



### Tabula rasa?

The practical implications of the new legislation on spent convictions



### Fair dealings

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The imposition of martial law after the 1916 Rising and the rule of law

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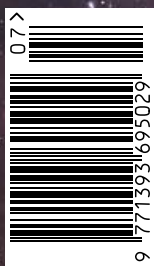
LAW SOCIETY

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# BRITTS OUT!

## What next for Britain and the EU?





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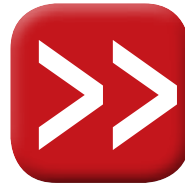
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# GOOD RELATIONS PERSIST DESPITE 'BREXIT' RESULT

Since last month's *Gazette*, much has gone on with our nearest neighbours across the water. Indeed, just a few days prior to the holding of the 'Brexit' referendum, I had the honour of hosting the half-yearly meeting of the presidents, vice-presidents and chief executives of the law societies of England and Wales, Scotland, and Northern Ireland.

As always, this meeting was held in a great spirit of cooperation and collegiality, but clearly – and as it turned out, with full justification – our counterparts were extremely worried at that point about the outcome of the referendum.

Even prior to the holding of the referendum and the decision of the British people to exit the European Union, we here in the Law Society had received almost 200 applications from British-based solicitors to take out Irish practising certificates, as they are currently entitled to do under EU law.

Whatever the long-term consequences, it is our intention to maintain our very strong links with the law societies of our neighbouring jurisdictions, as there is much benefit to be derived from maintaining our good relations into the future, whatever adverse circumstances are prevailing.

One of the items discussed at the meeting with our neighbouring

counterparts was the forthcoming evaluation of Ireland by the Financial Action Task Force (FATF), which is due to take place next November.

Under this evaluation, all public and private bodies with obligations in relation to countering money laundering and terrorist financing will be evaluated. With regard to the solicitors' profession here in Ireland, FATF would evaluate the Law Society's powers to monitor and regulate solicitors' firms in terms of compliance with their anti-money-laundering and anti-terrorist-financing obligations.

They will also evaluate the effectiveness of the Society's supervisory and regulatory regimes in identifying risks and preventing legal services from being used as a vehicle for money laundering or terrorist financing. The Law Society, under deputy director general Mary Keane has been actively preparing for this evaluation for some time now, and the Law Society is satisfied that it has in place robust systems of monitoring and comprehensive systems of training, information, and support for its members.

Traditionally, however, the solicitors' profession has been identified in national risk assessments as being at very high risk because of the nature of the services provided, which include the establishment of companies, trusts, and the transfer of property and other assets, all of which are

regarded as possible vehicles for laundering 'dirty money'.

I would like to compliment Mary Keane and her team for the significant amount of work they have undertaken and are continuing to undertake in this area.

## Collegial clusters

In the past few weeks, I have had the pleasure of chairing very successful cluster events, providing low-cost but very high-quality CPD to our members, in both Limerick and Donegal.

Being from the southern end of the country, Donegal is a county that I rarely have the pleasure to visit. It was gratifying to meet my colleagues 'up there', including my second cousin, whom I met for the first time – Mary Coldrick – who practises with PA Dorrian & Company. My colleagues in Limerick, of course, I know a little better and, at this point in time, I could probably recite Ken Murphy's excellent talk on the *Legal Services Regulation Act 2015*, having heard it approximately 16 times by now!

Which leads me neatly to the question of this act – no news yet! The Minister for Justice honoured us by attending and speaking at a recent parchment ceremony at Blackhall Place and indicated to us that it will probably be September when the act will ultimately be commenced.



**‘The Law Society of Ireland intends to maintain our very strong links with the law societies of our neighbouring jurisdictions’**

Simon Murphy  
President



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## law society gazette

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## nationwide

News from around the country



*Keith Walsh is principal of Keith Walsh Solicitors, where he works on civil litigation and family law cases*

### KILDARE

## KSBA elects new officers

The Kildare Solicitors' Bar Association (KSBA) held its AGM at the Keadeen Hotel, Newbridge, on 26 May. Prior to the AGM, the members were informed and entertained in equal measure by the always-colourful Mr Paul Keane, solicitor, who spoke about the *Legal Services Regulation Act 2015* and its implications for practitioners.

The AGM was followed by a presentation by Rory O'Neill of the Law Society on cybercrime and the risk to client moneys. His talk fascinated and terrified in equal measure, and gave attendees plenty of food for thought, as well as very practical tips on how to safeguard against internet scams.

### SLIGO

## Carrick cluster success

Sligo Bar Association president Michael Monahan tells us that the Carrick cluster event held on 12 and 13 May was an outstanding success, with numbers up again on last year, with over 220 attendees from Leitrim, Sligo and the surrounding counties. Michael paid credit to local solicitor Kieran Ryan, who had the

difficult task of encouraging practitioners to forego the wonderful sunny weather and come inside in order to qualify for the points!

The most recent cluster event took place in the Lough Eske Castle Hotel, Donegal, on 23 June, which, once again, was well supported by Sligo solicitors.

### LOCAL AUTHORITIES

## CPD marathon session for LASBA solicitors

Patrick Healy (secretary of the Local Authorities' Solicitors Bar Association) informs us that it held its annual late spring seminar on 27 May 2016 in County Hall, Cork. The speakers included

Pat Brady (Workplace Relations Commission), Alan Haugh (deputy chairman, Labour Court) and Liam Barrett (Law Society).

Over 50 local authority solicitors attended for their six

## Tribute to the late Phil Armstrong

**The news from Yeats' County is that Judge Keenan Johnston paid a moving tribute in his court to well-known and much-loved local solicitor, the late Phil Armstrong, formerly of the Legal Aid Board and a great devotee of mediation. *Ní bheidh a leithéid arís ann.***

hours of CPD, followed by a meal in the Kingsley Hotel. Plans are already afoot for the winter seminar, to be held on 18 November 2016. Watch this space.

### GALWAY

## Galway CPD packs them in

The Galway Solicitors' Bar Association held a sold-out three-hour general CPD seminar on the topic of 'Recent developments in Revenue audits' on 20 May 2016 at Galway Courthouse. It was delivered

by tax experts Julie Burke and Clare McGuinness.

The next CPD event takes place on 22 July 2016 at 2pm, once again at Galway Courthouse. Practitioners who wish to join the GSBA are asked

to send their annual subscription of €50 to treasurer Cairbre O'Donnell (John C O'Donnell & Sons), which allows the association to provide the maximum possible number of CPD events during the year.

### DONEGAL



The regional SkillNet clusters continued apace with a visit to the Solis Lough Eske Castle in Donegal on 17 June. Pictured at the Donegal cluster event were (l to r): Alan Wilkie (Wilkie & Flanagan, Monaghan), Damien Colton (investigating accountant, Law Society), Geraldine Conaghan (MacBride Conaghan, Donegal), Michael Monahan (Sligo), Katherine Kane (Law Society SkillNet), Susan Bourke (Digital Cascade Ireland), Edward Tynan (president, Midland Bar Association), Bill Holohan (Holohan Law, Dublin/Cork), Margaret Mulrine (MM Mulrine & Co, Donegal), Moya O'Donnell (Moya O'Donnell & Co Donegal), Attracta O'Regan (head, Law Society SkillNet), Brendan Twomey (James P Sweeney & Co, Donegal) and Kieran Ryan (Kelly & Ryan, Co Leitrim)

## MOOC attracts 2,700 global students

Almost 2,700 participants from 30 countries signed up for the Law Society's third 'massive open online course' (MOOC) on 'Privacy – a human right for the digital age'.

The course was delivered online over five weeks by the Society's Diploma Centre. Experts made presentations in data protection and digital privacy, live online discussions and assessments, and the balance between an individual's right to privacy and the efficient use of data by companies and other organisations.

TP Kennedy (director of educa-



tion) says: "Less than half of the course participants described themselves as having a legal background in terms of their profession. Our continued commitment to MOOCs is enabling us to widen access to legal education and to the legal profession."

The data protection MOOC acts as a bridge to the Society's Certificate on Data Protection Practice, which takes place in autumn 2016. It will feature in-depth coverage of many of the topics introduced in the MOOC. To learn more, visit [www.mooc.lawsociety.ie](http://www.mooc.lawsociety.ie).

## Paul Gallagher SC: correction and apology

The *Law Society Gazette* that was published in July 2015 contained an article entitled 'The burning question', written by Caroline Bergin-Cross. The article asserted that, in 2010 and 2011, the Government decided against 'burning' senior bondholders of the Irish banks, on the basis of advice from the then Attorney General that any such action was legally impermissible. The article also asserted that such advice was "entirely incorrect" and that it resulted in a Government decision "to burn €64 billion to cover [senior bondholders'/creditors'] losses".

The Attorney General at the time was Paul Gallagher SC, and the article would clearly have been understood to refer to him.

The Law Society and the Editorial Board of the *Gazette* acknowledge that the statements in the article referring to the advice given by Mr Gallagher on this issue were wholly inaccurate and untrue. We acknowledge that, as found by the Joint Committee of Inquiry into the Banking Crisis, Mr Gallagher in fact advised the Government that it was legally possible to provide for the imposition of losses on senior bondholders. We also acknowledge that, as also found by the Joint Committee of Inquiry into the Banking Crisis, the Government was prevented from pursuing such a course by reason of the position taken by the European Central Bank.

The Law Society and the Editorial Board of the *Gazette* deeply regret these errors and wish to apologise unreservedly to Mr Gallagher for the distress understandably caused to him arising from the publication of the article.

## William Fry shines at European awards



The Ireland soccer team wasn't the only one to shine on the European stage recently. Two partners from William Fry emerged as winners at the annual Europe 'Women in Business' Awards on 16 June. Nora Lillis (*left*) took the trophy for 'Best in trusts and estates' in Europe, while her colleague Carol Plunkett won the award for 'Best in litigation' in Europe.

Nora is head of William Fry's private client group. She advises

clients on issues such as business succession. She is listed in the *Citywealth* 'International Financial Centre Power Women Top 200' list, and *Expert Guides* 'Top 30' of trusts and estates practitioners in the world.

Carol was nominated in three categories. Earlier this year, she was named by *Managing Intellectual Property* magazine as one of the top 250 women in intellectual property, globally.

## New data investigations group

McCann FitzGerald has established a data investigations group, which it describes as "a pioneering model for the management of high-volume document review and reporting".

It claims that the group can save clients up to 40% in costs compared with traditional review-and-research methods by combining state-of-the-art data review software and techniques with specialist legal project management.



Gráinne Bryan (director of data investigations, McCann FitzGerald), Barry Devereux (managing partner) and Karyn Harty (partner)

## Last call for pre-contract investigation views

The Conveyancing Committee wishes to thank all those who have already submitted their views on the idea of moving to pre-contract title investigation. Since this is an

important issue for conveyancers, the committee is extending the date for making submissions to the end of July. If you have not already responded, you can review

the committee's note previously published in the March issue of the *Gazette* (p9) and in the February *eZine*. You should email your views to [precontractenquiries@lawsociety.ie](mailto:precontractenquiries@lawsociety.ie).





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## Voice of the victims never heard in insurance debate

One important voice that is never heard in the debate about motor insurance is the voice of accident victims, writes Ken Murphy. No one in the insurance industry, in the media, or in the political world seems to have much sympathy for them.

The victims of accidents, by contrast with the insurance industry, have no massively funded industry organisation to propagandise on their behalf. They are vulnerable individuals with no corporate or collective clout. The only voice they have is that of their solicitor.

The fact that individual human beings – innocent victims of the negligent driving of others – suffer agonising, debilitating, or even life-changing injuries seems to matter very little to most commentators. All that matters is that the profits of multinational insurance companies have been diminished and that the insurance companies will load the consequences on to the long-suffering premium-paying public.

Far more people pay premiums than make claims. That is the nature of all insurance. Yet there are two dates potentially vital to your insurance policy. The first is the date on which you pay your insurance premium and obtain cover. This applies to everyone. The second date, equally important, although it applies directly to only a small minority, is the date on which you may have the misfortune to have to make a claim because of an injury someone else has caused to you, or that you have caused to someone else.

### Tainted victims

The victims of accidents are continuously tainted by insurance industry advertising campaigns with the suspicion of fraud or exaggeration. But, as the retired President of the High Court, Mr Justice Nicholas Kearns, said last week, if insurance companies believe that fraudulent claims are being made, why don't they



Murphy: 'Victims of accidents – the only voice they have is that of their solicitor'

defend these cases in court and, having done so successfully, report them to the gardai?

Could it be because the overwhelming majority of claims by victims of accidents are, in fact, perfectly legitimate?

What of the role of solicitors in taking on so-called 'spurious' claims? To begin with, it should be understood that it is the client who is the plaintiff in the litigation, not the solicitor.

In accordance with section 14 of the *Civil Liability and Courts Act 2004*, a plaintiff in a personal injuries action must swear an affidavit verifying any assertions or allegations on which the claim is made. It is an offence for the plaintiff to make a statement in this 'verifying affidavit' that they know to be false or misleading. In addition, the medical evidence in the case is given not by the solicitor, but in a written report or oral evidence by a member of the medical profession. Both the accident victim and his/her doctor can be cross-examined on their evidence at a trial.

Accordingly, it is very difficult, in view of the rigour of the courts system and the aggressive approach that insurers take to every claim, for a 'completely spurious' (that is, a completely false and fraudulent) claim ever to succeed.

For a solicitor to knowingly assist a client in bringing such

a claim would, if proved, in all likelihood be career-ending for that solicitor. It is likely that their name would be struck off the Roll by the President of the High Court on the application of the Law Society, which would consider such conduct utterly reprehensible. In addition, the solicitor could, and in the view of the Law Society should, be prosecuted by the State for criminal conduct, with prison as the likely result of conviction.

But I am unaware of any case where a judge has reported to the Law Society evidence of a solicitor knowingly bringing a spurious claim on behalf of a client.

### Spurious and misleading

In the view of the Law Society, it is the claims of the insurance industry propaganda machine – not the claims of the overwhelming majority of accident victims – that are spurious and misleading of the public. But who should the public believe?

In his contribution to the Dáil debate on this subject on 20 April 2016, Minister for Finance Michael Noonan referred to a letter he had written to the governor of the Central Bank,

seeking a report on the insurance sector. In reply, he was told by the Central Bank that, until recently, insurance firms enjoyed a prolonged period of reasonable investment return on the asset side of their balance sheets. This income stream provided firms with the scope to compete aggressively on price.

The Central Bank proceeded to advise the minister that "recent premium increases are designed to restore core underwriting profitability".

As the independent and authoritative Central Bank makes clear, therefore, it is matters internal to the insurance industry, including their reductions on investment returns and consequent inability to continue competing aggressively on price, that are driving these huge hikes for insurance consumers.

It is not the legal process or the legal profession that have caused this. Nor is it the victims of accidents, whose plight, wrongly, receives little or no sympathy. The insurance industry's propaganda machine continues to blame everyone but themselves.

*This article was previously published in the Irish Independent on 23 June 2016.*

## Cork solicitors welcome Dubliners with open arms

The Southern Law Association (SLA) was delighted to welcome Dubliner Anne Stephenson and Limerick man now living in the Pale, Padraic Courtney, to Cork on 20 May to deliver an afternoon CPD seminar on assisting the vulnerable in the context of wills, trusts and tax planning, writes Juli Rea (CPD coordinator).

The seminar was organised in conjunction with Solicitors for the Elderly and was warmly received by Cork practitioners,

who attended in large numbers for the afternoon event.

Another joint event with the Cork Chartered Accountants took place in mid-June and further possible collaboration with the Cork Chamber of Commerce is being explored.

The SLA is collaborating, also, with the Law Society Skillnets team in presenting the 'Practical Conveyancing' seminar – a full-day programme that will be held on 14 July 2016.

## British referendum on EU dominates Dublin summit

The presidents, vice-presidents and CEOs of the law societies of Ireland, Northern Ireland, Scotland, and England and Wales meet twice yearly to discuss matters of mutual interest. Together, they represent a total number of approximately 180,000 solicitors.

The meetings rotate from one jurisdiction to the next and, on 21 June, it was the turn of the Law Society of Ireland to host the event. Given that this meeting was taking place just two days before the 'Brexit' referendum provided an added *frisson*. In fact, the referendum was top of the agenda.

Usually, the observation is made at every meeting that the nature and content of the challenges faced by all solicitors and their professional bodies in all four jurisdictions are remarkably similar. This meeting was somewhat different, however, with the law societies of England and Wales, Scotland, and Northern Ireland sharing serious concerns about the direct impact that a 'leave' vote in the forthcoming EU referendum might have for their solicitor members.

Not that Ireland regarded itself as in any way immune to the



At the meeting at Blackhall Place were (front, l to r) John Guerin (president, Law Society of Northern Ireland), Eilidh Wiseman (president, Law Society of Scotland), Simon Murphy (president, Law Society of Ireland) and Jonathan Smithers (president, Law Society of England and Wales); (back, l to r): Alan Hunter (chief executive, Law Society of Northern Ireland), Graham Matthews (vice-president, Law Society of Scotland), Lorna Jack (chief executive, Law Society of Scotland), Ken Murphy (director general, Law Society of Ireland), Ian Huddleston (junior vice-president, Law Society of Northern Ireland), Mary Keane (deputy director general, Law Society of Ireland), Robert Bourns (vice-president, Law Society of England and Wales) and Catherine Dixon (chief executive, Law Society of England and Wales)

outcome of the referendum – on the contrary. President Simon Murphy and director general Ken Murphy expressed their concerns about the potential negative impact that a 'leave' vote could have on the Irish economy, on free trade, and the free movement of people between our neighbouring jurisdictions,

as well as the potential political fallout for the Northern Ireland peace process.

In addition to discussing 'Brexit' and its implications for lawyers and their law societies, other important items on the agenda included:

- The proposed British *Bill of Rights* and threats to legal professional privilege,
- Regulation – updates of regulatory reviews/reforms of the regulation of the legal professions in each of the four jurisdictions,
- Anti-money-laundering – FATF evaluations and governments 'throwing the legal profession under the bus',
- Cybercrime threats to the legal profession,
- Updates from each jurisdiction on legal aid, professional indemnity insurance, and electronic dispute resolution,
- Succession in the CCBE,
- The big picture for small firms – what does the future hold for solo general practitioner solicitors' firms? What can and should law societies be doing to assist?

These meetings are important biannual events. They now take on an added significance, given the largely negative reactions of the vast majority of the EU member states to the decision by the British electorate to depart the EU.

Ireland will play a key role in ensuring that the special relationship it enjoys with its nearest neighbours continues – in order to safeguard its economic, political and security ties, as well as free trade and the free movement of people that have existed between our islands for centuries.

Indeed, Simon Murphy assured the colleagues from our neighbouring jurisdictions that, whatever the long-term consequences of the referendum vote, the Law Society of Ireland would do all in its power to maintain the very strong links that exist between our neighbouring law societies. This would ensure that the mutual benefits to be derived from maintaining our good relations would not only continue, but thrive well into the future.



(From l to r): John Guerin (president, Law Society of Northern Ireland), Eilidh Wiseman (president, Law Society of Scotland) and Jonathan Smithers (president, Law Society of England and Wales)

## Brexit propels record numbers to seek admission here

A record number of solicitors from Britain and Northern Ireland have been admitted to practice in Ireland during the first six months of 2016.

The total of 186 is more than three times the total at this stage last year, when fewer than 50 solicitors had sought admission to practice in Ireland. The majority of these solicitors cited the possibility of Britain and Northern Ireland's exit from the European Union as their primary reason for seeking admission in Ireland.

Under rules made following an EU directive of 1989, solicitors who have qualified in Northern Ireland, and England and Wales, are permitted to undergo a simple process that allows them to be admitted as solicitors in Ireland. Solicitors qualified in Ireland can transfer with similar ease to the rolls of solicitors in Northern Ireland, and England and Wales.

Foreign solicitors who complete the qualification transfer process can continue to practice in the jurisdiction



where they initially qualified.

"It's been very much in the interest of Ireland, because we are a net exporter of solicitors," director general Ken Murphy told Sean O'Rourke on RTÉ Radio 1 on 20 June 2016.

"During recessions, including the recent one, hundreds have gone to work in London," he added.

"Of the EU member states, Ireland is the legal jurisdiction most equivalent to England and Wales, and Northern Ireland. We are both English speaking, both common law jurisdictions, and our legal institutions are

much the same. This makes Ireland the destination of choice for solicitors in England, in particular, who are concerned about the possibility of Britain voting to leave the EU.

"The right to argue before EU tribunals, such as the Court of Justice of the European Union, is only afforded to lawyers qualified in an EU state.

"It is our understanding that the majority of the solicitors who are completing this process will continue to practise in London or Brussels, and do not intend to set up a physical

practice in Ireland.

"While no one yet knows what agreements will be put in place following Britain's decision to leave the EU, some British firms have been making contingency plans. The majority of solicitors that are transferring are from large London-headquartered firms, including at least one of the so-called 'magic circle' firms – one of the ten largest law firms in the world. Many of these solicitors specialise in EU and competition law."

The director general said that several dozen applications are still being processed, with the number of transferring solicitors from Britain expected to rise further following the referendum decision on 23 June.

In 2015, the total number of solicitors from Britain and Northern Ireland that transferred to Ireland was 101. In 2014, that number was 51. There were 15,196 solicitors on the Roll in Ireland at the end of 2015.

## Responses from British legal establishment to Brexit vote

The Law Society of England and Wales has said that the 23 June 'Brexit' vote "has created an unprecedented and complex range of legal issues, and the solicitors' profession is already firmly focused on finding solutions".

Law Society president Jonathan Smithers said that his organisation would offer support and guidance to help its members make the transition to a post-EU era. "We did not take a stance on whether Britain should remain or leave the EU," Smithers said. "That was because we are a professional body and our membership has a diverse range of views. Instead, we sought to provide facts to inform the debate, with a focus on the impact on legal services.

"It's clear that there is an enormous amount of work to do in



Smithers: 'There is an enormous amount of work to do in the coming months and years to establish the terms of withdrawal'

the coming months and years to establish the terms of withdrawal from the EU and scope necessary changes to domestic law," adding that Britain would also need to



Doerries: 'The long-term effect ... will depend significantly on the nature and terms of the post-Brexit relationship with the EU'

"resolve issues relating to its trading relationship with other parts of the world, specifically in terms of international trade agreements".

The society's Brussels office will

remain open and continue to provide a base from which it – with the law societies of Northern Ireland and Scotland – would "seek to influence and inform an orderly transition".

The English Bar Council chair, Chantal-Aimée Doerries QC, said: "The Bar of England and Wales is ready to assist in an achieving an orderly restructuring of the UK's relationship with the EU in the coming months and beyond."

She said she was confident that London would remain a leading centre for international dispute resolution: "The reputation of barristers and our judiciary overseas, beyond the EU, is very high, and I expect it will remain so in the years to come. We shall continue to work closely with our partners in European bar associations."

## Younger members given opportunity to have their say

An online survey of solicitors who qualified since 2001, undertaken by the Law Society's Younger Members Committee last November, has given an important insight into their experiences and needs.

With almost 40% of Law Society members being aged 39 or under, younger solicitors represent a significant proportion of the profession. The survey offered younger members an opportunity to have their voice heard on issues such as career, volunteerism, CPD courses, and additional services they would like to see the Society offering. The survey results will inform the work of the Younger Members Committee over the next two years. The aim is to serve younger members better, and the results of the survey have indicated a clear direction to do just that.

One of the larger planned initiatives includes a conference for young solicitors, which will take place on 12 October 2016. This is just one of the steps the Society and the committee are taking to ensure that the needs of younger members are met.

Engagement with members on their terms is high on the Society's agenda, evidenced by its increased presence on social media channels, the latest being the Law Society Instagram account. Encouragingly, younger members share the Law Society's desire to engage, with significant numbers (43%) indicating an interest in becoming involved with Law Society committees.

Despite the pressure of



home and work commitments, respondents demonstrate remarkable altruism, with 56% either previously or currently active in voluntary organisations, such as FLAC, LawCare, or Consult a Colleague.

Of reassurance to newly qualified solicitors is the news that the employment market for this group is relatively stable. In all, 81% of respondents less than one year qualified have listed one employer since qualification.

### CURRENT OR PAST VOLUNTEERISM AMONG YOUNGER MEMBERS

- Law Society committees – 16%
- Law Society Council – 2%
- Local bar association – 35%
- Voluntary organisations – 56%
- Representative groups – 17%
- Other – 9%

Litigation (including personal injuries) is the most popular practice area for respondents qualified since 2013, followed closely by property, then corporate law.

Respondents were asked to select their areas of concern from a choice of topics (with the option of selecting more than one), with stress management being the most selected issue. This was followed closely by work/life balance, salary, and

### AGE PROFILE OF ALL MEMBERS OF THE LAW SOCIETY

• 20-29	3.67%
• 30-39	35.80%
• 40-49	26.46%
• 50-59	17.09%
• 60-69	9.86%
• 70+	2.55%
• Unknown	4.56%

career progression.

While more women (71%) than men (62%) selected 'lack of career progression' as a concern, the difference was marginal in relation to stress management, work/life balance, and salary.

Selection of 'lack of career progression' was higher than average among in-house and public sector respondents – at 79% compared to 62% of respondents in private practice.

Salary issues loom large for those in the public sector, with 88% of such respondents selecting salary as a concern. This compares with 79% of private practice respondents and 76% of in-house respondents.

The Younger Members Committee, in partnership with Law Society Professional Training, will host a conference on Wednesday 12 October 2016, which will address professional wellness and mastering time.

Speakers will include best-selling author Walt Hampton, Eileen Roberts (partner at A&L Goodbody), Kevin Hannigan (HPC), Caroline Crowley (solicitor at Beauchamps Solicitors and international athlete), Carol Eager (chairperson, Younger Members Committee), and Sinead Travers (Law Society).

You can secure your place at the conference by booking online at [www.lawsociety.ie/cpd](http://www.lawsociety.ie/cpd). The attendance fee is €105 and includes a reception afterwards. The conference starts at 2pm, with attendees receiving three CPD hours (management and professional development).

## Society's radio ads do themselves justice

The Law Society's Public Relations Committee has been working with marketing firm Chemistry over the past few months to redevelop the Law Society's radio advertisements. The ads began airing at the end of June and

are in a testimonial style.

The tagline for the adverts has been updated to: 'Do yourself justice – talk to your solicitor.' There are three versions: two featuring clients and one a solicitor – all extolling the benefits of

having a solicitor 'in your corner'.

The ads can be heard on RTÉ Radio One's prime time programmes, including *Morning Ireland* and *Drivetime*, Newstalk's *Breakfast*, *The Last Word* on Today FM, and across the Wireless Group radio

network, including Cork's 96FM, Limerick 95FM, LMFM and others.

The ads will be played throughout the year, excluding August and December, and will be complemented by an online advertising campaign.

## Technology and the changing face of justice

“Technology not only simplifies the practice of law, it expands the very focus of the law.” So said President of the District Court Rosemary Horgan, in a wryly humorous and at times provocative keynote address to the **EdTech 2016** conference at Blackhall Place on 26 and 27 May 2016.

Judge Horgan lamented the fact that “paper was still king in our courts” – and that our courthouses have “yet to include [computer] terminals for lay access”. She welcomed, however, the numerous ways that the now “essential tool” of technology assists wider access to justice, particularly through the use of digital recording in Irish courts.

But technology does much more than allow for the storage, retrieval and analysis of decisions, Judge Horgan said. Live video links helped vulnerable witnesses to give testimony. She cited the success of the Small Claims Court’s online service, which since 2010 had assisted in delivering justice to a wider constituency. She predicted more online courtroom services – and with them, more challenges.

Contrasting the training of older, established legal practitioners with the newer generation, Judge Horgan said: “Those of us over the age of 30 fondly recall how the first thing the Law Society did was teach us to conduct research. A lot of time and effort went into attaining even an outline of the core knowledge of judgments.” Today’s students, she said, could use various electronic searches and “cut a swathe through all that effort”.

Judge Horgan said she was reliably informed that “in 2010, for the first time in history, the number of connected devices was more than the number of humans on the planet”. By 2015, it was estimated that there were 25 billion connected devices on the planet compared with 7.2 billion people.

“The effect of all of this is that the law will increasingly not only know what you said, but when exactly you said it, have



video footage of you saying it, have records of your friends commenting on what you said, and you liking their comments.”

She cited examples of how technology had been used to bring to justice child pornographers, how insider

traders had been “found out” through comments left in internet chat-rooms, how gloating rioters in London had been identified through comments left on Flickr.

Facebook, and the sometimes vitriolic comments left thereon, was now almost a routine part of

the work of the family law court, she added. The sheer volume of content has vastly increased, with serious implications for the law and its practitioners who must remain open-minded: “In 1985, who could have conceived of the concept of a re-tweet?”

Twenty years ago, she explained, gossip was forgotten an hour after it had been broadcast. Today, however, it is conducted in public and stays recorded long after the event itself. The bottom line, she said, was that “you should not be saying anything on the internet you wouldn’t be worried about repeating to me, or any other judge, in a court of law on a rainy Monday morning.”

Other contributors included Maura Butler, Robert Lowney, Freda Grealy and Rory O’Boyle, Dr Gabriel Brennan, Caroline Kennedy, John Lunney and Brian Henry.

## Personal injury claims – is the tide turning?



PIG: JASON CLARKE PHOTOGRAPHY

At a personal injuries claims seminar organised by O’Brien Lynam Solicitors, new law firm McDermott Minehane Solicitors (Cork) and Davy Stockbrokers at the Marker Hotel on 16 June 2016, were Carrie McDermott (MDM Solicitors), former President of the High Court Mr Justice Nicholas Kearns (chair), Emer Lang (Davy), David Nolan SC, Jack O’Brien (partner OBL Solicitors) and Conor Murphy (Davy)

## Uncertainty abounds over data protection rules

Uncertainty appears to surround current data protection rules, with six out of ten Irish businesses confused about data transfer regulations, *writes Gordon Smith*. This follows the European Court of Justice's decision last October to invalidate the EU/US *Safe Harbour Agreement*.

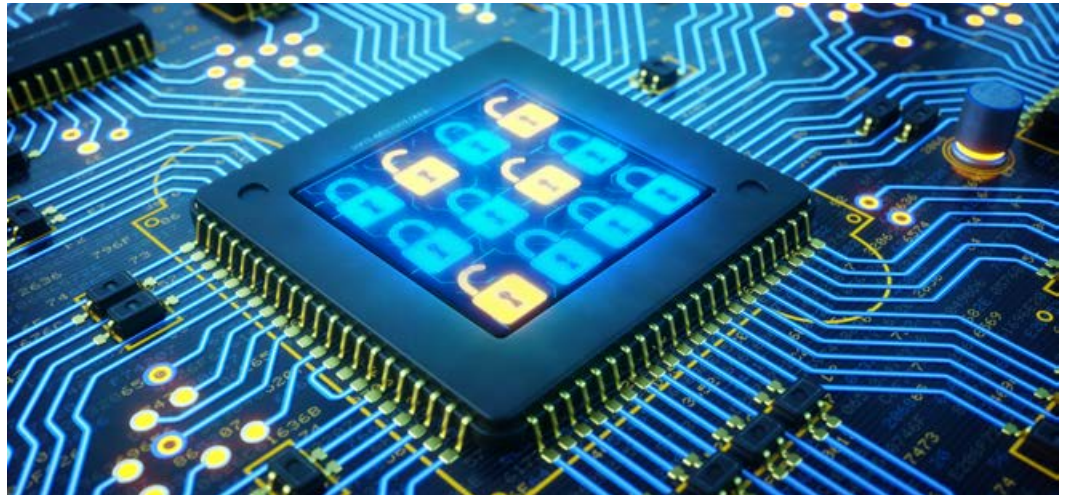
The finding comes from a survey of Irish information technology professionals by data centre operator Equinix. The news came just as the EU announced that its *General Data Protection Regulation (GDPR)* will come into force on 25 May 2018, giving businesses a two-year timeframe to adhere to a much stricter compliance regime than before.

In the survey, 60% of respondents say that they don't clearly understand the current state of EU/US data regulations and their implications for business. For foreign direct investment companies with operations in Ireland, the figure rises to 80%.

Just over half of respondents said they are now more likely to seek an Irish data-hosting solution following the demise of *Safe Harbour*.

### Confusion

Data protection expert Rob Corbet (head of technology and innovation at Arthur Cox) says it's not surprising that companies in Ireland are confused about their obligations under data protection laws, particularly about data transfers.



IT decision-makers want assurance that their digital assets are in safe hands

"There have been a series of European Court of Justice rulings, which change the landscape in relation to transfers of data outside of the EU, and the law remains uncertain.

For example, further case law is expected, given the recent announcement by the Data Protection Commissioner that she is to seek a Court of Justice ruling on the so-called '*model contractual clauses*' used by thousands of companies to legitimise their data transfers. That case is likely to come before the courts before the proposed *General Data Protection Regulation* commences on 25 May 2018."

GDPR will harmonise data protection regulations across Europe. Corbet says that it will affect every business that

processes personal data about Europeans – whether they are located in the EU or not. "Already some companies have decided that the option providing most certainty for them is to keep their data within Europe, so data centres in Ireland are already seeing an increase in business," he added.

### Internet of things

Eric Schwartz (EMEA president of Equinix) says that one of the biggest technology trends is likely to bring even more organisations into the data protection net. The 'internet of things' is the industry term for groups of tiny sensors that gather information and analyse it to deliver insight about everything, from traffic patterns to buying trends or health studies. "There's

no doubt that the security requirements and the privacy requirements, which meet up and overlap somewhat, are getting ever more crucial," Schwartz says.

Security and privacy issues have traditionally been handed off to IT departments, but the uncertainty around the legality of transferring information – and the constant risk of data breaches – is forcing the issue onto the desks of senior management and into company boardrooms.

Some 13% of companies say that an increased emphasis on data protection would figure in their decisions about where to host their data. As the role of data becomes ever more valuable to businesses, IT decision-makers want assurance that their digital assets are in safe hands.

## Professional wellbeing seminar for the in-house lawyer

The In-house and Public Sector Committee, in conjunction with Law Society Professional Training, will hold a seminar entitled '*Professional wellbeing for the in-house lawyer*' on 15 September 2016, from 10am to 4pm in the Kingsley Hotel, Cork.

In-house lawyers are required to be master jugglers of heavy caseloads, complex client issues, regular conflicts and onerous

practice management duties. Clients are often stressed and anxious – with in-house lawyers in turn finding themselves absorbing their pressures.

These challenges are augmented by others, such as meeting punishing budget targets, navigating tight deadlines and dealing with the complex landscape of professional life – which can lead to burnout territory.

This seminar will provide in-house practitioners with time and space to reflect with experts from the legal arena as well as the fields of psychotherapy and psychology.

The latest psychological research and clinical practices will be presented in order to offer practitioners an excellent set of tools and strategies that can be used right away. To view the event [brochure](#) and download the [booking](#)

[form](#), visit the In-house and Public Sector Committee's website.

■ Separately, the In-house and Public Sector Committee (in partnership with Law Society Professional Training) will hold its annual conference on 10 November 2016 from 10am to 4pm. Once finalised, a brochure and programme will be posted on the website, along with booking details.

## Follow me up to Carlow – and don't forget to come back



In mid May, Law Society President Simon Murphy and director general Ken Murphy visited the Carlow Bar Association. The president was presented with a road sign to Carlow, which now hangs in the president's office in Blackhall Place to remind his successors to visit there more frequently! (From l to r): Robert Ashe, Ciara Foley, Ann Marie Blake, Simon Attridge, Philip Vint, Marie Brody, Kate Craig, Niamh Bolger, Aoife Brown, Justin Cody, Mary Morrissey, Grainne Aylmer, Simon McElwee, Marie Garahy (county registrar), Jill Griffin, Simon Murphy (Law Society president), Judge Francis Comerford, Joe Farrell, Judge Alice Doyle, Deirdre Coleman, Ken Murphy (director general), Kirsty Kavanagh, David Clery, Dorothy Whelan, Barbara Jordan, Ron Clery, Bernard Jordan, Michelle Treacy, Anthony Coomey, Adrian Lennon, Ray Keyes (Courts Services manager) and Alan Millard

## Wigs on the green – solicitors and judges enjoy the sunshine



PIC: JOHN KELLY PHOTOGRAPHY

Local Clare solicitors paid tribute to their visiting guests from the judiciary at the Clare Law Association's (CLA) social gathering held at the Old Ground Hotel, Ennis, on 2 June 2016, to coincide with the sittings of the High Court personal injuries list in Ennis. (Front, l to r): Shiofra Hassett (treasurer, CLA), Marina Keane (secretary), Eugene O'Kelly (Circuit Court judge), Mary Larkin (District Court judge), Mr Justice Tony Barr, Daragh Hassett (president, CLA), Marie Keane (District Court judge), Mr Justice Tony O'Connor, Gerald Keys (Circuit Court judge) and Patrick Moylan. (Middle, l to r): John Callinan, Joe Moloney, Edel Ryan, Mary Nolan, Stephen Nicholas, Isobel O'Dea, Marie Darcy, Caoimhe Collins, Kate McInerney, Sinéad Glynn, Pamela Clancy and John Halpin. (Back, l to r): Paul Lynch, Michael Collins BL, John Casey, Gearóid Williams, Helen Rackard, John Shaw, Lorcan Connolly BL, Niall Casey, Gerry Flynn, Ruth Casey and Sheila Lynch



# DRAGON DELUGE DOESN'T DETER DUBLIN DASH

It was a dance-off with a difference, as Gavin Duffy of *Dragon's Den* fame took on the glitzy moves of glammed-up Law Society President Simon Murphy (well, he *was* sporting his brand new chain of office) in order to warm up a crowd of 1,140 runners, walkers and cyclists. All had travelled to Blackhall Place on 21 May to take part in the annual Calcutta Run, which raises badly needed funds for charities for the homeless – the Peter McVerry Trust and GOAL in Calcutta.

All were eager for the off and, following the starter's gun, wound their way through the Phoenix Park before returning to Blackhall Place to the beating sound of the Ma Samba drummers.

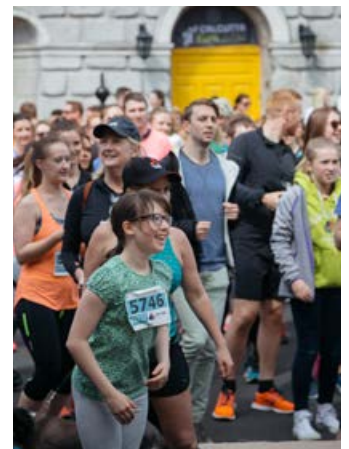
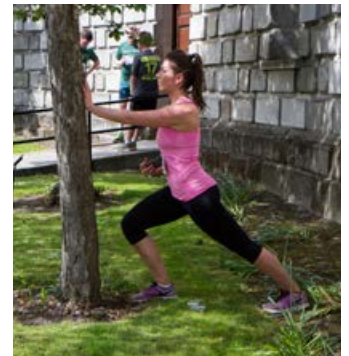
In all, 75 supporter firms encouraged staff members

to take part by offering them sponsorship, matching participants' sponsorship, making direct donations, or holding fundraising events such as 'beat the boss' in order to meet the fundraising goal of €200,000.

## Team challenge

The DX team challenge was a hotly contested affair. At least 30 firms sported their own Calcutta Run T-shirts on the day, adding to the colour of the occasion.

As participants crossed the finishing line, they were encouraged to head straight for the 'Finish Line Festival', which attracted 1,200 sporty types. They barbecue was sold out, while the bar faced its own challenges keeping up with demand. Then came the monsoon – 200 hardy





participants defied the deluge and pushed on through till the sun shone again. Later in the evening, over 500 sore legs made it to the popular Everleigh Gardens after-party.

The Calcutta Run Committee wishes to thank the event sponsors, including Bank of Ireland and DX Ireland. New catering partners, Fizers, excelled on the day with the wonderful fare on offer.

Special thanks go to everyone who took part, as well as the 180 volunteers who helped make the day such a special occasion. The target of €200,000 is within touching point. Any outstanding sponsorship money or donations that would help us to cross the €200k finish line should be sent to Calcutta Run, DX 79, Dublin, or feel free to make a donation through [www.idonate.ie/calcuttarun](http://www.idonate.ie/calcuttarun).



## It's starter's orders for Lawyers' Aquathlon 2016!



Following on from the success of the inaugural Solicitors' Aquathlon in 2015, all trainees and solicitors will have an opportunity to race again, with the added fun of competing with devils and barristers, in the Lawyers' Aquathlon 2016.

The race will take place on Thursday 11 August 2016 and will be part of the third and final race in the Pulse Triathlon Club Aquathlon Series.

The race starts with a 750-metre sea swim, followed by a 5k beach run along Dollymount Strand. The swim and run distances are ideal for anyone considering the sport for the first

time and promises to be a great evening out with colleagues from both sides of the profession.

All trainees and solicitors are welcome to participate and, if anyone would like to practice the course beforehand, they are welcome to enter the full race series.

A 'Splash and Dash Aquathlon' has been organised for children prior to the adults race. Please see the race page at [www.pulsetri.com](http://www.pulsetri.com) for further details.

Online entry for individuals or relay teams (of two persons) is now open via the Triathlon Ireland website at [www.triathlonireland.com](http://www.triathlonireland.com).

## Building the framework for tomorrow's adjudicators

Students from the Construction Adjudication Masterclass recently completed the inaugural Law Society Skillnet course, which ran over three weekends from March until May 2016 at Blackhall Place. Solicitors and barristers attended the programme, which

was coordinated by Katherine Kane (Law Society Skillnet) and programme director Peter Aeberli (British barrister and architect). Speakers included Anthony Hussey, James Golden, Manus Quigg and Anthony Albertini.



Peter Aeberli (programme designer) and Anthony Albertini (speaker) are pictured with Margaret Austin, Conor Cahill, Clare Cashin, Philip Deeney, Maria Edgeworth, Simon Fraser, Pamela Hanley, Norma Judge BL, Conor Kelly, Karen Killoran, Louise Loddick, David McCarthy, Jack McHugh, Rita Monaghan, Danny Nolan, John Nolan, James O'Donoghue, Fiona O'Neill, Nathy Regan, Cathie Shannon, Charles Wallace and Emer Walsh

## Society team wears the green jersey at Telders moot

A team of four trainees represented Ireland at the final of the Telders International Moot Court Competition from 17 to 21 May. They included: Aoife Mc Nichol (Sheehan & Partners), Aideen O'Mahony (Beauchamps), Filip Kwilinski (Matheson) and Stephen Kirwan (KOD Lyons), writes *Eva Massa* (course manager and team coach).

The Telders competition on public international law requires participating teams to submit memorials (on behalf of applicant and respondent) on a dispute between two states and present their oral arguments to a panel of international judges. The international final is held



annually at the Peace Palace, seat of the International Court of Justice, in The Hague.

Their great effort was demonstrated by their excellent performance in the final, at which our trainees excelled in knowledge of the law, advocacy skills, and responding with confidence to the numerous questions from the bench. They also showed great collegiality and professional conduct.

The team extends its thanks to their various law firms for sponsoring and supporting the trainees, and to various past 'mooters' for their practical advice during the practice rounds.

## Annual DSBA Book Awards recognise legal scholarship



Celebrating with the winners at this year's DSBA Annual Book Awards were Aine Hynes (vice-president, DSBA), Peter McKenna (joint winner of the 'Law Book of the Year' award with co-author Tadgh Dorgan), Flor McCarthy (winner of the 'Practical Law Book of the Year' award), Dr Thomas B Courtney (Arthur Cox) who received the 'Outstanding Contribution to Legal Scholarship' award, and DSBA president Eamonn Shannon

The British Ambassador to Ireland, Dominick Chilcott, was the guest of honour at the Dublin Solicitors' Bar Association (DSBA) **Annual Book Awards** on 17 June 2016, held at the Hilton Doubletree Hotel, Dublin.

The ambassador congratulated the shortlisted nominees, adding that he was very impressed with the range of issues covered. In a highly entertaining speech, Mr Chilcott spoke of the British-Irish relationship going back many centuries and how that relationship has evolved to one of

mutual respect, friendship and co-operation. Ambassador Chilcott was unable to speak directly about the then upcoming 'Brexit' election due to a four-week moratorium on civil servants speaking on such matters. However, he did refer to the "very large gorilla" in the room and, in his own inimitable (and oblique) style urged a vote against leaving.

The 'Law Book of the Year Award' (sponsored by ByrneWallace) went to *Damages* by Tadgh Dorgan and Peter



Presenting the 'Outstanding Contribution to Legal Scholarship' award were DSBA president Eamonn Shannon, British Ambassador Dominick Chillcott, Brendan Twomey (Law Society Skillnets) and Dr Thomas B Courtney (Arthur Cox)

McKenna (published by Round Hall). Michelle Ní Longáin (partner at ByrneWallace) joined the British ambassador to present the coveted award to Peter McKenna on behalf of both authors.

The 'Practical Law Book of the Year Award' (sponsored by Peter Fitzpatrick and Co, cost accountants) was presented for *The Solicitor's Guide to Marketing and Growing a Business: How to Turn Your Legal Practice into a Financial Success*, by West Cork

author Flor McCarthy. Eimear Fox (Peter Fitzpatrick & Co) and Ambassador Chillcott made the presentation.

The 'Outstanding Contribution to Legal Scholarship Award' (in collaboration with Law Society Skillnets) was awarded to Dr Thomas B Courtney (Arthur Cox) for his distinguished contributions to the law over many years. The award was presented to Dr Courtney by Ambassador Chillcott and Brendan Twomey (Law Society Skillnets).

## Large Limerick turnout for captivating cluster event

The second Skillnet cluster event of 2016 took place in the Strand Hotel in Limerick on 17 June. In all, 220 colleagues attended and Law Society President Simon Murphy chaired the event, which was designed and presented in collaboration with Law Society Skillnet and the Clare and Limerick bar associations.

Speakers discussed a broad range of topics, including the *Workplace Relations Act*, regulation compliance, the *Legal Services Regulation Act*, the *Assisted Decision-Making (Capacity) Act 2015*, and the *Companies Act 2014*. Delegates also enjoyed an evening networking reception and



At the cluster event in Limerick on 17 June 2016 were (front row, l to r): Ken Murphy (director general), Rachel Meehan (Limerick Bar Association), Simon Murphy (president, Law Society) and Marina Keane (Clare Bar Association); (back l to r): John Elliot (director of regulation, Law Society), Kathy McKenna (PR coordinator, Law Society), Attracta O'Regan (head, Law Society Skillnet), Niamh White (Limerick Bar Association), Katherine Kane (Law Society Skillnet), Shiofra Hassett (Clare Bar Association) and John P Shaw (Clare Bar Association and past-president, Law Society)

gained six hours of CPD for attendance at the regional event.

The series of Skillnet clusters continued in Donegal on 22 and 23 June, and will be followed by:

- *Tralee* – 8 September (essential general practice update),
- *Mayo* – 29 and 30 September (Connaught solicitors' symposium),
- *Castleblayney* – 14 October (north east CPD day),
- *Dublin* – 11 November (practice and regulation symposium),
- *Cork* – 18 November (practitioner update), and
- *Kilkenny* – 25 November (general practice update).

Contact [cpdclusters@lawsociety.ie](mailto:cpdclusters@lawsociety.ie) for full details.



## Is your firm prepared for cyber crime?

Losing data or exposing sensitive or confidential information may be the most frightening thing to happen to a law firm. Cyber crime is on the rise, it is one of the biggest emerging problems facing legal firms today.

There is no way to fully guarantee protection from this ever evolving problem however, with the help of eXpd8, there are ways to prevent firms falling victim to these cyber threats.

## Cyber Security Checklist:



Do you have antivirus, web filtering and anti spam software installed on all computers and servers?



Do you have firewalls and intrusion monitoring detection in force to prevent and monitor unauthorised access?



Do you provide awareness training for employees on data privacy and security incl. social engineering, passwords, internet use etc.?



Do you have a reliable and knowledgeable IT partner looking after these areas for you?



Have you considered switching to the cloud? The eXpd8 legal cloud can provide enterprise level data security for small legal firms.

Contact our team of cyber security and cloud experts today and arrange a free consultation on how you can prevent your firm falling victim to cyber threats.



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w: [www.eXpd8.com](http://www.eXpd8.com)



## Letters

### Always 'cheque' your affidavits

From: Robert Harley, Harley Associates, Inc, 1694 Eleventh Avenue, Brooklyn, NY 11218, USA

Some years ago, the *Gazette* published an article I had written. Ever since then I have been receiving your publication and have perused it with interest. Most recently, I read the piece on the necessity of swearing on religious texts.

From at least as long ago as 50 years, when I began the practice of law in New York, everyone has had the option of either swearing or "affirming pursuant to the penalties of perjury". The swearer or affirmer has no burden to justify the choice.

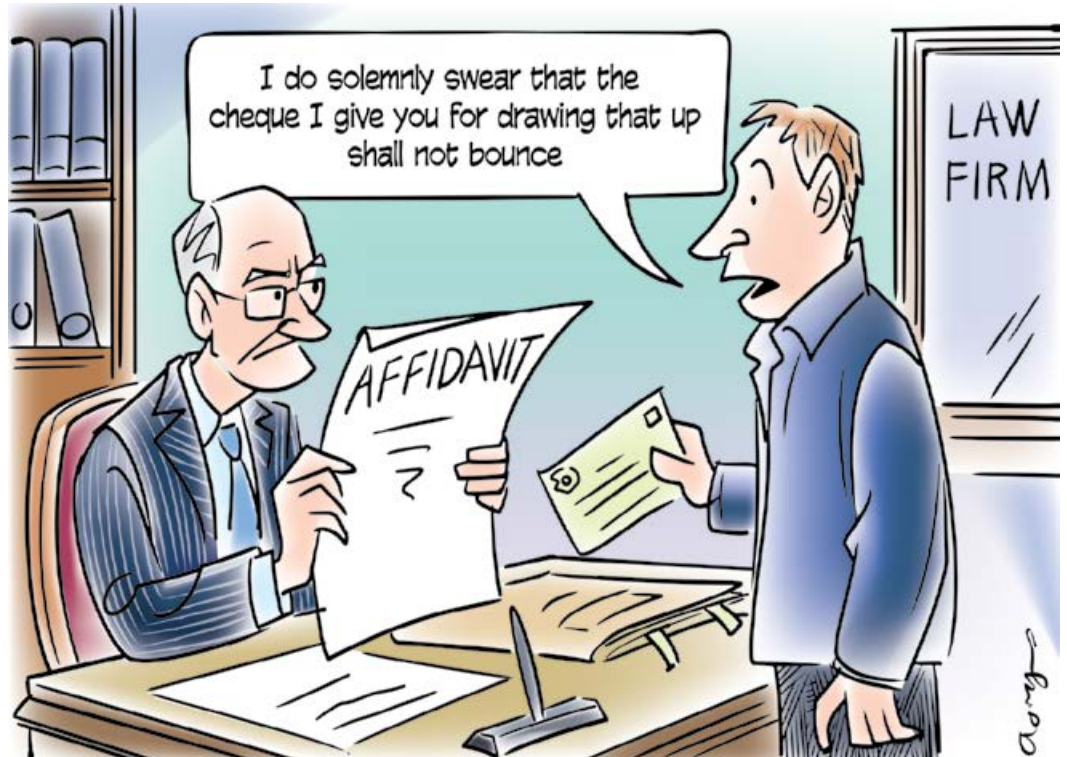
While New York law does not require any religious text to be present when one swears, it does require that it be before a notary public. Therefore, the almost universal routine in law offices as a 'simple expedient' is to affirm.

And in the 21<sup>st</sup> century, for most who would be inclined to forswear, the secular penalties for perjury are probably more inhibiting than any fear of Purgatorial or Hellish sanction.

But it all brings to mind the tale of the legendary criminal lawyer, Clarence Darrow. It is said that he was seated at his desk talking with a colleague when a secretary brought a stack of papers and placed them in front of him. He began signing them, one by one, continuing his conversation. He noticed his companion staring at him questioningly and asked what the problem was.

"Clarence, you are signing all of those cheques without looking at them."

"Cheques?" he exclaimed with alarm, "I thought they were affidavits!"



### Leman annual cycle has a Poirot-style twist

From: Leman Solicitors, 8-4 Percy Place, Dublin 4  
On Saturday 9 July 2016, two teams from Leman Solicitors raced their way through Wicklow in aid of Paralympics Ireland and Irish Guide Dogs for the Blind.

There was a twist – in a show of admiration for our visually impaired Irish Paralympians attending the Rio 2016 Paralympic Games this September and for blind citizens, participants tandem-cycled for 60km, 'Paralympic style', with one person blindfolded. They then scaled the highest peak in Leinster, Lugnaquilla (925m), thankfully without visual impairment, after which they ran 15km, again 'Paralympic style' (joined pairs with one person blindfolded).

Anyone reading this letter has full vision. By shutting our eyes

tight for ten seconds, we get a tiny sense of what challenges visually impaired athletes and citizens face every day of their lives.

Paralympics Ireland is a non-profit organisation that selects teams of athletes with a disability and raises funds to send our Irish competitors to Paralympic events. To maintain their services at current levels, and particularly to meet the added expense of participating in the Rio 2016 Paralympic Games, they and we need your support.

Irish Guide Dogs for the Blind is Ireland's national charity dedicated to helping persons who are blind or vision-impaired, and families of children with autism, to achieve improved mobility and independence. It costs €38,000 to breed, care for, and support a single working-dog partnership.

Your much-needed sponsorship will contribute towards the overall cost of a puppy's training. So we really need your help to meet the €30,000 target.

To help you decide on how much to donate, we have devised a donation plan for corporates, including platinum (€2,000), gold (€1,000), silver (€500) and bronze (€250). The donations plan for individuals includes platinum (€200), gold (€100), silver (€50) and bronze (€25).

Please don't put it off. Donate now by visiting [www.justgiving.com/fundraising/WildWicklowWay](http://www.justgiving.com/fundraising/WildWicklowWay). We really appreciate your support.

The forfeit for the losing captains (Gavin Bluett and Karl O'Brien) is an obligatory three-month 'Poirot'-style moustache!

We cannot do this without you. Thank you for your support.

## viewpoint

## SIT DOWN, PULL UP A CHAIR...

Since 2014, solicitors have been permitted to attend garda interviews with suspects. **Billy Keane** looks at how this came about, the uncertainty as to the role of the solicitor, and the actions that need to be taken



Billy Keane is a practising barrister with a particular interest in procedural rights

On 6 March 2014, the Supreme Court delivered its judgment in the joined cases of *DPP v Gormley* and *DPP v White*. Both concerned access to legal advice – in *Gormley*, prior to police interrogation and, in *White*, prior to the taking of forensic samples.

In relation to *Gormley*, the court found that the entitlement not to self-incriminate incorporates an entitlement to legal advice in advance of mandatory questioning of a suspect in custody, and that the constitutional right to a trial in due course of law encompasses a right to have early access to a lawyer after arrest and the right not to be interrogated without having had an opportunity to obtain such advice. It added that the conviction of a person wholly or significantly on the basis of evidence obtained contrary to those constitutional entitlements represents a conviction following an unfair trial process.

Clarke J, in delivering the judgment of the court, noted that the question as to whether the right extended to having a lawyer present during questioning did not arise on the facts of the case. However, he added that it needed to be noted that the jurisprudence of both the European Court of Human Rights and the United States Supreme Court clearly recognises that the entitlements of a suspect extend to having the relevant lawyer present. This was a very clear indication that, should a case come before the court in which that question arises, then the answer will be in the affirmative, and the court will declare the right to include the presence of the lawyer during questioning.

#### Change of position

The most significant response to this came on 7 May 2014, when the Garda Síochána began allowing solicitors to attend interviews with suspects. This came about after the DPP advised the Garda Commissioner that, where a request is made by a suspect who is

detained in a garda station to have his solicitor present for interview, the request should be acceded to. This change of position by the gardaí naturally attracted much comment from media and practitioners. Most of the commentary focused on the role of the DPP, with various reports stating that the director had issued a direction to the Garda Commissioner, that the move represented ‘a change of policy’ by the director and, in one instance, credited the DPP with having conferred the ‘right’ to have a solicitor present at interview on suspects. This type of commentary, in my opinion and for the reasons set out below, misinterprets the role and functions of the DPP and, unfortunately, distracts from a proper consideration of what needs to be done to address the comments of the court.

First, it is important to note that the DPP merely proffered advice to the commissioner. There is no provision in either the *Prosecution of Offences Act 1974* (which established the office of DPP) or in the *Garda Síochána Act 2005* (which provides for the director to issue certain directions to the gardaí in relation to prosecutions) that would provide a statutory basis for the director to issue a binding direction on the conduct of interviews to the commissioner.

Second, interviews with suspects occur at the investigation stage of the criminal process in which, as successive directors have emphasised, the DPP has no statutory function.

Third, whatever the frailties of our criminal justice system, they are not such that the rights of suspects

are determined by the prosecution authorities. Therefore, the contention that the DPP conferred a ‘right’ on suspects to have their solicitor present at interview is fanciful, to say the least.

It would, of course, have been open to the Garda Commissioner, who is not without access to legal advice, to have decided that it would be prudent, having regard to the clear message in the *Gormley* judgment, to immediately allow solicitors to attend interviews with suspects, there being no obvious

legal impediment to such an action. For whatever reason, the commissioner chose to take no action until prompted to do so by the advice of the DPP.

#### Not as of right

It is important to note that while, since May 2014, solicitors are attending garda interviews with suspects, the presence of solicitors at interviews is not as of right – the court having stopped short, if only just, of declaring it to be so – but is merely permitted. Once solicitors began attending interviews, the question arose as

to what the role of the solicitor in the interview should be. The Department of Justice and Equality circulated a draft protocol on the role of the solicitor in interviews, but this has not progressed beyond the draft stage.

In April 2015, the Garda Síochána published its own *Code of Practice on Access to a Solicitor by Persons in Garda Custody*. This code aims to streamline the interaction between the gardaí and solicitors in relation to arrested/detained persons and to provide practical guidance for the member in charge and those tasked with interviewing suspects. It is not proposed to examine the code

**‘ If legislation is not introduced, then it can only be a matter of time before some issue arises in relation to the presence or actions of a solicitor at interview that will cause the courts to consider this matter again ’**



in any great detail, other than to note that it is similar to the [Code of Practice 'C'](#) in force in Britain under the *Police and Evidence Act 1984*. Under that act, the code is issued by the Secretary of State at the Home Office following statutory consultation with stakeholders, including the Law Society and the Bar Council. While there is much in the garda code that is commendable, overall, and perhaps reflecting the garda view that the interview with a suspect is part of the investigation, there is a strong sense of 'my house, my rules' running through the text.

In December 2015, the Law Society published its [Guidance for Solicitors Providing Legal Services in Garda Stations](#), which, it says, has been designed to assist solicitors by identifying best practice to help navigate this complex and evolving area of legal practice. It includes what might be classed as a Law Society perspective on the

provisions of the garda code.

Given the inherent competing interests of the garda in pursuing their investigations and that of the solicitor in protecting and advancing the rights of the suspect, it is not surprising that there should be differences of approach in the two documents. However, it is not the responsibility of either body to decide this matter.

In *Gormley*, referring to the right to legal advice before questioning, Clarke J stated: "If it be the case that the State has not, to date, organised itself in a manner sufficient to allow questioning to take place in conformity not just with the Constitution but also with the well-established jurisprudence of the European Court of Human Rights, then it is those who are in charge of putting such provisions in place who must accept responsibility." Hardiman J, in his concurring judgment, stated "it will not be long before some person or

other asserts a right to legal advice in custody on a broader basis. I say this in explicit terms in order that this may be considered by those whose duty it is to take account of potential developments."


These statements lay the responsibility squarely on the Government to put in place the necessary provisions.

#### **A matter of time**

It would appear that, if the State is to heed fully the warning from the court, legislation will have to be introduced to regulate the right of access to legal advice before questioning and to establish a right for suspects to have their solicitor present at interview. This legislation should also define the role of the solicitor and indeed the role of the gardaí *vis-a-vis* the solicitor in interviews, including in the pre-interview period.

Any legislation brought forward would have to reflect the

jurisprudence of the European Court of Human Rights. In relation to the role of the solicitor, the general thrust of this is that the lawyer must be able to participate effectively in the interview, including by asking questions. It is likely that something more than a rehash of a British text will be required to satisfy the courts on this point.

If legislation is not introduced – and a perusal of the recently published Government legislation programme suggests none is in preparation – then it can only be a matter of time before some issue arises in relation to the presence or actions of a solicitor at interview that will cause the courts to consider this matter again. In such an event, it is likely that the court will have considerably more to say to "those who are in charge of putting such provisions in place" and "those whose duty it is to take account of potential developments". 



## news in depth

## AS CRIMES GO BY

Legislation on spent convictions recently came into force. But what are the practical implications?

**Matthew Holmes** throws away the key



Matthew Holmes is a lecturer in DIT and practising barrister. He is the author of *Nutshells on Administrative Law*

The *Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016* came into force in April. The act allows for criminal convictions to become spent, meaning they are effectively ignored. If a conviction is spent, you are treated as never having been found guilty of, or prosecuted for, or even having committed the offence. You are not obliged to disclose it to anyone – even future employers.

#### When are convictions spent?

A number of criteria have to be met for a conviction to be spent where the client is an adult:

- The client is a natural person and was 18 at the time of the relevant conviction,
- At least seven years have passed since the date of conviction,
- The sentence imposed by the court is not an excluded sentence,
- The person shall have served the sentence or complied with the relevant court order.

This is a one-time deal. If you have more than one conviction, you do not get the benefit of a spent conviction unless those convictions are for minor public order offences or road-traffic offences other than dangerous driving. Excluded sentences include anything where the client was imprisoned for more than a year, sexual offences, and Central Criminal Court offences (rape, murder, piracy, treason, genocide, and breach of competition law). If your client was convicted of two or more offences arising out of the same incident, then this is regarded as one conviction.

Where the client is a child, section 258 of the *Children Act 2001* provides

that offences committed by those under 18 years of age can be expunged from the record. The same criteria essentially apply, but the time limit is three years rather than seven. Children can benefit from this even if they have breached court orders or failed to pay fines. Children get more than one chance, but this does not apply if an offence was committed within the three-year period after the first offence.

Once the criteria for an adult or child are met, the convictions are automatically considered to be spent. There is no need to apply to court or anywhere else to get rid of them.

#### Effect of a spent conviction

As a general requirement, you are not required to disclose a spent conviction to anyone, and evidence of the conviction is inadmissible in court. There are, of course, many exceptions to this in the act. Evidence of spent convictions can be admitted if the court is satisfied, in all the circumstances, that justice cannot be done except by so admitting the evidence, although the court may make such orders as it considers

necessary to prevent or restrict publication of the convictions. This is very similar to the test used in Britain (*Thomas v Commissioner of Police for the Metropolis* [1997] QB 813).

There are exceptions covering the admission of spent convictions, specifically criminal and family cases. This also does not apply to:

- Garda investigations,
- Immigration applications,
- Insurance applications,
- Applying for licences such as

driving licences, taxi licences, and firearms licences,

- Applying for 'specified work', for example, the Defence Forces, the gardaí, the Courts Service, and the Office of the President,
- Applying for 'relevant work'. This is work involving regular access to children or vulnerable adults. Here, a spent conviction must be disclosed, unless the offence was prosecuted in the District Court, the individual was aged 18 or older when the offence was committed, and at least seven years have elapsed since the conviction.

This act, also, does not apply abroad – Irish law only applies to Ireland, after all. Just because you do not have to tell anyone in Ireland, that doesn't mean you can get away without telling, say, American or Australian authorities. Section 1(2) of the *Probation of Offenders Act 1907* relates to non-custodial sentences for the purpose of this act, although section 1(1) is not addressed. It may be then that clients may be entitled to section 1(1) after seven years, although English case law says that you cannot claim to have good character with a spent conviction. Given that many courts are prepared to grant section 1(1) where there are previous convictions, this may be academic.

#### English approach

In England, the *Rehabilitation of Offenders Act 1974* is their equivalent legislation. Ours is largely based on theirs; however, there are some significant differences. In England, crimes become spent after a rehabilitation period, the length of which varies between a year and seven years depending on the length of sentence. Unlike Ireland, convictions with sentences of up to four years can become spent. The biggest difference

Excluded sentences include Central Criminal Court offences (rape, murder, piracy, treason, genocide, and breach of competition law)



PIC: WIKIMEDIA COMMONS

between Ireland and England is that, unlike Ireland, spent convictions are not a one-time deal. More than one conviction can become spent.

This recognises that people can go through a bad period in their lives, even a lengthy bad period, before going on to turn their lives around. Where there are multiple offences, they do not become spent until the end of the rehabilitation period for the last offence. Repeat offenders are therefore unlikely to benefit from spent convictions where they continue to offend, and

are therefore given another incentive to stop offending.

In *R v Nye* (75 Cr App R), the court rejected the submission that someone with a spent conviction should be able to present themselves as having good character if tried for an offence.

In *R v Evans* ([1992] Crim LR 125 CA), a conviction was quashed where the trial judge refused to permit cross-examination of an alleged victim of violence about his previous spent convictions. Here there was a head-on conflict of evidence between the appellant and

the chief prosecution witness, and the jury were entitled to know of the latter's record.

In *R v O'Shea* (*The Times*, June 8 1993, CA), it was said that, whatever formula the judge adopts, the jury cannot be misled and cannot be told the defendant has no previous convictions.

In *R v Smallman* ([1982] Crim LR 175), prosecuting counsel referred to a defence witness's spent conviction during cross-examination without leave of the judge. The judge directed the jury to leave the resulting prejudice out of account.

The COA held that this could not be grounds for quashing an otherwise proper conviction.

This new act is to be welcomed. Courts are told every day that convictions are out of character or that clients are turning their lives around. This measure goes one step further to recognise this and rewards those who manage to stay out of trouble. It is unfortunate that the more liberal English approach was not adopted, as this recognises that people can commit a few offences before they go on to try to turn themselves around.

## news in depth

# BRILLIANT DOCUMENTARY TAKES 2016 'JAMMY' AWARD

The silver anniversary of the annual Justice Media Awards vied for the headlines with the 'Brexit' referendum on 23 June – but Blackhall Place was definitely the place where everyone wanted in! **Mark McDermott** reports



Mark McDermott is editor of the Law Society Gazette

There was no denying the level of excitement in the Presidents' Hall at Blackhall Place prior to the prize-giving ceremony on Justice Media Awards (JMA) day. While most of the angst centred on who the main winners might be – there was plenty of concern, too, about what way the Brits would vote in the Brexit referendum that same day – 'oui' ou 'non'.

While there was a profusion of doubt in relation to matters political, there were no misgivings in the minds of the JMA judges as to whom the overall winner would be. Having sifted through massive folders of articles and a large number of audio and visual programmes, the judges came down firmly in favour of an RTÉ *Documentary on One* radio entry – 'The case that never was' – which simply stuffed the ballot box.

The unique work of reporter Frank Shouldice and producer Liam O'Brien, the radio documentary was described by the judges as "excellent", "fascinating", "terrific", "original", "absolutely brilliant" and "richly deserving of the award".

It unearthed the story of Polish man Bogdan Chain, who was involved in an employment law case bearing his name – but without either his knowledge or consent. Shouldice and O'Brien produced a highly engaging radio documentary that doggedly chased the facts until the full story was revealed – starting with an Irish-based recruitment company, moving to a District Court case in Cyprus, on to a law firm in Brussels and the European Court of Justice in Luxembourg, and then on to Poland to meet with the man at the centre of a case that had significant potential

consequences for the EU's citizens. They ultimately discovered that the case was entirely bogus. The investigation had a significant impact and triggered the examination of the questionable legal procedures that had allowed the case to get so far.

Shouldice and O'Brien, accepting the overall award, dedicated it to Bogdan Chain – now an ill man who has been forced to return to work in order to survive economically – having been deprived of the social welfare payments that are rightfully his, despite having paid social insurance out of his regular salary for many years.

Now in its 25<sup>th</sup> year, the awards continue to go from strength to strength and attracted a record-breaking number of entries this year. The judges were vocal in their praise of several newspapers that allow their journalists to invest significant amounts of time in researching articles – and in providing them with the space to share their knowledge and information with their readers, either as long-form journalism or as series of articles.

Awards were presented in all categories, and the judges were particularly impressed with the high standard of this year's 'daily newspaper' entries.

Speaking at the awards, Law Society President Simon Murphy said: "We believe it is vitally important to recognise, reward, and encourage excellence in legal journalism. The media are crucial in increasing the public's understanding of law and the legal system. We must therefore strive for the highest standards possible. The investment of time, energy and resources in producing articles, programmes, investigations and research that help to inform and educate Irish citizens on justice and law is a very valuable investment."



Overall winners Liam O'Brien and Frank Shouldice dedicated their award to Polish man Bogdan Chain

ALL PICS: LENS MEN



Category and merit winners at the 2016 JMAs celebrate at Blackhall Place on 23 June

## justice media awards – results

### Overall award

**Winners:** Frank Shouldice and Liam O'Brien (RTÉ Radio One, *Documentary on One*) for their documentary, 'The case that never was'.

### Daily newspapers

**Winners:** Fiachra O Cionnaith and Daniel McConnell (*Irish Examiner*), 'Saving Grace – the story of 'Service User 42'.'

**Merit awards:** Arthur Beesley (*The Irish Times*) for his article 'Legal reform in action'; Alison O'Riordan (*Irish Independent*) for her series on the Mark Nash trial; Conor Gallagher (*The Irish Times*) for his article 'Why forensic evidence may not be as certain as we like to think it is'; Sean Dunne (*Irish Daily Mail*) for his article 'Names of no-show jurors will now be passed to gardai'.

### Sunday newspapers

**Winner:** Dearbhail McDonald (*Sunday Independent*) for her article 'Medical negligence – a suitable case for treatment'.

**Merit awards:** Shane Phelan (*Sunday Independent*) for his article 'Our disturbed children are being

sent abroad because we can't cope'; Francesca Comyn (*Sunday Business Post*) for her article 'A class apart – Ireland's back-door class actions'; Mark Tighe (*The Sunday Times*) for his article 'The conspiracy'.

### Regional newspapers

**Winner:** Ann Murphy (*Evening Echo*) for her series 'The drugs question – what next?'.

**Merit awards:** Maresa Fagan (*Roscommon Herald*) for her article 'Sex offenders in our community and proposed legislation'; Anne Sheridan (*Limerick Leader*) for her article 'Who'll protect the children?'.

### Court reporting – print media

**Winner:** Mark Tighe (*The Sunday Times*) for his article 'What the jury didn't hear'.

**Merit awards:** Maeve Sheehan (*Sunday Independent*) for her article 'Murder and suspicion linger in West Cork'; Michael Tracey (*Carlow Nationalist*) for his article 'Surreal name game tests judge's patience'; and Marisa Reidy (*The Kerryman*) for her article 'Shane Fitzgerald sentencing hearing'.

### Court reporting – broadcast media

**Winner:** Vivienne Traynor (RTÉ news) for her TV news report 'Satellite Gran'.

### Court reporting – digital media

**Winner:** Christina Finn (TheJournal.ie) for her report 'My daughter is my life: Mother pleads with judge to return child from care'.

### National radio

**Winners:** Frank Shouldice and Liam O'Brien (RTÉ Radio One, *Documentary on One*) for their documentary, 'The case that never was'.

**Merit award:** Kevin Magee and Catherine Smyth (BBC Northern Ireland) for 'Mark Kincaid – beyond reasonable doubt?'.

### Local radio

**Winner:** Jerry O'Sullivan and Miriam McGillicuddy (Radio Kerry, *Kerry Today*) for 'The legal lowdown'.

**Merit award:** Ruth O'Connell (LMFM news) for 'Tragedies and their impact'.

### Television news

**Winner:** Ray Kennedy (RTÉ news) for 'The battle for Gorse Hill –

five days in March'.

**Merit awards:** Eric Clarke and Sarah O'Connor (UTV Ireland, *Ireland Live*) for 'Prison series'.

### Television features and documentaries

**Winners:** Conor Ryan and John Cunningham (RTÉ, *RTÉ Investigates*) for 'Standards in public office'.

**Merit awards:** Katie Hannon and Doireann O'Hara (RTÉ, *Prime Time*) for 'Justice delayed'; Conor Tiernan and Brian O'Donovan (TV3) for 'The battle for Gorse Hill'.

### Digital/online news

**Winner:** Ellen Coyne (*The Times* online – Irish edition) for 'The criminalisation of the purchase of sex'.

**Merit award:** Alison O'Riordan (Independent.ie and TheJournal.ie) for 'Mark Nash'.

### Digital/online features

**Winner:** Will Goodbody (RTÉ.ie) for 'Safe Harbour' case – what is it and why should we care?'.

**Merit awards:** Aoife Barry (The Journal.ie) for 'This drama is shedding light on a big challenge unmarried parents face'.



## news in depth

## DIFF'RENT STROKES

In the final article based on the recent managing partner survey, **David Rowe** and **Donal Maher** review the results for mid-size and larger firms (from five solicitors up to 50)



David Rowe is founder of *Outsource*, which provides practice management and financial advice to Irish law firms



Donal Maher is a director in *Outsource*

Mid-size and larger firms are generally based in Dublin and the larger urban centres throughout the country, and they have seen different growth patterns and face different challenges than the sole-practitioner and two-to-four solicitor practices we reviewed last month.

While there has been an overall improvement in the profession's fee income in the last 12 months, much of the increased volume has been generated from larger commercial and institutional entities, which can be a different type of growth with different implications for the firm. This type of work has increasingly gravitated to larger firms, given that it is generally either high volume (requiring significant systemisation and resources) or else is more complex (requiring a high degree of specialisation).

In addition, these firms are seeing an increase in the number of higher value transactions (particularly in relation to commercial property) and also a growth in the number of instructions per client. Accordingly, 80% of these firms experienced a growth in fee income in the last 12 months, with 52% experiencing growth of 10% plus. If we compare this to the one-to-four solicitor firms, which are more dependent on the private client market, the figures are 63% and 42% respectively.

#### The next phase of growth?

Most mid-size and larger firms still expect to grow in the coming 12 months. However, the rate of anticipated growth in Dublin among firms is significantly lower than for regional firms and among smaller firms within the category. Only 20% of mid-to-large

Dublin firms expect to grow by more than 10% in the coming 12 months, compared with 41% outside Dublin.

This is also well behind the growth expectations of smaller firms considered last month. This is partly due to a lag effect of the recovery, which has been slower to take hold outside Dublin – indicating that regional firms are growing from a smaller base. In addition, the larger Dublin firms have less capacity for growth without taking on extra cost in people, systems, and additional

space. It is also the case that, as firms increase in size, double-digit growth becomes less sustainable, and these firms may simply be moving to a more normal growth phase.

As firms grow, rising overheads are a natural consequence after initial spare capacity that was created during the slow-down has been utilised. Some of this rise in cost is

attributable to natural and proportionate rise in activity levels, while a follow-on consequence of the rise in activity levels is that salary markets change, economic activity pushes up rents, and so on, meaning that we have both an increase in overheads because of volume and because of price increases. When significant price inflation is added to volume growth, the result is rapidly increasing overheads, which are difficult for firms to manage. These conditions appear to be in place in the Dublin market in mid-to-large firms, and there is some evidence of increased pressure on overheads in other large urban centres.

Firms will increasingly have to consider profitability when accepting work or pricing new work, particularly where any pricing is fixed for a number of years. Firms will also need to deliver work more efficiently to protect their

margins. As overheads increase, ensuring all work is delivering a return is the new challenge.

#### Location and size matters

The reliance on the core practice areas of PI litigation, conveyancing, and probate varies quite dramatically based on both location and size.

While the dependence on these work types is not surprising in smaller firms, the fact that this work represents more than half of fee income for 59% of mid-to-large regional firms (compared with only 20% of mid-to-large Dublin firms) illustrates the theory that commercial work is increasingly moving towards Dublin, and mid-to-large firms are less interested in private client markets.

It is also evidence that the extent of commercial work for SMEs is clearly not at the same level as that of larger and institutional clients, which are generally Dublin based.

#### Challenges in human resourcing

There are a number of interesting observations when we look at firms' resource plans for the coming 12 months. Again, there are significant differences by both size and location, with the majority of mid-to-large size firms expecting to increase fee-earner headcount (80% of Dublin firms, 55% of non-Dublin firms), while the figures for one-to-four solicitor practices are 32% and 19% respectively. This is consistent with the view that the larger firms have absorbed any spare capacity and need additional hires to meet their growth objectives.

There is a similar tale when it comes to non-solicitor staff, as most larger firms look to get the staff mix right. Consequently, the cost of retaining and attracting staff for these firms has been much greater than for smaller firms, particularly in Dublin.

Evidence on the ground shows the movement of solicitors to the capital,

Managing fees, overheads, and cashflow is a continuing challenge – making sure work is profitable is key

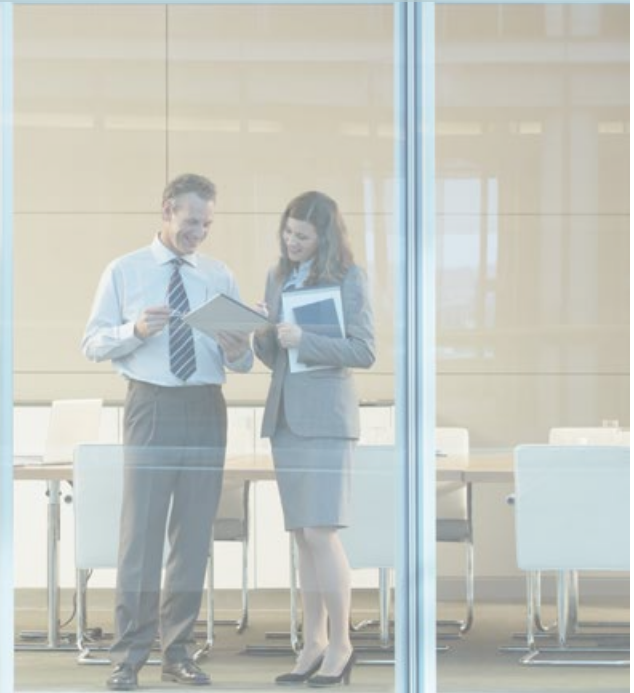
## WHAT PERCENTAGE OF FIRMS' TOTAL INCOME IS GENERATED FROM TRADITIONAL PRACTICE AREAS – PI LITIGATION, CONVEYANCING AND PROBATE?

### regional

- 12% of regional firms said that up to 25% of their total fee income was generated from traditional practice areas
- 29% of regional firms stated that between 25% to 50% of their total fee income came from traditional sources
- 37% of regional firms said that between 50% to 75% of their total fee income came from traditional practice areas
- 22% of regional firms said that traditional practice areas were responsible for between 75% to 100% of their total fee income

### dublin

- 40% of Dublin law firms said that up to 25% of their total fee income was generated from traditional practice areas
- Another 40% of Dublin firms said that between 25% to 50% of their total fee income came from traditional sources
- 15% of firms in the capital said that between 50% to 75% of their total fee income came from traditional practice areas
- 5% of Dublin law firms said that traditional practice areas were responsible for between 75% to 100% of their total fee income



PICT: GETTY IMAGES

with firms in the commuter belt finding staff retention and recruitment a challenge.

When we look at staff benefits and flexible working, the mid-to-large size firms tend to offer more than the smaller firms, as expected, but within the mid-to-large firms, there is an interesting divide between the Dublin-based firms and the rest. Dublin-based firms are more likely to offer financial benefits, such as paid trainee fees, higher maternity benefits, and so on, whereas firms outside Dublin offer more flexible working arrangements, such as part-time work, flexible hours, working from home and so on. In the battle for talent, it is still unclear which approach is winning, and it is likely that a combination of improved rates and conditions will have to be adopted to retain and attract the right staff.

Finally, after limited changes over the last eight years, we are now beginning to see changes at the partnership table. Some of

this is driven by the need to retain staff, and some of it is a delayed reaction to a natural changing of the guard. We expect the majority of the larger Dublin firms will appoint new salaried and/or equity partners in the coming year, and the larger regional firms are likely to follow suit in due course.

#### The shape of things to come

Last month, we noted that around 80% of one-to-four solicitor practices believed that any future growth would be organic rather than through any business combination such as a merger or acquisition. This view is echoed by mid-to-large firms outside Dublin, and it is only when we look at larger firms in Dublin that we see any appetite for non-organic growth, with 44% of firms saying that they expect to grow in this way.

This may be a reflection of the different markets that operate in the different geographical locations, or it may be that the larger regional

firms feel there is a lack of suitable candidates for merger in a smaller pool of choices.

However, there may be an opportunity being missed here for certain regional firms to broaden their offering and provide a quality alternative to the mid-to-large Dublin firms from a lower cost base.

Looking at barriers to growth, the mid-to-large firms identified the same major issues as the smaller firms, such as a lack of adequately profitable work and inadequate time for business development. However, the larger firms also highlighted difficulties in attracting appropriate staff and lack of office space as a challenge.

In relation to future investment, unlike the smaller firms, most larger firms indicated they were likely to invest in marketing, IT, additional people, and premises in the coming 12 months, with Dublin firms being more likely to do so than regional firms. This is largely

a reflection of where they are in the growth cycle and also the type of work and clients they are looking to attract.

The results of the survey have indicated increasing fee income, increasing overheads, and a more positive sentiment throughout the country. This follows a very challenging period, and the recovery to date has been felt more by the larger Dublin-based firms. From our day-to-day discussions with managing partners, this improved sentiment continues, notwithstanding the challenges of higher operating expenses, a change in the Irish political landscape, and tentative global financial markets.

Firms are having to adapt to meet the changing needs of their clients and staff, but most are facing this with a renewed energy and positivity. Managing fees, overheads, and cashflow is a continuing challenge – making sure work is profitable is key.

# Should I stay or SHOULD I GO?



Gary Fitzgerald is a Dublin-based barrister and director of the Irish Centre for European Law at Trinity College Dublin.

Some of the promises made by the ‘Brexiters’ during the recent referendum on EU membership were based on a fundamental misunderstanding of the nature of the economic and political union between member states.

**Gary Fitzgerald** holds the door ajar

At times of political turmoil, I always turn to *Yes, Minister* for political insight. In explaining the British policy towards Europe, Sir Humphrey and his willing minister, Jim Hacker, had the following exchange.

*Sir Humphrey*: “Minister, Britain has had the same foreign policy objective for at least the last 500 years: to create a disunited Europe. In that cause, we have fought with the Dutch against the Spanish, with the Germans against the French, with the French and Italians against the Germans, and with the French against the Germans and Italians. Divide and rule, you see. Why should we change now, when it’s worked so well?”

*Jim Hacker*: “That’s all ancient history, surely?”

*Sir Humphrey*: “Yes, and current policy. We had to break the whole thing [the EEC] up, so we had to get inside. We tried to break it up from the outside, but that wouldn’t work. Now that we’re inside, we can make a complete pig’s breakfast of the whole thing: set the Germans against the French, the French against the Italians, the Italians against the Dutch. The Foreign Office is terribly pleased; it’s just like old times.”


## Anarchy in the UK

On 23 June 2016, Britain voted, in a non-binding referendum, to leave the European Union, creating an existential crisis not just for the country, but maybe for the EU itself.

At the time of writing, the vote to leave has forced David Cameron to announce that he will resign as both Prime Minister and leader of the Conservative Party before the October Conservative Party conference. The Labour Party is in open revolt against its leader, Jeremy Corbyn, elected by a large majority of grass roots labour members less than a year ago. Nicole Sturgeon, Scottish First Minister, is looking to hold a second referendum on Scottish independence, and the

## at a glance

- Negotiations on Brexit can only commence when Britain applies to leave under article 50 of the *Treaty on European Union*
- In order for the Brexit agreement to pass, it needs to be accepted by 19 of the 27 member states, in addition to meeting the population requirements
- If there is no agreement within two years, then Britain will be treated as a normal third country, with no access to the single market



It is an unprecedented, utterly avoidable, economic and political crisis that may lead to the break-up of Britain, a redrawing of its political map, and a regional recession

"I cannae hold her together, Captain!"



delicate devolution settlement in Northern Ireland has been undermined.

It is an unprecedented, utterly avoidable, economic and political crisis that may lead to the break-up of Britain, a redrawing of its political map, and a regional recession. This article will examine some of the promises made by the Brexiteers during the referendum and show how they were based on a fundamental misunderstanding of the nature of the economic and political union between the member states of the EU. It will then seek to predict how Britain's relationship with the EU might evolve in the years ahead, and in this context examine some sectoral issues. But first, it will set out the process for a Brexit, under article 50 of the *Treaty on European Union*.

### I fought the law

Article 50 was only inserted in the *Treaty on European Union* by the *Lisbon Treaty*. Prior to that, it was always possible for a member state to leave, but the precise procedure was unclear. Given the novelty of Brexit, there is not much information on how it will work other than what is contained in the article itself.

It is clear that the negotiations on Brexit can only commence when Britain applies to leave. Once that happens, the negotiations are carried out under the procedure set out in article 218(3) of the *Treaty on the Functioning of the European Union*. This involves the European Commission submitting recommendations to the European Council, which then takes a decision by qualified majority to open negotiations and appoint a negotiating team. Once an agreement is in place, it must be accepted by a qualified majority in the council and get the consent of the European Parliament. Consent means that the parliament can veto the agreement, but cannot amend it.

A qualified majority requires a 'double majority', where the agreement is passed if

72% of member states are in favour and they represent at least 65% of the EU population. This is higher than the normal 55%, as the council will not be voting on a proposal made by the commission. According to article 50(4), Britain cannot participate in discussions of the council relating to Brexit and naturally cannot vote either. This means that, in order for the Brexit agreement to pass, it needs to be accepted by 19 of the 27 member states, in addition to meeting the population requirement. Therefore, any eight member states can block the agreement, or it can be blocked by four member states representing 35% of the EU's population.

Importantly, if there is no agreement within two years, then Britain will be treated as a normal third country, with no access to the single market. This could have potentially devastating effects on large sections of the British economy, especially on financial services operating out of London. While this time limit can be increased, it must be done by unanimity in the council. The importance of these voting requirements will be discussed below.

### Pretty vacant

It was very clear during and after the referendum that the Brexiteers knew that Britain would have to have access to the single market in order to avoid a severe recession, but argued that this could be done without having to accept standardised EU regulations, the supremacy of EU law, contribute to the EU's budget, or accept the free movement of labour. Of course, this is legally possible. The EU is a legal construct, giving effect to the political compromises of the 28 member states. The

remaining 27 *could* allow Britain full access to the single market on the terms sought by the Brexiteers – but this is politically highly unlikely, to the point of being almost certainly impossible. The EU began as a predominately economic union but, even from the beginning, there was an understanding that it was not possible to have a purely economic union and a fair society. In the absence of minimum harmonised standards in a whole variety of areas, economic union leads to a race to the

bottom in workers' rights, environmental protection, equality and social protection, to name but a few areas.

In the original *Treaty of Rome*, the six member states agreed to harmonise gender equality in relation to pay. To do otherwise would be to allow those states without gender equality legislation a competitive advantage over those with it.

The EU does allow non-EU states access to the single market, but that always comes with the same conditions of membership of the EU – an acceptance of the supremacy

of EU laws in relevant areas, acceptance of the free movements of goods, labour, services and capital, and a contribution to the EU budget. It is estimated that both Norway and Britain contribute about the same net amount per capita to the EU budget. Yet Norway has no say in the drafting of EU rules and has no inside information or influence on the development of EU policy. Whatever problems there are with EU democracy, Norway simply accepts EU rules. Thus the essential plan of the Brexiteers falls away. All of this was very obvious during the debate and was wilfully ignored or deliberately misunderstood by an opportunistic Leave campaign.

### God save the Queen

Brexit would be the world's largest, most complex, most expensive, and most unnecessary divorce. Britain and the EU have been married, at times uncomfortably, for over 40 years, and unwinding this in two short years will be very difficult. The Germans have rightly ruled out any talks on Brexit until an article 50 application is made. The EU cannot afford to give Britain a better deal on access to the single market than all the current members have. To do otherwise would be to risk the breakup of the EU, as other member states sought an advantage by leaving.

**‘ If there is to be a Brexit, the article 50 agreement will likely lead to a Norway-type arrangement. All that the Brexiteers will have achieved is a further reduction in British sovereignty, at a terrible cost ’**

### FOCAL POINT

## know your rights

**Brexit may also have implications for the funding of third-level research and for the transfer of data.**

**Between 2007 and 2013, Britain won €8.8 billion in university research funding. No matter the terms of Brexit, for Britain to participate in the next round of funding, it would require the unanimous agreement of the remaining 27 member states, and this is considered highly unlikely.**

**After Brexit, Britain might be a third country for data transfers. Each transfer will require a legal basis and will only be allowed if Britain guarantees protections essentially equivalent to those guaranteed under EU law. Given the mass surveillance carried out by British security authorities, it may become difficult to legally transfer data to there unless these practices were to change.**

One of the key aims of the Brexiteers is to control EU migration into Britain. This is really code for eastern European migration. Yet the article 50 procedure gives any eight member states, or any four representing 35% of the EU population, an ability to veto any agreement. For example, Germany and Poland have a combined 27% of the EU population and would need the support of one medium-sized country and one small country to block any deal. In reality, if Germany is opposed to the deal, it would not pass. Alternatively, eight eastern European states can veto any deal that does not allow full free movement of its workers to Britain. The Brexiteers, in attempting to regain control of sovereignty, have simply handed it to any number of potential coalitions of eight member states or four larger ones. Furthermore, if the time limit for negotiations needs to be extended, then every member state has a veto and could use this to fundamentally alter the draft agreement.

My view is that, when serious decisions have to be made and the reality of leaving becomes more obvious, there will be no room for the dangerous fantasies of the Brexiteers. I think that it is very likely that there will be a general election in Britain in the next 12 months, and a central theme will be membership of the


EU. If the Labour Party can elect a competent leader, irrespective of his or her other political views, who runs on a platform of either holding a second referendum or not applying for Brexit under article 50, then it could do very well. A divided Tory party may well be caught between UKIP on the right and Labour and the Liberal Democrats on the left. But Britain will be left with having to explain to an already disenchanted population why the democratic will of the people has been ignored.

#### English civil war

Maybe Charles de Gaulle was right. In the 1960s, he refused to allow Britain to join the then EEC on the grounds that it was only joining to disrupt it, echoing Sir Humphrey's comments above. David Cameron's gamble on Brexit was an act of extreme political folly. He was its first casualty, and rightly so. His desire to resolve the Tories' European problem may well lead to an early end to the Tories' comfortable majority in the House of Commons, will certainly lead to recession, and might just lead to the break-up of the country.

But once serious decisions on Britain's future relationship with the EU have to be made, it is hoped that decision-makers in London will engage with reality. British access to the single

market is in everyone's interest. If there is to be a Brexit, the article 50 agreement will likely lead to a Norway-type arrangement. All that the Brexiteers will have achieved is a further reduction in British sovereignty, at a terrible cost.

This whole debacle shows the limits of the 19<sup>th</sup> century notion of the sovereignty of the nation state in the 21<sup>st</sup> century globalised, interconnected world. It also shows the limits of popular democracy. Referendums are vital instruments in any democracy, but are predicated on the idea that that electorate are making an informed choice. That does not seem to have happened on 23 June, and Britain will need to examine closely why so many people accepted the  Brexiteers' ignorant fantasy.

#### look it up

##### Legislation:

- [Lisbon Treaty](#)
- [Treaty of Rome](#)
- [Treaty on European Union](#)
- [Treaty on the Functioning of the European Union](#)



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# How to become a JUDGE



Dr Jennifer Carroll MacNeill is a barrister and the author of *The Politics of Judicial Selection in Ireland*, recently published by Four Courts Press

**Much mystery surrounds the process of appointing judges in Ireland. So how does the JAAB go about its business?**

**Jennifer Carroll MacNeill opens the applications file**

**H**ow are judges appointed in Ireland? What is the role of personal and political connections in securing judicial office? Why do candidates lobby politicians, and does it work? How does the Judicial Appointments Advisory Board (JAAB) work in practice?

Any individual who wishes to be considered for a judicial posting must apply to the JAAB in writing, providing information as to their education, professional qualifications, experience, and character. Candidates must seek an application form to be sent to them by post. Completed applications, along with references and photographs, must be submitted in hard copy – emailed application forms will not be accepted.

The JAAB advertises annually in the national press to invite people who wish to be considered for possible future judicial appointment to submit their names to the board. More recently, it has published advertisements on its website and the websites of professional bodies, inviting applicants to submit their names in respect of specific judicial vacancies. Candidates are also entitled to submit an unsolicited application at any time during the year. Applications remain valid for one year. Candidates are also required to provide a tax-clearance certificate, along with a statutory declaration that their tax affairs remain in order since the issuing of their tax-clearance certificate.

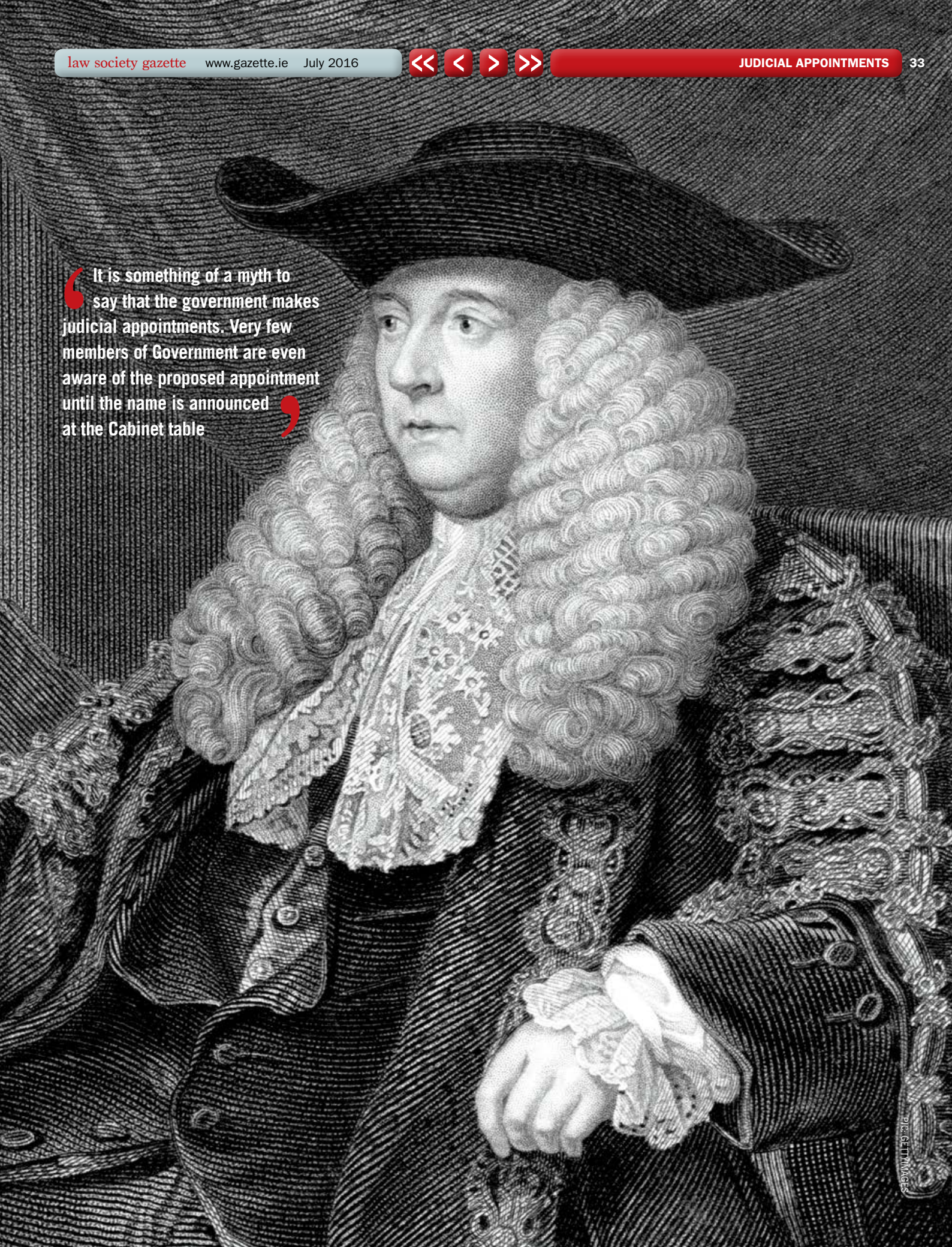
Applications are circulated to members of the JAAB about ten days before a meeting to consider the applications. In general, the practice has been that the Chief Justice may open discussions on a given candidate, followed in order of seniority by the other judges, with the president of the court to which the candidate has applied taking a stronger role in the discussion than their colleagues.

The representative of the branch of the legal profession to which the candidate belongs will also feature strongly in the discussion. The assessment process is based on the candidate's application form, CV and references, the above-mentioned discussion, and any 'soundings' taken by a member of the JAAB. A decision is made on each candidate, and the JAAB agrees its list of recommendations for each court where there are vacancies.

## at a glance

- How judges are appointed in Ireland and the application process
- Behind the scenes of the Judicial Appointments Advisory Board
- Do personal and political connections make a difference in securing judicial office?
- The wisdom – or otherwise – of canvassing for judicial roles

It is something of a myth to say that the government makes judicial appointments. Very few members of Government are even aware of the proposed appointment until the name is announced at the Cabinet table



The secretary of the board contacts the Law Society and the Bar Council to ensure that the people on the recommended list are in good standing, and have the requisite number of years' practice experience. On receipt of letters confirming this from the respective professional bodies, the secretary prepares the letter for the minister.

### Statement of earnings

The *Courts and Court Officers Act 2002* made solicitors eligible for direct appointment to the High Court and the Supreme Court. Consequently, the JAAB application form was revised to make it easier to identify people and make it more relevant for the breadth of people applying for positions on the different courts.

"We wanted to make the form more user-friendly for solicitors, because it was very orientated towards the Bar. There were questions that really pointed to experience as an advocate for example, whereas under the 1995 act, solicitors were eligible for appointment to the Circuit Court" (JAAB member).

The form included a requirement to include a statement of earnings for the previous three years. Those interviewed for this study stated that this was important, because it gave the board an idea of the extent of the applicant's practice. It also allowed the board to see if a person's earnings had declined over a period of three years prior to their application or remained constant. It was thought that this would give an indication of other underlying factors in the person's

decision to apply to the board – ill-health or a collapse in their practice perhaps.

While it could be a concern that to measure success in this way might unwittingly diminish the prospects of a practitioner who spends a great deal of time on *pro bono* or other socially valuable but non-remunerative work, the members of the board commented that, in such cases, they would already know whether a person did such work on a regular basis. They also said that those people would be known favourably, and that earnings would not be as important a factor for such people.

The JAAB has the power to engage in soundings in relation to a particular candidate in order to assist it in determining whether they are suitable for appointment to judicial offices. The members of the JAAB who contributed to this study had mixed views on the role of soundings in the judicial selection process.

One JAAB member said: "Soundings' is a bit like an applicant for a golf club – is he the right sort of person to admit into this club? It would be done on what is his background or her background, and what are they like as a person. There is no formal process. Someone would be saying, 'Do you know them, or do you know them, or maybe we should check?' But certainly, in my time on the board, nobody said, okay, we'll defer making a decision here until we do soundings on some of the applicants. If they were done, they were done in advance. But the reality is that, even though canvassing is not supposed to be done, and I think even disqualifies you, the reality is that most of the applicants would have been

well known, and I think that's why there's a balance on the board. So soundings, yes. If someone applied from Dingle, before I went into board, I would ring the president of the Kerry Law Society and say, 'Who's so-and-so-a-person, or what are they like?', without disclosing why I was ringing. But it would be very informal, and certainly no decision was taken at board [level] that we'll take soundings on this person or that."

Another added: "We did use soundings to good effect. And a lot of things will come out in the wash – you could have someone who appeared before you, was a good advocate with a good knowledge of law and was good on his feet, but through soundings you might find out that he had trouble with his practising certificate and that put him out of consideration.

"I would oppose anyone who had been in trouble with the Law Society, however good he was. When a solicitor blots his copybook and loses face in the public eye, he will then be known as someone who was in difficulties with the Law Society. Part of the make-up of the judge should be that he is respected, and how can he be respected if he [has been] in trouble with the Law Society? That put a lot of people 'out of court', and so soundings that way were useful. With the Bar, soundings weren't necessary. The Law Library is an echo chamber – every whisper goes from ear to ear, and they know everything about everybody."

Yet another JAAB member said: "I didn't do it very much. You would need to ask somebody completely trustworthy, and in any event I knew the applicants well. The solicitor on the board needed to do it more often, just because of the size of the profession and the geographic spread. I never had the experience that the soundings turned out to be wrong. They were always done discreetly, and very well, and there was never a leak either."

### Cabinet process

It is something of a myth to say that the government makes judicial appointments. Very few members of Government are even aware of the proposed appointment until the name is announced at the Cabinet table. There are only three or four people in Cabinet who are involved in the selection of judges. These 'key decision-makers' – the Minister for Justice, the Attorney General, the Taoiseach and the leader of a coalition party (if any) control who becomes a judge.

The Minister for Justice receives the list of recommended names from the JAAB, along with the CVs and application details of those

### FOCAL POINT

## opaque process

**From the perspective of the judicial aspirant, the selection system is truly opaque.**

**The applicant prepares and submits the application form and thereafter receives no communication (beyond an acknowledgment) from the JAAB on the outcome of his or her application.**

**The board has never conducted any interviews, out of concerns for confidentiality and about what could or should be asked in those interviews. The candidate has no capacity to contribute to the process of considering their application other than by the provision of references to support his or her application.**

**In other forums, interviews generally provide an opportunity to clarify issues in CVs**

**or application forms, and to correct any of the misunderstandings or misapprehensions that might possibly arise.**

**Judicial selection commissions in other jurisdictions employ a range of processes, including interviews and assessment centres, to assess the suitability of judicial candidates. However, the judicial applicant in Ireland has no such opportunity and receives no feedback from the JAAB – they are not told whether they have been successfully progressed through the JAAB process. The JAAB performs a role that has a direct bearing on the career prospects of an individual. It performs a decision-making function. Yet it provides little information on how those assessments are quantified or the outcome of those deliberations.**

people. The minister also receives a second list of all of those who had applied for the vacancy. This allows the minister to see those candidates who were ‘rejected’ by the JAAB.

As governments have appointed people from the list of JAAB recommendations in over 90% of vacancies (the others being promotions), being on the list of unapproved candidates is really the death knell for applicants on that occasion – although legally permissible, no government would risk appointing someone who had been rejected by the JAAB.

It has been known, however, for individuals to move from the ‘unapproved’ to the ‘approved’ list at a subsequent time, so it may be worth making a fresh application the following year (judicial applications remain valid for one year). The trouble here is that, unless you are ultimately appointed, you have no way of knowing whether you are on the approved or unapproved list. The JAAB does not communicate with candidates as to whether their application has been successful at the JAAB stage.

There are reports of candidates being told informally that they have or have not made it on a given occasion, but as “all proceedings of the board and all communications to the board shall be confidential and shall not be disclosed except for the purposes of this act”, the outcome of the deliberations of the JAAB must be confidential (section 20 of the *Courts and Court Officers Act 1995*), making that sort of informal communication possibly helpful, but ultimately unlawful.

### Closely guarded secret

The list of approved names is guarded closely in Government. It is not generally shared with Department of Justice officials, but is communicated to the minister directly. The minister will discuss the list with other decision-makers. Sometimes, the minister and Attorney General work together and present names for approval to the Taoiseach. On other occasions, a Taoiseach might have a strong view about a particular candidate and influence the debate at an earlier juncture. It depends on the working arrangement between the three main protagonists, on the court where the vacancy exists, and on the circumstances of the day.

Prior to the establishment of the JAAB, the Attorney General dominated the discussion and decision about appointments to the High Court and Supreme Court, with the minister having a more dominant role in respect of District and Circuit Court appointments. In more recent times, ministers and attorneys general have had a more equal role in most



appointments. Ministers for justice who have been legal practitioners themselves tend to have a greater impact on decisions about additional appointments than ministers who have not been legal practitioners. This is simply because ministers for justice who have been practising lawyers are more likely to personally know many of the candidates.

When making decisions about judicial appointments, the key decision-makers in governments will tend to consider whether there are any perceived gaps in areas of professional experience. They will consider the names on the approved list, or they may consider whether they may prefer to elevate a sitting judge of a different court.

Cabinet memorandums for judicial appointments go to Cabinet ‘under the arm’. This means that, even though they might be circulated or on the Cabinet agenda, the pertinent information – the names – is not included on the memo. Names are shared with other Cabinet members at the last possible second. Where a decision is made to appoint someone to the judiciary, they will usually get a phone call from the Minister for Justice in the early afternoon on a Tuesday (the usual day for Cabinet meetings), before the Government press secretary briefs the media on the outcome of the Cabinet meeting of the day.

### Canvassing

Perhaps because we have so little transparency on how the judicial selection system has operated in practice, lawyers canvassing politicians for judicial appointment has been a long-standing feature of Irish judicial selection. Making discreet, or not so discreet, suggestions that one’s time for public service has come can be tempting.

What we now know, from the evidence of the members of Cabinet in the period 1982–2016 who were interviewed, is that canvassing is fraught with risk. Lobbying key decision-makers directly tends to create an unfavourable impression, even if the appointment is subsequently made. The view of the interviewed Cabinet members was that canvassing was annoying and generally diminished their personal view of the candidate.


Lobbying other Government politicians – whether ministers or backbenchers – is similarly risky. Because decision-making is Cabinet-controlled by so few, lobbying other Government members or TDs requires them to lobby the decision-makers in turn on the candidate’s behalf. Sometimes, inter-political lobbying is prefaced with the code “I’ve been

**What we now know, from the evidence of the political contributors 1982-2016, is that canvassing is fraught with risk**

asked to mention to you”, which alerts the decision-maker that the politician is not happy to be so lobbying, but feels they must do so to retain the support of the individual. This allows the TD to go back to the candidate and say they’ve had a word on their behalf, but is of little value to the candidate’s actual chance of success.

In other cases, the recipient of the lobbying might quickly intervene and say, “Don’t tell me the name of the person. Tell them there is a list from an independent board and that additional representations are not necessary.”

Perhaps canvassing works often enough for candidates to regard it as valuable. Perhaps those who have been successful would have been appointed anyway. In a crowded field, with long lists of 50 or 70 recommended people coming from the JAAB, candidates might feel it helps them. But in nearly every case, it is mentally counted against the candidate by the decision-maker.

One former (pre-1995) Minister for Justice remembered the circumstances of one occasion of overt lobbying clearly – and unfavourably: “Often, the strongest lobbying is done for the least meritorious candidate. I remember one in particular for the District Court, who was brought into the Dáil and brought to visit the different ministers’ offices – I recall it was very unfavourably commented on in Government.” 

*The Politics of Judicial Selection in Ireland is published by Four Courts Press and tells the behind-the-scenes story of how judges have been chosen in Ireland since 1982.*

# The ODD COUPLE



Keith Walsh (Keith Walsh Solicitors, Dublin) is vice-chair of the Law Society's Family Law Committee



Graeme Fraser (partner, Hunters Solicitors, London) is chair of the Cohabitation and Equalities Committee at Resolution, an association of over 6,500 family lawyers and other family law professionals in England and Wales

Can Ireland teach England and Wales a thing or two about the reform of the law relating to cohabiting couples? **Keith Walsh** and **Graeme Fraser** look at the lessons to be learned

Although often internationally viewed as a Catholic, socially conservative country, Ireland has a more progressive legal regime than England and Wales when it comes to granting financial rights and remedies to unmarried couples since the introduction of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* on 1 January 2011.

The absence of a statutory financial remedy for cohabitants in England and Wales has created a lacuna in family law that has resulted in hardship for many, and which has been under scrutiny by policymakers and reformers since 2002, when the Law Commission produced its discussion paper, *Sharing Homes*.

## Demographics

Based on figures available from the 2011 census, Ireland saw an almost fourfold increase in the number of cohabiting couples in the ten years from 1996 to 2006 – from 31,300 to 121,800.

A more modest increase in the number of cohabiting couples resulted in an increase in the most recently published census (2011) to 143,561 couples. The 2011 census records 820,334 family units consisting of married couples.

In Britain, figures released by the Office for National Statistics last November show that the cohabiting couple family continues to be the fastest growing family type. Between 2005 and 2015, there was an increase of 29.7% of cohabiting couple families, consisting of 3.1 million opposite-sex cohabiting couple families, and 90,000 same-sex cohabiting couples.

It is possible to live with someone for decades, to have children together, but then for the more enriched partner to simply walk away without taking any financial responsibility for a former partner when the relationship breaks down. This can have a huge impact on the family unit, particularly in cases where a mother has given up or reduced her work to raise a family.

Prior to the introduction of the *Civil Partnership and*

*Certain Rights and Obligations of Cohabitants Act 2010*, cohabiting couples were treated as strangers in law, except in particular instances, such as for the purposes of bringing an application for some remedies under the *Domestic Violence Act 1996* or when seeking damages for wrongful death pursuant to the *Civil Liability (Amendment) Act 1996*. Unmarried couples could seek maintenance from the other in respect of any dependent children of their relationship, but could not seek maintenance for themselves. Disputes in relation to the ownership of property were settled until relatively recently by reference to the *Partition Acts 1868 and 1876* and the equitable jurisdiction of the court, which has been developed over the centuries to permit co-owners to determine their respective shares in a property by reference to the court. If cohabitants were engaged, they could invoke the jurisdiction of the *Family Law Act 1981* to determine ownership issues relating to the property of parties to a broken engagement.

## England and Wales

In England and Wales, there is a focus on the strict law of real property and trust law, mitigated to some extent by the principles underlying the common law constructive trust, those of proprietary estoppel, and by *schedule 1* of the *Children Act 1989*.

## at a glance

- Ireland has a more progressive legal regime than England and Wales when it comes to granting financial rights and remedies to unmarried couples
- The absence of a statutory financial remedy for cohabitants in England and Wales has created a lacuna in family law that has resulted in hardship for many
- In contrast with Irish cohabitation law, which is needs focused, attempts to reform cohabitation law in England and Wales have centred on establishing rights, albeit with a view to addressing hardship

An obvious lesson to be learned from the introduction of the new cohabitation law is the need to publicise the law more effectively

PICTURE: WIKIMEDIA COMMONS

Common intention constructive trusts are only engaged where there is a common intention to share the beneficial ownership of the property. In practice, this is particularly difficult to prove in sole ownership cases.

The common intention is then determined as to the extent of the parties' respective beneficial interests in the property. By looking at the whole course of the dealings between the parties in relation to the property, each party would then be entitled to that share which the court considers fair. The House of Lords in *Stack v Dowden* (2007) indicated that, in joint names cases, there will be a presumption of joint ownership, so it will only be in exceptional cases that the beneficial title will not follow the legal title, but the House of Lords listed factors in *Stack* that could make any case exceptional. The

Supreme Court in *Jones v Kernott* subsequently confirmed the ability to infer or impute a common intention as to the extent of the parties' respective beneficial interests. Distilling these concepts in practice is extremely difficult and often steeped in uncertainty, particularly as each case is fact specific, and therefore the case law is not easy to apply.

Proprietary estoppel can be established in cases where the common intention does not exist between the couple, but the court is constrained to do the minimum in that situation to satisfy the resulting equity.

Schedule 1 of the *Children Act 1989* entitles unmarried parents to make financial claims on behalf of children. This includes a menu of orders, including top-up periodical payments, lump-sum orders, and for settlement of

property. The relevant factors and principles are heavily child focused, taking into account each parent's income and earning capacity, financial needs and obligations. Reported decisions show that relatively generous provision is available in high-value cases, applicable in relation to a child living outside the jurisdiction, and can include legal costs funding. There are many cases, however, where schedule 1 awards are not made because the providing parent (normally the father) does not have sufficient surplus capital or income to meet a claim.

#### Ireland after statutory reform

The *Civil Partnership and Rights and Certain Rights and Duties of Cohabitants Act 2010* introduced entirely new rights for







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## FOCAL POINT

## low take-up of new redress by irish cohabitants

Figures supplied by the Courts Service indicate that there has been a very low level of litigation since the 2010 act was commenced, with 80 cohabitation cases being initiated in the Circuit Family Court in the Dublin region in the period 2011-2015 (comparable figures for the same period for

applications for divorce are 6,823).

There is only one reported decision of the superior courts, namely *DC v DR*, in relation to the new rights granted to cohabitants under the 2010 act, and it relates to provision from the estate of a deceased cohabitant.

cohabitants. Couples who meet the criteria were automatically cohabitants but, in order to seek relief arising from these rights, the cohabitant must apply to the courts and prove:

- They were in an intimate and committed relationship,
- They were qualified cohabitants,
- Financial dependence on the other cohabitant and that financial dependence arises from the relationship or the ending of the relationship (except in cases involving provision after death), and
- It would be just and equitable for the court to make an order for redress in all circumstances.

The relevant time limits within which to apply for relief are two years from the end of the relationship where cohabitants are both alive.

The reliefs available for 'qualified cohabitants' are maintenance (both periodic and lump sum), property adjustment orders (but not an order for sale), pension adjustment orders, and provision from the estate of a deceased cohabitant.

According to Fergus Ryan in *The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010: An Annotation*, where financial dependence is a prerequisite for relief then, if the applicant has an income and is able to support themselves independently, they will not be considered dependent. Ryan highlights the Irish Law Reform Commission's view that the purpose of the redress model is to "operate as a safety net to address the

needs of vulnerable qualified cohabitants on the breakdown of the relationship". The commission took the view that not all cohabitants should be entitled to redress and that casual or short-term relationships without interdependence do not require ancillary relief.

The principal criticism of the new regime is the absence of any new rights for cohabitants in relation to children of the relationship. It was only with the introduction of the *Children and Family Relationships Act 2015* that cohabitant fathers could be automatically appointed guardians by the court, provided they satisfied certain residency requirements, and that cohabitants who were not the fathers of the children of their cohabitants could now apply for guardianship. Such latter cohabitant guardians could also be liable for maintenance in respect of the children of their cohabitant where they had been appointed guardian.

### Lessons to be learned?


In contrast to Irish cohabitation law, which is needs focused, attempts to reform cohabitation law in England and Wales have centred on establishing rights, albeit with a view to addressing hardship, such as Lord Marks'

*Cohabitation Rights Bill*, most recently debated by the House of Lords in December 2014.

Resolution is an association of over 6,500 family lawyers and other family law professionals in England and Wales. Its proposals are for cohabitants meeting eligibility criteria and who indicate a committed relationship to have a right to apply for certain financial orders if they

separate, which is automatic unless the couple chooses to opt out. Opponents of reform have argued that providing rights to cohabitants would open the floodgates to high numbers of contested cases, saturating the already overwhelmed Family Court, and lead to overly generous awards that unfairly penalise those who have made a conscious decision not to marry.

Resolution campaigns for the urgent introduction of safety-net legislation providing legal protection and fair outcomes at the time of a couple's separation, particularly for children and mothers left vulnerable under the existing law. Although this would only be a small stepping stone along a gradual statutory road to achieving fairness for unmarried couples on separation, could the introduction of needs-based legislation, following the Irish example, provide such a safety net?

An obvious lesson to be learned from the introduction of the new cohabitation law in Ireland is the need to publicise the law more effectively, as the fact that only 80 cases have been taken in a five-year period indicate that there is a very low awareness of cohabitation law in Ireland at present, and it is important that awareness of rights and duties of cohabitants is increased by lawyers, the government,  and interest groups.

*This article is based on materials prepared for a cohabitation workshop delivered at Resolution's National Conference 2016, where both authors were speakers, and included presentations by John Wilson QC and Michael Gouriet on the legal principles in England and Wales, and Janys Scott QC on the position in Scotland.*

## look it up

### Cases:

- *DC v DR* [2015] IEHC 309
- *Jones v Kernott* [2012] 1 FLR 45
- *Stack v Dowden* [2007] 1 FLR 858

### Legislation:

- *Children Act 1989* (Britain)
- *Children and Family Relationships Act 2015*
- *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*

### Literature:

- Ryan, Fergus (2011), *The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010: An Annotation* (Round Hall)

# Fair and SQUARE



Orla Coyne is a partner in Eames Solicitors, Bow Street, Dublin 7, and is a member of the Law Society's Conveyancing Committee



William Devine is a member of the Law Society's Conveyancing Committee

**The 'Fair Deal Scheme' provides for the financial support of people who require long-term residential care services.**

**Orla Coyne and William Devine outline some key points and answer some frequently asked questions**

**T**he *Nursing Home Support Scheme Act 2009* came into force on 27 October 2009. It provides for the Nursing Home Support Scheme, commonly known as 'Fair Deal'. The scheme provides financial support to people who require long-term residential care services.

There are three steps involved in an application to the scheme:

- 1) The care-needs assessment determines whether long-term care services are required,
- 2) The financial assessment determines the level of financial support and the applicant's contribution, and
- 3) The optional step of applying for ancillary State support – often referred to as a nursing home loan.

A successful application for ancillary State support results in the creation of a charging order against the applicant's property. Ancillary State support is repayable upon the occurrence of a 'relevant event' as defined by the act, most frequently upon the death of the applicant.

When advising a person receiving the service (variously called 'the client', 'the applicant', 'the resident', 'the person' or 'the relevant person'), practitioners should highlight the importance of the following:

- The financial assessment takes account of income, cash assets, and relevant assets of the applicant, and the applicant's partner where the applicant is a member of



## at a glance

- A successful application for ancillary State support results in the creation of a charging order against the applicant's property
- Ancillary State support is repayable upon the occurrence of a 'relevant event' as defined by the act, most frequently upon the death of the applicant.
- Because of the number of inquiries that have been made to the Conveyancing Committee, it has decided to put together a number of FAQs

**Should a solicitor acting for such a resident write to the client advising them of the possibility of such assets being reviewed or revalued under the act? Yes**

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a couple. The definition of 'relevant assets' means all forms of property other than cash assets and includes 'transferred assets'.

- **Section 42** of the act provides that, where a person, in connection with the assessment, does not disclose or makes a misstatement in relation to the value of income or assets and receives a greater amount of State support than would have been the case if there had not been a non-disclosure or misstatement, the excess amount is payable by the person to the HSE on demand and may be recovered as a simple contract debt.
- **Section 27** of the act requires the personal representative of a deceased client to submit a schedule of assets to the HSE and to give notice of the representative's intention to distribute the assets as soon as practicable, and not less than three months before any distribution of assets, where financial support was provided at any time. A personal representative may be the person primarily accountable for the repayment of ancillary State support, which is collected by the Revenue Commissioners – see [section 26\(13\)](#).
- When there is an application for ancillary State support, the HSE must satisfy itself that the applicant has an interest in the property that can be charged under the scheme. Evidence of title must be submitted with an application for ancillary State support. Practitioners should ensure that a good root of title and sufficient documentation is furnished to show that the applicant has a good marketable title. Life interests and possessory title are not acceptable for ancillary State support. Original documents of title are not



required. If necessary, appropriate consents to the creation of the HSE's charge should be furnished with the application. This includes the consent of the first mortgagee if it is proposed to create a second charge over the applicant's property.

While these sections are of great importance when advising clients relating to the scheme, practitioners should familiarise themselves with all other sections as well.

Because of the number of enquiries that have been made to the Conveyancing Committee, it has decided to put together the following FAQs.

#### When review occurs

**Q:** When will a review/revaluation of an asset belonging to a person who has signed up to the scheme occur?

**A:** Section 30 provides that the HSE may carry out a review on its own initiative or at the request of a person who is provided with care services (a 'resident') at any time.

#### Events that may give rise to a review

**Q:** Are there any particular events that will prompt the HSE to hold a review or revaluation?

**A:** If the HSE is aware of a material change of circumstances – for example, if there was a sale or transfer, or on the death of a resident or the partner of a resident – then a review will be carried out.

In practice, reviews are carried out if

requested by the applicant, but generally the HSE will not carry out a review unless it is made aware of a material change of circumstances. It is worth noting that, under section 24, there is a requirement to notify the HSE of any material change in circumstances within ten working days of the resident becoming aware of them, and that a fine of €1,000 is provided for in a case of failure to comply. This may be relevant to a solicitor if the client is relying on the solicitor to attend to such matters.

#### What assets are reviewed?

**Q:** Will the family home be revalued/reviewed or not? Will all other assets be reviewed/revalued, including bank accounts?

**A:** Section 30 refers to a review of all or any of the following:

- The care needs of the person concerned,
- The financial assessment relating to the person,
- The weekly amounts of payments made by way of ancillary State support in respect of the person.

The financial assessment of means is carried out pursuant to section 10 of the act. The assessment of means of a person who is not a member of a couple is carried out in accordance with schedule 1, part 1 of the act. If the person is a member of a couple, the assessment is carried out in accordance with schedule 1, part 2 of the act. It should be noted that schedule 1 has been amended by

section 7 of the *Health (Amendment) Act 2013*.

The person's means are assessed by taking into account income, cash assets, and relevant assets, all of which are defined in the act.

If a person has benefited from the act for three years, the principal residence will cease to be a relevant asset, but the charge remains in place and a revaluation will take place on the occurrence of this event in any case.

#### Upward or downward review

**Q:** Can the review/revaluation be upward or downward?

**A:** Yes, but the HSE does not have to accept the valuation provided.

#### Advising client

**Q:** Should a solicitor acting for such a resident write to the client advising them of the possibility of such assets being reviewed or revalued under the act?

**A:** Yes. The right to a review is part of the process. The person in receipt of care services is entitled to a review and should be informed of this entitlement under section 30.

**Q:** If such a client decided to sell an asset, should the solicitor advise them that this would be an event that would trigger a review and that the HSE would then look to the proceeds of sale for a further contribution?

**A:** That is correct. In particular, if a person sells the principal residence before three years have expired, the client may lose the benefit of the three-year cap, when reached, and will be assessed on the proceeds of sale as cash assets.

If the person sells the principal residence after the three years, then the assets are re-evaluated.

#### Calculation of contribution

**Q:** With regard to the formula used by the HSE under the act in calculating the contribution to be made by the resident, could this be illustrated by way of an example?

**A:** You take 80% of the income. You then take the value of the cash assets over €36,000 (or €72,000 if a member of a couple), multiply it by 7.5%, and divide by 52 to get the assessable cash assets.

The total relevant assets are the assessable cash assets less any assets disregarded. If there are no cash savings, you can bring forward €36,000 to set against the value of the principal private residence.

For example:

- A person has a pension of €230 per week,
- 80% of this is €190 per week,
- Assume that the person has savings of €20,000,
- If you deduct €36,000 from this, the assessable cash assets amount is €0,

- Assume the house is valued at €216,000. You can set off the €16,000, which is carried forward from the assessable cash assets, leaving the house value at €200,000.

The person is then assessed on €200,000, multiplied by 7.5%, divided by 52 – that is, €15,000 divided by 52 = €288.46.

Add €288.46 to €190 (80% of the pension).

Therefore, assessable client contribution is €478.46 per week.

If the nursing home cost is €1,000 per week, the State support is €1,000 less €478.46 (that is, €521.54 per week).

Ancillary State support can be availed of on €478.46 for a maximum of three years.

If, after three years, the income remains the same (that is, 80% of pension) and the cash assets remain the same, the principal private residence is removed and goes to €0. Therefore, the client's assessed contribution is €190. If the nursing home cost is €1,000, the State support is €810. The person's contribution decreases, and the State contribution increases.

#### Postponement of house sale

**Q:** Where the resident who is benefitting from the scheme dies, will the HSE sell the house if it is the only asset but is occupied by another family member? Will the HSE wait until the family member passes away before they will look for payment, or will they insist on payment one year after the deceased's death, which would necessitate the sale of the house?

**A:** Section 20 of the act deals with the repayment of moneys advanced by way of ancillary State support where the deferral of the occurrence of a relevant event applies. A deferral of repayment can be granted to a surviving partner or a connected person, who is defined under section 20(4). A deferral will be granted if the conditions set out in the 2009 act are met. If a deferral is refused, it is the

Revenue Commissioners that collect payment. It is important to note that an application for a deferral must be made.

In the ordinary course of events, the nursing-home loan or ancillary State support is due to be paid from the estate. It is not necessary to sell the house to meet the liability where there are other assets available.

**‘ If such a client decided to sell an asset, should the solicitor advise them that this would be an event that would trigger a review and that the HSE would then look to the proceeds of sale for a further contribution? That is correct ’**

#### Transferred assets

**Q:** What are transferred assets?  
**A:** Schedule, 1 part 3 of the act sets out the relevant definitions.

‘Relevant assets’ means all forms of property, whether situated in the State or not, other than cash assets, including options and incorporeal property generally in which the relevant person has a beneficial interest, including transferred assets that would have been relevant assets if not transferred.

‘Transferred assets’ is then defined separately as “an interest of the person in an asset (whether a cash asset or a relevant asset) which has been transferred at any time in the

period of five years prior to (or at any time on or subsequent to [these words were inserted by section 7 of the *Health (General Practitioner Service) Act 2014*]) the date on which an application for State support is first made by or on behalf of that person which transfer is made:


- a) For no consideration,
- b) For nominal consideration,
- c) For consideration which is less than 75% of the estimated market value of the interest of the person in the asset at the time of the transfer, but does not include the transfer of an asset made in respect of the settlement of any claim made in respect of the maintenance of a child or other matrimonial proceedings and the Executive is satisfied that such transfer was made for that purpose,

and the estimated market value of a transferred asset shall be determined on the basis of the value of the asset at the time of the transfer, and where the asset comprises moneys not being in the currency of the State, or other assets held in a place outside the State, the currency of which is not the currency of the State, converted into the currency of the State at the date of the transfer of the asset concerned.”

There is a related definition of ‘transferred asset value’ and a corresponding definition for ‘transferred income’. It will be noted that the definition of ‘relevant assets’ is very wide and includes “options and incorporeal property generally in which the relevant person has a beneficial interest”. In this context, it should be noted (for example) that the HSE has indicated that, if the relevant person was entitled to a share in the estate of a deceased person and decided to disclaim it, then the value of the disclaimed share would be ‘likely’ to be treated as a ‘transferred asset’.

#### Data protection

**Q:** Is the HSE restricted by the *Data Protection Acts* in its agreeing to provide personal information about a relevant person?

**A:** Under section 8 of the *Health (Alteration of Criteria for Eligibility) Act 2013*, the HSE is obliged to furnish personal data to the Minister for Social Protection for the purpose of calculating benefits and services under the *Social Welfare Acts*, and to furnish personal data to the Revenue Commissioners for the purpose of collecting any tax,  and so on, payable to Revenue.

#### look it up

##### Legislation:

- *Health (Alteration of Criteria for Eligibility) Act 2013*
- *Health (Amendment) Act 2013*
- *Health (General Practitioner Service) Act 2014*
- *Nursing Home Support Scheme Act 2009*



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# Another CASUALTY



Michael Cross is news editor of the Law Society of England and Wales' Gazette, for which he has written extensively on the role of solicitors in the First World War

**Martial law may have been necessary during the 1916 Rising, but those circumstances passed with the surrender. However, it remained in force for months. The rule of law was also a casualty of 1916, writes Michael Cross**

On 6 May 1916, a brief item in a London magazine, *The Solicitors' Journal and Weekly Reporter*, informed readers: "The Irish law courts and the Four Courts Library were in possession of the rebels during the recent short-lived revolt and, according to earlier reports, the library suffered severely, but we hope it will be found that these were exaggerated."

This seems to have been the British legal press's first account of the Easter Rising. The language – "short lived", "exaggerated" – was in keeping with the official line. But if anyone in authority hoped that lawyers' interest in Irish affairs would soon move on, they would be disappointed. Throughout 1916, parliamentary records and the legal press would show ongoing concern about the revolt's quasi-judicial aftermath and harm done to the rule of law.

At the height of a world war, with patriotic sentiment running high, this must have taken courage.

Just a week after the first brief article, on 13 May, the editorial tone of the *Solicitors' Journal* had changed noticeably. A lead article entitled 'Rebellions in Ireland' revealed unease at the outcome of the sentences passed by field general courts martial convened following the suspending of the right of civil trial in Ireland under the *Defence of the Real Acts* of 1914 and 1915. "Thirteen executions for civil rebellion under sentences of martial law are a phenomenon long unknown to British history," *The Journal* growled. (In fact, the total had already reached 15; James Connolly and Sean MacDiarmada had been shot on 12 May.)

#### Who fears to speak of '98?

Looking back over the previous century of risings against British rule, *The Journal* noted that two Canadian rebellions had been suppressed, with only one execution in each case,

that of the rebel leader. To find a precedent for the 1916 executions, *The Journal* said, it was necessary to go back to 1798, when "as in 1916, the Irish rebels acted more or less in concert with foreign enemies". *The Journal* conceded that such collusion "explains, and to some extent justifies, the extreme severity employed". However, it concluded: "It should be pointed out that, in 1798, so soon as the rebels were actually defeated, the Lord Lieutenant, Cornwallis ... at once abolished martial law and brought the prisoners before civil courts. There seems no reason why the precedent of Lord Cornwallis should not now be followed."

*The Journal's* use of the term 'martial law' is interesting, because an embarrassed British government was soon to deny that the trials had been held on any such basis. Prime Minister Asquith told Parliament: "These sentences which have been passed by these courts martial are not passed under martial law at all. Martial law has really nothing to do with it. They are passed under the authority of the

#### at a glance

- Throughout 1916, English parliamentary records and the legal press showed ongoing concern about the Rising's quasi-judicial aftermath and the harm done to the rule of law
- Articles in legal journals revealed unease at the outcome of the sentences passed by field general courts martial convened following the suspending of the right of civil trial in Ireland
- The legal basis for the courts martial was dubious from the start

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**“All that followed the proclamation of martial law inevitably came to be tainted with illegality. The rule of law was the first casualty of the new administration.”**

*Defence of the Realm Act* by tribunals which have statutory jurisdiction.”

It is unlikely General Sir John ‘Conky’ Maxwell, hastily appointed military governor, worried himself about the distinction. Delegated by Asquith with wide powers to deal with the rebellion, the veteran of colonial wars turned instinctively to the field general court martial to enforce the law.

As Seán Enright points out in his authoritative *Easter Rising 1916: The Trials*, the legal basis for the courts martial was dubious from the start. The imposition of martial law “perhaps was the moment when those charged with the suppression of the rebellion took the wrong course”.

On 28 April, martial law may have been necessary – but those circumstances passed with the surrender. However, it remained in force for months, allowing Maxwell to do whatever he thought necessary, without needing to consider what the law permitted. “For these reasons, all that followed the proclamation of martial law inevitably came to be tainted with illegality,” Enright says. “The rule of law was the first casualty of the new administration.”

#### **The patriot game**

In particular, martial law allowed Maxwell to use his powers to try prisoners not by general courts martial, as provided under the *Defence*

*of the Realm Acts*, but by the more rough-and-ready field general courts martial. These courts were designed to enforce discipline on active service when a general court martial could not be convened. They were held *in camera* and defendants were unrepresented. A judicial panel of three officers would give their verdicts in ascending order of rank. Sentences were often designed to be exemplary rather than based on the facts of the case.

An immediate difficulty was that the *Defence of the Realm Acts* provided for a death sentence only where regulations were breached with the intention of assisting the enemy. Hence the prisoners were charged with taking part





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in rebellion “with the intention and for the purpose of assisting the enemy”. Yet it seems that the only such evidence produced at the courts was a postscript to a letter Pádraig Pearse wrote to his mother from detention, in which he claimed he had counted on a German expedition. That brought about the verdict desired by both Pearse and Maxwell.

Protests about the executions had already been heard in the Westminster Parliament, thanks to nationalist MP John Dillon, who on 11 May warned a hostile house of “letting loose a river of blood”. In fact, Asquith had telegraphed Maxwell the previous day: “no more executions until further orders”.

There were other signs that concerns were hitting home. On 20 May, *The Solicitors’ Journal* printed a defence of the executions by General Maxwell himself. Assuring the legal community that the trials by court martial were “practically finished”, Maxwell justified the death sentences “in view of the gravity of the rebellion and its connection with German intrigue propaganda”.

But on the same page, a letter from Belfast-born barrister and Liberal peer Viscount Bryce said that while “a few of those most responsible for this mad outbreak in Dublin” should be punished, “this once done, a large and generous clemency is the course recommended by wisdom as well as by pity”.

In the event, on 17 May, general courts martial began to sit, providing a little more protection for the accused. No further death sentences were passed in Ireland.

#### Men behind the wire

However, efforts to deal with the 3,226 men and women arrested between 1 May and 3 July, often on flimsy evidence, posed further legal questions. Of these, 171 were tried and 1,867 were interned in England and Wales. But, outside the martial law area, there was no power to try detainees by courts martial – and jury trials would have exposed the lack of admissible evidence.

The government sought another dubious legal fudge. Home Secretary Herbert Samuel proposed they be held under regulation 14B of the *Defence of the Realm Act*, which provided for the internment of enemy aliens. To objections that Irish citizens of the United Kingdom were by no stretch of the imagination aliens, and that regulation 14B internment was already being questioned as a breach of liberties, the government set out to interview the detainees as quickly as possible

**‘The imposition of martial law perhaps was the moment when those charged with the suppression of the rebellion took the wrong course’**



PICTURE IMAGES

to weed out the “innocents”. In the event, an advisory committee under Mr Justice Sankey released all but 579 of the detainees, after a radicalising experience whose lessons resound down the century.

There was one climactic legal drama. On 3 June, *The Journal* commented: “The archaic nature of our criminal procedure was illustrated in a striking manner last week when, after the grand jury of Middlesex found a true bill of high treason against Sir Roger Casement and his co-defendant, the Lord Chief Justice was invited to nominate on behalf of the prisoners a solicitor and two counsel” (see last month’s *Gazette*, p40).


The statutory basis of the charge against Casement came under particular criticism in the professional press. The thoroughly establishment magazine *Justice of the Peace* commented on 29 July: “It is curious that an important trial of this kind, in the 20<sup>th</sup> century, should depend on the doubtful wording of a statute passed nearly 600 years ago.”

But on 15 July, *The Journal* had printed a letter from barrister Sir Harry Poland, who said that he had been observing criminal trials since 1848, and “there is but one opinion as to the dignity, patience and balance with which the trial was conducted both by the judges and the counsel, certainly worthy of the best traditions of the administration of justice in England”.

Poland was writing before the decision was taken not to contrive a way of commuting the death sentence – preferably, from the government’s point of view, on the basis of insanity. This was certainly investigated at Cabinet level. Asquith’s sympathetic biographer, Liberal politician Roy Jenkins, wrote: “There can be few other examples of a Cabinet devoting large parts of four separate meetings to considering an individual sentence – and then arriving at the wrong decision.”

A century on, controversy still rages. The transcript of Casement’s trial and appeal suggests he was given a fair hearing in the circumstances; certainly fairer than the contemporaneous treatment meted out by the Austro-Hungarian Empire to Italian irredentists who took up arms with the allies.

However, by any standard, Maxwell’s field general courts martial remain a blot, for which the barrister and former home secretary Asquith must bear responsibility. Had the authorities paid earlier heed to legal concerns, history might have turned out differently.

But in 1916 there was no turning back. In August, the (English) *Law Society Gazette* needed three pages to record the death notices of solicitors who had fallen in the Somme. And, on 23 September, the *Solicitors’ Journal* reported that the battle had claimed two notable lawyers: Raymond Asquith was the eldest son of the prime minister, while Thomas Kettle was a Home Ruler. Both had volunteered to fight, in British uniform, for the principle that small nations might be free. 

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## The Law of Intoxication: A Criminal Defence

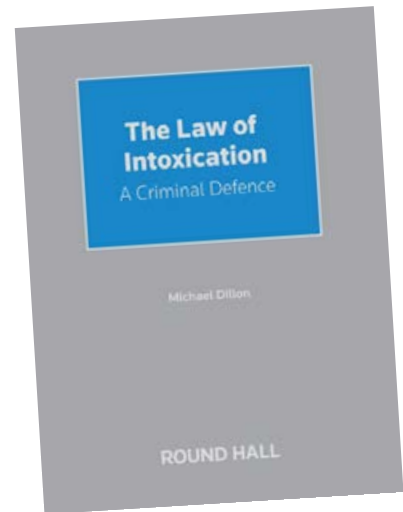
**Michael Dillon.** Round Hall (2015),  
[www.roundhall.ie](http://www.roundhall.ie). ISBN: 978-1-8580-069-87.  
Price: €195 (incl VAT).

Although intoxication, in one form or another, is a major driver of criminal offending, it is surprising to note how relatively little attention is paid to it in law or in academic analysis. In this impressive work, Dr Dillon has tried to fill that void, and he has succeeded admirably.

The author takes us on a world tour of jurisprudence, touching on notions of intoxication that I – a reasonably experienced criminal lawyer – have never experienced, nor even dreamed of. Thus, jet lag and withdrawal from medication, each in combination with small quantities of alcohol, are the subject of Canadian appellate decisions. Exposure to pesticides grounds a defence in New Jersey. And there is a detailed discussion on intoxication caused by medicine in Scotland. All of the common law jurisdictions feature at some stage, with law reports, academic articles, and law reform commission research peppering the pages.

To do Dr Dillon's work justice, however, it is worth noting that this is no mere academic tome. It is well laid out, fluently written, and genuinely interesting, even making due allowance for one's own professional interests. The seemingly infinite capacity of humankind to become intoxicated, whether voluntarily or otherwise, and then to offend against the criminal code, leads to a close examination in many jurisdictions as to whether the often peculiar sets of facts should properly constitute an excuse for offending behaviour.

Nor does he concentrate on the obscure: all the old friends from law school are here: *Majewski*, strict liability, specific/basic intent



– well-settled principles such as these are given the author's clear and intelligent treatment, so this could become the standard undergraduate text on the subject matter. In a provocative final chapter, likely to lead to arguments with the medical profession, he discusses 'fixed/settled insanity', being a type of mental disorder deriving from the long-term habitual use of intoxicants. Dr Dillon cites numerous US articles and cases on this topic, controversial in the USA and likely to be so in this jurisdiction if argued before the courts, where there is a primary emphasis on personal responsibility.

The foreword is written by Judge William McKechnie. As one of the foremost Irish jurists of the time, his words carry considerable weight. He predicts that this book is "likely to dominate the literary coalface on the criminal effects of intoxication for decades to come". I respectfully agree.

*Dara Robinson is a partner in the Dublin criminal defence firm of Sheehan and Partners.*

## Law and Finance in Retirement

*Law and Finance in Retirement* (third edition) is a forthcoming book by Law Society past-president John Costello that should be of particular assistance to retired people or those facing retirement.

In addition to wills, probate, inheritance tax planning and powers of attorney, the book covers income and capital-gains tax, pensions and State entitlements. It highlights, also, the new legal arrangements initiated by the *Assisted Decision-Making (Capacity)*

*Act 2015*, including its ramifications for decisions on personal, legal and financial matters, medical treatment and advance healthcare directives.

The options available for those who require nursing support or care are also examined in some detail.

The book will publish on 14 July 2016 and will cost €20. For more information, visit [www.lonsdalelawpublishing.com](http://www.lonsdalelawpublishing.com) or email [info@blackhallpublishing.com](mailto:info@blackhallpublishing.com).

## Easements

**Peter Bland.** Round Hall (2015, third edition), [www.roundhall.ie](http://www.roundhall.ie). ISBN: 978-0-4140-506-48. Price €265 (incl VAT).


Any practitioner dealing with land law is familiar with the name of Peter Bland. He was the author of the first comprehensive textbook on the Irish law of easements and *profits a prendre* in 1997, which is a staple in the office of most general practitioners. This new edition was badly needed following the reform of the law on prescription by the *Land and Conveyancing Law Reform Act 2009*. Given the words of the Minister for Justice introducing the second reading of the *Land and Conveyancing Law Reform Bill 2006* as a “happy hunting ground for lawyers” and Peter Bland’s opinion that it is inevitable that the innovations of the 2009 act are destined to the same fate, this edition of the book is a must for every office.

Interestingly, Bland is of the view that the continued existence of prescription cannot be easily reconciled with the policy of universal registration and electronic conveyancing. He opines that, regrettably, the prescription provisions in the 2009 act suffered from a number of drafting errors and caused such concern that an amendment was enacted to prolong the life of the long-derided former law of prescription, and a fast-track system for establishing non-contentious claims was introduced. He argues that there remains considerable confusion amongst the profession as to just what is and what will be the law governing prescription. Consequently, future reform is likely in the movement towards



a registration-based method of electronic conveyancing.

Another point worth highlighting is Bland’s view that a modern apartment block or housing development can contain a nest of putative easements. The rights burdening open spaces in housing estates and the nascent rights of parking and passage by elevator have only been considered in written judgments since the first edition of his work. It can be expected that other novel interests will be created to meet the developing purposes for which property is used.

The final line to the introduction neatly sums up his work: “This work can therefore be read as a celebration of the bloody-mindedness of the Irish litigant in asserting  and denying rights over land.”

*Aisling Meehan is principal of Aisling Meehan Agricultural Solicitors.*



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# HUGH GARVEY

## 1966 –2016

On 22 April 2016, after a valiant battle with cancer, Hugh Garvey quietly slipped away without fuss or warning in his family home in Killiney. Although those who knew and loved Hugh were aware of the extent of his illness, the suddenness of his death came as a tremendous shock. Right up to the end, Hugh had protected us from the truth and had assured us he was fine, and because he had been doing this for as long as we knew him, we believed him.

Hugh was born in London to Padraic and Anne Garvey and spent his childhood years between Carlow and Galway, before going to Rockwell College. A past-president of Rockwell College Union, the friendships Hugh forged there were strong and deep, as evidenced by the large number of Rockwellians who attended his funeral. While in Rockwell, Hugh's passion for music was kindled by the then fledgling U2; he was, in fact, one of the first members of the U2 fan club.

Hugh Garvey had an acutely defined moral compass that, when coupled with his loyalty and his compassion for his fellow man, made him an outstanding person to have on your side. Those who were privileged enough to get to know Hugh Garvey would say there were few people in their lives who have left such an impression on them.

After leaving Rockwell in 1984, Hugh studied law and sociology in what was then, and will always be to many of us, UCG, graduating with a BA (1987) and an LLB (1989). There too, Hugh made lasting friendships and profoundly touched the lives of those with whom he came into contact. Hugh was always sensible, an old head on young shoulders, always mindful



of others' feelings, but single-minded in his determination to succeed and live up to the opportunity his parents had given him.

Hugh worked his entire legal career in LK Shields – from apprentice in July 1989, to qualified solicitor, partner, and ultimately managing partner in 2005. As a commercial litigator, Hugh excelled in what he did best: being on the side of his clients through thick and thin, going above and beyond the call of the usual commercial relationship between a solicitor and his client, being their rock in times of trouble, their trusted advisor and, as frequently happened, their friend. His passion for promoting and vindicating his clients' interests, when coupled with his razor-

sharp legal mind, were a formidable combination. It is no surprise that Hugh played a pivotal role in several of Ireland's leading cases in the areas of shareholders' rights, insolvency litigation, and tribunals of enquiry. Many of the cases Hugh was involved in set legal precedent, particularly in the area of company law, one such being the 1997 decision in *Mebigan v Duignan*, the first successful proceedings to hold directors personally responsible for the debts and liabilities of a company for failing to keep proper books of account. The term used at his funeral by his brother Damien to describe Hugh was apposite: Hugh was a trailblazer.

When Hugh was first diagnosed with cancer, it was apparent he had been, for

some time, personally and silently battling the pain and consequences of such a ravaging disease. He made light of his first operation by remarking that he seemed to have given birth to a tumour the size of a small baby. His initial prognosis was dire: six months. Yet, for his family and friends, time after time, Hugh beat the odds and not only survived but appeared to thrive on his positive outlook on life. However, after one setback in July of 2015, Hugh went into Our Lady's Hospice in Blackrock, from where he emerged, in his own words, with his life-force revived.

The love and care shown to Hugh by the hospice prompted Hugh to give something back. Although a 'giver' all his life, Hugh had in the hospice become a 'taker' of unconditional love, care and attention. It was this that compelled Hugh to once more be a 'giver' by fronting an internet appeal that raised significant donations for the hospice and received over 70,000 hits on YouTube.

While Hugh made light of his professional achievements, the one achievement he always acknowledged was his greatest: his children. Hugh was enormously proud of each of them and regaled his friends with stories of their comings and goings. Hugh Garvey leaves behind his beloved wife of 23 years, Jacqueline; his children, Fiona, Cólín, Seán, Dara and Róisín; his mother Anne and siblings Brian, Pauline, Damien and Aideen; and many close friends.

*He was, to the very end, a caring and gentle man.*

TBC



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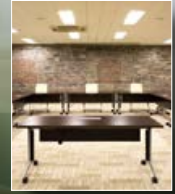
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10 June 2016

council report

### eConveyancing Project

Patrick Dorgan briefed the Council on the termination of the Society's association with Teranet. He noted that the Society's 'eVision' was unaffected and the eConveyancing Project remained on track. The implementation board viewed this as an opportunity to take stock after a lengthy involvement with Teranet. Technology and the investment environment had changed significantly since 2008. In the meantime, the Society had achieved almost universal acceptance of eConveyancing amongst stakeholders and the profession, and its introduction was now Government policy. Deputy director general Mary Keane outlined the next steps in the project under five separate work strands, including review and revalidation, electronic signatures, identifying a new partner, the reform agenda, and engaging with stakeholders. The Council agreed that the Society remained committed to the early introduction of eConveyancing and that momentum should be maintained over the coming months.

### Legal Services Regulation Act

Paul Keane briefed the Council on work being undertaken in preparation for commencement of the act, which was likely to occur, at least in part, in the Autumn. Work included briefings at regional cluster events and bar association meetings, the preparation of a summary of the act and a summary of amendments to the *Solicitors Acts*, an updated *eCompendium*, documentation in

relation to legal costs, a dedicated webpage, and meetings with department officials.

### Setanta case

Stuart Gilhooly reported that the MIBI submissions for the Supreme Court action had been filed. Law Society submissions would now be drafted and a case conference would follow. It was unclear whether a court date would be available before the end of July.

### Criminal Legal Aid Scheme

The director general noted that criminal legal aid fees had suffered severe cuts during the recession. The Society had now initiated a campaign seeking restoration of those cuts and other reforms. The key proposals being made by the Society included the urgent restoration of the 26% direct reduction in rates, reconsideration of the adequacy of the overall fee rates, a reassessment of travel and subsistence payments, a root-and-branch assessment of current work undertaken by solicitors, an agreement on fair and adequate payment for work undertaken, consideration of a contribution towards the cost of CPD for practitioners, and development of a technology-based approach to legal aid payments.

The director general noted that the programme for government indicated that the Government would "transfer responsibility for criminal legal aid to the Legal Aid Board who will have new powers to compel criminals to pay a contribution. We will also introduce a more rigorous and objective

means-testing process for such applications, as well as increasing the sanction for false declarations and improving prosecution in cases of abuse. In parallel, we will examine the feasibility of a new public defender system and report to the relevant Oireachtas committee and Government within six months." The director general noted that a public defender system had been repeatedly examined and rejected as being too expensive.

### Younger members

The Council approved a report and recommendations prepared by the Younger Members Committee following a survey of those solicitors less than 15 years qualified in November 2015, noting that approximately 44% of members were aged between 20 and 39 according to the 2013/2014 *Annual Report*.

The report's recommendations included publication of the survey results, a *Gazette* article, and a younger members conference on the theme of 'Work/life balance – how to manage time, stress and clients'.

### FATF evaluation of Ireland

Deputy director general Mary Keane outlined the work being undertaken by the Society in preparation for the evaluation of Ireland by the Financial Action Task Force (FATF) in November 2016. All public and private bodies with obligations in relation to countering money-laundering and terrorist financing would be evaluated. In terms of solicitors,

FATF would evaluate the Society's powers to monitor and regulate solicitors' firms in terms of compliance with their anti-money-laundering and terrorist financing obligations. They would also evaluate the effectiveness of the Society's supervisory and regulatory regimes in identifying risks and preventing legal services from being used as a vehicle for money-laundering or terrorist financing. A series of questionnaires had been issued by FATF. In due course, they would wish to meet with the Society and with a number of solicitors' firms.

Ms Keane noted that the Department of Finance would publish a national risk assessment in the coming weeks that would identify any shortcomings in Ireland's compliance with the FATF recommendations. Traditionally, the solicitors' profession had been identified in national risk assessments as very high risk because of the nature of the services provided, which included the establishment of companies, trusts, and the transfer of property and other assets, all of which were regarded as potential vehicles for laundering 'dirty money'. The Society was satisfied that it had robust systems of monitoring and comprehensive systems of training, information, and support for its members.

### Radio advertisements

The Council approved a series of radio advertisements, developed by the PR Committee, for broadcast in the coming  months.



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## practice notes



## PROBATE, ADMINISTRATION AND TRUSTS COMMITTEE

## Wills and EPAs: *Assisted Decision-Making (Capacity) Act 2015*

The Probate, Administration and Trusts Committee has been inundated with queries from colleagues regarding the *Assisted Decision-Making (Capacity) Act 2015*.

**It is important to note that, at this point in time, the new act has not yet been commenced and does not have any impact on current professional practice.**

A key feature of the new act is the introduction of a functional test for capacity. It is worth noting that the long-established test for testamentary capacity arising from *Banks v Goodfellow* (1870) is, in fact, already a functional test. Moreover, section 140 of the new act specifically confirms that the new act does not alter or amend the law

relating to capacity to make a will.

In respect of enduring powers of attorney, the new act will make significant changes when commenced. Section 79 of the act requires that secondary legislation be produced to prescribe, among other things, the form of the new instrument to create an enduring power of attorney, and the form of a report to be submitted by an attorney appointed after the commencement of the new act to a director of the Decision Support Service to be created under the new act. Naturally, this secondary legislation will need to be reviewed in conjunction with the new act to assess fully the impact that these changes will have in professional practice.

A number of the queries received relate to whether enduring powers of attorney currently being drafted and executed should contain reference to the new act, particularly its reporting provisions. At its meeting on 1 June 2016, the members of the committee in attendance were unanimously of the view that, until a commencement order has been issued in respect of the new act, it is not appropriate to include reference to the new act. Its provisions may never be commenced, or may be commenced in stages, and/or may not be commenced for a considerable period of time. Therefore, it is imprudent to include references in current enduring powers of attorney to the

new act, particularly the reporting provisions, in circumstances where a solicitor is not able to advise the client on the various forms yet to be issued, and when or whether the new act will come into effect.

It has always been the case that an enduring power of attorney may contain conditions to attach to the exercise of the power conferred therein by an attorney. Solicitors ought to consider with their clients whether any suitable conditions (including oversight and reporting) should be incorporated when drafting an enduring power of attorney, which though in a format derived from a statutory instrument, should nonetheless be bespoke for each client.



## PROFESSIONAL INDEMNITY INSURANCE COMMITTEE

## Cybercrime and professional indemnity insurance

The practice note 'Responsibility for deficits arising from cybercrime', as published in the *June 2015 Gazette* (p53), states that any deficit arising in client moneys held by a practice is the personal responsibility of the partner/principal of the practice, whether caused by a solicitor or staff member, or as a victim of cybercrime. It is the responsibility of the partners/principal to reimburse to the client account the amount fraudulently taken, rectifying any deficit, whether from the proceeds of insurance cover, and/or from personal funds.

As partners/principals of firms have a personal liability for a deficit of client moneys caused by cybercrime, even where they are the victim, in the event of loss of client moneys due to cybercrime, firms should immediately notify their insurer.

Third-party cover for civil liability claims in relation to cybercrime already exists under the minimum terms and conditions of PII cover set out by current regulations. The minimum terms and conditions provide a broad scope of coverage, as insurers

are required to provide cover to firms for civil liability claims arising out of the provision of legal services. A solicitor who holds client moneys in a client account on behalf of a client is providing a 'legal service' to a client within the meaning of that term, as defined by the minimum terms and conditions. A 'claim' is defined as including a request or demand for civil compensation or civil damages of any nature. A claim made by a client against a firm in circumstance where the client moneys have been lost due to cybercrime is a request for either civil compensation or civil damages.

It should be noted that cover under the minimum terms and conditions is third-party cover for civil liability claims, not first-party cover. As such, cover will need to be triggered by a client or clients making a claim against the firm or by a High Court order made on application by the Society requiring the firm to replace client moneys lost due to cybercrime. Policies may have a mitigation clause under which a firm could replace client moneys lost due to cybercrime

immediately, so as to mitigate loss for the insurer, which could trigger the insurance.

Expert advice should be sought on mechanisms for making a claim in the event of loss of client moneys due to cybercrime, including a review of the self-insured excess to check if the firm's policy provides for multiple claims to be treated as one claim for the purpose of the self-insured excess.

Speciality top-up insurance products are available on the market that provide more comprehensive cover for cybercrime, which may include first-party cover and cover for claims by employees, malicious or unauthorised use of the firm's own network to dam-

age or misuse or destroy client data, use of the firm's network to cause a denial of service attack, customer care and reputational expenses, loss of business income, damage to digital assets, cyber-extortion, and reputational damage. Care should be taken not to double insure, as any top-up cover should not be the same as cover for third-party claims already in place under the minimum terms and conditions.

Firms are encouraged to contact their broker regarding their existing cover for cybercrime, including review of any mitigation clauses and self-insured excess, and if the firm is interested in availing of top-up cover.

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## TECHNOLOGY COMMITTEE

## Crypto-ransomware – guidance for firms

Crypto-ransomware is malware that accesses computer networks and systems. It encrypts all the files of certain types on the system in order to put those files beyond use. When a victim can no longer access their files, he or she is directed to pay a ransom. The ransom is usually demanded to be paid in a digital currency called ‘bitcoin’. Payment of the ransom may – or may not – lead to regaining access to the data.

Some types of ransomware are concealed in email attachments that look like invoices or other commonly received file types. Others are distributed through hijacked hyperlinks on websites. **The malware is deployed by clicking to open.**

Where an infected computer is connected to a network, the ransomware may spread to other devices and drives on the network.

The number of crypto-ransomware attacks has increased in recent months and have been directed at businesses across Ireland. **Law firms are advised to take extra precautions to ensure the security of their systems.**

In most instances, there is no way of reversing the file-encryption carried out by the ransomware without receiving the encryption key from the criminal gang that deployed the malware. A firm’s options will be either:

- Revert to the most recent backup of the data (which might lead to some loss of work), or

- Pay the ransom (which has no guarantee that the criminal gang will provide the key, and which rewards the criminal gang for their actions).

Certain business procedures can be put in place to reduce the possibility of falling victim to an attack.

### First steps

- Review and update your backup procedures in light of this threat,
- Update all computers on your firm’s network to the latest versions of software available – many types of ransomware exploit known vulnerabilities that have not been patched in order to obtain access to systems,
- Educate your employees on the dangers of opening files from unknown sources, particularly .exe, .zip or .war files,
- Educate your employees on how to verify hyperlinks by hovering over the hyperlink and checking the file path before clicking – this is particularly important for websites that do not use the ‘https://’ protocol (look for the padlock icon on your URL bar),
- Access your system on the administrator account only when required,
- Contact your IT services provider and let them know that you are concerned about falling victim to a crypto-ransomware attack. Ask if your current systems will be of use in preventing an attack or in

dealing with the aftermath of an attack. To establish their credentials in dealing with such attacks, ask if they have previously dealt with an attack.

### Further actions that you or your IT services provider might take

- Reduce access to your file-storage drives to those of your employees who really require access. Now is a good time to audit and tidy-up creeping access privileges on your drives.
- Adopt internet and file-type ‘white-listing’, which permits your firm’s computers to access permitted URLs and file-types only.

### Services you might consider requesting from your IT services provider

- Email-scanning services to filter out dangerous files and URL links in emails,
- Viewer software to open files transmitted by email in a safe environment,
- Proxy servers to filter incoming and outgoing web-browsing internet traffic,
- Dual redundant firewalls that are regularly updated and tested – if one fails, the other automatically kicks in to maintain service and security.

### What will be of most use should I fall victim to an attack?

- It cannot be emphasised enough

that backups are crucial – suitable backup procedures ensure that data is not lost and permit business continuity,

- Ensure that critical backups are not continuously connected to the network – they must be stored separately, or the firm’s backups may also be encrypted and rendered useless,
- Cloud-based backups that ‘live-sync’ may not be effective, as they may also be encrypted.

### What to do if my firm’s network is attacked?

- Immediately pull any infected computers off the network,
- Call your IT support team for assistance,
- Do not access your backups until all the infected computers have been wiped clean or completely removed from the network.

At present, it appears that the encryption of data rather than extraction of data is the aim of the gangs that deploy crypto-ransomware. Firms, however, should consider their professional obligations to ensure confidentiality of communications with their clients, to keep full and accurate records of their dealings with clients, and their responsibilities under the *Data Protection Acts 1988 and 2003* to protect personal data from unauthorised disclosure, loss, destruction, or alteration.



## ALTERNATIVE DISPUTE RESOLUTION COMMITTEE

## Construction Contracts Act 2013

The *Construction Contracts Act 2013* applies to construction contracts entered into after 25 July 2016. The main features are as follows:

- Irrespective of the provisions of the subcontract, subcontractors are entitled to be paid the full value of work completed

every 30 days.

- The paying party must respond to a payment claim within 21 days of the payment claim date. If it fails to do so, it runs the risk of having to pay the full amount of the claim, irrespective of how inflated it may be.

- Any dispute relating to payment may be referred to an adjudicator at any time. The adjudicator must give a decision within 28 days, and the amount awarded by the adjudicator is payable immediately, irrespective of the fact that the dispute may then be the subject matter of arbitration or litigation.

tration or litigation.

- Pay when paid provisions are no longer permitted.

Practitioners advising clients involved in the construction industry need to be aware of the detail of this very short but important statute.

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8 Sept	ESSENTIAL GENERAL PRACTICE UPDATE 2016 – Ballygarry House Hotel, Tralee.	€105 - Hot lunch and networking drinks reception included in price	6 CPD hours (by Group Study) Full details TBC
29 & 30 Sept	CONNAUGHT SOLICITORS' SYMPOSIUM 2016 PART I & II – Breaffy House Hotel, Castlebar, Mayo – in partnership with Mayo Solicitors' Bar Association	Day 1 - 4 CPD hours (by Group Study) Day 2 - 6 CPD hours (by Group Study) Full details TBC	Day 1 - €75 Day 2 - €105 - Hot lunch and networking drinks reception included in price Attendance on Day 1 & 2 - €160
10 Nov	NORTH EAST CPD DAY 2016 – The Glencarn Hotel, Castleblayney, Co Monaghan - in partnership with Cavan, Drogheda, Louth and Monaghan Solicitors' Bar Associations	7 CPD hours (by Group Study) Full details TBC	€105 - Hot lunch and networking drinks reception included in price

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DATE	EVENT	DISCOUNTED FEE*	FULL FEE	CPD HOURS
2 Sept	LAW SOCIETY FINUAS NETWORK FINTECH SYMPOSIUM	€195	€225	7 General (by Group Study)
22 Sept	PROBATE AND TAX UPDATE in partnership with the Probate, Administration & Trusts Committee and the Taxation Committee	€150	€176	3.5 General (by Group Study)
22 Sept	TACTICAL NEGOTIATION SKILLS	€150	€176	3 M& PD Skills (by Group Study)
12 Oct	YOUNGER MEMBERS' COMMITTEE SEMINAR - HOW TO MANAGE TIME, STRESS AND CLIENTS – in collaboration with Law Society Skillnet	n/a	€105	3 M& PD Skills (by Group Study)
20 Oct	ANNUAL PROPERTY LAW CONFERENCE in collaboration with the Conveyancing Committee	€150	€176	3.5 General (by Group Study)
10 Nov	LEADERSHIP AND THE IN-HOUSE LAWYER The In-house and Public Sector Committee Annual Conference	€150	€176	TBC

### THE FUNDAMENTALS OF COMMERCIAL CONTRACTS

Course fee includes: iPad Mini & Interactive eBook on Commercial Contracts  
CPD Hours per Module: 10 Hours including 3 M & PD Skills (by Group Study)

Fee: €1,100/€1,000\*

Attendance on both modules is required

Please note: Access to an iPad is essential for participation in this programme

Dates:

16 & 17 September 2016 - Module 1: Negotiating and Drafting Commercial Contracts

7 & 8 October 2016 - Module 2: Analysis of Key Commercial Contracts

### THE FUNDAMENTALS OF DISTRICT COURT CIVIL PROCEDURE, DRAFTING & ADVOCACY SKILLS (Focus on General Tort & Personal Injuries Litigation)

CPD Hours Per Module: 10 CPD hours including 3 M & PD Skills (by Group Study)

Fee: €850/€750\*

Attendance on both modules is required

Dates:

30 September & 1 October - Module 1: The Fundamentals of PI Litigation; District Court Civil Procedure and Drafting Skills

14 & 15 October - Module 2 - Preparing for Trial and Court Room Advocacy

### CPD CERTIFICATE IN PROFESSIONAL EDUCATION

CPD Hours: Full General and M & PD Skills CPD requirement for 2016 (by Group Study) including 5 hours M & PD Skills (by eLearning)

Fee: €1,450/€1,250\* (iPad mini included in fee)\*

Delegates are required to attend all Modules.

Please note: Access to an iPad is essential for participation in this programme.

Dates:

30 Sept and 1 October and 14 October 2016

Modules:

Theory and knowledge; Educational technology; Skills and Practice; Professional Self.

### PROPERTY TRANSACTIONS MASTER CLASS

CPD Hours per Module: 10 Hours including 2 M & PD Skills

Fee per Module: €600/€500\*

Course fee includes: iPad Mini, interactive eBook on Commercial & Complex Property Transactions plus 2 Law Society/OUP manuals; Conveyancing 8th edition (to be published Autumn 2016) and Landlord & Tenant Law 6th edition

Dates:

11 & 12 November 2016 – Module 1: The Fundamentals of Property Transactions

20 & 21 January 2017 – Module 2: Complex Property Transactions

3 & 4 February 2017 – Module 3: Commercial Property Transactions

Attend 1, 2 or all 3 Modules

Please note: Access to an iPad is essential for participation in this programme

There is a reduced fee of €1,500/€1,400\* for attending all three modules

### THE FUNDAMENTALS OF TECHNOLOGY & INTELLECTUAL PROPERTY LAW

CPD Hours per Module: 10 Hours including 3 M & PD Skills

Fee: €1,100/€1,000\*

Course fee Includes: iPad Mini & Interactive eBook on Technology & IP Law

Dates:

25 & 26 November 2016 – Module 1: Intellectual Property Law

20 & 21 January 2017 – Module 2: Technology Law

Attendance on both modules is required

Please note: Access to an iPad is essential for participation in this programme

\*Applicable to Law Society Skillnet members

## Solicitors Disciplinary Tribunal

Reports of the outcomes of Solicitors Disciplinary Tribunal inquiries are published by the Law Society of Ireland as provided for in section 23 (as amended by section 17 of the *Solicitors (Amendment) Act 2002*) of the *Solicitors (Amendment) Act 1994*

**In the matter of Sean R Sheehan, a solicitor practising as Aaron Kelly & Company, 8 Palace Street, Drogheda, Co Louth, and in the matter of the *Solicitors Acts 1954-2008* [S819/DT17/12 and High Court record no 2015/3SA] *Law Society of Ireland (applicant) Sean R Sheehan (respondent solicitor)***

On 26 September 2013 and 10 December 2014, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in that he had:

- 1) Breached regulation 7(2)(a) of the *Solicitors Accounts Regulations 2001* (as amended) by allowing debit balances to arise on the client account,
- 2) Breached regulation 12(1) of the *Solicitors Accounts Regulations 2001* (as amended) by failing to maintain proper books of account.

The tribunal made the following orders:

- 1) That the respondent solicitor stand advised and admonished,
- 2) That the respondent solicitor pay the sum of €5,000 plus VAT as a contribution towards

the whole of the costs of the Society.

The respondent solicitor appealed the findings of the Solicitors Disciplinary Tribunal. The High Court heard the appeal on 15 June 2015 and, in a judgment dated 26 June 2015, upheld the above findings, noting “that the [solicitor’s] behaviour was at the lower end of the scale of seriousness and this is reflected in the sanction imposed”.

**In the matter of Eoin M Dee, solicitor, formerly of Thomas House, 47 Thomas Street, Waterford, and in the matter of an application by the Law Society of Ireland to the Solicitors Disciplinary Tribunal and in the matter of the *Solicitors Acts 1954-2011* [8243/DT107/15]**

*Law Society of Ireland (applicant) Eoin M Dee (respondent solicitor)*

On 3 March 2016, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in that he had:

- 1) Failed to satisfy the Society that he used his best endeavours to ensure that a fee note total-

ling €996.30, due and owing to Richard Lyons SC in relation to a case in which he had 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 and, in particular, to letters dated 6 February 2014, 12 March 2014, 20 March 2014, 14 April 2014, 24 April 2014, 25 April 2014, 1 May 2014 and 20 May 2014,
- 3) Failed to attend the Complaints and Client Relations Committee meeting on 24 June 2014, as required,
- 4) Failed to attend the Complaints and Client Relations Committee meeting on 29 July 2014, as directed by the committee.

The tribunal made the following orders:

- 1) That the respondent solicitor do stand censured,
- 2) That the respondent solicitor pay a sum of €996 (inclusive of VAT) to Richard Lyons SC,
- 3) Pay the whole of the costs of the Law Society of Ireland, to be taxed by a taxing master of the High Court in default of agreement.

**In the matter of John Mark McFeely, a solicitor formerly practising as principal of Hegarty & McFeely Solicitors, 27 Clarendon Street, Derry BT48 7EB, and in the matter**


**of the *Solicitors Acts 1954-2011* [10303/DT91/15]**

*Law Society of Ireland (applicant) John Mark McFeely (respondent solicitor)*

On 20 April 2016, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in that he had:

- 1) Failed to comply with part or all of his undertaking dated 10 May 2006,
- 2) Failed to respond adequately or at all to some or all of the correspondence sent to him by the complainant and, in particular, to letters dated 9 August 2012, 10 December 2012, 28 February 2013, 30 April 2013 and/or 23 August 2013,
- 3) Failed to respond adequately or at all to some or all of the correspondence sent to him by the Society and, in particular, letters dated 19 November 2013, 10 December 2013, 14 January 2014, 10 February 2014, 29 April 2014, 15 May 2014 and/or 25 June 2014.

The tribunal made the following orders:

- 1) That the respondent solicitor do stand censured,
- 2) That the respondent solicitor pay a sum of €1,500 to the compensation fund,
- 3) That the respondent solicitor pay a sum of €2,500 as a contribution towards the whole of the costs of the Society. 



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# FREIGHT FORWARDING CARTELS: IMPORTANT LESSONS

Recent judgments of the European courts resulting from various cartel investigations in the freight forwarding sector shed further light on the interplay between EU and national competition law enforcement.

Article 101 of the *Treaty on the Functioning of the EU* (TFEU) prohibits agreements between undertakings, decisions by associations of undertakings, and concerted practices that have the object or effect of restricting competition with an effect on trade between EU member states. Price fixing, market sharing and other forms of cartel behaviour are seen as 'hard-core' infringements of article 101. The national laws of the various member states each contain provisions that apply article 101 by analogy. (For example, the Irish equivalent is contained in section 4 of the *Competition Act 2002*, as amended.)

Under *EU Regulation 1/2003*, the responsibility for enforcing EU competition rules rests with both the European Commission and member states, namely, national competition authorities (NCAs) and national courts. Article 23(2) of Regulation 1/2003 gives the commission the power to levy fines on undertakings that negligently or intentionally infringe EU competition rules. Article 5 of this regulation grants similar powers to national courts and NCAs, although this provision does not address whether conditions relating to intention or negligence must be met.

## EU and national investigations

Cartels are usually secretive and conspiratorial. Accordingly, the relevant enforcement authorities have found that the best way to detect such infringements is to encourage one of the participants to come clean and cooperate with an investigation in return for immunity from or a reduction in

fines. Many competition regimes operate such immunity or leniency programmes, including in the EU and Ireland. Accordingly, major investigations at both EU and national levels are often triggered by applications for immunity or leniency. Under such schemes, a participant in cartel activity that blows the whistle regarding its co-conspirators may qualify for a reduction in or immunity from fines/other penalties.

## European Union

Following a 2007 application for immunity by Deutsche Post (including its subsidiary DHL) under the 2006 *commission leniency notice*, DG Competition began an investigation into alleged anti-competitive activities in the air freight forwarding sector between 2002 and 2007. The commission focused on four distinct price-fixing arrangements regarding specific freight surcharges. One of the cartels involved an agreed fixed surcharge for completing the so-called 'advanced manifest system' or customs declaration required prior to shipping goods to the USA. Another cartel involved an agreement regarding a 'currency adjustment factor'. This arrangement was designed to mitigate the risk of a drop in profits owing to the 2005 decision of the People's Bank of China to 'decouple' the yuan or renminbi from the US dollar. Ultimately, the commission imposed fines on 14 companies, including Deutsche Bahn and its subsidiary Schenker in 2012. Both companies (and others) appealed to the General Court of the EU.

## Austria

In the mid '90s, SSK (an association of various Austrian-based freight forwarding companies, including DHL and Schenker) was established. SSK agreed prices for

consolidated consignment transport in Austria. This service involves individual freight shipments from different companies being combined into one consignment for logistical purposes before being distributed to various locations. In order to avoid infringing article 101, SSK's members restricted their cooperation to Austria.

Austrian competition law contains an express *de minimis* provision. Under the 1988 cartel law, subsequently replaced by the 2005 cartel law, 'minor cartels' (that is, those arrangements whose participants have market shares below certain thresholds) are lawful under certain conditions. In 1996, the Austrian Cartel Court found that SSK was a 'minor cartel'. Around the same time, SSK sought external legal advice. In letters dated 1996, 2001, and 2005, SSK's specialist competition lawyers advised that this association's activities constituted a 'minor cartel' and were thus lawful, provided the relevant market share thresholds in either the 1988 or the 2005 statutes were not reached. Strangely, none of these advices addressed the issue of whether SSK's activities might infringe article 101.

Following 2007 dawn raids by DG Competition, in all likelihood triggered by Deutsche Post's application for immunity, the Austrian Competition Authority issued proceedings against SSK. It argued that, from 1994 to 2007, this association's members had infringed both EU and Austrian competition rules by fixing the prices for domestic road freight in Austria. However, the Vienna Higher Regional Court stated that SSK's members were entitled to rely on the Cartel Court's 1996 finding of a 'minor cartel'. The Austrian Supreme Court, on appeal, referred the issues to the Court of Justice of the EU (CJEU) in late 2011.

## Italy

In parallel with its application for conditional immunity at EU level, DHL submitted a summary request for immunity to the Italian Competition Authority in 2007 regarding international sea and air freight. As stated above, the commission's investigation ultimately targeted air freight only, leaving the way open for NCAs to pursue potential cartel activity in the maritime and road freight sectors. However, before DHL extended its initial Italian immunity application to encompass road freight, Schenker submitted a request for immunity regarding this sector.

At the conclusion of its investigation, the Italian Competition Authority found that several undertakings had participated in cartel activity. It did not fine Schenker, on the basis that it was the first applicant for leniency, but instead fined DHL. The latter appealed to the Italian courts, claiming that this NCA should have taken account of its application to the commission under the EU leniency programme, which pre-dated Schenker's application under the Italian cartel immunity programme. After its initial appeal was rejected by a local court, DHL appealed to the Italian Council of State, which stayed proceedings and referred the matter to the CJEU.

## European courts

### Austria

In its 18 June 2013 judgment in *Case C-681/11 Bundeswettbewerbsbehörde and Bundeskartellamt v Schenker & Co AG and Others*, the CJEU found that an undertaking commits a negligent or intentional breach of article 101 where it cannot be unaware of the anti-competitive nature of its behaviour. However, an NCA may be able to decide not to impose a fine where the principle of legitimate expecta-



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Being a Corellian YT-1300 Light Freighter, it is likely that the *Millennium Falcon* would not be bound by EU competition rules

tions applies. That said, this principle must be interpreted strictly and a company may not rely on same in the absence of specific assurances from the relevant authority that its behaviour does not infringe EU competition law. The court stated that the advice of an external lawyer cannot form the basis of a legitimate expectation. Similarly, the CJEU also found that, unlike the commission, the rulings of an NCA cannot give rise to a legitimate expectation. An NCA lacks the power to decide under Regulation 1/2003 whether there is no infringement of EU competition law. The court ruled that NCAs were therefore unable to create legitimate expectations that particular conduct is not prohibited under article 101.

The CJEU considered that Regulation 1/2003 does not exclude the power of NCAs to find that a company has infringed EU competition rules without imposing a fine. An NCA can thus decide not to impose a fine under a national immunity/leniency programme provided this scheme's implementation does not undermine the effective enforcement of article 101. The commission has the power either to reduce fines or to grant immunity when certain conditions are met under its 2006 leniency notice. The CJEU ruled that NCAs thus may, by way of exception, also find an infringement without imposing a fine where an undertaking has participated in a national leniency programme.

### Italy

On 20 January 2016, the CJEU found, in *Case C-428/14 DHL Express (Italy) Srl and DHL Global Forwarding (Italy) SpA v Autorità Garante della Concorrenza e del Mercato*, that there is no legal link between an application for leniency to the commission and an application to a national authority in respect of the same cartel. In the absence of a fully harmonised immunity/leniency programme across the EU, the different schemes are independent. Therefore, a national authority is not obliged to take account of a prior application to the commission under the 2006 notice when considering the position of a party subject to a national investigation. Furthermore, the CJEU held that a national authority may allow an undertaking that has not submitted an application for full immunity to the commission to avail of full immunity under the relevant national leniency scheme.

### EU

The General Court issued its judgments on 29 February 2016 (see *Case T-265/12 Schenker Limited v Commission* and *Case T-267/12 Deutsche Bahn AG and Others v Commission*) regarding the various challenges to the commission's decision in the international air freight forwarding cartel. Under the 2006 notice, the evidence provided by the immunity applicant must enable

DG Competition to carry out a targeted inspection of the alleged cartel arrangement. The various appellants, including Deutsche Bahn and Schenker, argued that the 'whistle-blower', Deutsche Post, had not given the commission sufficient evidence to conclude that they were involved in cartel activity. For example, the immunity applicant had not provided any information regarding the 'currency adjustment' cartel.

The court, however, rejected these arguments, stating that the information provided by Deutsche Post need do no more than justify the commission's initial suspicions regarding potential cartel activity. It found that the material provided by an applicant need not relate directly to the specific article 101 infringements ultimately found by the commission.

The appellants also argued that, by treating Deutsche Post's immunity application differently, the commission infringed the principle of equality of treatment. The court rejected this argument by finding that there is a distinction between an application for immunity and the subsequent applications for leniency. This distinction makes sense from a policy perspective, since the commission wants to encourage a cartel participant to 'blow the whistle' as soon as possible, thus allowing DG Competition's investigation of the potential co-conspirators to commence.


Apart from a small reduction in the fine imposed on one of the participants, the court rejected each of the appeals.

### Implications

These cases contain, perhaps, three key lessons for legal practitioners.

First, if you are advising a client who is considering submitting an application to the Irish Competition and Consumer Protection Commission under the [2015 Cartel Immunity Programme](#), it will be important to consider whether the relevant or related activities have an effect outside the State. In this event, you might recommend the client to submit applications for immunity/leniency at EU level and/or in any of the other jurisdictions where the relevant activity may have had an impact.

Second, practitioners should be aware of the interplay between EU and Irish competition rules. When giving advice on the former, it is critical to address whether the latter has an impact (and vice versa).

Finally and perhaps most importantly, once the client takes the decision to blow the whistle regarding a potential cartel, you should not delay before submitting an immunity or leniency application in all relevant jurisdictions. 

*Cormac Little is partner and head of the Competition and Regulation Unit at William Fry.*

# professional notices

## WILLS

**Brady, Patrick (deceased)**, late of Corravilla, Bailieborough, Co Cavan, who died on 13 February 2016. Would any person having knowledge of the whereabouts of any will executed by the said deceased please contact Kelly & Ryan, Solicitors, Manorhamilton, Co Leitrim; DX 5018 Sligo; tel: 071 985 5034, email: [jpfeelely@kellyryanmanor.com](mailto:jpfeelely@kellyryanmanor.com)

**Buckley, Noreen Olive (deceased)**, late of Mayfield, Clonskeagh Road, Dublin 14, who died on 12 April 2016. Would any person having knowledge of a will executed by the above-named deceased please contact Michael Sheil & Partners, Solicitors, Temple Court, Temple Road, Blackrock, Co Dublin; tel: 01 288 1150, email: [info@msheil.ie](mailto:info@msheil.ie)

**Dandy, Joseph (deceased)**, late of 12 Newgrange Road, Cabra, Dublin who died on 8 April 2016. 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 & Partners, Solicitors, High Street, Trim, Co Meath; DX 92002 Trim; tel: 046 943 1202, email: [chiggins@reganmcentee.ie](mailto:chiggins@reganmcentee.ie)

**Fallon, Maureen (deceased)**, late of 7 The Laurels, Terenure Road

**RATES**

## professional notice rates

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

West, Terenure, Dublin 6W, who died on 17 April 2015. Would any person having knowledge of the whereabouts of any will made by the said deceased please contact O'Brien Solicitors, Deerpark Business Centre, Claregalway Road, Oranmore, Co Galway; tel: 091 795 941, email: [law@obrien-solicitors.ie](mailto:law@obrien-solicitors.ie)

**Gallagher, Patrick Joseph (deceased)**, late of 8 Highridge Green, Stillorgan, Co Dublin, who died on 25 September 1989. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Martin C Ryan, solicitor, of 132 Harold's Cross Road, Dublin 6W; tel: 01

496 8219, fax: 01 496 822, email: [martin@martincryan.ie](mailto:martin@martincryan.ie)

**Hernon, Bridget (Bridie) (deceased)**, late of 13 Annamoe Drive, Cabra, Co Dublin, who died on 6 December 2015. Would any person having any knowledge of the whereabouts of any will executed by the above-named deceased, or if any firm is holding same, please contact Pamela O'Loughlin, Actons, Solicitors, Newmount House, 22-24 Lower Mount Street, Dublin 2; tel: 01 661 0655, email: [lawyers@actons.ie](mailto:lawyers@actons.ie)

**Keena, Harriet Philomena (otherwise Philomena) (deceased)**, late of 12 Brookvale Road, Donnybrook, Dublin 4. Would any

person having knowledge of any will made by the above-named deceased, who died on 19 May 2016, please contact NJ Downes & Co, Solicitors, Dominick Street, Mullingar, Co Westmeath; tel: 044 934 8646, fax: 044 934 3447, email: [jwallace@njdownes.ie](mailto:jwallace@njdownes.ie)

**Lynch, Patrick (deceased)**, late of Moate, Aughrim, Ballinasloe, Co Galway, who died on 22 November 2015. Would any person having knowledge of the last will made by the above-named deceased or its whereabouts please contact Hutchinson Davidson & Son, Solicitors, Bridge Street, Ballinasloe, Co Galway; tel: 090 96 42143, email: [info@hutchinson-davidson.ie](mailto:info@hutchinson-davidson.ie)

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**Lynch, Peter (deceased)**, late of 6 Chestnut Grove, Celbridge, Co Kildare, who died on 14 February 2016. Would any person having knowledge of a will executed by the above-named deceased, or if any firm is holding same, please contact Richard McGuinness & Co, 24 Sundrive Road, Dublin 12; tel: 01 492 1544, email: [info@richardmcguinness.ie](mailto:info@richardmcguinness.ie)

**McCrudden, Margaret Mary (Peg) (deceased)**, late of 14 Avondale Court, Nenagh, Co Tipperary, and formerly of Auburn Road, Dun Laoghaire, Co Dublin, who died on 24 May 2016. Would any person having knowledge of the whereabouts of a will made by the above-named deceased, or if any firm is holding same, please contact Maurice O'Callaghan, O'Callaghan Kelly, Solicitors, 51 Musgrave Street, Dun Laoghaire, Co Dublin; DX 6018; tel: 01 280 3399, email: [info@ocslegal.ie](mailto:info@ocslegal.ie)

**Neylon, John (deceased)**, late of 14 Phoenix Court, Castleknock, Dublin 15, and formerly of 291 River Valley Estate, Swords, Co Dublin, and originally of Kilmorane, Darragh, Ennis, Co Clare, who died on 28 December 2015. Would any person having any knowledge of a will made by the above-named deceased please contact Cahir & Company, Solicitors, 36 Abbey Street, Ennis, Co Clare; DX 25009 Ennis; tel: 065 682 8383, email: [reception@cahirsolicitors.com](mailto:reception@cahirsolicitors.com)

**Nolan, Stanley (deceased)**, late of Barker's Road, Carrigduff, Bunclody, Co Wexford, who died on 7 January 2015. Would any person having knowledge of the whereabouts of a will made by the above-named deceased please contact Aisling O'Hanlon, William Fleming & Partners, Solicitors, Belmont House, Kilkenny Road, Carlow; tel: 059 914 6620, fax: 059 914 6632, email: [office@aoh.ie](mailto:office@aoh.ie)

**O'Flynn, Tom (deceased)**, late of 5 Orr Street, Kilmallock, Lim-

erick, who died on 5 April 2016. Would any person knowing the whereabouts of any will executed by the above-named deceased please contact Mr Jonathan Lynam, Finghin O'Driscoll & Co, Solicitors, 11 Pembroke Street, Cork; tel: 021 420 4122, email: [info@fodsolicitors.ie](mailto:info@fodsolicitors.ie)

**O'Keefe, Catherine (deceased)**, late of Mount Carmel Hospital, Clonakilty, Co Cork, and formerly of 48 Terenure Road East, Terenure, Dublin 6, and Flat 7, Garville Court, 140 Rathgar Road, Dublin 6, who died on 24 May 2016. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Ciaran O'Brien, Solicitors, 43 Wolfe Tone Street, Clonakilty, Co Cork; tel: 023 883 3110, email: [info@ciaranoobriensolicitors.ie](mailto:info@ciaranoobriensolicitors.ie)

**O'Sullivan (otherwise Sullivan), Dennis (Din) (deceased)**, late of Kilmastulla, Birdhill, Co Tipperary, who died on 17 May 2005. Would any person having knowledge of the whereabouts of a will made by the above-named deceased please contact Martin J O'Brien Solicitors, Hanly's Place, Nenagh, Co Tipperary; tel: 067 42485, email: [martinjobriensol@eircom.net](mailto:martinjobriensol@eircom.net)

**Smyth, Francis Gerard (deceased)**, late of Portain, Batteredstown, Co Meath. Would any person having knowledge of the whereabouts of the original will, dated 28 March 2002, executed by the above-named deceased, who died on 28 January 2010, please contact Dara Fitzsimons, Steen O'Reilly Solicitors, 31/34 Trimgate Street, Navan, Co Meath; DX 36003; tel: 046 907 6300, fax: 046 902 9274, email: [solicitors@steenoreilly.ie](mailto:solicitors@steenoreilly.ie)

**Walsh, Mary (deceased)**, who died on 14 April 1997, late of 6 Gore Street, Killala, Co Mayo. Would any person having knowledge of the whereabouts of any

will executed by the above-named deceased please contact Orla O'Connell, solicitor, Eamon Murray and Co, Solicitors, 6/7 Sheares Street, Cork; tel: 021 493 7000, email: [orla@murraysolicitorscork.ie](mailto:orla@murraysolicitorscork.ie)

**Walsh, Patrick (deceased)**, who died on 20 June 2015, late of 6 Gore Street, Killala, Co Mayo. Would any person having knowledge of the whereabouts of any will executed by the above-named deceased please contact Orla O'Connell, solicitor, Eamon Murray and Co, Solicitors, 6/7 Sheares Street, Cork; tel: 021 493 7000, email: [orla@murraysolicitorscork.ie](mailto:orla@murraysolicitorscork.ie)

**Williams, Mary (deceased)**, late of 26 Leighlin Road, Crumlin, Dublin 12, who died on 27 January 2016. Would any person having knowledge of the whereabouts of the original last will and testament of the above-named deceased, dated 2 December 1998, please contact Brendan D O'Connor & Co, Solicitors, 179 Crumlin Road, Dublin 12; tel: 01 453 6218, email: [brendanocconnor@eircom.net](mailto:brendanocconnor@eircom.net)

#### MISCELLANEOUS

**Beer retailer's and spirit retailer's off-licence for sale in Co Kerry.** Contact Kelliher Coghlan & Co, Solicitors, Kealgorm House, Limerick Road, Castleisland, Co Kerry; tel: 066 714 1315, fax: 066 714 1766, email: [liam.coghlan@liamfcoghlan.com](mailto:liam.coghlan@liamfcoghlan.com)

#### TITLE DEEDS

**In the matter of the *Landlord and Tenant (Ground Rents) Acts 1967-2005* and the *Landlord and Tenant (Ground Rents) (No 2) Act 1978*: an application by **St Mary's Navan Credit Union Limited****

Vanessa Kim Fraser Smith and/or any person having any interest in the fee simple estate or any intermediate interest in all that and those lands more particularly described in and demised by lease dated 26 May 1945, and made between Elizabeth Nixon of the one

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part and Hugh Gunn of the other part, and being in the townland of Kilballivor, barony of Killaconnigan and county of Meath, containing 38½ perches statute measure or thereabouts, and which is now known as St Mary's Navan Credit Union, Main Street, Ballivor, Co Meath, for a term of 99 years from 1 January 1945 at a rent of £5 per annum.

Take notice that St Mary's Navan Credit Union Limited, being the person entitled to the lessee's interest under the said lease, intends to apply to the Meath county registrar at the Courthouse, Trim, Co Meath, for the acquisition of the fee simple and/or any intermediate interest in the said property, and any party asserting that they hold the fee simple or any intermediate interest in the said property is called upon to furnish evidence of their title thereto to the under-mentioned solicitors within 21 days from the date of this notice.

In default of such notice being received, St Mary's Navan Credit Union Limited intends to proceed with the application before the said county registrar at the end of 21 days from the date of this notice and will apply to the said county registrar for such directions as may be appropriate on the basis that the person or persons beneficially entitled to all superior interests up to and including the fee simple in the said property are unknown and cannot be ascertained and/or cannot be found.

*Date: 8 July 2016*

*Signed: Malone and Martin (solicitors for applicant), Market Street, Trim, Co Meath*



## professional notices

**In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by Fionn Murphy and Shane Byrne**

Any person having a freehold estate or any intermediate interest in all that and those that portion of ground with the houses and buildings thereon formerly known as 'Kelly's Garden', bounded on the north by John Street, on the west by the street or lane known as 'Stoney-lane', on the south by other premises in the occupation of said lessee, and on the east by premises in the occupation of the lessor and lessee, which said demised premises are situate in John Street in the town of Ardee, parish of Ardee, barony of Ardee, and county of Louth, as the same are more particularly delineated and described on the map or plan there hereon endorsed and edged red, subject to lease dated 11 April 1934 between Catherine Callan of the first part and Thomas Halpenny of the second part.

Take notice that Fionn Murphy and Shane Byrne, being the persons currently entitled to the lessees' interest under the said lease, intend to apply to the county registrar of

the county of Louth for the acquisition of the freehold interest and all intermediate interests in the aforesaid properties, and any party asserting that they hold a superior interest in the aforesaid property are called upon to furnish evidence of title to same to below named within 21 days from the date of this notice.

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

*Date: 8 July 2016*

*Signed: Aaron Kelly & Co (solicitors for the applicants), 8 Palace Street, Drogheda, Co Louth*

**In the matter of the *Landlord and Tenant Acts 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) Act 1967: an application by the Health Service Executive***

Take notice that any person having any interest in the freehold estate of or superior interest in the following property: all that and those the property comprised in folio 2349L of the register Co Wexford, more particularly known as no 2B St Peter's Square, Wexford, in the parish of St John's, situate in the townland of Townparks, barony of Forth, and county of Wexford, being the property held under lease dated 15 July 1970 from Nicholas Corish to Thomas Brown for the term of 297½ years from 25 March 1790 at the yearly rate of £2.95 shillings, and held under lease dated 22 July 1823 from Walter Eakins to Peter Sinnott for the term of 264½ years from 25 March 1823 at the yearly rate of £8 sterling and subject to the covenants on the part of the lessee and the conditions contained in the said lease insofar as same relate to or affect the said premises.

Take notice that the applicant, the Health Service Executive, intends to submit an application to the county registrar for the county of Wexford for the acquisition of the freehold interest and any intermediate interests in the aforesaid premises and that any party asserting that they hold a

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superior interest in the aforesaid property are called upon to furnish evidence of title to the aforementioned premises to the below named with 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 Wexford for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the aforesaid premises are unknown or unascertained.

*Date: 8 July 2016*

*Signed: Ensor O'Connor (solicitors for the applicant), 4 Court Street, Enniscorthy, Co Wexford*



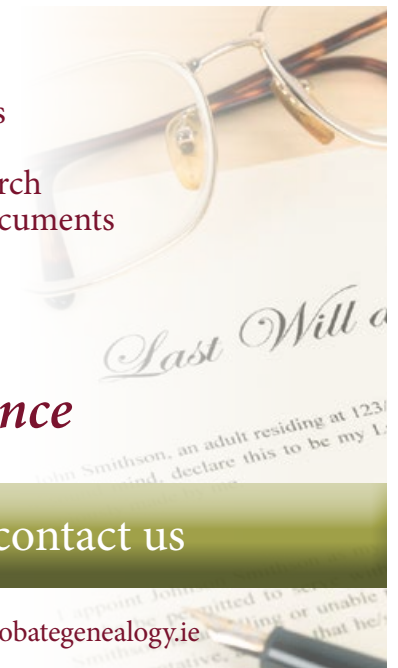
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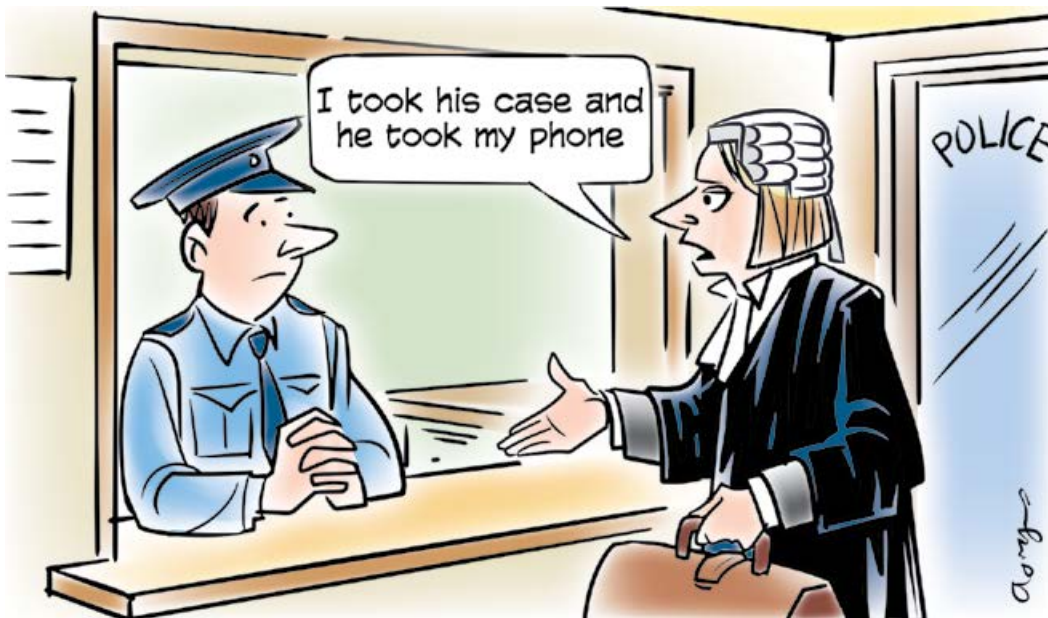
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## cogito ergo bibo



### Thief steals own barrister's phone

A man has been found guilty of stealing his own defence barrister's mobile phone while at court, *Legal Cheek* reports.

Bobby Heath was attending Bexley Magistrates' Court last summer to plead guilty

to possession of cannabis and driving without insurance. Having briefly met Heath to discuss his options, his barrister realised her phone had disappeared. Unfortunately for Heath, he was caught on CCTV

and arrested several days later.

Appearing in court on 13 June, the 26-year-old (currently in jail for another offence) refused to leave his holding cell and was found guilty in his absence.

### This is an ex-parrot – or, the parrot of an ex

A Michigan murder trial could hinge on a parrot that keeps saying "don't f\*\*king shoot!", according to the *Metro website*.

The ex-wife of murder victim Martin Duram is convinced her pet parrot Bud could be the crucial witness in a forthcoming trial. Christina Keller claims that, since the killing, the parrot has spoken about little else. She says that Bud

just keeps saying "don't f\*\*king shoot!" in her former husband's voice over and over again.

"I'm hearing two people in an intense argument – two people that I know, voices that I recognise," says Keller, who believes "don't f\*\*king shoot!" were Duram's final words.

Duram's mother also reckons Bud could provide crucial evidence, telling a local TV station: "That bird

picks up anything and everything, and it's got the filthiest mouth around."

The county prosecutor is apparently keeping his options open, saying: "I'm not aware of any legal precedent for that. Certainly, as we work our way through the case, that may be something to look at, but I highly doubt there is any precedent for that."

### Judge pressgangs juror from street

A judge has invoked a rarely used power to allow him to send court staff onto the streets to recruit an extra juror, reports *The Telegraph*.

On 6 June, Judge Andrew Barnett – relying on a power under section 6 of the *Juries Act 1974* – sent both his clerk and usher out of Salisbury Crown Court and onto the streets in search of a 12<sup>th</sup> juror.

There had been a pool of 14, but after one juror informed the court that he knew the defendant, another knew a detective who worked on the case, and a third fell ill, Barnett was left with just 11. Undeterred and keen to get the sexual assault trial underway on schedule, Barnett sent court staff out on to the streets to hunt for a 12<sup>th</sup>.

Having approached an elderly woman shopping and a man on a bicycle – both of whom politely declined – they found a member of the public willing and able to give up a week of their time. A further two jurors were corralled from nearby courts, and the trial was able to get underway.

A Judicial Office spokesman said: "There is a power for judges

### Pure Kerry gold

A man smeared himself in butter to make it difficult for gardaí to arrest him, *The Irish Times* reports.

Gardaí were called after Michael Rooney (35) broke most of the furniture in his home in Listowel, which he shared with his partner. He barricaded himself inside, stripped to the waist to better apply the butter, and was wielding a 14-inch knife. He roared at them: "Come in ye b\*stards!"

Rooney was wearing only jeans, a previous court sitting had been told. He said he had been imitating a scene from the 2008 movie *Bronson* (based on a notorious English criminal) and had been drinking heavily and was on medication at the time.

Gardaí had to use pepper spray and found it difficult to arrest and handcuff him because of the butter. He was given a suspended sentence on 14 June.



to summon people directly in exceptional circumstances if the jury is incomplete. The power is in section 6 of the *Juries Act 1974*. It's a power that goes back a long way and is colloquially known as 'praying a tales'.



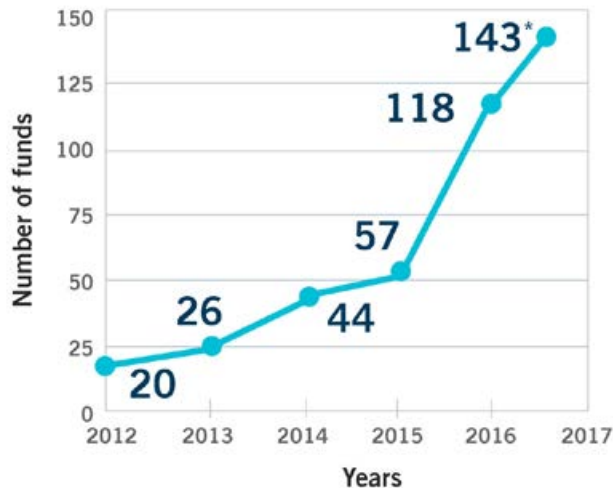
“The firm has amazing depth for cross-border work. The great advantage is that you get the firm’s wide spread of knowledge and experience, keeping things smooth between different offices.” *Chambers Europe, 2016*

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\* Number of funds authorised or in the process of authorisation at end of April 2016.

Source: Monterey Fund Encyclopedias and Central Bank of Ireland public registers. Figures represent total number of funds (including sub-funds).

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Having enjoyed considerable growth over the last three years, the financial services department of this Big 6 law firm seeks to appoint a partner/ partner designate to its debt capital markets practice. The firm acts for both borrowers and lenders with key mandates typically emanating from borrower clients. Suitable candidates will currently be operating at partner level in a large commercial firm in London or Dublin. Senior associates coming from a Magic Circle background will also be considered.

## Tax Associate

€80k-€110k + Bens

This top ten commercial law firm seeks to appoint an ambitious associate to its growing tax department. The team advises on a broad range of big-ticket tax issues across financial services and corporate M&A for both domestic and international clients. Suitable candidates will have gained 2-4 years' experience in corporate and/ or financial services tax with a top tier law or accountancy firm in Ireland or with a Magic Circle firm in London.

## M&A Associate

€80k-€110k + Bens

The corporate M&A department of this Big 6 firm enjoys an unrivalled position in the Irish market and has acted on the majority of the headline domestic and global deals in Ireland over the last five years. With busy workflow, the firm seeks to hire a talented junior to mid-level associate to join their team. Suitable candidates will have gained 2-4 years' corporate M&A experience with a Big 6, mid-tier or international firm in Dublin or with a City of London firm.

## NQ Funds Lawyer

€63k-€68k + Bens

With a reputation in Dublin for technical excellence, commercial nous and superb client servicing capabilities, this heavyweight Big 6 funds group seeks to appoint an ambitious newly qualified solicitor. Typically, team members work on a broad range of product structures for high profile institutional clients. Suitable candidates must have completed a rotation in the funds department of a large commercial law firm in Dublin, London or offshore.

## Real Estate Partner

€130k-€160k

Benefiting from a well-established name in the commercial property sphere, this top ten firm seeks to appoint an additional partner to its busy real estate department. The firm is involved in most of the major property transactions in Ireland and has long standing relationships with high profile investors, developers, funders, receivers and general corporate clients. Suitable candidates will currently be operating at partner level in a large commercial firm in Dublin, Cork or in the UK.

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## Funds Associate

€80k-€130k + Bens

This leading Big 6 Irish law firm seeks to appoint a talented associate to its highly regarded funds department. The team, which has seen double digit year on year revenue growth, advises major institutional investors on a broad range of UCITs and alternative products as well as fund regulatory matters. Suitable candidates will have gained 2-5 years' Irish funds experience with a Big 6, mid-tier or international firm in Dublin, London or offshore.

## NQ Aviation Lawyer

€63k-€68k + Bens

The top flight aviation finance practice of this Big 6 firm seeks to hire an ambitious newly qualified solicitor. Clients of the team, which acts both on Irish and multi-jurisdictional transactions, include high profile domestic and international airlines, lessors and aircraft financing companies. Suitable candidates must have completed a rotation in the aviation/ banking department of a large commercial law firm in Dublin, London or Cork.

For an exploratory conversation about career opportunities, please submit your CV to [bryan.durkan@hrmrecruit.com](mailto:bryan.durkan@hrmrecruit.com) or contact me by phone on +353 1 632 1852. All discussions and applications are strictly confidential.



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Our Client is a full-service international law firm seeking to recruit a Projects/ Construction Partner to assist in the expansion of its Dublin office. You will possess strong technical drafting skills and the ability to deliver a well-focused client service, giving clear, timely and practical legal advice coupled with the pre-requisite enthusiasm for and experience in, business development.

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