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UNITED WE STAND

I begin this month with a big thank you to all who participated or contributed at our very successful annual conference, held on 10 and 11 May in Killarney (see full report, p12). I appreciate the support from solicitors from all around the country and from a wide variety of firms. The message that rang out loud and clear was that we must stand united in order to forge a way forward in the public interest and for the benefit of clients, both domestic and international. The unity of purpose that was manifest from all the speakers was gratifying, and we were reminded again – if reminder was needed – of the ever-rising standards required throughout the profession.

We continue to work in very challenging times. However, it is important to remind ourselves that the challenge of putting scarce resources to better use is the same challenge faced by everyone in Ireland and throughout the EU. We will find new ways to deliver services to our clients, and we must continually evolve as a profession.

As well as thanking the many speakers, whose contributions were all of the highest calibre, I reserve a special thanks to our keynote speaker, Minister for Justice Alan Shatter. His was a particularly wide-reaching, thoughtful and provocative contribution. After the conference, I copied his speech electronically to every solicitor. As you will already know, the Law Society welcomes most, although not all, of the minister's proposals and initiatives.

Constructive engagements

Even where we question certain proposals, however, we do so always in a spirit of constructive engagement. It is gratifying when that spirit is noted and appreciated. Speaking specifically about the *Legal Services Regulation Bill*, Minister Shatter said: "I would like to express my appreciation of the highly constructive engagement of the Law Society with the process of developing the bill. The Society's considered submissions on a broad range of issues of common interest have been extremely useful in developing a number of key amendments for committee stage. The text of these will be made available for consideration prior to the commencement of that stage."

He went on to detail a lengthy series of changes, which the Society had sought, that he intends to make to the bill at the Dáil committee stage, scheduled for 10, 11 and 12 July 2013. We welcome all of the amendments he outlined and look forward to seeing the text.

I also want to extend a special thanks to the volunteers who organised the highly successful 15th Calcutta Run. This took place on a beautiful sunny Saturday on 25 May. In these challenging times, it is heartening to record that solicitors, along with support staff and friends, continue their efforts to assist those less fortunate and for whom GOAL and the Peter McVerry Trust provide wonderful support. This admirable event has been made to happen for the past 15 years by a large and tireless number of volunteers headed by Cillian MacDomhnaill, Eoin McNeill, Michael Barr, Joe Kelly and Alan Johnston.

"We will find new ways to deliver services to our clients, and we must continually evolve as a profession"

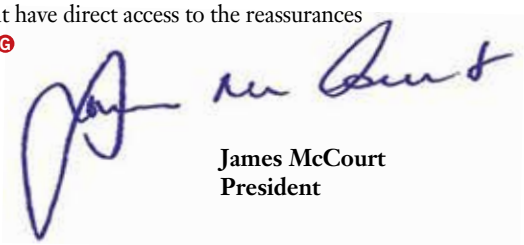
Towers Watson report

Towards the end of 2012, the Society's Finance Committee requested one of the leading Irish and international consultancy firms, Towers Watson, to conduct an objective remuneration review of senior management pay in the Law Society.

Although this review process had commenced before the major controversy broke in relation to the remuneration and pension entitlements of the former chief executive of the Irish Medical Organisation, this undoubtedly formed a backdrop to the exercise being undertaken by the Society. The elected representatives of the solicitors' profession needed to be reassured that no 'IMO-type situation' existed in the Law Society. I am pleased to report that the Council of the Law Society has been completely reassured in that regard.

Towers Watson assured the Society that the current governance structure and processes for managing reward in the Society are working well and that executive pay is market competitive with appropriate comparators. In addition, the Society's actuaries, Mercer, verified that the Society's pension fund is 95% funded so that, in this regard also, no 'IMO-type situation' pertains in the Society.

The Council has decided to take the very unusual step of publishing the Towers Watson report in full on the members' area of the Society's website, so that members, as a whole, might have direct access to the reassurances outlined above.



James McCourt
President

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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 **DSBA's annual tennis tournament in Elm Park Golf and Sports Club, Donnybrook, on 29 June**
- Employment opportunities
- The latest CPD courses

... as well as lots of other useful information

Nationwide

Compiled by Kevin O'Higgins

Kevin O'Higgins has been a Council member of the Law Society since 1998

Get golfing with DSBA

DUBLIN

The DSBA Golf Society has provisionally organised a number of outings in 2013:

- **Friday 14 June at Elm Park Golf and Sports Club (sponsored by BCK Wealth Management),**
- **Thursday,11 July at St Anne's Golf Club, and**
- **Thursday 5 September at Killeen Castle (Captain's Prize).**

Membership of the society is €20, and payment is mandatory for all participants. Membership and attendance at previous outings will determine priority in the event of an outing being oversubscribed.

To reserve your place on the first outing in Elm Park, visit www.dsba.ie for full details.

If you are unable to attend the first outing and wish to book your place on any of the other outings, send the application form with the appropriate cheque (€55 for St Anne's Golf Club and €80 for Killeen Castle, inclusive of membership fee).

If you, your firm, or one of your clients wishes to sponsor a prize or an event, please contact John O'Malley at on 086 895 0942.

The DSBA Golf Society is a registered member of the Golfing Union of Ireland.

Friday the 13th in the Fire Restaurant – what could possibly go wrong?

The Corporate and Public Lawyers' Association (CPLA) represents the views and interests of lawyers working in the public and in-house sector. It has members from the local authorities, Government departments, the Chief State Solicitor's Office, the DPP's office, the Office of the Director of Corporate Enforcement, the ESB, financial institutions, Enterprise Ireland, the Criminal Assets Bureau, the Medical Council and the private sector.

The association runs networking events and occasional lectures and seminars throughout the year. Association president Terence O'Keefe says: "Our primary social event of the year is the annual fundraising lunch in aid of the Irish Guide Dogs for the Blind. The lunch will be held on Friday 13 September 2013 in the Fire Restaurant in the Mansion House. The event affords attendees an excellent networking opportunity. Tickets are usually on the basis of a table of ten for €1,000 or individual tickets of €100 each."

Anyone wishing to join the CPLA needs only to complete an application form. If you wish to be kept informed about the fundraising lunch, please email orla.hastings@dublincity.ie.

Focus on insolvency

KERRY

The Kerry Law Society held an insolvency seminar on 26 April in the Meadowlands Hotel, Tralee; *(l to r)*: Deirdre O'Callaghan, James Lucey, Mary Cronin and Dan O'Connor (James Lucey & Sons, Kanturk)

Meath election results

MEATH

The Meath Solicitors' Bar Association AGM was held on 14 May last, following a lecture by Ross Maguire SC on the provisions of the *Personal Insolvency Act 2012*.

Outgoing president of the association James Walsh (Keaveny Walsh & Co, Kells), thanked the secretary and committee for their support during his term in office.

Election results were as follows: president – Oliver Shanley (Oliver Shanley & Co Solicitors, Navan); honorary secretary/treasurer – Elaine Byrne (Regan McEntee & Partners, Solicitors, Trim); PRO – Niamh Tuite (Niamh Tuite & Co, Solicitors, Navan); committee members – Declan Brooks (Brooks & Lee Solicitors, Ratoath), Mark Dillon (Dillon Geraghty Solicitors, Navan & Athboy), Stephen Murphy (Regan McEntee & Partners Solicitors, Trim), Ronan O'Reilly (Steen O'Reilly Solicitors, Navan), and William O'Reilly (Steen O'Reilly Solicitors, Navan).

Top ten secrets to successful growth

KILDARE

The Kildare Bar Association has organised a briefing session for members in cooperation with Law Society Practitioner Support, at which Sinead Travers will address:

- **Complying with Law Society financial regulations (regulatory hour),**
- **Top ten secrets of successful practice growth.**

A two-hour management/group study CPD credit will apply and a booklet of papers will be provided to all who attend.

Forthcoming CPD events will be held on 13 June 2013 and 4 July at 6pm in the Kilashee Hotel.

Shut that door

GALWAY

It was standing room only at the Galway Solicitors' Bar Association's five-hour CPD event held at the Galway Courthouse on 26 April 2013.

The next seminar is in Galway Courthouse on 28 June. Details of this and upcoming events can be found at www.gsba.ie, where members can view their certificates of attendance.

Solicitor stabbing

A man in his 30s was arrested in Dublin city centre on 28 May in relation to the stabbing of solicitor Violet Quigley more than two years ago. He has been released without charge. Gardaí are preparing a file on the case for the DPP.

Ms Quigley sustained multiple stab wounds to her legs, stomach, arms and side, as well as head injuries, when she disturbed a burglar armed with a knife on 8 April 2011. The solicitor was alone in her home when she was attacked shortly after 11.30pm.

Detectives made the arrest due to what they said was significant new information. Gardaí are treating the attack as attempted murder.

'Voice and Choice'

'Voice and Choice' is the title of the fifth International Disability Summer School organised by the Centre for Disability Law and Policy at NUI Galway. It will focus on the UN Convention on the Rights of Persons with Disabilities. The summer school takes place from 17 to 22 June.

Speakers will include senior academics, practitioners and policy-makers from around the world, most of whom have been directly and actively engaged in drafting and implementing the convention.

General information is available at www.nuigalway.ie/cdlp. Registration costs €300.

In News this month...

Irish law firms excel at international awards

At the presentation of the 'Irish Law Firm of the Year' award to Arthur Cox on 25 April 2013 were *(l to r)*: Georgia Brooks (editor, Chambers Europe), Mark Saunders (Arthur Cox), who was presented with the award by Miriam González Durántez (of the international legal practice Dechert), who co-hosted the awards)

Arthur Cox was named Irish Law Firm of the Year at the Chambers Europe Awards for Excellence in London on 25 April. The country awards recognise a law firm's excellence in key practice areas and take into account strategic growth, market feedback and involvement in market-leading deals.

According to Chambers Europe, "Arthur Cox remains one of the premier Irish law firms, lauded for offering an exceptional quality of service across an impressively broad range of practice areas. Among a range of other attributes, clients particularly value the credibility the firm brings to negotiations, its strength in depth and its common-sense approach."

At the same awards, Mason Hayes & Curran was presented with the Client Service Law Firm of the Year award, based on feedback and recommendations made by clients. Managing partner Emer Gilvarry said: "As this award is based on feedback from clients, it is very humbling to be one of only a few firms in Europe to be recognised."

Separately, Matheson was named Irish Tax Firm of the Year by the *International Tax Review* at its European awards ceremony in London on 16 May 2013. Head of Matheson's tax practice, Turlough Galvin, accepted the award.

New NUIG law school head

Prof Donncha O'Connell is the new head of the School of Law at NUI Galway, having been appointed recently to an established chair in law. Donncha served a term as Dean of Law from 2005 to 2008, after which he spent a year as a visiting senior fellow at the London School of Economics. He is a part-time Commissioner of the Law Reform commission, a member of the Legal Aid Board and editor of the *Irish Human Rights Law Review*.

Prof O'Connell teaches constitutional law and European human rights to undergraduate students, as well as two postgraduate courses in advocacy, activism and public interest law, and the processes of law reform.

Collins for Europe

The Government has nominated Anthony M Collins SC for appointment as a judge of the European General Court. Mr Collins (53) will replace the current Irish representative on the General Court, Judge Kevin O'Higgins, whose term of office expires on 31 August 2013.

Mr Collins was educated in Trinity College Dublin, graduating with a BA (Mod) in Legal Science. He completed his legal studies at the Honorable Society of King's Inns, Dublin, becoming a barrister in 1986.

A specialist in administrative and public law and the law of the European Union, he regularly pleads before the High and Supreme Courts of Ireland and the Court of Justice of the European Union.

Personal Insolvency Practitioner Certificate

Personal insolvency has been the subject of major reform due to the introduction of the *Personal Insolvency Act 2012*. The syllabus for the diploma programme's *Personal Insolvency Practitioner Certificate* is the first such course to be approved by the Insolvency Service of Ireland. Anyone who successfully completes the course meets the relevant criterion required for submitting an application for authorisation as a personal insolvency practitioner.

Details of this and all diploma programme courses are available at www.lawsociety.ie/diplomas, or email the course leader Olga Gaffney at o.gaffney@lawsociety.ie.

Council approves review group's report on touting for business

The Law Society Council meeting on 17 May 2013 received and approved the report of the group set up following the most recent annual general meeting to review regulation 13 of the *Solicitors (Advertising) Regulations 2002*.

The part of that regulation on which the report focused primarily was the prohibition on a "direct unsolicited approach to any person who is not an existing client … in, at, or adjacent to, a garda station, prison, or courthouse".

This 48-page report (including appendices) has now been published in the public area of the Society's website, and all who are interested in this issue are urged to read the report in full.

The report of the Regulation 13 Review Group (above) has been approved by the Law Society's Council

There was unanimous agreement among the group that the problems identified by ethical criminal law practitioners were genuine, current and real, and neither infrequent or apocryphal.

The group immediately recognised that, while the problem impacts on ethical solicitors who are losing clients to unscrupulous competitors, the really exposed persons are those vulnerable clients who are losing the services of competent and ethical criminal practitioners and, instead, find themselves being represented by persons whose sole motivation is personal gain. As such, it behoves the Society to act in the public interest and ensure that such vulnerable persons are as fully protected as they are entitled to be under the constitution.

The group's recommendations were summarised as follows:

- Emphasis should be placed on placing barriers in the path of the intending wrongdoer, rather than relying on the prosecution of breaches,
- The Criminal Law Committee should pursue its representations to the Department of Justice that a replaced solicitor should be paid a portion of the case fee, reflective of the work he has done to date of transfer,
- The Society should fully support any solicitor who declines to act improperly on the instructions of an employing solicitor,
- The Society should facilitate the establishment of an accessible register of specialists in the field of criminal law,
- The Society should promote public awareness by communicating to persons appearing before the Criminal Courts precisely what their entitlements are,
- As a priority, the Law Society should establish and maintain a readily accessible list of legal-aid practitioners,
- The Society should authorise evidence-gathering activity in court venues,
- If it is the first occasion a solicitor is identified as engaging in an unsolicited approach, he/she would not necessarily be referred to the Disciplinary Tribunal but would be advised that they had been identified as part of a Society initiative and cautioned as to their future conduct.

Education

- The existing teaching of ethics in the Law School should be augmented to include specific reference to the restrictions imposed by regulation 13,
- Trainee solicitors should be requested at the start of their traineeship to sign and adhere to a code of professional conduct, and the declaration at the conclusion of the period of traineeship should address specifically the training provided in ethical matters,
- The Society should run refresher courses at a reasonable fee for colleagues who wish to keep their skills current.

Practice

- The procedures for the transfer of a legal-aid file should be made more demanding.

Other bodies

- There should be stricter supervision of access by solicitors to persons in custody,
- The Society should avail of the introduction of 'measure B' to facilitate the provision of information to detained persons as to how they can access the full range of solicitors available,
- A centralised national system should be introduced, which would facilitate the maintenance of a comprehensive and up-to-date list of legal-aid practitioners, which information can be promulgated to the general public,
- Persons in garda custody should be advised of the availability on the Society's website of a list of available solicitors,
- The Criminal Law Committee should make representations to the Irish Prison Service that persons in detention should also be advised of the list available on the Society's website,
- The Society should engage with the translation and interpretation professionals to ensure a coincidence of expectation in relation to what is required on a professional level and, in particular, what is prohibited by its code of ethics,
- The Solicitors Disciplinary Tribunal should be invited to review their rules of evidence.

The courts

- Information leaflets should be posted on designated notice boards in courthouses, alerting accused persons to their entitlements and pointing out the prohibition on unsolicited approaches by solicitors,
- The information notices should be in a range of languages familiar to persons appearing before the courts, and there should be continuous review of the languages required,
- At the commencement of each court sitting, local practitioners should indicate to the presiding judge, by way of a list, the identities of those legal-aid practitioners available in that court room on that day, in the event that an assignment is required.

'Deep concern' over harsh treatment of Turkish lawyers

Law Society President James McCourt has written to the Turkish Ambassador to Ireland to express the "deep concern of the solicitors' profession in Ireland in relation to the protection of lawyers in the exercise of their professional duties in Turkey".

The letter was written on the day of the opening of the trial of the head of the Istanbul Bar Association, Umit Kocasakal, and nine other lawyers in the city.

President McCourt states that representatives of the Law Society had recently attended a conference of the European Criminal Bar Association in Istanbul, "where they received disturbing information that became the basis for the Law Society of Ireland's concerns".

At its 17 May meeting, the Society's Council passed the following resolution: "That this Council notes and endorses the resolution of the European Criminal Bar Association concerning the protection of lawyers in their professional duties and urgently and respectfully calls upon Turkey:

Head of the Istanbul Bar Association, Umit Kocasakal

- To comply with the UN *Basic Principles on the Role of Lawyers* in respect of all cases tried within its jurisdiction, including cases being tried under its terrorism laws,
- To release all lawyers detained in breach of the *UN Basic Principles on the Role of Lawyers* and to permit them to return to their professional duties,
- To ensure the personal and professional safety of all lawyers including those defending persons accused of anti-state activities,
- To desist from the prosecution of lawyers' representatives or associations who in good faith seek to protect their members from persecution and improper restrictions and infringements."

The president signed off by saying that he looked forward to hearing from the ambassador "with the assurances sought above".

The letter has been copied to the Minister for Foreign Affairs and to the Minister for Justice.

Special merit award for Shannon at Irish Law Awards

Dr Geoffrey Shannon with Law Society director general Ken Murphy

The Society's deputy director of education, Geoffrey Shannon, has been recognised for his groundbreaking work for children's rights at this year's Danske Bank Irish Law Awards. Mr Shannon, who is also the Government's special rapporteur on child protection, was presented with a 'Special Merit Award'.

The awards were presented to 25 recipients by former justice minister Nora Owen on 3 May. One of the award-winners was 73-year-old Rory O'Donnell, whose legal career spans more than half a century. The highly respected lawyer founded what would later become Eversheds International in 1967 and was awarded the prestigious 'Lifetime achievement award'.

RESULTS

Lifetime Achievement Award: Rory O'Donnell (Eversheds)
Law Firm of the Year: Mason Hayes & Curran
Leinster Provincial Law Firm of the Year: Augustus Cullen Law
Munster Provincial Law Firm of the Year: Ronan Daly Jermyn
Connacht Provincial Law Firm of the Year: RDJ Glynn
Ulster Provincial Law Firm of the Year: VP McMullin Solicitors
Sole Practitioner of the Year: Daniel Hughes (Hughes & Associates Solicitors)
Law Firm Innovation Award: Woods Hogan Solicitors/ Fileaway – Peter Woods
In-house Legal Team/Lawyer of the Year: Paddy Power
Banking/Finance/Restructuring and Insolvency Team/Lawyer of the Year: Eversheds
Litigation Team/Lawyer of the Year: William Fry – Owen O'Sullivan
Family Law Team/Lawyer of the Year: Gallagher Shatter Solicitors – Catherine Ghent
Commercial Law Team of the Year: Mason Hayes & Curran
Public Sector Lawyer/Team of the Year: Patricia T Rickard Clarke
Employment Lawyer/Law Team of the Year: Daniel Spring & Co – Donal Spring, Paula Murphy and Ailbhe Murphy
Criminal Law Team/Lawyer of the Year: KOD Lyons – Kevin O'Dea
Law School of the Year: UCD School of Law (University College Dublin)
Legal Executive of the Year: Ballymun Community Law Centre Ltd – Christina Beresford
Pro Bono and Public Interest Team/Lawyer of the Year: FLAC
Property Team/Lawyer of the Year: Beauchamps Solicitors
Mediation, Arbitration, Dispute Resolution Team/Lawyer of the Year: Bill Holohan & Co – Bill Holohan
International Transaction of the Year: Simon Carty (Simon Carty Solicitors)
Special Merit Award: Geoffrey Shannon

iPad clinics to come

The Diploma Programme is running free iPad clinics in conjunction with Compu B at the Education Centre, Blackhall Place. In addition, Compu B is offering discounts to all Diploma Programme students on accessories and devices.

The Diploma Programme recently ran two free iPad clinics that covered a range of features and apps relevant to busy practitioners learning how to integrate their iPads into their professional lives to achieve greater efficiency. Further clinics are planned for July and September. Attendance is free to Diploma Programme students, but preregistration is essential. Please email diplomateam@lawsociety.ie and register your interest in attending.

The clinics address topics such as organising your iPad, email management, note management, using the iPad as a work tool in practice. Apps discussed will include *GoodReader*, *Pages*, *iAnnote*, *LogmeIn*, *Dragon Dictation*, *TrialPad*, *Scanner*, *Notebook*, *Penultimate*, a VAT app and more.

Compu B will introduce the iPad, set up iTunes, and the downloading of relevant applications. Specialised IT personnel will be available to answer any queries you may have and help you to set up your iPad to operate as a 'personal and professional information manager'.

In addition, our relationship with Compu B enables Diploma Programme students to claim discounts on products, namely:

- **10% off all products in Compu B (non-Apple products),**
- **5% off all Apple accessories,**
- **3% off all devices to Diploma Programme students and lecturers.**

To avail of these offers, please email the Diploma Team at diplomateam@lawsociety.ie to get the letter required to identify you as a Diploma Programme student.

(See tablet feature in this **Gazette**, *page 20)*

In the media spotlight

BRIAN HARRINGTON
PRINCIPAL, HARRINGTON & CO, SOLICITORS, NEWTOWN, BANTRY, CO CORK

Peter Sweetman and Brian Harrington *(right)*

Case summary

Brian Harrington represented environmental campaigner Peter Sweetman in a landmark case against the proposed N6 Galway outer city bypass. Sweetman instituted judicial review proceedings against An Bord Pleanála's decision to approve the bypass scheme in November 2008, due to their failure to ensure the protection of a surrounding natural priority habitat known as limestone pavement.

Sweetman lost the application in the High Court. The High Court granted permission to appeal the case to the Supreme Court and, for the first time in environmental law, the Supreme Court made a preliminary reference to the European Court of Justice.

In April 2013, the ECJ found that the plan, as approved by An Bord Pleanála, which was funded under EU programmes from 2000 until 2006, breached the provisions of the EU *Habitats Directive*. The ECJ found that the proposal as permitted would permanently destroy 1.47 hectares of limestone pavement within the Lough Corrib Special Area of Conservation (SAC).

How did you become involved?

While I was working for Casey & Co Solicitors in Bandon, Co Cork, who were representing Mr Sweetman, I became centrally involved in this case. Initially, Mr Sweetman instructed Casey & Co to pursue this case on his behalf, as they were one of the leading practitioners in environmental law in the country at the time. When I set up Harrington & Co Solicitors, Mr Sweetman transferred his file to my office.

What is your background?

I come from a farming background in West Cork. I received an LLB from the University of London in 2000. I have a keen interest in the environment and its protection and, wishing to specialise in this field, I apprenticed at Casey and Co. My current disciplines are environmental, planning, fisheries and land law.

Thoughts on *Sweetman v An Bord Pleanála*?

In my view, this judgment will ensure a greater level of protection for the environment. It will provide a greater level of certainty to those regulatory and State bodies that are tasked with the protection of the environment and its laws.

Are there other significant infrastructural projects that might be affected by the decision?

There's no question but that this judgment will affect many infrastructural projects nationwide. The *Sweetman* judgment will have an adverse impact on projects that are proposed to take place within specially designated European sites.

In my opinion, this judgment will also have an impact on any project that is likely to have a significant adverse effect on the protection of undesignated priority habitats and species. This judgment is now the seminal European judgment on the protection of natural priority habitats in Europe.

Have you received any negative feedback?

No. The feedback to date is that this judgment is hugely progressive.

Why should this European ruling be good news for the people of Galway and Ireland?

This ruling is good news because it obliges State bodies and planning authorities to strike a balance between the need to progress infrastructural development and the need to protect the environment.

In the *Sweetman* judgment, the ECJ found that the Galway bypass project might have progressed had the planning authorities invoked the proper legislative provisions to ensure the adequate protection of the limestone pavement.

Law Society marks Irish presidency of the EU

The Law Society recently organised an event to mark the Irish presidency of the Council of the EU. Ambassadors, judges, the president of the CCBE and Brussels representatives of European bar associations and law societies were welcomed to Blackhall Place on 10 April by Law Society President James McCourt for the reception and dinner, *writes Eva Massa*.

The event was one of a series organised by the Society's EU and International Affairs Committee to mark the presidency.

In his welcome speech, President McCourt referred to the opportunities that the EU presidency has offered to Ireland by allowing it to advance the EU's work agenda, and to shape and influence EU policy and legislation.

The following day, there was a round-table discussion with Brussels' representatives of the bars of Belgium, Luxembourg, France, the joint Bars of England and Wales, Scotland and Northern Ireland, Spain, Germany and the CCBE. Participants explained the current concerns of the legal profession in their respective countries, including:

- The potential consequences of the *Legal Services Regulation Bill* in Ireland,
- The lack of application of Directive 2005/29 on the protection of consumers in Belgium,
- The potential effects of the British government opt-out in criminal areas, and
- The new law on judicial taxes in Spain.

Ken Murphy (director general), James McCourt (Law Society president) and Dominick Chilcott (British ambassador)

On Thursday afternoon, the committee held a conference titled '40 Years in the European Union', which was opened by former justice minister Nora Owen.

Dr Vincent Power (A&L Goodbody), Mary Casey (chair, EU and International Affairs Committee), Peter O'Neill (legal counsel, Facebook Ireland), guest speaker Nora Owen (former Minister for Justice) and Bernard O'Neill (principal at NCTM O'Connor, Brussels)

Cliff House Hotel competition winner

The Cliff House Hotel competition in the May issue of the *Gazette* is Maureen Whelan of John P Walsh & Co, Solicitors, 68 Queen Street, Clonmel, Co Tipperary.

Maureen correctly answered that the hotel's executive chef, Martijn Kajuiter, is Dutch.

Congratulations! You and your guest can look forward to a wonderful mid-week, two-night break in the two-floored Cliff Veranda Suite at The Cliff House Hotel, located in Ardmore, Co Waterford. It is regarded as one of the finest, smaller, luxury five-star hotels in Ireland and features a Michelin-star restaurant. For more information, visit www.thecliffhousehotel.com.

We had a huge response, so keep an eye out for more wonderful competitions in the future!

Sentencing in robbery cases 'relatively consistent'

Sentencing in robbery cases has been deemed "relatively consistent", with so-called 'tiger kidnappings' attracting the heaviest sentencing, according to an illuminating new report published by the Irish Sentencing Information System.

Compiled by the Judicial Researchers' Office, under the supervision of High Court judge Mr Justice Peter Charlton, the report states: "It appears that the sentencing in robbery has been relatively consistent and has taken into account factors relevant to each case. Similar cases tend to have similar sentences and similar aggravating and mitigating factors serve to effect sentence."

Factors considered when sentencing include "level of violence, personal circumstances of the accused, remorse, impact on victim, guilty plea and recovery of stolen property".

The report – a valuable resource now online – indicates that robbery most commonly attracts a sentence in the one-to-five-year bracket. A serious case involving the possession of firearms may lead to a sentence of up to 14 years. Of those imprisoned for robbery in 1993 and 1994 (combined), 47% got three years or less, about 30% got three to five years, 21% got five to ten years, and only 0.5% got ten years or more. "Therefore, close on 80% got five years or less."

Detailed sentencing breakdowns of individual cases are provided, many of which offer valuable insight into the daily workings, and indeed the humanity, of our courts. The full report can be found at www.irishsentencing.ie.

NEWS FROM THE LAW SOCIETY'S COMMITTEES AND TASK FORCES

Child law forum planned for Galway

FAMILY AND CHILD LAW COMMITTEE

The Family and Child Law Committee, in conjunction with the Family Lawyers' Association in Cork, recently hosted an information and discussion forum to exchange views on:

- Current and pending legislation and developments in practice and procedure in child law,
- Mediation,
- The Central Bank's code of conduct,
- Specialist courts, specialist judges and the *in camera* rule.

A lively debate ensued on the benefits of collaborative law, appropriate cases for referral to mediation, how to hear the voice of the child, and challenges presented by an increasing number of lay litigants.

The committee intends to host a similar forum in Galway on 25 July and looks forward to hearing the views of those able to attend. For details, contact c.farrell@lawsociety.ie.

If you have views on the matters raised above, or other area within the remit of the committee that might inform our submissions or representations on your behalf, please forward these to c.farrell@lawsociety.ie.

Results are in for Society's IT systems and support survey

TECHNOLOGY COMMITTEE

The Technology Committee has recently completed a survey of general IT systems and support being offered to solicitors in the Irish marketplace. This is the second part of the survey, with part 1 being published in 2012 (*Suppliers of Accounts and Practice Management Systems*). This replaced *Get Integrated* (last published in 2007) as a guide to IT suppliers to the legal profession.

The committee prepared a list of questions designed to highlight features it believed should be considered by solicitors when making a decision to buy or change IT systems. Suppliers were asked to respond in a set format, so that answers could be more easily compared. Suppliers' responses can be viewed on the Technology Committee's page in the members' area at: www.lawsociety.ie/technologyresources.

While the survey asks many useful questions, nothing can be regarded as definitive or complete in the fast-moving world of technology.

The survey is broken down into useful sections, including:

- Installation,
- Networking/security,
- Type of support available,
- Managed services,
- Cloud services, and
- Project management.

All suppliers were asked to name five firms that already use their systems.

These names have been supplied to the Society, but cannot be released without the firms' consent.

As a result, prospective purchasers should ask suppliers for up-to-date references and should check those references by contacting the relevant firms.

IT'S ONLY ROCK 'N' ROLL...

'Firming up for the future – building legal agility and a positive perspective' was the theme of this year's annual conference. Or to paraphrase Micheál Ó Muircheartaigh: 'I'm not finished yet!' Mark McDermott reports

Mark McDermott is editor of the Law Society Gazette

It's the small things that trip you up – as Alan Shatter would probably tell you as a result of recent experiences. The Minister for Justice was the main speaker at the Law Society's annual conference on 10 and 11 May in the Europe Hotel and Resort in Killarney, which looks out over the exquisitely beautiful Lough Leane.

Mr Shatter might not have been aware that a man much mightier than he had learned that very same lesson on the shores of that same lovely lake, a literal stone's throw from where he spoke – when Time was but a boy.

Everyone is familiar with the tale of how the famous Oisín had been enticed by Niamh of the Golden Hair to accompany her on her white horse to Tír na nÓg, said to be located under the waters of Lough Leane. After a period of what appeared to be three years – in reality 300 – Oisín had asked to return home for a short visit. Niamh warned him that if he got off his horse, he would instantly become his true age.

One day, watching five men struggling to move a huge rock, Oisín rather haughtily quipped that just one of the Fianna could have done the job – singlehandedly. Challenged by the builders, he had started moving the boulder when one of his stirrups broke – whereupon he fell to the ground and instantly became ancient.

It's the small, unexpected things that will catch you out.

Minister Alan Shatter addresses the conference

These thoughts would, no doubt, have been far from the mind of the exceptionally busy minister, who received a warm welcome from conference participants. Speaking on the topic 'A time for change', Mr Shatter commented positively on the conference's "constructive theme".

It's no secret that the Minister for Justice is advocating very heavily for change across the entire legal landscape, implementing a radical agenda for statutory reform. In Killarney, he touched on a significant amount of that legislation. There's a lot of 'heavy lifting' going on.

> ***"The minister expressed his appreciation of the 'highly constructive engagement of the Law Society' with the process of developing the bill"***

Stirred, not shaken

Solicitors stirred in their seats when the minister broached the topics of the *Legal Services Regulation Bill*, the appointment of specialist judges, the hot topics of judicial independence and the abolition of the Seanad.

The minister outlined that the committee stage of the *Legal Services Regulation Bill* was "now due to take place from 10-12 July". He expressed his appreciation of the "highly constructive engagement of the Law Society with the process of developing the bill", including, particularly, the development of its new complaints and disciplinary provisions.

He complimented the Society on its considered submissions on "a broad range of issues of common interest", which had been particularly useful in developing a number of key amendments for the committee stage.

"The text of these will be made available for consideration prior to the commencement of that stage," he said. "I will, for example, be removing the need for ministerial approval for any codes of practice that the Legal Services Regulatory Authority proposes to apply to the legal profession and, in other instances where, having reflected on the contents of the bill, I see no benefit or public interest in maintaining a requirement for ministerial consent."

In a full-frontal assault on accusations that the new legislation would interfere with the independence and integrity of appointments to the new authority, Minister Shatter said that he intended to introduce an amendment that would stagger the appointment of members of the authority in order to ensure its continuity and to "minimise the scope for external interference by a wholesale reconfiguration".

He added that he would be bringing forward amendments to "enhance and copper-fasten the independence of appointment of members of the Legal Services Regulatory Authority by means of nominating bodies". The Law

PICS: DON MCMONAGLE

Speakers at the first day of the annual conference were *(from l to r)*: Eamon Harrington, Attracta O'Regan (head of Law Society Professional Training), Conal Boyce, Anna-Marie Curran, Law Society President James McCourt, Richard Hammond, Michelle Nolan (Law Society Professional Training) and Paul Keane

Society and Bar Council are already named nominating bodies for the appointment of solicitors and barristers to the new authority, which will also include lay members. The minister was also looking at ways of improving the method of appointing members to the Complaints Committee and the Legal Practitioners' Disciplinary Tribunal.

"Taken together, these amendments will put to rest previously voiced concerns about the independence of the new regulatory regime and its immunity to any meddling by Government."

Addressing the Society's fears about the cost of the proposed new mechanism for dealing with complaints against solicitors, Minister Shatter stated that certain changes would be introduced that would give "more balanced emphasis to the informal or alternative resolution of complaints and front-load that option".

These changes were a "direct response to the Law Society's concern that these be stated in the bill in order to avoid uncertainty and to better reflect current best practice".

He said that it was important that informal and alternative

President McCourt takes the stand

Micheál O Muircheartaigh and Catherine Guy

Chris Callan, Catherine Guy, Minister Alan Shatter, Sonia McEntee and James McCourt

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dispute mechanisms be clearly available, where appropriate, alongside the "more formal and costly procedures of the Complaints Committee and the Disciplinary Tribunal, which might otherwise come into play".

He was giving active consideration, too, to the Society's proposals for the introduction of limited liability partnerships. "It is my intention that provision for such partnerships will be made in the bill upon enactment."

Prick up your ears

One of the issues that boiled over recently was the row between the minister and members of the judiciary over the issue of judicial independence. His reference to the subject, then, caused ears to prick up.

Minister Shatter said that there was nothing new in disputes between the executive and the judiciary, especially in times of change. His hope, however, was that any tensions that might arise could "always be resolved by constructive dialogue and engagement, which should always be conducted with respect on all sides for the separation of powers and a full understanding of the crucial constitutional roles played by the legislature, executive and judiciary".

It was the Government's responsibility, however, to address issues of judicial delays in the determination of court cases, the expense of legal costs incurred, and damages awarded in such litigation – and to ensure that citizens' rights were protected. Accordingly, the executive had to address issues that related to the functioning of the courts.

But Oisín's stirrup started to strain at Minister Shatter's next words: "I hope I will not be misunderstood, and there will not be a suggestion of some new controversy, if I merely raise the question of the appropriateness, in this day and age, of a court vacation period that, at least formally, incorporates the entirety of August and September, and of the additional Whit vacation period that interrupts court sittings for nine working days between Easter and the long vacation.

"I have an obligation to do what is possible within my remit to ensure that we have an efficient and cost-effective court system that facilitates the determination of cases of both a civil and criminal nature, without undue delay, in the interests of all of those who find themselves before our courts. This should not be misinterpreted to suggest that government or parliament is in any way entitled to int erfere in the hearing and determination of cases before our courts."

It was the sound-bite of the conference, with the national media covering it extensively. The minister managed to stay on his steed, however, still engaged with lifting those many boulders that will undoubtedly bring massive change to Ireland's legal landscape – in due course.

The question is, will we all be as old as Oisín when that time comes?

Conference materials (Friday only) can be purchased for €30 from LSPT@lawsociety.ie.

Aine Curran, Georgina Drum, Ann Carter and Orla Coy

Catherine Hegarty, John Glynn and Romaine Scally

QUALITY, QUALITY, QUALITY STREET

The sheer quality of the presentations at this year's annual conference made for riveting listening.

There were highly informative sessions on civil litigation and legal costs (Eamon Harrington) and criminal litigation and *District Court Rules* (Conal Boyce); a superb presentation on probate, administration and trusts (Richard Hammond); demystifying the *Companies Bill 2012* (Paul Keane at his insightful best); and developments and latest trends in procurement (Anna-Marie Curran), which was of significant interest for those engaged with the public sector.

Day two's business session featured a thought-provoking panel discussion on the theme of 'Challenges and opportunities facing Irish solicitors'. Chris Callan spoke about the advantages of the merger of two firms. Catherine Guy spoke about business opportunities, pricing pressure, choosing the right business model, and not being afraid to innovate. Sole practitioner Sonia McEntee encouraged practitioners to, first of all, realise what they were good at – and to focus on that. Paul White dealt with the importance of attracting and retaining the best talent. Staff are a firm's most important asset and needed to be respected.

The best wine was kept till last, however, with the inimitable Micheál O'Muircheartaigh taking the stage to deliver a motivational talk on the theme of 'Up the field and face the ball'.

Due to his involvement at 4am that morning in the national walking campaign against suicide, 'From darkness into light', it was no surprise that much of his narrative focused on the topic of never giving up. He regaled us with stories about sportsmen from the four provinces who, despite year after year of defeats, eventually broke through to captain their teams, win their cups, brandish their medals – and even represent the Kingdom of Kerry in the House of Commons.

My personal favourite was his story about the settled Traveller from Cavan, Bill Doonan, who eventually went to fight in World War II for the Allies in northern Italy and was found one afternoon by a search team up a tree, having failed to return from a dangerous sortie. Asked why he had been stringing wire across the branches of this particular tree, Bill said that he wouldn't expect them to understand, but his county team was, at that very minute, playing in the All-Ireland final back home, and he was trying to establish radio contact with the game to find out how Cavan was doing. Bill was given a reprieve.

Micheál encouraged everyone never to give up and to borrow the mantra of so many football and hurling greats: "I'm not finished yet. I'll try one more. Don't give in!"

RELIEFS SOUGHT IN CARE PROCEEDINGS REJECTED

A High Court judicial review case in relation to care proceedings raised issues of errors of law, breaches of constitutional rights, and rights under the *European Convention on Human Rights*. Joyce Mortimer reports

Joyce Mortimer is the Law Society's human rights executive

The applicant in the case of *Esther Natasha Enguye v Health Service Executive* ([2011] IEHC 507) was a citizen of the Republic of Congo who arrived in the State as an unaccompanied minor, aged 16 years, in 2008. The applicant was taken into the care of the respondent, the HSE, pursuant to section 4 of the *Child Care Act 1991*, and in particular section 8(5)(a) of the *Refugee Act 1996*, as amended. The applicant was in the care of the HSE until 10 June 2010. Between arriving in the State in 2008 and June 2010, the applicant resided in Dublin in a hostel for separated children. Upon attaining her majority in April 2010, the applicant applied for asylum status, which was refused, and she remains in Ireland pending an application currently before the Minister for Justice to remain in the State on humanitarian grounds.

Upon completion of her fifth year school programme at St Joseph's Secondary School in Dublin, and having reached the age of majority, the applicant was transferred under the auspices of the Reception and Integration Agency (Department of Justice) to Eglington House Hostel in Salthill in Galway, and enrolled in a school there to complete her Leaving Certificate.

A consultant psychologist visited the applicant in Galway in October 2010 and found her deeply unhappy. She was taken under the umbrella of a voluntary organisation, Young People at Risk (YPAR) and placed back in her school in Dublin. The applicant had no contact with the HSE since being transferred to Galway in October 2010. The YPAR, who has been looking after her since then, is concerned about the ongoing situation from a funding perspective.

Certain reliefs were sought by way of judicial review:

1) An order of *certiorari* quashing the decision of the respondent, in or about March 2010, to cease having care of the applicant on 10 June 10 2010,
2) A declaration that section 45 of the *Child Care Act 1991* is mandatory, requiring the respondent as the agency empowered by the said statute to exercise its powers where the need arises,
3) A declaration that the respondent was, and is obliged to consider the applicant's aftercare needs pursuant to section 45 of the *Child Care Act 1991*, and failed to do so at all, or adequately, and breached fair procedures by failing to take adequate account of independent evidence that the applicant needed aftercare,
4) In the alternative and without prejudice to the foregoing, a declaration that the respondent's discretion pursuant to section 45 of the *Child Care Act 1991* was unlawfully fettered by the respondent's adherence to an inflexible policy rule,
5) In the alternative and without prejudice to the foregoing, an order of *mandamus* compelling the respondent to exercise its discretion pursuant to section 45 of the *Child Care Act 1991* properly, and to consider the applicant's need for aftercare in a fair and impartial manner,
6) A declaration that the respondent breached its statutory and regulatory duty in failing to provide adequate care to the applicant since coming into the care of the respondent in February 2008 to date,
7) A declaration that the respondent's acts and/or omissions breached the applicant's rights to the Constitution.

> ***"Whilst the decision of the respondent to transfer the applicant to Galway may appear to be insensitive, it is one which the respondent was entitled to make in the exercise of its discretion"***

The respondent's argument

Initially, the HSE, as the respondent, raised a number of objections to the granting of relief due to delay, the absence of any sufficient evidence to explain the delay, the lack of reasonable specificity in the orders for relief sought on the application, and the failure of the applicant to exhaust a statutory alternative remedy.

The respondent also argued that the orders for relief sought by the applicant were "an attempt to have the High Court determine the assessment, provision and allocation of scarce public resources contrary to the constitutional doctrine of the separation of powers". They argued that the application was moot as a result.

Complicated case

The judge explained that the case in hand was complicated, in that the applicant had been permitted to

remain in the accommodation in Dublin after her attaining majority in April 2010. The court held that it was entitled to exercise its discretion with regard to the aspect of delay. The judge stated: "Taking into account the various surrounding circumstances and, in particular, the absence of any prejudice to the respondent", the delay was reasonable and could be excused.

Regarding the lack of specificity of reliefs sought, the court was satisfied that, while the applicant originally sought a variety of reliefs, these had been clarified and narrowed.

The respondent contended that there had been a failure by the applicant to exhaust the alternative remedy of complaint under part 9 of the *Health Act 2004*. It was argued that the applicant had the option to make a statutory complaint to a complaints officer of the HSE regarding "anything done or omitted to be done" by the HSE within a period of 12 months from the date of the action giving rise to the complaint.

The judge did not consider the opportunity to voice a complaint pursuant to part 9 of the *Health Act 2004*, as a matter of law, to be one that had to be undertaken prior to contending for judicial review. He said that it had to be borne in mind that the applicant in the present case was raising issues of errors of law, breaches of constitutional rights and her rights under the *European Convention on Human Rights*.

Discretionary duty

The court stated that the "application, in effect, centres in the applicant being moved from Dublin to Galway in June 2010, clearly against her own wishes, clearly against the wishes of her designated project worker, clearly against the wishes of the school authorities, and probably against the wishes of all those who came in contact with her".

Judge Gilligan pointed out that the applicant had appeared to lose sight of the fact that she had entered the State as an unaccompanied minor, had been provided for while she applied for refugee status and, following her unsuccessful application in this regard, had been provided for pending the determination of her application to stay on humanitarian grounds.

Referring to section 45(1)(a) of the *Child Care Act 1991*, Judge Gilligan concluded that the respondent had a duty to exercise its discretion, taking into account the need for assistance of the individual concerned. Furthermore, the judge stated that "on this occasion, the decision made by the respondent in relation to the applicant was in accordance with government policy".

Concluding, the court held that "whilst the decision of the respondent to transfer the applicant to Galway may appear to be insensitive, it is one which the respondent was entitled to make in the exercise of its discretion".

The judge stated that, as the applicant had attained the age of majority, the current status of the applicant fell to be considered under the *Refugee Act*, as an adult seeking asylum. The court declined the reliefs sought by the applicant. G

LITIGATION LIONS OUTFOXED

A judgment on 28 March by Mr Justice Gerard Hogan has landed a significant blow to the solar plexus of defence litigation – and has 'put the fox among the lions', argues Stuart Gilhooly

Stuart Gilhooly is junior vice-president of the Law Society

If you've ever met Mr Justice Gerard Hogan, you'd know he was a proper lawyer. Not like most of us. I don't know about you, but I know a bit of law, apply it when it arises, and look up the rest as I go along. This is not how Gerry Hogan has, or ever will, operate. He sees a set of facts, reaches into his large swag bag of legal knowledge, and liberally spreads each ounce of legal principle applicable to the given factual premise.

This was his *modus operandi* as a barrister of some repute and, not surprisingly, has been carried through to his short but already significant career on the High Court bench. If Paddy Power is offering odds on him making the Supreme Court bench at some point in the future, get your house on it, no matter what the price.

The reason for this sycophantic eulogy is his recent foray into the world of personal injury litigation, an area that, I suspect, he rarely, if ever, ventured into during his career at the Bar, but in which he has now landed a significant blow to the solar plexus of defence litigation – the 'notice for particulars'.

"It is undoubtedly a robust and damning judgment as far as defendants are concerned. Many of the questions asked are standard in such notices for particulars, so this will severely limit the entitlement of the defendant if heeded by other High Court judges"

Luck of the draw

It has rarely been subjected to much judicial scrutiny in the past and, indeed, the many inter-party disputes have tended to be resolved by the particular view of whatever judge was hearing a motion. So diverse have these decisions been, that the fate of your dispute is often determined by the luck of the draw. For the first time, though, some sort of consistency may now apply, as Mr Justice Hogan has undertaken a typically forensic approach to this much used, but often little-understood, litigation weapon.

In a judgment delivered on 28 March 2013, in the case of *Agnes Armstrong v Sean Moffatt and Thomas Moffatt trading as Ballina Medical Centre and Maura Irwin* ([2011] 4081P), he has put the cat among the pigeons or, to use his metaphor, the 'fox among the lions'.

The matter arose out of a public liability action, in which a medical centre was alleged to have been negligent in allowing a patient to fall from a couch. The central tenet of his judgment is that the *Civil Liability and Courts Act 2004* has changed the approach to how personal injury litigation must be pleaded and, therefore, somewhat paradoxically, reduced the extent to which particulars may be demanded.

In section 10 of the act, specific requirements for what must appear in a personal injuries summons have 'put manners' on pleadings in such cases. Whereas, before the enactment of this legislation, you could see ten statements of claim drafted by ten different counsel with completely alternative styles and little consistency in content, now the requirements are clearly set out.

Section 11 of the 2004 act proceeds to provide a list of questions that may be sought under the heading of 'further information'. However, they tend not to arise from the pleadings already made but, rather, matters that are not required specifically by section 10.

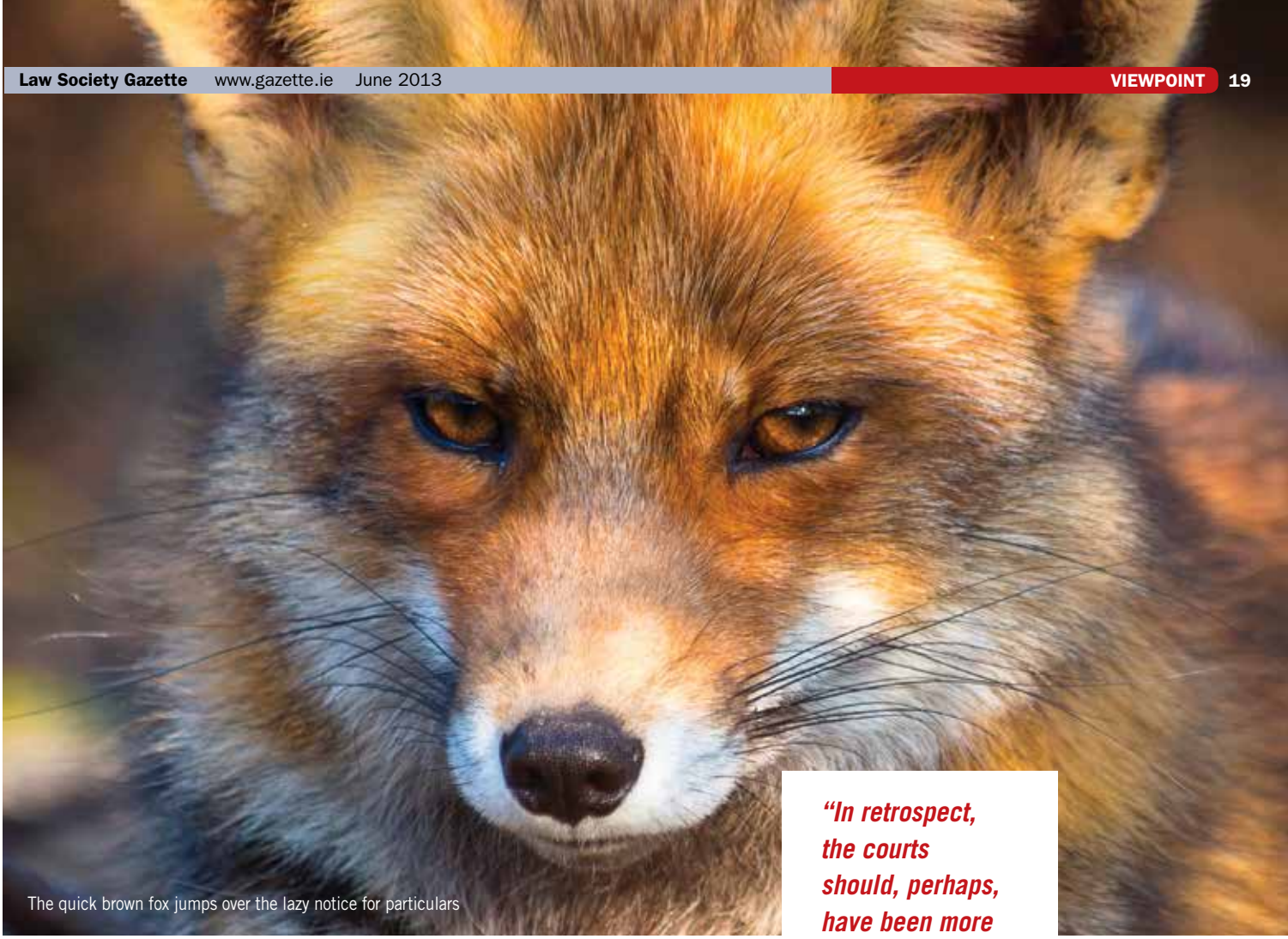
Something of an art form

Mr Justice Hogan is sharply critical of the practice of seeking particulars above and beyond the realms of necessity: "Not least in personal injury cases, the particulars sought in many cases had reached something of an art form. Quite often, no possible detail or dimension of a statement of claim (or since the 2004 act, the endorsement of claim required for a personal injury summons) remained unexplored at the hands of pleaders who, at times, seem to revel in this glorious new art form. It was by no means uncommon to find notices for particulars stretching to 20 or more paragraphs, often replete with individual subparagraphs … In retrospect, the courts should, perhaps, have been more prepared to strike out many of the pre-rehearsed requests as oppressive and, in some cases, as constituting, quite simply, an abuse of process."

The criteria he sets for allowing particulars is that effectively set out in *Cooney v Browne* ([1984] IR 185), where he summarises Henchy J's decision as follows: "Particulars will be ordered in the interests of fair procedures and to ensure a litigant will not be surprised by the case he has to meet."

In this case, he dissects the disputed notice and specifically allows any questions that reflect those allowed by section 11 of the 2004 act, namely the two queries relating to prior and subsequent accidents, illnesses or injuries.

These questions are standard in any notice for particulars and had been long before the enactment of the 2004



The quick brown fox jumps over the lazy notice for particulars

act. However, Mr Justice Hogan goes on to disallow every other question posed in the notice – and this is where it gets interesting.

Short shrift

The first request is probably the least controversial and most ridiculous. The issue as to whether legal expenses insurance has been obtained is frequently sought, but never revealed by experienced practitioners. He says: "The question of legal costs insurance does not even remotely arise from 'any matter stated in any pleading'."

Similarly short shrift is given to queries relating to the time of the accident and whether an ambulance was called. Seeing as neither issue actually relates to the matters pleaded in the summons (for instance, the time of the accident is irrelevant to the question of negligence), he completely rejects them.

The identity of any witnesses to an accident has long been established as inappropriate unless it is "exceptional or unusual". He does not find a personal injury case as remotely within that category and says that the request, in fact, "effectively seeks to elicit evidence rather than clarify the scope of a pleading".

A request for a narrative account of the accident has been summarily dismissed as seeking "what amounts to a witness statement from the plaintiff by way of particulars".

He rejects a demand for particulars of negligence and breach of duty, as well as breach of statutory duty, as being already pleaded, though he does order that the plaintiff clarify her claim in respect of the *Occupiers Liability Act 1995*.

Particulars of treatment are deemed irrelevant beyond those pleaded in the summons. Why, he asks, is the identity of the medical advisers relevant, or details of medication prescribed? In fact, he misses a point here, as the identity of medical attendants *is* relevant, but only insofar as to ensure that the defendant does not seek to use the same ones.

He rejects questions of the plaintiff's prognosis as already pleaded and inquiries into social welfare and special-damage details as premature. Defendants would, no doubt, argue that such details are necessary for the purpose of making lodgements or tenders.

> ***"In retrospect, the courts should, perhaps, have been more prepared to strike out many of the pre-rehearsed requests as oppressive and, in some cases, as constituting, quite simply, an abuse of process"***

Robust and damning

It is undoubtedly a robust and damning judgment as far as defendants are concerned. Many of the questions asked are standard in such notices for particulars, so this will severely limit the entitlement of the defendant if heeded by other High Court judges. This, of course, is far from certain. While the Circuit Court will be obliged to follow the precedent, and many of Mr Justice Hogan's colleagues will choose to, there is no obligation on other High Court judges to do so. They have frequently interpreted such requests in a very different manner up to this point.

However, it is clear that, as matters stand, this is the law – and I understand that it is not under appeal.

Mr Justice Hogan concludes by quoting Lee's words "in respect of a subordinate general who rashly and indiscriminately confronted his opponents at every possible opportunity: 'Too much of the lion and not enough of the fox'… In this – as in much else in litigation – the fox is more likely to prevail than the lion."

miPAD and me

Dorothy Walsh is principal of the Drogheda firm Dorothy J Walsh & Co

Tablet devices such as iPads have become essential tools in the lives and hands of busy professionals everywhere, and are especially useful for solicitors. Dorothy Walsh is in love ... with a machine

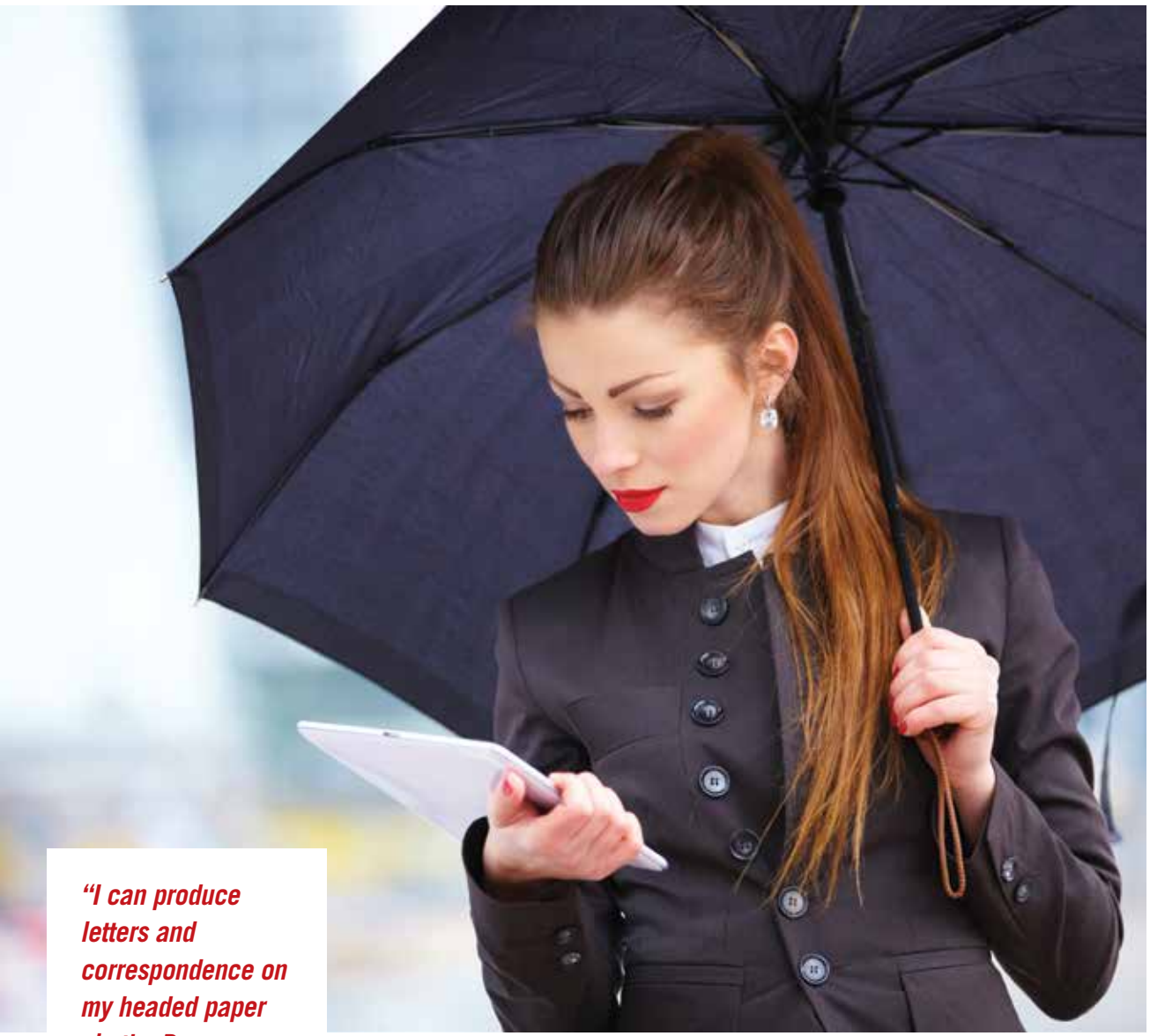
Running a law firm has turned into a never-ending, 24/7 exercise in client, staff and file management. It has been made all the easier for me by incorporating an iPad into my daily life. It hasn't been a seamless transition, but one that has evolved by way of 'trial and error'. I sometimes worry about overdependence on my handheld friend and the whole iCloud phenomenon due to the fact that I never really was a 'techie', but I do find the iPad to be super user-friendly and a very reliable device. I tried and tested a number of apps and processes, some of which promised the world and delivered considerably less, and some that weren't highly rated and didn't draw fantastic reviews, but which I found to be great.

My iPad and I have become inseparable due to the discovery of great business apps and mobile work solutions that I now cannot live or work without. Again, this was following a trial-and-error process. Generally, I will test an app with the free version first to see if it gives me what I need before committing to the full paid version. Sometimes the free version is fine for some functions without having to buy the full version. This is something to bear in mind when browsing the App Store.

I have to say that I believe the iPad (and the iPhone) work brilliantly for solicitors, allowing us to do a day's work from outside the office as if we were sitting in front of our PCs at our desks. It is the same with the iPad as it is with anything else in life – the more one uses the device, the more one will get out of it. In terms of work, it is, in my opinion, an invaluable work tool for solicitors.

A day in the life

To give a good illustration of its uses in everyday terms, the last few weeks – with Circuit Court sessions in full swing – offered me a great research opportunity for this article, allowing me to focus on how I typically use my iPad in my work and what apps work for me. With two cases to be



"I can produce letters and correspondence on my headed paper via the Pages app and email that correspondence as a PDF. All while out of the office and all using my iPad"

heard, I headed for the courthouse with a briefcase of files to work on, my iPad and iPhone, and the knowledge that, regardless of whether my cases were called, I would certainly have a productive day.

Firstly, as cases were running over from the previous day's sittings, I accessed the internet via Google or Safari (both free), using the Courts.ie website to pull up the legal diary in order to view the most up-to-date court list for the call-over. I usually copy and paste the list into my *Pages* app (€9.99 from the App Store). *Pages* is essentially the same as MS *Word*: I create a blank document into

FAST FACTS

- Tablet users can use their devices to access their office PC's case-management system, among other things
- As well as internet, email and document preparation software, dictation and note-taking apps are also available
- The Diploma Programme is to run free iPad clinics in conjunction with Compu B at Blackhall Place (see p9)

Law Society of Ireland Technology Committee Seminar

NEW WAYS TO WORK:

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Lecture Theatre, Law Society, Blackhall Place, Dublin 7.
Friday 28th June 2013, 2.00p.m. – 5.30p.m.

Fee: €95.00
CPD Hours: 3 hours Management & Professional Development Skills)

The business of running a practice has never been more challenging. The pressure to reduce costs and increase efficiencies continues to affect all law firms, big and small. Does cloud computing offer the solutions that suppliers claim? What are the real benefits of the cloud in relation to server overheads and maintenance, cash flow and back-up support? Are there hidden problems that cloud users need to be aware of?

How should law firms address the issue of social media? What are the implications of solicitors and others using their own devices, including smart phones, laptops and tablet computers for work purposes? This seminar will provide practitioners with an understanding of what's happening in the wider business environment and will offer some practical oversights from within the legal sector. In addition, the group of speakers will address questions from the floor in a panel discussion.

1.45 – 2.00	***Registration***
2.00 – 2.10	***Opening Remarks*** Raymond Smith, Chairman Technology Committee A review of the current situation with use of technology in legal practice. Adrian will consider current business uses of emerging technologies, cloud computin
2.10 – 2.30	***Cloud concerns for solicitors*** – Peter McKenna, McKenna Durcan (Technology Committee) To set the scene, we will start with a brief description of issues a practitioner might be concerned with when considering migrating office systems to the cloud.
2.30 – 3.15	***The practical aspects of implementing cloud based solutions*** – Clodagh O'Donnell Independent IT Consultant What is available in the marketplace and how can it impact the day to day workings of an office? What are the practical issues that need to be considered? Is it more cost effective? What are the main security challenges and how can they be addressed? Practical steps to implementation plans. This session will consider what the technology sector can offer today in relation to cloud computing, what companies can gain from a cloud strategy, as well as the risks and how to address these in practical terms when moving to the cloud.
3.15 – 4.00	***The legal aspects of cloud computing*** – Robert McDonagh, Mason Hayes & Curran The session will look at contractual, data protection and other legal and practice issues that affect the use of cloud computing in a law firm environment.
4.00 – 4.15	***Tea/Coffee***
4.15 – 5.00	**Social Media/Use of own devices in the work place, what you need to know** – Deirdre Kilroy, LK Shields Solicitors The session will examine the use of social media and mobile devices in the workplace and the issues, that can arise. The session will include a look at the security risks and other potential problems when workplaces operate "Bring Your Own Device" policies.
5.00 – 5.30	***Panel Discussion*** The presenters will address and discuss questions that attendees might have arising from the presentations.

NEW WAYS TO WORK: Putting your office in the Cloud

Venue: Lecture Theatre, Law Society
Date: Friday 28th June, 2013
Time: 2.00.m. to 5.30p.m.
Fee: €95.00

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Signature: _____

Please return to Veronica Donnelly, Law Society of Ireland, Blackhall Place, Dublin 7.

which I paste the list, and I can edit it by typing in a note of whether the case is adjourned, struck out and so forth.

While waiting for the call-over, I accessed my *Newsstand* app. This app comes with the iPad and is a central location for storing newspaper and magazine subscriptions. I have my favourite newspapers saved there, and I have my morning read and update my social media sites as I read. I have my Twitter and LinkedIn (free) sites connected to my newspapers, so I can post content straight to them. Having updated the world on all things legal, I can then turn my attention to the call-over and see how the day is shaping up.

Can I use your dictaphone?

After the call-over, I phone the office, to be told the post is in, opened, scanned onto our system, and winging its way to me for review by email. Reading through the day's post, I access my practice's case-management system on my office PC via an app called *LogMeIn Ignition*. *LogMeIn* is a paid app and costs €29.99. It's one of the more expensive apps, but one that I would not be without. This basically turns my iPad into my office PC. I read through the post, access the various cases on my system, and I am ready to digitally dictate responses to the post. I use an iPhone/iPad app called *Dictamus*. This has a free version that gives the user 30 seconds of recording. I tried and tested the free version, and purchased the full paid-for version. It is exactly the same as any handheld dictation device, with full edit, overwrite, review and email functionality, allowing me to record dictation and email it to the office for transcription.

The transcription end of things, I should say, is excellent. I downloaded *Express Scribe* from the internet (it cost €14.99) to the typist's PC and purchased a special foot pedal called a 'V-Pedal' from vpedal.com at a cost of $80, including shipping. This is connected to the typist's PC via a USB connection. This is a secure, inexpensive, reliable and effective digital dictation system that I find flawless. Dictation done, I email it to the office for transcription.

Out-of-office experience

That done, I dig out the files from my briefcase. Again, with full access to my case-management system (I use *Opsis Case Management*, which I find to be excellent), I am in a position to create documentation, access my precedent bank, and save documents to a client's file. *Opsis* has a document review function that allows my secretary to search the system to find the letters and so on that were produced by either of us and see which ones have been marked as 'approved and ready for dispatch', so it can be printed and sent off in the post. I can produce letters and correspondence on my headed paper via the *Pages* app and email that correspondence as a PDF. All while out of the office and all using my iPad!

> ***"I believe the iPad (and the iPhone) work brilliantly for solicitors, allowing us to do a day's work from outside the office as if we were sitting in front of our PCs at our desks"***

I then seek out my opposite number and start some discussion on the cases in hand. Where settlement discussions happen, I can take contemporaneous notes of my discussions, my client's instructions, and so on, using *Penultimate*. This turns the iPad's screen into a notebook and allows one's finger to act as a pen to write notes on the screen. This is a paid-for app and costs €4.89. I have to say, I prefer to use a stylus, which is a specially made pen for writing on-screen. I bought one in a local PC retail outlet for €9.99. A finger works, but I find the stylus much neater. Penultimate is great for taking notes during a hearing, saving on the shuffling, ripping, and flurry of paper. These handwritten notes can be emailed to the office to save to the case.

Another note-taking option is *Notebook+*. This is a free app, and I see no need to buy the full version. It is slightly different to Penultimate, as I can actually type up the settlement terms and have them signed electronically by each party on-screen using the stylus. This app allows typed and handwritten content within the same document. That document can then be emailed to the office to be saved onto the client's file and emailed to the parties.

Another option is to type up terms using the *Pages* app and use a WiFi connection to send it to printer. I don't find this to be a time saver or feasible in most circumstances. Where we are using the traditional method of writing up terms and having each of our respective clients sign them, I use a free app called *Genius Scan* to scan the handwritten terms of settlement. I can then email them back to the office as a PDF to be printed and put on a file, emailed to my client, and so on.

All work and no play

It's not all work with my iPad, in fairness. I can take a little time out to do an online crossword, play a little Angry Birds, listen to music, read my latest e-books – all via the one device. If I really have time on my hands, I can use *Pages* to produce newsletters, blog articles and other publications.

My iPad and I work brilliantly together, and I really don't know how I managed before. To the non-believers still using USB sticks and laptops, I say: my pad can do everything your laptop can do, but can do it bigger, better, quicker and easier!

Attack of the CYBERMEN

Legally, cyberbullying is a very grey area. Specific legislation would act as a deterrent, though, and could provide a litmus test for litigation. Clíona Kimber and Hannah Lowry O'Reilly hack your Facebook account

Cliona Kimber is a Dublin-based barrister and a leading practitioner in the area of employment and equality law

Hannah Lowry O'Reilly is a practising barrister

Technology has advanced at an incredibly rapid pace this past decade, so much so that the law has not been able to keep up, and there is a lacuna in relation to the internet and online attacks. A shocking consequence of this technological boom is the prevalence of online or cyberbullying among schoolchildren.

In 2012, a number of high-profile cases of the serious and oppressive consequences of cyberbullying were reported, including in some cases victims tragically taking their own lives after being subjected to bullying campaigns on social networking sites. This horror has brought to light the need for better regulation in relation to cyberbullying in schools.

The *Guidelines on Countering Bullying Behaviour in Primary and Post-Primary Schools* (September 1993) define bullying as "repeated aggression, verbal, psychological or physical, conducted by an individual or group against others".

Cyberbullying refers to bullying that is carried out using technological devices. It can include bullying via text messages, instant chat, emails, videos, social networking sites, apps, voicemails, silent phone calls, and so on. An isolated incident of 'cyber-attack' can't be defined as bullying. The 1993 guidelines state that "when the behaviour is systematic and ongoing, it is bullying". Therefore, while a mean post on a social networking profile should not be condoned, it cannot of itself constitute cyberbullying.

Social networking sites such as Facebook, Twitter and Ask.fm have enabled children to have an online persona, and young people can hide behind the mask of anonymity that the internet allows them create.

In 2011, Cotter and McGilloway reported that 17% of Irish 12 to 18-year-olds have suffered from cyberbullying. The impact of cyberbullying is striking, according to a 2013 report by O'Neill and Dinh, and over half of all children bullied online said they were very upset or fairly upset (52%) and for 44% this has a lasting effect.

School children are also engaging in 'sexting'. The term 'sexting' refers to someone sending sexually explicit pictures of themselves or others via mobile phone, email or the web to another. An example of sexting is a boy taking a 'sexy' photo of his girlfriend and then forwarding it to his friends. The danger of sexting is that the originator has no control over the image once they hit the send button.

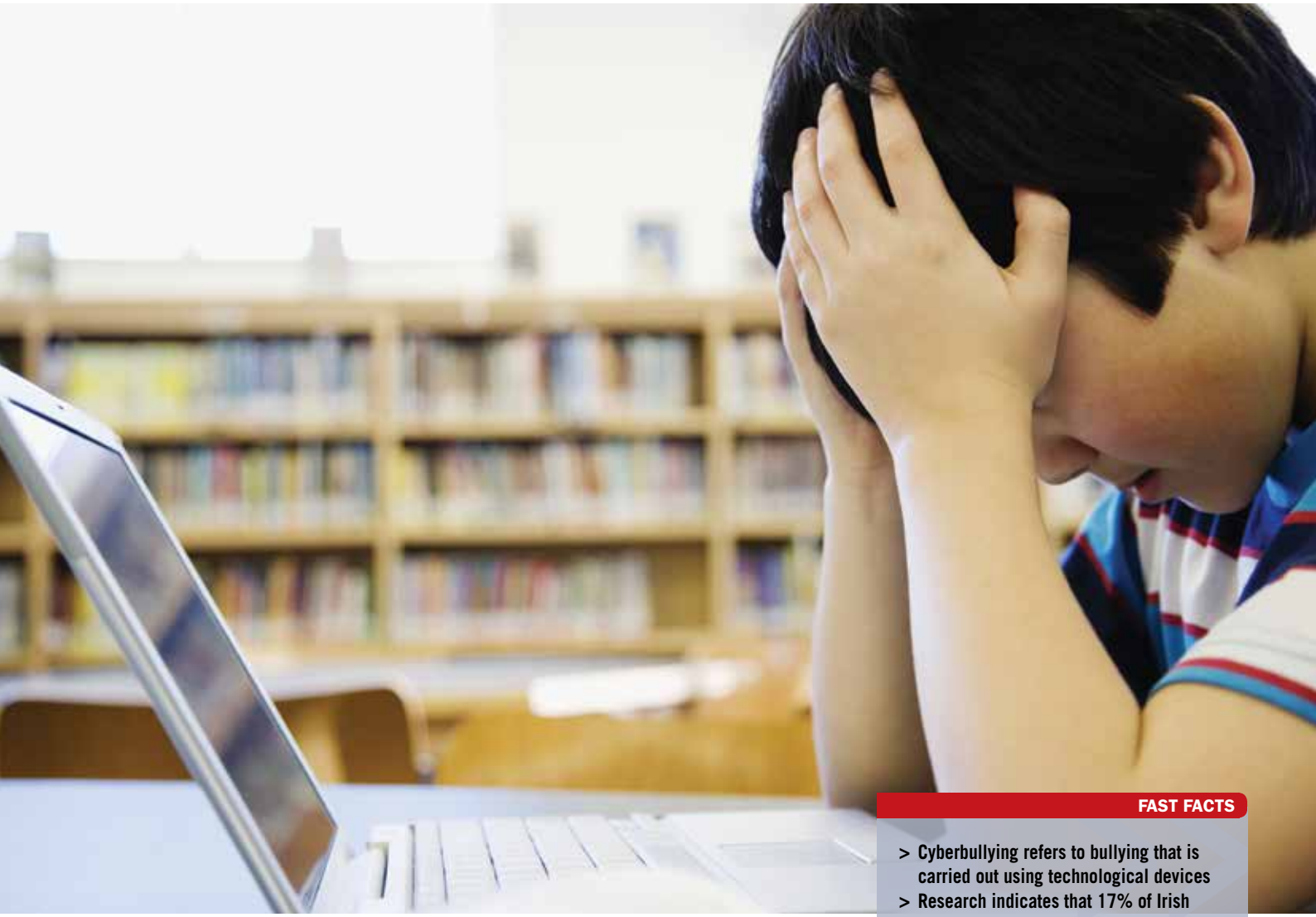
A 2012 report on sexting found that the threat comes mostly from peers and that girls are more adversely affected. The sexting epidemic is a feature of cyberbullying that is extremely serious, as it is potentially contrary to anti-pornography laws. With that in mind, one can see the seriousness of sexting when it is being undertaken by underage children.

> ***"It is vital that schools have an anti-bullying policy in place, and it should include cyberbullying"***

Laws and policies

In 1993, the Department of Education drew up guidelines to counter bullying in schools. These are now outdated and do not address the issue of cyberbullying. Minister for Education Ruairí Quinn has expressed concerns about this and acknowledges that reforms are needed to deal with cyberbullying. In 2012, Mr Quinn called for an anti-bullying working group and, in January 2013, the group delivered a report to the minister. The report acknowledges the many problems of cyberbullying.

The working group believes that every school must have an anti-bullying policy in place. This requirement



Jeremy's poke in class today

FAST FACTS

- Cyberbullying refers to bullying that is carried out using technological devices
- Research indicates that 17% of Irish 12 to 18-year-olds have suffered from cyberbullying and that over half of all children bullied online said they were very upset or fairly upset by it
- Parents are slow to complain to the gardaí about cyberbullying by their children's classmates in case it leads to further bullying

already has a legal footing: under the section 23(3) of the *Education (Welfare) Act 2000*, all schools are required to have a code of behaviour in place. This code is to be drawn up in accordance with the 2008 guidelines of the National Education Welfare Board. However, while these codes are beneficial, in that they set out anti-bullying policies, there is greater need for cyberbullying to be universally acknowledged and for preventative measures to be enacted. The *Education (Welfare) (Amendment) (No 2) Bill 2012* helps in this regard, as it offers an updated definition of bullying and includes references to cyberbullying.

Schools are crying out for practical guidance on how to handle issues of cyberbullying, and they need a clear line of support when a problem strikes. If issues aren't sorted out in schools, this may lead to litigation being commenced by parents against their child's school. The use of criminal law is a potential method of seeking redress. This is a question that provokes much debate: whether criminal sanctions against young people for engaging in cyberbullying is the appropriate action to take. Justice Minister Alan Shatter has stated (7 November 2012) that "bullying is a form of harassment and, as such, falls within the provisions of the *Non-fatal Offences against the Person Act 1997*". He further said that "there is no doubt that bullying using technology, or cyberbullying, falls within the term harassment".

The minister advocates current law to address the problem. The difficulty with bringing successful harassment claims under section 10 is the need to demonstrate persistence in the harassment. Mr Shatter has asked the Law Reform Commission to examine the difficulty that arises with the 'persistence' issue and awaits their conclusions within the first half of this year. The *Equal Status Acts 2000-2004* prohibit harassment and sexual harassment in Irish schools, under section 11. While this is a legislative provision that may be relied upon when taking a potential action against

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'You are inferior. You will perish under maximum deletion'

a school for allowing cyberbullying to take place, it would be difficult to prove, as it is a defence for the school to claim that they took steps that were 'reasonably practicable' to prevent the harassment.

Sexting

The problems that face schoolchildren as a result of sexting are very serious. Let's take the example of the boy who takes a photo of his girlfriend while she is semi or fully naked, and then sends it to his friends or posts it online. What are the consequences of his actions? The existing policy on bullying applies, but it could also be a criminal offence under the *Child Trafficking and Pornography Act 1998*. Section 2 of the act sets out that images of a child (anyone under the age of 17) "engaged in explicit sexual activity" or images that focus on the "genital or anal region" will be considered as child pornography.

If it is established that the image constitutes child pornography, the boy could be liable under section 5 of the act, which sets out that knowingly producing or distributing child pornography is an offence.

What about the friends to whom he sent the picture? They could be liable under section 6 of the act, which creates the offence of possession of child pornography.

It needs to be borne in mind that social media providers may refuse or be reluctant to take material down. This can be seen from the recent Northern Ireland case of *HL (A Minor) v Facebook Incorporated & Ors*, where the 12-year-old plaintiff was posting sexually suggestive images of herself on Facebook via several different accounts with different profile names.

"The need for special cyberbullying legislation is evident. It would address the dilemma of whether to commence a criminal action or not"

What should schools and parents do?

It is vital that schools have an anti-bullying policy in place, and it should include cyberbullying. Children need to be taught internet safety and about the dangers and effects of writing nasty comments on other people's social networking sites or sending aggressive or mean messages via email or phone. In cases where students don't adhere to the anti-cyberbullying rules, the school should have an open door policy, whereby students are encouraged to report any incidence of cyberbullying that they have suffered or from which a fellow student is suffering. Upon receiving such information, the school should investigate the issue and punish anyone found to be cyberbullying and, if necessary, they should also keep records and copies of cyberbullying attacks.

Parents need to monitor their child's internet usage and educate them about cyberbullying. However, there is only so much that parents can do to prevent cyberbullies, so what can parents do when their child has repeatedly been the victim of cyberbullying and the school has failed to put a stop to it? They could contact the gardaí and seek legal advice. The gardaí can take action under the *Non-Fatal Offences against the Person Act 1997*.

The question then arises as to whether a school could be held liable for allowing the cyberbullying to take place. It is an arguable case. A school owes a duty of care to its students. If a school fails to implement an anti-cyberbullying policy or fails to address reports of bullying, in certain circumstances they may be found to be in breach of their duty and, in turn, found to be negligent. Each case has to be addressed on its specific facts, and the Supreme Court judgement in *O'Keefe v Hickey* raises important arguments in this regard.

Cyberbullying is, legally, a very grey area. Parents will be slow to make complaints to the gardaí against a fellow classmate of their child. Not only is this a draconian step to have to take against a classmate, but it could lead to their child being stigmatised and suffering further bullying. The need for special cyberbullying legislation is evident. It would address the dilemma of whether to commence a criminal action or not and it would also act as a deterrent, as it would be made clear to students that engaging in cyberbullying, be it within or outside of school hours, is unlawful. G

LOOK IT UP

Cases:

- *HL (A Minor) v Facebook Incorporated & Ors* [2013] NIQB 25 (1 March 2013)
- *O'Keefe v Hickey* [2009] 2 IR 302

Legislation:

- *Child Trafficking and Pornography Act 1998*, section 2
- *Education (Welfare) Act 2000*, section 23(3)
- *Equal Status Acts 2000-2004*, section 11
- *Non-Fatal Offences against the Person Act 1997*

Literature:

- Cotter, P and S McGilloway (2011), "Living in an electronic age: cyberbullying among Irish adolescents", *Irish Journal of Education*, 39, 44-56
- Department of Education (1993), *Guidelines on Countering Bullying Behaviour in Primary and Post-Primary Schools*
- O'Neill B, T Dinh (2013), *Cyberbullying Among 9 to 16-year-olds in Ireland*, Digital Childhoods Working Paper Series (No 5) (Dublin: Dublin Institute of Technology)
- Ringrose, Jessica, Rosalind Gill, Sonia Livingstone and Laura Harvey (2012), *A Qualitative Study of Children, Young People and 'Sexting': A Report Prepared for the NSP*

Consulting the ORACLE

Legal change guru Richard Susskind is convinced that the legal profession in Britain and Ireland is on the cusp of being transformed into a world of virtual courts, online solicitors, and packaged legal services. Colman Candy consults the Oracle

Colman Candy is a qualified solicitor who writes on legal topics

Prof Richard Susskind, IT adviser to leading law firms and Britain's Ministry of Justice, believes that the legal profession is poised to change more fundamentally in the next two decades than in the previous two centuries. However, this change will create new opportunities for IT-savvy lawyers and firms that adapt to the new market conditions.

In his new book, *Tomorrow's Lawyers: An Introduction to Your Future*, Susskind offers a survival guide for lawyers in this rapidly changing legal landscape and includes vital career advice for graduates starting out on the road to becoming lawyers.

Unlike reaction to his previous books, lawyers' reactions have been positive. Perhaps, he says, they finally accept that change is inevitable and want to prepare for it. In the public sector too, cutbacks in legal funding are forcing practitioners to review how public legal services can still be provided.

Lawyers are often seen as resistant to change, but Susskind says they have no choice and, although there'll be no 'big bang', change will be incremental and will accelerate over the next decade. He accepts that some lawyers are cynics who have 'seen it all before', but he insists that the harsh economic climate is forcing commercial clients to find new ways to cut legal bills.

"You reach a certain point where coming up with ingenious new ways to price legal services is not sufficient. You need to move from pricing differently to working differently, and I think we're at that time just now."

> ***"People see the legal system as kind of a parallel phenomenon that they dip into only in extreme conditions, and most of life goes on in spite of, rather than because of, the support of the legal system – and that is fundamentally wrong"***

Pressure points

Although many lawyers are resistant to radically changing their work practices, British market liberalisation (also coming to Ireland in the *Legal Services Regulation Bill*) has attracted new competition from the likes of major accountancy firms and retail giants such as Tesco. According to Susskind: "There's nothing that will change a market more than competition, and we've never really had that in the legal services market before – and it's only just warming up."

He adds: "It's very hard to think of large firms wanting to change without the pressure of the marketplace."

Susskind identifies three key drivers

The power of in-house counsel – a notion that Orestes fully understood when he consulted the Oracle at Delphi

FAST FACTS

- Lawyers shouldn't assume that only large-scale, low-margin work can be commoditised
- Some of the most interesting developments in legal services are being driven by sole practitioners or smaller firms – particularly those who take advantage of open-source software
- The power of in-house counsel cannot be underestimated. Their immense purchasing power is driving law firms to change how they deliver and price for business
- There's a significant need for public legal education. Many small business owners and citizens remain untouched by the legal system, which Susskind describes as a "profound difficulty"

'Pull my finger' – Keanu Reeves gets unexpected advice from the Matrix's Oracle

of change: the 'more-for-less' demands of clients, new technology, and market liberalisation that is forming a 'perfect storm' for the legal profession.

Although some may be less affected (for example, judges, global dealmakers and legal specialists), many legal functions will become outsourced to paralegals or become fully automated.

Although this seems bad news for most existing firms, Susskind says new market opportunities will emerge and that "one shouldn't confuse the firm that dominates today with individual lawyers who can be positioned in a variety of roles in the future legal profession".

Although deregulation and market entry by big retail players in Ireland hasn't always reduced consumer prices, Susskind cautions: "It's too early to know. I'd hope that consumer prices will come down, but I think that retailing goods and managing inventory is different from retailing knowledge – and I think we can control human inventory in a way that I believe will lead to lower costs."

"I don't think we should think of this as only a 'cost play'. It's pretty clear when one looks at some of the new businesses that have evolved – for example, legal process outsourcing – that the quality of service is extremely high as well."

The full Monty

Another key concept in Susskind's vision is the ability to package some basic legal services, with little client interface needed. Critics warn that this may erode the quality of will-drafting, probate and divorce work, but Susskind replies that only the best providers will survive in the new market, warning that people shouldn't assume that only large-scale, low-margin work can be commoditised. In fact, many large deals or compliance exercises can be broken down into individual tasks for outsourcing to specialists, so "commoditisation is more subtle than people think".

Although legal technology has been around for a while, most software has been developed for back-office applications. Today, social networking and e-commerce has transformed the way we live and work. Says Susskind: "It's impossible that the legal services market will be immune or not be affected by this lifestyle change."

In the past, IT was only available to those who could afford or understand it, but those days are gone, he says, and most lawyers are happy to use technology.

"Some of the most interesting developments in legal services are not driven by big firms, but by sole practitioners or a few partners, people who've got the will and the determination to say: 'Hang on a second! In the days of the world wide web, where there's so much open-source software and there's the ability to knock together systems cheaply and cheerfully over a weekend, we really don't need to be delayed by huge 18-month development projects using external system developers who over-engineer'."

Luddite outlook

Susskind is disappointed by the British government's relatively slow implementation of technology in legal services to date.

"Progress with the take-up of technology in the courts system has been slow. Civil justice, in particular, doesn't seem to attract public funding, or generate enthusiasm among politicians and officials in the same way that criminal justice does."

He concludes that legal services don't rank up there with health or education as government priorities. He cites Lord Woolf's seminal *Access to Justice* report in 1996, much of which was well received, but never acted upon. "I cannot rejoice at the progress," he adds wearily.

However, Susskind is aware of the power of in-house counsel: "I think the future, in large part, is in the hands of general counsel. If they drive law firms harder to change – and they do have immense purchasing power in what is, after all, a buyer's market just now – then the firms *will* change. If they expect law firms to change without urging, it seems to me that that's an unwarranted expectation."

Susskind accepts that many general counsel are cautious, referring to the leading text, *The Innovator's Dilemma* by Clayton Christenson, who observed that market-leading customers and clients are often resistant to change in service delivery. Nevertheless, Susskind insists that, "there's a growing body of in-house lawyers driven by cost pressures who realise that, unless they change the way they work internally and the way they instruct law firms, they simply will not be meeting their shareholders' needs".

> ***"People regard legal services as too costly, too confrontational, too time-consuming and too forbidding, and therefore it's not really part of their lives"***

He emphasises that such clients can change the way the profession operates, for example, by reducing the panel of lawyers they use or by requiring that major law firms outsource routine work to boutique firms.

"I can't overstate how important it is that general counsel think about their future and drive the market themselves," he says.

Alien nation

At the same time, Susskind admits that many smaller clients feel alienated from the law and the legal profession, and often shy away from contacting a solicitor: "I think if you speak to small businesses and individual consumers, a lot of the legal work that they could be paying for – a lot of work that's relevant to them – is somehow by-passing them or they're working around it. It's not that small business isn't heavily regulated or that complex law doesn't apply, or that they don't enter into agreements, it's just that, by-and-large, they can't afford to involve

lawyers at all stages, and so they do their best on their own."

Susskind borrows the language of political philosophy, describing this as a form of alienation: "People have just learned to live without the legal system. They see it as kind of a parallel phenomenon that they dip into only in extreme conditions, and most of life goes on in spite of, rather than because of, the support of the legal system – and that is fundamentally wrong."

He regrets that many people are excluded from legal services because, in his experience, "they regard it as too costly, too confrontational, too time-consuming and too forbidding, and therefore it's not really part of their lives".

"I can't overstate how important it is that general counsel think about their future, and drive the market themselves"

The great untouched

Susskind acknowledges that a problem addressed in his 1996 book, *The Future of Law*, concerned the need to integrate the law more fully into ordinary people's lives but, to a large extent, that has yet to happen.

"It leads to another issue of public legal education, and when one asks people about their levels of satisfaction with public legal services, many of them don't even interact with the law. Although the law could convey all sorts of benefits on them, they would have no sense of that. Many small business-owners and citizens remain, sadly, untouched by the legal system, and that is a profound difficulty."

Besides being a champion of change and market efficiency, Susskind is also deeply committed to wider access to justice for all citizens and feels strongly that society would benefit greatly from a better legal system.

In his words, he's on a mission "to improve access to justice for citizens and to fully or better integrate the law in people's working and personal lives". For him, "all the things I do in life – be it advising judges, advising law firms, as an academic – it's all about trying to bring about change.

"In my heart, I feel that so much of the practice of law and the administration of justice are antiquated and inefficient, and I think we can do a better job, and I want to play a part in actually changing the way we go about the delivery of legal and court services."

LOOK IT UP

Literature:

- Christensen, Clayton M, *The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail* (1997, Boston: Harvard Business School Press)
- Susskind, Richard, *The Future of Law: Facing the Challenges of Information Technology*. (1996, Oxford University Press)
- Susskind, Richard, *Tomorrow's Lawyers: An Introduction to Your Future* (2013, Oxford University Press)

AT debt's DOOR

Paul Keane is managing partner at Reddy Charlton

Daragh O'Shea is a partner in the financial services team at Mason Hayes & Curran

Lorraine Rowland is a senior associate in the commercial litigation department of Reddy Charlton

The two main debt resolution mechanisms available under the *Personal Insolvency Act 2012* are the debt settlement arrangement and the personal insolvency arrangement. Paul Keane, Daragh O'Shea and Lorraine Rowland explain

The new debt settlement arrangement (DSA) and personal insolvency arrangement (PIA) introduced under the *Personal insolvency Act 2012* share common features, particularly in relation to general eligibility criteria and application procedures. The eligibility criteria for DSAs and PIAs (see section 57 for DSAs and section 91 for PIAs) are broadly identical.

To avail of a DSA or a PIA, a debtor must be domiciled in Ireland, or be ordinarily resident in Ireland, or have had a place of business in the State within one year before application. The debtor must be insolvent (that is, unable to pay his debts as they fall due). To establish this, the debtor must make full financial disclosure using a prescribed financial statement (PFS). The information set out by the debtor in the PFS is confirmed by a statutory declaration.

The procedures for applying for and implementing a DSA or a PIA are also broadly the same.

Firstly, the debtor must engage a personal insolvency practitioner (PIP). The debtor will then provide the PIP with details of their assets/liabilities using the PFS. If the PIP is satisfied that the debtor is eligible for a DSA or a PIA, the PIP applies to the Insolvency Service for a protective certificate. If the Insolvency Service is satisfied that the application for a protective certificate is in order, the Insolvency Service will certify this to the court and lodge an application to the court for a protective certificate. If, in turn, the court is satisfied that the debtor qualifies, it must issue the protective certificate. This is the triple lock, which requires the satisfaction of the PIP, the Insolvency Service and the court.

> ***"DSAs and PIAs are designed to be as flexible as circumstances allow with a view to reaching an arrangement with creditors"***

The protective certificate prohibits creditor action against the debtor for a period of 70 days. This can be extended by a further 40 days, and an additional 40 days may be available in certain circumstances where the PIP is replaced.

During the protective period, the PIP and the debtor will attempt to propose a solution for dealing with the debt that will be acceptable to creditors. It is envisaged that the PIP will engage with creditors to obtain submissions, information and, if necessary, proof of debt.

In-built flexibility

DSAs and PIAs are designed to be as flexible as circumstances allow with a view to reaching an arrangement with creditors. The arrangements can provide

FAST FACTS

- DSAs cater for settling unsecured debt (generally over €20,000) with no maximum upward limit
- PIAs cater for settling (i) unsecured debt (generally over €20,000) with no maximum upward limit and (ii) secured debt up to a €3,000,000 (or in excess if all the secured creditors consent to a higher limit)
- A DSA/PIA may not include terms that would mean that the debtor would not have sufficient income to maintain a reasonable standard of living for him and (if any) his dependants

for the payment of a lump sum, phased payment, variations in interest rates and repayment lengths, and/or asset disposal. In relation to asset disposals, principal private residences are given special treatment.

The PIP will convene a creditors' meeting during the protection period, where the scheme will be put to the creditors for consideration. If the minimum creditor approval is not obtained, then the protection comes to an end and the debtor may be subject to renewed action by creditors.

Generally, it may not be proposed as part of a DSA or a PIA that a debtor's home be disposed of. This is subject to

Will DSAs and PIAs get the monkey off your back?

certain exceptions outlined in the act (see section 69 for DSAs and section 104 for PIAs; for example, it may be agreed as part of the scheme that the home is too large/expensive and so will be sold). Also, relevant provisions of the *Family Home Protection Act 1976* or the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* still apply.

If a debtor is six months in arrears under a DSA/PIA, the arrangement terminates and all debts – including arrears and interest under the arrangement – are reinstated, unless the DSA/PIA provides or the court orders otherwise. A creditor or a PIP may apply to court to have the arrangement terminated if the debtor is three months in arrears. Also, a creditor may challenge an arrangement on certain grounds relating to prejudice, fraud, ineligibility or false information on the part of the debtor.

Applications relating to DSAs/PIAs where debts are less than €2.5 million are heard in the Circuit Court. Applications in relation to debts over this amount are heard in the High Court. Applications are generally heard *in camera*.

State priority

The act defines the concepts of 'excluded debts', 'excludable debts' and 'preferential debts'.

'Excluded debts' include liabilities arising from domestic support orders and damages awarded in respect of wrongful death or personal injury. These cannot be compromised under a DSA/PIA and must be paid in full.

'Excludable debts' include liabilities owed to the State, such as taxes and rates, but also debts owed to an owners' management company. These can be compromised via a PIA/DSA with the prior explicit consent of the creditor.

It is envisaged that 'preferential debts' – which overlap somewhat with excludable debts – will be paid in priority to other debt but, with the cooperation of the preferential creditors, this can be varied.

Reasonable living expenses

A DSA/PIA arrangement may not include terms that would mean that the debtor would not have sufficient income to maintain a reasonable standard of living for him and his dependants (if any).

One of the functions of the Insolvency Service is to issue guidelines on what will constitute reasonable standards for debtors. The Insolvency Service published initial guidelines in April, and these will be subject to yearly review. It would appear that the overarching policy is to safeguard a minimum standard of living for debtors while facilitating the recovery by creditors of some of the debts due to them.

Putting together these guidelines must have been a complex task, as it is acknowledged that each debtor represents an individual case. On 18 April last, the head of the Insolvency Service outlined some factors that were considered, including the measures and indicators of poverty set out in government policy publications, the varying size, composition and costs of different households, and the parties who were consulted.

Changes to bankruptcy regime

A number of significant changes have been made to the current bankruptcy code, which is governed by the *Bankruptcy Act 1988*. The changes appear to be framed with a view to promoting non-judicial debt settlement arrangements over an official court process.

When presenting a petition, a debtor must be able to demonstrate that, to the extent that his/her circumstances permit,

DSA OR PIA?

DSA	PIA
DSAs cater for settling unsecured debt (generally over €20,000) with no maximum upward limit.	PIAs cater for settling (i) unsecured debt (generally over €20,000) with no maximum upward limit and (ii) secured debt up to a €3,000,000 (or in excess if all the secured creditors consent to a higher limit).
Creditors participating and voting at the creditors' meeting and who represent 65% (or more) of the value of the debt represented at the meeting must approve the DSA.	Creditors participating and voting at the creditors' meeting and who represent 65% (or more) of the value of the debt represented at the meeting must approve the PIA. In addition, more than 50% of the value of both secured and unsecured creditors who are entitled to vote and have voted at the creditors' meeting must vote in favour of the PIA.
If the debtor complies with the arrangement for five/six years, the debts covered by the DSA will be discharged.	If the debtor complies with the arrangement for a six/seven-year period, extendable by one year, the debts covered by the PIA will be discharged.

COMPARISON WITH BRITAIN

The British system provides for an automatic discharge period of one year and also allows applications to be made for income payment orders (which mirror the bankruptcy payment orders) over three years. These differences, coupled with the emphasis on encouraging applicants into the non-judicial system, may militate against any significant increase in applications in this jurisdiction. Certain debtors may elect to seek to establish the necessary centre of main interests in Britain in order to expedite their return to economic activity.

reasonable efforts have been made to reach an appropriate arrangement with creditors by making a proposal for a DSA/PIA. This may result in an unnecessary burden being placed on a debtor where he/she is aware from discussions with creditors that such an arrangement is neither reasonable nor practicable.

Further, the court must in all cases consider whether, having regard to the financial circumstances of the debtor, the matter would more appropriately be dealt with by entering into a DSA/PIA. If the court reaches such a conclusion, it has discretion to adjourn the hearing of the petition to allow such arrangements to be pursued.

This emphasis on pursuing non-judicial arrangements is also reflected in the change made to the award of a creditor's petitioning costs. Previously, a creditor was entitled to an award for costs. The position now, however, is that the court can exercise its discretion and, in doing so, must have regard to whether the creditor unreasonably refused to accept proposals made under a DSA/PIA.

The effect of these provisions may considerably lengthen the process of an application for bankruptcy, as a debtor will be faced with at least one attempt – but possibly two – at seeking a non-judicial arrangement.

Automatic discharge

The current discharge period of 12 years has been reduced to three years under the act, which is in line with the recommendation made by the Law Reform Commission.

However, the right to discharge, while automatic, is not absolute. The official assignee or a creditor can apply to the court to object to the automatic discharge. Where the court finds that the bankrupt failed to cooperate or has hidden or failed to disclose assets, it can extend the period of bankruptcy for up to eight years.

An automatic discharge may not, however, be the end of the road for the bankrupt. The act allows the official assignee or the trustee in bankruptcy to make an application to court for an order requiring the bankrupt to make payments from his income or other assets for the benefit of his creditors, and is referred to a bankruptcy payment order.

This application must be made prior to the bankrupt's discharge from bankruptcy, is limited to a five-year period, and is subject to variation. A relevant factor for the court to consider before making such an order is the reasonable living expenses of the bankrupt and any dependants. Therefore, it is conceivable that the entire process may last for up to eight years in total. G

LOOK IT UP

Legislation:

- *Bankruptcy Act 1988*
- *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*
- *Family Home Protection Act 1976*
- *Personal insolvency Act 2012*

FROM A LAND *down under*

John McCormack is a Galway-based barrister

At a recent seminar on constitutional reform held at Blackhall Place, Justice Minister Alan Shatter expressed a preference for the system of family courts as established in Australia. So what does that system look like? John McCormack gets digging

The Government has expressed the intention to have a referendum in the autumn that will, among other things, establish a Court of Civil Appeal and specialist family courts. Recently, the justice minister said that he intended to engage in a full process of consultation with all the interested parties as stakeholders, but stated his personal preference for the system of family courts as established in Australia.

The Family Court of Australia was established by parliament in 1976 under chapter 3 of the constitution as a state court exercising both state and federal jurisdiction. It began operating on 5 January 1976, and consists of the chief justice, the deputy chief justice and other judges. The court operates in all Australian states and territories, except Western Australia.

The passage of the *Family Law Act 1975* heralded a no-fault divorce regime and aspired to create a holistic approach to dispute resolution with the setting up of a specialist family court complete with court-attached conciliation and counselling.

"The Australian family law courts system and, in particular, the Western Australian model has a lot to recommend it. The question is, can we afford it?"

Today, there are factors that distinguish the Australian family law courts system from any comparable systems, in particular its dual role in counselling and mediation, known collectively under the *Family Law Act* as 'primary dispute resolution methods'. The judges in the courts are required by the act to be appointed for their suitability to deal with matters of family law by reason of training, experience and personality.

In relation to the jurisdictional division of the Family Law Court and the Federal Magistrates Court, any matters not specifically referred to by the constitution as being within the legislative power of the commonwealth are the responsibility of the states. Where there are inconsistencies between valid state and commonwealth legislation, section 109 of the constitution requires the latter to prevail.

From the outset, the then attorney-general, Lionel Murphy, envisaged the court as an informal, private and unthreatening atmosphere for the resolution of family disputes, with the design of small courtrooms where judges and counsel remained unwigged and with the proceedings being closed to the public.

In 1983, this was amended and proceedings were required to be held in open court, with tight restrictions introduced on the reporting of identifying information about the parties and their children.

Increasing workload

Over the years, the Family Court has sought to manage its ever increasing workload in a variety of ways. The court's jurisdiction is exercised through a judicial structure comprising judges, judicial registrars, senior registrars and deputy registrars – all but the judges exercising delegated jurisdiction. This is necessary because of the diversity of the matters that come before it, and also because of the constitutional constraints.

The judges and other decision makers must deal with matters ranging from allegations of child sexual abuse, international abductions and disputes involving complex trusts and overseas assets, to arguments about a child's surname or who should receive the share of a small bank account, or house and garden items. Registrars also play an important role by using their delegated powers to ensure adherence to the guidelines, which regulate case management within the court.

The *Family Court (Additional Jurisdiction and Exercise of Powers) Act 1988* amended the *Family Law Act 1975* to create the offices of deputy chief justice, judicial administrator and judicial registrar, and established a permanent appellate division of the court. In addition, jurisdiction under the *Family Law Act* was exercised by the

They do family differently in Oz

FAST FACTS

- The Australian *Family Law Act 1975* heralded a no-fault divorce regime and aspired to create a holistic approach to dispute resolution with the setting up of a specialist family court complete with court-attached conciliation and counselling
- There are factors that distinguish the Australian family law courts system from any comparable systems, in particular its dual role in counselling and mediation
- The Family Court's jurisdiction is exercised through a judicial structure comprising judges, judicial registrars, senior registrars and deputy registrars
- Interim procedures, undefended work, and matters that involve consent orders are usually delegated to judicial registrars by the judges, but only judges can make final orders concerning children, while judicial registrars can make final property orders

state and territory and Magistrates Court and now, also, by the Federal Magistrates Service. For obvious reasons, judges hear those matters that go to a final defended hearing.

Interim procedures and undefended work and matters that involve consent orders are usually delegated to judicial registrars by the judges via the *Family Court Rules*. Because of constitutional concerns, only judges can make final orders concerning children, while judicial registrars can make final property orders providing that the gross value of the property that is the subject of the order does not exceed certain value limits. Where the parties consent, there are no constraints to jurisdiction.

It is important to note that appeals from anyone other than a judge or federal magistrate must be by way of *de novo* review rather than an appeal. On an appeal from a judge's decision, it allows examination of material from the first hearing, with the court having discretion to admit additional material and reach different conclusions.

Into the West

As waiting lists in the courts grew, it was necessary in 1999 that the Family Court judges would agree to delegate their powers and some matters to a new category of senior registrars. In the Family Court of Western Australia, which was set up under the *Family Law Act 1975* as a state family court, Mr Justice Stephen Thackray stated that there was a 35% increase in matters listed for trial in 2010/11 and, although the delay rate improved significantly, the waiting time for trial still stood at nearly two years. This was notwithstanding the court having employed many strategies to reduce delays, including having magistrates (at the lower court level) conduct more trials and the greater use of judicial settlement conference.

This is of particular relevance, as it would appear that Minister Shatter envisages a two-tier system similar to that of Western

Australia; that is, where the family law jurisdiction of the three courts – the District, Circuit and High Court – would now be amalgamated and reduced to two courts: a lower family court and an upper family court, the upper family court having no limit on jurisdiction.

The Western Australia experience demonstrates that, unless there are adequate resources, we could be in a situation where the delay in getting a case on for trial could lengthen rather than shorten, despite the best intentions of all concerned.

It is instructive to note that, in Western Australia itself, which has a population of 2.4 million, the court's workload as per the 2011 annual report was as follows:

- Applications received – 14,749,
- Matters finalised – 15,226,
- Divorce applications – 5,252,
- Final order applications – 2,633,
- Interim order applications – 4,582,
- Consent order applications – 2,282
- Finalisations by trial – 296,
- Appeals – 29.

The staffing levels were approximately five judges, eight magistrates, two registrars, 55 registry support staff, 32 judicial support staff, 15 family consultants and indigenous family liaison officers (IFLOs) to deal with the Aboriginal community, and six counselling support staff.

In relation to the applications for final orders, it should be noted that some of these would have been parenting-only orders, some would have been property-only orders, and some a combination of both. The remaining applications sought other reliefs, such as the issuing of passports and injunctions. Interestingly, there were only 130 applications seeking spousal maintenance, child maintenance or child support orders, compared with 142 such applications the previous year.

In 2011, there were 29 appeals/applications for leave to appeal filed from the decisions of the judges of the Family Court of Western Australia. Appeals from judges exercising non-federal jurisdiction were heard by the Western Australia Court of Appeal rather than by the full court of the Family Court of Australia. Six such appeals were filed during the year under review. A total of ten full court judgments were handed down, four appeals were dismissed, and the remaining six were allowed. As of 30 June 2011, the number of appeals outstanding was 28.

The registrars deal with most of the applications for consent orders, subpoena hearings, procedural hearings and divorces. They conduct most of the conferences, as well as advising court staff and litigants on more complicated matters of practice and procedure. Trends there, like in Ireland, indicate a high volume of cases involving unmarried parties, and many litigants are self-represented.

The legislation provides for parties to undertake a family dispute resolution process (FDR) prior to commencing parenting proceedings in the court. However, there are a number of grounds on which parties may be exempt from attending FDR. During 2011, about 58% of all parenting applications were commenced on the basis that a ground for exemption was established, hence FDR was not conducted prior to the commencement of the proceedings.

Counselling and consultancy service

The management of children's cases is based on collaboration between the family consultants and the judges and magistrates.

> *"From the outset, the court was envisaged as an informal, private and unthreatening atmosphere for the resolution of family disputes"*

In January 2011, the court implemented a new child-related proceedings pathway for people seeking parenting directions from the court. This was designed in part to try out cases for referral to conferences with family consultants in order to allow the Family Court Counselling Consultancy Service (FCCCS) greater capacity to provide a higher level of case management in complex cases.

In this approach, the first appearance is before a magistrate in a child-related proceedings court list where, with the advice from a family consultant, the need for referral to a case-assessment conference is determined. The family consultant (who would have a background in social work or psychology) contributes advice based on initial screening of possible risk to the safety and well-being of children or other family members. The annual report states that the implementation of the child-related proceedings model in January 2011 allowed for the prioritising of resources towards more complex cases and more intensive case management.

The majority of cases, over time, achieve suitable outcomes without having to go to trial. Commenting on that, one would note the significant resources that would be necessary to implement this system from scratch.

The work of the FCCCS relies on the support of other agencies within the broader family law and human services sector. For example, the Department of Child Protection has a co-located worker based at the Family Court of Western Australia. This has enabled the timely consideration of child protection matters. Collaboration with the department has become an integral feature of the daily operations of the Family Court. The child protection consultant has forged a strong departmental presence at the court through collaborative working arrangements

ORGANISATIONAL STRUCTURE

The Family Court of Australia is led by Chief Justice Diana Bryant, who overseas the judicial administrative functions of the court. The court has 19 family law registries in all states and territories – except Western Australia, which has its own family court. The registries are designed and staffed to support families to resolve their family law disputes and, if that is not possible, to provide judicial determination on the disputes. The registries also support the family law jurisdiction of the Federal Magistrate Courts.

Judges are the most senior members of the Family Court and are appointed by the Governor General, usually from the ranks of the legal profession. Appointments to the Family Court have also included academics with special expertise in family law. Currently, there are 35 judges.

The Family Court of Australia has its own appeals division, so an appeals judge can hear appeals against federal magistrates' decisions, while the full court of the Family Court of Australia, comprising three appeal judges, can hear appeals against decisions by judges in the Family Court of Australia, the Family Court of Western Australia and, in some cases, the Federal Magistrates Court.

There are ten judges of the appeals division, including the chief justice and the deputy chief justice. The five judges of the Family Court of Western Australia also hold positions in the Family Court of Australia. There are a series of judicial committees to assist the chief justice and the courts in the implementation of their tasks, including the Family Violence Committee, the National Case Management Committee and the Costs Issues Committee.

Western Australia is only unusual insofar as it was not part of the agreement of 1975. It maintains its own separate family court, which deals with federal legislation, such as the *Family Law Act*, as well as state legislation, such as the *Family Court Act*. In the other states, there is a duplication of courts.

with the family consultants and judicial officers. Orders protecting children are now often able to be made earlier in proceedings.

Less adversarial trials

In July 2006, under part VII of the *Family Law Act*, the court implemented its model for 'less adversarial trials' to be applied to all new child-related proceedings in the Family Court without the need of the consent of the parties. According to the court, a change from a traditional, common-law approach to a less adversarial trial has significant implications not only for the conduct of family law litigation, but also the conduct of litigation as a whole.

In a less adversarial trial, no affidavits are filed before the trial and parents only complete a questionnaire. The judge rather than the parties or lawyers decides on how the trial is conducted. The judge controls the case and gets everyone to concentrate on the major disagreements about the child's best interests. Parents and carers can speak directly to the judge and not simply to their lawyers. The judge identifies the issues to be decided and the evidence to be heard, and the judge is assisted by evidence from a family consultant.

Proposed changes

In 2008, the federal attorney general announced a review of the delivery of family law services by the Family Court of Australia and the Federal Magistrates Court. The report recommended that the most effective model for the delivery by the courts of family law services would be a single family court with two separate judicial divisions serviced by a single administration. The proposed model is similar to that of the Family Court of Western Australia, which the Law Council of Australia, in its submissions, had noted provided a useful model, structure and functioning of an integrated family court.

The chief justice noted that, at present, the two courts had concurrent jurisdiction doing family law work with no legislative differentiation. Her submissions favoured combining the current family law functions of the Federal Magistrates Court with the Family Court of Australia under a new court with a new name. It would appear that the majority of proceedings under the *Family Law Act* are now filed in the Federal Magistrates Court and, in general practice, only the more complex and protracted family law cases are transferred from the Federal Magistrates Court to the Family Court. It is for this reason that I have concentrated in particular on comparing and analysing the model of the Family Court of Western Australia.

Suitable for Ireland?

As can be seen, a lot of the work carried out by judges or registrars in the pre-trial procedure is very similar to our case-management structure, which was introduced to the Irish family law courts over the last number of years. I think most practitioners would agree that this has actually worked to the benefit of parties in identifying issues and making sure matters are ready for trial.

A difficulty has arisen, however, in the preparation of reports under section 47 of the *Family Law Act 1995* and/or section 42 of the *Family Law (Divorce) Act 1996*, which are commonly used by practitioners in custody or access disputes. It is for the practitioners themselves to organise and the parties to finance such reports, which are prepared invariably by private practitioners in the area of child psychology and so on.

The other widely used procedure is under section 20 of the *Child Care Act 1991*, which allows a court to order the HSE to carry out a report or investigation with a view to providing a report on whether a care order or supervision order is appropriate in relation to a child who is the subject of proceedings. On the completion of a section 20 report, if the HSE is of the opinion that neither a care order nor supervision order is required, then usually very little, if any, other guidance is contained therein. In my experience, this has been the source of much frustration for members of the judiciary hearing family law cases.

In the Australian model, the family law consultants are attached to the court full-time to prepare such reports. If such a system was enacted here, it would require a new structure with an amalgamation of the child protection services and a different mindset for the carrying out such reports. Bearing in mind how long it currently takes to get such reports, if the same were to be used extensively, then the aforementioned delays in family law proceedings being determined are again likely only to be increased – and justice delayed is justice denied.

The minister's stated intention to open a debate in relation to reforming the family law court structures in Ireland is to be applauded. In the final analysis, the Australian family law courts system and, in particular, the Western Australian model has a lot to recommend it. The question is, can we afford it in these times of austerity? G

"The Western Australia experience demonstrates that, unless there are adequate resources, we could be in a situation where the delay in getting a case on for trial could lengthen rather than shorten, despite the best intentions of all concerned"

LOOK IT UP

Australian legislation:

- *Family Court (Additional Jurisdiction and Exercise of Powers) Act 1988*
- *Family Law Act 1975*

Irish legislation:

- *Child Care Act 1991*, section 20
- *Family Law (Divorce) Act 1996*, section 42
- *Family Law Act 1995*, section 47

Garda Commissioner Garda Martin Callinan was guest speaker at a recent parchment ceremony at Blackhall Place, seen here with director general Ken Murphy

The Garda Commissioner Garda Martin Callinan and Law Society President James McCourt congratulate Caroline Davin-Power on receiving her parchment recently. She was accompanied by her dad, RTÉ's political correspondent, David Davin-Power

The President of the High Court, Mr Justice Nicholas Kearns *(left)*, was a special guest at the parchment ceremony on 16 May, seen here with Judge Jacqueline Linnane of the Circuit Court and Law Society President James McCourt

The Chairman of the Joint Oireachtas Committee on Justice, Defence and Equality, Mr David Stanton TD, was the guest speaker at the 16 May parchment ceremony, seen here in conversation with director general Ken Murphy

Kerman & Co are on the ball

In late April, Kerman & Co – one of Britain's leading law firms, specialising in the sports and energy sectors – launched its Dublin office at Fitzwilliam Place, Dublin 2. The firm acts for many of Europe's prominent sporting bodies, including the Ryder Cup, the English and Welsh Rugby Football Unions, Wimbledon, UEFA, the British Racehorse Owners' Association, and the GPA Tour.

The official opening was attended by 140 local and international guests, many sports organisations, their advisers and other guests. The keynote speaker was Donagh Morgan (assistant secretary and head of the Sports Division at the Department of Transport, Tourism and Sport). He outlined the sports agenda and priorities of the department for the year ahead, as well as the notable consequences for the sports sector of the EU having acquired a supporting competence in the field of sport.

Kerman & Co was awarded the ACQ Global Awards AIM 'Law Firm of the Year' and 'Oil and Gas Law Firm of the Year' in 2012.

Sean Nolan (partner, Kerman & Co), Andy Kerman (senior partner), Daniel O'Connell (managing partner, Kerman & Co), Hilary Forde (solicitor), Nick Bitel (head of sports department) and Donagh Morgan (Department of Transport, Tourism and Sport)

Made of more!

The sizzling sounds of the Guinness Jazz Band welcomed over 750 runners and walkers to this year's annual Calcutta Run on 25 May. A whopping €120,000 in sponsorship has been raised to date this year for the Peter McVerry Trust and GOAL.

In glorious weather, the event got off to an energetic start with a warm-up by sponsors One Escape. After some encouraging words from Law Society President James McCourt, the athletes were quick off the mark for their highly strenuous (or very relaxing) 10km – depending on the pace selected!

Back at the Blackhall Place finish line, the weary runners and walkers were greeted by the smoky aroma of a garden barbecue. Children launched themselves at the bouncy castles, while there were copious amounts of food and refreshments.

The hope is that the original target of €200,000 will be achieved – especially with the help of corporate donations. So please keep your contributions rolling in for these excellent causes!

PICS: CIAN REDMOND

(Above): Orlaith and Clodagh Nic Dhomhnaill enjoy the sunshine after the run; and *(left)*: second and first placed runners

(Back, l to r): Carmel Drumgoole (GOAL), Anne Marie Connolly (Peter McVerry Trust), Ronnie Feeney (Bank of Ireland, main sponsor), Cillian Mac Domhnaill (Law Society) and Alan Vard (GOAL). *(Front, l to r)*: Pat Doyle (Peter McVerry Trust), Eoin MacNeill (A&L Goodbody) and James McCourt (Law Society president)

The Calcutta Run Committee thanks all its sponsors, including Bank of Ireland, One Escape Health and Fitness, DX, Thornton's Recycling, Pearl Audio Visual, Kefron Filestores, The Panel, Traffic Management Systems, Smyth's, Seafood2go.ie, Compass Catering and Timing Ireland. Thanks, too, goes to all those legal firms that signed up as Calcutta Run Supporters – and to the volunteer registrars and stewards.

Eva Massa (EU and International Affairs Committee), Evangelos Tsouroulis (president of the CCBE), Hélène Biais (Brussels representative, Délégation des Barreaux de France) and James McCourt (President of the Law Society)

Col John Spierin (director of legal Service, Defence Forces), Mary Fitzgerald (foreign affairs correspondent, *The Irish Times*), Dr Gavin Barrett (senior lecturer at UCD), Mary Casey (chair, EU and International Affairs Committee) and James Kingston (legal adviser, Department of Foreign Affairs and Trade)

Don't be negligent – get the book!
At the recent launch of the book *Lawyers' Professional Negligence and Insurance* were co-authors Bill Holohan *(left)* and David Curran *(right)*, with Mr Justice Michael Peart, who wrote the foreword

Getting to grips with Islamic finance
Participants in the Diploma in Islamic Finance and the Advanced Diploma in Islamic Finance graduated on 27 April. The diplomas were delivered by the Law Society Finuas Network in partnership with the Chartered Institute of Management Accountants (CIMA). Celebrating with the graduates were: Simon Murphy (Law Society Finuas Network), Neil Ryan (Assistant Secretary, Department of Finance), Denis McCarthy (divisional director of CIMA Ireland) and Dr Mohd Bakar (chairman, Amanie Holdings and Advisors, Malaysia)

ON THE MOVE

Mason Hayes & Curran has appointed Liam Guidera as a partner in the litigation department. Liam focuses on the resolution of business disputes and the representation of members of trade and political associations and unions. He has also acted for high profile parties in tribunals of inquiry.

William Fry has appointed Eibhlin O'Donnell as partner. She joined the firm in 2003 and is a member of the banking and financial services department. She specialises in secured and unsecured lending transactions, acquisition finance, property finance, syndicated loans and debt restructuring.

William Fry has announced the appointment of Catherine O'Flynn as partner. Catherine joined the firm in 2001 and specialises in equality legislation and presenting cases to the Employment Appeals Tribunal, the Labour Court, the Equality Tribunal and the Rights Commission.

William Fry has appointed Cliona Donnelly as partner. Cliona is a tax specialist with over ten years' experience in advising clients in tax structuring, including corporate reorganisations, mergers and acquisitions, due diligence. She is also a key member of the firm's foreign direct investment group.

PICS: DON MACMONAGLE

At the Law Society's annual conference in the Europe Hotel, Killarney, were *(l to r)*: Ken Murphy (director general), Carol Shatter, Justice Minister Alan Shatter, and Geraldine Clarke (past-president)

Simon Murphy and Melissa Gowan

John Galvin (Kerry Law Society chairman), James McCourt (Law Society president), Pat Mann (Kerry Law Society president) and Ken Murphy (director general)

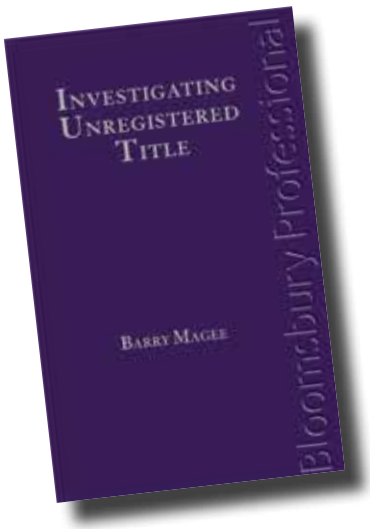
Norville Connolly, Dan O'Connor and President of the Law Society of Scotland Austin Lafferty, who gave the very amusing after-dinner speech

Barbara Cotter, James McCourt, Denise and Christopher Callan

Brendan Frawley, Jamie Harrington and James McCourt

Investigating Unregistered Title

Barry Magee. Bloomsbury Professional (2012), www.bloomsburyprofessional.com. ISBN: 978-184766-732-8. Price: €185.



Whereas the title to registered land is relatively straightforward – the Land Registry folio indicating the result of all previous dealings in relation to the land – unregistered title is more like a fossil, revealing the terms of all of the transactions that took place over time, but leaving the reader to ascertain whether or not they achieved their intended result.

Investigating unregistered title in conveyancing has always been a complex task. This complexity has increased greatly in the last half-century, during a period of rapid development (boom and bust) and increasing urbanisation. Changes in land use have been a factor, but likewise the volume of changing legislation, for example, in the areas of family law, insolvency, succession and taxation (who could claim to be able to recall from memory the multiplicity of stamp duty rates and exemptions that have applied to property in recent years?). The part that property transactions played on the country's recent road to ruin will also feature in the measures taken to restore order in the property market and will add complexity to unregistered property titles.

In contrast, clients expect conveyancing to cost less than a (modestly priced) mass-produced designer handbag or a set of tyres for a boy racer. The recent introduction of compulsory first registration of title for all has added yet more significant work to the conveyancing of unregistered title. The more that registration reduces the volume of unregistered title over time, the more exceptional and time consuming it will become.

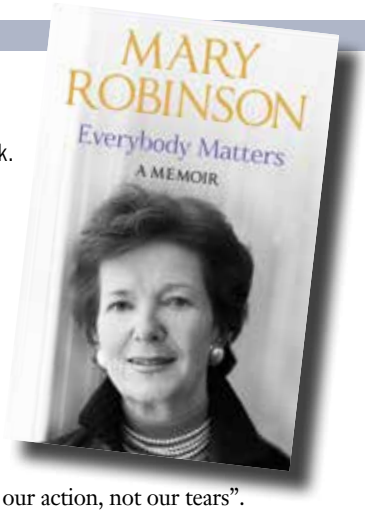
Against this backdrop, the appearance of this book is most welcome. It strikes a balance between brevity and detail and will fit well between the 'nutshell' texts and the weighty tomes. This results in a practical size, which will ensure that it will always lurk on my desk. The style is direct and practical. Account is taken of the radical reforms introduced by the *Land Law and Conveyancing Reform Act 2009*. There are chapters dealing with the basics of title; freeholds; leaseholds; general investigation of title; the contents of deeds; events on title (including joint tenancy, corporate insolvency and adverse possession); implied covenants; capacity (with pre and post-2009 act analysis of trustees and mortgagees); State property (this chapter is novel, useful and interesting alike); easements (with pre and post-2009 act analysis); mortgages, charges and liens; family law; identity and maps (very relevant to first registration in the Land Registry); and searches. The glossary of common terms will be especially useful for students and non-conveyancers.

Particularly beneficial to the reader is the presentation of detail in tabular format, for example, checklists, ground rents, limitation periods, implied covenants, easements, and the priority of charges. A minor criticism is the lack, in common with many law books in recent years, of a hierarchical system of headings within each chapter – I find an alphanumeric system best. Instead, each paragraph is numbered, but this does nothing to convey the structure of the author's treatment of the subject matter.

This book will be valuable to practitioners of all levels, trainees, students, non-legal property professionals, and any other interested reader. I imagine it will also be consulted by academics to see what has become of the theory in practice. Of course, on any issue of property law, practitioners should consult several (if not all!) of the text books. This book will be a good place to start. Knowledge is found among the branches.

Peter Byrne is a solicitor in the Commercial and Property Section of the Law Department of Dublin City Council.

Everybody Matters



Mary Robinson. Hodder & Stoughton (2012), www.hodder.co.uk. ISBN: 978-144472-331-1. Price: stg£20.

Mary Robinson's biography, written with her daughter Tessa, is an interesting as well as an inspiring read. The book discloses the source of Robinson's tenacity in her journey to becoming barrister, senator, Ireland's first woman president, UN High Commissioner for Human Rights, and a fierce defender of the rights of the poor and underprivileged. Robinson was not afraid to confront, test, and at times defy convention on her quest for justice.

Elected a senator at the age of just 25, she strove vigorously for reform in the areas about which she particularly cared, including women's rights and the causes of the impoverished. As a barrister, she took a principled, rather than a commercial, approach to her cases, choosing to advocate on behalf of the impecunious, the disadvantaged, and the deprived.

When she became the first woman president of Ireland in 1990, she injected into the role a dynamism and vigour that helped bolster Ireland's reputation abroad and caused real joy to the people of Ireland. Much of Robinson's time as UN High Commissioner for Human Rights was spent travelling "to many of the most troubled regions of the planet". She acknowledges that people in those regions "needed our action, not our tears".

Robinson explains how she subsequently formed Realizing Rights in 2002, a New York-based organisation that promoted social and economic rights. She writes about the work she currently does at her eponymous Climate Justice Foundation. She also describes her current role as one of the 'Elders', a group of eminent global leaders formed by Nelson Mandela on his 89th birthday in 2007.

Robinson tells her story with quiet confidence and humility. She has been relentless in her work for the rights of the oppressed and underprivileged. It is impossible to be anything but inspired by this chronicle. G

Emma Keane is a barrister, practising mainly in Dublin.

JUST PUBLISHED

New books available to borrow

- Barnes, Rachel, *Professional Services Agreements: a Guide for Construction Professionals* (ICE Publishing, 2012)
- Birds, John, *Birds' Modern Insurance Law* (9th ed; Sweet & Maxwell, 2013)
- Connor, Rosalind *et al*, *Pensions and Corporate Insolvency: a Practitioner's Guide* (Jordans, 2013)
- Dowling, Karl and Robert Grimes, *Irish Probate Practitioners' Handbook* (Round Hall, 2013)
- Grist, Berna, *An Introduction to Irish Planning Law* (2nd ed; IPA, 2012)
- Harris, Brian, *Disciplinary and Regulatory Proceedings* (7th ed; Jordans, 2013)
- Lambert, Paul, *Data Protection Law in Ireland – Sources and Issues* (Clarus Press, 2013)
- Lloyd, Ian and David Mellor, *Telecommunications Law* (2nd ed; Sweet & Maxwell, 2013)
- McFadden, David, *The Private Enforcement of Competition Law in Ireland* (Hart Publishing, 2013)
- Moore-Vaderaa, Rithika *et al*, *Good Practice Guide to Electronic Discovery in Ireland* (eDiscovery Group of Ireland, 2013)
- Pollard, David, *Corporate Insolvency: Employment and Pension Rights* (5th ed; Bloomsbury Professional, 2013)
- Reid, Colette (ed), *Civil Litigation* (Law Society manual) (3rd ed; OUP, 2013)
- Waincymer, Jeffrey, *Procedure and Evidence in International Arbitration* (Kluwer, 2012)
- Weisgard, Geoffrey M, *Company Voluntary Arrangements and Administrations* (3rd ed; Jordans, 2013)
- Wijffels, AA and CH van Rhee, *European Supreme Courts: a Portrait Through History* (Third Millennium, 2013)

New e-books available to borrow – contact the library for login details

- McFedries, Paul, *iPad 4th Generation and iPad Mini Portable Genius* (John Wiley, 2012)
- Ellison, Robin, *The Pension Trustee's Handbook* (7th ed; Thorogood Ltd, 2011)

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Law Society Council meeting 17 May 2013

Guide to Good Professional Conduct

The Council approved an update of the *Guide to Good Professional Conduct* for circulation to the profession. It was agreed that, as a statement of the high professional standards of the profession, the guide was a core document for all practising solicitors.

Report of Regulation 13 Review Group

The Council approved the report of the Regulation 13 Review Group, which had been established following the AGM in November 2012 to consider the steps that might be taken by the Society to address the problem of touting at the criminal courts.

The Council noted that there was no 'silver bullet' to address the issue, but agreed that a combination of specified initiatives could assist. The Council approved the recommendations of the review group for implementation by a number of the Society's committees.

Resolution in support of Turkish lawyers

The Council noted that the European Criminal Bar Association had passed a resolution in support of members of the Istanbul Bar Association who were being prosecuted by the Turkish state for actions taken in the exercise of their professional duties.

The Council passed a resolution calling on Turkey to comply with the UN principles on the role of lawyers, to release all lawyers detained in breach of these principles, to ensure the personal and professional safety of all lawyers, and to desist from the prosecution of lawyers or their associations who sought to protect their members from persecution.

It was agreed that the resolution should be communicated to the Turkish ambassador to Ireland, with copies to the Minister for Foreign Affairs and the Minister for Justice.

Remuneration review of senior management pay

The director general and the deputy director general having withdrawn from the meeting, the Council discussed the remuneration review of senior management pay prepared by Towers Watson. Following a presentation made by the chairman of the Finance Committee, Michelle Ní Longáin, the Council considered the contents of the report.

Following a lengthy discussion, the Council resolved that it:

- Welcomed the report's conclusions that the Society's governance structure and processes for managing reward are working well and that the pay levels and benefits packages of the director general, the senior management team, and other executive roles are market competitive with appropriate comparators,
- Agreed to place the remuneration review in the members' area of the Society's website, together with an explanatory note from the president: (a) identifying the principal points in the simplest possible terms; (b) outlining the legal advice on disclosure; (c) confirming that the Society's pension fund is 95% funded as verified by the Society's actuaries, Mercer; and (d) confirming that no 'Irish Medical Organisation-type' situation pertains in the Society.

In the course of its discussion, the Council recorded its appreciation for the excellent work and commitment of the director general, the senior management team and the executive of the Society generally, who have the Council's full support. G

BRIEFING

Practice notes

Property tax: recommended wording for Conditions of Sale

CONVEYANCING COMMITTEE

Section 123 of the *Finance (Local Property Tax) Act 2012* provides that any local property tax (LPT), interest or other monetary penalty amount that is due and unpaid by a liable person shall be and remain a charge on the relevant residential property to which it relates. Section 124 of the act provides that the charge referred to in section 123 shall continue to apply without a time limit until such time as it is paid in full.

Section 126(1) of the 2012 act (as amended by section 12(e) of the *Finance (Local Property Tax) (Amendment) Act 2013*) provides that a vendor of residential property shall, before completion of the sale of the property, pay any local property tax, penalties, and accrued interest due and payable in respect of that property. Section 126(2) of the 2012 act (as amended by section 12(f) of the 2013 act) provides that LPT shall be paid, notwithstanding that a sale of a property is completed before that tax is payable, in accordance with section 119(1A) (inserted by the 2013 act).

Section 127 of the 2012 act provides that any unpaid LPT and any penalties and accrued interest shall remain a charge on the property to which it relates. This statutory obligation on the vendor does not mean that the amount of the LPT already paid by the vendor cannot be apportioned between the vendor and the purchaser at closing. It is the view of the committee that this should be done, except where an exemption from LPT applies.

The above type of statutory obligation was not envisaged at the time that General Conditions 8(c) and 27(b) of the Law Society's standard contract for sale were drafted. As currently drafted, the two are mutually exclusive, whereas the manner in which LPT should be dealt with would require that both general conditions would apply. The committee therefore recommends that the following special condition be inserted in the Conditions of Sale: *"The Vendor shall discharge all local property tax relating to the Subject Property in advance of the completion of the Sale and furnish the Purchaser with confirmation of payment on completion of the Sale. The amount paid by the Vendor in respect of local property tax relating to the Subject Property shall be apportioned as between the Vendor and the Purchaser in accordance with the provisions of General Condition 27. General Condition 8(c) and General Condition 27 are amended accordingly."*

Practitioners should note that section 17(4) of the 2012 act provides that "the amount of local property tax to be charged for 2013 and determined in accordance with subsection (1) or (3), as the case may be, shall be an amount which is reduced by 50 per cent." Therefore, the charge should be apportioned over the entire calendar year, as the charge relates to the full year. It is not the case that the tax applies only in respect of the period between 1 July and 31 December 2013.

Where an exemption from LPT applies and the LPT will, therefore, either not arise (that is, new properties) or will not be apportioned between the parties (for example, purchaser is a first-time buyer), evidence of entitlement to the exemption should be furnished by the relevant party, if necessary in the form of a statutory declaration.

Practitioners should note that Revenue has advised that, after 28 June 2013, it will be possible to check online what the LPT status of a property is. Between now and 28 June, Revenue has said it will provide this information by letter on request from a vendor's solicitor and that a dedicated email address will be provided by Revenue for this purpose.

Advice to clients:

1) Advise vendors to print off their confirmations of payment if they are paying online.
2) Advise vendors who are paying by deduction at source from salary that they will not be given credit for amounts paid during the year until their employers file P35s after the end of the relevant tax year. If they are selling within the tax year, they will have to pay the full amount of LPT for the year up front before closing, and later claim a refund from Revenue of any amount deducted at source. If they know they intend selling during the course of a particular year, they might prefer to alter their method of payment so as to avoid the inconvenience of such a double payment.
3) It is recommended that a vendor would furnish a purchaser at the pre-contract stage with a note of the value band declared for a property by the vendor. Advise vendors to keep a copy of their returns for this purpose.

The operation of the LPT remains fluid and the committee will issue further practice notes as the matter develops.

Ten steps to improve cashflow

GUIDANCE AND ETHICS COMMITTEE

The Guidance and Ethics Committee has compiled a series of 'ten-tips' practice notes on practice management issues. The first is presented below. The remainder will follow during the coming months.

1) Monitor the firm's financial performance on at least a monthly basis:
   - Assess fees received in previous month compared with fee target,
   - Review fees received in respect of each solicitor,
   - Review fees billed by each solicitor.
2) Review outstanding fees and chase up. Consider outsourcing the credit control function. Make sure somebody is doing it!
3) Prepare quarterly cashflow statements and analyse them.
4) Review your costs on an ongoing basis. Look for alternative quotes. Negotiate with your existing suppliers. If you are funding client outlays, ask yourself if you can afford to continue to do so.
5) Tell clients at the outset that you will interim bill, and do what you say you will do – that is, interim bill.
6) Carry out regular reviews of work in progress of all files in the office. Make sure the high-value files are progressed as quickly as possible.
7) If you have not already done so, introduce time costing. Benefits are:
   - It will tell you what files are profitable,
   - It will make it easier to justify your fees to a client/third party in the event of a dispute with the client.
8) Allocate an hour every week simply for issuing bills.
9) Allocate a separate hour every week to chase bills. Remember that a delay in sending out a fee note is a delay in getting paid.
10) Finally, enforce your credit terms. A delay in getting paid by your client amounts to an interest-free loan to your client. Can you afford it?

Ulster Bank policy on solicitors acting for family members

CONVEYANCING COMMITTEE

A number of practitioners have indicated to the Conveyancing Committee that they have been advised by Ulster Bank that the bank has a policy that a solicitor cannot act for family members borrowing from the bank. It appears that this policy applies to both residential and commercial lending. It is the view of the committee that this policy is too broadly applied by the bank.

Residential loan transactions

The committee notes that SI 211 of 2009 provides that a solicitor may not give an undertaking for his or her own secured loan transactions or those of 'connected persons' unless the solicitor has notified the bank (of the beneficial interest in the underlying property used to secure the loan) and the bank has, in writing, both acknowledged receipt of such notice and has consented to the solicitor supplying the undertaking. While this SI originally applied to both residential and commercial loan transactions, it now applies only to residential loans because of SI 366 of 2010, which has since prohibited borrowers' solicitors from giving undertakings to lenders in commercial loan transactions.

The term 'connected person' is defined in the above SI as including:

- The spouse of the solicitor,
- Another solicitor who is a sole principal or a partner in the firm in which the solicitor is engaged,
- A person who is cohabiting with (but not married to) the solicitor in domestic circumstances for at least three years,
- A fiancé(e) of the solicitor.

Other family members are *not* included in the definition of connected persons.

Commercial loan transactions

In commercial loan transactions where a borrower's solicitor acts solely for the borrower and is not furnishing an undertaking to the lending institution, and the lender has its own legal representative, the committee sees no justification of any bank policy that would purport to prevent a solicitor from acting for any of the above categories of 'connected person' or any other family member in a commercial loan transaction.

Undertakings in stage payment cases

CONVEYANCING COMMITTEE

The Conveyancing Committee has received a number of queries from solicitors who are being asked by lending institutions to furnish opinions on compliance with planning permission, confirming that the dwelling in question has been completed in compliance with the relevant planning permissions. The factual situations in these cases vary, but the committee believes that it would be helpful to clarify the general position in relation to undertakings and certificates of title under the certificate-of-title system for residential properties, where stage payments are being advanced by lending institutions.

It is the committee's view that a solicitor who has drawn down the first tranche of a mortgage loan on completion of the mortgage is only obliged to certify the title as of that date. The committee would point out, however, that such a certificate of title involves certifying that the planning title is in order at that date. If, in fact, there is no development on the property on that date, it will not be necessary to furnish an opinion on compliance. If any development has taken place, then, in order to certify the planning title, the solicitor should obtain an interim opinion on compliance with the planning permission as at the date of drawdown. Failure to obtain such an opinion will cast doubt on the validity of the certificate of title and render the solicitor at risk of having to provide a further certificate of title at a later date backed by an opinion on compliance with planning.

It is in situations where solicitors have not provided or cannot provide a certificate of title as of the date of drawdown, based on an appropriate opinion on compliance with planning, that they are being put under pressure to provide opinions on compliance at later stages of the development at times when there are difficulties in obtaining such opinions.

Transfer of common areas alone – VAT considerations

TAXATION COMMITTEE

The Revenue has confirmed at a recent Indirect Taxes TALC meeting that, if common areas alone in a development are sold to a management company for a nominal sum (as the costs of the common areas are reflected in the cost of the apartment unit), a Capital Goods Scheme adjustment is not required. On this basis, VAT would not generally be chargeable on the sale of such common areas. Obviously, if the transaction is not a fully straightforward one, VAT advice will be required.

BRIEFING

Internal complaints procedure in solicitors' firms

GUIDANCE AND ETHICS COMMITTEE

The following statement may be useful for firms who wish to have a policy on internal complaints procedures.

Complaints procedure

Statistics show that if complaints from clients are handled expeditiously within a firm and the result is to the satisfaction of the client, not only will he/she stay with the firm, but the person is likely to send the firm more business. On the other hand, clients who make a complaint to a firm, but find that their complaint is not properly dealt with, will be more likely to leave the firm. They may go on to make a complaint to the Law Society or the Solicitors' Disciplinary Tribunal, who must then formally investigate the matter.

It is the policy of this firm, therefore, to deal quickly with complaints made to us, to ensure, where possible, that the result is to the satisfaction of the client.

Even if the complaint is not justified, if the result is the loss of a good client, this is always significant for our firm.

What constitutes a complaint?

A client may express dissatisfaction to the solicitor or fee-earner handling their case or transaction. However, the solicitor or fee-earner may succeed in resolving the matter.

For the purpose of this procedure, our firm considers any expression of dissatisfaction that cannot be resolved by the solicitor or fee-earner handling their case or transaction to be a complaint. This applies no matter how the complaint is expressed, and whether it is verbal or in writing.

Terms and conditions of business

Our firm's *Terms and Conditions of Business* document provides for internal complaints, as follows:

- The client should bring any issue of concern to the attention of the solicitor or fee-earner handling their case or transaction, and the solicitor or fee earner will make every effort to resolve the issue.
- In the event that the issue is not resolved, the client can avail of this internal complaints procedure.
- To avail of the procedure, the complaint should be made in writing, addressed to [insert name of principal of the firm, or the partner in charge of customer relations in the firm]. If the complaint concerns [insert name of principal of the firm, or the partner in charge of customer relations in the firm], the complaint should be addressed to [insert name of office manager].
- When the written complaint is received, it will be brought to the attention of [insert name of principal of the firm, or the partner in charge of customer relations in the firm, or office manager].
- The complaint will then be recorded in the firm's Complaints Register.
- The client will be sent a written acknowledgement of the complaint within seven days.
- The relevant file will be reviewed by [insert name of principal of the firm, or the partner in charge of customer relations in the firm, or office manager] and he/she will discuss the matter with the solicitor or fee-earner dealing with the case or transaction.
- The client will be sent a full written response within 14 days of the receipt of the written complaint.

Focus on meeting the client's concerns

In reviewing the complaint, the issue that will be addressed will not be whether the complaint should be upheld or rejected. Rather, the focus will be on meeting the client's concerns. The aim will be to seek to ensure that the client is satisfied that their concerns have been addressed and all necessary actions taken.

With this approach, it is more likely that the firm's relationship with the client will continue, to the benefit of both the firm and the client.

Even though a solicitor or fee-earner may not believe that a complaint is valid, it is important for all staff to understand that some elements of the complaint will invite an appropriate response from the firm, so that the client is reassured that efforts are being made to meet their concerns.

Possible remedies for the client

- An apology from the firm in respect of any errors, omissions or matters that should not have occurred,
- A commitment from the firm that there will be no recurrence of the error, omission or other matter,
- A reduction in the bill,
- An abatement of the bill in total,
- Notification to the client of his/her right to make a formal complaint to the Law Society,
- Assurance to the client that any unsatisfactory procedures that have been highlighted by the complaint will be corrected.

Implementation of procedure

- It is important that every member of staff is aware of the procedure and implements it whenever necessary. Every member of the firm has a vested interest in this matter.
- [Insert name of principal of the firm, or the partner in charge of customer relations in the firm] will be responsible for ensuring the implementation of the procedure throughout the firm.

Annual review

This internal complaints procedure will be reviewed in January of every year.

NPPR charge and household charge – charges on property

CONVEYANCING COMMITTEE

Any unpaid household charge or NPPR charge is a charge on property for a period of 12 years from the due date for payment of the charge. If a residential property is sold, the vendor is liable to pay all outstanding charges, late payment fees and interest due before completion of the sale. 'Vendor' is defined to include a solicitor as agent of the owner who receives the proceeds of sale or provides legal advice to the owner. A 'sale' includes a CPO or gift. Therefore, despite the current abolition of the household charge and the upcoming abolition of the NPPR charge, vendors and their solicitors will still have to deal with both of these charges for a period of 12 years from the last due date.

Under the legislation, a vendor is obliged to give to the purchaser either a certificate of discharge, a certificate of exemption, or a certificate of waiver in respect of the household charge, and either a certificate of discharge or a certificate of exemption in respect of the NPPR charge. An up-to-date receipt or a declaration made by the vendor is not sufficient.

Practitioners are referred to the practice note dated 5 April 2012 (April *Gazette*, p53), setting out the procedure to apply for the relevant certificates regarding the household charge. Applications for certificates in relation to the NPPR charge should be made to the NPPR section of the relevant local authority.

BRIEFING

Release of solicitor's undertaking to lender when common areas not yet transferred to a management company

CONVEYANCING COMMITTEE

The committee has received several queries about whether a solicitor is entitled to be released from an undertaking to a lending institution where title has earlier been certified, but where the common areas in a relevant development have not yet been transferred to the management company.

The committee wishes to remind practitioners that a property does not automatically become unsaleable because the common areas in a relevant development have not been transferred. A solicitor's certificate of title is usually given to a lending institution in residential mortgage lending cases following completion of stamping and registration by the borrower's solicitor. As previously indicated by the committee, such certificates of title should operate as of the date of parting with the loan funds, or the first drawdown of loan funds where stage payments are involved, which date is usually also the date of the mortgage and of title searches. Such certificates of title certify the title to the property as of that date, and they speak only to circumstances that pertained as of that date. If some title matter arises subsequent to that date, it does not impact on the certificate of title.

In relation to multi-unit developments where units had been transferred to purchasers prior to 1 April 2011 (a pre-2011 development), the *Multi-Unit Developments Act 2011* (*MUD Act*) imposed a statutory obligation on developers to transfer the relevant parts of the common areas in developments to owners' management companies (OMCs) by 30 September 2011. The act did not provide a sanction for failure by a developer to comply with these statutory obligations, but the obligation to transfer remains with the developer. In cases where no units had been sold before 1 April 2011, there should not have been any sales of units unless the common areas had already been transferred to the management company.

The normal practice prior to the coming into force of the *MUD Act* was to provide a contract between the developer and the purchasers of individual units for the transfer of the common areas after the completion of the development to an OMC.

It appears to the committee that some solicitors may be unnecessarily qualifying their certificates of title, on account only of the fact that common areas in relevant developments have not yet been transferred to management companies. This causes lenders to reject these certificates of title and causes unnecessary difficulty for solicitors in being released from their undertakings.

Solicitors should, of course, bring any title issues present in advance of drawdown to the attention of a lending institution as early as possible, and certainly before any drawdown. This would necessitate a qualification to the solicitor's undertaking – to be agreed with the lending institution in writing in advance of drawdown of the loan funds (or first drawdown in the case of stage payment loans). It would also necessitate a qualification to the solicitor's certificate of title when lodging registered title and deeds with the lending institution at a later stage. The fact that the relevant parts of common areas had not yet been transferred to an OMC in a pre-2011 development at the time of a sale of a unit in such a development does not constitute a 'blot' on the title at the date of the certificate of title, and does not require qualification of the undertaking or certificate of title. G

REGULATION

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 Aisling Maloney, solicitor, practising as AM Maloney & Co Solicitors, Harbour Street, Tullamore, Co Offaly, and in the matter of the *Solicitors Acts 1954-2008* [10728/DT118/11]
Law Society of Ireland (applicant)
Aisling Maloney (respondent solicitor)

On 28 June 2012, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in her practice as a solicitor in that she:

a) Failed to comply with her undertaking, dated 26 February 2007, to the complainant, and/or
b) Failed to reply in a timely manner and/or at all to one or more letters from the complainant.

The tribunal ordered that the respondent solicitor:

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

NOTICES: THE HIGH COURT

Record no 2013 no 51 SA
In the matter of John Quigley, solicitor, practising as John Quigley & Co, Solicitors, Prospect House, Railway Road, Cavan, Co Cavan, and in the matter of the *Solicitors Acts 1954-2011*

Take notice that, by order of the High Court made on Monday 15 April 2013, it was ordered that the respondent solicitor shall be suspended from practising as a solicitor until further order of the court.

John Elliot, Registrar of Solicitors,
29 April 2013

Record no 2013 no 45SA
In the matter of Patrick Aidan Crowley and in the matter of the *Solicitors Acts 1954-2011*

Take notice that, by order of the High Court made on Monday 15 April 2013, it was ordered that the name of Patrick Aidan Crowley, solicitor, be struck off the Roll of Solicitors.

John Elliot, Registrar of Solicitors,
2 May 2013 G

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Legislation update 9 April – 13 May 2013

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SELECTED STATUTORY INSTRUMENTS

Burial Ground (Amendment) Regulations 2013

Number: SI 144/2013

Amends the *Rules and Regulations for the Regulation of Burial Grounds 6/7/1888*, relating to the coffin requirements for interring bodies.

Commencement: 1/6/2013

European Communities (Evidence in Civil or Commercial Matters) Regulations 2013

Number: SI 126/2013

Specifies the Circuit Court as competent to take evidence for the purpose of article 1.1(a) of Council Regulation (EC) no 1206/2001 relating to the taking of evidence in civil or commercial matters. The power conferred on the Circuit Court will be exercised by the county registrar in accordance with the provisions of regulation 3. Specifies the Courts Service as the central body in the State for the purposes of articles 3 and 17 of the Council Regulation.

Commencement: 1/6/2013

Finance (Local Property Tax) (Pyrite Exemption) Regulations 2013

Number: SI 147/2013

Provides for an exemption from the local property tax for residential properties that have significant pyritic damage. Sets out the methodology for the assessment of residential properties and the testing of the sub-floor hardcore material to establish the presence of significant pyritic damage and the certification required to confirm such damage in order to avail of the exemption provided for in section 10A of the *Finance (Local Property Tax) Act 2012* (as amended).

Commencement: 2/5/2013 G

Prepared by the Law Society Library

ONE TO WATCH

One to watch: recent case

ECJ decision in Waterford Crystal case

The European Court of Justice issued judgment on 25 April 2013 in respect of the preliminary reference put to the court from the Irish High Court in July 2011 concerning the interpretation of articles 1 and 8 of the *Insolvency Directive* (2008/94/EC). Ten former employees of Waterford Crystal claimed that the State had failed to properly implement the directive to protect their pension benefits on the insolvency of Waterford Crystal.

Article 1(1) of the *Insolvency Directive* provides that the directive is to apply to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency within the meaning of article 2(1) of that directive. Article 8 of the directive provides that member states are to ensure that necessary measures are taken to protect the interests of employees and of persons having already left the employer's undertaking or business at the date of the onset of the employer's insolvency, in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivor's benefits, under supplementary occupational or interoccupational pension schemes outside the national statutory social security schemes.

The ECJ noted that the only measure of national law adopted for the express purpose of transposing article 8 of the *Insolvency Directive* is section 7 of the *Protection of Employees (Employers' Insolvency) Act 1984*, which provides that any contribution deducted by an employer, or due to be paid by that employer, during the 12 months preceding insolvency is to be paid into the supplementary occupational pension scheme.

Decision of the ECJ

The court made the following findings:

- Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer must be interpreted as meaning that it applies to the entitlement of former employees to old-age benefits under a supplementary pension scheme set up by their employer.
- Article 8 of the directive must be interpreted as meaning that state pension benefits may not be taken into account in assessing whether a member state has complied with the obligation laid down in that article.
- Article 8 must be interpreted as meaning that, in order for that article to apply, it is sufficient that the pension scheme is underfunded as of the date of the employer's insolvency and that, on account of his insolvency, the employer does not have the resources to contribute sufficient money to the pension scheme to enable the pension benefits owned to the beneficiaries of that scheme to be satisfied in full. It is not necessary for those beneficiaries to prove that there are other factors giving rise to the loss of their entitlement to old-age benefits.
- The directive must be interpreted as meaning that the measures adopted by Ireland following the judgment of the Court of Justice in case C-278/05, *Robins and Others* (25 January 2007), do not fulfil the obligations imposed by that directive and that the economic situation of the member state concerned does not constitute an exceptional situation capable of justifying a lower level of protection of the interests of employees as regards their entitlement to old-age benefits under a supplementary occupational pension scheme.
- Directive 2008/94 must be interpreted as meaning that the fact that the measures taken by Ireland subsequent to *Robins and Others* have not brought about the result that the plaintiffs would receive in excess of 49% of the value of their accrued old-age pension benefits under their occupational pension scheme is in itself a serious breach of that member state's obligations.

This decision of the ECJ is a result of the preliminary reference made to the court on 25 April 2013. The High Court must now review the decision handed down by the ECJ and determine what, if any, compensation is due to the former employees of Waterford Crystal. G

BRIEFING

Brief cases

Judgment abstracts are compiled by the Incorporated Council of Law Reporting and are reprinted with kind permission

BANKING

Guarantees

Equitable set-off – mortgage – real property – hotel premises – bank – receiver – duties – waste – whether receiver owed duty to mortgagor to preserve and maintain premises – whether receiver owed duty to obtain best possible price for premises – whether bank or receiver negligent in allowing deterioration of premises – whether bank became mortgagee in possession – whether receiver became agent of bank following taking of possession of premises – whether breach of duty – whether premises in good condition at time of bank taking possession – whether bank or receiver perpetrated waste of premises – whether bank or receiver negligent in failing to renew licences for premises – whether bank or receiver negligent in refusing to accept offer to purchase premises – whether bank or receiver took reasonable care – whether any allowance would exonerate principal debt such that liability of guarantor could be reduced – whether guarantee specifically precluded set off.

Holohan v Friends Provident and Century Life Office [1966] IR 1 applied – *Standard Chartered Bank v Walker* [1982] 1 WLR 1410 considered.

Judgment granted (2011/238S – Kearns P – 29/3/2012) [2012] IEHC 138.

Allied Irish Banks plc v Heagney

COMPANY LAW

Directors

Fraudulent preference – restriction – irresponsible conduct – winding-up order – purchase of properties with company funds for own benefit – property held in trust for company – resulting trust – whether defendant wrongfully and in breach of fiduciary duties used company funds for own benefit – whether properties beneficially owned by company – whether legal interest held on trust for company – whether transaction constituted fraudulent preference – whether invalid – whether counterclaim could be set off – whether defendant should be restricted from acting as director – whether defendant acted responsibly in relation to conduct of affairs of company – whether conduct irresponsible – whether conduct exacerbated insolvency.

Re Greendale Developments Ltd (No 2) [1998] 1 IR 8; *Re Squash (Ireland) Ltd* [2001] 3 IR 35 and *La Moselle Clothing Ltd v Soualhi* [1998] 2 ILRM 345 considered – *Companies Act 1963*, ss220(2), 231 and 286 – *Companies (Amendment) Act 1990*, ss29 and 150 – *Land and Conveyancing Law Reform Act 2009*, s31.

Relief granted (2008/6883P – Laffoy J – 20/6/2012) [2012] IEHC 246.

Elite Logistics Ltd v McNamara

Winding up

Insolvency – ability to meet debts – disputed debt – whether company indebted to petitioner – whether company unable to pay debts – whether debt disputed *bona fide* on substantial grounds – whether s214 demand could be served by registered post – whether company had full details of outstanding amount – whether abuse of process.

Re WMG (Toughening) Ltd (No 2) [2003] 1 IR 389; *Stonegate Securities v Gregory* [1980] Ch 576 and *Re Pageboy Couriers Ltd* [1983] ILRM 510 considered – *Companies Act 1963*, s214(a).

Winding-up order made (2012/355COS – Laffoy J – 1/10/2012) [2012] IEHC 392.

Re REP Ltd

Winding up

Liquidator – duties – voluntary winding up – liquidator seeking order fixing time within which creditors obliged to prove debts – personal injuries claims against company received by liquidator after advertisement of notice to creditors – whether all reasonable steps taken by liquidator to establish debts of and claims against company – whether all reasonable steps taken by liquidator to establish position regarding employer's liability insurance .

Pulsford v Devenish [1903] 2 Ch 625; *In re Armstrong Whitworth Securities Co Ltd* [1947] Ch 673; *Austin Securities Ltd v Northgate & English Stores Ltd* [1969] 1 WLR 529 considered – *Civil Liability Act 1961*, s62 – *Companies Act 1963*, ss241 and 280.

Orders made, application adjourned (2011/303COS – Laffoy J – 16/3/2012) [2012] IEHC 114.

In re Unidare plc (in voluntary liquidation)

CONSTITUTIONAL

Detention

Lawfulness – remedy – immediate release – stay – *habeas corpus* – mental health – accused detained as unfit to plead, suffering from mental disorder and in need of in-patient care – statutory requirements followed – detention unlawful – whether stay can be put on order for release.

N v HSE [2006] IESC 60, [2006] 4 IR 374 applied – *JH v Russell (Mental Health)* [2007] IEHC 7, [2007] 4 IR 242 and *Doyle v Central Mental Hospital* [2007] IEHC 100 (unreported, Finlay Geoghegan J, 20/3/2007) followed – *A v Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 88 and *Kinsella v Governor of Mountjoy Prison* [2011] IEHC 235, [2011] 2 ILRM 509 considered – *SC v Jonathan Swift Clinic, St James's Hospital* (unreported, SC, 5/12/2008) distinguished – *Constitution of Ireland 1937*, article 40.4.2.

Release directed but with stay (2012/1258SS – Hogan J – 8/7/2012) [2012] IEHC 272.

X(F) v Central Mental Hospital

Personal rights

Interlocutory injunction – inviolability of dwelling – right to enter and depart from home without hindrance – protection of person – harassment by third defendant – demand for payment of alleged debt – picketing of private dwellinghouse – right of free speech and free expression – balance of convenience – whether demands intended to subject plaintiff to alarm, distress or humiliation – whether damages adequate.

Damache v Director of Public Prosecutions [2012] IESC 11, [2012] 13 ILRM 153; *People (Director of Public Prosecutions) v Cunningham* [2012] IECCA 64 (unreported, CCA, 11/5/2012); *People (Director of Public Prosecutions) v O'Brien* [2012] IECCA 68 (unreported, CCA, 2/7/2012); *Attorney General v Lee* [2000] 4 IR 65; Lovett v Gogan [1995] 3 IR 132; *Pierce v Dublin Cemeteries Committee (No 1)* [2009] IESC 47, [2010] 2 ILRM 73; *Kinsella v Governor of Mountjoy Prison* [2011] IEHC 235 (unreported, Hogan J, 12/6/2011); *Heeney v Dublin Corporation* (unreported, SC, 17/8/1998); *Frisby v Schultz* (1998) 487 US 474; *Cornec v Morrice* [2012] IEHC 376 (unreported, HC, Hogan J, 18/9/2012) and *Campus Oil Ltd v Minister for Industry and Energy (No 2)* [1983] IR 88 considered – *Non-Fatal Offences Against the Person Act 1997*, ss10 and 11 – *Constitution of Ireland 1937*, articles 40.3.2, 40.5 and 40.6.1.

Interlocutory injunction restraining third defendant from watching and besetting plaintiff's home granted (2012/8738P – Hogan J – 4/10/2012) [2012] IEHC 389.

Sullivan v Boylan

BRIEFING

Right to bodily integrity

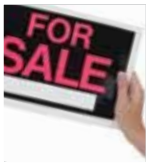
Right to access hospital and specialist – whether breach of right to bodily integrity, cruel and unusual punishment or negligence.

O'Reilly v Governor of Wheatfield Prison (unreported, Hanna J, 22/6/2007) followed – *McDonagh v Frawley* [1978] IR 131 and *State (C) v Frawley* [1976] IR 365 considered.

Leave granted (2012/353JR – Hanna J – 29/6/2012) [2012] IEHC 431.

McMenamin v Governor of Wheatfield Prison

CONTRACT



Sale of land

Agreement for sale – *lis pendens* – notice to complete issued by defendant – *lis pendens* vacated – defendant refusing to complete sale – specific performance – whether notice to complete valid – whether plaintiffs complying with contractual obligations.

Haldane v Rooney [2004] IEHC 344, [2004] 3 IR 581 applied – *Higgins v Irish Land Commission* [1960] IR 277 considered – *Registration of Title Act 1964*, s69.

Specific performance ordered, counterclaim dismissed (2009/4127P – Laffoy J – 29/2/2012) [2012] IEHC 96.

Roche v Leacy

Specific performance

Contract for sale – building agreement – rescission – damages in lieu of specific performance – breach of contract – whether plaintiff entitled to specific performance – whether breach of contract – whether unit provided to defendant fit for purpose – whether defendant entitled to rescind contract – whether specific performance appropriate remedy.

Aranbel Ltd v Darcy [2010] IEHC 272, [2010] 3 IR 769 followed.

Order for specific performance made and counterclaim dismissed (2008/1922P – Laffoy J – 1/10/2012) [2012] IEHC 385.

Wynn Clons Development Ltd v Cooke

EMPLOYMENT LAW

Redundancy

Fixed-term worker – comparable permanent employee – objective grounds – whether error in law – whether error in construction or application of legislation – whether appropriate comparator – whether treated less favourably than comparable permanent employee – whether objective grounds – whether correct to consider objective justification – whether enhanced redundancy terms constituted 'conditions of employment'.

Barber v Royal Exchange (case C–262/88) [1990] ICR 616; *Sunday Newspaper Ltd v Kinsella* [2007] IEHC 324 (unreported, HC, Smyth J, 3/10/2007); *O'Cearbhaill v Bord Telecom Éireann* [1994] ELR 54 and *Rafferty v National Bus and Rail Union* [1997] 2 IR 424 considered – *Protection of Employees (Fixed-Term Work) Act 2003*, ss5, 6, 7 and 15(6) – Council Directive 1999/70/EC.

Appeal refused (2011/248MCA – Kearns P – 17/2/2012) [2012] IEHC 76.

University College Cork v Bushin

PRACTICE AND PROCEDURE

Costs

Solicitors – complex litigation – settlement – statutory entitlement of solicitor to charge property recovered or preserved – whether solicitors employed to prosecute suit in court – whether wording of section mandatory – whether order could be made where money recovered or preserved by reason of compromise – whether property recovered through instrumentality of solicitors – whether order would give solicitor priority over other creditors – equity – whether countervailing considerations of equitable nature that made making of order inequitable – whether court should take into account fact that solicitor was beneficial owner of plaintiff – whether inequitable to allow claim for full costs – whether court should take account of indebtedness of solicitors to party who appointed received to plaintiffs – whether court should distinguish between solicitors as equity partners in firm and as debtors – whether appropriate for court to consider debt between parties – delay – whether solicitors delayed in seeking order – whether prospect of recovery of property at time of judgment – whether culpable delay – whether making of order sought would be in vain – whether recovery of costs should be proportionate to reduced settlement – whether court set formula for recovery of proportionate costs.

Mount Kennett Investment Co v O'Meara [2007] IEHC 420 (unreported, Smyth J, 21/11/2007); *Mount Kennett Investment Co v O'Meara* [2010] IEHC 216 (unreported, Clarke J, 1/6/2010) and *Mount Kennett Investment Co v O'Meara* [2011] IEHC 210 (unreported, Clarke J, 9/3/2011) considered – *Roche v Roche* (1892) 29 LR Ir 339; *M'Larnon v Carrickfergus UDC* [1904] 2 IR 44; *Cole v Eley* [1894] 2 QB 350; *Hamer v Giles* (1897) 11 Ch D 942 approved – *Legal Practitioners (Ireland) Act 1876*, s3 – *National Asset Management Agency Act 2009*, s149.

Orders granted (2005/1657P – Clarke J – 29/3/2012) [2012] IEHC 167.

Mount Kennett Investment Co v O'Meara

Limitation of actions

Building defect – date of contract for sale – facts – evidence – whether facts in preliminary issue required to be either agreed facts or facts as pleaded – whether court could admit affidavit evidence of date of contract for sale – whether court would require factual evidence to determine date of contract for sale – whether facts giving rise to point of law in dispute between parties.

Byrne v Hall Pain & Foster [1999] 1 WLR 1849 considered – *McCabe v Ireland* [1999] 4 IR 151 followed – *Nyembo v Refugee Appeals Tribunal* [2007] IESC 25, [2008] 1 ILRM 289 applied – *Rules of the Superior Courts* (SI 15/1986), order 25, rule 1.

Preliminary issue determined in favour of plaintiff (2006/1352P – Peart J – 30/3/2012) [2012] IEHC 164.

Agar v Conroy

TRUSTS

Constructive trusts

Equitable remedy – tracing – new model constructive trust – unjust enrichment – conduct – whether trust created – whether wrongdoing – whether inequitable for legal owner to deny another's title – whether unjust and unconscionable to exercise legal right – whether monies held in trust for deceased – whether money formed part of deceased's estate – whether money available for distribution to creditors.

Muschinski v Dodds (1985) 160 CLR 583; *Hussey v Palmer* [1972] 1 WLR 1286; *Eves v Eves* [1975] 1 WLR 1338; *D(NA) v D(T)* [1985] ILRM 153; *HKN Invest Oy v Incotrade Pvt Ltd* [1993] 3 IR 152; *Murray v Murray* [1996] 3 IR 251; *Dublin Corporation v Ancient Guild of Incorporated Brick and Stone Layers and Allied Trade Union* (unreported, Budd J, 6/3/1996); *Kelly v Cahill* [2001] 1 IR 56; *Foskett v McKeown* [2001] 1 AC 102; *Millett* (1991) 107 LQR 71 and *Sinclair v Brougham* [1914] AC 398 considered.

Trust created (2011/351COS – Gilligan J – 3/2/2012) [2012] IEHC 278.

Re Varko Ltd (in liquidation)

BRIEFING

Eurlegal

Edited by TP Kennedy, Director of Education

Every little helps: indirect exchanges of price information in Tesco competition tribunal appeal

Britain's Competition Appeal Tribunal recently published its decision in the appeal lodged by Tesco Stores Limited, Tesco Holdings Limited and Tesco Plc against a decision of the Office of Fair Trading (OFT) finding that Tesco and others had participated in a number of anti-competitive concerted practices contrary to section 2(1) of the *Competition Act 1998* (as amended). That provision is the British equivalent of section 4(1) of the Irish *Competition Act 2002*, as amended, in Ireland and the equivalent of article 101 of the *Treaty on the Functioning of the European Union*.

OFT findings

The infringements found by the OFT may be summarised as follows:

- Concerted practice in which Asda, Safeway, Sainsbury's and Tesco indirectly exchanged cheese retail pricing intentions via Dairy Crest, Glanbia and McLelland acting as intermediaries in 2002 (2002 cheese initiative),
- Concerted practice in which Asda, Sainsbury's and Tesco indirectly exchanged cheese retail pricing intentions via McLelland acting as intermediary in 2003 (2003 cheese initiative),
- Concerted practice in which Asda, Safeway, Sainsbury's and Tesco disclosed fresh liquid milk retail pricing intentions via Arla, Dairy Crest and Wiseman acting as intermediaries in 2003. As no findings were made against Tesco in relation to fresh liquid milk, the appeal did not concern this aspect of the OFT investigation and findings.

The appeal tribunal held that a retailer, supplier and another retailer may be properly regarded as parties to a concerted practice that has at its object the restriction of competition in the following circumstances:

- Retailer A discloses to Supplier B its future pricing intentions,
- Retailer A may be taken to intend that Supplier B will make use of that information to influence market conditions by passing that information to other retailers, of whom Retailer C is or may be one.

The tribunal pointed out that it is incumbent on a competition authority to demonstrate that the disclosure by Retailer A to Supplier B of its future pricing intentions was in circumstances where Retailer A "may be taken to intend that B will make use of that information to influence market conditions by passing that information to other retailers". The tribunal pointed out that the state of mind of Retailer A may be inferred from the circumstances and referred to the expressions used in other British competition cases such as 'must have realised', 'must have been aware' or 'must have known' that the disclosure of Retailer A's future pricing intentions to Supplier B would be passed on by that supplier to Retailer C. The tribunal pointed out that a competition authority is entitled to draw inferences from what the person knew, said and did, both at the relevant time and subsequently.

The tribunal highlighted that a finding of infringement would be all the stronger where there is reciprocity in the sense that, Retailer C having already received Retailer A's future pricing intentions, discloses to Supplier B its future pricing intentions in circumstances where Retailer C may be taken to intend that Supplier B would make use of that information to influence market conditions by passing that information to, among others, Retailer A. The tribunal pointed out that this is not a necessary ingredient of an infringement.

The tribunal pointed out that the absence of any legitimate commercial reason for a disclosure by Retailer A of its future pricing intentions to Supplier B may be indicative of the requisite state of mind, in light of all the circumstances known to the disclosing party at the time of the communication. The tribunal seemed to draw a distinction between communications to the effect that a retailer will reduce its prices on the one hand, and that a retailer will maintain or increase its prices on the other. It pointed out that, in the case of a reduction in retail price, the retailer might legitimately relay its intentions to the supplier, for example, in an attempt to secure a lower cost price to help fund the anticipated loss of margin. The tribunal pointed out that there may be fewer legitimate commercial reasons for the transmission of a retailer's intentions to maintain or increase its price, but pointed out that one such legitimate reason – undoubtedly relevant to the appeal – was that a cheese retailer will need to disclose its intention to increase retail prices of random weighed cheeses to a supplier in order for that supplier to print the new retail prices on the packs of cheese in advance of supply.

The OFT adopted the following approach to the issue of the state of mind of Retailer A:

- Acts of any employee may be attributed to his or her corporate employer, with whom they comprise the same undertaking,
- A retailer's state of mind is a subjective mental state, but the law applies an objective standard as to whether that mental state existed or not,
- A retailer intends a particular result of its conduct if it actually foresees that result,
- A retailer may be taken to intend a particular result of its conduct, having regard to all the evidence placed before the tribunal, including the evidence of the person alleged to have held the state of mind and the surrounding circumstances, and
- It is trite law that inadvertent or accidental disclosures are unlikely to constitute circumstances from which the requisite state of mind can be inferred.

Supplier B does in fact pass that information to Retailer C: The tribunal underlined that the fact that Retailer C does not believe the data originally supplied by Retailer A, or suspects that it will turn out to be false, does not rule out the possibility of the existence of a concerted practice. The tribunal stated that anti-competitive collusion between competitors may be riddled with distrust and suspicion and that an agreement and/or concerted practice may nevertheless be found to exist provided, of course, there is sufficient and cogent evidence of the necessary conduct.

The tribunal stated that the exchange of individualised data is more likely to facilitate coordination because it makes it easier for companies to reach a common understanding about future prices or sales and contributes to a more credible prospect of retaliation, which disciplines the coordinat-

Mmmm... cheesetastic

ing companies. The tribunal stated that, conversely, the exchange of aggregated data is less likely to lead to a collusive outcome since it is less likely to be indicative of specific competitors' future conduct or lead to a common understanding of business behaviour.

Retailer C may be taken to know the circumstances in which the information was disclosed by Retailer A to Supplier B: The tribunal held that it was sufficient if Retailer C may be taken to have known the circumstances in which Retailer A disclosed future retail pricing intentions to Supplier B. The tribunal pointed out that Retailer C must have been shown to have appreciated the basis on which Retailer A provided the information to Supplier B, so that A, B and C can be regarded as parties to a concerted practice.

Retailer C does in fact use the information in determining its own future pricing intentions: The tribunal made it clear that the word 'use' in this context is to be understood as referring to Retailer C taking into account Retailer A's future pricing intentions when making decisions as to its own future conduct in the market. The tribunal stated that, even where Retailer C's participation is limited to the mere receipt of information about the future conduct of a competitor, the law presumes that Retailer C cannot fail to take that information into account when determining its own future policy on the market, although it is open, of course, to Retailer C to seek to demonstrate that it independently determined the policies it pursued and did not act on the basis of Retailer A's future pricing intentions.

Burden of proof

The appeal tribunal held that the burden of proof was on the OFT to show an infringement including the five steps above, which are the prerequisites to a finding of an A-B-C transmission of information. The appeal tribunal held that the burden of proof was the civil standard of the balance of probabilities. The tribunal made it clear that account must also be taken of the presumption of innocence under the *European Convention on Human Rights* and that any doubt in the mind of the tribunal as to whether a point is established on the balance of probabilities must operate to the advantage of the undertaking alleged to have infringed the competition rules.

The infringements found

Regarding the 2002 cheese initiative, there were nine strands analysed by the OFT and reviewed by the appeal tribunal.

Strand 1: The OFT found an infringement where Tesco (Retailer A) communicated information to Dairy Crest (Supplier B), which in turn communicated the information to Asda (Retailer C). The appeal tribunal held that there was insufficient evidence to establish an A to B transmission from Tesco to Dairy Crest (the tribunal did not find it necessary to examine whether or not the other constituent elements of infringement were proved).

Strand 2: The OFT found an infringement where Sainsbury's (Retailer A) communicated information to McLelland (Supplier B), which in turn communicated the information to Tesco (Retailer C). The appeal tribunal upheld the decision of the OFT and held that the evidence established that each of the five elements summarised above for finding an anti-competitive concerted practice was present.

Strand 3: The OFT found an infringement where Tesco (Retailer A) communicated information to Dairy Crest (Supplier B), which in turn communicated the information to Sainsbury's (Retailer C). The appeal tribunal upheld the decision of the OFT and held that the evidence established that each of the five elements summarised above for finding an anti-competitive concerted practice was present.

Strand 4: The OFT found an infringement where Tesco (Retailer A) communicated information to Dairy Crest and/or McLelland (Supplier B), which in turn communicated the information to Safeway (Retailer C). The appeal tribunal held that there was insufficient evidence to establish an A to B transmission from Tesco to Dairy Crest and/or McLelland (the tribunal did not find it nec-

essary to examine whether or not the other constituent elements of infringement were proved).

Strand 5: The OFT found an infringement where Asda (Retailer A) communicated information to Dairy Crest (Supplier B), which in turn communicated the information to Tesco (Retailer C). The appeal tribunal held that, although it appeared that there had been an A to B transmission from Asda to Dairy Crest, there was insufficient evidence to establish that Asda may be taken to have intended or foresaw that the pricing information would be passed on by Dairy Crest to Tesco.

Strand 6: The OFT did not make a finding of an infringement where Asda, Safeway, Sainsbury's and Tesco (Retailers A) communicated information to McLelland (Supplier B), which in turn communicated the information to the Co-Op (Retailer C). The OFT referred to the above as "important contextual evidence", in that it was said to amount to another instance of Tesco having disclosed its future pricing intentions for cheese to McLelland and was therefore relevant to the analysis.

Strand 7: The OFT found an infringement where Tesco (Retailer A) communicated information to McLelland (Supplier B), which in turn communicated the information to Sainsbury's (Retailer C). The appeal tribunal upheld the decision of the OFT and held that the evidence established that each of the five elements summarised above for finding an anti-competitive concerted practice was present.

Strand 8: The OFT found an infringement where Asda (Retailer A) communicated information to McLelland (Supplier B), which in turn communicated the information to Tesco (Retailer C). The appeal tribunal held that, although it appeared that there had been an A to B transmission from Asda to McLelland, there was insufficient evidence to establish that there was a B to C transmission from McLelland to Tesco (the tribunal did not find it necessary to examine whether or not the other constituent elements of infringement were proved).

Strand 9: The OFT found an infringement where Tesco (Retailer A) communicated information to McLelland and/or Dairy Crest (Supplier B), which in turn communicated the information to Asda (Retailer C). The appeal tribunal held that there was insufficient evidence to establish an A to B transmission from Tesco to McLelland and/or Dairy Crest (the tribunal did not find it necessary to examine whether or not the other constituent elements of infringement were proved).

2003 cheese initiative

Regarding the 2003 cheese initiative, there were five strands analysed by the OFT and reviewed by the appeal tribunal.

Strand 1: The OFT found an infringement where Asda (Retailer A) communicated information to McLelland (Supplier B), which in turn communicated the information to Tesco (Retailer C). The appeal tribunal held that, although it appeared that there was an A to B transmission from Asda to McLelland, there was insufficient evidence to establish that Asda may be taken to have intended or foresaw that the pricing information would be passed on by McLelland to Tesco.

Strand 2: The OFT found an infringement where Sainsbury's (Retailer A) communicated information to McLelland (Supplier B), which in turn communicated the information to Tesco (Retailer C). The appeal tribunal held that, although it appeared that there was an A to B transmission from Sainsbury's to McLelland, there was insufficient evidence to establish that Sainsbury's may be taken to have intended or foresaw that the pricing information would be passed on by McLelland to Tesco.

Strand 3: The OFT found an infringement where Sainsbury's (Retailer A) communicated information to McLelland (Supplier B), which in turn communicated the information to Tesco (Retailer C). The appeal tribunal held that, although it appeared that there was an A to B transmission from Sainsbury's to McLelland, there was insufficient evidence to establish that Sainsbury's may be taken to have intended or foresaw that the pricing information would be passed on by McLelland to Tesco.

Strand 4: The OFT found an infringement where Asda (Retailer A) communicated information to McLelland (Supplier B), which in turn communicated the information to Tesco (Retailer C). The appeal tribunal held that, although it appeared that there was an A to B transmission from Asda to McLelland, McLelland did not pass on the information to Tesco until a time at which the prices were already effective and publicly available in Asda stores and that therefore there was insufficient evidence to establish that there was a B to C transmission from McLelland to Tesco of future price intentions.

Strand 5: The OFT found an infringement where Tesco (Retailer A) communicated information to McLelland (Supplier B), which in turn communicated the information to Asda (Retailer C). The appeal tribunal held that, although it appeared that there was an A to B transmission from Tesco to McLelland, there was insufficient evidence to establish that Tesco may be taken to have intended or foresaw that the pricing information would be passed on by McLelland to Asda.

Indirect exchanges of information

The appeal tribunal pointed out that there are no EU cases dealing specifically with the circumstances in which there can be a concerted practice by virtue of indirect contact between two or more undertakings via a common supplier. With regard to British case law, the appeal tribunal referred to its decisions in cases 1021 and 1022/1/1/03, *Allsports Ltd and JJB Sports plc v OFT* ([2004] CAT 17) and cases 1014 and 1015/1/1/03, *Argos Ltd and Littlewoods Ltd v OFT* ([2004] CAT 24), as well as the single judgment of the Court of Appeal in the appeals against those decisions ([2006] EWCA Civ 1318).

The tribunal highlighted that article 101(1) of the TFEU does not define what is meant by a concerted practice. The tribunal underlined that the concept was first considered by the Court of Justice in case 48/69, *ICI v Commission* ([1972] ECR 619). The court dismissed nine appeals against a decision of the commission fining ten manufacturers of dyestuffs for entering into three concerted practices to increase prices for those products. The court explained that the object of the inclusion of concerted practices in what is now article 101(1) of the TFEU is to bring within the prohibition "a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition".

The court continued that a concerted practice has an independent meaning that encompasses forms of cooperation other than just those belonging to the concept of agreements between undertakings. The court noted that the question of whether there had been 'a concerted action' in that case could only be determined if the evidence upon which the decision was based was considered as a whole, taking account of the specific characteristics of the market. The court went on to reject the producers' attempts to explain away the price increases and held: "Although every producer is free to change his prices, taking into account in so doing the present or foreseeable conduct of his competitors, nevertheless it is contrary to the rules on competition contained in the treaty for a producer to cooperate with his competitors, in any way whatsoever, in order to determine a coordinated course of action relating to a price increase and to ensure its success by prior elimination of all uncertainty as to each other's conduct regarding the essential elements of that action, such as the amount, subject matter, date and place of the increases."

The tribunal also referred to joined cases 40/73, *Suiker Unie v Commission* ([1975] ECR 1663), a case involving, among other things, alleged restrictions on those to whom sugar was to be supplied, where the Court of Justice again considered the concept of concerted practice under article 101(1) of the TFEU. The Court of Justice laid down what have since been accepted as governing principles for the concept of a concerted practice: "The criteria of coordination and cooperation laid down by the case law of the court, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market, including the choice of the persons and undertakings to which he makes offers or sells.

"Although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does, however, strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market."

The appeal tribunal in *Tesco* stated that there is, therefore, a clear and important difference between undertakings intelligently adapting their behaviour in light of the existing and anticipated conduct of competitors, which is legitimate, and coordination that has as its object or effect the influencing of a competitor's conduct on the market or disclosing the course of conduct that a competitor has decided to adopt, or is contemplating adopting, on the

market, which is not permissible.

The appeal tribunal also referred to joined cases T-25/95, *Cimenteries CBR v Commission* ([2000] ECR II-491), in which the Court of First Instance (now the General Court) considered various alleged collusive contacts involving a large part of the European cement industry. The court stated that: "The concept of concerted practice does in fact imply the existence of reciprocal contacts … That condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it...

"In order to prove that there has been a concerted practice, it is not therefore necessary to show that the competitor in question has formally undertaken, in respect of one or several others, to adopt a particular course of conduct or that the competitors have colluded over their future conduct on the market … It is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct to expect of the other on the market."

The tribunal referred to case C-49/92 P, *Commission v Anic Partecipazioni* ([1999] ECR I-4125), in which the Court of Justice affirmed the validity of a commission decision finding that Anic had participated in a EU-wide cartel operating in the polypropylene production sector from 1977 to 1983. The court reaffirmed what it had held in *Suiker Unie*, above, and stated: "It follows that, as is clear from the very terms of article [101(1)] of the treaty, a concerted practice implies, besides undertakings' concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two."

So far as the relationship of cause and effect between undertakings concerting together and their subsequent conduct on the market is concerned, the court held that: "Subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period."

The tribunal noted that this is commonly referred to as the '*Anic* presumption'. The tribunal pointed out that the Court of Justice was asked, on a preliminary reference, to consider the nature and operation of the *Anic* presumption in case C-8/08, *T-Mobile Netherlands BV v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* ([2009] ECR I-4529). The court referred to what it had said in its judgment in *Anic* and held: "Depending on the structure of the market, the possibility cannot be ruled out that a meeting on a single occasion between competitors, such as that in question in the main proceedings, may, in principle, constitute a sufficient basis for the participating undertakings to concert their market conduct and thus successfully substitute practical cooperation between them for competition and the risks that that entails."

The court further held that what matters is whether the participating undertakings were afforded "the opportunity to take account of the information exchanged with their competitors in order to determine their conduct on the market in question and knowingly substitute practical cooperation between them for the risks of competition. Where it can be established that such undertakings successfully concerted with one another and remained active on the market, they may justifiably be called upon to adduce evidence that that concerted action did not have any effect on their conduct on the market in question."

The tribunal stated that the above presumption was justified by the commercial and economic reality that competing undertakings are likely to take into account how their competitors are planning to behave on the market when determining their own strategy and conduct. The disclosure of future pricing intentions significantly reduces, and may indeed eliminate, uncertainty as to competitors' future conduct on the market, allowing an undertaking to alter its behaviour accordingly. The tribunal determined that, as a result of the disclosure or exchange of information, the participating undertakings are likely to behave differently on the market than if they were required to rely only on their own perceptions, predictions and experience of the market. Accordingly, the likely outcome of such an exchange is that the market will not be as competitive as it might otherwise have been.

The tribunal highlighted that it was clear from the judgments of the Court of Justice in *Anic* and *T-Mobile* that the evidential burden is on the participating undertakings to adduce evidence to rebut the presumption and establish that their concerted action did not have any effect on their conduct on the market. The tribunal highlighted that, although there is no EU authority on the point, it was common ground that the *Anic* presumption applied to the indirect exchange between competitors of confidential future pricing intentions. G

Marco Hickey is head of the EU, Competition and Regulated Markets Unit at LK Shields Solicitors and is a member of the Law Society's EU and International Affairs Committee.

Recent developments in European law

LITIGATION

Case C-645/11, *Land Berlin v Ellen Mirjam Sapir and Others*, 11 April 2013

Julius Busse owned a plot of land situated in the former East Berlin. In 1938, he was forced to sell the land to a third party. That land was subsequently expropriated by the German Democratic Republic and incorporated into a larger plot. Following the reunification of Germany, the entire parcel of land passed partly to the Land Berlin and partly to the Federal Republic of Germany. In 1990, a number of successors in title of Mr Busse lodged an application for the return of the part of the land that had previously belonged to him. However, in 1997, the entire parcel of land was sold. Return of the property was impossible, and the successors in title were only able to obtain the corresponding share of the proceeds of sale. The Land Berlin unintentionally paid over the proceeds of the sale of all the land to the successors in title of Mr Busse. It sought to recover the overpayment (€2.5 million) in an action before the Regional Court of Berlin. The successors in title opposed that recovery, arguing that the German court did not have international jurisdiction to decide the case with respect to the defendants, who were domiciled in Britain, Spain and Israel. They also argued that they were entitled to claim payment of an amount greater than the share of the proceeds of sale due to them, as those proceeds amounted to less than the market value of the property that had belonged to Mr Busse.

The German courts held at first instance that they did not have international jurisdiction to rule, as the dispute was a public law matter and thus outside the scope of regulation 44/2001. The Federal Court of Justice referred the matter to the CJEU. It held that this case was a civil law matter. Regulation 44/2001 applies to an action of this nature. The action is one based on ground of unjust enrichment and is not connected to an exercise of public powers by the Land.

Case C-332/11, *Prorail BV v Xpedys NV*, 21 February 2013

On 22 November 2008, a freight train bound from Belgium to the Netherlands was derailed near Amsterdam. In 2009, a Belgian court appointed an expert to investigate. Most of the investigation was to be carried out in the Netherlands. One of the parties to the case challenged this. It was argued that the task of the expert should be limited to determining the damages insofar as that task could be carried out in Belgium. If evidence was to be collected in the Netherlands, it was argued that the Belgian expert should be confined to the procedure laid down in regulation 1206/2001 on the taking of evidence abroad.

The CJEU held that the regulation applies as a general rule only if the court of a member state decides to take evidence according to one of the two methods provided for by the regulation. In that case, the court must follow the procedure laid down in the regulation. A national court wishing to order an expert investigation to be carried out in another member state is not required to use regulation 1206/2001. However, there is one exception to this. This is where the investigation affects the exercise of the powers of the member state in which it takes place. This can happen, in particular, where the investigation is carried out in places connected to the exercise of state powers or in places to which access or other action is, under the law of the member state in which the investigation is carried out, prohibited or restricted to certain persons.

Case C-543/10, *Refcomp SpA v Axa Corporate Solutions Assurance SA, Axa France IARD, Emerson Network and Climaveneta SpA*, 7 February 2013

Refcomp is an Italian company that manufactures compressors. The processors were purchased by another Italian company, Climaveneta, which sold them to a French company. The contract between Refcomp and Climaveneta included a clause providing for the jurisdiction of the Italian courts. The ultimate purchaser of the processors was a French property developer, Doumer. They were used in an air-conditioning system and caused it to malfunction. Doumer's insurer sued Refcomp and other parties in the French courts. Refcomp challenged the jurisdiction of the French courts on the basis of the jurisdiction clause in the contract. It argued that all participants to the chain of contracts, which successively transferred ownership of the goods, were bound by it. Under French law, the action would be contractual.

The CJEU held that the jurisdiction clause could not be relied on. Article 23 of regulation 44/2001 can only apply to a third party to the contact if it is established that the third party has actually consented to the jurisdiction clause. G

NOTICES

WILLS

Brennan, Thomas J (deceased), late of Lakeview House, Monasteraden, Co Sligo. Would any person having knowledge of any will made by the above-named deceased, who died on 2 May 2012, please contact Kilrane O'Callaghan & Co, Solicitors, Ballaghaderreen, Co Roscommon; tel: 094 98 60013, fax: 094 98 60765, email: ocall@io.ie

Butler, John (deceased), former journalist with *The Irish Times*, late of Wildfield, New Road, Greystones, Co Wicklow, who died on 18 April 2013. Would any person having knowledge of the whereabouts of a will made by the above-named deceased please contact his sister, Andrea Lyons, Glenaiteann. New Road, Greystones, Co Wicklow; tel: 01 287 7425

Casserley, Maureen, Miss, Flat 27, 54 Tritonville Road, Sandymount, Dublin 4. Would any person having knowledge of the whereabouts of a will or the name of the legal representative of the above-named please contact Siobháin; tel: 086 865 4822, email: kilcoor@eircom.net

Collins, Laurence (deceased), late of Glenquin, Strand, Co Limerick. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, who died on 5 May 2009, please contact Cornelius J Noonan, Solicitors, Mitre House, Bishop Street, Newcastle West, Co Limerick; tel: 069 62070, fax: 069 62848, email cjnoonansolr@eircom.net

Doyle, Rose (deceased), late of Knockroe, Delgany, in the county of Wicklow. Would any person having knowledge of any will made by the above-named deceased, who died on 20 June 1989, please contact Caroline Murphy of Neville Murphy & Co, Solicitors, 9 Prince of Wales Terrace, Bray, Co Wicklow; tel: 01 286 0639, fax: 01 286 0572, email: cmurphy@nevillemurphysolicitors.ie

Duhig, Elizabeth (deceased), late of 3 McAuley Court, Athy, Co Kildare, and formerly of The Curragh, Newbridge, Co Kildare. Would any solicitor holding or having knowledge of a will made by the above-named deceased, who died on 31 October 2012, please contact HG Donnelly & Son, Solicitors, 5 Duke Street, Athy, Co Kildare; ref RP/STY006-01

Foster, Annie (deceased), late of 11 Geraldine Road, Athy, Co Kildare. Would any solicitor holding or having knowledge of a will made by the above-named deceased, who died on 5 July 2012, please contact HG Donnelly & Son, Solicitors, 5 Duke Street, Athy, Co Kildare; ref: RP/FOS001-1

Gleeson, Catherine, (deceased), late of 12 Clanree Road, Donnycarney, Dublin 5, who died on 9 February 2013. Would any person having knowledge of the whereabouts of an original will dated 20 February 2004, executed by the deceased, please contact Niall Gaffney, Gaffney Halligan & Co, Solicitors, Artane Roundabout, Malahide Road, Artane, Dublin 5; tel: 01 831 2470, fax: 01 831 5726

Hurley, Br Paul SVD (deceased), late of Divine Word Missionaries, Moyglare Road, Maynooth, Co Kildare, who died on 26 October 2012. Would any person holding or having knowledge of a will made by the above-named deceased please contact Padraig Mullins of Kelly Noone & Co, Solicitors, Taney Hall, Eglinton Terrace, Dundrum, Dublin 14; tel: 01 296 5144, fax: 01 296 5088, email: padraig@kellynoone.ie

Kelly, Gráinne (deceased), late of 42 Fosterbrook, Blackrock, Co Dublin. Would any person having knowledge of a will made by the above-named deceased, who died on 4 April 2013, please contact Gerard O'Shea of Gerard O'Shea, Solicitors, Meridian House, 13 Warrington Place, Dublin 2; tel: 01 661 9831, email: osmeridian@eircom.net

Kelly, Vincent (deceased), late of 37 St Anne's Road, Drumcondra, Dublin 9. Would any person having knowledge of a will made by the above-named deceased, who died on 8 February 2013, please contact Joanne Kangley, Solicitors, Anne Street, Bailieborough, Co Cavan; tel: 042 966 6741, email: nicola@kangley.ie

Murphy, Richard (orse Dick) (deceased), late of 5 St Bride's Road (orse 5 St Bride's Terrace), Wicklow Town, Co Wicklow. Would any person having knowledge of a will (or documents relating to a will) made by the above-named deceased, who died on 25 December 2012, please contact Augustus Cullen Law, Solicitors, 7 Wentworth Place, Wicklow, Co Wicklow; DX 46001 Wicklow; tel: 0404 67412, email: michele.caulfield@aclsolicitors.ie

O'Dea, Anthony (deceased), late of Derryglad, Curraghboy, Athlone, Co Roscommon, who died on 19 May 2013. Would any person having knowledge of a will made by the above-named deceased please contact **box no 03/06/13**

Peters, Teresa (deceased), late of 22 Arbour Vale, Oola, Co Limerick, and St Michael's Nursing Home, Caherconlish, Co Limerick, who died on 20 April 2013. Would any person having knowledge of a will made by the above-named Teresa Peters please contact Caroline Browne, Browne & Murphy, Solicitors, 64 O'Connell Street, Limerick; tel: 061 599 033, fax: 061 599 022, email: info@bmsolicitors.ie

Quinn, Nora (deceased), late of 27 Moreno, Arcadia, Athlone, Co Westmeath, who died on 26 December 2012. Would any person having knowledge of the whereabouts of a will executed by the above-named deceased please contact Gerard M Neilan, solicitor, Patrick J Neilan & Sons, Solicitors, Golf Links Road, Roscommon; tel: 090 662 6245, fax: 090 662 6990, email: pjneilan@securemail.ie

Walsh, John (deceased), late of The Barracks, Effernogue, Ferns,

RATES

Professional notice rates

RATES IN THE PROFESSIONAL NOTICES SECTION ARE AS FOLLOWS:

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

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 July *Gazette*: 19 June 2013. For further information, contact the *Gazette* office on tel: 01 672 4828 (fax: 01 672 4877)

NOTICES

Co Wexford. Would any person having knowledge of a will executed by the above-named deceased, who died on 3 January 2013, please contact Ensor O'Connor, Solicitors, 4 Court Street, Enniscorthy, Co Wexford; tel: 053 923 5611, fax: 053 923 5234

MISCELLANEOUS

Busy Galway city solicitors' mixed practice for sale. For information, please reply in strictest confidence to **box no 01/06/13**

Established south Dublin city office seeking to purchase a litigation or licensing practice (or part thereof). May suit practice that is winding down later this year. Prompt attention will be given to all expressions of interest (to be treated in strictest confidence) to **box no 02/06/13**

TITLE DEEDS

The Jessop, Charlotte's Quay, Dublin: booklet of title

Magennis & Creighton Solicitors are trying to trace a booklet of prior title for the above development. Reasonable legal fees will be offered to a solicitor who can assist. Please contact margaret@magtonlaw.co.uk or lorraine@magtonlaw.co.uk or tel: (Belfast) 02890 365777; from the Republic of Ireland, tel: 04890 365777

In the matter of the *Landlord and Tenant Acts 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by Elizabeth Mitchell

Take notice that any person having any interest in the freehold estate of the following property: all that and those the premises now known as St Teresa's Nursing Home, 1 Fitzwilliam Terrace, situate in the parish of Bray, barony of Rathdown and county of Wicklow, together with the dwellinghouse and offices erected thereon.

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

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

Date: 7 June 2013

Signed: Cunningham Solicitors (solicitors for the applicant), 8 Emily Square, Athy, Co Kildare

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 Una Peters

Take notice that any person having any interest in the freehold estate of the public house/dwellinghouse known as the Tuning Fork Public House, Willbrook, Rathfarnham, Dublin 14, being the property more particularly described in an indenture of lease dated 11 March

NOTICES

1913 and made between Miriam Madden of the one part and Elizabeth Carey of the other part for a term of 100 years, and subject to a yearly rent of IR£21 and to the covenants and conditions therein.

Take notice that Una Peters intends to submit an application to the county registrar for the county/city of Dublin at Aras Uí Dhálaigh for the acquisition of the freehold interest in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid property are called upon to furnish evidence of the title to the aforementioned property to the below named within 21 days from the date of this notice.

In default of any such notice being received, Una Peters intends to proceed with the application before the county registrar for the county/city of Dublin for directions as may be appropriate on the basis that the persons beneficially entitled to the superior interest including the freehold reversion in each of the aforesaid premises are unknown or unascertained.

Date: 7 June 2013

Signed: Kevin Tunney Solicitors (solicitors for the applicant), Millennium House, Main Street, Tallaght, Dublin 24

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 Una Peters

Take notice that any person having any interest in the freehold estate of the public house/dwellinghouse known as the Tuning Fork Public House, Willbrook, Rathfarnham, Dublin 14, being the property more particularly described in an indenture of lease dated 29 September 1929 made between Percy Carey, John Carey, Richard Carey, William Carey, George Carey and Dora Carey of the one part and John Cullen of the other part, for a term of 100 years and subject to a yearly rent of IR£10 and to the covenants and conditions therein.

Take notice that Una Peters intends to submit an application to the county registrar for the county/city of Dublin at Aras Uí Dhálaigh for the acquisition of the freehold interest in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid property are called upon to furnish evidence of the title to the aforementioned property to the below named within 21 days from the date of this notice.

In default of any such notice being received, Una Peters intends to proceed with the application before the county registrar for the county/city of Dublin for directions as may be appropriate on the basis that the persons beneficially entitled to the superior interest including the freehold reversion in each of the aforesaid premises are unknown or unascertained.

Date: 7 June 2013

Signed: Kevin Tunney Solicitors (solicitors for the applicant), Millennium House, Main Street, Tallaght, Dublin 24

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 Una Peters

Take notice that any person having any interest in the freehold estate of the public house/dwellinghouse known as the Tuning Fork Public House, Willbrook, Rathfarnham, Dublin 14, being the property more particularly described in an indenture of lease of field dated 11 March 1913 and made between Miriam Madden of the one part and Elizabeth Carey of the other part for a term of 100 years and subject to a yearly rent of IR£5 and to the covenants and conditions therein.

Take notice that Una Peters intends to submit an application to the county registrar for the county/city of Dublin at Aras Uí Dhálaigh for the acquisition of the freehold interest in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid property are called upon to furnish evidence of the title to the aforementioned property to the below named within 21 days from the date of this notice.

In default of any such notice being received, Una Peters intends to proceed with the application before the county registrar for the county/city of Dublin for directions as may be appropriate on the basis that the persons beneficially entitled to the superior interest including the freehold reversion in each of the aforesaid premises are unknown or unascertained.

Date: 7 June 2013

Signed: Kevin Tunney Solicitors (solicitors for the applicant), Millennium House, Main Street, Tallaght, Dublin 24

RECRUITMENT

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*.

WILD, WEIRD AND WACKY STORIES FROM LEGAL 'BLAWGS' AND MEDIA AROUND THE WORLD

Girl's hopscotch grid garners police warning

Police in Kent have told a ten-year-old girl that drawing a chalk hopscotch grid on the pavement outside her house is criminal damage, reports the *Daily Telegraph*.

Bob Allen, from Ramsgate, said the officers frightened his daughter, Lily-May Allen, and has lodged a complaint with Kent Police, who are trying to trace the officers concerned. "I'm so infuriated that they didn't come and knock on the door and ask to see me or her mum. They've just gone and said something to her and then just driven off."

Lily-May said: "The police came over to me and said you can't draw on the floor because it's criminal damage. It kind of scared me."

A police spokesman said: "From the circumstances described, it would not appear to have been necessary to advise the young girl that chalking a hopscotch grid may be criminal damage and illegal."

Sparks' £163k mobile phone bill shocker

An electrician and his wife got the shock of their lives when they received a mobile phone bill for Stg£163,000 – then fought for months to have the debt cleared.

They told the BBC's *Watchdog* programme that, normally, their bill was for Stg£300 a month, before receiving the shock demand last September.

Mr Mazkouri's contract with mobile provider Orange covered his work phone and employees' phones. He reported a problem with his phone last summer when the handset seemed to overheat. The phone was eventually replaced by the shop where he bought it.

Shortly afterwards, the phone was cut off and the couple was informed that this was due to a large bill on the account. The bill suggested that Mr Mazkouri's phone had downloaded data by dialling up the internet every 20 minutes for three weeks.

The data use was the equivalent of downloading more than five million emails or 15,000 songs – and resulted in the massive bill.

Orange has apologised for the significant delay in dealing with the matter and has promised a refund as a gesture of goodwill.

Think of the cost of the toner cartridges!

The US government has demanded that designs for a 3D-printed plastic gun be taken offline, *www.wired.co.uk* reports. The order to remove the blueprints for the gun came after they were downloaded more than 100,000 times. The US State Department wrote to the gun's designer suggesting that publishing them online might breach arms-control regulations.

Although the files have been removed from the company's site, other sites ontinue to host the files for the Liberator pistol. The plastic pistol is the first fully-3D-printed firearm developed by Defense Distributed, led by 25-year-old Cody Wilson. Mr Wilson describes himself as a crypto-anarchist, and his belief is that everyone has a right to a gun.

Clean sweep

The body of a man found in the chimney of a law firm in Derby, England, has been named as Kevin Gough (42). Staff at Moody & Woolley Solicitors called police after being alerted to the presence of the body by a bad odour, the *Derby Telegraph* reported. Staff told the local paper they noticed a gap in the wall in an unused part of the building about a month before the discovery and thought it looked as if someone had tried to break in.

Twit and run

A British motorist who "knocked a cyclist off his bike" and then drove away has found herself in a lot of hot water after she tweeted about the incident, presumably thinking that her comments would be read only by her 100 or so Twitter followers – not realising that everyone could see them.

The motorist, identified by her Twitter handle @EmmaWay20, said in her tweet: "Definitely knocked a cyclist off his bike earlier – I have right of way he doesn't even pay road tax!" #bloodycyclists."

Imagine her surprise when she received the following message from Norwich Police: "@ emmaway20 we have had tweets ref an RTC [road traffic collision] with a bike. We suggest you report it at a police station ASAP if not done already & then dm [direct message] us."

A case of social media putting paid to a not very social message!

Matheson

In order to succeed, we leave nothing unturned.

We're looking for somebody like minded.

General Counsel & Head of Risk

Matheson is seeking to appoint a General Counsel & Head of Risk. Reporting to the Managing Partner, the successful candidate's responsibilities will include:

- leading and directing the firm's risk management and professional standards functions
- ensuring compliance with relevant legislation and regulations
- risk management and professional standards education for the firm's staff
- management of the firm's insurance programme
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The remuneration package will be commensurate with the successful candidate's experience.

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