing process of recent legislative changes brought about by the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*. As soon as they are ready for publication, there will be a further announcement and the declarations will be placed in the members' area of the Law Society's website for use by the profession.

CLEAR DESK – CLEAR MIND!

Two Dublin-based firms, Dillon Solicitors and Paul W Tracey, are united in a commitment to innovation in practice management, garnering 'Excellence Through People' awards in 2010, as Colin Murphy found out

Colin Murphy is a journalist and documentary maker in Dublin, specialising in social and cultural affairs

Brendan Dillon was in permanent crisis management. "The firm was too busy. *I* was too busy. I was fire-fighting the whole time."

That was five years ago. And then, one day, in the office of Dillon Solicitors in Rathfarnham, he glanced at an unsolicited fax lying on the machine.

The fax was the kind that many people – particularly when snowed under with work – would merely glance at and discard. But it caught Dillon's eye.

If was from Dennis Farrell & Associates, a training firm, and offered a four-day intensive training in management issues for owner-managers.

Though many own-practice solicitors might be reluctant to view themselves in the typical terms of small businesses as 'owner-managers', Dillon realised he was shouldering too much of the burden of running the business, alongside his legal work. And he was bad at passing it on.

"Delegation is my biggest weakness," he admits, ruefully. "I still have to fight it."

Dillon Solicitors is a small suburban firm, with four solicitors in a total staff of nine. Dillon had no training in management. For him, as for many of his colleagues in the legal profession, the science of management was "virgin territory". He thought of his firm as a practice – not as a business.

He decided to do the four-day course, and it was a revelation. Dennis Farrell focused on delegation – or, as Dillon puts it, "how to cascade responsibilities down through the firm".

"It changed my mindset as to how I ran the practice."

Back in Rathfarnham, as Dillon sought to implement what he had learned and reorganise his own workload, he realised he was now faced with a new question: "How do I get this culture embedded into the firm?"

"The tradition of having piles of files hanging around the place, cluttering your desk, is an unhealthy one"

It was all very well improving his own workload management, but it would be a waste of time if it merely made life better for him, and not for his staff.

He did a further one-day course with Farrell and started bringing his staff together to examine their work practices and seek where they could be improved.

The drive for excellence – staff from Dillon Solicitors in Rathfarnham celebrate their 'Excellence Through People' award

At the other side of town…

Meanwhile, on Marlborough Street in Dublin, Paul Tracey had also found non-legal expertise to be beneficial to his firm. In his case, it came from his wife, Sharon, a chartered accountant.

Sharon Tracey joined the firm after they married, 15 years ago, and set about developing a "strategic focus" for the firm. The firm now has 18 staff, with just three of them solicitors. On the management team, there are more non-lawyers than lawyers.

There are regular strategy meetings, and a full-day strategy meeting every

PICS: SIOBHAN BYRNE PHOTOGRAPHY

Excellent people – excellent results! Paul W Tracey staff in Marlborough Street, in Dublin's city centre

three months. The firm uses the services of a management consultancy, Century Management, to support it in strategy development.

Is that not expensive? "It's very expensive if you make the wrong business decisions," Tracey replies. "Just as we provide advice to our clients, so we too need professional advice."

Both firms are united in a commitment to innovation in practice management, and to thinking of themselves not simply as law firms, but as businesses. And both are the only law firms in the country last year to gain the 'Excellence Through People' award.

Motivational factor

'Excellence Through People' is the national human resource standard, awarded by FÁS. According to FÁS, the standard aims to help organisations "improve performance and achieve business goals through their employees". It seeks "to get organisations to look at their people as a key source of competitive advantage".

The standard takes applicant organisations through a step-by-step guide to help them improve efficiency and implement best practices, focusing always on staff management.

Sharon Tracey decided to apply for the Excellence Through People award as a way of acknowledging their "fantastic" team.

For Brendan Dillon, the process of applying for the award provided an opportunity "to put a structure around what we had previously been doing in an *ad hoc* way". It offered an opportunity to establish clear systems and procedures in the office, with buy-in from all the staff.

> ***"Just as we provide advice to our clients, so we too need professional advice"***

"The main expense was time. The fee for entering is modest. There's a free, one-day introductory seminar. Then Excellence Through People provides an assessor, who is there to facilitate the organisation."

The firm set a central mission statement, with the idea that all objectives for the year would flow from that. At weekly meetings, tasks were assigned to different members of the office (all the staff were involved), and progress was monitored.

They revised their systems for all the key areas of human resources: recruitment, training, appraisals, and so on, contributing towards a complete revamp of the office manual. They set out a plan for marketing, aiming to improve their 'brand awareness' within their community. (Dillon refers to this as marketing rather than advertising. Law firms, he notes, have to be careful about positioning themselves in the market so that they promote awareness of the firm without creating uneasiness around their sales strategy.)

"But it's not just about producing your business plan," he says. "You have to show how it works within the office."

The assessor from FÁS visited and interviewed everybody in the

EIGHT STEPS TO EXCELLENCE

According to Excellence Through People (www.excellencethroughpeople.ie), these are the key areas to focus on for business improvement:

1) **Business planning and quality improvement,**
2) **Effective communication and people involvement,**
3) **Leadership and people management,**
4) **Planning of learning and development,**
5) **Training and lifelong learning,**
6) **Review of learning,**
7) **Recruitment and selection,**
8) **Employee wellbeing.**

office to measure the extent of awareness and buy-in from staff.

"They make sure it's not just a folder in a drawer."

So what were the gains to the firm? "There's a big motivational factor. If you have a well-run business, that brings the whole team with you. It's a virtuous circle.

"When we had our review of 2010, taking part in (and winning) Excellence Through People was a big highlight for staff. We also identified marketing opportunities, such as through our website, improved our internal systems, and hopefully solidified our reputation with our existing clients." (Both firms have impressive websites. See www.dillon.ie and www.traceysolicitors.ie.)

Given the controversies involving FÁS over recent years, how did Brendan Dillon find the organisation? 'I've been highly impressed with the clarity of thought of these people. They are delivering very good programmes at the coalface. They're certainly not paper-pushers with no idea of how a business works. I'd put them up there with any management consultant."

Where to next?

It sounds like an oxymoron: a paperless law firm. But the firms of Paul Tracey and Brendan Dillon have stepped into the brave new world that is the paperless office – and both firms are thriving on the change.

"It's not actually paperless," clarifies Sharon Tracey, who took her firm that route last year. "It's less paper."

Brendan Dillon, who followed them in making the shift to paperless at the beginning of last month, had noticed the change when encountering solicitors from Tracey's in court. Normally, solicitors are laden down with files. Not those from Tracey's, he noticed. "They don't have files – they have envelopes."

In each firm's case, the example of other businesses was a crucial inspiration. Sharon Tracey had observed other (non-legal) companies making the shift – and brought some of her team to see how it worked at one such company.

"This is phenomenal," was their response. They came back to the office, and proselytised for the change. Within a week, the whole office had gone paperless.

Tracey had already had the necessary systems in place, and those systems are crucial. They use Opsis case management software. All incoming files are scanned in (having an efficient system for doing this is key, says Tracey), and is then available to the office via a simple computer search.

"'The client's on the phone, where's the file?' – those days are gone," she says. "You're never looking for files. It's all there at the touch of a button."

The strategy was so successful that the firm's paper supplier rang, wondering whether they had changed supplier.

For Brendan Dillon, the inspiration to go 'paperless' came from Paul Tracey's firm, and he brought some staff to visit their offices and witness it at work. Again, they were immediately convinced.

There's both a cost and a time saving in going paperless, he says. The cost is that of off-site storage for archived paperwork – though this is offset by the investment in the necessary computer systems. (Dillon put this at a ballpark figure of €80,000.)

But the time saving is more significant. "We're selling time," he says. "There's only so many hours in the day. You've got to condense the time wasted."

A further benefit is less tangible, but perhaps more fundamental. "The tradition of having piles of files hanging around the place, cluttering your desk, is an unhealthy one." Those piles are like physical representations of mental pressures, he says, and cannot but have an effect on people's mood and productivity.

"If you've a clear desk, you've a clear mind," he says.

THE SOCIAL NETWORK

You are what is known about you – and who knows it. As a result, social networking is a vital component when job seeking, says Keith O'Malley

Keith O'Malley is the Law Society's career development advisor in the Career Support section

In job seeking, nothing works better than networking. About half of all appointments follow on from a personal recommendation. In Ireland, and among solicitors, the proportion is even higher.

Quite simply, more solicitors get jobs through their network of contacts than through all other sources combined, including adverts, recruiters, internet job boards and speculative approaches.

Networking is often thought to be based on the adage: 'You are who you know.' More accurately, it is based on: 'You are what is known about you – and who knows it.'

Social networking is the term given to the use of new technology and internet facilities such as LinkedIn, Facebook and Twitter that assist people to network better and to optimise what is known about them and who knows it.

Social networking is a really important job market development that will radically change how we manage our careers. It opens up opportunities for people to personally brand themselves and to market their careers in a way that, so far, has not been possible.

Social networking also opens up big opportunities for employers. New fora are becoming available to them, like LinkedIn, full of information, with details on what individuals are currently doing, their aspirations and their contact details.

Big opportunities have opened up, too, for employers to disseminate information quickly and inexpensively on their staffing requirements though facilities like Twitter.

Notwithstanding, old-fashioned networking tactics – such as meeting up with people, attending events, and cooperating on projects – still remain relevant and necessary. Social networking should be done alongside, rather than instead of, other networking activities. Laid out in this article are suggestions on how solicitors can be effective at social networking and can tie it in with their overall networking strategy.

> *"Quite simply, more solicitors get jobs through their network of contacts than through all other sources combined"*

Create a presence

Every solicitor should have a profile on LinkedIn – whether you are job seeking or not. Not being on LinkedIn risks having other people think that you are out of touch/disinterested in new developments and in sharing ideas.

This is because LinkedIn has been developed as more than just a job-seeking forum. It is also relevant for disseminating professional and industry sector information – to such an extent that, if someone is not involved, they may not be fully aware of emerging developments.

Don't wait until you are out of work to get involved in social networking. Build an online presence and your network of contacts well in advance of when you need them in place. Then, keep working away at them, in order to improve and extend. All of this, of course, is true of all networking activities.

Make connections throughout your profession and your area of speciality. Follow and link up with experts. Join groups in LinkedIn and Facebook and participate in discussions. Help people out if possible.

Do it properly

People often post the minimum amount of personal information on LinkedIn, Facebook and other social networking sites (in order to gain access to the facility and look at other peoples' profiles). This is a significant wasted opportunity, even if you are not in the market for a job. Post good information on what you are doing currently and on your career aspirations.

Add a photograph, outline experience to date and education details and get people to provide recommendations. Connect up with anyone you have a relationship with now, or have had one with in the past. Consider how you can occasionally send them something that they should value, in order to maintain an active link with them.

Networking approach

All networking works best both ways. The more you are willing to help others, the more likely they will be interested in helping you. Take time every day to reach out to

PERSONAL BRANDING

Personal branding is about taking a marketing management approach to your career. It follows on from in-depth, self-appraisal work and answering questions such as: what type of work can I enjoy greatest success in? What sets me apart, or could set me apart, from other job seekers?

Through personal branding, you first figure out what can differentiate you in the market, and then you consider how you will do this. Social networking can help greatly on this front.

Getting published on the subject, starting a blog and a wide range of other social networking activities can facilitate you to establish public awareness about the brand you want to create, and how you want to build your career.

your social network. Write a recommendation on LinkedIn, offer to make introductions or share articles and other news with them.

There are two schools of thought about how many people you should connect with when using social media – reflecting quality versus quantity. Whichever way you opt to go, you should always keep building your network over time, while also staying in touch with your existing contacts.

Be careful

Before making a hiring decision, employers increasingly Google candidate names and review what is thrown up. Google your name occasionally. If this throws up some kind of problem, you need to come up with some way to address this.

Be really careful about what you tweet. For proof of this, search Twitter for the phrase 'I hate my job'. Tweets also show up in Google search.

People post all sorts of private information and images on sites like Facebook. If you are not careful with your privacy settings and you also don't monitor what information and images friends post relating to you, you could be badly compromised as a result of the information that prospective employers might find. G

"Social networking is a really important job market development that will radically change how we manage our careers"

FAILING TO LEGISLATE FOR LAWFUL ABORTION – THE IMPACT OF *C*

In the recent *C* case, the European Court of Human Rights found that the Irish State failed to legislate for abortion permitted under the Constitution – leading to a breach of C's right to private and family life, as protected by article 8 of the ECHR

Joyce Mortimer is the Law Society's human rights executive

The *C* case originated in an application against Ireland lodged with the European Court of Human Rights under article 34 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) by two Irish nationals, Ms A and Ms B, and by a Lithuanian national, Ms C. The complaints of the first two applicants differed, in that A and B complained about the prohibition of abortion for health and well-being reasons in Ireland, while C was eligible for an abortion under Irish law because her pregnancy posed a real and substantial risk to her life. C complained under articles 2, 3, 8, 13 and 14 of the ECHR about the alleged failure of the state to implement her constitutional right to an abortion in the case of a risk to her life under article 40.3.3. C's complaint forms the subject matter of this article.

The facts

On 3 March 2005, C had an abortion in England, having established that she could not enforce her right to an abortion in Ireland. She was in her first trimester of pregnancy at the time of the termination. C became pregnant unintentionally while in remission from a rare form of cancer, for which she had received three years of chemotherapy previously. The applicant consulted her general practitioner, as well as several medical consultants to ascertain the impact of the pregnancy on her health and life, and also the effect of her prior tests for cancer on the foetus. The applicant alleged that, "as a result of the chilling effect of the Irish legal framework, she received insufficient information" in this regard. As a result of the uncertainty about the risks involved, the applicant travelled to England for an abortion.

> ***"The people were entitled to believe that legislation would be introduced so as to regulate the manner in which the right to life of the unborn and the right to life of the mother could be reconciled"***

Failure to legislate

The court held that the issue to be determined was whether there is a positive obligation on the State to provide an effective and accessible procedure allowing C to establish her entitlement to a lawful abortion in Ireland, and thereby respecting her rights under article 8 of the ECHR. The court stated that a broad margin of appreciation is to be accorded to the Irish State in its determination of whether a fair balance was struck between the protection of the public interest (that is, the protection of the right to life of the unborn in Irish law) and the conflicting rights of the applicant. However, once a decision is taken to permit a lawful abortion in any circumstances, the court stated, referring to *SH and Others v Austria*, that a legal framework devised for this purpose should be "shaped in a coherent manner which allows the different legitimate interests to be taken into account adequately and in accordance with the obligations deriving from the convention".

The Irish Government upheld that effective and accessible procedures existed whereby C could enforce her right to a lawful abortion in Ireland. The court noted that article 40.3.3, as interpreted by the Supreme Court in the *X* case, "provides that an abortion is available in Ireland if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, including the risk of self harm, which can only be avoided by a termination of the pregnancy".

Measuring the risk

The court pointed out that, while a constitutional provision of this type and scope was not uncommon, there had been failure to put in place in Irish law procedures or guidelines by which to measure that risk. This absence of criteria, coupled with the fact that sections 58 and 59 of the *Offences Against the Person Act 1861* had never been amended (providing an absolute prohibition on abortion punishable by penal servitude for life), have led to significant uncertainty for women seeking a lawful abortion in Ireland. In the absence of guiding principles, the court held that the "criminal provisions of the 1861 act would constitute a significant chilling factor for both women and doctors in the medical consultation process".

On the question of how to determine whether a particular


European Court of Human Rights

woman qualifies for a lawful abortion, the court held that the constitutional courts are not the appropriate fora for such a determination.

The court referred to the fact that McCarthy J in the *X* case had noted "prior judicial expressions of regret that article 40.3.3 had not been implemented by legislation". The court stated further: "The people were entitled to believe that legislation would be introduced so as to regulate the manner in which the right to life of the unborn and the right to life of the mother could be reconciled." The court relied on the *C* case, in which the High Court stated that it would be wrong to turn the High Court into a "licensing authority" for abortions.

The court rejected the explanations offered by the Government as to the failure to implement article 40.3.3. The court referred to the 1996 *Constitution Review Group Report*, which found Irish law on abortion to be unclear and recommended the adoption of a legislative framework to regulate the application of article 40.3.3 "by including a certification process by medical specialists and a time limit for any certified termination in the case of an abortion considered lawful". The court made reference to the 1999 *Interdepartmental Working Group Green Paper on Abortion*, which highlighted the advantages of implementing legislation: it would provide "a framework within which the need for an abortion could be assessed, rather than resolving the question on a case-by-case basis before the courts, with all the attendant publicity and debate".

"In the absence of guiding principles, the court held that the criminal provisions of the 1861 act would constitute a significant chilling factor"

Breach of C's rights

The court held that the "uncertainty generated by the lack of legislative implementation of article 40.3.3, and more particularly by the lack of effective and accessible procedures to establish a right to abortion under that provision, has resulted in a striking discordance between the theoretical right to a lawful abortion in Ireland on grounds of relevant risk to a woman's life and the reality of its practical implementation."

The European Court of Human Rights found a breach of C's right to private and family in life, as protected by article 8 of the ECHR, in that the State had failed to legislate for constitutionally permitted abortions. G

PRISON SHOULD ONLY EVER BE THE LAST RESORT

More than 6,600 people were imprisoned for non-payment of fines in 2010. A political decision must be made towards the use of community sanctions as the default penal sanction for less serious offences, writes Liam Herrick

Liam Herrick is executive director of the Irish Penal Reform Trust

Imprisonment should only be reserved for the most serious offences and for those offenders who present an ongoing risk to society. This is one of the core messages of the Irish Penal Reform Trust and, to that end, we welcomed moves by the outgoing Government to end the practice of imprisoning people for failure to pay court-ordered fines and, more recently, the introduction of legislation aimed at reducing imprisonment for minor offences.

The *Fines Act 2010* was signed into law on 2 June 2010, and the *Criminal Justice (Community Service) (Amendment) Bill 2011*, which would require judges to consider community service for those offences that would normally receive a custodial sentence of six months or less, was published on 12 January 2011. These moves are in line with international recognition that short sentences do more harm than good; the moves would also release pressure on a chronically overcrowded, costly and currently ineffective prison system.

Fulsome prison blues

However, earlier this month, it was revealed in a Dáil question that a shocking 6,681 people had been imprisoned for fines default in 2010 – despite the enactment of the *Fines Act 2010*. (The exact figure is subject to change, as statistics are currently being finalised by the Prison Service for their annual report.) It became clear that, eight months after the legislation was signed into law by the President and almost 11 months after the *Fines Bill* was passed by the Dáil, the legislation – which had been welcomed by all parties and agencies as urgent, necessary and a common sense response to fines default – was still not yet fully commenced.

The reason cited is that the Courts Service ICT system is not yet ready to facilitate the payment of fines by instalment, provided for in section 15, which allows for the payment by instalment of a fine over a 12-month period (and, exceptionally, over a two-year period). In the meantime, thousands continue to be imprisoned where trial judges have determined the initial offence to merit only a financial penalty. However, section 14 of the act, which requires the court to take into account the person's financial circumstances before determining the amount of the fine, has been commenced.

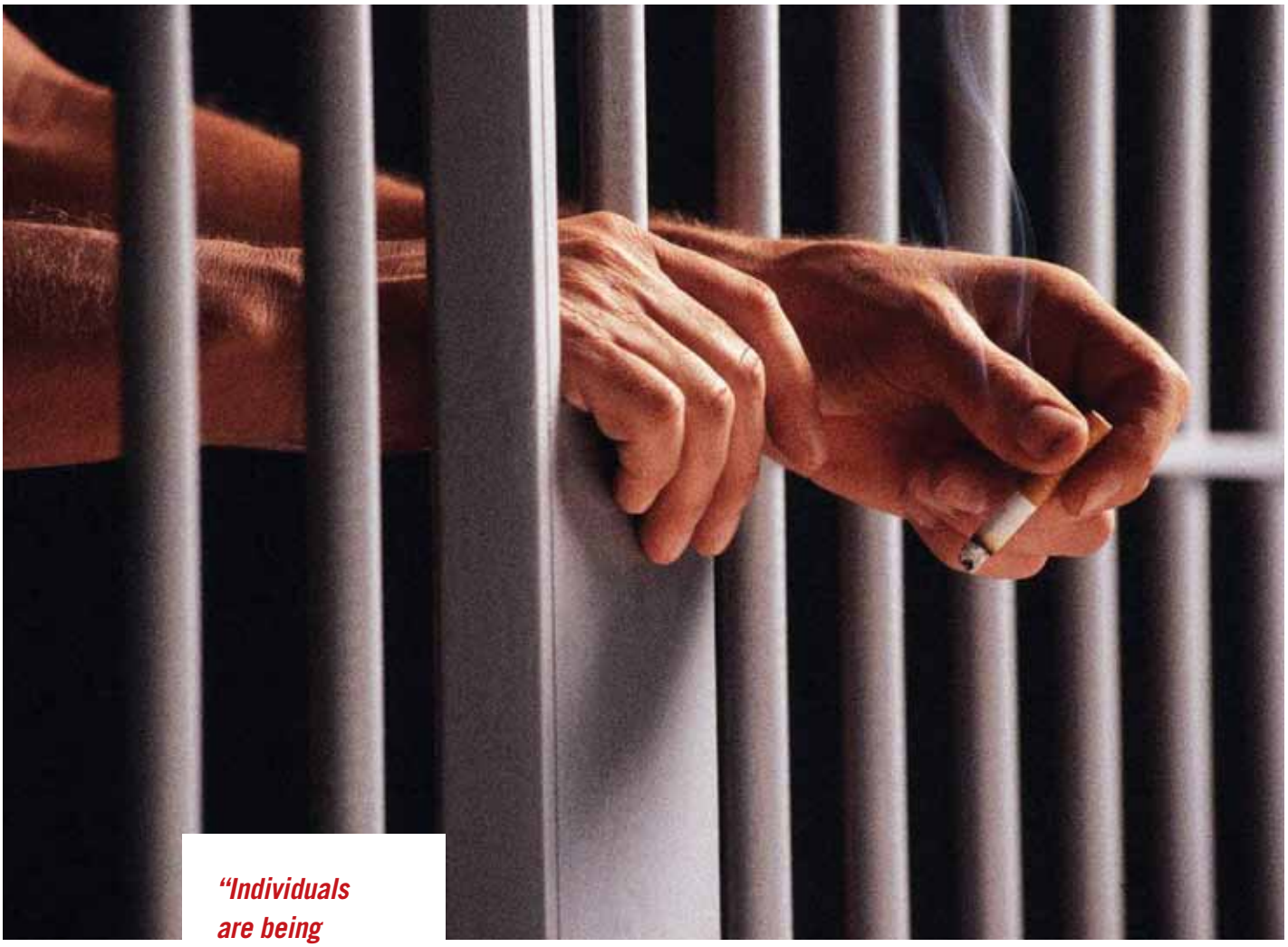
> ***"The figures suggest that as many as half of the number of people who enter prison under sentence are there for fine default"***

Imprisonment for fines has soared in recent years, from 1,335 in 2007 to 4,806 in 2009, to 6,681 in 2010. Of course, in the context of chronic overcrowding, most fine defaulters are released after only a short time in prison and do not make up more than 30 of the 4,500 prisoners in prison on any given day. In many cases, they are not counted in temporary release figures, as their fines are mitigated shortly after arrival in prison. This all amounts to a redundant exercise that is extremely costly to the taxpayer and wasteful in terms of court services, garda and Prison Service resources. While there is not yet a final figure for the total number committed to prison last year, the figures suggest that as many as half of the number of people who enter prison under sentence are there for fine default. Furthermore, the futility of this practice is further underlined by the fact that 85% of those sentenced to imprisonment for fine default return to prison within four years, putting further future burden on a prison system already in crisis. In effect, individuals are being committed to our overcrowded and unsafe prisons in cases where judges have already determined that prison sentences are not appropriate.

Jailhouse rock

Although the Irish Penal Reform Trust had broadly welcomed the *Fines Act*, we did seek amendments that we felt necessary to make it more robust. We believe that the legislation as passed does not provide a system in which imprisonment is only ever used as a measure of last resort in relation to fine default. IPRT considers that, in cases of non-payment of fines, community service orders (CSOs) or other community-based sanctions should be used as a default sanction. The act states that the power to make a CSO does not impair the power of the court to imprison upon default. Also, while the IPRT welcomed the introduction of payment by instalments, the limit of one year from the imposition of fine (two years on application) should be made more flexible, to enable courts to take into consideration the individual circumstances of the defendant. Finally, we felt that the limit (€100) below which a fine cannot be paid in instalments should be removed.

The IPRT has long been calling for a review of sentencing practice with regard to the associated problem of the high number of short custodial sentences handed out for less serious offences. A shocking



"Individuals are being committed to our overcrowded and unsafe prisons in cases where judges have already determined that prison sentences are not appropriate"

70% of sentenced committals in 2009 were for sentences of six months or less, which is not only contributing to the chronic overcrowding in Irish prisons but is also disproportionately damaging to families and communities. Non-custodial sanctions, such as CSOs, are proven to be more cost-effective responses to more minor offences, resulting in lower reoffending rates and demonstrable payback to the community. The Department of Justice projected savings of €14 – 17 million, not factoring in the financial value of the work carried out in the community, through the passing of the *Criminal Justice (Community Service) (Amendment) Bill 2011*.

I fought the law

The IPRT has previously suggested that to remove or restrict the sanction of custodial sentences from the District Court level would be a straightforward way to put this in practice.

When Dermot Ahern first announced that he intended to bring forward legislation requiring judges to consider community service sanctions as an alternative to imprisonment for minor offences, the IPRT was initially hopeful that this would amount to an outright presumption against imprisonment for minor offences (as applied to juvenile offenders under section 96 of the *Children Act 2001*). As it stands, the *Criminal Justice (Community Service)(Amendment) Bill 2011* does not go as far as the IPRT had hoped for, since it merely requires judges to consider imposing a community service order instead of a prison sentence.

It would be preferable if judges who decided against imposing a CSO were obliged to state their reasons for opting for imprisonment and why other means of addressing offending behaviour would not be sufficient in a particular case.

As the new Government sets out its programme, the IPRT believes that any programme of reform in the area of penal policy needs to be underpinned by a clear political commitment to reduce imprisonment. Ideally, this should be underpinned by 'imprisonment as a last resort' legislation. A political decision must be made in favour of the use of community sanctions as the default penal sanction for less serious offences, and the Government should commit itself to the promotion of community sanctions throughout the whole criminal justice system as a replacement for imprisonment. G

'Disbelief' over duplicate practising certificate fee

From: Katherine Irwin, Irwin Solicitors, 42 Castle Street, Dalkey, Co Dublin

It is in disbelief that I read the final paragraph of the practice notes on page 55 of the December *Law Society Gazette*. Am I to understand that you will charge members of the profession €50 for the issuing by the Law Society of a duplicate practising certificate where such has to be presented to the Law Society's accountant?

Would it not be fairer to everyone concerned for the Law Society's accountant to make that enquiry himself from the Law Society?

In this era of increasing charges for solicitors and the enormous cost of the professional indemnity insurance and the havoc that has already been wreaked on the solicitors' profession, it would be nice to think that the Law Society would step up and take some responsibility for keeping the costs down. Perhaps the certificates could be transmitted electronically to the accountant through that new-fangled email thing.

John Elliot, Registrar of Solicitors, replies:

The charge referred to is not a new charge and has been in existence since the beginning of 2010, having been announced in the December 2009 *Gazette*.

There may be some misunderstanding about the charge. What the Law Society has found happening is that, when a reporting accountant asks to see a solicitor's practising certificate, some solicitors have difficulty locating the original certificate and, rather than searching their files properly or, alternatively, having a system whereby they can locate their practising certificate easily, they think it is easier simply to apply to the Law Society for a duplicate. This practice imposes an obviously avoidable administrative burden on the Law Society, which has to be paid for by all practising solicitors, including the vast majority of solicitors who keep their original practising certificate safe and easy to locate.

I trust this explains the charge in context.

Article 43.3.3 unworkable?

From: Ronald W Nairm, FII L Ex, Ashfield, Ballincar, Sligo

May I suggest the removal of article 43.3.3 of the Constitution and its replacement by article 43.3.3 as follows: "No law shall be enacted providing for abortion within the State save only, on the balance of public morality, for such limited and real and substantive cases as may be by law prescribed."

This would oblige and entitle the legislature to enact suitable statutory cases, including rape, ectopic pregnancy and real and substantial risk to the life of the mother.

Article 43.3.3, proposing equal rights to the unborn and the mother, appears to be unworkable.

Are there any comments?

Hong Kong seeks information on the Irish experience of the 'publication of legislation'

From: Steve Chan (assistant to the Legislative Councillor), Office of Ms Cyd Ho, member of the Legislative Council, Unit 602, 6/F, Citibank Tower, 3 Garden Road, Hong Kong

We are writing from Hong Kong and would like to hear about the Irish experience regarding publication of legislation. The Hong Kong government has introduced a bill on this matter to the Legislative Council, and we would therefore like to learn about the experiences in other common law jurisdictions.

The aim of the bill that the Hong Kong government introduced is to grant statutory power to the attorney general to make editorial amendments and to revise existing legislation. No approval by the legislature will be required for editorial amendments. Apart from that, the government also proposed to set up an electronic database to replace printed copies as the authenticated version of legislation of the territory.

In particular, the power to make editorial amendments will include, for example, to correct grammatical, clerical or typographical errors, to change expressions of dates, to replace expressions indicating gender, to amend headings of provisions, to alter the texts of existing provisions to new format of style of new legislations, and so on. Editorial amendments require no oversight or approval by the territory's Legislative Council.

We have learnt that Ireland has the *Statute Law (Restatement) Act 2002* to empower the Attorney General to make restatements of versions of acts of the Oireachtas, which, as well, require no parliamentary scrutiny. We would therefore like to hear from the Irish legal profession regarding the Irish experience – both the concerns raised during the passage of the act and the implementation of the act since it was enacted. Replies, by email, should be sent to steve.chan@cydho.org.hk.

Reaching the point of 'thus far, but no further…'

Patrick Igoe and Company, Solicitors, 15 Carysfort Avenue, Blackrock, Co Dublin

I want to compliment the Conveyancing Committee on its suggested addition to letters that practitioners send to lending institutions when giving them certificates of title and documents of title (see *Gazette*, Jan/Feb 2011, p48).

The most blatant, not to say arrogant, double standards are usually applied by the lending institutions in dealing with solicitors. When we seek documents of title, we can expect to be required to sign for receipt of all documents before we receive them. But they only accept them from us "subject to checking".

The suggested addition from the Conveyancing Committee of giving the lending institutions ten days to acknowledge full receipt, or we take it that they have received all the listed documents, and then charging them if we have to recover our closed files, is heartening.

It shows that we are not quite ready to roll over and always just take whatever they decide to pronounce.

Maybe, in our dealings with the lending institutions, we have now reached the point of 'thus far, but no further…' I certainly hope so.

The Conveyancing Committee's practice note is heartening to a profession that needs more of the same, please.

Debt-collection request appears to be an international scam

The editor has withheld the author's name and firm details due to the subject matter of this letter.

I would like to explain something that happened to me, of which I think the members of the profession should be made aware.

I was asked to collect a debt due to one company from another. The alleged debtor had an address in Galway and I presumed that was the reason I had become involved. I had been contacted by email and was surprised that the company involved had selected my office to collect the debt; however, I had no reason to be suspicious. I was aware, however, that any monies received would need to be dealt with by complying with the usual money-laundering requirements.

After a short period of time, and the threat of High Court proceedings, I resisted giving out my client account details to the debtor. I insisted, however, that a bank draft be delivered to this office. I received a bank draft for approximately €60,000, being part-payment of the debt and a promise to pay the balance within a short period of time. The bank draft was drawn on HSBC Bank in Britain and I duly lodged same to my client account.

I was surprised that, shortly after lodging same, my own contact in the regional office of the bank telephoned me to state that it would take a few weeks to have that bank draft cleared in Britain. I informed my client, the creditor, that this was going to take place and to await clearing of the bank draft.

The bank draft was found to be effectively a forgery, and I am in the lucky position that I had not paid out any monies on foot of same being lodged to my client account. I am expecting that this is some form of international scam. It is quite possible that a similar email requesting the collection of the debt was forwarded to a number of solicitors – if not in Ireland, certainly in Europe. I am considering bringing the matter to the attention of the gardaí. In the meantime, however, I suggest that you may wish to consider alerting the profession to this matter. G

Email your letters to gazette@lawsociety.ie, or post to: *Law Society Gazette*, Law Society of Ireland, Blackhall Place, Dublin 7.

ENSURE YOU'RE INSURED

Anger, frustration, bemusement and fear are emotions not normally associated with renewing insurance. David Rowe reviews the PII renewal experience in 2010 and looks towards how the 2011 renewal can be made less traumatic

David Rowe is the managing director of Outsource (business advisors and approved risk management consultants to the solicitors' profession)

We had all hoped that the professional indemnity insurance (PII) renewal in 2009, which saw huge increases in premiums, was as bad as it could get – and then along came 2010. The 2010 renewal was undoubtedly more traumatic for the profession, with further price increases, uncertainty in getting cover at all, last minute quotes, late entrants and withdrawal of insurers from the market, and a moving of the goalposts within some of the insurers – all adding to the stress and financial pressure on a profession in which many are struggling to make a living.

Market trends

While the market is confused overall, there are a number of clear trends from the 2010 renewal. The insurers appear to be reluctant participants, following high claims experience. This has led to a reassessment, internally, of their appetite to insure solicitors, and on what terms. Two of the insurers, in particular, have quite obviously adapted an 'up-or-out' policy: they have increased premiums dramatically, or seen the firm move elsewhere. It is also clear with these two insurers that previous claims were reviewed and, even where there were no new claims or notifications in the last insurance year, premiums still jumped enormously – doubling in some cases.

Another obvious feature has been that claims or notifications have resulted in a serious financial penalty, almost to the point of the firm wondering what the purpose of the insurance was in the first place. The spread of premiums between those firms that are seen as 'good risk' and 'poor risk' has widened, with insurers differentiating even more than in 2009. The previous perception that larger firms were low risk changed, with many larger firms experiencing difficulty for the first time. Large, historic, commercial property, developer and banking transactions – sometimes for NAMA-bound clients – makes this the most nervous sector for claims in 2011. Smaller firms are no longer considered an automatic higher risk.

It is also clear that the insurers have put a huge emphasis on risk management within the firms, with definite but unquantifiable rewards for those that have robust risk-management procedures in place. The rewards have varied, from those getting lower premiums to those getting insurance when it would have been difficult without. There is no doubt that the insurers see an outside, independent, quality assessment of a firm as being of higher value than the firm's self-assessment on its own proposal form.

The 'route to market' has become even more confused. During the most

FAST FACTS

- There are a number of clear trends from the 2010 renewal
- Claims or notifications have resulted in a serious financial penalty
- The spread of premiums between those firms that are seen as 'good risk' and 'poor risk' has widened
- Insurers have put a huge emphasis on risk management within the firms, with definite but unquantifiable rewards for those that have robust procedures in place
- In 2011, the emphasis will move upwards to managing the register of undertakings (to ensure that there are no reasons why the undertakings cannot be discharged, and that they are being discharged on a timely basis)

It was with shock that Jasper realised his parachute was actually a backpack full of toys

recent renewal phase, practitioners were understandably confused about which brokers had access to which insurers – and whether a broker was needed at all. Many of the smaller to medium-sized brokers found that they no longer had an insurer to offer their clients, as there had been a definite migration towards the bigger brokers.

Finally, the overall cost of insurance seems to have gone up again. General benchmarks for firms with good claims history and robust risk-management procedures are a premium of €6K to €10K per solicitor for start-up or young firms; €10K to €15K per solicitor for more mature firms; €7K to €10K per solicitor for medium-sized and larger firms. Those with poor claims records and inadequate risk management have been offered premiums of anything between €50K and €100K per solicitor.

Changes in market share

It is believed that market share among insurers has changed significantly during the most recent renewal period, with XL becoming the largest provider. The two new entrants, UK General and Axis, picked up significant market share, despite entering at a very late stage. The Solicitors' Mutual Defence Fund continued to be an important participant. Chartis and Liberty are thought to have broadly maintained their market positions.

"Within the formulae, commercial conveyancing is the highest risk practice area, residential conveyancing next, then plaintiff personal injury, followed by probate"

The notion that the relationship between the insurer and the client is a long-term partnership appears to have gone out the window with a number of insurers. Others have remained loyal to their clients, being predictable in the quotes that they issued, which is as much as you can ask from your insurer. Without exception, all insurers were far more selective in pricing and risk selection, resulting in approximately 35 firms moving to the Assigned Risks Pool. This is a relatively small number in a profession of approximately 2,200 firms.

Moving on from a claims history

It is possible to move on from a claims history, but you have to work at it. The first thing to do is to ensure that you provide a comprehensive report on the claims and notifications to the insurer, and that you work during the year to mitigate the losses and crystallise the claims. Insurers hate uncertainty. You should show a strong interest in working proactively with the defence solicitor in this regard. Other items that can make a difference include:

- A full independent file and undertaking review by a risk-management consultant,
- Achieving a risk-management accreditation standard,
- A change in ownership structures in the firm, and
- The passage of time.

Having low claims for a three to four-year period (or, even better, no claims) will see an underwriter's view of the firm change. Many firms need to review both open and closed files for potential problems and rectify these issues before they become an insurable event.

Insurers' emphasis in 2011

In 2010, the insurers were encouraging firms to establish a comprehensive register of undertakings. This year, the emphasis will move upwards to managing the register to ensure that there are no reasons why the undertakings cannot be discharged, and that

HOW THE UNDERWRITERS ARRIVE AT A PREMIUM

Each insurer approaches the process of arriving at a premium slightly differently, but there is a common methodology. When you complete your proposal form, the results of this and any independent risk-management audit that you have carried out are fed into a matrix containing various formulae and weightings, which automatically give the underwriter a suggested premium.

The underwriters review the proposal form, review the risk-management report if there is one, and based on the 'feel' for the firm, either run with the suggested premium or alter it upwards or downwards.

The factors that affect the suggested premium are the size of the firm, the mix of work (conveyancing having a treble weighting to litigation), the claims history, the number of partners and the extent of the risk-management controls in place.

Within the formulae, commercial conveyancing is the highest-risk practice area, residential conveyancing next, then plaintiff personal injury, followed by probate.

Claims and notifications above €50,000 in the last five years will also affect the weighting. Where there are notifications, a good underwriter can read behind these as to their circumstances and whether they are likely to result in a claim, so it is better to notify and set out the full circumstances than to ignore them. Once-off claims, even if larger, are better than repeated claims, which indicate continuous systems breakdown.

The final premium is a combination of the insurer's overall view of the market, the premium suggested by the matrix, and the underwriters' review of the supporting documentation. It is also clear that the insurers do move the goalposts from year to year.

they are being discharged on a timely basis.

The majority of firms still need to recognise the importance of risk management. It should *not* be seen as a vehicle for a discount on the insurance premium – rather the opportunity to put in place the procedures and structures to ensure that future claims are avoided.

Working with the insurers on historic claims will continue to be important. Movement on claims is seen as good and easier to work with. It would pay many firms handsomely to conduct a full audit of their undertakings register and conveyancing files in order to identify problems before they surface into potential claims.

Preparing for the 2011 renewal

There are a number of things you can do well in advance of this year's renewal. Firstly, do not regard it as a six-week process – it is not. Try to meet your insurer between now and the end of June to tell your story. Take the time when the renewal deadline is not looming to put in place appropriate risk-management structures. Have an independent risk-management audit carried out when you are ready for it. Finally, work on the number of undertakings you have outstanding.

There are many things that would make the renewal process less stressful for practitioners. The most obvious one is that more insurers are needed in the market. For this to happen, the market needs to be more attractive. This will happen in time as we move further away from the peak conveyancing years of 2004 to 2007. Already, we are beginning to approach the time where claims are barred by the *Statute of Limitations*.

Secondly, in my opinion, there is little rationale in a common renewal date. Every year, it leads to six weeks of dread. Other professions spread renewal dates out throughout the year and thus avoid the panic. The renewal also comes at a time when firms have high cash-flow demands through income tax, pensions and practising certificates, so moving the renewal to a different part of the year would also make sense on a cash-flow basis. Others differ on this opinion, however, saying that the profession gets some benefit out of the common renewal date.

There may also be considerable merit to having a closed period of, say, three months, during which no insurer can exit the market or enter the market. Last-minute additions and, more particularly, last-minute withdrawals, create havoc. Firms do have a track record with their existing insurer. The current situation with very high run-off premiums and the fact that many practitioners are 'trapped' into the profession also needs to be reviewed.

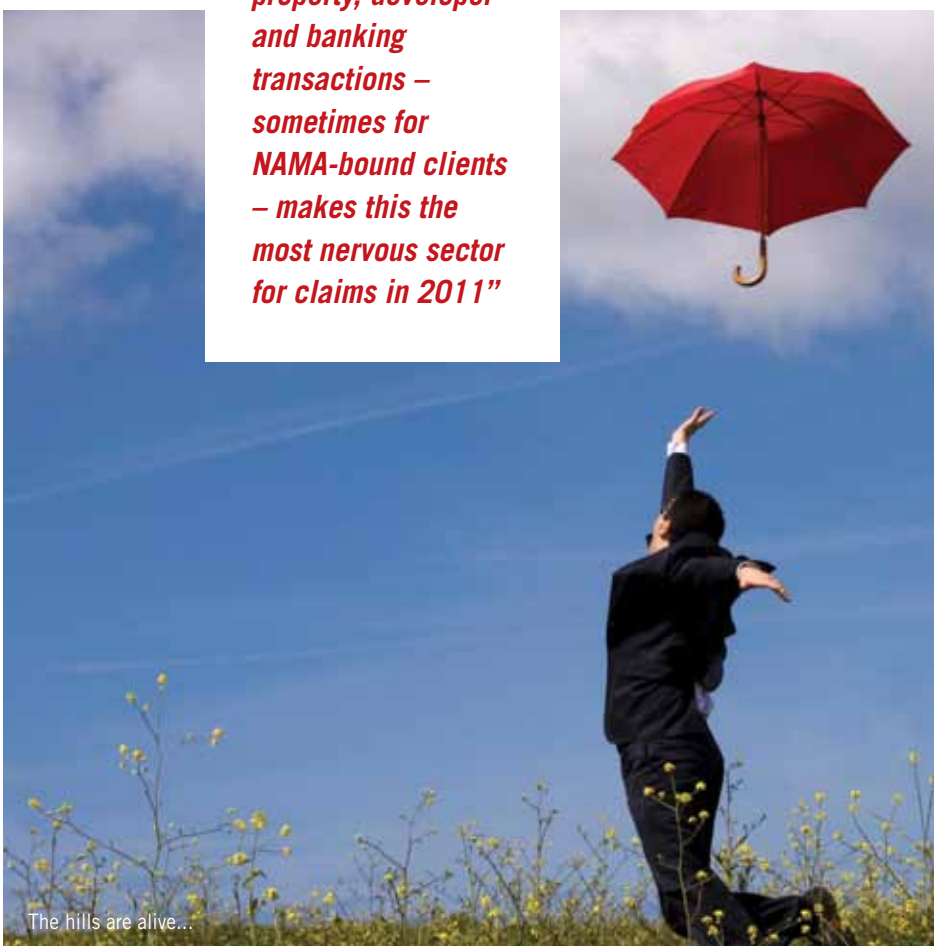
In conclusion, the 2010 renewal was undoubtedly even more difficult than the traumatic 2009 renewal. The appetite of the insurers changed. Some clearly wanted to partly exit certain sectors of the market. Insurers came and went very late in the day, and the uncertainties on price and getting cover at all increased.

More insurers are needed and much of the stress can be taken out of the renewal process by implementing some of the suggestions above.

Many of the answers also lie within each practice. There is no doubt that firms can help themselves considerably at a time when the profession is going through an unprecedented financial challenge.

Professional indemnity insurance needs to become routine, predictable, available, and should include incentives for a good record – with some penalty, but not extinction, as a censure for certain claims. Certainty and 'boring' predictability are needed.

"Large, historic, commercial property, developer and banking transactions – sometimes for NAMA-bound clients – makes this the most nervous sector for claims in 2011"



The hills are alive...

THE 'MASTER POLICY' SYSTEM

The 'master policy' system raises as many questions as it answers. There has been much chatter among members about the merits and demerits of moving to the 'master policy' system, which currently operates in Northern Ireland and Scotland, whereby the primary layer of insurance is run through the Law Society. All firms must participate in this. The insurers cover the market, rather than specific firms, receiving a slice of the fee income and taking a slice of the overall risk.

This would have the advantage of certainty, but raises many questions. Significant premium differential would have to exist between firms with good claims records and robust risk-management procedures, and firms without – otherwise there would be little incentive for firms to run themselves properly. Some averaging of claims consequences would, nonetheless, be welcome.

Well-managed firms still do have claims, and, at the moment, the effects of these can be catastrophic, including potentially putting firms out of business. Despite the attractions of the 'master policy' route, overall premiums are likely to be higher at a time when the profession cannot afford it.

FAST FACTS

- The importance of confidence in the current economic climate
- The new emphasis on corporate governance and its impact
- Competition in necessary services – including legal costs
- Glass ceilings and the 'token woman'

MY LADY'S CHAMBER

The former managing partner of Beauchamps, solicitor Imelda Reynolds, is the new President of the Dublin Chamber of Commerce. Colin Murphy speaks to her about her goals for the year, the evolving nature of corporate governance, and the cost of necessary services

Colin Murphy is a journalist and documentary maker in Dublin, specialising in social and cultural affairs. His radio series From Stage to Street *is currently being broadcast on RTÉ Radio 1 on Saturdays at 7.30pm. A selection of his work can be found at www.colinmurphy.ie*

Imelda Reynolds was at breakfast recently when an optimistic thought struck her. "We have to be *confident*," she thought. "We've taken a knock, but we're going to get out of this." The breakfast wasn't an ordinary one: it was one in the 'Business Breakfast' series, organised by the Dublin Chamber of Commerce, and the guest speaker was Christian Majgaard, a former executive of the iconic Danish firm, Lego.

Majgaard's talk was titled 'A brand rebuilt' and examined how Lego had successfully moved from reliance on a low-tech toy business to running a diverse, and more high-tech set of businesses under the Lego brand. One of those in the audience asked Majgaard how damaged he considered the 'Ireland brand' to be.

"I've been telling people I was going to Ireland to give this talk," Majgaard told his audience, "and all of them said, 'You're so lucky. It's a lovely place'."

For Reynolds, the new president of the Dublin Chamber, Majgaard's answer was revealing.

"I think we're more acutely aware of the damage to our brand than are a lot of people outside the country. We can't keep talking ourselves down. We have dropped the ball, but we still have a beautiful country. We still have a fantastic people.

"If there is a glass ceiling, I haven't noticed it," she says. "I don't want to let the sisterhood down, but I don't think there is"

"We should be forensic in terms of analysis of our failures – but everything in proportion. We should learn from that, apply that knowledge – and now, let's look forward."

Talking in the light-filled corner boardroom at the offices of her firm, Beauchamps Solicitors on Sir John Rogerson's Quay, she gestures out the window towards the river. A quick sweep of the hand takes in the new Beckett Bridge and Convention Centre. Behind the centre runs the new Luas line extension, and beyond it, the Port Tunnel. Down the river is the O2. Behind the office is the Grand Canal Theatre, the magnificent Montevetro building just bought by Google, and the Aviva Stadium. The city has never looked – or worked – better.

"We've made a lot of progress," she notes. "We have a business community that's hurting at the moment. But the Chamber also has a longer-term vision. We had a 2020 vision, and now we're working towards a 2030 vision. What do we want Dublin to look like? We want it to be a world-class city. Can we, in the Chamber, be the catalyst for making some of this happen?"

Concrete carcass

The view out the window, though, also takes in the concrete carcass on North Wall Quay that is the unfinished building once intended to be the headquarters of Anglo Irish Bank.

"It is an eyesore," says Reynolds. "It's a reminder of what went wrong. But we *have* done a lot right. We need to be ambitious – but it should be prudent ambition."

Reynolds is a corporate governance expert: what does she make of the failures in Irish corporate governance that shepherded in the bust?

"With benefit of hindsight, yes, definitely, there have been failures of corporate governance. But that's not to say that the people on the boards weren't good people and weren't trying to do a good job."

There may have been an element of back-slapping camaraderie feeding into those 'human failures', she concedes. But she stresses that corporate governance is a field that has evolved rapidly in recent years.

"Clearly, there was not enough interrogation and challenge from the boards, and there was too much trust in CEOs. Yes, directors need to take more responsibility. But it's too simple to say there was necessarily a failure in corporate governance in any one case. These responsibilities would not have been so well understood before.

"One potential consequence of the new emphasis on corporate governance is that companies are finding it very hard to get people to take on directorships, and that's not a good thing either."

The presidency of the Chamber is a one-year, non-executive, honorary position, which Reynolds equates to being "an actively involved chairman", with a key role in helping to select policy priorities. "It's definitely more than a 'figurehead' role."

The Chamber's broad priorities are "to enable businesses to grow," focusing on such matters as taxation policy, enterprise, job creation and local government levies. (The organisation produced a 'manifesto' for the general election campaign, organised under three headings: 'Support the growth of enterprise and employment', 'Infrastructure to support enterprise', and 'Effective support through leadership and government'.)

"This year, 2011, presents a lot of opportunity for the Chamber," Reynolds says. "The election presents a lot of opportunity for engagement with politicians. And then there's the opportunity to have an influence on the shaping of a programme for government."

Wielding influence, and advocacy, is one part of the Chamber's work. Another is networking – hence the business breakfasts. A similar event is 'Business after hours', a two-hour evening networking event open to all members. (Members range from businesses with thousands of employees to those with just one, she notes.) At this event, a bell is rung every five minutes to encourage people to mingle actively. At each event, business cards are placed in a jar, and five are drawn out, with those people being given the opportunity to make a 60-second pitch to the room.

The word 'networking' often has a Machiavellian ring to it, as if it implies that the social connections being made are purely instrumental, and any friendship or affection is feigned. But the best networkers are those to whom this kind of sociability comes naturally, and who have no need to feign sincerity, because it comes naturally.

> ***"One potential consequence of the new emphasis on corporate governance is that companies are finding it very hard to get people to take on directorships, and that's not a good thing either"***

Figurehead

Reynolds clearly fits this bill. Ironically, for a lawyer and, now, the figurehead of a prominent organisation, she is "not that keen on standing up and speaking in public". (Hence she became a solicitor and not a barrister.) But she has an easy, affable manner and the lack of airs and graces that one might associate with someone who first learned about business on the floor of her father's shop in Athlone.

Her own route to the Chamber of Commerce presidency seems relatively charmed. As managing partner at Beauchamps (from 2001 to 2008), she joined a Chamber of Commerce delegation on a business mission to the US. That sparked an interest in the Chamber's activities and more involvement, and then the decision to run for election to the Chamber's council some years ago, and a steady progress to the position of president. (The council has 40 members: 30 are elected – ten each year – and the final ten are *ex-officio* members.)

So as somebody who has pursued an active involvement in civic life outside of her job, with relative success, could she see herself stepping onto a larger – political – stage? "I've never been asked!" she laughs.

"It's a very difficult life," she says. "I regard people who make the commitment to go into public life very highly. I wouldn't question their motives.

"The culture of politics in Ireland is all-consuming – you're either in or you're out. If the system changed – so that it wasn't so invasive of one's personal life – I could, perhaps, be interested."

BREAKING THROUGH THE GLASS CEILING?

Imelda Reynolds is one of the few women to have been managing partner of a major Dublin law firm. So does that disprove the existence of a putative 'glass ceiling' for women, or is she simply the exception that proves the rule?

"If there is a glass ceiling, I haven't noticed it," she says. "I don't want to let the sisterhood down, but I don't think there is. I think people are judged individually on their performance. I have never had a sense that I didn't get something because I was a woman. And the idea that one might be a 'token woman' would be equally insulting."

She is in favour, though, of some form of quota system being applied to politics. "I would have been against it previously, but representation levels have gone into reverse." Any quota should be applied to political parties – not to the Dáil itself, she suggests – to encourage them to put up more women for election. This has worked well in the Scandinavian countries.

And, of course, the involvement of more women in politics could perhaps change the prevailing culture, she says, thereby making it easier for yet more women to get involved.

"Costs are coming down. Legal businesses are operating in the same environment as everyone else. If rent, rates and wages come down, legal costs can come down also. The competition, now, is such that costs aren't too high any more"

Given the current crisis, the polarising effect it has had on political debate, and the severe impact of budgetary austerity on those less well off, is the Chamber of Commerce firmly entrenched on the side of business in any debate on how pain should be shared?

"The pursuit of profit and social protection are not mutually exclusive," she says. "Our vision is of Dublin as a good place to live, to work, to visit – for *everybody*. We want an environment where all businesses can grow, so all people can be in employment. We are a business organisation, but there is a social dimension to our work – it is consequential rather than direct."

On the question of the recently reduced minimum wage, she is circumspect: she doesn't comment on the specifics. "We need to have a competitive environment," she stresses. "Wage agreements need to be reviewed – to make it easier to start businesses, and to make Ireland more attractive to investors. A balance has to be struck between competition and social protection, to reflect the priorities and values of society as a whole.

"Our primary objective is to advance Dublin as a commercial centre, and to help people to do business with each other."

A key issue for businesses, of course, is the cost of necessary services – such as legal services. What is her position on that?

"It's a question of myth verses reality. It irritates me when I hear people going on about high legal costs – it's thrown out as a mantra. Solicitors have become very competitive. The EU-IMF programme acknowledged progress in respect to accountancy costs, but not legal costs.

"Costs are coming down. Legal businesses are operating in the same environment as everyone else. If rent, rates and wages come down, legal costs can come down also. The competition, now, is such that costs aren't too high any more."

Competitiveness will be one of the areas crucial to the 'rebuilding' of 'brand Ireland'. Reynolds has a metaphor for the task that lies ahead. "They say that, in order for a woman to succeed, she has to do better than the men around her. The same applies now to Ireland. We can't simply do a good job of rebuilding our economy and our image. We have to do better than the countries around us. Ireland has to do a *superb* job."

CLAMP

The clamping of cars has proliferated in recent years as a means of private landowners exercising their property rights. However, it does not have a clear lawful basis, writes Dermot Francis Sheehan

Dermot Francis Sheehan is a barrister operating on the Dublin circuit

Many a person has returned to their car to be aghast at the sight of a yellow monstrosity clinging to a wheel, impeding them from using their beloved motor. Clamping on a public road is governed by regulations made by the Minister for Transport under section 101B of the *Road Traffic Act 1961*, which was inserted into that act by section 9 of the *Dublin Transport Dissolution Act 1987* (which, despite the name, applies throughout the country and not just in the Dublin region).

These regulations (SI 247 of 1988) provide that a garda, traffic warden or person authorised by a local authority can immobilise a vehicle parked in contravention of parking restrictions, and they prescribe the fee to be paid for the release of the vehicle.

Similar to section 101B of the *Road Traffic Act*, byelaws for harbour areas made under the *Harbours Act 1996* or airports under the *Air Navigation Acts* provide for certain authorised persons to clamp unlawfully parked vehicles.

Clamping on private land, however, does not clearly have a lawful basis, in contrast to the above. A vehicle parked without the permission of the landowner is clearly a trespassing chattel, but does that give the landowner or their agent a right to fix an immobilisation device? Equally, retaining another's chattel without lawful authority would give rise to a claim in tort for detinue and trover for the vehicle owner. In addition, interference with the mechanism of a vehicle without lawful authority is a criminal offence under section 113 of the *Road Traffic Act*.

> ***"It appears, therefore, that – since 1961 – the doctrine by which private clamping is rendered lawful in England and Wales has not been in operation in Irish law"***

Trespassing chattels

The Court of Appeal for England and Wales examined this issue in *Arthur v Anker*. The plaintiff was clamped in a private car park by the defendant, who was engaged by the owners to clamp persons parked there without authorisation. The owners of the car park had signage indicating that cars parked there without permission would be clamped, with a £40 de-clamping fee. The plaintiff refused to pay the de-clamping fee, got into an argument with the clamper, and called his wife – who appeared with a tow truck to assist him. The defendant then attempted to clamp the wife's tow truck. The plaintiff's wife resisted, assaulting the defendant in the process. The plaintiff's car was somehow removed from the car park overnight, and the plaintiff initiated proceedings for trespass to goods, while the defendant counterclaimed for the cost of the clamps and the assault.

Bingham MR rejected the argument put forward by the plaintiff that private clamping was illegal based on the Scottish decision in *Black v Carmichael*, which held that private clamping in Scotland constituted the criminal offence of extortion. The Court of Appeal relied on the previous English authority of *Lloyd v Director of Public Prosecutions*, which held that a person in England and Wales who damaged a wheel clamp, that was placed pursuant to a notice warning that vehicles would be clamped, was guilty of criminal damage.

The Master of the Rolls noted that whether the conduct constituted a criminal offence depended on whether the demand for payment was legitimate and whether, under the civil law, the defendant was entitled to demand the de-clamping fee.

However, Bingham MR further rejected the contention of the defendant that he was entitled to rely on the ancient remedy of 'distress damage-feasant'. This doctrine held that a landowner was entitled to detain trespassing chattels for the purpose of enforcing a claim for damages that might arise from the trespass. The court held that it was debatable as to whether damage was caused by a trespassing motor vehicle, considering that the remedy had been designed for trespassing stock that had eaten crops or grass. Any damage that would have occurred would have been the use of the parking space in question, while the fee charged was clearly deterrent in nature. The Master of the Rolls rejected the decision of the New Zealand

DOWN RACES

Doo-da, doo-da day

FAST FACTS

- A vehicle parked without the permission of the landowner is clearly a trespassing chattel – but does that give the landowner a right to fix an immobilisation device?
- Current English law permits clamping by a landowner or his agent on private land, provided a reasonable fee is charged for the release and reasonably sufficient notice is given to any motorist
- But there are legal difficulties in engaging in the practice of private clamping under Irish law, given that the defence of voluntary assumption of risk has been virtually abolished

Court of Appeal in *Jamieson's Tow and Salvage v Murray*, which held that a reasonable cost of towing could be considered damage committed by a trespassing motor vehicle.

Bingham MR held, however, that the defendant was entitled to detain the vehicle under the doctrine of the voluntary assumption of risk. *Volenti non fit injuria* (or voluntary assumption of risk) was a complete defence to the tort of trespass to goods. The Master of the Rolls noted that the plaintiff must have seen the signage and, therefore, consented to the risk of his motor vehicle being clamped – and when the clamping, in fact, took place, this was a complete defence. A reasonable fee must, however, be charged, since a person would not consent to the risk of an extortionate fee.

Reasonably sufficient notice

The Court of Appeal again considered the issue of private clamping in *Vine v Waltam Forest London Borough Council*. The plaintiff, who was in distress after recently learning that she required an urgent operation, pulled into a private car-parking space and left her vehicle in order to vomit. When she returned to the vehicle, there was a clamp attached, along with a notice stating that a £105 fee must be paid to release the vehicle.

Although she was clamped by a local authority, the local authority was not acting pursuant to any powers it held by virtue of its byelaws or by an act of parliament but, rather, pursuant to a contract that it had with the private landowner of the space in question. There was a single sign in the area where the plaintiff had been clamped, but the plaintiff had not read the sign, given her distressed state. Roch LJ found for the plaintiff, indicating that the defendant must prove in such circumstances that a motorist read or ought to have read the signs in question.

May LJ found that cases that focused on the contractual terms implied by signage, such as *Thornton v Shoe Lane Parking*, were helpful in determining whether the defendant had given reasonably sufficient notice to the motorist that clamping was in force.

Clamping, Irish style

It appears that, notwithstanding proposed legislative changes to the contrary, the current law of England and Wales permits clamping by a landowner or his agent on private land, provided that a reasonable fee is charged for the release and that reasonably sufficient notice is given to any motorist. The question is whether such principles would apply under Irish law.

In *Hussey v Twomey*, the Supreme Court held that section 34(1) of the *Civil Liability Act 1961* abolished the doctrine of *volenti non fit injuria*, save as preserved by section 34(1)(b). This case tested whether the doctrine could be applied to a person who knowingly got into a motor vehicle as a passenger with a drunk driver. Kearns J held that the common law doctrine was abolished by section 34(1), save as preserved by section 34(1)(b). The latter section permits the doctrine of *volenti non fit injuria* to remain by operation of a contract between the plaintiff and defendant before the wrong has been committed.

Section 2(1) of the *Civil Liability Act* defines 'contract' as made under seal or by parol, and would appear to exclude a contract entered into by signage, as per the *Thornton v Shoe Lane* principle. It appears, therefore, that – since 1961 – the doctrine by which private clamping is rendered lawful in England and Wales has not been in operation in Irish law, unless a prior parol agreement or agreement under seal has been entered into between the motorist and car park.

Consumer contract

A further problem for private car parks is the operation of consumer contract law when a motorist enters a car park as a consumer to purchase parking. The motorist reads the signage stating that clamping is in force for vehicles without tickets, purchases a ticket and parks – but returns after the time indicated on the ticket has expired. In such a situation, the motorist is not a trespasser and has not consented to his vehicle being clamped, but rather has entered into a consumer contract to park, which has expired. The car park in such a scenario is entitled to a *quantum meruit* claim for the additional cost of parking rather than the deterrent-type fees normally charged to de-clamp.

> ***"The motorist returns after the time indicated on the ticket has expired. In such a situation, the motorist is not a trespasser … The car park in such a scenario is entitled to a quantum meruit claim for the additional cost of parking rather than the deterrent type fees normally charged to de-clamp"***

A large deterrent fee – even if agreed to by the consumer through reading the signage – is a penalty fee and unenforceable, unless some relationship can be shown with the damages suffered by the car park through the overstaying motorist. A penalty fee rather than liquidated damages is void under the common law and is regarded as an unfair term and, therefore, unenforceable under the *European Communities (Unfair Terms in Consumer Contracts) Regulations 1995* (SI 27 of 1995, schedule 3, article 1(e): "requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation".

The actual loss suffered by the car park can be easily quantifiable, as it publishes its hourly rate for parking. An issue arises as to whether the car park could argue that the cost of engaging clampers, absent any profit on the car park, is recoverable as part of the de-clamp fee. This fee, apportioned among the average number of vehicles clamped, could be regarded as liquidated damages suffered by the car park to enforce payment, or as a sum that is proportionate in compensation under

the unfair terms regulations.

A car park making such an argument would have to show that:

- It makes no profit and that the apportioned economic cost of engaging clampers to enforce its right to payment is the same as the penalty fee, and that
- An alternative barrier-type system in which a late motorist is merely charged the additional hourly rate is not feasible.

This would be a difficult argument to make, since a barrier-type system over the long term would be more cost effective then employing clampers, provided there is no profit from the de-clamping. Since a barrier system – even though it charges no deterrent-type large fees – would have a near 100% compliance rate, with no ongoing employment costs, it would be very difficult to show a plausible reason for having clampers enforce the parking restrictions.

It appears, therefore, that there are legal difficulties in engaging in the practice of private clamping under Irish law, given that the defence of voluntary assumption of risk has been virtually abolished. English authority relies on this doctrine as the basis for the lawfulness of private clamping, which cannot operate in Ireland without a parol agreement or agreement under seal. Furthermore, car parks, that act as a business, risk having a term that requires "any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation" regarded as an unfair term – and void as a penalty clause at common law. G

LOOK IT UP

Cases:

- *Arthur v Anker* [1997] QB 564 (England and Wales)
- *Black v Carmichael* [1992] SCCR 709 (Scotland)
- *Hussey v Twomey* [2009] 3 IR 293
- *Jamieson's Tow and Salvage v Murray* [1984] 2 NZLR 144 (New Zealand)
- *Lloyd v Director of Public Prosecutions* [1992] 1 ALL ER 982 (England and Wales)
- *Thornton v Shoe Lane Parking* [1971] 2 QB 163 (England and Wales)
- *Vine v Waltam Forest London Borough Council* [2000] 1 WLR 2383 (England and Wales)

Legislation:

- *Civil Liability Act 1961*, section 34(1); section 2(1)
- *Dublin Transport Dissolution Act 1987*, section 9
- *European Communities (Unfair Terms in Consumer Contracts) Regulations 1995* (SI 27 of 1995)
- *Road Traffic (Immobilisation of Vehicles) Regulations 1998* (SI 247 of 1988)
- *Road Traffic Act 1961*, section 101B; section 113

Ask, and ye shall RECEIVE

Fixed-charge receivers will be coming to a property near you, and solicitors would be well advised to be familiar with the concept and practice. Frank O'Neill keeps his eye on the ball

Frank O'Neill is a chartered accountant and chartered surveyor with over 20 years' experience in the property sector who acts as a fixed-charge receiver. He is a director of WK Nowlan & Associates, an independent property consultancy

"I am determined that NAMA will change the market by using statutory receivers and property receivers, as is the practice in the United Kingdom, rather than traditional receivers, who in most property-related cases may not add very much value" (NAMA chief executive Brendan McDonagh, speaking to the Public Accounts Committee on 18 November 2010).

The legal concept of receivership is not new. It extends from receiver by way of equitable execution to receivers of wrecks, but most of us will be familiar, to some extent, with the appointment of a receiver in accordance with rights given to a lender by a borrower in a mortgage, charge or debenture, as provided for by common law and by statute.

Generally, in the recent past, when we think of a receiver, we think of a company going 'into receivership'. In this, a lender appoints a receiver – typically an accountant specialising in insolvency – to manage the company so that the debt due to the lender can be repaid. The company receiver will typically manage the company, dealing with employees, creditors, debtors, and so on, as well as with its assets, in the best way he can, with the objective of recouping as much as possible for the lender. This company receivership must be distinguished from a property or fixed-charge receiver.

In the past, property has typically been just one of the assets of a company going into receivership, and usually one that caused the least problems. It could always be sold, after all, and often its sale funded the rest of the receivership process. Now, things are fundamentally different – property is itself the problem, and there is usually no easy or obvious disposal course, with limited investor appetite and demand.

A property receiver (otherwise, a fixed-charge receiver) will be appointed by a lender over a specific mortgaged asset or assets of an individual borrower or borrowers, or of a company, with a view to managing, and probably disposing of, just that asset in the way most advantageous to the lender. The fixed-charge receivership can apply equally to mortgaged assets of individuals and of companies, therefore. The fixed-charge receiver will not be concerned with management of the individual or company's general affairs, only with the possession and management of the specific asset or assets over which he is appointed. Those assets will usually be an estate or interest in land, but could be a chattel such as a plant or machinery.

"As agent of the borrower, the lender does not take on any additional liability by appointing a receiver"

There is nothing new in the concept of a fixed-charge or property receiver in Ireland or in Britain – it is simply the case that the concept has not been in much use here. In Britain, the equivalent is generally known as a '*Law of Property Act* receiver', where the process is mature and many firms, especially property consultancy and management firms, have developed specialist departments focusing on the area. Lenders here have used the procedure, albeit sparingly, over decades.

Receiver is agent of borrower

Any well-drafted mortgage will state that a receiver (of any kind) will be the agent of the borrower and not of the lender. This is specifically set out in the *Land and Conveyancing Law Reform Act 2009* and the *NAMA Act*

The invisible man could be forceful at times

FAST FACTS

- Property or fixed-charge receivership is different from company receivership
- Fixed-charge receivers are appointed by lenders over a specific mortgaged asset of a borrower with a view to managing, and probably disposing of, just that asset in the way most advantageous to the lender
- By appointing a receiver who enters into property as receiver and as agent of the borrower, the lender itself is not entering into possession of the property
- There is currently no formal qualification or licence required to be either a fixed-charge or company receiver in Ireland

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DATE	EVENT	DISCOUNTED FEE*	FULL FEE	TRAINING HOURS
22 March	Law Society Skillnet: Impressive presenting skills for solicitors	€202	€270	**4.5** Management and professional development skills (by group study)
29 March	Law Society Skillnet: Report writing skills workshop	€180	€240	**4** Management and professional development skills (by group study)
5 April	DIT/Law Society Skillnet accredited certificate in learning, teaching and assessment	€896	€1,280	**16.5** Management and professional development skills (by group study)
April	Preliminary notice – Law Society Professional Training in partnership with the Law Society Family Law Committee present a cohabitant agreements masterclass	Full details will be available shortly at **www.lawsociety.ie/lspt**		
15 **and** 16 April	Law Society Skillnet in partnership with the DSBA: Mediation skills training	€395	€493	**14** General (by group study)
28 May	Preliminary notice – Law Society Skillnet in partnership with the Federation of Irish Sports	Full details will be available shortly at **www.lawsociety.ie/lspt**		
23 June	Law Society Skillnet: Setting up in practice	€225	€285	**5** Management and professional skills **and 1** regulatory matters** (by group study)
Ongoing	CIMA certificate in business accounting in partnership with Law Society Skillnet (online course)	€670	€895	Full management and professional development skills requirement for 2011 (by e-learning)
Ongoing	Suite of e-learning courses • Touch typing – €40 • *PowerPoint* – all levels – €80 • Microsoft *Word* – all levels – €80 • How to create an e-newsletter – €150	To register or for further information, email: professionaltraining@lawsociety.ie		Full management and professional development skills requirement for 2011 (by e-learning)

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**Full regulatory requirement for 2011

2009. Where a receiver is appointed, he or she becomes the agent of the borrower with – except in the case of the rent receiver – all the rights of the borrower over the property, and also the right to exclude the borrower from exercise of those rights.

As agent of the borrower, the lender does not take on any additional liability by appointing a receiver. Indeed, the receiver, if he acts prudently and appropriately, equally is not exposed to liability, as such will rest with his principal, the borrower.

An important feature arising from this agency is that, by appointing a receiver who enters into property as receiver and as agent of the borrower, the lender itself is not entering into possession of the property. A lender, on entering into possession (as it would almost certainly be entitled to do once the mortgage became enforceable), would become wholly and irreversibly responsible for the property, for better or for worse, until it is sold. This includes liability for environmental hazards, planning compliance and occupier's liability, among other responsibilities. No lender would want to take on such a responsibility without very careful consideration, as these issues could be very onerous and expensive. These, together with the reality that property values have plummeted, might bring about a position where the asset could have little value – or worse, a negative one.

Who can be a fixed-charge receiver?

There is no formal qualification or licence required to be either a fixed-charge or company receiver in Ireland.

In England, only a licensed insolvency practitioner can hold certain insolvency positions. Also in England, there is an established association of property and fixed-charge receivers (NARA, www.nara.org.uk), and discussions are ongoing regarding a similar Irish organisation. In the absence of any licensing or formal qualification, it will be up to the lender to satisfy itself of the quality and integrity of the person it appoints, knowing that a receiver can carry personal liability for his actions.

As a property problem, most lenders – just like Brendan McDonagh of NAMA – are starting to realise the sense of using a property professional as fixed-charge receiver.

Property receiver or insolvency practitioner?

This is a 'horses for courses' situation. Experienced insolvency practitioners have a wide range of skills to deal with the administration and effective winding-up of companies, but none, to my knowledge, claim any particular skill in property. They will, therefore, typically employ a property expert to actually manage the property aspects of the receivership.

On the other hand, the lender can appoint a property expert as fixed-charge receiver. The ideal property expert appointee should understand property generally, and particularly get to know the property in question. A good fixed-charge receiver will have the detailed property competence and experience to both devise and implement an appropriate strategy to maximise the value of the property. They will use local estate agents and – where they do not have them already – bring in specialist skills where necessary. This way, the best outcome can be achieved for the lender and, therefore, the borrower.

"A good fixed-charge receiver will have the detailed property competence and experience to both devise and implement an appropriate strategy to maximise the value of the property"

An additional advantage for the lender is that a layer of fees and reporting is eliminated by the direct appointment of a property expert by the lender, rather than have the property management function subcontracted through an insolvency practitioner. Brendan McDonagh has been clear that this is another of NAMA's objectives.

Bearing in mind that a receiver effectively usurps an owners' right to enjoyment of a property, at possibly very short notice, contentions can arise. It is therefore important that great care is taken that a lender does have the necessary powers to appoint a receiver and that the appointment is procedurally valid.

While a fixed-charge receiver usually has power to manage or lease a property on a longer term basis, the lender will usually prefer to sell and realise what it can to deal with the debt. Getting a property ready for sale will therefore be one of the first tasks of the fixed-charge receiver. Apart from title, he will be concerned with planning, tax, and health and safety, and a clear understanding of these issues will be required, as well as understanding his own powers and responsibilities.

And solicitors?

Generally, once appointed, a fixed-charge receiver will decide what solicitor is going to act for and advise him. Usually, the lender will prefer the solicitor who took the charge, provided the solicitor has adequate knowledge and experience of receivership. G

APPOINTING A FIXED-CHARGE RECEIVER

The right of a lender to appoint a fixed-charge receiver stems from three sources:

- **A right contained in a mortgage, whereby a borrower gives a lender the right to appoint a receiver over some or all of the assets charged in the event of default by the borrower. Such a receiver takes his authority from the contract between the lender and the borrower, as set out in the mortgage document. Once a receiver is validly appointed, he typically will assume (to the exclusion of the borrower) the same powers the borrower had relating to the property.**
- **Under the *Conveyancing Act 1881*, and now the *Land and Conveyancing Law Reform Act 2009*, a lender can appoint a receiver, generally known as a rent receiver, with limited powers to receive rent or other income from a property, as well as to insure the property.**
- **Under the *National Asset Management Agency Act 2009*, where there is a loan under NAMA's management secured by mortgage, NAMA can appoint a statutory receiver with considerable powers over the asset charged by the mortgage, even where the mortgage itself does not contain any – or any adequate – power to appoint a receiver.**

STATUTORY RECEIVERS

This new concept to Irish law is created by the *NAMA Act 2009*. It is exclusive to NAMA. Where NAMA has acquired a loan secured by mortgage – and either a power of sale or a power to appoint a receiver has become exercisable – it may appoint a statutory receiver who has all the powers conferred on a statutory receiver by the *NAMA Act 2009*. These powers are in addition to any that might (or might not) be given to a receiver under the mortgage.

LOOK IT UP

Legislation:

- *Conveyancing Act 1881*
- *Land and Conveyancing Law Reform Act 2009*
- *National Asset Management Agency Act 2009*

THE SEARCHERS

British firm Clifford Chance has developed its own internal search engine, and the experience illustrates how firms can get the most from information technology in order to help staff work more effectively. Gordon Smith rides into the sunset

Gordon Smith is a freelance journalist and has covered business and technology for more than 15 years

Technology has made searching for information much easier. On the internet, search engines like Google, Yahoo and Bing are like guiding stars through vast swathes of information. Their popularity is easily explained: they are simple to use and they help people to find what they're looking for – fast.

The British law firm, Clifford Chance, one of the world's top ten law firms, is putting the same principle into practice. Last year, it launched its own search system, 'CC Search', which is designed to tap into the accumulated knowledge and information residing throughout the firm.

Having just won for 'best use of technology' in the 2010 British Legal Awards, Clifford Chance makes for a useful case study about getting the most from information and harnessing technology to help staff work more effectively. After all, a legal firm's reputation and standing owes much to the sum total of the knowledge it has accumulated over years.

> ***"Responsiveness to clients is hugely important; the ability to do that well will always be primary. IT being more efficient helps the firm as a whole to meet its financial objectives and its business objectives"***

The wild bunch

Putting that knowledge easily into the hands of people who need it has been hugely beneficial, according to Paul Greenwood, chief information officer at Clifford Chance. (A brief biographical aside: if Greenwood's job title seems more suited to the boardrooms of big business, it might help to know that it's an evolution from his previous role as 'director of knowledge'.)

In Clifford Chance's case, that knowledge had previously been scattered across 26 separate systems – the firm has 29 offices throughout the world, in 20 different countries. What's more, its practice spans all the primary areas of commercial activity: capital markets, corporate and M&A, finance and banking, real estate, tax, pensions and employment, litigation and dispute resolution.

The scope of the information naturally made it both difficult and time consuming for lawyers to find what they were looking for. Compounding the problem was the presence of other systems also holding important information. Some could be found on pages of the firm's extensive website, while there was also a further trove of editable documents called 'wikis'. Other sources of knowledge included the firm's database of client publications and its bound volumes, which are the closing bibles of transactions.

CC Search joins up all of the various places where the firm keeps its information, so that any of the lawyers at Clifford Chance worldwide can find information simply by typing a query onto a single screen. Instead of having to search through multiple databases – with all the time and effort that would entail – CC Search interrogates all of the firm's systems in a matter of milliseconds. That might involve locating a particular document, a subject matter expert, or details about a previous client engagement that relates to a specific topic or sector.

Search results are first targeted to the lawyer's location, but they can be expanded to also include information from the rest of the firm that is appropriate to the individual's role, specialisation, client and sector focus.

True grit

The system has been a resounding success, and Greenwood has the figures to prove it. In a recent survey within the firm, 80% of respondents said CC Search had improved their ability to find information and people.

FAST FACTS

- British firm Clifford Chance has developed its own internal search engine
- 'CC Search' links all of the various places where the firm keeps its information, so that any of the firm's lawyers worldwide can find information simply by typing a query onto a single screen
- Results are presented so as to preserve security: some content is generically available to everyone in the firm, and some may be locked down to specialist practice groups

Now that's a search engine – old stylee

"The system is measured and this data is reviewed monthly: we look at the volume of usage, how long people are spending, how many searches return no results," Greenwood says. Searching for information is now so much easier that it has improved staff's perception of many of the firm's other IT systems, he adds.

"Knowledge management is one of the systems that can actually provide you with a competitive advantage as a law firm," he says. "The benefit is it's leveraging the combined knowledge of one of the biggest law firms in the world, and doing it at the push of a button."

The key with CC Search was to make it as easy to use as possible. While Greenwood doesn't agree with the stereotype of law firms as being technophobic, he accepts the need not to over-complicate things. "Ideally, you want to design a system so you don't really need any training. No one gets trained to use Google," he points out.

The comparison with websites also sets the bar high for expectations: if people are kept waiting for search results, they will quickly tire of using the system. "We have probably one of the largest knowledge collections of any law firm in the world, so we've got a particular challenge in terms of making it high performance," Greenwood admits.

Certain information at the firm needs to remain confidential, and that created another challenge. Search results are presented so as to preserve security. While some parts of the content are generically available to everyone in the firm, others that may be commercially sensitive, such as antitrust documents, are often locked down to specialist practice groups.

"In some areas you want to show people the content that's available but not necessarily allow them unfettered access to it," Greenwood explains. "There are a number of aspects that the search has to take into account and present back, and it has to do all that in the fraction of a second that people are willing to wait to have the results returned – and I think that's where the real technological sophistication is."

A fistful of dollars

For firms of any size – or any sector – when it comes to building any IT system that will have a major impact on the business, one of the key decisions is whether to buy off the shelf or build a bespoke system.

At Clifford Chance, the philosophy is buy rather than build, Greenwood explains. "Customisation can seem like the easiest thing to do at first, until a year later you suddenly have a problem. It costs more in the long run."

To build CC Search, Clifford Chance first embarked on a competitive tender and proof-of-concept phase. Greenwood notes the challenge facing many law firms when it comes to using technology. "There are a lot of tools developed specifically for the legal sector, but many of those are developed with a mid-sized American law firm in mind.

Then there are other tools developed for major corporations, but the trouble with that is, they're not developed with a law firm in mind. We often find ourselves having to do things slightly differently; we've found ourselves having to build our own and develop our own way forward."

Following the tender, the firm chose software company Recommind's 'Decisiv Search' technology, which became the base for what would become CC Search. Both parties worked on designing the system to enhance the core product's usability. Clifford Chance's size confers some privileges in this respect: it's big enough to command that kind of involvement from its technology providers. Moreover, it is one of only 20 companies worldwide – in any sector – that has direct access to Microsoft for feedback on *Office* products.

> *"It's leveraging the combined knowledge of one of the biggest law firms in the world, and doing it at the push of a button"*

Fundamentally, Greenwood believes his approach to information technology applies just as well to firms of any size: consolidate, simplify, standardise. On his watch, Clifford Chance cut down the number of different versions of products to allow them to be managed more easily and more cost effectively.

It also reduced the number of data centres where its information was being stored and has implemented a standard telecoms system throughout the firm, to avoid having to maintain many different systems. Wherever a lawyer goes within the firm's various offices around the globe, they can log in to a computer and the screen will appear exactly as their own. "It should be one seamless global system," Greenwood declares.

The magnificent seven

Another clever use of technology is its use of templates that act as the agreed 'best first draft' of a particular kind of document, such as a share purchase agreement. That is stored in Clifford Chance's document management system as a *Word* file. According to Greenwood, the firm saw that some of these documents were used a lot and had as many as ten other connected documents that were all linked in order to complete a transaction. "Instead of having these as static *Word* documents, we've broken these down into their component pieces. The lawyer can go in and fill out a brief questionnaire; what is the client name, what issue and a whole series of questions. Once they've done that, it generates all the associated documents. You only have to put the information in once and then, if you make changes, the system will make changes to all of the documents simultaneously. And equally, when any legal issues have changed, they can manage that from the same interface. It's a very efficient way for our lawyers to get up and running very quickly."

That is a recurring theme in the conversation – how technology can help to speed up finding information and, in turn, respond to clients' needs faster. That's good practice at any time, but is especially important in the current economic climate. "Responsiveness to clients is hugely important; the ability to do that well will always be primary. IT being more efficient helps the firm as a whole to meet its financial objectives and its business objectives. Being efficient is itself a good thing."

For those reasons, Greenwood points to technology's important strategic role at Clifford Chance and advises other firms of any size to think of it in the same terms. "IT is now indispensable to law firms, whether it's a *Word* document or an email to a client that's received on a BlackBerry," he says. "If you treat IT as a cost, ultimately you're going to get the IT you deserve." G

DR GORDON HOLMES 1935 – 2011

An appreciation

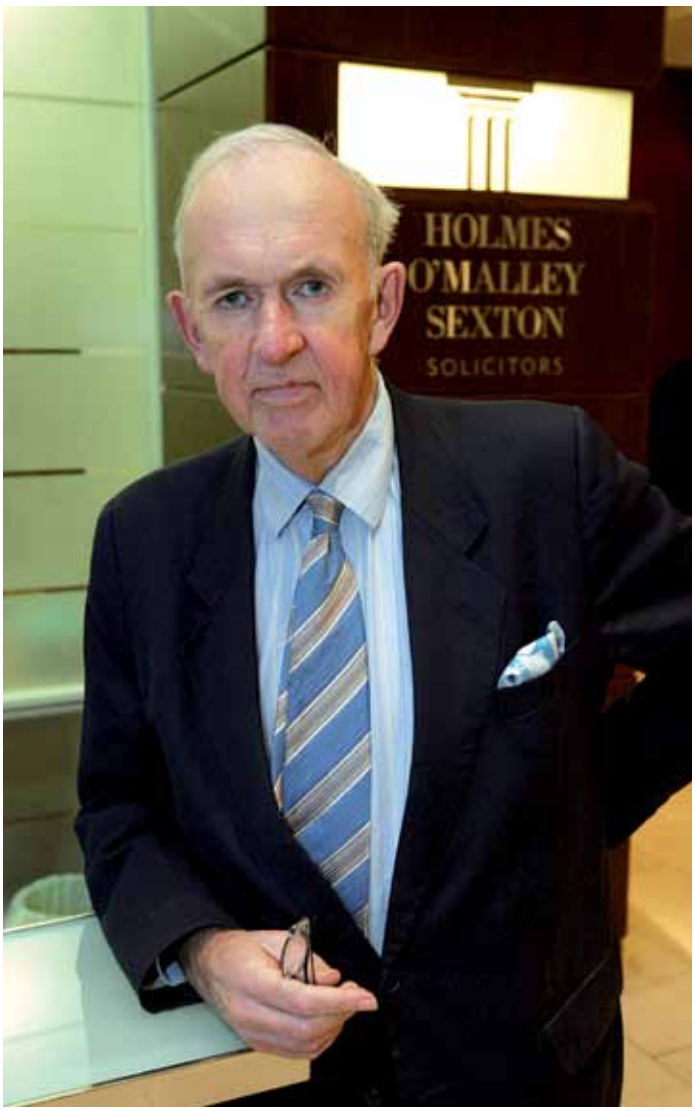
Gordon Holmes sadly passed away on 20 January 2011 after a relatively short illness. Having qualified as a solicitor in 1958, he continued to attend to his work at Holmes O'Malley Sexton in Bishopsgate, Henry Street, Limerick, until December 2010.

He held many offices and performed many roles, such as chairman of the Parole Board, chairman of the Garda Síochána Complaints Board and chairman of the Betting Appeals Committee of Horseracing Ireland.

He was the first state solicitor for Limerick, holding this position between 1970 and 1980.

He was awarded an honorary doctorate of law from the University of Limerick in 2005, "in recognition of his contribution to Irish society". He was quite pleased with this tribute, joining the ranks of a number of medical doctors in his family.

He served for many years on the Superior Courts Rules Committee and, before that, on the Circuit Court Rules Committee. He reported to the Government as chairman of the Commission of Intoxicating Liquor Licensing, which involved an in-depth study of all relevant licensing laws in the country. He certainly enjoyed this role.



Youngest bridge team captain

He was a keen follower of racing and acted as a steward of the Turf Club. He was also a keen bridge player, being the youngest captain of the Irish bridge team when, at the age of 26, he represented Ireland in the European Bridge League, where he faced Omar Sharif.

The year 1970 saw him come together with Jim Sexton and Michael B O'Malley to found the firm of Holmes O'Malley Sexton, now located in Limerick and Dublin. He loved his work and had a brilliant legal mind. He set the ethos for the firm when he stipulated that no one with a stateable or reasonable case should be prevented from engaging the firm's legal services due to lack of money.

Those who worked with him will remember him with great fondness. He treated everyone with great respect, no matter who they were. He had a great sense of humour and turn of phrase and loved to debate detailed legal points. He was, to those who worked with him in Holmes O'Malley Sexton, a great master, employer, partner, colleague and friend. He loved to help people and solve problems. Though not given to physical work, he often used to say: "It is the duty of the professional man to give work to the artisan." However, he was given on occasion to making an exception to this policy if it involved moving, storing or opening '*du vin*'.

Our local paper, *The Limerick Leader* (22 January 2011), on the occasion of his passing, noted that "his contribution to local and national life was considerable and his list of accomplishments vast". It indicated that "a huge number of disparate organisations and individuals benefited from his experience and wise counsel". In short, the newspaper noted, "Gordon Holmes made a difference".

I certainly agree, and he will be sadly missed by his colleagues and friends at the office and, of course, by his wider circle of colleagues, friends, acquaintances and clients – and, not least, his family.

He was one of nature's true gentlemen and, most importantly, he was our friend.

He is survived by his wife Hilary, daughters Valerie and Melanie, and sons Keith and Gordon. To them we extend our sincere sympathy.

May he rest in peace. G

DC

Past-presidents attend outgoing president's dinner

PIC: LENSMEN

Past-presidents and Council members of the Law Society gathered on 20 January 2011 to attend the outgoing president's dinner, held in honour of Gerard Doherty. *(Front, l to r)*: Frank Daly, Geraldine Clarke, Gerard Doherty, John Costello, Moya Quinlan, Bruce St John Blake and Judge Frank O'Donnell. *(Back, l to r)*: Judge Gerard Griffin, Philip Joyce, Elma Lynch, Ward McEllin, Laurence K Shields, James MacGuill, Owen Binchy, Adrian Bourke, Michael Irvine, Michael V O'Mahony, John D Shaw and Andrew Smith

FINANCIAL SERVICES OPPORTUNITY
Speakers at the 'Financial services opportunity' initiative on 27 January included George Ryan (solicitor) and Attracta O'Regan (Law Society Professional Training)

Midland Bar Association

PIC: COLE-DUPUIS PHOTOGRAPHY

At the AGM of the Midland Bar Association (MBA), held in Tullamore's Bridge House Hotel on 3 February were *(front, l to r)*: Ken Murphy (director general), Mary Ward (outgoing president, MBA), John Costello (president of the Law Society), Ray Mahon (incoming president, MBA), Anne Marie Kelleher (outgoing secretary). *(Back, l to r)*: John Hughes (committee member), Brian O'Meara (outgoing treasurer), Hillary Cahalan (joint secretary), Susan Fay (outgoing PRO) and Dermot Murphy (incoming treasurer)

Society welcomes President McAleese for annual dinner

ALL PICS: LENSMEN

Attorney General Paul Gallagher and Law Society President John Costello

Welcoming Uachtarán na hÉireann Mary McAleese and her husband Martin to Blackhall Place were *(l to r)*: Senior Vice-President Donald Binchy and Junior Vice-President Kevin O'Higgins, President John Costello, President Mary McAleese and her husband Martin and Director General Ken Murphy

Uachtarán na hÉireann Mary McAleese met the British Ambassador to Ireland, His Excellency Julian King, at the Law Society's Annual Dinner

Elma Lynch (past-president), Junior Vice-President Kevin O'Higgins and Michael V O'Mahony (past-president) exchange greetings

Among the guests were Mr Justice Frank Clarke and Jim O'Keeffe TD (Joint Oireachtas Committee on the Constitution)

President of the Law Society John Costello welcomes Gay Mitchell (MEP)

President John Costello and his children, Mark, Eleanor and Laura, met President McAleese and her husband Martin at Blackhall Place

Southside solicitors keep gloom at bay in Dun Laoghaire

Lawyers from the southside of Dublin convened for their annual dinner at the Royal St George Yacht Club on 21 January 2011. Despite the economic doom and gloom, members did their utmost to remain optimistic about the future and took the opportunity to network with colleagues and friends.

ALL PICS: DERMOT BYRNE PHOTOGRAPHY

Justin McKenna, Clare McKenna, Jane Houlihan and Law Society President John Costello

Susan Gray, Jacinta Enright and Ethna Ryan

Alex Petrelli, Jacinta Enright, Aimee Dillon and Owen Donnelly BL

Ken Byrne, Denise Brett BL and Mr Justice Paul Gilligan

Law Society Director General Ken Murphy and Yvonne Chapman

Mary Swords, Geraldine Kelly, Deirdre McDermott and Yvonne Allen

Inge Clissmann SC, Law Society Junior Vice-President Kevin O'Higgins, Mr Justice Michael Moriarty and Doreen Delahunty

Maeve Carney, Joanne Sheehan and Brian Harpur

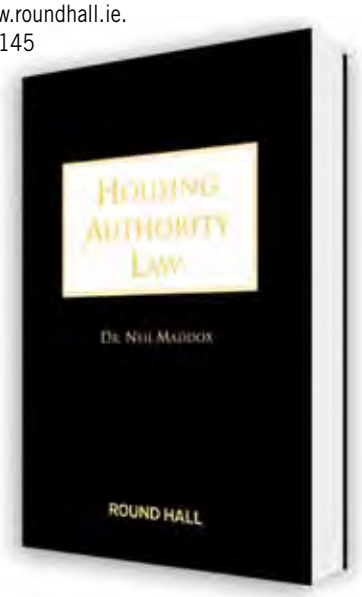
Julia Hussey, Cilian McKenna and Karen Brennan

Sharon McElligott, Aisling Crowley BL and Marjorie Murphy

DSBA President Stuart Gilhooly, Fidelma McManus and Justin McKenna

Housing Authority Law

Neil Maddox. Round Hall (2010), www.roundhall.ie. ISBN: 978-1-85800-542-3. Price: €145



The *Housing (Miscellaneous Provisions) Act 2009* provided the catalyst for this book. The act consolidated and amended a number of provisions relating to housing strategies and affordable housing schemes. Dr Maddox covers these new legislative changes in forensic detail in the opening chapters of his book.

The 2009 act not only amended existing legislation, but also introduced schemes for social housing, such as rental accommodation arrangements, an incremental purchase scheme, and an apartment purchase scheme. The mechanics of these innovative schemes demand rigorous examination of the legislation in order to reveal the finer details. For example, the implementation of the apartment purchase scheme would leave a contortionist in knots, but Dr Maddox deftly guides us through the complexities of the statute.

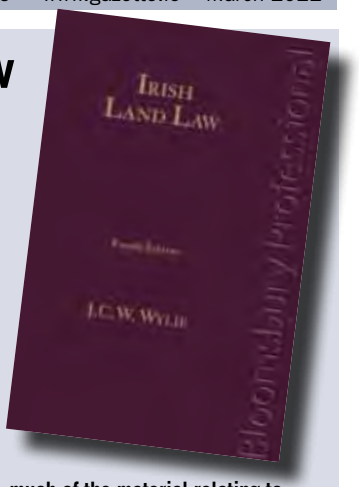
The text highlights the broad remit of the local authority's housing functions and responsibilities. The housing authority not only initiates policy decisions relating to housing matters but is also responsible for the implementation of those functions at local level.

The author analyses policy, operational functions, anti-social behaviour and Traveller accommodation in chapters 6 and 7. The final chapter gives an overview of the compulsory acquisition powers of local authorities under the 1966 act. There is no doubt that a comprehensive examination of this area of law was long overdue. Dr Maddox's book provides a clinical, non-judgemental analysis of current housing legislation and recent case law.

Máiréad Cashman is senior solicitor at Dublin City Council.

Irish Land Law

JCW Wylie. Bloomsbury Professional (4th ed, 2010), www.bloomsburyprofessional.com. ISBN: 978-1-84766-081-7. Price: €195.



Every practitioner will be familiar with one edition or another of this book, many of us since our student days. Indeed, it is tempting to think of this and Wylie's *Irish Conveyancing Law* as the Old and New Testaments for conveyancers.

There have been significant changes to the statute book since the publication of the third edition of this authoritative work in 1997. The *Land and Conveyancing Law Reform Act 2009* alone has seen to that. But even the *Civil Partnership Act 2010* (to give it its informally short title), which had yet to be commenced as the book went to print, is included in this volume.

The 2009 act has, of course, had an impact on every chapter of the text. This has resulted in the most thoroughgoing revision to the book since the publication of the first edition over 30 years ago. Much of this revision is by way of addition to the existing text rather than outright replacement: practitioners will need to know their land law history for at least a generation to come. To keep the volume to a manageable size – the table of cases takes up 130 pages alone – Prof Wylie has excised much of the material relating to Northern Irish land law.

The position regarding easements of prescription makes for interesting reading. Wylie broadly adopts a more sanguine view than many practitioners might do, noting that there will always be 'winners' and 'losers' in any scheme of transitional provisions (see part 8 of the 2009 act). Of course, it remains to be seen how these matters pan out between now and the end of next year; one suspects that this subject alone will provide ample new material for the fifth edition of this self-recommending reference text.

David Soden is a sole practitioner based in Rathgar, Dublin.

Jordans Irish Company Secretarial Precedents

Paula Phelan, Liam Brazil and Paul Egan. Jordans (4th ed, 2009), www.jordanpublishing.co.uk. ISBN: 978-1-84661-189-6. Price: Stg£120.

For those of us practising in the area of company law and corporate compliance, *Jordans Irish Company Secretarial Precedents* is a prerequisite for Irish company secretaries and professional advisers. The book contains a comprehensive set of professionally drafted precedent minutes of directors' and shareholders' meetings and draft resolutions. It also contains the Companies Registration Office's standard template forms. All of the precedents and forms are included on the accompanying CD-ROM, allowing the user immediate access to tailor them to their own needs.

Jordans' precedents span the full spectrum of corporate activities and possibilities. Many of the precedents are suitable for use by either public companies, limited or unlimited companies, and companies limited by guarantee.

At the beginning of each chapter, a very clear and succinct introduction is provided, setting out an explanation of precisely when and how each precedent, minute, resolution and form should be used. Annotations throughout the book provide cross-references to the relevant legislative provisions.

In this new edition, the precedents and commentary have been fully updated to reflect the provisions of several legislative developments that are relevant to company secretarial work, right up to the *Companies (Amendment) Act 2009*. This is very helpful. It makes this fourth edition an attractive purchase, given that the last edition was published in 2004.

Corporate compliance is a key concern for directors and secretaries. Given that it is high on the agenda for Irish companies, *Jordans Irish Company Secretarial Precedents* is an indispensable resource for all those advising on, or interested in, Irish corporate procedures.

Breda O'Malley is a partner and Sabrina Burke is an associate in the Commercial Department of Hayes Solicitors.

Finding that journal article easily

The Law Society Library subscribes to over 120 journals, around 30 of which relate to Irish law. Head of library and information services Mary Gaynor outlines the ways in which the library can help you to find what you're looking for

Mary Gaynor is head of library and information services at the Law Society of Ireland

Journal articles are always a valuable resource for up-to-date legal research, particularly in instances where a key textbook on a specific topic might be a number of years out of date.

Searching legal journal content can be carried out by personal callers to the library, who can browse the current issues (shelved on display racks on the ground floor) or can use the online database 'Legal Journals Index' to search for specific subjects. If you are a remote user, you can request the library staff to do a journal search, the results of which can be emailed to you, including details of authors, titles, journal citation and short abstracts. The full text of articles can be supplied from the library's own stock or ordered in from a network of back-up libraries and emailed at a nominal charge, subject to copyright conditions. Details of library charges for this service are available on the library menu under 'ordering documents' at www.lawsociety.ie.

As well as the long-established general content journals such as the *Law Society Gazette* (published since 1907), *Irish Law Times and Solicitors' Journal* (since 1867), *Bar Review* (since 1996), *Irish Jurist* (since 1935), and the DSBA's *Parchment*, there are a number of academic and student review journals, including the *Dublin University Law Journal*, *Hibernian Law Journal*, *Irish Student Law Review*, *Trinity College Law Review*, *University College Dublin Law Review* and others published by third level colleges, some available free online.

Topic-specific Irish journals

The range of Irish legal journals has grown hugely in recent years, and there is now a journal specific to almost every legal topic. Specific legal subject areas are explored via comprehensive articles, case updates, and guidance practice notes in the following titles:

- Round Hall: *Commercial Law Practitioner*, *Conveyancing and Property Law Journal*, *Irish Criminal Law Journal*, *Irish Employment Law Journal*, *Irish Journal of Family Law*, *Irish Planning and Environmental Law Journal*, *Medico-Legal Journal of Ireland*.
- Clarus Press: *Irish Business Law Quarterly*, *Quarterly Review of Tort Law*.
- First Law: *Arbitration and ADR Review*, *Civil Practice and Procedure*, *Irish Road Traffic Review*, *Employment Law Review*, *Irish Intellectual Law Quarterly*, *Local Government Review*.
- Courts Service: *Family Law Matters*.

The newest Irish legal journal is the *Employment Law Updater*, which is compiled by Maeve Regan, solicitor, and is delivered to subscribers by email. This began publishing in December 2010 and contains useful summaries of employment law cases from the courts, EAT, Labour Court, Equality Tribunal and also news items on relevant employment legislation. G

HAVE YOU GOT YOUR LIBRARY PIN?

Do you know how to borrow and renew online? Have you got a book purchase suggestion? Contact the library staff for PIN details or if you require help in searching the online catalogue; tel: 672 4843/4 or email: library@lawsociety.ie.

Any member requesting an online loan during Library Ireland Week (7-13 March 2011) will be included in a raffle for a €100 book token.

JUST PUBLISHED

New books available to borrow

- Barrett & Quinlivan, *Revenue Audits and Investigations – the Professional Handbook* (2010; Irish Taxation Institute)
- Blaney, Colm (ed), *Taxing Financial Transactions* (3rd ed, 2010; Irish Taxation Institute)
- Brindle & Cox, *The Law of Bank Payments* (4th ed, 2010; Sweet & Maxwell)
- Carolan & O'Neill, *Media Law in Ireland* (2010; Bloomsbury Professional)
- Carter-Ruck, Peter, *Libel and Privacy* (6th ed, 2010; LexisNexis)
- Equality Authority, *Expanding Equality Protections in Goods and Services: Irish and EU Perspectives* (conference proceedings, 21/5/2010)
- Farrell & Hanrahan, *The European Arrest Warrant* (2011; Clarus Press)
- *Kelly's Legal Precedents* (20th ed, 2010; LexisNexis)
- McCormick, Roger, *Legal Risk in the Financial Markets* (2nd ed, 2010; OUP)
- Mason, Stephen (ed), *Electronic Evidence* (2nd ed, 2010; OUP)
- *Offences Handbook 2010: Criminal and Road Traffic* (2010; Round Hall)
- Pickavance, Keith, *Delay and Disruption in Construction Contracts* (4th ed, 2010; Sweet & Maxwell)
- Smith, Olivia, *Disability Discrimination Law* (2010; Round Hall)
- Smith & Randall, *Contract Actions in Employment Law: Practice and Precedents* (2nd ed, 2010; Bloomsbury Professional)

BRIEFING

Practice notes

Notice to all practising solicitors – undertakings

COMPLAINTS AND CLIENT RELATIONS COMMITTEE

The Society is continuing to receive a considerable number of complaints relating to undertakings. While many of these complaints are ultimately resolved, the investigation of them suggests that many members of the profession still fail to understand the obligations imposed upon them when they give an undertaking. This practice note has therefore been reissued to remind practitioners that non-compliance with an undertaking amounts to misconduct.

Not only is dealing with a complaint of this nature likely to take up a great deal of time that could have been spent more profitably, it may also involve a substantial financial claim, with the additional possibility of a referral to the Solicitors Disciplinary Tribunal. Undertakings considered to have been given negligently have also given rise to a considerable number of insurance claims, resulting – inevitably – in a substantial increase in premiums. The affairs of clients are more easily transacted because people can rely on a solicitor's undertaking. An undertaking should not, therefore, be given or accepted carelessly.

Remember

Undertakings should be clearly understood and agreed, and they should always be confirmed in writing. If an undertaking involves the payment of a sum of money, make sure the amount is clear or that it is easy to calculate. Ambiguous undertakings will generally be construed in favour of the recipient, and they are binding even if they do not include the word 'undertake'.

A solicitor's undertaking is a professional conduct issue. Consideration is not required for it to be enforceable, and undertakings are not subject to any limitation period.

There is no obligation on a solicitor either to give or accept an undertaking, and a client cannot instruct you to do so. Likewise, you cannot avoid complying with an undertaking because you have been instructed to do so, or because it is no longer in your client's interests.

Undertakings should refer to a particular task or action that is clearly identified and defined. Do not give general undertakings, such as an undertaking to discharge 'all outstanding mortgages on a property' or 'pay costs on the conclusion of the case'. Do not give 'the usual undertaking', or think in terms of 'routine' or 'standard' undertakings. An undertaking to pay monies out of a fund should be qualified by the proviso that the fund comes into your hands, and that it is sufficient.

Undertakings should be achievable at the time they are given. You must consider carefully whether you will be able to implement it. Likewise, an undertaking should only be accepted if it relates to matters under the direct control of the person giving the undertaking. If any events must happen before you will be able to comply with your undertaking, you should spell out those events in the undertaking, and only give a qualified undertaking.

Undertakings should indicate when they will be complied with. In the absence of an express term, there is an implied term that an undertaking will be performed within a reasonable time.

Particular care should be taken if you agree to hold title deeds, documents, cheques, money, or anything else on accountable trust receipt or 'to the order' of another solicitor or third party, as you may well be deemed to have given an undertaking to do so.

Litigation

Do not ask other solicitors to provide an undertaking in terms you would not give yourself. This applies particularly to undertakings as to costs. Do not give, or expect

another solicitor to give, an open-ended undertaking to pay costs. Refer to specific bills if possible but, if not, at least make provision for the costs to be 'taxed in default of agreement'. It should be clear from the terms of the undertaking when and how such costs are to be paid.

You should not pay out monies due to your client on the successful conclusion of a case without ensuring that you have sufficient funds to discharge undertakings that may have been given on their behalf. Make sure that such undertakings have been given with your client's written agreement, and that they understand that these monies do have to be repaid out of their damages/settlement. You should think very carefully before giving what may amount to a financial guarantee for your client.

Conveyancing

Make sure that an undertaking to discharge a mortgage specifies exactly which mortgage(s) you intend to discharge. Vague replies may result in you being liable to discharge all mortgages, whether you know of them or not. Particular care should be taken with 'all sums due' or 'all monies' mortgages.

You should not accept carelessly worded undertakings to provide missing plans, planning documents or deeds, which are often outside the control of the vendor's solicitor. An undertaking is only binding upon the parties to it. It cannot compel a third party to do anything. If a document is not available, consider whether you should be closing the transaction without it at all.

For this reason, particular care should be taken when acting for a purchaser of a property/apartment in a new development. A distinction must always be made between those issues that are in the contract/lease and are to be dealt with by the vendor/developer, and those that are to be the subject of an undertaking given by their solicitor. You should not therefore give an unqualified undertaking to provide a copy of a deed that, for example, deals with the conveyance of the common areas, if that is something that will only be executed by the vendor/developer at some point in the future.

A solicitor cannot assign the burden of an undertaking (and claim to be released from its obligations) without the express agreement of the recipient of the undertaking. The recipient can assign the benefit of an undertaking, but you should be cautious of accepting such an assignment unless there is a good reason why the original undertaking has not been complied with. For this reason you should not accept a 'chain of undertakings', as these could prove to be unenforceable.

Do not treat the Law Society's approved form of undertaking for residential mortgage lending as a mere formality. In giving that undertaking, you undertake, among other things, that you "are in funds to discharge all stamp duty and registration fees", that you will lodge the deed for stamping "within the time prescribed by law" and, following receipt of the deed stamped, lodge it and the mortgage deed in the appropriate registry "as soon as practicable but in any event within four months".

Good management

Principals are responsible for undertakings given by staff, whether qualified or not. Clear guidance should be given to all staff as to who is permitted to give or accept undertakings. You should also consider drawing up approved forms of undertakings that are to be used unless otherwise agreed.

Make sure that undertakings are not overlooked, by indicating on the file that an undertaking has been given and its date. You could, for example, print off a copy of the undertaking on different-coloured paper, so that it can easily be identified. It should be apparent to anyone taking over a matter that an undertaking is still outstanding. If you do not already have one, you should set up a register of undertakings.

The recipient of an undertaking is entitled to make reasonable enquiries as to the discharge of the undertaking, and you must therefore ensure that such enquiries are not ignored. This specifically includes letters received from banks and other financial institutions. Such letters often make it clear that a complaint will be made to the Society if a response is not forthcoming; a short reply may therefore save a quite unnecessary complaint being made.

The Society's Complaints Section has received an unprecedented amount of complaints about undertakings from lending institutions within the last 18 months, the majority of which were triggered by a complete lack of response from the solicitor to the lending institution's queries. There have been some complaints made in error, or prematurely, and solicitors are understandably annoyed when this happens. Thankfully, most of the complaints made to the Society are resolved through correspondence and that is the end of the matter. However, in a small but significant number of cases, the Society's enquiries reveal that the solicitor, for a variety of reasons, cannot comply with the undertaking and, in these cases, the Society has no choice but to initiate disciplinary proceedings.

Have available and refer to the current Law Society publications on the subject, in particular the *Guide to Professional Conduct of Solicitors in Ireland* (2nd edition), as this practice note is in addition to, rather than in substitution for that material. Practice notes are not legal advice; they are notes issued by the Law Society for the use and benefit of its members. The Law Society will not therefore accept any legal liability in relation to them.

John Elliot, Director of Regulation and Registrar of Solicitors

Non-principal private residence charge: position of personal representative

CONVEYANCING COMMITTEE

There has been considerable confusion as to the position of a personal representative in relation to the NPPR (non-principal private residence) charge since it was introduced by the *Local Government (Charges) Act 2009*. The committee had anecdotal evidence of different local authorities applying different interpretations of the legislation. There was a suggestion that some authorities held the view that a personal representative would, for the purpose of the act, be treated as the owner of a property from the date of death of the deceased. Following enquiries made by the committee, a reply was received from the Department of the Environment (extracts from which are set out below), which, in effect, confirms that it is only when a grant has issued in a deceased's estate that a personal representative becomes liable for the charge:

"In 2009, this department issued guidelines to local authorities to assist in implementing the Local Government (Charges) Act 2009. *Included in these guidelines was advice on how property where the owner was deceased was to be treated. In effect, if probate on the property had not yet been granted, the property was to be treated as if it had no owner, as there would be no person who would satisfy the definition of owner in the act. … However, given that the* Succession Act 1965 *provides that, on a person's death, his or her estate becomes vested in his (or her) personal representatives, it was considered advisable to seek further legal advice in order to ensure probate cases were being treated correctly in this regard.*

"The Office of the Attorney General has now confirmed that, where there is a property whose owner is deceased, there is no person meeting the definition of owner in the Local Government (Charges) Act 2009 *until letters of administration or probate have been granted. Where letters of administration are required, the person who is granted administration becomes the owner for the purposes of the act. In a probate case, the executor becomes the owner on the issue of probate. Only at that point does liability commence and liability lies with the owner.*

The act does not include any provision for a waiver in the case of an insolvent estate, and insolvency of the estate would not negate the owner's liability.

It is intended to update the FAQs on the NPPR website in due course."

It is hoped that the above clarification will be of assistance to solicitors in practice when advising clients on the matter. The matter has been added to the FAQs section of www.nppr.ie – solicitors are reminded that this website also contains other useful information that will assist in advising clients on this charge.

PRA policy on rejection of dealings for incorrect fees

CONVEYANCING COMMITTEE

The committee would like to alert practitioners to the PRA's recent practice direction (Legal Office Notice no 8/2010) published on www.prai.ie in relation to its policy on rejection of dealings. The committee wishes to bring particular notice to the policy of rejecting dealings:

- Where prescribed fees are not lodged,
- Where insufficient fees are lodged.

Legislation update 1 January – 4 February 2011

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

ACTS PASSED

Bretton Woods Agreement (Amendment) Act 2011
Number: 1/2011
Content: Provides for acceptance by the Government of certain amendments of the articles of agreement of the International Monetary Fund approved by the board of governors of that fund on 28 April 2008 and 5 May 2008 respectively, provides for the construction of certain references to those articles, and for related matters.
Enacted: 21/1/2011
Commencement: 21/1/2011

Communications (Retention of Data) Act 2011
Number: 3/2011
Content: Gives effect to Directive 2006/24/EC on the retention of data (excluding the content of any communication) generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks – that is, fixed telephony, mobile telephony and internet services. Provides for the retention of and access to certain data (excluding the content of any communication) for the purposes of the prevention of serious offences, the safeguarding of the security of the State and the saving of human life. Repeals part 7 (ss61-67, 'communications data') of the *Criminal Justice (Terrorist Offences) Act 2005*, amends the *Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993* and provides for related matters.
Enacted: 26/1/2011
Commencement: 26/1/2011

Criminal Justice (Public Order) Act 2011
Number: 5/2011
Content: Prohibits harassment or intimidation of members of the public by persons who engage in begging. Confers powers on members of the Garda Síochána to give directions to persons to desist from begging in certain circumstances, and provides for powers of arrest.
Enacted: 2/2/2011
Commencement: 2/2/2011

Multi-Unit Developments Act 2011
Number: 2/2011
Content: Establishes a new statutory framework for multi-unit developments, including provisions dealing with the transfer of common areas to the property management company, the management of such areas by the company, and the effective internal governance of the company. Introduces a court-based dispute resolution mechanism for both new and existing multi-unit developments, and provides for related matters.
Enacted: 24/1/2011
Commencement: Commencement order(s) to be made for sections other than ss14 and 32, as per s34 of the act

Student Support Act 2011
Number: 4/2011
Content: Provides for a unified grant payment scheme, replacing the four existing schemes, for the making of grants in certain cases, by awarding authorities to enable persons to attend certain courses of higher or further education. Establishes the Student Grants Appeals Board, repeals the *Local Authorities (Higher Education Grants) Acts 1968 to 1992* and provides for related matters.
Enacted: 2/2/2011
Commencement: Commencement order(s) to be made as per s1(2) of the act

SELECTED STATUTORY INSTRUMENTS

Central Bank Reform Act 2010 (Commencement of Certain Provisions) (No 2) Order 2010
Number: SI 686/2010
Content: Appoints 1/1/2011 as the commencement date for s6 (arrangement for secondment of certain employees), s15(5) (amendment to the *Consumer Protection Act 2007*) and part 5 of schedule 2 of the *Central Bank Reform Act 2010*.

Civil Partnership (Civil Partnership Registration Form) Regulations 2010
Number: SI 671/2010
Content: Sets out prescribed form.
Commencement: 1/1/2011

Civil Registration (Delivery of Notification of Intention to Enter into a Civil Partnership) (Prescribed Circumstances) Regulations 2010
Number: SI 666/2010
Content: Sets out prescribed circumstances under s59B(5) of the act.
Commencement: 1/1/2011

Civil Registration (Delivery of Notification of Intention to Marry) (Prescribed Circumstances) Regulations 2010
Number: SI 667/2010
Content: Sets out prescribed circumstances under s46(2) of the act.
Commencement: 1/1/2011

Civil Registration (Marriage Registration Form) Regulations 2010
Number: SI 670/2010
Content: Sets out prescribed forms under s48 of the act.
Commencement: 1/1/2011

Civil Registration (Register of Civil Partnerships) (Correction of Errors) Regulations 2010
Number: SI 668/2010
Content: Allows for the correction of errors in the Register of Civil Partnerships.
Commencement: 1/1/2011

Civil Registration (Register of Marriages) (Correction of Errors) Regulations 2010
Number: SI 672/2010
Content: Allows for the correction of errors in the Register of Marriages.
Commencement: 1/1/2011

District Court (Intoxicating Liquor) Rules 2011
Number: SI 1/2011
Content: Substitutes form no 72.4 (general exemption order in respect of premises situate in the vicinity of a place at which a considerable number of persons are following a lawful trade or calling) in schedule C of the *District Court Rules*.
Commencement: 12/1/2011

European Communities (Motor Insurance) Regulations 2010
Number: SI 657/2010
Content: Provides for the compensation of victims of road traffic accidents who may be passengers of drunk drivers; the policyholder being able to request, at any time during the period of cover of a motor insurance policy, details of any third-party liability claims during the previous five years and the insurance undertaking providing this information within 15 days of the request; prohibits insurers applying an excess to injured parties who claim on foot of any motor insurance policy issued in accordance with the *Road Traffic Act 1961*.
Commencement: 22/12/2010

Fines Act 2010 (Commencement) Order 2011
Number: SI 662/2010
Content: Appoints 4/1/2011 as the commencement date for parts 1 and 2 (increase of fines), and s12

(definitions) and s14 (capacity of person to pay) of the act.

Road Traffic (Licensing of Drivers) (Amendment) Regulations 2011
Number: SI 35/2011
Content: Increases the fees chargeable by the issuing authority for the issue of a certificate of competency.
Commencement: 1/2/2011

Rules of the Superior Courts (Examiner) 2011
Number: SI 2/2011
Content: Substitutes certain provisions of orders 40, 50, 52, 55 and 74 of the *Rules of the Superior Courts* to provide for the filing in the Examiner's Office – instead of the Central Office as previously required – of documents in proceedings that are the subject of a notice to proceed before the examiner.
Commencement: 12/1/2011

Social Welfare Act 2010 (Sections 7, 8, 9 and 10) (Commencement) Order 2010
Number: SI 679/2010
Content: Appoints 29/12/2010 as the commencement date for s8 (jobseeker's allowance – reduction of rate in certain circumstances), s10 (repeals) of the act; 30/12/2010 as the commencement date for s7 (jobseeker's benefit – reduction of rate in certain circumstances) of the act; 3/1/2011 for s9 (supplementary welfare allowance – reduction of rate in certain circumstances) of the act.

Social Welfare and Pensions Act 2010 (Sections 15 to 26) (Commencement) Order 2010
Number: SI 673/2010
Content: Appoints 1/1/2011 as the commencement date for ss15-26, amending the social welfare code as a consequence of the provision contained in the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*.

Prepared by the Law Society Library

ONE TO WATCH

One to watch: new legislation

Capital Requirements Directive III

On 30 September 2010, the Council of the European Union published a revised text of the *Capital Requirements Directive III*. The Minister for Finance issued the *European Union (Directive 2010/76/EU) Regulations 2010* (SI 625 of 2010) on 21 December 2010.

CRD III amends the *Central Bank Act 1942* as well as four other sets of regulations:

- *European Communities (Licensing and Supervision of Credit Institutions) Regulations 1992* (SI no 395 of 1992),
- *European Communities (Capital Adequacy of Credit Institutions) Regulations 2006* (SI no 661 of 2006),
- *European Communities (Capital Adequacy of Investment Firms) Regulations 2006* (SI no 660 of 2006),
- *European Communities (Credit Institutions) (Consolidated Supervision) Regulations 2009*.

The CRD III remuneration policy provisions came into effect from 1 January 2011.

Applicable institutions

The CRD III remuneration requirements apply to all credit institutions, investment advisers, investment managers, building societies, brokers, corporate finance firms, and other investment firms subject to the EU *Markets in Financial Instruments Directive*. In addition, institutions covered by the remuneration principles should apply those principles "at group, parent company and subsidiary levels, including those established in offshore financial centres".

New remuneration principles

At least 40% of the variable remuneration component should be deferred over a period of not less than three to five years and, where variable remuneration is particularly high, then a minimum of 60% of the amount should be deferred, and must be recoverable if the institution's investments do not perform as expected.

At least 50% of variable remuneration must be delivered in shares or share-linked instruments and must be applied equally to the upfront and deferred part of awards (a maximum of 30% or, for larger bonuses, 20% of total variable remuneration).

Explicit maximum ratios of fixed/variable compensation must be set, although these may vary between firms and between staff at the firm depending on job description and seniority.

Awards should be subject to *malus* performance adjustments, which can be used to prevent vesting of all or part of the deferred payments, and clawback arrangements, under which staff would return previously vested awards in the case of established fraud or misleading information, or where remuneration is received in breach of CRD III and the guidelines. The equity portion of awards that is paid upfront is fully vested and therefore not subject to *malus* adjustment provisions.

Guaranteed bonuses should only be offered in exceptional circumstances to new hires and should only apply for the first year of service. Multi-year guarantees are prohibited. Retention awards are considered to be a form of variable compensation and are only permitted where risk-alignment requirements are properly applied.

Payments in connection with the early termination of a contract should reflect performance achieved over time and should not reward failure. The CEBS guidelines specifically state that institutions should pay due regard to the EU Commission's recommendation that severance pay be capped at two years' fixed remuneration.

Enhanced discretionary pension benefits (that is, one-off payments, not standard pension plan contributions) must take the form of shares or share-linked instruments.

In the context of retirement, vested benefits should be subject to retention for a minimum of five years. In the context of termination prior to retirement, benefits should not be vested before a period of five years, and should be subject to performance adjustments and *malus*/clawback provisions.

In the event of a pre-retirement departure, discretionary pension benefits should be held by the credit institution for a period of five years in shares or other instruments eligible to be treated as an alternative to shares for bonus payments (and discretionary pension benefits paid to employees reaching retirement should also be paid in the form of such instruments, subject to a five-year retention policy).

Firms within the scope of CRD III will be required to make, at least annually, general and specific public disclosures regarding their remuneration policies and practices and the decision-making process, as well as information on how pay and performance are linked. Aggregate quantitative information on remuneration must be provided, broken down by (i) business area and (ii) senior management and members of staff whose actions have a material impact on the firm's risk profile. G

BRIEFING

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 Anthony M Murphy, a solicitor practising as Anthony Murphy, Solicitors, at 2 Straffan Green, Maynooth, Co Kildare, and in the matter of the *Solicitors Acts 1954-2008* [4012/DT66/10]
Law Society of Ireland (applicant)
Anthony M Murphy (respondent solicitor)

On 4 November 2010, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Failed to ensure that there was furnished to the Society an accountant's report for the year ended 30 June 2009 within six months of that date, in breach of regulation 21(1) of the *Solicitors' Accounts Regulations 2001* (SI no 421 of 2001) in a timely manner or at all,
b) Through his conduct, showed disregard for his statutory obligation to comply with the *Solicitors' Accounts Regulations* and showed disregard for the Society's statutory obligation to monitor compliance with the *Solicitors' Accounts Regulations* for the protection of clients and the public,
c) Failed to deal with the correspondence of the Society in connection with his qualified report for the year ended 30 June 2008 and, in particular, the Society's letters of 16 March 2009, 26 June 2009, 3 November 2009 and 27 November 2009 in a timely manner or at all.

The tribunal ordered that the respondent solicitor:

a) Do stand censured,
b) Pay a sum of €4,000 to the compensation fund,
c) Pay the whole of the costs of the Society as taxed by a taxing master of the High Court, in default of agreement.

INFORMATION ON COMPLAINTS

Information on complaints about solicitors is published in accordance with section 22 of the *Solicitors (Amendment) Act 1994*

IN RELATION TO COMPLAINTS RECEIVED BY THE SOCIETY FROM 1 SEPTEMBER 2009 TO 31 AUGUST 2010:

Allegations of misconduct

Delay	8
Failure to communicate	60
Failure to hand over	104
Failure to account	88
Undertaking	1,134
Conflict of interest	22
Dishonesty or deception	12
Witnesses' expenses	2
Advertising	3
Other	209
Total	**1,642**

Allegations of inadequate professional services:

Delay	145
Failure to communicate	74
Shoddy work	86
Other	35
Total	**340**

Allegations of overcharging:

Conveyancing	15
Probate	26
Litigation	37
Matrimonial	43
Other	14
Total	**135**
GRAND TOTAL	**2,117**

NUMBER OF COMPLAINTS REFERRED TO THE SOLICITORS DISCIPLINARY TRIBUNAL:

Delay, failure to communicate, failure to hand over papers	7
Delay, failure to communicate, failure to carry out instructions	7
Delay, failure to communicate, failure to carry out instructions, failure to comply with CCRC direction	1
Failure to account	2
Failure to comply with direction of CCRC/court order	5
Undertakings	124
Multiple undertakings	1
Breach of advertising regulations	1
Dishonesty/deception	4
Conflict of interest	2
Counsels' fees	3
Failure to communicate	1
Total	**158**

OUTCOME OF THE INVESTIGATION OF ABOVE COMPLAINTS BY THE SOLICITORS DISCIPLINARY TRIBUNAL:

- Recommendation of strike off in two cases against same solicitor,
- Censure, fine of €1,000 and costs,
- Two solicitors struck off prior to hearing,
- Finding made and penalty deferred in one case,
- Three cases part heard,
- Finding of no misconduct in one case,
- One solicitor died prior to hearing,
- The remaining cases await hearing.

As of September 2010

Law Society of Ireland

2011

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Justis update

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Compiled by Bart Daly

COMPANY

Auditor

Director – disqualification application – section 160(2) of the Companies Act 1990 *– whether the High Court judge erred in exercising his discretion to refuse to make an order in respect of the respondent pursuant to s160.*

This case involved an appeal by the applicant against the decision of the High Court refusing to make an order in respect of the respondent pursuant to sections 160 or 150 of the *Companies Act 1990*. The High Court judge declined to make the aforementioned order despite reaching the conclusion that the respondent had failed in his duties as an auditor. More specifically, the court found that the respondent had acted as an auditor of a specific company while also being a director of that company, thereby breaching section 187(2)(a) of the 1990 act and, further, that the respondent had sought to rely on a letter that had been backdated and also had backdated the notification of his resignation as a director in order to "correct the paper record". However, the judge refused to make the order sought by the applicant for a number of reasons, namely because the events in question occurred some time ago and the respondent's business was now successful, and most importantly because he perceived there was "no risk" of the respondent returning to the "irregular and improper conduct he was mixed up in all those years ago". The judge also went on to state that the purpose of section 160 was not to punish the individual, but to protect the public from harm.

The Supreme Court (O'Donnell, Fennelly, Finnegan JJ) allowed the appeal, holding that there were three interrelated errors of principle contained within the judgment of the High Court judge, which were central to the decision of that court and, accordingly, required the reversal of that decision. Section 160 was not solely concerned with protecting the public from harm. That section also contained a deterrent element and sought to improve corporate governance. Consequently, it was a significant error to characterise the section as having only a single purpose, namely that of protecting the public from the respondent in the future. Rather, the act required a two-stage inquiry: firstly, the court should have determined, as a matter of objective forensic inquiry, whether one or more of the criteria under the subparagraphs of section 160(2) had been established to the degree and level required, and the second stage involved the exercise of the court's discretion. Furthermore, the 1990 act directed attention to past conduct, and that was the key to disqualification. It followed from the trial judge's findings that the respondent was in breach of his duty both as a director and auditor and, on that basis, he was unfit to be involved in the management of a company. The most appropriate way to deal with this application was to re-enter the matter with a view to considering whether a short period of disqualification, and the conditions that might be attached to it by way of limitation to specific clients or limitation on sole practice as an auditor or otherwise, might meet the merits of this case and still achieve the objects of the act.

***Director of Corporate Enforcement (applicant) v McCann (respondent)*, Supreme Court, 30/11/2010** [2010] 11 JIC 3001

Examinership

Receivership – rates – reduction – hourly fees – Missford Limited t/a Residence Members Club *([2010] IEHC 240).*

An examiner had applied to court for an order for the payment of his remuneration pursuant to section 29 of the *Companies (Amendment) Act 1990* and, by the time of the application, a receiver had been appointed. The issue arose as to the rate of fees being charged. A judgment had at this time been reserved and then was delivered by the High Court (Kelly J) in *Missford Limited t/a Residence Members Club*, and the court had sought to consider that judgment prior to deciding the present issues. In *Missford*, the court had directed significant reductions in the rates for personnel of an examiner.

Clarke J held that the court would fix the rate similar to Kelly J in *Missford*, as it was difficult to accept that it would be appropriate to allow a rate in excess of €375 per hour for those at partnership level. The court proposed allowing €375 per hour for those at partner level, and the rate for associate director would be €300 per hour, €260 per manager per hour, €200 per hour for senior accountants and €80 for trainee accountants.

***In the matter of Marino Limited and in the matter of the Companies Acts 1963-2006 and Others*, High Court, 29/7/2010** [2010] 7 JIC 2904

CONTRACT

Summary judgment

Whether the plaintiff was entitled to summary judgment in respect of monies owed for work done pursuant to a contract.

The plaintiff company sought summary judgment in the sum of €219,811.83, being a sum that it contended was due from the defendant in respect of works and services provided by it in respect the construction of a dwelling-house in Co Galway. By written agreement, the parties agreed that the plaintiff would build and construct the house for the sum of €604,302.50. Between the time the defendant purchased the site and obtained planning permission, her husband became very unwell, and ultimately the defendant could not afford to continue with the development. The defendant engaged a consulting engineer, who undertook to negotiate a price for the development, and the defendant averred that she relied completely on the engineer in these matters, as she was personally inexperienced in matters of finance and, further, that she relied on him when she executed the building contract. The plaintiff was paid the first invoice but was not paid the sum of €139,000, representing the second invoice, or the sum of €80,816 representing the third invoice. Both those sums were certified by the engineer as being fair and true. However, the respondent alleged that, in January 2009, she directed the engineer to inform the plaintiff to cease work on the project. There was some dispute as to when that request was in fact received but, in any event, work ceased on or around February 2009 and the last invoice was sent on 19 February 2009. The defendant claimed that she was grossly overcharged and further submitted that the fact she was suing the engineer for professional negligence was a factor that would justify the court adjourning the present claim for plenary hearing.

Hogan J granted judgment in favour of the plaintiff in the sum of €178,966.17, together with contractual interest in the sum of €24,335.03, but placing a stay on the enforcement of that judgment for a period of five months from 15/11/2010, holding that, given that the contract provided for payments in tranches based on certification by the defendant's own engineer, and in view of the fact that the engineer duly certified for those sums in the manner envisaged by the contract, the plaintiff was *prima facie* entitled to payment for those sums. The fact that the defendant was suing the engineer for professional negligence was not a factor that the court could take into account. There was a factual dispute as to

when the defendant instructed the plaintiff to cease work, and this was relevant as regards the third invoice. However, it was indisputable that the plaintiff was entitled to a significant portion of the sum claimed on that invoice, namely €40,000. The balance of the claim was adjourned to plenary hearing, since the defendant may be able to prove that the additional sum was the result of the plaintiff's failure to adhere to her instructions.

***Michael Feeney Contractors & Civil Engineering Ltd (plaintiffs) v Murray Roberts (defendant)*, High Court, 29/11/2010** [2010] 11 JIC 2901

EQUITY

Rectification

Deed of amendment – pension plan – intent – definition of member – integration – mistake of parties – trial judge – appeal – whether rectification of deed of amendment would be granted.

The proceedings related to an appeal from a decision of the High Court and were confined to rectification sought of the deed of amendment by the insertion of the word 'member', so that the definition of 'pensionable salary' in the schedule was altered. The proceedings related to the company's pension scheme and the execution of the deed of amendment in 1999. The technical effect of the rectification sought would be that the practice of 'integration' of members into the scheme would cease only in the case of members who were in active employment. The intention of the parties was that the deed was to eliminate 'integration'. A mistake was alleged to have happened and the deed had gone further that this, and the evidence provided outlining the intent of the parties and this mistake was not controverted. The representative defendant did not contradict any of the deponents in the High Court proceedings who swore affidavits. The trial judge had made findings as to the manner in which the deed was approved.

The Supreme Court (per Hardiman J; Macken, McKechnie JJ concurring) held that the evidence on behalf of the parties was clear, free of ambiguity and consistent with their actions. The trial judge had addressed herself to an issue not in the rectification proceedings – the issue of what was or was not agreed between the parties to the industrial relations discussion that predated the amendment to the deed. The representative defendant did not counterclaim that, if the deed fell to be amended, it damaged the position of those whom he represented. The present case related to the question of whether the deed entered into properly expressed the intentions of the company and its trustees. There was ample evidence, unchallenged, as to the intention of the company and of the trustees and that it established that the deed did not express that intention. The court would therefore grant a rectification in the terms claimed.

***In the matter of the Tara Mines Pension Plan Boliden Tara Mines Limited (plaintiff/appellant) v Cosgrove and Others (defendants/respondents)*, Supreme Court, 21/12/2010** [2010] 12 JIC 2101

IMMIGRATION AND ASYLUM

Judicial review

Deportation – reasons – whether the respondent's decision refusing to revoke a deportation order ought to be quashed for failure to give reasons or for being irrational.

The applicant sought an order of *certiorari* by way of judicial review, quashing the decision of the respondent refusing to revoke a deportation order that had been made in respect of the applicant on 20 January 2006. It was submitted on behalf of the applicant that the respondent's decision gave no adequate reason why the prohibition on refoulement did not apply to the applicant, given the clear evidence of persecution of Christians and lack of protection for them by the police authorities in the information on which the decision was based. It was also argued that, insofar as the decision could be read as containing any reasons for rejecting the claim that the prohibition on refoulement was applicable, the decision was irrational and contained internal inconsistencies.

Cooke J refused the application, holding that, having read the decision of the respondent, that decision could not be quashed upon the ground that there was a failure to give reasons. The issue faced by the respondent when making the relevant decision was whether the fresh information being put before him was evidence of such a material change of circumstances as to give rise to a risk of infringement of the prohibition on refoulement if the existing deportation order was implemented. The information put before the applicant did not relate to any new or different risk of persecution or any altered circumstance. Furthermore, the decision of the respondent was not so flawed as to be condemned as irrational or unreasonable, having regard to the fact that the respondent was considering an application to revoke an existing deportation.

***Irfan (applicant) v Minister for Justice, Equality and Law Reform (respondent)*, High Court, 23/11/2010** [2010] 11 JIC 2303

Naturalisation

Reasons – absolute discretion – Irish passport – Middle Eastern travel – obligation to integrate into Irish society – Irish Naturalisation and Citizenship Act 1956 – Geneva Convention.

The applicant claimed to be a Palestinian born in Libya and arrived in Ireland in 2004 seeking asylum. He alleged that he had experienced persecution at the hands of the authorities in Jordan. He applied for a certificate of naturalisation in 2008, pursuant to section 15 of the *Irish Naturalisation and Citizenship Act 1956*, as amended. He wished to be granted naturalisation in order to obtain an Irish passport to facilitate travel to and from all countries in the Middle East to source ingredients for his restaurant in Dublin. He argued that the failure to give reasons for the refusal of the application was in breach of fair procedures and constitutional justice. The applicant also contended that the *Geneva Convention* put an obligation on the minister to integrate the applicant into Irish society. The respondent contended that the minister had absolute discretion, pursuant to the terms of the 1956 act, as amended.

Clark J held that the court was not satisfied that the applicant was entitled to the reliefs sought, and the application failed. The furnishing of reasons was undoubtedly the trend in recent times, but such matters fell to be determined by the legislature and not the courts.

***Abuissa (applicant) v Minister for Justice, Equality and Law Reform (respondent)*, High Court, 1/7/2010** [2010] 7 JIC 0106

LITIGATION

Practice and procedure

Strike-out of proceedings – res judicata – *whether proceedings frivolous and vexatious – whether appropriate to grant 'Isaac Wunder order'* – Rules of the Superior Courts 1986.

The plaintiff had previously been engaged in litigation against some of the defendants. The plaintiff had litigated issues over 30 years relating to family law proceedings, his employer and his trade union. In particular, issues had arisen relating to his pension entitlements. The plaintiff initiated the present proceedings, and oral submissions were made. The three defendants brought motions seeking to have the plaintiff's claim dismissed or struck out, pursuant to order 19, rule 29 of the *Rules of the Superior Courts 1986*. The defendants also sought what was colloquially known as an 'Isaac Wunder order', seeking to restrain the plaintiff from taking any further proceedings against the defendants without leave of the High Court.

Hanna J dismissed the proceedings, holding that it was apparent to the court during the course of the plaintiff's oral submissions that he was fighting past battles yet again. The proceedings disclosed no reasonable or sustainable cause of action and would be struck out. The proceedings against all defendants would be struck out. An 'Isaac Wunder order' would be granted restraining the plaintiff from taking any further proceedings against the second and third-named defendants. As these were the plaintiff's first proceedings against the first-named defendant, no Isaac Wunder order would be granted.

***Talbot v McCann Fitzgerald, Solicitors and Others*, High Court, 8/10/10** [2010] 10 JIC 0802

TORT

Duty of care

Doctor – garda station – accused – sample of urine – attack – injuries suffered – reasonable care – independent contractor – whether duty of care owed.

The plaintiff was a native of the Punjab district in Pakistan and was a medical practitioner in Ireland since 1978. He was attending a garda station to obtain a blood or urine sample from an individual charged with driving under the influence of alcohol when an incident had occurred. The accused, Mr Foran, had thrown the contents of a urine sample over the head and face of the plaintiff. The plaintiff contended that the defendant owed him a duty to take reasonable care for his safety. The plaintiff alleged that he had suffered much injury and distress arising from this event and contended that he had been exposed to a risk that the defendant ought to have known of, that the defendant had not taken steps to ensure his care, and that the defendant had failed to provide adequate protection for him. The defendant denied this duty, emphasising that the plaintiff was providing medical services as an independent contractor.

Lavan J held that the duty of the defendant to protect the plaintiff from foreseeable harm and risk was not breached here. The actions of Mr Foran were wholly unforeseeable and unpredictable in the extreme. The relief sought was refused.

***Mansoor (plaintiff) v Minister for Justice, Equality and Law Reform, Ireland and the Attorney General (defendants)*, High Court, 4/10/2010** [2010] 10 JIC 0402

Personal injuries

Bus accident – locus of accident where alighted – use of hazard lights – whether negligence on part of third and fourth-named defendants.

The plaintiff suffered very serious head injuries in a road traffic accident and had settled her action with the first and second-named defendants. The first and second-named defendants now sought a contribution in respect of their liability to the plaintiff from the third and fourth-named defendants. The plaintiff and her friends had been travelling on a bus of the fourth-named defendant, driven by the third-named defendant, which had stopped when it was not scheduled to at the request of the plaintiff. As the bus moved off, the first-named defendant, who had been driving under the influence of alcohol, had struck the plaintiff. The first and second-named defendants alleged negligence on the part of the third-named defendant, among other things, concerning his actions surrounding the incident, the place where the bus had stopped, and the use of hazard lights.

O'Neill J held that there was no negligence on the part of the third-named defendant. It was not necessary that the third-named defendant should not have moved off until the girls had completed their crossing off the roadway. There was no negligence on the part of the first-named defendant. The court would conclude that there was no negligence on the part of the third and fourth-named defendants, and the first and second-named defendants were not entitled to any contribution from them towards their liability to the plaintiff.

***Farrelly (a minor) (plaintiff) v Earley & Others (defendants)*, High Court, 3/11/2010** [2010] 11 JIC 0303 G

BRIEFING

Eurlegal

Edited by TP Kennedy, Director of Education

New antitrust rules and guidelines on agreements between competitors

Late last year, the European Commission published two new revised block exemption regulations, one on research and development (R&D) agreements (OJ L 335/36, 14 December 2010), the other on specialisation contracts (OJ L 335/43, 14 December 2010). The same day, the commission also adopted revised guidance for reviewing cooperation agreements between competitors. These so-called *Horizontal Guidelines*, published in OJ C 11/1 (14 January 2011), underline the commission's increasingly economic approach to competition law issues. The overall aim of the package is to make it easier for a company to assess whether its cooperation agreements are lawful while, at the same time, minimising the risk that collaboration between competitors will result in anti-competitive harm.

Article 101 of the TFEU

Article 101 of the *Treaty on the Functioning of the EU* (formerly article 81 of the *EC Treaty*) generally prohibits agreements between companies, decisions by associations of undertakings and concerted practices that have the object or effect of restricting competition in the EU. However, restrictive agreements may be exempted where their overall effect is to promote competition. The commission has issued various block exemption regulations, pursuant to article 101(3), specifying the conditions under which certain types of agreements are exempted from the prohibition of restrictive arrangements laid down in article 101(1).

Background and framework

The rules for assessing whether R&D contracts and specialisation agreements are prohibited by article 101 were previously contained in two block exemption regulations. These block exemptions provided safe harbours for contracts that fell within their scope. Moreover, the previous *Horizontal Guidelines*, originally published in 2001, helped parties decide whether their agreements were enforceable, even if the terms of the relevant block exemption were not satisfied. The old block exemptions expired on 31 December 2010 and were replaced by the new block exemptions the following day. Neither of the new block exemptions represents a radical reform of its predecessor. The old guidelines ceased to apply from 14 January 2011, the date of publication of the new *Horizontal Guidelines* in the *Official Journal of the EU*.

> ***"The commission's two new block exemptions and the new* Horizontal Guidelines *collectively provide a useful guide for a company in assessing the legality of any proposed collaboration with one or more of its competitors"***

Unlike the two block exemption regulations, the new *Horizontal Guidelines* offer non-binding guidance. Like their predecessor, they apply to various types of horizontal cooperation agreements, including production/specialisation agreements, purchasing contracts, commercialisation agreements and R&D agreements. The new *Horizontal Guidelines* are significantly more detailed than their predecessor, comprising 335 paragraphs rather than 198. However, in providing an analytical framework rather than a 'checklist', they retain the same basic structure. The revised guidelines follow a two-step approach.

First, the new *Horizontal Guidelines* consider whether an agreement has the object or effect of restricting competition within the meaning of article 101(1). Restrictions of competition by object have, by their very nature, the capability of adversely affecting competition. If a contract is an object breach of article 101(1), it is not necessary to consider whether it has anti-competitive effects. For an arrangement to have anti-competitive effects, it must have, or be likely to have, an appreciable adverse impact on at least one of the parameters of competition in the market.

Second, if the agreement has the object or effect of restricting competition, the new guidelines address whether it benefits competition overall and, thus, should be exempted under article 101(3). The commission's guidelines on the application of article 101(3), published in OJ C 101/97 (27 April 2004), contain general guidance on the interpretation of this provision.

Information exchanges

Probably the most noteworthy feature of the new *Horizontal Guidelines* is the inclusion of a new section on information sharing between competitors. Competitors may share data directly between themselves or indirectly through a trade association, supplier, customer or other third party. The commission recognises that the exchange of information between market rivals is not necessarily anti-competitive. For example, businesses may become more efficient by learning from their competitors' best practices. However, the exchange of information may result in a negative impact on competition where it gives companies an insight into their competitors' commercial plans.

An information exchange may occur by agreement between companies, by a decision of an association of undertakings or by a concerted practice. The European Court of Justice has consistently defined a concerted practice as a form of coordination between undertakings that, without reaching the stage where formal agreement has actually been reached, knowingly substitutes practical cooperation between them for the risks of competition. This does not mean that a company may not react intelligently to the current or future business strategies of its competitors. However, article 101 does prevent the sharing of strategic information between competitors, since it diminishes their incentives to compete. Moreover, a concerted practice can also occur where only one company discloses confidential strategic information to its competitors. This information may be exchanged via telephone calls/e-mails or at a 'face-to-face' meeting.

Information exchanges may raise various competition concerns, such as collusion and foreclosure. Sharing information regarding commercial strategy is likely to facilitate companies in aligning their market behaviour. In addition, increased market transparency allows the monitoring of the conduct of both mavericks and new entrants. Furthermore, the exclusive sharing of information between a particular group of competitors can lead to the foreclosure of non-participating business rivals.

In order to determine whether an information exchange constitutes an object breach of article 101, it is sufficient that this co-operation has the potential to have a negative impact on competition. If the relevant exchange of information does not result in an object breach, its effect on competition must be examined.

An information exchange is more likely to lead to anti-competitive effects in markets that are transparent, concentrated, non-complex, stable and symmetric. In such markets, it is easier to align commercial behaviour while successfully monitoring and punishing deviations. Companies are likely to be incentivised to collude in situations where they know they will interact with the same handful of competitors for the foreseeable future. The exchange of information that reduces strategic uncertainty is more likely to infringe article 101 than the sharing of other types of data. In general, pricing data is the most strategic, followed by information regarding quantities, costs and demand. The usefulness of the information shared also depends on various factors. For an information exchange to have an anti-competitive effect, the participating companies should cover a sufficiently large part of the relevant market. In addition, the regular exchange of recent and individualised company information is more likely to give rise to competition concerns than the infrequent sharing of aggregated or historic market data.

An information exchange that falls under article 101(1) is not necessarily unlawful. Information sharing may lead to efficiency gains and other pro-competitive objectives and, thus, may be exempted under article 101(3).

Agreements between competitors – something the sumo world has been wrestling with of late

Standardisation

The other key development in the new *Horizontal Guidelines* is the inclusion of an expanded section on standardisation contracts. Used in a wide variety of industries, but particularly in the IT and communications sectors, these agreements define technical or quality requirements for products or production processes, services or methods. The commission notes that standardisation agreements are often pro-competitive, since they encourage the development of new products. However, these contracts may also reduce price competition, foreclose innovative technologies or discriminate against certain companies by preventing or limiting access to a particular standard.

Indeed, agreements that use a standard as part of a broader arrangement aimed at foreclosing actual or potential competitors constitute an object infringement of article 101. Standardisation agreements that do not restrict competition by object must be assessed in their relevant legal and economic context in order to determine whether they have any restrictive effect. In the absence of market power, such contracts are unlikely to be anti-competitive.

For those contracts likely to give rise to market power, the new *Horizontal Guidelines* provide a specific safe harbour for standardisation activities. A standardisation contract will benefit from the safe harbour, provided the following cumulative criteria are satisfied:

1) Participation in the standard-setting process is unrestricted,
2) This process is transparent,
3) The standardisation agreement does not contain any obligation to comply with the resulting standard, and
4) The contract provides access to the standard on fair, reasonable and non-discriminatory terms ('FRAND').

In the case of a standard involving intellectual property rights (IPR), the standard-setting organisation must adapt a clear and balanced approach. A participant wishing to have its IPR included in the standard must commit to licence same to all third parties on FRAND terms. In addition, if this company transfers this IPR, it must commit that the transferee is also bound by this licensing commitment. Furthermore, participants should disclose their ownership of any IPR that might be required for the implementation of the standard under development. The FRAND commitment also requires participants to assess its implications on their scope to set royalty levels. These fees should not be excessive – they should be based on the economic value of the underlying IPR.

A standardisation agreement that falls outside the safe harbour is not necessarily unlawful. Indeed, members of a standard-setting organisation are entitled

to agree a set of rules and procedures that do not follow some or all of the safe-harbour criteria. In this event, the participants must consider the likely effects of their arrangements on competition. Some of the relevant factors include whether the participants remain free to develop alternative standards or products, the accessibility of the standard-setting process to all market players, and the market shares of the products based on the standard.

If article 101(1) does apply, the parties should assess whether their standardisation agreement should qualify for an exemption under article 101(3).

New block exemptions

The new R&D block exemption regulation follows a similar approach to its predecessor. Most notably, the market-share threshold has not been changed – the exemption will continue to apply provided the parties' combined market share does not exceed 25%. The commission has, however, broadened the scope of the exemption. It now extends to cover 'paid-for' research, that is, where one company finances the R&D. Previously, the exemption only applied where both companies collaborated. The new regulation also provides for a greater range of possibilities for joint exploitation, such as where one party grants the other an exclusive licence to produce and sell the relevant products.

Specialisation contracts arise where a party active on a particular product market decides to refrain from manufacturing certain products and, instead, purchase same from the other party. These agreements may be unilateral or reciprocal. Like its R&D counterpart, this block exemption retains the same framework as its predecessor. Contracting parties will continue to benefit from an exemption, provided their combined market share is no more than 20%. However, where the product purchased is intermediary, this threshold must now be met in respect of the markets for both the intermediary and the downstream products.

In both new block exemptions, the definition of 'potential competitors' has been adjusted by the inclusion of a three-year period, during which a party must be likely to enter the relevant market in order to be considered a potential rival. R&D and specialisation agreements benefiting from the previous block exemptions will continue to do so for a transitional period of two years, that is, until 31 December 2012.

"Information exchanges may raise various competition concerns, such as collusion and foreclosure. Sharing information regarding commercial strategy is likely to facilitate companies in aligning their market behaviour"

Impact of the new rules

The commission's two new block exemptions and the new *Horizontal Guidelines* collectively provide a useful guide for a company in assessing the legality of any proposed collaboration with one or more of its competitors. The Competition Authority has also focused on collaboration between competitors. The authority's *Notice on the Activities of Trade Associations and Compliance with Competition Law* (N/09/002, November 2009) also considers, albeit in less exhaustive detail, the competition issues arising from information exchanges and standard-setting agreements.

More particularly, the commission wishes to promote open standard-setting systems. It is also anxious to increase the transparency of IPR licensing costs. The commission also recognises that information exchange may lead to efficiencies. However, companies should not share information with the purpose or effect of aligning their market behaviour. Overall, this package of instruments makes a significant contribution to clarifying various complex issues. This is particularly welcome for the business sector in light of the severe financial penalties for infringing competition rules.

Cormac Little is a partner in the Competition and Regulation Unit of William Fry, Solicitors.

NOTICES

WILLS

Counihan, Seamus (deceased), late of 5 Ballybough Court, Ballybough, Dublin 7, who died on 23 September 2009. Would any person having knowledge of any will executed by the above-named deceased please contact Edel O'Brien, solicitor, Maguire McNeice & Co, Solicitors, Bray House, 2 Main Street, Bray, Co Wicklow; tel: 01 286 2399, fax: 01 282 9428, email: edel@maguiremcneice.com

Fitzgerald, Christopher (ors Christy) (deceased), late of Ballynalackon, Cloghane, Tralee, Co Kerry, and also of Kilmore, Cloghane, Tralee, Co Kerry, who died on 11 September 2010. Would any person having any knowledge of a will executed by the above-named deceased please contact Margaret Collins, solicitor, O'Donovan Murphy & Partners, Solicitors, The Quay, Bantry, Co Cork; tel: 027 50808, fax: 027 51554, email: mcollins@odonovanmurphy.ie

Harrington, Kathleen (otherwise Catherine Harrington) (deceased), late of 14 Park Road, Navan Road, Dublin. Would any person having knowledge of a will executed by the above-named deceased, who died on 16 January 2011, please contact Paul O'Sullivan, solicitor, Kevin O'Donovan & Partners, Solicitors, of the Old Market House, Upper Main Street, Bantry, Co Cork; tel: 027 51440, fax: 027 51371

Kennedy, Barbara (deceased), late of 31 O'Dwyer Villas, Thomandgate, Limerick, who died on 26 November 2010. Would any person having any knowledge of the whereabouts of a will executed by the above-named deceased please contact Sharon Martin, Dermot G O'Donovan, Solicitors, Floor 5, Riverpoint, Lower Mallow Street, Limerick, tel: 061 490 400, fax: 061 310 447, email: smartin@dgod.ie

Kiernan, Mai (deceased), late of Main Street, Abbeyleix, Co Laois and formerly of Preston House, Abbeyleix, Co Laois, who died on 7 December 2010. Would any person having any knowledge of the whereabouts of a will executed by the above-named deceased please contact Breen Manning, Solicitors, Tower Hill, Portlaoise, Co Laois; tel: 057 866 0006, fax: 057 863 0916, email: info@breenmanning.ie

Lennon, Elizabeth (Betty) (née Meenan) (deceased), late of 13 Hollypark Avenue, Blackrock, Co Dublin, who died on 13 July 2010. Would any person having knowledge of the whereabouts of a will made by the above-named deceased please contact Conor Lennon; tel: 087 971 6737, email: conorlennoncl@gmail.com

Lucey, Daniel (deceased), late of Inchybridge, Timoleague, Co Cork. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, who died on 11 July 2000, please contact Wolfe & Co, Solicitors, Market Street, Skibbereen, Co Cork; tel: 028 21177, email: info@wolfe.ie

McMahon, Declan (deceased), late of 27 Manor Court, Mount Argus Grove, Harold's Cross, Dublin 6W (formerly 410 Harold's Cross Road, Terenure, Dublin 6W and formerly again of 7 Templeville Road Terenure, Dublin 6W and originally of 30 Cypress Grove South, Templeogue, Dublin 6W). Would any person having knowledge of the whereabouts of any will made by the above-named deceased, who died on 27 October 2010, please contact Maurice E Veale & Co, Solicitors, 6 Lower Baggot Street, Dublin 2: tel: 01 676 4067, fax: 01 676 3436, email: c.keane@vealesolicitors.com

O'Malley, Gerard (deceased), late of Glebe Street, Ballinrobe, Co Mayo, who died on 17 October 2010. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Teresa Mullan, solicitor, of T Mullan & Co, Solicitors, Bowgate Street, Ballinrobe, Co Mayo; tel: 094 954 1800, fax: 094 954 1802, email: solicitorm@eircom.net

Palmer, Philomena (otherwise known as Phyllis) (deceased), late of 45 Kilshane Road, Finglas, Dublin 11. Would any person having knowledge of the whereabouts of the original will executed by the above-named deceased, who died on 7 July 2000, please contact O'Reilly Doherty & Co, Solicitors, 6 Main Street, Finglas, Dublin 11

Reaney, Bridget (otherwise Brigid Reaney) (deceased), late of 12 Quinn Place, Mervue, Galway, in the county of Galway, who died on 7 February 2010. Any person having knowledge of any will executed by the above-named deceased please contact Ms Susan Egan, solicitor, Emerson & Conway, Solicitors, 1 St Francis Street, Galway; tel: 091 562 531, fax: 091 566 808, email: susan@ecsolicitors.com

Rickard, Mary (deceased), late of Brymore Nursing Home, Thormanby Road, Howth, Co Dublin, and formerly of 17 Main Street, Baldoyle, Dublin 13 and The Links, Leas Cross Nursing Home, Swords, Co Dublin, who died on 1 October 2009. Would any person having knowledge of any will executed by the above-named deceased please contact Seamus Whelan, solicitor, Carvill Rickard & Co, Solicitors, Watermill House, 1 Main Street, Raheny, Dublin 5; tel: 01 831 2163, fax: 01 831 452, email: swhelan@carvillrickard.ie

Tennant, Mary (deceased), late of Parke House Nursing Home, Kilcock, Co Kildare and formerly of 35 Malahide Road, Artane, Dublin 5. Would any person having knowledge of the whereabouts of a will executed by the above-named deceased, who died on 5 October 2010, please contact Ciaran Feighery, solicitor, 'Breffni', Main Street, Blanchardstown, Dublin 15, tel: 01 821 3312, fax: 01 821 1457, email: cfeighery@feigherylaw.ie

RATES

Professional notice rates

RATES IN THE PROFESSIONAL NOTICES SECTION ARE AS FOLLOWS:

- **Wills** – €144 (incl VAT at 21%)
- **Title deeds** – €288 per deed (incl VAT at 21%)
- **Employment/miscellaneous** – €144 (incl VAT at 21%)

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

ALL NOTICES MUST BE PAID FOR PRIOR TO PUBLICATION. CHEQUES SHOULD BE MADE PAYABLE TO LAW SOCIETY OF IRELAND. Deadline for April *Gazette*: 16 March 2011. For further information, contact the *Gazette* office on tel: 01 672 4828 (fax: 01 672 4877)

NOTICES

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 15 and 16 Sampson's Lane, in the parish of St Mary and city of Dublin, held under lease dated 3 March 1875 from Robert William Burton to William Brunton for the term of 999 years from 1 January 1874, subject to the yearly rent of £35.

Take notice that Joseph O'Reilly, being the person entitled to the lessee's interest in the said lease, intends to apply to the Dublin County Registrar at Áras Uí Dhálaigh, Inns Quay, Dublin 7, for the acquisition of the fee simple estate and all intermediate interests (if any) 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 the 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: 4 March 2011

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 Thomas Lawler

Any person having a freehold estate or any intermediate interest in all that and those the premises known as number 90 Tullow Street, Carlow, the subject of an indenture of lease dated 30 April 1933 between Louisa Lowe and Harriet Anne Featherston of the one part and James Griffin of the other part for a term of 99 years at a rent of one shilling per annum.

Take notice that Thomas Lawler intends to apply to the county registrar for the county of Carlow to vest in him the fee simple and any intermediate interests in the said property, and any party asserting that they hold a superior interest in the aforesaid property is called upon to furnish evidence of title to same to the below named within 21 days from the date of this notice.

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

Date: 4 March 2011

Signed: PJ Byrne & Co (solicitors for the applicant), Athy Road, Carlow

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*.

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- Organise trial/settlement negotiations.
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WILD, WEIRD AND WACKY STORIES FROM LEGAL 'BLAWGS' AND MEDIA AROUND THE WORLD

'Bikini baristas' serve up steamy hot coffee

Local coffee shops in Washington State, USA, are taking on the 'big coffee' houses by some creative marketing approaches that have landed some outlets in legal hot water. Among the techniques adopted are so-called 'bikini baristas' – in no way to be confused with sun-bathing barristers.

One shop in Yakima (the tenth-largest city by population in Washington State) even featured pole dancing, the city's mayor Micah Cawley told Reuters.

The city decided to enact an ordinance that banned baristas from wearing G-strings and see-through clothing. Now the ordinance has been upheld in a criminal case against Dreamgirls Espresso owner Cheryl Clark, who was found guilty of violating the city's indecent exposure ordinance after a municipal court jury trial. The bikini barista at issue in that case reportedly wore shorts that were both too skimpy and too sheer.

Clark could face up to 90 days in jail when she is sentenced later this month. But she says she will appeal. The barista also was charged in the indecent exposure case. However, she was acquitted by the jury, reports the *Yakima Herald-Republic*, due to a 'lack of evidence' – having neither taken photos of the barista nor seized her shorts (if they could have found them?).

'Rainmakers' soak it up

Many US law firms are reducing partner compensation so that they can free up more money for superstar lawyers. In some cases, these 'rainmakers' are earning as much as $10 million a year.

According to *The Wall Street Journal*, the top earners often make eight to ten times more than other partners – and it's creating morale issues for partners on the lower rungs.

The pay gap is about double the spread of a decade ago, according to Blane Prescott, who is now chief executive of the law firm Brownstein Hyatt Farber Schreck. Most big law firms are cutting partner pay by 10% to 30% each year, he said, partly so they can pay more money to the top performers.

Examples include Kirkland & Ellis, which paid top partners last year more than $8 million – about eight times the amount earned by other partners. DLA Piper paid its top partners $6 million in 2010 – about nine times more than other partners. K&L Gates' top partners were also nine times better off than other partners.

Worcestor gets saucy with Virginia Supreme Court

The Virginia Supreme Court was unanimous when it ruled that state judges could not use a writ of error *coram vobis* to reopen the cases of immigrants who had not been informed that they could be deported after a criminal conviction.

But Judge Dean Worcester, the chief general district judge in Loudoun County, wasn't swayed, *The Washington Post* reports. He decided to ignore the ruling, writing that it "is at odds with long-standing precedent and jurisprudence" and it "creates confusion".

The newspaper said: "Loudoun prosecutors were flabbergasted. Even the defendant's attorney was shocked."

Worcester's opinion on 31 January 2011 cited the US Supreme Court's 2010 ruling in *Padilla v Kentucky*, which held that lawyers have a Sixth Amendment obligation to warn their clients when their guilty pleas can result in deportation. Under the state supreme court ruling, "a constitutional violation will stand uncorrected," he said. "The court will not allow this to happen."

Beard ban for prison guards

California's attorney general has upheld a corrections department ban on prison guards wearing beards, writes the *Belfast Telegraph*. Attorney general Kamala Harris said religious beliefs are not enough to trump a corrections department ban on prison guards wearing beards.

The stance has drawn protests from civil rights organisations.

The AG argued in a Sacramento County Superior Court filing on 6 January that Trilochan Oberoi cannot be properly fitted for a gas mask if he keeps the facial hair required by his Sikh religion. She is asking that Mr Oberoi's lawsuit be dismissed at a 19 April hearing.

Corrections spokeswoman Peggy Bengs said that gas masks needed to fit tightly to protect correctional officers from tear gas and pepper spray, sometimes used to quell inmate uprisings.

Civil rights organisations sent a letter to Ms Harris asking her to reconsider her opposition. G

Mako Search,
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The Sweepstakes,
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FINANCE — €Excellent

Our client is a high profile law firm and is now looking to recruit high calibre finance lawyers. Ideally you will have a background in capital markets and banking and now wish to continue your career in a highly profitable firm with an excellent culture. A firm committed to excellence in its training and development of its lawyers, you will learn rapidly whilst assuming some real responsibility. Clients of the firm are assured of a commercial approach together with the experience and technical excellence necessary to structure and implement their financing transactions on time and within budget. The firm advise both lenders and borrowers on a broad range of finance transactions including asset finance, banking, derivatives and structured finance. Excellent terms on offer for this role.

Contact carolmcgrath@makosearch.ie **Ref: C2020**

CORPORATE — €120+Bonus+Benefits

Our client wishes to recruit an associate or salaried partner to join an already successful corporate team. This firm stands out for its collegiate culture, the strength of its management team and its consistent level of profitability. Here is a unique firm and platform from which you can play a lead role in further shaping and developing the corporate and commercial practice. You will have strong experience in m&a, shareholder agreements and joint venture transactions. This is a key appointment and one that the senior management team are keen to get right. If you are looking for a senior appointment and want to work for a practice with a genuine commitment to its staff and clients this is the firm for you.

Contact carolmcgrath@makosearch.ie **Ref: C2022**

BANKING — €Negotiable

An excellent opportunity has arisen for a senior lawyer to join a leading banking team within a large dynamic law firm. Having worked within the banking and finance sector you will have particular experience in securitisation, property acquisition and finance experience. You will be skilled at providing general banking and governance advice and at executing transactional work with attention to detail. You will be ambitious and eager to form part of a team that is fast becoming a force to be reckoned with. Reporting directly to the partner for the group there will be a defined route to partnership for the appropriate individual. You will benefit from working in a collegiate and pro active environment and will be rewarded by a competitive salary.

Contact carolmcgrath@makosearch.ie **Ref: C2023**

PROFESSIONAL INDEMNITY — €100+Bonus+Benefits

This firm is looking to recruit an ambitious lawyer who has experience in the area of professional indemnity. This firm has an overall reputation of excellence in this area and is looking for a solicitor to take up and assist in the running of high profile, high value cases. You will be familiar with high court practice and procedure and will be comfortable in other arenas of dispute resolution including arbitration and alternative dispute resolution. You will also have sufficient experience to manage your client and provide advices as to the best possible outcome and the potential pitfalls including costs. You will defend professionals in various disciplines including engineers, architects, surveyors and solicitors. You will have gained experience within a well established law firm and have strong academics.

Contact carolmcgrath@makosearch.ie **Ref: C2024**

FUNDS — €Negotiable

Easily identified as a leading light in the field of investment funds, our client is actively looking to secure the services of a top tier partner/team with exceptional experience within the investment funds market. Ideally the candidate will have retail, mutual, UCITs, ETF's or hedge fund areas. The successful applicant will be tasked with developing the Irish market, working closely with their colleagues to capitalise on their blue chip client base. you will demonstrate an ability to work as part of a team and have strong communication and technical skills. Having gained experience from a leading law firm or industry, you will have strong academic and commercial sence. A competitive salary and attractive bonus structure is on offer to the right canidate.

Contact carolmcgrath@makosearch.ie **Ref: C2025**

PSL — €100+Bonus+Benefits

This firm requires a barrister/solicitor to act as a PSL within the legal education and resources team, dealing with queries and research from across all practice areas and managing documentation and practice notes. You will be aware of developments in relevant areas, regulation and industry practice, collate precedents and co-ordinate group training and education. involvement in other support projects as may arise. You will have a strong academic background, excellent technical ability and a commitment to quality and accuracy of work produced. The successful canidate will interact and communicate well with all team members, thus insuring that the lawyers are adequately informed on a regular basis, this role offers the right canidate varied work within a collegiate environment.

Contact carolmcgrath@makosearch.ie **Ref: C2026**

COMPETITION — EXCELLENT

Our client is looking for a Competition Lawyer to expand its existing client services. Your experience should include a broad understanding of all areas of competition and an instinct for business development. You will have excellent academics and be experienced in M&A work, behavioural competition, state aids, trading agreements, public procurement and have well honed litigation skills. Our client's business model keeps it right at the heart of the business community, constantly exceeding expectations and proactively managing their client's needs. This is a truly unique opportunity to work in a fabulous practice with an enviable market pedigree. This role offers a varied client portfolio together with a highly competitive remuneration package.

Contact sharonswan@makosearch.ie **Ref: S2027**

TECHNOLOGY — EXCELLENT

An ambitious firm is looking to recruit a Commercial IT specialist to further build this practice area. Drawing on the firm's current client base you will have strong business development skills and have a strong reputation in the technology field. You will be working with other solicitors who are specialists in their respective areas of law, and have a history of success to date. This is a fantastic opportunity for a top commercial IT solicitor to join a growing firm and develop their own practice. The firm wishes to become a leader in commercial law, so wishes for a top solicitor with the gravitas and technical skills to entice new clients to work with the firm.

Contact sharonswan@makosearch.ie **Ref: S2028**

For opportunities in Ireland or overseas, please contact carolmcgrath@makosearch.ie on 01 685 4018 or sharonswan@makosearch.ie on 01 685 4017 or visit www.makosearch.ie

New Openings

Private Practice

Banking – Associate to Senior Associate: A well respected Dublin practice is seeking a strong Banking lawyer to work with a small dedicated team with a well-established client base. You will be dealing with a range of transactions including acquisition finance, re-structuring and NAMA work for a number of clearing banks. The successful candidate will have experience of acting for both lenders and borrowers and be familiar with facility letters, negotiations, taking security, and security review (ideally with syndicated lending experience). There will also be the possibility of some insolvency work.

Commercial Property/Banking – Associate to Senior Associate: Our client is a leading full service Irish law firm with a first class client base and an enviable reputation. We are instructed to search for a solicitor with strong transactional experience in the sale/purchase of Commercial Property. The successful candidate will be dealing with a range of matters including security reviews and NAMA. A thorough understanding of the financial aspects of property transactions and the taking of security is an essential pre-requisite.

Corporate/Commercial – Associate to Senior Associate: An exciting opportunity has arisen for a strong Corporate/ Commercial practitioner to join this major legal practice. The team deals with a broad range of transactions spanning the corporate and commercial spectrum. You will be a strong all-rounder, ideally with exposure to FDI. An excellent academic record is essential.

Intellectual Property/Technology – Associate to Senior Associate: This highly regarded Dublin firm seeks to recruit an additional solicitor to join this specialist department. The successful candidate will have specialised in non-contentious IP and general commercial work.

Professional Indemnity – Associate to Senior Associate: A high calibre practice with an excellent client base is searching for a first class PI practitioner. Strong exposure to professional indemnity matters is essential. Candidates will need to demonstrate the drive and enthusiasm to market and develop the firm's services with existing and prospective clients.

Projects Solicitor – Associate to Senior Associate: This top-flight Dublin law firm seeks to recruit an experienced practitioner to join its expanding Projects Team. The work in the group is challenging, multi-disciplinary and varied, providing legal services to project sponsors, contractors, funders and other financial institutions. You will be a bright solicitor with a keen interest in this practice area. A practical understanding of the financial background to PPP transactions is essential.

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