LAW SOCIETY
Gazette
€3.75 **April 2010**

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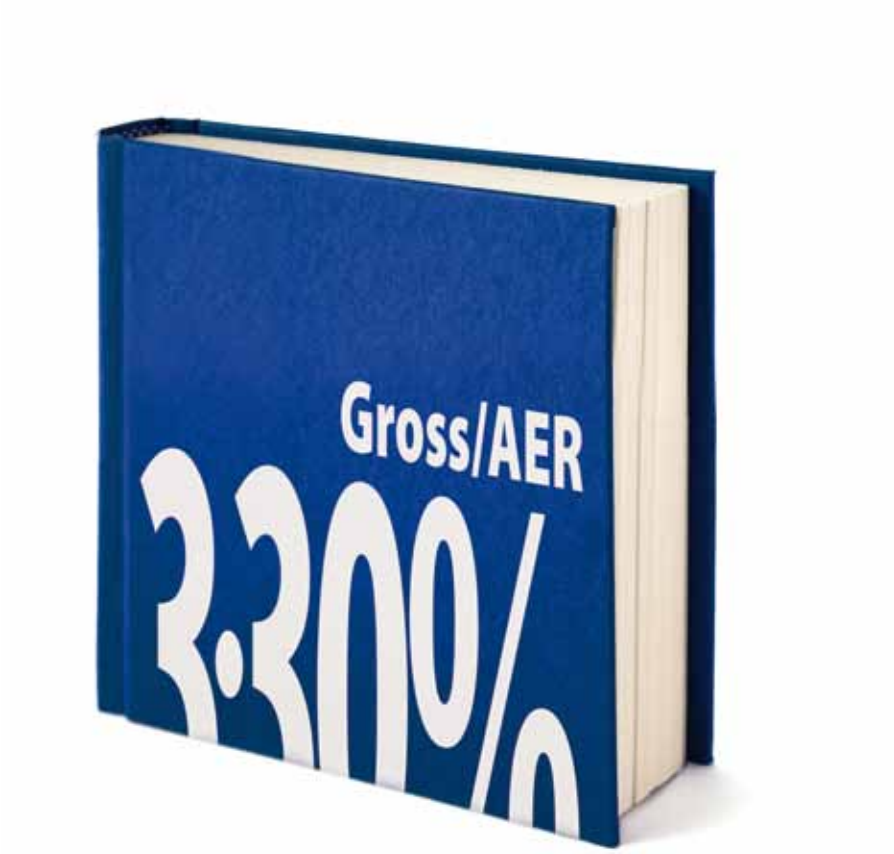

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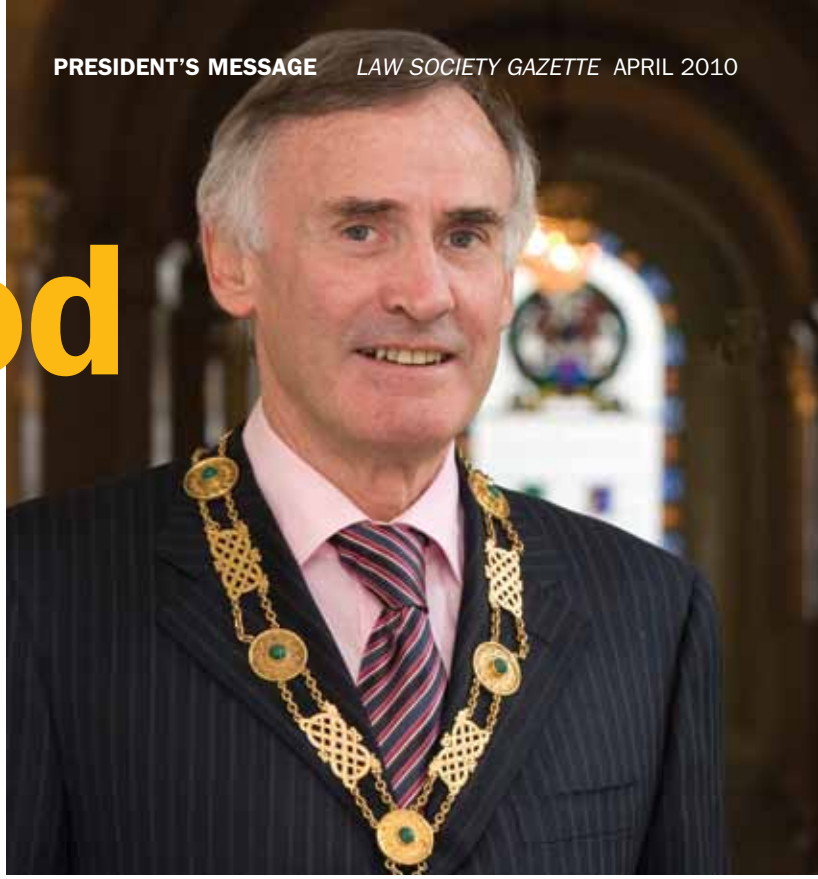

It's good to talk

The recent special general meeting in the Presidents' Hall in Blackhall Place on 11 March 2010 witnessed the biggest attendance at any general meeting of the Society for many years. The meeting was called by the Council following receipt of a requisition signed by more than 100 members of the profession to consider three separate motions, set out below. No fewer than 39 colleagues spoke in the course of a meeting that lasted three hours, of whom 18 were Council members.

The discussions focused on two specific decisions of the Council, namely:

a) The Council's decision in October 2009 to give a guarantee of €8.4 million for a bank loan to be obtained by the Solicitors Mutual Defence Fund, and
b) The decision, in 2005, to acquire a 1.1 acre site adjoining the Society's premises at Blackhall Place.

There was both criticism and praise of these decisions. There was also criticism of the manner in which the decisions were taken and communicated by the Council. In reply, Council members explained in detail the good reasons for these decisions, the responsible manner in which they were taken, and why it would be contrary to the best interests of the profession to seek to fetter the Council in making such decisions.

A detailed explanation was given of the circumstances, together with the process, in which the Council decided to guarantee a loan to the SMDF. As I explained in my e-bulletin to all solicitors of 15 December 2009, it was done in order to ensure a competitive professional indemnity insurance renewal market at the end of 2009, and to avoid the chaos of a potential market failure. Several Council members described the decision as necessary and as "the least worst option available".

"The essence of the debate related to trust and communication"

Trust and communication

Many speakers described the essence of the debate as relating to trust and communication. It is necessary for members of the profession to trust the people they elect to the Council. However, it is also necessary for Council to communicate better with the profession.

At the end of the evening, the three resolutions were put to a vote. The result in each case was as follows:

- 'That (without prejudice to the invalidity or otherwise of past actions of the Council) the Council be prohibited from entering into any guarantee of any nature on behalf of the Society without the prior approval of the members at a special general meeting convened for this purpose and that the bye-laws be amended accordingly.'
  (*Votes in favour: 39; votes against 108.*)
- 'That the Council of the Law Society or any subcommittee thereof be prohibited from purchasing or acquiring any interest in freehold or leasehold property without the prior approval of the members at a special general meeting convened for this purpose and that the bye-laws be amended accordingly.'
  (*Votes in favour: 29; votes against: 108.*)
- 'That (without prejudice to any other limitation on its powers) the Council be prohibited from exposing the Society to any risk involving exposure to any sum in excess of €500,000 without the prior approval of the members of the Society at a special general meeting convened for this purpose, provided nothing in this limitation shall prevent the performance by the Society of its statutory functions in relation to the compensation fund.'
  (*Votes in favour: 21; votes against: 133.*)

In my view, the special general meeting was an excellent exercise in two-way communication, from which both the Council and the members present benefited greatly. Strong views were expressed by many colleagues, but, overwhelmingly, the speeches were very positive and constructive.

My thanks to all who were involved in organising the requisition that brought this meeting about. It proved to be a very important and valuable exercise.

Gerard Doherty
President

On the cover

The problems of missing evidence and the risk of an unfair trial have led to a surplus of judicial review cases relating to 'missing evidence'. Irish solicitors should be aware of recent developments in case law in the area

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SEAMUS MAGUIRE & CO

An article in the March 2010 issue on solicitors' undertakings (entitled 'Keep me covered') referred to the decision of Mr Justice Peart in *Allied Irish Banks Plc v Charles Maguire, Noel McDonald, Richard Clinch and Tommy Gibbons, carrying on practice under the style and title of Seamus Maguire & Co, Solicitors* ([2009] IEHC 374).

We wish to make it clear that none of the partners in Seamus Maguire & Company were found to have engaged in any dishonourable conduct or to have contributed in any personal way to the matters before the court. Judge Peart specifically stated that he was: *"satisfied that as soon as the defendants discovered the awful truth of what had happened, they acted promptly, professionally and honourably in the only way they could"*.

We are happy to make this clear and to apologise to the partners in Seamus Maguire & Company for any contrary impression that might have been taken from the report.

nationwide

Send your news to: *Law Society Gazette*, Blackhall Place, Dublin 7, or email: nationwide@lawsociety.ie

MONAGHAN

The Monaghan Bar Association held a retirement function for retiring county registrar, Ms Josephine Duffy, on 26 February at the Hillgrove Hotel, Monaghan. Josie has been the county registrar since 1988 and was much respected by all who worked with her – evidenced by the large crowd who attended to wish her well in her retirement. Special guests at the black-tie event included President of the Circuit Court Mr Justice Matthew Deery, Mr Justice John O'Hagan and Mr Justice Sean McBride.

Speeches were made by Mr Justice Matthew Deery, Monaghan Bar Association president Dan Gormley, Kevin Hickey (solicitor) – a former apprentice of Josie's, John O'Hagan, and Frank Martin BL on behalf of the Bar. The dinner was followed by dancing into the early hours.

TIPPERARY

The bar association continues to hold an excellent array of CPD courses in the very convenient location of Horse and Jockey – within striking distance for most Tipperary colleagues. Following on from the well-attended seminar last month on risk management and professional indemnity insurance matters, none other than Professor John Wylie will be the big draw on the new *Land and Conveyancing Law Reform Act 2009* in coming weeks.

CORK

The Southern Law Association (SLA) recently held a major CPD event entitled 'Staying Out of Trouble'. Those attending were addressed by Ernest Cantillon, solicitor, on how to avoid being sued; Sean Sexton, solicitor, on how to stay out of trouble with regulation; and, finally, Tim Bolger, investigating accountant with the Law Society, who spoke on pitfalls relating to the *Solicitors' Accounts Regulations*. The seminar was a great success, with 150 solicitors attending and the feedback was very positive. The SLA sponsored a social event at the end of the meeting.

According to SLA president Eamon Murray: "Our intention is to have two CPD events per month and to provide at least 40 hours of CPD to our members from within the resources of our own association during the course of the year."

The annual dinner took place recently in Maryborough House Hotel in Douglas, Cork. Over 250 people enjoyed all that was on offer. Guests included Mr Justice Liam McKechnie of the High Court, Law Society President Gerard Doherty, director general Ken Murphy and members of the local judiciary, including District Court judges James McNulty, Con O'Leary and David Riordan; Circuit Court judges Patrick Moran, Con Murphy, Seán Ó Donnabháin and James O'Donohoe; Garda Commissioner Fachtna Murphy, DPP James Hamilton and a host of local dignitaries (see page 38).

Tributes were paid to Judge Uinsin MacGruairc following his recent retirement from the District Court, having served the bench in Cork for so many years and with such distinction.

The South Dublin Collaborative Law Group was launched by the Minister for Children and Youth Affairs Barry Andrews TD on 23 February in the County Hall, Dun Laoghaire. At the event were *(back, l to r)*: Sharon McElligott, Michael Sheil (chairman), Raphael Gilmore, Jason McGoey, Gearóidín Charlton, Kathy Irwin and Brendan Dillon. *(Front, l to r)*: Mary O'Neill, Joan O'Mahony, Yvonne McEvoy and Shauna O'Gorman (see page 8)

DUBLIN

The family law mediators were honoured that Chief Justice John Murray took time out to attend the recent launch of the DSBA mediation programme. A number of colleagues have already completed the intensive course pioneered in this country by the DSBA and which has already attracted the involvement and commitment of leading family law practitioners across the country. The demand for places on the course has been such that it is being repeated in May. Details are available at www.dsba.ie, or tel: 01 476 3824.

DSBA president John O'Malley is delighted with the choice of Istanbul as the venue for the DSBA annual conference 2010. The dates to be noted are 16-20 September at a cost of €999 per person sharing. Full details are available at www.dsba.ie. As always, the DSBA is a broad church, where paying colleagues from outside the Pale are welcome to attend.

The bar association has been busy with seminars on defamation and NAMA. A series of seminars are scheduled at cost-effective and convenient locations. Another date for your diary is Saturday 15 May for the DSBA annual dinner. This year marks the 75th year of the association. DSBA president John O'Malley was keen to break out of the doldrums of winter – the traditional period for the event – and instead schedule it for early summer. The event will take place this year in the Radisson in Booterstown. Details will be available on the website, with tickets priced at an attractive level.

WATERFORD

Bernadette Cahill continues to fulfil her duties as president of the WLA with aplomb. Last week, she attended a dinner hosted by the legal department of WIT for the presidents and secretaries of the South Eastern Circuit bar associations. Also, the WLA sponsored a lively debate on so-called 'head shops'. G

'Nationwide' is compiled by Kevin O'Higgins, principal of the Dublin law firm Kevin O'Higgins.

Law Society launches new Business Arbitration Scheme

The Law Society's new Business Arbitration Scheme (BAS) was launched by the president, Gerard Doherty, at Blackhall Place on 23 March 2010. The scheme, designed and initiated by the Arbitration and Mediation Committee, was established in response to a clear demand for a fast, cost-effective service to assist with the resolution of disputes. The launch was attended by the President of the Circuit Court, Mr Justice Matthew Deery, who welcomed the scheme.

While there will be no minimum on the dispute-value requirement in the scheme, it is envisaged that it will be suitable for any dispute between businesses or commercial enterprises involving sums of up to €100,000 in value. The BAS also offers the knowledge and experience of qualified arbitrators, all of whom are members of the Law Society's Arbitration Panel.

One of the highlights of the BAS is that disputes would be resolved within 90 days from start to finish. The process will be confidential between the parties, who will also be able to put a limit on costs. The details of the scheme (also available on the Law Society's website, www.lawsociety.ie) provide for very strict time limits for the exchange of pleadings between the parties, setting down a date for oral hearing, and the publishing of the arbitrator's award following hearing.

The awards are to be reasoned awards, unless otherwise expressly agreed by the parties. The timing of the launch of the scheme is considered to be particularly appropriate, given the recent coming into force of the *Circuit Court Rules (Case Progression (General)) 2009* (SI 539/2009), which provide for the referral by a Circuit Court judge or a county registrar at a case progression hearing of a case to mediation/conciliation/ arbitration or other dispute resolution process to settle or determine the proceedings or issue.

Pictured at the launch were *(l to r)*: Mr Justice Matthew Deery, Law Society President Gerard Doherty and Eamon Harrington, chair of the Law Society's Arbitration and Mediation Committee

How does the scheme work?

When the parties agree to proceed by means of arbitration:

- The Law Society nominates a qualified arbitrator from its panel, with expertise on a particular dispute area,
- Both parties submit written details outlining their respective positions to the arbitrator,
- An oral hearing is held in private within 60 days of the appointment of the arbitrator,
- The arbitrator makes an award within 30 days of the hearing,
- The arbitrator has the power to award costs against either party, including the costs of the arbitration,
- The process and the award are confidential.

What does it cost?

- A €250 fee is payable to the Law Society on initial submission of agreement.
- The arbitrator's fee is entirely a matter of negotiation between the arbitrator and the parties – the parties have control of the cost. The Law Society will not set or recommend fees to be paid to the arbitrator. The fee will be agreed with the arbitrator before the arbitration commences.
- If the parties are unable to agree a fee, then the Law Society will appoint an alternative arbitrator, who will be entitled to have his/her fee decided by a court officer.

According to the chairman of the Arbitration and Mediation Committee, Eamon Harrington: "Disputes between businesses can be protracted and difficult to resolve. The cost and time involved in court litigation can be unpredictable. This scheme offers an alternative mechanism controlled by the parties. It offers a speedy and cost-efficient resolution of disputes, together with the knowledge and experience of qualified arbitrators, with expertise in resolving disputes in diverse areas."

Queries relating to the scheme should be directed to: Colleen Farrell, secretary to the Arbitration and Mediation Committee, Law Society of Ireland, Blackhall Place, Dublin 7 (DX 79); or visit www.lawsociety.ie for full details.

SOCIETY CLARIFIES COURSES STANCE

As a result of a number of queries raised by solicitors with the Law Society, the Society wishes to clarify that no external courses or training providers are affiliated with the Society and no external courses are accredited as Law Society courses. If a seminar, conference, certificate or diploma is stated to be a Law Society course, the brochure or e-zine in which it is publicised will always bear the Law Society crest and the wording 'Law Society of Ireland'.

While a number of external course providers also use the term 'CPD' – often in the form of direct email marketing – the Law Society wishes to emphasise that it does not accredit any particular course or training provider.

The onus is on each solicitor to exercise his or her reasonable judgement as to the quality of training or education being provided, and its relevance to his or her training practice.

CRIMINAL NEGLIGENCE CONFERENCE

The patient safety and justice charity Action against Medical Accidents (AvMA) will host a 'Criminal Negligence and Access to Justice Conference' on Thursday 22 April at the Radisson Hotel, Golden Lane, Dublin from 9.15am to 4.10pm. Speakers include Mr Justice William McKechnie (High Court), Dr Brian Farrell (Dublin City coroner), Roger Clements (consultant obstetrician and gynaecologist), Michael Boylan (Augustus Cullen Law) and Ernest J Cantillon (Ernest J Cantillon & Co).

Legal recruitment survey – significant decline in 2009

The first six months of 2009 saw a significant decline in legal recruitment within both in-house and private practice in Ireland, according to the Robert Walters' *Legal Market Overview and Salary Survey for 2010*.

Redundancies slowed considerably in the third quarter. Where staff or skill shortages existed within private practice, lawyers were moved internally to different areas of specialisation. Insolvency, litigation and employment remained busy throughout 2009, while corporate and banking departments reduced the size of their teams significantly. It is not yet known what impact NAMA might have on legal recruitment figures in 2010.

Senior solicitors with strong experience in corporate/commercial law, renewable energy, and commercial contracts/procurement were sought after in 2009.

Organisations preferred to hire individuals who had trained and worked with a leading law firm before gaining in-house experience.

Fixed-term contracts grow

The final quarter showed a small but steady increase in recruitment across commerce and industry. Many organisations circumvented headcount freezes by hiring fixed-term contractors for an initial six to 12-month period.

Salary and bonus expectations changed significantly in 2009 due to the influx of available candidates in the marketplace. Senior solicitors with strong sector-specific experience could, in some circumstances, demand a premium for fixed-term contract roles. However, overall there was a decline in salary levels across the board. This is expected to continue in 2010.

Due to the high number of good quality candidates available in the marketplace, organisations were able to hire professionals with a skill set above their original requirements. This trend is expected to continue for at least the first half of 2010.

The majority of legal recruitment this year is expected to be for contract in-house positions within industry. Despite the surplus of legal candidates in the market, Robert Walters says that finding niche skill sets will continue to be difficult.

Sterling line-up for surrogacy seminar

The education committee of the Family Lawyers' Association is running a free seminar titled 'Surrogacy/Legal Issues/Ireland' at the Distillery Building on Church Street, Dublin, on 21 April 2010.

The seminar, which is being chaired by High Court judge Mr Justice Henry Abbott, will feature a sterling line-up of speakers. They include Bronagh O'Hanlon SC, who will address the issue of the law surrounding surrogacy in England; US lawyer and co-founder of Circle Surrogacy in the US, John Weltman, who will talk about surrogacy laws there; Dr Deirdre Madden of UCC, who will focus on the topic 'Does surrogacy have a future in Ireland?'; and Dr Gerard Byrne, who will concentrate on the psychological challenge of surrogacy.

All you need to know about regulation

'Law Society regulation in the 21st century – what every practitioner needs to know' is the intriguing title of a CPD Focus seminar that takes place on 9 June 2010 at Blackhall Place in Dublin.

The seminar will provide practitioners with an outline of the Law Society's regulatory system and how it affects solicitors' practices. It is designed to assist practitioners in avoiding the more common pitfalls and to provide them with a hands-on guide to compliance.

It will be of interest to all practitioners, but particularly to sole practitioners, managing partners, and those responsible for compliance issues within firms. A unique feature of the seminar will be the facility to ask questions of the panel on an anonymous basis concerning matters that may be of concern to participants.

Topics to be discussed:

- An outline of the regulatory system and how it operates,
- Preparation for a Law Society investigation and what happens during such an investigation,
- How to respond to a Law Society investigation,
- Solicitors' accounts revisited – pitfalls for practitioners,
- How the Law Society deals with complaints and practical tips on how to handle a complaint in practice,
- Undertakings as a professional conduct issue, and
- Traps for the unwary – a practitioner's perspective.

The experienced panel of speakers will include:

- John Elliot (director of regulation),
- Linda Kirwan (head of Complaints and Client Relations),
- Tony Watson (deputy head of Complaints and Client Relations),
- Seamus McGrath (senior investigating accountant),
- Tim Bolger (investigating accountant),
- Michael Quinlan (Dixon Quinlan, chair),
- Sean Sexton (PJ Walsh & Co).

The course is liable for 2.5 management and professional development skills points, and fulfils practitioners' entire requirement of one hour of training in regulatory matters, specified by the CPD scheme 2010.

Date: Wednesday 9 June 2010
Time: 4pm to 6.30pm
Fee: €140
Skillnet fee: €105
Venue: Law Society of Ireland, Blackhall Place, Dublin

For the full list of discussion topics, visit www.lawsociety.ie/cpdfocus, or contact a member of the CPD Focus team, tel: 01 881 5727, fax: 01 672 4890, email: cpdfocus@lawsociety.ie, web: www.lawsociety.ie/cpdfocus.

Are you thinking of getting admitted across the water?

Large numbers of solicitors are currently going through the process of applying for a qualification in England and Wales – because the arrangement that provides for full reciprocal rights could change by autumn 2010, with a requirement to pass exams in the future, *writes Keith O'Malley*.

If you believe that an England and Wales qualification might be good to have, then you should consider applying for one without delay. All the information you need to make an application to qualify in England and Wales is provided on the Society's website at www.lawsociety.ie/en/pages/careersupport.

The process of application is based on submitting the following to the Solicitors Regulation Authority (SRA) of England and Wales:

- An AD1 application form – available from the SRA,
- The Irish equivalent of a Criminal Records Bureau check,
- A certificate of good standing from the Law Society of Ireland,
- An application fee of £100.

There is then an annual fee of Stg£20 to maintain your name on the roll in England and Wales.

The most difficult matter to organise is the Irish equivalent of the Criminal Records Bureau (CRB) check. The Garda Central Vetting Unit, through which this must be obtained, is difficult to make contact with. It also takes a relatively long time to provide the equivalent CRB document.

If you apply for a 'certificate of good standing' from the Society's Regulation department at the same time as applying for the CRB check, you may run into difficulty. The SRA in England insists that the certificate of good standing you provide them with is less than three months issued. The best approach is to seek a CRB check first – refraining from seeking a certificate of good standing until you believe your CRB document (from the Garda Central Vetting Unit) will soon be with you.

Supports for newly qualifieds

People who have qualified in recent months, or who are about to in the next few months, are encouraged to link up with the Society's Career Support service and to avail of the wide range of information and supports they provide.

Workshops are currently being organised, focused on matters of concern to people just qualifying – such as getting your name entered on the roll of solicitors, working and qualifying in other jurisdictions, and particular problems that face newly-qualified solicitors in the current market. There is no charge for these events. Details on where and when they will take place are available on the Society's website.

Seminars that are relevant to all solicitors, regardless of level of experience, continue also, with upcoming dates and locations listed on the Society's website. For full details on these training events and to book your place, visit www.lawsociety.ie/en/pages/careersupport.

Spring diploma programme launched

The Law Society's diploma team has launched its spring 2010 programme.

The six-month Diploma in Employment Law course will start on Saturday 17 April and will run weekly. The course gives a comprehensive 'cradle to the grave' understanding of the employment relationship – from recruitment through to termination. The diploma places a heavy emphasis on employment issues that have come to the fore since the economic downturn, such as redundancies, pay reductions, industrial relations and employer insolvency.

The Diploma in Commercial Litigation will start on Tuesday 20 April. Its objective is to provide practitioners with a comprehensive knowledge of certain aspects of large-scale commercial litigation, to include an examination of the Commercial Court, rules of discovery, evidence, injunctions, judicial review and the *Rules of the Superior Courts*.

These diploma courses will also be webcast live on the Education Centre's secure internet site.

Useful certificate courses

In addition, a number of two-month certificate courses are on offer, including a Certificate in Taxation Law, starting on 21 April, and a Certificate in District Court Advocacy, starting on 24 April.

The Certificate in Taxation Law, provided in association with the Irish Taxation Institute, aims to provide professionals who have not yet specialised in taxation with an understanding of key issues and concepts. Core topics will include a review and application of legal issues relating to capital gains tax, capital acquisitions tax, VAT and stamp duty.

The Certificate in District Court Advocacy will analyse some of the key areas of District Court practice, including debt collection, licensing, road traffic offences and family law proceedings, while also focusing on the advocacy skills inherent in such applications. This will be a blended learning course, meaning that online learning will be supplemented by a limited number of onsite workshops.

The fee for diploma courses is €2,180 and for certificate courses is €1,280. However, reductions are available for unemployed solicitors, with course fees now reduced by 20% for such applicants.

For further information on these courses and application forms, visit the diploma programme pages at www.lawsociety.ie, email: diplomateam@lawsociety.ie, or tel: 01 672 4802.

Supreme courts presidents' network comes to town

The Network of the Presidents of the Supreme Judicial Courts of the EU met in Dublin Castle on 19 March 2010 for its bi-annual colloquium, which was hosted by the Chief Justice, Mr Justice John L Murray. The Chief Justice is a vice-president and board member of the network.

These colloquia provide an opportunity every two years for presidents to address issues common to supreme courts across the EU. The Dublin colloquium discussed:

- Developing and improving judicial cooperation in the EU,
- The network of presidents' relationship with EU institutions,
- Judicial independence, and
- The organisation and working environment of supreme courts.

The network was established in 2004 to address issues arising from the developing and enhanced role of the EU in the field of 'justice, freedom and security', among other matters.

The network manages a 'common portal' on the internet, through which each supreme court has access to the case law of every other supreme court in the EU. Data and information is exchanged on all matters relating to the role and functions of supreme courts. The network also promotes judicial exchanges between other supreme courts.

Setting up in practice 2010

'Setting up in Practice 2010' is a CPD Focus course designed to provide a practical guide to solicitors thinking of setting up in practice – and to those who have already done so.

It will be relevant, also, to new partners and provides a useful 'health check' for those who have been in practice for some time.

A unique feature of this seminar is its mentor group system. Each group of participants meets with an experienced solicitor, who provides the group with advice and answers any questions or concerns. These mentors remain available to participants in the months after the seminar.

The seminar will cover the following matters:

- Factors influencing the decision to set up in practice,
- Financing your practice: the commercial reality,
- Itemised costs of setting up and running a practice and the compilation of a realistic budget/costs of closing a practice,
- Dealing with the accountant and the bank,
- Account systems and management information,
- Taxation: the ticking time-bomb – income tax, motor expenses, VAT, PAYE, PRSI and Revenue audit,
- Technology requirements,
- Marketing and client care,
- *Solicitors' Accounts Regulations*,
- Anti-money-laundering legislation.

The experienced panel of speakers include:

- John A Campbell,
- Eamonn Keenan,
- Elma Lynch,
- James McCourt,
- Kevin O'Higgins,
- Charles Russell,
- Jim Ryan.

In all, 5.5 management and professional development skills hours, plus one hour of regulatory matters, are available for this course.

Date: Saturday 12 June 2010
Time: 9.30am to 5pm
Fee: €175
Skillnet fee: €131
Venue: Law Society of Ireland, Blackhall Place, Dublin 7

For the full list of topics being discussed, visit www.lawsociety.ie/cpdfocus, or contact a member of the CPD Focus team – tel: 01 881 5727, fax: 01 672 4890l, email: cpdfocus@lawsociety.ie, web: www.lawsociety.ie/cpdfocus.

South Dublin embraces collaborative law

The latest group of collaborative law practitioners to pool resources is South Dublin Collaborative Lawyers. Collaborative law is an alternative way to resolve family disputes. Its aim is to assist couples to reach agreement based on open discussions and realistic aspirations. It minimises the involvement of the courts in such cases.

Chair of the South Dublin group, Michael Sheil, explains: "Collaborative law encourages the parties to try to resolve their difficulties in a non-confrontational manner, with the help of collaborative lawyers."

Collaborative law solicitor Gearódin Charlton has seen a significant increase in clients choosing this method in the past year, chiefly because "it is becoming increasingly clear that the courthouse is not the place to resolve family disputes and restructure family relationships. The adversarial system is not always suited to the complex dynamics of family law work," she says. "While a high percentage of cases settle, this is often only on the steps of the court, by which time the adversarial system has taken its toll on all parties, especially on the children involved."

The essence of the collaborative process is that the best interests of the family are served by trying to resolve these disputes in a non-confrontational way. To find out more about South Dublin Collaborative Lawyers, visit www.southdublincollaborativelawyers.ie.

FitzGerald compliments profession

"I want genuinely to compliment the Law Society of Ireland, who over the last two decades have worked ceaselessly to improve standards and have never lost the sense that the law is ultimately about justice and the rights of the citizen," Dr Garret FitzGerald told a packed Presidents' Hall in Blackhall Place recently.

The former taoiseach was guest speaker at a parchment ceremony on 25 February 2010.

Dr FitzGerald also spoke of the importance of the independence of the legal profession. "The independence of the Bar, combined with the fact that members of your side of the legal profession are officers of the court, are, I believe, crucial elements of our democratic system."

PIC: JASON CLARKE PHOTOGRAPHY)

Former Taoiseach Garret FitzGerald speaking at the parchment ceremony on 25 February 2010

Common law tradition

He continued: "We have been lucky to have been inheritors of a common law tradition – one of our happier gifts from our former colonial rulers. Both the neighbouring island and ourselves escaped Napoleon's reforms – which together have determined much of the social fabric of today's European continent.

"And, in a European Union of 27 states, the majority of whom are civil law regimes, we have to be vigilant about preserving our common law system – a system which, I have to say, from my experience of the working of the European Union, is neither understood nor appreciated by many of our partners," he remarked.

"For, in conjunction with a constitution which, despite a few dated elements, was well-drafted overall, that common law tradition secures the rights of our citizens in a manner which I believe to be unique, and of which we should be proud – and the maintenance of which must be one of our prime concerns," he said.

Key element of the Constitution

One of the key elements of the Constitution, the former taoiseach believes, is "the valuable mechanism of a presidential constitutional reference, following consultation of the Council of State".

He continued: "This unique constitutional provision reflected Mr de Valera's concern about the danger to human rights of parliamentary tyranny – of which he and his revolutionary colleagues had earlier had ample experience.

"That power of reference has been invoked on a score of occasions, a number of which were followed by laws, or parts of them, being declared unconstitutional.

"I know that some politicians resent the right of the courts to have a last word on our laws. They are wrong. Even in a country where the executive and legislature have never consciously sought to impinge on the rights of citizens, unintentional violations of these rights can, nevertheless, occur.

"Moreover, I know from my own experience as taoiseach that, especially in the absence of a provision under which the executive can seek the constitutional advice of the Supreme Court in advance of legislating, this reference procedure can be employed as a substitute. I think I am right in recalling that, 27 years ago, my government encouraged the President to refer to the Supreme Court legislation to remove rent control and, when problems with this legislation had been identified by the Supreme Court, this enabled the defects in that legislation to be corrected in a new bill.

"We also encouraged reference to the Supreme Court of a bill to extend voting rights in Dáil elections to citizens of states, such as the UK, which extended that right to our citizens because, in this way, we were able to insure against the constitutional chaos that would have ensued if a challenge to the provisions of that bill were to be taken, and to succeed, after an election in which, under the terms of that bill, non-citizens had voted.

Employment and career prospects

Addressing the newly qualified solicitors directly, and reflecting on his own life experience, he said: "When I went into the employment market over 60 years ago, life was difficult in Ireland – as it is again now.

"It must be very disheartening for you, having studied so hard, due to no fault of your own, to find such a challenging economic environment when it comes to employment and career prospects.

"The final message I want to leave with you is that law gives you a good basis for any career – as I found when I completed my course in the King's Inns.

"Please forgive me – a non-practising barrister of 62 years standing – for daring to talk about the law to practising lawyers. But I could not resist the temptation provided by the invitation to address you here today!

"I went on to undertake the seven careers I chose instead of the law – airline economist, journalist, university lecturer, economic consultant, author of a dozen books, researcher into aspects of 19th century Irish history and, also, of course – although only for 27 years – politician!"

Standard of scrutiny raised in

In the *Meadows* decision, the Supreme Court has raised the standard of scrutiny to be applied in judicial review decisions affecting fundamental rights, writes Joyce Mortimer

In a Supreme Court decision of 21 January 2010, *Meadows v Minister for Justice, Equality and Law Reform*, the majority of judges granted Ms Meadows leave to judicially review the minister's decision to deport her to Nigeria, on the grounds that the minister did not properly address the refoulement issues. Section 5 of the *Refugee Act 1995* prohibits 'refoulement' (or deportation to a state) where the individual's life or freedom would be threatened or they could be subject to a serious assault.

This decision effectively means that an applicant's fundamental rights must be considered if they are at stake in a decision.

The facts of the case

The applicant claimed that, if she returned to Nigeria, she would be forced into an arranged marriage and be subjected to female genital mutilation. She applied for refugee status, but both the Office of the Refugee Applications Commissioner and the Refugee Appeals Tribunal refused her asylum application.

Following this refusal, the solicitor for the applicant wrote to the Minister for Justice, outlining that the refusal might adversely affect her constitutional rights, including the right to freedom from torture and inhuman and degrading treatment as protected by article 3 of the *European Convention on Human Rights*. The minister subsequently replied, indicating that he had decided to issue a deportation order.

Judicial review application

Taking into consideration the applicant's claim that her fundamental human rights would be violated if she were deported, the judge concluded that the appropriate test was that laid down by Finlay CJ in *O'Keefe v An Bord Pleanála*.

The applicant challenged the High Court refusal to grant leave for judicial review of the ministerial deportation order.

A point of law

The High Court certified that there was a point of law of exceptional public importance that required determination by the Supreme Court. The point of law in question was "whether or not in determining the reasonableness of an administrative decision which affects or concerns constitutional rights or fundamental rights, is it correct to apply the test as set out in *O'Keefe v An Bord Pleanála?*"

Doctrine of reasonableness

The case effectively turned on the interpretation and application of the common law doctrine of reasonableness in judicial review. The Irish courts have mirrored English jurisprudence in determining the grounds for granting judicial review. The commonly accepted standard for judicial review was laid down in the English case of *Wednesbury*, where it was stated: "The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to have taken into account or conversely have refused ... or neglected to take into account matters which they ought to have taken into account. Once that question is answered in favour of the local authority, it may still be possible to say that ... they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, I think the court can interfere."

In the case of *Keegan v Stardust*, Henchy J stated that

ONE TO WATCH: NEW LEGISLATION

Pensions Insolvency Payment Scheme

On 18 January 2010, the Minister for Finance signed SI no 4 of 2010 under the *Social Welfare and Pensions Act 2009*. Section 22 of this act provides for the introduction of the Pensions Insolvency Payment Scheme (PIPS), to take effect from 1 February 2010. PIPS is a cost-neutral scheme for the exchequer that was drawn up by the Minister for Finance in consultation with the Minister for Social and Family Affairs.

The scheme aims to offer special payments to pensioners in situations where a defined benefit pension scheme is winding up in deficit and the employer has also become insolvent. This is called the 'double insolvency' criterion.

The scheme took effect from 1 February 2010. It will operate on a pilot basis for three years, following which it will be reviewed.

How does PIPS work?

The scheme works by enabling pension schemes to purchase annuities from the government at a lower price than normally available on the open market. The reduced purchasing cost is intended to yield a greater balance of assets for members who have yet to retire.

Under PIPS, trustees of a qualifying pension scheme may pay the government a lump sum, which will cover the cost of paying the pensions of retired members. On receipt of the lump sum into the exchequer, the government will assume responsibility for future payment of pensions to beneficiaries at the rate agreed by the minister in approving the application.

It is noteworthy that the scheme expressly excludes post-retirement increases. Section 22(2)(b) of the act provides for the exclusion of schemes that have contrived a double insolvency or where, according to the minister, it is in the public interest or in the interests of the exchequer to exclude them.

human rights watch

judicial review decisions

"the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense". In the case of *O'Keefe v An Bord Pleanála*, Finlay CJ stated: "The circumstances under which the courts can intervene on the basis of irrationality with the decision maker involved in an administrative function are limited and rare."

The Irish courts have adopted a strict interpretation of the doctrine of reasonableness. In *O'Keefe*, Finlay CJ stated that, for the court to intervene, "it is necessary [to establish] ... that the decision-making authority had before it no relevant material which would support its decision". The court implemented a significantly high threshold in the case of *Aer Rianta CPT v Commissioner of Aviation Regulation*, where it was stated that "to be reviewably irrational, it is not sufficient that a decision maker goes wrong or even hopelessly and fundamentally wrong; he must have gone completely and inexplicably mad; taken leave of his senses and come to an absurd conclusion".

PIC: COLLINS

Abosede Meadows: raised the standard

As a result of this narrow line of interpretation, the standard of reasonableness was almost insurmountable in this jurisdiction.

'Anxious scrutiny'

The applicant in *Meadows* submitted that the court should extend the basis for judicial review beyond the scope of the test set out in *Keegan* and *O'Keefe* to an 'anxious scrutiny' standard. This standard derives from English jurisprudence and allows for more rigorous examination of an administrative decision where it relates to individuals' fundamental rights.

In *R v Minister for Defence*, the Court of Appeal stated: "Where an administrative decision was made in the context of human rights, the court would require proportionately

How to apply?

There are three separate stages to the application process:

1) The scheme's trustees must apply to the Pensions Board to have it certified as an 'eligible pension scheme', as defined under PIPS. In submitting an application, trustees are required to submit the following:
   a) A completed application,
   b) Written confirmation that the winding up of the pension scheme had commenced,
   c) A statement that the scheme does not satisfy the funding standard as provided by section 44 of the *Pensions Act 1990*,
   d) A statement of affairs of the insolvent employer,
   e) A notice of appointment of a liquidator or receiver,
   f) A statutory declaration by the employer declaring insolvency and by the trustees declaring that the information provided is complete and accurate.
2) On certification by the Pensions Board, the trustees may then apply to the Minister for Finance for approval. The minister will request the National Treasury Management Agency to calculate the assessed net cost of providing pension payments to the pensioners of the scheme. The minister will provide this quotation in writing to the trustees of the applicant scheme. The quotation will expire after two weeks if not accepted by the trustees. The quote will specify the amount to be paid to the relevant pensioners and the administrative costs to be charged by the minister.
3) Before payments can be made by the minister under PIPS, the trustees must accept the quote by paying the quoted price by electronic funds transfer.

What happens on review of the scheme?

PIPS must be reviewed within three years of its introduction. At this time, any schemes that are already in participation will continue. The government may, at that stage, decide to discontinue the scheme, continue it or modify it. G

Joyce Mortimer is the Law Society's human rights executive.

greater justification before being satisfied that the decision was within the range of responses open to a reasonable decision maker." The court held: "The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable."

The Supreme Court in *Meadows* rejected the adoption of the 'anxious scrutiny' standard, opting instead for the use of a test based on the doctrine of proportionality.

Proportionality

Justice Denham explained that, while the test of reasonableness used in *Keegan* and *O'Keefe* did not explicitly refer to proportionality, it is implied in any analysis of the reasonableness of a decision. Justice Denham stated: "A decision which interferes with constitutional rights, if it is to be considered reasonable, should be proportionate."

Murray CJ stated: "In examining whether a decision properly flows from the premises on which it is based, and whether it might be considered at variance with reason and common sense, I see no reason why the court should not have recourse to the principle of proportionality in determining those issues."

The Chief Justice, referring to the decision of the Supreme Court in *Fajujonu v Minister for Justice*, stated: "It is inherent in the principle of proportionality, where there is grave or serious limitations on the rights, and in particular the fundamental rights, of individuals as a consequence of an administrative decision, the more substantial must be the countervailing considerations that justify it."

Implications

The *Meadows* decision clarified that there is a necessity to consider fundamental rights in the context of the reasonableness test by the use of the doctrine of proportionality. The Supreme Court has raised the standard of scrutiny to be applied in judicial review decisions affecting fundamental rights. The Chief Justice stated: "A purely formulaic decision of the minister may not in particular circumstances be a sufficient statement of the rationale or reasons underlying the decision."

In granting Ms Meadows leave, he stated: "An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken."

This decision will undoubtedly lead to increased demands on public bodies and the minister's officials in the consideration of decisions affecting fundamental rights. However, it could be argued that this is a welcome development that will lead to greater accountability and transparency, and possibly fewer judicial review cases. G

Joyce Mortimer is the Law Society's human rights executive.

letters

Send your letters to: *Law Society Gazette*, Blackhall Place, Dublin 7, or email: gazette@lawsociety.ie

Wine retailer's licence changes

From: Joseph Mooney, solicitor, 23 Upper Mount Street, Dublin 2

Recently, a client who owns a store in Dublin, while carrying out a substantial refurbishment of his shop, allowed his wine retailer's off-licence to lapse for the licensing year 2007-2008. When he went to take up his licence from the Revenue Commissioners in October 2008, he discovered that the provisions of the *Intoxicating Liquor Act 2008* now applied in relation to the taking up of a wine retailer's off-licence and he was required to have a court certificate in order to take up the licence from the Revenue Commissioners.

The act itself at section 6 states: "The Revenue Commissioners shall not grant a new wine retailer's off-licence to a person unless a certificate is presented to them which has been received by the person from the District Court and which entitles the person to a wine retailer's off-licence."

The actual application itself is quite straightforward. However, it is necessary to serve notice parties, to advertise, to produce plans of the premises, to produce the title to the premises, and to have an architect or someone to deal with proving the plans and compliance with the planning and fire-safety aspects of the premises. Luckily for the client, since he had an architect involved in the refurbishment/reconstruction of the shop, he was able to get a set of licensing plans and had the architect ready to deal with proving plans and compliance with planning and fire-safety aspects of the premises to the court. Once the court certificate was taken up, he then had to go through the normal procedure of taking up the licence from the Revenue Commissioners.

It should be noted also that, following the act, in order to transfer a wine retailer's off-licence (for example, because of sale of the property), it is now necessary to go through the normal *ad interim* and confirmation of transfer procedure. In essence, all shops with a wine retailer's off-licence are now brought fully within the transfer regime operated by the District Court, just like pubs, hotels, off-licences and so on.

It should also be noted that the application for a new wine retailer's off-licence has to be included with every application for a new off-licence. This application will now be made up of the application for the two licences previously applied for (that is, the beer retailer's off-licence and the spirit retailer's off-licence), together with the application for a new wine retailer's off-licence. Unless mention of the wine retailer's off-licence is included in the application, the judge may end up granting an off-licence without the entitlement to sell wine.

It would be interesting to know from whence the demand for this change in legislation came – however, it is now the law, and holders of wine retailers' off-licences have no alternative but to live with it.

(Editor's note: see also 'One bourbon, one scotch, one beer' at p28 of the December 2009 Gazette, *which dealt with the new licensing regime.)*

Mallow District Court notice

From: Anne Casey, District Court Office, Courthouse, Mallow, Co Cork

I would appreciate if you could notify readers of the *Gazette* that the Fermoy District Court Office has closed since September 2009. Mallow District Court is now the administrative office. All documentation relating to the District Court areas of Lismore, Mitchelstown and Fermoy are dealt with in Mallow District Court.

Please note that the actual court sittings still sit in Lismore, Mitchelstown and Fermoy courthouses.

Protecting the 'royals' has a price?

From: Brian Montaut (spokesperson), Architects' Alliance, Bray, Co Wicklow

Architects' Alliance is a recently created, unincorporated association that presently speaks for 170 non-registered architects from across the state. Membership is being formalised and requires the making of a statutory declaration of establishment (as evidence of having earned one's living as an architect for ten years and more).

In his letter in last month's issue (p17), the director of RIAI Ltd (the institute) stressed the consumer benefits, as he conceived them, of 'protecting the title of architect', and he did so without touching upon the benefits this supposed protection brings to his royal organisation. Those benefits include the transfer of many of its internal operating duties to RIAI Ltd (the statutory registration body). This new department is to be funded entirely by registered practitioners, whether or not they are institute members. The annual registration fees are also to cover the operating costs of the third member of this trinity, RIAI Ltd (the competent authority).

The letter boasted of the High Court-like powers permitted under part 3 of the *Building Control Act 2007*, but neglected to mention the diminished rights of consumers (clients) and of defendants (architects) when a complaint is heard.

The following extract from *John Bull's Other Homes* (Murray Fraser, Liverpool University Press, 1996) is informative.

"The RIAI was formed in 1839. Membership stood at about 65 architects in the 1880s and this barely rose to around 100 members in the period just before the First World War. The business of the RIAI was riven from the turn of the century by a growing division with a splinter association in Belfast, the Ulster Society of Architects, and by a fruitless obsession with the idea of securing compulsory legal registration for the use of the title 'architect'."

A second informative extract is from Wikipedia, 'Architects registration in the United Kingdom'. Although about the longer-established UK system, its arguments are readily transposed to Ireland:

"In relation to statutory protection of title, three aspects of the field in which architects practise invite examination. In summary:

- *The design quality of the built environment*: this is essentially a cultural concern which was and remains one of the principal reasons for the formation and continuance of the Royal Institute of British Architects as a chartered body. It has connotations not only for the United Kingdom but worldwide. It is beyond the ambit of statutory protection of title.
- *The technical sufficiency of buildings*: the public interest is secured in the United Kingdom under building regulations and other enactments. This too is beyond the statutory protection of the title 'architect'.
- *The business of architectural practice*: contracts of engagement for professional services are always between a business entity (whether individual, firm, partnership, or company) and the client, and are governed by the general law, including consumer protection legislation where applicable. Protection of the title 'architect' for business entities is of no practical relevance for securing the performance of architectural services.

"In the light of experience since the inception of the register under the 1931 act, and more particularly under the Architects Registration Board's regime from 1997, the recurring question has been whether protection of title serves useful purposes in respect of the three aspects mentioned above."

Unlike Britain, our registration standards were decided in full knowledge of the relevant European directive (2005/36/EC on the mutual recognition of professional qualifications) and there can be no excusing its over-zealous and restrictive transposition into law. In addition, registration as enacted suffers from two major weaknesses, viz the absence of a 'grandfather clause' and the absence of an independent registration body. Consumer protection will remain diminished by part 3 of the *Building Control Act 2007* until those defects are corrected.

Overhaul of direct provision

On 18 February, FLAC launched its report, *One Size Doesn't Fit All*, on the direct provision and dispersal system for asylum seekers, writes Saoirse Brady

While the Irish state has put many resources into adapting its immigration and protection policies, it has not put the same vigour into improving the reception and living conditions of persons seeking asylum or other forms of protection.

Direct provision refers to the scheme whereby people who apply for asylum in Ireland are housed in accommodation centres and given three meals a day at set times. Direct provision residents are given a weekly allowance of €19.10 for an adult and €9.60 for a child. They can also apply for once-off payments under the exceptional or urgent needs payments scheme. People who have applied for protection are dispersed to centres located around the country without any consultation of either local residents or the applicant.

ALL PICS: DEREK SPEIRS

Report author Saoirse Brady speaking at the launch, with Vukasin Nedeljkovic, who gave his personal experience of the direct provision and dispersal system for asylum seekers in Ireland

Ireland is a party to the UN's 1951 *Refugee Convention* and has undertaken to protect anyone who has come to Ireland to "seek and enjoy asylum". While the Department of Justice, Equality and Law Reform recognises this duty of care to those seeking protection, it is not fulfilling this duty to the extent outlined in a number of domestic and international human rights instruments.

The universality of human rights is recognised both in domestic law and international human rights instruments. The Irish Constitution contains a number of stated and implied human rights, as Walsh J pointed out in *McGee v Attorney General* ([1965] IR 294): "Articles 41, 42 and 43 emphatically reject the theory that there are no rights without laws, nor rights contrary to the law and no rights anterior to the law. They indicate that justice is placed above the law and acknowledge that natural rights, or human rights, are not created by law but that the Constitution confirms their existence and gives them protection."

General Comment No 31 of the UN Human Rights Committee explicitly states that rights are "not limited to citizens" and "must also be available to all individuals", including asylum seekers.

At the launch of FLAC's report on direct provision was Labour's spokesperson on justice, Pat Rabbitte TD

Some leeway

However, states are given some leeway, as rights may be restricted by policy concerns. Denham J explained in *Oguekwe v The Minister for Justice, Equality and Law Reform* ([2008] 3 IR 795) that "these rights are not absolute, they have to

viewpoint

system required

be weighed and balanced in all the circumstances of the case", but she emphasised that any restriction has to be "proportionate to the legitimate aim pursued". Although it was originally set up to alleviate a housing shortage, the direct provision and dispersal system now seems to be used as a disincentive to people who might want to come to Ireland to seek asylum rather than as a way for the Irish government to discharge its human rights obligations.

The state contracts out the care of asylum seekers, and others seeking another form of protection, to private businesses, but the responsibility ultimately rests with the Department of Justice. It is an "organ of the state" as defined in the *European Convention on Human Rights Act 2003*; therefore, it has to ensure that it complies with the rights enshrined in that instrument.

But, in real terms, direct provision residents are not afforded the same rights as other destitute people in Ireland. The social welfare supports they receive are different to those given to other homeless people, who the state also has to house; the direct provision allowance is the only payment never to have increased since its inception. Despite this low level of payment, coupled with the fact that direct provision residents are not allowed to work, they are not included as a target group in government anti-poverty or social inclusion strategies.

Revised rules not yet published

Another difficulty arises around the complaints procedure, as it is not administered in a fair or transparent way.

At the launch of FLAC's report on direct provision, *One Size Doesn't Fit All*, were *(l to r)*: Vukasin Nedeljkovic, Saoirse Brady (FLAC policy and campaigns officer), Sue Conlan (Irish Refugee Council CEO), Noeline Blackwell (FLAC director general) and Josephine Ahern (ISICI CEO)

Essentially, residents have to make a complaint to the same department that is responsible for both housing them and deciding on their application for protection. Proper safeguards must be put in place to ensure that residents are treated in line with due process and fair procedures.

FLAC is calling for the complaints mechanism to be reformulated using the Ombudsman's guidelines. A review of the house rules and complaints procedure was undertaken by the Department of Justice and completed in 2008, but the revised rules have yet to be published.

The difficulties with the current procedure were highlighted in *N v Minister for Justice, Equality and Law Reform*, which came before the High Court in October 2008. Leave was given for judicial review following the expulsion of the plaintiff from direct-provision accommodation. He suffered from a mental illness and, after being expelled, was without a medical card until his solicitor intervened.

In initial submissions, counsel for the plaintiff argued that the state's failure to accommodate him constituted "inhuman and degrading treatment" and cited the British decision of *R v Secretary of State for the Home Department, Ex p Adam, Limbuela and Others* ([2006] 1 AC 396), in which the House of Lords found that there had been a breach of the *ECHR*. The department settled the case out of court and agreed to rehouse him, taking into account his medical requirements.

One Size Doesn't Fit All calls for the abolition of the current system but, while it remains in place, there are a number of ways it could be improved. The government should carry out a human rights audit of the direct provision and dispersal policy. Furthermore, an independent assessment of value for money needs to take place that would include the cost of long-term consequences for residents in terms of health and social inclusion. The government must take steps to guarantee that direct-provision residents are able to live in dignity.

FLAC's report and executive summary can be downloaded at www.flac.ie. G

Saoirse Brady is policy and campaigns officer with FLAC and the author of the report.

MISSING

The courts have been encountering a surplus of cases brought by way of judicial review relating to so-called 'missing evidence'. Rebecca Smith inspects recent developments in missing-evidence case law

In recent years, the courts have encountered a surplus of cases brought by way of judicial review relating to so-called 'missing evidence'. The prosecuting authorities' obligations to seek out and preserve evidence were established in the now well-known and seminal cases of *Braddish v DPP* and *Dunne v DPP*. These judgments started an area of jurisprudence known as 'missing evidence' cases. Recently, the Supreme Court handed down a number of judgments that, although they do not change the original principles, have narrowed the circumstances where an applicant can succeed in prohibiting his trial.

In *Braddish*, the investigating garda obtained CCTV footage showing a robbery, which he viewed. The applicant was arrested on foot of identification from the video and made admissions, having been informed that he was viewed on CCTV. The footage was subsequently destroyed. In prohibiting the trial, the Supreme Court held that the garda was not entitled to dispose of evidence simply because the prosecution was only relying on the confession and not the CCTV footage.

In *Dunne*, the obligation on the prosecution broadened to not only preserving evidence, but also seeking it out in the first place. The Supreme Court held that there was a duty on the gardaí to seek out and preserve all evidence (within reason), whether the state intended to rely on it or not. While the video had been seized by gardaí and disposed of in *Braddish*, in *Dunne* there had been no effort to seek out the video.

Crash and burn

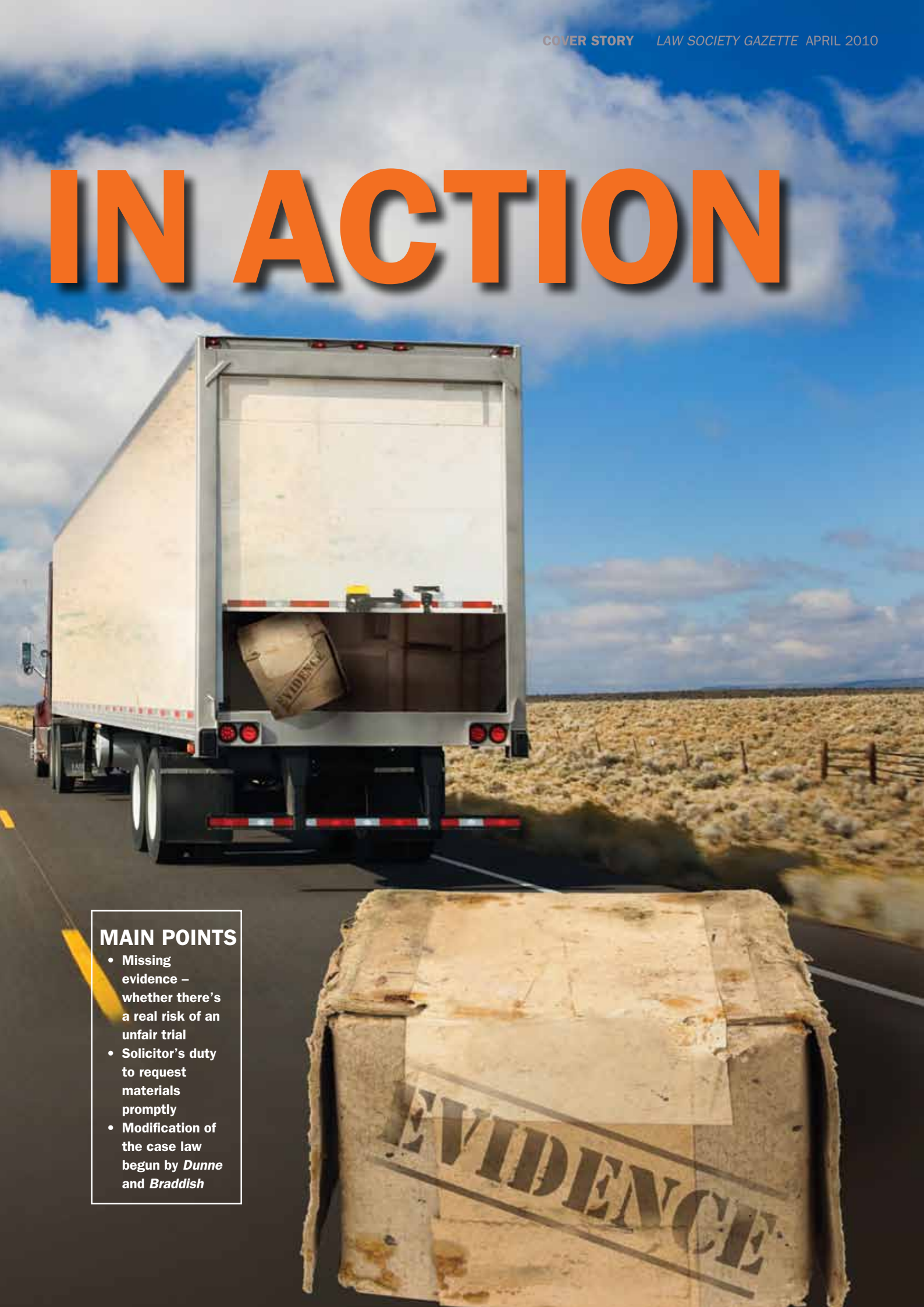
In *Savage v DPP*, the applicant was charged with dangerous driving causing serious injury and unauthorised taking of a vehicle, which was involved in a crash. The vehicle was destroyed two months after the crash, before a prosecution was instigated, and inspected only by a public service vehicle inspector. The prosecution was not relying on the condition of the car as a factor in the crash, but on independent evidence from witnesses stating that the speed of the vehicle was the cause of the crash. The applicant had been trapped in the car at the time of the incident, so there was no suggestion that he was not driving. However, he argued that, as the vehicle had been destroyed without an opportunity to have it forensically examined, it resulted in a risk that he would not receive a fair trial. The Supreme Court held that he had failed to establish that an examination of the car was necessary to advance possible reasons for the crash as part of any defence and refused to prohibit the trial.

This case can be compared with *Ludlow v DPP*, where prohibition was granted. In that case, the missing evidence involved car tyres, which were disposed of by the applicant's employer. The Supreme Court held that the applicant was impeded in defending himself on the critical issue of the trial, which was the state of the tyres. As these were not available for inspection by the defence – or any forensic reports upon which the defence could cross-examine – the court held that there was a real risk. In the above cases, the Supreme Court included a best practice policy to avoid future difficulties. This recommends that gardaí give notice to an accused of any intention to destroy a vehicle, in order to allow them to inspect it.

Movie stills

The second category of 'missing evidence' cases involves CCTV footage. In *McHugh v DPP*, the applicant was accused of stealing a jacket from a shop. The evidence against him was that he was observed on CCTV allegedly taking a jacket and leaving. He was arrested at the scene and detained. The footage allegedly showing this was lost, and

IN ACTION



MAIN POINTS

- Missing evidence – whether there's a real risk of an unfair trial
- Solicitor's duty to request materials promptly
- Modification of the case law begun by *Dunne* and *Braddish*

there was no other evidence from witnesses. The state argued that there were five still photographs from the CCTV in the possession of the prosecution that could be relied on. The question to be considered was whether, in the absence of the 'moving' CCTV footage, there was a real risk. The court held that the essence of the case was the identification on the CCTV; any other evidence was minor or peripheral. The defence never had access to this footage, only to the stills. The court concluded that these stills were not enough to confirm that the accused had engaged in the alleged illegal activity. There was a real risk of an unfair trial, as the defence was unable to test the identification of the state witnesses.

That case can be contrasted with *CD v DPP*. There, the applicant sought prohibition on the basis that not all of the possibly relevant footage was downloaded from CCTV and, while there were still photographs and some footage from other cameras, there was no moving footage covering the entire relevant period of the alleged incident. The applicant sought prohibition of a trial of an allegation that he sexually assaulted a female garda outside Leinster House. The evidence alleged was that he reached down and tried to grab between her legs and that his hand brushed off her thigh. The Supreme Court noted that the alleged incident could not have lasted more than a fleeting second and was based on the garda's own statement, there being no other witnesses. The court stated that the assault, as alleged, was not such as to prompt any expectation that the event would actually be caught on camera. The failure to download some of the relevant moving footage was regrettable, but it did not follow that the applicant suffered any prejudice. The applicant had also argued that the still photos were not of good quality, in that there were no photos of every half-second interval. In refusing the relief, the court noted that to have this level of detail sought out would be positing a level of duty on the gardaí that was far beyond anything that had occurred before. Describing it as far-fetched and unreasonable, the court held that there was no real risk of an unfair trial.

"Given this shift towards a more stringent test, solicitors should be cautious about launching judicial review proceedings without having first examined thoroughly whether or not the accused is at risk"

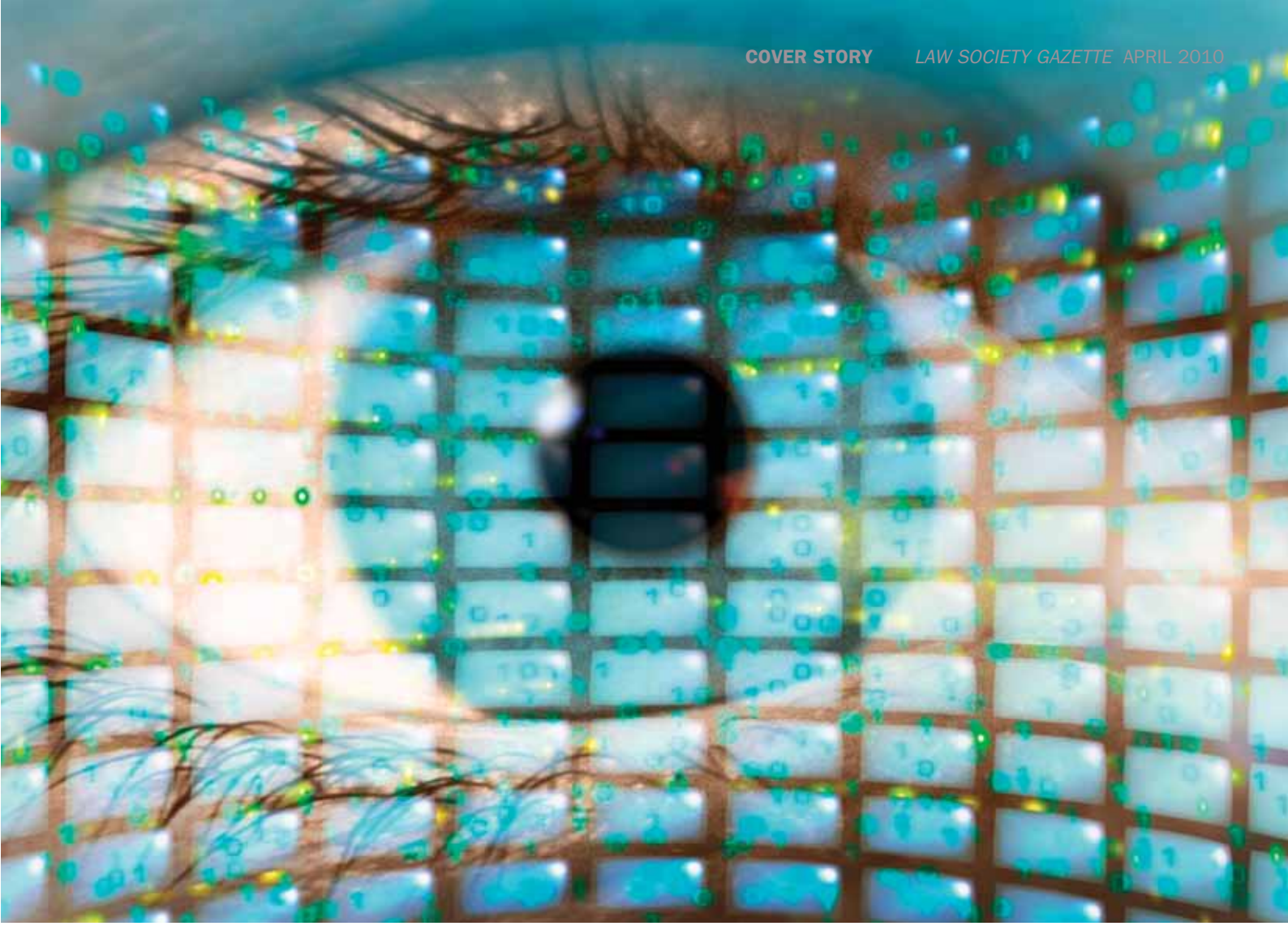
Word of warning

The case law has stated very clearly that there is a duty on the defence to request any materials promptly. Therefore, the following is general

GENERAL PRINCIPLES

The following is a general summary of the principles involving missing evidence, summarised from the Supreme Court cases:

- It is the duty of the prosecution, in particular An Garda Síochána, to preserve and retain all evidence having a bearing or potential bearing on the issue of guilt or innocence of the accused, to be kept until the conclusion of any prosecution, as far as is practicable.
- The duty includes seeking out evidence that the prosecution does not intend to rely on, and includes evidence that may assist the accused or undermine the prosecution.
- The duty is not one that is unending: it must be reasonable and cannot be construed as requiring the gardaí to engage in an exhaustive search.
- The threshold that an applicant must meet is a high one and should only succeed in exceptional circumstances.
- The missing evidence must be such as to give rise to a real possibility that, in its absence, the accused will be unable to advance a point material to his defence – no remote, theoretical or fanciful possibility will lead to the prohibition of a trial.
- The fact that the prosecution intends to rely on evidence independent of the missing evidence in order to establish guilt does not preclude the making of an order.
- The application is considered in the context of all the evidence likely to be put forward at the trial.
- The application must show, by reference to the case to be made, how the missing evidence will affect the fairness of a trial. The applicant must engage in a specific way with the evidence available so as to make the risk apparent.
- The risk must be such that cannot be avoided by any directions given by a trial judge. An applicant will not succeed where he can, by alternative means, make the point in his defence that he wishes to make, for example, cross-examination on a report.
- The request for disclosure must be made as early as possible. Unexplained delays or 'eve of trial' applications may result in prohibition being refused.
- The essential question at all times is whether there is a real risk of an unfair trial. The court should focus on that issue alone and not on whose fault it is that the evidence is missing and what the degree of fault may be.



I spy with my big eye... missing or unobtainable evidence can lead to the granting of prohibition

advice to practitioners:

- A request for the material should be made as soon as possible, even where there may only be possible impending charges,
- If the material in question is a vehicle, a request for inspection should be made as soon as the defence is notified,
- If the material is CCTV footage, a 'Gary Doyle order'/disclosure order should be obtained,
- A follow-up letter should be sent requesting the said material, and repeated if not complied with,
- A hearing/trial date should not be set before the said material has been disclosed and any CCTV footage viewed properly (the disc may not be compatible with certain systems),
- If the material is not forthcoming, an application should be made to the court to vacate the date for hearing/trial date until the issue relating to the missing/unviewable footage has been resolved.

Recent case law has narrowed the circumstances where prohibition will be granted. The question is ultimately one of whether there is a real risk of an unfair trial. Each case is fact specific, with independent evidence separate to the missing evidence being a crucial factor. Given this shift towards a more stringent test, solicitors should be cautious about launching judicial review proceedings without having first examined thoroughly whether or not the accused is at risk. This can only be done by evaluating the possible difference to the case and seeing if it is affected by any missing or unobtainable evidence. The case law seems to suggest that these applications are now more appropriate for the trial judge to consider. Given the higher threshold that an applicant now faces, perhaps the shift will move back to a remedy before trial judges, rather than looking to the High Court for a remedy. G

LOOK IT UP

Cases:

- *Braddish v DPP* [2001] 3 IR 127
- *Dunne v DPP* [2002] 2 IR 305
- *Savage v DPP* [2009] 1 IR 185
- *Ludlow v DPP*, unreported, Supreme Court, 31 July 2008
- *McHugh v DPP*, unreported, Supreme Court, 24 February 2009
- *CD v DPP*, unreported, Supreme Court, 23 October 2009

Rebecca Smith is a Dublin-based barrister practising in the area of criminal law.

NEW LEASE

The interplay between companies in examinership and their landlords has come into sharp focus as companies try to find a way out of burdensome leases signed in more prosperous times. Conor Feeney turns the key

With the recent dramatic rise in the number of petitions to have examiners appointed to troubled companies and the sharp decline in the property market, the interplay between such companies and their landlords has come into focus as companies attempt to find a way of out burdensome leases signed in more prosperous times.

Section 20(1) of the *Companies (Amendment) Act 1990* provides: "Where proposals for a compromise or scheme of arrangement are to be formulated in relation to a company, the company may, subject to the approval of the court, affirm or repudiate any contract under which some element of performance other than payment remains to be rendered both by the company and the other contracting party or parties."

The first written judgment to address the issue of whether the above provision covers leases was *Re O'Brien's Irish Sandwich Bars Ltd* last October. Ryan J contrasted the section with section 290 of the *Companies Act 1963*, which empowers a liquidator to disclaim property. Section 290(8) deals specifically with leases. There is no such provision in section 20. Ryan J saw this as "a significant omission" and went on to find that, having regard to the underlying purpose of the provision and the restriction contained in subsection 1, he could not approve the repudiation under section 20. He placed particular emphasis on the requirement for "residual performance elements other than payment".

The same issue came before the court again, a few weeks later, in *Re Linen Supply of Ireland Ltd*. Counsel for the landlords referred the court to section 25B of the *Companies (Amendment) Act 1990*, as inserted by section 26 of the *Companies (Amendment) (No 2) Act 1999*, which provides that proposals for a scheme of arrangement cannot contain a reduction or extinguishment of any rent payable under a lease after the scheme of arrangement has taken effect, unless the lessor or owner of the property concerned has consented in writing. In the High Court, McGovern J found that "it would be completely at variance with section 25B" to permit the repudiation of a lease.

The company in *Linen Supply* appealed to the Supreme Court, which reversed the decision of the lower court, finding that section 20 allowed for the repudiation of a lease. Looking at the "ordinary meaning" of the wording in the statute, Murray CJ held that: "Leases as a matter of law are contracts. Moreover, if the Oireachtas intended to exclude leases from the term 'contract' by which they are normally covered, it would have said so explicitly."

While not specifically referring to it, Murray CJ then went on to reject the reasoning behind the judgment in *O'Brien's*: "A lease by its very nature involves the performance of obligations by both the lessor and the lessee other than payment of money. Some of these obligations have been referred to in the course of the hearing, such as the right to quiet enjoyment and to obligations to insure. It has not been shown that the obligations arising under the leases in this case are confined to the making of payments."

As regards section 25B, Murray CJ found that it was "concerned only with the variation or even the complete extinguishment of the rights of the lessor to payment of any rent while the lessee continues to have the benefit of the property the subject of the lease". This was "an entirely different matter" to "repudiation of a lease, which involves the mutual release of both the lessor and the lessee from all rights and obligations under the lease".

The court's jurisdiction

It is clear from the wording of the provision and the judgment of the Supreme Court in *Linen Supply* that some element of performance requires to be rendered by the parties under the lease, other than the payment of rent, for the lease to be the subject of an order under section 20. Indeed, the one dissenting judge in the Supreme Court, Hardiman J, found that the leases that were the subject of the application in *Linen Supply* did not satisfy this requirement. Hardiman J was of the view that covenants of quiet enjoyment or insurance were not obligations to be performed under the leases.

Of course, the majority in the Supreme Court adopted a broader approach. Given that the right of passive enjoyment, effectively a negative covenant, was sufficient to satisfy the test in this regard, it is submitted that it will be relatively easy for any standard lease to fall within the court's jurisdiction.

When can an application be made?

Section 20(1) empowers the company, subject to the approval of the court, to repudiate a contract "where proposals for a compromise or scheme of arrangement

MAIN POINTS

- Affirming and repudiating leases
- Jurisdiction of the High Court to approve the repudiation of a lease
- Applications under section 20 of the *Companies (Amendment) Act 1990*

OF LIFE

are to be formulated". The question of when or how this temporal limitation is satisfied has not been addressed by the courts. It would appear, however, to require some kind of positive indication from the examiner that he has started the process of putting together a proposal for a scheme of arrangement.

There is no case law in relation to when the court will decide to exercise its discretion when approving the repudiation of a lease. However, an idea of the approach the court might take can be seen in cases dealing with the disclaimer of onerous property by a liquidator pursuant to section 290 of the 1963 act. In particular, in *Tempany v Royal Liver Trustees Ltd*, Keane J held that "the exclusive concern of the court in an application for leave to disclaim must be the interests of all persons interested in the liquidation". It is submitted that a court will adopt a similarly broad approach to its discretion under section 20, assessing the interests of all parties interested in the examinership.

In *Linen Supply*, when the Supreme Court allowed the appeal, it remitted the matter back to the High Court. In a brief *ex tempore* judgment, McGovern J in the High Court exercised his discretion to approve the repudiation of the leases, conditional upon, among other things, the ultimate confirmation of the scheme of arrangement. It is submitted that among the factors influencing McGovern J's decision would have been:

- The fact that the leases in *Linen Supply* were

surplus to the requirements of the company and had become burdensome,
- The fact that the investor was not willing to put money into the company if the leases remained, and
- The fact that the examiner was of the view that he could not put together a scheme of arrangement unless the leases were repudiated.

Loss and damage

Section 20(2) provides that "any person who suffers loss or damage" as a result of repudiation under section 20(1) "shall stand as an unsecured creditor for the amount of such loss or damage". Section 20(3) then provides that "the court may hold a hearing and make an order determining the amount of any such loss or damage and the amount so determined shall be due by the company to the creditor as a judgment debt".

The manner in which a determination pursuant to subsection 3 is to be carried out remains to be addressed by the courts. In *O'Brien's*, the company applied for an order pursuant to the subsection. However, no such order was made, as the court refused an order under section 20(1). In *Linen Supply*, the company and each of the landlords had previously agreed figures for the loss and damage resulting to the landlords in the event that the repudiations were approved.

The following passage from McGovern J indicates the factors taken into account by the parties in *Linen Supply* in coming to the agreed figures: "In this case, the claim by the landlords is a claim for agreed damages based on the loss of rent in the future, and taking into account dilapidations and the possibility of the landlords re-letting the properties during the currency of the term of the repudiated leases."

Is the amount due to the landlord from the repudiation subject to impairment in the scheme of arrangement? In his final judgment in *Linen Supply*, McGovern J gave judgment approving the scheme (unreported, 3 February 2010). His judgment at this stage is noteworthy, as it deals with the important question of whether the amount due to the landlord arising from the loss and damage suffered as a result of the repudiation of the lease can be subject to impairment in the scheme of arrangement under the 1990 act.

The scheme of arrangement provided that the landlords would receive 30% of the agreed figure for loss and damages arising from the repudiation of the lease. The landlords argued that this was a post-petition liability and must be paid in full. They referred the court to section 22(5) of the act, which states that "a creditor's claim against a company is impaired if he receives less in payment of his claim than the full amount due in respect of the claim at the date of presentation of the petition for the appointment of the examiner". The landlords submitted that this meant that the scheme could only apply to debts due "at the date of presentation of the petition" and argued that, in their case, there were no amounts due at that time.

In rejecting this argument, the court pointed to section 3 of the act, which lists, among the bodies and persons who may present a petition to have an examiner appointed, "a creditor, or contingent or prospective creditor (including an employee) of the company". The court deduced from this that it was "clear that the act had regard to different types of creditors". The court then went on to find that the landlords were prospective creditors and that the fact that they argued that their claim was for damages arising from repudiation, rather than for unpaid rent, did not alter their status.

> *"The court then went on to find that the landlords were prospective creditors and that the fact that they argued that their claim was for damages arising from repudiation, rather than for unpaid rent, did not alter their status"*

Confirming proposals

In what circumstances will the court confirm proposals for the impairment of a landlord's debt? Section 24(4)(c) of the 1990 act provides that "the court shall not confirm any proposals … unless the court is satisfied that … (i) the proposals are fair and equitable in relation to any class of members or creditors that has not accepted the proposals and whose interests or claims would be impaired by implementation, and (ii) the proposals are not unfairly prejudicial to the interests of any interested party".

Without prejudice to their argument that the impairment was not covered by the statute, the landlords in *Linen Supply* objected to the impairment of their debts on these grounds as well. These objections were rejected, McGovern J finding that the 30% dividend being offered to the landlords was fair and equitable, as it was similar to the offer made to many other creditors who were supporting the scheme.

It is important to note in this regard that the court's assessment of the fairness of the write-down of the landlord's debt should not take account of the possibility of re-letting the premises. This will already have been taken into account in the assessment of the figure for the landlord's loss and damage. Indeed, as noted above, it appears to have been accounted for in the parties' agreed figures in *Linen Supply*. G

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LOOK IT UP

Cases:
- *Re Linen Supply of Ireland Ltd* ([2009] IEHC 544, 4 December 2009; Supreme Court, 10 December 2009; High Court, 3 February 2010)
- *Re O'Brien's Irish Sandwich Bars Ltd* ([2009] IEHC 465, 16 October 2009)
- *Tempany v Royal Liver Trustees Ltd* ([1984] ILRM 273)

Legislation:
- *Companies (Amendment) Act 1990*, s20(1), s25B
- *Companies Act 1963*, s290
- *Companies (Amendment) (No 2) Act 1999*, s26

Keeping

Directors should take serious note of the implications of recent changes to Irish company law as a result of the enactment of the *Companies (Amendment) Act 2009*. Majella Twomey keeps company with the changes

The *Companies (Amendment) Act 2009* was signed into law on 12 July 2009. The act was, effectively, a knee-jerk reaction to unhealthy practices that had evolved in the banking industries. It was a rapid response to Ireland's current economic crisis and the public outcry that ensued. The new act is aimed at increasing the transparency of loans made by companies that are banks to their directors and persons connected with them. It confers extra powers on the Office of Director of Corporate Enforcement (ODCE) and it amends existing provisions relating to Irish-registered non-resident companies.

The act incorporates some of the Company Law Review Group's proposals for major changes in the world of corporate law. The CLRG have been working on a myriad of proposals that, it is hoped, will dramatically streamline company law. While some of the CLRG's proposals are incorporated in the 2009 act, there is a plethora of other proposed changes that will be coming into play in the near future.

This article outlines the main changes that have been brought about by the *Company Law (Amendment) Act 2009*, and it sets out some of the other proposals that the CLRG hopes to incorporate in the imminent *Companies Consolidation and Reform Bill*.

Extra supervisory powers

In an attempt to prevent company directors from abusing their position for their own personal benefit, the act sets out a number of changes that confer extra supervisory powers on the ODCE. Section 2 of the act gives the ODCE a specific right of access and a power to take copies of books that record a director's interest in contracts or proposed contracts with the company. This provision gives the ODCE more supervisory powers and may act as a deterrent to errant directors in the future. Under section 194 of the *Companies Act 1963*, a director has an obligation to declare any interest that he may have in contracts or proposed contracts with the company, and the company is required to record all such information. The new provision seeks to ensure that directors actually comply with section 194, something that many have failed to do in the past.

Section 5 of the act expands the power of the ODCE to enter and search premises and seize information, whether in hard copy or electronic form. It gives the ODCE extended powers of seizure. The act states that it has the power to remove material or electronic information from the premises for subsequent off-site storage and examination. The act allows the ODCE to apply for a search warrant from the District Court, which would be valid for one month and could be extended if the court saw fit.

It is interesting to note that the ODCE can rely on this section, even if it includes the seizure of information that is claimed to be legally privileged, while the question of privilege is being determined by the courts. This might, potentially, be controversial and it will be interesting to see what happens when the ODCE uses this power in circumstances where a court, at a later date, deems the information privileged. Section 6 seems to apprehend the potential problem with this provision, stating that if a situation arises whereby privilege is being sought over certain documents, the documents can be possessed by the ODCE, as long as the confidentiality of the information can be maintained pending determination by the court.

Directors' powers and duties

In addition to the extra powers that have been conferred on the ODCE, certain changes have been made to directors' powers and duties. Section 43 of the *Companies (Amendment) Act 1999* required that the company had an Irish resident director – this to ensure that the business was being carried on in Ireland and was tax compliant here. This requirement has been amended by the 2009 act, in that it now requires that at least one director of the company must be resident in a member state of the European Economic Area, provided there is a real and continuous link with one or more activities that are carried on in the state. The act also clarifies the circumstances in which a company is regarded as having a real and continuous link with one or more activities that are carried on in the state, the existence of which removes the necessity of having a resident director.

The banking crisis was an impetus for the changes that have come about in relation to loans made between the company and a director. Section 9 of the act increases

company

disclosure obligations regarding transactions between a company and its directors and applies special rules of disclosure to licensed banks. This section was necessary after the adverse public reaction to the manner in which certain banks were running their business and the procedures that were being used in giving out loans.

Section 31 of the *Companies Act 1990* prohibits loans by a company to its directors and connected persons. Section 40 of the *Companies Act 1990* provides for criminal penalties for breaches of section 31. The new act has also removed the requirement of 'wilful' or 'knowing' default on the part of an officer who authorised or permitted a transaction in contravention of section 31 in order for that officer to be guilty of an offence. The new act imposes liability on all officers of the company who are in default where the company breaches section 31. The sanctions and penalties that are now in place are much more onerous – as an officer cannot plead that he was unaware that he was breaching section 31 – and it brings the offence within the remit of a strict liability offence. All officers are now at risk.

The 2009 act requires banks to disclose, in their annual accounts, the particulars of any arrangements or contracts with each director. This

MAIN POINTS

- **Extra supervisory powers for the ODCE**
- **Changes to a director's powers and duties**
- **Disclosure obligations regarding transactions**

LOOK IT UP

Legislation:

- *Companies Consolidation and Reform Bill*
- *Companies Act 1963*
- *Companies Act 1990*
- *Companies (Amendment) Act 1999*
- *Companies (Amendment) Act 2009*

Literature:

- Company Law Review Group's *Report on the General Scheme 2007* (available on line at www.clrg.org)
- *Company Law Review Group First Report*
- *Company Law Review Group Second Report*
- *CLRG Company Law Statute Book* www.clrg.org/CLRGarchive/welcome.asp
- Company Law Review Group website: *www.clrg.org*

requirement creates far more transparency in relation to agreements with directors, and it also provides protection for the public.

CLRG *General Scheme*

In its *General Scheme of the Companies Consolidation and Reform Bill 2007*, the Company Law Review Group has created a structure that incorporates two different parts, which are commonly known as 'pillars'. 'Pillar A' is exclusively concerned with the private company limited by shares. 'Pillar B' provides the variations for each other company type, for example, public limited companies, unlimited companies and investment companies. The CLRG proposes that there will be a new type of company known as the 'designated activity company'.

The *General Scheme* contains a number of significant proposed reforms of Irish company law. It is proposed that the model company, under the legislation, will be the private company limited by shares (CLS). The proposal provides that a private company limited by shares may have a single director. The bill eliminates the need for the annual general meeting and replaces it with a provision whereby it can now be carried out by written procedure. A single document constitution is envisaged, replacing the current need for the memorandum and articles of association. New criminal offences arising under the *Companies Acts* are proposed and the offences have been graded. The private company limited by shares will now have the legal capacity of natural person. The doctrine of *ultra vires* will be defunct, apart from situations that arise where a limit on the powers of a company is desirable. In that situation, the proposed legislation provides for a designated activity company, which will retain an objects clause.

Company incorporation

Chapter two of the *General Scheme* deals with incorporation and registration of a CLS. The proposed process of incorporation has been simplified greatly. The current requirement that a company must lodge a memorandum and articles of association will be replaced by the filing of a single document – the company constitution. It will not be necessary to insert a limited liability clause, as the CLS will be limited by definition. The CLS will have its own application for incorporation. An objects clause will not be necessary.

Changes to directors' duties

The *General Scheme* gives clarity in relation to the definition of a 'director'. The definition of 'director' is stated to include "any person occupying the position of director by whatever name called". This effectively means that shadow directors and *de facto* directors will fall within the definition.

The *General Scheme* proposes codification of common law fiduciary duties of directors, like the requirement to act in good faith and to avoid conflicts of interest. Until now, these duties could only be deciphered by trawling through case law. These changes would be very welcome, as they would bring much needed clarity to the issue of directors' responsibilities. The CLRG also proposes a new age restriction on directors, in that there will be a minimum age of 18. This will prevent child directors from being issued with summonses for failing to file annual returns, among other things. Furthermore, directors will be enabled to give restriction/disqualification undertakings to the Director of Corporate Enforcement.

Pillar A, chapter 2 of part 5, details the general duties of directors and secretaries. In head 5, the duty of each director to ensure compliance with the *Companies Acts* is set out and will apply equally to shadow directors and *de facto* directors. This head also makes provision for the concept of 'an officer in default' and requires directors to acknowledge their statutory and common law duties on their appointment.

Pillar A also proposes a new provision that concerns directors' liability to account to their companies for gains made and to indemnify their companies for losses caused as a result of their breach of duty. This provision is modelled on remedies currently available in part III of the *Companies Act 1990* where directors act in breach of their duties. This is an important amendment, as it exposes a director personally and it erodes the doctrine of limited liability.

Designated activity companies

If a contract or agreement is not within a company's memorandum and articles of association, the doctrine of *ultra vires* operates to render a contract, purportedly entered into by a company, void and unenforceable. With the practice of the flooding of the objects clause by company members, the reality is that these structures no longer achieve what they were intended to achieve. The CLRG has recognised that companies are not carrying out business in relation to matters for which they were originally designed, because of the practice of drafting wide and varied objects clauses.

The new proposals attempt to circumvent this problem by stating that the capacity of a private company limited by shares (CLS) is stated to be "full and unlimited capacity to carry on and undertake any business or activity, do any act or enter into any transaction". In effect, a CLS would be endowed with the capacity of a natural legal person.

However, it is important to note that there will be provision made for retaining an objects clause in certain circumstances. There will be two types of 'designated activity company' (DAC), which will be identified by the letters 'DAC' appearing at the end of their corporate title. The first type will be a special-purpose vehicle, and the second will be a private company limited by guarantee and having a share capital. The obligation to ensure the DAC acts within its powers will lie with the directors, who will be liable for any breach. It is asserted that the DAC may be used for specific ventures, such as property management companies or charities.

Single director companies

The CLRG proposes that new private companies limited by shares will be allowed to have a single director. This recognises the reality that many small businesses have a second token director for compliance reasons only. It will also cut down on the number of directors appearing before the District Court for failing to file tax returns and annual returns. This provision may save large quantities of court time in the future, as the Revenue and the Companies Registration Office will only have to pursue one director. From a director's viewpoint, this proposal will place more of a burden on them, as they will now have sole responsibility for all decisions taken and contracts made.

Abolition of the AGM

The *General Scheme* proposes to dispense with the need to hold an AGM. However, it will be imperative for shareholders to unanimously accept this. The CLRG noted "that in many private companies, the business of an annual general meeting is a foregone conclusion, particularly where the members in their capacity as directors will already have approved the accounts, the level of dividend, the re-election of themselves as directors and the continuance in office of auditors". It is asserted that, with the use of modern-day communications such as email and conference calls, the need for AGMs is now obsolete.

> ***"The General Scheme proposes to dispense with the need to hold an AGM. However, it will be imperative for shareholders to unanimously accept this"***

Positive step

It is apparent that the legislation that was introduced earlier this year was precipitated by the near collapse of the banking system, and as a result of some of the insidious practices that had evolved at the higher echelons of some of these institutions.

The 2009 act is a positive step towards reining in the large number of wayward company directors who had escaped under the radar in the past. Further, it acts as a deterrent to any other would-be miscreant individuals who have become directors of companies and banks. However, it is clear that the 2009 act is merely the tip of the iceberg compared with the colossal changes that the *Companies Consolidation and Reform Bill* proposes to introduce.

With the regularisation of directors' duties, the clarification in relation to the definition of the term 'director', the introduction of a single-member director company, and the copious amounts of new criminal penalties for failing to comply with company law, a new era has dawned for company directors. They must be cognisant that an awareness of the legislation is imperative in order to comply with the law and to evade the extensive and far-reaching forces of the Director of Corporate Enforcement. G

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The *Harbours (Amendment) Act 2009* introduces further liberalisation and lucrative opportunities for the commercial ports. Sean Nolan sights his sextant on the principal changes

Any port in

The *Harbours Act 1996* enacted the first major revision of Irish harbours legislation since the 1940s. Prior to that act, Ireland's 26 state-owned ports operated as harbour authorities under the *Harbours Act 1946* and were essentially run as public utilities by harbour commissioners, many of whom were nominated by local authorities, chambers of commerce and other representatives of port-user interests.

Central to the reforms introduced by the 1996 act was the introduction of a legislative framework for establishing a top tier of state-owned commercial companies, incorporated under the *Companies Acts*, to own and manage the principal commercial ports of Dublin, Cork, Shannon, Foynes, Dun Laoghaire, Waterford, Dundalk, Galway, Drogheda, New Ross, Arklow and Wicklow. (Rosslare Port is excluded from the 1996 and 2009 acts and continues to be governed by private legislation of the Victorian era under the aegis of Iarnród Éireann.)

Given that Ireland – of all the countries in the EC – is the most heavily dependant on external trade, the state policy underpinning the *Harbours Act 1996* reflected the importance of fostering a competitive and commercial regime within the Irish ports sector by removing operational state control of the principal commercial ports. After a decade of operating within the commercial environment introduced by the 1996 act, the majority of the commercial ports have adapted to the new commercial environment and have developed from being essentially public utilities with unclear mandates to being enterprises with clear and defined commercial objectives. By implementing the government's policy as set out in its *Ports Policy Statement 2005*, the *Harbours (Amendment) Act 2009* complements and expands upon the commercial mandate given to the commercial ports under the 1996 act and removes the local authority and port-user representation at board level, which had constrained the ports' commercial ambitions.

As with much legislation that has a commercial impact, the 2009 act was preceded by a consultation process with the port sector stakeholders, including the Irish Ports Association, whose members include the Irish commercial port companies. The 2009 act became law on 21 July 2009. Here, we focus on the principal changes introduced by the act.

Changing tack

The scope of activities that may be undertaken by port companies has been extended by section 5 to permit port companies to invest in or engage in commercial activities outside the limits of their respective harbours, subject to obtaining ministerial consent. Under the 1996 act, the port companies were constrained, in that they could only engage in business activities that were advantageous to development within their harbours. Port companies may now participate in a range of commercial ventures with other harbour companies, local authorities and private enterprises outside of their harbour limits, including ventures overseas. Thus far, there has been little appetite for establishing cross-border joint ventures between port companies. However, as traffic volumes within the Irish ports decline, port companies are now empowered to make strategic external investments with a view to benefiting from such investments when the economy recovers.

Section 9 introduces flexibility to enable the port companies to borrow funds to finance a number of strategically important capital projects. Under the 1996 act, the amount of borrowings of a port company was capped at 50% of the value of its fixed

MAIN POINTS

- Port companies permitted to invest outside harbour limits
- Relaxation of borrowing constraints
- Removal of local authority and user representation on port boards

a storm

The Seacat enters Dublin's harbour

assets. Borrowings may now exceed this threshold where ministerial consent is obtained, provided that total borrowings do not exceed €200 million.

Land ahoy!

Under section 6, port companies are now subject to a legal obligation to have regard to government policy or guidelines in relation to both the disposal and the acquisition of land and the consideration therefor. Under the 1996 act, port companies were only required to have regard to government policy or guidelines in relation to the acquisition of land. Notwithstanding this, port companies were, and continue to be, expected to adhere to the corporate governance principles in the *Code of Practice for the Governance of State Bodies*, which addresses both land acquisitions and disposals. It remains to be seen whether the 'Bord Snip Nua' report will be adopted as government policy. If it is adopted as government policy, port companies will be required to adhere to its policies in respect of land disposals and acquisitions.

Mutiny on the *Bounty*

Sections 8 and 11 have repealed the provision contained in the 1996 act and the *Port Companies (Appointment of Local Authority Directors) Regulations 1996* (SI 335 of 1996), whereby the Minister for Transport was required to appoint three directors of a port company, as nominated by the local authority in which the port company was situated, and neighbouring local authorities. The repeal of local authority and user representation is central to the liberalisation of the Irish commercial ports. Given their role and status as commercial entities, the government regards it as being essential that the boards of the port companies be smaller and more focused on the achievement of commercial objectives and well-being of the port company alone.

The former requirement for significant local authority representation was regarded as being inconsistent with government policy, and the 2009 act gives effect to this policy. Those practitioners with an interest in history will be aware that the harbour authorities that preceded the commercial port companies were founded in the Georgian/early Victorian era and evolved in tandem with the local chambers of commerce. As a result, it became common practice – and later a legal requirement of the 1946 act – for harbour authorities to have commercial, user and local authority representation on their boards. By removing local authority and user

SEASCAPES

Arklow Harbour
The 1996 act envisaged and provided for the incorporation of Arklow Harbour. This is no longer warranted, and section 17 amends the 1996 act to facilitate the reversion of Arklow Harbour from being a port company governed by the *Companies Acts 1963 to 2009* to local authority control.

Braemore Port
Section 3 alters the harbour limits of Drogheda Port Company in order to facilitate the construction of a new port at Braemore in North County Dublin. The change to the harbour limits is being effected by a retrospective change to the 1996 act. These changes had previously been made by the minister under statutory instruments passed under section 9 of the 1996 act, which are now revoked. The power of the minister to alter a company's harbour limits under section 9 of the 1996 act has also been clarified in the 2009 act to take account of case law developments in *Cityview Press Limited v An Chomhairle Oiliunna* and *Mulcreevy v Minister for Environment* concerning the extent to which a minister may, by statutory instrument, effect changes to primary legislation. Following advice from the attorney general that the 1996 act did not contain sufficient principles and policies to allow the harbour limits to be altered by ministerial order, section 9 has now been amended to include sufficient principles and policies to satisfy the requirements identified in the above cases.

Bantry Bay, Tralee and Fenit Harbours
Section 18 makes provision for the transfer by ministerial order of Bantry Bay Harbour to Port of Cork Company, and Tralee and Fenit Harbours to Shannon Foynes Port Company, in the event that it is determined that there is significant commercial traffic within these harbours. However, flexibility is maintained to provide for their possible reversion to local authority control or to local port company control. No such transfer may take place unless a public consultation process is undertaken in accordance with the section.

representation, this characteristic of the ports for upwards of 300 years has been severed. As a result, the maximum number of directors who may be appointed to the board of a port company has been reduced from 12 to eight. Consequential changes are made to the model form of articles of association of port companies, which will require implementation by special resolution of each of the port companies.

All hands on deck
With a view to reducing the size of the boards of port companies, section 11 has reduced the number of staff-elected directors of port companies from two to one, irrespective of the number of staff employed by the port company.

Under the 1996 act, where the number of a port company's employees was between 30 and 50, it was required to hold an election for the appointment of one member of staff as a director of the company. Where the number of employees exceeded 50, an election for the appointment of two employees to the board was required. In addition to reducing the number of worker-elected directors from two to one, the 2009 act introduces helpful averaging provisions in recognition of the fact that the number of employees may rise above or fall below the trigger number of 30 during the course of a year. An election is now only required where the average number of the employees will remain in excess of 30 in the following accounting year.

Under the former law, an election was required if the threshold was attained at any point in time,

LOOK IT UP

Cases:
- *Cityview Press Limited v An Chomhairle Oiliunna* [1980] IR 381
- *Mulcreevy v Minister for Environment, Heritage and Local Government* [2004] 1 ILRM 419

Legislation:
- *Harbours (Amendment) Act 2006*
- *Harbours Acts 1946, 1996*
- *Harbours (Amendment) Act 2000*
- *Maritime Safety Act 2005*, section 58
- *Planning and Development (Strategic Infrastructure) Act 2006*
- *Port Companies (Appointment of Local Authority Directors) Regulations 1996* (SI 335 of 1996)

Literature:
- *Code of Practice for the Governance of State Bodies* (updated 15 June 2009) (www.finance.gov.ie)
- *Ports Policy Statement 2005*, Department of Communications, Marine and Natural Resources (www.transport.ie)
- *Report of the Special Group on Public Service Numbers and Expenditure Programmes* (www.finance.gov.ie).

even if it was envisaged that the workforce would fall below the threshold level immediately after the election result was announced. In determining the number of a port company's employees, those members of staff employed in subsidiary companies are not to be aggregated with the employees of the port company itself. For example, where a port company employs 29 members of staff directly and a further two are employed in a subsidiary, no election is required, whereas if all of the 31 staff were directly employed in the port company, an election is required. Surprisingly, the 2009 act has not addressed this issue. For those port companies whose employees number less than 30, and consequently where no election is required, the Minister for Transport is required to appoint a person who, in the minister's opinion, is representative of the interests of the employees of the company. In this regard, the minister is required to consider any recommendations of nominees made by any relevant recognised trade union or staff association. Such a person need not be an employee of the port company.

In an effort to prevent conflicts of interest at board level, the 2009 act precludes the appointment and/or nomination of certain persons as directors, such as a person who has provided a "significant commercial service" to the port company during the previous three years.

Haul anchor

Section 15 gives effect to recent changes in international maritime conventions that extend the range of persons who may be issued with a pilotage exemption certificate under section 72 of the 1996 act. The holder of a pilotage exemption certificate is exempt from compulsory pilotage within the whole or part of a port company's pilotage district. Before such a certificate is issued, the port company must be satisfied that the holder is in possession of the skill, experience and local knowledge sufficient to enable the holder to pilot the ship within the relevant area of the company's pilotage district.

The 2009 act implements the advice of the attorney general by closing off a lacuna under the 1996 act, whereby those harbour authorities that were not incorporated under the 1996 act and that remain subject to the 1946 act had no power to organise and ensure the provision of pilotage services, including the making of bye-laws in relation to pilotage services.

Port companies were conferred by the 1996 act with powers of compulsory acquisition of land within their harbour limits. Section 7 of the 2009 act transfers the CPO functions exercisable by the Minister for Transport to An Bord Pleanála. This transfer is similar to that made by the *Planning and Development (Strategic Infrastructure) Act 2006* with regard to the CPO powers of Dublin Airport Authority.

Dublin's harbour enters a sea cat

Taking the wheel

Given that the government expects that the commercial port companies should be capable of funding their operations and infrastructural requirements without relying on exchequer support, the 2009 act provides for the necessary legal environment to encourage the port companies to develop sources of revenue from other avenues, such as private sector investment. Notwithstanding the 2009 act's focus on individual port responsibility, it is likely that amalgamations and mergers of port companies, and even the possibility of privatisation of port companies, will feature as the current economic climate and contraction of exports bring further commercial challenges to the ports sector.

"The 2009 act provides for the necessary legal environment to encourage the port companies to develop sources of revenue from other avenues, such as private sector investment"

The government has indicated that the case for amalgamations will be accepted where the proposals demonstrate the potential to reduce costs, create synergies and opportunities for more dynamic development, marketing, product delivery and critical mass. The case for amalgamations has already been made and implemented in relation to Foynes Port Company and Shannon Estuary Port Company, which were amalgamated to form Shannon Foynes Port Company. It will be interesting to see if other port companies follow suit. G

Sean Nolan is a partner in MJ O'Connor, Solicitors, Waterford. He represented the Irish Ports Association in its submissions to the Department of Transport on the Harbours (Amendment) Bill 2008.

Jol

In May 2008, seven judicial fellows were appointed to provide support to the judges of the High Court, with a further three fellows appointed later that year. Orla Veale Martin gives three cheers

PIC: LENSMEN

MAIN POINTS

- Duties of judicial fellows
- 'Decision enhancing'
- Behind the curtain of judicial decision making

Those attending the High Court for chancery, commercial, judicial review or asylum matters over the past two years may have noticed an extra body in the familiar line up at the top of the court, next to the registrar. In May 2008, seven judicial fellows were appointed to provide support to the judges of the High Court, with a further three fellows appointed later that year. They were assigned by the President of the High Court to work directly with one or two judges whose major commitment was to judicial review, chancery and commercial lists.

Judges who were assigned fellows included Judge Frank Clarke, Judge Iarfhlaith O'Neill, Judge Peter

ly good fellows

Kelly, Judge Mary Laffoy and Judge Mary Finlay Geoghegan. Fellows were also appointed to judges of the asylum and competition lists. It is a requirement for the role that the judicial fellows are legal professionals, and so the first ten fellows comprise qualified solicitors and barristers.

Although these fellowships comprise a new role in the Irish state, similar roles are well established in other jurisdictions. The titles for these roles may vary throughout the common law world – from judicial fellow to law clerk to judicial assistant or associate – but the duties remain essentially the same. The Supreme Court of the United States has had judicial assistants, or clerks, gracing its halls for over 100 years, and their role and functions are as familiar as those of any protagonist in the courts system.

Duties of judicial fellows

As the first set of judicial fellows, the role was ours to form – within certain parameters. In forming the role, we drew on the experiences of similar, more established roles, and from the expectations of the judges to whom we were assigned. In essence, the primary functions of a judicial fellow are akin to those of a professional support lawyer providing assistance to a High Court judge.

Prior to the appointment of judicial fellows, research assistance to the judiciary was provided by a number of judicial researchers, who were first put in place in 1993. Yet the functions and duties of the judicial fellows were intended to be entirely separate to those of the researchers. A judicial fellow is assigned to a particular area of court business and works alongside an individual judge.

A key element of the fellow's role is in providing assistance with the drafting of written decisions by their assigned judges. To this end, judicial fellows typically sit in court for the duration of any cases over which their judge is presiding. Then, after consultation with the judge to whom they are assigned, the fellow prepares a draft summary of relevant facts and law, plus the submissions of the parties for inclusion in a draft judgment. Further assistance is provided by the fellow in editing and proofreading the draft judgment. As extremely important documents of public interest, and because of instantaneous worldwide publication, there is no margin for error with the drafting and editing of judgments.

'Post-adolescent mandarins'?

Like our American counterparts, there is no defined statutory basis for the role of judicial fellow. The American Federal Judicial Centre has attempted to define the role of the law clerk in its publication, the *Law Clerk Handbook*, which states: "Clerks are usually assigned to do legal research, prepare bench memos, draft orders and opinions, edit and proofread the judge's orders and opinions and verify citations. Many judges discuss pending cases with their law clerk and confer with them about decisions."

However, the functions and duties of a judicial fellow will vary considerably, depending on the judge to whom they are assigned. Perhaps a more comprehensive and accurate summary of the duties of a fellow is set out by US Court of Appeals judge Daniel Mahoney, in an article for the *Brooklyn Law Review*: "A large part of a clerk's functions in America

is to do the legwork on a given case; spot the most important issues, summarise the arguments, give an impression of which arguments are most persuasive, and thus identify the aspects of a case that should have an impact on the final decision. With this assistance, the judge can get to the heart of the case and be prepared to highlight the most important issues at oral argument or at a conference afterwards. A clerk performing such functions renders a valuable service, but it is hardly the equivalent of decision making. After cases are argued, it is the judge who casts the vote on a tentative disposition, based partly upon a clerk's impressions and recommendation, but more dispositively upon the judge's review of the briefs and related materials, oral arguments and ultimately his own conclusions. Is this a usurpation of decision making? I would suggest that the law clerk's role is better described as 'decision enhancing'."

In that regard, as judicial fellows, we would agree that we are 'decision enhancers'. Some criticism of clerking in the US courts is that it has led to a "corps of post-adolescent mandarins, judges for a year", as put by Richard Posner in his article 'The jurisprudence of skepticism'. We can be very clear about this: the role of judicial fellow is not intended to encroach on judicial function.

There is, obviously, a very strong emphasis on confidentially and ethics in the role. Judicial fellows must protect the judge's confidences and the integrity of the courts. Being professionally qualified lawyers, we have come to the role with a knowledge of ethics in the practice of our respective professions, but we also follow distinct guidelines – currently those as set out by the American Federal Judicial Centre in their publication *Maintaining the Public Trust: Ethics for Federal Judicial Law Clerks*. As an evolving role, every possible ethical issue is not covered, and this is an area that must be managed by the fellow and their assigned judge.

"Few legal professionals have the occasion to see behind the curtain of judicial decision making, until they themselves are on the bench. There is no apprenticeship for the judiciary. The fellowship has placed us in a pseudo-apprenticeship for its duration"

Behind the curtain

The posts were intended to provide a direct insight into the judicial process and to expose the fellows to practice in the High Court. As a role in the Irish legal system, the experience is completely unique. Additional to the privilege of being the first judicial fellows in this jurisdiction, few legal professionals have the occasion to see behind the curtain of judicial decision making, until they themselves are on the bench. There is no apprenticeship for the judiciary. The fellowship has placed us in a pseudo-apprenticeship for its duration.

The experience of each judicial fellow has as many differences as similarities. For example, the judicial fellow assigned to a list with a fast turnover, such as asylum, may sit in on a new case every day, with input required on each case heard. Judicial fellows are also assigned to lengthy and complex commercial cases, some lasting over six months, where the duties will cover keeping track of evidence and submissions and summarising these as the case progresses.

The experience may also include sitting in on a trial for a number of days, only for it to settle. In which case, having invariably read the pleadings and researched the issues, the judicial fellow may seem to be the only party to be disappointed at such a settlement, with his or her work being filed only in the knowledge banks rather than forming the basis of a judgment.

Whatever the differences, all of the fellows have

LOOK IT UP

Cases:

- *Doran v Ireland* (ECtHR 50389/99)

Legislation:

- Section 46(3) of the *Courts and Court Officers Act 2002*, as amended by section 55 of the *Civil Liability and Courts Act 2004*

Literature:

- Coonan, Genevieve, 'The role of judicial research assistants in the decision-making role of the Irish judiciary', *Judicial Studies Institute Journal* (2006) 6(1) 171
- Federal Judicial Centre, *Law Clerk Handbook*
- Federal Judicial Centre, *Maintaining the Public Trust: Ethics for Federal Judicial Law Clerks*
- Mahoney, Daniel, 'The second circuit review – 1986-1987 term: foreword; law clerks: for better or for worse?' *Brooklyn Law Review* (1988) 54
- Posner, Richard, 'The jurisprudence of skepticism', *Michigan Law Review* (1988) 86

PIC: LENSMEN

The ten judicial fellows with the President of the High Court, Mr Justice Nicholas Kearns. Back row *(l to r)*: Geoffrey Sumner, Stephen Byrne, David Fennelly, Gerard Nicholas Murphy, Stephen Fagan and Christopher Martin. Front row *(l to r)*: Laoise Ní Chonail, Orla Veale Martin, President of the High Court Nicholas Kearns, Máire Reidy and Joanne Williams

gained an insight into the contemporary policy issues facing the judiciary, as well as an appreciation of the nature of judicial administration.

The future

The Courts Service hopes to continue the fellowship program, as the work of the High Court is by no means slowing down – with ever more complex cases being heard, particularly given Ireland's recent economic difficulties. In 2008, the number of civil matters issued was 22,861, an increase of 3,426 over the previous year. Of these, for example, breach of contract cases almost doubled, with 1,507 such cases received by the High Court in 2008. There was another large increase in 2009, with 27,465 new civil cases issued in the High Court, an 18% increase on the number from 2008. Preliminary statistics for 2009 from the Courts Service indicate that 579 reserved judgments were delivered in 2009, compared with 449 in 2008 and 403 in 2007.

Non-delivery and or late delivery of reserved judgments can lead to a finding of liability on the part of the state, as determined by the European Court of Human Rights in the case of *Doran v Ireland*. Following on from this, section 46(3) of the *Courts and Court Officers Act 2002*, as amended by section 55 of the *Civil Liability and Courts Act 2004*, sets out a time limit of two months from the hearing of the case within which reserved judgment should be delivered. As such, there is increased pressure on judges to deliver judgments quickly after the hearing of a matter. Judges are also expected to read the relevant papers in advance of a trial in order to reduce the length of hearings.

The judicial fellows were appointed to help the High Court judges meet these time frames. Following an *ad hoc* analysis carried out by the fellows, it can be confirmed that most judgments worked on by a judge with the assistance of their fellow are issued within these time limits. In 2009, nine judicial fellows worked on a total of 181 judgments.

With the first fellowship programme coming to an end, a new group of judicial fellows will be recruited this summer. It is envisaged that these judicial fellows will be assigned to an area of law rather than to an individual judge, to allow a greater number of judges access to a judicial fellow's assistance. Without judicial fellows, judges in Ireland's superior courts are in the relatively unique and unenviable position of carrying a voluminous and ever-increasing workload with only secretarial support. No partner in a large law firm or busy senior counsel would ever tolerate such skeletal resources. In this way, judicial fellows positively aid the judiciary and, in turn, bring about increased efficiency in the courts. G

Orla Veale Martin is a qualified solicitor and judicial fellow.

Singing Sinatra at SLA dinner

The annual Southern Law Association (SLA) dinner was held in the Maryborough House Hotel on 26 February. In all, 250 solicitors and their guests attended. Special guests included Gerard Doherty (president of the Law Society), Ken Murphy (director general), Norville Connolly (president of the Law Society of Northern Ireland), John O'Malley (president of the Dublin Solicitors' Bar Association) and Bernadette Cahill (president of the Waterford Law Society).

Four local district judges, four local Circuit Court judges, together with High Court judges Liam McKechnie and Patrick McCarthy represented the judiciary, and the Director of Public Prosecutions and Garda Commissioner were also present.

In the course of his address, the SLA president called for the abolition of stamp duty as a stimulus to the sale of unoccupied housing stock.

Patrick Dorgan and Kieran McCarthy provided humorous entertainment, with the traditional 'topical song' poking fun at many local and national events from the year gone by.

Music and entertainment was provided by the Sinatraesque Ronnie Costly until 3.30am, ending the night on a high note!

ALL PICS: DEE BAUMANN PHOTOGRAPHY

Gerard Doherty (Law Society president), Eamon Murray (SLA president), Bernadette Cahill (WLS president) and John O'Malley (DSBA president)

Stephen Rowe, Harvey Kenny (retired judge), Mary Campbell and Tim Bracken

Finian Dullea and Philomena Murnane

Gerard Doherty (Law Society president), James O'Donoghue (Circuit Court judge), Patrick Moran (Circuit Court judge), Eamon Murray (SLA president), Con Murphy (Circuit Court judge) and Seán Ó Donnabháin (Circuit Court judge)

Pat Mullins (past president SLA)

SLA president Eamon Murray with staff, enjoying the SLA's annual dinner

Emer O'Callaghan and Noel Power

Kate Murphy and Jim Thompson

Eileen Lee and Tim Bracken

Louise O'Brien and David O'Mahony

Dressed to impress for Respect

The Trinity Business Alumni recently hosted a 'dress to impress' event – with all proceeds going to the charity Respect. Fashion and business clashed, in more ways than one, at the corporate fashion show on 6 March at the Mansion House in Dublin.

The event organiser was solicitor Marie Louise Heavey of Matheson Ormsby Prentice. Her novel approach saw lawyers, auditors, accountants and office workers strutting their stuff on the catwalk wearing Irish and international fashion from, among others, Louis Copeland, LK Bennett, Arnotts and Fran & Jane.

Directed by Celia Holman Lee and jointly hosted by business veteran Eddie Hobbs and TV personality Kathryn Thomas, there were guest appearances on the catwalk by Senator Shane Ross, politicians Leo Varadkar and Lucinda Creighton, Louis Copeland, the reigning Rose of Tralee Charmaine Kenny and Breffny Morgan from *The Apprentice*.

Just over €20,000 was raised for Respect, the Irish-registered charity responsible for fundraising projects for people with intellectual disabilities. Respect is currently working to develop an Alzheimer's unit, with all proceeds from the fashion show being set aside for this purpose.

Mark Ryan, Kathryn Thomas, Marie Louise Heavey, Eddie Hobbs and Celia Holman Lee

Paul Farrell (Matheson Ormsby Prentice)

Dr Leo Varadkar TD

Louis Copeland

Lucinda Creighton TD

Kate and Emma Walls

Lucy O'Reilly and Clare Walsh (both of Maples and Calder)

Caroline Hosey and Ingrid Hoey

PIC: JASON CLARKE PHOTOGRAPHY

Former Taoiseach Garret FitzGerald celebrates at the Law Society with his granddaughter, Ciara FitzGerald, who won the Constitutional Law Prize for best overall performance in that subject in the final examination first part (FE1) in 2009

PIC: JASON CLARKE PHOTOGRAPHY

Attending the parchment ceremony on 25 February 2010 were *(l to r)*: President of the High Court Mr Justice Nicholas Kearns, former Taoiseach Garret FitzGerald, director general of the Law Society Ken Murphy, and president Gerard Doherty

PIC: JIM YORKE

Members of the Laois Solicitors' Association (LSA) met in the Heritage Hotel, Portlaoise, on 3 March, where they were briefed by Law Society president Gerard Doherty and director general Ken Murphy on matters of interest to the profession. *(Front, l to r)*: Karen O'Sullivan, Ken Murphy (director general), Philip Meagher (president, Laois Solicitors' Association), Gerard Doherty (Law Society president) and Elaine Dunne (secretary, LSA). *(Back, l to r)*: Tony Duncan, John Turley, Donal Dunne, Jim Binchy, Vincent Garty, Gerry Meagher, Noel Egan, Pat O'Sullivan, Kevin O'Donnell and Eugene O'Connor

Attending the seminar 'Mortgages and judgment mortgages following the *Land and Conveyancing Law Reform Act 2009*' at Blackhall Place on 10 March 2010 were *(l to r)*: William Prentice (Matheson Ormsby Prentice), Ms Justice Mary Laffoy (High Court), Susanne Bainton (Liston and Co), Barbara Joyce (Law Society), Sean Green (Eversheds O'Donnell Sweeney) and Frank Nowlan (AB Wolfe)

student spotlight

Giving something back

"We're not just training technocrats," says Geoffrey Shannon. "We're training professionals." And those professionals won't just be responsible for providing legal advice, but "assistance to society generally," *writes Colin Murphy*.

Shannon is the deputy director of education at the Law Society. In that role, he has helped oversee the Law Society's increasing focus on volunteerism among its students. As well as the community volunteer programme run by the Student Development Service, which has been profiled here in a series of articles in recent months, students are encouraged to volunteer with FLAC and to participate in an overseas volunteer programme.

For Shannon, this is about connecting trainee solicitors, not just with the local community, but with a 'global community'.

"We're helping to create opportunities for trainees to contribute to society. Hopefully, they will continue when qualified.

"There is an understated tradition in the profession of doing *pro bono* work, and we hope this will encourage trainees to engage in *pro bono* work when they qualify."

This year, students have participated in four projects: a reading club with young girls at Stanhope Street primary school, the 'Just ASK' homework club at the Dublin Christian Mission on Chancery Place, the Capuchin day centre for homeless people, and a homework club for Junior and Leaving Cert students at St Paul's CBS on North Brunswick Street.

Getting down to business at the 'After School Klub' are *(l to r)*: Sean Grouse (11), Arron McKenna (12) and Scott Fitzsimons (11)

Energised by the experience

Antoinette Moriarty, who set up the programme for the Student Development Service eight years ago, says it's vital that students – who often come from more privileged backgrounds than the communities local to the Law Society – learn about the challenges faced in those communities.

"They're not all going to be practising in Donnybrook or Ballsbridge. It's important for them to get an insight into what's going on in the community around them."

According to Geoffrey Shannon, the volunteers have been "energised" by the experience. "Many feel they get more out of it than they put into it."

One of those who took it particularly to heart was student Cian Martin, who volunteered to help at the homework club at St Paul's, and ultimately found himself coordinating the club. He was impressed by the dedication he found among the students at St Paul's.

"Most of those who come here have a desire to go on to third level," he said, and while some were looking for support simply to "get their pass in the Leaving Cert, and move on", others had "very high ambitions".

For Martin, the benefits of volunteering are two-way, with the trainees gaining in insight and skills from the experience, an insight he hopes his fellow students will carry with them into their careers.

"It wouldn't hurt the profession to have more of a social conscience," he says.

Overlapping benefits

For Geoffrey Shannon, the volunteering programme ultimately has a number of overlapping benefits: it helps connect the Law Society to its local community, allowing it to "give something back"; it opens the trainees to an awareness of "the broader public interest dimension of law"; and it helps them develop greater awareness and skills in the broader area of client care.

Visiting these projects in recent months, the *Gazette* was struck by the sense of history that permeates these communities. They are among the most firmly rooted in the city, with many families having lived in the same areas for generations. With the legal community similarly rooted in this area of Dublin since the 18th century, the volunteering programme could be seen also as a celebration of that linkage.

With record numbers of trainees having signed up this year, in part inspired by the economic crisis, that linkage looks set to be strengthened further in the academic year to come.

Society team takes ELMC regional final in New York

The European Law Moot Court competition is a prestigious bilingual competition in French and English. Teams of students prepare written pleadings on a problem of European law and present their arguments before the Court of Justice of the European Union.

This year, the Law Society's team comprised Anna Hickey, Richard Kelly (both Matheson Ormsby Prentice trainees), Ruth Ní Fhionnáin (trainee with the Immigrant Council of Ireland) and Grace O'Connor (trainee with William Fry).

The competition started in September with the publication of this year's case, which primarily focused on the effects of directive 94/19 on deposit guarantee schemes and directive 103/2009 on long-term residence of third country nationals. The team submitted two sets of written pleadings, one for applicants and another for respondents, in the form usually submitted by parties to a preliminary reference to the Court of Justice of the European Union.

In January, the team heard that it had qualified for the regional final in New York (the other three finals are held in Maastricht, Madrid and Florence). Twelve teams compete at each final, with only one team from each qualifying for the all-European final at the Court of Justice in Luxembourg. Columbia University hosted the regional final and became a European enclave in the heart of New York, with a variety of European teams pleading over two days.

The competition was tough, and the judges' questions even tougher! Anna Hickey pleaded on behalf of the applicant on the first day of the competition, while Richard Kelly pleaded for the respondents later the same day. Grace O'Connor pleaded as representative of the Commission of the European Union. Their points' score brought them through to the next day of pleadings – a great result. Richard Kelly pleaded again for the respondent and Ruth Ní Fhionnáin on behalf of the applicant.

Professor George Bermann (Columbia University), Eva Massa (team coach), Grace O'Connor (William Fry), Ana Hickey (Matheson Ormsby Prentice), Ruth Ní Fhionnáin (Immigrant Council of Ireland) and Richard Kelly (Matheson Ormsby Prentice)

When the finalists were announced, we were somewhat pessimistic, due to the fact that native English speakers may only be awarded points for the use of one foreign language (French), and not two like most other teams. We were surprised, but delighted, to reach the final. It was decided that Ruth Ní Fhionnáin would plead for the team in the final in her role as applicant. She was up against a strong team from Katholieke Universiteit Leuven in Belgium but spoke brilliantly and with passion.

Tears flow

On past performance, KU Leuven were favourites to win. The Law Society team benefited, however, from the merits of each individual and from fantastic teamwork at all stages: from the drafting of the written pleadings in September to each acting as co-counsel for one another – which was apparent to the judges. Tears flowed when the team was named the winner – a testament to five months of hard work put in by the team.

As winners, after a formal dinner in Columbia University, we had the honour of kicking off proceedings in a tongue-in-cheek 'Eurovision'. The team attempted a 'Walls of Limerick' while singing 'Whiskey in the Jar'! Despite two feet of snow on the ground, Columbia was beautiful, and the participants managed to fit in some sightseeing and a Broadway show. The team is now preparing to plead in front of the Court of Justice in Luxembourg in April.

Thanks goes to each member's firm, the Immigrant Council of Ireland, Matheson Ormsby Prentice and William Fry for their support throughout; to Philip Burke of Independent Colleges for his sponsorship; and all former participants who assisted with practice rounds. Thanks, too, to team coach Eva Massa for her generous help and support. G

council report

Law Society Council meeting, 19 February 2010

Motion: commercial undertakings

'That this Council directs the Registrar of Solicitors to prepare draft regulations for the approval of the Council at its March meeting to prohibit solicitors giving undertakings to a financial institution in a commercial property transaction as defined in the Solicitors Acts 1954 to 2008 (Professional Indemnity Insurance) (Amendment) Regulations 2009.'

Past-president John Shaw reported that the working group appointed by the Council to progress this matter was strongly of the view that the introduction of regulations prohibiting undertakings in commercial transactions was an issue of prudence and best practice. The Registrar of Solicitors had indicated that there had been a surge in complaints by financial institutions relating to breaches of undertakings, both commercial and residential, and there were overriding considerations of safe conveyancing and banking practice underpinning the proposal. Mr Shaw noted that the proposed regulations represented a response to a seriously flawed system and were in the public interest for a number of reasons:

- The new system would substantially reduce the risk of conflict of interest,
- Proper registration of securities was a cornerstone of prudent banking,
- Ensuring registration of the security improved the quality of the loan book/asset,
- It would reduce the risk of reckless lending and fraud, and
- It would help to avoid a real threat to the stability of the professional indemnity insurance market.

Mr Shaw noted that, in many large commercial transactions, the banks already retained their own solicitors and, in these instances, there would effectively be no change.

Mr Shaw said that, essentially, the proposal was a regulatory matter, and he noted that the proposed new regulations would have to co-exist with the professional indemnity insurance regime. Accordingly, it was proposed to ask the Registrar of Solicitors to prepare draft regulations for consideration by the Council at its March meeting and for dissemination for the views of the profession thereafter.

Kevin O'Higgins noted that the principal lenders were already reassessing their current systems. He understood that one of the main banks had already decided that, in every commercial loan, regardless of value, they would instruct their own solicitor. Another of the main banks was considering a threshold of €2.5 million, above which they would also instruct their own solicitor.

Simon Murphy said that one of the significant difficulties in relation to the Lynn and Byrne cases was the existence of multiple undertakings on investment properties.

John O'Connor agreed that the Lynn and Byrne cases had done huge reputational damage to the profession. As a consequence, the financial institutions, the Society, and the professional indemnity insurance companies were all pursuing their own responses to the matter. Any objective observer would agree that the entire system needed an overhaul.

Michael Mullane raised queries about aspects of the proposal. He did not believe that it was logical that, if a solicitor bought a 20-acre farm for €150,000, with no buildings and no requisitions on title, the new regulations would suggest that the purchaser's solicitor was competent to purchase the property, but was not competent to stamp and register the property. The proposal would suggest that a solicitor was competent to act if the property was to be occupied by his client, but the solicitor was not competent to act if the property was not to be occupied by his client. He noted that his own office was not in breach of any undertakings and had not been the subject of any complaints about service. He asked why the stamping and registration of his client's interests should be passed to someone else who might not be as competent.

Mr Mullane said that he had no difficulty if a limit was set, above which the bank had to engage its own solicitor, regardless of whether the property was residential or commercial. However, he did not believe that a system that required him to send his client to another solicitor, which would require the preparation of a power of attorney and which would require his client to sign an acknowledgement that he would not sue his own solicitor if the transaction went wrong, was a system that represented progress.

Special general meeting

The Council considered a requisition for a special general meeting, signed by more than 100 members, to consider three proposed resolutions. The Council agreed that the meeting should be held at 6.30pm on Thursday 11 March 2010.

Professional indemnity insurance

Eamon Harrington reported that, as of that morning, 14 firms had indicated to the Society that they had not yet succeeded in renewing professional indemnity insurance for the current insurance year. Each of these firms had been offered assistance from the Society-appointed broker. However, as these firms were potentially in breach of their statutory obligations, each firm had been asked to either close their practice voluntarily or, alternatively, disciplinary proceedings would have to issue.

Mr Harrington confirmed that the PII Committee had met with the Qualified Insurers Liaison Committee and had raised the Society's concerns that the debacle of 2009 should not recur. It had been agreed that efforts should be made to produce a common proposal form and an agreed timetable, including deadlines, for the indemnity process for 2010.

In addition, the issue of risk management had been canvassed, and the Society had pressed the insurers on whether a risk management procedure would result in a discount on renewal premiums. The insurers had responded negatively and had indicated that it was important that the issue of risk management would be ingrained into solicitors' practices and, accordingly, they would provide no guarantee that discounts would be on offer if a risk management package was introduced for firms during 2010. Nevertheless, the committee had decided to embark on the production of a list of approved risk management consultants. G

practice notes

COMMON LAW MOTIONS LIST 1 – NO 'SECOND CALLING'

It has been announced that, from Monday 8 March 2010, motions listed in his Monday motions list will no longer be put to 'second calling' if counsel or the solicitor dealing with the matter is not in court when the matter is first called. Applications for adjournments will not be permitted – if counsel is not present and the matter is not in a position to proceed, the motion will be struck out. Where one counsel is present and is prepared to await the arrival of the other side (in order not to take a colleague short), the court may still not allow the matter to go to 'second calling'.

Instructing solicitors should therefore stress to counsel that they *must* be present at first call of the list.

In addition, it has been directed that a fully paginated book of pleadings **must** be available on the day a motion is being heard.

Litigation Committee

GARDA STATION LEGAL ADVICE *AD HOC* SCHEME – PAYMENT FOR S50 *CRIMINAL JUSTICE ACT 2007* DETENTIONS

Following representations made by the Society's Criminal Law Committee to the Department of Justice, the committee is pleased to advise that the department has now confirmed that the scope of the Garda Station Legal Advice *Ad Hoc* Scheme has been extended to include detentions under s50 of the *Criminal Justice Act 2007*.

A revised claim form will issue in due course. In the interim, solicitors lodging claims should indicate on the existing claim form that the claim is in respect of a s50 *CJA 2007* detention. Further information is available on the Criminal Law Committee page on the members' area of the Society's website, www.lawsociety.ie.

Criminal Law Committee

STAMP DUTY RETURNS IN RESPECT OF BUSINESS ACQUISITIONS

The form of stamp duty return currently in use by the Revenue Commissioners does not allow an apportionment of the assets acquired to be entered in the return. In many acquisitions of businesses, the assets acquired comprise a mixture of assets, some of which attract a stamp duty charge (for example, land, goodwill, and so on) and others that do not (for example, intellectual property). There is a risk that, if the e-stamping system is used to calculate the stamp-duty liability on such transactions, it may produce an inaccurate result. The system also requires an address for the business to be provided as a mandatory field entry. In many situations, the business assets being acquired may not include the acquisition of a business premises and, in such cases, practitioners may not be able to submit a stamp duty return in the normal way.

These problems have been brought to the attention of the Revenue Commissioners, who have indicated that they are working to resolve them, but it will be June 2010 at the earliest before they are resolved. In the meantime, it is recommended that practitioners do not rely on the calculation of stamp duty produced by the e-stamping calculator, but should compare it with their own assessment and, if necessary, seek clarification from Revenue.

Taxation Committee

HOUSING (STANDARDS FOR RENTED HOUSES) (AMENDMENT) REGULATIONS 2009

Practitioners are referred to SI no 462 of 2009 for details of the above regulations, introduced by the government to update and effectively enforce minimum standards for rented housing. These replace the 1993 minimum standards regulations.

The committee recommends that any reference to such regulations in precedent tenancy agreements going forward should be to these regulations.

Conveyancing Committee

FIRE SAFETY CERTIFICATES: IMPORTANT CHANGES

The Department of the Environment made the *Building Control (Amendment) Regulations 2009* (SI no 351 of 2009) last year. All of these regulations are in force since 1 January 2010.

These regulations introduced important changes in relation to fire safety certificates.

A problem for developers in relation to developments that required a fire safety certificate (FSC) has been that the form of commencement notice required the person submitting it to put in details of the FSC. Developers frequently deferred authorising the preparation of an application for an FSC until planning permission had been obtained and a decision was made to proceed with the construction. Developers were then faced with a delay while the application for the FSC was prepared, which could take a few months for a large development. A further few months' delay would then ensue while the Building Control Authority (BCA) processed the application. Developers tended to want to start work on site works, basements, car parks and so on without waiting for an FSC. The result was that developers got their architects or engineers to submit commencement notices without the details of the FSC (which, of course, did not yet exist) and, usually, these were returned rejected by the BCA. Some developers tried to get around this by issuing a commencement notice in relation to site works only, and some local authorities allowed this device, but others refused to countenance it and returned the commencement notice duly rejected.

The above regulations introduced a new form of notice, called a 'seven-day notice'. This can be filed with the local authority instead of a commencement notice. A seven-day notice has to be accompanied by a valid application for an FSC and a statutory declaration from the applicant, saying that he will comply fully with the *Building Regulations*, and, within such period as may be specified by the BCA, will carry out any modifications to the works that may be required under the FSC or required under any conditions attached to the FSC when granted. This should largely resolve the practical difficulty that is described above.

These regulations also expressly provide for a revised FSC (if changes are made in the course of the building that necessitate this) and what is called a regularisation certificate, which does what its name implies – that is, it regularises a situation where an FSC should have been obtained but was not. Higher fees are charged for a regularisation certificate, and the fees for a seven-day notice are substantially higher than for a commencement notice.

These regulations include a significant new provision, which imposes a prohibition on opening, operating or occupying buildings unless an FSC has been granted by the BCA in respect of the building. A breach of this prohibition will be an offence and will render a person in breach liable to prosecution under the *Building Control Act 1990* as amended.

Conveyancing Committee

legislation update

16 January – 15 March 2010

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

ACT PASSED

Arbitration Act 2010

Number: 1/2010

Contents note: Gives the force of law to the UNCITRAL (United Nations Commission on International Trade Law) model law on international commercial arbitration and provides that it will apply to all arbitrations that take place in the state. Repeals the *Arbitration Act 1954*, the *Arbitration (Amendment) Act 1980* and the *Arbitration (International Commercial) Act 1998*. Gives effect to Ireland's international obligations under the *New York Convention*, the *Geneva Convention*, the *Geneva Protocol* and the *Washington Convention*: these matters were previously provided for in the *Arbitration Act 1954* and the *Arbitration Act 1980*.

Date enacted: 8/3/2010

Commencement date: 8/6/2010 (three months after the passing of the act, per s1(2) of the act)

SELECTED STATUTORY INSTRUMENTS

Criminal Justice (Mutual Assistance) Act 2008 (Section 4) Order 2010

Number: SI 42/2010

Contents note: Designates the United States of America, the Isle of Man, the Bailiwick of Guernsey and the Bailiwick of Jersey for the purpose of mutual assistance between Ireland and these states under specified provisions of the *Criminal Justice (Mutual Assistance) Act 2008* in accordance with international treaties and conventions.

Commencement date: 1/2/2010

Extradition (European Union Conventions) Act 2001 (Section 4) Order 2010

Number: SI 43/2010

Contents note: Designates the United States of America as a country being deemed to have adopted the convention on simplified extradition between the member states of the European Union (Brussels, 1995) and applies part 2 of the *Extradition (European Union Conventions) Act 2001* to the United States of America.

Commencement date: 1/2/2010

Extradition (European Union Conventions) Act 2001 (Section 10) Order 2010

Number: SI 44/2010

Contents note: Designates the United States of America as a country being deemed to have adopted the convention relating to extradition between the member states of the European Union (Brussels, 1996) and applies part 3 of the *Extradition (European Union Conventions) Act 2001* to the United States of America.

Commencement date: 1/2/2010

Extradition Act 1965 (Application of Part II) (Amendment) Order 2010

Number: SI 45/2010

Contents note: Amends the *Extradition Act 1965 (Application of Part II) Order 2000* (SI 474/2000) to apply in relation to the United States of America the provisions of part II of the *Extradition Act 1965*. Enables the extradition of persons in pursuance of the arrangements for extradition entered into by way of the agreement on extradition between the European Union and the United States of America (Washington, 2003) (US-EU extradition agreement) and the

Circuit Court Rules (Criminal Justice (Mutual Assistance) Act 2008) 2010

Number: SI 82/2010

Contents note: Substitute a new rule 1 in order 68A of the *Circuit Court Rules* prescribing forms and procedure in relation to the *Criminal Justice (Mutual Assistance) Act 2008*.

Commencement date: 23/3/2010

District Court (Criminal Justice (Amendment) Act 2009) Rules 2010

Number: SI 33/2010

Contents note: Substitute a new order 14 ('Admission to court and publication of proceedings') in, and amend orders 12, 17, 18, 24 and 31 of, the *District Court Rules 1997* (SI 93/1997) to provide forms and procedure in relation to the *Criminal Justice (Amendment) Act 2009*.

Commencement date: 1/3/2010

Rules of the Superior Courts (Criminal Justice (Mutual Assistance) Act 2008) 2010

Number: SI 54/2010

Contents note: Amend order 136 of the *Rules of the Superior Courts* to provide forms and procedure in relation to the *Criminal Justice (Mutual Assistance) Act 2008*. Substitute new rules 10, 18, 19, 20, 21 in order 136, delete rule 24 from order 136, and substitute a new part V ('Proceedings under the *Criminal Justice (Mutual Assistance) Act 2008*') (rules 33 to 47 inclusive) in order 136. Insert prescribed forms in the schedule as appendix HH.

Commencement date: 16/3/2010

instrument as contemplated by article 3(2) of that agreement as to the application of the 1983 treaty on extradition between Ireland and the United States of America (Dublin, 2005).
Commencement date: 1/2/2010

National Asset Management Agency (Determination of Long-Term Economic Value of Property and Bank Assets) Regulations 2010
Number: SI 88/2010
Contents note: Revoke and replace the *National Asset Management Agency (Determination of Long-Term Economic Value of Property and Bank Assets) Regulations 2009* (SI 546/2009).
Commencement date: 3/3/2010

Road Traffic Act 2002 (Section 9) (Commencement) Order 2010
Number: SI 11/2010
Contents note: Appoints 28/1/2010 as the commencement date for section 9 (disqualification pursuant to European convention on driving disqualifications) of the act.

Solicitors Acts 1954 to 2008 (Section 44) Regulations 2010
Number: SI 352/2010
Contents note: Set out the requirements, in accordance with s44(3) and (4) of the *Solicitors Act 1954*, as substituted by section 52 of the *Solicitors (Amendment) Act 1994*, to be fulfilled by a person qualified to practise in a corresponding profession (profession in a non-EU member state jurisdiction that has already been the subject of an order made under the said section 44 as amended) in order to be admitted as an Irish solicitor.
Commencement date: 1/3/2010

Prepared by the Law Society Library

TAXATION AGREEMENTS

- *Double Taxation Relief (Taxes on Income and Capital Gains) (Bosnia and Herzegovina) Order 2010* (SI 17/2010)
- *Double Taxation Relief (Taxes on Income) (Georgia) Order 2010* (SI 18/2010)
- *Double Taxation Relief (Taxes on Income) (Republic of Moldova) Order 2010* (SI 19/2010)
- *Double Taxation Relief (Taxes on Income) (Republic of Serbia) Order 2010* (SI 20/2010)
- *Exchange of Information Relating to Taxes (Anguilla) Order 2010* (SI 21/2010)
- *Exchange of Information Relating to Taxes (Bermuda) Order 2010* (SI 22/2010)
- *Agreement Concerning Information on Tax Matters (Cayman Islands) Order 2010* (SI 23/2010)
- *Double Taxation Relief (Taxes on Income and Capital Gains) (Kingdom of Bahrain) Order 2010* (SI 24/2010)
- *Double Taxation Relief (Taxes on Income and on Capital) (Republic of Belarus) Order 2010* (SI 25/2010)
- *Exchange of Information Relating to Taxes (Gibraltar) Order 2010* (SI 26/2010)
- *Exchange of Information Relating to Tax Matters and Double Taxation Relief (Taxes on Income) (Guernsey) Order 2010* (SI 27/2010)
- *Exchange of Information Relating to Tax Matters and Double Taxation Relief (Taxes on Income) (Jersey) Order 2010* (SI 28/2010)
- *Exchange of Information Relating to Taxes (Liechtenstein) Order 2010* (SI 29/2010)
- *Exchange of Information Relating to Taxes (Turks and Caicos Islands) Order 2010* (SI 30/2010)

Solicitors' Benevolent Association

146th report and accounts

Year: 1 December 2008 to 30 November 2009

The Solicitors' Benevolent Association is a voluntary charitable body, consisting of all members of the profession in Ireland. It assists members, or former members, of the solicitors' profession in Ireland and their wives, husbands, widows, widowers, family and immediate dependants who are in need. The association was established in 1863 and is active in giving assistance on a confidential basis throughout the 32 counties.

The amount paid out during the year in grants was €629,660, which was collected from members' subscriptions, donations, legacies and investment income. Currently, there are 57 beneficiaries in receipt of regular grants. Approximately 50% of these are themselves supporting spouses and children.

There are 19 directors, three of whom reside in Northern Ireland, and they meet monthly in the Law Society's offices at Blackhall Place, Dublin, and every other year at the Law Society, Belfast. The work of the directors, who provide their services entirely on a voluntary basis, consists in the main of reviewing applications for grants and approving new applications. The directors also make themselves available to those who may need personal or professional advice. They have available the part-time services of a professional social worker who, in appropriate cases, can advise on state entitlements, including sickness benefits.

The directors are grateful to both law societies for their support and, in particular, wish to express thanks to John Shaw (past-president of the Law Society of Ireland), Barry Finlay (past-president of the Law Society of Northern Ireland), Ken Murphy (director general), Alan Hunter (chief executive) and the personnel of both societies.

I wish to express particular appreciation to all those who contributed to the association when applying for their practising certificates, to those who made individual contributions, and to the following:

- Law Society of Ireland,
- Law Society of Northern Ireland,
- Local Authority Solicitors' Bar Association,
- Co Louth Bar Association,
- Donegal Bar Association,
- Dublin Solicitors' Bar Association,
- Faculty of Notaries Public in Ireland,
- Irish Solicitors' Golfing Society,
- Limavady Solicitors' Association,
- Mayo Solicitors' Bar Association,
- Meath Solicitors' Bar Association,
- Midland Solicitors' Bar Association,
- Monaghan CPD Association,
- Sheriffs' Association,
- Southern Law Association,
- Tipperary Bar Association,
- Roscommon Bar Association, and
- Waterford Law Society.

There were 7,755 practising certificates issued this year, but 1,328 of these did not contribute to the Solicitors' Benevolent Association. I suspect that many of these are employees of the banks or other corporate bodies and are not aware of the non-payment of the subscription to the association. I would urge these solicitors to make a personal subscription to the association of €50, which is less than €1 per week. We had to realise investments to fund grants this year, and we expect more demands on our funds due to the present economic difficulties. Many of the new applications received are from persons in their 30s and 40s.

To cover the ever-greater demands on the association, additional subscriptions are more than welcome, as, of course, are legacies and the proceeds of any fundraising events. Subscriptions and donations will be received by any of the directors or by the secretary, from whom all information may be obtained at 73 Park Avenue, Dublin 4. I would urge all members of the association, when making their own wills, to leave a legacy to the association. You will find the appropriate wording of a bequest at page 32 of the *Law Directory 2010*.

I would like to thank all the directors, and the association's secretary Geraldine Pearse, for their valued hard work, dedication and assistance during the year.

The annual accounts will be published in the May issue of the *Gazette*.

Thomas A Menton,
Chairman

DIRECTORS AND OTHER INFORMATION

Directors
Thomas A Menton (chairman)
John Sexton (deputy chairman)
Robert Ashe (Carlow)
Caroline Boston (Belfast)
Thomas W Enright (Birr)
Felicity M Foley (Cork)
William B Glynn (Galway)
John Gordon (Belfast)
Colin Haddick (Newtownards)
Dermot Lavery (Dundalk)
Anne Murran (Waterford)
John M O'Connor (Dublin)
John T D O'Dwyer (Ballyhaunis)
Brian K Overend (Dublin)
Colm Price (Dublin)
David Punch (Limerick)
Andrew F Smyth (Dublin)
Brendan J Twomey (Letterkenny)
Brendan Walsh (Dublin)

Trustees
(*ex-officio* directors)
John M O'Connor
Andrew F Smyth
John Sexton
John Gordon

Secretary
Geraldine Pearse

Auditors
Deloitte & Touche, Chartered Accountants, Deloitte & Touche House, Earlsfort Terrace, Dublin 2

Stockbrokers
Bloxham Stockbrokers, 2-3 Exchange Place, IFSC, Dublin 1

Bankers
Allied Irish Banks plc, 37/38 Upper O'Connell Street, Dublin 1

First Trust, 31/35 High Street, Belfast BT1

Offices of the Association
Law Society of Ireland, Blackhall Place, Dublin 7

Law Society of Northern Ireland, Law Society House, 96 Victoria Street, Belfast BT1 3GN

Charity number: CHY892

NOTICE: THE HIGH COURT

2009 no 102SA
2010 no 13SA
In the matter of Eamon P Comiskey, a solicitor previously practising as Eamon Comiskey & Company, Solicitors, at Ballycarnan, Portlaoise, Co Laois, and in the matter of the *Solicitors Acts 1954 to 2008*

Take notice that, by orders of the High Court made on Monday 1 March 2010, it was ordered that the name of Eamon P Comiskey, solicitor, formerly practising as Eamon Comiskey & Company, Solicitors, at Ballycarnan, Portlaoise, Co Laois, be struck off the Roll of Solicitors.

John Elliot, Registrar of Solicitors,
Law Society of Ireland,
11 March 2010

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 Michael J Murphy, a solicitor formerly practising as MJ Murphy & Co, Solicitors, 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 to 2002* [4803/DT46/07 and High Court record 2009 no 80 SA]
Law Society of Ireland (applicant)
Michael J Murphy (respondent solicitor)

On 27 July 2009, the President of the High Court made an order in relation to the respondent solicitor:

1) That the respondent solicitor should 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 Law Society of Ireland,
2) That the Law Society do recover the costs of the proceedings before the High Court and the costs of the proceedings before the Solicitors Disciplinary Tribunal when taxed and ascertained.

The president had before him a report of the Solicitors Disciplinary Tribunal of a hearing before it on 3 July 2008.

The tribunal found the respondent solicitor was guilty of misconduct in his practice as a solicitor in that he had:

- Breached section 68(6) of the *Solicitors Amendment Act 1994* by failing to provide his client with a bill of costs as prescribed by the section,
- Procured his client to sign a document dated 10 May 2002, whereby his client agreed that the solicitor and own client fees would be 25% of the damages, that is, €5,000, before he had settled the party and party costs recoverable from the defendant,
- Procured his client to sign the foregoing document, in which his client effectively waived his right to be appraised of the party and party costs offered on his behalf to his solicitor and to his right to seek taxation of same,
- Charged his client fees, notwithstanding that he was entitled to recover those fees from the defendant or, in the alternative, failed to demonstrate the services provided to his client, the fees for which were not recoverable from the defendant.

The opinion of the tribunal as to the fitness or otherwise of the respondent solicitor to be a member of the solicitors' profession and their recommendation as to the sanction that, in their opinion, should be imposed was as follows:

- That the respondent solicitor should not be permitted to practise as a sole practitioner or in partnership, that he be permitted only to practise as an assistant solicitor under the direct control and supervision of another solicitor of at least ten years' standing, to be approved in advance of the Law Society of Ireland,
- That the respondent solicitor pay the whole of the costs of the Law Society of Ireland, to be taxed in default of agreement.

In the matter of Gerard Corcoran, a solicitor previously carrying on practice as James H Powell & Son, Solicitors, at East Green, Dunmanway, Co Cork, and in the matter of the *Solicitors Acts 1954 to 2008* [5559/DT22/09 and High Court record 2009 no 110SA]
Law Society of Ireland (applicant)
Gerard Corcoran (respondent solicitor)

On 17 November 2009, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Caused or allowed a deficit of €340,645 to occur on the client account as of 31 July 2008,
b) Failed to maintain proper books of account, with the result that the books of account did not show the true clients' funds position as of 31 July 2008,
c) Misappropriated clients' money totalling €337,962 as of 31 July 2008,
d) Concealed his misappropriation of clients' money through teeming and lading in the books of account,
e) Initially denied that he had borrowed or taken clients' money (before subsequently going on to disclose that he had misappropriated clients' money),
f) Incorrectly took client's money of €96,500 from a named client's ledger account to another client's ledger account where it helped to partly clear a debit balance of €152,495.10 on another client's ledger account and, as a result, left a shortfall of €96,500 on the named client's ledger account,
g) Subsequently incorrectly took the sum of €93,816.69 from another named client's ledger account and used it to clear part of the shortfall on the client ledger account of the client mentioned at (f),
h) Incorrectly caused a debit balance of €81,013.08 on

the client's ledger account mentioned at (g) when he transferred the above sum of €93,816.69 therefrom,

i) Caused transfers to be made between accounts in the clients' ledger without maintaining supporting documents to enable the transfers to be appropriately vouched, in breach of the regulations,

j) Caused entries in the books of accounts to be backdated from March 2008 to October 2007, with the result that a debit balance of approximately €337,000 on the ledger account of a named client was concealed.

The tribunal ordered the Society to bring the matter forward to the High Court and, on Monday 11 January 2010, the President of the High Court ordered:

1) That the respondent solicitor should not be permitted to practise as a sole practitioner or in partnership, that he be permitted only to practise as an assistant solicitor or consultant 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 Law Society of Ireland,
2) That the Law Society do recover the costs of the proceedings in the High Court and the costs of the proceedings before the Solicitors Disciplinary Tribunal, to include witness expenses as against the respondent when taxed or ascertained. G

firstlaw update

News of Irish case law information and legislation is available from FirstLaw's current awareness service on www.justis.com

Compiled by Bart Daly

COMPANY LAW

Directors

Disqualification – approach to adopt in deciding whether person unfit to be director – statutory interpretation – words and phrases – lack of commercial probity – whether respondent unfit to be concerned in management of company – Companies Act 1990, *section 160.*

Section 160(2) of the *Companies Act 1990* provides, *inter alia*, that "where the court is satisfied … that … (e) in consequence of a report of inspectors appointed by the court or the minister under the *Companies Acts*, the conduct of any person makes him unfit to be concerned in the management of a company, the court may … make a disqualification order against such a person for such period as it sees fit." Inspectors appointed to investigate and report upon the affairs of National Irish Bank in relation to the evasion of tax on interest on accounts held therein applied to the High Court for an order under section 160 of the 1990 act disqualifying the respondent. The High Court found that there had been no evidence of gross negligence or total incompetence, nor of him being a danger to the public. It then found that the conduct of the respondent displayed a lack of commercial probity on the basis that he failed to raise the issue of a potential retrospective liability for DIRT due in respect of interest on accounts wrongly classified as exempt, and made an order pursuant to section 160 disqualifying him from being concerned in the promotion, formation or management of any company. The respondent appealed that decision to the Supreme Court.

The Supreme Court (Denham J) allowed the appeal, holding that, in deciding whether to make a disqualification order, the factors that had to be considered were:

1) The conduct necessary to justify the making of a disqualification order had to be much more grave and blameworthy than the conduct that justified a restriction order.
2) Incompetence, even when occurring with irresponsibility, was not sufficient to ground a disqualification order.
3) The conduct necessary to justify a disqualification order had to be manifestly more blameworthy than merely failing to exercise an appropriate degree of responsibility. Commercial misjudgement was not sufficient. The conduct complained of had to display a lack of commercial probity although, in an extreme case of gross negligence or total incompetence, disqualification could be appropriate. Probity was used in the sense of dishonesty or lack of integrity.
4) The primary purpose of a disqualification order was not to punish the individual, but to protect the public against the future running of companies by persons whose past records have shown them to be a danger to creditors and others.
5) The court should take into account the entire history of the person in question and not just the alleged acts of wrongdoing in isolation.
6) The matter was not to be judged with the benefit of hindsight.
7) The court retained a discretion in deciding whether to make the order, and that discretion had to be exercised proportionately and could be informed by the fact that the effect of an order could be greater on a professional person.
8) The substantial burden of establishing that an order was warranted rested on the Director of Corporate Enforcement.

(Cahill v Grimes *[2002] 1 IR 372 adopted and applied.)*

***Director of Corporate Enforcement (applicant/respondent) v Byrne (respondent/appellant)*, Supreme Court, 23/7/2009**

CRIMINAL LAW

Sentencing

Court of Criminal Appeal – principles – mitigating and aggravating factors – indecent assault – severing of indictment – consecutive and concurrent sentences – leave to appeal – appropriate sentence.

The appellant brought an application for leave to appeal against a sentence of three years imposed by the Central Criminal Court in 2009 for indecently assaulting a female pupil. The appellant contended that the trial judge erred in imposing a consecutive sentence on the appellant. The appellant had been sentenced to four years' imprisonment for the same offence as to another complainant, which he had already served. The fifth trial was the subject of the appeal. It was submitted that he had no previous convictions other than those relating to a severed indictment.

The Court of Criminal Appeal (per Denham J; Dunne, MacMenamin JJ concurring) held that the court would treat the application for leave to appeal as the hearing of the appeal and would quash the sentence. In its place, the court would sentence the appellant to three years' imprisonment, with the last 12 months suspended on condition that he attend probation supervisions, subject to the condition that he engage in sex therapy as directed by the Probation Service. The plea had taken place very late in the proceedings. The appellant had sought the severance of the indictment. There was only one count involved, and the fallacy of the case of the appellant was to assume that, if all of the offences had been tried together, he would have received in effect a total sentence amounting to four years.

***Director of Public Prosecutions (defendant) v O'C(P) (appellant)*, Court of Criminal Appeal, 5/11/2009**

EMPLOYMENT LAW

Practice and procedure

Injunctive relief – consultant orthodontist – compromise of proceedings – special leave – career break – particular hospital – extension of career break as no suitable position available at particular area hospital.

The plaintiff was a consultant orthodontist who was an employee of the defendant and sought a permanent injunction to restrain the defendant from refusing her permission to resume her post at a particular hospital, in addition to damages. A dispute ensued between the plaintiff and the defendant in 2002, and the proceedings were struck out with no order in 2003. The compromise agreement was not reduced to writ-

ing. A compromise of the proceedings was reached, whereby the plaintiff would remain on special leave. The basis of the compromise was that the plaintiff would take a career break for five years. Following the reconstitution of the Health Boards from 2000, her employment was transferred between the entities, as they were reconstituted, that would evolve into the Health Service Executive. The defendant maintained that there was no vacancy for her in the Dublin/mid-Leinster region to facilitate her return from career break in 2008. In the circumstances, her career break was being extended for a further 12 months while efforts were being made to source a suitable vacancy for her. The plaintiff claimed that the purported extension of her career break for an additional 12 months was in breach of her contract of employment.

The High Court (per Laffoy J) held that, having regard to her contractual rights, the plaintiff was entitled to resume her position as a consultant orthodontist with the defendant on the terms of her contract dated from 2008, but without identifying the actual locus where she might be required to provide orthodontic services. She did not have an entitlement to a mandatory order to a position in a particular hospital. She was entitled to be paid her salary and emoluments from 2008.

***McNamara (plaintiff) v Health Service Executive (defendant)*, High Court, 26/5/2009**

IMMIGRATION AND ASYLUM LAW

Judicial review

Certiorari – *finding as to credibility of applicant – fair procedures – jurisdiction of court – whether decision of Refugee Appeals Tribunal flawed* – Refugee Act 1996 – Immigration Act 2003 – Illegal Immigrants (Trafficking) Act 2000 – Geneva Convention 1951.

The applicant had arrived in the state from Ethiopia and had applied for refugee status. The applicant's claim had been based on his political activities as a student and membership of a particular political coalition, the 'CUD'. Both the Refugee Applications Commissioner and the Refugee Appeals Tribunal had rejected the applicant's application and had found that the applicant's claim lacked credibility. The applicant brought judicial review proceedings in respect of the decision, claiming that the negative conclusion as to his credibility was legally flawed. It was claimed that there had been a failure to give consideration of a report (SPIRASI) carried out on the applicant.

Mr Justice Cooke declined to quash the decision of the tribunal. Because a decision maker such as the tribunal member had the benefit of hearing testimony at first hand and of seeing the demeanour of a witness, the court would not interfere with an assessment of credibility unless it was clearly demonstrated that the conclusion that been reached had been vitiated by material error. Unless an issue as to the improper or unlawful conduct of an appeal hearing had been raised and wrongly rejected at the time, judicial review was not a remedy for subjective dissatisfaction with the hearing or a complaint as to how evidence actually given has been received and perceived by the decision maker.

***MAW (applicant) v Refugee Appeals Tribunal, Minister for Justice (respondent)*, High Court, 8/7/2009**

TORT

Land law – equity – professional negligence – probate – succession – undue influence – standard of care in producing will.

The plaintiffs, brothers, initiated proceedings against the defendant solicitors for alleged negligence in advices and work carried out in respect of a will and a transfer of lands by a deceased testatrix. The two transactions that were the subject of the claims were carried out by the defendant firm of solicitors. It was alleged that the defendants had advised both the deceased testatrix and the intended beneficiaries of the will. The husband of the deceased was the beneficiary of her will, in respect of a house and lands, whereas she had transferred a parcel of land to the plaintiff. After her death, her husband had sought to obtain a half share of his late wife's estate in lieu of the life interest arising under the will, and it was alleged that the transfer after the will was invalid and that the defendants had failed in their duty of care. The deceased testatrix died in 1999 and her husband died in 2000. The defendants had compromised probate proceedings in 2007. The defendants raised a defence, pursuant to section 11 of the *Succession Act 1957*, that the proceedings were time barred.

Irvine J held that the standard of care provided for the parties fell short of what the parties were entitled to expect from a prudent solicitor. The defendants failed in their obligations. The claim challenging the validity of the will would have occurred irrespective of whether the defendants were negligent. The loss occasioned was a direct and foreseeable consequence of the negligence of the defendant. It was clearly foreseeable that, if the same solicitors acted for both parties in the case, a stateable case could be made to invalidate the transfer, even if there was a possibility that it could have been successfully defended.

***Darby & Another (plaintiff) v Shanley & Shanley, practising under the style and title of Shanley and Company, Solicitors (defendants)*, High Court, 16/10/2009** G

News from the EU and International Affairs Committee
Edited by TP Kennedy, Director of Education, Law Society of Ireland

The commission's decision to fine Intel

Last summer, the European Commission found that Intel Corporation had abused its dominant position under article 82 of the *EC Treaty* (now article 102 of the *Treaty on the Functioning of the European Union*). The abusive conduct resulted from Intel's wish to combat the threat to its leading position in the market for computer chips posed by its main competitor, Advanced Micro Devices Inc (AMD). In its decision, the commission found that Intel abused its dominant position by offering both conditional rebates and direct payments to its commercial partners in order to exclude AMD from the market. The commission fined Intel €1.06 billion and ordered it to desist from the abusive conduct. This fine represents the largest ever imposed on a single firm by the commission for competition law infringements.

Article 102

Article 102 prevents the abuse of a dominant position in the EU (or in a substantial part of it) that affects trade between EU member states. Accordingly, in order to establish that a company has infringed article 102, the commission must first establish that this company has a dominant position. A dominant position is defined as a position of economic strength that allows a company to hinder effective competition being maintained on the relevant market by allowing it to behave, to an appreciable extent, independently of its competitors, customers and, ultimately, consumers. Dominance *per se* is not illegal, but dominant companies are under a special responsibility not to hinder effective competition in the market place. Article 102 contains a non-exhaustive list of various types of abusive conduct. These include the imposition of unfair purchase prices or other trading conditions and the limitation of markets to the prejudice of consumers. A dominant company may argue that its behaviour is objectively justified and thus does not infringe article 102.

Procedure

The commission's investigation was both lengthy and procedurally complex. The focus on Intel's business practices began when AMD made a complaint to the Competition Directorate-General (DG Comp) of the commission in October 2000. The investigation stalled until AMD supplemented its original complaint with further evidence, most notably in November 2003. In May 2004, the commission relaunched its investigation and, in July 2005, in conjunction with representatives of the relevant national competition authority, DG Comp officials carried out 'dawn raids' at Intel locations in Britain, Germany, Italy and Spain and at the premises of several Intel customers in these states and in France.

In July 2007, the commission issued a statement of objections (SO) concerning Intel's conduct in relation to five major original equipment manufacturers (OEMs), namely Dell, HP, Acer, NEC and IBM. Intel replied to this SO in January 2008, and an oral hearing was held in March 2008. In July of the same year, following further 'dawn raids', the commission issued a supplementary statement of objections (SSO) concerning Intel's conduct *vis-à-vis* the German-based Media Saturn Holding GmbH (MSH) (Europe's largest computer retailer through its Media Markt and Saturn chains) and another OEM, Lenovo. This move arose from, among other things, a complaint by AMD to the German competition authority regarding Intel's practices involving MSH. This complaint was passed to the commission. The SSO also included new evidence of Intel's conduct *vis-à-vis* certain OEMs covered by the July 2007 SO.

Intel did not reply to the SSO by the October 2008 deadline, but instead lodged an application with the European Court of First Instance (CFI), now known as the General Court, seeking an order for the commission to obtain potentially exculpatory documents from, among other sources, the file of the private litigation between Intel and AMD in the US state of Delaware. Intel also applied for measures to suspend the commission's proceedings pending the ruling of the CFI and to be granted 30 days from the date of the court's judgment to reply to the SSO.

In December 2008, the commission sent a letter to Intel outlining specific items of evidence that it intended to use in a potential final decision. Intel failed to reply to this letter by the relevant deadline. In February 2009, following the previous month's rejection by the CFI of its application, Intel made a substantive written submission to the commission, including its response to the SSO. The commission considered this document, notwithstanding the fact that Intel had decided not to respond to the SSO by the original deadline.

In February 2009, Intel requested an oral hearing in relation to the SSO. This request was rejected by the hearing officer. After obtaining the unanimous endorsement of the Advisory Committee on Restrictive Practices and Dominant Positions (the group containing a representative of each EU member state that advises the commission on relevant competition and merger-control matters), the commission imposed a negative decision on Intel in May 2009.

Computer chips market

The products involved in the commission's decision are central processing units (CPUs) of the x86 architecture. CPUs are better known as computer chips. The CPU, which is often referred to as the 'brains of a computer', is the key component of these machines, both in terms of performance and cost. CPUs used in computers can be subdivided into two categories: those that utilise the x86 architecture and those that do not. The x86 architecture is a standard designed by Intel for its CPUs. The commission found that the relevant product market was not wider than the market for x86 CPUs, but left open the question of whether the relevant

product market could be further subdivided into separate markets for desktops, laptops and servers (as this would make no difference to its conclusions on dominance). The relevant geographic market was held to be worldwide.

Intel's dominance

The two main global x86 CPU manufacturers are Intel and AMD. The commission noted that, from 1997 to 2007, Intel consistently held a worldwide market share in excess of or around 70%. Other factors indicating dominance were also present, such as the significant barriers to entry and expansion in the x86 CPU market arising from the substantial investment in research and development, intellectual property and production facilities required. The position of Intel as an unavoidable trading partner due to its 'must-stock' status was also noted as a barrier to entry. The commission pointed out, as further evidence of the high barriers to entry, that each of Intel's competitors (other than AMD) hold an insignificant market share or have exited the market. On this basis, the commission concluded that Intel was dominant in the market for, at least, the period covered by the decision, that is, October 2002 to December 2007.

Conditional rebates

The commission found that Intel awarded OEMs rebates that were conditional on these companies purchasing all or almost all of their x86 CPU requirements from Intel:

- Rebates to Dell were conditional on it buying Intel CPUs exclusively,
- Rebates to HP were dependent on this company purchasing no less than 95% of its CPU needs for desktop computers from Intel,
- Rebates to NEC were conditional on it sourcing no less than 80% of its CPU needs for its desktop and notebook segments from Intel, and
- Rebates to Lenovo were dependent on this company buying its CPU needs for its desktop computer segment exclusively from Intel.

Abuse of a dominant position can cost you dearly

Intel also awarded payments to MSH, conditional on this retailer selling exclusively Intel-based personal computers. The commission's decision states that these payments were equivalent in their effects to the conditional rebates offered to the four OEMs.

The commission emphasised that it did not object to rebates themselves, since such payments may ultimately lead to lower prices for consumers. However, the competition concerns in this case arose from the actual conditions that Intel attached to the rebates. The commission relied on the ECJ's 1979 decision in *Hoffman-La Roche*. This judgment states that it is an infringement of article 102 for a dominant undertaking to apply a system of fidelity rebates conditional on the relevant customer obtaining all or most of its requirements of a particular product from the dominant company. The commission found that the conditional rebates/payments granted by Intel constituted abusive fidelity payments fulfilling the conditions of *Hoffman-La Roche*. The commission indicated that the Intel rebates lost by customers in the event of increased sourcing of CPUs from AMD would be significant and, also, disproportionate to the actual volume of computer chips purchased. In addition, Intel was likely to allocate rebates withdrawn from one OEM to another OEM. The freedom of customers to source CPUs from AMD was therefore restricted.

Intel's conduct predates last year's publication of the commission's guidance on its enforcement priorities in applying article 102 to abusive exclusionary conduct by dominant undertakings. Nevertheless, the commission's analysis did follow the approach of this document by conducting a detailed economic analysis regarding whether Intel's conduct would foreclose an equally efficient competitor from the market. The commission found that, in order to compensate an OEM for its loss of the Intel rebate, a hypothetical 'as efficient' competitor would be obliged to sell its CPUs below a viable measure of Intel's costs (given the restricted amount of a purchaser's computer chip requirements that were open to competition due to, among other things, Intel's 'must-stock' status).

Ultimately, Intel's conduct meant that consumers were deprived of the choice of different products that an OEM/MSH may have offered if its procurement decisions were purely based on quality and price. The commission's approach reflects a deeper analysis of the economic effects of the dominant undertaking's conduct than was carried out in previous cases. The commission also noted the increased potential for foreclosure resulting from Intel's conduct, given the strategic importance of Dell and HP in allowing a CPU manufacturer access to the market and, in particular, the corporate segment. Intel's behaviour also reduced the incentive of its business rivals to innovate.

Intel sought to justify its rebate schemes on the basis that they were merely a response to price competition or were necessary to achieve efficiencies. The commission rejected these arguments on the basis that they focused on conduct that was not anticompetitive. DG Comp did not object to volume-based rebates, it objected to fidelity rebates. The commission, therefore, concluded that the conditional rebates and payments offered by Intel constituted an abuse of article 102, as they diminished the abilities of this company's competitors to compete on the merits of their x86 CPUs and resulted in a reduction of consumer choice and lower incentives to innovate.

The commission found evidence that Intel had sought to

conceal the conditional nature of its payments. Many of the conditions that were found to be abusive were not explicit in Intel's contracts. The commission obtained proof of these terms in emails, in responses to formal requests for information, and in a number of formal statements made to DG Comp by third parties. Mindful of these hidden terms and conditions, the commission recommends that Intel's future compliance with article 102 would be facilitated if the terms of each agreement between this company and its commercial partners were written down in full.

Naked restrictions

The commission also found that Intel awarded three OEMs payments that were conditional on their delaying or cancelling the launch of AMD-based products and/or putting restrictions on the distribution of such products. DG Comp termed these payments 'naked restrictions'.

Examples of such 'naked restrictions' included a payment to HP to delay its launch of its first AMD-based desktop computer by six months. Similarly, Intel paid Acer and Lenovo to postpone the launch of laptops containing AMD CPUs by a number of months. The commission relied on the CFI's 1999 decision in *Irish Sugar*, where the court found that it was an abuse for a dominant undertaking to seek to prevent a competitor's brand from being present on the market. DG Comp concluded that these payments by Intel did not constitute competition on the merits, were not linked to any objective justification or efficiency, and resulted in reduced choice for consumers by delaying a product from reaching the market.

The fine

The commission concluded that the conditional rebates/payments, allied to the naked restrictions, formed a uniform strategy aimed at foreclosing the growing threat of AMD and, therefore, constituted a single infringement of article 102 that persisted from October 2002 to December 2007. This behaviour justified the imposition of a fine because the abuse was committed intentionally. In fixing the fine, the commission considered the gravity and duration of Intel's infringement. The level of the fine could not exceed 10% of Intel's global turnover in its most recent completed financial year.

In accordance with the commission's 2006 fining guidelines, the basic amount of the fine was calculated on the basis of a particular percentage of the value of Intel's annual sales of x86 CPUs to European customers, multiplied by the number of years the abuse lasted. The relevant percentage was calculated on the basis of the gravity of the infringement. In assessing this, the commission noted the major economic importance of the CPU market, the Europe-wide scope of the abuse, the fact that Intel was seeking to foreclose its sole credible competitor, and the measures taken by Intel to conceal its conduct. In light of these factors, the commission concluded that the proportion of the value of sales to be used to establish the basic amount of the fine to be imposed on Intel should be 5%. This amount was multiplied by 5.5 to take account of the duration of the infringement (five years and three months), resulting in a final figure of €1.06 billion. In accordance with the 2006 guidelines, the commission considered whether any mitigating factors – such as early termination of the abuse – were applicable, but concluded that no such elements were present. The fine represents 4.15% of Intel's 2008 global turnover – that is, less than half the allowable maximum of 10%.

The appeal

In July 2009, Intel appealed the commission's finding of infringement and the fine imposed to the General Court. The company argues that the commission erred in law, failed to meet the required standard of proof in its analysis of the evidence, did not prove that Intel engaged in a long-term strategy to foreclose a competitor and, also, infringed essential procedural requirements.

In particular, Intel contends that the commission erred in law by failing to establish that the conditional discounts had the capability to foreclose competition, by omitting to conduct any analysis of foreclosure regarding the naked restrictions and by failing to analyse whether the rebates had immediate, substantial, direct and foreseeable effects within Europe.

Regarding the commission's alleged failure to meet the required standard of proof, Intel claims that the commission failed to prove that the rebates were conditional on the customer purchasing all or almost all their CPU requirements from Intel, committed errors in its application of the 'as efficient' competitor test, and failed to address certain other issues (such as the positive impact of Intel's discounts upon consumers). Intel also argues that the commission's finding of a long-term strategy to foreclose AMD is not supported by the evidence.

Intel's argument that the commission infringed essential procedural requirements relates to the failure of the commission to grant Intel an oral hearing in relation to the SSO, to procure certain internal documents from AMD when requested to do so by Intel, and to make a proper note of a meeting with one of Intel's customers.

Intel also challenges the level of the fine, claiming that it is disproportionate and takes into account irrelevant considerations.

Next steps

Intel's business activities have also come under regulatory review in Japan, South Korea and the United States. In November 2009, the New York attorney general filed an anti-trust suit against Intel, reiterating many of the European Commission's findings. The following month, the US Federal Trade Commission took legal action against Intel. The latter proceedings focus not only on Intel's actions in the CPU market, but also on actions in the graphics chip market. In addition, Intel may be pursued for damages caused by its anticompetitive behaviour in some or all of the relevant jurisdictions. Accordingly, Intel's competition/antitrust woes are far from over.

It is obviously beyond the scope of this article to consider the many interesting legal or economic issues resulting from the commission's decision to fine Intel. However, perhaps the key issue of this case is how fiercely a dominant company may compete in the marketplace.

Intel would argue that it has done nothing more than compete vigorously for every possible sale in a highly competitive market. The commission would respond that Intel has engaged in a series of anticompetitive practices aimed at eliminating its sole viable competitor. The General Court's views on these issues will not only be vitally important for the respective business strategies of Intel and AMD and to the future enforcement of article 102 by the commission, but also to all companies with a strong market position. We await the General Court's judgment with great interest. G

Cormac Little is a partner in the competition and regulation unit of William Fry Solicitors. *He wishes to thank his colleague, Sarah Lynam, for her help with the preparation of this article.*

Recent developments in European law

CONSUMER LAW

Case C-243/08, *Pannon GSM Zrt v Erzsébet Sustikné Gyorfi*, 4 June 2009. Directive 93/13/EEC on unfair terms in consumer contracts provides that unfair terms used in a contract concluded with a consumer by a seller or supplier are not binding on consumers. In December 2004, Mrs Sustikné Gyorfi entered into a contract with Pannon for the provision of mobile telephone services. By signing the contract, she accepted Pannon's general terms and conditions. This stipulated that the District Court for Budaors, the court of the place where Pannon has its principal place of business, had jurisdiction for any dispute arising from the subscription contract or in relation to it. Pannon brought proceedings against Mrs Gyorfi, arguing that she had not complied with her contractual obligations. The court observed that she was in receipt of an invalidity pension and lived 275km from Budaors, with limited means of transport between those two places. The Hungarian court had doubts about the possible unfairness of the term conferring jurisdiction in the subscription contract. It referred a number of questions on the unfair terms in consumer contracts directive to the ECJ. It wished to know whether it must, of its own motion, ascertain whether that term is unfair, in the context of verifying its own territorial jurisdiction. The ECJ held that the role of the national court in the area of consumer protection is not limited to a mere power to rule on the possible unfairness of a contractual term, but also consists of the obligation to examine that issue of its own motion, where it has available to it the legal and factual elements necessary for that task, including when it is assessing whether it has territorial jurisdiction. Where the national court considers such a clause to be unfair, it must not apply it, unless the consumer, after having been informed of it by the court, does not intend to assert its unfairness and non-binding status. A national law does not comply with the directive where it provides that it is only in the event that the consumer has successfully contested the validity of a contract term before the national court that such a term is not binding on the consumer. Such a law would rule out the possibility of the national court assessing, of its own motion, the unfairness of a contractual term. A term, contained in a contact concluded between a consumer and a seller or supplier, which has been included without being individually negotiated and which confers exclusive jurisdiction on the court in the territorial jurisdiction of which the seller or supplier has his principal place of business, may be considered to be unfair. A court, designated in that way, may be a long way from the consumer's place of residence, which is likely to make it difficult for him to enter an appearance. In the case of disputes concerning limited amounts of money, the costs relating to the consumer's entering an appearance could be a deterrent and cause him to forgo any legal remedy or defence. The court held that it is for the Hungarian court to assess whether the contractual term conferring jurisdiction in the subscription contract concluded between the parties was unfair. G

PROFESSIONAL NOTICES

LOST LAND CERTIFICATES

Registration of Deeds and Title Acts 1964 and 2006

An application has been received from the registered owners mentioned in the schedule hereto for an order dispensing with the land certificate issued in respect of the lands specified in the schedule, which original land certificate is stated to have been lost or inadvertently destroyed. The land certificate will be dispensed with unless notification is received in the registry within 28 days from the date of publication of this notice that the original certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the certificate is being held.

Property Registration Authority, Chancery Street, Dublin 7 (published 1 April 2010)

First registration application: lost conveyance dated 28 November 1967 between Jane M Stokes of the one part and John K Stokes of the other part

An application has been made in the Land Registry for a first registration over lands at Townsparks, Cahir, Co Tipperary. There is a missing document associated with this registration, which is a deed of conveyance dated 28 November 1967 and made between Jane M Stokes of the first part and John K Stokes of the second part. This document cannot be located and is stated to have been lost or inadvertently destroyed. The application will proceed unless notification is received in the registry within 28 days from the date of publication of the notice that the original deed of conveyance dated 28 November 1967 and made between Jane M Stokes of the first part and John K Stokes of the other part is in existence and in the custody of some person other than the registered owner. Any such notice should state the grounds on which the conveyance is being held.

Date: 1 April 2010

Registrar of Titles, Land Registry, Tipperary Section, Waterford.

Schedule: all that and those the dwellinghouse (known as Apsley House) out offices, yard and garden situate in the townland of Townsparks, Cahir, in the barony of Iffa and Offa West and county of Tipperary

IMPORTANT NOTICE:
Abolition of land certificates and certificates of charge

Section 73(1) of the *Registration of Title Act 2006* provides that the Property Registration Authority (PRA) shall cease to issue land certificates and certificates of charge under the *Registration of Title Act 1964*. The section commenced on 1 January 2007.

The subsection also provides that section 105 of the *Registration of Title Act 1964* (requirement to produce land certificates or certificates of charge) will only apply to certificates issued before commencement, and then only for a three-year period after the commencement of the section.

Section 73(2) of the 2006 act provides that land certificates and certificates of charge issued before commencement of section 73 that are not already cancelled will cease to have force or effect three years after the commencement of the section, that is on 31 December 2009. Until that date, land certificates must be furnished with all applications by the registered owner. Certificates of charge, where issued, must be produced on all releases of charge except where such release is by discharge.

From 1 January 2010, both land and charge certificates will cease to have any force and effect and should not be lodged with applications. In the interim, if an application is lodged without the land certificate, where one issued, it will be rejected. If the land certificate is not forthcoming, the application should be held over and relodged after 31 December 2009.

Registration of lien created through deposit or possession of land certificate or certificate of charge

Section 73(3)(b) of the 2006 act provides that a holder of a lien may apply to the authority for registration of the lien in such manner as the authority may determine.

The section applies to a person holding a lien. This may include a solicitor's letter of undertaking to lodge a land certificate or certificate of charge.

The application shall be on notice by the applicant to the registered owner and must be accompanied by the original certificate (see section 73(3)(c)).

The last date for lodgement of applications was 31 December 2009. Applications lodged after that date will not be accepted. Applicants must therefore ensure that the prescribed notices are served in good time, as the application may only be lodged after the expiration of 26 days from such service.

Where the certificate is claimed to be lost or destroyed, the applicant for a lien must first apply for its production to be dispensed with, pursuant to rule 170(2) *Land Registration Rules 1972*.

This procedure can be lengthy, as the authority must satisfy itself that the certificate has been lost or destroyed and has not been pledged as security (other than in respect of the application before it). Proofs would include affidavits from the applicant and registered owner and notices would be directed in the *Law Society Gazette* and a local or national newspaper.

WILLS

Brady, James (deceased), late of 75 Raithin Cuilinn, Hollyfort Road, Gorey, Co Wexford. Would any person having knowledge of the whereabouts of a will made by the above-named deceased, who died on 13 August 2009, please contact McKeever Taylor, Solicitors, 31 Laurence Street, Drogheda, Co Louth; tel: 041 983 8639, fax: 041 983 9762

Burke, Edward (deceased), late of Viper, Kells, Co Kilkenny. Would anybody having knowledge of the whereabouts of the last will and testament of Edward Burke, deceased, who died on 21 October 2009, please contact Owen O'Mahony & Co, Solicitors, 5 Johns Bridge, Kilkenny

Curley, Noreen (also known as Nora) (deceased), 23 Ashington Court, Navan Road, Dublin 7. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, who died on 28 January 2010, please contact Bowen & Co, Solicitors, Pound Street, Sixmilebridge, Co Clare; tel: 061 713 767, fax: 061 713 642, email: gwen@legalsupportservices.ie

Doyle, Paul Joseph (deceased), late of La Touche, 25 Brickfield Drive, off Crumlin Road, Drimnagh, Dublin 12; formerly of 12 Selbourne Place, Minehead, Somerset, England; of Flat 1, The Manse, 2A Bacup Road, Rawlinstall, Rossendale, Lancs BD4 7ND, England; and of The Village Room, 104 George Street, Sedgley Park, Prestwich, Manchester, England. Would any person having any knowledge of any will made by the above-named deceased, who died on 27 December 2009, please contact Mary B Morris, Solicitor, 10 Ailesbury Grove, Donnybrook, Dublin 4; tel: 01 269 2342, fax: 01 269 2342, email: mbmorris@eircom.net

Foley, James (deceased), late of Spring Cottage, Quartertown, Mallow, Co Cork. Would any person having knowledge of a will executed by the above-named deceased, who died on 12 February 2010, please contact John Murphy, O'Connor Murphy Clune, Solicitors, 26 South Mall, Cork; tel: 021 427 8380, fax: 021 427 8586, email: jmurphy@ocmcsolr.ie

Heery, Margaret (deceased 11/11/2009), late of 69 Riverside Park, Clonshaugh, Dublin 17. Would any person having knowledge of the whereabouts of a will made by the above-named deceased please contact Laura Gallagher; email: lauragallaghercbs@gmail.com, tel: 086 833 7978

Johnson, Mary Ann (otherwise Molly) (deceased), late of 56 Derham Park, Balbriggan, Co Dublin, who died on 9 February 2008. Would any person having knowledge of a will made by the above-named deceased please contact Gerrard L McGowan, Solicitors, The Square, Balbriggan, Co Dublin; tel: 841 2115, fax: 01 841 2037, email: info@glmcgowan.ie

Kearns, Helen (deceased), late of 31 Lenabeag, Lahinch Road, Drumcliffe, Ennis, Co Clare and formerly of Dough, Kilkee, Co Clare, who died on 4 January 2010. Would any solicitor holding or having any knowledge of a will made by the above-named deceased please contact Joseph A Chambers, Francis Street, Kilrush, Co Clare

Murphy, Michael (deceased), late of Sruhaun, Gorvagh, Co Leitrim (also known at Foxfield, Carrick-on-Shannon, Co Leitrim) who died on 5 February 2010. Would any person having any knowledge of a will made by the above-named deceased please contact law@wptoolan.com or, alternatively, telephone Bernie of Walter P Toolan & Sons, Co Leitrim; tel: 071 964 4004

O'Driscoll, Josephine (Josie), deceased), late of 7 Somerton Rd, Ballinlough, Cork. Would any person having knowledge of a will executed by the above-named deceased, who died on 4 June 2009, please contact John Murphy, O'Connor Murphy Clune, Solicitors, 26 South Mall, Cork; tel: 021 427 8380, fax: 021 427 8586, email: jmurphy@ocmcsolr.ie

O'Sullivan, Christopher (deceased), late of Apartment No 1, 8 Baldwin St, Mitchelstown, Co Cork, or Thomas St, Mitchelstown, Co Cork who died in the South Infirmary/Victoria Hospital, Cork on 5 October 2009. Would any person having knowledge of the whereabouts of a will made by the above-named deceased please contact Brooks and Co, Solicitors, Baldwin Street, Mitchelstown, Co Cork; tel: 025 24833, fax: 025 24694

Slayven, Colin (deceased), late of Main St, Brosna, Co Kerry. Would any person having knowledge of a will made by the above-named deceased, who died on 19 May 2009 (approx), please contact Gerard Hanley, solicitor, Frank Buttimer & Co, Solicitors, 19 Washington Street, Cork; tel: 021 427 7330, fax: 021 427 2496, email: gerard@buttimersols.ie

PROFESSIONAL NOTICE RATES

RATES IN THE PROFESSIONAL NOTICE SECTION ARE AS FOLLOWS:

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

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

ALL NOTICES MUST BE PAID FOR PRIOR TO PUBLICATION. CHEQUES SHOULD BE MADE PAYABLE TO LAW SOCIETY OF IRELAND. Deadline for May *Gazette*: 21 April 2010. For further information, contact the *Gazette* office on tel: 01 672 4828 (fax: 01 672 4877)

MISCELLANEOUS

Solicitor's practice for sale in Dublin city centre. Well-established sole practitioner who wishes to retire. Contact: Pat McCrohan, McCrohan Quinn & Co, Accountants, Dun Mhuire House, Old Naas Road, Dublin 12; tel: 01 450 7577, email: info@mccrohanquinn.ie

TITLE DEEDS

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of the property at Marsh Road, Drogheda, Co Louth ('the property') and College Proteins Limited ('the applicant')

Take notice that any person having any interest in the freehold estate of the following property: all that and those part of the premises demised by indenture of lease dated 12 March 1864, made between John Gradwell, Richard Gradwell, John Chadwick and Francis Chadwick of the one part, and Saint George Smith, George Harmon Strype, Rev Thomas Roe and Rev William Disney Roe of the other part, for a term of 170 years, which premises are described as all that and those the part of the lands of Lagavoreen being the premises known as 'The Saint James's Dockyard' with the dwellinghouse at the west side of the gate and the store houses on the east side of the entrance gate and the patent slip and forge heretofore erected by one Henry Smith, which said premises are bounded on the north by the River Boyne and on the south by a wall running along the rear of houses fronting Saint James Road and the east by a wall at the rear of the houses in Ship Street and upon the west by the premises now held by the Drogheda Gas Light Company, which said lands and premises are situate in the parish of St Mary in the borough of Drogheda, and as by a map thereof inscribed upon these presents are more particularly delineated and described at Marsh Road, Drogheda, Co Louth.

Take notice that the applicant intends to submit an application to the county registrar for the county of Louth for 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

PROFESSIONAL NOTICES

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 21 days from the date of this notice and will apply to the county registrar for the county of Louth for directions as may be appropriate on the basis that the persons beneficially entitled to the superior interest including the freehold reversion in each of the aforesaid premises are unknown or unascertained.

Date: 1 April 2010
Signed: Eugene F Collins (solicitors for the applicant), Temple Chambers, 3 Burlington Road, Dublin 4; DX 25

In the matter of the *Landlord and Tenant Acts 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) No 2 Act 1978* and in the matter of an application by Derek Wine and Alison Saffer re: 31 Leinster Square, Rathmines, Dublin 6 (formerly 22 Leinster Square, Rathmines in the county of Dublin)

Take notice that any person having an interest in the freehold estate of the following property: the premises known as 31 Leinster Square, Rathmines, Dublin 6 (formerly 22 Leinster Square, Rathmines in the county of Dublin).

Take notice that Derek Wine and Alison Saffer (the applicants) intend to submit an application to the county registrar for the county of 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 property (or any of them) are called upon to furnish evidence of title to the aforementioned premises to the below named within 21 days from the date of this notice.

In default of any such notice being received, the applicants 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 maybe appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the above premises are unknown or unascertained.

Date: 1 April 2010
Signed: Miley & Miley (solicitors for the applicant), 35 Molesworth Street, Dublin 2; ref: 15

In the matter of the *Landlord and Tenant (Ground Rents) Acts 1967-1986*; Hilary Timmins and Christopher Timmins (applicants); property at Laurel Grove, Dublin Road, Celbridge, Co Kildare

Take notice that application will be made to the county registrar sitting at the Courthouse, Naas, in the county of Kildare on 28 May 2010 at 11.30am for the following relief:

1) An order determining the entitlement of the applicants herein to acquire the fee simple and any intermediate interests in the premises more particularly described in the schedule hereto,
2) An order determining the purchase price to be paid by the applicants herein in respect of the acquisition of the fee simple and all such intermediate interests,
3) If necessary, an order apportioning the said purchase price between the various interests as affect the said lands,
4) If necessary, an order pursuant to the provisions of section 8(3) of the *Landlord and Tenant (Ground Rents) Acts 1967* appointing an

officer of the court to execute any necessary documentation, including an assurance in respect of the said property or any interest therein for and on behalf of any unascertained owner of same.

Which said application will be grounded upon the notice of intention to acquire the fee simple dated 3 December 2009, the nature of the case and the reasons to be offered.

Schedule: all that and those that portion of lands situate at Laurel Grove, Dublin Road, Celbridge, in the county of Kildare, as more particularly delineated on the map annexed hereto and thereon edged in red, held under indenture of lease made 2 October 1973 and made between John Joseph King of the one part and James Price of the other part, being a demise for the term of 66 years from 1 January 1973, subject to yearly rent of five pence (if demanded) and held under indenture of lease made 1 August 1967 and made between John Joseph King of the one part and James Price of the other part, being a demise for the term of 71 years from 1 July 1967, subject to the yearly rent of five pounds.

Date: 1 April 2010

Signed: LC O'Reilly Timmins & Co (solicitors for the applicants), The Harbour, Kilcock, Co Kildare

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by George Kearns and in the matter of premises situated at the rear of 568 South Circular Road

Take notice any person having an interest in the freehold estate of the following property: all that and those part of the premises demised by an indenture of lease dated 7 June 1933 between Charles Byrne of the one part and William Byrne and Robert Stewart of the other part, therein described as "that plot of ground situate on the South Circular Road near Rialto Bridge bounded on the north partly by property in the possession of the Grand Canal Company and property in the possession of the lessor and on the south by the South Circular Road on the west partly by property in the possession of the Grand Canal Company and the South Circular Road and on the east by property in lessor's possession all which lands and premises are situate in the parish of St James, barony of Upper Cross and county of the city of Dublin".

Take notice that the said applicant intends to submit an application to the county registrar for the city of Dublin for the acquisition of the freehold interest in portion of the aforesaid property, and any party or parties asserting that they hold a superior interest in the aforesaid premises, in particular, such persons who are entitled to the interest of Charles Byrne, are called upon to furnish evidence of title to the aforementioned premises to the below named within 21 days from the date of this notice. In default of any such notice being received, the said applicants 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 city 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 premises are unknown or unascertained.

Date: 1 April 2010

Signed: Cullen & Co (solicitors for applicant), 86/88 Tyrconnell Road, Inchicore, Dublin 8

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Please note that, as and from the August/September 2006 issue of the *Law Society Gazette*, **NO recruitment advertisements will be published that include references to years of post-qualification experience (PQE)**.

The *Gazette* Editorial Board has taken this decision based on legal advice, which indicates that such references may be in breach of the *Employment Equality Acts 1998* and *2004*.

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For Law Society members seeking a solicitor position, full-time, part-time or as a locum.

Log in to the new self-maintained job-seekers' register in the employment opportunities section on the members' area of the Law Society website, www.lawsociety.ie, or contact Trina Murphy, recruitment administrator, at the Law Society's Cork office, tel: 021 422 6203 or email: t.murphy@lawsociety.ie

Law Society of Ireland

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For Law Society members to advertise for all their legal staff requirements, not just qualified solicitors.

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Law Society of Ireland

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A global law firm with offices throughout the United States, Europe and Asia, our client is among the leading names world-wide for funds/asset management, transactional and contentious work.

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t: 353 (0)1 669 8522
e: portia.white@laurencesimons.com

Kate Coughlan | Consultant
t: 353 (0)1 669 8523
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Interested applicants should contact Yvonne Kelly in strict confidence on 01 8415614 or 087 6824591. Alternatively email your CV to ykelly@keanemcdonald.com. Absolute discretion assured.

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Opportunities

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A leading global leasing operation is seeking to recruit a senior lawyer to join their expanding legal team. The successful applicant will perform a senior management role with a focus on managing a team of lawyers in the execution and completion of transactions relating to aircraft fleet. The role involves extensive client contact and requires superior communication skills together with proven transactional experience. Candidates with strong leasing or financing experience will be considered.

Senior Legal Advisor – Capital Markets, Dublin

Our Client is seeking a senior banking lawyer with experience in capital markets transactions with a leading banking institution or with a top law firm. You will have a full understanding of securities laws, bank regulation and corporate governance matters. This is a key appointment in the organisation and will suit a confident negotiator with strong management skills. You will be admitted to practice in a common law jurisdiction. Excellent package on offer for the successful applicant.

Commercial Litigation Solicitors, Dublin

A leading litigation practice is seeking to recruit two experienced litigators to represent Insurance Clients on all contentious matters to include commercial disputes, professional negligence, policy disputes and professional indemnity matters. Financial Services experience is preferred but not essential. Solicitors with alternative dispute resolution experience are particularly welcome.

Corporate Lawyers, Dublin

Our Client, a leading Irish law firm, is seeking two corporate lawyers to join the firm. The candidates will have big ticket transactional experience and have gained solid experience in negotiating and drafting agreements. Attention to detail is essential as is the ability to use one's initiative. This is a superb opportunity to join a dynamic environment which offers huge variety in work and excellent career prospects.

Funds Lawyer, Dublin

Our Client, a respected Irish law firm, wishes to recruit an experienced funds lawyer with a solid background in negotiating, drafting and reviewing fund documentation and agreements. An impressive client portfolio includes domestic and international banks, fund managers brokers and pension funds. Top tier experience preferred.

To apply for any of the above vacancies, interested applicants should contact Yvonne Kelly in strict confidence on +353 18415614 or email your CV to ykelly@keanemcdonald.com.

For a comprehensive list of our vacancies visit our website at www.keanemcdonald.com

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- Offshore Legal Team of the Year - STEP
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Our commitment to our clients and people distinguishes our ability to grow businesses and we are now set to establish a significant presence in Ireland. We are seeking a number of innovative partners to join our Dublin operations in the following areas:

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Applications from partners specialising in associated fields where they can demonstrate a strong business case will also be considered.

These roles represent significant opportunities for individuals to leverage their respective experience and make excellent career moves.

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Commercial Litigation-Assistant : Our client is a Top Tier law firm with an enviable client base searching for exceptional candidates to deal with a broad mix of Commercial Litigation. You will have a first class academic background coupled with excellent communication skills.

Corporate Finance-Assistant/Associate: Leading Dublin practice requires a high calibre lawyer to deal with corporate advisory work including mergers and acquisitions, joint ventures, management buy outs, reverse takeovers and debt and equity financings as well as advising on flotations and fundraisings.

Intellectual Property-Assistant: First rate Dublin law firm is seeking a strong junior lawyer to join its IP department. Candidates must have a science degree. .

EU/Competition-Assistant: Our client is a first class legal practice whose client base includes prestigious public service and private sector organizations operating both in the domestic market and internationally. You will be a Solicitor or Barrister with excellent exposure to EU and Competition Law, gained either in private practice or in-house.

Funds-Assistant/Associate: Top ranking law firm requires excellent Funds specialists at all levels. You will advise investment managers, custodians, administrators and other service providers of investment funds on establishing operations in Ireland.

Projects/PPP – Senior Associate/Partner - Belfast: One of Northern Ireland's leading Commercial law firms has a superb opportunity for an innovative, highly motivated individual with vision and energy to quickly create a strong, separate practice area. You must have significant experience of major projects and a track record of PPP work on both procurement authority and bidder sides. An excellent package commensurate with the role, which will include imminent entry to Partnership, will be available to the successful candidate.

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Telecoms-Assistant: A major player in the Telecoms industry is looking for bright solicitors with outgoing personalities to work with its international sales team focusing on opening up new markets. Fluency in either Spanish or French is an essential pre-requisite.

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Partnership

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