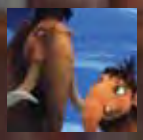
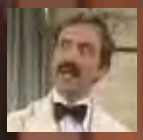


Mammoth task
The results of the Law Society's survey of members on PII issues



A little knowledge
The implications of the Mahon Tribunal for corporate governance

To boldly go
Fundamental changes in the EU's data protection regime

LAW SOCIETY
GAZETTE
€4.00 June 2012

THE DIRECTOR'S CUT

Exclusive interview with the new DPP Claire Loftus

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AN ROINN DLÍ AGUS CIRT AGUS COMHIONANNAIS
DEPARTMENT OF JUSTICE AND EQUALITY

HALF DAY CONFERENCE

Regulatory Reform for a 21st Century Legal Profession

to be held on Friday 6th July 2012
at the Conrad Hotel, Earlsfort Terrace, Dublin 2

PROGRAMME AND SPEAKERS

Chair: Professor Sandeep Gopalan, Professor of Law and Head of Dept. of Law, NUI Maynooth.

09.00	Registration and coffee.
09.30	Mr. Alan Shatter TD, Minister for Justice, Equality & Defence.
10.00	Professor Colin Scott, Dean of Law, University College Dublin.
10.45	Coffee Break
11.00	Mr. Steve Mark, Legal Services Commissioner, State of New South Wales, Australia.
11.30	Mr. Chris Kenny, Chief Executive, Legal Services Board for England & Wales.
12.00	Questions & Answers Session
13.00	Closing of Conference

Places are limited, so to register please email: rsvp@justice.ie. CPD points will be awarded for attendance.

FINDING EQUILIBRIUM

There being no recent developments in relation to the *Legal Services Regulation Bill*, it makes for a pleasant change to be able to write about something else in this message: Blackhall Place has, in the last short while, hosted three very different events, each of which was hugely successful and enjoyable.

The first of these was the Brown-Mosten client consultation competition, an event that has its origins in the US going back to 1969. From humble origins as an international competition in 1985, when three countries participated, the competition has grown over the years. In all, 22 teams from educational institutions all over the world participated in this year's event in Blackhall Place – the first time that it has been held in the Republic of Ireland.

The event ran over four days, with New Zealand the eventual winners, followed by joint runners-up, China and Germany. It was a great honour for the organisers to bring the competition to Ireland and great credit is due to Jane Moffatt of the Law School for all the work she and her colleagues did in arranging the event.

Shifting the balance

The second event was the Annual Human Rights Lecture, held at Blackhall Place on 10 May, which we were honoured to have delivered to us by the Lord Chief Justice of Northern Ireland, Sir Declan Morgan. Sir Declan delivered a very stimulating and topical speech on the subject of 'Finding the equilibrium'. He spoke about how the incorporation of significant elements of the *European Convention of Human Rights* into domestic law in Northern Ireland has caused a change in the relationship between the judiciary, the executive and the legislature. He said: "It has inevitably shifted the balance between us, and each of us must now try to identify how we achieve our point of equilibrium."

In a fascinating talk, he traced the history of the development of administrative law in Northern Ireland through judicial review, and the impact of the *Human Rights Act 1998*.

In looking at how the courts have responded to the challenges created by the 1998 act, he analysed, among other things, very recent case law surrounding the development of the right to privacy, including the now notorious 'super injunctions' cases. Inevitably, these cases led to the question: who determines public policy on privacy?

That must surely be a matter for the executive, but it is obviously no easy task, and the problem is compounded in the internet age by reason of the fact that different countries will arrive at different solutions.

It seems to me that it is more than a little bit disturbing that there is so little debate or discussion about the effect of social media or technology, generally, on the right to privacy. A recent, very well-written article in the *Irish Independent*, headed 'The death of privacy', highlighted the need to debate what privacy should mean in today's world. I hope that the Law Society may promote debate on the issue by organising a conference on the subject later in the year.

"It is more than a little bit disturbing that there is so little debate or discussion about the effect of social media or technology, generally, on the right to privacy"

Calcutta Run

The final event to which I wish to refer is, of course, the Calcutta Run, which took place in Blackhall Place on 26 May. For a change, the weather conditions were perfect, with beautiful sunshine and a nice cooling breeze. More than 900 people took part. It is hoped to raise over €130,000 on behalf of the two charities who benefit from the event, namely GOAL and the Peter McVerry Trust.

I need hardly say that I am fully aware that these are very straitened times, but if you can make a donation – if you have not already done do – it is still not too late. Donations can be sent to: Calcutta Run, Law Society of Ireland, Blackhall Place, Dublin 7. Cheques should be made out to 'The Calcutta Run'. More than 100 people are involved in organising this event and I would like to thank them for giving of their valuable time to ensure its success.

Each of these three very different events highlights what a wonderful resource we have in Blackhall Place and how it can be used to promote knowledge, justice and collegiality within the profession. Well done to all concerned.

Donald Binchy
President

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LAW SOCIETY GAZETTE

REGULARS

4 News

12 Analysis
12 **News feature:** The recent PII survey results suggest that the future may not be so grim
16 **Human rights watch:** Diverting people with mental-health problems away from the criminal justice system

19 Comment
19 **Letters**
20 **Viewpoint:** Part 2 of Lord David Puttnam's speech on justice and the citizens' interests to the Law Society's annual conference

46 People and places

50 Student spotlight

52 Books
52 **Book reviews:** *Contempt of Parliament*, *Irish Family Law Handbook* and *The Law of Personal Injuries*
53 **Reading room:** Updates from the Law Society Library

54 Briefing
54 **Practice notes**
55 **Legislation update:** 6 April – 8 May 2012
55 **One to watch:** *Social Welfare and Pensions Act 2012*
56 **Regulation**
57 **Justis update**
58 **Eurlegal:** New EU data protection proposals; recent developments in European law

61 Professional notices

63 Recruitment advertising

64 Captain's blawg

64


47


49

COVER STORY

22 The director's cut

Claire Loftus is only the third DPP in the history of the State – and the first solicitor to serve in the role. In an exclusive two-part interview, she speaks to Mark McDermott about getting from there to here

FEATURES

26 Soul searching

The recent *Damache* case represents a laudable decision by the Supreme Court to strike down a questionable statutory provision, writes Dara Robinson

30 I know nothing!

The *Mahon Report* is likely to have an impact beyond the world of property development, local government and elected politicians: businesses are set to feel the brunt of the tribunal recommendations. Paul Egan surveys the fallout

34 Using your discretion

A discretionary trust can be a useful tool in succession planning, but it is fraught with dangers from a legal and taxation perspective. Aileen Keogan reviews some recent changes

38 Pick 'n' mix

The current employment rights dispute-resolution system is too complicated, takes too long and costs too much. Major reform is on the way. Ailbhe Murphy gets digging

42 Making the adjustment

Pension adjustment orders often cause difficulties for family law practitioners, but they are also a complex area for pension specialists. Donagh McGowan and Tommy Nielsen deliver the crash course

HOW TO REACH US: *Law Society Gazette*, Blackhall Place, Dublin 7. Tel: 01 672 4828, fax: 01 672 4877, email: gazette@lawsociety.ie

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HAVE YOU MOVED? Members of the profession should send change-of-address details to: IT Section, Blackhall Place, Dublin 7, or to: customerservice@lawsociety.ie

Get more at lawsociety.ie

Gazette readers can access back issues of the magazine as far back as Jan/Feb 1997, right up to the current issue at lawsociety.ie.

You can also check out:

- Current news
- Forthcoming events, including the **IWLA Gala Dinner in the Presidents' Hall, Law Society, Blackhall Place, on Saturday 30 June**
- Employment opportunities
- The latest CPD courses

... as well as lots of other useful information

Nationwide

Compiled by Kevin O'Higgins

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

New executive takes the helm

MEATH

The newly appointed members on the Meath Solicitors' Bar Association are president: James Walsh (Keaveny Walsh & Co), secretary/treasurer: Elaine Byrne (Regan McEntee & Partners Solicitors), PRO: Audrey O'Reilly (McGovern Solicitors), and committee members: Declan Brooks (Brooks & Lee Solicitors), Mark Dillon (Dillon, Geraghty Solicitors); Claire Lehane (NAS advocate, Ronan O'Reilly (Steen O'Reilly Solicitors) and William O'Reilly (Steen O'Reilly Solicitors).

Get your hiking boots on!

MAYO

Mayo Solicitors' Bar Association is undertaking a charity climb of Croagh Patrick in aid of the Children's University Hospital, Temple Street, on Saturday 14 July. (For full details, see 'Letters', page 19.) The climb will take place on Saturday 14 July 2012.

Anyone who would like to get involved for this worthy cause should contact Evan O'Dwyer at e.odwyer@cocod.com or tel: 094 963 0011, or contact Brid Miller at: bridmiller@eircom.net.

A top debater at work

WATERFORD

PIC: GARRETT FITZGERALD PHOTOGRAPHY

President of Waterford Law Society Gerard O'Herlihy presents winner Kyle O'Sullivan *(left)* with a medal at the WIT Law Society Debate on 27 March

Monitoring the *Mediation Bill*

DUBLIN

The Irish Women Lawyers' Association (IWLA) celebrates its tenth anniversary this year. In collaboration with Law Society Skillnet and the Bar Council of Ireland, it is hosting a gala dinner entitled 'Women celebrating women lawyers' on 30 June at Blackhall Place, which is open to solicitors and barristers. Booking can be made through the IWLA website. Honorary membership of IWLA will be conferred by the association's president, Ms Justice Maureen Clark, on:

- **Mary Robinson (former President of Ireland and founder and chair of the Mary Robinson Foundation for Climate Justice),**
- **Catherine McGuinness (former Supreme Court judge and member of the Council of State),**
- **Susan Denham (Chief Justice of the Supreme Court),**
- **Claire Loftus (Director of Public Prosecutions),**
- **Eileen Creedon (Chief Prosecution Solicitor), and**
- **Deirdre Curtin (professor of European Law at the University of Amsterdam).**

The DSBA continues to monitor the *Mediation Bill*. Geraldine Kelly and other council members recently attended a round-table discussion on the bill and its implications for people working in the field. This was a novel initiative involving several key stakeholders. The convener has since written to David Stanton TD, who chairs the Oireachtas committee for carriage of the bill, and has indicated a constructive engagement.

Forthcoming seminars on technology (12 June) will be of interest to those who have always threatened to master the power of the internet. The workshop will deal with website design, online marketing and how best to utilise social media. On 13 June, the DSBA Probate and Taxation Committee are hosting a seminar on issues relating to contested wills, a CAT update and a look at how best to store and maintain wills in your cabinet. On 20 June, the Commercial Law Committee is putting on a topical seminar on the new personal insolvency regime. All seminars take place in the Radisson, Golden Lane.

On matters social, the DSBA midsummer ball takes place in the Mansion House on 16 June. A black-tie event, the guest speaker will be Minister for Justice Alan Shatter. Tickets are available from maura@dsba.

Lilywhites' new leaders

KILDARE

The bar association's new president is Sharon Murphy, assisted by Eva O'Brien, David Osborne, Andrew Cody, Helen Coghlan, Luke Hanahoe and Conal Boyce.

At the AGM, Conal Boyce updated colleagues on court delays, publican/special restaurant licences and a precedent statutory declaration on annual certification of the building regulations, changes to the lodgements procedures and the criminal list in the Circuit Court.

Good for our souls

GALWAY

The Citizens' Information Centre consists of volunteers from the Galway business community. It oversees the provision and organisation of fortnightly general legal advice nights and the weekly family law and employment law advice nights at the centre on Augustine Street. Colleagues give their time voluntarily. Bar association president, James Seymour, would like to hear from anyone who would to get involved for two hours every six weeks.

Says James: "On a personal note, I have been involved with this service since 1998 and I have found it very good for the soul."

An exhibition of the works of renowned local artist Jim Kavanagh will take place in Galway Court House on 14 June at 6.30pm. Fifty percent of the proceeds from the sale of paintings will go to CROI (the West of Ireland Cardiology Foundation).

Advance notice is given for the bar association's Galway Races event on Monday 30 July.

Colin Daly – District Court

New judicial appointments

Solicitors Colin Daly, Mary Larkin, and John O'Connor have been nominated for appointment to the District Court. Paul McDermott SC and Iseult O'Malley SC have been nominated for appointment to the High Court.

In other news, the new Chief Prosecution Solicitor is to be Peter Mullan (Sheehan and Partners).

Important notice on the Run-off Fund

The attention of practitioners is drawn to a special notice on the Run-off Fund (ROF) and run-off cover in the 'Practice Notes' section of this issue (see page 56).

Firms ceasing practice, who have renewed their professional indemnity insurance for the current indemnity period – subject to meeting eligibility criteria, including that there is no succeeding practice in respect of the firm – will be provided with run-off cover through the new ROF.

The relevant regulations, documentation and more detailed information on the ROF can be found on the Society's website at www.lawsociety.ie/Pages/PII.

In News this month...

7 The YDS holds its first seminar
8 Update on the *Legal Service Regulation Bill 2011*
8 Qualifying in Britain
9 Conveyancing Conflicts Task Force publishes key findings
10 MIBI gets tough
10 Job Seeker Support Programme

Joint table quiz scores great result for charity

The SYS, with the Chartered Accountants of Ireland Young Professionals, got together to hold a joint table quiz in aid of the Irish Kidney Association and The Ark, which is a Temple Bar-based cultural learning centre for children. The event raised €3,550 – over €1,000 higher than last year's efforts!

The organisers wish to express their appreciation to main sponsors, recruitment company Brightwater.

Fry partner wins international client choice award

John Larkin, a partner in William Fry, is the only solicitor in Ireland to win an International Law Office Client Choice Award for his work in the insurance sector.

The award, chosen by in-house lawyers following a survey process, recognises John's extensive expertise built up over 20 years advising the insurance sector in Ireland. His practice focuses on assisting insurance and reinsurance companies to establish in Ireland and advising on cross-border passporting issues.

John is a member (and former chairman) of An Taoiseach's IFSC Insurance Group.

Having a laugh with the *Legal Services Bill*

Justis Publishing is introducing Justis Irish Cases to its Irish portfolio. To mark the launch, there will be an evening of topical debate to be hosted by comedian and former solicitor, Keith Farnan, at Dublin's Shelbourne Hotel from 6pm on 12 June.

Hotly debating the *Legal Services Regulation Bill* will be barrister and journalist Kieron Wood, James McDermott BL, Dr Gerald Kean, and former Law Society president Patrick O'Connor. For more information, see www.justis.com/dublindebate.

Dispute resolution seminars in Dublin

Dispute resolution gurus CEDR Ireland are hosting an arbitration seminar on 12 June in the Ormond Meeting Rooms, Dublin, from 5 to 7.30pm. Topics include costs under the *Arbitration Act 2010* and the future of adjudication in the construction sector.

The following day, there is to be a one-day conference on mediation at the same venue. For more information or to book a place at these events, email Nicola White at nwhite@cedr.com.

Summer BBQ

TEAM BUILDING EVENTS @ BLACKHALL PLACE

Summer BBQ Classic Package for only €22.50pp

Package pricing includes:

Catering - Arrival Summer Punch • 3 Choice Menu option

• Selection of chefs summer salads • Dessert of the season

Exclusive Venue Hire - Outdoor space at The Law Society • The Blue Room or The Presidents Area (numbers dependent)

• Minimum Number - 60 people.

Full inclusive Event & Catering Package for only €62pp

Experience the exhilaration of beating your colleagues at the Celtic Challenge, or the Eliminator Challenge in the historic grounds of The Law Society of Ireland.

Package pricing includes:

Catering - 2 Choice Menu option

• Selection of chefs summer salads • Dessert of the season

Fun & Games - Choice of two team building events - The Celtic Challenge or The Eliminator • Full event management on the day • Scoring of each teams

Exclusive Venue Hire - Outdoor space at The Law Society • The Blue Room or The Presidents Area (numbers dependent) • Minimum Number - 60 people.

Price incl VAT Upgrades possible on menu choices Prizes are extra and optional

For further details contact Christina Schoeman, Sales Executive, Blackhall Place
telephone: (01) 672 4918 or email: events@lawsociety.ie

Law Society of Ireland

Blackhall Place
Headquarters of the Law Society of Ireland

Young Dublin Solicitors Committee seeks your support

The Young Dublin Solicitors Committee (YDS) is a committee of the DSBA and represents the interests, both professionally and socially, of the younger and most recently qualified members of the profession, from newly qualified up to five years qualified.

The YDS organises low-cost CPD seminars, lectures and other events and have a wide mix of committee members from all sectors – large, mid-sized and small firms, sole practitioners, in-house solicitors and solicitors in other roles.

The committee held its first seminar on 23 February 2012 entitled 'Effective networking and business development skills and a CV workshop'. Speakers included Peter Cosgrove (director, CPL Recruitment) and Karen Sutton (career support executive at the Law Society).

A second seminar on 18 April 2012 dealt with the topic 'Social media and data protection law'. Speakers were Billy Hawkes (Data Protection Commissioner) and Andrea Martin (consultant, Eugene F Collins).

(Above) Caitriona McGonagle (William Fry, sponsor), Eamonn Sayers (founder, Sports Charitable Trust), Ray Houghton (FAI ambassador) and Carol Eager (YDS Chairperson)

(Left) Speakers at the Networking Seminar included *(l to r)*: Carol Eager, Peter Cosgrove, Karen Sutton and Eamonn Shannon

To date, over 150 young solicitors have attended seminars. The YDS thanks all the speakers gave up their time to speak at the events.

Euro 2012 on the big screen

The YDS is teaming up once again with the Sports Charitable Trust by staging the upcoming big screening of the Euro 2012 Ireland v Spain match on 14 June 2012. This event will be hosted in the Sugar Club, Dublin, and is kindly sponsored by the William Fry CSR Programme. The event is open to members and non-members. Tickets are only €10 and all proceeds raised will be donated to charity.

The match kicks off at 7.45pm. Doors open at 6.30pm. To register for this event just log on to the following link: www.eventelephant.com/ydseuro2012.

New guide for in-house solicitors launched

At the launch of the new version of the Guide for Solicitors Employed in the Corporate and Public Sectors were *(front, l to r)*: Donall King, Maureen Synnott, Mary Cummins (chairman), Louise Campbell (secretary), Mary O'Connor and Caroline Dee Brown.*(Back, l to r)*: John Healy, Leon Atkins, James Kinch and Brian Connolly

OUTLAWS AND INLAWS

Lives less ordinary

MARGARET MULLARNEY
Move4 Parkinson's
Margaret Mullarney qualified in 1978 and, after qualifying, worked in-house with Irish Life & Permanent. Margaret founded a not-for-profit organisation – Move4Parkinson's – earlier this year, having been diagnosed with Parkinson's in 2004. Last October, Margaret was awarded the inaugural Dublin Lord Mayor's Medal after completing the Dublin City Marathon.

Move4Parkinson's provides support and advice for the 10,000 plus people in Ireland living with this progressive neurological disorder. On 20 June, they are hosting a 'patient empowerment day' to coincide with the international Movement Disorder Society conference taking place in Dublin.

The day has five key themes: nutrition, exercise, medication, emotional wellbeing and additional supports. Move4Parkinson invites people with Parkinson's, their families and carers to attend. Contact www.move4parkinsons.com or tel: 01 524 2781.

NICHOLAS K ROBINSON
Historian and cartoonist
Husband to Mary Robinson, Nick Robinson qualified as a solicitor in 1974 and, over the past four decades, has helped to establish numerous bodies focused on conservation. These include the Irish Architectural Archive, the Birr Scientific and Heritage Foundation and the Irish Landmark Trust.

He was a co-author of *Vanishing Country Houses of Ireland*, which beautifully documented hundreds of great Irish houses, most of which are now demolished or in ruins.

In 1996, Nick published *Edmund Burke: a Life in Caricature*, a study of Burke's life and career through contemporary political cartoons.

CATHERINE COSGRAVE
Immigrant Council of Ireland
Catherine started her legal career as a barrister, but transferred to the solicitors' profession in 2008. She joined the Immigrant Council of Ireland in 2004. She manages the ICI legal services and provides advice and representation to migrants and their families.

In addition, Catherine also contributes to migration policy, undertakes research projects and makes policy submissions to Government departments and domestic and international committees.

She teaches refugee, immigration and citizenship law at the Dublin Institute of Technology and is also the author of a number of publications, including *Family Matters: Experiences of Family Reunification in Ireland* (2006) and *Living in Limbo: Migrants' Experiences of Applying for Naturalisation in Ireland* (2011).

DO YOU LIVE A LIFE LESS ORDINARY? Or do you know an outlaw? If you or someone you know has trained or practised as a solicitor, but are now working in another field, please let us know your story. Write to: k.omalley@lawsociety.ie

Update on *Legal Services Regulation Bill 2011*

Dara Calleary: elicited information

The latest information on the *Legal Services Regulation Bill 2011* is that the committee stage of the bill will not take place, other than commencing very briefly, before autumn 2012.

The information was elicited from a reply to a parliamentary question submitted by Dara Calleary TD.

In his reply to Deputy Calleary, Minister for Justice Alan Shatter refers specifically to his closing statement on the second stage of the bill on 23 February 2012 and his speech to the Law Society Conference on 14 April 2012. Nothing much has changed since then.

At the conclusion of his response to the parliamentary question, Minister Shatter said: "It remains my objective … that the committee stage of the *Legal Services Regulation Bill* commences before the summer recess."

However, it seems certain now that the bill will not become an act before 2013 – and, indeed, it may not commence until well into the New Year. There are many complex issues in the bill unresolved as yet.

It is acknowledged, also, that the controversial, complex and Troika-demanded *Personal Insolvency Bill* is a much higher priority for the minister and the department at present.

Qualifying in Britain – significant development

A date has been set for the new training course in English and Property Law, to run over an intensive two-day period at Blackhall Place in September. Irish solicitors who successfully complete this course will be able to bypass the QLTS system that has been in place in England and Wales for the past two years.

Solicitors who complete the course will be able to qualify by completing one simple form, paying £100, and providing Garda clearance and a certificate of good standing (available free of charge from the Society's Regulation Department).

This training course, leading to a Certificate in English and Welsh Property Law and Practice, has been organised by Law Society Skillnet and takes place on 14 and 15 September.

The course will especially facilitate Irish solicitors living abroad who wish to qualify in Britain. Full details are available on the Society's website, at www.lawsociety.ie/Certificate_in_English_and_Welsh_Property_Law_and_Practice_2012.aspx.

Conveyancing Conflicts Task Force publishes key findings

The report of the Conveyancing Conflicts Task Force has just been published. It has been sent electronically to every member of the profession for whom the Society has email addresses.

Among the key findings, the task force recommends the total prohibition on a solicitor or a firm acting for both sides in a voluntary conveyancing transaction, subject only to one limited exception. In addition, it recommends an outright prohibition on a solicitor or firm acting for both vendor and purchaser in transactions for value, with two exceptions.

Terms of reference

In November 2010, the Council of the Law Society established the task force with terms of reference (as subsequently slightly amended) as follows: "To review the Society's existent guidance and regulations relating to solicitors acting for both vendor and purchaser in conveyancing transactions (including voluntary transactions) and to examine also the systems in other jurisdictions with a view to making any recommendations for change considered appropriate."

In its report, the task force, chaired by Catherine Treacy, concluded that:

- In the case of voluntary transfers and transfers manifestly below market value, there should be a total prohibition on a solicitor or firm acting for both sides in a voluntary conveyancing transaction, subject only to one limited exception. This exception is recommended in recognition of the special statutory treatment afforded to the transfer into joint names of the family home and shared home in line with the *Family Home Protection Act 1976* and the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*.
- Having completed its review, the task force concluded that transfers for value and voluntary transfers should be treated on the same basis. It therefore recommends an outright prohibition on one solicitor or firm acting for both vendor and purchaser in transactions for value, with two exceptions.
- The wording of these two exceptions is drawn from existing statutory provisions. They can be interpreted based on objective criteria and empirical evidence. One of the exceptions is where both parties are 'qualified parties' as defined in the proposed regulation by reference to the definition of 'qualified investor' in the *Prospectus Directive Regulations* of 2005.

The Society is now seeking members' views, in particular on the draft regulation that appears on page 45 of the report. Members are requested to let the Society have their views no later than 5pm on Tuesday 3 July 2012. This is so that they may be considered in advance of the Law Society Council meeting on Friday 13 July 2012, when the Council will consider whether to adopt the draft regulation.

Presidents or secretaries of bar associations are requested to communicate the views of their bar associations to the Society by 3 July 2012, which should be emailed to: conveyancingconflictsTF@lawsociety.ie.

Wide consultation

President of the Law Society Donald Binchy has congratulated the task force for its extremely hard work: "The depth of their research and analysis is most impressive, and I want to thank the members of the task force for their outstanding work on this complex issue."

The report's contents are based on wide consultation both inside and outside the solicitors' profession, together with in-depth research of rules, regulations, legislation, and jurisprudence in relation to conveyancing conflicts, both in Ireland and in jurisdictions around the world.

Law School of the Year!

The Law Society's diploma programme won the 'Law School of the Year' award at the inaugural Irish Law Awards 2012. Pictured are *(front, l to r)*: Jane Callaghan (diploma administrator), Freda Grealy (diploma manager), Rory O'Boyle (diploma co-ordinator), Deirdre Flynn (diploma executive) and Tina Dwyer (diploma administrator). *(Back, l to r)*: TP Kennedy (director of education), Paul Mooney (IT executive), Loretto Kennedy (diploma administrator) and Geoffrey Shannon (deputy director of education)

MIBI gets tough on uninsured drivers who cause accidents

It will be of interest to solicitors who act for clients who have caused accidents driving while uninsured that the Motor Insurers' Bureau of Ireland (MIBI) has now entered upon a more intensified programme of financial recovery from such drivers.

The *Gazette* has learned that the new programme involves the MIBI's solicitors writing to uninsured drivers within a short time of the accident and, based on a professional case estimate of the amount of compensation and associated costs likely to be payable to the innocent victims of the accidents, quoting a figure that, if paid promptly by the uninsured driver, will have the effect of settling the MIBI's claim against the uninsured driver.

According to the MIBI, the purpose of the new programme is to bring home the consequences of the uninsured driver's actions

at a very early stage, to afford him/her one opportunity to accept responsibility, and to pay a fair settlement figure to the MIBI in order to avoid further civil litigation or pursuit for debt recovery into the future.

The new programme will be operated on behalf of the MIBI by two expert recovery firms, namely Mason Hayes & Curran (solicitors for Dublin, Leinster and Cavan/Monaghan) and Pierse & Fitzgibbon (solicitors for Munster, Connacht and Donegal).

The MIBI counterpart organisation in Britain has a similar programme in operation in Northern Ireland and both bureaux cooperate fully on accidents with a cross-border dimension.

The MIBI says that it wishes to urge solicitors who act for uninsured drivers to engage with its solicitors in the best interests of their clients and of the wider, compliant motoring public who, through their annual insurance premiums, are the ultimate payers of claims caused by uninsured drivers.

The bureau says that failure to use the new opportunity to engage with the MIBI and its agents at an early stage "may result in many years of stressful litigation, judgment and enforcement action against the uninsured client".

Getting back to work with Job Seeker Support Programme

Law Society Skillnet and Law Society Finuas Network have secured funding from Skillnets Ltd to run its Job Seeker Support Programme (JSSP) in 2012. The first course will start in June. Additional courses will run throughout the summer months.

This is a significant opportunity for solicitors who are out of work and are unable to access employment in the area that they traditionally have worked or trained in.

The Skillnets Job Seeker Support Programme was established to open up new opportunities through cross-training, and to help people to get started in new work areas where job opportunities exist – either through providing training and work experience placements.

The Skillnet JSSP initiative opens up opportunities for solicitors to move into work areas, such as:

- **Legal officer roles,**
- **Compliance and regulation,**

- **Funds management,**
- **Islamic finance,**
- **Social policy, and**
- **Litigation.**

Courses run by the Law Society Skillnet and Finuas Networks in 2011 assisted solicitors in finding employment in all of the above areas – indeed, the Law Society and its networks received two 'Outstanding Achievement' awards from the Irish Institute of Training and Development for the quality of the JSSP and the innovative use of technology in delivering training.

To date, almost one third of all those who participated in both training and work placement in 2011 have secured full-time employment.

The JSSP initiative is funded by Skillnets Ltd and is managed and delivered by Law Society Skillnet and Law Society Finuas Network. The Society's Policy, Communications and Member Services department and its career support service is providing work-placement support and training services for these networks.

Solicitors interested in taking part in these training and work-placement courses – either as a trainee job-seeker or as an employer who would like to take on someone for work experience – should make contact with the Law Society Skillnet and Law Society Finuas Networks, by emailing: jssp@lawsociety.ie.

The eligibility criteria for trainee jobseekers and employers can be found at the Skillnets Ltd website at: www.skillnets.ie/job-seekers/eligibility-criteria.

NEWS FROM THE LAW SOCIETY'S COMMITTEES AND TASK FORCES

ECLA meeting looks at bribery and diversity

IN-HOUSE AND PUBLIC SECTOR COMMITTEE

A member of the In-House and Public Sector Committee represented the Law Society at the meeting of the European Company Lawyers' Association (ECLA) in London on 16 March 2012. The Law Society of England and Wales hosted the meeting. Over 20 delegates attended.

Counsel from Shell International Ltd provided insight on Britain's *Bribery Act 2010*, which replaced previous bribery laws and extends to all private sector transactions. (Previously, focus was on transactions with public officials and their agents.) There are four separate offences under the act:

- General offence – offering, promising or giving a bribe (section 1),
- General offence – requesting, agreeing to receive or accepting a bribe (section 2),
- Bribing a foreign public official to obtain or retain business (section 6),
- New strict liability offence for commercial organisations – failing to prevent bribery by those acting on their behalf ('associated persons') where bribery was intended to obtain/retain a business advantage (section 7).

'Associated persons' is broadly defined (section 8) and can include intermediaries, agents, sub-contractors, employees, subsidiaries, suppliers, joint venture partners or companies. No awareness is needed for guilt, but there is a defence if it can be shown that there were 'adequate procedures' to prevent bribery. Guidance suggests that companies should adopt procedures with the contractual counterparty and ask them to adopt procedures with the next company in the chain.

Senior officers of a body corporate can be convicted where they are deemed to have given consent or connivance for bribes involving a foreign public official (section 14).

Regarding the act's territorial reach, sections 1, 2 and 6 apply to conduct both in Britain and abroad where the person involved has a "close connection" with Britain (for example, incorporation or residence). Section 7 applies to bodies incorporated in Britain or carrying on a business or part of a business in Britain, regardless of where the bribery takes place.

Diversity and inclusion

A representative of the Law Society of England and Wales gave an overview of diversity and inclusion legislation. This area of the law has developed over a number of years.

The most recent piece of legislation, the *Equality Act 2010*, extends public-equality duties that cover race, disability and gender, to include religion/belief, sexual orientation, age and gender reassignment. Private companies delivering a public service are often required to meet the public-equality duty through explicit terms.

The impact of these duties on private companies is that, when delivering contracts for the public sector, they need to meet equality duties in terms of:

- Specific contract performance measures for various protected characteristics,
- Supplier and subcontractor management, including processes for equality of opportunity and engaging diverse businesses, often through 'flow down' clauses around equality and diversity performance,
- Monitoring and reporting on the equality impact of employment policies,
- Any reasonable contract provision designed to assist the public body to achieve its equality objectives.

The Law Society of England and Wales has a procurement protocol that may be used by purchasers of legal services to encourage better equality and diversity in practice.

New guide for in-house solicitors

IN-HOUSE AND PUBLIC SECTOR COMMITTEE

The new version of the *Guide for Solicitors Employed in the Corporate and Public Sectors* has just been published. Produced by the In-house and Public Sector Committee in conjunction with Society staff, the guide will prove useful to existing in-house solicitors (who represent 16% of the Law Society's membership) and prospective in-house solicitors.

The guide was distributed at a committee panel discussion, 'Managing the recession – the evolving role of in-house lawyers', on 16 May. It is available on the committee's FAQ page at www.lawsociety.ie/Pages/Committees/In-House-and-Public-Sector/FAQ.

If there is a matter of interest or concern to you that you would like to raise with the committee, please contact Louise Campbell, committee secretary, Law Society of Ireland, Blackhall Place, Dublin 7; tel: 01 881 5712, or email: l.campbell@lawsociety.ie.

Seminar on using technology for a more efficient practice

TECHNOLOGY COMMITTEE

'Working smarter, not longer! Using technology for a more efficient practice' is the title of a Technology Committee seminar that will take place from 1.45pm to 5.30pm on Friday 29 June 2012 at Blackhall Place.

The fee is €95 and features a total of 3¼ CPD hours of management and professional development skills.

The seminar will examine the use of various devices and emerging technologies – in particular, cloud computing – and how they can make for more efficient use of your working time. It will examine the practical use of various mobile devices and will provide a practitioner's own story of technology use. The seminar will also address security issues in using mobile devices and innovative applications, and will provide practical guidance on data protection and other issues.

Main speakers will include Adrian Weckler (*Sunday Business Post*), Joe Kane (Joseph Kane and Co, Solicitors), John Kennedy (editor of siliconrepublic.com) and Colm Fagan (Espion Intelligence). Opening remarks will be by Frank Nowlan (chairman, Technology Committee). See advert in this issue (page 18) for further details and application form. G

AT THE END OF THE STORM...

After several disastrous years, the professional indemnity insurance market is starting to look better for solicitors. Stuart Gilhooly delves into recent survey data and predicts an immediate future with a little less rain

Stuart Gilhooly is chairman of the Law Society's PII Committee and PII Task Force and is an award-winning writer

There's a song. You'll know it. It's the one they sing in football stadiums. Usually Liverpool fans, but Celtic seem to think they own a piece as well (they don't, but you can't tell them: they get annoyed when you mention it). And in the middle of the first verse, there is a wonderful line – "at the end of the storm, there's a golden sky..."

By the end of November for the past three years, many solicitors did feel that they were walking alone. Indeed, some were happy just to be walking at all, such was the impact and general chaos of the PII renewal process. And that was before the mammoth quotation caused you to take out a second mortgage. If you could get a mortgage. If you didn't already have a second mortgage. Or a third.

You get the picture. The storm came, and it was a perfect one. Insurance costs rose, business fell through the floor, and many solicitors' pensions (their way out of the rat race) went south. They sought in vain for a way out, but a combination of expensive run-off and decimated pensions made staying in the only option.

Here comes the sun

While it would be premature to feel, to say the least, that we have turned the corner, at least there is a hint of the sun breaking through the clouds. Yes, business is still woeful and pensions are still in the can, but at least insurance costs are heading the right way for the first time in five years, and there is an exit strategy if you want one.

In insurance terms, the storm isn't quite over (we live in Ireland for God's sake: when is a storm ever over?), but it has been reduced to sudden squalls and, although the sky isn't quite golden, the sun is at least peeping through.

The last renewal was welcome for being a surprise as much as for saving us all some money. Having been accustomed to increases in high percentage terms, the prospect of status quo was some people's idea of nirvana. But the market had different ideas.

"Insurers aren't wicked stepmothers who want to punish errant children. It's much more simple than that. They just want to make money. So when they are, they are very, very nice. And when they are not, they are horrid"

And here's the thing. It's all about the market. It always was. Insurers aren't wicked stepmothers who want to punish errant children. It's much more simple than that. They just want to make money. So when they are, they are very, very nice. And when they are not, they are horrid.

And that's what happened. The claims have slowed from a torrent to a trickle, many of the insurers that got burnt in the bad years have left the market, and the rest are starting to see black numbers in the ledger. Basic economics tells you that profits bring more competition into the market. And competition usually means lower prices. That was what we saw last year.

Like a hurricane

But it's all very well for me to say that it was a better renewal, so rather than rely on pure anecdote, we repeated what we did last year. The Law Society Council unanimously agreed that we needed independent confirmation of the word on the street. So, between 11 April and 2 May 2012, Behaviour & Attitudes polled every firm by email and received 225 responses.

While this is considerably down on last year's 770 replies, it's generally accepted that an angry populace is much more likely to elicit a response. As the response rate is only 10%, the survey findings do come with a health warning. However, they match the anecdotal evidence that many of us have heard from colleagues, so I think it's fair to say the findings are largely accurate.

The most interesting statistic is that a whopping 88% were happy with the renewal process. In a country where one out of ten people would still have a gripe if they won the Lotto, this is remarkable. Maybe it was relief; perhaps it was surprise. Or else it could have been the common proposal form.

SURVEY BACKGROUND AND OBJECTIVES

- **This is the Society's second survey of the profession in relation to PII, and the survey was carried out by Behaviour & Attitudes.**
- **As PII is required by solicitors' firms rather than by individual solicitors, the survey was conducted on a per firm basis and focused on firms' experience of the PII renewal process. It was requested that the survey be completed by the managing partner or equivalent of each member firm, or a person nominated by the managing partner of the firm.**
- **The research was conducted through an online survey using a questionnaire designed by the Society's PII Task Force, and the results received were compared throughout to those from the 2011 PII survey.**
- **Fieldwork was conducted between 11 April 2012 and 2 May 2012, and 225 responses in total were received from members.**

A total of 88% of respondents were pleased with its introduction, and there is no doubt that it improved matters to a huge extent. It can get better, though, and a meeting took place in May with the insurers to agree amendments to make the process even smoother.

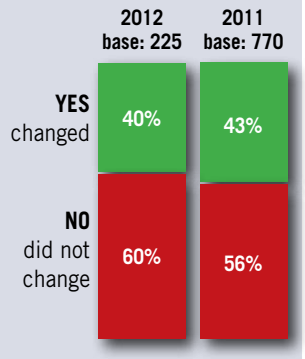
One of the big changes over the course of the last two years has been the curbing of our natural reluctance towards change. Eddie Hobbs (I know; I can't believe I'm referring to him in an article either) used to tell us that, as a nation, we didn't shop around. Well, now we sure as hell do. As with last year, 40% changed insurers. One of the great successes last year was comparing quotes and playing them off other insurers. It produced huge savings for many solicitors.

So what was the drop in premium? Of those that responded this year, an average drop of 19% (from €23,132 to €18,711) was noted. However, as the sample was only 10% of firms, a more appropriate indicator might be the drop in total premium received, which was from €45m to €32m, or approximately 30%. And to complicate matters even further, the average premium in last year's survey (with a larger sample and not necessarily the same respondents) showed a huge 51% decrease in this year's average (from €38,416 down to €18,711).

All this tells us is that surveys only tell us so much – but we can safely surmise that the drop

CHANGE INSURER FOR PII

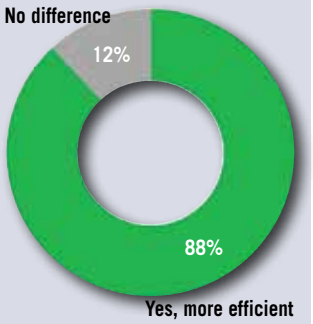
B5: Did your firm change its insurer for compulsory PII cover for 2011/2012?



Considerable 'switching' activity evident in 2012

COMMON PROPOSAL FORM

B11: Did you find having a common proposal form enabled you to access the various insurers and effect your PII cover more efficiently when compared to the previous renewal?



was substantial, whichever way you look at it. It was good news all round as well. Firms with claims in the past five years, while still paying more than double the premium of those without, were in fact receiving larger discounts, from 27% for those with claims down to 15% for those without.

Don't let the sun go down on me

And what about risk management? Does it do any good? Our survey gave it an overwhelming thumbs up. Some 30% of firms had carried out a risk-management audit, and 25% had an accreditation. More than three out of four of those firms claimed the process was good value and of benefit in the renewal process.

Risk management works. Over 75% of all firms now have formal risk-management procedures in place. It reduces claims and makes insurers happy. What's not to like? It really is in your best interests – particularly if you are one of the 25% without formal procedures – to embrace it. It will not only improve your premium, it will transform your firm.

So all is rosy in the garden then? No, not quite. As I have been butchering twee analogies throughout this article, why stop now? Here's another cautionary cliché – one swallow does not a summer make. We need to build on the last renewal and make this one better again. Premiums still have a long way to go before they reach reasonable levels, but if more insurers enter the market – and there is no reason why they wouldn't – you can hope for further reductions.

We have a responsibility here, though. This is no time for complacency. The reason for improvement is fewer claims. That must continue. It's a simple enough equation – fewer claims equals less premium. If that graph starts to go the other way, expect the skies to darken again very quickly.

"Surveys only tell us so much – but we can safely surmise that the drop was substantial"

But let's finish on a bit of good news. One of the reasons many solicitors couldn't retire when they wanted in previous years was the prohibitive cost of run-off cover. Since the last renewal, anyone with a current policy who needs run-off may now apply for it without any further cost. So, if you wish to avail of this next November, or indeed before, please consult the Law Society's website for further information. Needless to say, some terms and conditions apply, so it's important to plan for this in plenty of time.

Mammoth quotation: 'The prospect of Status Quo was some people's idea of Nirvana'

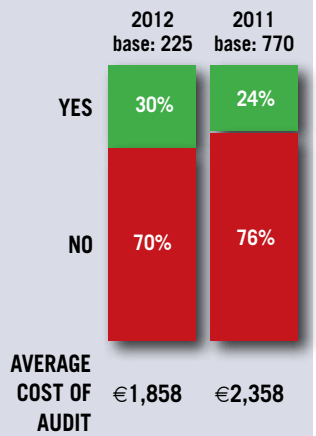
Riders on the storm

And finally, what about the much-discussed master policy? A huge amount of work was done last year in preparing for the possibility of the introduction of such a scheme. For a variety of reasons, we decided that we should give the freedom-of-choice market one more chance. Thankfully, they delivered and the master policy has returned to the back burner for the time being. But the insurers are aware that, if the current downward trend is not continued, a clamour for its return won't be far away.

The song 'You'll never walk alone' originated in the musical *Carousel*. I would have said the last few years were more of a rollercoaster, but at least we're not being taken for a ride anymore.

RISK MANAGEMENT AUDIT

E2: Has your firm had a risk-management audit?



30% of members claim to have had a risk-management audit in the 2012 members' survey. This rises to 57% of firms who have made a claim on their PII in the past five years.

COST OF PII INSURANCE

B8: What was the cost of your firm's compulsory level of PII insurance for 2011/2012 (premium plus levy plus any other charges)?
B9: What was the cost of your firm's compulsory level of PII insurance for 2010/2011 (premium plus levy plus any other charges)?

	MEMBERS' SURVEY 2012 (Base: 225)			MEMBERS' SURVEY 2011 (Base: 770)		
	2011/12	2010/11	Shift	2010/11	2009/10	Shift
	€	€	+/-	€	€	+/-
Cost of PII all firms	18,711	23,132	-19%	38,416	24,695	+56%
PII claim – past five years						
Yes	37,775	51,477	-27%	80,691	34,752	+132%
No	14,959	17,534	-15%	27,863	22,356	+26%

Average decrease in cost of PII based on figures from 2012 members' survey is 19% (€18,711/€23,132). Decrease based on comparison between 2011 and 2012 members' survey is 51% (€18,711/€38,416).

DIVERSIONARY TACTICS

The Government recently convened an interdepartmental group to report on the issue of diverting people with mental-health problems away from the criminal justice system. Charles O'Mahony draws up a wish-list

Charles O'Mahony is a doctoral candidate at the Centre for Disability Law and Policy at NUI Galway and legal officer (mental health) for Amnesty International Ireland. The views expressed in this article are his own

The issue of diverting people with mental-health problems away from the criminal justice system has been a neglected topic and has only recently begun to be considered in Ireland. It is an opportune time to consider this topic, as the Government recently convened an interdepartmental group to report on the issue by mid 2012, and in light of the recent European Court of Human Rights (ECtHR) decision in *MS v United Kingdom* in May 2012.

Most, if not all, Council of Europe countries have special legal systems for people whose mental-health problem is directly linked to their criminal behaviour. It is clear from the case law of the ECtHR that, where the justification of a person's detention is based on the existence of a mental disorder, then that person needs to receive treatment in a therapeutic environment, such as a hospital.

> ***"A comparative analysis of the provisions allowing for the diversion of offenders with mental-health problems from the criminal justice system reveals that Ireland has very underdeveloped law and policy"***

Nevertheless, in Ireland, large numbers of people with mental-health problems are detained in prisons – although their detention is justified on punitive grounds. The ECtHR, in *Keenan v United Kingdom*, has clearly stated that, when people with mental-health problems are detained in prison, appropriate treatment has to be provided. The case law of the ECtHR does not require diversion of such people from the prison to a psychiatric or hospital environment – even if the mental-health problem is treatable – provided that the treatment is available in the prison. However, the failure to provide access to treatment has been found to be in violation of the ECHR.

The ECtHR, in the recent case entitled *MS v the United Kingdom*, issued a significant judgment. The court held, unanimously, that there had been a violation of article 3 of the ECHR. The case related to the detention of a man with a mental-health problem in police custody for more than three days. The court found that the applicant's prolonged detention without appropriate psychiatric treatment had diminished his human dignity – even though there had been no intentional neglect on the part of the police – and amounted to "degrading treatment". The applicant remained in police custody for more than 72 hours, locked up in a cell where he was very distressed, shouting, removing his clothing, banging his head on the wall, drinking from the toilet, and smearing himself with food and faeces.

Human-rights deficiencies

The judgment of the Central Criminal Court last year in *DPP v B* highlights the deficiencies in terms of the human rights of people detained under the *Criminal Law (Insanity) Act 2006*, compared with people held involuntarily under the 2001 act. These concerns have been aired elsewhere, for example, by the Committee on the Prevention of Torture (CPT) in its 2006 report on Ireland, which stated that a comparative reading of both the *Mental Health Act 2001* and the *Criminal Law (Insanity) Act 2006* indicated that patients placed under the 2006 act potentially benefitted from considerably fewer safeguards than those placed under the *Mental Health Act 2001*. It noted that the *Criminal Law (Insanity) Act 2006* lacked provisions on the use of physical restraint, seclusion and inspection.

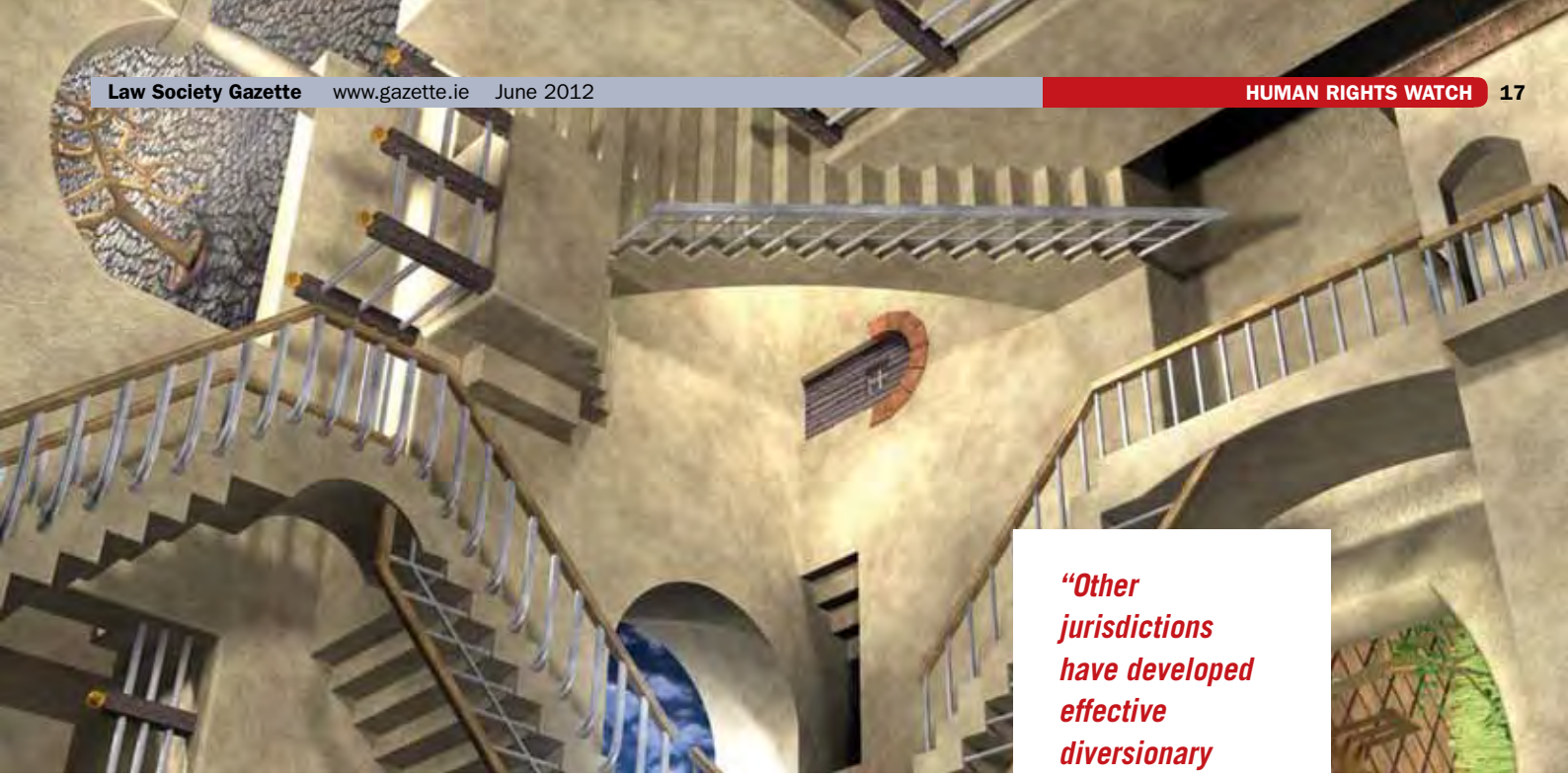
Similarly, the mandate of the Mental Health (Criminal Law) Review Board was limited compared with that of the tribunal system under the 2001 act. This criticism was reiterated in its most recent report, where the committee noted that the Central Mental Hospital voluntarily applies the *Mental Health Act 2001* provisions "as regards consent to treatment and use of means of restraint and seclusion, to patients placed under the 2006 *Criminal Law (Insanity) Act*".

The CPT recommended that the Irish government introduce legally binding safeguards in relation to consent to treatment, use of means of restraint, and seclusion for patients detained under the 2006 *Criminal Law (Insanity) Act*.

Ireland's obligations

As well as the ECHR, it is important that Ireland considers its obligations as it moves towards ratification of the *UN Convention on the Rights of Persons with Disabilities* (CRPD). The CRPD contains many provisions that are relevant to people with mental-health problems who come into contact with the criminal justice system.

The convention introduces the concept of 'reasonable accommodation' into international human-rights law, which it defines in article 2 as meaning "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden where needed in a particular case". Article 5(3) of the CRPD provides that failure to provide reasonable accommodation will amount to discrimination. Therefore, failure to provide reasonable accommodation



to those with mental-health problems who come into contact with the criminal justice system can amount to discrimination. The provision of reasonable accommodation may also require changes in practice and procedure, so that people with mental-health problems can navigate the system and understand proceedings.

Article 13 of the CRPD on access to justice is also important, as it specifically requires the provision of reasonable accommodation for those who come into contact with the criminal justice system. Article 13 requires state parties to the convention to ensure effective access to justice for people with disabilities, on an equal basis with others. Article 13(2) requires that state parties, in realising their obligations in facilitating access to justice, ensure effective and appropriate training for all those working in the area of the administration of justice, including police and prison staff.

While there is much discussion of article 12 of the CRPD in terms of replacing the wards-of-court system with the CRPD compliant legislation, there has been little consideration of article 12 in respect of the criminal responsibility of people with mental-health problems and intellectual disability.

Article 12 of the CRPD relates to decision making and asserts that people with disabilities are entitled to make decision and have their decisions respected on an equal basis with everyone else. Article 12(3) goes further, in requiring the state to provide supports to people who need them in order to exercise their legal capacity. In this regard, participation in any diversion programme should be voluntary, and a person with a mental-health problem should be able to decide what services or supports they need. A person with a mental-health problem should not be required to take medication or any psychiatric treatment as a requirement of participation on the programme.

It is also important that there is consideration of the implications of article 12 on the area of criminal responsibility. In the thematic report on enhancing awareness and understanding of the CRPD (2009), the UN Office of the High Commissioner for Human Rights (OHCHR) stated that "in the area of criminal law, recognition of the legal capacity of persons with disabilities requires abolishing a defence based on the negation of criminal responsibility because of the existence of a mental or intellectual disability".

The OHCHR stated that article 12 requires "disability-neutral doctrines on the subjective element of the crime should be applied, which take into consideration the situation of the individual defendant".

However, the rationale underlying this position has not been clearly articulated. Presumably it is that the defence strips a person of their legal capacity in being held accountable for their actions and, as such, is incompatible with article 12.

Alternatively, the rationale might be that the inevitable consequence of raising the insanity defence is that the defendant will be indefinitely detained and treated in a psychiatric setting (as opposed to being released into the community) and will likely spend longer in a psychiatric hospital had they served the prison sentence for the offence(s). Regardless of the underlying rationale of the OHCHR's proposition, it is important that the article 12 of the CRPD and its implications are fully considered as the 2001 and 2006 acts are reviewed and the Department of Justice develops new legal capacity legislation.

> ***"Other jurisdictions have developed effective diversionary procedures through pre-offending, pre-arrest and arrest interventions"***

Diverting offenders

A comparative analysis of the provisions allowing for the diversion of offenders with mental-health problems from the criminal justice system reveals that Ireland has very underdeveloped law and policy compared with other common law jurisdictions. There are limited legislative provisions providing for the diversion of those with mental-health problems and there are few legislative powers open to members of the judiciary to impose alternative disposals to custodial sanctions.

Unlike other jurisdictions, there is no official government policy in Ireland on this matter, although the Government seems interested in the notion, as evidenced by the creation of the interdepartmental group. Other jurisdictions have developed effective diversionary procedures through pre-offending, pre-arrest and arrest interventions, as well as court-linked and corrections-based interventions. These procedures are wholly underdeveloped in Ireland. There is a clear need to develop, fund and monitor these types of programmes.

The lack of appropriate services in the community and diversionary measures at the different points of the criminal justice system has resulted in the over-representation of people with mental health in the Irish prison population.

Working Smarter, Not Longer!

USING TECHNOLOGY FOR A MORE EFFICIENT PRACTICE

Law Society Technology Committee Seminar

Law Society, Blackhall Place, Friday 29 June 2012, 2pm – 5.30pm. Fee €95
CPD hours: 3¼ hours management and professional development skills

1.45 – 2.00	**Registration**
2.00 – 2.15	**Opening remarks** *Frank Nowlan, Chairman, Technology Committee*
2.15 – 3.00	**Where we are now and where we are going?** *Adrian Weckler (*Sunday Business Post*)* A review of the current situation with use of technology in legal practice. Adrian will consider current business uses of emerging technologies, cloud computing and the development of mobile technologies as we move towards Web 4.0. As well as being a journalist and editor on digital affairs, Adrian is also well known as a broadcaster and commentator on technology issues.
3.15 – 3.45	**Emerging technologies – what I did** *Joe Kane (Joseph Kane and Co, Solicitors)* This session will look at practical uses and efficiencies made with the emerging technologies. Joe will explain how he came to make use of cloud computing and other easily available applications to make his working environment more efficient.
3.45 – 4.00	**Coffee**
4.00 – 4.45	**Top ten apps and devices** *John Kennedy (editor of Siliconrepublic.com)* John will provide a review of key apps and other generally available technologies and devices which can make the working environment easier.
4.45 – 5.30	**Is mobile technology secure?** *Colm Fagan (Espion Intelligence)* The session will review some of the key practice issues that need to be considered when using mobile technologies. Colm will give an overview of general security, reliability, legacy issues and data protection. The session will also include a summary of Technology Committee advice in this area.
5.30	**Questions and answers**

The fast pace of technological innovation – particularly that of social media applications – impacts on the working environment. Mobile devices can mean that there is no longer any office downtime. This seminar will look at the use of various devices and emerging technologies – in particular cloud computing – and how they can make for more efficient use of your working time. It will examine the practical use of various mobile devices and will provide a practitioner's own story of technology use. The seminar will also address security issues in using mobile devices and innovative applications, and will provide practical guidance on data protection and other issues.

WORKING SMARTER, NOT LONGER! USING TECHNOLOGY FOR A MORE EFFICIENT PRACTICE

VENUE: Green Hall, Law Society, Blackhall Place, Dublin 7. **TIME:** 2pm to 5.30pm. **DATE:** Friday 29 June 2012. **FEE:** €95

Name: _____ Firm: _____

Address: _____

DX: _____ Phone: _____

Please reserve _____ place(s) for me on the above course. I enclose cheque for € _____

Signature: _____

PLEASE RETURN TO: VERONICA DONNELLY, LAW SOCIETY OF IRELAND, BLACKHALL PLACE, DUBLIN 7.

Law Society of Ireland

NPPR penalties and loan sharks – a lot in common

From: Sara McDonnell, Richard H Donnell, Solicitors, Market Square, Ardee, Co Louth; DX 59001

I wonder if all practitioners are aware of the draconian measures introduced by the Government by means of non-principal private residence (NPPR) charges? This annual €200 tax was introduced in 2009 and, since the tax can be registered against a person's property, it is obviously something we, as conveyancing practitioners, must be very careful with when buying or selling houses for clients. I am finding it increasingly difficult to explain to clients how a charge that started out at €200 per annum now amounts to over €2,000 (including penalties for late payment of €20 per month).

In circumstances where the penalties for late payment of the recently introduced household charge are just similar to those for late payment of stamp duties, the imposition of what seems to me (not being expert at maths) to be in the region of 200% penalties on late payment of NPPR charges is outrageous. Loan sharks would be excoriated for charging such an interest rate.

Is there anything that can be done to persuade the Government of the folly of their ways, particularly in a stagnant market such as we are all experiencing at present?

Mayo solicitors to scale The Reek for Temple Street

From: Evan O'Dwyer, Crean O'Cleirigh & O'Dwyer, Bridge Street, Ballyhaunis, Co Mayo

This year, for the first time, the Mayo Solicitors' Bar Association is undertaking a charity climb of Croagh Patrick in aid of the Children's University Hospital, Temple Street, Dublin.

The climb will take place on Saturday 14 July 2012, and we hope it will become an annual event.

Each member is being asked to do their part in raising funds for this most worthy cause. Sponsorship cards are being prepared and will be circulated to all members soon. The association is also compiling a list of corporate sponsors who will be approached to assist in the fund-raising drive. We are also asking our sister bar associations to lend their support – either by taking part, or by sponsoring a colleague.

The climb itself is not limited to members of the association, and it is hoped that we will have a healthy turnout from among family members, friends and supporters – from near and far. It promises to be a great get-together, free from the shackles of work. After the climb, we have arranged for a sponsored barbecue in Campbell's at the foot of The Reek to cater for climbers and supporters alike.

Any assistance you can lend for the event would be much appreciated. Further details can be had from either myself at: e.odwyer@cocod.com; tel 094 963 0011; or from Bríd Miller at bridmiller@eircom.net.

Nuffield Farming Scholarship

From: Aisling Meehan, Rathlahine Farm, Newmarket-on-Fergus, Co Clare

I am a solicitor, tax consultant and qualified farmer specialising in agricultural law and taxation and was recently awarded a Nuffield Farming Scholarship to undertake a study entitled *Access to Land – New Legal and Tax Models.*

As part of my study, I have spent the last year networking with industry representatives, including government departments, farming lobby groups and farmers themselves to understand the deficiencies in Irish farm structures in terms of age profile, farm size and skill set.

The Department of Agriculture, Food and the Marine has acknowledged that, in view of the structural deficits that still exist and the ongoing threats to farm viability, there is a need to implement appropriate policy measures to take advantage of the many farm business-growth opportunities.

In a recent Teagasc paper on the capacity to expand milk production, it is stated that the ability of farmers to acquire land that is accessible to the milking parlour will be a limiting factor in achieving the target of a 50% increase in national milk production by 2020. In addition, *Food Harvest 2020* highlights the need to accelerate the restructuring process at farm level and includes the recommendation that any remaining obstacles to partnership formation, or other new models of farming business structures, should be removed. It is against this highly positive backdrop to research on the facilitation of progress in Irish farm business structures that I am undertaking my study.

As a member of the Law Society of Ireland, I would welcome the opportunity of meeting fellow members with an interest in improving the current farming partnership model, as well as introducing other 'collaborative farming' concepts, to include share farming, contract farming, share milking, equity partnerships, limited companies and joint ventures.

Many thanks in advance. I can be contacted by phone at 061 368 412 or email aisling@agriculturalsolicitors.ie.

'A SHINING LIGHT IN A DARK WORLD'

Continuing with his theme that 'justice must serve the citizen's interests', we present part 2 of Lord David Puttnam's speech to members of the Law Society at its annual conference on 13 April 2012

Part 1 concluded with Lord David Puttnam quoting the distinguished lawyer, Helena Kennedy, who said: "But there are some areas of our lives – including the justice system – where a reliance on economic drivers, or populist desires, creates distortions, injustice, and outcomes that take no account of the common good. Justice is not, and never can be, a commodity."

I would argue that exactly the same holds true of the media. Properly regulated, the media should be capable of safeguarding that 'plurality of public voice', which is one of the prerequisites of a healthy democracy, ensuring that all of a nation's citizens are promptly, accurately and impartially informed.

Recent events in Britain, as being revealed by the Leveson Inquiry, demonstrate that when these principles are undermined, many of our shared notions of democracy start to crack and fall apart.

In fact, as a result of the (almost accidental) discovery of industrial-scale phone hacking, a seemingly toxic relationship between the media, the police and the government has been revealed that's already proving to have enormous political and social consequences – a scandal incidentally that was initially denied by just about everybody now found to have been involved. And of course, it has uncomfortable echoes elsewhere.

It's my belief that an independent media, together with a fiercely independent judiciary and the capacity to hold free, fair and regular elections (if necessary, under the aegis of an electoral commission) remain the cornerstones of any modern democracy worthy of the name.

Visible justice

Central to this is the relationship between 'visible justice' and an independent judiciary, entirely free of any suspicion of partiality and corruption – free of any and all 'political pressure' – the type of pressure which, in the past, has sometimes been mistakenly forgiven, or explained away, as some form of residual 'tribal loyalty'.

This can all too easily lead to a failure to administer justice by bringing politicians, or officials in the public and private sector, to book for offences committed while holding positions of public trust.

> **"We have to stand firm in the belief that sustainable policies do not flow from the back of newspaper headlines"**

We have to stand firm in the belief that sustainable policies do not flow from the back of newspaper headlines.

Sustainability, whether for our criminal justice system or the media, for education or for health services, requires a vision that looks well beyond the 'quick and popular win', to the longer-term needs of a healthy and informed society, one in which everything flows from the rights and responsibilities of individual citizens.

In the years following 1997, I watched, initially bemused, but eventually horrified, as the opportunities, along with the reputation of my own party, the British Labour Party, disintegrated under the weight of a political atmosphere in which the 'means' were continually held to justify the 'ends'.

This confusion of 'means and ends' – or the clash of conflicting ideas of justice – has offered rich pickings to serious filmmakers ever since the invention of the 'talkies' over 80 years ago.

Among the movies that most influenced me as a young man was Stanley Kramer's film, *Inherit the Wind*. This, the story of the 'Scopes/Monkey trial', concerns itself with the right of a teacher to discuss, in the early 1920s, in his own classroom, Darwin's 'theory of evolution'.

In a final courtroom scene that I still find very moving, Clarence Darrow [the lawyer] is confronted by William Jennings Bryan [leading American politician and opponent of Darwinism], who demands of Darrow whether he believes in anything that's sacred to the community. Darrow retorts emphatically "Yes!" – and continues: "I believe in the individual human mind. In a child's power to master the multiplication table, there is more sanctity than in all your shouted 'Amen's!' An idea is a greater monument than a cathedral...

"Gentlemen, progress has never been a bargain. You've got to pay for it.

"Sometimes I think there's a man behind a counter who says: 'All right, you can have a telephone, but you'll have to give up privacy and the charm of distance. Madam, you may vote, but at a price. Mister, you may conquer the air, but the birds will lose their wonder, and the clouds will smell of gasoline.'

"Why did God plague us with the power to think! Why deny the one faculty which lifts man above all other creatures on earth: the power of his brain to reason? What other merit have we?

"The elephant is larger, the horse is stronger and swifter, the butterfly more beautiful, the mosquito more prolific; even the simple sponge is more durable."

Bryan replies: "He's a man, not a sponge, but that if the Lord wishes a sponge to think, it will think."

Darrow then inquires if a man has the same privileges as a sponge.

When Bryan replies in the affirmative, Darrow says, "Then this man wishes to be accorded the same privilege as a sponge! *He wishes to think!*"

Cinema's greatest moments

The law, and questions of justice, have given cinema some of its greatest and most memorable moments. The law often finds itself dealing with absolutes, but when passionately filmed, its fundamental values can be absorbed directly into the minds and hearts of the audience.

Such films frame for us the great questions of good and evil, life or death, even conflicting concepts of right and wrong. They also confirm for us, through their imaginative presentation, the

value of individual dreamers, in contrast to the everyday and more expedient concerns of society.

Mr Smith Goes to Washington; *And Justice for All*; *Twelve Angry Men*; *The Caine Mutiny*; *Daniel* (the story of the Rosenberg trial); *The Trial of the Secaucus Seven*; *Billy Budd*; *Mutiny on the Bounty* and, of course, *To Kill A Mockingbird* – along with dozens more – each of you will no doubt have your own special favourite.

And how about those films that celebrated the struggle of the 'little man', especially the early work of Chaplin, Keaton, Ford, and Capra; notably Frank Capra's *It's a Wonderful Life* and *Mr Deeds Goes to Town*?

In almost every case, it was left to one or other representative of the law to remind us of the value of a single individual, and their right to think and express themselves, even at times in opposition to accepted norms and beliefs.

In an ideal society, the right of independent thought constitutes the other half of a respective social contract, for each of us has the right to demand that the community in which we live maintain high standards, proper aims, and intelligent goals – goals that bind its members to it through an appreciation of the opportunities a just society offers in the pursuit of happiness, liberty, justice, and truth.

Fifty years ago, Justice Brandeis said this: "Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes the lawbreaker, it breeds contempt for law, it invites every man to become a law unto himself, it in fact invites anarchy."

I think it's fair to argue that, in light of the unravelling of the economy in recent years, these words have a particular resonance to all of us here in Ireland.

Almost five years ago, on 15 May 2007, the then Taoiseach, Bertie Ahern, addressed a Joint Session of both Houses of Parliament at Westminster. During his speech, he referred to a successful Ireland built upon, as he put it, "old values and new beginnings".

He made several references to the role of this country's founders, people like O'Connell, Parnell and Collins, and the legacy he felt he'd inherited from them. Three months later, this country's 'financial fiction' began to come apart at the seams.

Now I don't know enough about Daniel O'Connell or Parnell but, living as I do in West Cork, I know a fair amount about Michael Collins. And all of my reading of Collins tells me that he understood better than most that 'old values and new beginnings' are not natural bedfellows.

He understood that squaring this particular circle involves a lot of difficult decisions and, from time to time, some very tough choices. He wanted to help build something that was, in his words, "not like other nations" – an Ireland that could be "A shining light in a dark world" – and that in the raw human material, forged out of 700 years of mostly bitter experience, Ireland had the capacity to become exactly that.

> ***"All of my reading of Collins tells me that he understood better than most that 'old values and new beginnings' are not natural bedfellows"***

Since coming to live here 24 years ago, I have always badly wanted to believe that we can prove him right. As I see it, the world remains desperately in need of that 'shining light'.

The question that hangs over all of us is whether the country still has the will to look deep into itself, and deliver on that ambition – not just for our sake but for that of our children, and our children's children.

Crucial lessons

With all of that in mind, if we are to navigate our way to the type of society most of us would wish to see emerge – in that ever-more difficult world I've been describing – let me conclude by re-assessing the crucial lessons I've learned during my 15 years working within the British legislature.

Unsurprisingly, in one way and another, they all revolve around education.

Firstly, like it or not, getting our education systems right is not just one among a number of social and political priorities – education is far closer to being 'the whole ball of wax' for us and every ambitious nation on earth.

Secondly, no education system – and therefore no society – can ever be better than the quality of the teachers it employs, and the constantly improving standards it requires of them.

Finally, there needs to be an undisputed national and global acceptance of the importance of the education of women. As I discovered during my seven years as president of UNICEF, women are the fulcrum around which can be built educated and healthy families – and those families will invariably be smaller, and better cared for.

There is absolutely no magic in any of this.

The reality is that a world-class education system can, over time, deliver the economic underpinning for world-class health and social security, even world-class judicial systems – the reverse can never, ever be possible.

The good news is that this country continues to throw up excellent people who instinctively understand that education at every level will be both the 'cause and the consequence' of any possibility of regional, national or global renewal.

It's just that people like me – and maybe people like yourselves – need to get about more, and become far more persuasive in getting these messages across!

I think we all now acknowledge that, as a human species, we know more than we've ever known about ourselves and our natural environment; so, if I may, I'll leave you with a thought from the environmentalist Stewart Brand that, while ostensibly flattering, is also very cautionary: "We are as Gods; so we'd better start getting good at it!"

This speech is republished with the kind permission of Lord David Puttnam.

THE *director's* CUT

Mark McDermott is editor of the Law Society Gazette

Claire Loftus is only the third DPP in the history of the State – and the first solicitor to serve in the role. In an exclusive two-part interview, she speaks to Mark McDermott about getting from there to here

Claire Loftus is not a person you'd wish to play poker with. On meeting her for the first time, she plays her cards very close to her chest and ignores my attempts at 'deflective' humour. Her perspicacity, allied with a cautious and defensive nature, make her ideally suited to her relatively new role as Director of Public Prosecutions. During the week of our interview in early May, she was marking six months in office.

She's clearly clever, very adept, has vast managerial experience honed by several roles within the DPP's Office, and undoubtedly possesses enviable amounts of political acuity. She's abrupt – but not in a manner where you'd take offence. She seems keen to 'stay on agenda' and not be deflected in any way from the task in hand. When she doesn't want to deal with a question, it doesn't get dealt with. For instance, she pulls me up short on several occasions when I ask her questions relating to her personal life. She is so assiduous about this that her answer to the question of where she is from is simply: "Dublin. South Dublin."

Similarly, when I ask her about her secondary schooling, that's off-limits too. I'm staring into the abyss of what looks like being the journalistic equivalent of dying on stage. However, before delving into the business end of the interview, I'm drawn to ask her about an oil painting that hangs on the wall of her Merrion Street office. Titled *Bend in the Road*, by Jonathan Hunter, she says it was one condition of moving from her office as Chief Prosecution Solicitor that this painting (and another one) should come with her. It's a modern piece, in muted colours, reminiscent of the West of Ireland, but you'd be hard-pressed to identify any specific features in it. It reminds me of the work of the French artist Cézanne, but his *Bend in the Road* is considerably more colourful, more defined and warmer in tone. Maybe Claire's painting is a portent of where we're headed.

Following the bumpy start, it's clear that the DPP wishes

PIC: SIOBHAN BYRNE PHOTOGRAPHY

only to discuss 'business', so business it will have to be. Given the '24/7' nature of the job, where she admits to being on the mobile phone 365 days a year – "You know, I can't just switch off. If I go on holidays, they have to be able to ring me, so, from that point of view, it's fairly full on" – why would anyone want the role?

"Well, I suppose, I've always felt that jobs come along, not necessarily when it suits you. You might prefer to have more time under your belt, but I've always felt you just simply have to go for these things and, I suppose, I realised that if I didn't go for it at that stage, somebody else might be in the position for ten years."

The relative longevity of the previous incumbents means that Claire is only the third DPP to have served in the history of the State. As she points out, the contract is now a ten-year one. "Previously they were entitled to stay until they were 65. I suppose, really,

FAST FACTS

- Claire Loftus is the first solicitor to serve as DPP
- She qualified in 1992 and joined the Chief State Solicitor's Office in 1993, serving in the District Court Section for seven years
- In 2000, she was selected as Solicitor to the DPP, but had to wait until December 2001 before being officially appointed Chief Prosection Solicitor
- In 2009, she took on the role of Head of the Directing Division

"I've always wanted to be a solicitor. I never wanted to be anything else. I wanted to be a solicitor from the age of 12"

it was an obvious progression [for me], but without any huge expectation of being successful, but I felt I had to go for it."

Wish list

So what's her wish list, now that she has her feet firmly under the DPP's table?

"The big, big plan is that we would have a single headquarters, a single office. And that's not just about bricks and mortar. It's about bringing 190 staff together under one roof so that we can actually achieve efficiencies and greater integration. It's something that was recommended for the Office back in 1999, and we're still working towards it. I'm very glad that the minister in charge of the Office of Public Works, Brian Hayes, has recently restated his commitment to Infirmary Road, the former Department of Defence building, ultimately being our single headquarters. Now it's not clear when we will all get onto that site. The OPW have told us that they're aiming for a date towards the end of June for the first phase of the move. So we'll just have to see what transpires.

"From my point of view, if during my time as director I can manage to bring that to

VIEW FROM ABOVE

Claire served on the Law Society's Criminal Law Committee from 2002 until her appointment as DPP in November 2011. Of her time on the committee, she says: "I really enjoyed it. I knew a lot of the solicitors and I have to say we had very constructive discussions, and they respected the prosecution point of view. What was good about the committee was that it dealt with both the prosecution and defence perspectives."

She succeeded Dara Robinson (Sheehan and Partners) as chairman, serving from 2010 to 2011. "I was meant to do a second year as chair but, as soon as I was appointed DPP, I stepped down."

And her comment on being the first solicitor to be appointed to the post?

"I'm very proud to be a solicitor, number one. And there is a certain pride that comes with being the first solicitor DPP and, certainly, the Law Society have been very good in terms of the goodwill that they've shown towards my appointment. I've certainly got fantastic feedback from solicitors – both criminal defence colleagues and across the wider profession. So I'm certainly happy that this has happened."

fruition, it will be a great success. Obviously there's a huge benefit from the point of view of staff who are currently spread over two locations. What it means is that we can bring the Directing Division out of the Merrion Street building, together with the District Court Section and the Circuit Court Trial Section from North King Street in Smithfield. That gives us opportunities to look at ways of streamlining our business."

Call of duty

She says that she decided for law at a relatively early stage. Her father, Dermot Loftus, was a solicitor who served as the last law agent for Co Dublin before Dublin County Council was broken in three – Fingal, South Dublin and Dun Laoghaire Rathdown.

"I've always wanted to be a solicitor. I never wanted to be anything else. I wanted to be a solicitor from the age of 12. In 1984, I did my Leaving and I qualified as a solicitor in 1992. Of course, the early '90s were pretty bad economically, but it really was all I wanted to do. I personally didn't see myself as being a sole practitioner. The life of a barrister didn't particularly appeal to me and, I suppose, I had a big background in public service."

Following her Leaving Certificate, she did a degree in history and politics in UCD and graduated in 1987. She admits to having a great interest in history. "I was delighted to be able to combine an arts degree with becoming a solicitor. I did the one-year Diploma in Law course in Rathmines, now the Dublin Institute of Technology, and sat the Blackhall Place entrance exam in November '88 for the Professional Practice Course."

She served her apprenticeship with Marcus A Lynch and Son in Lower Ormond Quay. "It's a very old family firm, established in the late 19th century. My master was Brian F Lynch. I got fantastic training there, great mentoring and a great sense of what it was to be a family solicitor advising people in their best interests, on all fronts. The door was always open to my master and his partner, Hugh O'Neill, to ask questions, which I did daily – day in, day out! I certainly feel that it set me on the right road. I learnt that there's huge value to a very good apprenticeship, because, sometimes people may not necessarily get as much as they'd like to out of it. As soon as I qualified, I certainly relished being allowed to go in and do cases by myself in the District Court. I very much enjoyed the advocacy part of it."

In the public service

Before she had completed her second year of post-qualification experience, Claire applied to the Chief State Solicitor's Office for a position there. So, was the public-service element the foil that spurred her to apply for a role in the Chief State Solicitor's Office?

"Not immediately, but certainly I wasn't averse to the idea of joining the Chief State Solicitor's Office, which I did in '93. So, certainly, I had an interest in public service and I could see the merit in it."

In 2000, the job of Chief Prosecution Solicitor to the DPP was advertised. Claire was the successful applicant, being offered the position in November that year.

"There was something of a hiatus, because I was appointed to the post as a sort of 'solicitor designate' and I was tasked with creating a new solicitor's office for the DPP. I was officially appointed Chief Prosecution Solicitor in December 2001 because I spent a year getting the new office premises organised, recruiting the staff and transferring staff from the Chief State Solicitor's Office. There was a lot to go through before I could officially take over."

"I've always felt that jobs come along, not necessarily when it suits you. You might prefer to have more time under your belt, but I've always felt you just simply have to go for these things"

After eight years serving as Chief Prosecution Solicitor, she moved again, taking on the role of Head of the Directing Division in November 2009.

"That gave me a way back into very much case-focused work. As Chief Prosecution Solicitor, I couldn't really delve into very many cases myself. Now, I did on occasion and, obviously, staff would come to me and look for guidance. There were cases in which the director would ask me to have an input, for whatever reason. But really it wasn't a full-on caseload or casework everyday.

"So, as the Head of the Directing Division, the focus shifted back very much to casework. Obviously, it was, and is, a management position. There are 25 lawyers working in the Directing Division. It did immerse me back into some of the most serious cases that the office deals with. As you know, we have a system of pushing things up the line if they require further consideration. I was effectively acting as the main gatekeeper, along with deputy director Barry Donoghue, for files that came in here to the former director – the cases that I felt he needed to know about or that he needed to have an input into.

"I was literally in that role for almost exactly two years and then the position for DPP came up. The two years in the Directing Division gave me a great grounding for this job so that, as I say, having been one of the main filters of the work and issues that came across the director's desk, I had a very good idea of what was involved. And it certainly made the transition into this job back in November last year a lot easier."

Did she have any reservations about applying for the role, due to her relatively short stint as head of the Directing Division?

"Well, in a way, it was a natural progression. Quite honestly, I never expected to be in this position, particularly just coming up on nearly 20 years qualified. But having done the Chief Prosecution Solicitor role, which gave me huge management experience and operational experience, basically I was running a solicitor's office with 75 legal staff – the vast majority of them solicitors – which, in Ireland, by any standards, is a very large office; and then the directing role, it was an opportunity for progression." G

The second part of this interview will appear in the July Gazette.

SOUL searching

The recent *Damache* case represents a laudable decision by the Supreme Court to strike down a questionable statutory provision, writes Dara Robinson

Dara Robinson is a partner in the Dublin law firm Sheehan & Partners and a member of the Law Society's Criminal Law Committee

Most decisions of the Supreme Court pass, relatively speaking, under the radar of many lawyers and the general public. Every so often, however, a case announces itself with a thunderous crash, causing considerable fallout in the established legal order. One such case was the recent decision in the *Damache* case, a judgement handed down by the Supreme Court on 23 February 2012.

At issue in *Damache* was the constitutional inviolability of the dwellinghouse, as protected by article 40.5 of *Bunreacht na hÉireann*, which provides that "the dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law". Substantial inroads have, of course, been made into the asserted protection, and there are numerous powers that enable gardaí to secure a search warrant and enter the premises on foot of that warrant. In the *Damache* case, the warrant used to gain entry to the premises was issued pursuant to section 29 of the *Offences Against the State Act 1939*, as amended.

The offending provision, section 29(1) of the *Offences Against the State Act 1939*, as inserted by section 5 of the *Criminal Law Act 1976*, provides that "where a member of An Garda Síochána not below the rank of superintendent is satisfied that there is reasonable ground for believing that evidence … is to be found in any building or part of a building … he may issue to a member of An Garda Síochána not below the rank of sergeant a search warrant under this section in relation to such place". This provision has now been deemed unconstitutional by the Supreme Court.

Still haven't found what I'm looking for

The facts of *Damache*, against a dramatic backdrop, were – in the ordinary operation of section 29 warrants – routine enough. A superintendent of An Garda Síochána issued a warrant for the search of a house in Waterford. Material was found on foot of the search. In part in reliance on that material, a prosecution was commenced. The original investigation had concerned an alleged conspiracy to murder a Swedish cartoonist who had lampooned the prophet Mohammad, a multi-jurisdictional case. Ultimately, Mr Damache was charged with an offence contrary to the telecommunications legislation, by way of a menacing message allegedly sent on a phone seized during the impugned search.

Prior to the case coming on for trial, judicial review proceedings were issued in respect of a challenge to the constitutionality of the section 29 warrant. While the Supreme Court had certain reservations about the mechanics of the proceedings, they nevertheless were prepared to determine the case, and the result was a finding of unconstitutionality in respect of the warrant-issuing power of section 29. The case was, on its own facts, a legal 'perfect storm', combining issues touching on the constitutional inviolability of the dwellinghouse and gardaí operating under the *nemo judex in sua causa* principle. The outcome of *Damache* was despite the court observing that, on a literal interpretation of the words of the statute, a superintendent in charge of an investigation was not precluded from issuing a warrant in a case in which he was an investigator. This had been the finding in a previous case in the Court of Criminal Appeal (*DPP v Birney*). However, the Court of Criminal Appeal has no constitutional jurisdiction, and thus was not able to pronounce on the constitutionality of the relevant provision.

The seeker

The starting point for the inviolability of the dwellinghouse was perhaps the *Dunne* case. In *DPP v Dunne*, Carney J had described the constitutional protection given in article 40.5 as "one of the most important, clear and unqualified protections given by the Constitution to the citizen".

FAST FACTS

- The issue in *Damache* was the constitutional inviolability of the dwellinghouse and the operation of section 29 search warrants
- The decision has the potential to upset existing convictions, but concluded cases will be permitted to be reopened by the court only in limited circumstances
- The *Criminal Justice (Search Powers) Bill 2012* appears to meet the criticisms whereby the Supreme Court found the existing statutory provisions wanting

In *Damache*, at paragraph 47, the Supreme Court noted that "the procedure for obtaining a search warrant should adhere to fundamental principles encapsulating an independent decision maker, in a process that may be reviewed. The process should achieve the proportionate balance between the requirements of the common good and the protection of an individual's rights. To these fundamental principles as to the process there may be exceptions, for example when there is an urgent matter."

Matters that featured large in the Supreme Court's deliberations were *nemo judex* and a strong thread of Canadian case law that was critical of similar powers in Canadian legislation. The Supreme Court of Canada, in *Hunter v Southam Inc*, struck down a similar provision in Canada, noting that "for the authorisation procedure to be meaningful, it is necessary for the person authorising the search to be able to assess the conflicting interests of the state and the individual in an entirely neutral and impartial manner". In that case, it found that the relevant investigatory body made decisions that "do not accord with the neutrality and detachment necessary to balance the interests involved".

This was described by Denham CJ on behalf of the Supreme Court as "an appropriately high standard for a search warrant process", and confirmed the necessity for a neutral arbiter to be involved in the process of issuing a search warrant.

> ***"Presumably, the DPP will review all existing files, as no doubt will defence teams, for evidence secured under section 29 warrants in pending cases, and act accordingly"***

Search and destroy

Damache should have come as no surprise to the State. The fundamental proposition that a member of An Garda Síochána might be able to issue a search warrant to circumvent the inviolability of the dwellinghouse, in an investigation in which he himself was involved, was subject to severe criticism from Mr Justice Morris in the Morris Tribunal.

The potential abuse intrinsic in such a situation needs no elaboration. In the 'Burnfoot module' of the *Morris Tribunal Report* (2008), at paragraph 6.22, Morris J expressed himself satisfied that "there is a danger that the power to issue a section 29 warrant thereby becomes a mere formality in which the investigating sergeant might as well be empowered to issue a search warrant to himself", and, at paragraph 6.23, described himself "satisfied that it is preferable that the power to issue a warrant should be vested in a judge". He saw no reason, in the context of today's technology and communications, why a judge would not easily be contacted for the purpose of an application for a search warrant. Morris J, it should be said, merely articulated what many defence lawyers had already privately believed.

The State moved quickly to repair the damage caused by the *Damache* decision. The *Criminal Justice (Search Powers) Bill 2012* was rapidly drafted and moved in the Oireachtas, addressing the most obvious shortcomings of the impugned section 29. The new bill still entitles a warrant to be issued by a member of An Garda Síochána, but only in circumstances of urgency – not in an investigation in which that member is involved or in charge of – and a warrant should be valid only for a period of 24 hours when issued in such circumstances. At first glance, this appears to meet the criticisms whereby the Supreme Court found the existing statutory provisions wanting.

Hard to find

However, while the bill may address prospective search warrants, the retrospective effect of the finding of unconstitutionality had to be dealt with, and already the fallout of the *Damache* case has been seen. An unknown number of cases, which were pending for trial at the time of the decision, have been the subject of applications by the DPP for *nolle prosequi* (meaning that the charges have been withdrawn) on the basis that most, if not all, of the relevant evidence against the accused has been secured on foot of the section 29 warrant process. Presumably, the DPP will review all existing files, as no doubt will defence teams, for evidence secured under section 29 warrant in pending cases, and act accordingly.

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However, the decision also has the potential to upset, in certain circumstances, existing convictions. In the recent case of *DPP v Cunningham*, the appellant succeeded in an appeal on the basis that his premises also had been searched on foot of a section 29 warrant, and property was found that led to him being prosecuted and convicted. The Court of Criminal Appeal quashed the convictions and directed a retrial. The judgment, by Mr Justice Hardiman, is notable in that it deals with many arguments raised by the State as to the extent of the *Damache* fallout and clarifies many of the circumstances in which the *Damache* finding will affect or not affect warrants previously issued. In a wide-ranging review of jurisprudence from comparable jurisdictions, both within and outside Europe, Hardiman J underlined the constitutional necessity to interpose a judicial authority "between the citizen and the police". Some of the language used is rather apocalyptic, including references to Nazi Germany, but the import of the judgment will be most helpful in enabling advisors to assess the prospects for cases that have previously resulted in convictions.

Perhaps most importantly, the *A* case was approved by Hardiman J, in that, in *A*, the applicant had pleaded guilty and had never appealed until, in an unrelated case, the relevant section whereby he had been convicted was declared unconstitutional. Mr A sought to 'piggyback' on foot of a Supreme Court decision (*CC v Ireland*), subsequent to his own guilty plea, declaring unconstitutional the statutory provisions relating to the offence of unlawful carnal knowledge, but was prevented from doing so on the basis that he had acquiesced in his original prosecution, to the extent that he had pleaded guilty, had not appealed, and had raised no issue as to defence in his prosecution. Critically, Hardiman J observed that his case had "been finally adjudicated".

The concept of 'final adjudication', combined with the fact that section 29 was never impugned by an accused in the course of his trial, is likely to be fatal to a potential flood of applications on foot of the *Damache* decision.

Dealing succinctly with the 'appalling vista' scenario, Judge Hardiman observed that a declaration of unconstitutionality "does not necessarily mean that all actions, decisions and transactions taken in good faith on foot of that [now declared] unconstitutional law must be unravelled, even if that invalidity operates *ab initio*. Any other conclusion would simply represent the triumph of abstract logic over the dictates of justice and the practical administration of society."

Finding Nemo *judex in sua causa*

"The case was, on its own facts, a legal 'perfect storm' combining issues touching on the constitutional inviolability of the dwellinghouse and gardaí operating under the 'nemo judex in sua causa' principle"

By contrast, however, the court made it clear that a declaration of unconstitutionality "will (in all probability) be applied in future similar cases", and further observed that "article 15.4.2 of our Constitution … provides clear textual evidence that such a finding of an invalidity must apply to third parties, certainly so far as current and prospective transactions are concerned".

Turkey in the straw

It is clear, therefore, that concluded cases will be permitted to be reopened by the court only in limited circumstances, and almost never when it can be said that an accused person 'acquiesced' in acknowledging the validity of the impugned section. Even where cases have not technically concluded, such as having an appeal outstanding, it is anticipated that defence teams will have some trouble in persuading the Court of Criminal Appeal to permit them to add an additional ground of appeal unless, at a minimum, some protest had been made during the trial concerning the validity of the search warrant.

For all that, *Damache* must surely represent a laudable decision by the Supreme Court, in striking down a questionable statutory provision. It is perhaps unfortunate that more attention was not paid to the observations made in the Morris Tribunal, but it is submitted that *Damache* represents a triumph of constitutionality over expediency, and certainly represents more than a mere nod to *Bunreacht na hÉireann*.

LOOK IT UP

Cases:

- *A v Governor of Arbour Hill Prison* [2006] IESC45
- *CC v Ireland* [2006] 4IR1
- *Damache v DPP* [2012] IESC11
- *DPP v Dunne* [1994] 2 IR 537
- *DPP v Birney* [2007] 1 IR 337
- *DPP v Cunningham* [2012] IECCA64 (Court of Criminal Appeal, 11 May 2012)
- *Hunter v Southam Inc* [1984] (2SCR145) (Supreme Court of Canada)

Legislation:

- *Bunreacht na hÉireann*, article 40.5
- *Criminal Law Act 1976*, section 5
- *Criminal Justice (Search Powers) Bill 2012*
- *Offences Against the State Act 1939*, section 29

I KNOW NOTHING!

Paul Egan is a partner in Mason Hayes & Curran, Solicitors, and a member of the Company Law Review Group

The *Mahon Report* on corruption in the planning process is likely to have an impact beyond the world of property development, local government and elected politicians. Businesses, generally, are set to feel the brunt of the Mahon Tribunal recommendations. Paul Egan surveys the fallout

The final report of the Mahon Tribunal, officially the *Tribunal of Inquiry into Certain Planning Matters and Payments*, was published on 22 March 2012, arriving 15 years after the tribunal had been initiated under original tribunal chairman, Mr Justice Flood. The bulk of the report concerns the varying degrees of greed, evasion, incompetence and folly that have underpinned the interaction between various actors in the property development business, politics and local government.

Some consequences may come to those found guilty, in a court, of criminal wrongdoing – if the infrastructure to prosecute that wrongdoing can creak into action. But that will concern a relatively small number of people, some of whom are dead and many of whom will, no doubt, claim prejudice to any jury trial by reason of trial by media.

Chapter 18 of the report sets out a series of recommendations as to what kind of stable doors we should have in the future in order to forestall a continuance or recurrence of the behaviours that gave rise to the tribunal in the first place.

"Employing a bagman to stuff money into the pockets of politicians and officials will, to the extent that it was ever an option, no longer be one beyond the arm of the law"

A triad of recommended measures

The tribunal's recommendations are focused on what it describes as a triad of measures:

- Regulating political donations,
- Regulating conflict of interests affecting politicians and public officials, and
- Strengthening the laws concerning bribery and corruption.

The overall purpose of the provisions recommended must be "to ensure that there is a comprehensive scheme for regulating payments to public officials so as to minimise the risks of corrupt payments being made, the abuse of public office and/or the appearance of corruption".

For solicitors in practice, and for people in business generally, it will be the last of these three focuses that will have the greatest impact.

Proposed *Criminal Justice (Corruption) Bill*

Irish law on bribery and corruption is contained in a series of statutes dating from 1889, with a collective citation of the *Prevention of Corruption Acts 1889-2010*. The law is not clear in places and is difficult to navigate. Some wrongful acts can be prosecuted under several separate provisions; other unethical acts are not regulated at all.

In an answer to a parliamentary question on 23 February 2012, Tánaiste Eamonn Gilmore promised to bring to Government the heads of a bill to reform and consolidate the existing law before Easter 2012. The stated objective of the new bill would be to clarify, consolidate and reform the seven different enactments that make up the *Prevention of Corruption Acts*. A short time after the publication of the *Mahon Report*, Minister for Justice Alan Shatter spoke in favour of implementing the report's recommendations as they affect those acts.

Most recently, Minister Shatter, speaking at the OSCE Economic and Environmental Forum in Dublin on 24 April 2012, stated his objective for a new *Criminal Justice (Corruption) Bill* to clarify and reform the anti-corruption laws so that the relevant measures are made clearer

> *"The overall purpose of the provisions recommended must be 'to ensure that there is a comprehensive scheme for regulating payments to public officials so as to minimise the risks of corrupt payments being made, the abuse of public office and/or the appearance of corruption' "*

FAST FACTS

- The *Mahon Report* (chapter 18) seeks to forestall a continuance or recurrence of the behaviours that gave rise to the Mahon Tribunal
- It recommends the establishment of a comprehensive scheme for regulating payments to public officials in order to minimise corruption
- A new *Criminal Justice (Corruption) Bill* has been proposed by the Minister for Justice
- The changes advocated by *Mahon* on three key issues will affect business generally, including: bribery by intermediaries; defective corporate governance that facilitates bribery; and whistleblowing

and more accessible for everyone. The Government plans to publish the general scheme of the *Corruption Bill* (it is understood, in the near future) in order to allow all concerned to make an input before the bill is drafted and introduced. As well as implementing the Mahon recommendations, the minister aims to ensure that "trading in influence" is addressed in a "robust, discrete offence provision in the forthcoming bill".

The report's recommendations

Unsurprisingly, most of the report's recommendations are focused on law and procedure to do with planning, political finance, lobbying, bribery, corruption in office, money laundering and asset confiscation.

However, it will be the changes advocated by Mahon on three key issues that will affect business generally:

- Bribery by intermediaries,
- Defective corporate governance that facilitates bribery, and
- Whistleblowing.

Specifically, the report recommends the following:

a) Introducing a specific offence of making payments to a third party, where the payer ('P') knows or is reckless to the fact that that party intends to use some or all of those payments to pay bribes for the purpose of furthering P's interests.

b) Introducing a new offence criminalising a commercial entity for failing to take adequate measures to supervise or control individuals carrying on activities on its behalf, where that individual commits bribery in the context of those activities and that bribery is to the benefit of the entity.

c) i) Introducing a pan-sectoral whistleblower protection act protecting all those reporting suspected offences and/or breaches of regulatory measures from any form of liability, relief and/or penalisation arising from that report.

ii) Extending existing whistleblower protection under the *Prevention of Corruption (Amendment) Act 2010*, to protect independent contractors who report suspicions of corruption from penalisation.

iii) Removing the existing limit on the amount of compensation that may be awarded to those penalised for whistleblowing and, under the *Criminal Justice Act 2011*, to cover those reporting

or giving evidence on offences under the *Public Bodies Corrupt Practices Act 1889*.

The report recommends a small extension of the circumstances where a payment to a politician or public official is corrupt, as well as extra penalties for those found guilty of bribery and corruption.

Recent British law

In 2010, Britain passed its *Bribery Act*, which was brought into force on 1 July 2011, accompanied by detailed official guidance for companies and for prosecutors. Irish companies carrying on business in that jurisdiction (which we must remember can include commercial activities in Northern Ireland) have had to become compliant with the new law already.

The director of Britain's Serious Fraud Office has stated that "a foreign company that carries on business or any part of its business within the United Kingdom is within the scope of the *Bribery Act* in respect of any of its activities anywhere in the world. The phrase 'carrying on business' is a very general one and the SFO is adopting a very wide interpretation of these words … It would be very dangerous for [businesses] to use a highly technical interpretation of the law to persuade themselves that they are not within the *Bribery Act* and that it is permissible for them to carry on using bribery."

Effect on governance

The key change in British law is to automatically impute the improper act of a company's employee or agent to the company, as Mahon now recommends. In Britain, a commercial organisation is guilty of an offence if a person associated with it bribes another person intending to obtain or retain business for the organisation, or to obtain or retain an advantage in the conduct of its business.

In Ireland, at present, there is no such automatic imputation to a company of the acts of an employee, officer or agent. It turns on the extent that it could be argued on the facts that liability is imputed under the identification doctrine or attribution doctrine. (For a detailed examination of this issue, see Horan, *Corporate Crime*, published by Bloomsbury Professional (2001), p23.)

In Britain, as a counterbalance to the new corporate liability, a commercial organisation has a defence if it can prove it had in place "adequate procedures designed to prevent persons associated with [it] from undertaking such conduct".

The practical effect of this is to compel businesses to establish and monitor procedures. Failure to do so will mean that an employee on a 'frolic of his own' will attract criminal liability to the employer.

No more 'head in the sand'

The Mahon proposal to deal with intermediary behaviour is consistent with the requirement for adequate procedures; it will not be enough for an individual or company to put its head in the sand and pretend it knew nothing. Employing a bagman to stuff money into the pockets of politicians and officials will, to the extent that it was ever an option, no longer be one beyond the arm of the law.

One of the challenges that faces companies doing business overseas is navigating what can be euphemistically called 'local culture'. 'Grease' payments or facilitation payments (to get public officials to do something they should be doing anyway) are illegal under the British model, whereas they continue to be

SIX PRINCIPLES FOR ADEQUATE PROCEDURES

The British Ministry of Justice published official guidance on how these 'adequate procedures' should be designed by commercial organisations, and articulated six principles that should underpin the procedures and their operation:

1) **An organisation's procedures to prevent bribery by persons associated with it should be proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. They should be also clear, practical, accessible, effectively implemented and enforced.**
2) **The top-level management of an organisation (be it a board of directors, the owners, or any other equivalent body or person) must be committed to preventing bribery by persons associated with it. They must foster a culture within the organisation in which bribery is never acceptable.**
3) **The organisation must assess the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment must be periodic, informed and documented.**
4) **The organisation must apply due-diligence procedures, taking a proportionate and risk-based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.**
5) **The organisation must seek to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation, through internal and external communication, including training, that is proportionate to the risks it faces.**
6) **The organisation must monitor and review procedures designed to prevent bribery by persons associated with it and make improvements where necessary.**

'BRIBERY AND CORRUPTION'

'Bribery and corruption' is an offence at common law, defined in *Murdoch's Dictionary of Irish Law* as: "Corruptly to solicit, promise, give, receive or agree to receive a bribe (that is, a reward) in order that any public official should either:
a) Act contrary to a duty he has to do something in which the public has an interest, or
b) Show favour in the discharge of his duty and function."

'You know nothing about the horse'

accommodated under comparable US law. This will be a challenge also for those drafting the Irish law.

The Mahon whistleblowing proposals go further than the protections to employees proposed in the draft *Protected Disclosures in the Public Interest Bill 2012*, published on 27 February 2012, by proposing their extension to independent contractors.

"The new Criminal Law (Corruption) Bill is almost certain to make it easier for commercial organisations to become criminally liable for corrupt payments made by its employees and agents. This will make anti-corruption systems imperative for those organisations, in order to protect against this risk"

Corporate governance

The law that is likely to emerge from the consideration of the Mahon recommendations will inevitably impose greater duties on companies and other commercial organisations. There is a public and, it has to be said also, a growing corporate mood in its favour.

When, in 2003, company law was amended to require large companies to have a directors' compliance statement, it generated considerable controversy, on the grounds that it was requiring such companies to adopt disproportionate procedures to ensure compliance by the company with an undefined body of law.

The Company Law Review Group published a special report in 2005 suggesting a more focused approach, requiring a directors' compliance statement for such companies to be appended to the annual accounts, but concerning tax law and company law only. This was with a view to relieving companies from the requirement to try to contemplate what other bodies of law they ought to be considering and declaring compliance with. This CLRG approach is reflected in the draft consolidated companies legislation currently in circulation.

The new *Criminal Law (Corruption) Bill* is almost certain to make it easier for commercial organisations to become criminally liable for corrupt payments made by its employees and agents. This will make anti-corruption systems imperative for those organisations, in order to protect against this risk. In that context, it will be one short step to add the proposed anti-corruption law to the directors' compliance statement.

As well as being an annual wake-up call on the subject, it will have the effect of communicating that a satisfactory anti-corruption system in a commercial organisation is an integral part of good governance.

WHAT ARE THE *PREVENTION OF CORRUPTION ACTS?*

The *Prevention of Corruption Acts* comprise the following:

- ***Public Bodies Corrupt Practices Act 1889* (outlaws the bribery of public officials).**
- ***Prevention of Corruption Act 1906* (outlaws bribery and corrupt payments generally).**
- ***Prevention of Corruption Act 1916* (presumes certain payments made to be corrupt).**
- ***Ethics in Public Office Act 1995*, section 38 (extends law to special advisers of ministers).**
- ***Prevention of Corruption (Amendment) Act 2001* (revamped the 1906 act).**
- ***Proceeds of Crime (Amendment) Act 2005*, Part V.**
- ***Prevention of Corruption (Amendment) Act 2010* (revamped the 1906 act; added whistleblower procedures).**

LOOK IT UP

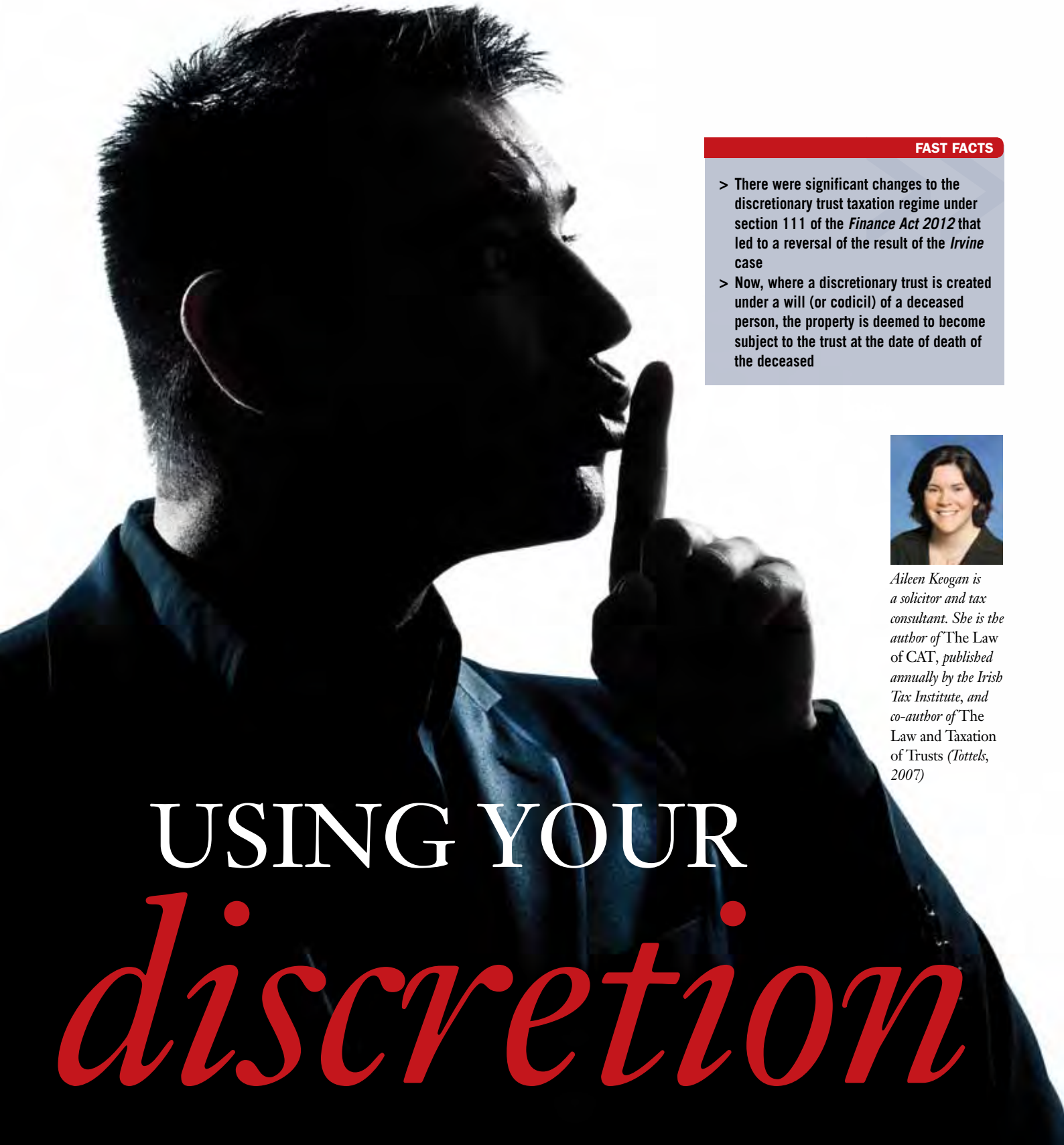
Legislation:

- *Bribery Act 2010* (Britain)
- *Criminal Justice Act 2011*
- *Ethics in Public Office Act 1995*, section 38
- *Prevention of Corruption Act 1906*
- *Prevention of Corruption Act 1916*
- *Prevention of Corruption (Amendment) Act 2001* (revamped the 1906 act)
- *Prevention of Corruption (Amendment) Act 2010* (revamped the 1906 act)
- *Proceeds of Crime (Amendment) Act 2005*, part V
- *Protected Disclosures in the Public Interest Bill 2012*
- *Public Bodies Corrupt Practices 1889*
- *Public Bodies Corrupt Practices Act 1889*

Literature:

- Horan, *Corporate Crime*, Bloomsbury Professional 2001
- *Murdoch's Dictionary of Irish Law*, Bloomsbury Professional 2009

A discretionary trust can be a useful tool in succession planning, but it is fraught with dangers from a legal and taxation perspective. Aileen Keogan reviews some recent changes to the discretionary trust taxation regime



USING YOUR *discretion*

FAST FACTS

- There were significant changes to the discretionary trust taxation regime under section 111 of the *Finance Act 2012* that led to a reversal of the result of the *Irvine* case
- Now, where a discretionary trust is created under a will (or codicil) of a deceased person, the property is deemed to become subject to the trust at the date of death of the deceased

Aileen Keogan is a solicitor and tax consultant. She is the author of The Law of CAT, *published annually by the Irish Tax Institute, and co-author of* The Law and Taxation of Trusts *(Tottels, 2007)*

The discretionary trust structure in its various forms is used regularly in cases where young children are involved, where a beneficiary has special needs and, in some cases, as a form of what is colloquially known as 'asset protection' – for example, protecting the assets from creditors or estranged spouses. It is also perceived as a structure that can minimise tax.

Recently, there has been a significant change to the taxation regime for discretionary trusts. The *Finance Act 2012* introduced changes in a reversal of the result of the *Irvine* case. These changes to the taxation position of discretionary trusts do not affect lifetime trusts, but only those created under a will or codicil.

Discretionary trust levies

An initial levy of 6% generally arises on the creation of a discretionary trust. An annual levy of 1% arises on 31 December each year after, so long as that trust remains discretionary. These levies are collectively also known as 'discretionary trust tax'.

Two significant changes to the treatment of the levies have arisen in recent years: the *Irvine* case, and its reversal under section 111 of the *Finance Act 2012*.

In *Irvine*, a will made provision for the residue of the estate to pass on discretionary trust. The case dealt with the issue of when the initial levy and annual levies were chargeable (as opposed to payable). It was acknowledged by all that the valuation date for the levies was the date of the ascertainment of the residue (thus triggering the calculation and payment date). The Revenue Commissioners argued that the chargeable date was the date of death. Accordingly, the annual levies would accumulate from the date of death, resulting in a number of levies (the initial levy and the accumulated annual levies) being payable within four months of the valuation date. However, it was successfully argued by the trustees of the trust that, as there were no assets vested in them until the ascertainment of the residue, there was no charge to the initial levy until that date. In accordance with section 20 of the *Capital Acquisitions Tax Consolidation Act 2003*, the property was not subject to the discretionary trust until the extent of the residue was ascertained. Therefore, the chargeable date for the initial levy was the date of the ascertainment of the residue. Only after that date would the annual levies arise.

> ***"It was successfully argued by the trustees that, as there were no assets vested in them until the ascertainment of the residue, there was no charge to the initial levy until that date"***

The practical effect of this case was that, where there was a long administration period in an estate – for example, where there was litigation in the estate or very complicated assets to deal with, resulting in the administration taking a number of years to sort out – the levies would not accumulate. Typically, in cases where there was no discretionary trust and the administration of the estate took a number of years, the benefits passing to the residuary beneficiaries might be delayed for CAT purposes, as it would not be known, for example, until the end of the litigation what each beneficiary was to receive. The decision in the *Irvine* case followed this logic, so that, in the case where discretionary trustees took the residuary benefit, in a similar manner, they would not be charged with the levies until the ascertainment of that residue.

However section 111 of the *Finance Act 2012* has reversed the effect of the decision in *Irvine*. Now the legislation provides that the date of death is the chargeable date for the initial levy. This will have a significant impact on the management of estates where discretionary trusts are involved.

New position

Under section 111 of the *Finance Act 2012*, which takes effect in relation to deaths arising on or after 8 February 2012, where a discretionary trust is created under a will (or codicil) of a deceased person, the property is deemed to become subject to the trust at the date of death of the deceased. (As clarified by the Revenue manual revised April 2012; *eBrief* no 19/12. The legislation merely refers to the date of the section coming into effect, but does not specify whether this relates to the date of death or the valuation date.)

In this way, the charge arises at the date of death of the deceased, albeit that the valuation date for the payment of the tax remains the same (in the case of trusts of the residue, that is usually the date of ascertainment of the residue).

Therefore, if it takes a number of years to administer an estate, levies can accumulate during those years (see example in panel). The valuation date is the relevant date for the purposes of calculating the levy. The values at the date of death or each 31 December in the course of the administration are not relevant at that point. The date of death is merely a trigger for the tax, while the valuation date is the date used for deciding what is to be taxed and the timing of the payment of the tax.

A PRACTICAL EXAMPLE

Mary dies on 10 June 2012, leaving her residuary estate on discretionary trusts. The estate is valued at €800,000 at date of death. There are no principal objects under age 21 or other exemptions. A claim is taken by a child of Mary against the estate under section 117 of the *Succession Act 1965*. The claim is settled in January 2015, and the executors finalise the estate, appointing €500,000 in value of assets to the trustees to hold on discretionary trust on 3 February 2015. The trustees retain the assets for two more years, appointing them out in full to a child on 5 July 2017. As at December 2015, the trust assets were valued at €550,000 and, as at December 2016, the trust assets were valued at €585,000, but were €560,000 at 5 July 2017.

Taxes arising after administration of estate:

- **Valuation date for residue: 3 February 2015,**
- **Value of assets at that valuation date: €500,000,**
- **6% of €500,000 initial levy (10/6/12),**
- **1% of €500,000 annual levy (31/12/13),**
- **1% of €500,000 annual levy (31/12/14),**
- **Total: 8% of €500,000 (€40,000), payable within four months of 3/2/15.**

Additional taxes:

- **1% of €550,000 annual levy (31/12/15), payable within four months of 31/12/15,**
- **1% of €585,000 annual levy (31/12/16), payable within four months of 31/12/16,**
- **CAT on benefit of €60,000 for child payable by 31 October 2017,**
- **No refund of initial levy available, as initial levy arises more than five years ago (10/6/12–5/7/17).**

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POINTS OF INTEREST REGARDING TAX AND DISCRETIONARY TRUSTS

- Discretionary trusts are widely defined. Once income is capable of accumulation or if there is discretion retained over who is to benefit from the income and/or capital, there is a discretionary trust.
- The definition of discretionary trust has been extended under the *Finance Act 2012* to include entities similar to discretionary trusts, for example, Jersey foundations, Swiss *stiftungs* and Liechtensteiner *anstalts*.
- The levies do not arise until there are no principal objects under age 21 in the trust and, in the case of lifetime trusts, the settlor has died.
- The trustees are deemed to take an inheritance of the trust assets for the purposes of calculating the levy. Therefore, the usual CAT rules (with adjustments) will apply to the inheritance by the trustees.
- There are exemptions to the levies under certain conditions.
- The annual levies do not arise until the initial levy is chargeable.
- The annual levy cannot be charged within 12 months of the initial levy arising.
- Distributions from the trust are generally chargeable to CAT, even where they are income distributions.
- Where income is earned in the trust and it is not distributed within a certain period, a discretionary trust surcharge of 20% is incurred in addition to the standard rate income tax charged.
- Capital gains tax can arise within the trust when assets are sold, and also when deemed disposals arise on certain events.

The benefits passing to the residuary beneficiaries might be delayed for cat purposes

Revenue has updated its internal guidelines on the effect of section 111 of the *Finance Act 2012* by way of *eBrief* no19/12, and practitioners should check www.revenue.ie accordingly.

Tips and traps

It's not just about the residue: While section 111 reverses the effects of the *Irvine* case decision, which concerned a residue passing to a discretionary trust, the section also applies to all discretionary trusts created under a will (or codicil). Therefore, a specific legacy of assets into a discretionary trust will also be charged with the levy at the date of death and, once the trustees are entitled to retain that legacy, the valuation date will arise.

Warn your executors: Where a discretionary trust is created under a will or codicil, as practitioners, we should ensure that the executors are made aware of the importance of administering the estate in a timely manner in order to minimise the accumulation of levies.

Warn the trustees: The executors may wish to inform the trustees of the fact that there may be levies accumulating so that the trustees can seek advice on how best to minimise the levies and pay the tax within the short four-month period post-valuation date. It is no longer possible to plan to avoid the initial levy in these cases.

Prior interests in possession/future trusts: The legislation as drafted appears to capture discretionary trusts that are created under wills but that are not intended to come into effect until after a prior interest in possession has expired.

For instance, if a discretionary trust arises after, say, a life interest ('to A for life and then to trustees to hold on discretionary trust'), the annual levies would accumulate for the period of the life interest. This could, in the case of a life interest lasting a period of, say, 25 years, result in the trust being subject to a 30% levy (6% plus 24x1%) on the date of death of the life tenant before making any appointments out, which in turn would be liable to the additional 30% rate of CAT (total 60% tax).

> ***"If it takes a number of years to administer an estate, levies can accumulate during those years"***

Revenue have verbally indicated to me that this was not the intention of the legislation and that this will be clarified in the next *Finance Act*. Pending this, the Revenue manual revised in April 2012 has confirmed that the taxation of such future trusts is not changed by the *Finance Act 2012*. Comfort can be taken from the reference in the manual that no charges to discretionary trust tax arise while a person is beneficially entitled in possession to a limited interest in the trust property.

Four month payment rule still applies for levies: While the *Finance Act 2010* took away the four-month rule for both CAT and the levies and replaced the CAT payment dates to what is now 31 October in each year in respect of valuation dates arising on or before 31 August in that year, the payment date for the levies was removed in 2010 but not replaced until the *Finance Act 2012*. This act has now restored the four-month payment rule, so that the levies must be paid within four months of the valuation date (see the example in the panel).

Refund of part of initial levy within five years: The change to the date of charge to the property under the *Finance Act 2012* affects the refund of half of the initial 6% levy (its reduction to 3%). If a discretionary trust is wound up within five years of the initial levy arising, the initial levy is reduced from 6% to 3%.

As the five-year period starts at the date of death rather than the valuation date, if the valuation date is more than five years from the date of death, the initial levy cannot be refunded, even in the case of a trust being wound up immediately after the date of ascertainment of the residue.

Given that usually the trustees would need to know the level of the funds available to them to determine if they wish to wind up the trust and obtain the refund, this appears harsh and against the spirit of the refund provisions of section 18 of the *Capital Acquisitions Tax Consolidation Act 2003*. A submission has been made to Revenue on this point. G

LOOK IT UP

Cases:

- *Revenue Commissioners v Executors and Trustees of Jeannie Hammett Irvine, Christie & Others* [2005] no 172R (High Court; Laffoy J).

Legislation:

- *Capital Acquisitions Tax Consolidation Act 2003*, sections 15 (as amended), 18, 20 and 30
- *Finance Act 2010*
- *Finance Act 2012*, section 111
- *Succession Act 1965*, section 117

PICK 'N' mix

Ailbhe Murphy specialises in employment law and litigation with Daniel Spring & Company. In addition to the Circuit and Superior Courts, she regularly appears before the Rights Commissioner Service, the Equality Tribunal, the Labour Court, and the Employment Appeals Tribunal

The current employment rights dispute-resolution system is too complicated, takes too long and costs too much. Major reform is on the way. Ailbhe Murphy gets digging

"If we had a blank page, I doubt anyone would draft the system that we have today."

These are the comments of Minister for Jobs, Enterprise and Innovation Richard Bruton about our employment rights dispute-resolution system, made in an address to the pithily titled 'High Level Conference on the Resolution of Individual Employment Rights Disputes' at UCD in July 2011. He noted that the system was "too complex and onerous", "takes too long to navigate" and "costs too much", summarising the position as follows:

- Approximately 30 different pieces of employment law and many more statutory instruments,
- Five redress/enforcement bodies,
- At least six websites, including that of his own department,
- Upwards of 35 different complaint forms,
- A range of different time limits within which to pursue a claim, and
- A waiting time of anything up to 80 weeks, depending on which route is taken.

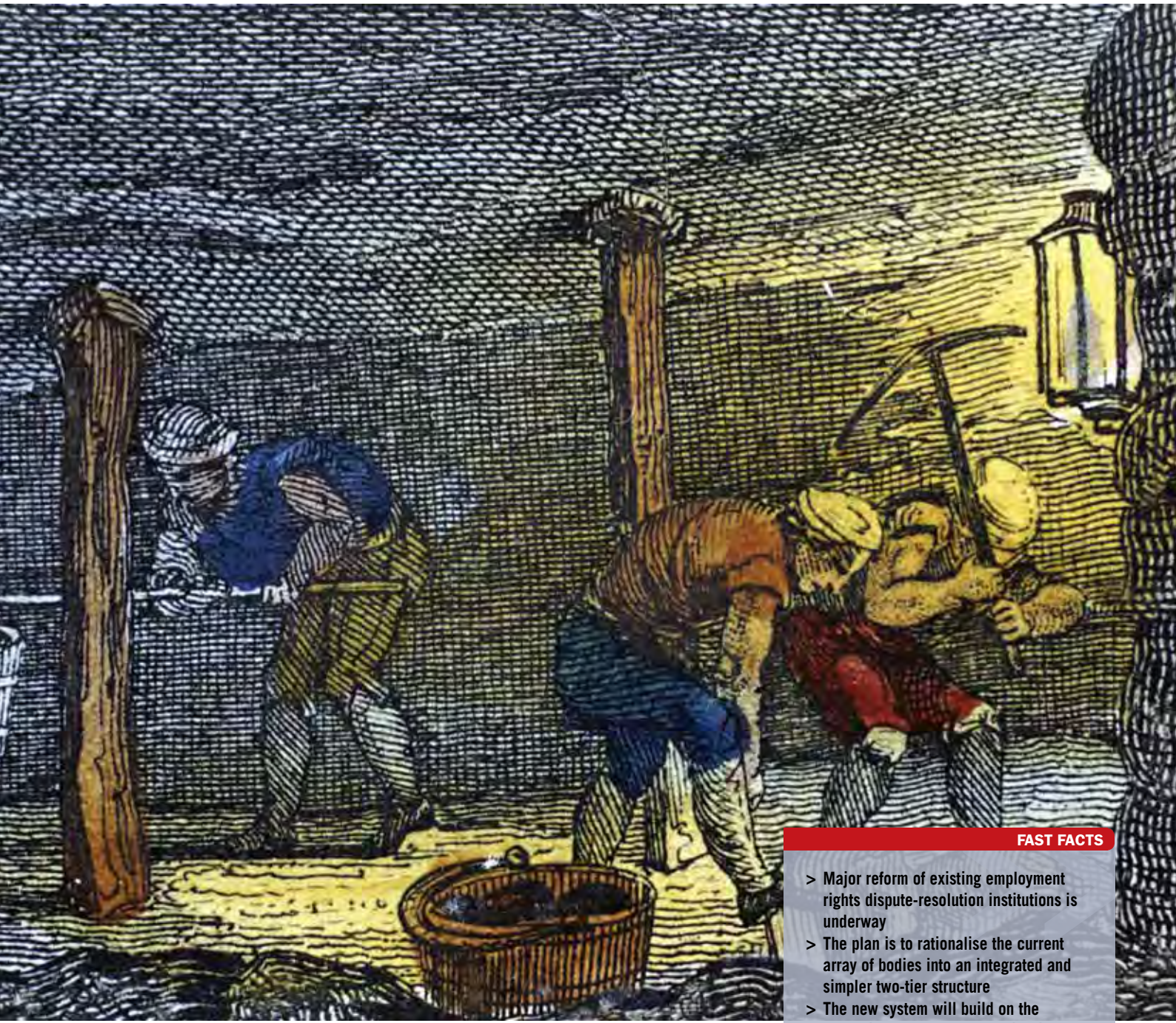
"The absence of face-to-face mediation in the predominantly desk-based Early Resolution Service may make it unworkable, or at least paper-heavy and unfocused"

The minister promised a major reform of the existing institutions, including a plan to rationalise the current array of bodies into an integrated and simple two-tier structure. The intention is to build on the recognised strengths of the first-instance functions currently performed by the Labour Relations Commission (LRC), the National Employment Rights Authority (NERA), the Equality Tribunal and the Employment Appeals Tribunal (EAT), by forming a merged, first-instance body – the Workplace Relations Commission (WRC). In addition, the minister proposes to centralise all of the appellate and interpretative functions of the Labour Court and the EAT within a single, upper-tier body.

We can work it out

The overall objectives of reform are the early resolution of disputes, the creation of a more user-friendly system, and the reduction of costs. A consultation period began in August 2011, and submissions were received from 67 parties, including trade unions, legal professionals, employer representatives, NGOs and individuals. Since then, the changes have begun.

There is now an integrated, albeit interim, website



'Mr Murphy's afraid you'll make a claim if you take a fall...'

(www.workplacerelations.ie) that aims to ultimately replace those of the five existing bodies. The site is user-friendly and contains information on employment, equality and industrial relations legislation, including guidance notes to assist the claimant in making a complaint.

A single first-instance complaint form has been launched. It is clear and well designed, and although you need to print it off, sign it, and post it to the Workplace Relations Customer Services Department in Carlow, ultimately they envisage an entirely online experience. To find the new form, you simply log on to the new website, select the 'services' heading located on the website's home page and then go to 'how to make a complaint'. Multiple complaints can be

FAST FACTS

- Major reform of existing employment rights dispute-resolution institutions is underway
- The plan is to rationalise the current array of bodies into an integrated and simpler two-tier structure
- The new system will build on the recognised strengths of the first-instance functions
- All of the appellate and interpretative functions of the Labour Court and Employment Appeals Tribunal will be centralised within a single, upper-tier body, to be called the Workplace Relations Commission
- The overall objectives are to ensure the early resolution of disputes, install a more user-friendly system, and reduce costs

made within the same form, by simply clicking on the 'new complaint' bar each time a complaint has been entered.

Practitioners should note that the new form is not to be used when appealing or seeking the enforcement of a decision or determination made under employment, equality, equal status and certain industrial relations legislation, or when referring a collective dispute for decision by the relevant authorities. Due to technical difficulties, it also cannot currently be used when making a complaint to the Equality Tribunal under the *Equal Status Acts 2000-2011*. It is important to note, also, that the time limits that currently apply to the lodging of complaints under the various *Employment Acts* still apply to the lodging of this new form.

Finally, a single point of contact has been established and has been fully operational since the beginning of this year. This new service, called the Workplace Relations Customer Services of the Department of Jobs, Enterprise and Innovation, has responsibility for the receipt and registration of all first-instance complaints and will deal with queries in relation to the status of those complaints and associated procedures. The minister recently claimed that all first-instance complaints are now acknowledged, and the employer notified, within five working days of lodgement. This is a huge improvement.

Working up a sweat

The next major step is to establish the two-tier structure. From the end of 2012, it is envisaged that two statutorily independent bodies will replace the current five. Work has already begun on drafting the *Workplace Relations (Law Reform) Bill 2012* to give effect to this new structure, and it is intended to have this legislation enacted by autumn this year. It will provide for the orderly wind down of the LRC, NERA, the EAT and the Equality Tribunal – and the transfer of the services of the LRC, NERA and the Equality Tribunal, together with the first-instance functions of the EAT and the Labour Court, to the Workplace Relations Commission. The appellate functions of the EAT will be amalgamated into a reconfigured Labour Court.

"The Labour Court may well be overstretched, expanding from three divisions to four to deal with an estimated 56% increase in caseload and with no internal division of responsibility for dealing with industrial relations matters"

The minister recently published a *Blueprint to Deliver a World-Class Workplace*

NEW STRUCTURES AND PLANS FOR REFORM

The Workplace Relations Commision:

- **All complaints would be made to the WRC, where three options for resolving the dispute would be available – early resolution, inspection and adjudication.**
- **A time limit of six months for initiating all complaints requiring adjudication would be introduced, as would consistent criteria under which such time limits might be extended to 12 months in exceptional circumstances, across all legislation.**
- **Any complaints found to be incomplete, out of time or wrongly grounded would be rejected or redirected by a registrar, who would be a qualified lawyer. The reasons for any decision to dismiss a complaint without a hearing would be communicated to both parties in writing, affording them the right to appeal the decision to the Labour Court.**
- **A pilot 'Early Resolution Service' has commenced. This service will assist parties to a dispute to resolve the issue themselves with the assistance of a case resolution officer. A number of officials in the minister's department have already participated in case-resolution-officer training and have begun delivery of the pilot service. There is a dearth of information as to how this service will operate, other than that a range of intervention tools will be used, including email and telephone communication and, in exceptional circumstances, tripartite meetings.**
- **Parties availing of the voluntary early resolution service will not lose their right to progress to full hearing or inspection if unsuccessful, nor will they lose their place in the queue. Where availed of, it is anticipated that the process would conclude within a timely two months of the complaint being lodged. The process will be confidential to the parties and, if agreement is reached, it will be binding and enforceable in the civil courts.**
- **All WRC hearings would be heard by a single adjudicator in private, within three months of lodging the complaint. A request for a public hearing could be made by either party, in writing, in advance of the hearing, and the other side would be consulted by the adjudicator before any decision is made.**
- **The inspection service currently provided by NERA would be supplemented by a number of improved provisions so as to encourage a culture of compliance, with compliance officers being appointed to carry out workplace inspections and to educate employers in relation to employment law compliance. Mechanisms such as compliance notices, Labour Court orders**

Relations Service (April 2012), which sheds further light on the shape of the new structures and his plans for reform, including many administrative and operational changes. It is worth consideration in its entirety – see the panel for some of the most immediate areas of interest to practitioners.

Don't forget your shovel

While the majority of reforms proposed in the blueprint are welcome, some aspects will need to be given further consideration. There is currently no requirement for adjudicators, either at first instance or on appeal, to be legally qualified. The absence of face-to-face mediation in the predominantly desk-based Early Resolution Service may make it unworkable, or at least paper-heavy and unfocused. The Labour Court may well be overstretched, expanding from three divisions to four to deal with an estimated 56% increase in caseload and with no internal division of responsibility for dealing with industrial relations matters as opposed to employment-rights-based disputes.

Finally, the constitutionality of rejecting claims without any hearing, or the closing off of appeals deemed not to be 'sufficiently meritorious', remains in doubt.

The minister is making the right noises, but the details of the plan need some urgent fine tuning.

> ***"The minister proposes to centralise all of the appellate and interpretative functions of the Labour Court and the EAT within a single, upper-tier body"***

We said pick 'n' mix, not pecan mix

LOOK IT UP

Legislation:

- *Employment Acts*
- *Equal Status Acts 2000-2011*
- *Industrial Relations Acts 1946-2004*

Literature:

- Address by the Minister for Jobs, Enterprise and Innovation, Richard Bruton, at the opening of the High Level Conference on the Resolution of Individual Employment Rights Disputes' at the School of Law, University College Dublin (1 July 2011)
- *Blueprint to Deliver a World-Class Workplace Relations Service* (April 2012)
- *Consultation on the Reform of the State's Employment Rights and Industrial Relations Structures and Procedures* (October 2011)
- *Workplace Relations Reform Quarterly Newsletter* (April 2012)
- www.workplacerelations.ie (publications/ workplace relations reform)

and fixed-charge notices would be introduced to reduce the need to resort to prosecution.

The Labour Court:

- **The Labour Court would continue to deliver all of its existing services (other than a small number of first-instance functions transferring to the WRC), in addition to taking on the appellate functions of the EAT and a role in dealing with complaints brought by compliance officers, as set out above.**
- **Either party may appeal a WRC decision to the Labour Court within 42 days, unless they failed to attend (or be represented at) a WRC hearing without reasonable cause.**
- **The notice of appeal would require applicants to provide specific grounds of appeal, allowing the Labour Court to examine whether a claim is 'sufficiently meritorious' to proceed to an appeal hearing.**
- **Appeals would be heard *de novo* and in public by a three-person tribunal, with the only further right of appeal being to the High Court on a point of law.**

General:

- **The provision of information, so as to avoid disputes in the workplace, would remain a priority. Online tools to aid employers in developing appropriate terms and conditions of employment and sample codes of practice for dealing with workplace disputes would be made available free of charge on the new website.**
- **The existing *Code of Practice: Grievance and Disciplinary Procedures*, SI no 146 of 2000 (under the *Industrial Relations Act 1990*) would also be revised, strengthened and its use promoted.**
- **The statutory mediation and conciliation remit of the Labour Court and the LRC under the *Industrial Relations Acts 1946-2004* would not be altered by the new arrangement.**
- **All decisions would be in writing and required to contain greater detail in terms of issues identified, findings made and the reasons for same, with a searchable database of decisions being maintained and categorised on the new website.**
- **It is planned that 90% of decisions would be communicated to the parties within 28 days of the hearing, with copies being published on the website within ten days of notification.**
- **A new and more efficient system for the enforcement of awards is promised, though, as yet, no detail is available as to what precisely is contemplated. The idea of introducing a modest administrative fee for making a complaint/ lodging an appeal is also still under consideration.**

MAKING THE *adjustment*

Pension adjustment orders often cause difficulties for family law practitioners, but they are also a complex area for pension specialists. Donagh McGowan and Tommy Nielsen deliver the crash course

Donagh McGowan is a partner in the family law unit of Mason Hayes & Curran and vice-chair of the Law Society's Family Law Committee

Tommy Nielsen is a director of Independent Trustee Company, a provider of self-administered pensions

Distribution of pension benefits is inherently difficult, due to the fact that they are deferred in nature. Quite apart from these intrinsic difficulties, it is particularly important to take care, because early specialist financial advice may need to be obtained.

The key to dealing with pensions is to understand the nature of the pension benefit. There are two types of pension benefit in Ireland:

- Defined benefit (DB) schemes, where the pension payable is predetermined as defined by a formula in the scheme rules, generally as a percentage of final salary, and
- Defined contribution (DC) schemes, where the pension payable depends on the contributions paid into the scheme and investment performance.

The benefits of DB and DC schemes can generally be categorised as follows:

- Benefits payable post-retirement, typically referred to as 'retirement benefits', which usually include:
  i) A lump-sum payment on retirement,
  ii) A pension paid to the scheme member, or to the member's spouse and/or dependants, should the member die post-retirement.
- Benefits payable if the member dies while still working and still a member of the scheme, otherwise known as 'contingent benefits'. Unlike retirement benefits, contingent benefits become payable upon the death of member, not at the member's retirement age. These benefits typically include:
  i) A lump-sum payment,
  ii) A pension payable to the member's spouse and/or dependants.

Pension policies, as opposed to pension schemes, are essentially DC arrangements of assets, which the beneficiary can avail of upon retirement. The pension policy can be transferred like any other asset, but only matures at the retirement age of the beneficiary.

Assets distributed by PAO

When the practitioner, in proceedings for divorce or judicial separation, completes the list of matrimonial assets available for distribution between the parties, it is essential to take note of pension assets, as these appropriately are distributed by separate pension adjustment order (PAO).

There has been some discussion as to the type of retirement benefits that may be distributed in this manner. It seems clear that they include all benefits under:

- An occupational pension scheme (DC and DB),
- A personal pension,
- A personal retirement savings account and public sector schemes.

However, social welfare pensions, such as the old-age pension, are excluded.

There is, however, nothing in the legislation to exclude post-retirement schemes like pension annuity products and approved retirement funds (ARFs). Indeed, with regard to ARFs, Revenue has indicated that only ARF assets passed to a spouse under a PAO are tax-exempt. By extension, an ARF distributed under the terms of, say, a property adjustment order would be treated as a drawdown from the scheme and, accordingly, would be subject to income tax. Therefore, if such funds are to be transferred other than by PAO, Revenue guidance should be sought in advance.

Get the information

The biggest danger when dealing with pensions in marital disputes is usually failure to get information regarding the nature of the pension benefits involved. It is strongly recommended that the following information should be obtained early in the process:

- Name of the scheme (or policy number),

Maurice found his Harrod's iPad captivating

FAST FACTS

- The Society's Pensions Sub-Committee launched a template pension adjustment order in November 2011, which was published in the Society's November 2011 *eZine*
- In proceedings for divorce or judicial separation, it is essential to take note of pension assets, as these appropriately are distributed by separate pension adjustment order
- Given the many steps required to deal with pension assets, the advice is to consider the pension benefits of both spouses at an early stage in the process

- Name of the member or beneficiary,
- Names and addresses of scheme trustees,
- Normal retirement age,
- Current pensionable salary,
- Period of membership of the scheme,
- Most recent benefit statements,
- Details of additional voluntary contributions,
- Details of additional benefits arising from a transfer of accrued rights from another scheme, and
- A copy of the rules of the pension scheme.

The trustees are obliged to disclose all such information, as referred to in section 54 of the *Pensions Act 1990*.

Once all the relevant information has been collated, the next step is to deal with the requirement to serve a notice on the trustees of the scheme or policy. The notice is akin to a third-party notice and is intended to alert the trustees to the fact that the court may make orders affecting the scheme or policy.

Notification is also designed to allow the trustees to make representations to the court, although this is rare in practice. The notice must be filed in court and served on the other party. Beware of various court rules making provision for the timing of the service of the notice. The advice is to serve notice as early as possible.

"There is significant wealth in Irish pension funds – and the retention or distribution of those assets requires due and early consideration"

Drafting the PAO

The parameters of the PAO are limited to two. The first consideration is the period of reckonable service – that is, *the period over which retirement benefits were earned*. This is typically the period of the marriage, but does not have to be so exclusively. The period can obviously not extend to a time prior to the beginning of scheme membership. However, it is possible to lengthen the relevant period, due to such circumstances as the spouses cohabiting prior to the marriage. The relevant period cannot go beyond the granting of the decree of judicial separation or divorce. The order must specify the commencement date and cessation date of the reckonable service, not just a period.

The second element of the order is the relevant percentage, that is, *the percentage of the retirement benefits accrued during the relevant period*, which will be allocated to the applicant spouse. It can range from 0.001% to 100% depending on the circumstances.

If the aim of the parties is to disregard the pension or ensure that neither spouse has an interest in the pension scheme of the other, a nominal PAO must be sought. A provision in

"As a society, perhaps the most sensitive measurement of our maturity is the manner in which we care for those who are facing the ultimate challenge – the loss of life."

(REPORT OF THE NATIONAL ADVISORY COMMITTEE ON PALLIATIVE CARE, 2001)

QUALITY HOSPICE CARE FOR ALL

Over 6,000 people use hospice care each year.

Hospice care involves the total care of patients and their families at the stage in a serious illness where the focus has switched from treatment aimed at cure, to ensuring quality of life. It seeks to relieve the symptoms of illness and cater for a person's entire needs – physical, emotional, psychosocial and spiritual.

The demand for hospice care is growing. While the service has expanded in recent years, much more needs to be done to ensure quality end-of-life care for all.

Please remember the Irish Hospice Foundation when drafting a will.

THE IRISH HOSPICE FOUNDATION 20th 1986-2006

Irish Hospice Foundation, Morrison Chambers, 332 Nassau Street, Dublin 2
Tel: 01 679 3188; Fax: 01 673 0040
www.hospice-foundation.ie

No-one should have to face death without appropriate care and support.

a separation agreement will not suffice, as that is merely an agreement between the parties and not an order binding the pension trustees. A nominal pension adjustment order would be for perhaps one day at the beginning of the period of reckonable service and a percentage of 0.001%. The order should contain a clause to exclude the application of future variations of the order. Any other way could leave the member spouse open to the future revisiting of the matter and professional exposure of the practitioner.

Further guidance is contained in the Society's Pension Sub-Committee precedent PAO, issued with the *eZine* of November 2011.

Where the scheme rules provide for both retirement benefits and contingent benefits, it is necessary to draft separate orders in respect of both types of benefit.

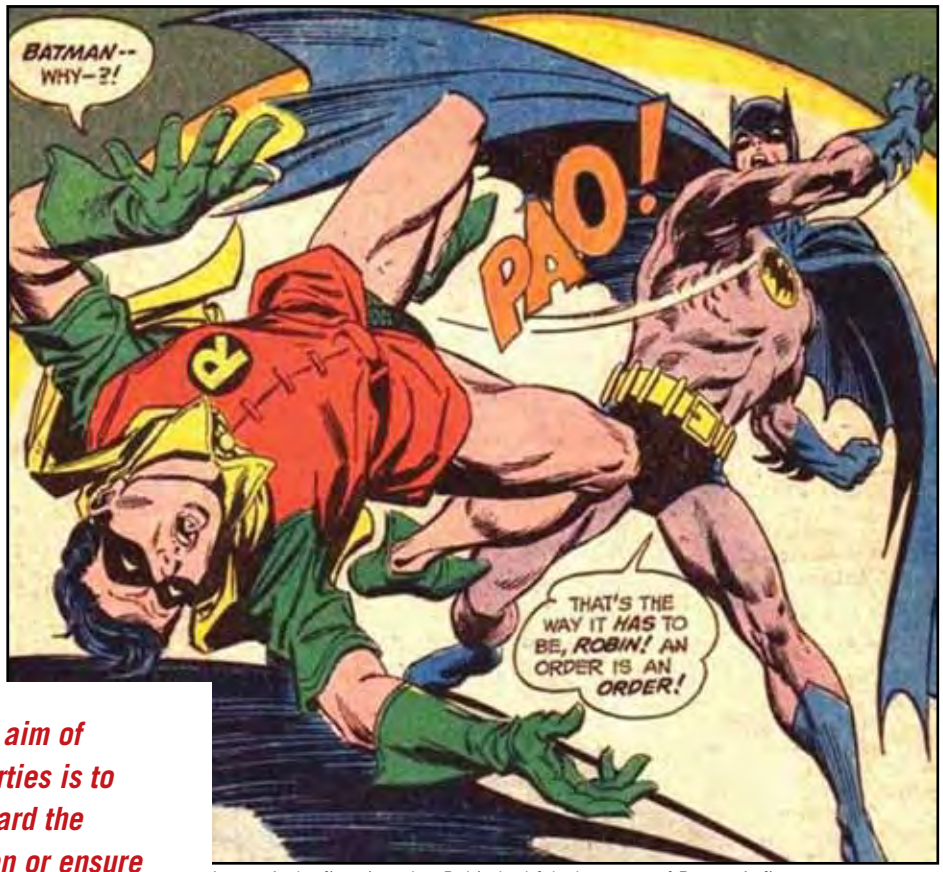
Court ruling

The accepted practice is to agree a draft order between the parties and then to submit the draft to the trustees. There is varying practice among trustees regarding the approval of such drafts. Some trustees will approve a draft, others will acknowledge receipt of the draft, but not offer any comment on the substance of the draft itself. In either event, a letter or email should be obtained from the trustees (or the administrators of the scheme) confirming that a draft order has been received. Pension orders must then be filed in court, ideally with an approval letter from the trustees.

"If the aim of the parties is to disregard the pension or ensure that neither spouse has an interest in the pension scheme of the other, a nominal PAO must be sought"

Service and implementation

Once filed in court, the court office will finalise the order and serve it directly on the trustees. A copy of the order is then made available to the parties. Generally, the scheme or policy trustees will write to both the scheme member and to the beneficiary of the order to confirm that a PAO has been received.



It wasn't the first time that Robin had felt the power of Batman's fist

After service, it is prudent of the practitioner to liaise with the trustees and the client's financial advisor to ensure that the PAO is properly implemented. In the same manner that practitioners would attend to the conveyancing of real estate assets following the granting of a property adjustment order, the practitioner should secure the client's pension rights upon the granting of a PAO.

Given the many steps required to deal with pension assets, the advice is to consider the pension benefits of both spouses at an early stage in the process, not as an after-thought. There is significant wealth in Irish pension funds – and the retention or distribution of those assets requires due and early consideration. In addition, and depending on the complexity of the pension assets, it may be prudent to take specialist advice in relation to the valuation of pension assets, how those assets may best be distributed, and the drafting of PAOs. G

TERMS AND CONDITIONS APPLY

It is prudent to advise the non-member client who stands to benefit from a PAO to seek, at an early course, independent financial advice about the options available to the client once the order has been made. In particular, the client should be advised to seek financial advice as to whether or not to take a transfer of a separate benefit from the member spouse's pension to a separate pension scheme in the client's own name. In that regard, a number of issues may be considered:

- **The financial performance of the existing scheme or policy. If the financial performance is poor, the client may wish to transfer out to a different pension provider.**
- **The financial standing of the pension provider, and the manner in which assets are held, may determine if the non-member spouse should pursue a strategy of transferring a separate benefit to another provider.**
- **The funding situation of the pension scheme – where a scheme is under-funded, the client may wish to seek a benefit transfer to secure the benefits.**
- **In-specie transfer. Depending on the nature of the scheme, it may be possible to transfer assets in specie.**
- **In the case of many self-directed or small company schemes, the spouse or a family member is often one of the trustees and, therefore, the client may feel more comfortable transferring the benefits out of that scheme.**

LOOK IT UP

Legislation:

- *Family Law Act 1995*, section 12
- *Family Law (Divorce) Act 1996*, section 17
- *Pensions Act 1990*, section 54

Midlands welcome for Law Society president


Midland Bar Association

The Midland Bar Association (MBA) held a meeting on 4 April 2012 at the Bridge House Hotel, Tullamore. Special guests were Law Society President Donald Binchy and Director General Ken Murphy. In attendance were *(front, l to r)*: Brian O'Sullivan, Marcus Farrell, Joahanna McGowan (honorary secretary, MBA), Donald Binchy (Law Society President), Raymond Mahon (President, MBA), Ken Murphy (Director General), Hilary Cahalan (committee member, MBA) and Patrick Caulfield. *(2nd row)*: Bernadette McArdle, Marianne Deely, Joanne Bane, Dermot Scanlon, Louis Kiernan and Dermot Murphy (honorary treasurer, MBA). *(3rd row)*: Michael Byrne, Aisling Maloney, Verona Smith and Shane Johnston. *(4th row)*: Patrick Turley, Oisín M Casey and Sandra Mahon. *(5th row)*: Caren Farrell, Matt Johnston, Thomas Farrell and Tom Woods. *(6th row)*: John Cummins, Dermot Mahon and Jane Farrell

First graduates in Diploma in Islamic Finance

Graduates of the first ever Diploma in Islamic Finance were presented with their parchments by Minister of State Brian Hayes at a ceremony at the headquarters of the Chartered Institute of Management Accountants (CIMA) on 26 April. The programme was delivered by the Law Society Finuas Network in partnership with CIMA. The minister is pictured with graduates and representatives from Law Society Finuas Network, Skillnets Ltd and CIMA Ireland

Getting your message across

The Society's PR Committee held a communications day event for bar association presidents and PROs at Blackhall Place on 3 May 2012.

The purpose was to encourage a greater level of communication between bar associations and their local media organisations, to impart some of the media skills required when being interviewed by local radio stations and newspapers, and to inform bar associations about a Law Society initiative to help them advertise cost-effectively on their local stations.

Feedback from the presidents and PROs added significantly to the value of the occasion. Future similar events are being planned.

'Roman Holiday' for Cavan solicitors

Cavan solicitors travelled in significant numbers to Rome from 27 to 29 April 2012, all for the sake of CPD! This was the third such foreign trip in recent years, following in the footsteps of Berlin and Amsterdam.

The 33 practitioners – all members of County Cavan Solicitors' Association – attended lectures by fellow members on the topics of:

- Appearing before the Employment Appeals Tribunal,
- Recent developments in personal injury litigation, and
- Anti-money-laundering obligations in the light of the *Criminal Justice (Money Laundering and Terrorist Financing) Act 2010*.

As expected, there was an appropriate balance of work and play. Cavan's solicitors were privileged to be hosted at a private reception in the Villa Spada by the Irish Ambassador to Italy, Pat Hennessy, and his wife Pauline. The Villa Spada was purchased by the Irish Government in the 1940s and was the official residence of the Irish Ambassador to the Holy See until the recent Government decision to shut the embassy. It is now the official residence of the Irish Ambassador to Italy.

Members of the County Cavan Solicitors' Association are seen here with the Irish Ambassador to Italy, Pat Hennessy, and on a walking tour at the famed Spanish Steps

The ambassador was presented with a specially commissioned, framed photograph of Clough Oughter Castle, taken by Paddy Bush (brother of legendary singer Kate Bush), together with a separate book of watercolours of Co Cavan.

Sleet fails to stop play at Heritage Hotel

The spring outing of the Lady Solicitors' Golf Society took place at The Heritage Hotel and Golf Resort, Killenard, Co Laois, on 20 April. After coffee and scones in the clubhouse, 25 happy golfers stormed down the first fairway, buoyed up by the cool but unexpectedly benign conditions.

Before you could say 'hole in one', a sleet-filled blizzard blew in from The Heath of Maryborough, buffeting the now less-than-happy band across the bleak terrain. Some struggled on, others fell away and were retrieved later.

A brandy-and-port-filled silver hip-flask, left on the 17th by a person who cares, ensured that the last three-ball made it back safely to the club house.

After several warming preprandials and lively 'catching-up' chat, dinner was served and prizes presented. Jeanne Cullen was the very worthy winner of first prize and the O'Connor Cup. It was a late night.

The next outing will be held in Knightsbrook, Trim, Co Meath ('only an hour from Dublin') on 7 September. This is the captain's outing and the overall winner will be presented with the Quinlan Rose Bowl. We are reliably informed that the weather on the day will be Mediterranean. All colleagues, past and present, including trainees, are most welcome.

For details of society membership and forthcoming events, please email Anne Delaney at amdel@eircom.net, or tel: 086 828 9094.

Frozen beings! Judge Petria McDonnell and Anne Delaney confront sleet at the outing of the Lady Solicitors' Golf Society on 20 April

Peter McVerry Trust
Opening doors for homeless people

LET THE GAMES BEGIN!

Nominate a team of your best athletes to represent your organisation in:

PETER MCVERRY TRUST ALTERNATIVE OLYMPICS 2012

THE DAY: **Friday 29 June 2012**

THE ARENA: **The Wanderers RFC, Merrion Road, Ballsbridge, Dublin 4**

THE TIME: **6pm – 9.30pm**

THE GAMES:
Human Table Football
Wheel Barrow Race
Bungee Run
Egg & Spoon Race
Three Legged Race

THE ULTIMATE CHALLENGE: Rumble in the Jungle, a130ft inflatable assault course.

PROCEEDS

Each team must provide a minimum contribution of €1000. Proceeds go towards Peter McVerry Trust's services for **young homeless people**.

For more information:

01 823 0776
fundraising@pmvtrust.ie
www.pmvtrust.ie

1,000 runners going for GOAL

Close to 1,000 runners and walkers took their place at the starting line for the 14th Calcutta Run on Saturday 26 May. It was a blistering day for a change and the highly festive atmosphere at Blackhall Place added to the atmosphere.

The run from Blackhall Place to the Phoenix Park and back again was followed by the usual after-event monster barbecue, with bar, music, bouncy castles and even a fire-engine demonstration for the kids. There was a strong temptation to rehydrate with beer!

RTÉ's Michael Lester fired the starting gun following a warm-up by the team from One Escape, while 98FM provided pumped-up music to heighten the adrenalin.

In his short address to the eager runners, Law Society President Donald Binchy congratulated them on their efforts to run and walk the route – but primarily on their efforts to fundraise for the event's two charities, GOAL and the Peter McVerry Trust. He expressed his thanks to the organising committee, which primarily comprises solicitors from A&L Goodbody and staff from the Law Society, as well as over 100 helpers and stewards who volunteered to help on the day.

Law School trainees were extremely well represented, with over 100 PPCI and PPCII students participating or helping out in other ways. They thoroughly enjoyed the after-party festivities!

€150k target

While the final amount of sponsorship raised is not yet known, the target is €150k – or €75k for each charity. This goes a long way to helping street kids in Calcutta and homeless boys in Dublin.

The event's success is due, also, to the huge support of a wide range of sponsors, including primary sponsors Bank of Ireland and Irishjobs.ie who gave financial and logistical support. Other valuable sponsors were: DX Ireland, Legal Panel, One Escape, Filestores/Kefron and TMS – Traffic Management Services.

In 14 years, this one-day event has raised over €2.5 million – an extraordinary amount – thanks largely to the support of law firms who supply over half of the participants. It is estimated that over 70% of the sponsorship raised comes from these runners.

As with all events since 2008, fundraising is getting more difficult. People have less to give and more charities than ever are competing for funding. After 14 years, it is time to radically review what the Calcutta Run does and how the patronage of the legal profession can be leveraged to continue to make this one of the primary fundraising events in Ireland. This type of event is unique to the legal profession – and is something of which it can be justly proud.

Anybody with any thoughts or suggestions about the potential future direction of the Calcutta Run should email: calcuttarunteam@lawsociety.ie.

Here's to next year!

Calcutta Run winner, Brian Murphy

(L to r): Eoin MacNeill (A&L Goodbody), Donald Binchy (Law Society President), Ronnie Feeney (Bank of Ireland) and Lisa O'Shea (GOAL)

No monsters were harmed in the making of the 'monster barbecue'

Kiwis capture client consultation competition trophy

The Kiwis aren't just great at rugby – they have budding lawyers, too, who could teach longer-established colleagues a thing or two about client consultation. Rob Clarke and Alex Boock from the University of Otago, New Zealand, took on the might of 21 international competitors and came out clutching the Brown-Mosten International Client Consultation Competition Trophy.

This year, the event was held from 18 to 21 April at Blackhall Place, Dublin, with over 100 delegates, teams, coaches and national representatives taking part from 22 countries. Competitors travelled from as far afield as Australia, Cambodia, Canada, China (finalists), England and Wales, Finland, Germany (finalists), India, Indonesia, Jamaica, Malaysia, the Netherlands, New Zealand, Nigeria, Northern Ireland, Puerto Rico, Russia, Scotland, Sri Lanka, Turkey and USA.

A number of international observers also attended from Sweden, Switzerland and, for the first time, the Iran Central Bar Association Educational and Professional Centre Law School. They hope to enter teams in the 2013 competition, which will take place in Scotland.

Law Society President Donald Binchy and Education Committee chairman Michelle Ní Longáin warmly welcomed everybody, while Mr Justice Michael Peart delivered a highly inspiring speech on interviewing clients. A lively céilí music and dancing session followed, which thoroughly broke the ice.

Alex Boock and Rob Clarke with the trophy

Two days of very competitive rounds followed, with the nine teams going through to the semi-finals on Saturday morning. In the afternoon, China, Germany and New Zealand interviewed their clients before a panel of five judges in front of a packed lecture theatre.

The eventual 2012 champions, Rob Clarke and Alex Boock, were presented with the trophy by Mark Hope (Norman Manley Law School, Jamaica) – a member of last year's winning team. Cheques were presented by the International Bar Association representative for Ireland, Michael Greene (A&L Goodbody).

An integral part of the competition is the fostering of friendships and the exchange of legal experience and cultures. On the first afternoon, Áine Hynes (St John Solicitors) and John Costello (past-president) facilitated a master class on the topic of 'Dealing with vulnerable clients'. General discussion followed a role play, which outlined how these matters would be dealt with across the different jurisdictions.

At Friday's cultural evening, each team had the opportunity to share and enjoy each other's culture: you could learn to bongo-dance with the Dutch, dance Bollywood-style with the Indians, walk like a Jamaican, listen to Chinese poems, and sample delicacies from around the world. The cultural exchange was well and truly cemented at the awards dinner when many of the male competitors, ably taught by the winning New Zealand team, performed a hair-raising *Hakka*!

The organising committee wishes to express its thanks to solicitors from around the country who gave of their time to judge at the competition, including the 2007 international winners, Michelle O'Mahony (David J O'Meara and Sons Solicitors) and Melanie Evans (Fitzgerald Solicitors). Also deserving of thanks are the dedicated staff and student volunteers who worked tirelessly to ensure a successful event – and who were treated to a standing ovation on awards night!

Ireland's top negotiators: talking their way to the top

Ireland's top negotiators are two PPCI trainees at Blackhall Place, Deirdre Toner (GJ Moloney, Cork) and Frank Wall (Holmes O'Malley Sexton, Limerick). They won the National Negotiation Competition, which was held at King's Inns on 11 May.

They will now represent the Republic of Ireland at the International Negotiation Competition, which will be hosted by the Institute of Professional Legal Studies at Queen's University, Belfast, from 3 to 7 July.

Deirdre and Frank competed against five other teams from the Law Society, King's Inns and NUI Maynooth to claim the coveted national cup, which now resides in the Education Centre at Blackhall Place.

Deirdre Toner and Frank Wall (PPCI trainees) are presented with their certificates to mark their victory in the National Negotiation Competition by Jane Moffatt (course manager, education centre)

The International Negotiation Competition is a law student competition in which a team of two law students representing a party/client negotiates either an international transaction or the resolution of an international dispute with an opposing team of two law students.

Teams from Australia, Canada, Denmark, England and Wales, Hong Kong, India, Japan, New Zealand, Northern Ireland, Puerto Rico, Scotland, Singapore, South Korea and the USA will also take part in the 2012 competition.

A 'York' a day helps you work, rest and play!

The Law Society's PPCI football team travelled to the College of Law, York, for its annual Legal Sports Day on 19 April, *writes Bryan Sweeney*. The tournament comprised teams from various law colleges across England and Wales, as well as many law firms such as DLA Piper, Walker Morris and Squire Sanders. The event was a great networking opportunity to meet fellow trainees in Britain.

The PPCI team fared reasonably well before their luck ran out against the College of Law, Bloomsbury, being beaten 2-0 in a disappointing semi-final.

The Law Society has facilitated trainee solicitors in Ireland to qualify in England and Wales, with the introduction of English property law on the PPCII course. It has emerged as an important jurisdiction for newly qualified solicitors. The relationships built with British law firms may prove useful to those who wish to practise outside of Ireland in the future.

PIC: LINGS PHOTO

The Society's PPCI team reached the footie semi-finals in York *(back, l to r)*: Keith McAndrew, Richard Margetson, Joseph O'Rourke and Conor Rock. *(Front, l to r)*: Wayne Kenny, Brian Dagg, Peter Cronin, Bryan Sweeney and Cian McGinley

Special thanks goes to Director of Education TP Kennedy and the Education Centre, who were very supportive in helping with the organisation. Thanks, also, to the hard-working management of Bryan Sweeney, Peter Cronin, Brian Dagg, John Kearns and Keith McAndrew for their commitment throughout the year.

Finally, our gratitude goes to the College of Law, York, for giving us such a warm welcome. We were delighted to be invited to participate at next year's event. In a year when sport is very much in the news, let's hope that we can build our relationships with the British legal sector through our mutual love of sport.

Contempt of Parliament

Kieron Wood. Clarus Press (2012), www.claruspress.ie. ISBN: 978-1-9055-364-36. Price €28 (paperback), €23 (e-book).

Kieron Wood is well known to *Gazette* readers. A broadcaster and journalist, he subsequently became a practising barrister. His published works include *The High Court – A User's Guide*, *The Kilkenny Incest Case* and *Divorce in Ireland* (as co-author).

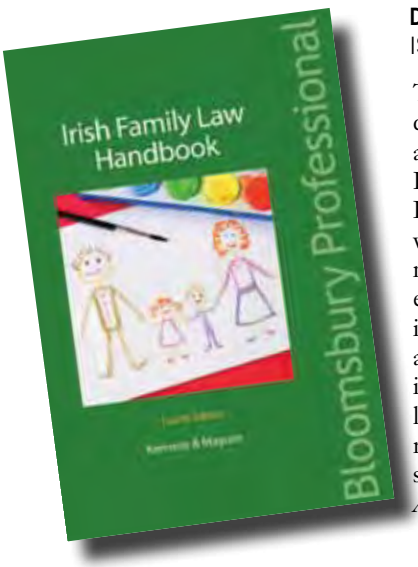
The functioning of parliamentary democracy, how a parliament deals with breach of privilege in parliament, contempt of parliament by members of parliament and strangers, and the relevant punishments are of great significance.

Leaving aside the advantages of this book for other legislatures, in Ireland, the language of article 15.10 of the Constitution implies that each House of the Oireachtas has a quasi-criminal jurisdiction to punish persons who have infringed rules and standing orders. There is a specific chapter on Ireland in the book.

Kieron Wood has succeeded in writing a most informative, highly readable and universal account of contempt of parliament and breach of parliamentary privilege.

Dr Eamonn G Hall is principal of EG Hall & Co.

Irish Family Law Handbook



Deirdre Kennedy and Elizabeth Maguire. Bloomsbury Professional (4th ed, 2011), www.bloomsburyprofessional.com. ISBN: 978-1-8476-693-22. Price: €120.

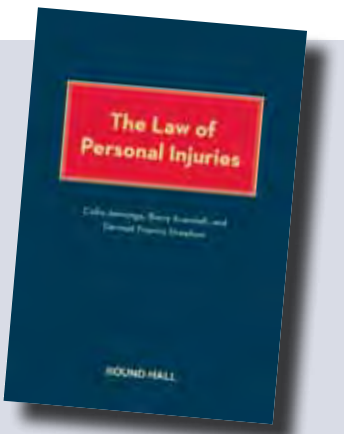
The *Irish Family Law Handbook* could be given the more appropriate title of the 'Irish Family Law Legislation Handbook', for that is precisely what it is. The book does not contain any case law or explanatory notes. However, it is an extremely useful tool for any family law practitioner, as it includes most general family law statutes, together with other relevant pieces of legislation, such as the *Taxes Consolidation Act 1997*.

This book also includes relevant EU legislation, such as the *Brussels II bis Regulation* and the recent *European Communities (Maintenance) Regulations 2011*. It also includes a section covering the relevant Circuit Court and Superior Court rules and provides various precedent forms. However, the book does not include forms used in the District Court.

The big benefit to a practitioner in using this book is that the legislation is updated to include all recent legislative amendments, including the amendments contained in the *Civil Law (Miscellaneous Provisions) Act 2011*, which some practitioners might not have been aware of. I should also point out that the area of child care is not covered in this book, which is disappointing. However, it is certainly a handy resource for any family law practitioner, and this is evident from the fact that this book is now in its fourth edition.

David Taylor is an associate solicitor at Comyn Kelleher Tobin, Solicitors, 29 South Mall, Cork.

The Law of Personal Injuries



Colin Jennings, Barry Scannell and Dermot Sheehan. Thomson Reuters (2011), www.roundhall.ie. ISBN: 978-1-8580-062-53. Price: €265.

In recessionary times, a rise in the number of personal injury claims has been noted, and it would appear that the timing of this book is especially relevant.

It is laid out in 14 chapters: each opens with a succinct synopsis of the area of law to be dealt with, and it is current as of September 2011. The text brings one from the procedures for submitting an application to the Personal Injuries Assessment Board through to filing procedures, dealing with liability related issues, negligence, handling insurance related claims, and the Motor Insurance Bureau of Ireland.

The first two chapters deal with procedural issues and contain some excellent reminders in relation to certain rarely used sections of the *Courts Act 1981*, as amended by the *Courts Act 1991*. The following chapters deal with the significant issues of negligence and the various forms of liability. The chapter on damages is informative and well laid out, and the text ends with a chapter dealing with insurance-related issues and the Motor Insurance Bureau of Ireland.

Appendix 1 sets out useful precedents, which can be adapted for most proceedings. The authors send a word of caution in relation to PIAB application, which was being updated at the time of publication, and practitioners should therefore refer to the website for the most up-to-date forms. It would be the icing on the cake if these precedents were provided by way of CD-ROM. Appendix 2 contains the 2009 MIBI agreement.

The aim of the text is "to provide an authoritative account of the law and procedures relating to the area" – the authors have clearly achieved this aim with a thoughtful, well laid out, practical handbook that will be of use to any solicitor wishing to practice in the area or update their knowledge. G

Berni Fleming is a solicitor in the Law Department of Dublin City Council.

Law Society Library services

The Law Society Library offers many and varied services to members – and it's always service with a smile

Library services include:
- Book loans,
- Online catalogue plus app,
- Enquiry service,
- Precedent service,
- Document delivery,
- Judgments alerter.

Further details on any of these services are available by contacting the library on tel: 01 672 4843/4, email: library@lawsociety.ie.

TOP OF THE POPS

Over the last 12-month period, March 2011 to March 2012, the most frequently requested loans, ranked in order of popularity, were:

1) ***Laffoy's Irish Conveyancing Precedents*** **(Bloomsbury Professional)**
2) ***Cassidy on the Licensing Acts*** **(Clarus Press)**
3) **Nesbitt & Wallace, *Irish Commercial Precedents* (Round Hall)**
4) **Regan, *Employment Law* (Bloomsbury Professional)**
5) **Spierin, *Wills: Irish Precedents and Drafting* (Spierin)**
6) **Woods, *Liquor Licensing Laws of Ireland* (Woods)**
7) **Delany, *Equity and the Law of Trusts in Ireland* (Round Hall)**
8) ***Keating on Probate*** **(Round Hall)**
9) **Shannon, *Child Law* (Round Hall)**
10) ***Law Society Manual on Employment law*** **(OUP)**

JUST PUBLISHED

New books available to borrow

- Cooper, John, *Inquests* (Oxford: Hart, 2011)
- England, Paul, *Expert Privilege in Civil Evidence* (Oxford: Hart, 2010)
- Goulding, Paul, *Employee Competition: Covenants, Confidentiality and Garden Leave* (2nd ed) (Oxford: OUP, 2011)
- Hogan, Gerard, *The Origins of the Irish Constitution* (Dublin: Royal Irish Academy, 2012)
- Irish Centre for European Law, *Competition in Energy and Regulated Markets* (Dublin: ICEL, 2011)
- Mansfield, Barry, *Arbitration Act 2010 and Model Law* (Dublin: Clarus Press, 2012)
- O'Connor, Michael, *VAT on Property Made Simple* (2nd ed) (Haywards Heath: Bloomsbury Professional, 2012)
- Wareham, Philip (ed), *Competition Law and Shipping: the EMLO Guide to EU Competition Law in the Shipping and Port Industries* (London: Cameron May, 2010)

Practice notes

New arrangements for legal aid schemes

CRIMINAL LAW COMMITTEE

The Legal Aid Board has published updated guidance notes in relation to the operation of the Garda Station Legal Advice Scheme and has introduced a single application/claim form – GLAS1 – in place of the previous GSAS1, GSAS2 and GSAS3 forms. The guidance notes and new GLAS1 form are available to download from the members' area of the Society's website (www.lawsociety.ie) and from the Legal Aid Board website (www.legalaidboard.ie). The Legal Aid Board also intends furnishing hard copies of the GLAS1 form to solicitors' practices in due course.

Members should note that, while claims will still be accepted on the old forms for a limited period, it is envisaged that, **after 1 July 2012, only claims submitted on the new form will be accepted for processing**. Completed GLAS1 forms should be submitted to the Legal Aid Board, Garda Station Legal Advice Scheme, Criminal Legal Aid Section, 47 Upper Mount Street, Dublin 2 (DX 139 Dublin).

Also, the administration of the Attorney General's Ad Hoc Legal Aid Scheme will be transferred to the Legal Aid Board with effect from 1 June 2012. The completed Ad-hoc Legal Aid Scheme (Attorney General) Claim Form (which is available on the Law Society and Legal Aid Board websites), together with copy initiating and final orders and original invoices (setting out itemised accounts for the various aspects of the claim), should be submitted to the Legal Aid Board, Attorney General's Scheme, Criminal Legal Aid Section, at the board's Mount Street address. Queries in relation to individual claims or the implementation of the Attorney General's Scheme may be directed to the above address or to tel: 01 644 1913.

Stamp Office – change of opening hours

LITIGATION COMMITTEE

The Courts Service has advised that the recently changed opening hours of the Stamp Office have again been modified, with effect from Monday 14 May 2012.

Since the introduction of revised opening hours at the end of January 2012, the operation of the changed hours has been closely monitored. On foot of feedback from customers of the Stamp Office and representations made by the Litigation Committee, the opening hours are now as follows: 10am to 12.30pm and 1.30pm to 4pm.

Sale of repossessed properties

CONVEYANCING COMMITTEE

It has come to the attention of the Conveyancing Committee that many solicitors acting for vendors in the sale of repossessed properties are restricting the information that they furnish and are restricting the general conditions and warranties that apply under the standard contract.

Solicitors for a purchaser should advise their client of the implications of the restrictions.

In some cases, the client may be in a position to obtain the necessary information before contracts are signed (for example, by employing an engineer to prepare a certificate of compliance).

The solicitor will have to consider whether he or she is in a position to give an unqualified certificate of title (a) in light of any lack of information on the title itself, and/or (b) in light of any refusal on the part of the vendor to utilise the standard contract of sale without significant amendment or any refusal to reply to the standard requisitions on title (these are matters that are specified in the definition of 'good marketable title' in the standard undertaking for residential mortgage lending)

If the solicitor is not in a position to give an unqualified certificate of title, then the qualifications required should be agreed in writing with the lender before contracts are signed.

If the restrictions cannot be adequately explained or resolved, the dangers of proceeding should be explained to the client.

The solicitor will have to consider whether he/she is in a position to continue to act in the matter.

The issue of a lender having power of sale will remain under review by the committee. Solicitors acting for purchasers of repossessed properties should be careful to ensure that vendors have the necessary power to sell.

New licensing regime for auctioneers, estate agents and letting agents

LITIGATION COMMITTEE

Under the provisions of the *Property Services (Regulation) Act 2011*, the licensing of auctioneers, estate agents and letting agents has been transferred from the courts and the Revenue Commissioners to the Property Services Regulatory Authority.

The authority will also, for the first time, licence management agents. The authority will take over the licensing of auctioneers/estate agents/letting agents and introduce the new licensing regime for management agents with effect from 6 July 2012.

Practitioners should note that one of the features of the new application procedure is that it is no longer necessary to place newspaper notices in advance of lodging the licensing application. Applications for licences may be made to the authority from 30 May 2012.

Further information, application forms and guidance notes are available on the authority's website, www.npsra.ie.

Legislation update 6 April – 8 May 2012

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. Recent statutory instruments are available in PDF at www.attorneygeneral.ie/esi/esi_index.html

SELECTED STATUTORY INSTRUMENTS

Circuit Court (Fees) Order 2012
Number: SI 109/2012
Provides for the fees to be charged in Circuit Court offices with effect from 10/4/2012. In addition, the order provides for the exemption from fees of certain proceedings, including family law proceedings.
Commencement: 10/4/2012

District Court (Fees) Order 2012
Number: SI 108/2012
Provides for the fees to be charged in District Court offices with effect from 10/4/2012. In addition, the order provides for the exemption from fees of certain proceedings, including family law proceedings.
Commencement: 10/4/2012

Supreme Court and High Court (Fees) Order 2012
Number: SI 110/2012
Provides for the fees to be charged in the Office of the Registrar of the Supreme Court, the Central Office, the Examiner's Office, the Office of the Official Assignee in Bankruptcy, the Taxing Master's Office, the Accountant's Office, the Office of Wards of Court, the Probate Office and District Probate Registries. In addition, the order provides for the exemption from fees of certain proceedings, including family law proceedings.
Commencement: 10/4/2012

Planning and Development (Amendment) Regulations 2012
Number: SI 116/2012
Amends the *Planning and Development Regulations 2001* to reduce the period prior to the event that an application for a licence for an outdoor event must be made, from 16 weeks to ten weeks.
Commencement: 4/4/2012

Rules of the Superior Court (Bankruptcy) 2012
Number: SI 120/2012
Substitutes a new order 76, substitutes certain forms in Appendix O, principally to facilitate the operation of Council Regulation 1346/2000 on insolvency proceedings and provides a new form of statement of affairs.
Commencement: 20/4/2012

Rules of the Superior Court (Criminal Procedure Act 2010) 2012
Number: SI 114/2012
Amends orders 58, 85, 86 and 87 to prescribe new procedures and forms consequent upon the coming into operation of certain provisions of the *Criminal Procedure Act 2010*.
Commencement: 28/4/2012

ONE TO WATCH

One to watch: new legislation

Social Welfare and Pensions Act 2012
The *Social Welfare and Pensions Act 2012* gives legislative effect to a number of changes to the social welfare code announced in the Budget statements of 5 and 6 December 2011. This includes a change in the method of calculating the daily rate of Jobseeker's Benefit (payment will be based on a five-day week rather than a six-day week); a curtailment on access to the Mortgage Interest Supplement Scheme for the first 12 months, while a person engages in the mortgage arrears resolution process; and, for new recipients of the One-Parent Family Payment, the age limit for the youngest child will reduce on a phased basis to seven years by 2014.

The act further amends the provisions relating to PRSI liability in the case of people who qualify for income tax relief under the Special Assignee Relief Programme and in relation to share-related remuneration.

The act also makes a number of other miscellaneous amendments to the social welfare code, including the strengthening of the powers of social welfare inspectors to make enquiries of landlords where rent supplement is being paid, and powers to make enquires at ports and airports to ensure that certain social welfare claimants comply with the residency requirements.

The *Social Welfare and Pensions Act* amends the *Pensions Act 1990*. From 2016, defined benefit pensions schemes must hold a risk reserve that will act as a buffer in assisting pension schemes to absorb financial shocks in the future. This obligation will require trustees of the pension schemes to produce an actuarial funding reserve certificate. The act also provides that the annual revaluation of defined pension benefits for deferred scheme members (that is, former employees) can take account of negative changes in the Consumer Price Index.

The act increases the minimum number of voluntary contributions from 260 to 520 contribution weeks, reconciling it with the required minimum for the state pension (contributory). The increase in requirements will be implemented on a phased basis from April 2013 to April 2015.

Rules of the Superior Court (Winding-up of Companies and Examinership) 2012
Number: SI 121/2012
Substitutes a new order 74 and substitutes and inserts various provisions of order 75A, substitutes certain forms in Appendix M, principally to facilitate the operation of Council Regulation 1346/2000 on insolvency proceedings.
Commencement: 20/4/2012 G

Prepared by the Law Society Library

BRIEFING

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 Margaret Tansey, a solicitor practising as Bruce St John Blake & Company, Solicitors, Ross House, Merchant's Road, Galway, and in the matter of the *Solicitors Acts 1954-2008* [6373/DT24/11]
Law Society of Ireland (applicant)
Margaret Tansey (respondent solicitor)
On 1 March 2012, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in her practice as a solicitor, in that she:

a) Gave undertakings to AIB on 20 April 2005 and to a named firm of solicitors for Bank of Scotland on 30 November 2005, in respect of borrowings to be secured on a named premises in Athlone, leaving the property secured to the two banks,
b) Gave two undertakings to National Irish Bank on 27 February 2007 to secure a first legal charge on a named property in Athlone and failed to register the National Irish Bank mortgage as soon as practicable to ensure that the bank obtained a first legal charge on the property, and failed, despite the undertaking, to ensure that the clients had executed a deed of mortgage prior to negotiating the loan cheque.

The tribunal ordered that the respondent solicitor:

a) Do stand advised,
b) Pay a sum of €500 to the compensation fund,
c) Pay the costs of the Law Society of Ireland of appearing before the tribunal.

In the matter of Patrick Delaney, principal solicitor of P Delaney & Co, Parkside House, Main St, Castleknock, Dublin 15, and in the matter of the *Solicitors Acts 1954-2008* [7406/DT27/11]
Named client (applicant)
Patrick Delaney (respondent solicitor)
On 6 March 2012, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he breached the Law Society's code of conduct for solicitors by breach of section 68 of the *Solicitors (Amendment) Act 1994*.

The tribunal ordered that the respondent solicitor do stand censured.

NOTICE: THE HIGH COURT

High Court – 2012 no 19SA
In the matter of Alexander M Gibbons, a solicitor of Scartagh House, Clonakilty, Co Cork, and in the matter of the *Solicitors Acts 1954-2011*
Take notice that, by order of the High Court made on Monday 21 May 2012, it was ordered that the name of Alexander M Gibbons of Scartagh House, Clonakilty, Co Cork, be struck off the Roll of Solicitors.
John Elliot,
Registrar of Solicitors,
24 May 2012

NOTICE

Firms ceasing practice: Run-off Fund and run-off cover

Firms ceasing practice that have renewed their professional indemnity insurance for the current indemnity period, subject to meeting eligibility criteria, including that there is no succeeding practice in respect of the firm, will be provided with run-off cover through the new Run-off Fund (ROF) under the following terms:

1) **Run-off cover should be provided indefinitely for so long as the freedom-of-choice model is retained or master policy is introduced in future.**
2) **The cost of providing this run-off cover will be recovered by insurers through general premiums collected, rather than by way of an additional premium paid by the firm ceasing practice.**
3) **All firms will carry the same self-insured excess into run-off that they had in their last coverage period in practice, and this standard excess will be separate from any additional excesses that may be applied in certain cases.**
4) **Firms obtaining run-off cover through the ROF will not be required to bear any additional excesses for run-off cover, provided they meet the following cessation obligations in the required timeframes:**
   a) **Notification of closure to the Special Purpose Fund (SPF) manager,**
   b) **Provision of last proposal form and policy document to the SPF manager,**
   c) **Adherence to close-of-practice guidelines,**
   d) **Meeting a common minimum risk-management standard, as assessed by risk-management audit,**
   e) **Prompt notification of claims to the SPF manager, and**
   f) **Cooperation with the conduct of claims.**
5) **Additional self-insured excesses will be applied to firms commensurate with any failure to meet these cessation obligations. There will be no payment by insurers of excesses for claims by financial institutions.**
6) **Run-off cover will commence at the end of the expiring coverage period for a firm, not at the date of cessation of practice of the firm.**
7) **Anti-abuse provisions are in place to prevent 'phoenix firms' (that is, firms ceasing in practice in order to put claims into the ROF and then reopening under another identity).**

NOTICE OF CLOSURE
With regard to notice of closure, a firm that intends to cease practice must provide the SPF manager with a written notice of its intention to cease practice in the form of the Notice of Closure Form (available on the Society's website) or in any written form, provided that it includes the information contained in the Notice of Closure Form. Any notification of closure must include a copy of the firm's most recent completed proposal form and its most recent policy of qualifying insurance. The written notice of closure must be provided to the SPF manager by whichever is the earliest of the following:

- **At least 60 days prior to ceasing practice, or**
- **At least 60 days prior to the expiry of its coverage period.**

FURTHER INFORMATION
The SPF manager is Capita Commercial Insurance Services and can be contacted by phone on 0044 207 397 4539 or by email: spf@capita.co.uk.

The relevant regulations, documentation and more detailed information on the ROF can be found on the Society's website at www.lawsociety.ie/Pages/PII.

Justis 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

CRIMINAL

Extradition

Abuse of process – whether the documents that were the subject of the discovery application related to any matter properly in question in the proceedings and, if so, whether their discovery was necessary for disposing fairly of the issues in the proceedings – European Arrest Warrant Act 2003 – Rules of the Superior Courts (European Arrest Warrant Act 2003 and Extradition Acts 1965-2001), *SI no 23 of 2005*.

The respondent in the substantive proceedings objected to his surrender, on foot of a European arrest warrant, to the authorities in the Republic of Lithuania. The respondent's points of objection claimed that the warrant did not comply in form or substance with the requirements of the *European Arrest Warrant Act 2003* and that his surrender should be refused under section 37 of the act due to the poor conditions in places of detention in Lithuania and because there were fundamental defects in the criminal justice system in Lithuania. Further additional points of objection were filed and, in particular, points 17 and 18 alleged that the requesting state intended to rely on evidence of an agent or agent provocateur of Britain's military intelligence agency, and evidence against the respondent that emanated from an unauthorised operation conducted by that service within this State, and that, consequently, the surrender of the respondent amounted to a device whereby the provisions of the Constitution and/or the law of this State, insofar as they relate to the admission of evidence, could be avoided or defeated. The respondent applied for discovery of various documents, which he claimed he was entitled to in order to enable him to properly address the issue raised by him in his challenge to the application for his surrender. The applicant appealed from the order of the High Court directing him to make discovery of documents regarding all requests to the authorities in this jurisdiction, and responses to such requests from the Republic of Lithuania or Britain or Northern Ireland for the provision of assistance in respect of the respondent relating to the offences referred to in the European arrest warrant, and copies of all records maintained and authorities granted in respect of interception and surveillance of the respondent.

The Supreme Court (Murray J; Denham CJ, Hardiman, Macken, Finnegan JJ) allowed the appeal and set aside the High Court order, holding that the only issues purportedly raised by the respondent in the points of objection to which the documents sought to be discovered could be considered directly relevant were those set out in points 17 and 18 of the points of additional objection. All of the documents that were the subject matter of the High Court order for discovery related to matters that occurred within this State. Consequently, those documents were not relevant to issues concerning the criminal justice system in Lithuania nor the conditions of detention there. Points 17 and 18 amounted to serious allegations of allegedly unlawful acts done with the knowledge and/or connivance of individuals in the employ of the State. However, those allegations were mere assertions, and there was no evidence whatsoever put forward to support those contentions. Consequently, those matters could not be properly considered to be in issue in these proceedings. In any event, it was clear from the affidavits filed on behalf of the respondent that the application for discovery was a fishing expedition. The points of objection raised in paragraphs 17 and 18 contained allegations of serious illegality but were not supported by any evidence. Consequently, those paragraphs ought to be struck out as an abuse of process. Finally, the respondent was not entitled to a recommendation pursuant to the Attorney General's scheme.

***Minister for Justice, Equality and Law Reform (applicant/appellant) v McGuigan (respondent)*, Supreme Court, 23/2/2012**

JUDICIAL REVIEW

Immigration and asylum

Health Service Executive – obligation to put in place a care plan – delay in bringing application – whether HSE failed to properly provide services to applicants and to comply with the Child Care Act 1991 – Refugee Act 1996 – Rules of the Superior Courts 1986, *order 84* – Child Care (Placement of Children in Residential Care) Regulations 1995, *SI 259/1995*.

Both applicants were subject to the immigration process. The first-named applicant had arrived in the State as a minor and was taken into the care of the respondent pursuant to the *Refugee Act 1996* and attended school. When the applicant attained her majority, she applied for asylum status, which was refused. Subsequently, the applicant was transferred to different accommodation in Galway. Owing to deep unhappiness at the situation, both applicants were transferred back to Dublin under the umbrella of a voluntary organisation. Judicial review proceedings were brought, contending that the Health Service Executive was obliged to consider the applicant's aftercare needs pursuant to section 45 of the *Child Care Act 1991* and had failed to so. An order of *mandamus* was sought, compelling the respondent to exercise its discretion pursuant to section 45 of the *Child Care Act 1991* to properly care for the applicants. The respondent contended that there had been a failure to exhaust the alternative remedy of complaint under part 9 of the *Health Act 2004*.

Gilligan J refused the reliefs sought. Unaccompanied minors entering the State were subject to section 8(5)(a) of the *Refugee Act 1996* (as amended by the *Immigration Act 1999*). In accordance with the regulations, the respondent should have put in place a care plan for the applicant, setting out the aims and objectives of the placement. While there might have been a breach of the regulations, the applicant did very well and nothing of significance turned on the failure to have in place a care plan. The applicants appeared to have lost sight of the fact that they entered the State as unaccompanied minors and had been provided for both while they applied for refugee status and their further application to stay on humanitarian grounds. From the moment they stepped onto Irish soil, the applicants became involved in the asylum process pursuant to the *Refugee Act 1996* and were still involved in the process. Section 45 of the *Child Care Act 1991* did not create a separate system for aged-out minors, separate from the asylum and immigration process. While the decision of the respondent to transfer the applicants to Galway might have been insensitive, it was one that the respondent was entitled to make in the exercise of its discretion.

***Esther Natasha Enguye and Nana Ama Twumasi (joined cases) v The Health Service Executive, High Court*, 26/10/11**

BRIEFING

Eurlegal

Edited by TP Kennedy, Director of Education

Data dilemmas – new EU data protection proposals

Data protection law is about to undergo its most fundamental change in 15 years. The EU's Justice Commissioner, Viviane Reding, announced in January a proposal for reform of the EU data protection regime. If passed into law, the proposed changes would require businesses to make some significant changes in how they currently process and use personal data. The new rules will represent nothing less than a complete overhaul of the current data protection regime.

Assuming the proposed reforms are adopted, many of the changes will not take effect until 2015 at the earliest. Thankfully, this gives businesses a reasonable period of time to explore how they can integrate the legal changes into their operations with minimum disruption. Of course, the far-reaching implications of the new rules mean that significant lobbying from interest groups is now likely to occur, even though the measures were published after a long public consultation.

In the 24th century, Data can protect himself

What are the key points?

- A single European data protection regulatory framework is proposed. This will involve repealing the 1995 *Data Protection Directive*, which is in current operation, and replacing it with a regulation that will be automatically effective in all EU member states. This means that, unlike the *Data Protection Directive*, member states will not need to implement their own laws to transpose the new measures. This change is significant, and aims to ensure that the same law applies across the EU, as currently the implementation of the *Data Protection Directive* can differ across member states. However, this uniformity may not be easily achieved, given that the regulators of each member state may still adopt and apply different interpretations of the new law.
- Increased fines will be available to national regulators, on a sliding scale of up to €1 million, or up to 2% of a company's global turnover in serious cases. Even for businesses that had feared that a 5% fine was in the pipeline, this is clearly a 'game-changing' provision aimed at ensuring data protection compliance is taken seriously.
- The introduction of a new 'right to be forgotten' will be of particular interest for businesses in the social media space, but, it is not limited to that area. If a customer contacts a business to ask it to remove their details from its database, it will be obliged to do so, unless it has a legitimate reason to retain their data. This is likely to be one of the most controversial aspects of the regulation and will be the subject of much lobbying.
- The introduction of a 'right to data portability' for data subjects will mean customers must be able to receive data from businesses in a way that allows them to move it freely (for example in a commonly used format such as PDF). This, no doubt, will have an impact on suppliers of cloud-computing services who may need to redesign their storage systems to allow easy data extraction.
- Businesses with more than 250 employees, as well as some other personal data-intensive businesses, will be obliged to appoint a data protection officer for a minimum two-year term. They will also be obliged to resource that person to enable him/her to carry out their functions. Again, this is likely to attract a great deal of attention from lobbyists, given the potential cost of compliance.
- Companies will only need to deal with a single data protection regulatory authority in the member state in which they have their main establishment. Many technology companies involved in foreign direct investment have based their European, Middle Eastern and African headquarters in Ireland. Under the new regime, the Irish Data Protection Commissioner will be their data protection regulator. This change should be beneficial for multinational companies with a trans-European presence, as they should no longer have to deal with multiple data protection regulators.
- Rules on consent will be considerably enhanced, with few opportunities for data controllers to rely on implied consent. This development has already attracted criticism as, while it is a truism that consent is key to data protection compliance, consumers often express frustration at being repeatedly asked for consent in their interactions with businesses. Conducting business online and electronically will become less dynamic and more cumbersome in the absence of implied consent.
- The introduction of a mandatory security breach notification obligation to data protection regulators, which may need to happen within 24 hours of an organisation becoming aware that a breach has occurred. Anyone who has ever been involved in a large-scale security breach will know that this can be extremely onerous. In many cases, several days can elapse while the scope and extent of the breach is being determined.
- The introduction of a 'privacy by design' principle will mean that data protection safeguards must be taken into account at the planning stage when companies are designing products and services. Systems currently in design will need to be future-proofed to ensure they meet the requirements of the new regime, taking account of the new rights such as the 'right to be forgotten' and 'data portability'.

Jeanne Kelly is a partner in the Commercial Department of Mason Hayes & Curran.

Recent developments in European law

CONTRACT

Case C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlözlési Zrt*, 26 April 2012

Directive 93/13 on unfair contract terms provides that consumers are not bound by such terms used in a contract with a seller or a supplier. In Hungary, the applicant, the national consumer protection authority, may apply to the court for a declaration that an unfair term used in a consumer contact is void if the use of such a term by a seller or supplier affects a significant number of consumers or causes substantial disadvantage. The declaration of invalidity of an unfair term by a court, following such an action, is applicable to any consumer who has entered into a contract with a seller or supplier in which that term is used.

The authority received a large number of complaints from consumers concerning the company Invitel, a fixed-line telephone network operator. Invitel had unilaterally introduced a term into the general business conditions of its subscriber contracts, granting it the right retroactively to charge customers 'money order fees' (fees applied in the event of payment of invoices by money order). The method by which those fees were calculated was not specified in the contracts. The authority took the view that this was an unfair contract term. It brought an action in the Hungarian courts seeking a declaration that the contested term was void and an order requiring the reimbursement to Invitel's customers of the 'money order fees'. The Hungarian court asked the CJEU whether the legislation allowing any consumer concerned to benefit from the legal effects of a declaration of invalidity of an unfair term, following an action brought in the public interest, is compliant with the directive.

The CJEU pointed out that the directive allows a consumer organisation to bring an action for an injunction to obtain a decision as to whether contract terms drafted for general use are unfair and, where appropriate, to have those terms prohibited. The directive does not seek to harmonise the penalties applicable in the event of a term being found to be unfair in proceedings brought by those persons or organisations. Terms declared to be unfair should not be binding on consumers. Thus, the Hungarian legislation is entirely compatible with the directive. It is for the national courts to assess the unfair nature of the term.

EMPLOYMENT

Case C-415/10, *Galina Meister v Speech Design Carrier Systems GmbH*, 19 April 2012

Directive 2000/43 prohibits discrimination on the grounds of sex, age and ethnic origin in recruitment procedures. Where people consider themselves wronged because the principle of equal treatment has not been applied to them, they must establish, before a court or other competent authority, facts from which it may be presumed that there has been discrimination. It is then for the opposing party to prove that there has been no infringement of that principle. Member states are required to take such measures as are necessary, in accordance with their national judicial systems, to ensure the application of that principle.

Ms Meister is a Russian national born in 1961. She holds a Russian degree in 'systems engineering', which has been recognised in Germany as the equivalent of a German degree awarded by a university of applied science. A company, Speech Design, published two successive advertisements seeking to recruit an 'experienced software developer'. Ms Meister applied in response to the two successive advertisements. Her applications were rejected without her being invited to interview or being told on what grounds her applications were unsuccessful. She argued that she met the requirements for the job and had suffered less favourable treatment than another on the grounds of her gender, age and ethnic origin. She brought an action before the German courts seeking compensation from the company for employment discrimination and also the production of the file of the person who was hired, to enable her to prove that she was more qualified. The Federal Labour Court asked the CJEU whether EU law entitles a worker in these circumstances to have access to information indicating whether the employer employed another candidate and, if so, on the basis of what criteria. It also asked whether the fact that the employer does not disclose the requested information gives rise to a presumption that the discrimination alleged by the worker exists.

The CJEU pointed out that the person who considers himself wronged, as equal treatment has not been applied, must initially establish the facts from which it may be presumed that there has been discrimination. It is only where he establishes those facts that the defendant must then prove that there has been no breach of the principle of non-discrimination. The assessment of the facts from which it may be presumed that there has been discrimination is a matter for national judicial bodies. EU law does not specifically entitle persons who consider themselves to be the victim of discrimination to information in order that they may establish facts from which it may be presumed that there has been discrimination. It is not, however, inconceivable that a refusal of disclosure by the defendant, in the context of establishing such facts, is liable to compromise the achievements of the objective pursued by that directive and, in particular, to deprive that provision of its effectiveness. It is for the German court to ensure that the refusal of disclosure by Speech Design is not liable to compromise the achievement of the objectives pursued by EU law. It must take account of all the circumstances of the dispute in order to determine whether there is sufficient evidence for a finding that the facts, from which it may be presumed that there has been such discrimination, have been established. Among the facts that may be taken into account is the refusal by Speech Design to give Ms Meister any access to the information that she sought to have disclosed. Account can also be taken of the fact that the employer did not dispute that Ms Meister's level of expertise matches that referred to in the job advertisement and that, notwithstanding this, Speech Design did not invite her to a job interview after the publication of the two vacancy notices. A worker who has a plausible claim that he meets the requirements listed in a job advertisement and whose application was rejected is not entitled to have access to information indicating whether the employer engaged another candidate at the end of the recruitment process. However, it cannot be ruled out that a refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination. It is for the referring court to decide whether that is the case in the proceedings in question, taking into account all the circumstances of the case before it.

FREE MOVEMENT OF PERSONS

Case C-83/12, *Minh Khoa Vo*, 10 April 2012

Regulation 810/2009 lays down measures on the crossing of external borders and on the procedures and conditions for the issuing of visas by member states. The objective is to facilitate legitimate travel and tackle illegal immigration through further harmonisation of national legislation and handling practices at local consular missions. The competent consulate when examining an application for a visa must de-

termine whether the conditions for the entry into EU territory of a national of a non-member state have been satisfied. Particular attention has to be given to assessing whether the applicant presents a risk of illegal immigration or a risk to the security of the member states. If there are serious grounds for believing that a visa was obtained fraudulently, it must be annulled. It is, in principle, annulled by the member state of issue. However, it can also be annulled by another member state, in which case the member state of issue must be notified.

Mr Vo, a Vietnamese national, was prosecuted in Germany in criminal proceedings in which he was charged with facilitating illegal immigration. He was a member of organised Vietnamese gangs that assisted other Vietnamese nationals to enter Germany illegally. They persuaded the Hungarian consulate in Vietnam that those Vietnamese nationals were part of tourist groups. They would follow a tourist programme for a few days and were then transported to other states, primarily Germany. Those concerned paid from $10,000 to $15,000 for this. The network also used Sweden as a state of entry. Sweden allowed Vietnamese citizens to stay several months in the Schengen area if they held work visas permitting them to pick berries. Once the work visa was obtained and sums between €500 and €2,000 paid to 'couriers', the Vietnamese travelled on to Germany. Some of these people were found in Germany when they were seeking to settle and work there. Mr Vo, as a member of the immigration network, was arrested in Germany and sentenced to a term of imprisonment of four years and three months. The German Federal Court of Justice asked the CJEU whether it is contrary to EU law for provisions of national law to make aiding and abetting illegal immigration punishable by criminal penalties when nationals of non-member states who have infiltrated EU territory hold visas obtained by fraud that have not yet been annulled.

The CJEU observed that EU law governs the conditions for the issue, annulment or revocation of visas, but does not lay down rules providing for criminal penalties if those conditions are breached. However, the visa application form contains a section informing the applicant that any false statement will lead, among other things, to the annulment of the visa and may also render him liable to prosecution. In addition, Framework Decision 2002/946/JHA obliges every member state to take the measures necessary to ensure that infringements in this field are punishable by effective, proportionate and dissuasive criminal penalties. Thus, not only does EU law not prevent a member state from prosecuting any person intentionally assisting a person who is not a national of a member state from entering unlawfully into its territory, but it is expressly obliged to do so. Member states are faced with two duties. The first is not to act in such a way as to hinder the free movement of persons holding visas unless the visas have been duly and regularly annulled. The second is to provide for and enforce the criminal penalties for persons committing such infringements. These obligations must be performed, giving the provisions of EU law their full effectiveness. If need be, national courts are bound to seek solutions achieving a proper balance in relation to provisions of law, the application of which might well jeopardise the effectiveness or consistency of EU legislation. Of its nature, a prosecution (in which it may be necessary for the investigation to be secret or confidential and for urgent measures to be taken) will not always be able to satisfy a requirement of previous annulment of visas by the competent authorities.

INTELLECTUAL PROPERTY

Case C-145/10, *Eva-Maria Painer v Standard Verlags GmbH and others*, 1 December 2011

A freelance photographer claimed infringement of her copyright in portrait photographs. She had made a series of photographs of Natascha Kampusch at her nursery at the age of six. The child was later abducted and held for eight years by her kidnapper. The photographer gave prints of the portrait photographs to the parents and the police. Some of these were subsequently released by the Austrian authorities during the search for her. Her escape after eight years became a major international news story. The defendant newspapers published the old portrait photos without the permission of the photographer or without crediting her. Using these photographs, they published a simulated 'photo-fit' of what she might look like in 2006. The photographer commenced proceedings in the Austrian courts. The question arose as to whether there was copyright in these photographs and what the scope of such protection would be. The proceedings that led to a preliminary reference were against five newspapers – one established in Austria and the other four in Germany. The Austrian newspaper was only established in Austria, while the German newspapers were primarily distributed in Germany with some additional distribution in Austria. The question arose as to whether the Austrian court could take jurisdiction for the infringements in Germany and Austria.

Article 6 of the *Brussels Regulation* allows co-defendants in different member states to be sued in a single state "provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings". In Case C-593/03, *Roche Nederland v Primus*, the CJEU had ruled that a close connection requires the same situation of law and of fact. In this case, the court held that the fact that the claims against the defendants concern infringements of territorially distinct copyrights for Germany and Austria does not of itself preclude the possibility of consolidating them on the basis of article 6. This is the more so if the applicable laws in the two states are very similar. German and Austrian law on copyright and related rights is very similar for photographs.

The other issue to be determined was that of copyright. The court decided that a photograph enjoys the same protection as that conferred by copyright on any other work, as long as it expresses the author's creative abilities. The media may publish such a photograph, without the consent of its author, if the object of its publication is to assist the police in a criminal investigation or to find a missing person. Works that have already been lawfully made available to the public may be quoted, provided that the source (including the author's name) is indicated – unless that turns out to be impossible. G

NOTICES

WILLS

Brady, Brendan (deceased), late of Springtown, Granard, Co Longford, who died on 31 December 2011. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Field Solicitors, Office Unit 4, Manor Mills Centre, Maynooth, Co Kildare; tel: 01 629 5511, email: info@fieldsolicitors.ie

Brady, Frank (deceased), late of Springtown, Granard, Co Longford, who died on 29 June 1990. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Field Solicitors, Office Unit 4, Manor Mills Centre, Maynooth, Co Kildare; tel: 01 629 5511, email: info@fieldsolicitors.ie

Brady, Mary (otherwise known as Molly) (deceased), late of Springtown, Granard, Co Longford, who died on 6 February 1991. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Field Solicitors, Office Unit 4, Manor Mills Centre, Maynooth, Co Kildare, tel: 01 629 5511; email: info@fieldsolicitors.ie

Brady, Thomas (deceased), late of Springtown, Granard, Co Longford, who died on 19 February 1996. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Field Solicitors, Office Unit 4, Manor Mills Centre, Maynooth, Co Kildare; tel: 01 629 5511, email: info@fieldsolicitors.ie

Candon, Margaret Lillian (deceased), late of 5 Carrignafoy Terrace, Cobh, Co Cork. Would any person having knowledge of a will made by the above-named deceased, who died on 27 September 2011, please contact Frank Kelleher, solicitor, Frank Kelleher & Co, Solicitors, 1 Pearse Square, Cobh, Co Cork

Convey, Mary (deceased), late of 7 Great Western Villas, Phibsboro, Dublin 7. Would any person who has any knowledge of any will executed by the above-named deceased, who died on 31 January 2012 at the Mater Hospital, Dublin, please contact Brian D O'Brien & Co, Solicitors, 23 Main Street, Swords, Co Dublin; tel: 01 840 1447, fax: 01 840 7264, email: sharon.devine@bobsolicitors.ie

Fagan, Anne (deceased), late of 18 Munster Street, Phibsboro, Dublin 7. Would any person having knowledge of a will made/executed by the above-named deceased, who died on 10 April 2012, please contact Cullen & O'Beirne, Solicitors, Suite 338B, The Capel Building, Mary's Abbey, Dublin 7; tel: 01 888 0855, fax: 01 888 0820, email: info@cullenobeirne.ie

Fagan John (deceased), late of 37 Deanstown Park, Finglas West, Dublin 11 and 4th Field Artillery Regiment, Mullingar Barracks, Westmeath, who died on on 1 April 2012. Would any person with information concerning the last will and testimony of the above-named deceased, please contact David Fagan of 14 Deanstown Avenue, Finglas West, Dublin 11; email: tendercove1@yahoo.ie, tel: 086 839 4270

Faherty, Barbara (orse Bairbre Ní Fhatharta) (deceased), late of Claremount, Oughterard, Co Galway and also Kilroe, Spiddal, Co Galway and Coill Rua, Indreabhain, Co Galway, who died on 2 September 2011. Would any person with any knowledge of a will executed by the above-named deceased please contact Messrs Padhraic Harris & Co, Solicitors, Merchants Gate, Merchants Road, Galway; tel: 091 562 066, fax: 091 566 653, email: cirwin@harrissorls.ie

O'Boyle, Angela (deceased), late of 39 Harold's Cross Cottages, Dublin 6W, who died on 30 March 2012. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Creavin & Co, Solicitors, 18 Lower Kilmacud Road, Stillorgan, Co Dublin, tel: 01 283 2922, fax: 01 283 2847, email: solicitors@creavinco.com

RATES

Professional notice rates

RATES IN THE PROFESSIONAL NOTICES SECTION ARE AS FOLLOWS:

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

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

ALL NOTICES MUST BE PAID FOR PRIOR TO PUBLICATION. CHEQUES SHOULD BE MADE PAYABLE TO LAW SOCIETY OF IRELAND. Deadline for July *Gazette*: 20 June 2012. For further information, contact the *Gazette* office on tel: 01 672 4828 (fax: 01 672 4877)

NOTICES

O'Flaherty, Joan (deceased), late of Aisling, Oranmore, Co Galway, who died on 15 December 2011. Would any person having knowledge of the whereabouts of a will executed by the above-named deceased please contact Edon Byrnes of Colman Sherry, Solicitor, The Square, Gort, Co Galway, tel: 091 631 383

O'Shaughnessy, Kathleen (deceased), late of Apartment 2, Thornfield, Stillorgan Road, in the city of Dublin, who died on 2 October 2011. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Eoin O'Shea of O'Shea Solicitors, 3 Chancery Place, Dublin 7; tel: 01 677 7495, fax: 01 878 2347, email: e.oshea@osheabusiness.ie

White, Brede (née Maher) (deceased), late of 118 Seskin View Road, Tallaght, Dublin 24 (formerly Shinrone, Co Offaly), who died on 9 September 2010. Would any person having knowledge of the whereabouts of a will executed by the above-named deceased please contact Bernadette Mannion of John L Mulvey & Company, Solicitors, Main Street, Tallaght, Dublin 24; tel: 01 451 5055, email info@jlms.ie

MISCELLANEOUS

Seven-day liquor licence for sale. Please contact Donncha O'Connor, Johnson & Johnson, Solicitors, Ballymote, Co Sligo; tel: 071 918 3304

TITLE DEEDS

In the matter of the *Landlord and Tenant (Ground Rents) Acts 1967-1984*: Hannigan Holdings Limited (applicant)

Take notice that application will be made to the county registrar sitting at the Courthouse, Naas, in the county of Kildare, at 11.30 o'clock in the forenoon on 13 July 2012 or the next opportunity thereafter, for the following relief:

1) An order determining the entitlement of the applicant to acquire the fee simple and any intermediate interests in the premises, more particulars described in the schedule hereto.
2) An order determining the purchase price to be paid by the application for the said fee simple and any intermediate interests.
3) If necessary, an order apportioning the said purchase price between the holder of the fee simple and any such intermediate interests.
4) An order pursuant to the provisions of section 8(3) of the *Landlord and Tenant (Ground Rents) Act 1967* appointing an officer of the court to convey on behalf of any unknown or unascertained person holding any intermediate interests.
5) Further and other reliefs.

Which said application will be grounded upon the notices of intention to acquire the fee simple dated 9 March 2012, the nature of the case and the reasons to be offered.

Schedule: All that and those the premises situate at Pound Street, Leixlip, in the county of Kildare, being (lot 1) the part of the property described in folio 1865 of the register county Kildare, registered on folio 6655L of the register county Kildare, and being (lot 2) the property described in folio 55193F of the register county Kildare, both lot 1 and lot 2 held under lease made 15 May 1934 between Elizabeth Wogan of the one part and Richard O'Neill of the other part for the term of 250 years from 1 May 1934, subject to the yearly rent thereby reserved and the covenants and conditions therein contained.

Date: 8 June 2012

Signed: LC O'Reilly & Co (solicitors for the applicant), 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 (No 2) (Ground Rents) Act 1978* (as amended) and in the matter of an application by Flanagans of Buncrana Limited (in receivership), acting by its receiver, Declan Taite, insolvency practitioner of RMS Farrell Grant Sparks, Molyneux House, Bride Street, Dublin 8 ('the receiver), and in the matter of the property known as 'Flanagans Furniture Shop', 66 Deerpark Road, Mount Merrion, Co Dublin ('the property')

Take notice that any person having an interest in the freehold estate or any intermediate interests in the property, being the property held under an indenture of lease dated 21 February 1956 between Francis Henry Wilson and Charles Henry Mather of the one part and The Deerpark Cinema Limited of the other part, more particularly described in the first part of the schedule to the lease as "all that and those that piece or plot of ground being part of the lands of Mount Merrion, otherwise Callary, situate in the half barony of Rathdown and county of Dublin, with the cinema or theatre offices erected thereon, which premises are particularly delineated, measured (be the same more or less) and described on the map or plan drawn on these presents and are thereon edged red and held for a term of 250 years from 25 March 1953 and subject to the yearly rent of £435 (€541.52) and the covenants and conditions therein contained".

Take notice that the applicant, Flanagans of Buncrana Limited (in receivership), acting by its receiver, intends to submit an application to the county registrar for the city of Dublin at Áras Uí Dhálaigh, Inns Quay, Dublin 7, for the acquisition of the freehold interest and all intermediate interests in the property and that any party asserting that they hold the said freehold interest or any intermediate interests in the property are hereby called upon to furnish evidence of title to the property to the under-mentioned solicitors 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 said county registrar for the city of Dublin for such directions as may be appropriate on the basis that the person or persons beneficially entitled to all superior interests and all intermediate interests in the property up to and including the fee simple in the said property are unknown and unascertained.

Date: 8 June 2012

Signed: Gartland Furey Solicitors (solicitors for Declan Taite, receiver of Flanagans of Buncrana Limited, in receivership), 20 Fitzwilliam Square, Dublin 2

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by Mary Mulchinock and in the matter of the dwellinghouse and premises situated at the western side of Main Street, Buttevant, in the county of Cork

Take notice that any person having an interest in the freehold estate or any intermediate interests of that part of the property situated at the western side of Main Street, Buttevant, Co Cork, held under an indenture of lease made on 15 January 1878 between the Right Honourable Charles George, Earl of Egmont, on the one part and Thomas Ryan of the other part (hereinafter 'the lease') for a term of 61 years from 29 September 1877 at the annual rent of £3.10 shillings and subject to the covenants and conditions therein contained.

Take notice that Mary Mulchinock intends to submit an application to the county registrar for the county of Cork at the Courthouse, Washington Street, Cork, for the acquisition of the freehold interest and all intermediate interests in the aforesaid property and that any party asserting that they hold

NOTICES

the fee simple or any intermediate interest in the aforesaid property is called upon to furnish evidence of title to the said property to the below-named solicitors within 21 days from the date of this notice.

In default of any such notice being received, Mary Mulchinock 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 Cork for directions as may be appropriate that the person or persons beneficially entitled to the intermediate interests, including the fee simple, in the aforesaid property are unknown or unascertained.

Date: 8 June 2012
Signed: Matthew J Nagle & Co (solicitors for the applicant), Broadview, West End, Mallow, Co Cork

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 Carmel Julia Dunne and in the matter of the property known as 182 Phibsborough Road, Dublin 7

Take notice that any person having an interest in the freehold estate of the property known as 182 Phibsborough Road, Dublin 7, held under an indenture of lease dated 11 June 1908 between Anna Maria Swanzy, Frances Cunningham and Frances Burnell of the one part and John Bermingham of the other part, for the term of 200 years from 1 November 1907, subject to the yearly rent of £8 thereby reserved and to the covenants and conditions therein contained.

Take notice that Carmel Julia Dunne intends to submit an application to the county registrar for the county of the city of Dublin 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 upon to furnish evidence of the title to the aforementioned property to the below named within 21 days from the date of this notice.

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

Date: 8 June 2012
Signed: MacCarthy & Associates (solicitors for the applicant), 10 Upper Mount Street, Dublin 2

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 Sheila Dorrington and in the matter of the property at the rear of 14 Longwood Avenue, South Circular Road, Dublin 8, in the city of Dublin (being also the property adjacent to 8 Bloomfield Park, Dublin 8, in the city of Dublin and known as 8A Bloomfield Park, Dublin 8

Take notice that any person having an interest in the freehold estate or any intermediate interests of the property situate at the rear of 14 Longwood Avenue, South Circular Road, Dublin 8, being also the property adjacent to 8 Bloomfield Park, Dublin 8, and known as 8a Bloomfield Park, Dublin 8, held under an indenture of lease made 13 March 1893 between George Elliott and Martha Anne Elliott of the one part and Elizabeth Smith of the other part (hereinafter 'the lease') for a term of 123 years from 1 March 1893, at the annual rent of £3 sterling and subject to the covenants and conditions therein contained.

Take notice that Sheila Dorrington intends to submit an application to the county registrar for the city of Dublin at Áras Uí Dhálaigh, Inns Quay, Dublin 7, for the acquisition of the freehold interest and all intermediate interests in the aforesaid property and that any party asserting that they hold the fee simple or any intermediate interest in the aforesaid property are called upon to furnish evidence of title to the said property to the below-named solicitors within 21 days from the date of this notice.

In default of any such notice being received, Sheila Dorrington intends to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the city of Dublin for directions as may be appropriate that the person or persons beneficially entitled to the intermediate interests, including the fee simple, in the aforesaid property are unknown or unascertained.

Date: 8 June 2012
Signed: Gartlan Winters Solicitors (solicitors for the applicant), 56 Lower Dorset Street, Dublin 1; DX 105 004 Dorset St

RECRUITMENT

NOTICE TO THOSE PLACING RECRUITMENT ADVERTISEMENTS IN THE *LAW SOCIETY GAZETTE*

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

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

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

Past president to practise presently

Former French president Nicholas Sarkozy is swapping the glamour of the Elysée Palace for the daily grind of his old law firm, according to the *Wall Street Journal*. Roundly beaten by François Hollande, the former president will holiday with his family in the south of France before rejoining the law firm Cabinet Arnaud Claude et Associés, which he founded in the 1980s. The firm has fewer than 20 lawyers and specialises in property and construction law.

Rockers reclaim rights to recordings

Jim Peterik, who founded the musical group Survivor, has put publishing company Warner/Chappell Music on notice that he intends to reclaim the copyright to his songs. Peterik, now 61, co-wrote 'Eye of the Tiger', the theme song from the 1982 movie *Rocky III*.

The *ABA Journal* says that he can reclaim copyright to his songs within the next few years, thanks to the US *Copyright Act 1976*, which gives people the right to reclaim copyright to post-1977 music after just 35 years.

The previous copyright law required artists to wait at least 56 years to reclaim their rights. Prior to 1972, sound recordings could not be copyrighted, so those recordings will always be owned by the record label.

Rights to musical compositions and master recordings from 1978 could return to musicians as early as 2013.

Juror Janet jailed after jetting off on junket

A juror has been jailed for 56 days after bunking off to Malta in the middle of a trial. Janet Chapman (51) was nearing the end of a four-week armed robbery trial in Preston, Lancashire, when she decided that a week in sunny Malta would be more interesting than Judge Stuart Baker's summing up. Before jumping on a plane with her boyfriend, she left a message for the court saying: "Hello, this is Janet Chapman. I won't be attending court for a period of up to two weeks. I have got to return to the doctor's next Tuesday. I have got sciatica. Thank you. Bye."

While Chapman was sunning herself, the trial was delayed while police tried to track her down. She was arrested on her arrival at John Lennon Airport in Liverpool and charged with contempt of court. Judge Anthony Russell sentenced her to 56 days in the clink.

Bungling boozy burglar busted in bedroom

A Scottish burglar was apprehended after the owners of the house he had broken into discovered him asleep in their bed, AP News reported.

24-year-old Mark McCole broke into the Al-Hamdanis' house in Perth by smashing a glass pane in their back door. He had planned to rob the couple of their cash and jewellery, but a combination of booze, cocaine and ecstasy caused him to fall asleep before completing the job.

He was woken by Mrs Al-Hamdani's screams after she had gone into the couple's bedroom after smelling strong alcohol. The hapless thief tried to flee the scene but was tackled to the ground by the homeowners, who sat on him until the police arrived.

McCole pleaded guilty and was sentenced to six months in jail at Perth Sheriff Court.

Groovy granny gets gratuitous grounding

A Norfolk grandmother of six has been given a stern warning by Locog, the Olympics organising body, after knitting an Olympics outfit – for a doll.

Joy Tomkins (81) wanted to contribute to her local church fundraiser, says rollonfriday.com, and so knitted the small Olympics outfit for a doll that she planned to sell for Stg£1. Having heard about the clampdown on the unauthorised use of Olympic logos, she got in touch with Locog officials. They warned her that, should she sell her doll, she could be staring a lawsuit in the face!

"It's Olympic correctness gone mad," said Tomkins. A Locog spokesman insisted that the organisation was "not like Big Brother. We'll take things on a case-by-case basis."

Incidentally, the 'groovy granny' bears a tattoo on her back reading 'PTO' and one on her chest reading 'Do Not Resuscitate'!

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