Safe as houses
The implications of the new planning and residential tenancies legislation

Chairman of the board
The *Gazette* speaks with Philip O'Leary, the Legal Aid Board's chairman

Cheque, mate?
The 2017 *Mediation Bill* will bring new obligations – and opportunities

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Top tips for mitigating firms' cyber-risks

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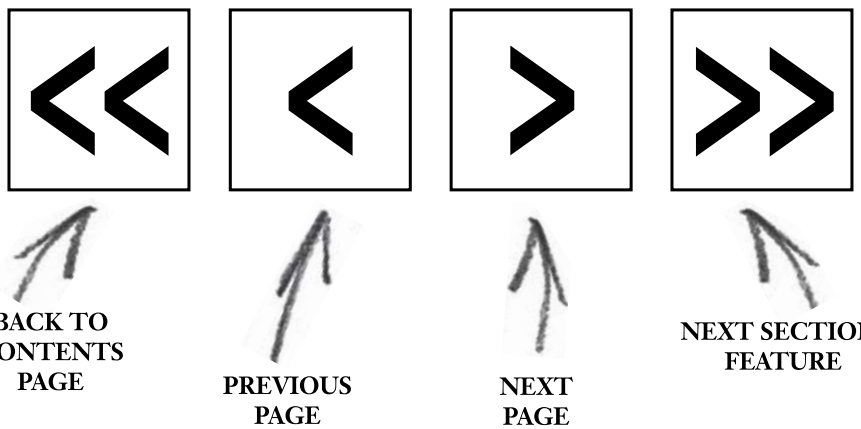

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Does your client have a claim eligible for ASR Hip ADR?

The ADR Process gives claimants a neutral non-binding evaluation of eligible claims

How it works

To apply, submit a completed Form B to McCann FitzGerald solicitors. Form Bs are available from McCann FitzGerald and from *www.hipadr.ie*. On receipt of Form B McCann FitzGerald may ask for additional information or documents, such as necessary medical records or details of any special damages claimed. If the claimant's case is eligible, Form B will be endorsed and returned to the claimant's solicitor. Both parties prepare written submissions which are submitted to an independent Evaluator who issues a written evaluation stating the amount of any damages assessed. The parties have 45 days to accept or reject the evaluation.

- Claimants in the ADR Process do not have to prove liability; only causation and quantum are relevant
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Eligible claims

Claimants may avail of the ADR Process if:

- Proceedings have issued
- The index surgery of the ASR product took place in Ireland
- Revision surgery took place in Ireland not earlier than 180 days and not later than 10 years after the index surgery
- Injuries Board authorisation has been obtained
- The claim is not statute barred
- Revision surgery was not exclusively due to dislocation; trauma; infection; fracture of the femoral head; or any issue related to the femoral stem

For further information, or to discuss settlement of any eligible claim, please contact McCann FitzGerald (DFH/RJB) on 01 829 0000 or email *hipadr@mccannfitzgerald.com*

THE 'B' WORD

This is my fourth president's message and, up until now, I haven't mentioned the 'B' word. You know the one. Brexit. You may have heard of this phenomenon. The good news is that you will be hearing about it for many more years to come. Nearly a year after the vote, we really are none the wiser about how it's going to affect us, both as a nation and as a profession.

Which is not to say we are not trying to pick up as much information as we can. Much rumour and counter-rumour surrounds which firms may or may not be setting up here, as they try and escape the damage that Britain has inflicted on itself. What we do know is that just over 1,000 solicitors to date have entered the Roll in this jurisdiction since the vote – though, at the time of writing, less than a quarter have taken out practising certificates, and no firms have yet established here.

In view of the uncertainty and the interest of the profession in this issue, the director general and I are embarking on a series of meetings in London, Brussels, and Paris to attempt to broaden our knowledge of what plans may or may not be afoot, and whether the anticipated influx is real or speculative.

Dublin v rural divide

Closer to home, though, the divide between Dublin and the rest becomes more defined. The managing partner survey carried out by the Society last year was the subject of a presentation by David Rowe of Outsource, and it confirmed what we know has been a growing problem. Like most economic activity, more and more legal work is focused in Dublin and, as a result, the percentage of solicitors based in the capital keeps rising.

The upshot is that, inevitably, Dublin appears to be making a quicker recovery from the recession, in general, than outside of the Pale. While, of course, there are exceptions on both sides to this, it is a consistent finding in the report, which will be the subject of an article in the June *Gazette*, outlining its key findings.

While we can't be surprised, we need to be clear that there is no easy answer to what is not exclusively an Irish problem. The centralisation of economic activity in big cities is a global phenomenon, and its effects are felt throughout the working world.

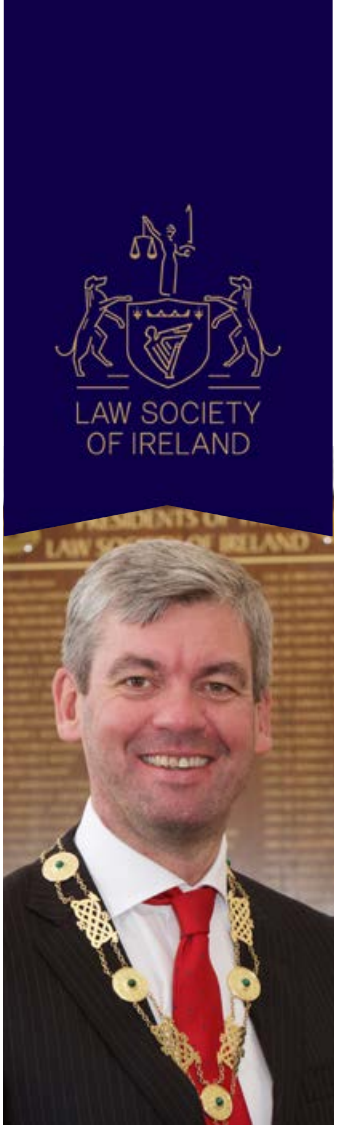
However, we are acutely conscious of how difficult many practitioners, particularly those in smaller practices, continue to find the post-recession era. It's an issue that remains on our agenda, and we will continue to provide as much assistance as possible.

In other news, the seemingly never-ending insurance industry propaganda to cover up their huge increases in premiums, and to seek to place the blame anywhere but on themselves, rumbles on in what now feels like a *Groundhog Day* cycle. I appeared on *Claire Byrne Live* on 10 April, where Kevin Thompson, CEO of Insurance Ireland, rolled out further platitudes about why it's all because damages are too high – and not because the insurers are stockpiling, correcting erroneous reserving, or because of poor underwriting.

> WE ARE ACUTELY CONSCIOUS OF HOW DIFFICULT MANY PRACTITIONERS, PARTICULARLY THOSE IN SMALLER PRACTICES, CONTINUE TO FIND THE POST-RECESSION ERA

While the latter is, of course, the case – and government knows this – it would appear that the media are happy to let the insurers have a platform to deflect attention from themselves. Frustrating as this is, we will continue to tell the truth and fight for victims' rights to be compensated fairly.

A little like death, taxes, and Brexit, the insurance debate may always be with us. g



STUART GILHOOLY,
PRESIDENT

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REGULARS

IN-HOUSE CONTENT

Content of interest to in-house and public sector solicitors in this month's *Gazette*:

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THE BIG PICTURE

PIC: KCNA

FREUDIAN FIELD DAY

North Korea performed its largest-ever long-range artillery firing drill on 25 April 2017, in a demonstration by the Korean People's Army. The government reportedly deployed aircraft and submarines in the drill, which simulated an attack on 'enemy warships'. The war games were observed by Dear Respected Comrade Kim Jong-un, Supreme Leader of the Glorious Democratic People's Republic of Korea, to celebrate the 85th anniversary of the People's Army

COMPILED BY KEITH WALSH, PRINCIPAL OF KEITH WALSH SOLICITORS

DONEGAL

SKILLNET GOES NORTH

The travelling roadshow that is Law Society Skillnet pulls into Lough Eske Castle Hotel on 29 and 30 June 2017. Topics will include practice management and regulation, managing your office, understanding what professionalism really is, avoiding conveyancing pitfalls, civil litigation update, a guide to data protection, acting for the elderly, new costs obligations under section 150, and a panel of experts giving conveyancing updates. Ten hours of CPD are on offer and, even if you are not based next or near Donegal, it looks like an enticing conference, given the quality of the accommodation and speakers. To book your place, contact skilnetcluster@lawsociety.ie.

CORK

WILLING WAYS

Southern Law Association CPD coordinator Julie Rea has set a hectic pace with her programme for the year. Recent successful seminars have included 'VAT on property' (Stephen Gahan), and 'Wills and probate' (organised by the SLA, in conjunction with STEP). Grainne Duggan BL addressed the topic of how to challenge a will, while Carol Jermyn provided a practical guide to common probate queries. Pictured are Carol Jermyn (Carol Jermyn & Co), Joan Byrne (vice-president, SLA) and Grainne Duggan BL

LIMERICK

LIMERICK MEMBERS' UPDATE

The Strand Hotel in Limerick will be the venue for the Skillnet cluster event on 16 June 2017. Well-known criminal practitioner Darach McCarthy will speak on road-traffic and drink-driving offences, James V Woods will deal with liquor licensing, Felix McKenna (retired chief bureau officer of CAB) will give an enforcer's perspective on anti-money-laundering, while Anne Stephenson will deal with probate matters. Margaret Walsh (Sheil Solicitors) and Catherine O'Flaherty (Regulation Department, Law Society) will deal with acting for the elderly and the new contract for sale and requisitions on title. To book your place, contact skillnetcluster@lawsociety.ie.

GALWAY

FAMILY LAWYERS CONVENE IN CITY OF THE TRIBES

An afternoon of family law updates and three hours of CPD are promised by the Galway Solicitors' Bar Association (GSBA) on 16 June. GSBA sources tell 'Nationwide' that at least half of the Law Society's Child and Family Law Committee will be in Galway to deliver papers on the *Child and Family Relationships Act 2015*, pensions in family law, recent case law update, as well as the likely impact of Brexit on family law. A big turnout is expected, so interested delegates are advised to contact the GSBA at the earliest opportunity.

As part of the GSBA's plan to hold up to 40 hours of free CPD during 2017, the following CPD dates should be noted in your diary:

- Friday 26 May, 2pm, Galway Courthouse (four hours' general) – medical negligence seminar: updates on medical negligence will be provided by John Scurr (consultant general/vascular surgeon and Medico Legal Chambers Ireland Ltd),
- Friday 16 June, 2pm, in Galway Courthouse (four hours' general) – update from the Law Society's Child and Family Law Committee on all aspects of family law.

The GSBA would encourage all members to send in their annual subscription of €50 per solicitor to allow the association to provide the maximum possible number of CPD events during the year. Payment can be sent to James Seymour (Berwick Solicitors, 16 Eyre Square, Galway) or Cairbre O'Donnell (John C O'Donnell & Son, Solicitors, Mary Street, Galway).

DUBLIN

BREAKTHROUGH ON LEGAL COSTS

Dublin solicitors have been congratulating DSBA president Áine Hynes for the association's recent success in suggesting a solution that would permit payments on account to be made in High Court cases.

President of the High Court Mr Justice Peter Kelly has recently issued a practice direction on this topic, which should prove to be of great practical assistance to practitioners who, of late, have suffered significant delays and backlogs in the taxation of costs system **(see p24).**

NEWS FROM THE LAW SOCIETY'S COMMITTEES AND TASK FORCES

FAMILY AND CHILD LAW COMMITTEE

GUARDIAN *AD LITEM* SUBMISSION

The Law Society's Family and Child Law Committee has called for an urgent amendment of the proposed guardian *ad litem* (GAL) system. In its submission to the Oireachtas Joint Committee on Children and Youth Affairs on 6 April, the committee conveyed its recommendations on the reform of the service, as provided for in the *General Scheme of the Child Care (Amendment) Bill 2017*.

Keith Walsh (committee chair) and Carol Anne Coolican (former chair) presented the submission on behalf of the Law Society. The full submission is at www.lawsociety.ie/Solicitors/Representation.

As a matter of urgency, the Society has called on the Oireachtas Joint Committee to address three priority issues:

- Arising from article 42A.4.2 of the Constitution, there is a legislative presumption that a child is entitled to a guardian *ad litem* in every case, including reviews. The current scheme needs to be amended to reflect this presumption and to impose an obligation on the courts to appoint a guardian *ad litem*. The scheme, as drafted, gives discretion to the Circuit and District Courts on such appointment.
- The establishment of an independent agency to manage the guardian *ad litem* service; such an agency to be an independent non-departmental body that is also independent of the parties (Tusla). This is the approach adopted in our neighbouring jurisdiction.
- The scheme, as drafted, would be greatly enhanced by the specific inclusion of the criteria to be assessed in determining the best interest of children, as set out in section 31 of the *Guardianship of Infants Act 1964* (as inserted by section 63 of the *Child and Family Law Act 2015*), regarding cases involving children in private law matters.

Sinead Kearney (ByrneWallace), Denise Kirwan (Comyn Kelleher Tobin), Children's Ombudsman Dr Niall Muldoon, Josepha Madigan TD, Keith Walsh (chair, Child and Family Law Committee), Carol Ann Coolican (Legal Aid Board), Naomi Kennan (policy officer, Ombudsman's Office) and Cliona O'Neill (director of policy, ISPCC)

The Society made 12 recommendations in relation to the general scheme, including the following:

- The necessity for a national guardian *ad litem* service,
- Greater clarity of roles, in respect of service providers,
- A recommendation for a comprehensive list of criteria for establishing the best interests of the child,
- A strengthening in relation to the qualification of the GAL,
- The Society recommends the introduction of a fee structure for both GALs and their legal representatives and regular audits of files and accounts, in addition to clarity on the discretion of the courts, and
- Careful consideration is required in relation to the provision of information to the GAL, and reports prepared by the GAL for the courts.

Members of the Child and Family Law Committee, specifically Sinead Kearney, Denise Kirwan and Geraldine Keehan attended the subcommittee hearing. The committee wishes to thank all members who contributed to the submission, including Cormac Ó Culain and Derek Owens for their assistance. The committee will continue to make submissions and advocate on this issue.

LITIGATION COMMITTEE

PAYMENT ON ACCOUNT PENDING TAXATION OF COSTS

From 24 April 2017, it will be possible to seek an order directing payment of a reasonable sum on account of costs, pending the taxation of such costs.

In recognition of the long delays experienced in the taxation of costs, the President of the High Court issued practice direction 'HC71 – Payment on Account of Costs Pending Taxation'. This direction provides that such orders may be made in all cases where there is no dispute as to the liability for the payment of costs, and in any other case which a judge thinks appropriate.

In order to obtain such an order, the solicitor for the successful party must undertake that, in the event of taxation realising a smaller sum than that directed to be paid on account, such overpayment will be repaid.

For more information, see p24 and the *President's Bulletin* of 13 April.

IRISH CENTRE FOR HUMAN RIGHTS APPOINTS DIRECTOR

NUI Galway has appointed Prof Siobhán Mullally as the established professor of human rights law and director of the Irish Centre for Human Rights at NUI Galway. Prof Mullally will take up her post in September 2017.

Mullally is currently a professor at the School of Law (UCC), where she also holds the position of vice-head of the College of Business and Law. She was recently elected president of the Council of Europe expert group on human trafficking, is a commissioner of the Irish Human Rights and Equality Commission, and a member of the Permanent Court of Arbitration in The Hague.

FLAC SUCCEEDS IN MOUNTJOY ENFORCEMENT CASE RELEASE

A man has been released from Mountjoy on bail following an application by FLAC that pointed out a failure to adhere to debt enforcement law, *writes Fintan Price*.

The man had failed to make court-ordered instalment payments on judgment debts and had been sentenced to a week in prison on 21 March.

An application to the High Court led to his release after serving two nights. FLAC claimed that the judge had failed to apply two safeguards required under legislation: that legal aid must be offered to the debtor, and that a judge may not make any order to imprison unless he or she is satisfied that the creditor has shown beyond a reasonable doubt that the debtor failed to pay, due to his or her "wilful refusal or culpable neglect".

FLAC chief executive Eilis Barry called on the Minister for Justice to sign the statuary instrument to bring the *Civil Debt (Procedures) Act 2015* into effect as a matter of urgency.

GETTING YOUR TAX RIGHT

***Small and Expanding Businesses: Getting the Tax Right* is the title of a new book by Kerri O'Connell (fellow of Chartered Accountants Ireland), *writes Fintan Price*. It is described as a "guide to the tax issues typically encountered by small and expanding businesses".**

The book examines the tax implications for small businesses in the areas of VAT, income tax on business profits earned by a sole trader or partnership, payroll taxes, and corporation tax on business profits earned by companies. It includes case studies and explains tax issues faced by businesses, with worked examples. Published by Chartered Accountants Ireland, it retails at €45.

NEW MCCANN CHAIR

Pictured are Prof Joseph McMahon (dean of the Sutherland School of Law), Prof James Devenney, Prof Imelda Maher (deputy dean) and Barry Devereux (managing partner, McCann FitzGerald)

James Devenney is the new McCann FitzGerald Chair of International Law and Business at UCD's Sutherland School of Law. Prof Devenney delivered his inaugural lecture entitled on 6 April 2017. He reflected on four recent cases that fundamentally alter our understanding of contract law and have wide-reaching implications for lawyers and businesspeople.

Commenting on the lecture, Barry Devereux (managing partner, McCann FitzGerald) said: "James is widely recognised as a world-leading expert on transactional commercial law. At McCann FitzGerald, we are very proud to have him represent our firm in the legal educational world and we look forward to building on our ongoing support of the chair."

CORK FIRM EXPANDS

PIC: ROB LAMB

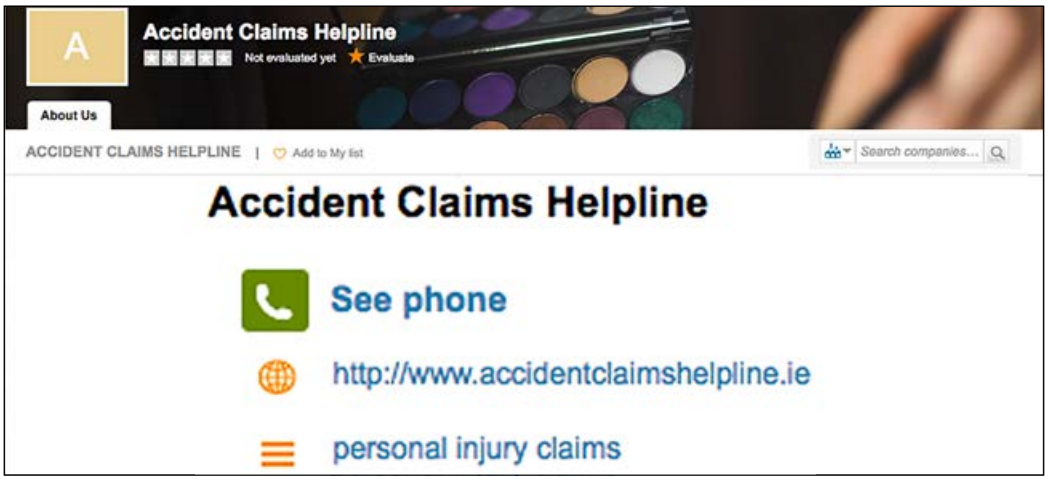
Cork commercial law firm O'Flynn Exhams Solicitors continues to expand, with the appointment of two new partners. Des Lynch is now partner in the private client team, while Tom O'Byrne is a partner in the litigation and dispute resolution team. O'Flynn Exhams is the largest city-centre law firm in Cork, currently employing 45 people. Pictured outside the firm's South Mall offices are Des Lynch (partner), Richard Neville (managing partner) and Tom O'Byrne (partner)

CRACKDOWN ON 'CLAIMS HARVESTING' SITES

Since 2014, a total of 17 'claims harvesting' websites have been taken down as a result of Law Society investigations. Claims harvesting websites gather and sell information for potential injury claims to panels of solicitors – and the Society has been swift in cracking down on such illegal activity.

Solicitors connected with claims harvesting sites face a range of sanctions, including reprimands and a formal direction that all future advertising must be approved by the Society for a period of three years. In certain instances, referrals have been made to the Solicitors Disciplinary Tribunal on the grounds of professional misconduct.

The Society is sensitive to concerns raised by members about these sites and regards them as a scourge for the vast majority of practitioners who struggle to compete with them. Director general Ken Murphy said: "One of the difficulties is finding out who, exactly, is behind such advertising. The degree of anonymity offered by such websites can be a source of great frustration, but the Law Society has put significant resources into identifying those involved."



Late last year, the Law Society began proceedings against two claims harvesting websites that are owned and operated by non-solicitors. Such litigation was the first of its kind for the Society and was brought under section 18 of the *Solicitors (Amendment) Act 2002*.

In *Law Society v Accident Claims Helpline Ltd*, the High Court ordered the permanent removal of the harvesting website 'accidentclaimshelpline.ie' and prohibited the owner of the website, Mr Anthony Russell, from future contravention of, among other things, section(s)55 and/or 56 of the *Solicitors Act 1954* (as amended) and/or section 5 of the *Solicitors (Amendment) Act 2002*.

These sections prohibit an unqualified person from acting and/or pretending to be a solicitor and from publishing advertisements relating to services of a legal nature "that could otherwise be provided by a solicitor, for or in expectation of a fee, gain or reward".

The order also directed that Mr Russell must cease any involvement and/or connection and/or association and/or operation of or with the website or any similar website operating in breach of the *Solicitors Acts*.

During the proceedings, the President of the High Court remarked that he would make orders "bringing an end to claims harvesting, a practice which is as unattractive as its name".

The second set of section 18 proceedings continue before the High Court and are being defended by the respondents.

The Law Society enforces the *Solicitors (Advertising) Regulations 2002* through the advertising regulations division of the Regulation of Practice Committee. The regulations govern the manner in which solicitors advertise their professional services. They are interpreted and applied by the Society in such a way that, while not representing a ban on advertising activities, is robust and clearly delineated, thereby ensuring that a level playing field is maintained across the profession.

Since January 2014, over 500 alleged breaches have been considered by the Society. The vast majority of these matters related to solicitor firms' websites. The solicitors responsible were overwhelmingly cooperative and quick to address the apparent breaches, once notified.

Further, the Society has engaged a media monitoring company to examine print media at local and national level to identify advertising in violation of the rules introduced by the 2002 legislation. In 2016, a total of 19 such advertisements resulted in investigations being opened.

GEN UP ON THE GDPR

The *General Data Protection Regulation* (GDPR) is due to come into effect in 2018. It will strengthen and unify data protection within the EU and address the export of data outside the EU. Practitioners will need to be ready to give advice to their clients on the implications of these new rules.

To that end, the Law Society's Intellectual Property and Data Protection Committee is organising a seminar in June, titled 'Data protection: the GDPR – an introduction'. The aim is to provide a practical overview and introduction to the provisions of the GDPR. Speakers will include Ann Henry (chair of the Intellectual Property and Data Protection Committee), Paul Lavery (McCann FitzGerald), Peter Bolger (Mason Hayes & Curran), Elaine Morrissey (McDowell Purcell) and Seamus Carroll (Department of Justice).

The seminar will take place at the Law Society on 8 June, 3-5pm, and will end with a complimentary drinks reception. For more information and to book, see www.lawsociety.ie or email lspt@lawsociety.ie.

CIVIL JUSTICE SYSTEM SET FOR A SHAKE-UP

Justice minister Frances Fitzgerald has announced a major review and reform of the administration of the civil justice system, aiming to "deliver a more efficient and effective Irish legal system in regard to the area of civil justice".

A review group chaired by Mr Justice Peter Kelly will examine the current system and report to the Tánaiste within two years on how to:

- Improve access to justice,
- Reduce the cost of litigation, including costs to the State,
- Improve procedures and practices in order to ensure timely hearings,
- Remove obsolete, unnecessary or over-complex rules of procedure,
- Review the law of discovery,

Mr Justice Peter Kelly will chair the review group

- Encourage alternative methods of dispute resolution,
- Review the use of electronic methods of communications,
- Examine the extent to which pleadings and submissions and other court documents should be available or accessible on the internet, and
- Identify steps to achieve more effective outcomes for court users, with particular emphasis on vulnerable court users, including children and young persons, impecunious litigants who are ineligible for civil legal aid, and wards of court.

The group's remit is currently being finalised, but will take into account other work and initiatives already carried out, such as the 2010 report of the Law Reform Commission on *Consolidation and Reform of the Courts Acts*, as well as the legal costs provisions of the *Legal Services Regulation Act 2015*, among others.

ECJ CLARIFIES HEADSCARF BAN

Following the publication of 'Burkinis in Bundoran' (see the March *Gazette*, p50), the European Court of Justice has addressed similar factual circumstances in the *Achbita* and *Bougnaoui* cases (C-157/15 and C-188/15 respectively), which were widely publicised.

Prior to the court's decision, there were two contrasting opinions from different advocates general (see the opinion of AG Sharpston handed down on 13 July 2016 in *Bougnaoui*, which contrasts with the earlier opinion of AG Kokott in the *Achbita* case) in similar headscarf matters before the European Court of Justice, which produced different outcomes.

Both cases involved Muslim women who were employed by private sector employers, and wore headscarves only, rather than any full-face coverage. They specifically dealt with pleas of discrimination in the employers' employment policy and manifestations of religion, rather than human rights pleas.

The Court of Justice, while referring the matters back to the local courts for implementation, allowed for the banning of visible religious symbols; however, the entire regime of the employer must be taken into account.

The policy on such apparel must essentially ban all forms of religious apparel – the direction to remove one particular item of apparel, however offending, will remain discriminatory unless the policy is applied equally.

The court did indicate there may be a form of indirect discrimination, and this matter was referred back to the Belgian Court of Cassation for review. It will not be regarded as indirect discrimination, however, if "it was justified by a legitimate aim and if the means of achieving that aim were appropriate and necessary". The test for this was left to the local court.

MATHESON APPOINTS 12 NEW PARTNERS

Matheson has appointed 12 new partners, in its largest partner promotions round in over a decade. The firm says that the appointments "reflect demand for advice in both traditional and emerging disruptive fields in a post-Brexit world".

The new partners are Matthew Broadstock (tax), Emma Doherty (corporate international business), Leonie Dunne (commercial real estate), Laura Gleeson (banking and financial services), Stuart Kennedy (asset finance), Brian McCloskey (corporate M&A), Madeline McDonnell (corporate M&A), Claire McLoughlin (commercial litigation and dispute resolution), Barry O'Connor (asset management and investment funds), Donal O'Donovan (banking), Karen Reynolds (commercial litigation and dispute resolution) and Kevin Smith (tax).

MOOC SPOTLIGHTS EMPLOYMENT LAW IN THE DIGITAL ERA

'Employment law in the digital era' is the theme for the Diploma Centre's next m assive open online course (MOOC) on Tuesday 9 May. MOOCs are free online courses open to all and are specifically designed for large numbers of participants.

Since their initial launch in 2014, the Diploma Centre's MOOCs have attracted over 6,000 participants from over 60 countries. These courses feature online recorded and streamed presentations, together with interactive discussion forums that allow those taking part to engage directly with the courses' expert presenters.

New and emerging employment law themes will be considered in this latest MOOC, titled 'Employment law in the digital era: Brexit, borders and offices without walls – challenges and impacts in uncertain times'. Experts will examine the topic through the prism of the employment law and industrial relations framework that applies in Ireland. For example, many employees are working far more flexible hours and spending less time in the formal workplace environment. These issues challenge the traditional boundaries of the employment relationship.

At the launch of the 2017 employment law MOOC were *(from l to r)*: Maeve Regan (Mercy Law Centre), Loughlin Deegan (ByrneWallace), Melanie Crowley (Mason Hayes & Curran), Rory O'Boyle (Law Society Diploma Centre), Oonagh Buckley (Workplace Relations Commission), Louise Harrison (William Fry) and Duncan Inverarity (A&L Goodbody)

In the context of Brexit, the MOOC will highlight the common employment law frameworks that operate in Ireland, and England and Wales. This common ground could give Ireland an advantage compared with other single market countries, and should open up possibilities for British firms looking to engage staff here.

The course will run over a five-week period. Materials for weekly modules will be released every Tuesday and will comprise short videos presentations from employment law experts, as well as suggested reading lists, quizzes, and live online Q&A sessions. Participants who successfully complete the weekly tasks and collect four 'badges' may opt to obtain a Certificate of Completion awarded by the Law Society of Ireland. To sign up visit: https://mooc2017.lawsociety.ie.

HIGH COURT GUIDES MINISTER ON SECRET BALLOTS

The High Court has found in favour of a visually impaired man, Robbie Sinnott, who sought to vindicate his right to a secret ballot, *reports Fintan Price*. Although the Constitution affords the right to a secret ballot, people with a visual impairment have had to do so through a trusted friend or the presiding officer.

Mr Justice Tony O'Connor said that the court could not require the Minister for the Environment to set up a secret ballot, but could declare that the minister had a duty to provide one, due to the relevant provisions of the *Electoral Act 1992*.

PIC: COLLINS COURTS

Robbie Sinnott leaving the Four Courts after his successful High Court action

This is in conjunction with the duty under the Constitution to assure a secret ballot, as far as is reasonably practicable.

The judge proposed declaring that the minister had a duty to provide such arrangements where there were no disclosed reasonably practicable economic or effective reasons not to vindicate the right to mark ballot papers without assistance.

Mr Sinnott is a founding member of the Blind Legal Alliance and said that the legal victory was about the fundamental right to vote for those who face discrimination due to visual impairment. Visually impaired people make up 5% of the Irish population.

SOCIETY SUBMISSIONS ON MATTERS OF INTEREST

The Society, through its committees and with the assistance of the Policy and Public Affairs department, continues to participate in a range of consultations, pre-legislative hearings, and at the committee stages of a number of bills:

Mediation Bill 2017

The Society made a number of recommendations for amendments in advance of the committee stage regarding the regulation of mediators and the need to protect the voluntary nature and confidentiality of the process. In addition, it outlined how the bill would affect the family law mediation regime (ADR Committee, Family and Child Law Committee).

Parole Bill 2016 (private member's bill)

Six areas for consideration were proposed by the Society. These included support for the proposal that a clear statutory test should exist to determine who is eligible for parole and temporary release. Any revocation of parole should be decided via an independent review hearing, which is subject to appeal. In addition, we argued that the Parole Board should retain the power to make recommendations

and referrals in individual cases (Criminal Law Committee and the Human Rights Committee).

Bail (Amendment) Bill 2017

The Society emphasised the importance of fair procedures in criminal and bail proceedings. It made eight recommendations to the Oireachtas select committee, including safeguarding the role of the courts as the ultimate decision-maker regarding the return to custody of people on bail, that criminal trials are processed as quickly as possible, and that a new requirement where courts provide reasons for granting bail does not interfere with an innocent person's ability to access bail and the courts power to grant bail (Criminal Law Committee).

Pre-budget submission

Budget 2017 is in preparation, and the Society recently submitted a menu of largely cost-neutral, pragmatic changes to the taxation codes across three main themes. Recommendations were made for changes to deal with inequities that exist in the tax code that principally affect the individual, but also companies; changes that are focused on keeping Ireland competitive and encouraging international investment, and a number of administrative or technical issues (Taxation Committee; Probate, Administration and Trusts Committee).

Other recent submissions include:

- Pre-legislative scrutiny of the *Childcare (Amendment) Bill* (Family Law Committee),
- A submission to the Revenue Commissioners and Department of Finance on the operation of section 481 of the *Taxes Consolidation Act 1997* (Taxation Committee),
- A preliminary view on the European Commission proposal for a directive on insolvency, debt, restructuring and second chance (Business Law Committee),
- A submission to the Department of Justice on the heads of the revised general scheme of the *Criminal Procedure Bill 2015* (Criminal Law Committee),
- Commentary to the Department of Jobs, Enterprise and Innovation on the transposition of the *Trade Secrets Directive* (2016/943) (Intellectual Property and Data Protection Law Committee).

The Society's main submissions to government departments, the Oireachtas and State agencies are available to view and download in the members section at www.lawsociety.ie.

FOCUS ON MEMBER SERVICES

BED AND BREAKFAST AT BLACKHALL PLACE

There are many benefits to being a Law Society member – including reasonably-priced B&B accommodation at Blackhall Place.

With the cost of Dublin hotel rates rising, the Law Society's B&B service offers members a competitive alternative for business and leisure overnight stays. It's open seven days a week, all year round. Just a short walk from Heuston Station and the

Smithfield and Museum Luas stops, the B&B is conveniently located for the city centre, the Four Courts and the Criminal Courts of Justice.

The cost of a single room is €45 and €65 for a double/twin room per night (with breakfast included – continental at weekends). All rooms are en suite, with television, wi-fi and tea/coffee-making facilities.

Residents can avail of free parking, with the reassuring presence of 24-hour security. Late arrivals are easily accommodated. Early booking is recommended due to the service's popularity. Find out more at www.lawsociety.ie/bandb. To check availability or book a room, contact Law Society reception – email: general@lawsociety.ie; tel: 01 672 4800.

HOPE IS WHERE THE CALCUTTA RUN IS!

The Calcutta Run has named the HOPE Foundation as its new charity partner. The announcement was made on 12 April – the International Day for Street Children. HOPE joins the Peter McVerry Trust as the other main beneficiary of the charity run.

HOPE has worked for 18 years providing crucial services for homeless children in Calcutta. Maureen Forrest (HOPE director) commented: "We are so delighted, grateful and honoured to announce a partnership with the Calcutta Run this year. This amazing event will make such an incredible difference to the children with whom we work in Calcutta.

"We have an opportunity to send a message that an extremely vulnerable group of children need to be cared for, and that we're listening to them. Together, with your support, we can be one voice for the voiceless and reach out to so many more children. We can never thank you enough for choosing HOPE."

The Calcutta Run takes place on Saturday 20 May and has 5k and 10k routes to choose from. All are welcome to walk or run. This year also sees the launch of the 'Calcutta Cycle Sportive' as a new fundraising venture. The cycle will be an 80k non-competitive event to be held on the morning of the run, and aims to attract participants who are passionate about this growing pursuit.

To achieve this year's goal of €200,000, all participants are being encouraged to fundraise. Just asking ten people for €10 would make a huge difference to the financial success of the event. Every cent raised will go to the Peter McVerry Trust and HOPE.

After the event, participants and their families and friends are invited to enjoy the Finish Line Festival at Blackhall Place, where they can enjoy a barbecue, bar, DJ, comedy, tennis and kids' mini-athletics.

Further information and an application form can be found at www.calcuttarun.com.

Information on the Supporter Firm Initiative, DX Firm Challenge, or the Cycle Sportive can be had by emailing hilary@calcuttarun.com.

BUILDING MENTAL RESILIENCE

Good mental health is more than the absence of a mental-health problem. People are struggling to cope with the demands of life and are stuck on getting through the day. In the increasingly demanding and changing legal environment, resilience is important in order to thrive. It is now recognised as an important factor in the workplace.

Resilience is defined as the ability to resist or bounce back from adversity. In any workplace, there will be people who thrive on challenges and difficulties, while others will find it harder to cope with unexpected change or problems.

Here are some top tips to help build resilience:

- **Learn to see challenges, mistakes and failures as valuable learning experiences.**
- **Give yourself a pat on the back when things go well. Forgive yourself when things go wrong.**
- **Don't give in to negative thoughts.**
- **Use humour to defuse and downplay difficulties.**
- **Be flexible – nothing stays the same, especially in the workplace.**
- **Take care of physical and mental health – get enough sleep, exercise and eat well.**
- **Take time off work, use your holiday entitlements and try to take breaks during the working day.**
- **Recognise that a bad situation is usually temporary.**
- **Build a support network – make time for friends and family who offer encouragement and strength. Consult supportive work colleagues.**
- **Don't extrapolate one bad situation into another unrelated situation.**

LawCare supports and promotes good mental health and well-being across the legal community. Its key support service is its free, confidential and independent helpline, and its trained staff and volunteers listen and support with any issues.

Call 1800 991801 or visit www.lawcare.ie.

IN-HOUSE SOLICITORS AND RECOVERY OF COSTS

In-house and public sector solicitors work in many roles across different sectors, including retail, State bodies, utilities, charities, and commercial businesses, *writes Annelie Walsh (legal manager, ESB Networks)*. It is not uncommon for in-house solicitors employed by these organisations to conduct cases – often complex and long-running – either with or without engaging external solicitors and/or counsel.

What happens if the in-house solicitor successfully obtains an order for costs as part of the judgment of the court in the matter – are these costs recoverable? In Britain, the Court of Appeal (*Lloyds Bank Ltd v Eastwood and others* [1975] 1Ch 112) took the view that in-house solicitors were entitled to recover costs on an *inter partes* basis, which should reflect the salary of the solicitor handling the matter, and overheads, but excluding any element of profit.

The courts in Ireland have taken a somewhat different approach and have concluded that in-house solicitors are entitled to recover the reasonable and necessary costs incurred in litigation cases. The leading case in this area is *Bank of Ireland v Lyons* ([1981] IR 295) in which Judge Finlay set out the criteria by which a claim for in-house legal costs should be supported and the factors that ought to be considered relevant – including details of the number of personnel involved and time spent on the case, the overhead costs applicable to the case, and the amounts incurred in relation to support staff.

The judgment in that case confirmed that the general principle applies, that is, that the unsuccessful party must pay the costs concerned on an indemnity basis. While the onus is on the objecting party to argue why certain costs ought to be disallowed in this scenario, the party claiming his or her costs will be required to produce the facts and figures supporting the calculation of costs claimed.

The position of the Chief State Solicitor in recovering in-house legal costs was considered in detail by the taxing master in *Bula Ltd & others v Tara Mines & others* (ruling of the taxing master, 25 March 1998). In that case, the taxing master made it clear that the instruction fee allowable to the Chief State Solicitor was not to be based on, or related to, the salary paid – but instead must reflect the amount of work done, the effort required, and the complexity of the matter at hand, together with the other factors set out in order 99, rule 37(22)(ii) of the *Rules of the Superior Courts 1986*.

What is the position where an in-house solicitor instructs external solicitors, but continues to be involved in the handling of the case? This is exactly what occurred in the case of *Ultraframe (UK) Limited v Eurocell Building Plastics Limited* (ruling of the taxing master, 31 July 2006), in which the claimant's in-house litigators instructed an external law firm, since the case involving patent litigation was exceptionally complex. The claimant was successful and obtained an order for costs.

The bill furnished to the defendants included both the costs of the in-house solicitor and those of the external law firm. The defendants claimed that the in-house solicitor was the client in this instance, and his costs should therefore be disallowed. Master Campbell disagreed and held that, where the tasks undertaken by the in-house legal team can be measured and are distinct from those undertaken by the external law firm, they are recoverable.

The significant increase in the number of organisations employing in-house solicitors – who then prosecute or defend litigation on behalf of their employers – is likely to lead to much more jurisprudence in this area in the future.

Get LinkedIn

In-house and public-sector solicitors are invited to join and participate in the Law Society's In-house LinkedIn Group, which can be accessed at www.lawsociety.ie/inhouselinkedin.

PROTECTION FOR 710,000 ASYLUM SEEKERS

EU member states granted protection status to 710,400 refugees last year – more than double that of 2015. Over half of those granted protection status were Syrians (405,600). Iraqis came second with 65,800 (9%), while asylum-seekers from Afghanistan totalled 61,800 (9%).

Of the three main citizenships granted protection status in Ireland, 150 were Syrians (19%), 70 were from Afghanistan (9%), and 65 from Zimbabwe (8%).

Germany granted protection status to 445,210 in 2016 – three times more than in 2015. Sweden welcomed 69,350 asylum seekers (double that of the previous year). It was followed by Italy, which granted protection status to 35,450 refugees.

Ireland made 790 positive decisions on asylum applications in 2016, of which 645 were granted refugee status, while 140 received subsidiary protection (meaning they would not be sent back home due to the risk of harm). No figures were supplied by Ireland on decisions taken for humanitarian reasons.

THE TAXMAN COMETH – LAW SOCIETY DINNER FOR THE REVENUE COMMISSIONERS' TOP BRASS

PIC: LENSMEN

(Front): Marie-Claire Maney (assistant secretary, Revenue solicitor), Gerry Harrahill (revenue commissioner), Niall Cody (chairman, Revenue Commissioners), Stuart Gilhooly (president, Law Society), Liam Irwin (revenue commissioner), Caroline Devlin (Law Society representative, TALC); *(back)*: Brian Doyle (assistant secretary, Revenue's Personal Taxes Policy and Legislation Division), Patrick Bradley (Law Society representative and current chair, TALC), Ken Murphy (director general, Law Society), Richard Hammond (chair, Law Society's Probate, Administration and Trusts Committee), Phillip Brennan (Revenue assistant secretary, Dublin Region), Patrick Sweetman (vice-chair, Law Society's Conveyancing Committee), Cormac Gilhooly (principal officer, Revenue's Galway-Roscommon Region), Gavin McGuire (chair, Law Society's Taxation Committee), Declan Rigney (assistant secretary, Revenue's Planning Division) and Mick Gladney (collector general, Revenue)

Chairman of the Revenue Commissioners Niall Cody, his two fellow commissioners Liam Irwin and Gerry Harrahill, and many of their most senior colleagues were the guests of the Law Society for a special dinner on 4 April 2017.

Chairman Cody has frequently referred very positively to the solicitors' profession as "one of Revenue's most important stakeholders". And why wouldn't he value solicitors, given the vast amount of work – onerous and unpaid, as solicitors would quickly point out – that the profession does every year to collect money in dozens of different ways in order to fill the coffers of the State?

Practising solicitors often complain about the unremunerated tax collection obligations imposed on them. However, as the Revenue correctly points out, it is successive governments, not Revenue, who make the policies in this regard.

It is in the interests of both the solicitors' profession and Revenue to cooperate in the administration of the taxation system and, in fact, the Law Society and Revenue do this both constructively and effectively. The main vehicle for this long-standing cooperation between Revenue and the Law Society (together with others, such as the accountancy bodies) is the Taxation Administration Liaison Committee, known simply as TALC.

This year, it is the Society's turn to chair TALC and, indeed, Patrick Bradley had chaired such a meeting on the very day that this dinner – a relaxed and social occasion designed to further improve communication – was hosted by the Society in Blackhall Place.

A former TALC chair, Caroline Devlin (Arthur Cox), explains that the important work of TALC is divided between resolving current issues as they arise, particularly in relation to new taxes and issues arising from *Finance Bills*, and the implementation of ongoing longer-term projects. It's good to talk, even with your taxman.

INAUGURAL SPRING GALA A SHINING SUCCESS

Dee Purcell, Aoibhne Hogan, Claire O Caoimh and Sheila Duignan

Attracta O Regan, Tánaiste Frances Fitzgerald and Michelle Nolan

ALL PICS: ANGELA HALPIN

Alisia Mulvany and Niall Lynchehaun

Noel Malone, Harry Ward, Emmanuel Kehoe, Tomas F Burn and Daniel Kelly

Zena Westerman, Robert Vard and Siobhan Marry

Natasha McKenna, Michael Kavanagh and Ciara O'Kennedy

Paul Keane, Roisin Bennett and Siobhan Kirwan

Alastair Campbell, Yvonne Chapman and Ken Murphy

Jacinta Glynn and Anna Clancy

Michael Neary and John Doyle

Eibhlin Sharkey, Brendan Sharkey and Elaine McGrath

Catherine Guy, Declan Black and Helen Dooley

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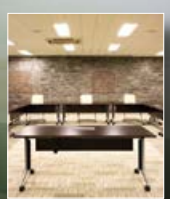

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LOUTH AND PROUD

PIC: KEN FINNEGAN PHOTOGRAPHY

The County Louth Solicitors' Bar Association held its AGM at Dundalk Courthouse on 10 April. The meeting was attended by President of the Law Society Stuart Gilhooly, and director general Ken Murphy. Pictured are *(front, l to r)*: Patrick Mulcahy, Rory O'Hagan (secretary), John McGahon (treasurer), Stuart Gilhooly, Ken Murphy, Catherine MacGinley (president), Catherine Allison and Peter McGuinness; *(middle, l to r)*: Conor MacGuill, Roger MacGinley, Donal O'Hagan, Eimear Hall, Francis Bellew, Catherine Fee, Laurence Steen, Fergus Mullen, Catherine Taaffe, Niall Lavery, Ciara Hughes, Paula Tiernan, Derek Williams, James MacGuill, Gary Matthews and Stephen Reel; *(back, l to r)*: Elaine Grills, Olivia McArdle, Simon McArdle, Adrian Ledwith, Sharon McArdle, Barry O'Hagan, James Murphy, John Kieran and Niall O'Hagan

BE BOLD FOR CHANGE!

PIC: CIAN REDMOND PHOTOGRAPHY

The Irish Women Lawyers' Association (IWLA) and the Dublin Solicitors' Bar Association presented 'Be bold for change!' in collaboration with Law Society Skillnet, at Blackhall Place on 5 April. At the event were *(l to r)*: Noeline Blackwell (CEO, Dublin Rape Crisis Centre), Karyn Harty (partner, McCann FitzGerald), Aoife McNickle (chairperson, IWLA), Ivana Bacik (senator, and Reid Professor, TCD), Josepha Madigan TD, Áine Hynes (president, DSBA), Muriel Walls (partner, Walls & Toomey Solicitors), Prof Irene Lynch Fannon (Law School, UCC) and Michelle Nolan (marketing and communications manager, Law Society Skillnet)

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ON A CLARE DAY…

PIC: MARTINA REGAN PHOTOGRAPHY

Law Society President Stuart Gilhooly and director general Ken Murphy attended a meeting of Clare Law Association (CLA) at the Old Ground Hotel, Ennis, on 11 April 2017, which was attended by *(front, l to r)*: Marina Keane (vice-president, CLA), Mary Nolan, Stuart Gilhooly, Conor Bunbury (president, CLA), Ken Murphy, Edel Ryan (secretary, CLA) and Aisling Meehan (Council member, Law Society); *(middle, l to r)*: Miriam Rowe, Ann Marie Browne, Leona McMahon, Laura O'Halloran (treasurer), John Halpin, Pamela Clancy, Roisin Moloney, Lorraine Burke and Sinead Glynn; *(standing, l to r)*: Niall McDonagh, William Cahir, John Callinan, John McNamara, John Shaw, Patrick Moylan and Gearoid Williams

GALWAY'S EASTER PARADE

PIC: MARTINA REGAN PHOTOGRAPHY

Following its annual Easter CPD event on 13 April at Galway courthouse, over 70 members of the Galway Solicitors' Bar Association (GSBA) met with the Law Society's President Stuart Gilhooly and director general Ken Murphy. Having had their thirst for legal knowledge quenched, attendees retired to O'Connell's Bar in Eyre Square for the GSBA annual Easter social, where a healthy discussion ensued on Irish licensing law reform; *(front, l to r)*: Ken Murphy, Jenny Prendergast, James Seymour (vice-president, GSBA), Ian Foley, Jackie Prendergast and Stuart Gilhooly; *(middle, l to r)*: David Fahy, Brian Lynch, Claire Irwin, Adrian Harris, Brian D'Arcy and Michael Cunningham; *(back, l to r)*: Ronan Murphy and John Martin

WORKING CLASS HERO

Philip O'Leary is the (relatively) new chairman of the Legal Aid Board. He spoke with **Mark McDermott** about the challenges of running the €100 million operation over the next five years

MARK MCDERMOTT IS EDITOR OF THE *LAW SOCIETY GAZETTE*

The new chairman of the Legal Aid Board is something of a working class hero – though he shuns that description. Despite having reached the pinnacle in his law firm – he's also managing partner of FitzGerald Solicitors in Cork – it's obvious when speaking with Philip O'Leary that his legal career hasn't been handed to him on a plate.

From what he describes as "a very modest working-class background that I'm quite proud of", he was the first in his family to study law. Originally from Farranree on the north side of Cork city, he went to school in 'The Mon'.

"My father was working as a labourer with the corporation. My mother worked in Sunbeam in the factory. I remember tough times growing up. It was a large family – there were seven of us – so I know about difficult times and poverty. That's why maybe, in my role today, I feel I can empathise with people who are looking for legal aid, because, as people say – and it may sound trite – but poverty is not just about access to money. It's got to do with access to education and access to opportunity.

"Access to justice is a very important part of our society, and sometimes we take it for granted. That's why I was surprised and delighted to get this role. I feel that it's very important that we keep emphasising the fact that access to the courts for people of modest means is a critical part of our democracy."

While his father Liam and mother Noreen (both deceased) were educated only as far as primary level, Philip says "they were very interested in reading, very interested in educating their children, and there were always books around the house. We were always brought to the library. Their main aim was that we would be educated and get on in life – and they gave us that space and opportunity. Going to college and making the most of the opportunity was important to me as well."

So how did he come to taking on the mantle of chairman of the Legal Aid Board?

"I sat on the previous board. I was appointed in 2011 and served until October 2016." Appointed by the Minister for Justice, board members serve a statutory five-year term, which may be renewed on reapplication.

Big bang

"Coming to the end of that term, I was slightly, I wouldn't say reluctant to reapply, but I thought about it for a while, because I'd given the board five years. The one thing that encouraged me was the fact that it can be something of a 'big bang' when the board leaves. I felt it would help if the new board had a number of existing members sitting again – to preserve the corporate memory. On that basis, I reapplied." Philip was the only member of the former board to be reappointed.

His role as non-executive chairman is to run the statutory board of 12 ordinary members, which meets once a month. He also oversees the work of chief executive John McDaid and his management team. "John is a very capable individual, running a good organisation," says Philip. "He has 480 staff in 50 offices around the country, of which 33 are full-time offices. It's a big operation, with a large budget of €40 million, and John runs that very well."

The Legal Aid Board is to take over the administration of the State's criminal legal aid schemes – a €60 million operation that is treated separately from its civil legal aid and mediation services.

"I see my function as one of running the board effectively, overseeing the operation of the organisation efficiently, and making sure we're getting value for money. Because I come from a private-practice background, I'm conscious of the fact that there are budgets and targets that have to be achieved – and then to make sure that we give the best service possible to the person in need of legal aid."

Is he happy with the service that the Legal Aid Board is providing?

"We have improved efficiencies, in terms of the throughput of cases. Less than three years ago, the waiting list was over 5,000 people – it's now just over 2,000. So we are making significant progress. You're never not going to have a waiting list, but you would like to get to a point where you have a reasonable number on that list – and a reasonable waiting time in terms of obtaining professional legal advice.

"We do, of course, have systems in place to deal with emergency cases, such as domestic violence cases or childcare matters. So the cases where people are waiting on a service are oftentimes not critical, but perhaps no less urgent."

Broad brush

Family law cases comprise the biggest call on the board's civil-aid budget, where approximately 70% of the €40 million budget is spent. A significant amount is allocated to childcare cases, particularly in Dublin and Cork.

What are his objectives over the next five years?

"The first thing on my agenda is to look at the eligibility levels to make sure that they're adequate – that people of modest means can obtain adequate legal services from the board. It's a bit of what I call 'all duck, no dinner' at the moment. If you've over €18,000 in disposable income, you won't qualify for legal aid. Sometimes, you can have tough cases where applicants are perhaps a couple of hundred euro over


PIC: JOHN SHEEHAN PHOTOGRAPHY

> IT'S VERY IMPORTANT THAT WE KEEP EMPHASISING THE FACT THAT ACCESS TO THE COURTS FOR PEOPLE OF MODEST MEANS IS A CRITICAL PART OF OUR DEMOCRACY

that limit, and they don't qualify. We need to look at a more graduated system, whereby you don't 'fall off the cliff' just as soon as you're €5 over the limit. There's also an argument for the 'consumer price indexing' of the eligibility levels, so that they keep pace with inflation on an ongoing basis. I should add, however, that the board doesn't control its budget. The board can only make recommendations to the minister, and it's up to the minister thereafter whether those recommendations are approved."

Beat the bounds

What's crying out for attention?

"The Legal Aid Board has 33 full-time offices around the country, which has benefits and disadvantages. On the one hand, you're bringing the service close to the people who need it, but on the other, you might end up with some smaller offices unable to meet specific requirements. There is merit to reviewing the structures of the service to enhance the throughput of cases and the expertise operated in those offices.

"You could have bigger offices in the main population centres and still run part-time offices, so that you're continuing to bring the service to the public. This can happen by way of evolution, specifically where leases are coming up for renewal. For instance, if there's a family law office with a lease coming up and there's a mediation office down the road, we'll look for a building that will accommodate both together. We're doing that now in order to achieve synergy in our operations; and to offer alternative dispute resolution, such as mediation.

"I would see some advantages in larger law centres with a better spread of expertise.

"At the end of the day, I would prefer people to get to a service that's properly and adequately resourced, than have one that's not. It's all about getting that balance right.

"I have been very impressed with the professionalism of the staff I have met, in how they approach their work and their commitment to access to justice. At the end of the day, it's getting the quality of the service right, as distinct from the throughput. My focus is to ensure that people get access to justice, that they get the right advice, and at the right time." g

COSTS – INTERIM PAYMENT ON ACCOUNT

Two recent developments on the interim payment of costs are very much to be welcomed, writes **Ernest J Cantillon**

ERNEST J CANTILLON IS PRINCIPAL AT CANTILLONS SOLICITORS

It is often said that high legal costs can impede access to justice. If the costs of bringing a case are too high, a party may refrain from bringing an action. If costs are too high, a defendant may decide to make a settlement for economic reasons, rather than run the risk of exposing themselves to a large bill that, even if they are successful, they may not recover from the other side. However, the other side of the coin is that low costs can also have an impact on access to justice.

Plaintiff solicitors are akin to 'gatekeepers'. Most lay people cannot bring an action without the assistance of a plaintiff solicitor. If plaintiff solicitors are not adequately and timely remunerated, they will not be in a position to carry unprofitable litigation and thus will not take the case, or perhaps rule out an entire class of case. All solicitors have a threshold (be it a rule of thumb or whatever) before they decide to take on a case. With low costs and delays in recovering costs, that threshold is raised and, thus, some people are being denied access to justice that they would otherwise, perhaps, have obtained.

Cash-flow issue

Litigation, from the day the client walks in the door of a solicitor's office to the day of the conclusion of the case, can frequently take up to three years. The taxation process can, on occasion, take an equal length of time. There is no provision for costs in the taxation process itself. Some taxations are taking longer to be heard in full than the original litigation took to be heard. Thus, one can see a situation whereby a plaintiff's solicitor may have to wait some six years from the date the client comes into the office before any payment may be received. Interest on costs does not arise until the taxation process has been concluded. Over that six-year period, all the outgoings of a solicitor's office (including rent, salaries and general overheads) have to be paid, week in and week out. There are very few businesses that could withstand that timespan from the provision of a service to the date of payment.

In recognising the problems, plaintiff solicitors have been forced, in many instances, to accept uneconomical costs offers in order to assist the cash flow. That, of course, also has a knock-on effect, in that, if one accepts an uneconomic fee in a particular case, it will be quoted at the next negotiation of costs, where one is informed that this is now the going rate. It is the going rate because of the circumstances that have arisen, but it is not an economic rate of return.

A modest proposal

Two recent developments by the President of the High Court, Kelly P, and the judge in charge of the personal injury list, Mr Justice Cross, may ease the situation.

The first development arose out of the DePuy hip litigation, which has been case managed by Mr Justice Cross. In the course of that litigation, an application was made to Mr Justice Cross to provide a form of practice direction providing for an interim payment of costs, pending taxation.

The proposal put to Mr Justice Cross was to the effect that:

- At the conclusion of a case, an award would be made in favour of the plaintiff, and the plaintiff would be provided with an order for his costs.
- It was suggested to Mr Justice Cross that, at that point, the question of the costs would be adjourned for approximately two or three weeks.
- In the interim, the plaintiff would draw up a short-form bill. This would be presented to the other side and an attempt be made to agree it.
- If agreement was not possible, then when the matter came back before the court two weeks later, an application would be made for an interim part payment on account.

Mr Justice Cross ruled on this matter on 22 February 2017. He declined to make a practice direction and indicated that, the matter would have to be revised on a case-by-case basis. He did, however, indicate that at the conclusion of each DePuy case (that proceeds to determina-

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> PARTIES WHO WISH TO MAKE AN APPLICATION FOR AN INTERIM PAYMENT OF COSTS SHOULD SEEK TO HAVE THE COSTS ASPECT OF THE MATTER ADJOURNED AND A BILL PREPARED IN THE INTERIM

tion and an order for costs made), he intends to direct that:

- The plaintiff would prepare a short-form bill of costs.
- The case would be listed for mention before the trial judge approximately three weeks after the judgment.
- The parties should make submissions on the adjourned date as to what sums should be paid to the plaintiff. The plaintiff solicitor would be required to give an undertaking to repay any excess, should the interim amount paid be in excess of the total amount allowed on taxation.
- The trial judge would then determine what sum, if any, should be paid to the plaintiff's solicitors on an *ex gratia* basis, subject to the undertaking referred to above.

Notwithstanding the fact that Mr Justice Cross refused to grant an order bringing in a practice direction, DePuy has appealed this matter to the Court of Appeal.

In setting out the background to the DePuy application Mr Justice Cross stated: "The background to this application is that there is a significant and recognised and accepted problem in relation to the taxation of costs. There is now only one taxing master, who not alone has responsibility for work that was previously meant to be done by two, but he is also obliged to set up the new scheme for taxation that will be put in place in the future. In addition, a decision of the Court of Appeal has meant that individual taxation takes a far longer period of time than was previously the case. In effect, the taxation system has stalled. It may be arguable that there is a failure of the State to vindicate the rights of litigants for effective access to the courts under the Constitution…"

Clearly the constitutional issue was not before Cross J, and he of course did not determine that constitutional issue, but the above paragraph sets out the background adequately.

Practice direction

A second development occurred during a ruling of a case of *Costello v HSE*, which was before Kelly P on 21 March 2017. This was a ruling heard in public in respect of a settlement in the sum of €17.8 million for a ward of court. At the conclusion of the case, Kelly P indicated that he was aware of the cash-flow problems in relation to costs and the delays in the taxation system experienced by solicitors. In those circumstances, Kelly P proposed ordering the defendants to make an interim payment in respect of costs. The matter was adjourned to enable the parties to make submissions. Any payment that will be made will be on the basis of an undertaking given by the plaintiff's solicitors that, should the amount on taxation exceed the interim payment, the excess would be repaid by the plaintiff's solicitors. Indeed, some seven days later, on 28 March, Mr Justice Kelly issued practice direction HC71, providing for interim payments.

From the plaintiff's solicitor's perspective and, more importantly from the plaintiff's perspective, this is a very welcome development.

In future, at the conclusion of a case, parties who wish to make an application for an interim payment of costs should seek to have the costs aspect of the matter adjourned and a bill prepared in the interim. If it is not possible to negotiate a resolution of the bill, then an interim payment should be sought on foot of the undertaking outlined above. gs

FACE/OFF

Restrictions on identifying the parties involved in disputes do not apply to decisions under the equality legislation. **Emily Logan** outlines the factors in favour of identifying those who have engaged in discrimination

EMILY LOGAN IS CHIEF COMMISSIONER OF THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

On 11 April 2017, the Irish Human Rights and Equality Commission published an information note, aimed principally at practitioners in the field of employment and equality law, relating to the publication of decisions by the Workplace Relations Commission (WRC) under the *Employment Equality Acts 1998-2015* (EEA) and the *Equal Status Acts 2000-2015* (ESA).

The Irish Human Rights and Equality Commission is Ireland's designated national equality body under a range of EU anti-discrimination measures. Its functions include providing information to the public in relation to human rights and equality, and keeping under review the effectiveness of certain enactments, including the EEA and the ESA. The commission also enjoys a wide range of enforcement and compliance functions in respect of the EEA and ESA, under part 3 of the *Irish Human Rights and Equality Commission Act 2014*.

As practitioners will be aware, prior to the reforms introduced by the *Workplace Relations Act 2015*, complaints of discrimination in relation to employment and occupation under the EEA, and in relation to the provision of goods and services under the ESA, were heard by the Equality Tribunal. It was the practice of the tribunal to publish its decisions in a manner that identified the parties – except in cases of sexual harassment and discrimination on the grounds of sexual orientation, where identification of the complainant might inhibit the referral of complaints.

Functions transferred

On 1 October 2015, the functions of the director of the Equality Tribunal in respect of the investigation of complaints of discrimination under the EEA and the ESA were transferred to the director general of the WRC. This has meant that complaints of discrimination referred after 1 October 2015 are now heard at first instance by WRC adjudication officers.

While it is clear that such hearings are to be conducted in private (section 79(2) of the EEA, section 25(2) of the ESA), the commission became aware that there was a degree of confusion (both among legal practitioners and those attempting to access the WRC's services) as to whether decisions of adjudication officers would be published in anonymised form.

This confusion may have been attributable to the fact that decisions of adjudication officers under the wide range of employment statutes that now come within the ambit of the WRC must be published in a manner that does not identify the parties to the dispute, pursuant to section 41(14) of the *Workplace Relations Act 2015*. This requirement is reflected by rules of the WRC's *Procedures in the Investigation and Adjudication of Employment and Equality Complaints* (October 2015).

This requirement is limited in its application, however, to those enactments that are listed at schedule 5 to the *Workplace Relations Act 2015* – and neither the EEA nor the ESA are listed in this schedule.

This statutory requirement of anonymity does not, therefore, apply to decisions of adjudication officers in respect of complaints under the EEA and the ESA. Instead, such decisions are required to be published in such form and manner as the director general of the WRC considers appropriate (EEA section 89(1), as amended by sections 83(1)(c)(ii) and 83(1)(h) of the *Workplace Relations Act 2015*; ESA section 30(1), as amended by sections 84(1)(b) and 84(1)(f) of the *Workplace Relations Act 2015*).

> THE PRINCIPLE OF EFFECTIVENESS WILL NORMALLY REQUIRE THAT THE DECISION OF THE ADJUDICATION OFFICER BE PUBLISHED IN A MANNER THAT IDENTIFIES THE EMPLOYER OR SERVICE PROVIDER CONCERNED

Discretion

As such, the director general enjoys a discretion as to whether decisions under the EEA and ESA should be published in a manner that identifies the parties to the dispute. Given that the director general has delegated her functions in respect of the investigation of disputes to adjudication officers, this discretion falls

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> THE COMMISSION BECAME AWARE THAT THERE WAS A DEGREE OF CONFUSION (BOTH AMONG LEGAL PRACTITIONERS AND THOSE ATTEMPTING TO ACCESS THE WRC'S SERVICES) AS TO WHETHER DECISIONS OF ADJUDICATION OFFICERS WOULD BE PUBLISHED IN ANONYMISED FORM

to be exercised by adjudication officers.

So, what factors should adjudication officers take into account when exercising this discretion? In this regard, it must be remembered that the EEA and ESA are intended to implement a range of EU anti-discrimination measures (in particular, Directive 2000/43/EC, Directive 2000/78/EC, Directive 2004/113/EC, and Directive 2006/54/EC).

While the State enjoys a measure of procedural autonomy in implementing these measures, this is subject to the principle of effectiveness (joined Cases C-430/93 and C-431/93 *Van Schijndel and van Veen*). Further, these measures require that member states provide for effective, proportionate and dissuasive sanctions in cases of discrimination.

The Irish Human Rights and Equality Commission considers that a practice of publishing decisions in anonymised form is likely to undermine the effectiveness of the EEA and the ESA. The publication of written decisions that identify those employers and service providers who have engaged in discrimination is likely to have a dissuasive impact on others. Further, the prospect of publication may encourage the early resolution of complaints, whether in the context of mediation or otherwise.

As such, the Irish Human Rights and Equality Commission is of the view that, where an adjudication officer has found that a respondent has engaged in discrimination, the principle of effectiveness will normally require that the decision of the adjudication officer be published in a manner that identifies the employer or service provider concerned.

Of course, there may sometimes be cases where the publication of decisions in anonymised form is warranted. In particular, the publication of a decision in a manner that does not identify the complainant will often be justified by the need to ensure that those who have suffered discrimination are not inhibited from referring a complaint (see for example the judgment of the Court of Appeal of Northern Ireland in *JR5 v Department of Agriculture and Rural Development* [2007] NICA 19).

Decisions as to whether or not to anonymise one or both of the parties to a dispute in a published decision under the EEA or the ESA will ultimately be a matter for the discretion of the adjudication officer, properly exercised in light of the requirements of constitutional justice and the relevant principles of EU law. g

IN DEFENCE OF THE REALM

Steven T Wax is legal director of the Oregon Innocence Project. He spoke about miscarriages of justice at the Law Society's recent symposium – and his successful defence of former Guantanamo Bay inmates. **Mark McDermott** reports

MARK MCDERMOTT IS EDITOR OF THE *LAW SOCIETY GAZETTE*

Steven T Wax is utterly engaging. An obviously brilliant lawyer with an incredible legal pedigree, he is a consummate storyteller. During the Law Society Skillnet's Symposium on 24 March, he addressed the theme of 'Fighting for justice from Portland to Peshawar – a public defender's inside account'.

Wax and his team successfully represented six men formerly held as so-called 'enemy combatants' in the Guantanamo detention facility. He was also a key player in the Brooklyn, NY district attorney's prosecution of David Berkowitz, also known as 'The Son of Sam', where he worked from 1975-1979.

He described his life in law as follows: "My view is that the justice systems in which I have had the privilege of working in the United States generally work well. I have seen a number of miscarriages of justice in my career, and I have had the opportunity to fight for a number of people who suffered injustice at the hands of our system."

Systemic injustice

"We can distinguish between individual idiosyncratic miscarriages of justice, and systemic miscarriages."

Focusing primarily on systemic injustice, he painted a picture of his life back in the mid-noughties: "Let me take you back first to 2005. Serving as the federal public defender for the District of Oregon on the far west coast of the United States, I was aware of the imprisonment – and I'm using that word advisedly – of (at that point) something between 500 and 600 men at the US naval facility in Guantanamo Bay, Cuba.

"While serving as federal defender in 2005, I got a call from my counterpart in Washington DC asking if I would volunteer my office to assist in the representation of those men. It seemed to me it was very important work to get involved in. The United States District Court in Washington DC assigned my office to represent seven men.

"When we got into those cases, we had no idea if the men we were assigned to represent were hardened terrorists, were fighters who had alliances with the attacks of September 11, or whether they were innocent men.

"What I heard from the then president George Bush, the vice-president, and the secretary of defence was that every one of the men in Guantanamo was the 'worst of the worst' – a phrase used by the US administration.

"What I did know was that the men were being held without process, and that there was a very important legal issue that needed to be addressed – that these men were entitled to process. And we joined the fight with that in mind and with an open mind as to who it was that we would meet.

"On March 3, 2006, after a number of months of legal skirmishing, we were finally able to go to Guantanamo to visit our clients. And that was no simple feat, because the US Government has chosen to hold those men in Guantanamo for, among other reasons, the ability that island provided in preventing anyone from visiting, including lawyers. It had

PIC: EPA

The Guantanamo Bay detention centre, located on a US naval base on Cuba, has housed terrorist suspects since shortly after the 11 September 2001 terrorist attacks

PIC: ANGELA HALPIN

> I BELIEVE THAT OURS IS A TRULY GREAT PROFESSION THAT GIVES US ALL THE OPPORTUNITY, WHETHER WE'RE CRIMINAL DEFENCE ATTORNEYS OR NOT, TO LIVE OUR IDEALS, TO PURSUE JUSTICE AND TO HELP PEOPLE

taken nearly two years before the first lawyer had been able to get to the prison to meet with a client.

"The military escort opened the door and I looked in and saw sitting in front of me, at a little metal table, in a little metal chair – a very dark-skinned man wearing a white jumpsuit and a white kufi, a Muslim man from the Sudan, Adel Hassan Hamad.

"And during the two days of that visit with Mr Hamad, and all the visits with all of our clients there in the prison, our clients would sit chained to the floor – to my eye, chained to the floor like dogs.

"What do I do? I'm a nice white Jewish kid from Brooklyn, told by my president that I'm about to meet the worst of the worst. Sitting there is this very dark-skinned black man, a Muslim from the Sudan, told by his government that I'm the devil, and told by his fellow inmates and by the guards there that you really shouldn't trust lawyers to come down and see you – especially Jew lawyers, and especially Jew lawyers who are sent by the federal government. Because I was there paid by the United States' Government as a federal public defender – the same government that had imprisoned Mr Hamad at that point for nearly four years.

"We eyed each other, we started talking through an interpreter. One of my assistant defenders is there with me and we talked, and somehow we overcame the prejudices that I'm sure each of us had brought into the room with us. And for two days we listened as Adel told us his story.

"He told us how he was raised in Sudan in a very 'intact' family. His father was a medical man – not a doctor – but he was the medical man in the part of Sudan where Adel was raised. His parents sent him to college to that greatly more advanced country to the north of him, Egypt, where he got a degree in engineering. He came back to Khartoum in the early 1980s and was able to get a job as an engineer, but it wasn't what he wanted to do. In 1984, he

PIC: ANGELA HALPIN

Law Society Skillnet Symposium speakers: Judge Susan Pia Graber (judge of the US Court of Appeals), Steven T Wax (US attorney) and Judy Khan QC

was fortunate to get a job working for a charity that was based in Pakistan, working with refugees of the then Afghan-Soviet war. He rose through the ranks, first with one charity, and then another, to become the administrator of a hospital in Afghanistan."

Over the wall

"After September 11, the Afghan government told all foreign nationals that they needed to leave. Adel was one of the last foreign nationals to leave Afghanistan, going back to Pakistan. He told us how, in July 2002, after the end of a month's vacation with his entire family back in Sudan, he went alone back to Pakistan, leaving his wife and daughters at home, and how on the night of July 16 into July 17 he was at home in his apartment, awakened at 1.30 in the morning to see a team of men – Pakistani intelligence police – coming over the wall that ringed the two-family home in which he lived.

"The men split – one group went into the neighbouring Algerians' home; the team that came up to him was led by a blond American. The Pakistani in charge asked for his identification papers and he had it all: his work permit, his visa, his passport. The Pakistani looks at the blond American and says, 'What do we do?' And the blond American looks and says, 'Take him!' He spent six months in a Pakistani prison until, in January of 2003, he was flown to the United States airfield in Bagram, Afghanistan.

"Adel told those captors the same account that he was giving to us: 'I have a horror of Osama Bin Laden, I have a horror of violence – that is not Islam. Islam, as I practise it, as I understand it, is a religion of peace,' and his captors kept after him and the interrogators kept after him until he collapsed. Taken to a hospital, internally a very strong man, he survived; others did not that winter.

"Once I got into the case and researched it, I saw the reports of the number of people that died – reports of death by 'blunt force trauma' – or beaten to death. Adel told us how, in March of 2003, he was flown to Guantanamo, where he was interrogated again. Periodically over the next three years, he would be interrogated, and he would tell the captors the same thing that he was telling us.

> WE NEED A STRONG INDEPENDENT JUDICIARY TO ENFORCE AND UPHOLD THE RULE OF LAW, AND WE NEED A ROBUST AND INDEPENDENT PROFESSION OF LAWYERS TO BRING THESE FIGHTS TO THE COURT

"Now, listening to this, I have no idea whether or not to believe him.

"We get back to Oregon from that first visit, and we decided that what we need to do is what we do for all our clients – and that is investigate. And that meant, in this instance, sending a team of investigators from the federal defender office into the warzone in Afghanistan."

Fighting law with law

"They went to Afghanistan on behalf of Hamad and some of our other clients. By late summer of 2006, they had returned with scores of videotaped testimony and accounts confirming what Hamad had told us. We tracked down his landlord, his employer. We tracked down medical people for one of our other clients.

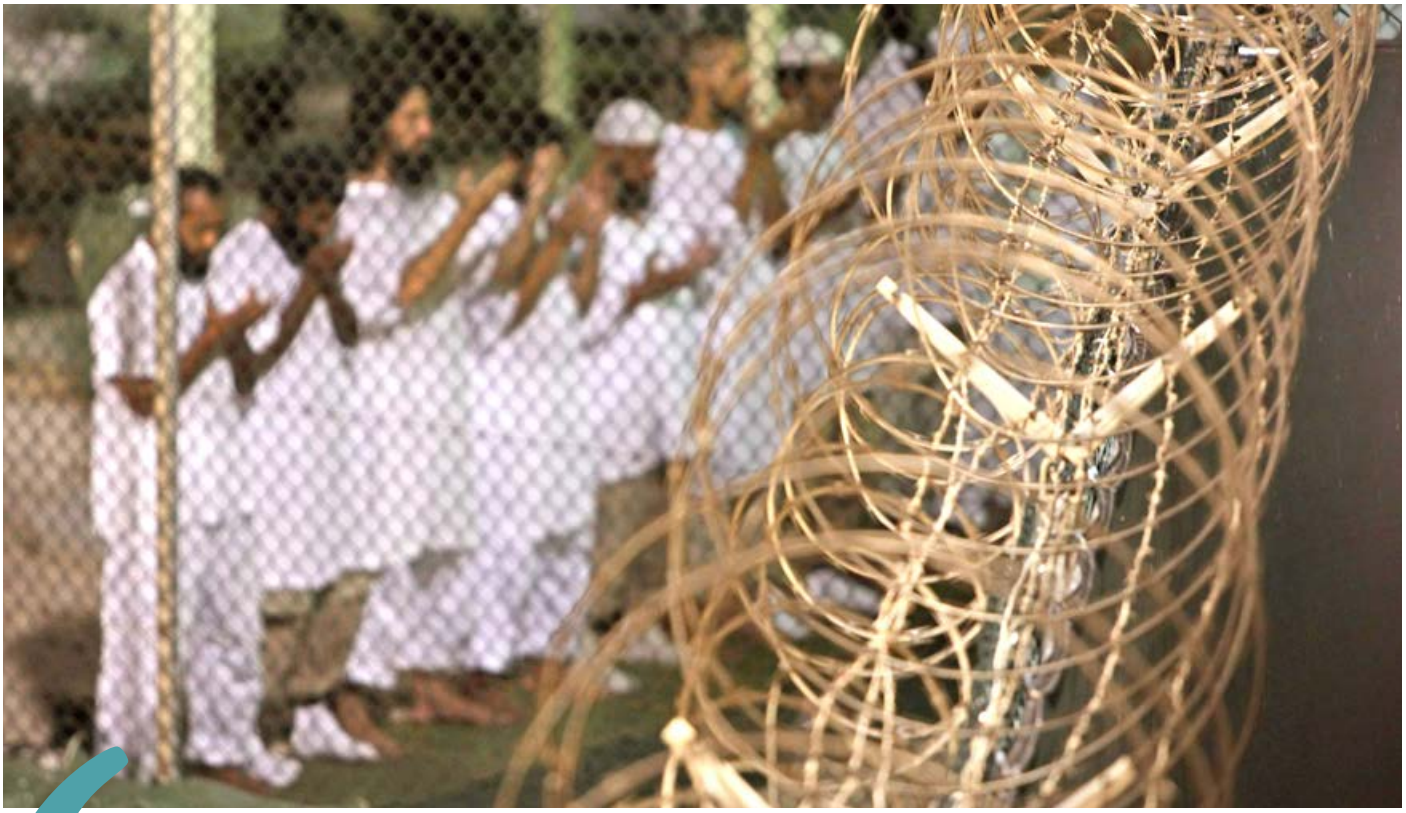
"But we had a problem. We couldn't present this evidence anywhere because, under the actions of the Bush administration, two statutes had been passed. The Supreme Court had said in 2004 that these men had a right to process. Bush and Congress passed the first law of the *Detainee Treatment Act*, stripping the federal courts of jurisdiction. The Supreme Court said in 2006: 'Mr Bush, for the second time, you're wrong!' They passed another statute, stripping the federal courts of jurisdiction again. We've got all this evidence, we're in *habeas corpus*, but the federal judges are being told: 'You can't see this.' Well, as a defence attorney, we do whatever we can.

"One of the young guys says to me "Steve, we got to go to YouTube. We've got to put together a video," and we put together a video called *Guantanamo Unclassified*. It rose to the number one spot on the YouTube political chart, telling the story – but Hamad stays in prison.

"In the spring of 2007, a colleague and I flew off to Sudan. We realised we had to do something more, so we went to Sudan to get more evidence. I'm not allowed to engage in diplomacy as a private citizen, so I did not do that, but in gathering evidence and in sharing what we had, we were able to meet with the state minister, the justice minister, the entire human rights commission of the Sudanese Government.

"Finally we get to the point: 'Well Mr Wax, what can we do for you?'

'Well, sir, we are here to provide you information about an innocent Sudanese who is being held in Guantanamo – Adel Hassan Hamad.'



> ONCE I GOT INTO THE CASE AND RESEARCHED IT, I SAW THE REPORTS OF THE NUMBER OF PEOPLE THAT DIED – REPORTS OF DEATH BY 'BLUNT FORCE TRAUMA' – OR BEATEN TO DEATH

'Oh, we know all about him. We've seen your video on YouTube.'

It's a small world.

'What do you want from us?'

"I said, 'Well, I'm not engaging in diplomacy, but it sure would help my client if you'd write a letter to Secretary Rice and say "let my people go".'

"They didn't really get the reference to Moses and the Egyptians, but he did write the letter and, in December 2007, after five years, four months and 25 days of imprisonment, Adel went home.

"In June of 2008, the US Supreme Court took the third of the Guantanamo cases and wrote an opinion, addressing the constitutional issue, telling President Bush that, under the United States' Constitution, he did not have the authority to seize and imprison a person without process, on his say-so alone. We had *habeas* hearings for two of our clients following that committee decision. We won them. They could not go home, but they went to other safe countries.

"In conclusion, my experience tells me that it is the rule of law that keeps us free. My experience tells me that we cannot invoke this phrase 'the rule of law' as a talisman – that the rule of law is only as strong as the judges who stand up and issue rulings and orders. We need a strong independent judiciary to enforce and uphold the rule of law, and we need a robust and independent profession of lawyers to bring these fights to the court. I don't hold myself out as an expert in national security law and *habeas corpus*, or much of anything else. But I do know this – that it is the legal profession that brought me to Guantanamo.

"I believe that ours is a truly great profession that gives us all the opportunity, whether we're criminal defence attorneys or not, to live our ideals, to pursue justice and to help people.

"And the last thing that I know is that, whatever you think about the United States and whatever you feel about Trump and the United States today, it is a truly unique and powerful system, in that it pays people like me to fight on the most important issues of the day. As the federal public defender, I was paid by the United States Government, not only to represent Adel Hassan Hamad, but to fight the United States Department of Justice in the courts in Washington, in the United States Supreme Court, through briefs supporting other lawyers. The government paid me to fight throughout my career, and left me alone to do that job as I saw fit, and that to me is the best example of the fundamental strength of the American system of justice, notwithstanding the fact that miscarriages do occur." g

APPLICATIONS FOR INTERNATIONAL PROTECTION

The *Refugee Act 1996* allows for subsequent applications for international protection. **Hilkka Becker** analyses the jurisprudence

HILKKA BECKER IS DEPUTY CHAIR OF THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL AND VICE-CHAIR OF THE LAW SOCIETY'S HUMAN RIGHTS COMMITTEE

The *Refugee Act 1996* (as amended) provided for the making of a subsequent application for international protection, by a person whose application for refugee status or subsidiary protection had been refused, only with prior consent of the Minister for Justice. Where such consent was not provided, an administrative review could be applied for pursuant to section 17(7G) of the *Refugee Act* (as inserted by section 8(b) of the *European Communities (Asylum Procedures) Regulations 2011*).

However, in *NM v Minister for Justice* ([2014] IEHC 638, December 2014), Barr J held that the internal review procedure against the minister's decision to refuse to readmit an applicant for international protection into the asylum procedure did not comply with article 39(1)(c) of the *Procedures Directive* (2005/85/EC), which requires EU member states, among other things, to "ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against a decision not to further examine the subsequent application pursuant to articles 32 and 34" of the directive.

In essence, the reason for his finding was that: "It has been stated on many occasions that the courts can only review the process leading to the impugned decision, rather than review the merits of the decision itself. The court is not an appeal court and is not free to substitute its own substantive findings for those of the decision-maker. The court cannot reverse the decision of the decision-maker; it can only annul its decision. The court can only interfere if it is satisfied that there was an error of law, or an error of fact on the face of the record, or there was some unfairness in the procedure adopted or if the decision was irrational in that there was no evidence supporting the finding made by the decision-maker."

Effective remedy

The decision of Barr J was subsequently overturned on appeal by the Court of Appeal ([2016] IECA 217, 14 July 2016). While Hogan J recognised that "the form of internal review provided by the 2011 regulations would not be regarded as the equivalent of a decision of a court or tribunal which was independent of the first instance decision-maker", he held in conclusion that "the fact that the applicant may challenge the validity of any decision of the minister to refuse to admit her to the asylum process in accordance with section 17 of the 1996 act (as amended) by way of judicial review means that the State has provided her with an effective remedy within the meaning of article 39 of the *Procedures Directive*".

According to Hogan J, "the corollary of this conclusion, of course, is that the High Court must ensure that, in the words of the Court of Justice in *Diouf* [Case C-69/10], the reasons which led the minister 'to reject the application for asylum as unfounded … [must] be the subject of a thorough review by the national court' … [and] there is no reason why this cannot be achieved by the High Court in judicial review proceedings by reference to the *Meadows* principles (as explained in cases such as *ISOF* [2010 IEHC 457] and *Efe* [2011 IEHC 214]), it is clear that contemporary judicial review does indeed provide an effective remedy for the purposes of article 39".

Notwithstanding the findings of the Court of Appeal, the *International Protection Act 2015* now does provide for an appeal to the International Protection Appeals Tribunal, pursuant to section 22(8) of the act, against a recommendation of an international protection officer to the Minister for Justice that a subsequent application not be permitted on the basis that an applicant for international protection has failed to show either that: "(a) since the determination of the previous application concerned, new elements or findings have arisen or have been presented by the person which make it significantly more likely that the person will qualify for international protection, and the person was, through no fault of the person, incapable

PIC: WIKIMEDIA COMMONS

> THE MINISTER'S REMIT IS TO DETERMINE WHETHER THE SALIENT CRITERIA FOR READMITTANCE TO THE ASYLUM PROCESS HAVE BEEN PRESENTED OR HAVE ARISEN WHICH 'SIGNIFICANTLY ADD TO THE LIKELIHOOD' OF THE APPLICANT BEING DECLARED A REFUGEE

of presenting those elements or findings for the purposes of his or her previous application", or that "(b) where the previous application concerned was one to which subsection (2)(b) applies, the person was, at the time of the withdrawal or deemed withdrawal, through no fault of the person, incapable of pursuing his or her previous application".

The relevant provisions in EU law are articles 32(3) and 32(4) of the *Procedures Directive*. However, it should be noted that, unlike the Irish provisions, they are limited to applicants for refugee status and do not extend to applicants for subsidiary protection.

Acid test

As yet, there is no case law on the application of section 22 of the *International Protection Act*. However, case law regarding subsequent applications pursuant to section 17(7) of the *Refugee Act* (as amended) make reference to the 'acid test', which originates from the decision of the Court of Appeal (England and Wales) in the case of *R v Secretary of State for the Home Department, ex parte Onibiyo* ([1996] EWCA Civ 1338, 28 March 1996), wherein Bingham MR set out with regard to subsequent applications being allowed that: "The acid test must always be whether, comparing the new claim with that earlier rejected, and excluding material on which the claimant could reasonably have been expected to rely in the earlier claim, the new claim is sufficiently different from the earlier claim to admit of a realistic prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the earlier claim."

This test was adopted by Clarke J in the case of *EMS v Minister for Justice* ([2004] IEHC 398, 21 December 2004), in which he held that "it is appropriate to regard the minister as being subject to a test analogous to that adopted by the courts in the UK and, insofar as that test might arguably be more stringent than that which the minister has imposed upon himself … for the purpose of this application, the more stringent test should be applied".

While the above cases were decided prior to the *Procedures Directive* entering into force, the matter of subsequent applications was considered more recently, among other things, by Faherty J in *PBN v Minister for Justice* ([2016] IEHC 316, 2 June 2016), wherein she sets out the parameters of the minister's decision to allow or not allow a subsequent application: "The first thing to be observed is that it is not the function of the minister to determine

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> AS YET, THERE IS NO CASE LAW ON THE APPLICATION OF SECTION 22 OF THE *INTERNATIONAL PROTECTION ACT*

the applicant's claim for refugee status on the ground of particular social group (the ground upon which the applicant sought to be readmitted to the asylum process and which formed the context of her section 17(7) review application); that function is reserved to ORAC and, on appeal, the RAT. That remains the position even in circumstances where the applicant has to seek the consent of the minister under section 17(7) in order to be readmitted to the process." She concluded in this regard: "The provisions of section 17(7) are clear. The minister's remit is to determine whether the salient criteria, namely new elements or findings, for readmittance to the asylum process have been presented or have arisen which 'significantly add to the likelihood' of the applicant being declared a refugee."

Faherty J further refers to the decision of Cross J in *AA v Minister for Justice* ([2012] IEHC 63, 31 January 2012), wherein Cross J states that "in order for the applicant to succeed in his section17(7) application to the minister – providing he has satisfied the requirements of new information … what must be established is not very onerous". She concludes that the issues that arose for determination in *PBN* were:

- The appropriate comparator for the purpose of the section17(7) application,
- The failure of the applicant to avail of the failed asylum seeker ground in her original asylum application,
- The manner in which the materials relied on by the applicant are addressed by the review decision-maker,
- The alleged lack of clarity in the review decision, and
- The alleged error in the decision-maker's reliance on the arrangements made by the Irish authorities to repatriate failed asylum seekers.

To date, the jurisprudence appears to have focused on cases in which the central question was, as expressed by Faherty J in *PBN*, whether the applicant had established that the element or finding upon which she relied was "new" and would "significantly add to the likelihood" of her qualifying as a refugee.

It remains to be seen how the case law evolves under the new act and, in particular, those cases involving applicants who claim to have been incapable of pursuing their previous application at the time of the withdrawal or deemed withdrawal, through no fault of their own. g

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With so much noise around cybersecurity, what practical steps can solicitors take to address the threat of cyberattacks? **Simon Collins** draws his ray gun

SIMON COLLINS IS A CYBERSECURITY EXPERT AND DIRECTOR OF EY, WHICH HELPS ORGANISATIONS MITIGATE CYBER-RISK

PIC: GETTY IMAGES/WIKIMEDIA/NUALA REDMOND

The time of paper-based practices is fading quickly. Many Irish law firms are adopting new and innovative technologies, from digital dictation to flexible remote working solutions.

Aside from technologies used to run their practices, many firms are using advanced technologies to manage the large volumes of data, that form the core of any modern discovery exercise.

Clients are also demanding more in terms of leveraging technology to deliver efficient and cost-effective services. High-profile and security-conscious clients are asking how their solicitors ensure the confidentiality and security of their data. This is especially so in litigation, where a firm will hold sensitive data relating to their client.

The giant claw

In what may come as a surprise, the majority of sophisticated data breaches start with an innocent click on a booby-trapped email attachment or website link. As such, firms are exposed to a similar threat landscape as many other businesses, primarily due to the fact that they have money and valuable data. On that basis, some of the top threats to law firms are:

- Ransomware – when malicious code locks you out of your systems or data. The attacker then demands a ransom payment in order to unlock your data.
- Financial fraud – when the attacker poses as the managing partner or an important client (in the middle of a transaction) and uses 'social engineering' (typically fake emails) to convince the finance contact to send funds to the fraudster.
- Espionage – cybercriminals (typically under instruction by a third party) will break into a firm's IT systems in order to gain information on a client or transaction (often during mergers/acquisitions/litigation), giving the other party the 'inside track'.

Unlike once-off incidents, motivated attackers mount persistent dynamic campaigns. A cyberbreach can have a significant impact on any business, both in terms of cost and reputational damage. Even the most technically advanced organisations struggle to manage the risk.

While threats in cyberspace mainly target weaknesses in technology: the risk posed is about far more than just technology, it is about practice disruption, client disruption, brand damage and significant financial impacts. Money and data are just part of the equation, cyberattackers could also prevent you from practising or put you in breach of your license to practise.

The hard evidence also shows that it's not the IT person who appears on the news when a breach occurs, it's the managing partner.

Plan 9 from outer space

It can be overwhelming to understand the risks, never mind deciding where to start. The steps below provide an overview of how firms of all sizes can go about improving their cyber-resilience. While many of these steps are necessarily technology-focused, it is important that senior management understands them (or ensure those responsible for cyber-risk within your firm do) rather than just having them sit with IT.

1. Get organised

Given the critical impact a cyberbreach can have on a firm, clear governance, defined roles and responsibilities, and the support of senior management is required for the successful management of cyber-risks.

Start by understanding key business drivers and obtaining senior management support for a robust cybersecurity programme. This should be followed by establishing roles and responsibilities, agreeing your security strategy (aligned with your business and IT strategies), developing policies and standards, and enabling reporting.

2. Identify what matters most

Understanding what and where your digital assets (such as key systems and information) are is an important first step in protecting them. After all, if you don't know what you have and where it is, how can you even start to protect it?

Map services/objectives/products to supporting people, processes, applications, middleware, data and technology infrastructure, and rank by criticality to your firm, all stored in an asset inventory.

3. Understand the threats

Threat actors vary in capability and sophistication, while also constantly changing depending on the value of the prize they seek. Depending on the nature of your firm and the digital assets you hold, you will likely be of interest to one or more threat actors. Know your enemy – learning as much as is practical about your exposures is an important step in defending against them.

Understanding who might want to attack you, why, and how they might go about it will allow you to focus your efforts on how to respond to the most likely threats. Record the results of your risk assessments in your risk register.

4. Decide what you're willing to risk

The next step is to estimate what your major threat scenarios, if realised, might cost your firm. Without an understanding of what the risk exposure is in terms of monetary value, it can be very difficult to justify investment in reducing the risk.

Start to understand what the most likely cyberattacks could cost your business by using cyber-risk quantification coupled with a cyber-risk management framework that forms part of your overall risk management processes. This includes setting your risk appetite and ensuring you're operating within it, which is recorded in your risk register.

AT A GLANCE

- A cyberbreach can have a significant impact on any business, both in terms of cost and reputational damage
- Many Irish law firms have a significant advantage by not having been the first to adopt new technologies
- As such, they can leverage significant experience and best practice from industries such as financial services to jump up the cybersecurity maturity curve, thus quickly reducing their risk exposure

> IN A LARGE NUMBER OF CASES, CYBERCRIMINALS EXPLOIT WEAKNESSES (KNOWN AS 'VULNERABILITIES') EXPOSED DUE TO A LACK OF BASIC PROTECTIONS. MOST EXPLOITS REQUIRE AN IT SYSTEM THAT HAS NOT BEEN KEPT UP TO DATE

5. Focus on awareness

The majority of cyberattacks include some form of human interaction, typically early in the attack life-cycle, whereby a legitimate user of a system is tricked into providing the attacker with access. This comes in many forms of social engineering, such as phishing emails, phone calls, and physically bypassing building access controls. Remember, your people are your first and most critical line of detection, defence and response.

Establish an education and awareness programme, ensuring all of your people (from junior staff to senior partners), contractors, and third parties can detect a cyberattack and are aware of the role they play in defending against cyberattackers. This should include email security, online banking procedures, mobile device usage, as well as incident reporting procedures and how to manage security technologies such as encryption.

> THE HARD EVIDENCE ALSO SHOWS THAT IT'S NOT THE IT PERSON *(LEFT)* WHO APPEARS ON THE NEWS WHEN A BREACH OCCURS, IT'S THE MANAGING PARTNER

6. Implement basic protections

In a large number of cases, cybercriminals exploit weaknesses (known as 'vulnerabilities') exposed due to a lack of basic protections. Most exploits require an IT system that has not been kept up to date with security patches and/or has out-of-date malware protection. Implementing basic protections can significantly reduce the risk of becoming a victim of a cyberattack, especially at the hands of an unsophisticated cybercriminal who is only capable of exploiting basic vulnerabilities.

Research the numerous technical standards available (such as ISO, NIST, etc) and implement appropriate technical protections covering areas such as anti-malware, firewalls, patch management, secure configurations, removable media, remote access, and encryption.

Implement programmes covering vulnerability management (identifying weaknesses and fixing them – usually through penetration testing), identity and access management (who has access to what, as well as strong authentication), data protection and privacy, and managing third parties who have access to your data.

7. Be able to detect a cyberattack

Most organisations will be attacked, if they have not been already. Attackers are many and sophisticated, and dedicated attackers have a high chance of getting in, given enough time and persistence. Detecting that you are under attack is the first prerequisite to any form of response.

Establish an activity/event logging and security monitoring capability that can detect an attack through monitoring activity at various levels. This can be a basic system, whereby an alert is generated and emailed when suspicious activity is detected on a firewall, through to 24-hour security operations-centre monitoring networks, operating systems, applications and end users.

8. Be prepared to react

Attacks will occur, so having the capability to respond is crucial. Firms that are well-prepared and rehearsed for this eventuality will typically experience a greatly reduced impact.

Establish a formal incident-management team who have been trained in and are able to follow a documented plan, which is tested at least annually. Plans should include how an incident will be detected, incident categorisation and classification, how it will be contained, how the root cause will be investigated, and how the firm will recover from the incident. Plans should include all stakeholders, such as business owners, HR, communications/marketing, risk/compliance, investigations, as well as IT/incident management.

9. Be resilient

Resilience is about the ability of a firm to recover from disruption caused by cyberattacks. When the inevitable cyberattack does occur, and damage and/or disruption is inflicted, a firm's ability to recover quickly will be key to survival.

Establish recovery plans (including comprehensive backups) for all processes and supporting technologies in line with their criticality to the survival of the firm.

10. Strengthen with additional protections

Once basic protections have been implemented, along with the ability to detect and react, firms should consider additional protections to further reduce cyber-risk. These should be considered in line with steps three and four, so that additional protections are focused on reducing the greatest risks further.

Work to mature existing capabilities in addition to implementing complementary capabilities/technologies such as intrusion prevention systems (IPS), intrusion detection systems (IDS), web application firewalls (WAF) and data loss prevention (DLP) systems.

11. Test regularly

Once a firm is comfortable that they should be able to protect against, detect and react to their current cyberthreats, the next step is to test that capability to gain some assurance that it is effective.

Carry out cyberincident simulation exercises to test your executive management's ability to manage the response to a significant cyberattack. Carry out 'red team exercises' to test your technical ability to detect and respond to sophisticated attacks.

12. Refresh the cycle

Cyber-risks will continue to evolve, along with a firm's exposure. Establishing a cyber-risk management lifecycle is essential for effective ongoing management of cyber-risks, while making the task part of business as usual.

Reflect on all areas of your cyber-risk management programme and identify areas for ongoing improvement, repeating risk assessments on a regular basis, and considering compliance with relevant regulations.

The man with x-ray eyes

While these steps provide an overview of actions a firm could take to improve its ability to prevent, detect, and respond to cyberattacks, every firm is different and will necessarily manage cyber-risks in line with their size, complexity and risk appetite. In many cases, one person will bear all responsibility, while in larger practices there will be multiple people tackling each of the areas outlined above.

Many Irish law firms have a significant advantage by not having been the first to adopt new technologies. As such, they can leverage significant experience and best practice from industries such as financial services to jump up the cybersecurity maturity curve, thus quickly reducing their risk exposure.

Firms may use this guidance as an initial approach to the challenges that must be addressed when managing cyber-risk. A starting point would be to ask whoever is responsible for risk and whoever is responsible for IT in your firm if they have answers to and/or are carrying out the activities suggested above. If not, it's time to start. In doing so, you will be able to ensure that, should a cyberattack strike, your firm will be ready to detect and respond.

EY recently opened a newly expanded advanced security centre – the largest cyberfacility of its kind within the professional services sector in Ireland. Located in Dublin, the centre hosts EY's dedicated cybersecurity team, which conducts ethical hacking, computer forensics, and vulnerability research activities.

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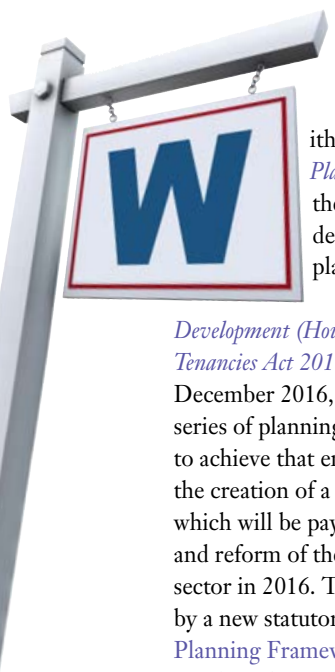
Planning ahead?

The *Planning and Development (Housing) and Residential Tenancies Act 2016* is the first in a series of planning reforms designed to reduce delays and create certainty with regard to planning for new housing development. **Peter Stafford** checks the snaglist

DR PETER STAFFORD IS A BARRISTER AND WAS PREVIOUSLY DIRECTOR OF PROPERTY INDUSTRY IRELAND (IBEC)



With the publication of *Rebuilding Ireland: Action Plan for Housing and Homelessness* last July, the government signalled its desire to reduce delays and create certainty with regard to planning for new housing development.

The *Planning and Development (Housing) and Residential Tenancies Act 2016*, enacted on 27 December 2016, is the first in a series of planning reforms designed to achieve that end. The act follows the creation of a vacant site tax, which will be payable from 2019, and reform of the private rented sector in 2016. This will be followed by a new statutory National Planning Framework and planning regulator later in 2017.

The two main provisions of the act that will be of interest to legal practitioners are the new fast-track planning process for large-scale housing developments, and reforms of the private rented sector. The act is being commenced in stages and, at the time of writing, regulations to give effect to many of the provisions are still awaited. Practitioners should monitor the websites of the Department of Housing, the Residential Tenancies Board and the Irish Statute Book for updates.

The author thanks Michael Wall BL and Rachel Minch (partner, Philip Lee) for reviewing this article

AT A GLANCE

- The *Planning and Development (Housing) and Residential Tenancies Act* contains significant reforms of both the planning system and the residential tenancies legislation
- The two main provisions that will be of interest to legal practitioners are the new fast-track planning process for large-scale housing developments and reform of the private rented sector
- While the act is intended to be only in place for the next two years, it is likely that Government will come under significant pressure to extend these provisions for the duration of the housing crisis

Part 2 of the act amends the *Planning and Development Act 2000* to create a new category of permitted strategic infrastructure called 'strategic housing development'. It guides applicants through a detailed statutory nine-week pre-application planning process, including consultation with the relevant local planning authority and prescribed bodies, prior to the lodgement of a planning application with a new Strategic Housing Division of An Bord Pleanála.

Once the relevant provisions of the act have commenced, all applications for strategic housing developments must be made directly to An Bord Pleanála, and not through the planning authority.

A strategic housing development consists of 100 or more houses or 200

PIC: GETTY IMAGES

> THE PRECISE DEFINITION OF 'SUBSTANTIAL CHANGE IN THE NATURE OF THE ACCOMMODATION PROVIDED' IS LIKELY TO BE A SIGNIFICANT AREA OF CONFLICT BETWEEN PARTIES

or more student bed-spaces on land zoned residential or mixed residential and other uses. Other uses are permitted, but housing must constitute at least 85% of total gross floor area of the development. Other uses cannot cumulatively account for more than 15m^2 of floor space of each house or 7.5m^2 of each student bed space.

Therefore, this new provision will not apply to all large housing developments; many mixed-use developments with a large non-residential element may not meet the land-use mix requirements and thus must go through the existing planning process, including, where necessary, an appeal to the board. In strategic development zones (SDZ), the new part 2 planning route will apply to those developments where the applicant opts to avail of it.

Section 6(6) protects the role of the local planning authority in this new process. It requires the applicant to engage in pre-planning consultation with the planning authority, which must then send its opinions on the proposed development to the board with a recommendation whether permission should be granted or refused, or to propose amendments to the scheme. The content of this opinion, and the general powers of the planning authority, is set out in detail in the act, and further regulations are expected.

Strict deadline

The act requires the planning authority's representative at any pre-planning consultation meeting to have "a sufficient level of relevant knowledge and expertise in the matter concerned". This is intended to ensure that the planning authority is properly represented and has a significant input into the board's decision, despite the inevitable relegation of its role in the planning process.

The act creates a statutory requirement for the board to make a determination within 16 weeks of the application being made. To ensure that this strict deadline is met, in only limited circumstances will requests for oral hearings be granted, and the powers of planning authorities and prescribed bodies to object to the granting of planning permission is also strictly limited.

Once the pre-planning consultation process has taken place, there is no scope for the applicant to submit further information in support of their application, or for the board to make a request for further information from the applicant. The legislation creates

> WHERE A LANDLORD PROPOSES TO SELL TEN OR MORE UNITS WITHIN A SINGLE MULTI-UNIT DEVELOPMENT WITHIN A SIX-MONTH PERIOD, THE SALE WILL BE SUBJECT TO THE EXISTING TENANTS REMAINING IN SITU, OTHER THAN IN EXCEPTIONAL CIRCUMSTANCES

an unusual position where submissions or observations may be considered, but the applicant cannot submit information to correct or clarify the issues raised in those observations.

Given that the board may refuse to grant permission for incomplete applications, this may result in the simple refusal of an application that, under the current procedure, would have been remedied through the submission of further information.

Where the board fails to make its decision within the 16-week period, it must pay the applicant, within four weeks, the sum of either €10,000 or three times the prescribed fee paid by the applicant to the planning authority in respect of the application, whichever is the lesser.

Section 28 of the act permits the extension of duration of planning permission and the granting of a further extension of duration of permission by five years by a planning authority, where it is satisfied that the 'relevant development' (in this case, of 20 or more houses) has not been completed due to circumstances beyond the control of the person carrying out the development. This avoids the cost and time of undertaking a repeat of the initial planning consent process.

The new part 2 planning provisions are time limited and will expire on 31 December 2019, or for "any additional period as may be provided for by the Minister [of Housing]".

According to official statistics, 15 housing schemes went through the planning process in 2016 that would have been eligible for the part 2 process had it existed, amounting to some 2,943 new units. The pre-application consultation process took, on average, 33 weeks, and from the point of the lodgement of the application to the determination took an additional 29 weeks.

Because of the tight definition of 'strategic housing development', the impact of this new planning route on overall housing output will be limited. For those developments that do meet the criteria, the new statutory timescale for planning determination will be significantly truncated, and the strict requirements that deadlines are adhered to should provide a degree of certainty lacking in the current regime.

FOCAL POINT

SUMMARY OF MAIN REFORMS

- **Section 3 – fast-track planning route for 'strategic housing developments' consisting of 100 or more houses and for student accommodation of 200 or more bed-spaces, and a new division of An Bord Pleanála to determine applications.**
- **Section 28 – second extension of existing planning permissions for developments comprising 20 or more houses that were not commenced for reasons beyond the control of the developer.**
- **Section 36 – introduction of 'rent pressure zones' in certain areas and limits on rental increases within and between tenancies in the same property.**
- **Section 37 – extension of part 4 tenancies from four years to six years.**
- **Section 40 – restriction on landlords terminating tenancies of ten or more units within the same development in order to sell the properties within a six-month period.**
- **Section 42 – repeal of the right of landlords to terminate a part 4 tenancy within the first six months of second tenancy without stating grounds.**

Private rented sector

Part 3 of the act designates certain parts of Dublin and Cork, and some areas near Dublin, as rent pressure zones (RPZ) for a period of three years. In these areas, the maximum amount by which rent can be increased within residential tenancies, and between tenancies within the same property, is capped at 4% per year for three years. The act sets a formula that landlords must use when calculating the new rent, based on the timing of the last review and the time period between the commencement date of the existing rent or, where the property is subject to a new tenancy, the rent that was last set under a tenancy for the property and when the new rent will come into effect. An online calculator to assist landlords to determine the limit of any rental increase is available on the Residential Tenancies Board website.

This new cap does not apply if the property was vacant before the current new letting, and was not let at any time in the 24 months before the area became an RPZ.

The cap also does not apply where there has been a "substantial change in the nature of the accommodation provided" since the rent was last determined. This is primarily intended to apply to property where substantial refurbishment works would increase the market rent applicable for that property. The precise definition of 'substantial change in the nature of the accommodation provided' is likely to be a significant area of conflict between parties. These limits will not

work retrospectively and will not affect any rent increases that have been informed to the tenant prior to the act coming into effect.

The *Residential Tenancies (Amendment) Act 2015* restricted rent reviews to every two years from the previously permitted annual review. Within RPZs, annual rent reviews will once again be permitted, but the two-year rent review restriction will continue to apply to tenancies located outside RPZs. Both within RPZs and elsewhere, the existing restriction introduced in 2004 on rent not exceeding the 'market rent' still continues to apply. Again, information for landlords on current market rents is set out on the RTB website.

In the case of new tenancies in RPZs, landlords must furnish the following information to the tenant at the start of the new tenancy:

- The rent that was paid under the last tenancy,
- The date that the rent was last set, and
- How the rent set under the new tenancy has been calculated having regard to the rental cap formula.

Part 4 tenancies

Section 37 increases the duration of standard 'part 4 tenancies' from four to six years. The existing six-month probation period survives the new act. The new regime therefore permits a tenant to remain in the property for five years and six months following the completion of the initial six-month probation.

Section 42 of the *Residential Tenancies Act 2004* created a six-month probationary period, which was applied at the beginning of each further part 4 tenancy, during which the landlord could terminate the tenancy without stating any reason.

Section 41 of the new act repeals that provision and so extinguishes the landlord's right of termination during this period. This applies to new tenancies created after the passing of the act, including what are called 'further' part 4 tenancies coming into existence on or after that date. A further part 4 tenancy comes into being when a part 4 tenancy continues to the expiry of the four-year period (for new tenancies this will be a six-year period) without being terminated.

Section 40 inserts a new section 35A into the 2004 act and provides that, where a landlord proposes to sell ten or more units within a single multi-unit development within a six-month period, the sale will be subject to the existing tenants remaining *in situ*, other than in exceptional circumstances. This so-called 'Tyrrelstown clause' aims to protect tenants whose homes are sold while their tenancies are ongoing, and is likely to be an area of further litigation and dispute in the future.

This provision will not apply where the landlord can show to the satisfaction of the RTB that "the price to be obtained by selling at market value [which is subject to an existing tenancy] is more than 20% below the market value that could be obtained for the dwelling with vacant possession, or that the application of that subsection would, having regard to all the circumstances of that case, be unduly onerous on that landlord, or would cause undue unfairness to, or undue hardship on, that landlord".

This section of the act has not yet commenced. No termination notices served before the commencement of this section of the act will be affected.

This act contains significant reforms of both the planning system and the residential tenancies legislation. While the act is intended to be only in place for the next two years, it is likely that the Government will come under significant pressure to extend these provisions for the duration of the housing crisis. g

PIC: GETTY IMAGES

> BECAUSE OF THE TIGHT DEFINITION OF 'STRATEGIC HOUSING DEVELOPMENT', THE IMPACT OF THIS NEW PLANNING ROUTE ON OVERALL HOUSING OUTPUT WILL BE LIMITED

LOOK IT UP

LEGISLATION:

- *Planning and Development (Housing) and Residential Tenancies Act 2016*
- *Planning and Development Act 2000*
- *Residential Tenancies (Amendment) Act 2015*
- *Residential Tenancies Act 2004*

LITERATURE:

- *Rebuilding Ireland: Action Plan for Housing and Homelessness*
- Residential Tenancies Board – rental pressure zone calculator: www.rtb.ie/rent-pressure-zones

Separation anxiety

The folly of Brexit may be visited on divorcing couples where there is an interjurisdictional dispute involving Britain – this will not only affect wealthy litigants, but also those who can least afford it. **Keith Walsh** explains

KEITH WALSH IS PRINCIPAL OF THE DUBLIN FIRM KEITH WALSH, SOLICITORS

"A divorcing couple that has to litigate the consequences of the marital breakdown is not blessed. The couple that first litigates where to litigate might be said to be cursed. In reality, it is a curse restricted to the rich. Only they can afford such folly" (Thorpe LJ of the Court of Appeal of England and Wales in *Wermuth* [2003]).

The consequences of jurisdictional disputes in family law are different to those in civil or commercial law:

- Family law applies to the private life of individuals and to their family life. It is a far more intrusive and personal form of litigation than almost any other.
- The length of time it may take to litigate a divorce or separation and its costs has a considerable impact on the lives of those involved. Any further complication of an already detailed and complex litigation process will adversely affect both litigants involved.
- Most couples involved in family law proceedings are paying their own costs from after-tax income. This is in contrast to commercial disputes, where business entities can write off legal costs.
- Family law involves not only financial remedies, but custody and access issues, and delays in commencing, progressing and completing these disputes can cause very serious harm to parent/child relationships, as well as affecting the normal development of children.
- The voice of the child is often lost in disputes that are not about the substantive issue, but are disputes about jurisdiction.

AT A GLANCE

- In divorce, legal separation, annulment, and parental responsibility cases in member states, *Brussels II bis* deals with issues of jurisdiction, service, and recognition and enforcement of judgments
- Once Britain actually leaves the EU, the practice of family law between Britain and Ireland will become more complicated and expensive
- While Britain may decide to automatically recognise EU orders post-Brexit, there is no guarantee that the EU will decide to automatically recognise orders made in Britain

The legal regime currently in place between Ireland and Britain in divorce, separation, annulment, and parental responsibility is governed by *Brussels II bis* (Council Regulation 2201/2003). Maintenance obligations are excluded from the scope of this regulation, since they are covered by Council Regulation 44/2001.

The Bar Council of England and Wales, in their December 2016 Brexit papers, set out the advantage of *Brussels II bis* and the *Maintenance Regulation* as follows:

- Certainty about jurisdiction – couples of different nationalities who live in different EU member states can find out relatively easily where issues concerning the


PIC: WIKIMEDIA/NUALAREDMOND

> REBECCA BAILEY-HARRIS ESTIMATED THAT OVER 40,000 ITEMS OF LEGISLATION REQUIRE CONSIDERATION POST BREXIT

welfare of children, divorce and/or maintenance should be resolved,
- Ease of enforcement – orders concerning custody, access, and maintenance must be recognised and enforced in other member states,
- Each member state must designate a central authority that is responsible for cross-border enforcement of orders and for the exchange of information and general cooperation in matters concerning the welfare of children, and
- The availability of protective measures pending resolution of disputes protects children's welfare.

This is likely to change with Brexit. In divorce, legal separation, annulment, and parental responsibility cases in member states, *Brussels II bis* deals with issues of jurisdiction, service, and recognition and enforcement of judgments.

It does not deal with substantive laws, but could be viewed as dealing with the more technical aspects. There is no system of applicable law in these matters.

In relation to jurisdiction in separation and divorce cases, the basic principle set out in *Brussels II bis* is that of *lis pendens* – the 'first in time' rule. The party who commences proceedings first obtains jurisdiction, and the courts of other member states must stay any subsequent equivalent proceedings until the jurisdiction of the first court has been established (by the first court).

Brussels II bis also deals with issues of jurisdiction in parental responsibility cases. There is a more nuanced approach here, where the rush to issue first may not succeed in determining jurisdiction if it can be shown that there is a court in a better position to determine the child's habitual residence other than the court where the proceedings were first issued.

To be or not to be?

As Britain will no longer be part of the EU, *Brussels II bis* will not apply to them. There will be an immediate issue for Britain of certainty as to jurisdiction and how (if at all) reciprocal arrangements could be put in place with the EU. Britain may choose to retain the rules of *Brussels II bis*, but other states will not be obliged to abide by Britain's domestic laws. This lack of reciprocity will be a huge issue for litigants and family lawyers in Britain.

The Court of Justice of the EU will continue to function without Britain, whose clock will stop at the date of Brexit. Prof Rebecca Bailey-Harris, speaking at the recent four jurisdictions conference, estimated that over 40,000 items of legislation require consideration post-Brexit. The 'Great Repeal Act' will only hold or freeze the decisions to be made regarding Britain's domestic law, post-Brexit. How high up the priority list will resolving family law disputes be?

Britain may choose – although it appears unlikely – to recognise the rules set down in *Brussels II bis* and the *Maintenance Regulation* in relation to jurisdiction, but it appears more likely that there would be a move to impose British law where possible. However, this is currently unclear.

How will disputes in relation to jurisdiction involving Britain and Ireland in divorce cases be resolved, post-Brexit? In the absence of any other agreement, disputes in relation to jurisdiction will be resolved by *forum conveniens*, which involves the court determining which jurisdiction is the most appropriate or suitable to adjudicate the issues

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> THERE ARE CONCERNS RELATING TO STRAIGHTFORWARD ISSUES TURNING INTO PROTRACTED 'PRE-LITIGATION LITIGATION ABOUT LITIGATION' EXPRESSED BY LAWYERS PRACTISING ON CIRCUITS ADJACENT TO THE BORDER

in dispute. This litigation to establish where divorce litigation should take place would have the following adverse effects for both litigants:

- It would substantially increase the costs involved,
- It would further delay the resolution of the substantive dispute, that is, the divorce, and
- It would lead to uncertainty.

Automatic

There is provision in article 21 of *Brussels II bis* for automatic recognition, without any special procedure, of orders made in one member state by other member states in divorce, separation and marriage annulment matters.

There are a number of grounds for non-recognition of judgments relating to divorce, legal separation or marriage annulment, including:

- If recognition would be manifestly contrary to the public policy of the member state where recognition is sought,
- Where given in default of appearance or if the respondent was not served with the writ or with an equivalent document in sufficient time and in such a way for them to arrange for their defence, unless it is determined that the respondent has accepted the jurisdiction unequivocally,
- If it is irreconcilable with a judgment given in proceedings between the same parties in the member state in which recognition is sought, or
- If it is irreconcilable with an earlier judgment given in another member state or in a non-member state between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the member state in which recognition is sought.

These grounds also apply to judgments relating to parental responsibility, with three additional grounds for non-recognition of judgments:

- If the judgment was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the member state in which recognition is sought,
- On the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard,
- If the procedure for placement of a child in another member state applies and is not complied with (as set out in article 56).

While Britain may decide to automatically recognise EU orders post-Brexit, there is no guarantee that the EU will decide to automatically recognise orders made in Britain. Prof Bailey-Harris is sceptical that automatic recognition will happen post-Brexit.

It appears inevitable that recognition and enforcement of orders between Britain and Ireland will become more difficult post-Brexit, since the current system, while far from perfect, does provide a great degree of clarity and certainty in most recognition and enforcement situations.

The system of recognition of foreign divorces from non-EU countries in Ireland is already complex, and the exit of Britain from the more straightforward recognition regime (for the period that *Brussels II bis* applies) will further complicate the lives of those whose marital life has crossed borders with our nearest neighbours.

Uncertain

We are entering a time of uncertainty in international family law. Once Britain actually leaves the EU, the practice of family law between Britain and Ireland will become more complicated and expensive. Litigants will inevitably be dissatisfied with the system, and delays appear likely.

At a recent Family Lawyers' Association seminar in Dublin, there were grave concerns relating to currently straightforward issues turning into protracted 'pre-litigation litigation about litigation' expressed by lawyers practising on circuits adjacent to the border with Northern Ireland. As Resolution (the family lawyers association in Britain) stated recently: "The problem with the 'Great Repeal Bill' is that it would force us [in Britain] to adopt rules which may not be helpful to families, but with no guarantee that the other member states will play by the same rules. Thus, proceedings issued or orders made in England could simply be ignored."

On the positive side, Britain has not left the EU yet – it has simply given notice to leave. Until it actually leaves, the current system will remain in place and we must use it to our best advantage until the alternative arrives (if it ever does).

There is plenty to be done – family lawyers in these four jurisdictions, as well as in the EU, can advocate for and lobby their own governments and the EU to adopt a more enlightened approach to meet the needs of children and family, post-Brexit, by the retention of some level of common agreements.

We are at the start and not the end of the Brexit process, and family lawyers owe it to their clients to highlight these issues and put it up to governments and the EU to consider the effects of not resolving the obvious issues of jurisdiction, enforcement, and recognition of divorces and other family law orders post-Brexit. g

LOOK IT UP

CASES:

- *Wermuth v Wermuth* [2003] EWCA Civ 50 1

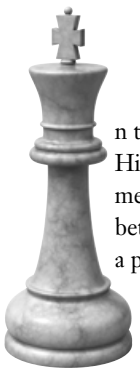
LEGISLATION:

- Council Regulation 2201/2003 (*Brussels II bis*)
- Council Regulation 44/2001

Mediation nation

The *Mediation Bill 2017* was published on 13 February and contains new and significant obligations for solicitors – but it also brings opportunities. **Richard Lee** reports

RICHARD LEE IS PRINCIPAL OF LEE SOLICITORS AND CHAIR OF THE MEDIATION SUBCOMMITTEE OF THE CHARTERED INSTITUTE OF ARBITRATORS (IRELAND BRANCH)



In the recent high-profile Kilkenny Group case, the High Court strongly urged the parties to consider mediation to avoid a public hearing of the difficulties between certain family members. Mediation provides a private and confidential process for parties to resolve their dispute with the support and assistance of a qualified and experienced independent third party. The courts are now more frequently suggesting mediation to parties coming before them as a means to resolving their difficulties.

The *Mediation Bill 2017* was published on Monday 13 February and contains new and significant obligations for solicitors – but it also brings opportunities. The bill recognises the importance of mediation and conciliation, and the contribution they bring to the resolution of complaints and disputes. It will put the process on a legal footing. The bill describes mediation as "a facilitative voluntary process in which parties to a dispute, with the assistance of a mediator, attempt to reach a mutually acceptable agreement to resolve the dispute" and confirms the process to be confidential and privileged.

One of the functions of the bill is to specify what legal requirements will apply to mediation and how mediation will interact with existing legislation and court procedures. The bill provides that participation in mediation shall be voluntary, that a party may withdraw at any time, and further provides that a party may be accompanied to the mediation and assisted by a person, including a legal advisor. In addition, the bill provides that a party may obtain independent legal advice at any time during the mediation. The bill also puts an onus on the mediator and on the parties to "make every reasonable effort to conclude the mediation in an expeditious manner which is likely to minimise costs".

AT A GLANCE

- The approach of a solicitor to mediation can have a significant bearing on the outcome for their clients
- The *Mediation Bill 2017* will have a very significant effect in relation to the resolution of disputes and will oblige all parties, including solicitors, to seriously consider the benefits of mediation to resolve disputes.
- It will bring significant change to the practice of civil litigation, with solicitors having to offer and explain mediation as an option to their clients, and subsequently swear a statutory declaration confirming that they have done so

Obligations

Part 3 of the bill sets out new obligations on solicitors and barristers. Prior to issuing

PIC: GETTY IMAGES

> THE BILL PROVIDES THAT PARTICIPATION IN MEDIATION SHALL BE VOLUNTARY, THAT A PARTY MAY WITHDRAW AT ANY TIME, AND FURTHER PROVIDES THAT A PARTY MAY BE ACCOMPANIED TO THE MEDIATION AND ASSISTED BY A PERSON, INCLUDING A LEGAL ADVISOR

proceedings, a solicitor will be required to:

a) Advise the client to consider mediation as a means of attempting to resolve the dispute,
b) Provide the client with information in respect of mediation services, including the names and addresses of persons who provide mediation services,
c) Provide the client with information about (i) the advantages of resolving the dispute otherwise than by way of proposed proceedings and (ii) the benefits of mediation,
d) Inform the client that the solicitor is obliged to swear a statutory declaration confirming that the solicitor has performed the obligations set out in (a), (b) and (c) and that, if the solicitor does not furnish such a statutory declaration, the court will be obliged to adjourn proceedings.

The solicitor will also be obliged to inform the client of the confidential and privileged nature of mediation, and of the enforceability of a mediation settlement (as per sections 10 and 11) of the bill.

Agreement to mediate

The bill will oblige the mediator and the parties to the mediation to enter into a written mediation agreement, which will need to include the manner in which the mediation is to be conducted, the manner in which the fees and costs are to be paid, the place and time at which the mediation is to be conducted, the fact that the mediation is to be conducted in a confidential manner, and the right of each of the parties to seek legal advice. It is currently standard practice for such an agreement to be put in place, but the bill will now make it mandatory.

The bill also sets out and regulates the role of a mediator and includes the obligation on a mediator to step aside if he/she has a conflict or potential conflict of interest. It further requires that a mediator inform the parties of his/her qualifications, training and experience and continuing professional development training, and also to furnish to the parties a copy of the code of practice to

> THE BILL WILL CREATE A GREATER NEED FOR SOLICITOR MEDIATORS WHO, BY VIRTUE OF THEIR PROFESSION, ALREADY UNDERSTAND THE LAW AND THE COURT SYSTEM

which he/she subscribes. Many practising mediators (solicitors, barristers, accountants, architects, engineers) will already be subject to the regulatory structures of their own professions and, indeed, will be members of existing mediation bodies, such as the Chartered Institute of Arbitrators and the Mediators' Institute of Ireland, which also have their own specific codes of conduct. The bill also makes it clear that a mediator must act with impartiality and integrity and treat the parties fairly. Mediators will also be under a duty to complete the mediation as expeditiously as is practicable and make sure that the parties are aware of their rights to obtain independent advice, including legal advice, prior to signing any mediation settlement. The bill makes it clear that the outcome of a mediation is to be determined by the mutual agreement of the parties, and it is not for the mediator to make proposals to the parties to resolve the dispute, unless the parties specifically request the mediator to make such a proposal. Standard mediation agreements will normally include a provision whereby the mediator can make proposals and recommendations to resolve the dispute, provided the parties so request.

Confidential and privileged

The bill makes it clear that all aspects of a mediation are confidential and privileged. This is an important aspect of the bill, as it allows parties to go into mediation without fearing that what they say will be used against them in court should the mediation be unsuccessful. It permits the parties to openly exchange views and make apologies if appropriate. In particular, the bill sets out that "all communications by the mediator with the parties and all records and notes relating to the mediation shall be confidential and shall not be disclosed in any proceedings before a court or otherwise". This is one of the main reasons that mediation works: the parties are able to talk and listen to each other in a 'safe space'. One of the functions of the mediator is to create and keep this 'safe space'.

The majority of mediations are successful, and unsuccessful mediations can often pave the way for later settlements. Statistics in this regard are hard to come by, but most experienced mediators agree that there are more successes than failures. Different types of disputes enjoy higher success rates than others – for example, business disputes tend to fare well in mediation. The longer a dispute goes on, the more entrenched the parties become, with the consequence that the chances of a successful mediation diminish.

The courts

Part 4 of the *Mediation Bill* sets out the role of the courts in mediation. The bill provides that a court may, on the application of a party to the proceedings or of its own volition, invite the parties to consider mediation. If the parties decide to engage in mediation, the court may:

- Adjourn the proceedings,
- Make an order extending the time for compliance by a party with rules of court or with any order of the court in the proceedings,
- Make such other order or give such direction as the court considers necessary to facilitate the effective use of mediation.

Where a case is to go to mediation from the court, then the mediator will be obliged to prepare and submit a report to the court. Where the mediation did not take place, the mediator will be obliged to furnish a statement of the reasons why it did not take place. Where the mediation proceeds and is successful or partially successful, the mediator will be required to furnish a statement setting out the agreed terms. In the case of a partial settlement, the mediator will be required to give a statement detailing the matters that remain unresolved. Where the mediation is unsuccessful, the mediator will be obliged to give a statement as to whether in his/her opinion the parties engaged fully in the mediation.

A consensus is emerging from the various mediation bodies that this particular section should be omitted, as the obligation to furnish a report gives the appearance that confidentiality will be breached, and it is likely to discourage the parties from engaging in open and direct communication, which is an essential part of the mediation process.

An important aspect of the bill is that,

FOCAL POINT

JUDICIAL VIEWS ON MEDIATION

The President of the High Court, Judge Peter Kelly, Judge Petria McDonnell of the Circuit Court, and President of the District Court Rosemary Horgan recently gave their personal views on mediation at an event organised by the Courts Service.

All three judges encouraged the use of mediation and expressed the view that they would like to see greater use of mediation in the future. The President of the High Court commented that there is a cost to society with litigation and that there is a public and social benefit to mediation. Judge McDonnell described mediation as creating a 'safe space' for the parties to talk and to listen to each other. The President of the District Court described mediation as a process in which the parties themselves have control of the outcome. Judge Horgan commented that encouraging the use of mediation made a significant difference to its uptake and that mediation is a good way of meeting the needs of a client.

in awarding costs, a court shall be entitled to take into account any unreasonable refusal to mediate. This is a significant and important feature of the proposed legislation and means that a party refusing to mediate will do so at their peril. Where an invitation to mediate is received, good practice would suggest that it should not be ignored and, if a decision is made to decline the invitation, then detailed reasons should be set out in writing explaining why the invitation is being refused (and sometimes there are good reason to refuse mediation).

Mediation clauses

The bill sets out important provisions to safeguard mediation clauses. If a party is bound by a mediation clause in a contract/agreement, but disregards that clause and then issues legal proceedings in respect of the contract, the other party can apply to court to have the proceedings adjourned so that the mediation clause might take effect. This will support and strengthen the benefit of having mediation clauses in all manner of agreements and contracts, including solicitors' terms and conditions and letters of engagement. To facilitate mediation, the bill provides for limitation and prescription periods to be suspended.

Opportunities

When passed, the bill will have a very significant effect in relation to the resolution of disputes and will oblige all parties, including solicitors, to seriously consider the benefits of mediation to resolve disputes. It will bring significant change to the practice of civil litigation, with solicitors having to offer and explain mediation as an option to their clients and subsequently swear a statutory declaration confirming that they have done so.

The bill will create a greater need for solicitor mediators who, by virtue of their profession, already understand the law and the court system. There will also be a greater need for 'mediation advisors' who know and understand their role in the mediation process and add benefit to it for the sake of their clients.

Going to court is an adversarial process in which all solicitors are well trained and experienced, but going to mediation requires a different set of skills. Clients will want their solicitor to accompany them to mediation and guide them through the process, giving them appropriate legal advice and writing up the mediation settlement. The approach of a solicitor to mediation can have a significant bearing on the outcome for their clients. g

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LAW SOCIETY OF IRELAND

Lost in translation

The work of legal translators is an important and growing area in Ireland. **Annette Schiller** discusses best practice when working with legal translators

DR ANNETTE SCHILLER IS A MEMBER OF THE EXECUTIVE COMMITTEE OF THE IRISH TRANSLATORS' AND INTERPRETERS' ASSOCIATION AND LECTURES PART-TIME IN TRANSLATION AT DUBLIN CITY UNIVERSITY

Translation refers to the written text and involves identifying and understanding concepts in one language and expressing them appropriately, coherently, and cohesively in another language.

Proficiency in a foreign language or even bilingualism is not sufficient to be a competent translator. Apart from excellent linguistic skills, a translator will show great intellectual curiosity, absolute integrity, and strong research skills.

A legal translator requires, in addition, an in-depth knowledge of the legal and judicial systems and terminology with which they are working, and of course, of European law. Furthermore, the legal translator in Ireland must know how to deal with the frequent lack of equivalence between the common and civil law traditions.

Given the general need for transactions to be concluded quickly in a legal context, the ability to analyse and process long and highly complex texts and to produce quality translations within a reasonable timeframe is a must.

Translations used in a legal context are also frequently hybrid in nature. For example, case documents about a road traffic accident may include an engineer's report on the condition of the road at the time of the accident, or about the vehicle, or a medical report about injuries incurred.

Legal translators are required in many different areas:

- Solicitors – family law, probate, conveyancing, company incorporation, all stages of civil disputes and criminal proceedings,
- Corporate clients operating internationally – procurement, recruitment, and contract drafting,
- Court of Justice of the European Union – in a freelance capacity,

AT A GLANCE

- A legal translator requires an in-depth knowledge of the legal and judicial systems and terminology with which they are working
- Also, the legal translator in Ireland must know how to deal with the frequent lack of equivalence between the common and civil law traditions
- Given the lack of a state accreditation system and the growing need for certified translations and legal translators, the ITIA has introduced the professional qualification 'ITIA Certified Legal Translator'

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> IN IRELAND, ANYONE WHO WISHES TO WORK AS A TRANSLATOR, EVEN A LEGAL TRANSLATOR, MAY DO SO, REGARDLESS OF WHETHER THEY HAVE A QUALIFICATION IN TRANSLATION OR KNOW ANYTHING ABOUT TRANSLATION

- Supreme or constitutional court judgments – on matters of great public interest that are relevant to other member states or countries,
- Universities and legal publishers – EU projects, general legal commentary, commentary on the civil codes of various countries,
- Private persons use legal translators for the certified translation of documents that are required when applying for citizenship, or to attend university.

In Ireland, anyone who wishes to work as a translator, even a legal translator, may do so, regardless of whether they have a qualification in translation or know anything about translation.

Non-regulated profession

While translation is a non-regulated profession worldwide, many countries in continental Europe (for example: Germany, France, Poland, Croatia) have a system

of sworn translators. The minimum requirements differ from one member state to another, but generally include most of the following:

- A Master's degree in translation,
- A minimum of five years' relevant experience,
- Success in the legal translation exam set by the courts or justice ministry,
- An oath to be taken before a court of law,
- Renewal of the licence as a sworn translator every five years.

In Ireland, the provision of translators (excluding translators for the Irish language) for government bodies, the courts, garda stations and the prison service is organised by public procurement competition. The most recent request for tender (RFT) of 27 November 2015 resulted in six translation agencies being chosen for a framework agreement. These six framework members subsequently partake in a 'mini-competition' for the actual award of contracts. Two of the six framework members are based in Britain, and apparently some of the six have not been asked to supply translators to date.

The RFT specifies that the translators to be used must be "native English speakers, with a recognised academic qualification in the language concerned or native speakers in the language required with a recognised academic qualification in English". A qualification in translation is, therefore, not a requirement. The RFT also states that "service providers will be required to provide quality audits of 5% of all translations completed in each calendar month".

It is hard to fathom how someone with no relevant qualification and who is possibly unaware of the wider ethical principles involved can provide a quality and cost-effective service in such a complex area of translation. The low level of independent testing is also of concern. While the State is perhaps paying a fair fee for this work, much of that fee is not trickling down to the translator, which means that qualified legal translators will not accept such work, as they are simply not prepared to work for very low rates.

The professionals

Given the lack of a state accreditation system and the growing need for certified translations and legal translators in Ireland, the ITIA – as the only professional translator association in the country – decided to introduce the professional qualification 'ITIA Certified Translator' (now ITIA Certified Legal Translator). The association spent over two years studying the sworn translator systems that are in place in Europe and also best practice in legal translation. In 2006, it introduced a procedure whereby translators working exclusively or primarily in legal translation and who are in the top membership category at the ITIA may apply to take the examination to become an ITIA Certified Legal Translator. The ITIA now has 33 ITIA Certified Legal Translators covering the following languages: from Chinese, Croatian, Danish, French, German, Italian, Japanese, Polish, Russian, Serbian and Spanish into English; and from English into German, Polish, Russian and Spanish.

> A COMPETENT TRANSLATOR WILL ASK FOR CLARIFICATION IF SOMETHING IS NOT ABSOLUTELY CLEAR. BE PREPARED TO DISCUSS ASPECTS OF A TEXT WITH THE TRANSLATOR

The profile of an ITIA Certified Legal Translator and details of the examination taken are as follows:

- Postgraduate or undergraduate degree in translation.
- A minimum of five years' experience in legal translation, but most will have between ten and 25 years.

- Many have a legal qualification (such as an LLB/LLM/Diploma in Legal studies from Ireland or similar from abroad) and/or have worked at a law firm.
- They are bound by the *Code of Practice and Professional Ethics* of the ITIA.
- Translators translate into their mother tongue. Translation out of the mother tongue is accepted only if the foreign language is at near-native level.
- The exam consists of the translation of two texts: the first a short text (for example, a birth/marriage cert), and the second an A4 excerpt of continuous text (such as a contract, or divorce document).
- The texts for translation are authentic documents.
- The scripts are assessed by highly qualified legal translators based in Ireland and Europe with experience of assessing exams.
- The failure rate tends to be between 50% and 85% each year. Translators who fail one or both papers may re-take those papers the following year.
- A certified translation by an ITIA Certified Legal Translator contains a certifying statement and two stamps with the ITIA certification number and contact details of the translator. The translator is, therefore, traceable at all times.

As regards certified translations, an ITIA Certified Legal Translator may be struck off the ITIA list if they are found to be wilfully mistranslating documents, certifying translations done by third parties, or certifying language combinations for which they have not been certified. In addition, they are required to translate only from original documents or certified copies and not from faxes or scanned copies. The certification stamps are issued only by the ITIA.

A certified translation done by an ITIA

Certified Legal Translator is intended to be a guarantee of quality and accuracy and therefore a reassurance to the client.

Right to translation

Article 5(2) of Directive 2010/64/EU, which provides for the right to interpretation and translation in criminal proceedings, says that member states "shall endeavour to establish a register or registers of independent translators and interpreters who are appropriately qualified. Once established, such register or registers shall, where appropriate, be made available to legal counsel and relevant authorities."

While such registers already exist in some member states, no such register has been established in Ireland to date.

When choosing a legal translator, the client should look for the following:

- Translation qualification – postgraduate or undergraduate,
- Legal qualification or training or experience working at a law firm, where possible,
- An ITIA Certified Legal Translator,
- Translator translating into the mother tongue (failing this, near-native level),
- Membership of a professional association (in Ireland or abroad),
- A recommendation from another well-established translator,
- Specialisation in another subject area, for example, medicine, or technical,
- Legal translators can be accessed through the ITIA or by recommendation or through translation companies.

A few tips for best practice when working with legal translators:

- A competent translator will ask for clarification if something is not absolutely clear. Be prepared to discuss aspects of a text with the translator.
- Include the legal translator as early as possible in an assignment to allow them time to familiarise themselves with the subject matter, to carry out any research required, and to come back to the solicitor for clarification.
- Develop a long-term relationship with a competent legal translator. This will allow them to become very familiar with your area of work.
- Legal texts are frequently unnecessarily complicated, requiring considerable clarification. Perhaps consideration should be given to clear writing at the drafting stage. An article in the March 2017 issue of the *Gazette* (p11) suggests that "clear communication saves costly court cases" and that refers only to work in one language!
- While speed is of the essence, a competent translator will not take on an assignment that has an unreasonable deadline, or one that pays very low rates, or that involves a subject area with which they are totally unfamiliar.
- A legal translator will generally translate between 1,500 and 2,000 words per day, depending on how complex a text is.
- Translators are highly IT literate and use computer-assisted translation tools. However, legal translation assignments are rarely suitable for economies of scale.
- Each translation job is different, and the price will depend on the language, type of text, deadline, and may be based on word, line, page or hour.
- As regards authentication, a translator cannot vouch for the authenticity of a foreign document. However, they can confirm that their translation is a true, accurate, and faithful rendering of the original document presented to them. This is done (a) through certification by an ITIA Certified Legal Translator, as outlined above, or (b) by means of a sworn affidavit. With the latter, the translator will arrange to have the swearing of the affidavit overseen by a solicitor/notary other than the solicitor who has commissioned the translation. g

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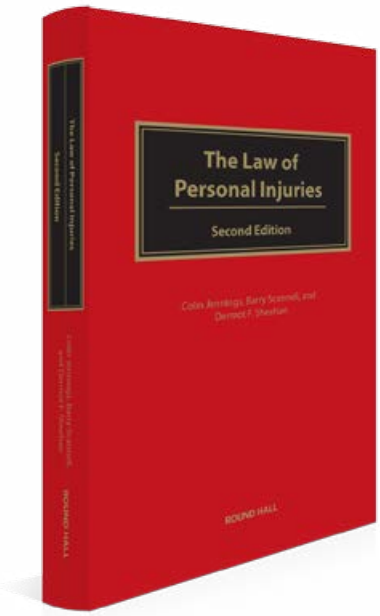
THE LAW OF PERSONAL INJURIES (SECOND EDITION)

Colin Jennings, Barry Scannell and Dermot F Sheehan. Round Hall (2016), www.roundhall.ie. ISBN: 978-0-41405-656-5. Price: €245.



While the title of this work specifically cites personal injuries, this book covers much more than personal injuries in the limited sense. It also includes a chapter on alternative forms of liability, which discusses nuisance, product liability, control of animals, and vicarious liability. A separate chapter is included on occupier's liability, and specialised compensation regimes. There is also a chapter on insurance. Three appendices are provided, which cover pleadings and notices, including the *MIBI Agreement 2009* and the Injuries Board form.

As expected in a book of this nature, the first chapter contains a detailed discussion and review of progressing a file through the Injuries Board, from initial consultation with the client to submitting the claim form and accepting or rejecting the award. Then a chapter deals with the practical steps of issuing proceedings and the transferral of proceedings from one court to another. Extensive reference has been made throughout to case law. The chapter on medical negligence includes discussion of the *Legal Services Regulation Act 2015*, which had been enacted but not commenced at the time of publication. This will bring significant changes to the manner in which medical negligence actions had previously been processed.

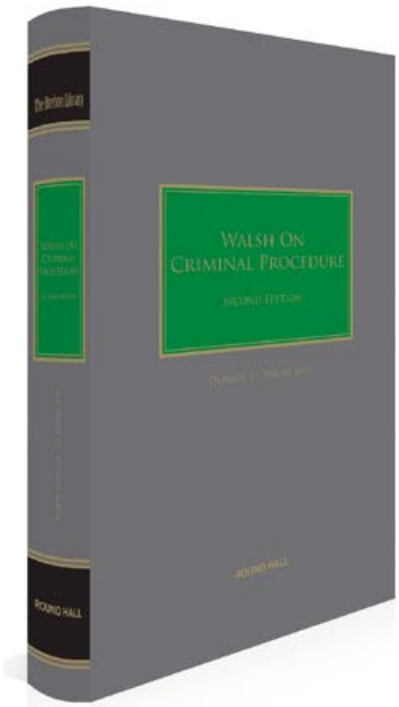
A chapter on specialised compensation regimes discusses garda compensation, the Reserve Defence Forces non-statutory compensation scheme, the Civil Defence compensation scheme, compensation under section 6 of the *Criminal Justice Act 1993*, and the Hepatitis C and HIV Compensation Tribunal.

In each chapter, the authors are meticulous in examining the issues with recourse to legislation, practice directions, and analysis of reported and unreported cases. The layout and division of the book make it easy to identify and locate the topic you are looking for quickly. The clear and concise manner in which it is written makes the book an excellent reference tool for practitioners. It is an invaluable and necessary guide, and great praise is due to the authors for an excellent publication.

Joyce A Good Hammond is a partner at Hammond Good, Solicitors, and is a member of the Law Society's Conveyancing Committee.

WALSH ON CRIMINAL PROCEDURE

Dermot Walsh. Round Hall (2016), www.roundhall.ie. ISBN: 978-0-41403-504-1. Price: €395.



Writing the foreword to the first edition of this work in 2002, regarded as the 'gold standard' on criminal procedure, the late Judge Adrian Hardiman commented on the rapid pace of change in the field, while recommending the book for practitioners and academics alike.

This second edition is more of the same. The preface, by Prof Walsh himself, refers to the some 70 acts of the Oireachtas passed in the intervening years that have had an impact specifically on criminal law and procedure, as well as multiple appellate judgments. The result is the need for six new chapters. In a near polemic, Walsh is critical of both the Oireachtas and judiciary for a rush towards a 'crime control' agenda and lessening of human rights values – notably, in the case of the latter, in respect of the *JC* case, a Supreme Court judgment that drastically (and controversially) redefined our law on the 'exclusionary rule', which he describes as a "surprising concession to prosecutorial expediency".

That apart, he maintains, mostly, an appropriate academic detachment, and the end product is a vast, 2,000-page tome, which has at least a starter pack, if not necessarily the last word, on virtually any procedural law issue. There is a review of the institutions – courts, gardaí, prisons, the role of the DPP; procedures from arrest and detention, through prosecution, bail, legal aid, trial, conviction, sentence and appeal; investigative powers and limitations thereon; rules of evidence; and the respective roles of DPP, trial prosecutors, defence and judges. Attention to detail is admirable, and Prof Walsh canvasses widely among common law jurisdictions and the European courts for relevant authorities. The chapter on the 2014 *DNA Database Act* – a massive and hugely contentious piece of legislation – is particularly comprehensive, although Prof Walsh can sometimes barely restrain himself from trenchant criticism of the Oireachtas.

His chapter on garda surveillance, one of the six new offerings, is an excellent overview of this tricky, technical and divisive subject, incorporating European law – from whence of course much of our domestic law in this field derives – and Irish, as well as various academic views from multiple jurisdictions. He notes, in particular, the *Digital Rights Ireland* case and the rather surprising lack of response by the Oireachtas to that momentous decision of the Court of Justice of the EU striking down the 2006 *Data Retention Directive*.

By way of criticism, the book is a little off the pace on the rights of solicitors to attend at garda interviews with arrested suspects; there is nothing at all on garda vetting (an issue of increasing importance in criminal practice); and the material on suspended sentences suggests clarity on the issue – something most practitioners would disagree with! But these are minor caveats on what is, overall, an enormously valuable volume that should be in every criminal lawyer's library. g

Dara Robinson is partner in the Dublin firm Sheehan & Partners.

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DATE	EVENT	DISCOUNTED FEE*	FULL FEE	CPD HOURS
11 May	Skillnet Cluster - Essential Solicitor Update 2017 Part I – in partnership with Leitrim, Longford, Roscommon and Sligo Bar Associations Landmark Hotel, Carrick-on-Shannon, Co Leitrim	€80 (Parts I and II €170)		2.5 General plus 1.5 M & PD (by Group Study)
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12 & 13 May	Law Society Skillnet – Planning & Environmental Law Masterclass for Residential and Commercial conveyancers	€350	€425	8 General plus 2 M & PD Skills (by Group Study)
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26/27 May & 9/10 June	Law Society Finuas Network - Wills, Probate, Estates & Tax Master Class	€700	€850	20 General (by Group Study)
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8 June	A practitioners guide to Immigration and inward investment- keeping Ireland open for Business - in partnership with the EU & International Affairs Committee	€95		2 General (by Group Study)
16 June	Skillnet Cluster - Practitioner Update 2017 – in partnership with Clare and Limerick Bar Associations Strand Hotel, Limerick	€115 *(Hot lunch and networking drinks included in price)*		5 General, 1 Regulatory Matters (Accounting and AML Compliance) (by Group Study)
23/24 June	Law Society Skillnet - Personal Injuries Litigation Master Class	€350	€425	10 CPD hours including 1 Regulatory Matters (by Group Study)
29 June	Skillnet Cluster - North West General Practice Update 2017 Part I – in partnership with Donegal and Inishowen Bar Associations Solis Lough Eske Castle Hotel, Donegal	€80 (Parts I and II €170)		2 M & PD plus 2 Regulatory (including 1 Anti-money Laundering & Financial Compliance) (by Group Study)
30 June	Skillnet Cluster - North West General Practice Update 2017 Part II – in partnership with Donegal and Inishowen Bar Associations Solis Lough Eske Castle Hotel, Donegal	€115 (Parts I and II €170) *(Hot lunch and networking drinks included in price)*		4 general plus 1 M & PD and 1 Regulatory (by Group Study)
7 Sept	Skillnet Cluster - Essential General Practice Update 2017 – Ballygarry House Hotel, Tralee	€115 *(Hot lunch and networking drinks included in price)*		6 (by Group Study)
21 Sept	The in-house solicitor – setting up a legal function and key responsibilities - Kingsley Hotel, Cork	€150	€176	5 M & PD Skills plus 1 General (by Group Study)
15/16 Sept & 29/30 Sept	Fundamentals of Commercial Contracts	€1,000	€1,100	20 Hours (including 6 Hours Management & Professional Development Skills) by Group Study

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PAUL HANNON
1976 – 2017

The office of Philip Hannon Solicitors was extremely shocked and deeply saddened by the passing of Paul Hannon BA, ACA, who died tragically in a road traffic incident in the early hours of Friday 24 March 2017. He is survived and hugely missed by his father, retired garda sergeant John, mother Florence, nine brothers and sisters, brothers and sisters-in-law, nephews and nieces, and extended family.

Paul, who attended Parteen National School and Ardscoil Rís, left his Clare home to work for KPMG in the capital after graduating from the University of Limerick with a degree in law and accounting.

He then served as head of finance of Goal's development projects in Sierra Leone in 2003. After two years of developing businesses and small enterprises in underprivileged communities, he then decided to become a solicitor and joined his brother Philip's firm in Dublin, where he spent ten years as an apprentice and senior solicitor.

A dedicated and enthusiastic member of staff, Paul was liked and revered by colleagues, clients and peers. Highly intelligent, Paul also had the personality and ability to relate to the clients of the firm (which specialises in criminal defence), many of whom were in trouble because of addiction, family breakdown, poverty or societal marginalisation. He had that wonderful knack of being able to cross social divides. His pursuit of justice on their behalf was unrelenting.

In January 2015, Paul was appointed senior enforcement lawyer at the Central Bank. His brief was to investigate the consequences of the recent economic crash and to ensure that it didn't happen again, a role that allowed Paul to continue his search for justice on a higher level. The demanding and rigorous role suited Paul's 'up-and-at-them' spirit – he was never one just to talk about a problem, he had to get involved and find solutions. A colleague said that you could never have too much work for Paul, and that workload, performed to exacting standards, was carried out with kindness, compassion and a smile – a wonderful team player.

With a huge zest for life, Paul not only excelled in his career, which included serving on the Criminal Law Committee of the Dublin Solicitors' Bar Association, but also managed to be a more than useful soccer player ("beautifully graceful" was the description provided by Parkville Football Club) who still was an ever-present member of the Law Society soccer team. A committed Limerick hurling, Munster rugby and Irish soccer supporter, a marathon runner – he raised a lot of money for Gorta participating in the Berlin and other marathons, and the Law Society annual charity Calcutta Runs – Paul was incredibly widely travelled and wonderful company at any social event. His outgoing and relaxed manner, his sharp intelligence allied with humour and compassion, his generosity of spirit, all combined to allow Paul to have a large and diverse range of friends across all social strata.

Paul enriched the lives of all he came into contact with, and he will be enormously missed by his family, work colleagues, both past and in the Central Bank, and his extremely wide circle of friends.

May he rest in peace.

MPH

PROBATE, ADMINISTRATION AND TRUSTS COMMITTEE

SOLICITORS, BENEFICIARIES AND SECTION 68 LETTERS

The issuing of section 68 letters to beneficiaries is still required in certain situations as a matter of professional standards and ethics.

The definition of client contained in section 2 of the *Solicitors (Amendment Act) 1994* includes "a beneficiary to an estate under a will, intestacy or trust". Accordingly, since the coming into force of the *Solicitors (Amendment Act) 1994*, it has been understood that beneficiaries should receive a section 68 letter. This could include a residuary beneficiary or beneficiaries, an intestate beneficiary or beneficiaries, or where the residue or any partial intestacy is insufficient to meet costs arising, or any pecuniary, general or specific beneficiary.

The Law Society (primarily through its Complaints and Client Relations Committee), when considering complaints from beneficiaries that they did not receive a section 68 letter, acknowledged the distinction between complaints from those beneficiaries out of whose share of the estate costs will be deducted and complaints from any other class of beneficiaries (see practice note, December 2010 *Gazette*, p56).

The Law Society took the view that the beneficiary indirectly paying costs should receive a copy of the section 68 letter furnished to the legal personal representative. This was the view of the High Court in *Condon v Law Society of Ireland* ([2010] IEHC 52) and *Sandys & anor v Law Society of Ireland* ([2015] IEHC 363).

The recent decision of the Court of Appeal in *Sandys & anor v Law Society of Ireland* [2015] IECA 395 does not support this view.

'Client', for the purpose of section 68 in the view of the Court of Appeal, is limited to the client giving instructions. In the cases outlined above, the 'client' giving instructions was a solicitor executor and, following the judgment, is not obliged by statute as a solicitor to furnish those beneficiaries with a copy of the section 68 letter. The issue of whether a solicitor executor should furnish himself or herself with a section 68 letter was not before the court.

Paragraph 57 of the judgment states: "If, in accordance with this construction, a firm of solicitors provides a section 68 letter to executors, or in the case of a sole practitioner, perhaps to himself at the commencement of the administration of an estate, there may be a separate question as to what obligation he or she owes as executor to furnish the section 68 letter at the time it is issued to any beneficiary who will ultimately, in reality, be paying those costs in the sense that they will come out of that person's entitlement under the estate."

While it is not clear whether a solicitor executor is obliged by statute to provide a copy of such section 68 letter as executor, there is nonetheless the issue of professional standards and ethics. When the solicitor is also acting as executor, it remains the view of the Law Society that the solicitor-executor should furnish a copy of the section 68 letter or any letter of engagement to the class of beneficiaries from whose benefit the legal costs will ultimately be paid (normally the residuary legatees). It is best and safest practice, both from the perspective of the solicitor-executor and the beneficiaries, to keep those beneficiaries who will ultimately bear the costs of administration informed of the likely costs from the outset.

Solicitors acting in the administration of an estate who are not acting as executor should advise their executor client that it is best practice to furnish a copy of the section 68 letter or any letter of engagement to the beneficiary or those beneficiaries from whose benefit the legal costs will ultimately be paid, and seek instructions so to do. It is then a matter for the executor client to instruct the solicitor as to whether or not to issue a copy of the letter to the relevant beneficiary or beneficiaries.

Upon commencement of part 10, chapter 3, of the *Legal Services Regulation Act 2015*, references in this practice note to section 68 of the *Solicitors (Amendment) Act 1994* shall be read as references to section 150 of the *Legal Services Regulation Act 2015*, and references to a letter of engagement shall be read as references to an agreement under section 151 of the *Legal Services Regulation Act 2015*.

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CONVEYANCING COMMITTEE

CONFIRMATION OF CONSTRUCTION COSTS

It has been brought to the attention of the committee that some lenders have a requirement in stage-payment cases that the borrower's solicitor will certify construction costs to the lending institution on the drawdown of stage payments.

The committee recently secured the agreement of a lender to desist from asking borrowers' solicitors for such a confirmation.

The committee wishes to remind conveyancing solicitors that they are not trained and do not have competence to certify construction costs, this being a job that quantity surveyors, engineers and/or architects are trained to do, and they should therefore not give such confirmations to lenders.

TECHNOLOGY COMMITTEE

DIGITAL PRIVACY – HOW TO PROTECT YOURSELF AND YOUR DATA

If someone could secretly monitor your computer history, what would they find? Photos of your family? Your bank details?

Information in deleted files can be retrieved years after removal. All computers are vulnerable and, in the wrong hands, this information could easily come back to haunt you.

The same goes for your online activity. When you send an email, run a Google search or write a Facebook post, you lose control of how the data is used. Your message can be read, redirected, and stored permanently by people who do not have (or need) your permission to do so.

The following are a few steps you can take to protect your digital privacy that can go a long way towards securing your private information, giving you peace of mind in the process.

Encrypt emails and files

With an encryption program, no one but you and the person you intend to message can read its contents. This requires that both parties are running the same program. The program scrambles the message, making it unreadable to anyone who doesn't have the program to decrypt it. Some encryption programs make it impossible to decipher messages.

To keep your emails secure, encrypt sensitive messages from every email address you use. You can also encrypt email chat messages and text messages to ensure that content remains private.

Pretty Good Privacy (PGP) encrypts and decrypts emails – a free basic version can be found at GNU Privacy Guard. Alternatively, try the encryption desktop available from Symantec (see symantec.com). This also allows you to encrypt the contents of your computer and safely delete files you want removed.

Encrypt messages and headers

The email subject line, the recipient, and the date and time it was sent remain intact. This means that your internet service provider and anyone else can see who you are messaging, when you are messaging them, and how often you're doing it.

Your internet browsing records are also unprotected. Think about that the next time you search for something on Google or another search engine.

To avoid exposure, consider encrypting the data stream between your computer and the internet, making it impossible for an eavesdropper to read email headers or to see your searches. The technology that allows you to do this is called a virtual private network (VPN). Your internet traffic still passes through your ISP, but it's encrypted, so no useful information can be seen. If anybody snoops, all they get is a long string of unintelligible gibberish.

Find a non-US webmail provider

Services like Yahoo mail, Gmail and Hotmail are all very convenient, but with the emphasis on security, you can kiss your privacy goodbye using these services. To protect yourself, use a non-US-made service that takes privacy and security seriously, for example, Century Media.

Encrypt your cloud storage

Storing data online, or in the cloud as it is known, is now routine. Like everything else, if you're dealing with a US company, it is not always private and secure. For example, Dropbox (a cloud service that lets you store files as well as send them to one or more people) is subject to very loose US privacy laws. In the past three years, hackers have stolen 7 million Dropbox passwords.

It also seems that private Dropbox files you share can be logged by search engines, so anyone who can find this link can access the files.

One way to protect yourself is to only upload encrypted files to Dropbox. Another is to look for an alternative cloud service.

Summary

Encrypting all the data you hold online is a great start to protecting your digital privacy. If you are really serious about privacy, consider deleting social networking profiles. This is easier said than done. Facebook is growing larger, with a vast amount of users. They don't want you to leave their platform once they have your information, and so provide various services for you.

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LAW SOCIETY OF IRELAND

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*

NOTICE

In the matter of Aiden Desmond, a solicitor practising as Desmond & Co, Solicitors, 35 Rockgrove, Youghal Rd, Midleton, Co Cork, and in the matter of the *Solicitors Acts 1954-2011* [8859/DT122/15 and 8859/DT123/15]

Law Society of Ireland (applicant)

Aiden Desmond (respondent solicitor)

Take notice that the *Law Society Gazette* wishes to correct the notifications made in its April 2017 issue (p64). In those notifications in the April 2017 issue, it was notified that the respondent solicitor was 'formerly practising'. This was in fact incorrect, and the respondent solicitor was then in practise and continues to be in practise.

In the matter of Paul Cunningham, a solicitor practising as Cunningham Solicitors, 8 Emily Square, Athy, Co Kildare, and in the matter of the *Solicitors Acts 1954-2011* [7986/DT40/14, 7986/DT41/14, 7986/DT42/14 and High Court record no 2016/113SA]

Law Society of Ireland (applicant)

Paul A Cunningham (respondent solicitor)

On 5 July 2016, the Solicitors Disciplinary Tribunal heard three complaints against the respondent solicitor and found him guilty of misconduct in his practice as a solicitor in that he had, at the date of the referral of the matter to the tribunal:

7986/DT40/14

1) Failed to comply in a timely manner with one or more of the following undertakings:
   a) Undertaking in respect of named clients dated 13 February 2007,
   b) Undertaking in respect of named clients dated 3 July 2007,
2) Failed to respond adequately to correspondence from the complainant,
3) Failed to respond adequately to correspondence from the Society.

7986/DT41/14

1) Failed to comply in a timely manner with his undertaking dated 24 June 2004,
2) Failed to respond adequately to correspondence from the complainant,
3) Failed to respond adequately to correspondence from the Society.

7986/DT42/14

1) Failed to comply in a timely manner with one or more of the following undertakings:
   a) Undertaking in respect of a named client dated 29 July 2004,
   b) Undertaking in respect of named clients dated 3 July 2006,
   c) Undertaking in respect of a named client dated 18 October 2006,
   d) Undertaking in respect of named clients dated 5 March 2007,
   e) Undertaking in respect of named clients dated 10 April 2007,
   f) Undertaking in respect of a named client dated 28 April 2008,
   g) Undertaking in respect of named clients dated 19 March 2009,
   h) Undertaking in respect of named clients dated 19 March 2009,
   i) Undertaking in respect of named clients dated 19 March 2009,
   j) Undertaking in respect of named clients dated 2 April 2009,
2) Failed to respond adequately to correspondence from the complainant in respect of one or more of the aforementioned undertakings,
3) Failed to respond adequately to correspondence from the Society in respect of one or more of the aforementioned undertakings.

The tribunal ordered that the respondent solicitor:

1) Do stand censured,
2) Pay a cumulative sum of €5,000 to the applicant's compensation fund,
3) Pay a cumulative sum of €5,000 as a contribution towards the costs of the applicant.

The applicant appealed the sanction imposed by the tribunal in the above proceedings to the High Court and, on 7 November 2016, the High Court ordered that:

1) The respondent solicitor not be permitted to practise as a sole practitioner or in partnership; that he be permitted only to practise as an assistant solicitor in the employment and under the direct control and supervision of another solicitor of at least ten years' standing, to be approved in advance by the applicant – said order to be stayed until 1 March 2017,
2) The respondent solicitor pay a sum of €5,000 to the compensation fund,
3) The respondent solicitor pay a sum of €5,000 to the applicant in respect of its costs before the tribunal – said order to be stayed for a period of one year from that date.

In the matter of Aiden Desmond, a solicitor practising as Desmond & Company, Solicitors, 35 Rockgrove, Midleton, Co Cork, and in the matter of the *Solicitors Acts 1954-2011* [8859/DT103/15]

Law Society of Ireland (applicant)

Aiden Desmond (respondent solicitor)

On 10 January 2017, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of professional misconduct in his practice as a solicitor in that he:

1) Failed to ensure that there was furnished to the Society an accountant's report for the year ended 31 December 2014 within six months of that date, in breach of regulation 21(1) of the *Solicitors Accounts Regulations 2001* (SI 421/2001),
2) Through his conduct, showed disregard for his statutory obligation to comply with the *Solicitors Accounts Regulations* and showed disregard for the Society's statutory obligation to monitor compliance with the regulations and for the protection of clients and the public.

The tribunal ordered that the respondent solicitor:

1) Do stand censured,
2) Pay a sum of €1,000 to the compensation fund,
3) Pay a sum of €200 towards the whole of the costs of the Law Society of Ireland within 12 months of the making of the order.

In the matter of Raymond O'Meara, a solicitor formerly practising as O'Meara & Co, Solicitors, Clare Street, Nenagh, Co Tipperary, and in the matter of the *Solicitors Acts 1954-2011* [8764/DT153/15]
Law Society of Ireland (applicant)
Raymond O'Meara (respondent solicitor)
On 18 January 2017, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of professional misconduct in that he failed to ensure that there was furnished to the Society an accountant's report for the year ended 31 December 2014 within six months of that date, in breach of regulation 21(1) of the *Solicitors Accounts Regulations 2001* (SI 421/2001).

The tribunal ordered that the respondent solicitor:

1) Do stand censured,
2) Pay a sum of €500 to the compensation fund,
3) Pay a sum of €1,000 as a contribution towards the costs of the Law Society.

In the matter of Peter D Jones, a solicitor practising as Peter D Jones & Company, Solicitors, Church Lane, Mullingar, Co Westmeath, and in the matter of the *Solicitors Acts 1954-2011* [3976/DT74/15]
Law Society of Ireland (applicant)
Peter D Jones (respondent solicitor)
On 9 February 2017, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor, in that he failed to comply with an undertaking furnished to the complainants on 23 February 2005 in respect of his named client and borrowers and property at Mullingar, Co Westmeath, in a timely manner or at all.

The tribunal ordered that the respondent solicitor:

1) Do stand admonished and advised,
2) Pay a sum of €3,500 to the compensation fund, and
3) Pay a sum a €2,500 towards the costs of the Law Society of Ireland.

In the matter of Eoin Dee, solicitor, formerly of Thomas House, 47 Thomas Street, Waterford, and in the matter of the *Solicitors Acts 1954-2011* [8243/DT146/15]
Law Society of Ireland (applicant)
Eoin Dee (respondent solicitor)
On 23 February 2017, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

1) Failed to use his best endeavours to ensure that a fee note dated 16 March 2012, totalling €1,691.24 due and owing to counsel in relation to a case in which he briefed him, was discharged,
2) Failed to respond adequately or at all to some or all of the correspondence sent to him by the Society, particularly letters dated 6 February 2014, 20 March 2014, 25 April 2015, and 18 May 2015,
3) Failed to attend a meeting of the Complaints and Client Relations Committee on 21 July 2015, as required.

The tribunal ordered that:

1) The respondent stand censured,
2) The respondent pay the sum of €2,500 to the compensation fund,
3) The respondent pay the sum of €1,691.24 as restitution to counsel, and
4) The respondent pay the sum of €2,500 as a contribution towards the whole of the costs of the Society.

In the matter of Peter Downey, a solicitor practising as Eagleton Downey, Solicitors, at Suite 1155, Fitzwilliam Business Centre, 77 Sir John Rogerson's Quay, Dublin 2, and in the matter of the *Solicitors Acts 1954-2011* [12722/DT23/16 and High Court record no 2017/12SA]
Law Society of Ireland (applicant)
Peter Downey (respondent solicitor)
On 14 November 2016, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of professional misconduct, in that he failed to ensure there was furnished to the Society an accountant's report for the year ended 31 January 2015 within six months of that date, in breach of regulation 21(1) of the *Solicitors Accounts Regulations 2001* (Statutory Instrument 421/2001).

The tribunal sent the matter forward to the High Court and, on Monday 27 February 2017, the High Court ordered that, within nine months from that date, the respondent solicitor:

1) Pay a sum of €500 to the compensation fund,
2) Pay a sum a €1,000 towards the costs of the Law Society.

Stephenson solicitors

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■ **Dwelling House Relief,** post 25 December 2016.
■ **Foreign assets,** which are "in" or "out" for the IRA/CAT-two different things!
■ **Assets passing to spouses:** When are they out of the charge to tax here but subject to foreign tax?
■ **When a beneficiary wants "out":** The most tax efficient way to facilitate this with precedents and check lists.
■ **What is or should be "in" Estate and Trust accounts and who gets them?** The startling effect of *Sandy v Law Society 20/12/2016* and the Law Society's view on s.68 in light of same. We will also consider s.150 of the *Legal Services Regulation Act 2015.*

For further details and booking form, see www.stephensonsolicitors.com and the April issue of the *Law Society Gazette*. Places are filling up fast, so booking is advisable.
We look forward to seeing you all there.

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NEWS FROM THE EU AND INTERNATIONAL AFFAIRS COMMITTEE
EDITED BY TP KENNEDY, DIRECTOR OF EDUCATION, LAW SOCIETY OF IRELAND

LETTING THE CAT OUT OF THE INDUSTRIAL BAG

Earlier this year, the General Court ordered the EU to pay damages to Gascogne and Gascogne Sack Deutschland GmbH ('Gascogne'), due to the excessive length of its previous adjudication of a challenge to a European Commission competition law infringement decision.

In addition, the court's decision in *Gascogne Sack Deutschland GmbH and Gascogne v European Union* (Case T-577/14, 10 January 2017) also contains some interesting parallels with relevant case law under both the *European Convention on Human Rights* (ECHR) and *Bunreacht na hÉireann*.

Challenge to findings

In 2002, the commission, on the basis of whistle-blower evidence, launched an investigation under what is now article 101 of the *Treaty on the Functioning of the EU* (TFEU) regarding alleged price fixing, market sharing, and other collusion in the industrial plastic bags sector in Western Europe.

In late 2005, the commission imposed aggregate penalties of €290 million on various participants in this cartel, including Gascogne, which was fined €13.2 million. In February of the following year, Gascogne sought the annulment of the commission's decision before the General Court. These proceedings do not have a suspensive effect. Accordingly, Gascogne chose to pay interest on the fine, while providing a bank guarantee to the commission. However, it was not until November 2011 – five years and nine months after the launch of the action for annulment – that the court actually delivered its judgment, in which it upheld the commission's 2005 decision.

Gascogne appealed the General Court's decision to the Court of Justice of the European Union (CJEU). As part of its pleadings, Gascogne argued that the CJEU should set aside the 2011 judgment or, alternatively, reduce the €13.2 million fine to take account of the adverse financial consequences of the General Court's failure to deal with the original action for annulment in a reasonable time frame. In *P Gascogne Sack Deutschland GmbH v European Commission* (Case C-40/12, 26 November 2013), the CJEU rejected Gascogne's appeal, while, at the same time, noting that if the duration of the original proceedings before its sister court was excessive, this could possibly give rise to liability on the part of the EU for damages.

Accordingly, in August 2014, Gascogne brought an action for damages under article 268 of the TFEU before the General Court. Gascogne argued that the excessive length of the previous proceedings before a different composition of the General Court breached its right to a timely trial, causing it both material and non-material harm. The applicant sought approximately €4 million in damages from the EU as compensation.

Article 340 of the TFEU provides that, in the case of non-contractual liability, the EU shall make good any damage caused by its institutions, for example, the European Parliament and the CJEU/General Court.

Whereas any disputes involving the contractual liability of the EU should be addressed by the governing law of contract, article 268 grants the CJEU and the General Court the jurisdiction to hear disputes regarding the non-contractual liability of the EU.

Right to a timely trial

Article 47 of the *EU Charter of Fundamental Rights* provides that all legal and natural persons are entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. (Proclaimed in 2009, the charter became legally binding on the EU, including its institutions, and EU member states with the entry into force of the *Treaty of Lisbon* in 2009). Article 47 of the charter reflects the text of article 6(1) of the ECHR.

The General Court stated that the non-contractual liability of the EU may be invoked when three cumulative conditions are fulfilled:

- The conduct of an EU institution must be unlawful,
- Actual damage must be suffered, and
- There must be a causal link between the unlawful conduct and the damage suffered.

The General Court held that it, as an EU institution, had acted unlawfully, since the length of the original proceedings was excessive, thus breaching Gascogne's right to adjudication within a reasonable period. The court noted that the period of five years and nine months (including 46 months between the end of the written proceedings and the opening of the oral proceedings) was not justified by the specific factual, legal or procedural complexity of Gascogne's action for annulment.

In reaching this conclusion, the General Court compared the length of the challenge to the commission's 2005 decision to the average length of similar proceedings. The court noted that, in cases concerning competition law, legal certainty is of utmost importance. On that basis, the court considered that the appropriate period between the end of the written part of the proceedings and the opening of the oral part should be, and generally is, 15 months.

Nevertheless, the court also bore in mind that competition law and, in particular, challenges against the commission's decisions entail a high degree of complexity. This is due, in part, to the length of the decisions (in this instance, 114 pages), coupled with the requirement to make a detailed assessment of the numerous and complex facts of the case.

Furthermore, the court also factored in the parallel treatment of the 11 other actions being taken against the same commission 'industrial bags' cartel decision. On this basis, the

PIC: GETTY IMAGES

I made a bags of that...

> IT IS HIGHLY UNLIKELY THAT A SUCCESSFUL ACTION FOR DAMAGES FOR BREACH OF THE RIGHT TO A TIMELY TRIAL WILL RESULT IN ANYTHING OTHER THAN A SMALL DENT IN THE OVERALL OUTGOINGS OF ANY UNDERTAKING THAT IS FINED BY THE COMMISSION FOR INFRINGING COMPETITION LAW

court considered it justifiable to increase the appropriate length of the proceedings by a period of one month per additional case, thus raising the reasonable duration of the relevant proceedings by a total of 11 months.

In conclusion, the court considered that a period of 26 months (that is, 15 months plus 11 months) between the end of the written part, and the opening of the oral part of the proceedings, would have been appropriate to deal with Gascogne's action for annulment, given the degree of factual, legal and procedural complexity. It therefore follows that the proceedings before the court were unlawfully and unjustifiably excessive by a period of 20 months.

Actual damage

Gascogne alleged that it suffered both material and non-material damage. The General Court stipulated that a party seeking to establish liability on the part of the EU has the burden of producing cogent evidence as to the existence and extent of the damage alleged. In relation to material damage suffered, the court accepted that the costs of the guarantee paid by Gascogne securing the payment of the €13.2 million fine during the extra 20 months amounted to actual and material damage.

The applicant also argued that it had suffered material damage in the form of late-payment interest, paid at a rate of 3.56% during the 'excess' of 20 months. The court rejected this argument, on the basis that Gascogne did not show that the payment of this interest outweighed the benefit that it gained by not paying the commission's fine on time, thus having the value of an additional €13.2 million at its disposal for a further 20 months.

In terms of non-material damage suffered, the applicant alleged that the inordinate length of the original proceedings damaged its corporate reputation. This argument was dismissed for lack of evidence. Secondly, Gascogne argued that the length of the original proceedings had a negative impact on its directors and employees. The court held that such alleged non-material damage was not at issue in the case: if Gascogne's directors and/or employees wanted to seek compensation for any alleged damage suffered, they should bring actions for damages in their own right. Finally, the court recognised that, while uncertainty is clearly inherent to all litigation, Gascogne was placed in a situation of uncertainty that went beyond the norm. This adversely affected both the management and commercial strategy of Gascogne, thus causing it non-material damage.

The court found that a causal link existed between excessive length of the proceedings and the damage suffered due to the payment of bank guarantee costs during the 'excess' of 20 months. This situation would not have arisen had the proceedings before the General Court been more efficient.

As a result, the General Court awarded damages of €47,064.33 to Gascogne as compensation for material harm suffered due to the payment of additional bank costs. In addition, aggregate damages of €10,000 were awarded to the applicant for the non-material harm caused by the excessive uncertainty created by the length of initial proceedings before the General Court.

Damages under Irish law

As mentioned above, the fundamental right to timely court proceedings is recognised by the ECHR (for example, the 14 March 2017 judgment in *Comna de Jos Greek-Catholic Parish v Romania*). In addition, the Constitution also guarantees a right to a timely trial. Key issues flowing from these similar rights were addressed by Clarke J of the Supreme Court in *Nash v The Director of Public Prosecutions* (24 October 2016).

Clarke J noted that, under the *European Convention on Human Rights Act 2003*, a person who suffers loss or damage as a result of an infringement of the ECHR by the State may, if no other remedy is available, be awarded financial compensation. This legislation also contains a general limitation period of one year.

Turning to our own primary law, Clarke J stated that the Constitution recognises the right to a timely trial, while also stipulating that an order of prohibition may not be the only remedy available in circumstances of prosecutorial/judicial delay. Indeed, the Supreme Court recognised that damages may be available for infringing the constitutional right to timely court proceedings.

The assessment of whether damages for a breach of a constitutional right are available should be examined first, since damages for an infringement of the ECHR may only be awarded where no other financial redress is available. Clarke J also stated that the issue of whether damages should be awarded will require a careful analysis of the facts, on a case-by-case basis, in particular as to whether damages are an appropriate remedy and, if so, the appropriate amount.

Assessment

The decision of the General Court in January 2017 shows that excessive delay in EU court proceedings is an actionable breach, to be addressed by bringing an action for damages under article 268 of the TFEU. This should be contrasted with the similar situation under national law, whereby excess delay in Irish court proceedings might, depending on the circumstances, result in criminal proceedings being accelerated, 'struck out', and/or damages being awarded.

The General Court is clearly sending a strong message to itself and to its sister court, the CJEU, that cases should be processed efficiently. While a failure to adjudicate within a reasonable time period will have no bearing on whether the commission's finding of a competition law breach is valid, or whether a judgment of the CJEU/General Court should be set aside, an applicant does have the chance of seeking some recompense through a damages action.

That said, given the often high level of financial penalties levied by the commission, it is highly unlikely that a successful action for damages for breach of the right to a timely trial will, in and of itself, result in anything other than a small dent in the overall outgoings of any undertaking that is fined by the commission for infringing competition law. g

Cormac Little is a partner and head of the competition and regulation unit at William Fry.

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ALL NOTICES MUST BE PAID FOR PRIOR TO PUBLICATION. CHEQUES SHOULD BE MADE PAYABLE TO LAW SOCIETY OF IRELAND. Deadline for June 2017 *Gazette*: 15 May. For further information, contact the *Gazette* office on tel: 01 672 4828.

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

WILLS

Cooney, Gerard (Gerard Joseph Cooney) (deceased), formerly of 67 Lorcan Road, Santry, Dublin 9, who died on 4 March, 2017. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, or if any firm is holding same, please contact Christina Sauer-Dechant, solicitor, Charltons Solicitors, 70 George's Street Lower, Dun Laoghaire, Co Dublin; tel: 01 230 2881, email: info@charltons.ie

Eustace, Breda (deceased), late of Apartment 25, Stanford, Goatstown, Dublin 14, who died on 24 May 2015. Would any person having knowledge of the whereabouts of any will made or purported to have been made by the above-named deceased, or of any firm that is holding same, please contact Steen O'Reilly, Solicitors, 31/34 Trimgate Street, Navan, Co Meath; DX 36 003 Navan; tel: 046 907 6300, email: solicitors@steenoreilly.ie

Eustace, John (deceased), late of Ballyconvrey, Enniscorthy, Co Wexford, who died on 7 September 2000. Would any person having knowledge of the whereabouts of any will made or purported to have been made by the above-named deceased, or of any firm that is holding same, please contact Steen O'Reilly, Solicitors, 31/34 Trimgate Street, Navan, Co Meath; DX 36 003 Navan; tel: 046 907 6300, email: solicitors@steenoreilly.ie

Fegan, Cathal (otherwise Fagan, Cathal) (deceased), late of Cloonglasney, Knockanillaun, Ballina, Co Mayo (formerly of Enniscrone, Co Sligo, and formerly of 130 Clea Road, Keady, Co Armagh) who died on 28 February 2017. Would any person have the knowledge of the whereabouts of any will made by the above-named deceased please contact Lynda Smyth, Coyle Kennedy Smyth, Thomas Street, Castleblayney, Co Monaghan; tel: 042 974 0010, email: lsmyth@ckslaw.ie

Griffin, Edward (otherwise Edmond) (deceased), formerly of 3 Abbey Terrace, Naas, Co Kildare, and late Mill Lane Manor Nursing Home, Mill Lane, Naas, Co Kildare, who died on 25 October 2016. Would any person holding or having knowledge of the whereabouts of a will made by the above-named deceased on 21 January 1989 or any subsequent will made by him please contact Joseph Morrin, Morrin & McConnell, Solicitors, Trident House, Dublin Road, Naas, Co Kildare; DX 49017 Naas; tel: 045 881 055, email: jm@morrinmcconnell.ie

Kerrigan, Brigid (orse known as Mary B or Breda) (deceased), late of 15 St James Terrace, South Circular Road, Dolphin's Barn, Dublin 8. Would any person having knowledge of any will made by the above-named deceased, who died on 15 January 2004, please contact Ferrys Solicitors, Inn Chambers, 15 Upper Ormond Quay, Dublin 7; tel: 01 677 9408, fax: 01 873 2976, email: info@ferrysolicitors.com

Kerrigan, Margaret (deceased), late of 15 St James Terrace, South Circular Road, Dolphin's Barn, Dublin 8. Would any person having knowledge of any will made by the above-named deceased, who died on 23 March 1991, please contact Ferrys Solicitors, Inn Chambers, 15 Upper Ormond Quay, Dublin 7; tel: 01 677 9408, fax: 01 873 2976, email: info@ferrysolicitors.com

Lalor, Gabrielle (deceased), late of 1 Luttrell Park Crescent, Castleknock, Dublin 15. Would any person holding or having knowledge of a will made by the above-named deceased, who died on 24 March 2016, please contact Gartlan Furey Solicitors, 20 Fitzwilliam Square, Dublin 2; reference ERF/LAJ103/0001; tel: 01 799 8000, email: info@gartlanfurey.ie

Leavy, Clare (deceased), late of Middleton, Cloughran, Co Dublin, who died on 6 February 2017. Would any person having knowledge of the whereabouts of any will made or purported to have been made by the above-named deceased, or if any firm is holding same, please contact Cora Higgins, Regan McEntee and Partners, Solicitors, High Street, Trim, Co Meath; DX 92 002 Trim; tel: 046 943 1202, email: chiggins@reganmcentee.ie

Murphy, Dorothy (otherwise Dot) (deceased), late of 1A Havelock Square Gardens, off Bath Avenue, Sandymount, Dublin, who died on 8 November 2015. Would any person having knowledge of the whereabouts of any will made or purported to have been made by the above-named deceased, or of any firm that is holding same, please contact Gerald Griffin, solicitor, of St Paul's Church, North King Street, Dublin 7; tel: 01 617 4846, email: gnagriffin@gmail.com

O'Brien-Livesey, Mary Josephine (deceased), late of Castlerickard, Longwood, Co Meath, who died on 13 January 2017. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Sarah Flynn, Corrigan & Corrigan, Solicitors, 3 St Andrew Street, Dublin 2; tel: 01 677 6108, fax: 01 679 4392, email: sarah.flynn@corrigan.ie

O'Flaherty, Mary (otherwise known as Maura) (deceased), late of St Jude's, Lagore Little, Ratoath, in the county of Meath who died on 5 August, 2016. Would any person having knowledge of the whereabouts of any will executed by the said deceased please contact McAlinden & Gallagher Solicitors, Main Street, Ashbourne, Co. Meath; tel: 01 835 1107; email: ashbourne@mcaglaw.com

TITLE DEEDS

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of the premises now known as 'Padua', Upper Main Street, Borrisoleigh, Co Tipperary, and in the matter of an application by Ann Slattery

Take notice that any person having any interest in the freehold estate or any superior leasehold estate of the following property: 'Padua', Upper Main Street, Borrisoleigh, Co Tipperary, being the premises assured and assigned by an indenture of assignment dated 9 July 1919 between John Young junior of the first part, John Young senior of the second part, Martin Hogan of the third part and Denis O'Shea of the fourth part, therein said to be held as a tenancy from year to year and therein described as "all that and those part of the lands of Cappanilly containing in or about 20 perches Irish plantation measure, situate in the barony of Kilnamanagh Upper and county of Tipperary", subject to the yearly rent, should give notice of their interest to the undersigned.

Further take notice that the applicant intends to submit an application to the county registrar for the county of Tipperary for the acquisition of the freehold interest and all intermediate interests in the aforesaid property, and any party asserting that that they hold a superior interest in the aforesaid property is called upon to furnish evidence of their title to the below named within 21 days from the date of this notice.

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

Date: 5 May 2017

Signed: Butler Cunningham & Molony (solicitors for the applicant), Slievenamon Road, Thurles, Co Tipperary

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*: an application by Frank Smith and Frederick Smith

Take notice that any person having any interest in the freehold estate (or any intermediate interest) of the piece of parcel of ground and the buildings thereon known as Sandford Service Station and Sandford Stores, Ranelagh, Dublin 6, held with other property under an indenture of lease in reversion dated 3 February 1903 between John Lewis Riall (first part), Robert Smith Chatterton and Elizabeth Ricky (second part), Charles Coates (third part) for the term of 999 years from 29 September 2009, subject to the yearly rent of £37.12s.6p and therein described as "all that and those that parcel of land being part of the lands formerly called Lundsland together with the dwellinghouses, offices and gardens thereon situate on the west side of the High Road leading from Dublin to Milltown by Cullenswood in the parish of St Peter and county of Dublin".

Take notice that Frank Smith and Frederick Smith intend to submit an application to the county registrar for the county of Dublin for acquisition of the freehold interest in the aforesaid premises, and any party asserting that they hold a superior interest in the aforesaid premises are called upon to furnish evidence of the title to the aforesaid premises to the below named within 21 days from the date of this notice.

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

Date: 5 May 2017

Signed: O'Callaghan Kelly (solicitors for the applicant), Mounttown House, 62-63 Lower Mounttown Road, Dun Laoghaire, Co Dublin

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 application by William S Jagoe and Denis Rebecca Jagoe of 11 Park Avenue, Sandymount, Dublin 4

All that and those the plot of ground being part of the garden of the dwellinghouse and premises known as 21 Gilford Drive, Sandymount, in the parish of St Mary in the city of Dublin, which ownership of the plot of ground is in the ownership of the applicants.

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

In default of any such notice being received, William S Jagoe and Denise Rebecca Jagoe intend 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/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: 5 May 2017

Signed: Peter J McKenna (solicitor for the applicants), 18 Sandymount Green, Dublin 4

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 29B Prussia Street, Dublin 7: an application by Prussia Properties Limited

Take notice that any person having any interest in the freehold estate of the following property: 29B Prussia Street, Dublin 7, held under lease dated 23 October 1929 and made between Guy Brabazon Pilkington and Mary Nerissa Hunt of the first part, Mary Florence Walker of the second part, and Maurice Joseph Corcoran of the third part for a term of 99 years from 29 September 1929, subject to the yearly rent of £45.

Take notice that Prussia Properties Limited, being a person entitled under the above entitled acts, proposes to purchase the fee simple in the lands described in paragraph 1 hereof and, for that purpose, intends to submit an application to the county registrar for the city of Dublin for acquisition of the freehold interest in the aforesaid property. Any party asserting that they hold a superior interest in the aforesaid premises are called upon to furnish evidence of the title to the aforementioned premises to the below named within 21 days from the date of this notice.

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

Date: 5 May 2017

Signed: Patrick F O'Reilly & Company (solicitor for the applicant), 9/10 South Great George's Street, Dublin 2

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If you would like more information on how to leave a legacy to Make-A-Wish, please contact Susan O'Dwyer on 01 2052012 or visit www.makeawish.ie

INTERNA REVECTA

LOCUS STANDI

'Does a phallic symbol have *locus standi*?' was the theme of at talk given by Gilead Cooper QC at a London conference on 3 April, *Legal Cheek* reports.

Cooper's presentation was actually based on a real case, *Bumper Development Corporation Ltd v Commissioner of Police* (1991), where the courts considered whether a Hindu Sivalingam – a stone phallus of religious worship – had standing to sue for the recovery of a looted sculpture.

The High Court said yes, while the Court of Appeal left matters open.

The debate was all part of his chambers' commercial litigation conference in London. Five barristers gave short presentations on cases – four real and one imagined – reminiscent of the TV series *Would I Lie to You?*

BUZZFEED GETS BUZZFED

A defamation claim against the *BuzzFeed* website included a 'clickbait'-style headline in an official court document, *Business Insider UK* reports.

Giving them a taste of their own medicine, lawyers filed a document headlined: 'Six ways *BuzzFeed* has misled the court (number two will amaze you) – and a picture of a kitten!'

Earlier this year, *BuzzFeed* published a leaked dossier about Donald Trump's relationship with Russia, containing a number of unverified allegations. The report also seemed to falsely claim that Russian technology executive Aleksej Gubarev was involved in hacking against the Democratic Party.

Unhappy that he had been named in the report, Gubarev, via his Boston-based lawyers, brought a legal action against the New York-based internet media company.

The document was in response to the website's application to have the matter moved to a New York court. The official court document includes a photo of a kitten, listed as 'Exhibit 41' – the cat purportedly belongs to Gubarev's lawyer, Fray-Witzer. The 22-page document discusses non-kitten related matters such as jurisdiction and trial location. g

COMMA CHAMELEON

In Maine, USA, the 'Oxford comma' helped a group of truck drivers win a dispute about overtime pay, *The New York Times* reports.

The Oxford (or serial) comma is used before the words 'and' or 'or' in a list of three or more items, and helps provide clarity.

An appeal court decision on 13 March sided with the delivery drivers for Oakhurst Dairy because the lack of an Oxford comma led to ambiguity in the meaning of a section of Maine's overtime laws.

The law says that the following activities do not qualify for overtime pay: "the canning, processing, presenting, freezing, drying, marketing, storing, packing for shipment or distribution of:

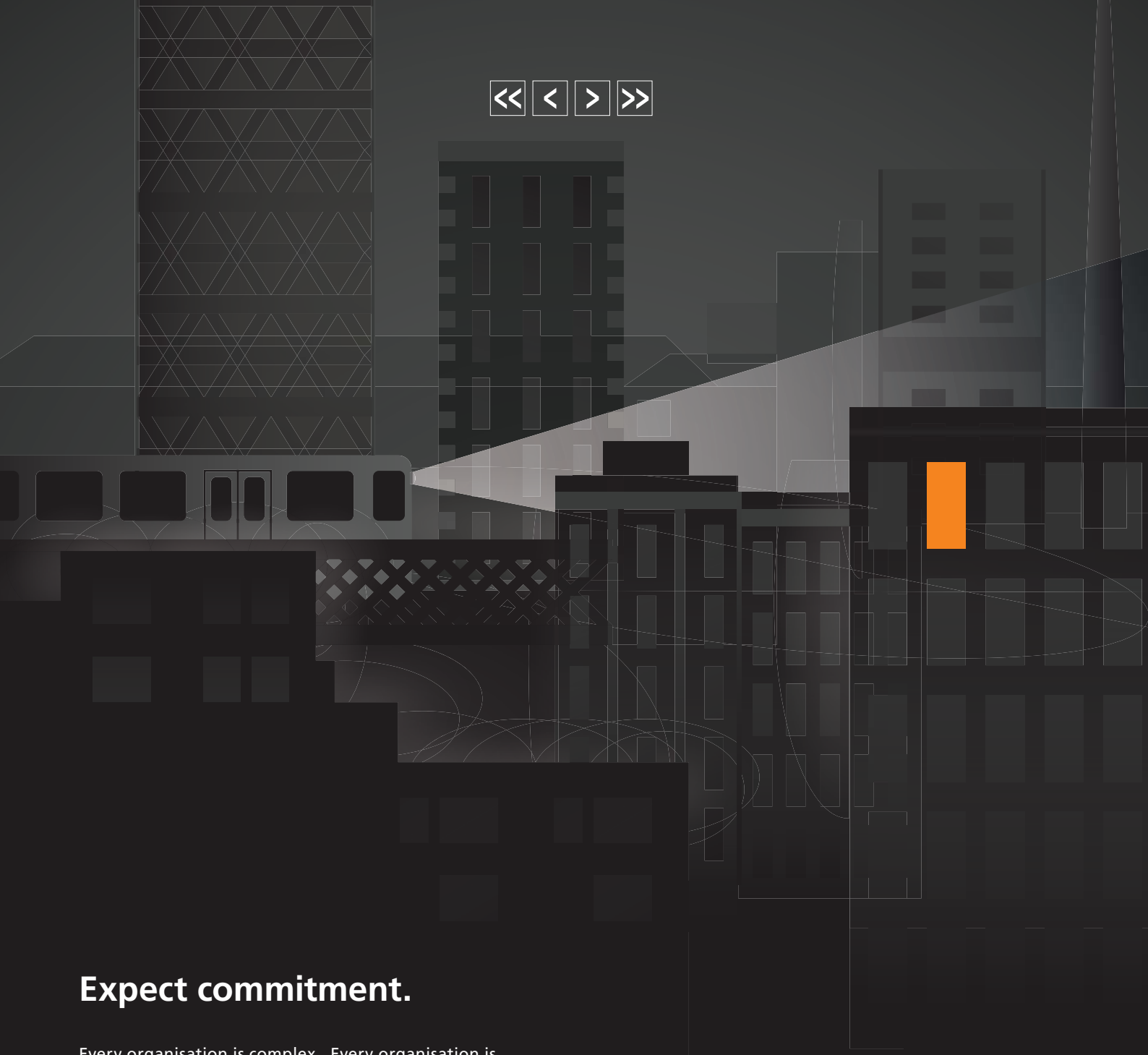
1) Agricultural produce,
2) Meat and fish products, and
3) Perishable foods".

The drivers argued that, due to a lack of a comma between 'packing for shipment' and the words 'or distribution', the law did not refer to 'packing' and 'distribution' as two separate activities, but rather a single activity of 'packing'. Since the drivers distribute the goods – but do not pack them – they argued they were eligible for overtime pay.

Judge David J Barron said: "Because, under Maine law, ambiguities in the state's wage and hour laws must be construed liberally in order to accomplish their remedial purpose, we adopt the drivers' narrower reading of the exemption."

The decision could cost the dairy company an estimated $10 million.

Thanks to Fintan Price (a TY student from Scoil Mhuire, Clane) who compiled this month's column.



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Banking/Aviation Lawyer – 1 yr+ pqe – PP0375

The Role: Our Client, a premier corporate law firm, is seeking to recruit a lawyer to join its Banking and Financial Services Department who act for both domestic and international clients. You will be dealing with asset finance transactions but will also be required to assist on general banking matters and capital market transactions.
The Requirements: You will be a qualified Solicitor or Barrister with at least 1 years' experience in aviation banking including excellent academics, commercial awareness and a strong work ethic.

Banking Solicitor – Associate to Senior Associate – J00480

The Role: This Top 6 Dublin law firm requires an experienced solicitor to join its Banking and Finance Group dealing with Irish and international banks and also financial institutions and corporations.
The Requirements: The role in question is for an experienced solicitor who can assist with a wide range of issues including: Portfolio sales; Secured facilities: Acquisition and infrastructure finance; Regulation & Compliance; Enforcement.

Corporate – Commercial Lawyer – Assistant to Associate – J00307

The Role: A leading corporate and commercial law firm are seeking to recruit a Corporate Solicitor to join their long established and expanding Corporate Team.
The Requirements: The successful candidate will be an ambitious Solicitor based in Dublin or be a solicitor relocating from another common law jurisdiction with the following experience and attributes; Experience in corporate transactions; First-rate technical skills; Proven ability to work as part of a team.

Corporate Solicitor – 5 yrs+ pqe – J00445

The Role: Our Client, a fast growing commercial law firm based in Dublin's City Centre, are seeking to hire an experienced Solicitor to join it's Corporate Team.
The Requirements: The successful Candidate will be a 5-year+ qualified Corporate Solicitor with experience in general commercial contract work including advising Clients on; Joint Ventures; Mergers and Acquisitions; Corporate Finance; Corporate Governance.

Privacy/IT Lawyer – Associate to Senior Associate – MB0018

The Role: Our Client, a full service business law firm, is seeking to recruit an experienced lawyer to join it's Privacy and Data Security Team dealing with all issues pertaining to data protection and privacy law compliance. This is a complex and rapidly evolving area of law advising Clients on a global scale.
The Requirements: You will be a qualified solicitor or barrister with expertise in both private and data security law gained either in private practice or as in-house counsel.

Competition and Regulated Markets Solicitor – Assistant to Associate – J00469

The Role: An opportunity has arisen in a Top 6 Dublin law firm for a Solicitor to join its Competition & Regulated Markets Group dealing with European and Irish law including compliance & regulation. There is a wide variety of work on offer in a broad range of industrial sectors.
The Requirements: You will have experience of mid to top tier practice coupled with a strong academic background and excellent technical skills.

Commercial Property/Real Estate Solicitor – Associate to Senior Associate – MB0012

The Role: Our Client, a progressive Dublin based law firm, are seeking to recruit an experienced Commercial Property/Real Estate Solicitor to join its Commercial Property Department to assist both public and private sector Clients.
The Requirements: You will be a qualified Solicitor with commercial property experience dealing with acquisitions, disposals, due diligence, landlord and tenant and asset management.

Tax Lawyer/Tax Consultant – 2 yrs+ pqe – J00359

The Role: This Top 6 Dublin law firm is seeking to recruit a Tax Lawyer/Consultant to join its expanding Tax Department to assist in managing and advising their tax clients dealing with a range of both domestic and international tax matters. You will have a genuine interest in building a career specialising in tax.
The Requirements: You will be a professional with a qualification in law, accountancy or tax looking to work in a top tier firm bringing with you initiative and enthusiasm with an excellent academic record and either hold a tax qualification or be working towards one.

EU Competition Solicitor – Assistant to Associate – MB0024

The Role: An opportunity has arisen in a Top 6 Dublin law firm for a Solicitor to join it's EU Competition and Regulatory Group.There is a wide range of work on offer including EU, litigation and investigations competition and regulation, market dominance, public procurement law and state aid rules.
The Requirements: You will have 2+ years pqe coupled with a strong academic background and excellent technical skills.

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

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