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The ECHR and the thorny issue of religious symbols and clothing

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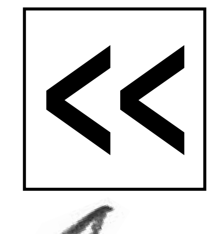

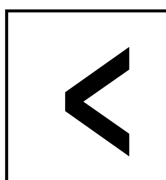

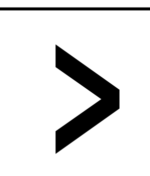

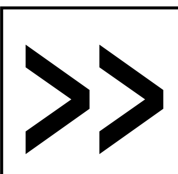

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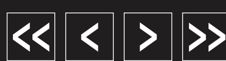

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# FOLLOWING THE SAME PATH

I was never very good at golf. And I sure never had any desire to join a golf club. So there is a certain irony in the comparisons I often hear made between the role of the president of the Law Society and the captain of a golf club. Of course, there are certain parallels. The dinners, speeches and hand-shaking cross both jobs. However, the largest part of this role – as I see it anyway – is our members and what we can do for them. In a golf club, the diverse interests (whether you are good, bad, male, female, etc) are largely aligned to produce a good quality course on which the members can all try to shoot the best score they can.

In the solicitors' profession, there are so many different requirements, concerns and demands of the diverse strands of practice that it can sometimes feel like we have little in common. While it's an understandable thought, I think it's wrong.

### Heading down the fairway

One week in the middle of February for me summed up both the differences and the similarities we have. I have made it a priority this year to meet as many of the individual solicitors in some of the larger firms – all of whom have more solicitors than the average bar association – while, of course, continuing to visit all the local bar associations as well.

On the Tuesday of this week, the director general and I visited the offices of Arthur Cox, where we addressed approximately 80 of their fee-earners, from managing partner and chairman to trainees. The discussion ranged from the education system to Brexit to the *Legal Services Regulation Act*.

Two days later, we headed south to the Wexford Bar Association. The welcoming crowd in the National Opera House mainly consisted of small, local firms whose concerns vacillated from rights of way, to the motor insurance crisis, and also the *Legal Services Regulation Act*.

While the attendees on each occasion worked in firms where they were unlikely to compete with each other for work in any meaningful way, they were all following the same path – solicitors seeking to serve their clients, educate their trainees, and earn a good living.

The reality is that there is far more uniting us than dividing us as a profession. Solicitors in the in-house and public sector (who, combined, now make up 18% of our number) were, in general, once trainees and often solicitors in some of the more traditional types of firms – and, of course, may be again.

### No longer an elite club

What was most enlightening, though, was the event that made a sandwich of these two visits. Much has quite rightly been made of the exceptional portrayal of the Society's access programme and Street Law initiative by RTÉ's *Nationwide* on 15 February. If you haven't seen it, I urge you to do so. It is genuinely heart-warming and reflective of all that is good about our profession. The most uplifting element featured the accounts of two solicitors who had come through the access programme and are now successful solicitors in Belmullet and Skerries. The stories that Kathleen Doocey and Liam Fitzgerald told of their journeys, and the successes they have now made of their careers, should leave no one in any doubt about what can be achieved, whatever your background.

THE MORE DIVERSITY WE SEE, THE LESS WE WILL BE COMPARED TO A GOLF CLUB

The reality is that, although many of us experience very different journeys, the destination is largely the same. We are a profession that has been unfairly and lazily accused of elitism. In order to continue to combat these perceptions, we need to accept our differences and embrace our similarities. The more diversity we see, the less we will be compared to a golf club.

STUART GILHOOLY,
PRESIDENT

COVER: GETTY IMAGES/
NUALA REDMOND

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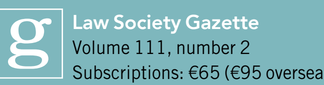


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**www.lawsociety.ie**

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# THE BIG PICTURE

**Romanians protest against government corruption**
More than 50,000 protesters flooded Bucharest's Victoriei Plaza on 12 February, using lights on their mobile phones and coloured paper to create a huge national flag. The fortnight-long protests were against a quietly introduced legal decree issued by the country's one-month-old ruling coalition on 31 January that would have decriminalised corruption by officials in office. The government quickly rescinded the decree on 5 February and Justice Minister Florin Iordache resigned

PIC: EPA/VLAD CHIREA

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# COURTNEY HONOURED

**Dr Tom Courtney (partner in Arthur Cox) has received the 2017 Alumni Award for Law, Public Policy and Government from NUI Galway. Courtney was honoured, along with five other alumni, at an awards ceremony on 4 March.**

**The awards recognise individual excellence and achievements among the university's 90,000 graduates worldwide.**

# FEEDBACK ON COURTS SERVICE WEBSITE

As part of a planned redevelopment of its website, the Courts Service is looking for feedback from users of www.courts.ie.

Visitors to the site are invited to take part in a five-minute survey to understand who is using the website, what they are using it for, any difficulties encountered in using the site, and where they would like to see improvements made.

The feedback will be used by the Courts Service to redesign its new site around the needs and expectations of users.

If you have any queries about the survey, please contact Mark Flanagan at mflanagan@deloitte.ie.

# NEW CHAIR FOR LAWCARE

LawCare has appointed Bronwen Still as its new chair, effective 5 December 2016. Outgoing chair Paul Venton has retired. LawCare is a charity that supports and promotes good mental health and well-being in the legal community throughout Ireland, Britain, the Isle of Man and Jersey.

Bronwen's involvement with LawCare began in the 1980s, when she became a volunteer while working at the Law Society of England and Wales. She has been a trustee of LawCare since 1997.

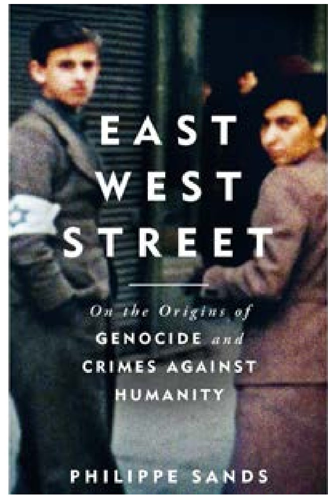
Following her 30-year career at the Law Society, she now works as an independent regulatory consultant and is chair of the Legal Professions Wellbeing Taskforce (an initiative of the Law Society of England and Wales that is being steered by LawCare).

# PERSONAL STORIES OF INTERNATIONAL CRIME

The Courts Centenary Commemoration Committee continues its lecture series with a talk titled 'East West Street: personal stories of international crime'.

Lawyer and writer Philippe Sands QC will explore how personal lives and history are interwoven. Drawing from his new book – part historical detective story, part family history, part legal thriller, and winner of the 2016 Ballie Gifford (Samuel Johnson) Prize – he explains the connections between his work on crimes against humanity and genocide, the events that overwhelmed his family during the Second World War, and an untold story at the heart of the Nuremberg Trial.

The lecture will take place on Wednesday 22 March at 5pm




in the Round Hall, Four Courts, Inns Quay, Dublin.

Free entry with ticket. Apply by email to courtscentenaryevents@courts.ie.

# AUTHOR'S THANKS

**As an addendum to an article 'The EU's role in advancing children's rights' (*Gazette*, December 2016, p32), author Aoife Byrne expresses her thanks to Dr Conor O'Mahony (UCC) for his input and assistance.**

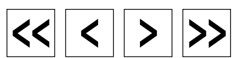
# NORA'S CHOICE AWARD

**Nora Lillis (partner and head of William Fry's private client group) has won the 'private client' category for Ireland at the Client Choice Awards 2017. Nora received the award in London on 9 February.**

**The award recognises her expert legal and taxation advice in the area of trusts and estates.**

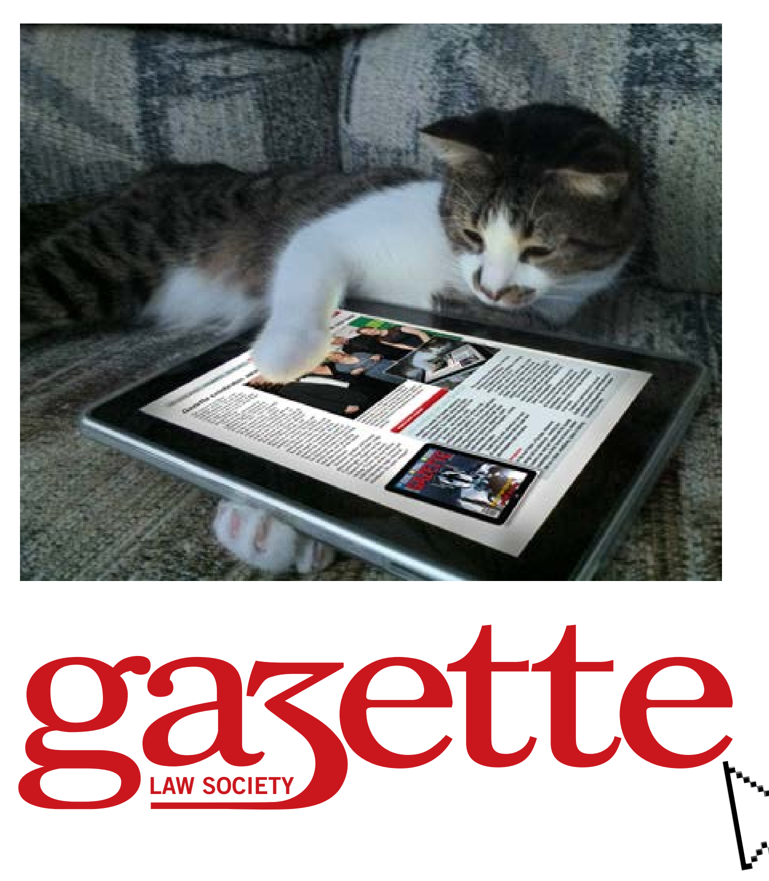
**This year's winners were chosen from a pool of more than 2,000 individual client assessments.**

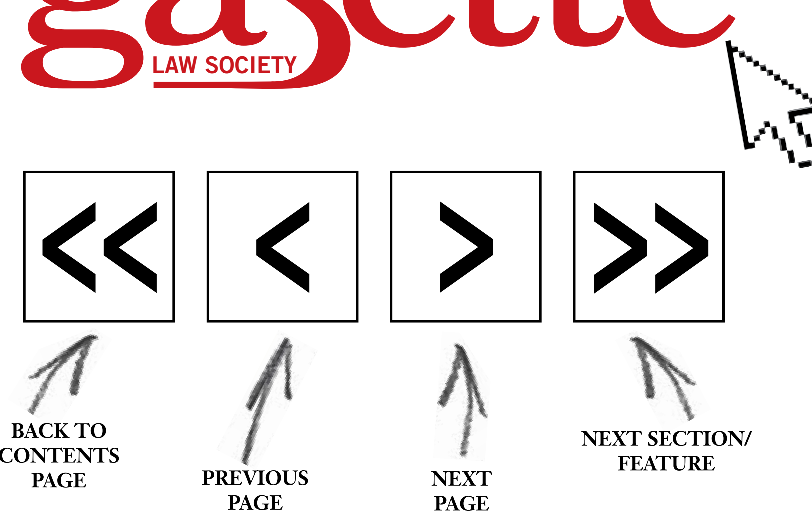
**A former chair of the Law Society, Probate, Administration and Trusts Committee, Nora was awarded the 'Best in Trusts and Estates Lawyer in Europe' award at the Europe Women in Business Law Awards 2016.**



# Have you played with us yet?

Because we have **issues...**



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# AWARD RECIPIENT CONDEMNS TURKEY INACTION

One of the winners of a European human rights award has condemned the international community's lack of action over the serious human rights abuses currently taking place in Turkey.

Ms Ayşe Bingöl Demir said that there had been "no effective response from the international community to the grave violations of human rights during this long period".

Speaking at the tenth Human Rights Award of the Council of Bars and Law Societies of Europe (CCBE) in Brussels on 2 December 2016, Ms Bingöl Demir highlighted how important it was that the international community should support Turkey's human rights lawyers "as it shows that the work of Turkish lawyers is seen and that there is still hope".

The CCBE presented its 2016 Human Rights Award to four Turkish lawyers who have been particularly active in the defence of human rights and the rule of law. The award was granted posthumously to Tahir Elçi (assassinated in November 2015) and to Ayşe Bingöl Demir, Ayşe Acinikli and Ramazan Demir.

## Travel bans

Due to travel bans imposed on them following their arrest, Ayşe Acinikli and Ramazan Demir were unable to attend the ceremony. They sent videos thanking the CCBE and explained the difficult situation for lawyers in Turkey. Ms Ayşe Bingöl Demir and Mr Elçi's widow, Turkan Elçi, travelled to Brussels to accept the award on their behalf.

According to the CCBE's latest figures, approximately 3,000 judges and 300 lawyers have been arrested or detained in Turkey. Following the failed coup last July, human rights and the rule of law have been severely undermined following the enactment of 11 decree laws under state-of-emergency legislation.

Stavros Lambrinidis (EU Special Representative for Human Rights), Ayşe Bingöl Demir (award recipient), Turkan Elçi (widow of recipient Tahir Elçi), Michel Benichou (CCBE president) and Patrick Henry (CCBE Human Rights Committee)

"Hundreds of civil society organisations have been shut down, with many being detained incommunicado," the CCBE said. "A wide censorship on media has been put in place and thousands of public servants (including judges and prosecutors) have been removed from office and arrested. Against this background, lawyers are facing overwhelming obstacles in defending their clients," the organisation warned.

Anti-terrorism laws have had a serious impact on lawyer/client confidentiality. For example, clients' interviews in prisons are recorded and often take place with a police officer present. Documents can be checked and confiscated. Clients in police custody have no access to a lawyer for the first five days – and this right can be suspended for up to six months.

The CCBE drew attention to a statement issued by the Union of Turkish Bar Associations and the local bar associations last November, warning of the crackdown that had ensued since the attempted coup.

The statement, signed by Dr Metin Feyzioglu (president of the union), warned: "The independence and impartiality of the judiciary, which were already problematic, have been completely demolished."

He added: "The reinstatement of the death penalty will lead to Turkey being extracted from the Council of Europe. In spite of being aware of this, the political power has started the campaign for [the] death penalty and has been escalating it with the aim to get a result.

"The extraction of Turkey from the Council of Europe means a radical shift in our path that we have been following since the Tanzimat reforms of the Ottoman period. This implies that we will no longer be a party to the *European Convention on Human Rights*.

"And to quit the *European Convention on Human Rights* means that the fundamental rights and freedoms of the citizens of the Republic of Turkey will become completely unsecured and that we will be robbed of our right to apply individually to the European Court of Human Rights."

# VIEWS SOUGHT ON *MEDIATION BILL*

**The long awaited *Mediation Bill* was published on 13 February 2017. The bill, once enacted, is likely to have a transformative effect on how civil law disputes are processed and resolved.**

**The impact on disciplines will vary, notwithstanding some of the exemptions included in the published bill. It sets out a range of conditions for mediation, the duty of solicitors and barristers, and the provision of a Mediation Council.**

**Members are invited to review the bill, and to submit their views and comments to mediationbill@lawsociety.ie, which may be considered as part of a Society response.**

**The bill can be accessed directly at https://goo.gl/wfbHBc.**

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**Please share your opinions and experiences by completing a short survey, which will take about five minutes.**

**The survey can be found at www.lawsociety.ie/tellthegazette. Hopefully it'll be a pain-free experience!**

**Your feedback will be used to further develop the *Gazette* to best meet our readers' online requirements.**

# ALASTAIR CAMPBELL ANNOUNCED AS SPRING GALA DINNER SPEAKER

Alastair Campbell has just been announced as the Law Society Spring Gala dinner speaker. In his remarks, Alastair will address issues related to Brexit. He is the former British Prime Minister Tony Blair's spokeman, press secretary and director of communications and strategy.

Tickets are selling fast – members should book soon to avoid disappointment. Generously sponsored by Grant Thornton, this new event is replacing the Law Society's Annual Conference and is set to be the premier legal occasion of the year. The event takes place in two parts, which can be purchased separately or together.

On 24 March at the Intercontinental Hotel in Dublin, the day will begin with the Law Society Skillnet Symposium, featuring international experts addressing our theme, miscarriages of justice. Speakers include Microsoft attorney Matti Neustadt Storie, US Court of Appeal Judge Susan Graber, US attorney and author Steven Wax, and Judy Khan QC.

That evening, the black-tie Spring Gala will take over the ballroom of the Intercontinental. Here, Alastair Campbell will speak of the impacts and challenges of Brexit.

Proceeds from the Gala will be donated to the Solicitors' Benevolent Association, which assists solicitors and their families who are in need.

More details on p14. To book, visit www.lawsociety.ie/springgala.

# IS YOUR WEBSITE SECURE?

From January 2017, major browser suppliers Chrome and Firefox are introducing warning messages in their URL (web address) bars where a web page is 'not secure' and that page contains a password or credit-card field.

Non-secure in this context means a page that is delivered by 'http' and not 'https'. Https is a secure variant of the http protocol and creates secure connections by providing authentication and encryption between the browser and the source of the web page. Https helps keep users safe from eavesdropping and tampering. If your web page has a password or credit-card field and the page is not using https, Chrome and Firefox will display an exclamation icon followed by a message stating 'not secure', which is intended to be a red flag to users. Furthermore, both browser vendors have confirmed that, eventually, they plan to label all http pages as non-secure and change the security indicator currently in the URL bar to the red triangle used for broken https pages. This, effectively, means the browsers are telling users and developers that they want all pages to be secured by the https protocol.

Chrome and Firefox have a combined market share in excess of 60% in Ireland, so this change has the potential to affect the user experience significantly.

# NOTICE OF SBA AGM

**The 153rd annual general meeting of the Solicitors' Benevolent Association will be held at the Law Society, Blackhall Place, Dublin 7, on Monday 10 April at 12.30pm to consider the annual report and accounts for the year ended 30 November 2016, elect directors, and to deal with other matters appropriate to a general meeting.**


## Bank of Ireland Payment of Accountable Trust Receipt (ATR) Fee 2017

**As part of our ongoing commitment to reduce cheques, Bank of Ireland recently moved to accepting the payment of the Accountable Trust Receipt (ATR) fee, currently €63, by electronic funds transfer (EFT).**

**Bank of Ireland would now like to advise that with effect from 31 March 2017 payment will only be accepted by EFT and we will no longer accept cheques for ATR Fees.**

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# CLEAR COMMUNICATION SAVES COSTLY COURT CASES

The use of plain English when drafting legal documents, including contracts, can save companies time and money by avoiding unnecessary legal costs. That's the central message in a new booklet called *Plain English and The Law: The Legal Consequences of Clear and Unclear Communication*, published jointly on 9 February by the National Adult Literacy Agency (NALA) and Mason Hayes & Curran.

The booklet presents the lessons learned from three Irish legal cases, two of which show how unclear language was argued in court. A third example reveals how a case was won because it was proven that a company had provided clear information to a consumer. The cases referred to include:

- *Ickendel Ltd v Bewley Café Grafton Street* – a lesson for landlords and tenants,
- *Corbally v Medical Council* – a lesson for regulators,
- *ACC Bank v Kelly* – a lesson for consumers and banks.

Promoting plain English – Declan Black (managing partner, Mason Hayes & Curran) and Inez Bailey (CEO, NALA) at the booklet launch

In his foreword to the booklet, President of the High Court Mr Justice Peter Kelly comments that these case studies are cautionary tales. "Having spent 20 years as a judge of the High Court and the Court of Appeal, I have seen many instances where the use of plain English would have avoided litigation. This book provides an opportunity to promote the use of plain English, particularly in the business world. One would expect the business community to be fully supportive of the plain English movement, if for no other reason than that it will save money."

Divided into three parts, the booklet deals with:

- The evidence of the legal consequences of unclear communication in three court cases in Ireland,
- What plain English is and how it is gaining traction – from public demands for clear consumer contracts, to the emphasis on plain language in the Central Bank of Ireland's *Consumer Protection Code*,
- Guidance on how to write in plain English, words and phrases to avoid, document design tips, and other useful resources.

Speaking at the launch, Inez Bailey (CEO of NALA) said: "Giving people information in a language they understand enables them to make informed choices, access their entitlements, and meet their legal opportunities. Not only does it make good business sense, but it's fair."

Declan Black, representing co-publisher Mason Hayes & Curran, added: "We often see that poorly written communications lead to misunderstanding and disputes. Every day, businesses settle cases or deal with regulatory issues that could have been avoided if communication was clear, accurate, and in plain English."

# COMMERCIAL MEDIATION – THE GOOD, THE BAD AND THE UGLY

The Irish Commercial Mediators' Association (ICMA) will be holding its annual conference on Friday 31 March in the St Stephen's Green Hibernian Club, Dublin 2, from 8am to 12 noon. The theme is 'Commercial mediation in Ireland today – the good, the bad and the ugly'.

Mr Nicholas Kearns (former president of the High Court) will give the opening address. National and international mediators, solicitors, and in-house lawyers will share their insights into mediations they have been involved in, and the lessons learned. The discussion will be chaired by Dermot McEvoy (chairman, ICMA, and partner at Eversheds Sutherland).

The event is free and admission is open to Law Society members once they register in advance. Places are strictly limited and will be allocated on a first-come, first-served basis. To register, email Rosemary Pollard (Eversheds Sutherland) at rosemarypollard@eversheds-sutherland.ie.

# ATTACKS ON BRITISH JUDGES 'UNDERMINE RULE OF LAW' SAYS SUPREME COURT PRESIDENT

The president of the Supreme Court in Britain, Lord Neuberger, has criticised politicians for failing to defend three judges who were severely criticised by certain news outlets after the British government lost the first stage of its legal battle to trigger Britain's exit from the EU.

A *Daily Mail* front-page story headline referred to the three judges who had decided on the case as "enemies of the people" who had "declared war on democracy" by "defying 17.4 million Brexit voters and who could trigger a constitutional crisis".

The story relayed how "MPs last night tore into three 'out of touch' judges for ruling that embittered 'Remainers' in parliament should be allowed to frustrate the verdict of the British public" and commented that "the Lord Chief Justice and two senior colleagues were accused of putting Britain on course for a full-blown 'constitutional crisis' by saying Brexit could not be triggered without a Westminster vote".

The story sparked a furious row, with MPs from all parties accusing Liz Truss (secretary of state for justice) of not standing up for an independent judiciary.

The president of the Supreme Court, in a BBC *Radio 4* interview on 16 February, said that politicians had failed to speak out quickly or clearly enough, especially after the initial High Court hearing, and that some media attacks had been unfair.

Lord Neuberger: 'Our view of life is very different from that of the media'

While Lord Neuberger did not single out any newspaper or politician for criticism, he said: "We [judges] were certainly not well treated. One has to be careful about being critical of the press, particularly as a lawyer or judge, because our view of life is very different from that of the media."

He added that undermining the judiciary also undermined the rule of law, as judges were "the ultimate guardians" of it: "The rule of law, together with democracy, is one of the two pillars on which our society is based," he said. "And, therefore if, without good reason, the media or anyone else undermines the judiciary, that risks undermining our society."

# REFUGEES IN 'PRECARIOUS CIRCUMSTANCES'

The recent decision by the US to suspend its refugee resettlement programme could leave up to 20,000 refugees in "precarious circumstances", the UN refugee chief Filippo Grandi has warned, *report Zakia Laassri and Katie Whelan*. An executive order by US President Donald Trump recently suspended the country's refugee resettlement programme for 120 days.

Speaking after a four-day visit to Syria in early February, the UN High Commissioner for Refugees (UNHCR) said that the US decision would negatively affect "the most vulnerable individuals". He expressed the hope that the US would resume resettlements following its internal review of the programme.

Grandi warned developed countries against politicising the issue of refugees: "Resettlement means taking refugees from places like Lebanon, where they are already refugees, selecting the most vulnerable and taking them to other places", he said. "If we weaken that programme, as has been done in the United States, this is a very dangerous weakening of the international solidarity for refugees."

PIC: EPA/LIBYAN RED CRESCENT

Libyan Red Crescent volunteers recovered at least 74 bodies of suspected refugees, washed ashore at the coast near Al Zawiya, Libya, on 20 February 2017

The office of the UNHCR and the International Organisation for Migration (IOM) have also issued a stinging criticism of Libya, describing it as an unsafe country that is unsuitable for extraterritorial processing of asylum seekers in North Africa. Both agencies called on the European Council to "better protect refugees and migrants". They have asked for "concerted efforts to ensure that sustainable migration and asylum systems are put in place in Libya, when the security and political situation permits", and in neighbouring countries.

Despite having made "tremendous efforts to deliver basic protection to refugees, migrants and affected local populations", the UNHCR and IOM say that security constraints continue to hinder their ability "to deliver life-saving assistance, provide basic services to the most vulnerable, and find solutions through resettlement, assisted voluntary return, or self-reliance".

# SHOULD YOU SERVE ON THE BOARD IF ASKED?

From time to time, in-house lawyers may receive invitations to serve on the board of directors of companies within their clients' groups, *writes Robert Heron (In-house and Public Sector Committee)*. But should they accept such invitations?

While there is no regulatory position on whether an in-house lawyer should serve on the board of their client company, it is clear that taking on a board position involves increased risk for the lawyer and the client, and you should only do this after careful and detailed consideration.

There is no regulatory rule or guidance on this question in Ireland so, in principle, in-house solicitors are free to serve as directors of client companies.

PIC: GETTY IMAGES

Serving on the board could leave you feeling conflicted

### Obvious advantages

The professional and career development advantages for any corporate counsel asked to join the board of directors of their client/employer are many:

- Gaining a wider understanding of the business,
- The opportunity to work closely with the business's decision-makers,
- The chance to participate in, and influence, commercial decision-making,
- Experiencing how the business receives and uses external legal advice, and
- Increasing your profile in the organisation.

It is also an advantage for the business client to have legal input directly at board level on a continuous basis.

### Less obvious disadvantages

The disadvantages for the lawyer and their client may be less obvious.

*Conflicting duties* – as a practising solicitor, your duty as an officer of the court is paramount. This is already an area of sensitivity for in-house counsel. Acting as a director increases the possibility for conflicts to occur between your duty to the corporation and your duty as a solicitor.

*Conflicting interests* – an example of potentially conflicting interests is where an in-house lawyer acting as a director has participated in a management decision and is subsequently called on to provide legal advice on it.

*Higher exposure to personal liability* – it is obvious in a general sense that you are more at risk of personal civil, regulatory and criminal liability through actions (or omissions) as a director than you already are as a lawyer.

*Uncertainty about availability of insurance cover* – any professional indemnity policy you hold as a lawyer may not respond in relation to your acts or omissions as a director.

*Further erosion of legal privilege* – it feels like the coastal defences of legal professional privilege are suffering continual erosion (witness the latest English Court of Appeal decision in the RBS rights issue litigation). There is no reason to believe that communications made by a lawyer in the capacity of a director attract legal advice privilege or litigation privilege.

### Disadvantages for the client

All of the above, plus:

- The lawyer acting as a director may be less independent as a result of their participation in corporate decisions. This can lessen their value to the corporation.
- There might be a negative impact on the corporation if the lawyer is put in a position where they have to resign as a director.

### Mitigating negative effects

Carry out your own due diligence before accepting an invitation to serve as a director. Assess how risky the role is likely to be or to become, especially in light of the company's financial condition, and assess the governance standards and practices in the company.

It should go without saying that, as a director, you will have access to all relevant information. It is also critical that the board really exercises its responsibility for managing the business of the company. Is this a role where it is likely that your two roles can sit comfortably side by side?

Is there an indemnity available, either in the company's constitution or from another group company (of substance)? Is there adequate and sufficient directors' and officers' insurance cover?

Explain your analysis of the advantages and disadvantages to the chairman of the board of directors you are being asked to join, as well as to the group CEO and your line manager. They need to know the risks and, especially, to know that – however unlikely this may be – you could be professionally required to abstain from decisions, or even resign from the board in some circumstances.

Ensure that external legal advisers are in place and, where required, can be called on to advise the board (including you as a director) on any decision that carries obvious risk (this will also reduce the risk of losing privilege). If you do give legal advice to the board of which you are a member, ensure that this is either identified separately in the minutes or documented outside the board minutes.

SELLING FAST!

# SPRING GALA

*and*

# LAW SOCIETY SKILLNET SYMPOSIUM

## Friday 24 March 2017

INTERCONTINENTAL HOTEL, BALLSBRIDGE, DUBLIN.

Book now for a new event featuring a Symposium of five speakers from around the world who will address our theme, **Miscarriages of Justice**. This will be followed by a black-tie dinner featuring our speaker, Alastair Campbell. See page 10 for more information.

SPRING GALA DINNER PACKAGES

Table dinner package for ten guests: €2,000.
Individual dinner seats: €200 per person.

THE LAW SOCIETY SKILLNET SYMPOSIUM

€176 per person (€150 for Skillnet members), which includes 5.5 CPD hours, lunch and tea/coffee breaks.

To book your place, visit **www.lawsociety.ie/springgala**

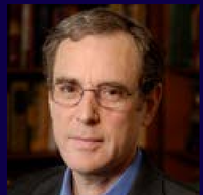
SPONSORED BY

# MISCARRIAGES of JUSTICE

## SPRING GALA SPEAKER ALASTAIR CAMPBELL

Alastair will speak at the Spring Gala dinner and will address issues related to Brexit. Alastair is a writer, communicator and strategist; he is the former British Prime Minister Tony Blair's spokesman, press secretary and director of communications and strategy

### Symposium Speakers and Topics include the following:



**Steven Wax**
Award winning US attorney and author: 'Fighting for justice from Portland to Peshawar – a public defender's inside account'.

**Judy Khan QC**
Award winning QC at the Legal Aid Lawyers of the Year Awards 2016: 'Miscarriages of justice – the UK perspective, the Hillsborough tragedy and others'.

**Judge Susan Graber**
United States Court of Appeal Judge: 'A judicial perspective on miscarriages of justice – 75 years after Japanese-American internment'.

**Matti Neustadt Storie**
Microsoft, Corporate, External and Legal Affairs: 'Technology's response when the law fails – the future legal landscape for the protection of electronic data for EU citizens and business'.

GALA PROFITS WILL BE DONATED TO THE SOLICITORS' BENEVOLENT ASSOCIATION

# THERESE CLARKE RETIRES AFTER 24 YEARS' SERVICE

Therese Clarke, solicitor, has retired after 24 years of outstanding service to the Law Society and the profession. One of the most popular individuals in the Society, her colleagues gathered at the end of February to pay tribute to her and wish her well for the future.

Therese ultimately performed two separate roles in the Society. She would be best known to the profession for the assistance she gave to practising solicitors on a daily basis in responding – always courteously, helpfully and authoritatively – to requests for practical guidance on what represented good conduct for solicitors in particular factual situations.

Therese was for many years the secretary to the Society's Guidance and Ethics Committee. She was an acknowledged expert on the application of the profession's ethical conduct rules in the endless variety of situations that arise in practice. Hers was never an 'ivory tower' approach. It was one that sought to provide practical solutions for colleagues, although always in line with the proper standards of conduct that are at the core of the profession's value system.

Separately, Therese led the team of Society staff who are involved in the vitally important work done, in the public interest and that of the profession's reputation, in dealing with client files in practices closed by order of the courts or abandoned by solicitors.

PIC: MICHAEL BUTLER

Among the most difficult 'practice closures' that she managed with her staff (simultaneously from October 2007 onwards) were the practices of Michael Lynn and of Thomas Byrne. Both practices, together with a great many others over the years, were wound-down and closed with great legal precision, calm and efficiency under the direction of Therese Clarke.

In paying tribute to her, the director of regulation John Elliot said that Therese was not merely a superb time manager and a great team leader, she was one of the nicest people you could ever meet. Director general Ken Murphy agreed and added that she had earned the thanks of countless numbers of practising solicitors with her expert advice on ethical questions. "The Society's updated *Guide to Good Professional Conduct*, published in 2013, is her legacy to the profession", he concluded.

# LADY SOLICITORS' GOLF SOCIETY

**The Lady Solicitors' Golf Society, founded some years ago by a number of our esteemed colleagues (including the wonderful Moya Quinlan), is open to all lady solicitors and trainees – practising or not. Guests are also welcome.**

**The Society organises two outings each year. The details of the 2017 outings are:**

- **The Patrick O'Connor Trophy – 7 April 2017 at Killeen Golf Course, Kill, Co Kildare, and**
- **The Moya Quinlan/Sheila O'Gorman Trophies – 8 September 2017 at Glasson Golf and Country Club, Glasson, Co Westmeath.**

**Two mixed outings are held each year with our gentlemen colleagues and the Bar, in July and October.**

**These events are a great opportunity to meet up with colleagues and friends from all over the country and to enjoy a game of golf and dinner. All are welcome, regardless of handicap or standard. If anybody wishes their name to be added to the circulation list, please contact the current Lady Solicitors' Golf Society captain, Deirdre Gearty, at deirdrelsgs17@gmail.com.**

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# EDUCATION SYSTEM IMPRESSES DUTCH BAR

*(Front, l to r)*: Raffi van den Berg (secretary general, Netherlands Bar), Bart van Tongeren (president, Netherlands Bar), Stuart Gilhooly (president, Law Society), Bert Fibbe (vice- president, Netherlands Bar) and Lucas Korsten (policy advisor, Netherlands Bar). *(Back, l to r)*: Michael Quinlan (senior vice-president), Eva Massa (course manager, Law School), Ken Murphy (director general), Colette Reid (course manager, Law School) and TP Kennedy (director of education)

A delegation at the highest level from the Nederlandse Orde van Advocaten (the Netherlands Bar), led by the Bar's president, Bart van Tongeren, visited Blackhall Place on 13 February 2017 as part of a project under which they are reviewing the training system for admission to the legal profession in the Netherlands.

They were hosted for lunch by President Stuart Gilhooly; but both before and for many hours after that, the Netherlands Bar delegation met with senior executives in the Law School, where the Society's education and training for solicitors (both pre and post-admission) was explained to them in great detail.

They openly acknowledged that much of what they saw and learned about the Law Society's education system impressed them greatly. The system for qualifying as a lawyer in the Netherlands is very different but, they believe, is in need of revision and improvement. It seemed to them likely that a great deal of the learning-by-doing and skills-focus of what they saw at Blackhall Place will find its way into their report and recommendations for change in the Netherlands.

They confessed themselves particularly envious of the Law School facilities at Blackhall Place, which have no counterpart in the Dutch Bar. Indeed, President van Tongeren was even envious of the fact that the Law Society president had his own parking space! There is no parking space for the president, he remarked ruefully, at the Netherlands Bar's headquarters in The Hague.

# SOLICITORS OF THE FUTURE VISIT BLACKHALL

A total of 45 transition year (TY) students from schools around the country visited the Law Society from 7 to 10 February to take part in the annual 'Solicitors of the Future' programme.

The four-day event introduced students to the solicitors' profession and combined lectures and hands-on work experience.

Open to schools around the country, the Solicitors of the Future programme encourages TY students to consider a career in law. It offers an insight into the roles of solicitors in practice.

PIC: JASON CLARKE PHOTOGRAPHY

Those involved in training included a retired judge, solicitors and barristers, Law Society staff members and trainee solicitors. Students got to sit in on cases being heard in the Criminal Courts of Justice, took a tour of some of the larger commercial law firms in Dublin, and participated in expert-led workshops, courtroom activities, a careers seminar and mock trial.

More information about the programme can be found at www.lawsociety.ie/Public/Transition-year-programmes/Solicitors-of-the-Future.

The registration procedure and timeline for 2018 will be announced later in 2017.

# A NIGHT AT THE OPERA HOUSE

The Wexford Solicitors' Association (WSA) held an informal meeting with Law Society President Stuart Gilhooley and director general Ken Murphy at the National Opera House, Wexford, on 16 February. Topics of interest included motor insurance hikes, taxation of legal costs, new section 150 letters, the implications of Brexit and difficulties surrounding registration of certain rights of way. *(Front l to r)*: Eadaoin Lawlor, Susan Murphy, Stuart Gilhooly (president, Law Society), Martin Lawlor (chairman, WSA), Ken Murphy (director general) and Siobhán Dunne (secretary, WSA). *(Middle, l to r)*: Ed King, Geraldine Fahy, Carina Mannion, Sarah Breslin, Bríd O'Leary, Anne Leech, June O'Hanlon, Mandy Walsh and Nigel Allen. *(Back, l to r)*: Liam Hipwell, Seán Lowney, Damien Jordan, Cormac Mullen, Rory Deane, Bill O'Connor and Paul Ebrill

# EXECUTIVE LEADERSHIP MANAGEMENT PROGRAMME CONFERRAL

At the recent conferring for the Law Society Finuas Network Executive Leadership Management Programme were *(from l to r)*: Paul Manley (Law Society Finuas Network), Sorcha Hayes (Law Society), Hilkka Becker (solicitor and member of the Refugee Appeals Tribunal), Carol Plunkett (chairman, Law Society Finuas Network), Tracey Donnery (executive director programme development, Skillnet), Margaret Walsh (Sheil Solicitors), Antoinette Moriarty (programme leader, Law Society), Attracta O'Regan (head of Law Society Finuas Network), Grainne Hassett (Bank of Ireland), Michelle Nolan (Law Society Finuas Network), Johanna Fullerton (Seven), Mary-Claire Coakley (DFMG Solicitors), Barry Creed (McDermott Creed & Martyn), Colette Cahalane (Seven), Eadine Hickey (Resonate Leadership) and Seán Ó Tarpaigh (Crann Counselling). Due to the success of the inaugural programme, this course will run again in early 2017

# DIPLOMA IN TECHNOLOGY LAW

PICS: JASON CLARKE PHOTOGRAPHY

At the Diploma Centre's conferral ceremony 2016 for the Diploma in Technology Law were Stuart Gilhooly (president, Law Society), Ms Justice Mary Laffoy (Supreme Court), Judge John O'Connor (District Court), Helen Dixon (Data Protection Commissioner), Freda Grealy (head of the Diploma Centre), Claire O'Mahony (course leader, Diploma Centre); lecturers: Daragh O Brien, John Darby and Paul Egan, with conferees Lynn O'Sullivan (prize winner), Bernard Coen, Collette Donelan, Frank Egan, Anthony Ellis, Brian Halligan, Nicolette Lennox, Alan Lynch, Colm MacCarvill, Rowena McCormack, Olive M McDaid, Cathal McLaughlin, Eileen McMahon, Tien Nghiem, Eimear O'Brien, Julio Ramírez, Niamh Roddy and Lisa Taylor

# LEGAL PRACTICE DEVELOPMENT CERT

Ms Justice Laffoy presents Valerie Peart (prize winner) with her parchment for the Certificate in Legal Practice Development

# ENVIRONMENTAL AND PLANNING LAW

Judge John O'Connor presents Leesha O'Driscoll (prize winner) with her parchment for the Diploma in Environmental and Planning Law

# DIPLOMA IN MEDIATION

President of the High Court Mr Justice Peter Kelly presents his sister Maria Kelly with her Diploma in Mediation parchment

# FINANCE LAW DIPLOMA

Ms Justice Laffoy presents Paul Christopher Hannon (prize winner) with his parchment for the Diploma in Finance Law

# CONSTRUCTION ADJUDICATION MASTER CLASS CONFERRAL

Pictured at the recent conferring for the Law Society Skillnet Construction Adjudication masterclass are *(from l to r)*: Conor Cahill (Sheehan & Co), David McCarthy (TDR Quantity Surveying Service), Cathie Shannon (Beale & Co Solicitors), Clare Cashin (Philip Lee Solicitors), James O'Donoghue (Bluett & O'Donoghue), Katherine Kane (programme coordinator, Law Society Skillnet), Carol Plunkett (William Fry Solicitors), Tracey Donnery (executive director programme development, Skillnet), Attracta O'Regan (head of Law Society Skillnet), Fiona O'Neill (Beauchamps), Pamela Hanley (Chief State Solicitor's Office) and Michelle Nolan (Law Society Skillnet). Due to the success of the inaugural programme, it will run again in early 2017

# STREET LAW PROGRAMME CONFERRAL

PIC: CIAN REDMOND PHOTOGRAPHY

Pictured at the recent Diploma Centre conferring ceremony for the Street Law Programme 2016 are Brendan Twomey, Mr Justice Colm Mac Eochaidh, Freda Grealy and John Lunney with trainee solicitors Caoimhe Stafford, Margaret Hayes, Martyna Brulinska, Gillian Cantrell, Kathriona Cunnane, Zoe Ennis, Amy Eustace, Daniel Griffin, James Hodgson, Katie Keogh, Michaela Lawless, Hayley Maher, Micheal McCarthy, Fiona McGowan-Smyth, Grace Moore, Eoghan Moore, Aoife Nannery, Ailbhe Ni Bhriain, Patrick O'Donovan, Daniel Price, Aisling Ryan, Agnieszka Siwiera, Carla Smyth, Rebecca Townsend, Karen Walsh, Ruth Walsh and Caitriona Clear

# ASYLUM AND IMMIGRATION TRAINING

PIC: MICHELLE NOLAN

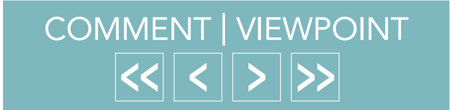
Pictured at the recent TRALIM (Training of Lawyers on European Law relating to Asylum and Immigration) event, which took place on 2-3 February, were *(l to r)*: Commander Patrick Burke (Brigade Legal Officer, Irish Defence Forces), Catherine Cosgrave (senior solicitor, Immigrant Council of Ireland), John Davis (senior solicitor, Immigration Section, Chief State Solicitors Office), Attracta O'Regan (head of Law Society Professional Training), Hilkka Becker (senior solicitor and deputy chairperson, International Protection Appeals Tribunal), Noemí Alarcón Velasco (Spanish lawyer and vice-chair of the Council of Bars and Law Societies of Europe's Migration Committee) and Eva Massa (Law Society)

# ALL IN A DAY'S WORK

An Taoiseach Enda Kenny receives a copy of the book *Employment Law* from author Frances Meenan SC on 8 February. The Taoiseach praised the work, citing its importance in the Irish jurisdiction and the acclaim it has received from the legal profession. The book is published by Round Hall

# DIPLOMA CENTRE CELEBRATES HIGHER EDUCATION WIN

The Diploma Centre was among the winners at the gradireland Higher Education Awards 2017. The awards acknowledge excellence in providing postgraduate courses in Ireland. The Diploma Centre's 2016 prospectus won 'Best Postgraduate Prospectus'. Pictured with the award are *(l to r)*: Lisa Duffy (print and design co-ordinator), Rebecca Raftery (marketing co-ordinator, Diploma Centre) and Freda Grealy (head of the Diploma Centre)






# REBALANCING VICTIMS' RIGHTS

The *Criminal Justice (Victims of Crime) Bill 2016* aims to establish minimum standards for the rights, support and protection of victims of crime. **Maria McDonald** takes the long view

MARIA MCDONALD IS A BARRISTER, FOUNDING MEMBER OF THE VICTIMS' RIGHTS ALLIANCE, AND CONSULTANT TO THE ICCL

On 29 December 2016, the *Criminal Justice (Victims of Crime) Bill 2016* was published. The main purpose of the bill is to transpose Directive 2012/29/EU, establishing minimum standards for the rights, support and protection of victims of crime. The directive came into force in Ireland on 16 November 2015 and provides for minimum rights to information, support, and protection for all victims of crime. As of December 2016, the European Commission has issued infringement proceedings against 11 member states, including Ireland, for failing to communicate implementation on the *Victims' Directive*.

The *Criminal Justice (Victims of Crime) Bill*, if implemented, will put victims of crime on a statutory footing for the first time in Irish law. There is currently no legal definition of a victim of crime in Irish law. Section 2 of the bill proposes to define a victim as "a natural person who has suffered harm, including physical, mental or emotional harm or economic loss, which was directly caused by an offence". This mirrors the definition in the directive.

A family member of a person/victim who died as a direct result of a criminal offence is also a victim of crime for the purpose of the bill. A family member will not be entitled to the rights thereunder if he/she has been charged with or is under investigation for the death of the victim.

## Victim identification

There is potential for the value of the directive and the bill to be diluted by the failure of the gardaí and other State agencies to identify someone as a victim of crime. This can occur for a number of reasons.

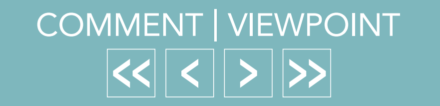
Firstly, a crime may not be recorded as such or it may be misclassified. This issue is illustrated in the reports of the Garda Inspectorate and figures from the Central Statistics Office, which indicate that some acts have been recorded as non-crimes by the garda information system, PULSE.

> THE *CRIMINAL JUSTICE (VICTIMS OF CRIME) BILL 2016* HAS A MAJOR OMISSION IN THAT IT DOESN'T DEAL WITH THE ISSUE OF RESTORATIVE JUSTICE

The impact of this mistake can be seen in the *O'Higgins Report*, and it has the potential to prevent victims from not only accessing their rights under the directive but it also inhibits access to justice. Secondly, a problem may occur where an act is a criminal offence in EU and international law but is not labelled as a criminal offence in Ireland.

Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography came into force on 18 December 2013. Ireland has, to date, failed to fully implement this directive. Article 2 of the directive defines child pornography, child prostitution, and pornographic performance. Article 3(1) requires member states to "take the necessary measures to ensure that the intentional conduct" is punishable. The *Criminal Law (Sexual Offences) Bill 2015* aims to legislate for a number of the offences defined under the directive. The directive has direct effect and, therefore, the crimes outlined within it are criminal offences – notwithstanding that Ireland has failed to legislate for them in national legislation. The question arises as to what would happen if an accused person committed a crime, which is punishable under the directive but has not been criminalised in Ireland? Would a victim be entitled to access their rights under the *Victims' Directive* in Ireland or under the *Criminal Justice (Victims of Crime) Bill 2016*, if implemented?

The *Criminal Justice (Victims of Crime) Bill 2016* does not provide for a right to legal aid for victims of crime. The *Victims' Directive* accords victims the right to legal aid only where they






PIC: GETTY IMAGES

ARTICLE 12 OF THE DIRECTIVE OUTLINES SAFEGUARDS TO PROTECT A VICTIM FROM REPEAT AND SECONDARY VICTIMISATION, SUCH AS RETALIATION AND INTIMIDATION

are parties to criminal proceedings. In Ireland, victims are not a party to legal proceedings and therefore would not be entitled to the right to legal aid on that basis.

Article 47 of the *EU Charter of Fundamental Rights* states that "legal aid shall be made available to those who lack sufficient resources, insofar as such aid is necessary to ensure effective access to justice". The *EU Charter* arguably gives victims, who are not participants in criminal proceedings, a right to legal aid when they are trying to get access to justice. An application for legal aid should illustrate that aid is necessary in order for the victim to access their right to an effective remedy under article 47 of the charter. If a victim could have sought an effective remedy elsewhere, then the court is unlikely to grant legal aid. It is therefore advisable that reasonable steps are taken to exhaust domestic remedies prior to going to the courts. Regard should also be given to the urgency of the matter.

### Major omission

The *Criminal Justice (Victims of Crime) Bill 2016* has a major omission, in that it doesn't deal with the issue of restorative justice. Article 4(1)(j) of the *Victims' Directive* asserts that victims must be informed, on first contact with the gardaí, of certain information, including restorative justice services. Article 12 of the directive outlines safeguards to protect a victim from repeat and secondary victimisation, such as retaliation and intimidation. For example, restorative justice should only be used if it is in the interest of the victim to do so, based on his or her free and informed consent.

Ireland has no statutory scheme for restorative justice. However, the *Children's Act 2001* does envisage a victim's involvement in the restorative justice process. Restorative justice is very often offender-led rather than victim-led.

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

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

## How it works

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

- Claimants in the ADR Process do not have to prove liability; only causation and quantum are relevant
- There is no fee to submit a claim to the ADR Process
- If necessary, McCann FitzGerald will collect the claimant's medical records where written authorisation has been provided
- Evaluators are senior counsel or retired Superior Court judges
- A €25,000 payment in respect of the claimant's legal costs, outlay and VAT will be paid within 28 days of settlement of claims within the ADR Process. This is without prejudice to a claimant's right in the circumstances of a case to seek higher costs and outlay through negotiation or taxation

## Eligible claims

**Claimants may avail of the ADR Process if:**

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

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

Victims are engaging with restorative justice within the criminal justice process, and this necessitates restorative justice safeguards to be legislated for. Given its noticeable absence, it is likely that restorative justice may be included in an amended version of the bill.

The *Victims' Directive* requires that victims have access to victim support services free of charge for a period before, during and after criminal proceedings. The gardaí are required to inform victims about victim support services and "shall facilitate the referral of victims". Section 6(8) of the *Criminal Justice (Victims of Crime) Bill* states that a garda or a member of the Garda Ombudsman "may, where a victim consents, arrange for the victim to be referred to a service which provides support for victims".

The inclusion of the word 'may' means that a member of the gardaí or Garda Ombudsman is under no legal obligation to refer a victim to support services, even when the victim has consented to such a referral. This does not appear to be in keeping with the positive obligation under article 8(2) of the *Victims' Directive*, where the competent authority, namely the gardaí, "shall facilitate the referral of victims" to support services.

## Right to be heard

Article 10 of the directive gives victims a right to be heard during criminal proceedings. Section 5 of the *Bail (Amendment) Bill 2016* enables a court to hear a complainant's voice in bail applications. On the application of a member of the gardaí, the court can receive evidence from a victim on the probability of "direct or indirect interference or attempted interference" by the accused on the victim, or on the victim's family, and evidence of the seriousness and type of any danger.

Section 27 of the bill seeks to amend section 5 of the *Criminal Justice Act 1993*, such that all victims of crime can make a victim impact statement. This is a very positive development, and some courts are already requesting victim impact statements in light of their obligations under the directive.

There are problems in the piecemeal, inconsistent approach to the implementation of the *Victims' Directive* in Ireland, but this is to be expected. We cannot expect a criminal justice system that focused on the rights of the accused to change overnight. It will take time for the criminal justice system to rebalance so that victims are involved in a system that treats them with respect and dignity.

Training is key to creating a criminal justice system that not only protects the rights of the accused, but also the rights of the victim. The Law Society's Diploma Centre, in conjunction with the Irish Council for Civil Liberties and the Bar of Ireland, has obtained EU funding to develop an EU training module for lawyers on the *Victims' Directive*. As part of that process, the Law Society will be conducting a survey of members in order to help develop such training. For further information, please contact Rory O'Boyle (diploma manager) at r.oboyle@lawsociety.ie. g

MAKE A DIFFERENCE IN A CHILD'S LIFE

**Leave a legacy**

Make-A-Wish® Ireland has a vision – to ensure that every child living with a life threatening medical condition receives their one true wish. You could make a difference by simply thinking of Make-A-Wish when making or amending your will and thus leave a lasting memory.

"Make-A-Wish Ireland is a fantastic organisation and does wonderful work to enrich the lives of children living with a life-threatening medical condition. The impact of a wish is immense – it can empower a child and increase the emotional strength to enable the child to fight their illness. It creates a very special moment for both the child and the family, which is cherished by all."

*Dr. Basil Elnazir, Consultant Respiratory Paediatrician & Medical Advisor to Make-A-Wish*

"I cannot thank Make-A-Wish enough for coming into our lives. Having to cope with a medical condition every hour of everyday is a grind. But Make-A-Wish was amazing for all of us. To see your children that happy cannot be surpassed and we think of/talk about that time regularly bringing back those feelings of joy happiness and support."

*Wish Mother*

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

# THE MARQUE OF TRUST

The Law Society's new solicitor member logo aims to set practising solicitors apart from their non-solicitor competitors – and will encourage members of the public to 'look for the logo' when seeking legal advice. **Teri Kelly** explains

TERI KELLY IS DIRECTOR OF REPRESENTATION AND MEMBER SERVICES AT THE LAW SOCIETY

For the first time, the Law Society has introduced a new solicitor member logo for display on firm stationery and marketing materials. The logo is available to all practising certificate holders who are also current members of the Law Society. It can be downloaded now from the members' area of the Law Society website at www.lawsociety.ie/memberlogo. Only solicitors who have a practising certificate and who are Law Society members can access this page.

The logo features Lady Justice – blindfolded, bearing scales, and with sword in hand. This logo represents the benefits and protections that clients enjoy every time they use a solicitor. It is a symbol of trust, knowledge, regulation, insured protection, professionalism, qualification and learning.

The development of the logo was proposed at the Society's annual general meeting in November 2015 by Sonia McEntee and seconded by Richard Grogan. A working group was then established to consider the risks and benefits of the proposal. The working group considered a number of possible options and consulted with the wider membership through an online poll. A final design, which was preferred by more than 50% of online voters, was subsequently approved by the 2016 AGM.

### Terms of use

Terms of use and brand guidelines have been developed to assist practitioners on the correct use of the logo. Only qualified solicitors with a current-year practising certificate, who also hold current membership in the Law Society of Ireland, are permitted to use the logo.

Should the individual at any time cease to

## FOCAL POINT

### STANDING OUT FROM THE CROWD

**The logo was designed by Red Dog, the company who created the Law Society logo in 2014. It incorporates elements of that logo, while being distinct and separate.**

**Using the logo in a firm's printed and online material will single out qualified and practising solicitors from other competing professionals and non-professionals. This is of particular importance in fields where non-solicitors are attempting to compete with qualified solicitors – for example, in the employment law field.**

**The launch of the logo is being supported by a national print and digital media advertising campaign. The aim of the ad campaign is to educate the public about what the new logo stands for and to encourage members of the public to look for the logo when they are seeking legal advice.**

**In the coming days, all firms will receive the logo in the form of a vinyl window sticker in the post. The logo sticker will serve as a marque of trust, capability, and professionalism to clients and potential clients as they go past your offices. We look forward to seeing them proudly displayed on law firm shop-fronts throughout the country.**

**We welcome all feedback on this exciting new member benefit. All comments or questions can be emailed to memberlogo@lawsociety.ie.**

PIC: GETTY IMAGES/NUALA REDMOND

> IT IS A SYMBOL OF TRUST, KNOWLEDGE, REGULATION, INSURED PROTECTION, PROFESSIONALISM, QUALIFICATION AND LEARNING

hold a current PC or membership, they must immediately remove the solicitor member logo from all of their communication materials and office fronts. Qualified solicitors working in the service of the State who are not required to hold PCs are permitted to use the logo if they are also current members of the Law Society.

Use of the logo is entirely voluntary, and solicitor members and firms may choose to display the 'practising solicitor' or 'practising solicitors' version on stationery and marketing content of their choosing. This includes firm stationery, such as letterheads and solicitor member business cards, as well as on websites, solicitor member email signatures, and electronic and printed marketing materials, such as e-zines, brochures, signs and advertisements. When a firm uses the logo on their collective firm stationery, website or marketing material, all practising solicitors in the firm must also hold membership.

All uses of the logo must be in accordance with the brand guidelines, which outlines precisely how the logo should be displayed in terms of colour, size, background and other design considerations.

To maximise the public's understanding of what the logo means, and the benefits of using the logo, we encourage all members to set up a link from the solicitor member logo to a specially created webpage – www.lawsociety.ie/whyuseasolicitor – in online or digital material. This page outlines to clients the benefits and extra protections every time they seek legal advice and services from a solicitor.

The Law Society is currently pursuing collective trademark registration of the logo. Once this registration is in place, all uses of the logo must be in accordance with the collective mark regulations. Protection of the logo is also provided in statute as it contains the term 'solicitor'. g

# DISABILITY – A HUMAN RIGHTS PERSPECTIVE

A century after proclaiming that independent Ireland would give "equal rights and equal opportunities to all its citizens", Irish people with disabilities enjoy fewer legal protections than their British counterparts

GARY LEE IS A MEMBER OF THE LAW SOCIETY'S HUMAN RIGHTS COMMITTEE

Today in Ireland there are at least 3,000 people with disabilities living in institutions, with a further 1,100 under the age of 65 inappropriately placed in nursing homes. Census data shows that Irish people with disabilities have significantly poorer educational outcomes and job opportunities, and are far more likely to experience poverty than their non-disabled peers. Ordinary things like choosing what time to get up, what to have for breakfast, and what to wear are denied to many – as is accessing public transport, socialising, marrying, having a family, and other norms of life. Basic challenges arise; for example, if you are a wheelchair user, you have to give at least 24 hours' notice to Iarnód Éireann should you wish to use the DART.

### Social model

Although it is beginning to shift perspective, the state unfortunately continues to view disability very much from a medical stance – in other words, that disability is intrinsic to the individual. Internationally, the past 50 years has seen a move away from this medical model towards a social model of disability. The social model views the inability of a person to participate in society not as limitations within the person themselves, but rather as barriers that can be removed by society: remove the barriers, and people with disabilities can live on an equal basis with their non-disabled peers. Viewing it from this angle, we can see how appropriate it is to adopt a human-rights-based approach to disability.

It's sad to reflect that 100 years after proclaiming a free and independent Ireland that would give "equal rights and equal opportunities to all its citizens", people with disabilities in Ireland are less well-off and enjoy fewer legal protections than their peers in Britain. Indeed, Ireland's decade-old National Disability Strategy is founded upon three statutes, none of which has been fully commenced. Perhaps most discouraging of all is Ireland's failure to ratify the first major international human rights treaty of the 21st century, a treaty that details basic human rights for people with disabilities.

PIC: GETTY IMAGES

The UN *Convention on the Rights of Persons with Disabilities* (CRPD), together with its optional protocol, was adopted on 13 December 2006. It was negotiated faster than any other human rights treaty, enjoying unprecedented consensus along the road to its adoption. The CRPD is about promoting and protecting the human rights and fundamental freedoms of people with disabilities. In keeping with a social/rights based model of disability, article 1 describes people with disabilities as "those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".

Rights covered by the convention are varied and include those in respect of independent living, housing, personal security, liberty, health, employment, education, and access to justice. It should be noted that it doesn't actually create new rights, but rather collates existing rights in one comprehensive treaty. There is an obligation on each state to set up an independent monitoring framework to ensure progress in implementing the state's obligations to promote and protect the rights of people with disabilities. A groundbreaking provision regarding monitoring is its requirement for the involvement of "civil society, in

PIC: GETTY IMAGES

particular persons with disabilities and their representative organisations" who shall be "involved and participate fully in the monitoring process".

The CRPD also establishes a UN committee consisting of 18 independent experts to monitor its implementation. Within two years of ratifying the CRPD, states must submit a report to this committee and thereafter must report every four years. Of particular interest to practising lawyers is the optional protocol to the CRPD. This provides for an individual complaints mechanism that enables individuals and groups to bring complaints to the UN committee in circumstances where a state has breached one or more of its obligations under the CRPD. The committee also has the power to undertake an inquiry where it receives evidence of "grave and systematic violations" of the CRPD.

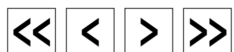
> THE BILL IS INTENDED TO BRING IRISH LEGISLATION IN LINE WITH THE CRPD AND SO PAVE THE WAY TO RATIFICATION. HOWEVER IT FALLS WELL SHORT OF THIS

### Ducks in a row

On 9 December 2016, North Korea became the 172nd country to ratify the CRPD. At the time of writing, Ireland (despite signing it on 30 March 2007 and giving repeated assurances over the past decade) has failed to ratify. Indeed, it stands alone among all other EU member states in that regard. Underlying the importance of the CRPD, the EU as a body took the unprecedented step of ratifying it, which has certain consequences for Ireland.

The Irish State's position is that it cannot ratify an international treaty unless it is first in compliance. Whether the State has been busy for the past ten years getting its 'ducks in a row' is debatable, especially given austerity measures brought in during the recession. This failure to ratify may be down more to economic and policy reasons rather than legal impediments. However, it should be noted that the State has concerns around imposing any requirement that may infringe upon the private property rights of business owners, in light of the Supreme Court decision following the referral of the *Employment Equality Bill 1997* to it by then-President Mary Robinson.

In 2015, the Government finally published its *Roadmap to Ratification* and, on 21 December 2016, the *Disability (Miscellaneous Provisions) Bill 2016* was presented to the Dáil. The bill is intended to bring Irish legislation in line with the CRPD and so pave the way to ratification. However it falls well short of this. The hope is that it will be significantly amended as it progresses. Of par-



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THE CONTINUED FAILURE OF THIS STATE TO RATIFY THE CONVENTION IS ALL THE MORE IRONIC, GIVEN THE HUGE CONTRIBUTION TO THE ADVANCEMENTS OF THE RIGHTS OF PEOPLE WITH DISABILITIES MADE ON THE INTERNATIONAL STAGE BY MANY IRISH PEOPLE

ticular concern is the dropping of provisions to provide legislative clarity regarding deprivation of liberty, which had been included in the original heads of the bill. Currently, many people with disabilities are effectively being deprived of their liberty in nursing homes and other congregated settings, contrary to the CRPD.

### Guiding principle

Even though Ireland has not ratified the CRPD, as a result of EU ratification it is still bound by it in certain circumstances where the EU has competence or shared competence. In 2012, the High Court in *MX v HSE* ([2012] IEHC 491) looked at Ireland's obligations under the CRPD in light of EU ratification, noting that the CRPD should be a "guiding principle". The question before the court concerned capacity, which is covered by article 12 of the CRPD. The court noted that this is within the sole competency of member states and, as such, the EU ratification did not extend convention obligations upon Ireland in relation to this article.

Article 12 has been described as the very heartbeat of the convention. In a nutshell, it seeks to ensure that people with disabilities have equal status before the law. To comply with this, the long-overdue *Assisted Decision Making (Capacity) Act* was signed into law in December of 2015. Central to this act is the establishment of the Decision Support Service. Unfortunately, at the time of writing, the act has not been fully commenced, and the *Lunacy Regulation (Ireland) Act 1871* still plays a central role. Indeed, over recent months, the number of people being made a ward of court under the 1871 act is actually increasing. There is some concern that the State will ratify the convention subject to a reservation regarding its article 12 obligations. Indeed, many disability activists are worried that the State will water down its obligations by making a number of other reservations also.

The continued failure of this state to ratify the convention is all the more ironic, given the huge contribution to the advancements of the rights of people with disabilities made on the international stage by many Irish people, including Frank Mulcahy (founder of the European Disability Forum) and Martin Naughton (founder of the European Network on Independent Living), both of whom died last year without seeing Ireland ratify the CRPD. g

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# Highway star

There have been so many *Road Traffic Acts* over the past 55 years that this area of law is a mess. There is an urgent need for at least a consolidating act. **Robert Pierse** puts his foot down

ROBERT PIERSE IS A SOLICITOR WITH PIERSE FITZGIBBON SOLICITORS. HE IS THE AUTHOR OF *ROAD TRAFFIC LAW: THE 1961-2011 ROAD TRAFFIC ACTS*, PUBLISHED BY BLOOMSBURY PROFESSIONAL. THE NEW EDITION WILL BE PUBLISHED LATER THIS YEAR

The main aim of the *Road Traffic Act 2016* is to tackle the drug-driving problem, on the broad lines that the drink-driving problem has been dealt with since the *Road Traffic Acts 1961-2010*. I find the short title surprising, therefore.

The act also deals with an agreement with Britain on the mutual recognition of driving disqualifications. Further, the act puts new obligation on insurers to notify the minister about vehicles that have been written off, introduces a 20km/h speed limit, substantially amends the law as to fixed charges, regulates rickshaws, and introduce a new liability on vehicle owners in relation to learner drivers.

### Magic carpet ride

The 2016 act introduces a basic *modus operandi* in relation to testing for scheduled drugs, such as certain requirements to:

- Provide an oral fluid specimen for detection of drugs, that is, a mandatory intoxicant test (MIT) at roadside checkpoints etc (heretofore the 'screening test' for alcohol, and
- A blood sample in the garda station if the MIT shows the presence of drugs, that sample being split and tested by the Medical Bureau in the same way as the alcohol testing. There are some differences between the alcohol provisions and the drug provisions, both of which are now included under the label of 'intoxicant'.

The definition of 'analysis' by the Medical Bureau is substantially widened.

### One bourbon, one scotch, one beer

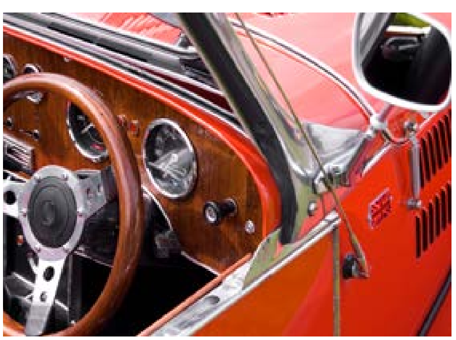
Section 4(1) of the *Road Traffic Act 2010* (*RTA 2010*) prohibits the driving of a mechanically propelled vehicle while under the improper influence of an intoxicant or if exceeding specified alcohol levels. Section 3 defined 'intoxicant' as including alcohol and drugs and any combination of drugs and alcohol.

The existing tests to ascertain if a person has committed an 'intoxicant' offence can be divided into two categories: a capacity or control test and the limit tests.

The *capacity or control test* first appeared in the 1933 *Road Traffic Act*, was re-enacted in the 1961 and 1994 acts, and was refined to its present form in *RTA 2010*. Section 4(1) reads:

## AT A GLANCE

- The main aim of the *Road Traffic Act 2016* is to tackle the drug-driving problem
- The act also deals with an agreement with Britain on the mutual recognition of driving disqualifications
- It puts a new obligation on insurers to notify the minister about vehicles written off, introduces a 20km/h speed limit, amends the law as to fixed charges, regulates rickshaws, and introduce a new liability on vehicle owners in relation to learner drivers



"A person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while he or she is under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle."

Because the word 'intoxicant' is used, the subsection prohibition extends to both alcohol and drugs. This has usually been a subjective opinion of the gardaí in relation to drugs as the main evidence in the prosecution. The *RTA 2010*, section 12, introduced a new testing system to aid in the determination to be made in section 11 of that act – that is, preliminary impairment testing.

A wide range of tests are specified in the *RTA 2010 (Impairment Testing) Regulations 2014* (SI 534 of 2014), in operation since 26 November 2014. There is little evidence of their use so far. 'Drugs' are undefined in the acts. In the amendments to section 4 below, the new subsections (1A) and (1B) inserted into section 4 will apply to a limited number of drug substances as set out in the schedule of the act of 2010.

With regard to the *limit tests*, section 4 of the 2010 act as it has existed is well known to practitioners, arising usually from a preliminary alcohol breath test, then blood and urine samples, or determinative breath tests. These will apply to alcohol as heretofore. There are new tests relating to drugs.

### Highway to hell

Section 4 of the *RTA 2016* adds three new subsections 1A, 1B and 1C, of which 1A reads: "Subject to subsection 1B, a person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while there is present in his or her body a quantity of a drug specified in column 2 of the schedule such that, within three hours after so driving or attempting to drive, the concentration of that drug in his or her body is equal to or greater than the concentration specified in column 3 at the same reference number of that schedule."

The schedule to the act is shown in the table *(below)*.

These levels shows the potency of drugs as against alcohol. Further information is

## SPECIFIED DRUGS

| (1) REFERENCE NUMBER | (2) DRUG | (3) LEVEL (UNITS IN WHOLE BLOOD) |
|---|---|---|
| 1 | 9-Tetrahydrocannabinol (Cannabis) | 1 ng/ml |
| 2 | 11-nor-9-carboxy-Δ9-tetrahydrocannabinol (Cannabis) | 5nb/ml |
| 3 | Cocaine | 10ng/ml |
| 4 | Benzoylecgonine (Cocaine) | 50ng/ml |
| 5 | 6-Acetylmorphine (Heroin) | 5ng/ml |

on the Medical Bureau website and their reports.

Section 4(1) does not apply to items 1 and 2, column 2, in the schedule (that is, cannabis) where the person is the holder of a medical exemption certificate that indicates that, at the time the drug was found to be present in his or her blood, it had been lawfully prescribed for him or her. This must be signed by the doctor who prescribed it.

Section 4(1C) says a person who signs a medical exemption certificate containing information that he or she knows to be false commits an offence and is liable to a class C fine (up to €2,500)

Watch this space! There is a campaign to legalise cannabis. Some multiple sclerosis sufferers are getting it. A medicinal drug called Sativex is being given to a smaller number of MS patients. This medicinal cannabis drug has regulatory approval in Ireland since July 2014, but is not available here on general prescription. Presumably, a difficult balance will be drawn soon to implement the new measure. Doctors will obviously have to be informed and warned. These are very complex provisions for lawyers, medics and the minister.

Presumably, the drivers will have to have their medical exemption certificate on them, or readily available. What is the positon of a driver who hasn't the cert? Presumably, they will be subject to the normal tests. One would also assume that if a person is driving suspiciously – that is, incapable of proper control – that person will get an impairment test as per section 4(1) above.

The additions by section 8(b) of the 2016 act to section 5 of the 2010 *Road Traffic Act* – the section creating the various test and penalties for being in charge of the vehicle under the influence of an intoxicant or of exceeding the alcohol limits – are much the same as section 4. The schedule of the drugs is the same for both section 4 and section 5 of the 2010 act.

PRESUMABLY, THE DRIVERS WILL HAVE TO HAVE THEIR MEDICAL EXEMPTION CERTIFICATE ON THEM, OR READILY AVAILABLE. WHAT IS THE POSITON OF A DRIVER WHO HASN'T THE CERT?

### Souped-up Ford

Before proceeding to some of the many amendments to the 2010 act, we should look at the two new sections to be inserted into the 2010 act by the 2016 act – sections 13A and 13B, inserted after the existing section 13 of 2010. I would have thought they should have gone in as 12A and 12B.

Section 13/2010 deals with the procedure following the provision of a breath specimen under section 12 – section 12 having the heading "obligation to provide breath, blood or urine specimens following arrest under part 2 of the 2010 act".

Section 13A is headed "obligation to provide oral fluid specimen following arrest under part 2" (that is, of the 2010 act). There is no definition of oral fluid type or quantity. It details nine sections of the *Road Traffic Acts* where, after arrest, a garda can require a person to supply a specimen of oral fluid in a garda station or hospital. This section is similar in many ways to both breath testing requirements for alcohol, that is, the screening and determinative tests.

Section13B is headed "obligation to provide blood specimen where suspected of certain offences involving drugs" and, again, is similar to section 10 of the 2010 act in relation to mandatory alcohol testing.

Both sections follow the lines of requirement following lawful arrest at the garda station and the taking of samples in hospitals and, as in section 12 of the *RTA 2010*, with the consequences of refusal and so on.

It seems to me that section 17A of the 2010 act (inserted by section 12(d) of the *RTA 2014*) is not wide enough to cover the drug testing of unconscious drivers.

### 2-4-6-8 motorway

The 2016 act has 17 other sections amending various sections of the *RTA 2010*. To summarise the amendments:

1) Section 9 extends the garda powers of entry to premises in section 7 of 2010 act.
2) Section 10 creates, by amendment of section 9 of the 2010 act, obligations to provide a preliminary oral fluid specimen;

BECAUSE THE WORD 'INTOXICANT' IS USED, THE SUBSECTION PROHIBITION EXTENDS TO BOTH ALCOHOL AND DRUGS. THIS HAS USUALLY BEEN A SUBJECTIVE OPINION OF THE GARDAÍ IN RELATION TO DRUGS AS THE MAIN EVIDENCE IN THE PROSECUTION

to accompany the garda to a place or vehicle in the vicinity; to remain at scene; and they also require the production of a medical exemption certificate – which, of course, is different from the parallel alcohol screening test in section 9 of the 2010 act.

3) Section 11 substitutes a new section 10 in the 2010 act. It follows the lines of the existing section 10 as to the mandatory intoxicant test. Again, the use of the word 'intoxicant' means that it is enlarged to the various determinative (of limits) tests, that is, blood for both alcohol and specified drugs, and urine and breath for alcohol only.
4) Section 12 substitutes a new and wider section 11 in the 2010 act, with the heading of 'impairment testing'.
5) Section 13 amends section 11 of the 2010 act to enable the Medical Bureau to analyse blood specimens in relation to drug concentrations.
6) Sections 15 and 16 add to presumptions in the *Road Traffic Acts* in aid of the prosecution. Section 15 adds a subsection to section 18 headed 'provisions regarding certain evidence in prosecutions' – that is, a presumption as well as substituting a new subsection (1). These relate to 'hipflask defences', extending them to 'pill-box' defences now. It is not necessary for the State to show that the defendant hadn't taken an 'intoxicant' between the time the alleged offence was committed and the provision of the specimen.
7) Section 16 amends section 19(1) of the 2010 act, extending the admission of written statement by members of the gardaí as evidence.
8) Section 17 extends presumptions relating to designated doctors and nurses to cover their role in relation to drug specimens.

'Dude, where's my car?'

9) Section 18 (costs of prosecution) extends the powers of the court, in section 21 of the 2010 act, to award costs to the prosecution in six sections of the 2010 act (4, 5, 12, 13B, 14 and 17A). The costs awarded under that section up to now are stated in SI 477/2012, the *RTA 2010 (Section 21) (Costs And Expenses) Order 2012* – that is, €250 or, in the case of drugs, €300. One can certainly expect an increase in the costs of drugs cases, as the new equipment is expensive. The cassettes used with the drugs apparatus costs approximately €15 each, as opposed to 16c per breath for alcohol. The wider section 82 of the *RTA 2010* on prosecution costs has, surprisingly, not been brought into force as yet. Does this show a lack of trust in the discretionary power of the courts under section 82?
10) Consequential disqualification in the schedule to the 1961 act now has included section 13B of the 2010 act. A new section 26(4) in the 1961 act is substituted to cover drugs.
11) Part 5 (sections 23 to 29 and section 36) of the 2016 act makes a number of substantial changes in part 3 of the 2010 act, which deals with fixed charges.
12) Section 4 of the *Vehicle Clamping Act 2015* is amended – even though that act is not in force.
13) Section 34 amends the first schedule to *Road Traffic Act 2002*, that listing penalty points. It adds part 12 to the 2002 schedule. This part deals with allocating penalty points to using a trailer or semi-trailer with a maximum permissible weight exceeding 3,500kg without a licence – two points on payment of a fixed charge; four points on court conviction. Also, there is a substitution on point allocations in relation to cycle paths.
14) Part 4 allows for a 20 km/h speed limit.

# FOCAL POINT

## RADAR LOVE

Section 40 of the 2016 act is a lengthy four-page section to implement an agreement on disqualification (dated 30 October 2015) between the governments of Ireland and Britain. Both the agreement (also four pages) and the section are aimed at the recognition and enforcement of disqualification from each other's jurisdiction. Was it a pre-Brexit premonition?

It follows the general lines of the wider European convention made in Luxemburg in 1998 and is scheduled in the *Road Traffic Act 2002*. That has proved unworkable and is being abandoned. The Road Safety Authority (as licencing authority), the Courts Service, and the District Court will be involved in the operation of the new agreement.

The specified offences are set out in the annex of the agreement:

- Reckless or dangerous driving (whether or not resulting in death, injury, or serious risk thereof),
- Wilful failure to carry out the obligations placed on drivers after being involved in road accidents,
- Driving a vehicle while under the influence of alcohol or other substances affecting or diminishing the mental or physical abilities of a driver,
- Refusal to submit to an alcohol or drug test,
- Driving a vehicle faster than the permitted speed,
- Driving a vehicle while disqualified, or
- Other conduct constituting an offence for which a driving disqualification has been imposed by the state of the offence of a duration of six months or more, or of a duration of less than six months where this has been agreed between the contracting parties.

### The passenger

Section 31 of the 2016 act amends the *Taxi Regulation Act 2013*, section 20, to enable the National Transport Authority to regulate what we call rickshaws, but in section 31 are called 'non-motorised passenger transport'.

During the passage of the bill through the Oireachtas, many changes were made to its contents. As a result of a horrific incident involving a learner driver, section 35A was added to the 1961 act. It makes it an offence for the owners of vehicles to allow their vehicles to be driven by a learner driver, driving unaccompanied.

The minister promised before Christmas 2016 that the act would be commenced immediately – within three weeks, if my memory serves me rightly. This was a very 'pro-life' stance, which I welcome in view of the increase of death and injuries on the roads in 2016. Already in 2017, it is not looking great. At the time of writing, there has been no commencement order. However, I am told some of the act will be operational before Easter. I would also point out that much of the 2010 act has not been commenced. g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# New horizons

A recent European judgment crosses new horizons in state-aid law and paves the way for the first ever completion of High Court proceedings seeking recovery of state aid granted by Ireland. **Kate McKenna** takes off

KATE MCKENNA IS A SENIOR ASSOCIATE IN MATHESON'S EU COMPETITION AND REGULATORY GROUP

Increasingly, high-profile state-aid investigations by the EU Commission have focused popular attention on the significant force and reach of state-aid law. The 21 December judgment of the Court of Justice in *Commission v Aer Lingus, Ryanair and Ireland* (C-164/15 P and C-165/15 P) clarifies how state-aid law interacts with the free movement and competition laws.

For those interested in state-aid litigation, the judgment paves the way for the first ever completion of High Court proceedings seeking recovery of state aid granted by Ireland.

And for those with axes to grind, the case serves as a warning that state-aid complaints can backfire and expose the complainant to liability. Before discussing these points, it is worth recalling the case history. The Irish air travel tax was introduced in Ireland's 2009 'emergency budget' with the stated objective of raising €150 million a year. Under the two-tier regime, a €10 tax applied to flights to destinations more than 300km away from Dublin Airport and a €2 tax applied to flights to all nearer destinations.

Shortly after its introduction in 2009, Ryanair made two complaints against the new tax regime to the EU Commission,

## AT A GLANCE

- The EU Court of Justice's decision in *Commission v Aer Lingus, Ryanair and Ireland* clarifies how state-aid law interacts with the free movement and competition laws
- The judgment is notable for advancing Irish state-aid practice by clearing the way for the completion of a number of unprecedented cases currently pending
- Successful damages claims for breaches by the state of EU law are rare in Ireland, and cases involving free movement law and corporate claimants are especially rare

PIC: GETTY IMAGES

which were based on EU state-aid and free movement rules respectively.

In 2010, the commission responded to Ryanair's free movement complaint by sending a letter of formal notice instructing Ireland to ensure that the regime complied with free movement law. While this letter was not a legal finding, it supported the complaint that the regime breached free movement law.

In 2012, the commission decision on Ryanair's state-aid complaint found that the two-tier regime breached state-aid law. The commission ordered Ireland to recover the 'advantage' obtained by the airlines that paid the lower rate. According to press reports, this decision leaves Ryanair facing a liability of €12 million (plus interest) and Aer Lingus facing a liability of €4 million (plus interest).

Much EU and Irish litigation has arisen due to Ryanair's complaints. Prior to the EU Commission state-aid decision, Ryanair (followed by Aer Lingus) began High Court proceedings against the Minister for Finance seeking restitution of the tax paid or, alternatively, damages for the State's breach of free movement rules. A short time after the commission decision, Ireland started its own High Court proceedings, seeking recovery of state aid from Ryanair, Aer Lingus and Aer Arann. Ryanair and Aer Lingus appealed the EU Commission decision to the EU courts.

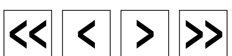
The airlines had some initial success in challenging the EU Commission state-aid decision. In 2014, Ryanair obtained a General Court order for the commission to re-examine a part of Ryanair's complaint that, if successful, may yet impose a further repayment obligation on operators of transfer and transit flights. Moreover, in 2015, the General Court annulled the decision for failing to demonstrate that the lower tax rate benefitted the airlines where they had passed on the tax to passengers in the form of a discrete charge.

However, the possibility of the airlines avoiding having to repay over €16 million in state aid was closed off in December 2016, when the highest EU court overruled the General Court and reaffirmed the EU Commission state-aid decision ordering recovery from all airlines that paid the lower tax rate.

### Pass it on

The Court of Justice judgment and the opinion of Advocate General Mengozzi, with which it concurs, contribute to state-aid theory by drawing clear lines between state-aid rules and other EU rules.

First, the judgment confirms that a beneficiary cannot use 'pass on' as a defence

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## HERE'S TO THOSE WHO CHANGED THE WORLD

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to state-aid enforcement. This means that it is irrelevant whether the airlines exploited the preferential tax treatment for short-haul flights by raising short-haul ticket prices. It was held that, as a matter of principle, the requirement for state aid to confer an 'advantage' does not equal a requirement for there to be an improvement in the beneficiary's financial position. This means, somewhat paradoxically, that a beneficiary is still a beneficiary even where it holds no benefit. This finding is not wholly surprising, as a 'pass-on' defence would impede state-aid enforcement and was rejected by Advocate General Jacobs in 1996. However, this case advances the law by providing reasons for why the defence of 'pass on' is not available. For example, Advocate General Mengozzi states that there is no conflict between having a 'pass-on' defence in private competition cases, but not in state aid enforcement cases, because of the different public and property interests that are at stake in each.

Second, the judgment provides new clarity on the relationship between two EU laws against discriminatory state measures, namely the laws on state aid and free movement. It was held that state-aid law applies totally independently of free movement law, such that one measure can involve both state aid and a barrier to free movement. It was further held that the approach to state-aid enforcement must be the same, regardless of any related free-movement cases. This means that it is appropriate to order a member state to recover state aid from a beneficiary, notwithstanding that a pending free-movement case may result in another payment being made in the opposite direction, namely a payment of damages to the beneficiary by the member state.

The air-travel-tax case is also notable for highlighting long-standing concerns about the unenviable legal position of a beneficiary in a state-aid case.

'Don't call me Shirley!'

First, Advocate General Mengozzi describes the state-aid beneficiary as having responsibilities, rather than as being a passive 'victim' of a state's infringement of EU law. He identifies a duty on beneficiaries to verify the legality of state aid granted to them and a possibility of beneficiaries being complicit in state-aid breaches. There is a striking imbalance between the burden of these responsibilities and the limited procedural rights of beneficiaries in state-aid investigations, which cost them dearly.

Second, the Court of Justice judgment wholly rejects Aer Lingus' argument that it ought to be entitled to respond orally to the advocate general's opinion. As history shows that the opinion is highly influential, this finding is another material barrier for a beneficiary in challenging a state-aid decision.

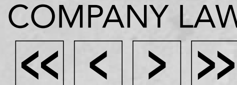
Finally, the judgment is notable for advancing Irish state-aid practice by clearing the way for completion of a number of unprecedented cases currently pending. The State's action against the airlines for recovery will tell us what a beneficiary can expect from a state-aid recovery procedure in Ireland, something on which there is no real precedent at present, despite EU state-aid law having applied in Ireland for 40 years. The airlines' free movement law actions against the State seeking restitution or damages of more than €80 million will also contribute to our understanding of the scope of the State's liability for breach of EU law. Successful damages claims for breaches by the state of EU law are rare in Ireland, and cases involving free movement law and corporate claimants are especially rare.

THE STATE'S ACTION AGAINST THE AIRLINES FOR RECOVERY WILL TELL US WHAT A BENEFICIARY CAN EXPECT FROM A STATE-AID RECOVERY PROCEDURE IN IRELAND

### March on

The Irish air-travel-tax case clarifies EU state-aid law in significant respects and paves the way for future Irish court judgments that will further enhance legal certainty for Irish entities. Overall, the Court of Justice judgment is a strong endorsement of the EU Commission. This seems likely to act as an encouragement to the commission to march on with its state-aid investigations of tax measures. We can consequently expect a growing recognition of the need to assess state measures for EU law compliance and for EU law to take on more significance for Irish clients and practitioners.

From a practical perspective, it is interesting to speculate as to how the amount of state aid that Ireland must recover from the airlines will compare to the amount of any free movement law damages payable to the airlines. So far, Ryanair's complaint has ironically resulted in it facing a liability for €12 million (plus interest) of unlawful state aid, and for legal costs incurred by itself and the EU Commission.



# Change of direction

There have been changes in the law relating to the disqualification and restriction of directors. **Kieran Wallace** and **Eucharia Commins** outline these changes and review recent case law

KIERAN WALLACE IS A PARTNER AND HEAD OF KPMG'S RESTRUCTURING AND FORENSIC ADVISORY PRACTICE. EUCHARIA COMMINS IS A SOLICITOR IN THE SAME DIVISION

The *Companies Act 2014* introduced changes relating to the restriction and disqualification of directors. Under the previous company law regime, it was a defence to an application to restrict a person from acting as a director or officer of a company if that person could demonstrate that they acted honestly and responsibly in relation to their dealings with the company. Now, under section 819(2)(b) of the act, the director must also demonstrate that they cooperated with the liquidator as far as could reasonably be expected during the winding-up of the insolvent company.

Chapter 5 of the act provides a new statutory mechanism whereby, in appropriate circumstances, the Office of the Director of Corporate Enforcement can offer company directors the option of consenting to a restriction and disqualification undertaking on a voluntary basis, without recourse to the court. It is anticipated that this innovative new provision will speed up the restriction/disqualification process, free up court time, and reduce costs. It is interesting to note that, in a judgment delivered on 19 January 2016 by Keane J in the matter of *Cahill v O'Brien & anor*, the court was willing to accept such an undertaking rather than imposing a restriction order, even though the case was taken under the old regime.

### AT A GLANCE

- Directors must show that they cooperated with the liquidator as far as could reasonably be expected during the winding-up of an insolvent company
- The ODCE can offer company directors the option of consenting to a restriction and disqualification undertaking on a voluntary basis – without recourse to the courts
- Directors must fulfil their statutory obligations to commence the orderly winding-up of companies under their control where such companies become insolvent

### Court of Appeal decision

On 20 January 2016, the Court of Appeal handed down an important decision in the case of *Director of Corporate Enforcement v Walsh & Ors*. This case concerned an appeal by the Director of Corporate Enforcement (DCE) against the decision of Barrett J, who refused to make a disqualification or restriction order against three directors. The directors were accused of failing to file annual returns for two companies, namely, Walfab Engineering

PIC: GETTY IMAGES/NUALA REDMOND

Hubert decided that animal husbandry was not for him after all

> ALL DIRECTORS, PASSIVE OR OTHERWISE, HAVE AN OBLIGATION TO TAKE ALL REASONABLE STEPS TO FILE ANNUAL RETURNS

Limited (Walfab) and RPB Products Limited (RPB), which resulted in both companies being struck off the Register of Companies. All three directors were common to both companies.

The application was brought by the DCE under section 160(2)(h) of the *Companies Act 1990*, which applies to company directors who have allowed an insolvent company to be struck off the register in circumstances where they had a duty to wind-up the company.

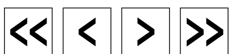
The directors did not dispute that they had failed to file annual returns. However, they blamed the economic downturn for the failure of the companies and stated that they did not have the financial resources to liquidate the companies when they became insolvent. One of the directors stated that she had never been actively involved in Walfab and had never received remuneration for acting as a director.

## Potential prejudice

Kelly J, in giving judgment in the Court of Appeal, relied on the decision of Finlay Geoghegan J in *Re Clawhammer Ltd*, where she identified the statutory intent for section 160(2)(h), as follows: "There is potential prejudice to creditors of an insolvent company if the directors, by default, permit it to be struck off the register rather than taking steps to wind it up. In such circumstances, such assets of the company as remain are not applied, as a matter of course, in the discharge of creditors according to statutory priorities."

In finding against the directors, Kelly J refused to accept that difficult financial conditions operated to change the purpose of section 160, which is to promote responsible corporate governance. Such financial circumstances also did not absolve directors of their statutory obligations to commence the orderly winding- up of the companies under their control where such companies became insolvent.

With regard to the passive directorship of one of the directors, Kelly J stated that all directors, passive or otherwise, have an obligation to take all reasonable steps to file annual returns.



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THERE IS POTENTIAL PREJUDICE TO CREDITORS OF AN INSOLVENT COMPANY IF THE DIRECTORS, BY DEFAULT, PERMIT IT TO BE STRUCK OFF THE REGISTER RATHER THAN TAKING STEPS TO WIND IT UP

In two recent High Court decisions concerning the restriction of directors, the court took account of the entire tenure of the directors in circumstances where directors continued to trade after their companies had become insolvent.

*Leahy v Doherty & ors* concerned a company that was incorporated in November 1993 and had traded profitably to May 2008, but was wound up in May 2011. While the company had a pre-liquidation liability to Revenue, it was able to evidence to the court a perfect Revenue filing record for over 16 years.

In reaching its decision, the court took account of the entire tenure of the directors and gave due regard to the directors' engagement with professional advisors and financial institutions once the company became loss making.

Keane J found that the directors had satisfied the court that, although they had made commercial errors and misjudgements, they acted honestly and responsibly in relation to the conduct of the company's affairs. Keane J refused the application for restriction.

### Responsible actions

*Leahy v O'Keefe & anor* related to a courier company that began trading in June 2011. In contrast to the aforementioned case, this company was never profitable. The directors commenced employment with the company shortly after another company of theirs (with a similar company name) went into liquidation owing a significant debt to Revenue.

There was little evidence to show that the directors attempted to deal with the historical Revenue debt or seek professional advice regarding the trading difficulties of

the company. There was no lengthy tenure of directorship of the company for the court to consider, and the company had a pre-liquidation Revenue liability of over €700,000.

Keane J found that the directors had failed to demonstrate that they had acted honestly and responsibly in the conduct of the company's affairs and, consequently, imposed a restriction order in respect of each of the directors.

### Objective standard

To conclude, it is worth noting that when considering restriction and disqualification proceedings, the courts do not view the events surrounding the collapse of a company unduly harshly. Whether a director acted honestly and responsibly is judged by an objective standard.

The following factors are taken into account by the courts in deciding whether directors have acted irresponsibly or otherwise:

- Fraudulent or reckless trading/trading while insolvent,
- Fraudulent preference of one creditor over other creditors,
- Increase in the company's indebtedness in the period prior to liquidation and failure to keep creditors informed,
- Lack of cooperation with the liquidator during the course of the liquidation,
- Failure to file a statement of affairs or a material difference between the directors' statement of affairs and the actual financial position,
- Degree of insolvency,
- Failure to correctly state and maintain CRO and Revenue returns,
- Failure to maintain proper books and records,
- Delay in placing the company in liquidation, and
- Direct causal link between the company's insolvency and the directors' actions.

Given the changes that have occurred in this area of company law, practitioners should be aware of the recent developments in order to best advise and protect their clients, taking into account the serious consequences of a restriction or disqualification order for a company director. g

## LOOK IT UP

**CASES:**

- *Cahill v O'Brien & anor* [2015] IEHC 817
- *Director of Corporate Enforcement v Walsh & Ors* [2016] IECA 2
- *Leahy v Doherty & ors* [2016] IEHC 588
- *Leahy v O'Keefe & anor* [2016] IEHC 589
- *Re Clawhammer Ltd* [2005] 1 IR 503

**LEGISLATION:**

- *Companies Act 1990*
- *Companies Act 2014*

# Return to innocence

A recent Court of Appeal decision appears to strengthen the concept of the 'innocent' co-owner, writes **Gary Hayes**

GARY HAYES IS A DUBLIN-BASED BARRISTER WHO SPECIALISES IN PERSONAL INJURY AND COMMERCIAL LAW. HE IS A VOLUNTEER WITH THE FREE LEGAL ADVICE CENTRES

A recent judgment of the Court of Appeal in *Muintir Skibbereen Credit Union v Hamilton & Crowley* has addressed the refusal of the High Court to grant an order for partition and sale and well charging orders in respect of two family homes over which judgment debts had been registered.

In the Court of Appeal, despite having the jurisdiction to do so, the credit union was refused an order for partition and sale, but granted well charging orders in respect of the properties, of which the two defendant husbands and their notice party spouses were joint owners.

The cases share a number of similarities with the 1992 case of *First National Building Society v Ring*. The current Chief Justice, Denham CJ, then sitting in the High Court, granted a well charging order over a family home, but refused to grant an order for partition and sale.

The plaintiff had registered a judgment mortgage over the first defendant husband's interest in the family home, which was jointly owned between himself and his co-defendant spouse. The spouse had contributed significantly to the purchase of the home in which their young children resided and possessed an unencumbered share; however, she was not involved in the activities on foot of which the judgment debts arose.

Denham J granted a well charging order over the property in question but refused to make an order for partition and sale. A key consideration of the judgment was that, if an order for sale were granted, the remaining sum from the defendant wife's equity would yield an insufficient sum with which to purchase another family home. In this matter, Mr Hamilton and Mr Crowley had procured a joint commercial loan from the credit union for use in property development. When unable to repay the loan, judgment was entered against them in 2011 in the amount of €562,500 plus costs, and subsequently registered over the folios of both homes.

The plaintiff then issued special summons, seeking various reliefs,

## AT A GLANCE

- In a recent Court of Appeal decision, a credit union was refused an order for partition and sale, but granted well charging orders in respect of two family homes over which judgment debts had been registered
- The notice parties were joint-owning 'innocent' spouses of the mortgage holders who had taken out a joint commercial loan from the credit union for property development purposes
- Given the sheer volume of loans in arrears and registered judgments against property, this judgment may have ramifications for other similar cases

The author thanks the following for reviewing his article: David Kennedy SC, James Dwyer SC, Sara Moorhead SC, Darren Lehane BL and Dermot Cahill BL

PIC: GETTY IMAGES

> THE JUDGMENT MAY STRENGTHEN THE CONCEPT OF AN 'INNOCENT' CO-OWNER AS CONCEIVED IN *RING*, COUPLED WITH THE JUDGMENT OF HOGAN J, AS PRECEDENT FOR CASES INVOLVING 'INNOCENT' SPOUSES WHO WOULD BE RENDERED HOMELESS WERE AN ORDER FOR SALE MADE

including orders of partition and sale. The Crowleys had three children under 13; the Hamiltons had no dependent children, but suffered from ill health, and neither had the resources to obtain alternative accommodation. The spouses were added as notice parties by the master of the High Court and the matter transferred to the judges list.

The distinguishing feature between *Hamilton & Crowley* and *Ring* is that, in *Hamilton & Crowley*, White J applied section 31 of the *Land and Conveyancing Law Reform Act 2009*. Prior to the 2009 act, the applicable statute for Denham J was section 4 of the *Partition Act 1868*. (The *Family Home Protection Act 1976* had no application in the proceedings pursuant to section 31 of the *Land and Conveyancing Law Reform Act 2009* in circumstances where the legal right of the plaintiff in both cases arose out of the registration of a judgment mortgage as opposed to a conveyance.)

Section 4 of the *Partition Act 1868* (now repealed) set out that, on application, "a court shall, unless it sees good reason to the contrary, direct a sale of the property". Denham J considered that "good reason to the contrary" was the fact that the house was a family home and, therefore, a factor that she could consider as relevant.

She held that, in circumstances where the co-defendant wife of the debtor was an 'innocent party' with no judgment registered against her (who would undoubtedly suffer a significant sacrifice if her family home were sold), it was not appropriate to order partition or sale in lieu of partition.

### Section 31

Section 31 of the *Land and Conveyancing Law Reform Act 2009* reads:

"1) Any person having an estate or interest in land which is co-owned, whether at law or in equity, may apply to the court for an order under this section.

2) An order under this section includes:

a) An order for partition of the land among the co-owners…

c) An order for sale of the land and distribution of the proceeds of sale as the court directs…

THE ADOPTION OF THE TERM 'INNOCENT' MAY NOT BE GOOD NEWS FOR CREDITORS WHO SEEK SATISFACTION OF DEBTS BY WAY OF PARTITION AND SALE IN CIRCUMSTANCES WHERE THOSE RELIEFS WERE REFUSED

f) Such other order relating to the land as appears to the court to be just and equitable in the circumstances of the case.

3) In dealing with an application for an order under subsection (1) the court may … (b) dismiss the application without making any order…"

Pursuant to section 31, the court is entitled to make orders for partition and an order for sale. However, section 31(2)(f) also gives the court full discretion to make any order "as appears to the court to be just and equitable in the circumstances". This section, as with section 4 of the *Partition Act 1868*, effectively releases the court from any obligation to make an order pursuant to any of the provisions within section 31, and enables the exercise of inherent jurisdiction of the High Court to make any order in respect of the application, namely under section 31(3)(b), which states that any application can be dismissed with no order.

## High Court decision

A number of technical points were advanced by the defendants relating to the validity of the registration of the judgment mortgage, which were rejected. After referring to the fact that nothing in section 31 affected the jurisdiction of the High Court, White J then set out a number of matters upon which it appears he based his decision to refuse all reliefs sought by the plaintiff (including, at a later date, the costs of the action):

1) Both the properties were the family homes of the respective defendants,
2) The spouses of both defendants were never consulted about the commercial loan drawn down by the defendants from the plaintiff,
3) The spouses of the defendants never signed any documentation providing the family home as security,
4) The personal circumstances of the spouse of the first-named defendant, who had three dependent children between the ages of 6 and 13 years of age, and the circumstances of the spouse of the second-named defendant, who was suffering from ill health,
5) Both defendants were in serious debt, and 50% of the net proceeds of any sale of the family homes due to the spouses would not provide either family with sufficient resources to purchase another family home.

## Court of Appeal

In delivering the unanimous judgment of the Court of Appeal, Hogan J traversed the historical statutory basis and the jurisdiction to make an order for partition and sale, as well as precedent relating to the topic. Hogan J declined to make the order for partition of sale.

More notable in his judgment, however, is the rekindling of the concept of the spouses of the defendants as 'innocent', as in the judgment of Denham J in *Ring*. Denham J referred twice to the co-owning spouse in *Ring* as an "innocent party".

Hogan J extracts the concept of the 'innocent' co-owner from *Ring*, where he states "the credit union's entitlements cannot prevail as against the rights of the two innocent parties, namely, Ms Crowley and Ms Hamilton, who had nothing to do with these transactions and who did not give formal consent to them".

The judgment may strengthen the concept of an 'innocent' co-owner as conceived in *Ring*, coupled with the judgment of Hogan J, as precedent for cases involving 'innocent' spouses (and their families) who would be rendered homeless were an order for sale made. White J, in the High Court judgment,

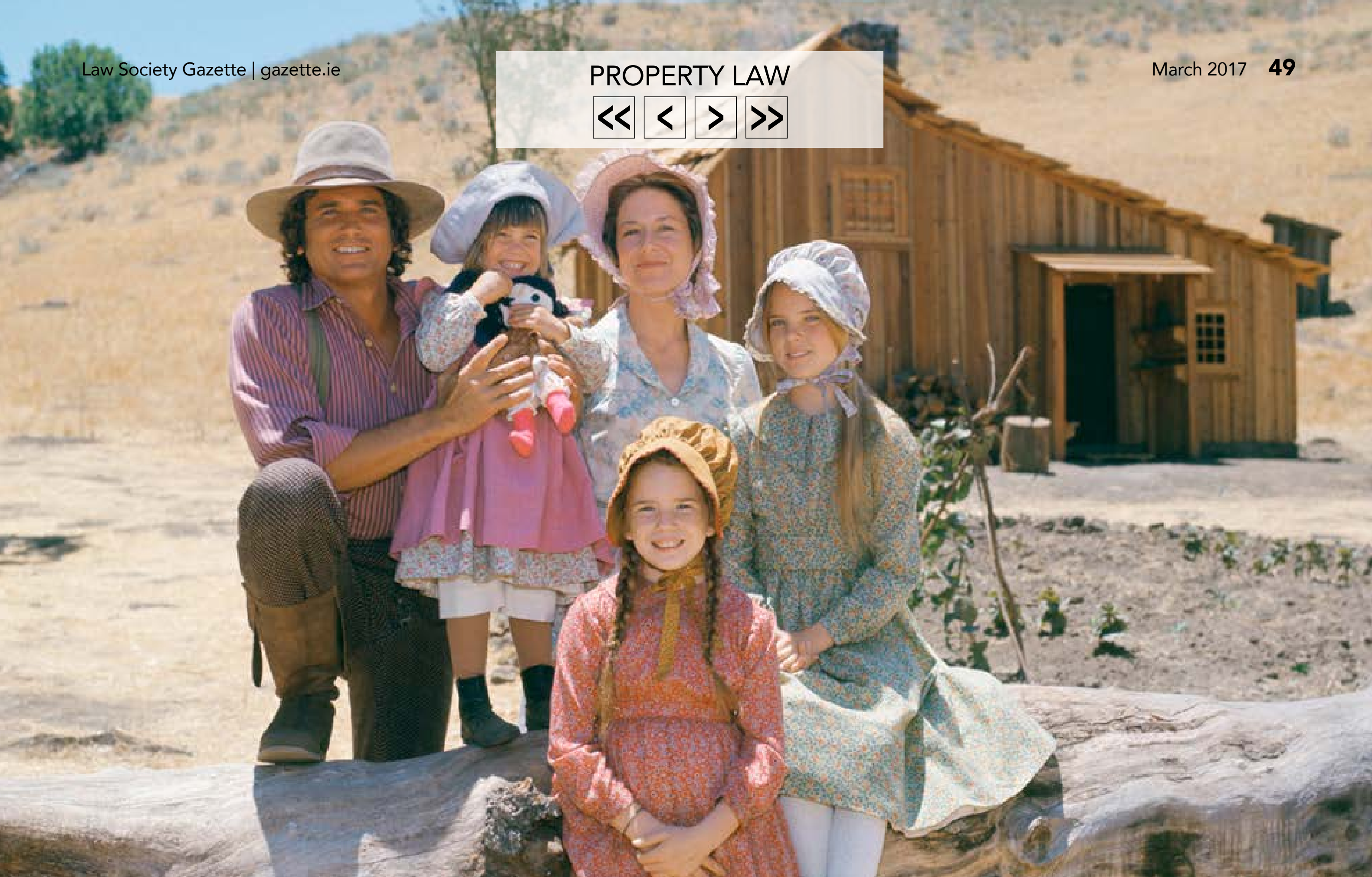
## FOCAL POINT

### MORTGAGE SUITS AND WELL CHARGING ORDERS

**A mortgage suit is a type of proceeding, taken by the holder of a security on property (usually a judgment mortgage or equitable mortgage) to recover a debt by forcing a sale of that property. A mortgage suit can result in a court making a well charging order. The details of a well charging order vary from case to case, but most contain three elements:**

- **A declaration that the debt owing to the plaintiff, plus interest, plus the plaintiff's costs are 'well charged' on the defendant's interest in the property,**
- **A direction that the property be sold (usually the court gives the defendant time to pay the amount due to the plaintiff before the order for sale becomes effective),**
- **A direction that the examiner take an account of all incumbrances and make an inquiry into their respective priorities. An incumbrance is a charge, mortgage, lien or other debt that is secured on a property.**

**When the High Court makes a well charging order and if the defendant does not pay the full amount due within the time allowed, the plaintiff must refer the matter to the examiner's office. (*From* www.courts.ie.)**



as well as Hogan J in the Court of Appeal, commented that the area of law in question was largely without application. The adoption of the term 'innocent' may not be good news for creditors who seek satisfaction of debts by way of partition and sale in circumstances where those reliefs were refused. A fact noted by Hogan J in his judgment is that the case remains the first and only examination of the relevant sections of the 2009 act since enactment.

Whether sufficient sales proceeds would remain to purchase a home after the sale of a property was an issue in the judgment of Laffoy J in *Trinity College Dublin v Kenny* and a major issue in cases of this type. The judgment made explicit reference to the proceeds due to Ms Kenny of €500,000 – as well as a further holiday property and funds in the hundreds of thousands held in other assets.

In considering "good reasons to the contrary" (pursuant to section 4 of the *Partition Act 1868*), Laffoy J stated that whether or not there were "sufficient resources to provide alternative accommodation for herself and Mr Kenny in the event of the court ordering a sale of the Dartry property" was a crucial factor in determining whether the court's discretion should be exercised in favour of ordering a sale.

Hogan J referred to the issue of the sufficiency of resources for the spouses of the defendants to purchase further accommodation with 50% of sale proceeds, albeit in the context of *Hay v O'Grady*, in that they could not interfere with the finding of White J that "50% of the net proceeds of any sale of the family home due to the spouses would not provide either family with sufficient resources to purchase another family home".

## A foil for judgment?

Aspects of *Ring*, in which the 1868 act was applied, are repeated in section 31 of the 2009 act in conferring a wide discretion on the court to make any order or dismiss any action where certain orders are sought. While the judgment may appear highly subjective in terms of its use as a convincing precedent, the facts may not be so unique and may be duplicated in other cases.

This is especially the case in light of the sheer volume of loans in arrears and registered judgments against property. If the facts were the same, or largely similar, the use of the judgment in *Hamilton & Crowley* may form a basis on which cases currently progressing through the courts could result in a simple dismissal, or the grant of a well charging order that may not be realised for decades. Whether or not the judgment will become a foil for judgment creditors seeking satisfaction remains to be seen. g

## LOOK IT UP

**CASES:**

- *First National Building Society v Ring and Ring* [1992] 1 IR 375
- *Hay v O'Grady* [1992] 1 IR 210
- *Muintir Skibbereen Credit Union v Hamilton & Crowley* [2016] IECA 213
- *Trinity College v Kenny* [2010] IEHC 20

**LEGISLATION:**

- *Family Home Protection Act 1976*
- *Land and Conveyancing Law Reform Act 2009*, section 31
- *Partition Act 1868*, section 4

# Burkinis in Bundoran

PIC: GETTY IMAGES

In a relatively short space of time, Ireland has become a multicultural society, and it's only a matter of time before Irish courts will have to rule on the issues of religious symbols and clothing. **Ben Mannering** parts the curtains

BEN MANNERING IS A SOLICITOR/SENIOR CLAIMS MANAGER WITH THE STATE CLAIMS AGENCY. THE VIEWS IN THIS ARTICLE ARE PERSONAL AND DO NOT REFLECT THE VIEWS OF THE NATIONAL TREASURY MANAGEMENT AGENCY

The presence of burkinis, niqabs, and hajibs are no longer an uncommon sight on the streets and beaches of Ireland. It is only a matter of time before a controversy like the recent French 'Burkini-gate' presents itself to the Irish judiciary. The Council of State (France's top administrative court) recently overturned a ban in the Riviera town of Villeneuve-Loubet on the wearing of burkinis. While the full judgment is awaited, human rights groups had challenged the legality of the ban on the basis that it infringed basic freedoms including, among other things, article 9 rights under the *European Convention on Human Rights*.

The European Court of Human Rights (ECtHR) has been grappling with the difficult issue of the display of religious clothing and religious items that fall under article 9 rights for the past 15 years.

As members of the Irish judiciary are obliged to interpret "any legislation in a manner compatible with the State's obligations under the convention's provisions" (as per article 2 of the *European Convention on Human Rights 2003*), this article aims to provide some guidance on the contrasting case law to date.

## AT A GLANCE

- The European Court of Human Rights has been grappling with the difficult issue of the display of religious clothing and religious items that fall under article 9 rights for the past 15 years
- It is only a matter of time before a controversy like the recent French 'Burkini-gate' presents itself to the Irish judiciary

### Behind the veil

The Grand Chamber of the European Court considered the case of *Leyla Sahin v Turkey* on 10 November 2005.

Ms Sahin was a Turkish Muslim medical student who considered it her religious duty

THE COURT ALSO NOTED THAT THE AUTHORITIES OFFERED THE APPLICANTS FLEXIBLE ARRANGEMENTS TO REDUCE THE IMPACT ON THEIR RELIGIOUS CONVICTIONS – NAMELY, THE ALLOWING OF BURKINIS

to wear the Islamic headscarf. In 1998, as a fifth-year student, she challenged a circular from the University of Istanbul that directed that students with beards and students wearing Islamic headscarves would be refused admission to lectures. Following a denial of access to her exams, she left the country and pursued further studies in Austria.

The Turkish constitutional court upheld the law by 16 to 1, and the applicant took her case to the Grand Chamber. Considering article 9, the court found that there was a legal basis in Turkish law for the interference with the applicant's right to manifest her religion. Due to the Turkish constitutional court's previous ruling that the wearing of a headscarf was contrary to its constitution, and having regard to the state margin of appreciation, the court held that the interference was "necessary in a democratic society". The impact of wearing the headscarf, sometimes presented as a compulsory religious duty, has to be weighed against those who choose not to wear it.

## Be true to your school

In *Dogru v France and Kervanci v France* (4 December 2008), the applicants, aged 11 and 12 respectively, were enrolled in the first year of a state secondary school. They participated in physical education and sports classes wearing their headscarves and repeatedly refused to remove them, despite requests to do so from teachers. They were eventually expelled from the school for numerous reasons, including safety reasons (the teachers had an obligation to stop behaviour that might present a danger), not complying with school rules (which necessitated that pupils must attend sports classes for health and safety reasons), and the applicability of a decision of the Conseil d'Etat (France's highest administrative court), which stated that "wearing a headscarf as a sign of religious affiliation is incompatible with the proper conduct of physical education and sports classes".

Considering article 9, the court specifically looked at the area of headscarves and sports classes and held that the decision to expel the children was not based on religious conviction, but more the applicants' refusal to comply with the school rules, of which they had properly been informed. The penalty of expulsion was therefore not disproportionate.

## Matching turban

In *Ahmet Arslan and Others v Turkey* (23 February 2010), 127 Turkish nationals – who belonged to a religious group known as Aczimendi tarikatÿ and who were on trial before the Turkish state's security court under anti-terrorism legislation – refused to remove their turbans in accordance with Turkish court custom, which requires that men must appear before a court with their heads uncovered. Following their refusal, they were further charged under Law 2596, which prohibits the wearing of religious garments in public, and under Law 671 on the wearing of headgear. Having been convicted and sentenced to pay a fine and failing in their appeal, they filed a complaint to the ECtHR arguing violation of article 9.

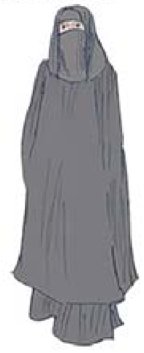
The Turkish government argued that the laws (2596 and 671) were to enhance the secular nature of the Republic of Turkey and that any interference in their religious rights was aimed at preventing further acts of provocation and to protect the rights of others and public security.

While the court accepted the interference with the religious rights argument, it did not accept that the applicants represented a threat to public order and found that the Turkish government had not convincingly established the necessity for interference with the religious rights of the applicants and, consequently, there was a violation of article 9.

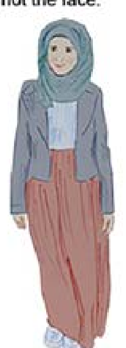
## The old rugged cross

*Lautsi and Others v Italy* (18 March 2011) concerned the displaying of a crucifix in an Italian state school classroom. The applicant,

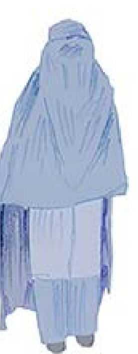
**Niqab**
A veil covering the head and face, but not the eyes, usually worn with a loose black garment (abaya) that covers from head to feet.



**Hijab**
A general term meaning 'to cover' or 'veil', most commonly refers to a headscarf that covers the hair and neck, but not the face.

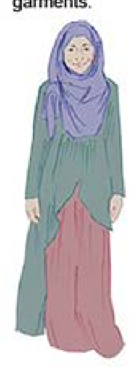


**Burka**
A veil that covers the entire body and face, with a mesh window or grille across the eyes for a woman to see out of.



**Chador**
A full-length cloak worn by many Iranian women, typically held closed at the front by the wearer's hands or under their arms.

**Dupatta**
A long scarf loosely draped across the head and shoulders, common in south Asia and often paired with matching garments.



PIC: ABC NEWS

THE DECISION TO EXPEL THE CHILDREN WAS NOT BASED ON RELIGIOUS CONVICTION BUT MORE THE APPLICANTS' REFUSAL TO COMPLY WITH THE SCHOOL RULES

who wished to bring her children up in a secular environment, sought the removal of the crucifix. The school governors decided to keep the religious symbols in the classroom, which resulted in the applicant taking administrative proceedings – without success – and, ultimately, a case before the European court, on the basis (at first blush, perversely) that the display of the crucifix was in breach of article 9 under freedom of thought, conscience and religion. The applicant also claimed a violation of the article 2 – right to education.

The Grand Chamber's decision, by a vote of 15 to 2, held that there was no violation of article 2.

Considering the article 9 reference, the court found that the issue of religious symbols in classrooms fell within the margin of appreciation of the state, especially when one considers that there is no European consensus on the question. Considering specifically the Italian scenario, where the country's majority religion is more visible in the school environment, this did not in itself indicate a process of indoctrination. Further, there was nothing to suggest that the school was in any way intolerant regarding pupils who believed in other religions or were non-believers.

It should be noted, however, that the applicant had previously been awarded €5,000 in respect of non-pecuniary damage by a chamber of the second section of the court, which held that the claimant's article 2 and 9 rights had, in fact, been violated. Following outcry from approximately 20 countries and motions by the European Parliament, the matter was appealed to the Grand Chamber, where the decision was reversed. This is an example of one of the varying decisions of the court.

The labour law case of *Eweida and Chaplin v United Kingdom* (15 January 2013) focused on the uniform policy of British Airways (BA). Ms Eweida worked as a Christian employee of BA and was asked to cover up a cross necklace, which it was alleged contravened BA's uniform policy. She refused to do so and was placed on unpaid leave. She alleged double standards, citing the fact that Sikh and Muslim employees were not prevented from covering up, although BA argued that wearing a cross was not a requirement in Christianity.

Ms Chaplin similarly alleged discrimination regarding the wearing of a necklace, although she worked for a state hospital. Her request to wear the necklace had been refused on health-and-safety grounds.

Eweida, having rejected an out-of-court settlement allegedly in the sum of £8,500, initially lost her case in the employment tribunal. She appealed to the Court of Appeal and subsequently, Britain's Supreme Court, which refused to hear the case. She took the case to the ECtHR in 2012.

The Strasbourg court found that there had been a violation of article 9 of the convention in respect of Ms Eweida. The court reached the conclusion that a fair balance had not been struck between the applicant's desire to manifest her religious belief and the employer's wish to protect a certain corporate image. There was no evidence that the wearing of any other religious item by different religions, such as turbans, hijabs or other such, had any negative impact on the British Airways brand. The claimant was awarded damages of €2,000 plus costs of €30,000.

The court found no violation in respect of Chaplin, however. The court sided with the hospital, stating that asking her to remove the cross for health-and-safety reasons was of "inherently greater magnitude" than for a reason of corporate image (as was the case with Eweida). It added that the hospital authorities were entitled to a wide margin of appreciation in relation to safety matters and were better placed to make decisions about clinical safety.

## Long black veil

In *SAS v France* (26 June 2014), a practising Muslim complained regarding the banning of the full-face veil in public following a law prohibiting the concealment of one's face in public places (*Loi N2010/1192 du 11 Octobre 2010 Interdisant la dissimulation du visage dans l'espace public*).

THERE WERE NUMEROUS WAYS IN WHICH ONE COULD MANIFEST ONE'S RELIGIOUS AFFILIATION. QUITE OFTEN, FROM THE VERY NAME OF THE OFFICIAL DISPLAYED ON THE DESK OR ELSEWHERE, ONE COULD BE REASONABLY CERTAIN OF THE RELIGIOUS AFFILIATION OF THAT OFFICIAL

The court held that there had been no violation under article 9 and that the state had quite a wide margin of appreciation. The defence argued specifically that one of the grounds for limiting the right to wear the burka was "respect of equality between men and women", "respect for human dignity", and "respect for the minimum requirements of life in society".

A minority, however, disagreed, arguing that the decision "sacrifices concrete individual rights guaranteed by the convention to abstract principles" and that the criminalisation of the wearing of a full-face veil is a measure that is disproportionate to the aim of protecting the idea of "living together".

Another French case, *Ebrahimian v France* (26 November 2015) concerned a psychiatric social worker working in Anterre Hospital and social care centre in France. Following complaints from patients, she was informed her contact would not be renewed because she refused to remove the Muslim veil. An unsuccessful appeal to the Paris administrative court and the administrative court of Versailles left the plaintiff with her article 9 complaint. The court held, by six votes to one (again another dissenting opinion), that French authorities had not exceeded the margin of appreciation and that the wearing of a veil was incompatible with the requirement of neutrality incumbent on public officials in the discharging of their functions in accordance with the French Conseil d'Etat's opinion of 3 May 2000, which protected hospital patients from any risk of influence or partiality in the name of their right to their own freedom of conscience.

The dissenting judgment of De Gaetano J found that there had been a violation of article 9. He commented that the application of the decision of the Conseil was false, as there were numerous ways in which one could manifest one's religious affiliation. Quite often, from the very name of the official displayed on the desk or elsewhere, one could be reasonably certain of the religious affiliation of that official.

### Sister act

Across the Alps to Switzerland, on 10 January 2017, the chamber delivered its judgment in a case taken by Muslim parents (*Osmanoglu and Kocabas v Switzerland*) who objected to sending their daughters to compulsory mixed-swimming lessons.

Concluding that there had been no breach of article 9, the court found that the school played a special role in social integration, and facilitating this integration according to local custom and mores took precedence over the parents' wish to have them exempt.

The court also noted that the authorities offered the applicants flexible arrangements to reduce the impact on their religious convictions – namely, the allowing of burkinis. g

## LOOK IT UP

**CASES:**

- *Achbita v G4S Secure Solutions NV80* [C-157/15]
- *Ahmet Arslan and Others v Turkey* [41135/98]
- *Bougnaoni v Micropole SA* [C-188/15]
- *Dakir v Belgium* [4619/12]
- *Ebrahimian v France* [64846/11]
- *Eweida and Chaplin v The United Kingdom* [48420/10, 59842/10]
- *Lautsi and Others v Italy* [30814/06]
- *Leyla Sahin v Turkey* [44774/98])
- *Osmanoglu and Kocabas v Switzerland* [29086/12]
- *SAS v France* [43835/11])

**PENDING APPLICATIONS:**

- *Belkacemi and Oussar v Belgium* [37798/13]
- *Hamidović v Bosnia and Herzegovina* [57792/15]
- *Lachiri v Belgium* [3413/09]
- *Pekünlü v Turkey* [25832/14]

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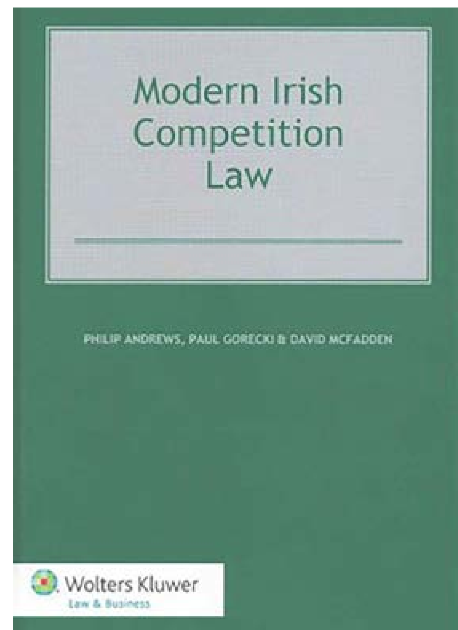
# MODERN IRISH COMPETITION LAW

**Philip Andrews, Paul Gorecki and David McFadden.** Wolters Kluwer (2015), https://lrus.wolterskluwer.com. ISBN: 978-9-0411-467-62. Price: €160 (incl VAT).




This book is a very welcome addition to the expanding library on Irish competition law. It is written by an economist who specialises in competition economics, a lawyer who enforced competition law, and a lawyer who advises on competition law. It therefore encapsulates different perspectives and experiences, which enables the reader to get a fascinating insight into the philosophy and practice of competition law. The combination works well.

The book focuses on Irish competition law rather than trying to cover both EU and Irish competition law, but highlights influences on Irish competition law from the EU and the US.

It has four chapters spanning 400 pages. The first chapter reviews the modernisation of competition law, the institutional framework, the scope of Irish competition law and the meaning of the term 'undertaking', the role of EU law, as well as the role of economics.

The second is a really interesting and well-written chapter that deals with the detail of enforcement based on practical experience – it covers the topic not just from a competition law perspective, but has precedent from other areas of the criminal law.

The third chapter deals not only with civil enforcement in the courts (including private enforcement), but also with substantive law topics, such as abuse of dominance, vertical restraints, and horizontal agreements.

The final chapter, covering almost 40% of the book, encompasses the involved and challenging area of merger control. This helpful chapter gives an overview of the topic, followed by a description and discussion of what is a notifiable transaction, how it is reviewed, the evidence involved, and so on.

All four chapters work well at presenting the information the reader needs, in a logical and efficient manner.

There are aspects of the book that are unique, such as the list on pp118-121 of the type of evidence seized on one dawn raid search, as well as two incisive cases studies on pp379-400 on some of the leading cases in the area. These case studies are useful because they provide background on cases that would not otherwise be accessible to most readers.

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*Dr Vincent JG Power is a partner in A&L Goodbody.*


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# GUARDIAN OF THE TREATY: THE PRIVY COUNCIL APPEAL AND IRISH SOVEREIGNTY

**Dr Thomas Mohr.** Four Courts Press/Irish Legal History Society (2016), www.fourcourtspress.ie.
ISBN: 978-1-8468-258-73. Price: €45 (incl VAT).

Article 66 of the Constitution of the Irish Free State, as adopted in 1922, contained an inherent contradiction about the court system. It coupled a statement of the finality and conclusiveness of decisions of the Supreme Court with a proviso that any person could petition for leave to appeal to 'His Majesty in Council' (that is, to the Judicial Committee of the Privy Council).

Since it was also provided that any constitutional amendment or other law that was repugnant to the treaty of December 1921 would be void, the Privy Council was seen in Britain as the ultimate arbiter of the treaty, its 'guardian' and, potentially, a safeguard for minority rights in the new state.

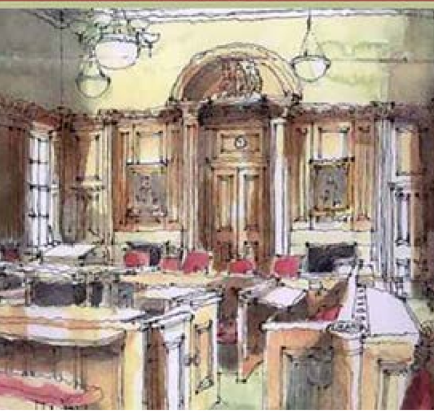
Thomas Mohr's book is a wide-ranging exploration of how the legal and political conundrum over sovereignty created by article 66 was approached on both sides of the Irish Sea over the next dozen or so years, the tensions that it gave rise to, and how it was ultimately resolved under Irish law and British law.

The treaty had said that the status of Canada as a dominion within the British Empire would be the model for Ireland. A right of appeal to the Privy Council (which had also been an integral part of the legislative proposals for Home Rule in 1886, 1893 and 1914) was then seen as an essential attribute of such status. Ireland was the first part of the empire unilaterally to abolish this appeal – a step taken by New Zealand only as late as 2003.

The building in Parliament Square housing the new British Supreme Court accommodates a dedicated courtroom for the Judicial Committee. Until 2009, it had convened in the Privy Council offices in Downing Street. Irish objections in principle to any appeal were thus fed by a perception that the committee was something other than a regular court of law – as being, at least potentially, subject to government influence.

In 1933, the Oireachtas amended the constitution so as to abolish the right of appeal. A

GUARDIAN OF THE TREATY
The Privy Council Appeal and Irish Sovereignty
THOMAS MOHR



case before the courts, involving fishery rights on the River Erne (*Moore v Attorney-General* [1934] IR 44, [1935] AC 484), was taken to the Privy Council which, to general surprise, held that, under the *Statute of Westminster 1931*, the Oireachtas was entitled to do this. The decision, in effect, decreed the end of any prospective role for any 'guardian of the treaty'.

The Irish government in 1922 had seemed unfamiliar with the nature or significance of the appeal provision, as Dr Mohr remarks, and the British negotiators on the *Statute of Westminster* were similarly to be unpleasantly surprised at what transpired to be one of that document's consequences.

Dr Mohr's book is the fruit of many years of archival research and study in Ireland, Britain and Canada. It is an excellent demonstration of the new cross-disciplinary scholarship that the Irish Legal History Society has done so much to encourage, and can be warmly recommended. g

*Daire Hogan is a solicitor and legal historian.*

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| 24 March | LAW SOCIETY SKILLNET SYMPOSIUM – MISCARRIAGES OF JUSTICE<br>InterContinental Hotel, Ballsbridge, Dublin 4 | €150 | €176 | 5.5 General (by Group Study) |
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| 12 May | ESSENTIAL SOLICITOR UPDATE 2017 PART II – in partnership with Leitrim, Longford, Roscommon, Sligo and Midlands Bar Associations<br>Landmark Hotel, Carrick-on-Shannon, Co Leitrim | €115<br>(Parts I and II €170)<br>*Hot lunch and networking drinks included in price* | | 6 (by Group Study) |
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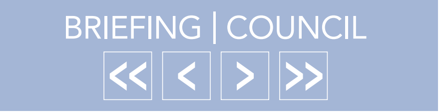




REPORT OF THE LAW SOCIETY COUNCIL MEETING ON 27 JANUARY 2017

### Sympathy

The Council observed a minute's silence in memory of Francis Aylmer, father of Council member William Aylmer.

### Representatives on bodies

The Council approved the appointment of Riobard Pierse to the District Court Rules Committee, the appointment of Stuart Gilhooly (with Frances Twomey as alternate) to the Personal Injuries Commission, and the appointment of John D Shaw as the Society's representative on the Judicial Appointments Advisory Board for a further year.

### Retirement of Therese Clarke

The Council noted the retirement of Therese Clarke, secretary of the Guidance and Ethics Committee and head of the Society's practice closures section, after 24 years of service. The Council acknowledged Ms Clarke's involvement in resolving many difficulties for members of the profession through her work with the committee and with practice closures, which she had managed with great skill and team-building spirit. They wished her a long and happy retirement.

### Symposium and Gala Dinner

The president urged Council members to attend and promote the Society's Inaugural Symposium and Gala Dinner, to be held on 24 March. The event replaces the annual conference and will provide an opportunity for colleagues throughout the country to meet and engage in both a professional and social context.

### Cost of motor insurance

The Council considered, with approval, the *Report of the Working Group on the Cost of Motor Insurance*. It was noted, in particular, that the report found that the insurance industry was itself responsible for the state of the market for insurance premiums, and that legal costs were not a major contributory factor in the recent increases.

### *Legal Services Regulation Act*

The director general reported on a recent positive meeting with the interim CEO of the Legal Services Regulatory Authority and noted the series of challenges facing the authority in the first months of establishment.

Paul Keane noted that the Society had received some useful feedback in its consultation with the profession on the draft section 150 notices. The consultation process would continue with the bar associations and the Society's specialist committees.

The president noted that the new authority was required to conduct a study of education and training within the legal profession within four years of establishment. In advance of that process, the Society had decided to ask an academic with experience in the area of professional education and training to conduct an appraisal of the Society's current education system. Following receipt of that appraisal, a task force would be established to examine the matter in greater depth.

### *Judicial Appointments Bill*

The Council discussed the Government's scheme of the *Judicial Appointments Bill*, together with the Society's previous submission on the appointment of judges made in 2014. It was agreed to establish a small working group to consider the matter further and to report back to the next meeting of the Council.

### Meeting of four law societies

The president reported on the meeting of the four law societies in Belfast on 23/24 January, at which there had been an interesting and informative exchange of views.

### Bar Liaison Committee

The president reported on a meeting of the Joint Consultative Committee with the Bar Council on 17 January, which had been a useful and collegiate meeting.

### PII renewal

Richard Hammond reported that all firms had secured professional indemnity insurance cover for the coming year, and no firms were in the Assigned Risks Pool. g

TAKE FIVE...

LAW SOCIETY OF IRELAND

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CONVEYANCING COMMITTEE

# NEW PRECEDENTS: PRE-CONTRACT QUESTIONNAIRES FOR PROPERTY PURCHASE AND SALE

The Law Society's Conveyancing Committee wishes to announce the publication, jointly with the Property Committee of the DSBA, of the 2017 edition of Pre-Contract Questionnaires for Property Purchase and Sale.

The new questionnaires are considerably changed from the last edition, due entirely to the increased complexity of the conveyancing process and the need to include several new areas of practice resulting from changes in legislation affecting property since the last edition was published.

The new questionnaires are available in fillable PDF format on the Law Society's website in the precedents section: (1) see Pre-Contract Questionnaire for Property Sale; (2) see Pre-Contract Questionnaire for Property Purchase.

These lists of questions can be sent out to clients at the beginning of a transaction, and the replies can form the basis of the clients' instructions and can assist solicitors in preparing the documentation in the transaction.

A few matters to note:

- It is recommended that you use *Acrobat Reader* to download and fill in the questionnaires,
- There is space on the front page of both questionnaires for 'main contact details' – solicitors should consider putting in their letters of engagement that the main contact person is the person on whose instructions the solicitor will act,
- Where the client is required to provide supporting documentation in the course of the transaction, the items are marked 'bring' on the right hand side of the document to remind them to provide you with the relevant materials,
- In relation to the sale questionnaire, a new sample letter to the clients has been provided, together with a new sample letter of authority for taking up their title deeds for signature by the clients.

It is hoped that the new precedents will be of benefit to members and will assist them in their day-to-day conveyancing work. Any feedback on the documents would be welcomed.

TECHNOLOGY COMMITTEE

# SPEAR PHISHING – THE LATEST THREAT

The Technology Committee is reissuing an updated version of this note due to the seriousness of the consequences for solicitors if they are successfully targeted in a spear-phishing scam. A similar practice note appeared in the *Gazette* in September 2016.

Spear phishing is a criminal hacking enterprise that sends an email or emails that appear to be from individuals or businesses you know in an attempt to obtain your credit card or bank account numbers, or passwords, or to attempt to convince partners or staff of your firm to transfer funds to an incorrect bank account to the criminals' benefit.

There have been instances in Ireland and Britain where incorrect bank account details were received by firms by phone from persons impersonating clients, resulting in the transfer of funds to persons other than the client.

Law firms are particularly targeted due to the potential high value of funds held. The scam is tailored to each targeted firm. Firms that practice in conveyancing or regularly transfer large sums of money are at particular risk.

Everyone should be particularly wary when bank account details change mid-transaction or when a sudden email changing account details is received on a Friday afternoon or just before a holiday period. This is when normal procedures have a greater tendency to be rushed or overlooked, and criminals intentionally target firms at these times.

An example of spear phishing is where a fake internal email within the company or firm is sent by the criminals to say that a bank account has changed (for example, an email instruction from a partner to his or her secretary to change payment details). The targeted staff member then sends the funds to the fraudulent account, unaware that the email they received was not sent by the authorising party, but by a criminal enterprise.

The Technology Committee strongly urges all firms to adopt the following ten tips to mitigate the risks of spear phishing:

1) If somebody tells you that their account details have changed, this is an instant red-flag marker. You should immediately raise a query and verify the account details through an alternative medium, such as by phone, fax or letter. In addition, let your clients know that your firm does not change its bank account details (if this is the case). Clients should be advised not to send any money to new account details without confirming the change by talking to someone in the firm.
2) Do not rely on the banks to verify the account name against the account number. If you put in a wrong number, then the money will go astray and may not be recoverable. Typographical errors must be avoided.
3) Clients should be asked for their bank details by way of a copy statement at the start of a transaction.
4) If a client does not give you copy bank documentation, then you should ask the client to write out the IBAN and BIC in full for you in their own handwriting and sign it.
5) If another solicitor is sending you their account details, then they should do it by fax or letter, and you should still verify these with them. It is common for the fraud to involve only changing one digit or letter.
6) If you have to write bank account details down yourself (for example, because you are getting them over the phone),

then you must read the details back to the client for verification and you must memo this on your file. If the client rang you, ring them back at the number on file (not by pressing the call-back button) or contact them by another method to confirm the change in bank details.

7) Only send IBANs and BICs for your accounts or other accounts to clients or external parties by letter or fax.
8) If you get an IBAN and BIC by email, including in an attachment, then you must ring the person to verify the details, and you also should memo that on your file.
9) Any internal email asking you to request or effect the transfer of money must be verified by a phone call to the sender.
10) The obligation is on the client to provide accurate bank details and the risk of fraud should be mentioned in the section 68 letter and letter of engagement.

In addition, the Technology Committee reminds all solicitors that ransomware continues to be a major threat to solicitors' firms across the country.

Please consult our practice note on this issue at www.lawsociety.ie/Solicitors/Practising/Practice-Notes/Crypto-ransomware--guidance-for-firms.

GUIDANCE NOTE: ALTERNATIVE DISPUTE RESOLUTION COMMITTEE

# COURT GUIDANCE ON WHEN IT WILL AND WON'T SUGGEST MEDIATION

Order 56A of the *Rules of the Superior Courts* (RSC) empowers the superior courts, on their own motion or that of one of the parties, to invite the parties to avail of an alternative dispute resolution (ADR) process or to refer proceedings to an ADR process where the parties agree.

An ADR process is defined as including mediation, conciliation, or another process approved by the court, but arbitration is expressly excluded. By contrast with section 15 of the *Civil Liability and Courts Act 2004* (applicable in personal injuries actions only), order 56A does not provide for compulsory mediation or ADR. Whether to engage in an ADR process if invited to do so by the court under order 56A remains a decision for the parties alone. However, under order 99(1)(b), the court may depart from the rule that costs follow the event where the court has invited the use of an ADR process pursuant to order 56A, and the (ultimately) successful party has, "without good reason", failed to participate in that ADR process.

The courts have given guidance concerning the circumstances in which the parties ought to be invited to engage in an ADR process under order 56A, most recently in *Grant & Ors v Minister for Communications & Ors* ([2016] IEHC 328).

In *Grant*, the plaintiffs' claims against the State arose out of the regulation of shipping, as it affected several vessels owned by the plaintiffs over a number of years in the late 1990s and early 2000s. The case, which began in 2003, was legally and factually complex and was ready to be set down for trial by the time the plaintiffs' order 56A application came to be determined.

Refusing the application for an order under order 56A, Costello J was critical of the plaintiffs' delay in suggesting mediation and noted that "the proceedings have progressed over 13 years with all the expense that entails, including the costs of discovery, to the point where the case is ready to be set down for trial. It is the experience of the courts that proceedings are most likely to be resolved by mediation after the pleadings are closed, but before the parties have incurred the expense of complying with discovery. They are far less likely to be resolved by a mediation just before the case is ready to proceed *a fortiori* where one party does not wish to engage in mediation."

Costello J followed the judgment of Gilligan J in the High Court in *Atlantic Shellfish & Ors v The County Council of the County of Cork & Ors* ([2015] IEHC 570), as affirmed by the Court of Appeal at [2015] IECA 283, in taking into account that mediation was less likely to succeed where one of the parties was not a wholly willing participant. Following the *Atlantic* Court of Appeal decision, Costello J was also satisfied that it was reasonable for the State defendants to seek to vindicate their conduct in open court, given the very serious allegations, including misfeasance, made against certain named officials.

Costello J noted that a resolution of the proceedings would require the parties to abandon the positions that they had maintained in the proceedings for 13 years and, while acknowledging that this was possible, regarded this as a matter of considerable weight in the exercise of the court's discretion. Costello J noted counsel for the State's submission that a mediation would be long and complex because of the complexity of the proceedings and would, therefore, impose a significant cost on the State, which was unwilling to mediate. Costello J concluded that the State's refusal to mediate was *bona fide* and that an invitation to do so ought not to be issued by the court under order 56A.

## Comment

Despite the outcome in each case, the judgments in *Atlantic* and *Grant* roundly endorse the benefits of mediation. The refusal to direct that order 56A requests be issued in both cases turned on the late stage at which an order was sought and other relevant factors. In *Atlantic*, there was a novel point of law raised that had a precedent value; in *Grant*, there were serious allegations made against State officials, which the State wished to have legally determined.

The *Mediation Bill*, published in February 2017, will place an obligation on solicitors, prior to commencing proceedings for clients, to advise those clients to consider resolving their dispute through mediation, explain what the process entails, and provide names of mediation service providers.

If enacted, it will be interesting to see how these provisions will impact the timing of applications under order 56A, given that plaintiffs will have considered and decided against mediation before issuing proceedings.

In that scenario, will the exchange of pleadings be enough to change a plaintiff's mind or will discovery be necessary, contrary to the timing guidance in *Grant*? g

# 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 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/DT73/14 and 10303/DT74/14]**

***Law Society of Ireland (applicant)***

***John Mark McFeely (respondent solicitor)***

On 15 June 2016, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor, in that up to the date of referral of this matter to the tribunal he had:

### 10303/DT73/14

1) Failed to comply with part or all of his undertaking dated 25 August 2006,
2) Failed to reply to one or more letters from the complainant bank, either in a satisfactory and/or a timely manner and/or at all, notwithstanding his undertaking to the bank,
3) Failed to reply to one or more letters from the applicant, either in a satisfactory and/or a timely manner and/or at all.

### 10303/DT74/14

1) Failed to comply with part or all of his undertaking dated 2 June 2004,
2) Failed to reply to one or more letters from the complainant bank, either in a satisfactory and/or a timely manner and/or at all, notwithstanding his undertaking to the bank,
3) Failed to reply to one or more letters from the applicant, either in a satisfactory and/or a timely manner and/or at all.

The tribunal ordered that the respondent solicitor:

1) Do stand censured (in respect of both matters),
2) Pay a cumulative sum of €1,500 to the compensation fund in respect of both matters,
3) Pay a cumulative contribution of €2,500 towards the whole of the costs of the applicant in respect of both matters.

**In the matter of Dr Mary Cecelia Lyons, a solicitor formerly practising as Mary Cecelia Lyons, 11 Copeland Grove, Clontarf, Dublin 3, and in the matter of the *Solicitors Acts 1954-2011* [11206/DT11/11]**

***Law Society of Ireland (applicant)***

***Dr Mary Cecelia Lyons (respondent solicitor)***

On 25 July 2016, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in her practice as a solicitor in that she:

1) Failed to disclose to the client complainant that the respondent solicitor acted for one or more of a named third party's companies,
2) Showed complete disregard for the interests of the complainant by failing to advise him adequately or at all about the implications of a specified agreement with the third party,
3) Breached section 68(1) of the *Solicitors Amendment Act 1994* by failing to provide the complainant with a section 68 letter as soon as practicable on taking instructions, as is prescribed by that section.

The tribunal ordered that the respondent solicitor:

1) Do stand advised and admonished,
2) Pay a sum of €1,500 as a contribution towards the whole of the costs of the applicant.

**In the matter of Patrick Sheehan, a solicitor practising as principal of Sheehan & Co, Solicitors, Augustine Court, St Augustine Street, Galway, and in the matter of the *Solicitors Acts 1954-2011* [5815/DT116/15]**

***Law Society of Ireland (applicant)***

***Patrick Sheehan (respondent solicitor)***

On 22 September 2016, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

1) In or around December 2010/January 2011, while acting on behalf of a named client in respect of the sale of a residential investment property:
   - Provided misleading information to a named lending institution as to the true sale price in correspondence in December 2010, which contributed to the lending institution being deprived of approximately €60,000,
   - Sent an inaccurate or misleading email to the aforementioned lending institution on 26 January 2011 that stated that the net sales proceeds available to be remitted to the institution were €226,942, when a draft of said email sent to him by a colleague six minutes earlier indicated that the balance available was €286,942,
   - Sent a cheque in the amount of €226,767 to the aforementioned lending institution on 2 March 2011, which purported to represent the true net proceeds of sale of the aforementioned property, when he knew that the true net proceeds of sale were approximately €60,000 more than that amount,
2) On various dates between December 2006 and March 2009, while acting on behalf of a named client development company in respect of the financing by a named bank of a development at a named location:
   - Caused or allowed a letter dated 20 December 2006 to be sent to the bank, which contained misleading information to the effect that fully enforceable binding commitments for the sale of five industrial units on the site (having a value of €2,100,000) were in place, at a time when no contracts were in place and which did not disclose that the only commitment the respondent solicitor had was a promise from the principals of the client company that they would sign irrevocable pre-lets/pre-sales with a minimum capital value of €2,100,000,
   - Provided misleading information to the bank in a letter dated 8 March 2007 to the effect that contracts had been issued and that it was anticipated that executed contracts would in place within two to three weeks, having a total purchase value in excess of €2,000,000, when no such contracts had been issued at that time and, when a contract for €2,100,000 was issued in December 2008, that contract was issued to two of the principals of the client

development company for completion as vendor and purchaser,
- Caused or allowed a contract for €2,100,000 to be drawn up in December 2008, which was backdated to 20 December 2006.

The tribunal ordered that the respondent solicitor:
1) Do stand advised and admonished,
2) Pay a sum of €3,000 to the compensation fund,
3) Pay a sum of €15,000 agreed costs to the applicant.

**In the matter of Anthony F O'Gorman, a solicitor practising as Anthony F O'Gorman & Co, Solicitors, St Michael's Road, Gorey, Co Wexford, and in the matter of the *Solicitors Acts 1954-2011* [3163/DT94/15]**
***Law Society of Ireland (applicant)***
***Anthony F O'Gorman (respondent solicitor)***
On 27 September 2016, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that, up to the date of the referral of the matter to the tribunal, he had:
1) Failed to comply with part or all of his undertaking dated 16 April 2007 to the complainant,
2) Failed to respond, either adequately or at all, to six specified letters from the complainant,
3) Failed to respond, either adequately or at all, to six specified letters from the applicant.

The tribunal ordered that the respondent solicitor:
1) Do stand censured,
2) Pay a contribution of €3,500 including VAT in respect of the costs of the applicant.

**In the matter of Anthony F O'Gorman, a solicitor practising as Anthony F O'Gorman & Co, Solicitors, St Michael's Road, Gorey, Co Wexford, and in the matter of the *Solicitors Acts 1954-2011* [3163/DT96/15]**
***Law Society of Ireland (applicant)***
***Anthony F O'Gorman (respondent solicitor)***
On 27 September 2016, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that, up to the date of the referral of the matter to the tribunal, he had:
1) Failed to comply with part or all of his undertaking dated 2 November 2006 to the complainant,
2) Failed to respond, either within an adequate time frame or at all, to one or more letters from the complainant, notwithstanding his undertaking to the complainant,
3) Failed to respond, either within an adequate time frame or at all, to one or more letters from the applicant.

The tribunal ordered that the respondent solicitor:
1) Do stand censured,
2) Pay the sum of €3,000 and VAT as restitution to the complainant,
3) Pay the sum of €3,500 including VAT as a contribution towards the costs of the applicant.

**In the matter of Anthony F O'Gorman, a solicitor practising as Anthony F O'Gorman & Co, Solicitors, St Michael's Road, Gorey, Co Wexford, and in the matter of the *Solicitors Acts 1954-2011* [3163/DT97/15]**
***Law Society of Ireland (applicant)***
***Anthony F O'Gorman (respondent solicitor)***
On 27 September 2016, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that, up to the date of the referral of the matter to the tribunal, he had:
1) Failed to comply with part or all of his undertaking dated 25 October 2005 to the complainant bank,
2) Failed to comply with part or all of his undertaking dated 7 November 2006 to the complainant bank,
3) Failed to respond, either adequately or at all, to ten specified letters from the complainant bank and/or solicitors acting on its behalf,
4) Failed to respond, either adequately or at all, to 13 specified letters from the applicant.

The tribunal ordered that the respondent solicitor:
1) Do stand censured,
2) Pay the sum of €3,500 including VAT as a contribution towards the costs of the applicant.

**In the matter of Derek Mathews, a solicitor formerly practising as principal of Derek J Mathews, Solicitors, Mespil House, Sussex Road, Dublin 4, 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* [3160/DT19/15]**
***Law Society of Ireland (applicant)***
***Derek Mathews (respondent solicitor)***
On 6 October 2016, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in that he:
1) Failed to comply with an undertaking dated 25 August 2008 in respect of two properties in Stillorgan, Co Dublin, in a timely manner or at all,
2) Failed to comply with the directions of the Complaints and Client Relations Committee of 9 April 2013 in a timely manner or at all,
3) Failed to respond to correspondence sent to him by the complainant, particularly letters dated 24 February 2009, 1 May 2009, 5 August 2009, 12 February 2010, 13 May 2010, 25 January 2011, 4 May 2011, 25 August 2011 and 30 November 2011.

The tribunal ordered that:
1) The respondent solicitor do stand censured,
2) The respondent solicitor pay a sum of €1,000 to the compensation fund,
3) The respondent solicitor pay a sum of €1,000 as a contribution towards the whole of the costs of the Law Society of Ireland.

**In the matter of Eoin M Dee, solicitor, formerly of Thomas House, 47 Thomas Street, Waterford, and in the matter of the *Solicitors Acts 1954-2011* [8243/DT115/15 and High Court record no 2016/139 SA]**
***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 his practice as a solicitor in that:
a) In the case of a named complainant:
   i) On 25 March 2013, he transferred or caused to be transferred moneys received in respect of outlays not yet disbursed from the client account to the office account, in breach of regulation 4(2) of the *Solicitors Accounts Regulations 2001-2006* (SI 421/2001 as amended), and/or
   ii) The transfer at a(i) represented a breach of regulation 7(1) of the regulations; and/or
   iii) The transfer at a(i) represented a breach of regula-

tion 8(4), and/or

iv) On 25 March 2013, he transferred or caused to be transferred moneys in respect of medical reports from the client account to the office account in breach of regulation 7(1) and/or regulation 8(4), and/or

v) In respect of one or more of the above transfers at a(i) to a(iv), he entered or arranged to be entered on the debit side of the office ledger entries described as 'miscellaneous charges', thereby reducing the office ledger balance to zero, in breach of regulation 12(2)(a) and/or regulation 12(1), and/or

vi) In respect of some or all of the conduct described in allegations at a(i) to a(v), acted dishonestly, given some or all of these moneys were received by him and were properly payable to third parties or were due to be reimbursed to his client.

b) In the case of a named complainant:

i) On 10 May 2012, he transferred or caused to be transferred moneys received in respect of outlays not yet disbursed from the client account to the office account, in breach of regulation 4(2) of the regulations, and/or

ii) The transfer at b(i) represented a breach of regulation 7(1), and/or

iii) The transfer at b(i) represented a breach of regulation 8(4), and/or

iv) On 10 May 2012, he transferred or caused to be transferred moneys in respect of medical reports from the client account to the office account, in breach of regulation 7(1) and/or regulation 8(4), and/or

v) In respect of one or more of the above transfers at b(i) to b(iv), he entered or arranged to be entered on the debit side of the office ledger entries described as 'miscellaneous charges', thereby reducing the office ledger balance to zero, in breach of regulation 12(2)(a) and/or regulation 12(1), and/or

vi) In respect of one or more of the above allegations at b(i) to b(v), acted dishonestly in so doing, as some or all of these moneys were received by him and were properly payable to third parties or were due to be reimbursed to his client.

c) In the case of a named complainant:

i) On 5 January 2012, he transferred or caused to be transferred moneys received in respect of outlays not yet disbursed from the client account to the office account, in breach of regulation 4(2), and/or

ii) The transfer at c(i) represented a breach of regulation 7(1), and/or

iii) The transfer at c(i) represented a breach of regulation 8(4), and/or

iv) On 5 January 2012, he transferred or caused to be transferred moneys in respect of medical reports from the client account to the office account in breach of regulation 7(1) and/or regulation 8(4), and/or

v) In respect of one or more of the above transfers at c(i) to c(iv), he entered or arranged to be entered on the debit side of the office ledger entries described as 'miscellaneous charges', thereby reducing the office ledger balance to zero, in breach of regulation 12(2)(a) and/or regulation 12(1), and/or

vi) In respect of one or more of the above allegations at c(i) to c(v), acted dishonestly in so doing, as some or all of these moneys were received by him and were properly payable to third parties or were due to be reimbursed to his client.

d) In the case of a named complainant:

i) On 20 July 2012, he transferred or caused to be transferred moneys received in respect of outlays not yet disbursed from the client account to the office account, in breach of regulation 4(2), and/or

ii) The transfer at d(i) represented a breach of regulation 7(1), and/or

iii) The transfer at d(i) represented a breach of regulation 8(4), and/or

iv) Transferred or caused to be transferred moneys in respect of medical reports from the client account to the office account, in breach of regulation 7(1) and/or regulation 8(4), and/or

v) In respect of one or more of the above transfers at d(i) to d(iv), he entered or arranged to be entered on the debit side of the office ledger entries described as 'miscellaneous charges', thereby reducing the office ledger balance to zero, in breach of regulation 12(2)(a) and/or regulation 12(1), and/or

vi) In respect of one or more of the above allegations at d(i) to d(v), acted dishonestly in so doing, as some or all of these moneys were received by him and were properly payable to third parties or were due to be reimbursed to his client.

e) In the case of a named complainant:

i) Transferred or caused to be transferred moneys received in respect of outlays not yet disbursed from the client account to the office account, in breach of regulation 4(2),

ii) The transfer at e(i) represented a breach of regulation 7(1), and/or

iii) The transfer at e(i) represented a breach of regulation 8(4), and/or

iv) Transferred or caused to be transferred moneys in respect of medical reports from the client account to the office account, in breach of regulation 7(1) and/or regulation 8(4), and/or

v) In respect of one or more of the above transfers at e(i) to e(iv), he entered or arranged to be entered on the debit side of the office ledger entries described as 'miscellaneous charges', thereby reducing the office ledger balance to zero, in breach of regulation 12(2)(a) and/or regulation 12(1), and/or

vi) In respect of one or more of the above allegations at e(i) to e(v), acted dishonestly in so doing, as some or all of these moneys were received by him and were properly payable to third parties or were due to be reimbursed to his client.

f) In the case of a named complainant, acted dishonestly in failing to refund medical report and/or PIAB fees properly due and owing to the client,

g) During the period 1 January 2012 to 30 June 2013, on one or more occasions, caused or permitted a credit balance to arise on the office side of one or more clients' ledger accounts, contrary to regulation 10(5), and/or

h) During the period 1 January 2012 to 30 June 2013, failed to comply on one or more occasions with the provisions of section 68(6)(c) of the *Solicitors*

*(Amendment) Act 1994*, in that, on one or more occasions, details of all or any part of the charges that were recovered by the respondent solicitor on behalf of the client from other parties (or insurers of any other such parties) were not furnished to clients at the conclusion of their cases, and/or

i) In respect of the period 1 January 2012 to 30 June 2013, failed to have a formal written anti-money-laundering policy document in place, in breach of section 54 of the *Criminal Justice (Money Laundering and Terrorist Financing) Act 2010*, and/or

j) Failed to attend or arrange for representation at meetings of the committee held on 23 January 2014 and/or 6 March 2014 and/or 10 April 2014, when required to so attend or be represented, and/or

k) Failed to respond in a timely manner or at all to correspondence sent by the Society in connection with this matter, including correspondence dated 13 February 2014 and/or 31 March 2014, and/or

l) Failed to comply with directions of the committee given at its meeting on 23 January 2014 and/or 6 March 2014.

The tribunal ordered that this matter should go forward to the High Court and, on 24 October 2016, the President of the High Court ordered that:

1) The respondent solicitor not be permitted to practise as a sole practitioner or in partnership; that he be permitted only to practise as an assistant solicitor in the employment and under the direct control and supervision of another solicitor of at least ten years' standing, to be approved in advance by the Society,
2) The respondent solicitor pay the whole of the applicant's costs before the Solicitors Disciplinary Tribunal, to be taxed in default of agreement,
3) The respondent solicitor pay the costs of the applicant in respect of the High Court proceedings, to be taxed in default of agreement.

**In the matter of Niall Mc Walters, solicitor, practising as a partner in O'Gorman Cunningham & Co, 16 Upper Main Street, Letterkenny, Co Donegal, and in the matter of the *Solicitors Acts 1954-2011* [8570/DT11/15]**
***Law Society of Ireland (applicant)***
***Niall McWalters (respondent solicitor)***

On 17 November 2016, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

1) Failed to comply with an undertaking dated 6 November 2007 to a complainant in respect of a named property in a timely manner or at all,
2) Failed to comply with an undertaking dated 6 November 2007 to a complainant in respect of a named property in a timely manner or at all,
3) Failed to comply with the directions of the Complaints and Client Relations Committee of the Society,
4) Failed to comply with correspondence sent to him by the complainant in a timely manner or at all, particularly letters dated 4 August 2010, 25 January 2011, 14 July 2011 and 15 August 2012.

The tribunal ordered that:

1) The respondent solicitor stand censured,
2) The respondent solicitor pay the sum of €1,500 to the compensation fund,
3) The respondent solicitor pay the sum of €6,000 plus VAT towards the costs of the Society.

**In the matter of Henry Joseph Arigho, a solicitor formerly practising as Henry Arigho & Co, Solicitors, Main Street, Moate, Co Westmeath, and in the matter of the *Solicitors Acts 1954-2011* [3452/DT61/13, 3452/DT62/13, 3452/DT63/13, 3452/DT176/13, 3452/DT185/13, and High Court record no 2016/222 SA]**
***Law Society of Ireland (applicant)***
***Henry Joseph Arigho (respondent solicitor)***

On 23 July 2014, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

### 3452/DT61/13

1) Failed to comply with part or all of his undertaking dated 28 August 2007 in respect of a named property to a bank in a timely manner or at all,
2) Failed to attend the meeting of the applicant's Complaints and Client Relations Committee on 10 January 2012, despite being required to do so,
3) Failed to reply satisfactorily to one or more letters from the complainant bank in a timely manner and/or at all, notwithstanding his undertaking to them.

### 3452/DT62/13

1) Failed to comply with part or all of his undertaking dated 28 August 2007 in respect of a named property to a bank in a timely manner or at all,
2) Failed to attend the meeting of the applicant's Complaints and Client Relations Committee on 10 January 2012, despite being required to do so,
3) Failed to reply satisfactorily to one or more letters from the complainant bank in a timely manner and/or at all, notwithstanding his undertaking to them.

### 3452/DT63/13

1) Failed to comply with part or all of his undertaking dated 17 October 2008 relating to a named property,
2) Failed to attend the meeting of the applicant's Complaints and Client Relations Committee on 10 January 2012, despite being required to do so,
3) Failed to reply satisfactorily to one or more letters from the complainant bank in a timely manner and/or at all, notwithstanding his undertaking to them.

### 3452/DT176/13

1) Failed to comply with part or all of his undertaking dated 19 December 2002, insofar as it related to a specified property,
2) Failed to reply to one or more letters from the complainant bank either in a satisfactory and/or a timely manner, notwithstanding his undertaking to the bank.

### 3452/DT185/13

1) Failed to comply with part or all of his undertaking dated 27 May 2002,
2) Failed to reply to one or more letters from the complainant bank either in a satisfactory and/or timely manner, notwithstanding his undertaking to the bank.

The tribunal ordered that the matter go forward to the High Court and, on 12 December 2016, the High Court ordered that any future practising certificate of the respondent solicitor limit him to practising as an assistant solicitor in the employment and under the direct control and supervision of another solicitor of at least ten years' standing, to be approved in advance by the applicant.

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

# PARLIAMENTARY APPROVAL REQUIRED BEFORE ARTICLE 50 IS TRIGGERED

On 24 January 2017, the British Supreme Court – by a majority of eight to three – rejected an appeal against the High Court's 3 November 2016 judgment that parliamentary consent is required before the British government submits a notice of withdrawal under article 50(2) of the *Treaty on European Union*. (For a longer discussion of the High Court's judgment, see 'Article 50 – judgment of the English High Court', *Gazette*, December 2016, p66.)

## High Court judgment

In *R (on the application of Gina Miller and Deir Tozetti Dos Santos) v Secretary for Exiting the European Union* ([2016] EWHC 2768), the High Court was asked to decide whether the government/the crown has the unilateral power under article 50 to notify the European Council of Britain's intention to leave the EU.

Miller and Dos Santos argued that the proposal to serve unilateral notice under article 50(2) violated the principle of parliamentary sovereignty. Under this key pillar of Britain's constitutional arrangements, the crown is subordinate to parliament when enacting laws that affect the rights of legal and natural persons. Against this, the Secretary of State claimed that, unlike regarding the creation of domestic laws where parliament is sovereign, the government has the exclusive power to negotiate international agreements (known as 'the royal prerogative').

Finding in favour of the claimants, the High Court held that the government may not use the royal prerogative in the conduct of international relations to give notice under article 50(2). It rejected the Secretary of State's argument that parliament intended, through the *European Communities Act 1972*, that the existence of any EU rights in domestic law would be dependent on Britain's continued membership of the EU. The Secretary of State appealed this judgment to the Supreme Court.

The Secretary of State argued that government ministers are entitled to exercise the royal prerogative regarding the EU treaties and, thus, to give notice under article 50(2) without prior legislation. He also claimed that the power derived under the royal prerogative to withdraw from the EU treaties was not excluded by the 1972 act. Moreover, this legislation effectively sanctioned a unilateral withdrawal by the British government from these treaties. The Secretary of State also argued that giving notice under article 50(2) merely initiates the relevant negotiation process and does not, in itself, alter any domestic legislation.

In response, the applicants relied on the principle that international treaties cannot alter domestic law. Giving notice under article 50(2) would set Britain on an "irreversible course" leading to EU law ceasing, in large part, to have effect in the Britain. Such a step would inevitably alter domestic law and abrogate certain statutory rights. Doing this, without prior statutory approval, would be unlawful.

## Conduit pipe

The court focused on the two key functions of the 1972 act. This statute provides that rules derived from EU law apply in Britain while also establishing a new process of making domestic legislation. While the 1972 act gives effect to EU law, it is not the source of EU law. Rather, it is the 'conduit pipe' by which that law is introduced into national law. In addition, the primacy of EU law over British law only exists for as long as the 1972 act remains in force. This issue is, the court held, solely a matter for parliament.

The majority judgment also considered whether the 1972 act prevents the use of the royal prerogative to withdraw from the EU. While noting that the 'conduit pipe' of EU legislation will be blocked should Britain leave the EU, the court held that the 1972 act precludes this happening without parliamentary approval. In this regard, the court drew a specific distinction between changes in British law arising from amendments to existing EU legislation, and changes arising from withdrawal from the EU.

The court noted that the key inconsistency in the Secretary of State's argument was that

NEITHER STORMONT, HOLYROOD, NOR Y SENNED (THE WELSH ASSEMBLY) ARE EMPOWERED TO MAKE AN INDEPENDENT DECISION REGARDING WITHDRAWAL FROM THE EU

Gina Miller speaks to the press following the court's decision

he did not satisfactorily address the constitutional implications of withdrawing from the EU without parliamentary approval. Withdrawal will result in significant constitutional change that cannot be initiated by unilateral action of the British government. The court therefore found that the royal prerogative in international affairs cannot be used to block a source of law. In other words, the existence of the 'conduit pipe', as against the contents that flow through it, may only be abolished if parliament changes the law. Moreover, the Secretary of State cannot rely on the fact that the 1972 act does not address whether prerogative powers may be used to withdraw from the EU. The court found that, given the domestic legal effect of such a decision, unless this legislation contains this specific provision, it cannot be read into it.

The majority thus found that, due to the substance of the 1972 act, the royal prerogative may not be invoked by the government to give notice of withdrawal under article 50(2) without the authority of primary legislation.

### Devolution

The Supreme Court decided to join two cases referred from the Northern Ireland courts raising key issues regarding the devolution of powers to Stormont. (The argument that the formal approval of the Northern Ireland Assembly is required before notice of withdrawal under article 50(2) is given was supported by both the Scottish and, interestingly, given that the majority of voters in the principality supported 'Brexit', Welsh governments.)

The court held that the *Northern Ireland Act 1998* was passed on the premise that Britain is an EU member state. However, this does not mean that the 1998 act requires Britain to remain a member of the EU. Furthermore, the court found that relations with the EU are treated no differently than other foreign affairs issues – that is, they are reserved or excepted for Northern Ireland and Scotland and are not devolved in the case of Wales. (In other words, the conduct of foreign affairs falls exclusively within the remit of the British government.) As a result, neither Stormont, Holyrood, nor Y Senned (the Welsh assembly) are empowered to make an independent decision regarding withdrawal from the EU. In addition, none of these bodies has a power of veto on Britain's decision to withdraw from the EU. Similarly, while the 1998 act gave the people of Northern Ireland the right to decide whether to remain part of the union or to become part of a united Ireland, this legislation did not require the consent of the majority of the people of Northern Ireland to any withdrawal from the EU.

The court also examined the relationships between Westminster and Belfast, Edinburgh, and Cardiff in situations where their legislative competences overlap. While in each of the relevant devolution settlements, parliament has preserved the right to legislate in devolved areas, a practice called the Sewel Convention has developed whereby the agreement of Stormont, Holyrood, or Y Senned is required before Westminster legislates in areas of devolved competence. The claimants argued that, under the convention, the relevant devolved legislature would therefore have to pass consent motions before Britain could give notice under article 50(2). However, the court

concluded that it could not rule on this question, since the Sewel Convention only creates political restraints and does not create any legally enforceable obligations. The policing of its operation thus falls outside the remit of the judiciary.

> THE COURT THEREFORE FOUND THAT THE ROYAL PREROGATIVE IN INTERNATIONAL AFFAIRS CANNOT BE USED TO BLOCK A SOURCE OF LAW

### Dissenting judgments

As mentioned above, three judges – Reed, Carnwath and Hughes – dissented against the majority verdict. Each judge penned a separate judgment, although Reed's is easily the most detailed.

This judge considered that the terms of the 1972 act do not prevent the British government from autonomously exercising its prerogative powers to give notice under article 50(2). He considered that the 1972 act does not impose any requirement or intention to uphold membership of the EU. Rather, it merely gives legal effect to rights and obligations under the EU treaties. In other words, the 1972 act presupposes and is conditional on ongoing membership of the EU. The 1972 act only operates and can only give legal effect to rights and obligations under the EU treaties while the Britain remains an EU member state and thus party to the EU treaties. As a result, if Britain leaves the EU, the 1972 act will simply cease to apply. Therefore, the act does not hinder the exercise of the royal prerogative in respect of membership of the EU.

Lord Reed also emphasised the double use of the phrase "from time to time" in section 2(1) of the 1972 act in reference to the rights and obligations that apply domestically under the EU treaties. He interpreted this provision as demonstrating that parliament intended for the rights and obligations under the EU treaties to be amended or repealed without the necessity of a further statute. He concluded that there is no difference between creating new laws or repealing and amending existing laws. Consequently, consent of parliament is not required to give notice under article 50(2).

The three dissenting judges also found that a notification under article 50(2) does not in itself alter the application or legal effect of EU rights and obligations in Britain. A notification does nothing more than initiate the "political process of negotiation and decision-making". Thus, legislation is not necessary.

### Immediate effect

The immediate effect of the Supreme Court's decision is that Westminster must pass the appropriate legislation before Britain issues its article 50(2) notice. In addition, there is no need for consent from any of the three devolved legislatures to the proposed withdrawal from the EU.

Interestingly, the Supreme Court ruled on the basis of the consensus that an article 50(2) notice may not be given in conditional or qualified terms and that, once given, it cannot be withdrawn. Indeed, the government argued that, even if this common ground was wrong, it would not make a difference to these proceedings. This is perhaps surprising, given that the key factor in rejecting the Secretary of State's appeal may have been that the inevitable effect of a withdrawal notice will be a fundamental change in Britain's constitution.

In addition, while press reports in the immediate aftermath of the 3 November 2016 judgment suggested that the government might seek to reverse its position on the issue of the irreversibility or non-conditionality of an article 50(2) notice, this option may not have been open, given that the point had been conceded before the High Court. Thus, arguing that this issue is not relevant to the ultimate outcome may well have been an attempt to divert attention from the potential tactical error made by the Secretary of State at first instance. In any event, the Supreme Court decided not to opine on whether an article 50(2) notice is unconditional or may be withdrawn.

Perhaps the court anticipates having to address this issue for real at some point in the not-too-distant future? g

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

RATES

# PROFESSIONAL NOTICE RATES

**RATES IN THE PROFESSIONAL NOTICES SECTION ARE AS FOLLOWS:**

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

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**ALL NOTICES MUST BE PAID FOR PRIOR TO PUBLICATION. CHEQUES SHOULD BE MADE PAYABLE TO LAW SOCIETY OF IRELAND.** Deadline for April 2017 *Gazette*: 20 March. For further information, contact the *Gazette* office on tel: 01 672 4828.

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

## WILLS

**Carroll, Patrick (otherwise Paddy) (deceased)**, late of Glebe House Nursing Home, Kilternan, Dublin 18, formerly of 1 Jamestown Cottages, Kilternan, Co Dublin, who died on 16 November 2016. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Caroline Murphy, Neville Murphy & Co, Solicitors, 9 Prince of Wales Terrace, Bray, Co Wicklow; tel: 01 286 0639, email: cmurphy@nevillemurphysolicitors.ie

**Cassidy, Mary (deceased)**, late of 100C Wedgewood Estate, Sandyford Road, Dundrum, Dublin 14, who died on 31 October 2016. Would any person having knowledge of the whereabouts of any will made by or purported to have been made by the above-named deceased, or if any firm is holding same, please contact Brian D Casey & Associates, Solicitors, Thomond House, High Street, Ennis, Co Clare; DX 25011 Ennis; tel: 065 682 0001, email: brian@brianandcasey.com

**Conneely, Nora (deceased)**, late of Salahoona, Spiddal, Co Galway, who died on 31 December 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 of any firm that is holding same, please contact Dillon-Leetch and Comerford, Solicitors, 3 Montpelier Terrace, Sea Road, Galway; tel: 091 582 316, email: galway@dillonleetchcomerford.ie

**Dickson, James (deceased)**, late of Drollagh, Castleblayney, Co Monaghan, who died on 30 May 2015. Would any person having or having any knowledge of a will made by the above-named deceased please contact Messrs Coyle Kennedy Smyth, Solicitors, Thomas Street, Castleblayney, Co Monaghan; tel: 042 974 0010, fax: 042 974 0329, email: info@ckslaw.ie

**Fitzpatrick, James (deceased)**, late of St Fiacc's Nursing Home, Killeshin Road, Graiguecullen, Co Carlow, and formerly of Farnans, Wolfhill, Athy, Co Kildare, who died on 14 December 2014. Would any person having any knowledge of a will made or purported to have been made by the above-named deceased, or if any firm is holding same, please contact Jennifer Morrow of Lavelle Solicitors, St James' House, Adelaide Road, Dublin 2; tel: 01 644 5800, email: jmorrow@lavellesolicitors.ie

**Fitzpatrick, Harry (deceased)**, late of 356 Orwell Park Close, Templeogue, Dublin 6W. Would any person having knowledge of any will made by the above-named deceased, who died on 28 December 2016, please contact Cogan-Daly Solicitors, Brighton House, 50 Terenure Road East, Rathgar, Dublin 6; tel: 01 490 3394, email: contact@cogandalylaw.ie

**Glennon, Thomas (deceased)**, late of Ballingranchy, Oldcastle, Co Meath. Would any person having knowledge of any will made by the above-named deceased, who died on 25 March 2014, please contact

Barry McAllister, solicitor, John P Prior & Co, Cogan Street, Oldcastle, Co Meath; tel: 049 854 1971, fax: 049 854 1973, email: barry@priorlegal.ie

**Hurson, Barbara (deceased),** late of 14 Prussia Street, Dublin 7. Would any person having knowledge of any will made by the above-named deceased, who died on 12 January 2017, please contact McEntee & O'Doherty, Solicitors, 20 North Road, Monaghan; tel: 047 82088, fax: 047 83486, email: law@mceodsolicitors.ie

**Kearney, James (deceased),** late of Deerpark, Mountrath, Co Laois and Kilminchy Lodge/Nursing Home, Kilminchy, Portlaoise, Co Laois who died on 16 November 2016. Would any person holding or having any knowledge of a will made by the above-named deceased please contact Messrs James E Cahill & Company, Solicitors, Market Square, Abbeyleix, Co Laois; tel: 057 873 1246, email: donalwdunne@securemail.ie

**Lyons, Jeremiah Patrick (deceased)**, who died on 12 July 2016. Last known address in Ireland: Moneen, Louisburgh, Co Mayo. Last known address in England: 20 Longmeadow, Eccleston, St Helens, Merseyside WA10 4LS, England. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, situated in Ireland, please contact Tickle Hall Cross Solicitors, 2 Derby Street, Prescot, Merseyside L34 3LJ, England; tel: 0044 1744 746 046, fax: 0044 151 430 8001, email: samc@ticklehallcross.co.uk

**Moran, Agnes (deceased),** late of 6 Clancarthy Road, Donnycarney, Dublin 5. Would any person having knowledge of the whereabouts of the will made by the above-named deceased, who died on 15 June 2016, please contact Brendan D O'Connor & Co, Solicitors, 179 Crumlin Road, Dublin 12; tel: 01 453 6218, email: brendandoconnor@eircom.net

**McInerney, Patrick (deceased),** late of 9 Marina Park, Victoria Road, Cork, who died on 5 January 2017. Would any person having knowledge of any will made by the above-named deceased, or if any firm is holding same, please contact Maigread Lavan, EA Ryan & Co, Solicitors, Bridge Street, Dungarvan, Co Waterford; tel: 058 41042, email: maigreadlavan@earyan.ie

**O'Neill, Anne (deceased),** late of 62 Beatty Park, Celbridge, Co Kildare, who lived or worked in Ballyfermot, Dublin city centre and Maynooth. Would any person having knowledge of the whereabouts of the will made by the above-named deceased please reply to **box no 01/02/2017**

**O'Rourke, Kathleen (deceased),** late of 72 Cherrywood Park, Clondalkin, Dublin 22, who died on 5 January 2017. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Patrick J Ryan, Ryan & Ryan, Solicitors, 5 St Brigid's Road, Clondalkin, Dublin 22; tel: 01 459 1693, email: info@ryanandryan.ie

**Scanlon, Henry (deceased),** late of 9 Castlefield Way, Knocklyon, Dublin 16, and formerly of 47 Osprey Drive, Templeogue, Dublin 6W and 43 Finglas Park, Finglas East, Dublin 11. Would any person having knowledge of any will made by the above-named deceased, who died on 23 May 2016, please reply to **box no 02/02/17**

**Sharkey, Grace (deceased),** late of 54 Upper Main Street, Dungloe, Co Donegal, who died on 7 July 1992. Would any solicitor holding/having knowledge of a will made by the above-named deceased please contact Sweeney McHugh Solicitors, Carnmore Road, Dungloe, Co Donegal; tel: 074 952 1115, email: info@sweeneymchugh.ie

**Walker, Anthony J (deceased),** late of 6 Idrone Terrace, Blackrock, Co Dublin, who died on 2 May 2008. Would any person having knowledge of a will executed on 10 September 1986, or any other subsequent will made by the above-named deceased, please contact John O'Leary & Co, Solicitors, Main Street, Tallaght, Dublin 24; tel: 01 427 1000, fax: 01 427 1001, email: info@johnolearysolicitors.com

**Walsh, Martin James (orse Jimmy) (deceased),** late of Cloonliffeen, Ballinrobe, Co Mayo. Would any person holding or having knowledge of a will made by the above-named deceased, who died on 7 January 2017, please contact Ailbhe Gill, solicitor, Patrick J Durcan & Company, Solicitors, James Street, Westport, Co Mayo; tel: 098 25100, email: admin@patrickjdurcan.ie

## RECRUITMENT

**Locum solicitor available for short/medium contract,** 17 years' PQE across a diverse range of legal matters, including family law, litigation, conveyancing, probate, employment etc, as well as extensive management/regulation experience. Contact Anne Neary Management Consultants, tel: 086 195 5919. Reply to **box no 03/02/17**

**Two locum solicitors required** in the South West from May 2017 until January 2018. Reply to **box no 04/02/17**

## TITLE DEEDS

**In the matter of the *Landlord and Tenant (Ground Rents) Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* – notice of intention to acquire fee simple (section 4): an application by Finnian Doyle, Martin Kennedy (the applicants)**

Notice to any person having any interest in the freehold interest of the following property: all that and those the property known as a plot of ground at rear of 43 Lower Dorset Street in the city of Dublin, demised by a lease dated 28 December 1883 made between Charles Corbet of the one part and Michael Moran of the other part (the lease), and described therein as "all that and those that piece or plot of ground particularly shown on the map thereof in the margin of these presents, which said piece or plot of ground is bounded on the north by a plot demised to Michael Moran for 20 feet, by a laneway at rear of Lower Dorset Street for 30 feet, and by a plot demised to James Forrester for 43 feet, 9 inches, on the east by laneway at rear of Belvedere Road, 85 feet, and by plot demised to James Forrester, 50 feet, on the west by plot demised to James McAuley, 78 feet, 4 inches, and by plot demised to Michael Moran, 43 feet, and on the south by plot in possession of lessor, 12 feet, 7 inches, be the said several admeasurements more or less and which said premises are situate in the parish of St George and county of the city of Dublin, together with all rights, members and appurtenances thereunto belonging or in anywise appertaining".

Take notice that Finnian Doyle and Martin Kennedy (the applicants), being the persons entitled to the interest of the lessee under the lease in respect of the property described above and situate to the rear of 43 Lower Dorset Street in the city of Dublin, intend to apply to the county registrar of the county of Dublin for the acquisition of the freehold interest and all intermediate interests in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid property is called upon to furnish evidence of the their title to same to the below within 21 days from the date of this notice.

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

*Date: 3 March 2017*

*Signed: Martin A Kennedy & Co (solicitors for the applicants), The Diamond, Malahide, Co Dublin*

**In the matter of the *Landlord and Tenant (Ground Rents) Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* – notice of intention to acquire fee simple (section 4): an application by Finnian Doyle, Martin Kennedy (the applicants)**

Notice to any person having any interest in the freehold interest of the following property: all that and those the property known as a yard at rear of 43 Lower Dorset Street in the city of Dublin, demised by a lease dated 19 April 1883 made between Charles Corbet of the one part and James Forrester of the other part (the lease) and described therein as "all that and those that piece or plot of ground particularly shown on the map thereof in the margin of these presents, which said piece or plot of ground contains in front thereof to lane at rear of Lower Dorset Street 43 feet, 6 inches, from front to rear on both sides, 50 feet, and at the rear 38 feet, bounded on the north by laneway at rear of Belvedere Road, on the south and east by a plot demised to Michael Moran, and on the west by a laneway at the rear of Lower Dorset Street, be the same admeasurements more or less, all which said premises are situate in the parish of St George and city of Dublin, together with all rights of way to proposed laneways above mentioned, members and appurtenances thereunto belonging or in any way appertaining".

Take notice that Finnian Doyle and Martin Kennedy (the applicants), being the persons entitled to the interest of the lessee under the lease in respect of the property described above and situate to the rear of 43 Lower Dorset Street in the city of Dublin, intend to apply to the county registrar of the county of Dublin for the acquisition of the freehold interest and all intermediate interests in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid property is called upon to furnish evidence of the their title to same to the below within 21 days from the date of this notice.

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

*Date: 3 March 2017*

*Signed: Martin A Kennedy & Co (solicitors for the applicants), The Diamond, Malahide, Co Dublin*

**In the matter of the *Landlord and Tenant (Ground Rents) Act 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* – notice of intention to acquire fee simple (section 4): an application by Louis Fitzgerald, Finnian Doyle, Martin Kennedy (the applicants)**

Notice to any person having any interest in the freehold interest of the following properties: all that and those the properties known as 40 Lower Dorset Street and 497, 499, 501, 503, 505, 507, 509 and 511 North Circular Road, Dublin, demised by a lease dated 3 September 1880 made between (1) Charles Corbet and (2) Thomas McAuley (the lease) and described therein as "all that piece or plot of ground situate on Drumcondra Road, bounded on the north by ground belonging to the said Charles Corbet, on the south by a plot of ground in the possession of the said Thomas McAuley, on the east by the plot of ground hereby secondly described, and on the west by Drumcondra Road, containing in front to Drumcondra Road 20 feet, in the rear 20 feet, and from front to rear on the north 208 feet, and on the south, 210 feet, be the same admeasurements or any of them more or less and, secondly, that plot of ground at the rear of and adjoining the plot of ground hereby firstly described, bounded on the north by ground in the possession of the said Charles Corbet, on the south by the North Circular Road, on the east by ground in the possession of the said Charles Corbet, and on the west by the premises hereby firstly described and by other premises in the possession of the said Thomas McAuley, containing on the north 10 feet, on the south 10 feet, on the east 50 feet, and on the west 50 feet, be the same admeasurements or any of them more or less, which said premises firstly and secondly described are situate in the parish of Saint George and county of the city of Dublin and are more particularly described in the map hereon delineated the premises herein firstly described being coloured red and the premises secondly described coloured green together with all rights, easements and appurtenances thereunto belonging or usually held or enjoyed therewith".

Take notice that Louis Fitzgerald, Finnian Doyle and Martin Kennedy (the applicants), being the persons entitled to the interest of the lessee under the lease in respect of the properties now known as 40 Lower Dorset Street and 497, 499, 501, 503, 505, 507, 509 and 511 North Circular Road, Dublin, intend to apply to the county registrar of the county of Dublin for the acquisition of the freehold interest and all intermediate interests in the aforesaid properties, and any party asserting that they hold a superior interest in the aforesaid properties is called upon to furnish evidence of their title to same to the below named within 21 days from the date of this notice.

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

*Date: 3 March 2017*

*Signed: Arthur Cox (solicitors for the applicants), Earlsfort Centre, Earlsfort Terrace, Dublin 2*

**In the matter of the *Landlord and Tenant (Ground Rents) Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* – notice of intention to acquire fee simple (section 4): an application by Brantive Limited (the applicant)**

Notice to any person having any interest in the freehold interest of the following properties: all that and those the properties known as 41, 41A and 41B Lower Dorset Street, Dublin, demised by a lease dated 17 March 1881 made between Charles Corbet of the one part and Michael Moran of the other part (the lease), and described therein as "all that and those that piece or plot of ground particularly shown on the map thereof in the margin of these presents, which said piece or plot of ground contains in front thereof to Drumcondra Road 30 feet in breadth, in the rear 20 feet, and in depth from front to rear on the north side 140 feet, and on the south side 140 feet. Bounded on the north partly by ground the property of lessor and partly by plot demised to lessee, on the south by holding in possession of Mr McAuley, on the east by an intended laneway, and on the west by Drumcondra Road, be the said several admeasurements more or less, all which said premises are situate in the parish of St George and city of Dublin".

Take notice that Brantive Limited (the applicant), being the entity entitled to the interest of the lessee under the lease in respect of the properties now known as 41, 41A and 41B Lower Dorset Street, Dublin, intends to apply to the county registrar of the county of Dublin for the acquisition of the freehold interest and all intermediate interests in the aforesaid properties, and any party asserting that they hold a superior interest in the aforesaid properties is called upon to furnish evidence of their title to same to the below named within 21 days from the date of this notice.

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

*Date: 3 March 2017*

*Signed: Arthur Cox (solicitors for the applicant), Earlsfort Centre, Earlsfort Terrace, Dublin 2*

**In the matter of the *Landlord and Tenant (Ground Rents) Acts 1967-1994* and in the matter of the *Landlord and Tenants (Ground Rents) (No 2) Act 1978*: an application by Viztip Limited, having its registered office at Sheil Kinnear, Sinnottstown Business Park, Sinnotstown Lane, Drinagh, Co Wexford**

Take notice that any person having an interest in the freehold or any superior interest in the property known as: all that and those the property known as 12 Dame Court, Dublin 2, held together with other premises under lease dated 12 May 1941 between Kate Farley of the one part and Becker Brothers Limited of the other part for a term of 150 years from 29 September 1938, subject to an apportioned yearly rent of £100 and therein together with other premises described as "all that and those that piece or plot of ground on South Great Georges Street in the parish of St Andrew and City of Dublin with the buildings and erections standing thereon containing the measurements and more particularly laid down and described on a map hereto annexed and coloured red thereon".

Take notice that the applicant, Viztip Limited, intends to submit an application to the county registrar for the county of Dublin for the acquisition of the freehold interest in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid property is called upon to furnish evidence of title to the aforesaid property to the below named within 21 days from the date of this notice.

In default of such notice being received, the applicant, Viztip Limited, intends to proceed with the application before the county registrar for the county of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the aforesaid property are unknown and unascertained.

*Date: 3 March 2017*

*Signed: Leman Solicitors (solicitors for the applicants), 8-34 Percy Place, Dublin 2*

**In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of premises situated at 120 Upper Drumcondra Road, Drumcondra, Dublin 9, D09T6P7: an application by Gerry Buckley and Larry Laffan**

Take notice any person having any interest in the freehold estate or any superior or intermediate interest of the following property: all that and those the premises known as 120 Upper Drumcondra Road in the city of Dublin and described in the sublease as "all and singular that plot of ground situate on the east side of Upper Drumcondra Road in the city of Dublin, more particularly delineated and described and having the measurements as shown on the map or plan annexed to these presents and therein edged red and numbered 120 on said map, and also the messuage or dwellinghouse out offices to be erected and built thereon pursuant to the covenant in that behalf hereinafter contained".

Take notice that the applicants, Gerry Buckley and Larry Laffan, intend to submit an application to the county registrar for the county/city of Dublin for acquisition of the freehold interest and all intermediate interests in the aforesaid premises, and any party asserting that they hold a superior interest in the aforesaid premises are called upon to furnish evidence of the title to the aforementioned premises to the below named within 21 days from the date of this notice.

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

*Date: 3 March 2017*

*Signed: Donal O'Hagan & Co (solicitor for applicant), Court House Square, Dundalk, Co Louth; A91 YWN1*

**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***

Take notice that any person having any superior interest (whether by way of freehold estate or otherwise) in the following property: all that and those the premises formerly known as 5, 7, 9, 9a and 11 Terenure Place, and now known as 5-9 Terenure Place, Dublin 6W (including Brady's licensed premises and adjoining buildings), being a portion of the premises the subject of an indenture of lease dated 15 May 1900 between Ida Emily Townsend and Helena Diana Maud Billing of the one part and Maurice P Flood of the other part for a term of 150 years from 25 March 1900 at a yearly rent of £50 per annum.

Take notice that Chanel Taverns Limited, as tenant under the said lease, intends to submit an application to the county registrar for the city of Dublin for the acquisition of the freehold interest in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid premises (or any of them) are called upon to furnish evidence of their title to the aforementioned premises to the below named within 21 days from the date of this notice.

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

*Date: 3 March 2017*

*Signed: Smith Foy & Partners (solicitors for the applicant), 59 Fitzwilliam Square, Dublin 2*

**In the matter of the *Landlord and Tenant (Ground Rents) Act 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* – notice of intention to acquire fee simple (section 4): an application by Aviva Life & Pensions UK Limited (the applicant)**

Notice to any person having any interest in the freehold or any intermediate interest of the following property: all that and those the premises known as 26 Grafton Street, which property is now described and contained in folio 98782L of the register of leaseholders of county Dublin and held under a lease dated 18 November 1930 between (1) Bernard Wine and (2) James Pankhurst Knowles for a term of 200 years from 1 December 1930, subject to the yearly rent of £500 and the covenants on the part of the lessee and the conditions contained therein (the lease), being property also held under a superior lease dated 31 January 1900 between (1) Rev Howard J Colclough and (2) William Prescott for a term of 250 years from 1 January 1900, subject to payment of an annual rent of £200.

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

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

*Date: 3 March 2017*

*Signed: Arthur Cox (solicitors for the applicant), Earlsfort Centre, Earlsfort Terrace, Dublin 2*

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

**matter of *the Landlord and Tenant (Ground Rents) Act 1967* and in the matter of the purchaser of the freehold estate or superior intermediate interests of property situate 52 Sundrive Road, Kimmage, Dublin 12, and in the matter of an application by John O'Toole and Ellen Maria O'Toole**

To any person having a freehold estate or any intermediate interest in the property now known as no 52 Sundrive Road, Kimmage, Dublin 12, the subject of indenture of lease fee farm grant dated 24 October 1857 between Sir William McKenny Bart of the one part and Patrick Regan of the other part, the premises more particularly described therein as all that piece or parcel of ground containing 2 acres, 2 roods, and 2 perches, situate near Harold's Cross in the county of Dublin, bounded on the north east to Phipps land, and on the south east to Stubbers Mills, and land on the south west to the Knight of Kerry's six acres, on the north west to William Purcell Esq, acre, rood, and 12 perches, and being part of the land commonly called or known by name of Parsons freehold in Crumlin and, in a new map of the said land called Parsons freehold, described and marked no 1 with all houses, gardens, offices and improvements thereon, was demised to the said Patrick Regan forever from 24 October 1857, subject to a perpetual yearly fee farm rent reserved of £25.18.6 and further subject to an indenture of assignment dated 26 May 1919 between Josephine Mary Countess Plunkett of the one part and Brendan R Cleary and Kevin Cleary of the other part, the premises more particularly described therein as all that and those part of the lands of Harold Cross called Larkfield field, containing 2 acres statute measure or thereabouts, situate, lying and being in the said barony of Newcastle and county of Dublin, held under fee farm grant from the bishop of St Asaph's at the yearly adjusted rent of £19.3.6, was assigned unto the said Brendan R Cleary and Kevin Cleary, subject to a perpetual yearly fee farm rent reserved of £19.3.6, and further subject to an indenture of lease dated 5 January 1934, made between Michael J Cleary and Kevin Cleary of the one part and Mary W Kavanagh of the other part, the premises more particularly described therein as all that and those that part of the lands described in the schedule thereto and now known as Larkfield, containing 4 acres and 11 perches statute measure or thereabouts, bounded on the north east side by Dark Lane, otherwise known as Sundrive Road, Kimmage, on the north west by lands in the possession of Mr Beggs, on the south west by lands in the possession of Mr Frank Perry, and on the south east by other lands the property of the lessor, demised by them to the lessee by indenture of even date and delineated and edged round with a red line on the map or plan thereon endorsed, all of which said premises are situate in the barony of Newcastle and county of Dublin, was demised to the said Mary W Kavanagh for the term of 175 years from 1 November 1933, subject to the year rent reserved of £100 and further subject to an indenture of lease dated 19 November 1935, made between Mary W Kavanagh of the one part and Patrick A Ussher of the other part, the premises more particularly described therein as all that and those that plot of ground with the shop, dwellinghouse, out offices and premises erected and standing thereon situate on the south west side of Sundrive Road Kimmage and measuring in front to Sundrive Road 22 feet, 3 inches, being the premises now known as no 42 Sundrive Road, situate in the barony of Newcastle and county borough of Dublin, and which said premises as to their position dimensions and boundaries are more particularly delineated and described in the map hereon endorsed and thereon edged red, was demised to the said Patrick A Ussher for a term of 173 years from 6 May 1935, subject to the yearly rent of 18 thereby reserved.

Take notice that John O'Toole and Ellen Maria O'Toole, being the persons currently entitled to the lessee's interest under the last-mentioned lease, intend to apply to the county registrar of the county of the city of Dublin to obtain the fee simple in the said property, and any party asserting that they hold a superior interest in the aforesaid property is called upon to furnish evidence of title to same to the below named within 21 days from the date of this notice.

In default of any such notice being received, Messrs Gill Traynor, solicitors for the applicants, intend to proceed with the application before the county registrar for the county of the city of Dublin for such orders or directions as may be appropriate on the basis that the person or persons beneficially entitled to a superior interest, including the freehold reversion in the aforesaid property, are unknown and unascertained.

*Date: 3 March 2017*

*Signed: Gill Traynor Solicitors (solicitors for the applicants), 39-41 Sundrive Road, Dublin 12*

**In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978*: an application by Maurice Crean**

Take notice any person having an interest in the freehold estate of the following property: 15 Barrington Street, Limerick city, held under an indenture of lease dated 12 November 1968 between Theobald Fitzwalter Butler and Arabella, Lady Seeds (the lessor), William James McDonagh (the lessee) for a term of 99 years from 10 April 1968 at a yearly rent of at a yearly rent of £100 for the first 21 years and a yearly rent of £120 for the remaining 70 years, and therein described as "all that and those the dwellinghouse and premises known as 15 Barrington Street, in the parish of Saint Michael and City of Limerick".

Take notice that Maurice Crean (the applicant) intends to submit an application to the county registrar for the county/city of Limerick for acquisition of the freehold interest in the aforesaid premises, and any party asserting that they hold a superior interest in the aforesaid premises are called upon to furnish evidence of the title to the aforementioned premises to the below named within 21 days from the date of this notice.

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

*Date: 3 March 2017*

*Signed: Holmes O'Malley Sexton (solicitors for the applicant), Bishopsgate, Henry Street, Limerick*

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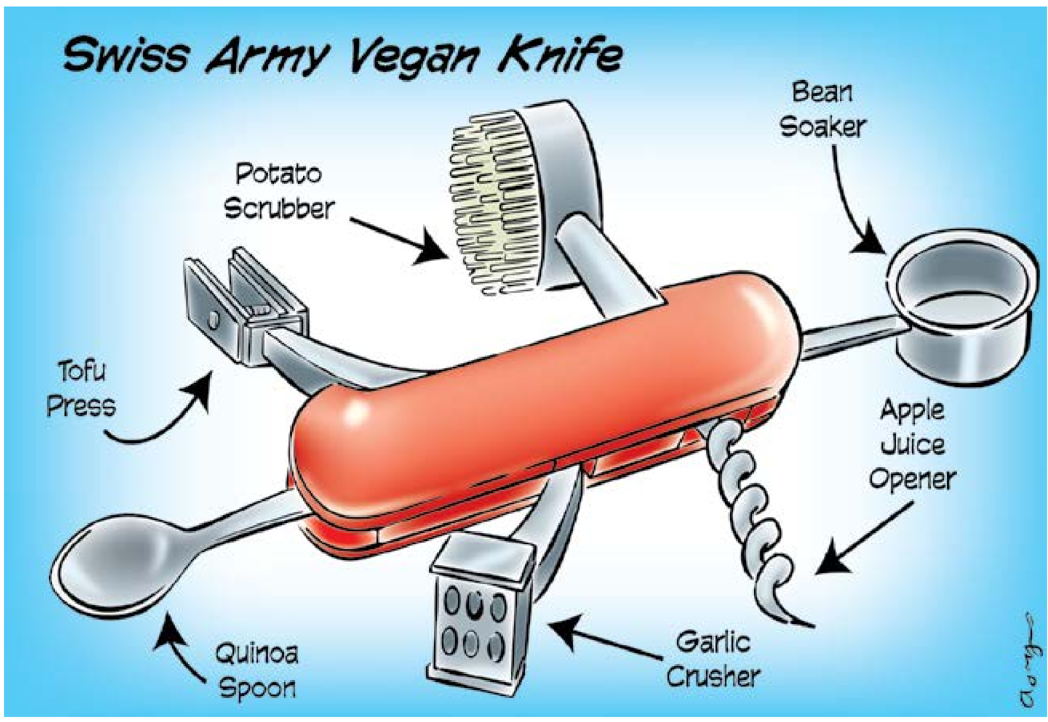
QUAM TIGRIS IN TERGO VEHEBAT




# PREPARED TO SERVE, BUT…

The Swiss Army has decided to allow a strict vegan to join the force, *The Independent* reports. Antoni Da Campo was keen to undertake military service, which is mandatory for able-bodied male citizens in Switzerland. Anyone refusing to serve has to pay a 3% tax on income until the age of 30.

However, the 24-year-old refused to eat animal products or wear leather due to his views. Despite Da Campo offering to pay for his own synthetic boots, the army said it wouldn't accommodate him.

Da Campo took his case to court in March 2015, but lost. He appealed to the Federal Administrative Court, arguing that being excluded from the army and being forced to pay an additional tax would constitute discrimination on the basis of his philosophical beliefs.

After the court ordered the two parties to mediate, the army relented, declaring Mr Da Campo fit for service.

# 'ANNOYING' VEGAN COWBELL CAMPAIGNER REFUSED PASSPORT

**In more Swiss vegan news, Netherlands-born Nancy Holten has been denied a second application for a Swiss passport after local residents took offence to her rejection of Swiss traditions and her "annoying" campaigning, *The Local* reports.**

**Ms Holten has campaigned publicly against the local traditions of piglet racing and putting bells around cows' necks.**

**The animal rights activist told media outlets that "the sound that cowbells make is a hundred decibels. It is comparable to a pneumatic drill. We also would not want such a thing hanging close to our ears," she said. "The animals carry around five kilograms around their neck. It causes friction and burns to their skin."**

**Tanja Suter (president of the local Swiss People's Party) claimed Ms Holten had a "big mouth" and residents had not wanted to give her the gift of citizenship "if she annoys us and doesn't respect our traditions". Swiss residents have a say in a person's passport application.**

**Her second attempt at naturalisation was rejected last November and has now been sent to the cantonal government in Aargau, where it could still be approved.**

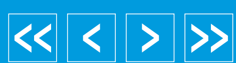
# THROUGH STREETS BROAD AND NARROW

**A US businessman in dispute with the Department of Motor Vehicles in Virginia paid his $3,000 tax bill using five wheelbarrows containing 300,000 coins, reports the BBC. Nick Stafford delivered so many coins that the DMV's automated counting machines could not cope with the volume. It took staff at least seven hours to count the coins, working until late.**

**Mr Stafford told the BBC he had made his protest because he wanted government departments to be more responsive to public inquiries. He had filed a freedom of information request to be given a direct number for the DMV and was eventually given one. When he phoned it, he was told the number was not for public inquiries. Mr Stafford then demanded the direct numbers of nine other tax offices. When that was refused, he went to court to argue his case.**

**A judge dismissed his three lawsuits, refusing his request for the DMV and its employees to be fined. Legal representatives of the state did hand over the phone numbers he requested however – most of which are now posted prominently on his website.**

"There's enough in it to pay the tax for using a wheelbarrow to pay the tax."



# LEGAL ROLES

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Ref: 909132

**Funds Solicitor**
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**Banking & Finance Solicitor**
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Ref: 911277

**Commercial Litigation Solicitor**
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Ref: 910245

**Commercial Property Solicitor**
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Ref: 909436

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### Featured Jobs

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Our client is growing its technology division by recruiting a partner to help drive & deliver their service offering. As part of a team of 4, you will join a well supported & reputable service. The job will involve mostly non-contentious work & will advise a broad range of clients within technology, content, outsourcing, e-commerce, data privacy & intellectual property. You will be responsible for mentoring junior solicitors & managing projects & stakeholders.
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This role will involve advising on the acquisition, disposal & finance of a variety of commercial property transactions. You will draft, review, analyse & negotiate leases, assignments & licences & options as well as surrenders & variations, which will be a key part of the role. The role will involve advising on planning issues, procedures & best practice. The ideal candidate will come from a recognised commercial property practice.
Ref: 910289

**REGULATORY INVESTIGATIONS SOLICITOR**
**€65,000 - €85,000 / Top Tier / Dublin**
Our client is seeking to recruit a solicitor to join its market leading regulatory investigations group. The role will involve advising on complex commercial litigation & disputes. You will work in public & administrative law, tribunal investigations & inquiries, banking disputes, corporate offences, white collar crime & fraud. The ideal candidate will have worked in a leading commercial litigation team with a keen interest in progressing within the regulatory space.
Ref: 911221

**FINANCIAL SERVICES REGULATION SOLICITOR**
**€65,000 - €75,000 / Top Tier / Dublin**
Our client is seeking to recruit a junior solicitor to its financial regulation group. The role will involve advising entrants to the Irish FS market, supporting clients through the Central Bank authorisation process, regulatory matters, fitness & probity, all Central Bank codes as well as administrative sanctions procedure. The ideal candidate will have come from a FS department or the financial services industry with exposure to regulatory & compliance matters.
Ref: 911282

## IN-HOUSE

**INTERIM HEAD OF LEGAL**
**€75,000 - €120,000 / Financial Services Company / Dublin**
Our client is seeking to a recruit an experienced solicitor either with a law firm in the FS practice area or within the FS industry. The role is on a contract basis to commence from May 2017. The role will involve providing legal support to all business areas within the company & will include drafting & reviewing of legal agreements & documentation. Managing a team of 6, you will be responsible for analysing & reporting on legal risks. You will liaise with external counsel to ensure security is perfected & all filings & registrations have been made.
Ref: 911313

**COMMERCIAL CONTRACTS ANALYST**
**€50,000 - €60,000 / Energy Commodities Company / Dublin**
This role is aimed at a lawyer with commercial contracts experience. It will require coordinating the internal & external contract development & review process for all commodities sales contracts (based on English & New York law) & on differing Incoterm bases, identifying issues of concern & clarifying these with relevant operational functions, as well as performing other contractual tasks & special assignments. The candidate will be enthusiastic, willing to learn & tackle new challenges, with an interest in commercial & legal issues.
Ref: 911193

Should you require further information about any of these roles or any other legal recruitment requirements, please contact **Michael Minogue, Assistant Manager (m.minogue@brightwater.ie)** in strictest confidence.

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# Medico-Legal Advisor

**OUR CLIENT**

Medisec assists its GP members whenever their professional reputation is at risk, whether by way of a clinical negligence claim for damages, involvement in a tribunal or inquest, or regarding an ethical or disciplinary matter. Medisec also strives to educate its members to reduce risk, incidents of complaints and claims, promote best practice and patient safety and care.

**THE ROLE**

**The successful candidate will:**

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- Work with the team on risk management awareness, education and training.
- Assist members with matters relating to professional conduct and ethics.
- Work with the team on assisting members drafting depositions for inquests and preparing for hearings and liaise with Medisec's legal panel.
- Keep abreast of and consider new legislation, regulations and case law as they are enacted.

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You will require a strong knowledge of the medico legal field in Ireland, good oral and written communication skills, empathy, confidence, an eye for detail and effective time-management.

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## Want to find out more?

**For more information, and/or a discussion in strict confidence, please contact our recruitment consultant, Michael Benson at Benson & Associates, who has been exclusively retained to conduct this assignment.**

**A: Suite 113, The Capel Building, St. Mary's Abbey, Dublin 7.**

**T: +353 (0) 1 670 3997 mbenson@benasso.com www.benasso.com**