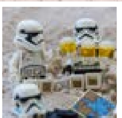
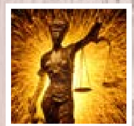
In her shoes
Kilrush-based solicitor and wheelchair-user Aisling Glynn talks to the *Gazette*



Constructive argument
Does the construction industry need a voluntary costs-limitation scheme in arbitration?



Gender fenders
Diversity is important in ADR, but we are approaching gender parity only at a glacial pace

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EXAMINERSHIP REFORMATION:
The proposed Summary Rescue Process

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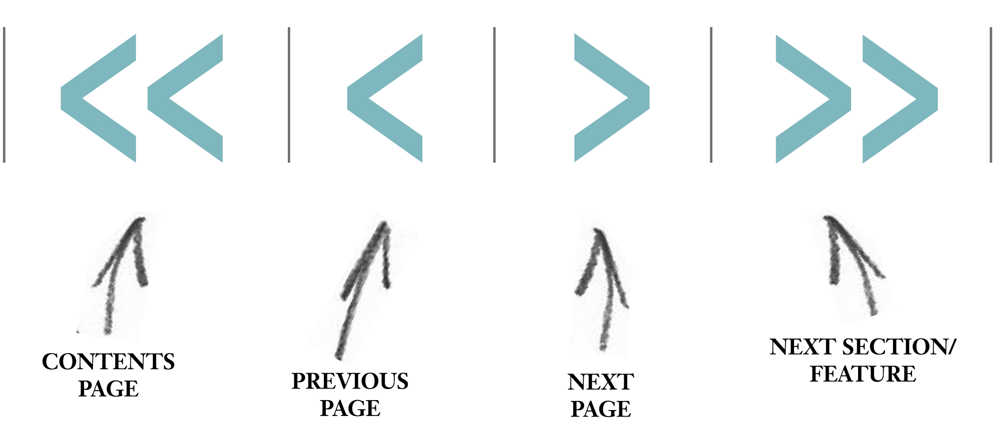
navigating your interactive



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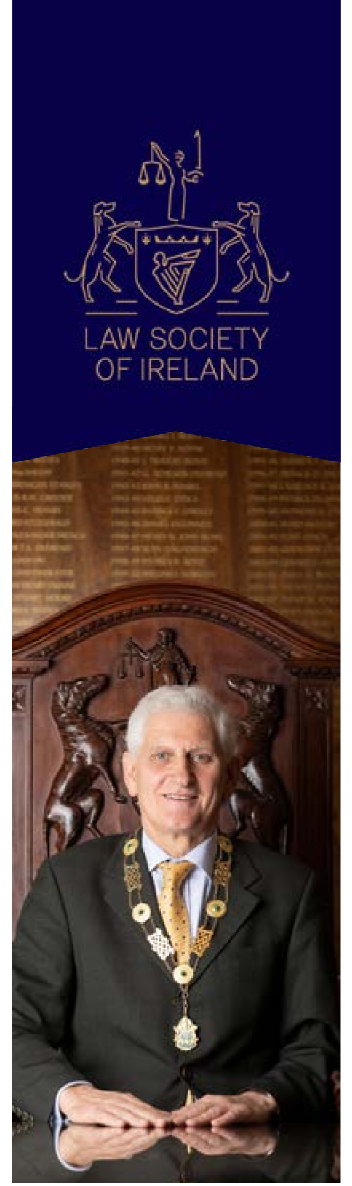
PRESIDENT'S MESSAGE

TRUSTING INSTITUTIONS



Transparency International rates Ireland in 20th place out of 180 countries in its Corruption Perceptions Index (2020) – a measure of public-sector corruption globally. Ireland's score was 72 out of 100 – down two points from the previous year. It is our lowest mark since 2014. Britain came in at 11th place with a mark of 77. New Zealand was ranked in first place, with 88 marks.

There is no reason why Ireland cannot occupy first place in international transparency with as little corruption as possible, and I believe that lawyers have a very important part to play in achieving that goal. We must insist that institutions are honest, and call on the power of truth when encountering dishonesty – and particularly perjury. The public is expected to be truthful, as emphasised by the proliferation of statutory declarations.

Many solicitors who have taken actions against an arm of the State have had the experience of receiving affidavits that can be far from truthful. Hopefully the *Criminal Justice (Perjury and Related Offences) Bill 2018* (when enacted) will ensure that we can, once more, begin to rely on affidavits, including those sworn on behalf of institutions, as being truthful.

To the ends of the earth

Lawyers are expected to be truthful – their obligation to be honest "extending to the ends of the earth" (as stated by former President of the High Court Mr Justice Peter Kelly) – so institutions themselves, and their staff, must be completely honest. A properly functioning country must be free from corruption.

The *Garda Síochána (Powers) Bill*, in its current form, would allow for easier arrests, and would make it illegal, for example, for a person to refuse to disclose their telephone passcode, without the need for a search warrant. To gain acceptability by the public, our police force must be truthful at all levels.

As you know, banks have introduced negative interest charges for high-net-worth individuals. By September 2021, they will collect their charges from solicitors whose clients' accounts exceed €1 million. It appears that banks believe that solicitors are high-net-worth individuals when they hold someone else's money in trust!

I attended with one brave solicitor, Michael Collins from Portumna in Co Galway, who got a Circuit Court injunction on this issue and a refund from the Bank of Ireland. The Law Society has issued directions to our members in an effort to soften the impact of solicitors breaching the *Solicitors Accounts Regulations*, yet all solicitors must ensure that a debit appearing on the client account due to these charges is balanced up immediately.

Anti-trust preliminary ruling

The European Commission, in a recent 'anti-trust' preliminary ruling, has found that certain motor insurers restricted competition in the Irish market by preventing proposed newcomers from accessing their Insurance Link platform – a data-sharing system administered by Insurance Ireland. We know that the spin from these insurance companies is selective, and that they take advantage of their dominant position to disempower claimants and consumer alike when it suits them.

> WE MUST CALL ON THE POWER OF TRUTH WHEN ENCOUNTERING DISHONESTY

Motions coming before Council of the Law Society in July include a recognition and affirmation that the standard of proof in all regulatory matters is the criminal standard, and that the burden of proof lies with the complainant. This will bring the Law Society into line with all other prominent regulatory bodies. g

JAMES CAHILL,
PRESIDENT

PIC: ALAMY

g Volume 115, number 6

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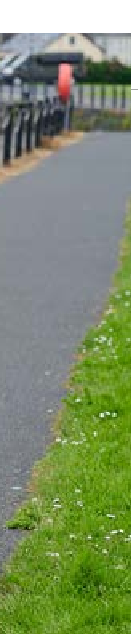

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With so many good businesses shut, the cash-flow drain caused by COVID closures has focused attention on the effectiveness of examinership and its usefulness across business sectors. Barry Lyons hammers it out

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Disability is often the forgotten frontier when it comes to diversity and inclusion, Aisling Glynn tells the *Gazette*'s Mary Hallissey. But at her solicitor's desk, she feels independent, self-reliant, and free

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The new *All-Ireland Arbitration Rules 2020* were designed to take account of the UNCITRAL Model Law on Arbitration. However, the lack of a costs-limitation scheme is a missed opportunity. Tom Wren uses the Force

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We are no longer debating whether diversity is good for the legal profession and for ADR. Susan Ahern and Alison Walker analyse the numbers of women arbitrators and mediators that have been appointed in recent years

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THE BIG PICTURE

FISHERMAN'S BLUES

Angry fishermen took their trawlers to Dublin's River Liffey on 23 June to protest against the lack of Government support in relation to the EU's Common Fisheries Policy, in what appears to be a replay of the mistakes made in the early 1970s. Back then, Ireland conceded a high level of access to Irish fish stocks to other EU member states, particularly France and Spain. It is estimated that, since Ireland joined the EU, the value of fish caught in Irish waters by trawlers from other member states is twice that of all the grants and supports paid to the Irish State over the same period

PIC: LEAH FARRELL/ROLLINGNEWS.IE

SeaQuest
BURDEN SHARING
IRISH
FISHERMEN
AN ENDANGERED
SPECIES
Brexit
gets hit for €44 Million
in lost catches
of EU = €120 million
is the burden sharing?
EQUAL RIGHTS
EQUAL OPPORTUNITY
G.233
SO-472

THREE LITTLE PIGS VS THE BIG BAD WOLF

ALL PICS: CIAN REDMOND

Pupils from St Francis Xavier's School took part in Street Law trials (see news story, p13) on 4 June, run by the Law Society's Mary Ann McDermott

I'll huff and I'll puff

On Jury Lane

It's the wolf, it's the wolf!

Red Riding Hood to the rescue...

Can he fix it?

Round and round the garden

Pinky swear

This little piggy went 'all the way home' via video link

Yes sir, yes sir

Whoops again

A pocket full of posies

Cowabunga!

Who's afraid of the Big Bad Wolf?

Sufferin' succotash!

Heavens to Murgatroyd!

Street gang

Girls and boys come out to play

Yes we can!

Eat my shorts

Three musketeers

Ring-a-ring-a-rosies

Th-th-th that's all folks

SOCIETY SEEKS FORMATION OF STATE MAINTENANCE AGENCY

A Law Society submission to the Oireachtas has said that children should not suffer because a parent chooses to ignore their obligations to provide for their basic needs.

The Society says that it is neither "reasonable nor realistic" to expect that lone parents should bear the primary burden of seeking maintenance from the other parent – and that a dedicated agency should be established for this purpose.

The Society says that the formation of a child maintenance agency is now critical in order to assist parents in resolving maintenance disputes. Such an agency would take on the burden of pursuing and/or enforcing maintenance payments and should have statutory powers to engage with other State organisations, such as the gardaí and Revenue.

The Law Society suggests that the dedicated agency should:

- Provide guidance on appropriate levels of maintenance,
- Assist parents in reaching agreed arrangements,
- Assist in (or, where appropriate, bring) court applications to determine maintenance, when in dispute,

- Act as the collecting agent for maintenance payments in appropriate cases, and
- Engage in the enforcement of maintenance and the collection of arrears.

The agency would require adequate resourcing of services for the amicable resolution of disputes, the Law Society says.

Varying circumstances, such as the income and expenses associated with second families, are complex issues that will require due consideration and comparative analysis with other jurisdictions, the paper adds.

The Law Society acknowledges that enforcement and the recovery of arrears are "hugely problematic" and will require careful consideration.

"What is clear is that, absent a robust system of enforcement, child-maintenance arrears will continue to be massively problematic, and will continue to result in ongoing losses to the State, to lone parents and – most importantly – to children," it says.

A robust regime of powers could include:

- No statute of limitations on maintenance arrears – that is, a lifetime liability extending to a charge on a maintenance debtors' estate,
- A requirement to obtain specific clearance from the proposed agency when seeking to administer estates,
- Where the maintenance debtor has passed away, the arrears become payable to the agency, and
- Imposition of penalties and interest on arrears, similar to those applying to tax arrears.

Sanctions, such as the withholding of a passport or driving licence, and powers to recoup maintenance from future assets (including pensions) are also mooted.

'Reasonable level' of support

While the primary obligation for the maintenance of children rests with their parents, the child has a right to a reasonable level of financial support and maintenance, the Law Society says.

It is a matter for the State to take reasonable steps to ensure that this right is vindicated, and to eliminate or alleviate child poverty to the best extent possible.

The Law Society has made its submission as part of the public consultation on child maintenance, which is being conducted by the Child Maintenance Review Group.

SMALL PRACTICE TRAINEESHIP GRANT SCHEME

The deadline for applying for the Law Society's 2021 Small Practice Traineeship Grant scheme is Friday 2 July.

Now in its second year, the scheme is worth a total of €125,000 and aims to assist with the cost of employing a trainee solicitor and to boost smaller solicitor practices outside the main urban districts of Dublin, Cork, Limerick and Galway.

The Society awards five grants of €25,000 each. This includes funding of €18,000 to the training firm over the course of the two-year training contract, and funding of €7,000 to the trainee solicitor by way of a discount on the PPC1 fee.

Chair of the Law Society's Education Committee, Richard Hammond SC, said: "This can make a real difference to a rural practice's ability to continue to provide a much-needed service, and trusted expert advice, to support businesses and residents in their local community. We are particularly encouraged by the feedback received from grant recipients in our 2020 round, the inaugural year of the scheme, with positive impacts shown for both firms and trainees. The Small Practice Traineeship Grant scheme marks continued progress of the Law Society's commitment to improving gender equality, diversity and inclusion in the solicitors' profession."

To be applicable for the grant, the trainee solicitor candidate must have passed all eight FE1 exams, and the proposed training contract firm should:

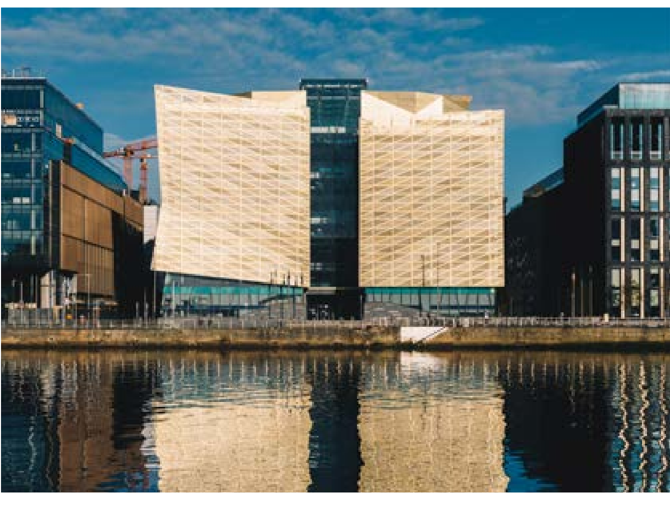
- Be located outside of the city and county of Dublin and the urban districts of Cork, Limerick and Galway,
- Be a small firm, consisting of five or fewer solicitors (including principal, partners, consultants and employed solicitors), and
- Agree to pay the trainee at least the living wage (currently €12.30 per hour).

Applications can be submitted on the Law Society website.

PASS ON TEST-CASE BENEFITS, CENTRAL BANK TELLS INSURANCE COMPANIES

The Central Bank has told insurance companies not to force all holders of similar policies to take legal action in order to benefit from test cases linked to business interruption claims.

Earlier this year, the High Court ruled in favour of four pub owners involved in a test case against insurance group FBD. The publicans had made claims for losses due to business interruption as a result of COVID-19 restrictions. FBD had originally argued that the policies did not cover events such as the pandemic.



Wider impact

On 11 June, the regulator said that, in cases where the final outcome of a legal action taken by customers would have a wider beneficial impact for similar customers, insurers should make sure that all customers received that benefit.

"If an insurance policy is interpreted in any legal action in a manner favourable to policyholders, the Central Bank is of the view that an insurer would not be acting fairly, and in the best interests of its customers, if it does not give the benefit of that outcome to other similarly placed policyholders," the bank's director of consumer protection, Gráinne McEvoy, said in a letter published on its website.

"Insurers should not insist on policyholders pursuing a multiplicity of legal actions dealing with similar issues," she added.

Other firms

The Central Bank said that it also expected insurers to look at the outcomes of legal actions linked to policies offered by other firms with similar business interruption clauses, and to give the benefit of those outcomes to its policyholders where appropriate.

A supervisory framework document, *COVID-19 and Business Interruption Insurance*, published by the Central Bank last year, said that the term 'legal action' included arbitrations, proceedings before the courts, and cases before the Financial Services and Pensions Ombudsman.

SOCIETY CALLS FOR URGENT REFORM OF EASEMENTS LAW

The Conveyancing Committee has made a submission to Government calling for further reform of the law on easements. This is in light of the upcoming deadline of 30 November 2021, by which certain easements must be registered.

The May 2021 submission, titled 'Urgent need to review the law relating to easements', is available at www.lawsociety.ie/submissions.

The committee, in partnership with Law Society Professional Training, is also running an online webinar ('Registration of easements – a ticking clock') from 3-5pm on Thursday 8 July. The cost is €135. Members can register at www.lawsociety.ie/easementswebinar2021.

DONAL O'DONNELL NOMINATED AS NEW CHIEF JUSTICE

Supreme Court judge Donal O'Donnell is set to become the next Chief Justice after the Government approved his nomination on 28 May. Subject to appointment, he will replace Chief Justice Frank Clarke, who will step down later this year, upon reaching the retirement age of 70.

The Government had set up an advisory committee to invite and consider expressions of interest in the position before making recommendations.

Mr Justice O'Donnell was born in Belfast and was educated at St Mary's CBS, UCD, King's Inns and the University of Virginia in the US. He was called to the Bar of Ireland in 1982, started practice in 1983, and was called to the Bar of Northern Ireland in 1989.

In 1995, he was appointed a senior counsel, and he has practised in all of the courts of Ireland, in the Court of Justice of the EU, and in the European Court of Human Rights.

He was a member of the Law Reform Commission from 2005 to 2012.

ENDANGERED LAWYERS

ABDULLAH AL-SHAMLAWI, BAHRAIN

PIC: SHUTTERSTOCK

Al-Shamlawi has practised law for more than 40 years. He is known in Bahrain for his defence of prominent opposition figures, including Sheikh Ali Salman, the imprisoned leader of Bahrain's largest opposition group, al-Wefaq. On 22 March, his licence to practise was revoked for one year, amid a government crackdown on defence lawyers and other prominent civil-society figures.

The decision by the Lawyers' Disciplinary Board to prohibit al-Shamlawi from practising came six months after a judge gave him a suspended sentence over two posts published on social media. The disciplinary board is comprised of lawyers and judges appointed by the justice minister.

Prior to the court decision, he had been sentenced to two years in prison over two tweets on his personal account. In a 2019 tweet, he expressed his personal opinion on fasting, whereafter he deleted the tweet and apologised to everyone who did not accept his point of view. For this, he was found guilty of "inciting hatred of a religious sect".

In a 2018 tweet, he commented on an article in a newspaper, in which he incorrectly said that the Bahraini featured in the article was a naturalised South Asian. Prosecutors interviewed al-Shamlawi about the tweet at the time, but brought no charges. The decision to prosecute him almost two years later, even though others who at the time had posted the same misinformation were not charged, indicated an apparent determination to punish al-Shamlawi under any available pretext, according to the director of the Bahrain Institute for Rights and Democracy (BIRD). For this 2018 tweet, he was found guilty of "deliberately causing inconvenience to others by using telecommunication devices".

The complaint was filed by the justice minister, in which he claimed that al-Shamlawi had violated the *Lawyers' Code* by posting personal views on Twitter. The penalties for infringing the code include warning, reproach, prevention from practising as a lawyer for a period not exceeding three years, and permanent cancellation of the licence to practice law.

Prior to the court verdict, BIRD and Human Rights Watch issued a joint statement that the Bahraini authorities should not contest his appeal. The Bar Human Rights Committee of England and Wales also raised its concerns regarding the prosecution and judicial harassment of lawyers and human-rights defenders in Bahrain, including al-Shamlawi.

Alma Clissmann is a member of the Law Society's Human Rights Committee.

GEDI LAUNCHES NEW POLICY

The launch of the Society's GEDI Task Force in 2019

An information session on the Law Society's Gender Equality, Diversity, and Inclusion (GEDI) policy took place on 16 June.

The policy, which is now available to members at lawsociety.ie, was developed by the Irish Centre for Diversity as a result of a recommendation from the Society's Gender Equality, Diversity, and Inclusion Task Force, which was launched in 2019.

Representatives from the centre were guest speakers at the online information session, which covered the importance of an effective policy on diversity and inclusion, adapting the GEDI policy to meet the needs of workplaces, and 'Policy in action – from policy to a lived document'.

ECO-LAW MOOC MOST SUCCESSFUL YET

Over 4,000 students are participating in the seventh annual massive open online course (MOOC) in environmental law and climate change, delivered by the Diploma Centre team this May, June and July.

The MOOC provides a short, incisive overview of the legal and ethical considerations for those involved in environmental law and the environmental and conservation spheres.

The participants hail from 50 countries, with students from the United Arab Emirates, Argentina, Australia, Belgium, Brazil, Canada, Switzerland, France, Britain, Greece, Hong Kong, Ireland, Israel, India, Italy, Japan, Jordan, Lebanon, Luxembourg, Malaysia, Nigeria, Netherlands, Pakistan, Portugal, and the Turks and Caicos Islands.

This year's MOOC boasted an exceptional programme of talks and live Q&A sessions, with a host of expert speakers. The MOOC remains open until 30 July, so there's still time to register. Join at mooc2021.lawsociety.ie and obtain eight hours of CPD.

LOOPY *LUPUS* ACQUITTED IN ATTEMPTED MURDER JUDGMENT SHOCKER!

PIC: CIAN REDMOND

There was a surprise twist in the *Three Little Pigs* case at the St Francis Xavier's Street Law Court on 4 June, when Alex T Wolf (aka 'Big Bad') was acquitted on all charges – including two for murder.

A surprise witness for the defence was Ms Little Red Riding Hood, who had travelled from the US as a character witness. Rather persuasively, she described the gregarious and voracious canine as "a reformed vegan hipster living in Stoneybatter, Dublin 7 – his only vice being a craft beer on a Friday night".

The mock trial, *DPP vs Big Bad Wolf*, saw Mr Wolf accused of attempted murder. The case was the culmination of weeks of work by over 30 primary pupils through the Street Law programme, run by the Law Society's Mary Ann McDermott and supported by John Elliot (Registrar of Solicitors).

Street Law is a programme that adopts a practical approach that taps into students' interest in the law and aims to promote legal literacy, access to law, and social skills through learning about legal matters. The students started their programme last April in a specially created 'outdoor classroom', and dealt with topics such as natural justice, the structure of the Constitution, and how the court system works. Courtroom practices included witness testimony, and how to make objections during a criminal trial.

Full legal team

Mr Simon Treanor BL (Law Society) presided on the day. 'Judge' Treanor heard full legal teams for both sides, including 'solicitors', 'counsel', and 'devils'. Garda Edward Carroll attended to ensure order in the outdoor courtroom. Emotions ran so high on the day that he was called on several occasions by Judge Treanor to restore order and to quell the "animal behaviour" of certain members of the public.

Mr Sean Hyde put a strong case for the prosecution, encouraging the jury to empathise and relate to the last surviving Little Pig who, owing to her tender years, gave video-link evidence via Zoom.

Mr Andrei Dumitrean, for the defence, capably illustrated, however, that there was insufficient evidence to convict Mr Wolf beyond reasonable doubt.

Celebrity witness

The witnesses for the trial included a distraught Mammy Pig, who was supplied with multiple tissues during her testimony, an investigating detective who testified that he had found a toothpick belonging to Mr Wolf at the scene with matching DNA, and Mr Bob the Builder, whose workmanship in building the pigs' homes was called into question.

Celebrity witness, Ms Red Riding Hood, spoke about the reformed character of Mr Wolf. She testified that, while Mr Wolf had been outside the 5km lockdown perimeter on the day in question, he had good reason to be – he was urgently looking for ingredients to make a cake for her dear old Granny. Having had a cold at the time – COVID wasn't mentioned – he had sneezed and accidentally blown the pigs' houses down. This may have been the crucial testimony that led the jury of 12 boys and girls to ultimately acquit him on all charges.

The 'outdoor classroom' project has now become a community effort, with local companies donating various materials to improve the space for the children.

The students proved that they had a great grasp of the legal issues, made timely objections, and illustrated a flair for the dramatic. The school plans to continue with the Street Law programme for many years to come – there are rumours of *Rapunzel v Witch* being set down for trial in 2022.

Embracing the spirit of Street Law, Tánaiste Leo Varadkar (a past pupil) donated a copy of the Constitution to each of the sixth-class students, together with a number of copies for the school library.

STREET LAW PARTICIPANTS 2021

Shivney Aggarwal, Maja Burksaite, Rebecca Byrne, Ben Carroll, Lily Christine Conroy, Patrick Dayman, Sarah Dolan, Matthew Downey, Andrei Dumitrean, Sophia Dumitritsa, Caoimhe Dunne, Jack Fitzpatrick, Laragh Gibson, Wyneth Gundran, Aaliyah Heeze, Jonah Huitema, Seán Hyde, Ecaterina Ionesi, Ava Keegan, Seán Lawlor, Aoibheann Leonard, Killian McGrail, Grace McLoughlin, Lily Melvin, Bobby Mitchell, Kasie Mooney, Ciara Moran, Sophie Mullins Dowdall, Evie Murray, Amy O'Grady, Garry O'Reilly, Caolan Raftery, Elizabeth Reilly, Oscar Sweeney, Niamh Tobin and Rory Toole.

COLLEAGUES RETIRE AFTER OVER 120 YEARS' COMBINED SERVICE

Three long-standing Law Society employees are to retire this year, having clocked up more than 122 years of service between them. Colleagues and practitioners will miss the familiar faces of librarian Mary Gaynor, IT's Veronica Donnelly, and the Four Courts Office's Paddy Caulfield.

Mary Gaynor

Veronica Donnelly

Paddy Caulfield

Closing the book

Head of library and information services Mary Gaynor is retiring at the end of July, after 42 years.

Mary started in the library in 1979 and has held a variety of responsibilities, culminating in her current role in 2010. Mary also acted as executive editor of the *Gazette* from 1981 to 1991, recalling editorial board meetings with Michael V O'Mahony, Charles Meredith, John Buckley, William Earley, Geraldine Clarke, Gary Byrne and Eamonn Hall, some of whom, sadly, have passed away in recent years.

Library services have changed vastly over the past four decades, including the move to an online catalogue and the digitisation of the judgments collection, as well as the Society's institutional archive.

This project provided opportunities to investigate its history, and we all learned more about the first president, those who died in World War I, and the first women to qualify as solicitors. "It was a joy to work on these projects and to engage with members and their families," said Mary.

The core of the library work is legal research, and Mary owes a huge debt of gratitude to her predecessor, Margaret Byrne, who generously shared her knowledge and expertise.

Mary is immensely proud of her library team, and paid tribute to director general Mary Keane and Teri Kelly (director of representation and member services), both of whom have been unwavering champions of the library.

Her future plans are fairly loose, Mary says, but they include more family time, travel when COVID permits, enjoying the English classics, discovering more new authors, and learning French. "Whatever else freedom from work throws up, bring it on!" joked Mary.

Bolt from the blue

Computer services manager Veronica Donnelly is logging off in July, after an incredible 47 years. Veronica has had a variety of roles. She worked in education and has been secretary to several Society committees. When she joined the education section, it only had a staff of two, dealing with apprentices, helping with exam and related queries, and with admission to the Roll.

Veronica moved into the IT section in 1981, with the computerisation of the membership database at the Society. In 1989, Blackhall was struck by lightning and the servers were blown out. This led to a new database, which served the Society for 25 years. Veronica was very involved in the specification, implementation and monitoring of this database and in processing the annual practising certificates. This information was vital in the production of the *Law Directory*.

"I have enjoyed greatly working in the Law Society with all of the many colleagues, some of whom have become friends for life. I have enjoyed it, but I'm looking forward to my retirement, to having more free time, and to spending more time travelling when the restrictions are lifted," she told the *Gazette*.

Need that room back

After almost four decades, Four Courts manager Paddy Caulfield will finally lock up on 26 August, when he turns 65.

Paddy is a familiar face to the more than 12,000 annual users of the Four Courts' consultation rooms. He joined the Society in 1977, doing clerical support work. He took a couple of years out and then rejoined in 1988, working at the Four Courts.

Known for his courteous and efficient manner, he was always very clear on when he 'needed a room back'! Paddy oversaw the extensive renovations and upgrading of the Four Courts' facilities to its modern format in 2012. The Society's computerised booking system never could quite match Paddy's knowledge: "I almost knew which room each solicitor wanted before they booked it!" he quipped.

After a total of 53 years in the workforce, Paddy is looking forward to the break: "I will miss the people and the interaction, but not the work!" he joked. "I would like to thank all of the members of the profession for their constant courtesy in all our dealings," he said. "Thanks, too, to the secretaries who do the room bookings, for all their help and cooperation over the years."

We wish our retiring colleagues a happy, healthy, and long retirement.

FIRE UP YOUR TRACKER FOR THE VIRTUAL CALCUTTA RUN!

Not to be outdone by a global pandemic, the Calcutta Run organisers have confirmed that the Virtual Calcutta Run will take place from 17-26 September.

Members of the profession, their families and friends will, once again, have the opportunity to fundraise together – virtually – by running, walking or cycling a collective 10,000km, representing the distance from Ireland to Kolkata.

Following on from the success of the 2020 Virtual Run, which saw €300,000 raised for those experiencing homelessness in Ireland and Kolkata, the same target has been set this year to support the great work of the Peter McVerry Trust and The Hope Foundation.

Participants can register individually or with their firm's team, participate locally in their area in their own time, or in smaller groups if their firm has reopened their office – pending the lifting of restrictions.

Distances can be tracked on a variety of apps, such as Fitbit, Strava and Garmin, which are connected to the Calcutta Run idonate.ie fundraising page. This will allow us to track the distances achieved to ensure we complete the virtual distance to Kolkata. It should be said that, in 2020, participants not only got to Kolkata but made it all the way back to Ireland!

As well as everyone uniting to raise funds for these vital causes, it is hoped that participants will use the event to get fit after a busy summer and continue with a daily fitness routine.

Why not follow your colleagues progress, post photos of your own route on Strava, and get to know other interesting exercise routes?

To take part, register at www.calcuttarun.com/virtual-calcutta-run-2021-sign-up.

We hope to have 50 teams participating, with 1,200 individual participants, so please spread the word!

WICKLOW ELECTS NEW PRESIDENT

Following the AGM of the Wicklow Solicitors' Bar Association, held via Zoom on 12 May, Damien Conroy (partner, Augustus Cullen Law) was elected president of the association. He replaces the outgoing president Paul McKnight (Felton McKnight). Brian Robinson (managing partner, Benville Robinson Solicitors) was also elected to the new role of vice-president. Mark Maguire (Maguire McNeice Solicitors) was appointed honorary secretary

NEW SOLICITOR SCs NOMINATED

The Government has approved the granting of patents of precedence to 12 solicitors and 25 barristers. This is only the second time that solicitors have been able to apply to become senior counsel. They join the 17 solicitors who were approved in 2020. Of the 12 approved this year, all are based in Dublin and five are women. Only five of the 25 barristers who have been approved are women.

The new solicitor SCs are Raymond Bradley, Geraldine Clarke, Nicola Dunleavy, Alison Fanagan, Larry Fenelon, Stuart Gilhooly, Damien Keogh, Conor Linehan, Rachel Minch, Geoffrey Shannon, Helen Sheehy, and Keith Walsh (see p48).

The 25 barristers are William Abrahamson, Ray Boland, Conor Bourke, John Byrne, Dermot Cahill, Oisin Collins, Ruth Fitzgerald, Robert Fitzpatrick, Tom Flynn, Ted Harding, Ronan Lupton, Elizabeth Maguire, James McGowan, Barra McGrory, Brian McInerney, Yvonne McNamara, Seamus McNeill, Suzanne Murray, Tom O'Malley, Aillil O'Reilly, Philipp Rahn, Cathy Smith, Fintan Valentine, Andrew Walker, and Carsten Zatschler.

SOCIETY SHORTLISTED

The Law Society of Ireland has been shortlisted in the annual Chambers Ireland Sustainable Business Impact Award for its work in promoting gender equality, diversity and inclusion in the solicitors' profession through the GEDI initiative.

The awards are held to recognise and celebrate best practice in sustainable development and social responsibility undertaken by companies of all sizes across Ireland.

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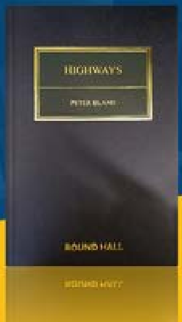
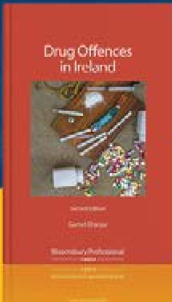




WELLBEING

Our 'Ask an expert' section deals with the wellbeing issues that matter to you

WEIGHING UP MY CAREER OPTIONS

Q I am an employed solicitor in a medium-sized firm in the south of the country. I enjoy my work and would be seen as an expert. My fee income is good, clients are happy, and I get on well with all in the firm. The difficulty is that promotion is based solely on length of service, as opposed to ability. I am ambitious and have lots of ideas regarding the business end of the firm, but new ideas are met with reluctance – almost disdain. I would consider opening a new practice, but it is difficult to leave 'a good job' in 'a good firm'. Please help!

A Congratulations on your successful career to date. You are in a strong position, having several years' experience, together with happy clients, ambition, ideas, and a strong revenue position.

When faced with a career junction, it is useful to pause and create an image of yourself in the future (say, in two to three years). It is valuable to ask: 'what is important to me?'

Here, I encourage you to focus less on titles or positions, and more on the factors that need to be present in the future. What environment would suit you? For example, do you work better with many colleagues around you, or on your own or in a small team? What aspects of your current work motivate and stretch you that you will want to keep? What would you like to let go of? Are you more interested in the business of law or the practice of law? The answers to these questions will help you create criteria against which you can assess potential options.

You do not mention other aspects of your life, and it is risky to examine career options without considering their impact on family and personal relationships. How much additional time can you commit to a new role? It is likely that any significant change will require the investment of more time – whether that is in developing new professional relationships, developing client business, marketing, and potentially the responsibilities of invoicing, debt collection, and financing a business. What time and other resources are available to you?

You present your situation in either/or terms: 'stay in a good job in a good firm' or 'set up your own practice'. Have you considered additional options? Could your ideas and ambition be welcomed in another law firm, or in-house? If you have rejected these options, what contributed to your thinking?

From your query, it seems that you are in an exploratory phase of career change, so I encourage you to investigate some of the options in more detail to enable a ranking against your answers to some of the questions I have suggested.

You mention setting-up a practice. Have you spoken to any colleagues who can share their experiences and realities of setting up a practice? You mention that your current firm promotes based on service, rather than contribution, and that your ideas have not been well-received. Have you considered adapting the way you communicate your ideas to the benefit of the firm? Can you put yourself in the shoes of the lead partners? What is important to them? Can you link a promotion and your ideas to what they value?

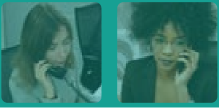
My response includes some questions that a career coach would explore with a client who is contemplating a career or job change. It can be quite an isolating and daunting time. You may find it valuable to work with a career coach who could help you untangle and evaluate the options, so that you take the next step with confidence and commitment.

To submit an issue that you'd like to see addressed in this column, email professionalwellbeing@lawsociety.ie. Confidentiality is guaranteed.

This question was received from a solicitor, and the response was provided by Fiona McKeever, a qualified lawyer now working as an executive and leadership coach. Any response or advice provided is not intended to replace or substitute for any professional, psychological, financial, medical, legal, or other professional advice.

The Law Society provides a career advice and support service that is free to members – www.lawsociety.ie/careers/advice-and-supports.

LegalMind is an independent and confidential mental-health support available to Law Society members and their dependants, 24 hours a day, and can be contacted at 1800 81 41 77.



Urgent Call for Lawyers to Volunteer on FLAC's Telephone Information Line

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We are asking qualified solicitors and barristers to volunteer on a regular basis remotely for a day or half-day on FLAC's telephone information line providing basic legal information.

Please send your expression of interest and a short CV to info@flac.ie

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BUILDING THE IRISH COURTHOUSE AND PRISON: A POLITICAL HISTORY, 1750-1850

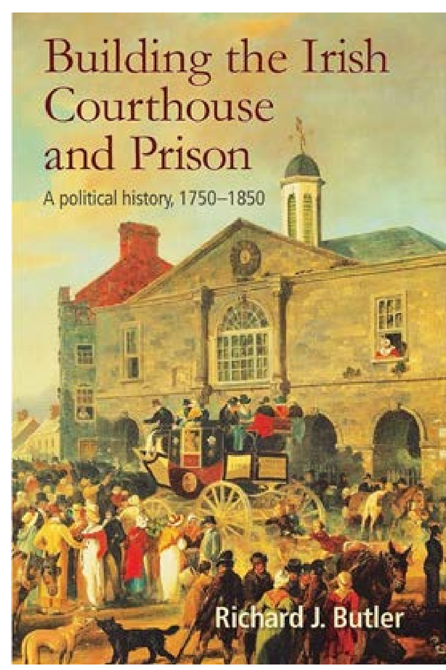
Richard J Butler. Cork University Press (2020), www.corkuniversitypress.com. Price: €39 (incl VAT).

This is a wonderful book, a definitive exploration of many aspects – political (local and national), financial, and architectural – of a dynamic period for the construction of expensive, showpiece, public buildings.

The author, a lecturer in the University of Leicester, refers to the early decades of the 19th century as a time of "frenzied architectural activity, driven mostly by intercounty competition and a desire to appropriate the most fashionable public architecture in a period of comparatively lax grand jury regulation and abundant capital … 1818 marked the all-time peak for Irish gaol building, with no fewer than 18 different projects underway".

There were disputes over the location of such buildings – not only within towns, but also, in some cases, between them. It took a while, for instance, after the division of Tipperary in 1836, to settle whether the assize town (with a new courthouse and prison) for the north riding would be Nenagh or Thurles. A determined, but ultimately unsuccessful, campaign was launched at about the same time to move the seat of the Co Waterford assizes to Dungarvan.

The narrative is based on comprehensive research, and the author's scholarly approach is coupled with a prose style that is a pleasure to read, in the tradition of Sir Charles Brett's *Court Houses and Market Houses of the Province of Ulster*, an elegant and pioneering 1973 work. The historical account complements the Irish Architectural Archive's recent, substantial, and up-to-date *Ireland's Court Houses* (2019).



A detailed appendix sets out the archival resources available for the history of each building, a treasure trove for those who may be minded, or surely will be inspired, to carry out their own further research.

The illustrations are copious and excellent, showing designs and the original appearance of the buildings, in their original street contexts, and the author and publishers deserve great credit for these and the overall production values of the book.

Daire Hogan is a solicitor and a former president of the Irish Legal History Society.

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ADOMNÁN'S *LEX INNOCENTIUM* AND THE LAWS OF WAR

James W Houlihan. Four Courts Press (2020), www.fourcourtspress.ie. €45 (incl VAT).

If you should happen to be an *aficionado* of gripping true-life, historical, Irish-focused action-adventure stories, then *Lex Innocentium* (*Lex I*) is a book you will want to read, not just once, but over and over again. Such is the treasure trove of unexpected, and electrifying, discoveries within its 200 or so riveting pages.

Recently published, *Lex I* is penned by author and retired Irish midlands solicitor James W Houlihan (MA, PhD) and is a masterpiece in tale-telling. Houlihan is an author who fits into that exclusive category: *'un écrivain qui connaît son métie'*.

Yet *Lex I* is a book apart. It is not the dry academic tome one might assume, of interest only to historians, students, and seekers of ancient laws.

This is the story of larger-than-life Irishman Adomnán, ninth Abbot of Iona (also known as Eunan), who was born in Donegal around 624AD. He was a man determined to change the way wars and battles were fought.

In 697AD, Adomnán, together with a number of powerful and influential leaders, met in the petty kingdom of Birr, Co Offaly. (This happens to be the author's hometown, where he ran a successful law firm for many years.)

In Birr, Adomnán proposed the *Cáin Adomnáin*, which became known as the *Lex Innocentium* (or *Law of Innocents*). It was written with the objective of guaranteeing the safety of women, children and other non-combatants in times of war. "Ironically [this was] the single year recording the most incidents of violence [in Ireland]", states the author.

And this is where the action and adventure really start. The reader is led on a wild, spellbinding and sometimes terrifying ride from the Greek to Roman wars, the mass beheadings at Solomon's Temple, and the murders of women, children and clerics.

The author also covers the First and Second World Wars and the reprehensible atrocities committed by American soldiers during the Vietnam War. The details are fully described in *Lex I*, but are far too horrific to be repeated here.

Please don't think that this is solely a story about killings, battles, slaughters, skirmishes, hostages and prisoners – though there are plenty of those, with vividly descriptive examples.

Rather, it is the study of early Irish law, and of one determined and righteous man who lived long ago. Adomnán decided he wanted to make a difference in the Christian world. He did not challenge the right to go to war, just the rules by which battles were fought.

Above all, the author strives to identify the rightful place of Adomnán's law within the history of the laws of war and, in doing so, he reaches some surprising conclusions. This is an excellent, inspiring read for everyone, and a real page-turner.

John Morris is a retired Dublin city solicitor, living in Wicklow.

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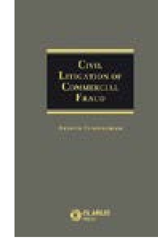

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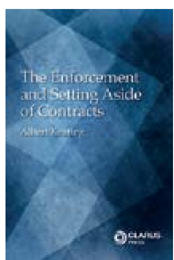

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CYBER SECURITY ADVICE FOR SOLICITORS

Questions and answers with David McNamara, MD of CommSec

Q What type of cybercrime attacks are solicitor's firms being hit with?

Cybercrime has increased by 400% since the beginning of the COVID 19 crisis. Solicitors' firms are attractive to cyber criminals as they are often perceived to be a particularly lucrative target for cybercrime. This is because the perception exists that particularly smaller firms will handle some large transactions but are not necessarily equipped with adequate security and are under-prepared to withstand a targeted cyber-crime attack. The most common attacks against small and medium sized legal firms are phishing attacks undertaken with a goal of committing invoice redirect fraud.

What this means is that if an attacker has gained access to a solicitor's email account through a phishing attack, they have full access to all email on the account and can watch for any sizeable upcoming transactions. Imagine the solicitor who has been compromised is now handling a house sale. When the time comes to receive the money from the purchaser, the criminals strike. The criminals send an email to the purchaser, from the solicitor's email account, with the "new" bank account details to transfer the money to. The buyer often doesn't question this as the email is expected and has come from the solicitor's genuine email account. They then transfer the house purchase fund to the criminal's bank account without realising they have reacted to a fraudulent email instruction.

In our recent experience, we have been involved in helping small / medium sized legal firms to recover from serious cyber-attacks just like this. The crimes are usually only discovered when the solicitor who was expecting to receive the funds queries payment delay. At that point both parties realise they had been the victims of a cybercrime – with the money to purchase the property now gone to a criminal's bank account that has since been closed.

We worked with the solicitor's firms and law enforcement to forensically trace the criminal's activities and gather evidence to assist in their efforts to reverse transfer of the funds, in addition to finding and removing the compromise on the affected email accounts.

A more detailed breakdown of how a Phishing attack like this works is available to read here: https://commsec.ie/2020/07/10/gone-phishing/

Q CommSec have a specialist digital forensics practise - so, what can digital forensics do for a legal firm?

Our forensics specialists can do anything from just securing potential evidence, right up to securing it and analysing every last piece of data on the device (or devices). The most important part is to secure the evidence. A forensics expert can obtain a forensic image of the device(s) and at that point the evidence is secure. From there you can decide how far you need to go in investigating. The forensic image can now be used to investigate, generate activity reports, for eDiscovery, to extract data etc. Whatever you decide you need to do, you are in the right starting place. The original suspect device can be put securely away in a safe and any further action is taken with the forensic image rather than the original device.

The important thing is that you have the foundation in place for whatever action it turns out you need to take when things become clearer, as they usually do over time.

Our forensics experts also provide expert witness testimony in cases where we have either been directly involved, or to contribute expertise to other cases, where expert opinion is needed in cyber forensics.

Q What advice would you give to a legal firm looking to engage a digital forensics company?

They should look to work with an organisation who specialises in IT security and governance and has specific high skills in digital forensics, as opposed to being a good security all-rounder. For example, the head of the CommSec digital forensics practice is is Colm Gallagher. Colm is an experienced detective with a wide range of experience in the security and investigations industry. Before joining CommSec, Colm spent 30 years in An Garda Síochána (the Irish Police Force), where he held a number of roles as a detective Garda, including Digital Forensic Analyst and Cyber Crime Investigator.

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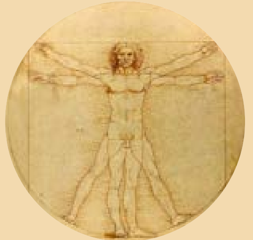
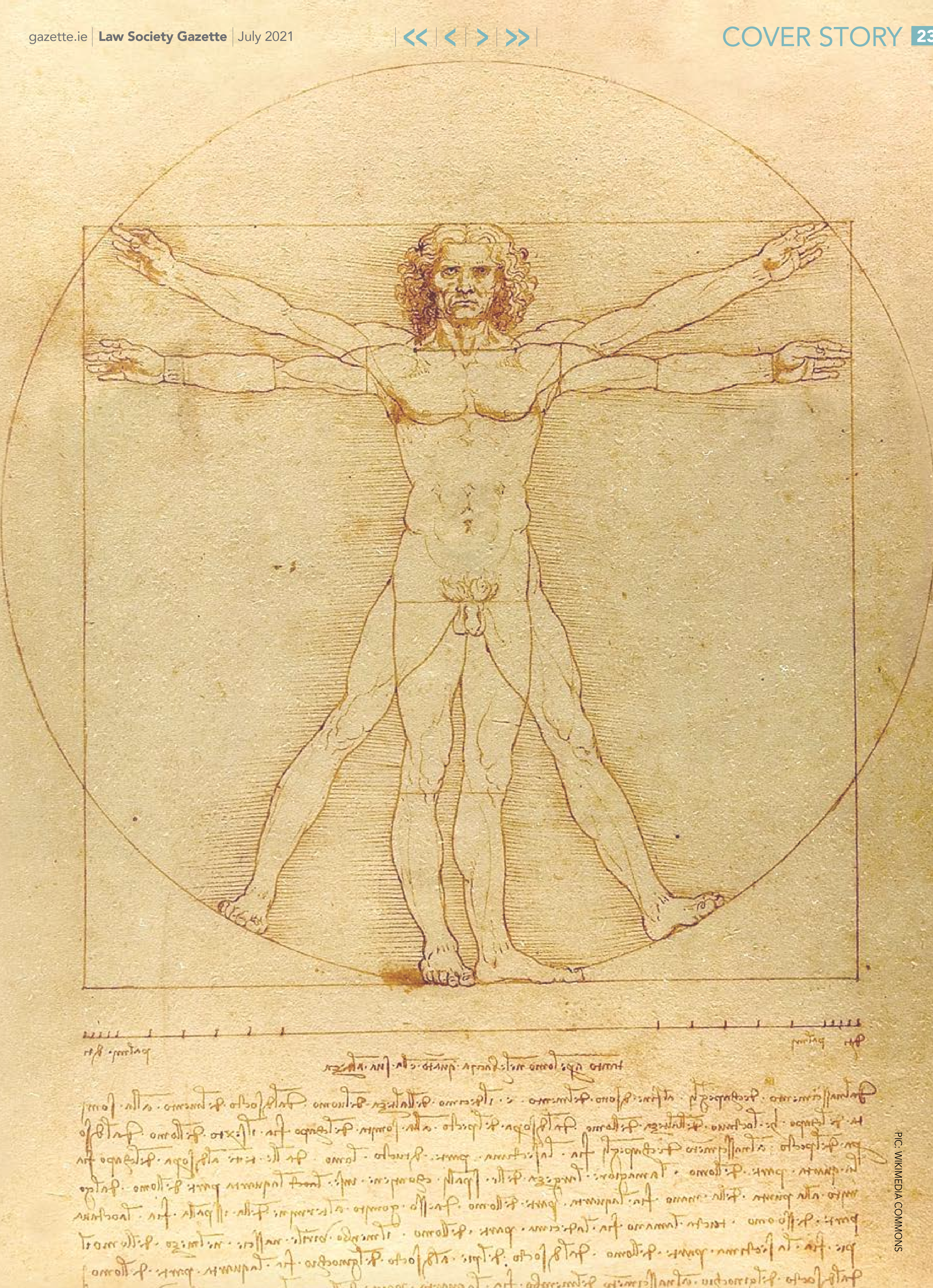
Renaissance AND *reformation*



With so many good businesses shut, the cash-flow drain caused by COVID closures has focused attention on the effectiveness of examinership and its usefulness across business sectors. **Barry Lyons** hammers it out

BARRY LYONS IS A SOLICITOR SPECIALISING IN CORPORATE RESTRUCTURING. HE WAS CO-OPTED TO THE COMPANY LAW REVIEW GROUP IN ITS REVIEW OF THE EXAMINERSHIP PROCESS IN THE EXPECTATION OF POST-COVID BUSINESS DIFFICULTIES



PIC: WIKIMEDIA COMMONS

AT A GLANCE

- **Five court applications are currently required to comply with the examinership process, adding to the costs associated with getting court protection**
- **The Company Law Review Group's submissions to the Department of Enterprise included a proposal for a low-cost, reduced process framework for dealing with latent liabilities**
- **It is anticipated that the Small Company Administrative Rescue Process (SCARP) will be commenced with the enactment of the *Companies (Amendment) Act 2021***

n the simplest terms, where an expert thinks it has a reasonable prospect of survival as a going concern, examinership gives an insolvent company breathing space against the enforcement of debts, pending a scheme of arrangement being agreed by creditors and the court.

Currently, there are at least five court applications required to comply with the processes in an examinership. Each time, tests that are set out in the *Companies Act 2014* must be satisfied to the court's evidentiary standard. This involves solicitors (and usually barristers) – and very much adds to the costs associated with getting court protection and, thereafter, the examinership process.

These court applications prompted an analysis of examinership – from preparing for the initial application for court protection (including the independent expert's report and consequent petition/statement of facts), to the examinership process itself.

Countless applications taking days to prepare (incurring significant costs on behalf of examiners) are granted as a matter of course, adding not a whit to the survival of the company, and making no difference, save for satisfying obligations in the act.

The exit from examinership is usually clear to an experienced insolvency practitioner from the outset of the instruction. While the independent expert will identify the most obvious elements needed (I have never come across a case where investment, and a compromise of the balance outstanding to creditors are not two issues required), sometimes achieving certainty around rescheduling bank liabilities, or repudiating onerous contracts, are required to enable the examiner to certify to the court that the company has a reasonable prospect of survival as a going concern.

Despite its quirks, in its essence, the examinership process is straightforward.

> WHILE THERE IS A SCHOOL OF THOUGHT THAT A RESTRUCTURE IS A CHARTER FOR IMPROPER DIRECTOR CONDUCT, THIS IS ABSOLUTELY NOT THE CASE, AND SO THE MORAL HAZARD ARGUMENT AGAINST ALLOWING A SECOND CHANCE DOES NOT STAND UP TO SCRUTINY

PIC: ALAMY

This being so, why is it so procedurally complicated and, as a result, expensive? Put another way, do the complications add to the process – and if not, why are they there?

Post pandemic

Small and medium enterprises (SME) promoters have had a torrid time in the past 12 years. Having recovered from the banking collapse in the late 2000s and the consequent absence of capital, they have been dealt another huge blow with COVID-19 mandated closures.

While there is a school of thought that a restructure is a charter for improper director conduct, this is absolutely not the case, and so the moral hazard argument against allowing a second chance does not stand up to scrutiny. I have seen the stress etched into business owners' faces, in the teeth of losing everything, including (typically very important for them) their employees' livelihoods. All they want is for the business to survive, and if they can stay a part of it, all the better.

There are typical scenarios: the absence of forfeiture actions suggests landlords are applying a light touch, foregoing rent collection. This reflects that their tenants are not trading and are unable to pay rent. Also, there are no alternative occupiers/uses for their premises.

There may be revenue liabilities warehoused from before the first lockdown, and trade creditors remaining outstanding. Leasing and loan payments are likely not to have been made. By their absence of enforcement action on foot of these liabilities, SME creditors reflect the uncertainty of recovering their money at this time.

FIGURE 1
WORKED EXAMPLE OF A SMALL EXAMINERSHIP

LIABILITIES		CREDITOR RECOVERIES
Bank debt of €500,000		
• Loan of €250,000 and property worth €250,000 @ (say) 70% recovery		€175,000
• Loan of €200,000 book debts		
a) Secured on assets worth €80,000 @ (say) 50% recovery		€40,000
b) Remainder €120,000 recovery of book debts @ (say) 30% recovery		€36,000
• Overdraft of €50,000 @ (say) 10% recovery		€5,000
		Total recoveries of €256,000 (51.2%)
Retention of title creditors of €30,000 (@ 80%)		**€24,000**
Revenue		
• of which €20,000 is unsecured (10%)		€3,000
• of which €30,000 is preferential (15%)		€4,500
• of which €30,000 is super preferential (80%)		€24,000
€80,000		
		€31,500 (39.38%)
Employee entitlements (preferential)	€20,000 (@15%)	€3,000
Trade creditors of	€120,000 (@10%)	€12,000
Landlord	€80,000 (@10%)	€8,000
An uninsured claim pending of	€60,000 (@10%)	€6,000
TOTAL	**€390,000**	**€41,500**

CLRG submissions

A low-cost, reduced process framework for dealing with these latent liabilities is proposed in the October 2020 report of the Company Law Review Group (CLRG), which advocates a Summary Rescue Process (SRP). This has been developed into the 'Small Company Administrative Rescue Process' (SCARP), which it is anticipated will be commenced with the enactment of the *Companies (Amendment) Act 2021*.

At the time of writing, the steps required in the SCARP are:

1) The company procures a report from their insolvency practitioner (IP), whose content mirrors the independent expert report in examinership, including the IP's view that the company has a reasonable prospect of survival, subject to certain matters occurring,
2) The company issues a notice of cessation of payments, advising its creditors it is entering an insolvency process,
3) Should the stakeholders oppose it (for example, on the grounds that the process is being invoked for improper means), they can appeal the notice of cessation of payments to (it is envisaged) the Circuit Court,
4) If protection from enforcement action by creditors is required, there will be a fast-track application to court for protection against sequestration or execution of the liabilities, as currently occurs on the presentation of a petition/statement of facts in examinership,
5) The IP has 50 days in which to put together a scheme of arrangement with the company members and its creditors,
6) If opposed, the scheme of arrangement is put to the court for its approval.

The SRP therefore omits a number of steps otherwise required in examinership, namely:

- No petition/hearing for the examiner's appointment – this means the notice for directions and grounding affidavits are not required and, other than the initial report by the IP, there are no costs associated with initiating the process,
- No requirement to report to the court in 35 days from the IP's appointment, and
- No requirement to file the report on the outcome of the meetings in court pending a hearing on the outcome of creditors' meetings.

At this time, one useful tool in examinership is omitted from the new scheme – the power to assume executive control of the company. While not often invoked, this power being available can make the difference when the scheme of arrangement is prepared for approval.

A place for SCARP

In the absence of an efficient mechanism to resolve the liabilities incurred by businesses highlighted above, the supports being rolled out by the State in response to the COVID-19 lockdowns are blunt. Even if a business can

A LOW-COST, REDUCED PROCESS FRAMEWORK FOR DEALING WITH THESE LATENT LIABILITIES IS PROPOSED IN THE OCTOBER 2020 REPORT OF THE COMPANY LAW REVIEW GROUP WHICH ADVOCATES A SUMMARY RESCUE PROCESS

THE *COMPANIES ACTS* NEED TO PROVIDE AN EFFICIENT, NON-JUDGEMENTAL FRAMEWORK FOR COMPANIES TO SURVIVE AND JOBS TO BE SAVED. THE DEVELOPMENT OF THE SCARP RECOMMENDATIONS, AS CONTAINED IN THE PROPOSED BILL, ACCOMPLISH THAT – AND NEED TO BE IMPLEMENTED URGENTLY

access credit or investment, that money will not be best utilised if all it can be used for is to address historic liabilities, and not provide for its future cash-flow requirements.

With this process, there are more prospects of wholesale recovery, albeit that the pain will properly be spread across the economy. As set out above, there are common categories of debt across companies that have felt the impact of the lockdowns – between landlord, Revenue, trade, and finance creditors.

The fundamental test in examinership is that, if a scheme of arrangement provides that a creditor gets less than they would if the company went into liquidation, they are unfairly prejudiced in the scheme, and it cannot be confirmed by the court. It is proposed that the same test will be provided for in the SCARP.

In Figure 1, I give a worked example of a typical examinership case. Here, bank and retention of title creditors accept payment when the business returns to turning over its trade, with the bank rescheduling payments over a longer period. The bank will rely on personal guarantees (PGs) for any deficit between the sum provided for in the scheme of arrangement, and the amount owed by the company. The guarantor will rely on their income from the company to discharge their obligation on the PG over time.

Therefore, the sum required to exit from examinership will be the costs of the examinership, plus the dividends needed to discharge Revenue, employee creditors, trade creditors, and the uninsured claimant (*see figure 2*). As can be seen from the comparison between the outcome of a restructure run under examinership versus the SCARP, process costs make a substantial difference in the funds required to exit the restructure, particularly where the amounts involved are relatively small. The reduced costs of the SCARP reflects the exclusion of typically unnecessary steps.

FIGURE 2

	Examinership	SCARP
Costs	€70,000	€25,000
Revenue	€31,500	€31,500
Employee	€3,000	€3,000
Trade creditors	€12,000	€12,000
Landlord	€8,000	€8,000
Uninsured	€6,000	€6,000
Total required to exit	**€130,500**	**€85,500**

FIGURE 3

Process	Cost	Available for distribution	Percentage dividend
None	€0	€120,000	30%
SRP	€25,000	€95,000	23.75%
CVA*	€50,000	€70,000	17.5%
Examinership	€70,000	€50,000	12.5%

** Indicative only because no distinction drawn between entitlements of different classes of creditors.*

A fourth way

There are currently two restructuring options: a creditors' voluntary arrangement (CVA) and examinership. Taking the cost of a CVA at €50,000 and examinership as set out above, including SCARP in the mix gives a fourth option – an agreed outcome to the restructure, based on avoiding restructuring costs.

Taking debts of €400,000 and investment of €120,000, these are the funds available to creditors* (*see figure 3*).

The solicitor's role

As the first to be told of notifications of legal proceedings in respect of (for example) forfeiture of a lease or an intention to institute legal proceedings to recover a debt, in many situations, the company's solicitor will be first person outside the boardroom to become apprised of its difficulties.

For the reasons set out above, the SCARP will rebalance the power equation between the creditor and their debtor, particularly in the light of the 'no blame' nature of business difficulties arising from the COVID lockdowns. The CLRG's scheme provides that the same categories of professionals as are currently able to act as liquidators and examiners (which include solicitors) can act as the SRP process overseer.

The *Companies Acts* need to provide an efficient, non-judgemental framework for companies to survive and jobs to be saved. The development of the SCARP recommendations, as contained in the proposed bill, accomplish that – and need to be implemented urgently.

WALK IN MY SHADOW

Disability is often the forgotten frontier when it comes to diversity and inclusion, Aisling Glynn tells the *Gazette*'s **Mary Hallissey**. But at her solicitor's desk, she feels independent, self-reliant, and free

MARY HALLISSEY IS A JOURNALIST WITH THE *LAW SOCIETY GAZETTE*

ALL PICS: JOHN KELLY PHOTOGRAPHY

Kilrush-based solicitor and wheelchair-user Aisling Glynn believes that there needs to be greater visibility of people with disabilities in the legal profession – because role models are important.

As a wheelchair-user, there are many barriers that arise on a daily basis, including inaccessible buildings, poor footpath-kerb design, steps, and lack of accessible transport. More particularly, however, negative attitudes and perceptions or attitudinal barriers towards people with disabilities are still apparent.

"We need to have honest conversations and challenge our own biases and perceptions,"

WHEN I BEGAN USING A WHEELCHAIR, THE WORLD CHANGED AROUND ME. APART FROM THE MORE OBVIOUS PHYSICAL CHALLENGES I FACED, WHAT I FOUND MOST DIFFICULT WAS THAT SOME PEOPLE LOOKED AT ME DIFFERENTLY AND TREATED ME DIFFERENTLY

Aisling says. Living with a disability can be challenging. It requires resourcefulness, determination and problem-solving. "On a positive note," she says, "these are skills that can be particularly useful to a solicitor!"

Heavy load

Aisling credits her teacher mother with steering her towards the modern and easily accessible campus at the University of Limerick when she expressed a desire to study law.

Her mother had the foresight to think ahead about practical difficulties, once Aisling's life began to change with the onset of a rare neuro-muscular condition in her teens.

That scary diagnosis – at 15 and in junior cert year – was a life-changing event.

"I realised that my physical abilities were going to change, so I had to start focusing on what I could do," Aisling reflects, adding that studying gave her a focus that distracted from the enormity of what was happening.

"I had fallen and broken my leg the summer after Leaving Cert, and it meant that I needed a wheelchair, and more help and support. I would have stayed at home and commuted to college, because the thought of moving away was daunting, but my parents wanted me to have the same opportunities and experiences as my sisters."

Living with a disability makes you appreciate the little things, she says. "Of course, it's not always easy, but giving up or feeling sorry for yourself isn't the solution. I try not to worry about the future or what's ahead, because I have no control over it. I prefer to focus on each day and on what I can do," she says.

As a wheelchair-user, Aisling is reliant on others. But at her solicitor's desk, she feels independent, self-reliant, and free. She is adamant that she doesn't want to be defined by her disability. "When I'm busy at my desk I'm least aware of my disability," she says. "I want to focus on my abilities and on what I can do."

Fire and water

"When I began using a wheelchair, the world changed around me. Apart from the more obvious physical challenges I faced, what I found most difficult was that some people looked at me differently and treated me differently.

"There can be an awkwardness. I think sometimes people view a wheelchair as a symbol of inability or incapacity. In fact, it allows me to function, to go to college, and to go to work.

"We need to focus on people and on their abilities. People have asked me: 'But how did you become a solicitor with the wheelchair?' Someone else said: 'Weren't they very good to give you a job with the wheelchair'."

Aisling wants to challenge those negative perceptions and underlying prejudices.

But there have been funny moments, too. "One day, I went to get my hair cut during lunch. While there, someone asked me what disability facility I lived in. An hour later, I was back at my office drafting a will. The

WHEN I'M BUSY AT MY DESK I'M LEAST AWARE OF MY DISABILITY. I WANT TO FOCUS ON MY ABILITIES AND ON WHAT I CAN DO

client said to me: 'I suppose you play a lot of golf?' The difference was: one saw the wheelchair, the other didn't."

In court, judges or other solicitors have sometimes presumed that Aisling was the plaintiff but, on the whole, her experience over the last ten years in practice has been very positive.

On my way

At UL (where she studied law, German and sociology), Aisling lived in a brand-new on-campus apartment, with all amenities to hand.

Perhaps the process of becoming a solicitor was more challenging for Aisling as a wheelchair-user, but she appears to bat away obstacles with a combination of grit and good humour.

With disability, there's a lot of planning and organising involved in everyday life, she says. "There are obstacles and challenges, on a daily basis, that arise from not being able to do the things I could once do for myself. People don't see the small things, such as not being able to open a door or make a cup of coffee. There is a reality to disability, and it does affect your choices." It is a reminder that, for those with a disability, practical issues are a key factor in accessing education and employment.

Aisling's PPC stint (in the Law Society's school at that time in Cork city) was fortuitous, in that the building was streamlined and easily navigable – a city-centre venue with lifts and wheelchair-accessible toilet facilities. "It was a really positive experience. Some of the best friends I have now are the gang I met there in Cork."

Qualified since 2008, Aisling's work life is an extremely busy blend of general practice strands, including personal-injuries litigation, wills and probate, Workplace Relations Commission (WRC) employment and equality law cases, enduring powers of attorney, and complex litigation matters.

She is a key member of the team at her west Clare employers, McMahon & Williams Solicitors. After four years in practice, the firm supported Aisling's decision to specialise with a master's in international disability law and policy from NUI Galway, which involved travelling to campus one day a week and combining work with intensive study.

Aisling describes her employers as incredibly supportive. "With my own personal experience, I had a particular interest and wanted specialist knowledge in the area of disability law," she says.

NUI Galway's law school also runs a disability legal information clinic, where

Aisling volunteered. While she was there, a case came in concerning a child with a physical disability being denied his right to continue his primary education because he required an assistance dog. Aisling took on the case *pro bono*, with the support of her employers, and wrote her thesis on the matter: "I wanted to see if I could use the law to effect real change," she says.

Little bit of love

Living with a disability had given her direct experience of the barriers that disabled people face every day – in accessing work, education, transport, and healthcare, as well as attitudinal barriers. The case took over four years, but was ultimately successful, and the boy was allowed to bring his assistance dog to school.

"Working to vindicate this young boy's rights was a very rewarding experience," she says. "Having a disability myself, I was lucky to have had access to education, so it was something that I felt very strongly about."

The case took long hours of Aisling's time, freely given – but it led to her being given an assistance dog from the charity Dogs for the Disabled. "It was an added bonus six months later for Gina to come my way."

Gina is a labradoodle that comes to work with Aisling and helps with practical matters, such as opening door handles, pressing the elevator button with her nose, picking up dropped items, and so forth. "She is wonderful!" says Aisling, who relishes getting out and taking some fresh sea air every day with Gina, who is very popular with staff and clients!

Aisling has subsequently taken disability and discrimination cases, though she points out that, in the WRC, there are no costs awards. "It's prohibitive for a lot of people, because there is no legal aid in this area."

Free me

Though legal practice appealed to her as a student, Aisling figured that she might pursue a PhD, simply because the UL campus was so accessible and convenient. "I was a bit nervous due to my disability. If I'm being honest, I did wonder if practice was a realistic option. My disability had progressed during those years, and I lost the ability to walk. I became very comfortable in those UL surroundings."

She credits her 'start' to local solicitor and current colleague Joe Chambers, who offered

SLICE OF LIFE

Biggest influence?
■ Personally, my mother. Professionally, Gearóid Williams, principal solicitor. Two great teachers who have really influenced my career.

Earworm?
■ My friend Jack Kavanagh's *Only Human* podcast.

Cats or dogs?
■ My assistance dog, Gina, who is a very important member of staff at McMahon & Williams!

Favourite flick?
■ *The Untouchables.*

Staycation or vacation?
■ Staycation – Kilkee.

Advice to your younger self?
■ Don't be afraid to be yourself, and don't be afraid to ask for help.

Must-have gadget?
■ My mobile phone – it contains my dictaphone, diaries, emails, music, audiobooks.

Favourite page-turner?
■ *The Choice* by Edith Eger: "We don't know where we're going, we don't know what's going to happen, but no one can take away from you what you put in your own mind."

I THINK SOMETIMES PEOPLE VIEW A WHEELCHAIR AS A SYMBOL OF INABILITY OR INCAPACITY. IN FACT, IT ALLOWS ME TO FUNCTION, TO GO TO COLLEGE, AND TO GO TO WORK. WE NEED TO FOCUS ON PEOPLE AND ON THEIR ABILITIES

her a summer internship. "That's when I thought: 'This is what I really want to do', so I went and got the FE1 manuals. Then the focus was on Blackhall and finding a traineeship. I was very fortunate in finding one locally, though it was 2008 and things were starting to change, economically.

"I will always be grateful to Joe for that chance meeting on the street, and for giving me the opportunity to realise what I really wanted to do," she says. "Ten years later, I'm still working where I started in McMahon & Williams, and I will always be grateful to principal Gearóid Williams and to my now-colleagues and friends Ciara and Sinead, who interviewed me."

McMahon & Williams was awarded 'diversity and inclusion law firm of the year' in 2019. Principal Gearóid is treasurer of the Kilrush St Vincent de Paul Society, and Aisling is the chair of the West Clare Mental Health Association, and sits on the board of the National Disability Authority.

"There is genuinely nowhere else I'd rather be working or living," says Aisling of Kilrush. There is a great sense of community, and she meets legal colleagues often, for walks and lunch.

Let me show you

As a wheelchair-user, everything Aisling does has to be planned in advance, and her decisions are often dictated by what is accessible. For instance, when Aisling travels to Dublin on legal business or to board meetings, there is only one accommodation facility that is suitable to her needs. This involves a lot of organising, in terms of arranging transport from West Clare to Limerick train station, ramps to access

the train, wheelchair-accessible taxis when in Dublin, and the various aids and appliances that are part of everyday life.

She manages her commitments thanks to lots of support, which starts at home with her parents and sisters, and extends to her friends and colleagues. Accessibility is improving in court and official buildings, she says, "but we have a long way to go". Some courthouses are still inaccessible, and lifts can break down.

"There's always a sense of relief when I see a ramp, but there are courthouses with ramps outside, then steps inside to access individual courtrooms. Court can be stressful in itself, and having to consider accessibility adds an extra layer of stress."

All right now

However, the COVID pandemic has highlighted the benefits and opportunities that remote working can provide for people with disabilities. Virtual meetings bypass the transport problem and, with 71% unemployment among those with disabilities in Ireland, remote working has the potential to bring about real change.

Digital tools have also made life easier. Aisling can dictate through her mobile phone, make calls through headphones, and use a talk-to-type dictation system. Online case management allows virtually paper-free work, and avoids cumbersome physical files.

"We have embraced technology and social media and, while it's important to have an online presence, in West Clare, word-of-mouth is as relevant today as when I started – and is still the most effective marketing tool."

While technology has brought many benefits, it has its disadvantages: "When I started ten years ago, you would send a letter and put a file away, knowing that you wouldn't hear back for a few days at least. Now we are sending letters by email and replies can come within minutes or hours. It can be difficult to strike the balance between keeping people updated and spending valuable time on trying to reply to numerous emails when it might not always be necessary."

High up on Aisling's wish-list is to see an inclusive and diverse legal profession that reflects the clients, and the communities in which it operates. Reflecting on what she has discovered during her time in law, Aisling says: "I'm lucky to have learned from Gearóid. He is a brilliant lawyer, with honesty and integrity. I've learned to always try and work with colleagues, as opposed to against them."

Her parting advice to fellow practitioners: "Treat your colleagues as you would like to be treated. Also, pick up that file you've been avoiding – it's never as bad as you think!" g

BUILDING POWER

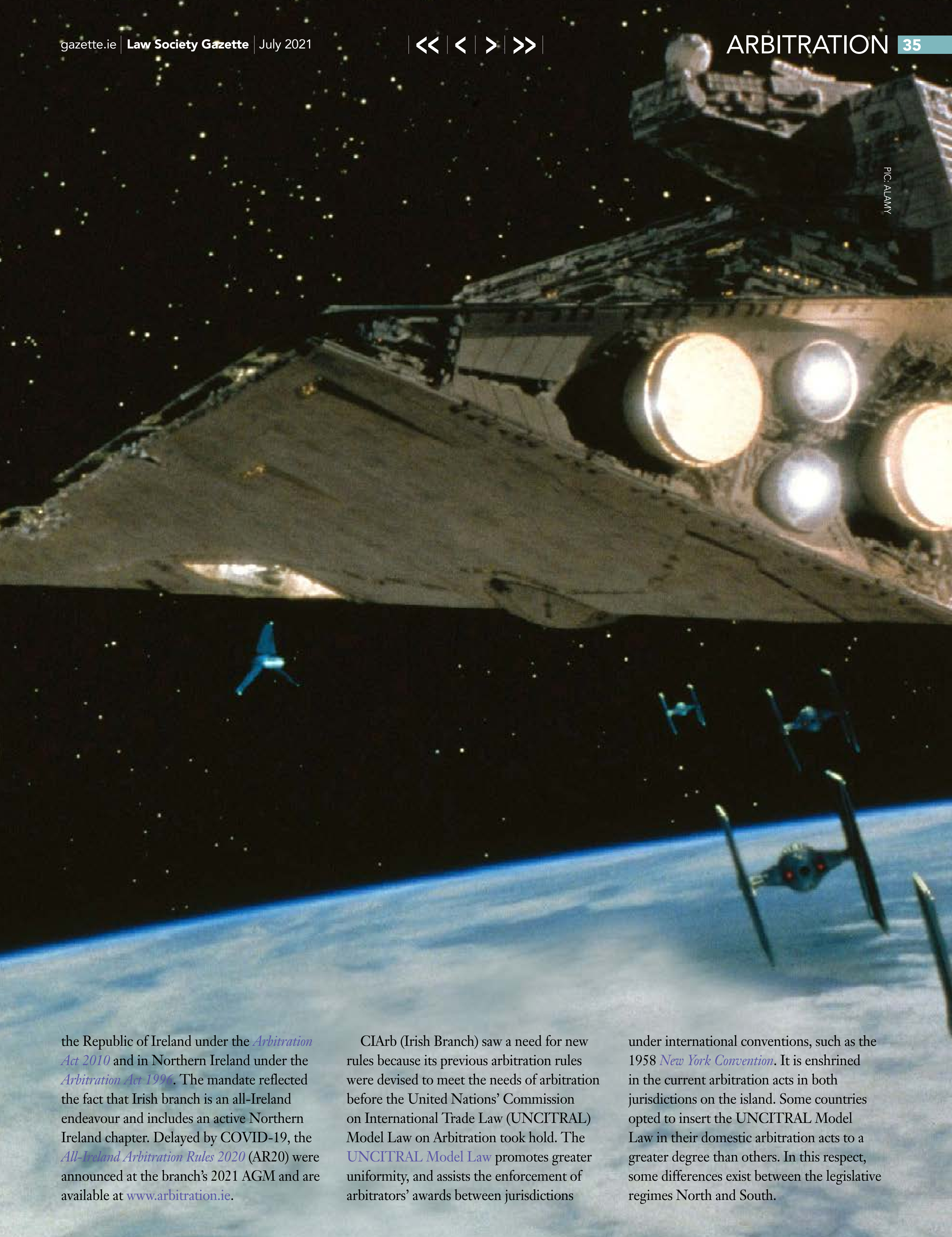
The new *All-Ireland Arbitration Rules 2020* were designed to take account of the UNCITRAL Model Law on Arbitration. However, the lack of a costs-limitation scheme is a missed opportunity. **Tom Wren** uses the Force

TOM WREN QUALIFIED AS A QUANTITY SURVEYOR IN 1981 AND IS AN ADR CONSULTANT. HE WAS SECRETARY TO THE AR20 SUB-GROUP OF THE IRISH BRANCH OF THE CHARTERED INSTITUTE OF ARBITRATORS

AT A GLANCE

- The construction industry needs a voluntary costs-limitation scheme to make arbitration competitive
- AR20 provides as much legal certainty as possible within the *Arbitration Acts* and the general body of law in Ireland and Northern Ireland
- The arbitration rules facilitate a just, expeditious and final determination of a dispute at a minimum of cost to the parties

aving considered the issues, in 2019, the committee of the Irish Branch of the Chartered Institute of Arbitrators (CIArb) gave a mandate to an Arbitration Rules Sub-Group to draft new arbitration rules capable of use in both jurisdictions – that is, in


PIC: ALAMY

the Republic of Ireland under the *Arbitration Act 2010* and in Northern Ireland under the *Arbitration Act 1996*. The mandate reflected the fact that Irish branch is an all-Ireland endeavour and includes an active Northern Ireland chapter. Delayed by COVID-19, the *All-Ireland Arbitration Rules 2020* (AR20) were announced at the branch's 2021 AGM and are available at www.arbitration.ie.

CIArb (Irish Branch) saw a need for new rules because its previous arbitration rules were devised to meet the needs of arbitration before the United Nations' Commission on International Trade Law (UNCITRAL) Model Law on Arbitration took hold. The UNCITRAL Model Law promotes greater uniformity, and assists the enforcement of arbitrators' awards between jurisdictions under international conventions, such as the 1958 *New York Convention*. It is enshrined in the current arbitration acts in both jurisdictions on the island. Some countries opted to insert the UNCITRAL Model Law in their domestic arbitration acts to a greater degree than others. In this respect, some differences exist between the legislative regimes North and South.

Luke and see

In addition to the all-Ireland mandate, the Arbitration Rules Sub-Group set for itself a core objective of producing user-friendly rules that provide as much legal certainty as is reasonably possible and capable of operation within the *Arbitration Acts* and the general body of law in the two jurisdictions.

The means adopted for the achievement of this aim was that the rules would avoid legalese as much as possible, aided by the use of break-out schedules to provide the necessary level of legal detail required for practitioners and parties' legal advisors, in order to meet any contingency that might arise in arbitration.

A second key objective was to facilitate the achievement of a just, expeditious, and final determination of a dispute at a minimum of cost to the parties, consistent with the standards to be expected of an arbitrator. In this respect, the sub-group devised an arbitration costs limitation scheme, referred to in the draft rules as 'Schedule G', but which was pulled before AR20 was approved.

Leia the land

The overarching mandate was encapsulated in rule 1 of AR20, which states: "Wherever a reference is made to 'act' or 'the act', it shall mean a reference to either the *Arbitration Act 2010*, if the arbitration is to be conducted under the laws of Ireland, or it shall mean a reference to the *Arbitration Act 1996*, if the arbitration is to be conducted under the laws of Northern Ireland, whichever is applicable."

Consistent with the aim of user-friendly rules, sections of either act are not referred to in AR20, nor are articles of the UNCITRAL Model Law. The sub-group took this decision, since to attempt to refer to sections of both *Arbitration Acts* would have resulted in an unwieldy document with too much opportunity for confusion. The approach taken stresses the need for an arbitrator to be fully familiar with the act and the law relevant to each appointment.

If AR20 applies to a contract where the parties are in dispute, in the absence of agreement on the appointment of an arbitral tribunal by the parties (normally one arbitrator), AR20 provides that the tribunal will be appointed by the Irish branch chair. An appointment fee of €475 (plus VAT) is required if an application is issued in the Republic of Ireland, and £425 (plus VAT) if issued in Northern Ireland.

Prior to writing this article, I would have said that, to maintain the standard required of arbitrators and to promote fairness in appointments, lists of suitable arbitrators for appointments in both jurisdictions should be kept and managed by CIArb (Irish Branch), which would be charged to keep the branch chair appraised of those available for appointment, with the consent of those individuals. While I remain of the view that the CIArb is the best-placed institute for the education and training of arbitrators, I believe the silos that exist between the different institutes need to be broken down.

PIC: SHUTTERSTOCK

Should a more joined-up approach emerge between the professional bodies as to whom should be the custodian for a panel of arbitrators, a pressing need already exists for a voluntary costs-limitation scheme. I would hope that CIArb (Irish Branch) would deliver as much, in the short to medium term.

Chewie problem

In this author's opinion, the genesis for the limitation of arbitration costs arose out of two illuminating papers read to the Construction Bar Association's Annual Conference in 2019 by Anthony Hussey; and by Colm Ó hOisín and Cormac Hynes – and the subsequent authors' discussion after presentation. It is a gross oversimplification of the authors' papers, but it could be said that one advocated that adjudication would predominate, while the other posited the death of arbitration by costs-led strangulation.

The central aim of a cap on arbitration costs would be to make arbitration more attractive to users of dispute-resolution services, and as a ladder to progression – but not at the sacrifice of standards. While the AR20 Sub-Group's 'Schedule G' was not perfect, if implemented (with or without modification), it would presage a new beginning for arbitration, which obtained a bad name primarily because of costs.

If arbitration on the island is to have a future, it must be made competitive. Conciliation – as various studies have shown, most notably that undertaken by Dr Brian Bond in 2014 (see *Conciliation: how has it served the construction industry and has it a future?*, IEI, 12 March 2014) – has proven to be a successful means of dispute resolution in the construction industry.

In the Republic, a retrograde step was introduced in the public works contracts (PWC), whereby a contractor, having won a recommendation, must provide a bond before payment. In terms of the PWC, conciliation is now less attractive, in that, if a contractor refers a payment dispute to adjudication under the *Construction Contracts Act 2013* and wins, the contractor does not have to provide a bond.

Recently, in *Gravity Construction v Total Highway Maintenance Ltd*, Mr Justice Simons opened a debate on section 6(10) of the *Construction Contracts Act* as to whether a stay on the execution of an adjudicator's decision may be ordered pending the issue of an arbitrator's award. If section 6(10) is so interpreted, adjudication will also stand to lose its attractiveness, and the need for a binding and cost-effective award of an arbitrator will become more acute.

In both jurisdictions, adjudication has its merits. One is to be found in paragraph 28 of the southern *Code of Practice on the Conduct of Adjudications* (issued pursuant to section 9 of the *Construction Contracts Act*), namely: "The adjudicator shall use reasonable endeavours to process the payment dispute between the parties in the shortest time and at the lowest cost." Yet this does not require an upset amount, and users still won't know the bottom line.

The Force is strong

The thrust of 'Schedule G' was to bring back arbitration into competition with other ADR processes for small-to-medium disputes, leaving higher-value references to arbitration

SOME COUNTRIES OPTED TO INSERT THE UNCITRAL MODEL LAW IN THEIR DOMESTIC ARBITRATION ACTS TO A GREATER DEGREE THAN OTHERS. IN THIS RESPECT, SOME DIFFERENCES EXIST BETWEEN THE LEGISLATIVE REGIMES BETWEEN NORTHERN IRELAND AND THE REPUBLIC

untouched in terms of the capping of costs. To attempt the latter would have been unrealistic, in that few (if any) practitioners might be willing to underwrite the risk of capping costs for disputes that could run for months, with millions of euro and reputations at stake.

As proposed by the AR20 Sub-Group, 'Schedule G' stated: "an arbitrator who agrees to participate in any of the below Irish branch costs-limitation schemes shall have his fees fixed at the relevant band, as set forth in this Schedule G, which schemes [the] Irish branch may review and amend from time to time. Any such review shall not apply to an existing appointment under any scheme. Expenses and other costs may be settled and taxed, as provided for in the act.

"None of the below schemes apply to consumer or statutory arbitrations and they apply only to those arbitrators who are approved by [the] Irish branch for each scheme and who have agreed to limit their fees pursuant to this Schedule G, if appointed.

"All monetary values for fixed fees refer to the unit of currency in the jurisdiction where the arbitration takes place. No scheme reduces the standard expected of an arbitrator.

"The 'maximum fee' column [in the panel] does not include accommodation, subsistence, travel costs, or VAT.

"The 'maximum period' column is the period measured from the last day of the hearing or, if no hearing, from the day the arbitrator receives the last written submission pursuant to rule 19, and is the maximum number of days the arbitrator has to write his substantive award in the reference, and to advise the parties that the award is ready to be taken up.

SCHEDULE G – COSTS LIMITATION SCHEMES (IRISH BRANCH)

Scheme	Claims value range (€)	Maximum fee (€)	Maximum period
1	Up to 30,000	3,000	28 calendar days
2	From 30,001 to 90,000	7,000	28 calendar days
3	From 90,001 to 150,000	10,000	28 calendar days
4	From 150,001 to 200,000	15,000	28 calendar days

"The 'claims value range' column in each scheme is the claim value only, without reference to the value of any counter-claim in the reference, and which shall be stated in making any request for an appointment of an arbitrator to the branch chairman, pursuant to rule 3.3 at (iv)."

In some respects, Schedule G is possibly too simplistic in approach. What the sub-group recommended was that the schemes be given a chance and that, its use or (depending upon the level of take-up) feed-back would determine the effectiveness or otherwise of Schedule G within two years. The proposal included that all who would wish to be considered for appointment as arbitrators under the Schedule G schemes would be FCIArb or CArb.

A new hope

CIArb Irish Branch was fortunate to have obtained the support of two senior members of the judiciary, one from each jurisdiction, who are closely connected with the administration of commercial law. Both kindly acceded to providing introductory comments on AR20.

My belief is that such support stands to be squandered unless, and until, a costs-limitation scheme is implemented.

LOOK IT UP

CASES:

- *Gravity Construction v Total Highway Maintenance Ltd* [2021] IEHC 19

LEGISLATION:

- *Arbitration Act 1996* (Northern Ireland)
- *Arbitration Act 2010*
- *Construction Contracts Act 2013*
- *New York Convention 1958*
- *UNCITRAL Model Law on Arbitration*

LITERATURE:

- Anthony Hussey, 'Conciliation v Adjudication – is the tide turning in favour of adjudication?' (Construction Bar Association Annual Conference, 29 March 2019; see www.cba-ireland.com)
- Colm Ó hOisín and Cormac Hynes, 'Is domestic arbitration fit for purpose?' (Construction Bar Association Annual Conference, 29 March 2019; see www.cba-ireland.com)
- Brian Bond, 'Conciliation: how has it served the construction industry and has it a future?' (*Engineers Ireland*, 12 March 2014)

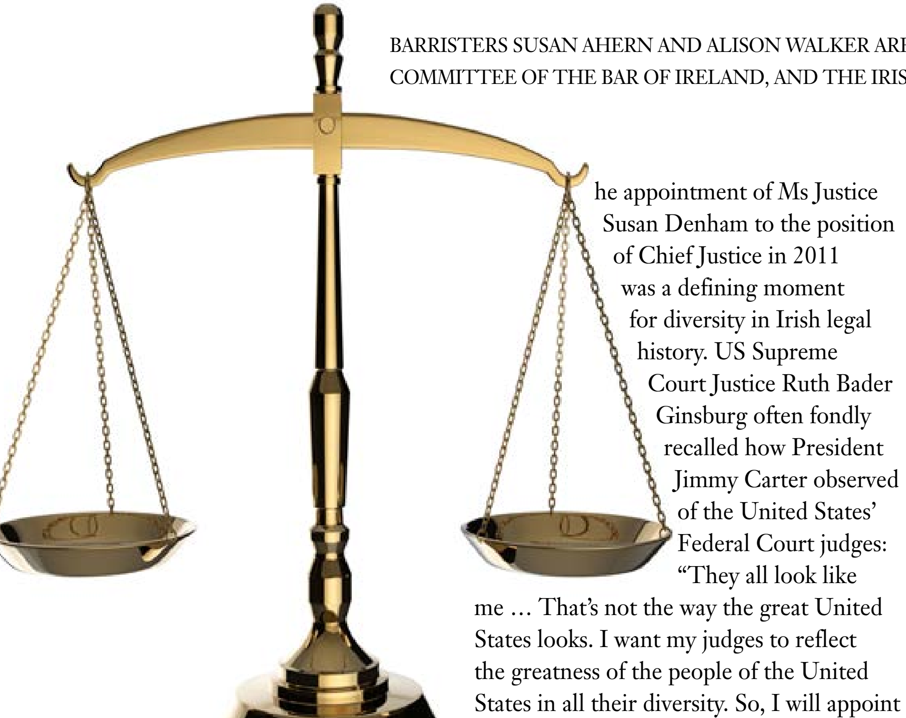
AT A GLANCE

- Many studies show us the changing face of legal practice and the marketplace today – and that diversity is good for the profession as a whole
- More specifically, diversity is important in ADR for a number of reasons: improved decision-making, financial incentive, and representation of the wider community
- There are practices that we can put in motion to increase diversity in ADR for the benefit of our clients and the ADR and legal community

SCALES OF JUSTICE

We are no longer debating whether diversity is good for the legal profession and for ADR: we know this to be true from many studies. **Susan Ahern** and **Alison Walker** analyse the numbers of women arbitrators and mediators that have been appointed in recent years

BARRISTERS SUSAN AHERN AND ALISON WALKER ARE MEMBERS OF THE ARBITRATION AND ADR COMMITTEE OF THE BAR OF IRELAND, AND THE IRISH WOMEN LAWYERS' ASSOCIATION



The appointment of Ms Justice Susan Denham to the position of Chief Justice in 2011 was a defining moment for diversity in Irish legal history. US Supreme Court Justice Ruth Bader Ginsburg often fondly recalled how President Jimmy Carter observed of the United States' Federal Court judges: "They all look like me … That's not the way the great United States looks. I want my judges to reflect the greatness of the people of the United States in all their diversity. So, I will appoint members of minority groups and women…"

It is now clear that we are no longer debating *why* diversity is good for the legal profession and for alternative dispute resolution (ADR). We know this to be true from many studies that show us the changing face of legal practice and the marketplace today. Diversity strategies to include women, people of colour, members of the LGBTQ community, and disabled people must now be implemented and put into practice to achieve equality in ADR appointments.

This article will concentrate in particular on the numbers of women arbitrators and mediators being appointed in recent years, according to the data, and what we can do to further these aims. It is because of the work and determination of organisations like Arbitral Women and arbitral institutions like

PIC: SHUTTERSTOCK

PIC: ALAMY

the ICC, LCIA, ICDR and SCC – many of which are now led by women – that these panels reflect increased gender equality.

Glacial pace

Diversity is important in ADR for a number of reasons: improved decision-making, financial incentive, and representation of the wider community.

We are currently reaching gender parity in ADR representation at a glacial pace. This is unacceptable in these times, and we must act to change this. The World Economic Forum *Global Gender Gap Report 2020* found that it will take 99 years to close the overall gender-parity gap globally, and 257 years to close the gap in economic participation and opportunity.

The 2019 CEDR report, *Improving Diversity in Commercial Mediation*, shows that there are just 34% of women working in commercial mediation, compared with 66% of men. And just 25% of mediators are under 50 years of age.

Diverse arbitral panels show improved quality of decision-making, as different perspectives introduce nuances and ensure that group-think is not a factor, as panellists can cover each other's blind spots.

There is also a financial incentive in promoting diversity and inclusion. The 2020 McKinsey & Company report, *Diversity Wins: How Inclusion Matters*, found that companies with more than 30% of women executives were more likely to outperform companies where this percentage was lower, or where there were no women executives at all. There was found to be a higher likelihood of profitability outperformance difference with ethnicity than with gender. The 2018 Queen Mary International Arbitration Survey shows that clients are increasingly seeking diverse ADR candidates.

The legal teams, tribunals, and ADR practitioners being appointed need to represent the community today, and the parties whose decisions they are resolving. The ICCA report on gender diversity discusses how arbitrators are stepping into the shoes of judges, and poses the question of whether they, too, should be subject to legitimacy requirements, such as the need to be representative of the various stakeholders affected by their decisions.

Taking the pledge

Each of us can make a difference. There are practices that we can put in motion to increase diversity in ADR for the benefit of our clients, and the ADR and legal community, including:

- 'Taking the pledge',
- Addressing the 'leaky pipeline', and
- Unconscious bias training.

The Equal Representation in Arbitration (ERA) Pledge seeks to have more women appointed to arbitral seats on an equal-opportunity basis and to strive for fair representation. The goal is to achieve gender parity in arbitration. The pledge has close to 5,000 signatories worldwide from major international law firms, arbitral institutions, corporations, and individuals.

Finding and considering qualified diverse arbitral candidates is incredibly important. Dame Linda Dobbs, the first person of colour to be appointed as a judge in the courts of England and Wales, said in *Counsel* magazine in June 2019: "Sadly, people are lazy. Instead of actively looking around to see who else they could recruit, … they tend to choose the usual suspects. [We should be] pulling in people who have not been pulled in before and getting them engaged. Role models [are] what we are, reluctantly or not, and it's really important to not just have the 'same old' … there are people actively involved on the ground who should be spotted and used."

Prof Lucy Reed challenges the arbitration community to take just five minutes longer when coming up with a list of potential ADR candidates to think of some suitably experienced women. When searching for diverse names, there is an abundance of networks that you can contact that can provide a list of talented diverse arbitrators and mediators, such as Arbitration Ireland, the Chartered Institute of Arbitrators (CiArb), Arbitral Women, the Bar of Ireland, or the Law Society.

Clients lose out when they are not afforded the opportunity to benefit from the valuable experience of diverse ADR practitioners. Clients need to lead the process, and it is more important than ever to companies and organisations that diversity initiatives are being followed.

Commitment to providing lists with a fair representation of diverse ADR candidates is imperative. Arbitral institutes such as the International Centre for Dispute Resolution (ICDR) have committed to ensuring that 20% of any list of ADR practitioners provided to parties will be diverse, and they have incorporated an algorithmic tool in its case-management system to support this. We need to commit to this target ourselves when compiling diverse and gender-balanced lists of ADR candidates for clients and, ultimately, this percentage should continue to rise and soon reach 50%.

Leaky pipeline

The 'leaky pipeline' refers to the barriers that women encounter in their legal careers that compel many to leave after just the first few years of qualifying – and this fall-out continues up to partner level. Solicitor Suzanne Carthy has written (*Gazette*, May and June 2018) that analysis tells us women are only half as likely as men to make partner in Ireland. Many women exit the market when it nears the time of making partner or becoming senior counsel. There are several reasons for this, such as lack of flexible work options, and work culture.

Having more women and persons of minority working in law firms will naturally increase diversity and inclusion within the business, as diverse lawyers attract diverse clients, and will be more inclined to recommend diverse ADR practitioners. The Law Society encourages firms to sign up to the *Gender Equality, Diversity and Inclusion Charter*. There are financial benefits to being part of this charter and to actively pursuing diversity policies, as clients are increasingly seeking diverse legal representatives who reflect their company's values and visions, and the culture that they nurture in their business. Where firms do not reflect their customers' values, they will lose their business advantage. Clients want diversity, and this needs to be catered for.

The Mansfield Rule is a global initiative signed by 117 major law firms to promote equality of opportunity at law firms, including in the hiring of diverse outside counsel and ADR practitioners. Women and diverse lawyers should also be invited to speak at conferences, as this acts as a platform to increase the visibility of these candidates, which in turn leads to appointments of arbitrators, mediators and counsel.

Unconscious bias training

A major draw to arbitration and ADR is the opportunity to choose your arbitrator or mediator. We need to recognise how our unconscious bias can affect our decision-making and take steps to prevent this. The 'halo effect' has a tremendous impact on clients, counsel and solicitors in the ADR process, and means that when a candidate is recommended to us, their flaws seem unnoticeable, and this writes off any other potential candidates.

Word of mouth is a common source of data, and while it may be easy to go with the usual suspects or the recommended individual, it may not always be in the best interest of the client. A little further research may be necessary to find the most suitable person for the task, and legal teams have an important role to play in the selection of mediators and arbitrators.

WE NEED TO RECOGNISE HOW OUR UNCONSCIOUS BIAS CAN AFFECT OUR DECISION-MAKING, AND TAKE STEPS TO PREVENT THIS

WITHOUT MAKING MAJOR CHANGES NOW, IT WILL BE 2277 BEFORE THE GLOBAL GENDER GAP IN ECONOMIC PARTICIPATION AND OPPORTUNITY IS CLOSED. THIS IS A GLACIAL PACE. INTERVENTION IS NEEDED NOW

The Harvard Implicit Association Test helps to identify our unconscious bias towards certain people. The results often surprise people when their hidden biases are uncovered. Training initiatives such as the Arbitral Women Diversity Toolkit help us recognise and counteract bias when it rears its ugly head. It is very effective when these training initiatives are led by senior, white, male figures, as they are often the gatekeepers. The good work being done by men who are striving for equality on behalf of women and minorities also needs to be acknowledged.

Arbitrator Lucy Greenwood recommends that, when selecting an arbitrator, we should start with a list of criteria or objectives, rather than a list of names. We should look to databases of arbitrators rather than individual recommendations, as this will give a greater pool of arbitrators from which to choose. This will lead to greater transparency and access to information, which will result in avoiding human bias or motive. She also proposes that lawyers advising clients on arbitrator candidates could consider using standardised CVs that remove identifying information, such as names.

Diversity inclusion language can be added to the suite of options for a party putting together an arbitration clause. The JAMS or the CPR diversity clauses could be inserted into contracts allowing for dispute resolution. This language can ensure that, when a dispute arises and an arbitrator is to be selected, this will be done with a view to selecting a diverse arbitrator or panel.

Strategic thinking

Forward-thinking companies and firms are committed to their long-term strategic plans, which often involve promotion of equality, diversity, and inclusion, as this is essential for the future growth and development of a company. These companies and firms will continue with this aim – even now during the pandemic. In business, there will always be fires to put out and urgent challenges to address, but the business must stay committed to its long-term strategy. This should equally apply to litigation and, more properly, to the ADR options that a business may become involved in.

We need diversity now more than ever. New and differing ideas are necessary during these times to come up with new innovations and to succeed in an increasingly competitive commercial environment. The legal community needs to commit to the increased selection of diverse practitioners, as the ADR process will lose credibility where the ADR providers do not reflect the diverse backgrounds of clients and companies.

Without making major changes now, it will be 2277 before the global gender gap in economic participation and opportunity is closed. This is a glacial pace. Intervention is needed now. Arbitral institutions have committed to compiling lists with a fair representation of both diverse and female ADR practitioners. As lawyers, it is now time to compile diverse and gender-balanced lists in our practices when considering recommending arbitrators and mediators, in order to reach gender parity in arbitration sooner. g

LOOK IT UP

- Arbitral Women Diversity Toolkit
- Carthy, Suzanne, 'Hidden figures' (*Law Society Gazette*, May 2018, p38) and 'Mind the gap' (*Gazette*, June 2018, p36)
- CEDR, *Improving Diversity in Commercial Mediation: Executive Summary Report* (May 2019)
- *Counsel* magazine (June 2019)
- CPR Diversity Commitment Clause
- Equal Representation in Arbitration (ERA) Pledge
- Harvard Implicit Association Test
- International Council for Commercial Arbitration, *Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings* (ICCA Reports No 8, 2020)
- JAMS Diversity and Inclusion Arbitration Clause
- Law Society of Ireland, *Gender Equality, Diversity and Inclusion Charter*
- Mansfield Rule
- McKinsey & Company, *Diversity Wins: How Inclusion Matters* (May 2020)
- School of International Arbitration, Queen Mary University (2018), *International Arbitration Survey: The Evolution of International Arbitration*
- World Economic Forum, *Global Gender Gap Report 2020*

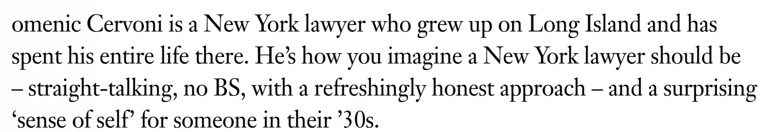
☰ AT A GLANCE

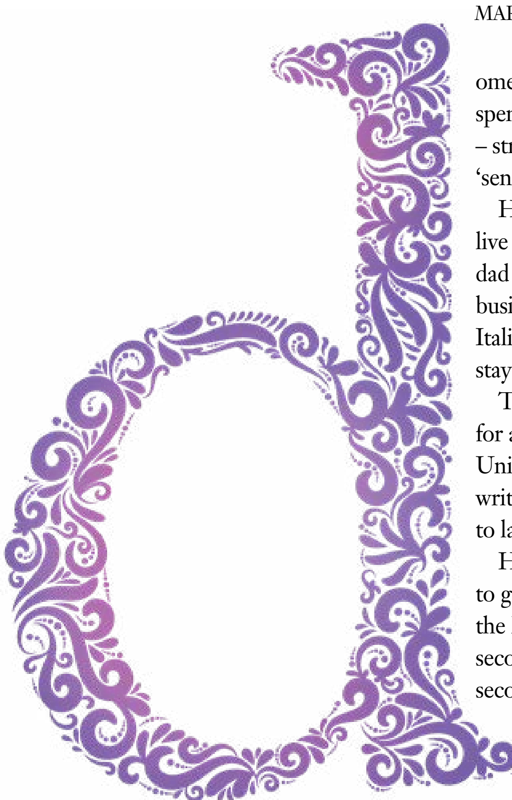
- How Domenic Cervoni and his family coped with his wife's serious illness led to him gaining perspective of what's truly important in life
- He recognised that mental health and wellbeing shouldn't be just an afterthought, especially the mental component
- The subtitle of the book he wrote is illuminating: 'How my wife's courageous battle with rare cancer has motivated me to live a better life filled with passion, empathy, and gratitude'

PAY IT FORWARD

Domenic Cervoni, vice-president of legal at HSBC North America Inc, speaks to the *Gazette* about the impact of his wife's diagnosis with a rare cancer – and the battle he faces each day in managing his own wellbeing

MARK McDERMOTT IS EDITOR OF THE *LAW SOCIETY GAZETTE*





omenic Cervoni is a New York lawyer who grew up on Long Island and has spent his entire life there. He's how you imagine a New York lawyer should be – straight-talking, no BS, with a refreshingly honest approach – and a surprising 'sense of self' for someone in their '30s.

He and his wife Barbie and their two boys, Benjamin (8) and Sebastian (6), live in their Long Island home, not far from his parents and his two siblings. His dad emigrated from Italy to the US at the age of 18 and "is in the construction business". He and Domenic's mother "married fairly young". Like the clichéd Italian family, Domenic was encouraged to "do well in school, be respectful and stay out of trouble". And that's pretty much where the clichés end.

The first in his family to go to college, he attended a university in Maryland for a semester, where he met his wife to be. He then transferred to Hofstra University in Long Island. "I was a history major in college; I like to read and write, but I didn't want to become a professor, so I thought, well I guess I'll go to law school – it seemed like a stable career."

He attended law school in New York City and was fortunate enough, in 2007, to get a job at the international law firm Mayer Brown, where he worked on the litigation team in the New York city office for over six years. He was then seconded to HSBC Bank – an opportunity he actively sought. The six-month secondment turned into 12 months, then 18 and, finally, full-time employment.

He thoroughly enjoyed the experience of jumping from private practice to working in-house. "You can never really appreciate the inner workings of a massive organisation unless you're in the building," he says. "It's an invaluable experience to meet people internally and see how everything works. You hear about the corporate matrix – that's real!"

PIC: SHUTTERSTOCK

Domenic Cervoni

WHEN I SHIFTED MY PRIORITIES TO MY OWN WELLBEING – THEN MY FAMILY'S, AND THEN MY WORK – NOT ONLY WAS I HAPPIER AND FEELING MORE FULFILLED, BUT I BECAME A BETTER ATTORNEY. I BECAME A BETTER PROFESSIONAL

Being an in-house counsel meant liaising with both external counsel and legal colleagues in HSBC. Among other things, he developed the important skill of communicating legal concepts and arguments to non-lawyer businesspeople, whether in the compliance, communications or risk departments, in an easily digestible way. "That was something of a challenge initially – but an invaluable skill to have," he says.

Domenic remains an integral member of the bank's litigation and regulatory enforcement group as vice-president (legal) of HSBC North America Holdings Inc.

Blast from the past

Not long after he started his secondment at HSBC, Domenic and Barbie were married, had the two boys, and bought a house. Life was good – but that didn't last. By the end of 2015, the past had caught up with Barbie – and, by extension, with Domenic and the rest of the family. Back in 2008, his wife had been diagnosed with a very rare cancer. "We were, I don't know, 27 or 28 years old at the time when I was a first-year lawyer at Mayer Brown. Barbie was in the process of obtaining her master's."

The diagnosis meant surgery and radiation treatment. A clean bill of health followed for eight years – until the end of 2015, when she started to get sick once again. In February 2016, she underwent surgery to remove very rare thymoma cancer – cancer of the thymus gland. Despite invasive surgery to remove the cancer, she remained sick, with no obvious reasons why. After a further procedure and various tests and different medicines, there was still no improvement. She continued losing weight, couldn't eat, and suffered muscle twitching and insomnia.

"At the time, our kids were aged about three and one," Domenic says, "and so it was a very difficult situation to watch your significant other's body deteriorate. Then we transferred her care to another hospital – Memorial Sloan Kettering – which I call the miracle factory. Within a week, they were able to diagnose a very rare autoimmune disease, which had been triggered by the cancer and was causing the underlying symptoms.

"They switched treatments and, eventually, in late summer 2016, she started improving. She still has cancer, so she lives with it, and she still has this autoimmune disease, which doesn't go away – it's just managed. Unfortunately, stress is a big trigger, and then when you have young kids at home, good luck, right? So it's a lifelong journey we've embarked on. If you met her today and I didn't tell you any of this, you would never know that she had any of these problems."

Not proud

So how did he cope with holding down a very responsible position, workwise, while looking after two active boys?

"Yeah, it was hard. I am not proud of how I reacted and responded many times, just to be blunt about it. I certainly failed as a husband, as a dad throughout that process. There were many times where I was angry and frustrated and scared, and just didn't know what to make of all of it.

"It's very hard for us 'type A' lawyers – the perfectionist personality type – to have a significant other be as ill as she was, and you can't do anything about it, right? And for a while I struggled with that, and took it out on the wrong people. I felt like there was no control – I couldn't rid her body of tumours, I couldn't make her feel better, I couldn't make her sleep, I couldn't make her not be in pain – and that was hard.

"But then I started thinking about all the things I could do, so I began focusing my energy on those. I started inviting her friends to come over to just hang out with her. I took care of our finances, and transferred her medical records from hospital A to hospital B."

What was the changing point?

"I have a vivid recollection of sitting in my car in the driveway. I had one of those moments when I realised that I couldn't keep doing what I was doing because it wasn't working. There were things I could do, so the object was to try to focus my energy on those, which helped."

I'm still standing

Barbie continues to live with chronic illness, but she's otherwise healthy. "I know that can sound confusing to a lot of people, but they're not mutually exclusive. My wife is a perfect example of this – you can live with illness, but lead a healthy life."

It's an interesting point. There are lots of people managing personal or family illnesses in different ways. It's a significant part of their lives of which their work colleagues might not even be aware.

Listening to Domenic, you get the sense that there's a lot that remains unspoken. There's pain, there's hurt – possibly even fear. But there's plenty of hope, too. And it was that hope that inspired him to write a book, *From Tragedy to Triumph*, about his family's experience. (It's subtitled 'How my

HAVE EMPATHY FOR WHAT OTHER PEOPLE ARE GOING THROUGH IN THEIR LIVES BECAUSE THERE IS SOMETHING BIGGER THAN THE JOB – AND IT'S LIFE, IT'S HEALTH, IT'S FAMILY. AND SO, EVEN IF YOU DON'T NECESSARILY BELIEVE THAT, HAVE EMPATHY FOR THOSE WHO DO

I THINK A LOT OF TIMES, ESPECIALLY IN THE LEGAL PROFESSION, OUR PRIORITIES GET MIXED UP A LITTLE BIT, AND THERE'S SUCH A HEAVY EMPHASIS ON THE WORK THAT EVERYTHING ELSE BECOMES SECONDARY, INCLUDING FAMILY OR FRIENDS AND YOUR OVERALL WELLBEING

wife's courageous battle with rare cancer has motivated me to live a better life filled with passion, empathy, and gratitude'.)

He says that writing proved therapeutic for him – and cathartic. "I had a lot of mixed feelings about all the stuff that had happened. I was angry, I was sad, I was frustrated, I was just so many mixed emotions – and putting things on paper helped me process all that information.

"It was painfully apparent to me how important our overall health is. I had watched my wife's body fail her, and how difficult that made life. Like ordinary experiences – getting up, sitting down, eating, changing a diaper, going for a walk, sleeping. Things we do every day, without even thinking about it – and she couldn't do any of those things."

So, how has the experience changed him?

"The short answer is 'perspective' and a recognition of what's truly important in life – and health is paramount. So I started exercising, and I recognised that taking care of myself first helps me take care of everything else."

Mixed up

"I think a lot of times, especially in the legal profession, our priorities get mixed up a little bit, and there's such a heavy emphasis on the work that everything else becomes secondary, including family and friends and your overall wellbeing. We think 'I don't need to exercise, I don't need to eat well, I don't need to meditate', or do whatever. I could just work, work, work and I'll be fine. And maybe you can for a period of time. In my experience, you burn out eventually. When I shifted my priorities to my own wellbeing – then my family's, and *then* my work – not only was I happier and feeling more fulfilled, but I became a better attorney. I became a better professional.

"And that's one of the things that I'm trying to impress upon people when speaking about mental health and wellbeing – it shouldn't be some afterthought, especially the mental component of it. But not everybody believes that, if I check in and take care of myself mentally, whatever that means for you (maybe it's walking the dog, reading a book, 20 minutes of quiet time), it will make you feel better and have an impact on your life, on how you approach the day and its challenges. There's a quote from the writer Eleanor Brownn that I love, which says that 'self-care is not selfish, you cannot serve from an empty vessel'."

Advice to the C-suite

What advice would he give to employers about how they can best support their employees in tough times?

"Have empathy for what other people are going through in their lives, because there is something bigger than the job – and it's life, it's health, it's family. And so, even if you don't necessarily believe that, have empathy for those who do. Even now, we're learning from the pandemic about the importance of flexibility, and how that has a very positive influence on people.

"We have also learned from this pandemic that, if you have the right people, they're going to do the job right. They might need to be allowed to take a small break during the day; they might need to go to a doctor's appointment, but they're going to get the work done, and it's going to be high-quality work. And so, be empathetic with your employees who are suffering, provide flexibility, and keep an open mind – no judgment. Something we seem to be getting right at HSBC."

Wellbeing v Bottom Line

What do you have to say about the 'suits' who look on staff wellbeing as being great for the bottom line? Is it right that the focus is on the bottom line rather than, first and foremost, on the mental and physical wellbeing of your staff?

"The short answer is that I don't think they're mutually exclusive. I would like to think that prioritising your people's wellbeing is the right thing to do, and that should be enough, but, practically speaking, sometimes it's not. But like I said, the two are not mutually exclusive. In other words, it is not 'either focus on people's wellbeing' or 'improve the bottom line'. They're actually connected, and the research suggests that, if you are taking care of your people and they are making healthier life choices – physical, emotional, mental – they'll be better at their jobs. They'll be more productive, they'll be happier, the work product will be better, there'll be less burnout, less attrition and less turnover.

"I am encouraged by some of the progress I'm seeing, at least in the United States. Speaking to law firms, and other in-house lawyers, there seems to be a more intense focus on some of these things, and so that's encouraging. There's a long way to go. We're not there yet, and I don't think we will be for a while, but I think we're off to a pretty good start."

From Tragedy to Triumph *is available to borrow through the Law Society Library.* g

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If you have been affected by any of the issues raised in this article, you can find support through LegalMind, an independent and confidential mental-health support available to solicitors and their dependants, 24 hours a day; tel: 1800 81 41 77. See www.lawsociety.ie/legalmind.

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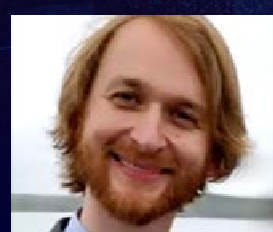
Gráinne Bryan

Inés Rubio



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IN HIGH-STAKES M&A, DATA BRINGS RISK AND REWARD

■ One year on from the beginning of the pandemic, companies in Ireland and across Europe face a tenuous economic climate. For many large organisations, a key piece of the survival strategy has been to centre M&A activity on bolstering business resilience. With this shift, due assessment of data risk (across IP, privacy, legal and other exposures) has become an increasingly critical element of M&A decision-making.

M&A activity is inherently propelled by confidence—in systemic factors, business stability and the certainty of data provided. Any sudden, unexpected changes to the context a deal has been negotiated within can complicate the process, cause delays or result in a failed transaction. This is why due diligence is so critical, and why given today's digital climate, data assessments must be a routine part of those processes.

The combined effects of remote work and an increasingly active global M&A landscape have made it more difficult for organisations to meet the demands of maintaining thorough due diligence and data analysis processes. In some cases, this has led to an increase in administrative overhead and other complexities in many transactions.

DATA RISKS IN M&A

■ M&A risk has also increased in the wake of data protection regulations like GDPR, and high-profile instances of data breaches. We have seen generally over the past eighteen months examples of the implications that can result from oversights in data due diligence, these oversights can result in organisations being exposed to the potential risk of incurring significant fines and liabilities due to alleged GDPR violations therefore reinforcing the importance of carrying out a comprehensive data due diligence from the outset.

There are steps organisations can take to overcome these new issues and efficiently and accurately evaluate their risk exposure in a potential deal. Mastering the use of technology in the due diligence and data assessment process will also help organisations reap more value from their data or the data they are acquiring from a target company.

Assessing the quality of data governance processes and data sharing practices among target companies and their third parties is a fundamental first step. Consideration must be given to the data in possession of the target company, the data held by third parties and protection requirements that will apply after a transaction closes. Counsel have an obligation to consider all relevant variables. This includes granular analysis of the information-sharing ecosystem and whether data is being sold or traded in violation with stringent data protection laws.

If an investment is being made to secure access to another company's data, the purchasing business should ensure that the target firm has already obtained consent from their customers to share data with third parties. Transference of consent is a complex legal issue. Without the proper structures in place, liability for breach of existing agreements with consumers can result in significant penalties for the acquiring organisation.

IP is another area where counsel should conduct a data audit to uncover any instances of improper use of IP, leakage of proprietary information or other IP-related risk. Contracts should also be vetted to assess any factors which may subject the business to long-term risk.

In an effort to get deals over the line, however, companies may not fully observe privacy, security or regulatory risks. Failure to adequately assess exposure in these areas can create significant future legal and regulatory problems. This of course poses a dilemma. Counsel must either evaluate massive volumes of information and thoroughly assess risk or skip the technical assessment so a deal's value can be achieved quickly. Balancing these expectations—maintaining a high standard of performance without an overcommitment of resources—requires the use of advanced analytics tools to automate the most cumbersome parts of the process.

LEVERAGING AI

■ The emergence of AI technologies and advanced analytics has accelerated data due diligence in M&A. With these, counsel can understand and mitigate critical data risks, allowing them to streamline asset acquisition under tight deadlines. Analytics tools like predictive coding scale strategic decisions about a transaction (i.e. what data needs to be retained or remediated ahead of the deal) and drive faster outcomes for data inventory and review.

For example, our team at FTI Consulting recently leveraged analytical review to remediate corporate IP in a divestiture. Using a combination of our experience, technical expertise and a blend of our analytical tools, the team determined the content of a massive universe of information residing on servers, laptops and other corporate applications, and ultimately remediated 1.3 million files. The strategic use of analytics enabled the team to protect corporate IP ahead of the divestiture, significantly reduce risk and move the deal forward in less than three months, all without disrupting business operations.

No business or industry is immune to the reality of their ever-increasing dependency on data, and the amount of due diligence required to successfully move deals forward is only going to increase. Learning to leverage technology to ensure total completion of this process is essential for any firm looking to mitigate risk, ensure prices paid are accurate and to make strategic decisions.

CONCLUSION

■ While technology offers tremendous potential for expediting high-stakes M&A due diligence and mitigating risk, is it not a silver bullet. Guidance from experts who can conduct robust technical examination of systems, and guide the application of analytics, is critical.

The importance of human oversight in the due diligence process is inarguable, but the strategic use of advanced technology and bespoke solutions will allow counsel to provide deeper insights, better valuations, drive efficient and informed decisions, deliver profitable long-term outcomes for their clients and prevent unexpected post-closing legal and regulatory liabilities.

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12 SOLICITORS NAMED SENIOR COUNSEL

The latest batch of 12 solicitors join their 17 predecessors who were granted patents of precedence in 2020. **Mark McDermott** reports

MARK McDERMOTT IS EDITOR OF THE *LAW SOCIETY GAZETTE*

SOLICITORS HAVE A UNIQUE PERSPECTIVE THAT THEY CAN BRING TO THE ROLE OF SENIOR COUNSEL AND WE ARE PLEASED THAT THE MANY CONTRIBUTIONS OF OUR PROFESSION TO THE LEGAL SYSTEM AND ADMINISTRATION OF JUSTICE ARE ONCE AGAIN RECOGNISED

Law Society President James Cahill has congratulated the 12 solicitors who have been approved by the Government for the granting of patents of precedence. This will allow them to use the designation 'senior counsel'.

For the first time in 2020, members of the solicitors' profession were allowed to apply for patents of precedence as a result of provisions of the *Legal Services Regulation Act 2015*.

Mr Cahill said: "We are proud to congratulate our colleagues who have demonstrated the necessary skills, knowledge and experience to become senior counsel, including former presidents of the Law Society – Geraldine Clarke and Stuart Gilhooly – and the Law Society's deputy director of education, Dr Geoffrey Shannon.

"Solicitors have a unique perspective that they can bring to the role of senior counsel," the president added, "and we are pleased that the many contributions of our profession to the legal system and administration of justice are once again recognised."

Of the 12 this year, all are based in Dublin and five are women, while only five of the 25 barristers who have been approved are women.

Raymond Bradley SC

(Malcomson Law, Dublin)

Raymond is managing and senior partner of Malcomson Law, where he leads their health-law litigation team. He is perhaps best known for his representation of victims in the contaminated blood scandal, in which he represented clients in Ireland, Britain and New Zealand. He maintains a cross-jurisdictional law practice in a wide range of health-related areas, including medical negligence, compensation schemes, statutory inquiries, inquests and product liability actions, specifically relating to pharmaceutical and medical-device products.

Geraldine Clarke SC

(Gleeson McGrath Baldwin LLP, Dublin)

Geraldine is a partner in the litigation and dispute resolution department of Gleeson McGrath Baldwin LLP. She is a past-president of the Law Society of Ireland, and of the DSBA. She has served as chair of the Property Services Regulatory Authority, as a member of the Financial Services Appeals Tribunal, and the Solicitors Disciplinary Tribunal. She is currently a member of the Legal Services Regulatory Authority.

Nicola Dunleavy SC

(Matheson, Dublin)

Nicola has a broad commercial litigation and investigations practice, and co-heads Matheson's commercial litigation group. She has significant expertise in EU and multijurisdictional cases and in acting as advocate in alternative dispute resolution. In January 2021, she was elected president of Arbitration Ireland – the first female president in the association's history. She is a court member of the London Court of International Arbitration.

Alison Fanagan SC

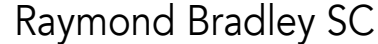
(A&L Goodbody LLP, Dublin)

Alison trained as a solicitor with Gore & Grimes. On qualification, she joined A&L Goodbody where, for the past 30 years, she has practised as a regulatory litigator with a particular expertise in planning and environmental matters. She was made a partner in 2000 and became a consultant in 2008, and jointly heads up the nine-strong environmental and planning group at the firm.

Larry Fenelon SC

(Leman Solicitors LLP, Dublin)

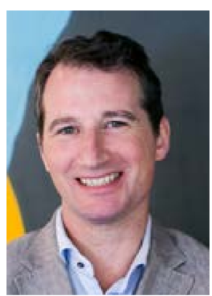
Larry co-founded Leman Solicitors LLP in 2007 and managed the firm from 2007 to 2018. He heads up the firm's litigation department and specialises in resolving construction, commercial property, commercial and sports disputes. He is an experienced dispute resolver and has been a CEDR mediator since 2005. He is a former chair


Raymond Bradley SC

Geraldine Clarke SC

Nicola Dunleavy SC

Alison Fanagan SC


Larry Fenelon SC

Stuart Gilhooly SC

Damien Keogh SC

Conor Linehan SC

Rachel Minch SC

Dr Geoffrey Shannon SC

Helen Sheehy SC

Keith Walsh SC

of the Law Society's ADR Committee, and a committee member of the Chartered Institute of Arbitrators.

Stuart Gilhooly SC

(HJ Ward & Co Solicitors LLP, Dublin)

Stuart qualified as a solicitor in 1995 and is a partner in HJ Ward & Co. He practises mainly in the area of personal injuries and sports law. He served as president of the Law Society of Ireland (2017) and the DSBA (2011). He has chaired many Law Society committees, is a member of the Superior Court Rules Committee, and was the Law Society's nominee for the Personal Injuries Commission, and the Administration of Civil Justice Review.

Damien Keogh SC

(DKA Solicitors, Dublin)

Damien is a construction lawyer, arbitrator, mediator, adjudicator and conciliator with DKA Solicitors, Dublin. He is a fellow of the Chartered Institute of Arbitrators, an adjudicator on the minister's Construction Contracts Adjudication Panel, a CEDR-accredited mediator, and a lecturer at a number of universities and colleges. He co-authored *Adjudication Practice and Procedure in Ireland Construction Contracts Act 2013* (Routledge, 2020).

Conor Linehan SC

(William Fry, Dublin)

Conor is a partner at William Fry and head of its environment and planning group. He is active internationally, serving on the IBA President's Task Force on Climate Justice. Conor was the Government appointee to the panel of environmental law expert arbitrators at the Permanent Court of Arbitration in The Hague. He is a member of the Advisory Board to the Centre for Law and the Environment at UCC, and the Law Society's Environment and Sustainability Task Force.

Rachel Minch SC

(Philip Lee, Dublin)

Rachel is a partner in Philip Lee, specialising in planning, environmental and public and administrative law. Her practice to date has primarily involved advising public-sector clients in these areas, with an emphasis on the defence of their decisions in the superior courts. Rachel is a Council member and former chair of the Irish Environmental Law Association (2012 to 2018). She is a regular conference speaker and lecturer (TCD, Law Society and King's Inns).

Dr Geoffrey Shannon SC

(Law Society of Ireland, Dublin)

Geoffrey is a solicitor and senior lecturer in child law and family law at the Law Society of Ireland. He held the role of Special Rapporteur on Child Protection for the Irish Government from 2006 to July 2019 and was chair of the Adoption Board and its successor, the Adoption Authority of Ireland (2007 to 2020). In 2010, he was appointed by the Government to chair the Independent Child Death Review Group. Earlier this year, Dr Shannon was appointed chair of an independent review into the manner in which complaints in relation to the sexual abuse of children were dealt with in St John Ambulance Ireland.

Helen Sheehy SC

(Helen Sheehy & Co, Dublin)

Helen is the sole practitioner in Helen Sheehy & Co, with offices in Dun Laoghaire. She is an expert in copyright law, particularly relating to recorded music and collective management organisations. Her most significant cases have involved obtaining Norwich Pharmacal Orders against internet service providers to obtain the names and addresses of infringers, site-blocking orders, cases (including the Supreme Court) that involved 'graduated response', and others (CJEU) that led to the introduction of new sections of the *Copyright and Related Rights Act 2000*.

Keith Walsh SC

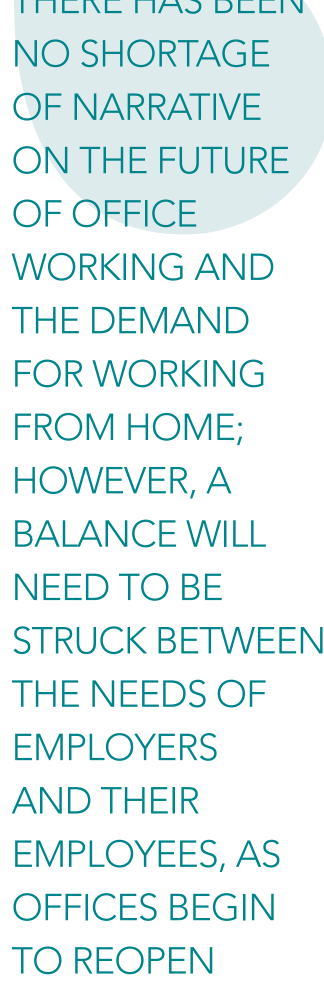
(Keith Walsh Solicitors, Dublin)

Keith is the principal of a four-solicitor practice, author of *Divorce and Judicial Separation Proceedings in the Circuit Court* (Bloomsbury, 2019), and specialises in family law and mental-health law. He is a multiple recipient of the Irish Law Awards' Family Law and Mediation Team/Lawyer of Year award. He is an elected member of the Council of the Law Society and a former chair of both the Law Society's and DSBA's Child and Family Law committees. g

THE FUTURE IS NOW

The pandemic has effected large-scale digital transformation, this year's In-House and Public Sector Committee panel discussion heard. **Mary Hallissey** reports

MARY HALLISSEY IS A JOURNALIST WITH THE *LAW SOCIETY GAZETTE*



THERE HAS BEEN NO SHORTAGE OF NARRATIVE ON THE FUTURE OF OFFICE WORKING AND THE DEMAND FOR WORKING FROM HOME; HOWEVER, A BALANCE WILL NEED TO BE STRUCK BETWEEN THE NEEDS OF EMPLOYERS AND THEIR EMPLOYEES, AS OFFICES BEGIN TO REOPEN

For obvious reasons, lawyers will not be happy with hot-desking arrangements in any post-pandemic office space shake-up, this year's In-House and Public Sector Committee panel discussion heard on 27 May.

When lawyers eventually return to their offices, they still won't want to share a desk, the participants agreed, since the desire for privacy is so strong on legal matters.

And while practitioners may want the flexibility of working from home, they will have missed the external retail options adjacent to their offices, the virtual discussion heard.

Ebba Mowat (divisional director at Savills Ireland) gave an overview of the post-pandemic property situation.

Mowat said that employers face a conundrum, in that their staff want the flexibility of working from home, yet bosses face challenges surrounding data protection and management of employees' wellbeing.

For example, many workers do not have dedicated office space at home, particularly those in urban locations, where house-sharing is dominant, she said: "This gives rise to a worry about appropriateness of space, in terms of wellbeing," she said.

While hub-and-spoke office set-ups – high-quality, city-centre buildings with dispersed smaller units on the periphery – have become popular in large metropolises like New York and Paris, they may not be so much in demand in Irish cities, given that commuting times are lower and cities smaller, Mowat said.

Collaboration

Collaboration spaces will remain important in offices, she predicted, as well as the increasing use of 'no-touch' technology.

"There has been no shortage of narrative on the future of office working and the demand for working from home; however, a balance will need to be struck between the needs of employers and their employees, as offices begin to reopen.

"A hybrid working model is predicted in many cases, although it is recognised that this is personal to the specific role," Mowat predicted.

She added that those who wished to push their career forward would also desire to attend the office.

Efficient energy ratings in office buildings have become an increasingly important factor in lettings, with environmental, social and governance policy a key consideration in a company's future, Mowat also predicted.

As a result, it is expected that there will be polarisation between modern spaces and older offices, since any saving in rent on older buildings will be reduced by higher operational costs.

"Younger people now coming into businesses expect sustainability to be dealt with seriously," she added.

Committee chair Anna Marie Curry commented that in-house lawyers are perhaps more used to collaboration than those in private practice.

For young lawyers, working from home at the very start of their careers is obviously not ideal, Curry added, since mentoring is such an important part of training. "It's much more difficult when a junior can't just knock on somebody's door with a question," she said.

Taking the temperature

Rachel Tobin (senior director, EMEA associate general counsel and global privacy counsel at Zendesk) said that anonymous surveys were an excellent way of taking the temperature and could yield powerfully honest answers about how employees are doing working from home, and generally dealing with the pandemic.

In her business, the majority of employees have said that they would like to continue working from home full-time. Those who come into the office will do so two to three days a week.

'Zoom fatigue' was a real issue, she observed, and screen-time should be limited. Employees should be encouraged to schedule time for lunch, to go for walks to make and take calls, and to take their annual leave. Management should also consider the impact of isolation and work-related

ONE OF THE FALLOUTS, HOWEVER, WOULD BE INCREASED MONITORING OF EMPLOYEES

stress, and put in place measures to help employees. In doing so, they should take account of their personal situations (whether living alone, with dependent parents, or other dependants, etc). Zendesk, for example, encourages employees not to check emails after a certain time in the evening.

Employees were also asked not to print anything at home for data-privacy reasons, to make use of shredders, and to avoid saving sensitive documents directly to a desktop or home computer.

Firms should also be aware that an employee's spouse might well be working in the same home office, and could even be working for a rival business. And working from a coffee shop offered no certainty that the Wi-Fi network was secure.

Scheduling certain days to have no Zoom calls at all, and a 'half-day Friday' was also helpful, Tobin noted.

> ONE PARTICIPANT SAID THAT COLLEAGUES HAD MOVED TO THE WEST OF IRELAND IN THE EXPECTATION OF CONTINUED REMOTE WORK, ONLY TO SUBSEQUENTLY BE CALLED BACK INTO THE OFFICE

Remote-working policies

Health-and-safety guidelines and proper remote-working policies were also key, the panel discussion heard, in terms of the fit-out for a proper ergonomic workstation when working from home. Employment lawyer Richard Grogan (Richard Grogan & Associates) warned that working from home might give rise to a raft of claims in terms of ergonomics and workplace safety.

He also pointed out that remote-working policies should also cover those who were working abroad. There might well be jurisdictional issues and tax implications arising out of working outside of the country for too long.

Bord na Móna company secretary Anna-Marie Curry pointed out that what employees had tolerated during the COVID emergency wouldn't necessarily hold when business returned to normal.

Group discussion yielded the insight that interactive group work was perhaps more difficult in a Zoom setting, though virtual meetings could be highly efficient in terms of travel-time saved.

Zoom was deemed to be better than a phone call, as it allowed documents and slides to be shared, the participants agreed.

Innovations

Curry added that real benefits and deficiencies had been discovered during the past 12 months, but that the benefits should definitely remain as 'part of the picture'. Innovations such as electronic signatures would continue to play their part in the future, since they saved so much unnecessary moving around of documentation, she added.

However, a warning note was sounded that employer insurance policies might be more difficult to obtain, given a scattered workforce, and that the law might be too heavily weighted against employers. Things might come full circle if working from home became more of an administrative burden than it was worth, the discussion heard.

Employers might need to be appeased by assuring them that the working-from-home environment was fully compliant with health-and-safety regulations.

Data mining

Linda Ní Chualladh (head of privacy – legal, EMEA, Citi) works for a company that has 210,000 employees, with offices in 160 countries. Ní Chualladh said that remote working would yield a lot of data on employees.

This was especially so where companies used and deployed newer-tech applications to monitor security, service issues, and fraud practices, including verification of identity and individual employee engagement.

This would yield data in terms of IP addresses, browsing history, keyboard click rates, and so forth. All of this information naturally raised questions of how such data should, or should not, be used.

Ní Chualladh said that 47% of employees globally were considering a career move as a result of COVID, and many had made long-term decisions on the back of the pandemic.

One participant said that colleagues had moved to the west of Ireland in the expectation of continued remote working, only to be called back subsequently to the office.

Ebba Mowat, Savills Ireland

Zendesk's Rachel Tobin predicted a figure of 42% (on average) of the workforce coming back to work in the office.

Digital transformation

COVID had accelerated digital transformation, Tobin said. While nobody was surprised that digital transformation would happen, people were quite surprised that it had happened "whether we wanted it or not". The changes had resulted in a shift away from place-driven work and towards purpose-driven work.

One of the fall-outs, however, would be increased monitoring of employees. Technology was now available that could measure eyeball engagement onscreen, to determine the level of attentiveness among employees. "To quote Spider-Man's Uncle Ben, 'with great power comes great responsibility' – so just because you can do these things doesn't mean you should," she said.

A data-centric world created huge levels of responsibility in terms of what was done with that data, she warned.

If employers made decisions based on data, they would have to account for how they gathered that data, in the context of necessity and proportionality, Ní Chualladh said. Employers should think of introducing a code of ethics in terms of how they treat their employees and their data, beyond mere compliance with the law.

"Trust between both employer and employee has to work both ways, so I think a code of ethics is a really good idea," Anna-Marie Curry agreed.

Remote hearings

Siobhan Hayes (head of litigation at the State Claims Agency) ran through the legislation and practice directions that introduced remote hearings in the teeth of the crisis.

It took a lot more work to set up and run remote hearings, the discussion heard, since, in general, they were less straightforward, and involved additional preparatory requirements, including lodging hard-copy booklets in advance of hearings.

In addition, it could be difficult to maintain the gravitas of the live courtroom environment, but lawyers had to do their best in terms of managing the boundaries.

Hayes added that it was also more difficult to have a quiet word with clients, or with opposing counsel – especially if they were not in the same location – and this could lead to delays during trials.

Wi-Fi checks in advance of remote hearings were also important, the discussion heard.

She predicted a future mix of hybrid remote and in-person hearings, where expert witnesses, especially those from outside the jurisdiction, might be heard virtually, while other witnesses would attend in person.

Hayes said that managing hearings was more complex with COVID-19, as teams and witnesses needed to socially distance and wear facemasks.

Under the superior courts' practice directions, consultations or negotiations are not permitted within the court buildings, so it can be more difficult to discuss matters or take instructions during a hearing.

Concerns about security and data protection that limit the printing of confidential documents at home were also a factor in practitioners having to learn rapidly how to mark-up and annotate documents on-screen.

This kind of innovation had pushed lawyers out of their comfort zone over the past year, the discussion heard. g

A WARNING NOTE WAS SOUNDED THAT EMPLOYER INSURANCE POLICIES MIGHT BE MORE DIFFICULT TO OBTAIN, GIVEN A SCATTERED WORKFORCE, AND THAT THE LAW MIGHT BE TOO HEAVILY WEIGHTED AGAINST EMPLOYERS

FROM LITTLE ACORNS...

The Dublin Solicitors' Bar Association was founded in 1935. **Kevin O'Higgins** looks back at its 86 years of representing Dublin solicitors

KEVIN O'HIGGINS IS PRINCIPAL OF DUBLIN FIRM KEVIN O'HIGGINS SOLICITORS AND IS A PAST-PRESIDENT OF BOTH THE LAW SOCIETY AND THE DSBA

THE DSBA CONFERENCE HAS BECOME AN INTRINSIC PART OF THE ASSOCIATION'S ACTIVITIES, AS A MEANS OF COUPLING GREAT FUN AND COLLEGIALITY WITH A GENEROUS DOLLOP OF CPD. THERE IS ALWAYS INTRIGUE AND FASCINATION SURROUNDING THE PRESIDENT'S CHOICE OF VENUE

The DSBA is the largest bar association in the country, with a membership of over 3,000. Initially called the Dublin Circuit and District Court Bar Association, it changed its name in 1937 to reflect a broader reach. The first president was Arthur Bradley, and the first secretary was Brendan T Walsh. While it may not have the antiquity of some other bar associations, it has a rich history, and has been to the fore of legal life in the capital since its inception.

Why it took until the mid-'30s for colleagues to form an association was probably because of a perception that the 'Dublin Law Society' was already present in the Four Courts Solicitors' Building. While perhaps having some validity, the Law Society's role and reach was different. The DSBA has always worked constructively and in support of the Law Society, while supporting its membership on the ground.

Born in a Dublin street

In fact, the catalyst for the formation of the DSBA arose from an altercation and subsequent brief imprisonment of a colleague appearing before a judge in the Bridewell. This caused consternation among the profession, which saw it as heavy handed and unfair, leading to a suspension of practitioners attending the court. The colleague, as a mark of appreciation to his colleagues for standing by him, presented a newly commissioned chain of office to the newly formed association – which has been worn with pride by each of its 84 presidents since.

The first annual dinner was held in 1937 under the presidency of John S O'Connor in the Dolphin Hotel. At the 1939 annual dinner, President of the Law Society Daniel J Reilly said that there was no better way of establishing closer links than through bar associations across the country. Over the decades, various topical issues exercised the DSBA, and it made numerous representations to Government.

During the early years, presidents included: Sean O'hUadhaigh (1936), John S O'Connor (1938), John Cusack (1939), JP Collins (1941), Charles McGonagle (1941), Brendan T Walsh (1948), PC Moore (1949), Desmond Moran (1950), and James J O'Connor (1951).

Rock around the clock

In 1954, the *Solicitors Act* brought major reform to the regulation of the profession. During the 1950s, the DSBA continued to meet and dine in the Solicitors' Buildings in the Four Courts. The first female council member was Thelma King in 1965, who went on to become the first woman president of the DSBA in 1973 and, subsequently, a District Court judge.

A further move to include women at social events was suggested in 1978 by then president, John Buckley, who brought a motion to council that members be allowed to bring "lady guests" to the annual dinners. Moya Quinlan became president in 1979 – the following year becoming president of the Law Society. Some of the many other prominent Dublin solicitors who acted as president during the 1950s to 1990s were two generations of the Pigot family (David R in 1955 and his son, also David R, 20 years later), JM Farrelly (1965), Ernest Margetson (1966), Eamon Sheil (1967), Edward Byrne (1968), Bruce St John Blake (1969), Gerard M Doyle (1970), Thelma King (1973), Johnny Hooper (1976), Moya Quinlan (1980), Rory O'Donnell (1981), Laurence K Shields, Elma Lynch, Gerard Griffin, Geraldine Clarke (1990), Dominic Dowling (1991), Terry Dixon, Tony Sheil (1992), Michael D Murphy, Justin Mc Kenna, Gerard Doherty, Ruadhan Killeen (1997), and Hugh O'Neill (1998).

These presidents, among others, steered the association through a plethora of legal issues that arose, including court delays, poor conditions of courthouses, legal costs, and judicial appointments.

Party like it's 1999

During the 1990s, the DSBA began to organise the annual conferences. These have taken place in such diverse locations as New York, Lisbon, Chicago,

DSBA dinner 1937

The old Bridewell District Court, where the DSBA was born

THE CATALYST FOR THE FORMATION OF THE DSBA AROSE FROM AN ALTERCATION AND SUBSEQUENT IMPRISONMENT OF A COLLEAGUE APPEARING BEFORE A JUDGE IN THE BRIDEWELL

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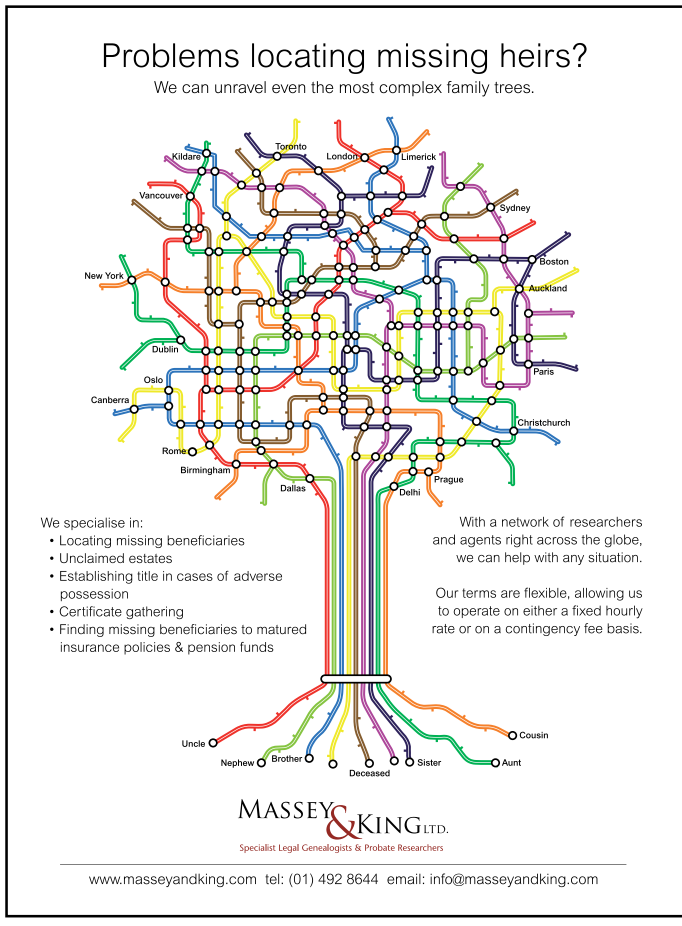

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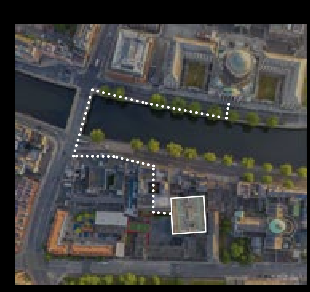

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Washington, St Petersburg, Buenos Aires, Rome, Chicago, Bordeaux, Berlin, Cape Town, and New Orleans.

The DSBA conference has become an intrinsic part of the association's activities, as a means of coupling great fun and collegiality with a generous dollop of CPD. There is always intrigue and fascination surrounding the president's choice of venue – and colleagues from across the country are always welcome.

A critical moment in association history was the creation of *The Parchment*, under the initial editorship of Justin McKenna. Subsequent editors have included Stuart Gilhooly, Keith Walsh, myself, and the incumbent – long-standing editor John Geary.

The Parchment is a high-quality magazine full of practical information, and is reflective of the Dublin legal social scene.

During the ensuing decades, presidents have included Helen Sheehy (2001/02), Brian Gallagher (2007), Michael Quinlan, James McCourt (2002/03), John O'Connor (2003/04), Orla Coyne (2004/05), David Bergin (2006/07), and John P O'Malley (2009/10).

In recent years, Moya Quinlan, Andy Smyth, Laurence Shields, Elma Lynch, Gerard Griffin, Geraldine Clarke, James McCourt, Michael Quinlan and Stuart Gilhooly have served as Law Society presidents as well. Some also moved onto the bench, including Judges Gerard Griffin, John O'Connor, and James McCourt.

Golden years

An initiative of John O'Connor (now Circuit Court judge) was the annual 'Golden Oldies' lunch, to honour those of our colleagues in practice for over 50 years.

Another part of the DSBA calendar is the Judges' Dinner, where Dublin-based judiciary from all courts meet colleagues in a social and relaxed setting.

All the DSBA female presidents: Helen Sheehy, Geraldine Clarke, Moya Quinlan, Orla Coyne, Elma Lynch and Thelma King

At the heart of the DSBA have been impressive continuing professional development courses. The formula has always been the same: high-quality presentations, ideally from among its membership, at an affordable cost.

In recent years, the association has continued to thrive, with huge strides being made under the respective presidencies of Stuart Gilhooly, Geraldine Kelly, John Glynn, Keith Walsh, Aaron McKenna, Eamon Shannon, Áine Hynes, Robert Ryan, Gregg Ryan, Tony O'Sullivan, and the current holder, Joseph O'Malley.

The consistent theme and message of each president is – as always – to foster collegiality and goodwill among the membership, and to help and assist them in practice in every possible way.

At its very core is the small staff who generate its CPD offerings, look after the membership, coordinate committee meetings, generate template precedents, and field telephone queries.

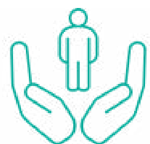
The association was most fortunate to have as its first salaried administrator, Mary Rigney; followed in more recent years by the ubiquitous Maura Smith – always pleasant, helpful and available to the membership. g

> A MOVE TO INCLUDE WOMEN AT SOCIAL EVENTS WAS SUGGESTED IN 1978 BY THE PRESIDENT, WHO BROUGHT A MOTION TO COUNCIL THAT MEMBERS BE ALLOWED TO BRING 'LADY GUESTS' TO ANNUAL DINNERS

DEATH KNELL FOR THE DEATH PENALTY?

Two landmark cases in Malawi – one asserting the right to life as 'the mother of all rights'; the other declaring the mandatory death penalty unconstitutional – appear to have announced the death knell for the death penalty there. **Lindiwe Sibande** reports

LINDIWE SIBANDE IS PROGRAMME OFFICER WITH IRISH RULE OF LAW INTERNATIONAL IN MALAWI



ALTHOUGH THE DEATH PENALTY HAS REMAINED ON THE STATUTE BOOKS SINCE MALAWI GAINED ITS INDEPENDENCE FROM THE BRITISH IN 1964, A *DE FACTO* MORATORIUM WAS INTRODUCED IN 2007

Less than a year after winning the prestigious Chatham House Prize in recognition of the historic decision to overturn Malawi's controversial 2019 tripartite elections (the award cited the "courage and independence" of Malawi's constitutional court judges "in the defence of democracy"), the Malawian judiciary has made international headlines, once again, by declaring the death penalty there unconstitutional.

In the landmark case of *Charles Khoviwa v The Republic* (MSCA Miscellaneous Criminal Appeal No 12 of 2017; [2021] MWSC 3, 28 April 2021), the Supreme Court of Appeal held that the right to life was "the mother of all rights". The court further held that "without the right to life, other rights do not exist" and, therefore, "the death penalty not only negates; it abolishes the right".

Although the death penalty has remained on the statute books since Malawi gained its independence from the British in 1964, a *de facto* moratorium was introduced in 2007. Malawi has sat midway between countries that actually enforce the death penalty, and those that have abolished it outright.

Although the *Khoviwa* decision certainly tips the scales further towards abolition, it must be considered within particular and significant sociopolitical realities.

Establishing legal precedent

Although the *Khoviwa* case is the first to declare the death penalty unconstitutional, the case is the latest, and most crucial, in a line of landmark cases that establish legal precedent on the death penalty in Malawi.

In the 2007 case of *Francis Kafantayeni and others v the Attorney General* (Constitutional Case No 12 of 2005; [2007] MWHC 1), the constitutionality of the mandatory death penalty for capital offences was brought into question. In declaring the mandatory death penalty unconstitutional, the court ordered the rehearing of cases involving those who had been given the death penalty.

An initiative called the 'Resentencing Project' took these cases. It comprised a coalition of criminal justice stakeholders, as well as local and international human-rights organisations, and led to the immediate release of 112 inmates. Many more are still being released after serving their custodial sentences, according to recent reports by the Malawi Human Rights Commission (see 'MHRC statement on abolition of death penalty in Malawi' at www.mhrcmw.org).

Potential shift

The resentencing project was a promising indication of a potential shift in judicial precedent on the death penalty. Nonetheless, under the *Malawian Penal Code*, sections 25(a) and 26, the death penalty remained a legal reality and could still be given as a sentence for particular crimes.

The 2021 *Khoviwa* decision now holds that the above-mentioned sections of the *Penal Code* must be read to mean the maximum prison sentence – life imprisonment. This decision does not fall far from practice, however.

Although the death penalty remained legal after the *Kafantayeni* ruling, it was not carried out in the 15 years preceding the ruling nor during the 14 years afterwards. According to Amnesty International, the last execution was carried out in 1992, when 12 people were hanged.

After the establishment of multi-party democracy in Malawi in 1994, all executions came to a halt, arguably as a result of changes in the political and judicial landscapes. The new constitution did retain the death penalty as a viable sentencing option for particular crimes. Yet, since 1994, no president has signed a death warrant, despite its continued use in sentencing. Malawian death sentences could more accurately be described

PIC: IRLI

Dedza Prison

as sentences to indefinite detention. So why keep using the death penalty, even though there is no political will to actually enforce it?

Death penalty and politics

The death penalty may have been left as an option under the law to appease the public in instances where certain crimes or cases have aroused public outcry. In several cases, various actors have called for stricter sentencing and invoked the death penalty as the ultimate punitive sentence towards deterrence.

For instance, between 2014 and 2019, the United Nations reported 150 cases of killings, attacks, and other human-rights violations against persons with albinism in Malawi (see OHCHR, 'Malawi: UN experts urge action over albinism 'atrocities' in run-up to elections').

Reports of killings, in particular, gained media attention and sparked various protests where a number of activists attacked Malawian courts for giving lenient sentences to those involved in kidnapping, violence, and the killing of persons with albinism.

In May 2019, the High Court imposed the death penalty in the case of *R v Mikaele* [(Sentence) (Homicide Case No 238 of 2018); [2019] MWHC 50 (3 May 2019)] on a 28-year-old man convicted of murdering a person with albinism.

Later in the same year, three people convicted of killing a person with albinism were also handed down the death penalty by the same court. The judge who imposed the sentence remarked that this was to act as a deterrent against future attacks and homicides (Al Jazeera, 'Malawi: three sentenced to death over killing of person with albinism').

Not alone

Malawi is not the only country that has utilised the death penalty in this way. In 2015, four people were sentenced to death in Tanzania after being found guilty of murdering a woman with albinism (*BBC News*, 'Tanzania albino killers sentenced to death').

Although there is no official data on public attitudes towards the death penalty, calls for stricter sentencing for certain crimes from the public may be an indication that public attitudes tip more in favour of retaining the death penalty than abolishing it.

For example, in a recent statement, the Malawi Human Rights Commission commended "stiffer punishments [for persons convicted] of sexual offences" (see 'A statement to commend progressive judgments on cases of defilement and call to further action' at www.mhrcmw.org).

The *Khoviwa* ruling exists against a backdrop of precedent, legal, political, as well as social pressures. Activism centred around the abolition of the death penalty has been a concerted effort between both local and international actors in Malawi. There is more to do to abolish the death penalty, legally – it must be removed from the statute books and more resentencing hearings need to take place akin to the *Kafantayeni* case, so that the cases of those who are currently on death row are reviewed.

That said, it would be hard to envisage a way that either the courts or the executive could row back from the decision in *Khoviwa* – that the death penalty violates the right to life. Furthermore, the President of Malawi, Dr Lazarus Chakwera, said in a statement in the aftermath of the decision that "the rule of law must be upheld and the interpretation of the law by the court must be respected".

Overall, the situation is quite promising, however, the practical implications of the case – given the political and social realities outlined, especially the use of harsh sentences for public appeasement – remain to be seen. g

REPORT OF LAW SOCIETY COUNCIL MEETING

11 JUNE 2021

Sympathy

The Council regretted the passing of former Council member Peter Murphy, from Donegal, who was a provincial delegate for Ulster and a colleague of the late judge and past-president Frank O'Donnell.

The Council also regretted the passing of the mother of the Society's director of education, TP Kennedy, and the president confirmed that he had written to Mr Kennedy to express condolences.

External appointments

The Council congratulated Imelda Reynolds on her appointment as chair of the Institute of Directors, and Michael Quinlan on his appointment as chair of the Property Services Regulatory Authority.

Approval of regulations

The Council approved the *Solicitors Accounts (Amendment) Regulations 2021*, drafted to provide certainty around solicitors' obligations in respect of the charges on deposits, which were being imposed by a number of banks, and how such charges should be treated by solicitors.

It is expected that the regulations will go before the next meeting of the LSRA, with a target commencement date of 1 October 2021.

Council election 2021

In accordance with the bye-laws, the Council approved dates relevant to the 2021 election and confirmed that the deadline for receipt of nominations will be Wednesday 15 September 2021.

Education

Richard Hammond (chair of the Education Committee) reported to the Council on the Small Practice Traineeship Grant, the new PPC syllabus design, the development of a competency framework for solicitors, the Diploma Centre's recent win in *Public Sector Magazine*'s 'Education Support' category at the 2021 Excellence in Business Awards, and the high level of participation in the ongoing environmental law and climate change MOOC.

Finance

Chris Callan (chair of the Finance Committee) reported on issues that included current and anticipated practising certificate numbers, the management accounts of both the Law Society and the Law School, and the budget 2022 process.

PII

Barry MacCarthy (chair of the Professional Indemnity Insurance Committee) reported that Council members would be invited to participate in a dedicated PII meeting later in the month, that meetings were being arranged with existing and potential insurers to discuss renewals, and that work was underway on the 2021/22 *PII Regulations*.

GEDI Task Force

Michelle Ní Longáin (task force chair) updated the Council on progress in implementing key recommendations of the GEDI Task Force, which had been circulated to Council members in advance.

A number of items had been actioned with a view to encouraging more female solicitors and solicitors from more diverse backgrounds to seek election to Council and to participate in various other bodies that reside under the aegis of the Law Society.

She reported that the president had written to the chairs/vice-chairs of such bodies to encourage more diverse participation and confirmed that a communications plan to promote GEDI on the Council had been developed. g

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CONVEYANCING COMMITTEE

COMPLETION MONEYS

After careful consideration, the Conveyancing Committee has decided to amend its longstanding recommendation regarding the manner in which completion moneys are to be furnished where there is an existing mortgage or charge ('mortgage') on title and a release, e-discharge, discharge or vacate ('discharge') will not be available on closing.

Up to now, the following was the recommended practice:

- Prior to completion, the vendor's solicitor would furnish the purchaser's solicitor with redemption figures in respect of the mortgage(s) secured against the subject property,
- On completion, the purchaser's solicitor would furnish the completion moneys to the vendor's solicitor by way of two bank drafts, one in the sum required to redeem the mortgage(s) and made payable to the relevant lending institution, and the other for the balance of the purchase moneys (if any) made payable to the vendor's solicitor.

The committee has decided to recommend a change in practice, having considered the matter carefully, and in particular:

1) There are increasing difficulties, costs, and delays for solicitors in obtaining bank drafts. In particular, because of the reduction in services and lack of availability of tellers in banks, it can take a very significant length of time to get a bank draft. Banks are continuing to reduce branch numbers and the services available in the branches that remain open. Some solicitors may now be practising in areas where there are no banking services that would allow for obtaining a bank draft.
2) A bank draft takes up to five working days to clear.
3) An increasing number of contracts for sale contain a condition that closing moneys are to be provided on closing by electronic funds transfer.
4) The decision of the English Court of Appeal in the case of *Patel & Anor v Daybells* ([2001] EWCA Civ 1229).
5) Undertakings are an integral and essential part of the conveyancing process.
6) The practice of completing on a vendor's solicitor's undertaking to discharge the mortgage(s) on title is widespread, convenient and efficient.

In arriving at its view, the committee has been mindful of weighing the risks against the benefits of a change in recommended practice and has considered carefully the question of comparative risks and benefits.

The committee has considered the risks associated with a purchaser's solicitor accepting an undertaking from a vendor's solicitor to discharge the mortgage(s) secured on the subject property. In the *Patel* case, it was common case "that there would always be some unquantifiable (but no doubt small risk) whether from fraud or misadventure, in any conveyancing procedure designed to achieve … the payment of money and the perfection of title [as] simultaneous transactions".

The risk involved in accepting an undertaking from a vendor's solicitor to furnish a discharge of a mortgage is that it may not be produced. Such failure may be caused either by the solicitor's dishonesty or by a dispute, misunderstanding, oversight or other error. The risk of the latter four is reduced for a vendor's solicitor who requests redemption figures using the QeD form or requesting same under the certificate of title system, as he/she is entitled to rely on those figures. The lenders who use the QeD procedure or operate under the certificate of title system have agreed that, where the redemption figure provided by the lender to the vendor's solicitor is incorrect, the lender will furnish a discharge of its security.

Taking into consideration that the failure by a vendor's solicitor to comply with an undertaking to furnish a discharge of the vendor's mortgage(s) is an extremely serious but rare event, and is a breach that may be enforced ultimately by the High Court by a claim on the vendor's solicitor's professional indemnity insurance or by application to the compensation fund, the committee has taken the view that it is acceptable for a purchaser's solicitor to accept from a vendor's solicitor an undertaking to furnish a discharge of mortgage except in cases where:

a) The lender is not one who is a party to the certificate of title system, or
b) The transaction is so large that the sum required to honour the undertaking might exceed the mandatory minimum level of solicitors' professional indemnity cover.

The committee accordingly now recommends (save in the cases referred to at (a) and (b) above) that:

1) Prior to completion, the vendor's solicitor would furnish the purchaser's solicitor with redemption figures in respect of the mortgage(s) secured against the subject property. The vendor's solicitor should, when requesting redemption figures in the case of residential property, use the QeD form in order to avail of the protections provided by its use.
2) On completion, the purchaser's solicitor would furnish the completion money to the vendor's solicitor's client account by way of electronic funds transfer.
3) The vendor's solicitor on completion furnishes to the purchaser's solicitor an undertaking in the Law Society approved form (see 'practice notes', 'Precedent Letter of Undertaking re Mortgage on Title' at lawsociety.ie) to pay to the vendor's lender the money required to redeem the mortgage(s) secured against the subject property and to forward the discharge as soon as possible thereafter.
4) The vendor's solicitor shall, within five working days of the date upon which the sale has completed, furnish to the purchaser's solicitor evidence that he/she has discharged to the vendor's lender the money required to redeem the mortgage(s) secured against the subject property.

The attention of practitioners is drawn to the practice note issued by the Guidance and Ethics Committee on undertakings.

Where the foregoing arrangements apply, general condition 6(f) of the standard *Conditions of Sale* (2019 edition) should be amended by special condition.

CONVEYANCING COMMITTEE

LPT UPDATE

The Conveyancing Committee has had a number of meetings with Revenue on various aspects of LPT that affect conveyancing practitioners, and confirms as follows:

LPT clearance in 'second and subsequent sales' scenario

Following representations from the committee, Revenue has reworded its website guidance note on this topic, which clarifies the matter for practitioners.

Revenue has confirmed that, in cases where specific clearance has been applied for and granted, the valuation band originally declared will be the relevant band until the next valuation date. For example, a property (outside Dublin) with a declared valuation of €300,000 (Band 5) sells for the first time in 2019 for €480,000. This sales figure is outside general clearance, so specific clearance is applied for and granted. Revenue has confirmed that the relevant band remains Band 5 for any subsequent sales in the valuation period.

The committee requested that Revenue put something on the LPT property history screen to show if specific clearance had been granted in a previous sale in a valuation period. The 'specific clearance' indicator has now been made available by Revenue and is included in the LPT history details screen. The date the specific clearance that was granted is also included.

Revenue has also confirmed that, where there is more than one sale in a valuation period and general clearance applied on the first sale, this is sufficient to confirm the declared valuation for any and all subsequent sales within the valuation period. For example, a property with a declared valuation of €300,000 is sold in 2014 for €350,000; general clearance would have applied at the time. The property is sold in 2019 for €480,000; specific clearance is not what is required, as the general clearance for the first sale confirmed the declared valuation.

In such circumstances, the following would apply: if the vendor does not have specific clearance for a previous sale (in the example above, general clearance would have applied to the 2014 sale) and general clearance does not on the face of the current sale apply, an application should be made to Revenue for specific clearance. In these circumstances, Revenue will issue a confirmation that the conditions for general clearance are satisfied and that, accordingly, the relevant band remains the valuation band originally declared. This will confirm that all LPT and Household Charge liabilities have been paid and returns filed and that the property valuation (as at 1 May 2013) was reasonable. This LPT clearance should be retained with the title documents, as it should be produced on any subsequent sales within the valuation period.

In circumstances where the current sale meets the general clearance criteria, the standard general clearance process should be applied.

A copy of the LPT clearance documentation (including confirmation that the 2013 valuation satisfied Revenue guidelines) for the first sale in the valuation period is sufficient to confirm the declared valuation for any and all subsequent sales within the valuation period. In addition, a current property history summary will confirm that all LPT and Household Charge liabilities arising to date have been paid in full.

Guidelines on Household Charge in LPT system

The committee had asked Revenue to review the problem that arises where there was on the face of the LPT property history screen no Household Charge due at the time a purchaser closed the sale of a property, but Revenue later finds out that a previous owner had misdeclared or not declared for Household Charge and the arrears due by the previous owner are then placed on the property history screen as arrears. This prevents the current owner from selling the property without addressing the previous owner's liability, as unpaid Household Charge is a charge on the property.

The Law Society's view is that the current owner should not be adversely affected by such an event if the LPT property history screen was clear at the time they purchased.

Revenue has acknowledged that, where the Household Charge liability comes to light after the date of sale, and the sum due was the liability of a previous owner, Revenue would not expect the current owner to be liable for same. They suggested that, in cases where sums due were the liability of a previous owner but have been put on the property history screen as arrears following a Revenue audit etc, Revenue can put an indicator on the property history screen saying that this sum is not a charge on the property. The committee agrees that, as a matter of practice, this would be sufficient evidence for title purposes that there is no claim by Revenue against the property and that Revenue will pursue the matter with the previous owner as a debt due. Revenue is to put a process in place to reflect that there is no charge on the property, even though the property history screen says there are arrears, and an IT development is needed for this. Until the process and IT has been put in place, Revenue has confirmed that solicitors for vendors in this situation should contact them as early as possible in a transaction at lpt@revenue.ie to have the matter resolved by provision of a letter confirming that Revenue has no charge on the property.

Please contact **Katherina.mccaul@smh.ie** by 26th July 2021 for further information and details of the application process

St. Michael's House provides a comprehensive range of services and supports to adults and children with intellectual disabilities and their families in 170 locations in the greater Dublin Area.

Funded by the Health Service Executive (HSE), TUSLA and the Department of Education and Skills, and supporting over 1950 individuals, the services and supports provided by St. Michael's House include; Residential supports and Independent living, Clinical supports, Day supports, Schools, Respite supports and Vocational training services.

St. Michael's House is committed to delivering services and supports based on the needs, wishes and choices of people with an intellectual disability, based in communities and connected to natural support networks.

Expressions of Interest are invited for a **Voluntary Director/Trustee with a legal background** and expertise for the St. Michael's House Board. Preparation for and attendance at approximately 10 Board meetings per annum is required. In addition, all members of the St. Michael's House Board are required to serve on one subcommittee and to attend meetings of that committee.

CONVEYANCING COMMITTEE

LPT INTEREST

Practitioners should note the provisions of section 149 of the *Finance (Local Property Tax) Act 2012*, which provide that interest shall be payable on unpaid LPT. The rate of interest prescribed in the act amounts to 0.0219% per day, or 8% per annum.

Although there is an interest column in the Property History Summary (PHS), as interest is calculated on a daily basis, the interest (if any) due on unpaid LPT is seldom if ever shown on the PHS. Solicitors should not rely on the PHS in this regard.

When a property is being sold and there are arrears of LPT, the vendor's solicitor should make an application to Revenue (at lpt@revenue.ie) to calculate the amount of interest due, which should be paid before closing.

If, despite the provisions of the act, the LPT is to be paid from the proceeds of sale and an undertaking is being given in this regard, care should be taken by both the solicitor for the vendor and the solicitor for the purchaser to ensure that any such undertaking includes arrears of LPT and interest due.

Problems have arisen in cases where, on the closing of a sale, the LPT due per the PHS is paid but not the interest, as a subsequent PHS will show that the LPT has been paid but will then show the amount(s) outstanding and due for interest.

In all cases where the PHS shows that LPT has been 'deferred', interest is payable at 4% per annum. In such cases, an application should also be made to Revenue well in advance of closing a sale to calculate the interest due.

Revenue has indicated to the committee that a new format of PHS has been designed that will, in appropriate cases, highlight by use of a footnote that interest is accruing on outstanding liabilities. The new form of PHS should be in use within the next couple of months

CONVEYANCING COMMITTEE

NPPR AS A CHARGE ON PROPERTY

The *Local Government (Charges) Act 2009* affected and continues to affect the sale of certain 'residential property' (as defined in the 2009 act), being in essence non-principal private residences (NPPR) from 31 July 2009. Section 3 of the act imposed an obligation on 'the owner' of such a property on the liability dates of 31 July 2009 and 31 March in the years from 2010 to 2013 inclusive to pay a charge of €200 to the local authority in which the NPPR was located.

Section 7(1) of the 2009 act states: "Any charge or late payment fee due and unpaid by an owner of residential property shall, subject to subsection (2), be and remain a charge on the property to which it relates."

Section 7(2) states further: "The said property shall not, as against a *bona fide* purchaser for full consideration in money or money's worth or a mortgagee, remain charged with or liable to the payment of such unpaid charge or late payment fee after the expiration of 12 years from the date upon which the amount concerned fell due."

The committee has received a large number of queries from the profession as to whether or not a purchaser and/or a solicitor for a purchaser who acquires such a property for full consideration in money or money's worth after the expiry of 12 years from a given liability date as defined in section 3(1) of the 2009 act should be concerned with any liability for non-principal private residence charge falling due on such liability date. As stated above, the first liability date was 31 July 2009.

Given the significance of this issue for the profession, the committee obtained an opinion on the matter from a leading conveyancing counsel. The advices received from counsel were that a *bona fide* purchaser acquiring property for full consideration in money or money's worth following the expiry of 12 years from a given NPPR liability date does not need to be concerned with any liability for non-principal private residence charge due in respect of such liability date.

While it is not the practice of the committee to interpret the law (and therefore practitioners should consider this matter themselves), the committee does give guidance to the profession on a regular basis on what it believes to be prudent conveyancing practice.

The committee is of the opinion that it is reasonable for a prudent solicitor to advise a purchaser acquiring property for full consideration in money or money's worth to proceed with a purchase without raising any requisitions or objections in relation to any NPPR charge outstanding following the expiry of 12 years from its liability date. Otherwise, the 12-year limit referred to in section 7(2) of the 2009 act would be meaningless.

PROBATE, ADMINISTRATION AND TRUSTS COMMITTEE

PAYMENT OF FUNERAL EXPENSES

Following on from previous practice notes in the *Gazette* (October 2011, p46, and Jan/Feb 2016, p48), practitioners are again reminded that funeral expenses are the priority debt payable from the assets of the deceased, even in cases where the deceased died insolvent, and can be paid before a grant of representation issues.

Where the deceased had sufficient funds in a bank account, the bank will release funds, either directly to the funeral director or to a relative who has paid the funeral director, on submission of the relevant receipts.

The AIB form for release of funds to pay the funeral expenses can be accessed at aib.ie/content/dam/aib/personal/docs/help-and-guidance/deceased/funeral-expenses.pdf. The Bank of Ireland form for release of funds to pay the funeral expenses can be accessed at personalbanking.bankofireland.com/app/uploads/BSU_1.1-June-2020.pdf.

The other financial institutions, such as building societies, credit unions and the Post Office should have similar procedures in place.

Practitioners should engage with the executor or with the person entitled to extract the grant of administration to arrange for this as soon as practicable after the initial meeting with same, and when the various bank accounts have been identified.

ADR COMMITTEE

NEW HIGH COURT PRACTICE DIRECTION – APPLICATIONS PURSUANT TO *CONSTRUCTION CONTRACTS ACT 2013*

The introduction of the *Construction Contracts Act 2013* brought about welcome reform for the construction industry. The act introduced a new process of dispute resolution in respect of payment claims that arise in construction contracts, in the form of adjudication. The effect of such a change was to protect parties to construction contracts by facilitating binding payment claims to preserve the relevant project cash-flow.

Although the act did result in a dramatic change, the waiting period at enforcement stage of adjudication decisions has been prolonged, flying in the face of what the act was intended to prevent. Following strong recommendations from the ADR Committee and communication from the President of the Law Society, the President of the High Court has recently issued a new practice direction (HC 105) for adjudication enforcement applications, which came into effect on 26 April 2021.

The President of the High Court, "in an effort to ensure expedition and consistency", has appointed Mr Justice Simons as the presiding judge for adjudication matters, and the practice direction will allow applications, pursuant to section 6(11) of the act, for leave of the court to enforce or enter judgment to be made returnable before Mr Justice Simons at 10.30am on the first available Wednesday. The judge will give such directions as are deemed necessary in ensuring that an application will be heard and determined with all due expedition.

Papers will need to be filed in hard copy in the list room on the previous Friday, along with an electronic copy, which is to be emailed to the appropriate registrar.

This is an important change to the High Court practice directions, and the impact of it cannot be overstated for the construction industry. It will have the effect of significantly improving the system of enforcing decisions of this nature in Ireland and will make the act more effective.

GUIDANCE AND ETHICS COMMITTEE

TEN STEPS TO STRENGTHENING YOUR FIRM IN A CRISIS

1) *Assess the crisis* – every problem has a solution. Invest time and effort in assessing the crisis. Be aware of your environment and, in particular, your clients' environment. Keep your perspective.
2) *Grow and strengthen communications with clients* – communicate with your clients regularly in a prompt and transparent manner. Written communications are fine, but consider picking up the phone – a conversation is more personable and can result in a deeper professional relationship.
3) *Improve communications within your firm* – engage with colleagues, seeking their feedback – both positive and negative.
4) *Reassure staff* – a firm's staff is its most valuable resource. Retention of talent is important, and a successful firm must invest in its staff. Reassure staff of the firm's commitment to them and consider measures such as remote/flexible working as an option. Business and operational needs may dictate that there will be situations that clearly require staff to be office-based.
5) *Develop a process improvement plan* – review your firm's business processes, both formal and informal procedures. Engage with your team and clients when considering/implementing new or improved processes that affect them.
6) *Marketing and networking* – increase the visibility of your firm online. Consider creating a link on your website providing regular updates on topics beneficial for clients, including updates on the law. Consider video-talks for clients, which will also promote your firm. Be a voice of reassurance and guidance to your clients.
7) *Use technology* – ensure staff have the tools and supports necessary to enable them to meet the crisis – remote working, e-discovery, e-booklets, remote hearings, remote settlement talks, and remote consultations are currently the new norm, and may well continue to be so.
8) *Contingency plans* – an important aspect of business in a crisis is having contingency plans in place. Plans are essential for succession and unexpected events. Never wait for the event to happen.
9) *Mindfulness and wellbeing* – awareness of mindfulness and wellbeing can help build resilience to unpredictability in a pressurised, competitive and volatile environment. Support one another, celebrate achievements, and learn from mistakes. Aim to better yourself, rather than beat the competitor.
10) *Learn* – history is a learning experience – as long as we learn. Learn the lessons of the crisis, and do not repeat.

CONVEYANCING COMMITTEE

UPDATE TO THE PROFESSION

NON-LAW-SOCIETY FORM OF CERTIFICATE OF TITLE NAMED 'COMMERCIAL REAL ESTATE (GENERAL) – SECOND EDITION 2021' PREPARED BY PROFESSIONAL SUPPORT LAWYERS REPRESENTING A NUMBER OF LAW FIRMS

The Conveyancing Committee is aware that, on some commercial lending transactions, solicitors are, from time to time, asked to provide certificates of title to the lender.

Practitioners are reminded of the requirements set out in the *Solicitors (Professional Practice, Conduct and Discipline – Secured Loan Transactions) Regulations 2009* (SI 211 of 2009), *Solicitors (Professional Practice, Conduct and Discipline Commercial Property Transactions) Regulations 2010* (SI 366 of 2010), *Solicitors (Professional Practice, Conduct and Discipline – Conveyancing Conflict of Interest) Regulation 2012* (SI 375 of 2012), and referred to in Commercial Mortgage Lending Law Society Approved Forms (2010 edition).

It is possible for the borrower's solicitor to provide a certificate of title in favour of a lender. Where solicitors are willing to give a certificate of title to a lender, solicitors are reminded to be cognisant that they should not be providing one that creates a potential liability greater than the cover provided by their professional indemnity insurance, and that they should consider carefully the format of the certificate of title involved.

The Conveyancing Committee has been advised that a number of firms have collaborated to draft a form of certificate of title for use in complex and/or high-value commercial transactions, commonly referred to as the 'PSL Forum Certificate of Title' – so named for the professional support lawyers who lead the project.

A copy of the current form of this certificate of title is available on the Law Society's website at lawsociety.ie/commercialcerttitle.

While this is not a Law Society form of certificate of title, and this note is not recommending its use *per se*, the Conveyancing Committee has taken the opportunity to review it in order to share its views with the profession.

While the draft form of the PSL Forum Certificate of Title is lengthy, and may appear at first to be unusually complex, in the view of the Conveyancing Committee, it is generally quite balanced, it uses expressions and concepts that connect well with those appearing in standard conveyancing documents, and it aims to distinguish between matters that a solicitor can certify and those that are more suitable for owner or third-party confirmation.

The Conveyancing Committee is supportive of the concept of using a common form of certificate of title. This approach should enable solicitors to become familiar with its form and content, and should improve efficiency and help reduce risk. The form developed by the

various firms to date, now in its second edition, also has a useful explanatory memorandum.

In addition to the points that are discussed in the explanatory memorandum to the PSL Forum Certificate of Title, the Law Society would like to draw practitioners' attention to the following particular points that should be considered by practitioners if providing this (or any other similar form) certificate of title:

1) The form is not appropriate for lower-value commercial or residential transactions, where the Law Society hybrid and/or other forms of certificate of title are more appropriate. Please refer to the 'use of certificate' section of the explanatory memorandum and, in particular, note the reference to the "intended for use in high-value commercial property transactions, where the certifying solicitor's liability on foot of the certificate exceeds €1.5 million".
2) Careful consideration should be given to the matter of:
   a) Potential liability and an appropriate cap on liability,
   b) Proposed length of time that it is anticipated that a right of action can be brought against the certifying party, and
   c) Reliance made by the certifying party on third-party confirmations, such as law searchers and/or architects/engineers, and the level of insurance cover in place for such parties.
3) The PSL Forum Certificate of Title is stated to be for the purpose of the 'transaction'. Care needs to be taken to ensure an appropriate definition of 'the transaction' is used so the certificate does not extend beyond matters of title.

While no amendment should be made to the main body of the certificate of title, care should be taken to include all appropriate, accurate, clear and concise disclosures against the relevant statements set out in the main body of the certificate of title.

If a position is reached commercially between parties in relation to matters such as:

a) A cap on liability, and/or
b) The inclusion of an express statement as to the maximum period during which an action for damages can be taken against this certifying party,

these points should be addressed in the opening section of the certificate of title in a manner first agreed in writing with the lender.

This note merely constitutes guidance to the profession and reference to a form of certificate of title that is in use on the market. The Conveyancing Committee is aware that there are other forms of certificate of title in use, and each form must be considered carefully by solicitors on a case-by-case basis. In some instances, while appearing shorter, other forms of certificate of title may be more onerous than the PSL Forum Certificate of Title.

If practitioners are asked to provide a certificate of title, they may find it more suitable to suggest using the PSL Forum Certificate of Title, once they have familiarised themselves with the form itself, rather than a different form of certificate of title that they may not be as familiar with.

The Conveyancing Committee wishes to thank the participating firms, and particularly the professional support lawyers, for their input and cooperation. g

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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 Shane O'Donnell, a solicitor practising as Flynn & O'Donnell Solicitors, Loft 3, The Grainstore, Distillery Lofts, Distillery Road, Drumcondra, Dublin 3, and in the matter of the *Solicitors Acts 1954-2015* [2019/DT64]

Law Society of Ireland (applicant)

Shane O'Donnell (respondent solicitor)

On 25 March 2021, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of professional misconduct in that he failed to ensure that there was furnished to the Society an accountant's report for the year ended 31 December 2018 within six months of that date, in breach of regulation 26(1) of the *Solicitors Accounts Regulations 2014* (SI 516 of 2014).

The tribunal ordered that the respondent solicitor:

1) Stand censured,
2) Pay a sum of €500 to the compensation fund,
3) Pay the sum of €1,212 as a contribution towards the whole of the costs of the Society.

In the matter of Gerard O'Reilly, a solicitor practising as Gerard O'Reilly & Co, Solicitors, Mylerstown, Clonmel, Co Tipperary, and in the matter of the *Solicitors Acts 1954-2015* [2019/DT12]

Law Society of Ireland (applicant)

Gerard O'Reilly (respondent solicitor)

On 21 October 2020 and 15 April 2021, the Solicitors Disciplinary Tribunal heard a case against the respondent solicitor and found him guilty of professional misconduct in that he:

1) Failed to ensure that there was furnished to the Society an accountant's report for the financial year ended 30 April 2017 within six months of that date, in breach of regulation 26(1) of the *Solicitors Accounts Regulations 2014* (SI 516 of 2014), and which report was not received by the Society until 23 February 2018, and
2) Failed to ensure that there was furnished to the Society an accountant's report for the financial year ended 30 April 2018 within six months of that date, in breach of regulation 26(1) of the *Solicitors Accounts Regulations*.

The tribunal ordered that the respondent solicitor:

1) Stand advised and admonished,
2) Pay the sum of €1,212 as a contribution towards the whole of the costs of the Society.

In the matter of George Wright, solicitor, practising as Wright Solicitors, incorporating Martin & Brett Solicitors, Mill Street, Monaghan, Co Monaghan, and in the matter of the *Solicitors Acts 1954-2015* [2019/DT48]

Law Society of Ireland (applicant)

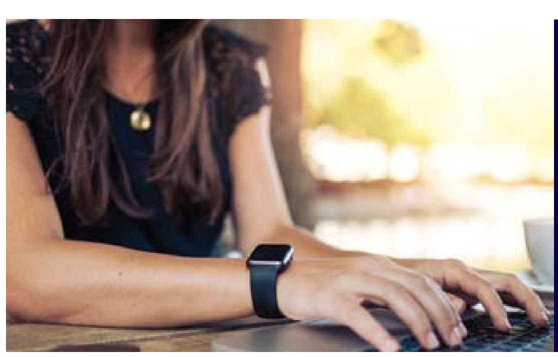
George Wright (respondent solicitor)

On 15 April 2021, the tribunal found the respondent solicitor guilty of misconduct in that he:

1) Caused or allowed a shortfall in the sum of €10,001 on his client account as at 31 December 2018,
2) Failed to insert the word 'client' into three client bank accounts of named clients, all held with AIB, contrary to regulation 2 of the *Solicitors Accounts Regulations 2014* (SI 516/2014),
3) Acted on both sides in six named clients' conveyancing transactions, in breach of the *Solicitors (Professional Practice, Conduct and Discipline – Conveyancing Conflict of Interest) Regulation 2012* (SI 375/2012),
4) Failed to stamp deeds on three named clients' transactions within a reasonable time or at all,
5) Failed to stamp deeds in respect of two named clients' historical matters,
6) Failed to ensure that persons involved in the conduct of the solicitor's business were (a) instructed on the law relating to money-laundering and terrorist financing, and (b) provided with ongoing training on identifying a transaction or other activity that may be related to money-laundering or terrorist financing, and on how to proceed once such a transaction or activity is identified, in breach of regulation 5(5) of the *Solicitors (Money-Laundering and Terrorist Financing) Regulations 2016*,
7) Failed to apply due diligence by not obtaining proof of address and evidencing same on four named client files, sales and purchases, in breach of regulation 13(1) and 13(2) of the *Solicitors (Money-Laundering and Terrorist Financing) Regulations 2016*,
8) Failed to adopt policies and procedures in relation to the solicitor's business to which the regulations of the *Solicitors (Money-Laundering and Terrorist Financing) Regulations 2016* apply, to prevent and detect the commission of money-laundering and terrorist financing, in breach of regulation 5 of the 2016 regulations.

The tribunal ordered that the respondent solicitor:

1) Stand censured,
2) Pay €5,000 to the compensation fund,
3) Pay the applicant's measured costs of €3,322.50.



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11 Nov **General Practice Update 2021** in partnership with the Carlow Bar Association, Kilkenny Bar Association, Wexford Bar Association and Waterford Law Society

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10/11 August	**Building Emotional Resilience**** Online via Zoom Webinar	3 Management & Professional Development Skills (by eLearning)	€135	€160
7/8 September	**Understanding Unconscious Bias**** Understanding Unconscious Bias Workshop, delivering engaging diversity and inclusion learning Online via Zoom Webinar	3 Management & Professional Development Skills (by eLearning)	€135	€160
Available now. Online, on-demand	**Anxiety Awareness Course** with Caroline Foran	1 Management & Professional Development Skills (by eLearning)	Complimentary	
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WILLS

Coote, Mary (deceased), late of Cornmarket Street, Ennis, Co Clare. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, who died on 20 May 2021, please contact Bowen & Co, Solicitors, Pound Street, Sixmilebridge, Co Clare; tel: 061 713 767, fax: 061 713642, email: gwen@bowensolicitors.ie

Doyle, Thomas (deceased), late of 34 Claddagh Road, Ballyfermot, Dublin 10, who died on 12 April 2021. Would any person having knowledge of the whereabouts of a will made or purported to be made by the above-named deceased please contact Michael Kelly, Howell & Company, 2 Tower Road, Clondalkin, Dublin 22; tel: 01 403 0777, email: michael@howellsolicitors.ie

Egan, Delia (née Bourke) (deceased), late of Aughtaboy, Knock, Co Mayo, and formerly of Upper Mace, Claremorris, Co Mayo, who died on 26 May 2021. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, or if any firm is holding same, please contact Patrick J Durcan and Co, Solicitors, James Street, Westport, Co Mayo; DX 53002 Westport; tel: 098 25100, email: admin@patrickjdurcan.ie

Hyland, Annie (deceased), late of 587 North Circular Road, Dublin 1, who died on 30 April 2010. Would any person having knowledge of a will made by the above-named deceased please contact John Costello, Orpen Franks Solicitors, 28-30 Burlington Road, Dublin 4; tel: 01 637 6200, email: john.costello@orpenfranks.ie

Igoe, Francis (Frank) (deceased), late of 24 Rialto Cottages, Rialto, Dublin 8, who died on 9 December 2020. Would any person having knowledge of a will made by the above-named deceased, or if any firm is holding same, please contact Tony O'Beirne, Mangan O'Beirne, Solicitors, 31 Morehampton Road, Donnybrook, Dublin 4; tel: 01 668 4333, email: solicitors@manganobeirne.ie

Judge, Audrey (deceased), late of 62 Coolamber Drive, Rathcoole, Dublin, who died on 16 May 2021. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, or if any firm is holding same, please contact Clear Solicitors, 42 St Stephen's Green, Dublin 2; tel: 01 644 5777, email: info@clearsolicitors.ie

Kavanagh, Gene (deceased), late of Ferndene Nursing Home, Stradbrook, Blackrock, Co Dublin, and formerly of Neptune Lodge, Sandycove Point, Sandycove, Co Dublin. Would any person having knowledge of the whereabouts of two codicils executed by the above-named deceased on 19 January 2007 and 4 September 2012, who subsequently died on 27 June 2019, please contact John C Walsh & Co, Solicitors LLP, 24 Ely Place, Dublin 2; tel: 01 676 6211, fax: 01 661 1420, email: info@johncwalsh.ie

Shaughnessy (orse O'Shaughnessy), Mary (orse Mamie) (deceased), late of Friar's Lodge Nursing Home, Ballinrobe, Co Mayo, and formerly of Dringneen, Cong, Co Mayo, who died on 26 January 2021. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, or if any firm is holding same, please contact Patrick J Durcan and Co, Solicitors, James Street, Westport, Co Mayo; DX 53002 Westport; tel. 098 25100, email: admin@patrickjdurcan.ie

Ward, Margaret (née Hynes) (deceased), late of 12 The Haven, St Mobhi Road, Glasnevin, Dublin 9, and formerly of 20 Old Finglas Road, Dublin 11, who died on 22 May 2021. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Gráinne Butler, Orpen Franks Solicitors LLP, 28/30 Burlington Road, Dublin 4; tel 01 637 6200, fax 01 637 6262, email: grainne.butler@orpenfranks.ie

Nesbitt, John (deceased), late of 58 Clifden Road, Ballyfermot, Dublin 10, who died on 29 September 2020. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact HJ Ward & Co, Solicitors, 5 Greenmount House, Harold's Cross Road, Dublin 6W; tel: 01 453 2133, email: eithne.doyle@hjward.ie

TITLE DEEDS

In the matter of the *Landlord and Tenant Acts 1967-2019* and in the matter of the *Landlord*

RATES

PROFESSIONAL NOTICE RATES

RATES IN THE PROFESSIONAL NOTICES SECTION ARE AS FOLLOWS:

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- **Title deeds** – €310 per deed (incl VAT at 23%)
- **Employment/miscellaneous** – €155 (incl VAT at 23%)

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ALL NOTICES MUST BE PAID FOR PRIOR TO PUBLICATION. ALL NOTICES MUST BE EMAILED TO catherine.kearney@lawsociety.ie and PAYMENT MADE BY ELECTRONIC FUNDS TRANSFER (EFT). The Law Society's EFT details will be supplied following receipt of your email. **Deadline for Aug/Sept 2021 *Gazette*: 11 August 2021.**

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

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Diploma in Environmental and Planning Law	5 October 2021	€2,600
Diploma in Insolvency and Corporate Restructuring	6 October 2021	€2,600
Certificate in Data Protection Practice	6 October 2021	€1,650
Diploma in Criminal Law and Practice	8 October 2021	€2,600
Diploma in Construction Law	9 October 2021	€2,600
Certificate in Property Law & Conveyancing for Legal Executives	9 October 2021	€1,750
Diploma in Finance Law	12 October 2021	€2,600
Diploma in Judicial Skills and Decision-Making	13 October 2021	€3,000
Diploma in Tech and IP Law	13 October 2021	€3,000
Diploma in Education Law	29 October 2021	€2,600
Diploma in Commercial Property	2 November 2021	€2,600
Certificate in Immigration Law and Practice	4 November 2021	€1,650
Certificate in Trademark Law	9 November 2021	€1,650

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07_21

***and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by Sheila Byrne in respect of the premises known as Byrne's Mini Market, Distillery Road, situate in the parish of St Mary's, town of Wexford, barony of Forth, and county of Wexford; Eircode: Y35 PHH1**

Take notice that any person having an interest in Byrne's Mini Market, Distillery Road, situate in the parish of St Mary's, town of Wexford, barony of Forth, and county of Wexford, Eircode: Y35 PHH1, the subject of an indenture of lease dated 18 November 1953 and made between Philip Pierce & Company Limited of the one part and William Goodison of the other part for a term of 99 years from 29 September 1953 and subject to the yearly rent of £1 (one pound).

Take notice that Sheila Byrne intends to submit an application to the county registrar for the county of Wexford for acquisition of the fee simple and any intermediate interest in the aforesaid premises, and any party asserting that they should hold a superior interest in the aforesaid premises (or any of them) are called upon to furnish evidence of the title to the aforesaid premises to the below named within 21 days from the date of this notice.

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

Date: 2 July 2021

Signed: Ebrill Solicitors (solicitors for the applicants), Iberius House, Common Quay Street, Wexford; Eircode: Y35 TYD0

In the matter of the *Landlord and Tenant (Ground Rents) Acts 1967-2005* and in the matter of 41 Meath Street, Dublin 8, and in the matter of an intended application by Ann O'Leary and Patricia Kelly

Take notice that any person having any interest in the freehold estate of the following property: all that and those the premises known as 41 Meath Street in the parish of St Catherine and city of Dublin, being a portion of the premises comprised in and demised by indenture of lease dated 18 June 1935 and made between Kellerman Eyre McMahon and Charlotte Eva Pilkington of the one part and Bernard Brown of the other part, and described therein as "all that piece or parcel of ground situate and being on the west side of Meath Street and known as numbers 41 and 42 Meath Street in the parish of Saint Catherine and city of Dublin, containing in breadth on the east side or front thereof next Meath Street aforesaid 44 feet, and in breadth on the west side or back thereof 36 feet, six inches, and in length from front to rear thereof or the north side 66 feet, three inches, and from front to rear thereof on the south side 56 feet, six inches, be the same several dimensions little more or less, which said premises are delineated on the plan thereto annexed and therein surrounded by a red verge line and also the messuages and buildings recently erected thereon by the lessee", held for a term of 99 years from 25 March 1933 and subject to the yearly rent thereby reserved and to the covenants by the lessee and conditions therein contained, should give notice of their interest in the aforesaid property to the solicitors named below within 21 days from the date of this notice.

Take notice that Ann O'Leary and Patricia Kelly intend to submit an application to the county registrar for 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 property are called upon to furnish evidence of the title to the aforesaid property to the solicitors named below within 21 days from the date of this notice.

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

Date: 2 July 2021

Signed: Carroll Kelly & O'Connor (solicitors for the applicants), 24 The Palms, Clonskeagh, Dublin 14

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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 Quadrant House, Chapelizod, Dublin 20, and 2B Mullingar Terrace, Chapelizod, Dublin 20: applicant Quadrant Engineers Limited

Take notice any person having any interest in the freehold estate (or any intermediate interest) of the properties known as Quadrant House, Chapelizod, Dublin 20, and 2B Mullingar Terrace, Chapelizod, Dublin 20, held under an indenture of lease dated 9 December 1694 made between Sir John Temple of the one part and Richard Winstanley of the other part and therein described as the lands and premises therein described situate in the town of Chapelizod, which was then in the county of Dublin.

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

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

Date: 2 July 2021

Signed: Beauchamps (solicitors for the applicants), Riverside Two, Sir John Rogerson's Quay, Dublin 2

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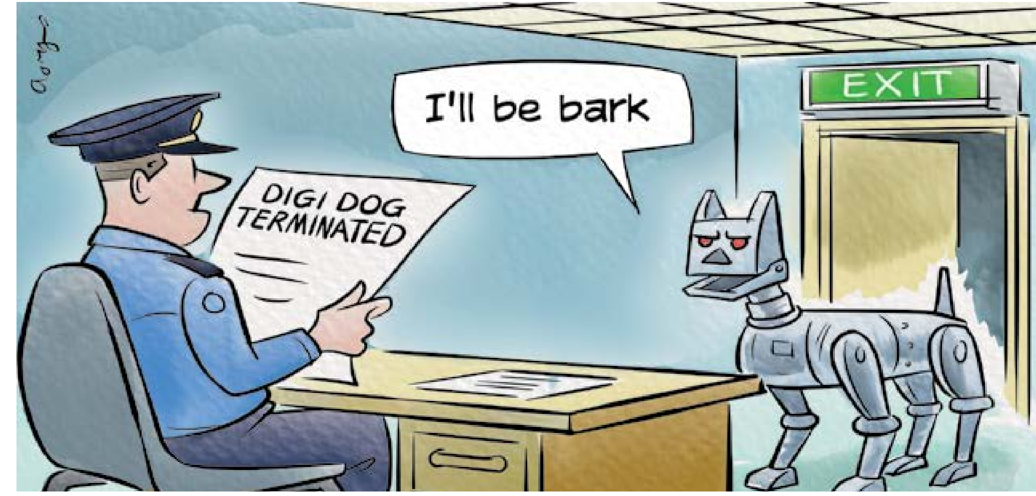


The NYPD has decided to 'put down' its new crime-fighting robo-dog, NPR.org reports.

When launched last December, the Boston Dynamics 'Digidog' was lauded as the next big thing in saving lives, protecting people, and protecting officers.

The terminator terrier could climb stairs and survey areas to identify dangers at crime scenes.

The public was sick as a dog, however, when they learned of the US$94,000 contract with Boston Dynamics, and cited concerns over police militarisation and the abuse of force.

New York's mayor said he was "glad the Digidog was put down", describing it as "creepy, alienating, and sends the wrong message to New Yorkers".

FLATPACK FLATFOOT FURTIVENESS

Ikea France has been ordered to pay a €1 million fine for spying on its employees, *The Irish Times* reports. The subsidiary of the Swedish low-cost furniture giant collected data on the police records, lifestyle, and finances of employees and aspiring employees.

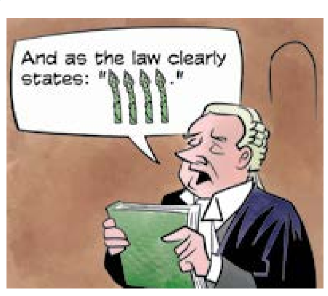
Though the practice started in the early 2000s, the trial focused on offences between 2009 and 2012.

Ikea France is believed to have spied on about 400 employees, using information provided by private detectives with close ties to the police. Most of Ikea's 30 stores in France took part. It is reported to have spent up to €600,000 annually on its employee investigations.

VEG-LEG RECIPE FOR DISASTER

Lawyers in Belgium went hungry after a recipe for asparagus gratin – which had mistakenly appeared in a legislation database – was deleted, Legalcheek.com reports.

The blunder was discovered by lawyer Morgan Molle after an update to the official *Moniteur Belge*. The recipe concluded with the line, '*Bon Appétit!*'



Molle commented: "I've had it with people who say that *Moniteur Belge* is useless. You find everything there: laws, decisions, recipes – you name it."

MONKEY SEE, MONKEY DO

A US law firm (which touts itself as "a team with experience and compassion") has fired one of its paralegals after footage emerged showing her climbing into a spider-monkey enclosure at a Texas zoo, CBSDFW.com reports. In a statement, the firm slammed the behaviour as "irresponsible" and "reckless".

An Instagram video showed the woman sitting on a rock under a waterfall appearing to feed two monkeys with the popular cheese-puff snack 'Hot Cheetos'. The paralegal was quickly hired by a different firm, with its principal blasting her previous employer, accusing it of having a "cancel-culture attitude, social-media virtue signalling and punishing their 'best employee' for something she didn't do on company time".

The zoo boss criticised the woman, however, saying that they had contacted the DA about pressing charges: "We can't let this behaviour go unpunished."

BODY-WASTE-BUCKET BAR BOSSES APOLOGISE

The Bar Standards Board (BSB) and Pearson VUE in Britain have been criticised by an independent review of their Bar exams in August 2020, Legalfutures.co.uk reports.

Both organisations were inundated with complaints by distressed candidates. Issues included students being locked out of the online system on the day, being able to complete only three-quarters of their exams, and having to urinate in buckets because no breaks were allowed.

Both bodies have issued apologies, with the BSB publishing an action plan for improvements.

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