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PRESIDENT'S MESSAGE

SEISMIC SHIFT

Regrettably, just as we were starting to emerge from a nationwide lockdown and enjoy some degree of normality, Ireland is sailing close to the wind towards a second wave of COVID-19. As I write, Dublin is already elevated to 'level 3' restrictions, with the real risk of other counties following suit. As a profession and as a society, we must continue to adhere to the public-health advice, and hope that our collective actions and collective responsibility in doing so will be enough to once again 'flatten the curve'.

When I was appointed President of the Law Society on 8 November 2019, I did not anticipate that my term of office would take the turn of events that it has. Neither did I anticipate that, instead of representing the profession at ceremonial events nationally and internationally, I – like you – would be navigating my way around a pandemic that is affecting 213 countries. However, the turn of events has brought into sharp focus that we cannot take anything for granted.

Fast forward

In early September I appeared before the Special Oireachtas Committee on COVID-19 Response. I highlighted to Government our willingness to adjust and adapt and that, from the onset of the crisis, the legal profession and judiciary had worked tirelessly to maintain the most urgent of services, and restore others, insofar as it has been possible to so do.

I emphasised that April 2020 marked a seismic shift in the manner in which justice is administered in the State, and that recent months had seen a remarkable fast-forwarding of the adoption and implementation of technology across our profession.

While I acknowledged that many aspects of Ireland's response were successful, I pointed out that there were lessons to be learned and steps to be taken to ensure that, in the event of a similar future crisis, certain issues could be better addressed by Government. These include mitigating constitutional and legal risk in the context of a range of fundamental rights that are protected under the Constitution and the *European Convention on Human Rights*; enhancing clarity around communications; investing in the Courts Service and in better technology; and finally the ability to commence proceedings, file and serve all documents, and pay court fees online.

The Society has long advocated for these changes, the absence of which has caused significant difficulties for solicitors throughout the crisis. I believe our submission was well received and, hopefully, our key recommendations will give rise to constructive, meaningful discussion.

In addition, on the day I write this, I had a very positive virtual meeting with Minister for Justice Helen McEntee, where I had the opportunity to highlight and engage on relevant issues of concern to the profession. The Law Society's open and constructive working relationship with Government and, in particular, with the Department of Justice and Equality, is a significant benefit in our ongoing engagement.

Historic development

I wish to congratulate my 17 solicitor colleagues who made legal history on 1 September, when they were officially announced as the first solicitors in the State to be allowed to use the designation 'senior counsel'. Coming from large and small practices across the country, the depth and breadth of our new SCs' expertise is of immense value to the Irish justice system and will reflect the modern legal profession of the 21st century.

> THE DEPTH AND BREADTH OF OUR NEW SCs' EXPERTISE IS OF IMMENSE VALUE TO THE IRISH JUSTICE SYSTEM

Crises can create opportunities, and COVID has created the opportunity for me to focus my undivided attention on representing the profession. I will continue in my resolve to do so, to the best of my ability for the remainder of my term and, as you read this message, I will be on the homeward stretch. g

MICHELE O'BOYLE,
PRESIDENT

PIC: ALAMY

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Blackhall Place, Dublin 7
tel: 01 672 4828
fax: 01 672 4801
email: gazette@lawsociety.ie

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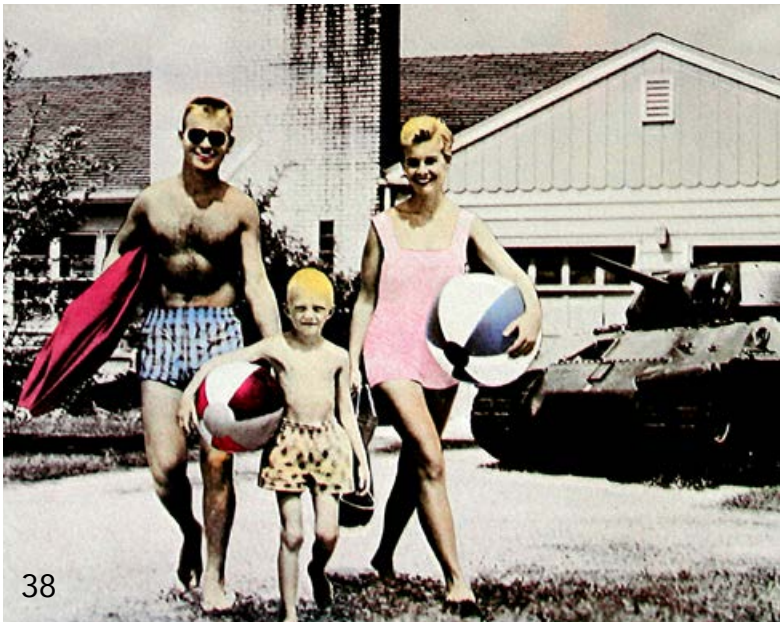
HAVE YOU MOVED? Members of the profession should send change-of-address details to: IT Section, Blackhall Place, Dublin 7, or to: customerservice@lawsociety.ie



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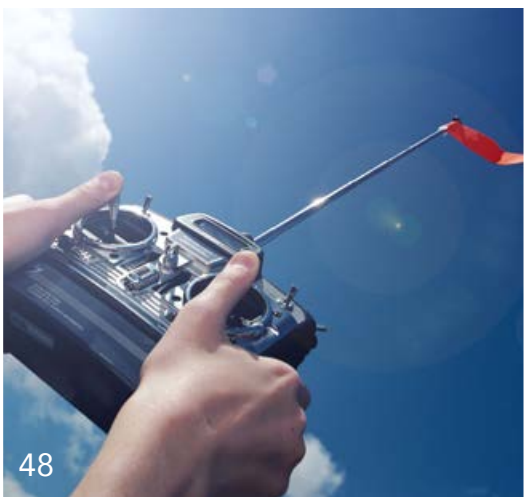
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REGULARS

LOVE HAITI

A Haitian demonstrator re-enacts the scene of the murder of Monferrier Dorval, president of the Port-au-Prince Bar Association. Dozens of students from the Haitian State University demonstrated on 1 September 2020 against the murder. Described as a "brilliant constitutional expert", Dorval (64) was assassinated on the night of 28 August by unknown gunmen in front of his house in Pelerin. Two other prominent Haitians were murdered the same day – Haitian-Arab businessman Michel Saieh and Radio-Television Caraibes journalist Frantz Adrien Bony. It is unclear if the killings were related

PIC: EPA-EFE/JEANTY EMMANUEL

THE BIG PICTURE

Considering a professional tax qualification this autumn?

Tax is grounded in law and one of the key skills of a Chartered Tax Adviser (CTA) is the ability to provide tax advice through the interpretation of tax legislation, case law and precedents. Many qualified solicitors and barristers complement their existing qualifications by completing the Chartered Tax Adviser (CTA) qualification - Ireland's leading tax qualification.

Begin your career in tax today with the Chartered Tax Adviser (CTA) qualification which commences online in October 2020. The CTA qualification is the leading tax advisory qualification in Ireland for tax professionals.

The Chartered Tax Adviser (CTA) qualification is the gold standard in tax and the international mark of excellence in tax advice with over 30,000 CTAs around the globe.

For more information visit: https://taxinstitute.ie/career-in-tax/chartered-tax-adviser/

The Hunt Scholarship

The Hunt Scholarship is an excellent opportunity for recently qualified solicitors and barristers with an interest in a career in tax, to qualify as a Chartered Tax Adviser (CTA).

The Scholarship includes:

- A place on the prestigious Chartered Tax Adviser (CTA) programme worth over €6,000.
- Option to commence the CTA course in either the autumn 2020 or summer 2021.
- All course materials, registration fees and exam fees are covered under this scholarship.

For more information and to download the application form visit:
https://taxinstitute.ie/career-in-tax/scholarships/

PRE-PANDEMIC PRESIDENTIAL PRIMARIES

At a pre-COVID-19 CPD seminar on 13 December 2019, organised by the Meath Solicitors' Bar Association (MSBA) in Navan, were Karl Sherlock (vice-president, MSBA), Ken Murphy (director general, Law Society), Michele O'Boyle (president, Law Society), James Murphy (president, MSBA) and Darren Costello (secretary, MSBA)

President of the Law Society Michele O'Boyle and director general Ken Murphy congratulate Navan-based solicitor James Murphy *(right)* on his appointment as president of the MSBA following its AGM, which was held in the Newgrange Hotel, Navan

ALL PICS: BARRY CRONIN PHOTOGRAPHY

LAW SCHOOL AMBASSADORS 2020

Law School Ambassadors are post-PPC2 trainee solicitors and newly qualified solicitors who provide support and guidance to new trainees on their route to qualification. This outreach programme enables trainees to reach out to the volunteer ambassadors, who share their expertise and experience with them

Richard Bonham

Natalie Bourke

Tarisai May Chidawanyika

Gráinne Cuddihy

Kellie Daniels

Peter Glennon

Andrew Heffernan

Gráinne Hussey

Alice Jago

Aishwarya Jha

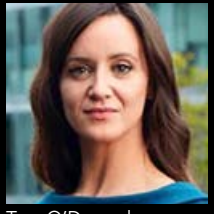
Ciara Keenan

Paul McNamee

Sarah McNulty

Cian Moriarty

Treasa Norrby



Tara O'Donoghue

Laura O'Farrell

Georgina Parkinson

Michael P Quinlan

Therese Ryan

SOCIETY RETIREMENT TRUST SCHEME

The deadline for final tax payment for the 2019 tax year under the self-assessment system is fast approaching. One way to reduce your tax liability is to make a contribution to an approved pension arrangement, such as the Law Society Retirement Trust Scheme, before the deadline.

If you can afford to put some money into a pension fund, you will be able to claim income tax back of up to 40%, depending on your tax bracket. You can still create a tax refund for 2019 by putting money into a pension scheme and submitting a claim to Revenue before 31 October 2020 (later, if you submit your return online).

The Retirement Trust Scheme is an ideal vehicle for making such a contribution. It offers all the flexibility of a personal policy and, in addition, offers a number of enhanced features, including a simple and transparent charging structure and 'best-in-class' investment management. There is also a flexible 'lifestyle strategy' in place that gradually reduces the level of equity risk in your retirement fund the closer you get to your chosen retirement age.

PIC: SHUTTERSTOCK

There are currently five fund offerings available to Law Society members under the scheme, which the investment committee is confident represent high-quality retirement and tax-saving solutions to members.

How do I join?

Membership of the scheme is open to all members of the Law Society who are self-employed, in partnership, or in non-pensionable employment. More information can be obtained from the scheme administrator at JustASK@mercer.com or by phoning 1890 275 275. A copy of the explanatory booklet can also be found on the Law Society's website.

GROSS FUND PERFORMANCE PER ANNUM (TO 30 JUNE 2020)

Fund	One year %	Three years % pa	Five years % pa	Annual management charge pa
Managed fund	-0.1%	2.9%	3.9%	0.86%
Diversified equity fund	0.0%	4.4%	5.3%	0.94%
Absolute return fixed income	1.4%	1.5%	-	0.55%
Long bond fund	6.5%	7.7%	6.4%	0.30%
Cash fund	-0.6%	-0.5%	-0.4%	0.12%

Performance shown gross of fees. Annual management charges are applied as a percentage of the assets of the fund. Past performance does not guarantee future results

HOW MUCH CAN I CONTRIBUTE?*

Up to age 30	15%
From 30 to 39	20%
From 40 to 49	25%
From 50 to 54	30%
From 55 to 59	35%
Age 60 and over	40%

*Contributions are subject to a maximum earnings limit of €115,000

CALCUTTA RUN – THE VIRTUAL CHALLENGE!

For obvious reasons, last May's Calcutta Run had to be scotched. Not to be outdone by a pesky virus, the organisers came up with a novel way to ensure that vital funds will continue to be raised for the Peter McVerry Trust and The Hope Foundation.

Members of the profession, their familes, and friends are being asked to run, walk, or cycle a collective 10,000km – the distance from Ireland to Kolkata – raising money in the process.

Participants are being asked to do their activity in their local area and to record the distance covered on an app – everyone's collective progress will be tracked on a map against the route to Kolkata. Those taking part can do so in their own time between 30 October and 8 November. As well as uniting everyone in a shared cause, this virtual event will help those taking part to stay physically and mentally healthy.

Those wishing to participate can sign up at calcuttarun.com/virtual-calcutta-run-2020-sign-up. You'll be directed to create a fundraising page on idonate.ie and be presented with three options: create your own individual page, set up a firm page, or join an existing firm's page.

The organisers are optimistic that the profession will, once again, rise to the challenge.

MURPHY ELECTED NEW BIC VICE-CHAIR

The Law Society's director general, Ken Murphy, has been elected to one of the most senior positions in the International Bar Association (IBA).

As the new vice-chair of the IBA's Bar Issues Commission (BIC), he and his fellow officers will be representing the interests of bars and law societies in almost every jurisdiction in the world.

The IBA is the 'global voice of the legal profession', representing the values and concerns of millions of practising lawyers around the world. This is the highest position that an Irish lawyer has ever held in the BIC. In addition, the director general has been appointed as vice-chair of the IBA's Policy Committee.

Murphy has served as a senior officer of the BIC for many years, and has been co-chair of its Bar Executives Committee since 2014. Prior to that, he held leadership positions in other international organisations, including the presidency of the International Institute of Law Association Chief Executives, which has members in 90 different jurisdictions and on every continent.

"We are a global profession," Murphy observes. "Having direct access to the latest information, initiatives, and cutting-edge thinking on what is happening in bars and law societies in other parts of the world is an invaluable resource.

"The challenges facing the profession are the same in nature, if not in scale, everywhere," he adds. "It is always useful to know what has worked, or not worked, elsewhere – and why."

ONLINE SESSIONS TO HELP YOUNG SOLICITORS

The Law Society has launched a series of free online information sessions for newly qualified and trainee solicitors.

The sessions, which last 20-25 minutes, started on 15 September and take place via Zoom at 7pm every Tuesday for nine weeks.

They focus on career management, interview preparation, and associated mental-health matters. Designed and organised by the Society's Younger Members Committee, the series invites expert speakers to explore topics of relevance to solicitors in the early stages of their career.

"Solicitors, like many others navigating the early years of a career path, can sometimes be unsure of what direction it should take, where their career path will ultimately lead them, and where they can find their 'dream job'," said Law Society President Michele O'Boyle. She said that the committee had identified key issues of relevance to their cohort and created this series to help colleagues who might face similar challenges and decisions.

PIC: SHUTTERSTOCK

The first session, 'Finding the hidden job market', featured career advisor Sinead English, who shared information on how to discover and get access to opportunities that are not advertised.

"An estimated 60-70% of all jobs are never advertised," Michele O'Boyle commented. "Networking is an essential tool that will proactively assist solicitors, and indeed all career professionals, to navigate their way along the career ladder. With COVID affecting how we network and meet potential employers, we must rethink how we connect with others and explore and be open to career opportunities when they arise. The key is to stay connected and to stay positive."

In the second session on 22 September, solicitor Barry McLoughlin (Communications Clinic) discussed how solicitors could impress at interviews. His advice was particularly useful, since many newly qualified solicitors emerging from completed training contracts are unlikely to have presented for a formal interview for up to four years.

Future sessions include:

- Mental health and wellbeing,
- Strengthening your self-confidence,
- Success at competency interviews,
- Dealing successfully with recruiters,
- Changing career direction,
- Personal brand management, and
- Dealing with high levels of uncertainty.

More information and registration details are available on the Law Society's website. Search for 'Younger members information sessions'.

ENDANGERED LAWYERS

EBRU TIMTIK, TURKEY

Ebru Timtik (42) died on 27 August after 238 days on hunger strike, only drinking water and taking vitamins. She was a Kurdish-Turkish human rights lawyer, one of a group arrested in September 2017 and known for representing clients critical of the Turkish government. In March 2019, Timtik and Aytaç Ünsal (32) were among 18 lawyers to be sentenced to prison terms ranging from three years to 19 years. She was seeking a fair trial for herself and others. She was sentenced to 13 years, six months.

From the outset of their trial, many incidents occurred that raised concerns about the impartiality and independence of the proceedings. These incidents were observed and analysed during a fact-finding mission in October 2019. This mission consisted of a group of 15 lawyers from seven European countries who met in Istanbul to clarify the legal circumstances that led to the conviction of these Turkish lawyers by the Istanbul High Criminal Court in March 2019.

For instance, the judges who had initially ordered the release of lawyers in pre-trial detention were removed from the case and the released lawyers were re-arrested; the identities of some witnesses were kept anonymous; and they testified remotely by video-link, not in person, which prevented verification of their identities or free will. This also prevented the defence from being able to effectively question the witnesses. In addition, the accused lawyers were frequently interrupted or escorted out of the courtroom during hearings. After challenging the Chief Justice of the Supreme Court for lack of impartiality, requests for disqualification were repeatedly rejected by the court, and their unfair treatment continued.

Despite many local and international efforts to secure her release and that of her colleague Aytaç Ünsal, also on hunger strike and in a critical condition, she was allowed to die, weighing less than five stone. A week after her death, Aytaç Ünsal was released temporarily by order of Turkey's Supreme Court on health grounds.

The persecution of lawyers associated with any opposition continues. On 11 September 2020, Ankara Chief Public Prosecutor ordered the arrest of 48 lawyers, seven trainees, four purged judges and a law graduate for being "members of a terrorist organisation". It is a widely accepted fact that, in Turkey, 'terrorism' charges are political in nature and are used to repress, intimidate and silence any opposition.

Alma Clissmann is a member of the Human Rights Committee.

NEW JUDICIAL APPOINTMENTS

President Michael D Higgins has appointed Ms Justice Teresa Pilkington of the High Court as a judge of the Court of Appeal, with effect from 17 September. The vacancy arose in the court following the retirement of Mr Justice Brian McGovern on 15 March.

Ms Justice Pilkington was appointed to the High Court in July 2018. She was formerly a member of the Property Registration Authority, a member of the Irish Financial Services Appeals Tribunal, tribunal chair of the Mental Health Commission, and a member of the Chartered Accountants' Regulatory Board.

Ms Justice Pilkington was educated at University College Dublin and King's Inns, and was called to the Bar in 1986 and the Inner Bar in 2012. She practised in property law and probate, construction law, guardianship, and charities law.

Solicitor Mary Morrissey has been appointed as a judge of the Circuit Court, with effect from 18 September. The vacancy arose following the passing of Judge John Hannan on 21 February this year.

Judge Morrissey was educated at the National University of Ireland Galway and the Law Society of Ireland. She qualified as a solicitor in 1999, operating her legal practice, Morrissey & Co Solicitors, from Bridge Street, Tullow, Co Carlow.

Both nominations follow recommendations by the Judicial Appointments Advisory Board, which is chaired by the Chief Justice Frank Clarke.

SOLICITORS WANTED FOR PSI ETHICS BOARD

The Psychological Society of Ireland (PSI) is seeking expressions of interest from solicitors willing to serve in a voluntary capacity on its newly created Ethics Review Board.

The PSI is a charitable body representing over 3,000 psychologists in Ireland. The Ethics Review Board will soon replace its Board of Professional Conduct.

The president of the Psychological Society of Ireland, Mark Smyth, says: "We believe that it would aid the transparency and independence of the process to have a number of non-psychologists on the review board. We are seeking expressions of interest from a number of bodies – from their members – to assist in a voluntary capacity."

The PSI's previous Board of Professional Conduct was assisted by members of the Law Society, and Smyth described their input as "invaluable".

SOCIETY COUNCIL NOMINATES SIMON MURPHY FOR LSRA

At its meeting on 11 September, Simon Murphy was nominated by the Council of the Law Society to be a new member of the Legal Services Regulatory Authority (LSRA). Nominees are subject to approval by the Cabinet. Following that, appointments to the LSRA are made by the Oireachtas.

The 11-member authority, with its lay majority, was created as a new regulator of legal services in Ireland under legislation enacted in 2015.

The act provides that the Law Society can nominate two practising solicitors, one male and one female, to serve four-year terms each on the authority. Geraldine Clarke was renominated for a second term last year.

Murphy will replace James MacGuill, whose term on the LSRA expired on 30 September and who chose not to seek reappointment, as he is shortly to commence the presidency of the CCBE, representing the bars and law societies of Europe.

Simon, like Geraldine and James, is a past-president of the Law Society, having served in 2015/16. He is a partner in JRAP O'Meara LLP Solicitors in Cork and is a former president of the Southern Law Association. He is well qualified to serve as a public-interest regulator on the authority, as he has remarkably wide and relevant experience.

Prior to his presidency of the Law Society, he served on and chaired the Society's three main regulatory committees: the Regulation of Practice, Complaints and Client Relations, and Education Committees – the only individual in recent memory in the Law Society to have chaired all three.

IRLI IN MALAWI

PROTECTING THE MOST VULNERABLE IN MALAWI'S PRISONS

16-year-old Tendai Kalumba (not her real name) awoke one night to the sounds of a disturbance outside her house. Stepping outside, she saw a scuffle. She immediately returned to her home and went back to sleep. A man later died as a result of injuries received in that scuffle.

The following morning, Tendai was contacted by police and taken into custody. She was questioned, charged with murder, and brought to appear before a magistrate's court. As a child, she should have been sent to the Child Justice Court for a preliminary inquiry and given the opportunity to apply for bail. Instead, the magistrate remanded her to an adult prison.

Irish Rule of Law International (IRLI) was informed of her arrest, took statements, and immediately proceeded with her bail application. As a 16-year old in an adult prison, Tendai was clearly in illegal detention in contravention of the law. Despite this, bail was denied.

It was then discovered that Tendai was pregnant when she was arrested. IRLI and legal aid counsel reapplied for bail, arguing there that was a change of circumstance and that, due to Tendai's pregnancy, she was in particular danger of contracting coronavirus in prison.

While waiting for a new court date, the female section of the prison was turned into a quarantine area for COVID-19 and all female prisoners were relocated. Tendai was taken hundreds of kilometres away to another adult prison. She was now half a day's travel away from her family, who could not visit her or provide her with essential food and sanitation supplies.

Tendai's bail application was heard at the High Court and, this time, bail was granted. Before she could be released from custody, IRLI had to trace her sureties, and they were examined at the High Court. IRLI liaised with local partners to provide all necessary logistical support for her release.

Without IRLI's assistance, Tendai potentially faced years in prison with her baby – awaiting trial for an offence that took place while she was sleeping.

Aonghus Kelly is executive director of Irish Rule of Law International

HAMMER TO FALL

The virus, disputes, and challenges under the *CCA 2013*. Is the '*Macob* moment' for adjudication in Ireland now close? **Peter O'Malley** thinks so

PETER O'MALLEY IS AN ARCHITECT, ADJUDICATOR AND ACCREDITED MEDIATOR. HE CAN BE CONTACTED AT PETER@OMALLEY.EU.COM

IT IS LIKELY THAT THERE WILL BE SOME EMPLOYERS WHO CANNOT, OR WILL NOT, APPRECIATE THE LEVEL OF FORBEARANCE THAT IS NEEDED. THERE IS NOW A CONSIDERABLE INCREASE IN THE LIKELIHOOD FOR DISPUTES TO TAKE PLACE

Following 'back-to-work day' earlier this year on 18 May, we are now at the beginning of the journey of living with the continuing presence of COVID-19. We now have to face the reality of a construction industry that has been starved of its lifeblood, namely cash flow. With resources heavily depleted, supply chains severely disrupted, and a significantly increased risk profile for continuing projects, it is clear that the full impact of the pandemic has yet to be fully quantified.

Against this backdrop, there is now a realisation that, for ongoing projects, the original programmes are no longer relevant, deadlines have been missed, and there is now the certainty of substantial and increasing delay.

Can forbearance from employers be relied upon in recognition of the difficulties that have, and will continue to occur? In many cases, it is hoped so – but it is likely that there will be some employers who cannot, or will not, appreciate the level of forbearance that is needed. There is now a considerable increase in the likelihood for disputes to take place.

I want it all

Conspicuously, since the *Construction Contracts Act 2013* came into force in July 2016 – now nearly four years ago – there has not been a challenge to the enforcement of an adjudicator's decision, despite the act making provision for this possibility (see section 6(10)). Indeed, there is no jurisprudence at all on the act that could provide guidance to the construction industry.

This is in marked contrast to when Britain's equivalent of the act, the *Housing Grants Construction and Regeneration Act 1996* (HGCRA), came into force in May 1998. The first challenge was submitted to the courts only nine months later, in February 1999, in *Macob Civil Engineering Ltd v Morrison Construction Limited* ([1999] EWHC Technology 254), from what was then a body of approximately 73 reported adjudications across Britain.

In the three-year cumulative period from the commencement of the act to July 2019, there were 52 reported adjudicator nominations through the Construction Con-tracts Adjudication Service (CCAS). The recent release of data from the CCAS confirms a total of 46 adjudicator nominations for the last 12-month period to July 2020. These statistics do not include the data from other nominating bodies in the industry or party-agreed appointments. We now have a considerable body of adjudication cases that is increasing rapidly, which would suggest that a challenge to an adjudicator's decision can be expected soon.

Another one bites the dust

These statistics are nothing more than indicative of where the real issue lies – the state of the economy, which (according to recent reports) is either in or on the brink of recession. If this is the case, the single priority for many contractors and subcontractors will be simply survival, where it is likely that many will turn to adjudication for assistance.

There has, undoubtedly, been a past reluctance to engage in adjudication. Some of the reasons for this are its adversarial nature, the success of other established methods (such as mediation and conciliation), a perception of high cost and risk, as well as technical issues, such as the ability to enforce a decision and the impact of the Constitution.

Compared to other forms of dispute resolution, adjudication offers the distinct advantages of speed and certainty of decision. Without doubt, adjudication is intense and requires meticulous preparation. But, at least from the beginning, the conclusion and end-date are within sight, which is not the case for mediation, conciliation or arbitration.

It follows that, for finance directors and senior managers of main contractors and subcontractors seeking to limit exposure of time and resource in disputes, adjudication provides a practical approach to the recovery of cost where representations in negotiation have failed. In straitened times, where the potential for dispute has been significantly increased and recalcitrance is present, the advantages of adjudication in facilitating a quick and relatively

PIC: SHUTTERSTOCK

certain decision in seeking recovery of cost appear to be becoming more attractive.

Bicycle race

Given a priority for survival, it is now likely that more marginal cases will be contended through adjudication over the next 12 months. There will be a temptation to bring disputes that are less certain to adjudication, which, in more favourable times, may have been directed to mediation or conciliation in order to seek quick resolution. Loyalties, particularly between main contractors and subcontractors, will be tested.

There have been moves towards the courts in the past – a case for enforcement of an adjudicator's decision reached the court list in November 2018, but was withdrawn following settlement. (The enforcement was sought under section 6(11) of the act through an action of law, namely by issue of a 'winding-up petition' under section 569(d) of the *Companies Act 2014*. Although the defendant submitted this was an 'abuse of process', a final settlement was reached prior to hearing.)

There is now, however, an economic urgency that is likely to give rise to not only new points of dispute, but also new points of defence. In recent weeks, a dispute between an Irish collective asset-management vehicle (ICAV), managed by Hines and Stewart Construction, part of the JSL Group, has reached the courts.

In this case, the ICAV is seeking a judicial review in challenge of the statutory adjudication process operated by the CCAS on behalf of the Department of Business, Enterprise and Innovation. (CCAS is the nominating body for adjudicators under section 6(4) and section 8 of the act.) Twomey J granted leave to bring the review, while imposing a freezing order, effectively halting the adjudication process while the court action is pending.

Apart from challenging the jurisdiction of the adjudicator, the ICAV is contending that the adjudication process works to its disadvantage.

It is being argued that, should the adjudication decision be made against the ICAV, it will have to immediately comply with the decision, and then accept the risk of pursuing recovery of the principal and legal costs through challenge. This, of course, is entirely consistent with the 'pay now – argue later' principle of adjudication in the first place.

Although there is some way to go in this dispute, the wider implications of the severe negative economic impact of COVID-19 on main contractors and subcontractors across the industry, resulting from an increasing prevalence of disputes, would suggest that the '*Macob* moment' for adjudication in Ireland could, indeed, be close. g

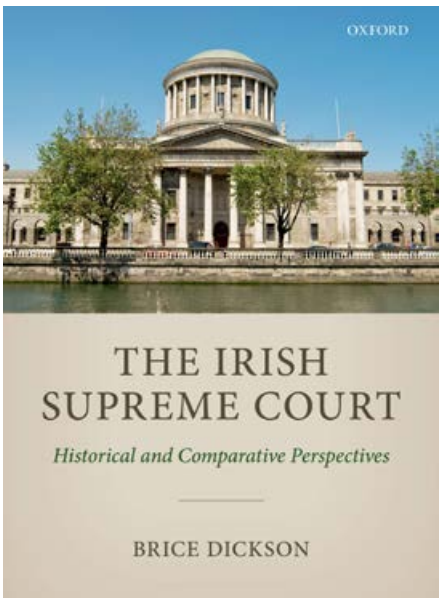
> THERE WILL BE A TEMPTATION TO BRING DISPUTES THAT ARE LESS CERTAIN TO ADJUDICATION, WHICH, IN MORE FAVOURABLE TIMES, MAY HAVE BEEN DIRECTED TO MEDIATION OR CONCILIATION

THE IRISH SUPREME COURT: HISTORICAL AND COMPARATIVE PERSPECTIVES

Brice Dickson. Oxford University Press (2019), global.oup.com. Price: Stg£79 (incl VAT).

The United States has always celebrated the pinnacle of its judicial power – the Supreme Court – and the judgments handed down by that court, particularly where those judgments have had the power to move the country in a particular direction.

As Ireland advances towards the centenary of the foundation of the State, there has been a recognition of the important role that the Irish Supreme Court plays, and an examination of the social history of some of its most significant judgments. This appreciation began with Ruadhán Mac Cormaic's excellent 2016 work, *The Supreme Court*, which charts the social history of the court. Brice Dickson, emeritus professor of international and comparative law at Queen's University Belfast, has advanced this contextual analysis of the role of the Supreme Court from its origins in 1924, just after the birth of the Irish Free State, to today.



The book plots the jurisprudence of the court and considers the various justices appointed to sit on it. He also considers the influence that some of these justices had in shaping the direction of the court. The author calls upon his vast experience of comparative law to consider the Irish Supreme Court against its equals in other common law jurisdictions.

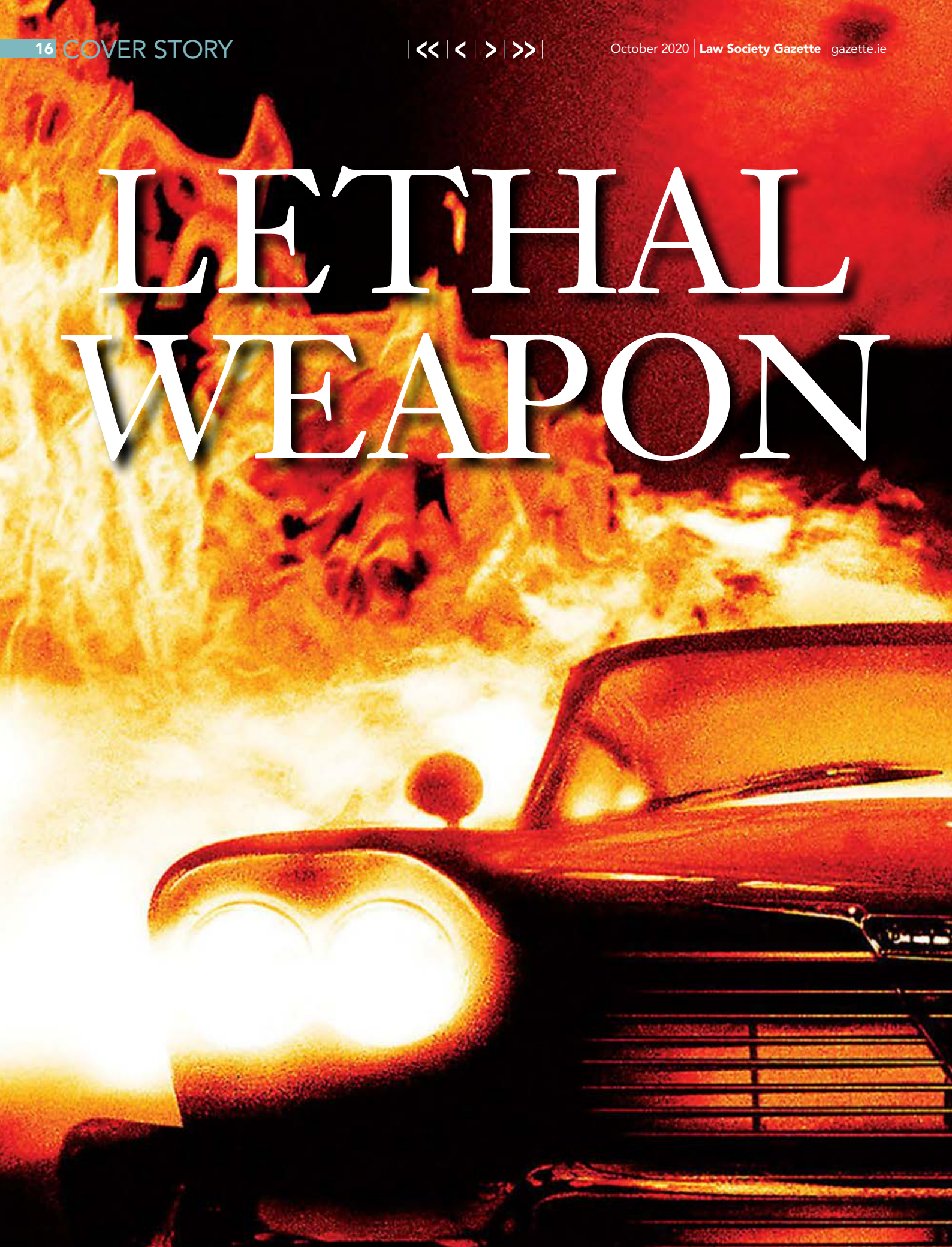
An independent and competent Supreme Court must have the ability to influence its State in a particular direction, in line with their interpretation of the law. The Irish Supreme Court has grasped its jurisdiction to shape the State, with a number of important decisions over its history. While, at first instance, the High Court is imbued with the power to decide cases of judicial review, under article 26 of the Constitution, the Supreme Court was given the power to test the constitutionality of bills presented to the President for signing. The golden age of the socially liberal (in an Irish context) Supreme Court began in the 1960s. Primary among these important decisions was *Ryan v Attorney General* (1965), in which the Supreme Court opened the door to the recognition of unenumerated rights and completely opened the Constitution to be interpreted in a more progressive fashion. The judgment in *Byrne v Ireland* (1972) held that the immunity from suit enjoyed by the British State prior to the creation of the Irish Free State was not carried forward to the new State, opening the door to private actions against the State.

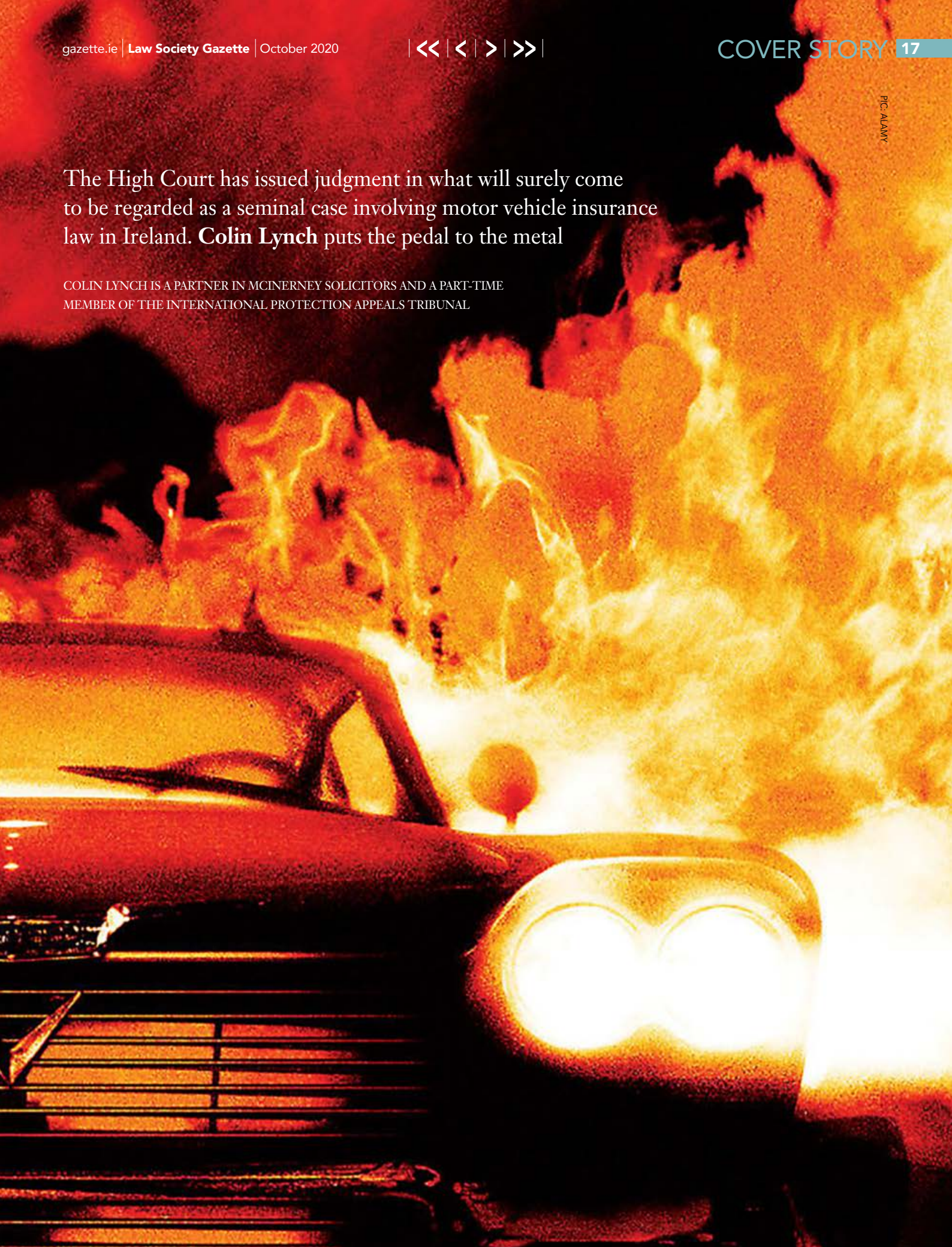
Dickson addresses the relationship between Northern Ireland and the Supreme Court, including the impact of the *Good Friday Agreement*. Arguably the most significant amendment to the role of the Supreme Court in its history occurred when Ireland entered the EEC in 1973, and the court conceded its ultimate authority to the Courts of Justice in the EEC.

Dickson has set the benchmark for the academic and social understanding of the role of the Supreme Court since its creation, and this authoritative work will stand as a testament to the vital role of the court and the authority, protections, and vindications pronounced in its judgments. g

James Meighan is an associate solicitor with Eugene F Collins.

LETHAL WEAPON





PIC: ALAMY

The High Court has issued judgment in what will surely come to be regarded as a seminal case involving motor vehicle insurance law in Ireland. **Colin Lynch** puts the pedal to the metal

COLIN LYNCH IS A PARTNER IN MCINERNEY SOLICITORS AND A PART-TIME MEMBER OF THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL

he case of *Gerard Mongan v Martin Mongan and the Motor Insurers Bureau of Ireland* considered the interplay between domestic legislative provisions (section 56 of the *Road Traffic 1961*), the *Motor Insurers Bureau of Ireland Agreement*, and the EU *Motor Insurance Directives*.

The Circuit Appeal Court decision in *Mongan* (29 May 2020) was in respect of a case in which the Motor Insurers Bureau of Ireland (MIBI) asserted that it was not liable for the injuries caused by an uninsured driver in circumstances where those injuries were caused, not by the negligent driving of the vehicle, but rather as a result of an assault and battery where the vehicle was used as a weapon.

The case can therefore be seen to have serious and far-reaching implications. One only needs to briefly pause in order to recognise that we live in a sometimes-scary world, with a modern history of vehicles being used as weapons against the innocent. We can all remember the events of Bastille Day 2016, when a driver deliberately drove a vehicle into a crowd, killing 84 people and injuring 200 more. We remember the news from Charlottesville, USA, in August 2017, when a car rammed protestors, killing one and injuring 19 others. We saw similar scenes play out in Britain, Spain and Germany in the recent past.

PIC: ALAMY

CLICK HERE TO LISTEN TO THIS ARTICLE

AT A GLANCE

- **A recent case has established that the MIBI is liable for injuries caused by an uninsured driver, not by the negligent driving of the vehicle, but as a result of the vehicle being used as a weapon**
- **The court established that people should be protected, should they find themselves victim to an assault where a vehicle is used as a weapon**

Extraordinary incident

Mongan involved an extraordinary incident in which the drunken and estranged son-in-law of the plaintiff drove his vehicle (while uninsured) toward the injured party (who was standing at the entrance gate of his home), hitting him head-on and knocking him to the ground, inflicting injury to the plaintiff's left knee.

The matter came before Mr Justice Denis McDonald by way of an appeal from the Circuit Court, whereby the trial judge (Judge Karen Fergus) had rejected the MIBI's contention and arguments, and found in favour of the plaintiff.

The MIBI relied upon clause 4.1.1 of the *Motor Insurers Bureau of Ireland Agreement*, dated 29 January 2009, which provides the obligation to indemnify an insured person in respect of injury or death, which is required to be covered by an approved policy of insurance under section 56 of the *Road Traffic Act 1961*. The nub of the issue was the MIBI's view that section 56

ONE ONLY NEEDS TO BRIEFLY PAUSE IN ORDER TO RECOGNISE THAT WE LIVE IN A SOMETIMES-SCARY WORLD, WITH A MODERN HISTORY OF VEHICLES BEING USED AS WEAPONS AGAINST THE INNOCENT

> EU LAW REQUIRES THAT MEMBER STATES MUST PUT IN PLACE APPROPRIATE MEASURES TO ENSURE THAT THE USE OF VEHICLES NORMALLY BASED IN THEIR TERRITORY ARE COVERED BY INSURANCE

only extends to liability for *negligent* use of a vehicle and does not extend to use with intent to injure (such as had occurred in this case).

In terms of the material facts, McDonald J stated: "I believe and so find, on the balance of probability, that, at the moment the vehicle struck the plaintiff on 16 June 2013, it was driven by the first-named defendant in a manner that demonstrates that his object was to hit the plaintiff. In that sense, the MIBI is correct in submitting that the vehicle was being used, at that moment, as a weapon with which to attack the plaintiff."

The judge went on to state: "Accordingly, I find that, at the moment of impact, the first-named defendant drove his car towards the plaintiff with a view to striking the plaintiff as the latter stood on the footpath outside his home."

In that regard, the record states that the first-named defendant was convicted of various road-traffic offences on 29 January 2014 in Galway District Court, including driving without insurance contrary to section 56(1) and 56(3) of the 1961 act (as amended).

Negligent use

The court looked to the act and, in particular, section 56, and noted that there was no definition of 'negligent use' provided. In the circumstances, the court felt it therefore necessary to consider what was intended by the Oireachtas by use of the words 'negligent use' and, in particular, what was intended by the use of the word 'negligent'. The MIBI's submission was that the intentional driving or use of a vehicle as a weapon to injure a person does not fall within the ambit of section 56(1) of the act.

The court was, therefore, faced with the task of considering section 56(1) and clause 4.1.1 of the *MIBI Agreement* in light of the provisions and object of the EU *Motor Insurance Directives*.

In that regard, the court noted that, as a starting point, EU law requires that member states must put in place appropriate measures to ensure that the use of vehicles normally based in their territory are covered by insurance. That obligation, which is designed to protect the victims of road-traffic accidents, was imposed under the provisions of what are known, in a motor insurance context, as the *First*, *Second* and *Third Directives* (Council Directives 72/166/EEC, 84/5/EEC and 90/232/EEC respectively), which were subsequently amended on a number of occasions and which have now been replaced by the *Sixth Directive* (Directive 2009/103/EC – the 2009 directive).

The court noted the considerable number of judgments delivered by the CJEU in relation to the motor insurance directives. In this case, the MIBI sought to rely upon two decisions, namely Case C-348/98 (*Ferreira*) and Case C-514/16 (*Rodrigues de Andrade*).

Andrade concerned a tragic occurrence whereby a tractor engine was being used to power a herbicide-spraying device in a vineyard. Crucially, the tractor was not being used as a means of transport at the material time. Ultimately, something went awry, and the tractor overturned and rolled down a hillside, with the result that several vineyard workers were killed.

At paragraph 42, the CJEU concluded that the concept of the 'use of vehicles' in article 3 does not cover a situation in which a tractor has been involved in an accident at a time when its principal function was not to serve as a means of transport but to "generate, as a machine for carrying out work, the motive power necessary to drive the pump of a herbicide sprayer". In taking that approach, the CJEU pointed out, at paragraph 37, that motor vehicles referred to in the definitions contained in article 1(1) of the *First Directive* "are, irrespective of their characteristics, intended normally to serve as means of transport".

Ferreira established that the directives do not go so far as to prescribe the types of civil liability that are required to be covered by insurance. Accordingly, the MIBI argued that the member states (including Ireland) retained the discretion to define what kinds of civil liability must be covered. In the circumstances, the MIBI placed significant emphasis upon the wording of section 56 of the act and, in particular, 'negligent use'.

Duty of care

In *Mongan*, the plaintiff argued that the words 'negligent use' in section 56(1) of the act should be construed as extending to any use of a vehicle that falls within the tort of negligence. Counsel for the plaintiff submitted that the behaviour of the first-named defendant on the night in question represented a very obvious breach of his duty of care as a driver of a motor vehicle, and that it did not matter, in this context, that he may have acted intentionally. Counsel asked rhetorically: how could it be suggested that the first-named defendant did not breach his duty of care to the plaintiff?

The court found the submission of counsel for the plaintiff helpful as regards understanding and interpreting the Oireachtas's intention in drafting section 56. Counsel referred the court to the now struck-down and unconstitutional provisions of section 57 of the act (*Cullen v Attorney General*).

The court stated that "the two sections are clearly designed to be read together. Section 57 … purported to empower the District Court, on conviction of a person under section 56 for failure to have insurance, to impose a fine equivalent in amount to the damages that might be awarded to a person injured by the accused's 'negligent' use of the vehicle. In my view, there is considerable merit in the argument made by counsel for the plaintiff that the Oireachtas was unlikely to have intended to give the District Court such a significant power in cases of careless driving, but not in the case of driving with intent to hit or injure such as might occur, for example, in a road rage incident."

After a considerable and detailed assessment of various cases, McDonald J made a central finding at p63 of his judgment: "In these circumstances – and having regard to the very clear guidance given by the CJEU – it seems to me that the word 'accident' should be read broadly to cover not only unintended incidents, but also cases where a driver has acted intentionally in striking an innocent third party."

The court gave consideration as to whether a reference should have been made to the CJEU for a preliminary ruling on the interpretation of the 2009 directive; however, given the very clear line of authorities from the CJEU, the court found that it had sufficient guidance as to the meaning and object of the 2009 directive.

The court went on to make a further key finding, that "the 2009 directive requires that the injury suffered by a person in the position of the plaintiff as a consequence of an incident of the type which occurred on 16 June 2013 … must be covered by a policy of motor insurance. I am of the view that, under the 2009 directive, the fact that the first-named defendant, in his inebriated state, at the moment of impact, had the object of injuring the plaintiff, does not mean that liability for the injury was not required to be covered under a policy of insurance of the kind required by the directive."


PIC: ALAMY

Mr Justice McDonald thereby clearly and unequivocally rejected the contention and argument of the MIBI.

Assault and battery

The court has now established as settled law that the MIBI is liable for the injuries caused by an uninsured driver, in circumstances where those injuries were caused as a result of an assault and battery where the vehicle was used as a weapon.

The certainty provided by Mr Justice Denis McDonald in this decision is to be very much welcomed. The court has clearly established that people should be, and will be protected, should they find themselves victim to an assault and battery where a motor vehicle is used as a weapon. g

LOOK IT UP

CASES:

- Case C-348/98, *Ferreira* [2000] ECR I-6732
- Case C-514/16, *Rodrigues de Andrade* 19 ECLI:EU:C: 2017:908
- *Cullen v Attorney General* [1979] IR 394
- *Gerard Mongan v Martin Mongan and the Motor Insurers Bureau of Ireland* (CA 454/16)

LEGISLATION:

- *Road Traffic 1961*, section 56
- *Motor Insurance Directives* (72/166/EEC; 84/5/EEC; 90/232/EEC; 2009/103/EC)

AT A GLANCE

- The Law Society recently introduced new indentures and its PPC Hybrid course – how are trainers and trainees in in-house legal departments adapting?
- Training in-house is now a clearly viable alternative to traditional solicitor training in private practices

PIC: ALAMY

HOUSE OF FUN

Coca-Cola's Irish in-house legal team consists of four solicitors, a trainee, and a legal secretary. **Sarah-Jane Clifford** and **John MacManus** share their experiences of solicitor training in-house

SARAH-JANE CLIFFORD IS AN IN-HOUSE SOLICITOR WITH COCA-COLA IN IRELAND AND HAS 11 YEARS PQE, MOSTLY SPENT IN-HOUSE. JOHN MACMANUS IS A TRAINEE SOLICITOR AT COCA-COLA

The Law Society's new PPC Hybrid has made training as a solicitor for people working in-house more accessible. The course structure allows trainees to undertake their studies without having to leave the office for months at a time to attend on-site training at Blackhall Place on a Monday-to-Friday basis. This makes it an attractive option for both employers and employees.

Here, we hope to give just a flavour to prospective in-house training solicitors of what it means to have a trainee, and offer food for thought for prospective in-house trainees.

SARAH-JANE'S PERSPECTIVE

Most large companies have in-house legal departments, and the in-house profession is growing all the time. In-house legal departments are busy environments (no different to a private practice) and having the right skillsets at the right levels is fundamental.

That is where having a trainee can add a lot of value to the in-house team. We were lucky that John had worked with us for several years as a paralegal before starting his training contract, so he 'hit the ground running' once the contract started.

However, even if this hadn't been the case, a trainee can really be the right fit for your organisation. In-house solicitors are often dragged in many different directions, and a trainee can work alongside you by researching legal areas, ensuring that the team is kept up to date on legal developments, and preparing first drafts of policies and advices. As a trainee develops in their role, they can take on more responsibility and operate their own workload.

Training solicitors in-house is now a real alternative to training in a traditional law

ALL PICS: PAUL CONNOR PHOTOGRAPHY

> ONE QUESTION A PROSPECTIVE IN-HOUSE TRAINEE MAY HAVE IS WHETHER TRAINING IN-HOUSE MEANS YOU CAN NEVER GO BACK TO PRIVATE PRACTICE – THAT IS CERTAINLY NOT THE CASE

> I DON'T SEE MYSELF OR THE OTHER IN-HOUSE STUDENTS ON MY COURSE AS ANY DIFFERENT TO THE STUDENTS FROM FIRMS, BUT YOU CAN SEE DIFFERENT APPROACHES TO SOME OF THE SKILLS MODULES AND HOW THEY PLAY OUT

firm. As an in-house lawyer, you need to have a different perspective. You are not only advising your client – people within your organisation who rely on your skills – but you are part of that same organisation. This, in turn, requires a different skillset: your advice must be business-focused and to the point. You must be able to offer the business the relevant options, and you may even be involved in a cross-functional team that implements the advice.

Therefore, training in-house teaches a trainee not only legal skills, but also in-depth business skills. For example, John has exposure to how a global organisation operates, including its manufacturing and shared-services operations. In addition, he has had the opportunity to work on projects that span across geographies: for example, he has had the opportunity to work with our colleagues across Europe on GDPR and marketing projects.

Our house

Our legal team works across numerous areas of law and is very much a 'general practice' in that sense. John does not do traditional rotations, but would support the team across matters as they arise. He has had in-depth exposure to GDPR and company law, but will also get opportunities to work in areas such as food law, marketing and advertising, employment law, and some property law.

Since John and I entered into the older indentures for trainee solicitors, we will need to organise a secondment for him. That secondment may prove a little more challenging in the current environment of COVID-19. As a result, we are likely to wait until closer to the end of the traineeship now – our initial plan was early 2021.

The Law Society has issued new indentures since January 2020. These are more flexible, requiring trainees to gain in-office experience in three distinct areas of law (rather than having to complete training blocks that include compulsory experience in land law and litigation). This should enable a trainee to be fully trained in the in-house legal department.

John is also part of the first year of the PPC Hybrid – this makes having a trainee really attractive to an in-house department, as it no longer means that the trainee has to spend large amounts of time in full-time education, but can study and work at the same time. It would not be feasible for many in-house departments to have someone out of the office for an extended period of time.

One question a prospective in-house trainee may have is whether training in-house means you can never go back to private practice – that is certainly not the case. An in-house solicitor brings huge value to a private practice, as they really understand things from the client's perspective. I spent my first seven years post-qualification in-house; I then returned to private practice for three years, before moving back in-house again.

I was lucky to have worked with John for the best part of a year before COVID forced us to the home office. Despite not being physically together, John's traineeship has not suffered. We are lucky to have excellent technology available to us. John and I connect nearly every day by video-call, as well as having other routines with the other members of the direct and extended team.

JOHN'S PERSPECTIVE

I worked in private practice for a little under a year after completing my LLM in international business law. When I saw the advertisement for a job in the legal team in Coca-Cola, I thought that it was a great opportunity to work with such an iconic company, and it would also allow the best opportunity to apply what I had learnt during my LLM. After working in the company for a few years and engaging with colleagues on projects across Europe, including the implementation of GDPR, I knew that this was where I wanted to train. Although working in-house is almost like working in a general practice, due to the wide areas of work that are covered, there is also the chance to develop in a niche area of law that really appeals to me.

One better day

I am enjoying my time on the PPC Hybrid and find the business law course almost second nature to me. I have some previous experience

of parts of the other elements of the course, but probate and conveyancing are completely new to me.

I don't see myself or the other in-house students on my course as any different to the students from firms, but you can see different approaches to some of the skills modules and how they play out. For example, I have noticed this in negotiation workshops. It has been useful for us to be paired together, as it allows us to see how the other analyses each situation.

Flexibility is the biggest advantage for me. I am quite lucky that my manager and I were able to come to an understanding early on in relation to how we would manage my working time, especially for the weekends I am in the Law Society and the intensive week-long sessions.

Coca-Cola also offers flexible working hours, which is a massive help with the course. Another big advantage of training in-house – and especially in a multinational – is that I get to work with people from across the world. These meetings are often in-person, which has allowed me to travel to different countries and, of course, we would also have weekly meetings via videoconferencing with our wider European team. During the current pandemic, this prior experience of videoconferencing meant that the transition to working from home and attending the PPC Hybrid virtually was not as drastic for me as it was for a lot of other people in my course.

One step beyond

A challenge I faced upon completing my FE1s was that I was going to have to be out of the office for a large chunk of time to attend the professional practice course, and I would also have to go on secondment to cover certain required blocks under the indentures. Part of this was dispelled when the Law Society announced the PPC Hybrid last summer and allowed trainees to work full-time and attend the PPC Hybrid over a slightly longer duration. The requirement to go on secondment to cover certain mandatory blocks has been removed for indentures entered into after January 2020, provided the training solicitor can provide in-office experience in three distinct areas of law. However, they still apply for those in the PPC Hybrid who entered into their indentures in December 2019.

One other challenge an in-house-trained lawyer may face is it that you are likely to be less familiar with formal legal language, as that is not as likely to be used in an in-house environment. That being said, I would not see that as a disadvantage as, more and more, the profession is moving towards the use of plain English.

It must be love

The removal of the requirement to do the traditional compulsory training blocks will also make training more accessible for people working in-house – for example, if your ambition is to travel and work in a more focused or specialised area of law, this new option is a massive help.

The biggest benefit for those seeking to do the PPC Hybrid is the fact that you can claim the traditional credits for working prior to attending PPC1 (maximum four months), and you can also claim up to five months' credits for working during PPC1 also. Thus, it allows you to make up most of the additional time that the hybrid course takes. g

PIC: SHUTTERSTOCK

AT A GLANCE

- Should employees be entitled to legal representation at employment-proceeding hearings?
- Legal representation should be the exception rather than the rule
- If an organisation has disciplinary procedures, it is 'wholly undesirable' to involve lawyers, according to the Supreme Court

HEAR MY TRAIN A-COMIN'

Can an employee have a fair disciplinary hearing without a lawyer by his side, and is it constitutional to deny him access to legal representation? **Niamh Ebbs** takes a close look at *McKelvey v Irish Rail* and sets us on the right track

NIAMH EBBS IS A SOLICITOR IN CANAL QUARTER SOLICITORS, SPECIALISING IN DEFENCE LITIGATION

s it possible to have a fair hearing at employment proceedings without the involvement of lawyers? Is it constitutional to have a hearing without lawyers? These are matters that were recently considered in the Supreme Court case of *Barry McKelvey v Irish Rail*. The appellant in this case was appealing a decision of the Court of Appeal, which held that he did not have an entitlement to legal representation in respect of an internal disciplinary process.

The appellant had been working for Irish Rail for a number of years and had been promoted to a managerial position. He had been issued with a fuel card as part of his role to allow refuelling, and it came to light that he appeared to be misusing his fuel card. The appellant asked whether he could be represented by a solicitor and counsel at an oral hearing. Irish Rail refused this request and appointed Mr Cullen, an experienced trade-union representative, to represent him instead. The appellant brought an application before the High Court, seeking an injunction preventing Irish Rail from continuing with the disciplinary process until he was legally represented.

Folsom Prison blues

Ms Justice Murphy in the High Court considered that the applicable case law in this instance was as set out by Geoghegan J in the 2009 case of *Burns v Governor of Castlerea Prison*. This case related to prison officers who were accused of misconduct. The prison

> IN ESSENCE, IT APPEARS THAT IT WILL BE VERY DIFFICULT FOR AN EMPLOYEE TO ESTABLISH THAT THEY ARE ENTITLED TO LEGAL REPRESENTATION UNLESS IT IS A VERY COMPLEX CASE, WITH VERY SERIOUS POTENTIAL CONSEQUENCES AND PARTICULARLY DIFFICULT MATTERS OF LAW

officers in question refused to participate in a hearing unless they were allowed legal representation. They were not granted legal representation, the hearing proceeded anyway, and sanctions were imposed against them.

They took a judicial review against this decision. Butler J in the High Court noted that the Constitution might require legal representation in exceptional cases, but, in this instance, legal representation was unnecessary. This was appealed to the Supreme Court, which upheld the decision of the High Court. In reaching his decision, Geoghegan J relied on the findings of Webster J in the 1985 British case *R v Secretary of State for the Home Department, ex parte Tarrant*. This interesting case related to a prison mutiny, in which the question of whether a fair hearing would require a lawyer was considered. Webster J set out the following six applicable criteria:

1) The seriousness of the charge and the potential penalty,
2) Whether any points of law are likely to arise,
3) The capacity of a particular prisoner to present his own case,
4) Procedural difficulty,
5) The need for reasonable speed in making the adjudication, and
6) The need for fairness as between prisoners and as between prisoners and prison officers.

Geoghegan J applied the above criteria to reach his decision in *Burns*, but he ultimately concluded: "I would reiterate that legal representation should be the exception rather than the rule."

Murphy J considered the above criteria as set out in *Tarrant*, and later adopted in *Burns*, when considering the facts of the *McKelvey* case. Murphy J found that:

- The charge and the consequences were serious,
- Multiple points of law were likely to arise,
- The appellant would not be able to present his own case,
- The procedures to be adopted were unclear,
- The involvement of lawyers would slow down the process, but she felt that the impact of this would be relatively minor, and finally,
- On the question of fairness, she held that, as Irish Rail had chosen to allege theft against the appellant, he was entitled to defend himself.

On the basis of all these considerations, she concluded that Irish Rail incorrectly exercised its discretion in refusing Mr McKelvey's request for legal representation, and his request for an injunction was grated.

Slow train coming

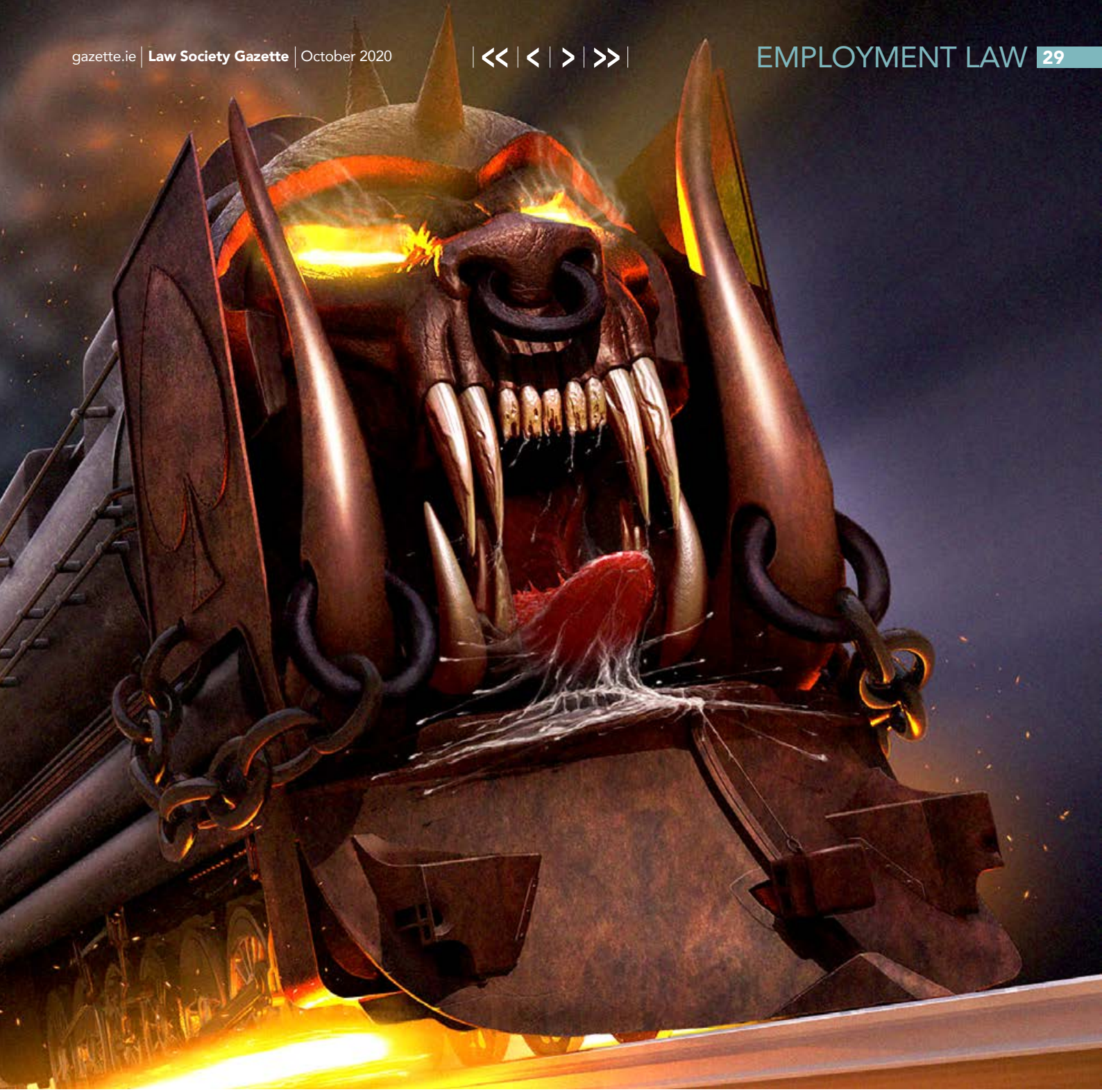
The High Court judgment was appealed by Irish Rail to the Court of Appeal. Irvine J agreed with the application of the principles set out in *Burns*. However, the court reached a completely different conclusion. It was held that the High Court had erred in law in finding for Mr McKelvey.

The Court of Appeal paid particular attention to what they considered to be the core criteria set out by Geoghegan J in *Burns*: "The cases for which the respondent would be obliged to exercise a discretion in favour of legal representation would be exceptional."

The court also applied another overarching principle set out in *Burns*: "It is wholly undesirable that lawyers should become involved in disciplinary proceedings."

Irvine J stated that *Burns* "provides clear authority for the proposition that, if the facts to be considered in the course of a disciplinary hearing are relatively straightforward, then a hearing cannot be stated to be unfair or in breach of the principles of natural or constitutional justice by reason only of the fact that the person against whom the misconduct is alleged does not have legal representation."

In relation to the specific criteria, the judge made several observations. Firstly, in relation to the question of whether the charge was serious, she agreed the potential charges were serious, but found that the High Court had attached undue weight to this. She also found there was nothing exceptional in the sanctions that Mr McKelvey might be subjected to. Secondly, the Court of Appeal did not accept that multiple points of law were likely to arise. Thirdly, the Court of Appeal did not accept that Mr McKelvey would be unable to defend himself, especially as he was going to be represented by an experienced trade-union official. In *Tarrant*, some of the prisoners were noted to have intellectual difficulties, and they had no right to any form of representation. Fourthly, the Court



of Appeal did not accept that there was a lack of clarity surrounding the process of the disciplinary hearing.

As part of its considerations, the Court of Appeal referred to the 2016 case of *Lyons v Longford Westmeath ETB*. This case related to an internal investigative process. Eager J departed to a significant extent from the jurisprudence set out in *Burns*, in that he found "it is quite clear that the proceedings were in breach of article 40(3)(1) of the *Constitution of Ireland* by refusing to allow legal representatives to appear on behalf of the applicant."

However, this case related to an investigation rather than formal disciplinary proceeding, and the Court of Appeal held that it was the decision in *Burns* that must guide the court.

Iron horse

Leave to appeal the Court of Appeal's decision to the Supreme Court was granted because it was held that an issue of general public importance had been raised. The Supreme Court agreed that *Burns* was the correct law to apply. The Supreme Court reiterated the overarching finding in *Burns* that cases requiring legal representation would need to be 'exceptional' and, if an organisation has disciplinary procedures, it is 'wholly undesirable' to involve lawyers.

The decision for a court to make was whether continuing disciplinary proceedings without legal representation could amount to unfair proceedings. The Supreme Court

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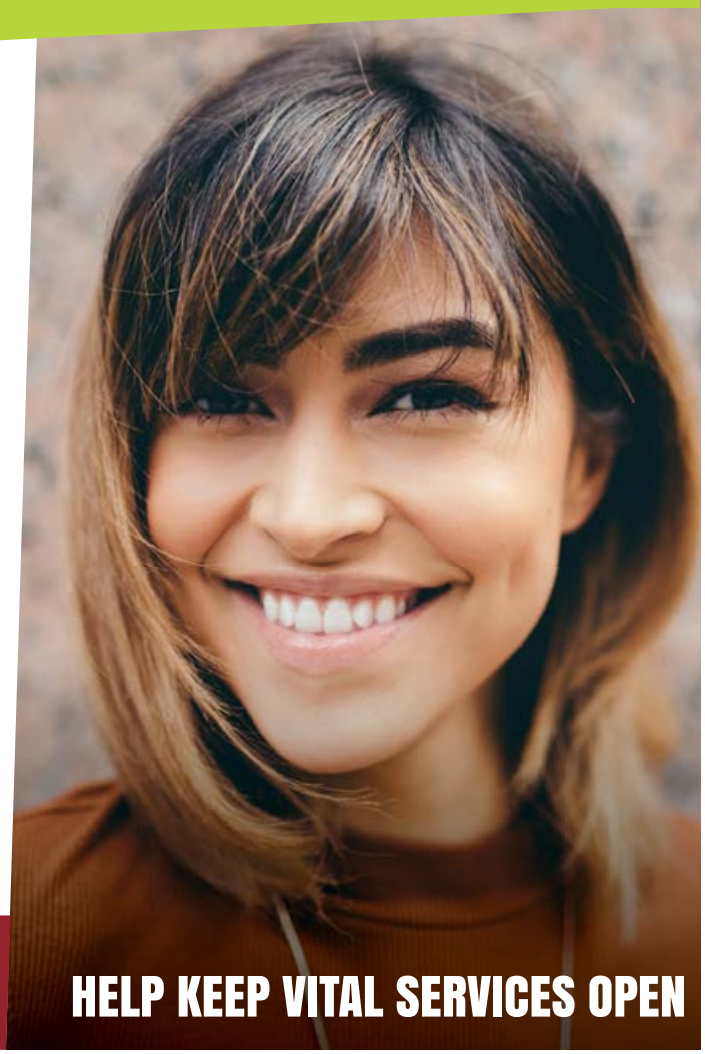

> IT IS NECESSARY TO CONSIDER WHETHER LEGAL REPRESENTATION IS NECESSARY TO ENSURE A FAIR PROCESS, RATHER THAN, POTENTIALLY BEING OF SOME POSSIBLE ADVANTAGE TO THE RELEVANT EMPLOYEE

noted that a case might be better presented by a lawyer, but wondered whether this meant that a lawyer would be needed for the process to be fair.

Clarke CJ took some guidance from the 2009 case of *Carmody v Minister for Justice*. This case related to the level of representation someone was entitled to, rather than an entitlement to legal representation in the first place, but the Supreme Court felt it could provide useful guidance. The question in this case was whether Mr Carmody was entitled to counsel as well as a solicitor. It was held that this case was complex, and the prosecution was going to rely on counsel. In these circumstances, it was held that, in order for a fair trial to proceed, Mr Carmody would need counsel. The Supreme Court held: "It follows that it is necessary to consider whether legal representation is necessary to ensure a fair process, rather than potentially being of some possible advantage to the relevant employee."

The Supreme Court made the following findings. It found that the case being made against Mr McKelvey was relatively straightforward – that he used or allowed to be used his fuel cards in an improper manner.

It also found that there was nothing in the allegations or likely evidence that would place these disciplinary proceedings beyond the competence of an experienced trade-union official. The Supreme Court did not accept that there was any real basis for suggesting that legal issues of any substance would arise. The court noted that an adverse finding could result in dismissal,

but that this could have no bearing on a potential criminal trial.

Long train running

Clarke CJ noted that if, together with a serious allegation and serious consequences, there were particularly difficult matters of law or extremely complex facts, then the cumulative effect of each of these matters might lead, in an exceptional case, to the view that legal representation was required. He held that there was nothing to suggest, as happened in *Carmody*, that the representation being provided was inadequate to secure a fair trial.

Clarke CJ stated: "I am also satisfied that the various considerations in *Burns* are not matters which need to be separately established, but rather are factors to be taken into account in an overall assessment as to whether a fair process can take place without legal representation. I am also satisfied with the observations to be found in the judgment in *Burns*, to the effect that legal representation will only be required as a matter of fairness in exceptional cases provides overall guidance to the proper approach."

Clarke CJ concluded that he was satisfied that the Court of Appeal was correct to allow the appeal from the High Court in this case, and to decline to grant Mr McKelvey an injunction restraining the process.

The outcome of this case very much reinforces the findings in the *Burns* case, after these principles were somewhat called into question in the *Lyons* case. Of note though, is that *Lyons* was a High Court case without the same precedent value as the Supreme Court case of *Burns*.

In essence, it appears that it will be very difficult for an employee to establish that they are entitled to legal representation unless it is a very complex case, with very serious potential consequences and particularly difficult matters of law. As established in *Burns*, the situation needs to be 'exceptional'. g

LOOK IT UP

CASES:

- *Burns v Governor of Castlerea Prison* [2009] IESC 33; [2005] IEHC 76
- *Carmody v Minister for Justice* [2009] IESC 71
- *Lyons v Longford Westmeath Education and Training Board* [2017] IEHC 272
- *McKelvey v Iarnród Éireann/Irish Rail* [2017/5121P]; [2018] IECA 346; [2019] [IESC 000]
- *R v Secretary of State for the Home Department, ex parte Tarrant* [1985] 1 QB 251

AT A GLANCE

- The burden of proof required to obtain summary judgment has been significantly raised as a result of recent judgments
- Particularisation, evidence, and any possible defences are key factors that practitioners must consider when preparing a summary summons
- An application to amend the proceedings may be successful only if both the three-step test for amendment and the requirements for summary proceedings are met

SUMMARY EXECUTION

Summary judgments just got harder! The ever-increasing evidential burden of proof in summary proceedings has serious implications for creditors and banks in their dealings with defaulting borrowers. **Mark Woodcock** and **Brendan Frawley** stalk the land

MARK WOODCOCK IS A PARTNER AND HEAD OF THE INSOLVENCY DEPARTMENT IN FIELDFISHER, AND BRENDAN FRAWLEY IS A SOLICITOR IN THE SAME DEPARTMENT

The burden of proof required to obtain summary judgment has been significantly raised in the past six months. Three recent cases – *Bank of Ireland Mortgage Bank v O'Malley*; *Havbell DAC v David Harris and Rita Harris*; and *Promontoria (Aran) Ltd v Burns* – will have serious implications for creditors generally, and particularly for banks in their dealings with defaulting borrowers.

O'Malley

In October 2008, Mr O'Malley took out a loan facility for €225,000 from the bank and, by November 2011, he had defaulted on the repayments due. In January 2014, a summary summons was issued, and summary judgment was thereafter sought against him. After considering conflicting legal argument about the appropriate level of detail in a summary claim, the High Court granted judgment in favour of the bank.

PIC: ALAMY

PIC: ALAMY

> THERE WAS, HOWEVER, A 'BALD REFERENCE' TO THE AMOUNT SOUGHT, AND NO DETAIL AS TO HOW THIS SUM WAS ARRIVED AT. THIS WAS NOT SUFFICIENT TO MEET THE PARTICULARISATION REQUIREMENT

On appeal, a more onerous test was imposed by the Supreme Court, with reference to order 4, rule 4 of the *Rules of the Superior Courts*. The test established the required level of detail in an indorsement of claim.

The Supreme Court held that the defendant to a summary summons is entitled to have sufficient particulars of the debt to enable him to "satisfy his mind whether he ought to pay or resist". In order to make such a decision, a defendant must be given sufficient detail of the debt so that he understands how the figure was arrived at in the first place.

However, the court held that, if the indorsement of claim sets out the liquidated sum due and states that the calculation was contained in an identified document previously sent to the debtor, this is sufficient information for the purposes of particularity, provided the documents relied on contain the necessary detail.

The court noted that the terms of the loan, its acceptance, and the subsequent failure to repay were explained in the indorsement of claim. There was, however, a "bald reference" to the amount sought, and no detail as to how this sum was arrived at. This was not sufficient to meet the 'particularisation requirement'.

Evidence of calculation

In debt-enforcement procedures, the statement of account of a debtor specifies the initial loan amount, records the monthly instalments, records the failure to pay the monthly instalments, and is intended to give a "very clear picture" as to why there are arrears.

It was held that financial institutions must specify "at least a straightforward account of how the amount said to be due is calculated, and whether it includes surcharges and/or penalties as well as interest". This must be seen in the special indorsement of claim and the evidence presented. The system that generated the statement of account must have some "inbuilt methodology" for calculating the closing balance, which must be clear from the document or any other evidence.

There was no indication in the statement of account in *O'Malley* as to what interest rate was being applied, and whether the sum claimed included penalties and

> AN APPLICATION TO AMEND THE PROCEEDINGS MAY BE SUCCESSFUL ONLY IF BOTH THE THREE-STEP TEST FOR AMENDMENT AND THE REQUIREMENTS FOR SUMMARY PROCEEDINGS ARE MET

interest. This was particularly problematic, as the loan agreement made it clear the interest rate could be varied. Accordingly, the court held that it was not obvious to a reasonable person as to how the sum claimed was arrived at.

Decision summary

The Supreme Court found that there was little detail as to how the sum claimed came to be due. Furthermore, there was no calculation shown as to how the figure sought was arrived at and what it was made up of. This meant that the debt was not sufficiently particularised, and the appeal was allowed. The case was sent back to the High Court for amendment of the proceedings to be considered.

The decision of the Supreme Court in this case came as a surprise to legal practitioners and banks, in that it set a higher burden of proof than had been acceptable previously in summary judgment proceedings. Many special indorsements of claim were amended in the wake of the decision. One such case, involving an application to amend the summary summons, was *Havbell*. The judgment in this case set out the factors to be considered in an application to amend a summary summons and whether or not to grant summary judgment.

Havbell

The defendant borrower took out an interest-only loan facility on 30 November 2004 from Permanent TSB. The loan was restructured in 2013 to require repayment of the principal as well as interest. The rights under the loan were subsequently sold to Havbell Ltd on 19 June 2015.

On 1 November 2017, a demand issued for €113,778.04, and a summary summons followed on 16 January 2018. In light of the decision of the Supreme Court in *O'Malley* (delivered on 29 November 2019), the plaintiff issued a motion on 13 February 2020 to amend the summary summons. The proposed amendment listed the opening balance, interest, credits, and total due.

The High Court considered two main issues: whether the amendment should be allowed, and whether summary judgment should be granted.

Amendment test

The court considered whether the proposed amendment was in the interests of justice and would ensure that the real issues in controversy were addressed. In deciding whether this overarching test was met, the court considered *BW v Refugee Appeals Tribunal*, a case that approved a threefold test for amendments generally – arguability, explanation, and irremediable prejudice.

The court found that the three strands of the test were met, and the amendment was allowed.

In deciding whether summary judgment should be granted, the High Court then laid down the following test:

a) The plaintiff's claim must be sufficiently pleaded and particularised,
b) The plaintiff must adduce evidence establishing a *prima facie* case,
c) If so, the court must inquire as to whether there is a fair and reasonable probability of the defendant having a real or *bona fide* defence, and
d) If so, the defendant must show this goes beyond mere assertion and be supported by evidence.

Looking at each of these requirements in more detail:

a) *Particularisation* – under this heading, *O'Malley* was considered, and it was reiterated that particularisation may be indirect by referring to another identified document that provides the necessary information. Some clarity was provided in *Havbell* as to such reference to other documents in the summons. It was held that the statement "the defendants have been regularly supplied with statements of account" does not constitute reference to an 'identified' document. It was further noted that particularisation is not just an evidential matter. There must be specification as to how the interest was calculated from time to time, either directly in the summons or indirectly. In *Havbell*, the court found that the case of *Bank of Scotland v Fergus* provided some guidance on particularisation. In *Fergus*, it was held that "a reference to putting a debtor in a position to know whether interest may have been overcharged implies that the interest rate as it varies from time to time has to be specified, together with the periods involved". Each figure in the summons must be accompanied by an explanation. In *Havbell*, there was no explanation as to how the opening balance was arrived at, and the High Court held that "the jurisprudence is clear that the amount claimed must be explained and, indeed, explained precisely".
b) *Plaintiff must also have a* prima facie *case supported by evidence – O'Malley* was again

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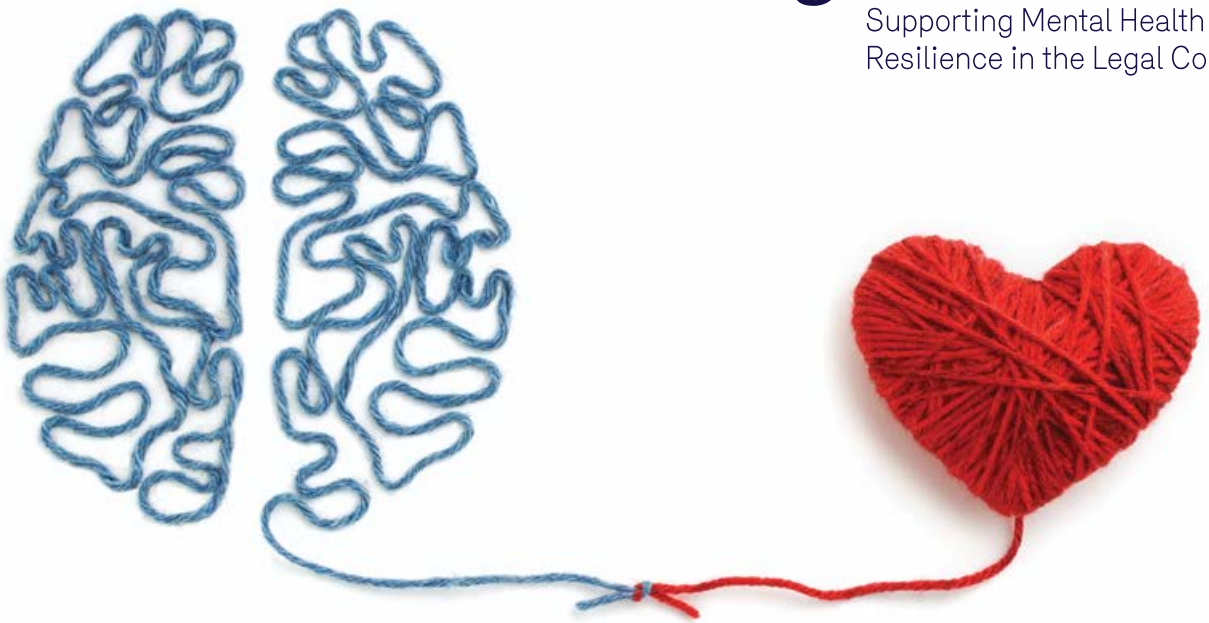

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Supporting Mental Health and Resilience in the Legal Community

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After this initial conversation, solicitors may then avail of further low-cost supports – counselling, psychotherapy or psychological supports within a 30 kilometre radius of their home.

For more information visit: www.lawsociety.ie/legalmind

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> THERE WAS NO INDICATION IN THE STATEMENT OF ACCOUNT IN *O'MALLEY* AS TO WHAT INTEREST RATE WAS BEING APPLIED, AND WHETHER THE SUM CLAIMED INCLUDED PENALTIES AND INTEREST. THIS WAS PARTICULARLY PROBLEMATIC

cited under this heading. Given the issues discussed under separate headings, it was held that the court would adjourn the matter to plenary hearing on this ground also.

c) *Fair or reasonable probability of defence* – the defendants' claim that the agreement had been unilaterally restructured was considered under this requirement. As this counterclaim was so tied up in the agreement on foot of which the plaintiff was proceeding, it was held that the matter would be adjourned to plenary hearing on this ground as well.

d) *Is the defence supported by evidence?* The affidavits submitted by the defendants were considered to be adequate evidence for the purposes of this requirement to transfer the case from summary to plenary hearing.

Although it was held that the amendment was allowed, the costs of the application to do so were awarded in favour of the defendants. Furthermore, as the test for summary judgment failed on various grounds, the matter was sent to plenary hearing.

Burns

This case involved an application for summary judgment that was issued by Ulster Bank; however, the title of the proceedings was later amended following the purchase of the debt by Promontoria. The grounding affidavit was sworn by a senior asset manager at Link ASI Limited, which administers debt collection of behalf of Promontoria.

In both the High Court and the Court of Appeal, it was held that, as Promontoria was not a bank, it could not rely on the exception to the hearsay rule contained in the *Bankers' Books Evidence Act 1879*. It was therefore found that the evidence provided by the asset manager was hearsay and, thus, inadmissible in court.

The global deed of assignment was not inadmissible, however. It was held that Promontoria must prove "that moneys were advanced on foot of certain agreements for repayment and subject to certain conditions, including a condition providing for the payment of interest, and that the moneys fall due for payment". It was held that letters illustrating that a demand was made illustrate only that a demand had been made – but not that funds were owed, the total owed, and by whom it was owed.

The court held that neither Promontoria nor the servicer were in a position to offer averments to prove the debt, and they could not rely on the 1879 act to overcome the difficulties faced as a result of the hearsay evidence rule. It was further noted by the court that the law in this area is in an unsatisfactory state.

We believe that this recent assessment of the law in this area will cause difficulties for venture capital funds who may not possess the documentation required to obtain summary judgment or a means of exhibiting them in a manner that does not breach the hearsay evidence rule.

Further clarity

Although *Havbell* does not appear to ease the requirements regarding particularisation put forward in *O'Malley* for summary judgment, it does provide further clarity as to what the legal requirements are in order to proceed by way of plenary hearing. Particularisation, evidence, and any possible defences are key factors that practitioners must consider when preparing a summary summons.

The *Havbell* decision also provides some comfort to banks and practitioners who have not sufficiently particularised debt. An application to amend the proceedings may be successful only if both the three-step test for amendment and the requirements for summary proceedings are met. Also, meeting the three-step test for amendment is no guarantee that the matter will continue to be heard summarily, as the test for summary judgment must also be met.

Finally, parties should also be conscious of the hearsay evidence rule when particularising the debt on affidavit. As *Burns* demonstrates, the rule can be a significant hurdle for venture capital funds and debt service providers to overcome in order to obtain summary judgment.

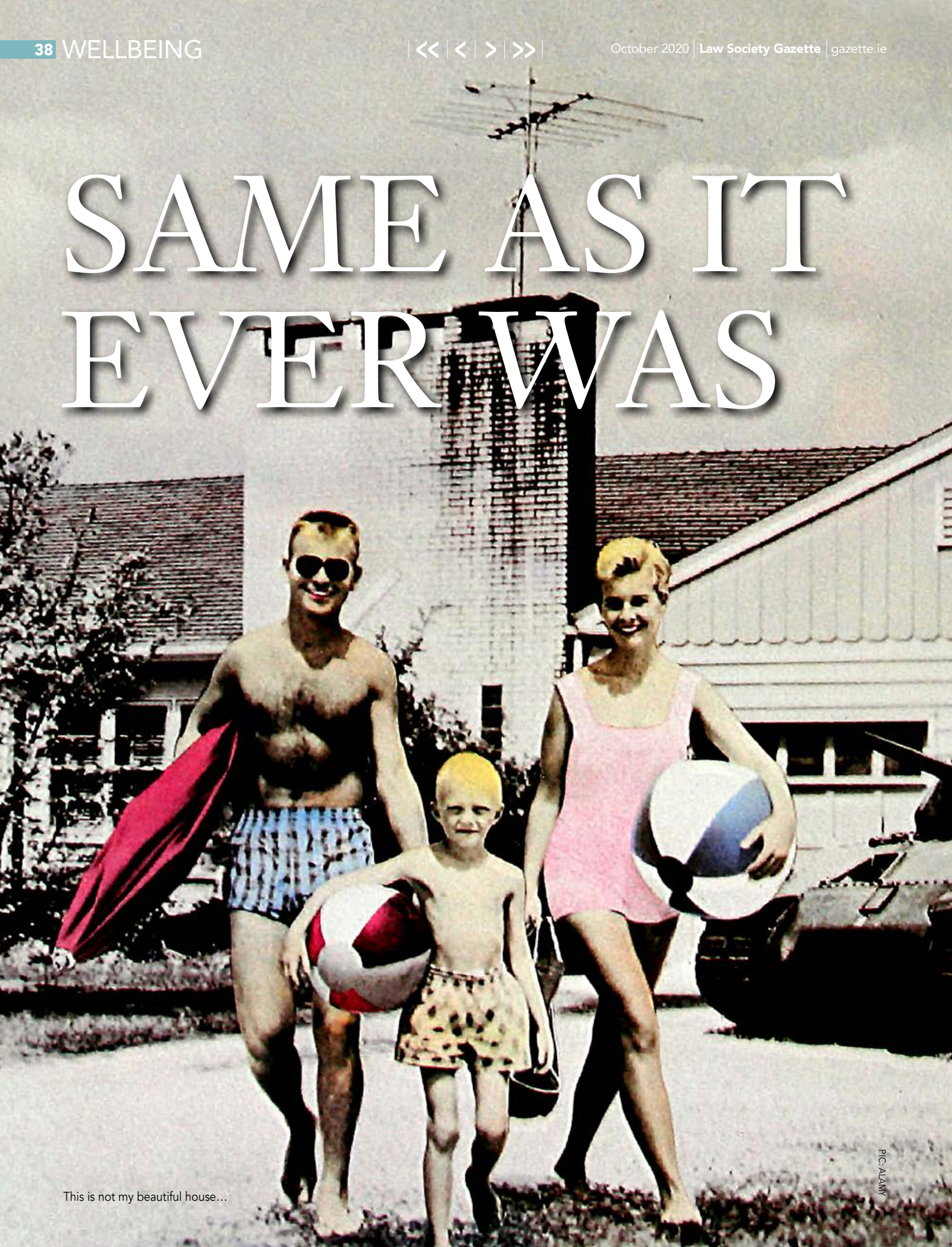
What is clear over the past six months is that it has become much more difficult for banks – and especially venture capital funds – to obtain summary judgments. Unfortunately, while the judgments are well meaning, their practical effect will be to significantly increase the cost of litigation for banks and borrowers alike. g

LOOK IT UP

CASES:

- *Bank of Ireland Mortgage Bank v O'Malley* [2019] IESC 84
- *Bank of Scotland v Fergus* [2019] IESC 91
- *BW v Refugee Appeals Tribunal* [2017] IECA 296
- *Havbell DAC v David Harris and Rita Harris* [2020] IEHC 147
- *Promontoria (Aran) Ltd v Burns* [2020] IECA 87

SAME AS IT EVER WAS



This is not my beautiful house…

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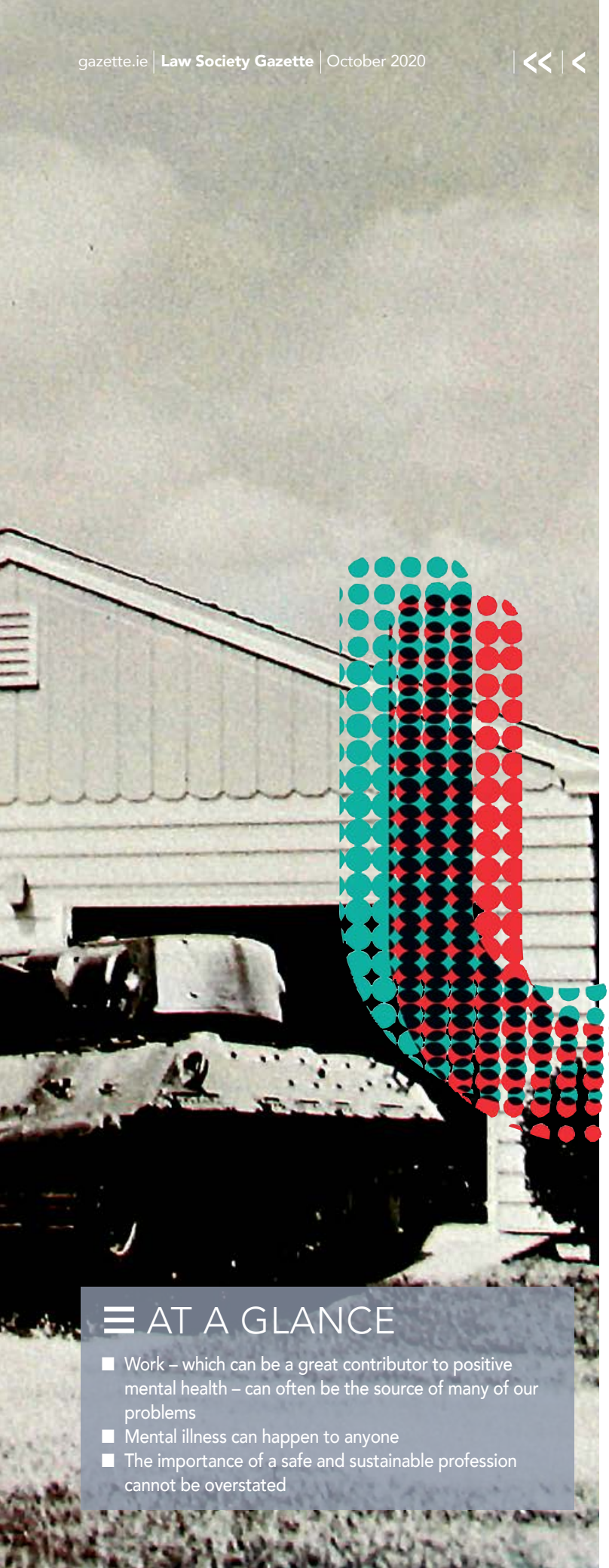


AT A GLANCE

- Work – which can be a great contributor to positive mental health – can often be the source of many of our problems
- Mental illness can happen to anyone
- The importance of a safe and sustainable profession cannot be overstated

You may find yourself behind the wheel of a large automobile, in a beautiful house with a beautiful wife. And you may ask yourself – as **Richard Martin** did following a panic attack at a toll booth in France – well, how did I get here?

RICHARD MARTIN IS THE DIRECTOR OF THE WORKPLACE BEHAVIOUR CONSULTANCY BYRNE DEAN IN LONDON

Until 2011, my story was a pretty standard one for a law firm partner. I had worked hard at school, got to a good university, studied law, got a good degree, trained at a good London firm and progressed to partnership there. A merger with a US firm followed and, after three years, I left to join another London firm where my interest in moving into law-firm management was more likely to be met.

I had a lovely wife, three equally lovely kids, a lovely house and I was involved in our community as a school governor and much else. I was your archetypal insecure over-achiever and, as with many such people, from the outside my life looked pretty sorted.

It looked pretty sorted from the inside too, if I ignored the ever-present feelings of stress and of guilt, and a gnawing feeling that my personal sense of purpose wasn't really aligned with what I was doing day to day, a day to day that increasingly absorbed all my time and energy, leaving little for my wife and kids, and none at all for me. But hey, I thought, if I just can get through the next week, month, year, somehow it would all get sorted, right?

Burning down the house

In his seminal book *Depressive Illness – the Curse of the Strong*, psychiatrist Tim Cantopher describes the kind of person who presents to him in clinic with stress-induced depressive illness: "He or she will have the following personality characteristics:

- (Moral) strength,
- Reliability,
- Diligence,

> MENTAL ILLNESS DOES NOT HAPPEN TO 'OTHER PEOPLE'. IT HAPPENS TO US, TO OUR FRIENDS, OUR COLLEAGUES, OUR FAMILY MEMBERS. I WAS THE LAST PERSON ANYONE WOULD HAVE THOUGHT WOULD GET ILL IN THIS WAY – THE TRUTH WAS, I WAS AT THE FRONT OF THE QUEUE

- Strong conscience,
- Strong sense of responsibility,
- A tendency to focus on the needs of others before one's own,
- Sensitivity,
- Vulnerability to criticism, and
- Self-esteem dependent on the evaluation of others."

Cantopher says that this is the sort of person to whom you would turn if you had a problem to sort out upon which your house depended, a safe pair of hands that you could trust, and who would often be taken for granted. And when they get ill, people are often very surprised.

But – and here is the crux of it – he says that it isn't so surprising when you consider that depressive illness is a physical condition. If you give a set of stresses to someone who is 'weak', cynical or lazy, they will probably give up quite quickly and never get stressed enough to become ill.

A 'strong' person, on the other hand, will react to these pressures by trying to overcome them, as they have overcome every other challenge they have faced in the past through diligence and effort. This person keeps going, absorbing more and more, until, inevitably, symptoms emerge.

Cantopher continues: "At this point, most people would say: 'Hang on, this is ridiculous, I'm doing too much, I'm getting symptoms! You're going to have to help; it's about time you pulled your weight and, as for you, you're going to have to sort yourself out.' So they pull back from the brink before it is too late."

But the sensitive person, without a very solid sense of self-esteem, can't stop struggling, fearing other people or (worse) themselves, and are disappointed in themselves. "So [this person] keeps going, on and on and on, until suddenly: bang! The fuse blows."

Road to nowhere

The accuracy with which this described me when I first read it brought me to tears. The only problem was that I was reading it too late – a couple of months after my fuse blew.

We had been driving back from a May half-term holiday in France and I started to feel a little uneasy. Nothing too dramatic, but enough that I was thinking that I would ask my wife to take over the driving when we next had cause to stop, but, of course, I did not want to mention anything, because that's not what we do, right?

A few minutes later, we were approaching a toll plaza on the motorway when suddenly it felt like I had exploded. I was feeling sick, my breathing was out of control and my heart was racing like I had never known, and I had this desperate desire to escape from where I was. So that's what I did – I stopped the car in the middle of a number of lanes of still quite fast-moving traffic and started walking to somewhere, anywhere, I thought might be safe. Fortunately, it was not long before someone stopped me, and closed the motorway, and took me to that somewhere safe.

I never went back to work. Within a few weeks, I was in the Priory Hospital as an in-patient, where I stayed for a month, followed by nearly two years off work, recovering, learning about what had happened to me, and working out what to do next – because the one thing I was sure about was that I could not go back to law.

There's a lot of stuff along the way I could mention, but that's not the point of this article. (If you are interested, I wrote a memoir, *This Too Will Pass – Anxiety in a Professional World*.) The one anecdote I will mention, because it is the point I want to get across, and because it is a big part of the reason I wrote the book and informs much of the work I do now, is a conversation with my psychiatrist shortly before I was admitted to hospital. He had asked me whether I wanted to be admitted, and I had no idea. All I knew was that I was completely broken and my family was struggling to cope with me, and I with them.

Having assured me that I was definitely ill enough to be admitted to hospital (I didn't like to make a fuss, you understand), I asked him what the patients in hospital were like. He said, "They are like you," and that's the point – mental illness does not happen to 'other people'. It happens to us, to our friends, our colleagues, our family members. I was the last person anyone would have thought would get ill in this way – the truth was, I was at the front of the queue.

This must be the place

The work I do now is all around mental health in the workplace. I spend a lot of time in classrooms (virtual at the moment, of course) raising awareness of mental health, encouraging people to be more aware and to take greater care of themselves and others, and helping them have the confidence to engage in conversations about this still too-stigmatised subject. I co-chair the Lord Mayor of London's campaign 'This is Me', which uses the power of storytelling to break down that stigma. I am a coach and a

PIC: ALAMY

A shotgun shack – warm, woody and without stress

mental-health first-aid instructor. But more and more of my time is now taken up with the *Mindful Business Charter* in Britain.

For many years, there was some great work being done around stigma and raising awareness. There always seemed, however, to be an elephant in the room. Although work can be a great contributor to positive mental health – through the connection, sense of purpose, and achievement it can provide – it can often be a source of problems, and no one was talking about that or trying to do anything about it.

Legal work is often hard, complex, demanding and highly pressured. It is also very important, to our clients and also to wider society. It is vital that lawyers and in the best state possible to take on this work. We know that when we are stressed, however, our brains do not work so well, our cognitive functioning is impaired, such that we are less creative, more aggressive, less efficient and much more besides. That is not good for us as lawyers, but it is also not good for our clients or the quality of work we provide to them.

There is a difference between pressure and stress – we need some pressure to perform at our best. Stress is something else – it is that state of mind we get into when we think we cannot meet the demands being put upon us, often because the pressure has got too much and our brains have begun to lose perspective.

Some stress is unavoidable, given the work we do, and the sort of people we are likely to be. Some of it is avoidable though, and that is what the charter focuses on – seeking to remove the avoidable stress so that we can work more effectively and healthily.

Critical to the approach that the charter advocates is the understanding that a major source of stress is the way in which we work with other organisations – as lawyers, it will often be our clients and other lawyers.

And she was

The charter creates a framework and a permission to allow us to be brave enough to speak up about our needs, to push back where necessary, and to empower us to create the best environment for ourselves to be able to do the complex and demanding work being asked of us.

To use a well-worn metaphor, if you required surgery, you would not want your surgeon to be tired from 'dropping another all-nighter', distracted by a number of different operations they were performing at the same time, breaking away every few minutes to answer the phone or respond to an email, worrying that they hadn't seen their partner or children for a week, while also under the cosh from the hospital director to get the bills out before the end of the day. I don't want that person negotiating the finer points of my merger or divorce either.

The charter does not claim to have all the answers – it is one part of a broader wellbeing strategy – but 55 organisations are now on board and we are getting traction internationally, as well as throughout Britain. It is making a difference and is a great example of the profession (and wider business community) coming together to solve a problem that affects us all.

There remains a huge amount of work to do in terms of ensuring we have a safe and sustainable profession, but it is encouraging to see the amount of focus and thought that is now being devoted to it.

It was a pleasure to be part of the Law Society of Ireland's Business of Wellbeing conference on 30 September to learn about all the work that is being done in Ireland, as well as sharing some of what we have learned from the charter in Britain. g

SC SOLICITORS MAKE LEGAL HISTORY

Solicitors are now eligible for a designation that, for centuries, was reserved for the Bar, with the appointment of 17 solicitors as senior counsel. **Mark McDermott** reports

MARK MCDERMOTT IS EDITOR OF THE *LAW SOCIETY GAZETTE*

THE SOLICITORS COME FROM A WIDE VARIETY OF PRACTICES RIGHT ACROSS THE COUNTRY, SPANNING URBAN AND RURAL, LARGE PRACTICES AND SMALL, AS WELL AS SOLE PRACTITIONERS

Seventeen solicitors from across Ireland made legal history on Tuesday 1 September 2020 when they were named the first solicitors in the State to be granted patents of precedence. This allows them to use the designation senior counsel – an honour previously reserved for "senior barristers of professional eminence, called to the Inner Bar by the Chief Justice of the Supreme Court, on the approval of the Government".

Members of the solicitors' profession were invited to apply for patents of precedence earlier this year as a result of provisions of the *Legal Services Regulation Act 2015*. Solicitors can apply for appointment on the basis of 'proven excellence'.

Applications were considered by the Advisory Committee on the Grant of Patents of Precedence, which made recommendations to Government under section 174(4)(a) of the act. The members of the committee include the Chief Justice (chair), the President of the Court of Appeal, the President of the High Court, the Attorney General, the Chair of the Bar Council, the President of the Law Society, and Dr Don Thornhill, a lay member of the Legal Services Regulatory Authority and its chair, nominated by the Minister for Justice.

Mark of distinction

The honour has been a long time coming for our most eminent practitioners. As far back as 2005, the Competition Authority recommended that, if the title of senior counsel were to be retained, then it should be opened up to solicitors.

Writing about the topic in the April 2005 *Gazette*, Dr Eamonn Hall said: "The Competition Authority concluded that the title of senior counsel as currently awarded may distort competition and that, if the title is to be retained, it should be opened up to solicitors. The authority noted that the title was perceived as a mark of quality for specialisations other than advocacy. To that extent, the title may distort the market against solicitors whose specialisation in a given discipline may be as great as that of a senior counsel."

Dr Hall concluded with the authority's statement that there appeared to be "no justification for confining the title to barristers and excluding solicitors".

The first day of September, then, marked a historic day for the solicitors' profession – at last recognising it to be on a par with its barrister colleagues.

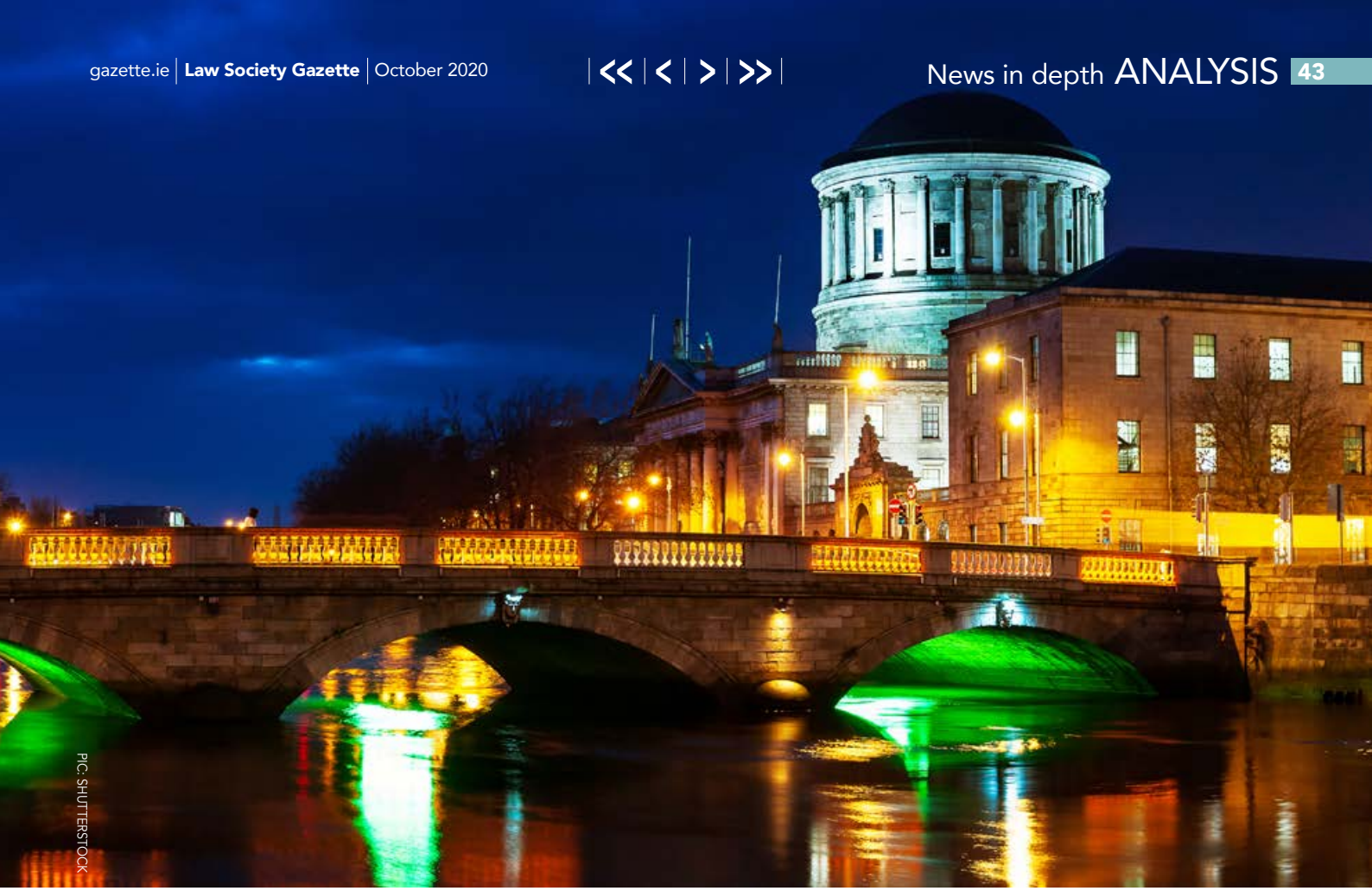
Reacting to the news, Law Society President Michele O'Boyle stated: "I am proud to be standing at the helm as 17 solicitors make history this week, as the first in the State to be granted the right to use the title of senior counsel.

Broad cohort

"The solicitors come from a wide variety of practices right across the country, spanning urban and rural, large practices and small, as well as sole practitioners. It is clear that the depth and breadth of experience and expertise these colleagues collectively possess is of enormous value to the Irish justice system."

The president commented that she hoped and expected that many more solicitors with the necessary skills, knowledge and experience would apply in the future.

President O'Boyle added: "In particular, I look forward to seeing a balance of male and female solicitors applying for, and being granted, patents of precedence,



PIC: SHUTTERSTOCK

to reflect the modern legal profession and 21st century Ireland."

Director general Ken Murphy congratulated all 17 solicitors, saying: "I recall discussing this with then Justice Minister Alan Shatter before he published his bill in 2011. I urged that it should be not only litigation solicitors, but also excellent practitioners in all areas of practice who should be eligible, and I was delighted that that was the result."

It is believed that 36 men and 11 women applied to the LSRA for patents of precedence, corresponding to a success rate of 42% for men but only 18% for women. The director general said this was disappointing. However he believed the most likely explanation for it was not conscious or unconscious bias, but that the senior echelons of the profession continued to reflect the intake of the past, which had been more male dominated.

The 17 solicitors granted patents of precedence are:

Éamonn Conlon SC

Éamonn Conlon Solicitors, Shankill, Dublin 18

Éamonn specialises in construction and infrastructure law and dispute resolution. He is a fellow of the Chartered Institute of Arbitrators and an accredited mediator. He recently commenced sole practice, after 16 years as partner at A&L Goodbody, where he led the construction group in the litigation department and also the firm's *pro bono* practice. Before that, he practised construction law in Ireland, Britain and California. He began his career at the Irish bar in 1983.

Paul Egan SC

Mason Hayes & Curran LLP, Dublin 4

Paul is a senior consultant with Mason Hayes & Curran, where he began his career in 1978 and was partner for 30 years, including ten years as head of corporate. He practises in company law and securities law. A former member of the Irish Takeover Panel, he chairs the Company Law Review Group and is author of, and contributor to, several legal textbooks. Paul has been a Council member since 2011. He currently serves on its Education Committee and Finance Committee.

Patrick Groarke SC

Groarke & Partners, Longford

Patrick enrolled as a solicitor in 1971 and was conferred with an LLM from UCD in 1984. Practising as a solicitor in Longford his entire career, he has specialised in defending professional negligence claims against solicitors before the regulatory committees of the Law Society and the Solicitors Disciplinary Tribunal. He was a member of the Superior Courts Rules Committee (1998-2013) and chaired the Law Society's Litigation Committee from 1988-90. He lect-

> THE HONOUR HAS BEEN A LONG TIME COMING FOR OUR MOST EMINENT PRACTITIONERS. AS FAR BACK AS 2005, THE COMPETITION AUTHORITY RECOMMENDED THAT, IF THE TITLE OF SENIOR COUNSEL WERE TO BE RETAINED, THEN IT SHOULD BE OPENED UP TO SOLICITORS

ures in litigation and risk management and has been a FLAC volunteer for over 30 years.

Richard Hammond SC

Hammond Good, Solicitors, Mallow, Co Cork

Richard is a partner, with his spouse Joyce A Good Hammond, at their Mallow-based law firm. He is a self-described 'succession law enthusiast' who also specialises in professional regulation. Much of his practice involves succession law consultancy for other law firms. He is a past-president of the Southern Law Association. Richard teaches extensively at the Law Society's Law School on the Professional Practice Courses. He is widely published and contributes regularly to CPD conferences for Law Society Professional Training, as well as local bar associations.

Bill Holohan SC

Holohan Lane LLP, Cork

Bill is the senior partner of Holohan Lane LLP, Cork and Dublin, and practises primarily in the areas of arbitration and mediation, insolvency, and professional negligence. A prolific author and conference speaker, he has authored eight books and presented countless papers and articles. A former chair of the Chartered Institute of Arbitrators (Irish Branch), he also previously made legal history in 2000 as the first notary public to be simultaneously appointed for Cork and Dublin.

Áine Hynes SC

St John Solicitors LLP, Dublin 7

Áine is a partner in St John Solicitors, specialising in disability and mental-health law. She is vice-chair of the Law Society's Mental Health and Capacity Task Force and chairs the DSBA's Mental Health and Capacity Committee. She is a member of the Law Society's Council, a member of its *Legal Services Regulation Act* Task Force, and serves on the Regulation of Practice Committee, as well as the Litigation Committee. She is a past-president of the DSBA.

Liam Kennedy SC

A&L Goodbody, Dublin 1

Liam, a partner and commercial litigator with A&L Goodbody, originally hails from Dunedin, New Zealand. He has served on the Law Society's Council for 12 years and chairs its Litigation Committee. He also serves on the Gender Equality, Diversity and Inclusion Task Force and the *Legal Services Regulation Act* Task Force. He represents the Law Society on the Government task force for the promotion of Irish law and legal services internationally. He is a member of the Remote Courts Task Force and is an active member of the International Bar Association, and recent chair of its Litigation Committee.

Rory Kirrane SC

Mason Hayes & Curran LLP, Dublin 4

Rory is a senior partner at Mason Hayes & Curran and is head of the construction, infrastructure and utilities department. He advises and represents utilities, funders, developers, contractors, insurers and professional consultants. He has particular expertise in real-estate development, renewable energy, and gas. He joined the firm in 2004 as partner after qualifying and working in London with the international shipping practice Ince & Co. He is a graduate of UCD and the London School of Economics.

Cormac Little SC

William Fry, Dublin 2

A graduate of UCG, Université de Poitiers, and the College of Europe (Bruges), Cormac is

a partner and head of William Fry's competition and regulation department. He specialises in EU/Irish competition, merger control, State aid, and public procurement law. He advises on the compatibility of business arrangements with EU and Irish competition laws. He also has a broader regulatory focus, advising clients on complying with anti-money-laundering rules and on issues relating to white-collar crime. Cormac is head of the Irish delegation and Law Society representative to the CCBE (Council of European Bars and Law Societies), as well as being vice-chair of the Law Society's EU and International Affairs Committee.

James MacGuill SC

MacGuill & Co, Dundalk, Co Louth

James is managing partner of MacGuill and Co. A native of Dundalk, he was admitted to the Roll in 1986, having obtained his BCL in UCC. He was appointed a notary public in 1996. As a litigator, he focuses on public law, especially criminal law, representing clients in all of the European courts. An active member on Law Society committees for many years, he is chair of the Anti-Money-Laundering Task Force. He served as president of the Society in 2007/08. Having served as head of the Irish delegation to the CCBE, he is now second vice-president of that organisation and, in that capacity, a frequent interlocutor with the European institutions on criminal law and human rights issues.

Roger Murray SC

Callan Tansey Solicitors LLP, Sligo

Roger heads up the medical negligence department of Callan Tansey Solicitors LLP, which has a national reputation for excellence. A recognised leader in the area of medical law, Roger represents families as an advocate at medical inquests nationwide. A graduate of UCD (BCL, 1995), he was admitted to the Roll in 1999 and is a highly regarded commentator and lecturer in the field of medical law.

Helen Noble SC

Noble Shipping Law, Arklow, Co Wicklow

Helen is the principal of Noble Shipping Law, based in Arklow. She was called to the Bar in England and Wales in 1994. She completed a master's in international commercial law at Nottingham University. Thereafter, she worked in the London and Singapore offices of a leading international shipping law practice, before relocating to Ireland in 2004 to establish a shipping and transport practice. Helen has over 25 years' experience as a dual-qualified Irish and English practising solicitor and is regularly called upon as a legal expert on Irish maritime and transport law.

Bernard O'Connor SC

Nctm Studio Legale, Brussels, Belgium

Bernard worked for two years as a solicitor in Dublin and then specialised in EEC law at the University of Amsterdam and the European University in Florence. He has been based in Brussels since 1986, and is a partner in Nctm, one of Italy's largest law firms. The advisory committee recommended him based on his case work before the EU courts in Luxembourg, his World Trade Organisation (WTO) dispute-settlement experience, and his overall knowledge of EU and WTO law. He is a long-term visiting professor in trade and agricultural law at the University of Milan.

Dr Vincent Power SC

A&L Goodbody, Dublin 1

Vincent is head of EU, competition and procurement law at A&L Goodbody. He is an internationally renowned lawyer involved in many leading EU, competition and transport cases, advising both public and private-sector clients. He is listed in the Lloyd's List 'Top 10 Maritime Lawyers 2019' worldwide. An author of several award-winning textbooks, he has been invited to

> IT IS CLEAR THAT THE DEPTH AND BREADTH OF EXPERIENCE AND EXPERTISE THESE COLLEAGUES COLLECTIVELY POSSESS IS OF ENORMOUS VALUE TO THE IRISH JUSTICE SYSTEM. I HOPE AND EXPECT THAT MANY MORE SOLICITORS WILL APPLY IN THE FUTURE

speak at conferences in over 25 countries. A graduate of UCC (BCL) and Cambridge (LLM and PhD), Dr Power is adjunct professor of law at UCC and visiting professor of EU law at Canada's Dalhousie University.

Dara Robinson SC

Sheehan & Partners, Dublin 8

After qualifying in London in 1988, Dara joined Garrett Sheehan and Co in 1992, where he is now joint senior and managing partner. He brought his British experience to the existing human-rights ethos of the firm, particularly in developing a strong mental-health law practice. He continues to manage numerous serious and complex criminal cases. Always active on Law Society committees, he is a chairperson of the Mental Health Tribunals and has written, lectured and broadcast extensively on legal topics.

Michael Staines SC

Michael J Staines & Co, Dublin 7

Michael qualified as a solicitor in 1974. He is a partner in Michael J Staines & Company, the firm he founded over 35 years ago. He has represented public figures, individuals, and corporate entities in some of the highest profile and most complex cases in the Irish criminal courts. He has extensive expertise in corporate, regulatory, and white-collar crime and has appeared as advocate without counsel before all courts (including appearing in jury trials) and before many regulatory bodies.

Damien MP Tansey SC

Damien Tansey Solicitors LLP, Sligo

Damien is founding and senior partner of Damien Tansey Solicitors LLP. He specialises in litigation, in particular medical negligence and personal injuries. During his almost 40 years of practice, he has been involved in some of the largest compensation awards handed down by the Irish courts. He has also been the lead advocate at over 100 coroners' inquests. He is a member of the Law Society's Litigation Committee and regularly receives referrals from other solicitors, including requests to act as an expert witness.

BARRISTERS NAMED AS SCs

Twenty barristers were also named senior counsel: John Breslin, Nessa Cahill, Eoin Carolan, Maurice Coffey, Catherine Donnelly, Marcus Dowling, Stephen Dowling, Michael Duffy, Emily Farrell, Brian Foley, Damien Higgins, Dean Kelly, Brian Kennelly, Suzanne Kingston, Darren Lehane, Anthony Moore, Bernadette Quigley, David Sharpe, Derek Shortall, and Kelley Smith.

> I LOOK FORWARD TO SEEING A BALANCE OF MALE AND FEMALE SOLICITORS APPLYING FOR, AND BEING GRANTED, PATENTS OF PRECEDENCE, TO REFLECT THE MODERN LEGAL PROFESSION AND 21ST CENTURY IRELAND

REMOTE CONTROL

Remote working is here to stay, but how can employers effectively manage staff members who are working from home? **Keith O'Malley** considers the impact on ethos, organisational priorities, and collegiality

KEITH O'MALLEY IS HEAD OF SUPPORT SERVICES AT THE LAW SOCIETY

EMPLOYEES ARE OFTEN SURPRISED BY THE ADDED TIME AND EFFORT NEEDED TO LOCATE INFORMATION FROM COLLEAGUES. EVEN GETTING ANSWERS TO WHAT SEEM LIKE SIMPLE QUESTIONS CAN FEEL LIKE A LARGE OBSTACLE TO A WORKER BASED AT HOME

When the COVID-19 lockdown hit last March, remote working looked like an interim measure that we would do just for a while. As we move through 2020, though, remote working has evolved into a much longer-term arrangement, and probably one that many solicitors and other legal staff may adopt (at least part-time) on a permanent basis.

In these circumstances, legal employers should ensure that they can effectively manage staff members who are working from home, and in other locations outside of their premises. Beyond just productivity, employers should consider the impact of remote working on critical matters such as ethos, organisational priorities, and collegiality.

The good news is that a great deal has been learned over the last six months about what works – and what does not – in remote-working arrangements. There is a myriad of advice now available.

Before employers make arrangements for remote working, it is useful to consider difficulties that regularly arise. If these difficulties arise and are not addressed, poor job performance and poor engagement may follow. So, let's consider remote-working difficulties that employees typically experience.

Lack of face-to-face supervision: Both employees and managers can have difficulties because of reduced face-to-face interaction. Managers worry that employees will not work as hard or as efficiently, though research indicates otherwise, at least for some types of jobs.

At the same time, employees may struggle with reduced management support and oversight. In some cases, employees can believe that remote managers are out of touch with their needs and efforts. They may end up viewing their manager as not supportive – or even not interested in them.

Lack of access to information: Employees are often surprised by the added time and effort needed to locate information from colleagues. Even getting answers to what seem like simple questions can feel like a large obstacle to a worker based at home. This phenomenon extends beyond task-related work to interpersonal challenges that can emerge among remote colleagues. Research has found that a lack of 'mutual knowledge' among remote workers translates to a lower willingness to give colleagues the benefit of the doubt in difficult situations.

Social isolation: Loneliness is a common complaint about remote working, with employees missing the informal social interaction of an office setting. It is thought that extroverts may suffer more from isolation in the short run, particularly if they do not have opportunities to connect with others in their remote-work environment.

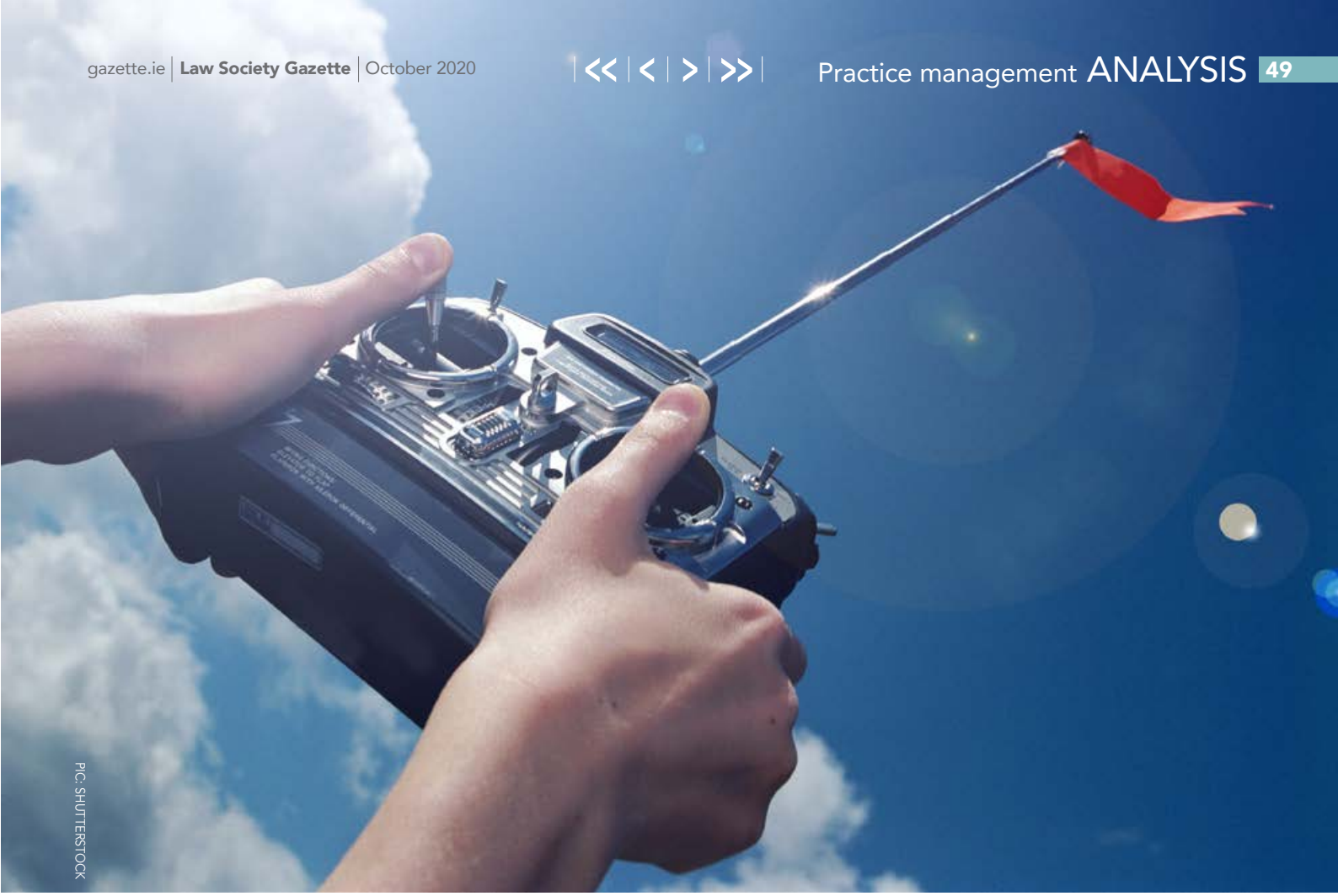
Over time, isolation can cause any employee to feel less 'connected' to their organisation, and can even prompt people to consider leaving their jobs.

Distractions: Ideally, employers should ensure that their remote workers have both dedicated workspace and adequate childcare before asking them to work remotely. However, in the case of a sudden transition to remote working, there is a much greater chance that employees will be contending with suboptimal workspaces and unexpected parenting responsibilities. Even in normal circumstances, family and home demands can impinge on remote work. Managers should expect these distractions to be greater during any unplanned work-from-home transition period.

Supporting remote employees

As much as remote work can be fraught with challenges, there are also relatively quick and inexpensive things that managers can do to ease the transition. Actions that you can take today include:

- *Structured daily check-ins* – many successful remote managers establish a daily call with their remote employees. This could take the form of a series of one-on-one calls if your employees work more independently from each other; or a team call, if their work is highly collaborative. The important feature is that the calls are regular and predict-



PIC: SHUTTERSTOCK

able, and that they are a forum in which employees know that they can consult with you, and that their concerns and questions will be heard.

- *Established rules* – remote work becomes more efficient and satisfying when managers set expectations for the frequency, means, and ideal timing of communication for their teams – for example: "We use videoconferencing for daily check-in meetings, but we use instant messaging when something is urgent." Managers should establish rules as early as possible, ideally during the first online check-in meeting. While some choices about specific expectations may be better than others, the most important factor is that all employees share the same set of expectations for communication.
- *Good ICT resources* – email alone is insufficient. Remote workers benefit from having a 'richer' technology, such as videoconferencing, that gives participants many of the visual cues that they would have if they were face-to-face. Zoom and other videoconferencing utilities are useful, especially for smaller groups. Visual cues allow for increased 'mutual knowledge' about colleagues, and also help reduce the sense of isolation among teams. Video is also particularly useful for complex or sensitive conversations, as it feels more personal than written or audio-only communication.
- *Opportunities for social interaction* – one step a manager can take is to structure ways for employees to interact socially (that is, have informal conversations about non-work topics) while working remotely. The easiest way to establish some basic social interaction is to leave some time at the beginning of team calls just for non-work items (for example: "We're going to spend the first few minutes just catching up with each other. How was your weekend?").
- *Encouragement and emotional support* – especially in the context of an abrupt shift to remote work, it is important for managers to acknowledge stress, listen to employees' anxieties and concerns, and empathise with their struggles. If a newly remote employee is clearly struggling, but not communicating stress or anxiety, ask them how they're doing. Research on emotional intelligence and emotional contagion tells us that employees look to their managers for cues about how to react to sudden changes or crisis situations. If a manager communicates stress and helplessness, this will have a 'trickle-down' effect on employees.

Two-pronged approach

Managing remote working requires managers to adopt a two-pronged approach. You should acknowledge the stress and anxiety that employees may be feeling in difficult circumstances, while also providing affirmation of your confidence in them and in the team.

Use language like: "This is tough, but I know we can handle it," or "Let's look for ways to use our strengths during this time." With this support, employees are more likely to take up the challenge of remote working with a sense of purpose and focus.

It is recommended that you continue to review your key processes involving technology, particularly with respect to security. The guidance note from the Technology Committee in the August/September issue of the *Gazette* (p61) outlines key tips in this regard.

And while we're at it, don't forget to read your *Gazette*. Current and past issues are available at lawsociety.ie/gazette/issues. g

CHECKING YOUR SAFETY NET

The 2020/21 indemnity period looks like being a 'hard' market, with increases anticipated in premiums. The **PII Committee** shares its wisdom on how best to prepare for your renewal – and keep these costs down

THE LAW SOCIETY'S PROFESSIONAL INDEMNITY INSURANCE COMMITTEE MONITORS THE IMPLEMENTATION OF THE *PII REGULATIONS*, ATTENDS TO QUERIES, AND DEALS WITH MATTERS CONCERNING PROFESSIONAL INDEMNITY GENERALLY

> YOUR BROKER SHOULD BE ABLE TO GIVE YOU ACCESS TO ALL INSURERS IN THE MARKET, TO MAXIMISE YOUR CHANCES OF AFFORDABLE COVER

The annual professional indemnity insurance (PII) renewal period once again looms on the horizon. As indicated in the news story in the August/September *Gazette* (p10), it is expected that the 2020/2021 indemnity period will be a hard market, with premium increases. It should be noted that these premium increases are not due to an underperforming Irish solicitors' PII market, but rather global issues, including expected COVID-19 related losses, which are leading insurers to increase their base rates across the board.

The Society has been in ongoing communication with current and potential new insurers regarding changes that can be made to the Irish solicitors' PII market to make it more attractive to insurers, thereby minimising the expected increases in premium. The changes to the market approved by Council can be found in the Practice Notes section of this *Gazette* (p59).

Firms are advised to begin preparing now for a hard renewal, and the Society will be providing comprehensive guidance to assist you with the renewal, including the following top tips.

Get the most from your broker

Brokers advise on and arrange insurance and, generally, act as the agent of the firm, unless they explicitly state that they are acting as the agent of the insurer. The insurance contract is between the firm and the insurer – not the firm and the broker. You should ensure that you are aware of the details of both your broker and your insurer, and the capacity in which the broker is acting.

Generally, there are two types of broker, namely 'execution-only' brokers, and 'advisory-role' brokers, and you should be aware of which type of broker you have.

Execution-only brokers solely place your cover and do not advise you on the market or how best to present your firm to insurers.

Advisory brokers should give you independent professional advice and assistance in preparing the best package to send to an insurer, inform you about market conditions, advise you how best to apply for PII, and negotiate on your behalf in relation to premiums. Advisory brokers are not just for the renewal, and should provide you with ongoing support during the year with regard to any PII queries or difficulties you may have.

You should check how many insurers your broker has access to. Some brokers have agreements to only provide cover from a limited number of insurers. Your broker should be able to give you access to all insurers in the market, to maximise your chances of affordable cover.

You should keep in mind that brokers are providing you with a service, and you are their client. Your broker should pay due regard to the interests of your firm, treat you fairly, and provide you with a good-quality service. As such, you should ask your broker what fees they get for placing your insurance and what services they will provide you for that fee, and you should agree acceptable service levels with your broker in advance of the renewal. Remember, as the client, you are entitled

PIC: SHUTTERSTOCK

Everybody needs somebody

to demand good-quality service from your broker.

Having a long-standing relationship with your broker can be beneficial, as your broker should then have insight into how your firm is run, its risk-management practices and its claims history and, as a specialist PII broker, be able to use this knowledge and experience to your advantage by presenting your firm in a way that demonstrates to insurers that your firm represents a good risk.

If you are not happy with the service being provided by your broker, you should discuss the matter with them and consider using another broker. If changing brokers, keep in mind what effect changing your broker will have on your ability to access insurers.

You can access further guidance on how to deal with brokers on the Society's website.

Financing your premium

As it is expected that premiums will increase for the 2020/21 PII renewal, you should put financing such premiums at the top of your 'to-do' list, including the use of savings or obtaining the necessary loan facilities.

Some insurers offer the ability to stagger premium payments over the year, using either monthly or quarterly payments. You should ask your broker for assistance negotiating such staggered premium payments with your insurer.

The Society partners with Bank of Ireland on an annual basis to provide a finance facility for members who wish to finance payment for their PII premium, income tax, pension contributions or practising certificates. Information on premium financing can be found on the Society's website at lawsociety.ie/Solicitors/Representation/Member-Benefits.

Collect information now

You should start collecting information well in advance of submitting your common proposal form, as the information required can be difficult and time-consuming to find. The common proposal form stays largely the same, year on year, so you should check your completed form (and associated documentation) from last year.

If you have provided legal services in areas that insurers consider to be 'high risk' (for example, conveyancing, wills, pro-

> YOU SHOULD ASK YOUR BROKER WHAT FEES THEY GET FOR PLACING YOUR INSURANCE, WHAT SERVICES THEY WILL PROVIDE YOU FOR THAT FEE, AND AGREE ACCEPTABLE SERVICE LEVELS WITH THEM

bate, etc), you should prepare an outline of the steps taken by your firm to minimise risk of claims in these areas and demonstrate your firm's experience in the relevant practice areas.

Your firm's claims history should be obtained from your current insurer for the current indemnity period, and from previous insurers for previous indemnity periods. The insurer is required to provide this information within ten working days of receiving a request to do so, in accordance with the *Participating Insurers Agreement*. You should include this claims report with your common proposal form, with comments on the current status of any outstanding claims, and outline what steps have been taken to avoid reoccurrence of the problem.

Maximise chances of cover

You should research the market and enquire from your broker about what type of firms are covered by each insurer. Many insurers have narrow underwriting criteria and will only quote certain types of firms. Enquiries should be made from your broker as to what the key issues are that suitable insurers for your type of firm will be looking for in assessing proposals.

You should not rely on your existing insurer to renew. You should ensure that your common proposal form is sent out to all insurers in the market, to maximise the number of quotations. If your broker only deals with a limited number of insurers, you should use more than one broker.

Notification of claims

All claims made against your firm, and circumstances that may give rise to a claim, should be notified to your firm's insurer as soon as possible, and in advance of **30 November 2020**. Notifying all claims and circumstances at the end of the indemnity period is referred to as 'laundry listing' and is looked on very unfavourably by the insurers. You should ensure that you comply with any notification requirements set out in your insurance policy's terms and conditions.

Are you a high-risk firm?

If insurers consider your firm to be a 'high-risk' firm, this can lead to refusal to quote, higher premiums, and/or higher excess. Indicators that you may be a high-risk firm include a sudden increase in the frequency/severity of claims made against your firm, deterioration in the firm's claims history, rogue fee earners, partners involved in fraudulent activity, liabilities arising from conveyancing work, failure to implement risk-management strategies, failure to have robust cybersecurity measures in place, delay in notifying claims, and difficulties with your last renewal. If you are concerned that you are a high-risk firm, you should seek advice from your broker on how to make your firm more attractive to insurers, including early application, providing professional and in-depth information to reassure underwriters, commissioning an independent risk review to focus on problem areas in the firm where claims have arisen, identifying the underlying causes of claims, implementing risk-management measures in relation to claims, and ensuring that all claims and circumstances have been properly notified and accepted by the firm's existing insurer.

The common proposal form

Insurers pay close attention to how professionally your common proposal form is completed, as an indication of the risk profile of your firm. You should ensure that the common proposal form is comprehensively and accurately completed with all required documentation. Ensure that your responses are legible, accurate, and well presented. Try to avoid submitting a handwritten proposal form. Further information on the common proposal form, including in-depth guidance on completion, can be found on the Society's website at lawsociety.ie/Solicitors/Practising/PII.

Apply early and follow it up

There is an especially high risk this year of insurers reducing capacity, thereby limiting the number of firms that they are willing to cover. Therefore, you should submit your common proposal form as soon as possible. Insurers view early submission of a proposal form as an indication that the firm is professional and well managed, and therefore lower risk. If you deal with more than one broker, ensure that your proposal form is only sent to each insurer once.

Follow up with your broker on the status of your application once submitted, including the identities of the insurers to which your broker submitted your application and the dates the forms were submitted. Respond promptly to any requests for further information or clarifications from your broker or insurer. Seek regular updates from your broker on the progress of your proposal if they do not provide such information. Insurers must confirm if they are willing to cover a firm and provide a quote within ten working days of receiving a properly completed proposal form.

Accept quote promptly

Insurers are required to leave quotes open for a period of not less than ten working days. If you receive an acceptable quote for cover, do not unduly delay accepting the quote, as the quote may be withdrawn if the insurer reaches capacity. Do not delay accepting a quotation beyond close of business on 30 November 2020.

> THESE PREMIUM INCREASES ARE NOT DUE TO AN UNDER-PERFORMING IRISH SOLICITORS' PII MARKET, BUT RATHER GLOBAL ISSUES, INCLUDING EXPECTED COVID-19 RELATED LOSSES, WHICH ARE LEADING INSURERS TO INCREASE THEIR BASE RATES ACROSS THE BOARD

Risk and cybersecurity

Insurers particularly focus on firms' risk management and cybersecurity procedures and policies as indications of a firm's risk profile. You should ensure that your firm has formal written risk-management and cybersecurity procedures in place, and that these are highlighted in your common proposal form applications.

Risk management guidance can be found at lawsociety.ie/Solicitors/Practising/PII/#risk and cybersecurity guidance can be found at lawsociety.ie/Solicitors/Running-a-Practice/Cybersecurity.

If you're unable to obtain cover

If you are unable to obtain cover in the market, you should contact the Special Purpose Fund Manager, DWF Claims (Ireland) Limited, in relation to applying to the Assigned Risks Pool (ARP) for cover. Further information on applying to the ARP, including contact details for the Special Purpose Fund Manager, can be found on the Society's website at lawsociety.ie/Solicitors/Practising/PII/#spfm.

Failure to obtain cover will result in the firm being declared a 'defaulting firm', and it will be required to close unless cover is obtained from the market or the ARP.

It should be noted that the ARP is a safety net for those firms that cannot obtain cover in the market. However, the level of cover provided by the ARP is significantly lower than that in the market, and the premiums for ARP cover are significantly higher than those in the market.

If you are considering closing your firm, you should contact the Special Purpose Fund Manager at least 60 days in advance of the PII renewal date (1 December 2020) to apply to the Run-off Fund. It should be noted that there is no penalty in applying to the Run-off Fund and withdrawing that application (in advance of entering the fund) if you decide not to close your firm.

For example, it is open to firms to make a 'provisional' application to the Run-off Fund, which is contingent on the firm being unable to obtain an affordable premium quotation in the market.

Variable renewal dates

Staggered or variable renewal dates have been available since 2011 in the solicitors' PII market, up to a maximum period of 24 months. Firms are not required to have a coverage period (period of insurance for the firm) that matches the indemnity period (1 December to 30 November annually). However, all firms, regardless of their coverage period, are required to have their broker provide confirmation of cover through the Society's online PII portal within three working days of the renewal date (1 December annually). No firm can practise for any period of time without PII cover in place.

Keep informed, ask for help

Remember that your first port of call for help should be your broker, as your market expert representative and advisor in obtaining cover and assisting you with PII. If you are considering contacting the Law Society regarding a PII matter, first contact your broker for assistance. Only if your broker is unable to assist you, should you contact the Society.

The Society provides extensive and in-depth renewal resources through its PII webpage, which is updated on an annual basis for each renewal, including the comprehensive guide to renewal, guidance on the common proposal form, risk-management guidance, cybersecurity guidance, current and past regulations, lists of insurers and brokers, the participating insurers agreements, Special Purpose Fund documentation, and guidance for run-off cover.

The Society's PII helpline assists firms in dealing with PII queries, and is available Monday to Friday, 10am to 4pm, at tel: 01 879 8707 or email: piihelpline@lawsociety.ie. g

ADVISORY BROKERS ARE NOT JUST FOR THE RENEWAL, AND THEY SHOULD PROVIDE YOU WITH ONGOING SUPPORT DURING THE YEAR WITH REGARD TO ANY PII QUERIES OR DIFFICULTIES THAT YOU MAY HAVE

YOU SAY IT BEST WHEN YOU SAY NOTHING AT ALL

Employers need to be aware that public comments could expose them to claims by potential applicants who could argue discrimination when making a job application. **Ross Pratt-O'Brien** explains

ROSS PRATT-O'BRIEN IS A PRACTISING BARRISTER

ONE DOES NOT REQUIRE OF A PUBLIC INTEREST ASSOCIATION DEDICATED TO PROTECTING WILD BIRDS AND THEIR HABITATS THAT ALL ITS MEMBERS SHOULD HAVE WINGS, BEAKS AND FEATHERS

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

The Court of Justice (ECJ) has handed down its judgment in case C-507/18 (*NH v Associazione Avvocatura per i Dritti LGBTI – Rete Lenford*) in relation to the *Equal Treatment Framework Directive* (2000/78/EC) establishing the equal treatment in employment and occupation, including that employers cannot discriminate against job applicants.

In its judgment, the ECJ raised several interesting issues, including freedom of expression, and builds upon the previous cases of C-54/07 *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV* (*Feryn*) and C-81/12 *Asociatia Accept v Consiliul National pentru Combaterea Discrimintrii*.

In these three cases, a person perceived as being capable of exerting a decisive influence on the employment process publicly stated that they would not hire a person from a protected category. In all three cases, there was no individual complainant, and all were pursued by an association. Apart from *Feryn*, the statements were released while there was no ongoing recruitment within the companies.

Background

In this case, NH, a senior lawyer at an Italian law firm, stated during a publicly broadcast radio interview that he did not wish to recruit or use the services of a homosexual person in his firm. At the time of the interview, the law firm was not actively recruiting.

An Italian association of lawyers that defends the rights of LGBTI persons pursued a case against NH for damages. In the proceedings, they asked, among other orders, that he be ordered to pay damages to the association for non-material loss. The action was successful in the first instance, and NH was ordered to pay €10,000 in damages, and extracts of the order to be published in a national paper. This order was upheld on appeal. This was appealed further by NH to the Supreme Court of Cassation in Italy, which referred the matter to the Court of Justice.

The Italian Supreme Court had reservations as to whether the association had standing to bring the proceedings against NH and ask for damages, since the case had no identifiable complainant. The court also questioned whether the statements, without specific recruitment occurring, were within the scope of the directive, on the basis that they concerned access to employment, or whether the statements of NH should be regarded as an expression of opinion.

Two questions were referred to the ECJ:

- Must article 9 of Directive 2000/78 be interpreted as meaning that an association composed of lawyers specialised in the judicial protection of LGBTI persons, the statutes of which state that its objective is to promote LGBTI culture and respect for the rights of LGBTI persons, automatically, as a legal person having a collective interest and as a non-profit association, has standing to bring proceedings, including in respect of a claim for damages, in circumstances of alleged discrimination against LGBTI persons?
- On a proper construction of articles 2 and 3 of Directive 2000/78, does a statement expressing a negative opinion with regard to homosexuals, whereby, in an interview given during a radio entertainment

PIC: ALAMY

programme, the interviewee stated that he would never appoint an LGBTI person to his law firm nor wish to use the services of such persons, fall within the scope of the anti-discrimination rules laid down in that directive, even where no recruitment procedure has been opened, nor is planned, by the interviewee?

NH argued that, as there was no active recruitment ongoing or planned at his law firm at the time of the interview, his statements could not be considered to have been made in a professional context and were therefore outside of the scope of the directive.

Furthermore, NH argued that the association could not be considered to have a legitimate interest to enforce the rights and obligations from the directive, since its members were lawyers and were not all members of the LGBTI community. In dismissing this argument, Advocate General Sharpston stated: "One does not require, of a public interest association dedicated to protecting wild birds and their habitats, that all its members should have wings, beaks and feathers."

It was further observed: "There are many excellent advocates within the LGBTI community who can and do speak eloquently in defence of LGBTI rights. That does not mean that others who are not part of that community – including lawyers and trainee lawyers motivated simply by altruism and a sense of justice – cannot join such an association and participate in its work without putting at risk its standing to bring actions."

First question

Under article 9(2) of the directive, member states are to ensure that associations, organisations, or other legal entities that have a legitimate interest in ensuring compliance with provisions of the directive may engage, either on behalf or in support of a complainant, with his or her approval, in any judicial or administrative procedure provided for the enforcement of obligations under the directive.

In this case, there was no identifiable person. Under article 9(2), an association may take a claim; however, it is necessary to have a complainant. As there was no injured party in the case, it was questionable whether the association had the standing to bring the case. Under article 8(1), member states are entitled to provide more favourable protection than those set out in the directive. Under Italian law, Decree 216/2003 provides that "trade unions, associations, and organisations representing the rights or interests affected under a mandate given by a public or certified private instrument …

IN *FERYN*, THE ECJ HELD THAT PAST STATEMENTS CREATE A PRESUMPTION OF A DISCRIMINATORY RECRUITMENT POLICY, WHICH THE EMPLOYER CAN REBUT IN COURT

shall have standing to bring proceedings … in the name and on behalf of, or in support of, the person subject to the discrimination, against the … person responsible for the discriminatory behaviour or act".

Therefore, the ECJ, as with *Asociatia Accept*, allowed the association to bring the claim to ensure compliance with the directive without the need for a complainant or in the absence of an identifiable complainant. In cases with no identifiable complainant, it is a matter for the member state to determine under which conditions the association may bring legal proceedings.

For the status of the association bringing the claim, the ECJ left it to the member states to determine whether the association is for-profit or non-profit. In the opinion of AG Sharpston in mentioning the written observations of the Greek Government, when there is a for-profit association taking claims such as these, there is a risk that abusive proceedings will be brought, leading to a "trigger-happy approach to launching actions". Furthermore, AG Sharpston observed that it is the duty of the national court to verify whether the association is complying with its stated objectives to protect the interests of the persons in question.

In relation to the damages that may be sought in situations where there is no complainant, the ECJ held that sanctions of some form are required under article 17 of the directive. The sanctions are to be effective, proportionate, and dissuasive – whether there is a complainant or not. This could include the payment of pecuniary damages.

> IN ANY RECRUITMENT PROCESS, THE GREATEST 'SELECTION' TAKES PLACE BETWEEN THOSE WHO APPLY, AND THOSE WHO DO NOT. NOBODY CAN REASONABLY BE EXPECTED TO APPLY FOR A POSITION IF THEY KNOW IN ADVANCE THAT, BECAUSE OF THEIR RACIAL OR ETHNIC ORIGIN, THEY STAND NO CHANCE OF BEING HIRED

Second question

NH argued that, as there was no current or planned recruitment at the law firm at the time of the interview, his statements should not be considered to have been made in a professional context and, therefore, fell outside of the scope of the directive.

Of fundamental importance to the court's reasoning was article 3(1)(a) of the directive, which protected people in relation to access to employment. As the directive is a "specific expression, within the field that it covers, of the general prohibition of discrimination" set out in article 21 of the *Charter of Fundamental Rights of the European Union* and because of the objectives of the directive, the ECJ noted that its scope could not be defined restrictively.

As was stated by AG Sharpston, and previously by AG Maduro in *Feryn*: "In any recruitment process, the greatest 'selection' takes place between those who apply, and those who do not. Nobody can reasonably be expected to apply for a position if they know in advance that, because of their racial or ethnic origin, they stand no chance of being hired."

In *Feryn*, the ECJ held that past statements create a presumption of a discriminatory recruitment policy, which the employer can rebut in court.

The AG and the court established a set of criteria for member-state courts to follow in order to establish when discriminatory statements present a sufficient link with access to employment to come within the directive:

- The status of the person making the statements and the capacity in which they are made, which must show the person is a potential employer or is capable of exerting a decisive influence on recruitment policy or decisions, or is so perceived,
- The remarks must relate to the conditions for access to employment with the employer and establish an intention to discriminate contrary to the directive, and
- The nature and content of the statements and the context within which they are made, whether public or private.

Freedom of expression

The Italian Supreme Court expressed reservations in its referral as to whether this matter was protected by article 10 of the charter (freedom of expression). The court also noted that the comments were made during an "irony-filled programme of political satire".

The ECJ acknowledged the judgment would have limitations on the exercise of free speech, but noted that freedom of speech was not an absolute right and may be subject to limitations that are provided for by law and the principle of proportionality. It held that the limitations to the freedom of expression were necessary to guarantee the rights in matters of employment and occupation for people protected by the directive, and the judgment did not go beyond what was necessary to achieve the aims of the directive.

Protected categories

This judgment completes a trilogy of cases on discriminatory statements made in public about people in protected categories. Although the judgment is clear, it does leave open questions concerning the categories of individuals that are protected by article 21 of the charter, but not by the directive, such as discrimination based on genetic features, language, birth or political opinion.

From a practical perspective, employers and those who are seen to influence employment policies need to be wary that comments in public could expose them to claims by potential applicants who could argue discrimination when making a job application.

Employers may consider it necessary to change their internal policies, thus ensuring that employees do not make statements that are, or could be seen as, discriminatory in nature. g

REPORT OF LAW SOCIETY COUNCIL MEETING

10 JULY 2020

Practising certificate fee

The meeting discussed two motions relevant to a possible reduction in the practising certificate fee for 2021 – both giving rise to considered and considerable debate. The Council agreed to hold an additional, single-issue meeting in October for the purpose of further discussing the fee.

Patents of precedence

The president reported that, in accordance with the *Legal Services Regulation Act 2015* and subject to meeting certain criteria, solicitors could begin to apply for the title of senior counsel.

The advisory committee – comprising the Chief Justice, the President of the Court of Appeal, the Attorney General, the Chairman of the Bar Council, the Chairman of the Legal Services Regulatory Authority, and the President of the Law Society – would meet the following month to consider applications.

Courts Service Users Group

The president and director general had attended a number of meetings of the group and engaged with the CEO of the Courts Service on the substantial efforts being made to reopen the courts.

Personal injuries litigation

The Chief Justice's Working Group on Personal Injuries Litigation (established by the Chief Justice and comprising the Law Society's President Michele O'Boyle, Ernest Cantillon, Joe O'Malley and Eamon Harrington) had worked diligently to ensure the resumption of the High Court Personal Injuries List. The leadership of president Mary Irvine, as well as her determination to unlock the courts and secure more courtrooms for remote hearings, was commended.

Education

Education Committee chair Carol Plunkett reported that, since the onset of COVID-19, a total of 6,032 individuals had availed of the free courses provided by the Education Department; 2,641 had attended the free online certificate courses; and 1,200 of those had completed further work to receive a diploma.

In addition, the committee had agreed that a seminar room on the first floor of the Green Hall would be named in honour of Dr Eamon Hall in recognition of his enormous contribution to solicitor education in Ireland and to the profession in general.

Finance

Finance Committee chair Chris Callan reported that Deloitte would be stepping down as auditors, in line with the Society's policy of not retaining auditors for more than 20 years. The Audit Subcommittee would issue a request for proposals to ten accountancy firms and make a recommendation to the Finance Committee, which would then be brought forward to Council and, if approved, provided to members at the AGM.

PII

One-on-one meetings had been held with each of the participating insurers during the previous month.

The PII Committee had also been in contact with insurers that might be interested in joining the market.

Further time was being allowed for insurers to make submissions on the market and the draft PII regulations.

A communications plan that would suggest ways to help minimise premiums was being devised by the committee, and a report on the PII market would be presented to the Council in September, together with the draft PII regulations.

Business law

The meeting noted the submission to the Department of Business, Enterprise and Innovation on the transposition of the EU regulation establishing a framework for screening of foreign direct investments into the EU.

LAW SOCIETY OF IRELAND

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LLM Advanced Legal Practice	26 September 2020	€3,400
Diploma in Finance Law	6 October 2020	€2,600
Diploma in Corporate Law and Governance	6 October 2020	€2,600
Diploma in Insolvency Law and Corporate Restructuring (NEW)	7 October 2020	€2,600
Diploma in Criminal Law and Practice	9 October 2020	€2,600
Diploma in Construction Law	10 October 2020	€2,600
Certificate in Conveyancing	13 October 2020	€1,650
Diploma in Judicial Skills and Decision-Making	14 October 2020	€3,000
Diploma in Technology and IP Law	14 October 2020	€3,000
Diploma in Regulation Law and Practice	15 October 2020	€2,600
Certificate in Agribusiness and Food Law	17 October 2020	€1,650
Diploma in Sports Law	21 October 2020	€2,600
Diploma in Education Law	30 October 2020	€2,600
Certificate in Mediator Training (NEW)	30 October 2020	€1,650
Certificate in Immigration Law and Practice	5 November 2020	€1,650
Diploma for Personal Insolvency Practitioners (NEW)	5 November 2020	€2,600
Certificate in Trademark Law	10 November 2020	€1,650
LLM Employment Law in Practice	14 November 2020	€3,400

CONTACT DETAILS

E: diplomateam@lawsociety.ie T: 01 672 4802 W: www.lawsociety.ie/diplomacentre

All lectures are webcast and available to view on playback, allowing participants to catch up on coursework at a time suitable to their own needs. Diploma Centre reserves the right to change the courses that may be offered and course prices may be subject to change.

PII COMMITTEE

PROFESSIONAL INDEMNITY INSURANCE RENEWAL

The mandatory professional indemnity insurance (PII) renewal date for all firms is **1 December 2020**. This date is not negotiable. All cover under the current indemnity period will expire on 30 November 2020. It should be noted that firms should not provide legal services for any period of time without PII cover in place.

Confirmation of cover

All firms must ensure that confirmation of their PII cover is provided to the Society within three working days of 1 December 2020, including those firms with variable or staggered renewal dates. Therefore, confirmation of cover in the designated form must be provided to the Society on or before close of business on Friday 4 December 2020.

Confirmation of cover should be provided by your broker through the Society's online PII confirmation system. Such confirmation must include your policy number, and confirmation of cover cannot be provided until the policy is actually in place. As your firm has a statutory obligation to ensure such confirmation of cover is provided to the Society on or before Friday 4 December 2020, you are responsible for ensuring that your broker provides the Society with confirmation of cover by that date. You should also ensure that your broker has familiarised themselves with the online confirmation system and has the necessary information to confirm cover online (such as their login and password) in advance of 1 December 2020.

Staggered or variable renewal dates have been permitted since 2011. It is noted that some firms who have confirmed PII cover to the Society during 2020 have a coverage period that extends past 30 November 2020. Such firms are still required to reconfirm cover for 2020/2021 with the Society by 4 December 2020.

Please note that your firm will not be reflected as having PII in place on the Society's 'Find a Firm' online search facility until such time as the Society has received the required online confirmation of cover.

Renewal resources

Renewal resources for the 2020/2021 indemnity period are available to download from the Society website at www.lawsociety.ie/PII and include the common proposal form, PII regulations and minimum terms and conditions, *Participating Insurers Agreement*, and relevant PII practice notes. The information available is frequently updated as more documentation becomes available.

Guide to renewal

The guide to renewal for the 2020/2021 indemnity period will be published on the Society's website on 4 November 2020 to assist the profession with renewal. The guide includes information such as tips for renewal, important points to note, and a guide to insurers and brokers. This guide will be updated frequently with new information received by the Society, in particular with regard to what insurers will be in the market in the next indemnity period.

Financial strength rating

There is a minimum financial strength rating requirement from a recognised rating agency for all participating insurers of A (S&P, Fitch) or equivalent. The recognised rating agencies are Standard & Poor's, Fitch, AM Best, and Moody's.

It should be noted that all participating insurers in the market are permitted to write insurance in this jurisdiction under the supervision of the Central Bank. The Society is not responsible for policing the financial stability of any insurer. The Society does not vet, approve, or regulate insurers.

Notification of claims

All claims made against solicitors' firms and circumstances that may give rise to such a claim should be notified to the firm's insurer as soon as possible. In particular, claims made between 1 December 2019 and 30 November 2020 (both dates inclusive) should be notified by the firm to their insurer by 30 November 2020.

It is proper practice for firms to notify insurers of claims or circumstances during the year as they arise, not at the end of the indemnity period. Notifying all claims and circumstances at the end of the indemnity period is referred to as 'laundry listing' by insurers, and is not looked on favourably. Firms should also ensure that their claims and circumstances notifications meet the notifications requirements set out in the insurance policy terms and conditions.

The minimum terms and conditions for PII permit firms to report claims or circumstances of which they are aware prior to expiry of cover to their insurer within three working days immediately following the end of the coverage period. Therefore, a three-working-day grace period from 30 November 2020 is in place with regard to notification of claims and circumstances to your insurer.

Quotes

Insurers are required to leave quotes to firms open for a period of not less than ten working days.

Run-off Fund

The Run-off Fund provides run-off cover for firms ceasing practice (a) who have renewed their PII for the current indemnity period, and (b) subject to meeting eligibility criteria, including that there is no succeeding practice in respect of the firm.

Any firm intending to cease practice after 30 November 2020 is required to renew cover for the 2020/2021 indemnity period.

Any applications to the Run-off Fund for cover must be made directly to the Special Purpose Fund Manager, not the Society. Further information on run-off cover and succeeding practices, including the contact details of the Special Purpose Fund Manager, can be found on the Society's website at www.lawsociety.ie/PII.

Run-off compliance

Provisions are in place to ensure the required level of compliance of firms in the Run-off Fund with the Special Purpose Fund Manager with regard to claims and membership of the Run-off Fund.

Under these provisions, three levels of run-off cover exist, depending on the compliance of run-off firms:

- Compliant run-off firms have cover in the Run-off Fund with the same minimum terms and conditions as those that exist in the market,
- Non-compliant run-off firms have reduced cover in the Run-

LAW SOCIETY PROFESSIONAL TRAINING

Centre of Excellence for Professional Education and Lifelong Learning

CPD CLUSTER WEBINARS

DATE	EVENT	LOCATION
9 October	**North East CPD Day 2020** with Cavan Bar Association, Drogheda Bar Association, Louth Bar Association & Monaghan Bar Association*	Online Webinar
28 October	**North West General Practice Update 2020** with Donegal Bar Association, Inishowen Bar Association, Leitrim Bar Association, Longford Bar Association, Roscommon Bar Association & Sligo Bar Association*	Online Webinar
6 November	**Essential Solicitor Update 2020** with Clare Bar Association , Limerick Bar Association & Mayo Solicitors' Bar Association*	Online Webinar
13 November	**Practice Update 2020** with Carlow Bar Association, Kilkenny Bar Association, Wexford Bar Association & Waterford Law Society*	Online Webinar
20 November	**Practitioner Update 2020** with Kerry Law Society & Southern Law Association*	Online Webinar

Full details are available at www.lawsociety.ie/cpdcourses *Includes Live Q&A session

ANNUAL CONFERENCE WEBINARS

DATE	EVENT	CPD HOURS	DISCOUNTED FEE*	FULL FEE
22 October	**Property Law Update 2020** Online webinar with Live Q&A session	3.5 General (by eLearning)	€160	€186
29 October	**Litigation Annual Conference 2020** Online webinar with Live Q&A session	3 General (by eLearning)	€160	€160
5 November	**Annual In-House & Public Sector Conference** Online webinar with Live Q&A session	1 General, 1 Management, 1.5 Regulatory – 3.5 Total (by eLearning)	€160	€186
26 November	**Employment Law Annual Updates** Online webinar with Live Q&A session	1 General, 2 Management & Professional Development – 3 Total (by eLearning)	€160	€186

ONLINE, ON-DEMAND COURSES

Available Now	**GDPR in Action: Data Security and Data Breaches** Online webinar with Live Q&A session	1 Hour Regulatory Matters (by eLearning)	€95
Available Now	**Covid-19 Safety, Health & Welfare at Work Masterclass (ReBound)** Online webinar with Live Q&A session	CPD hours are dependent on the particular sessions completed	Complimentary

For a complete listing of upcoming courses including online GDPR, Fintech, Regulatory Matters, visit www.lawsociety.ie/cpdcourses or contact a member of the Law Society Professional Training team on

P 01 881 5727 **E** Lspt@lawsociety.ie

off Fund with the same minimum terms and conditions as those that exist in the market, with the exception that there is no cover for claims by financial institutions,
- ARP run-off firms continue to have cover in the Run-off Fund at the same level that exist in the ARP, with aggregate cover and no cover for claims by financial institutions.

Further information on changes to run-off cover provisions can be found on the Society's website at www.lawsociety.ie/PII.

Amendments to cover

The main amendments to the PII regulations for the 2020/2021 indemnity period are:
- Run-off cover in the Run-off Fund will be reduced to six years for new entrants. This change is a return to the market norm.
- Run-off Fund premium – currently there is no premium for any entrants to the Run-off Fund. The majority of claims in the Run-off Fund come from a minority of non-compliant firms. As such, premiums will be introduced for two classes of non-compliant run-off firms on 'polluter pays' grounds, with normal compliant firms continuing to have run-off cover for free.
- A premium will be introduced in the Run-off Fund for distressed entrants – that is, firms that are closed by order of the High Court (strike-off, suspension, abandonment).
- A premium will be introduced for non-compliant run-off firms (that is, firms that have failed to comply with the rules of the Run-off Fund). This premium will be lower than the distressed firm premium and will be charged for whatever period of time that the firm is non-compliant.

Every firm that applies to enter the Run-off Fund will be required to have a risk-management audit by the SPF Manager. This will be one-to-one practice advisory audit and guidance by the SPF Manager to assist firms on proper wind-down procedures. There are a number of benefits to this. The audit creates a relationship between the firm and the SPF Manager that should improve the wind down of firms and minimise claims. The audit will provide the firm with cheap, expert one-to-one advice on their closure. The audit will also increase the chances that the firm may obtain a succeeding practice instead of entering the Run-off Fund due to improved wind-down procedures.

Insurers will not be responsible for the Special Purpose Fund liabilities of insolvent insurers.

The 1% minimum contribution to the Special Purpose Fund for insurers will be removed. This has been acting as a barrier for entry to new insurers.

PII helpline

The Society continues to operate the PII Helpline to assist firms in dealing with PII queries. The helpline is available Monday to Friday, 10am to 4pm, to assist firms with PII queries at tel: 01 879 8707 or email: piihelpline@lawsociety.ie.

PRACTICE DIRECTION

AFFIDAVITS OF MEDICAL PRACTITIONERS SUPPORTING A PETITION – WARDS OF COURT

I, Mary Irvine, President of the High Court, hereby issue the following practice direction in accordance with section 11(12) of the *Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020*. This practice direction, which concerns the content of medical affidavits/medical reports in relation to wardship proceedings, will come into force on 5 October 2020.

The following information must be included in the affidavit and/or medical report of any registered medical practitioner whose evidence is to be relied upon to support a petition presented under of the *Lunacy Regulation (Ireland) Act 1871*:

1) The date, place, duration and circumstances in which the medical examination was carried out (the examination should have been carried out within three months of the presentation of the petition).
2) The nature and duration of any prior relationship between the medical practitioner and the respondent.
3) The nature of the examination carried out and details of the test and/or capacity tools deployed for the purpose of concluding whether the respondent is or is not of unsound mind and incapable of managing their affairs.
4) Whether, in the opinion of the registered medical practitioner, the respondent is or is not of unsound mind and incapable of managing their affairs.
5) Where the medical practitioner is of the opinion that the respondent is of unsound mind and incapable of managing their affairs – that is, lacks capacity – he/she should state:
   i) The nature of the respondent's illness/condition,
   ii) The likely date of onset of that illness/condition,
   iii) The symptoms pertaining to that illness/condition,
   iv) The evidence relied upon in making their diagnosis, and
   v) Whether the illness/condition is permanent or likely to improve.
6) Where a medical report is prepared containing the above information, any verifying affidavit sworn by the medical practitioner need only affirm the content of the medical report. The medical practitioner is not required to set out *seriatim* in their affidavit the information contained in their report.
7) Any such medical affidavit must be sworn within one month of the date on which the medical examination was carried out, and the jurat must comply with SI 95 of 2009.

This practice direction will remain in force until further notice.

Mary Irvine, President of the High Court, 2 September 2020

WILLS

Alekseev, Dimitri (deceased), late of flat 1, 9 Nottingham Street, North Strand, Dublin, D03 EY882, who died on 22 December 2019. Would any person having knowledge of the whereabouts of a will made by the above-named deceased please contact Robert Jacob, Jacob and Twomey, Solicitors, Merrythought House, Templeshannon, Enniscorthy, Co Wexford; tel: 053 924 9920, email: rjacob@jandt.ie

Byrne, Elizabeth (deceased), late of Brownstown, Newcastle, Co Dublin, formerly of Hynestown, Celbridge, Co Kildare, who died on 30 March 2002. Would any person having knowledge of a will made by the above-named deceased please contact Ruairi O'Brien, John C Walsh & Co, Solicitors, 24 Ely Place, Dublin 2; tel: 01 676 6211, email: ruairi.obrien@johncwalsh.ie

Conroy, Michael (deceased), late of Apartment 10, 15/17 Lord Edward Street, Dublin 2. Would any person having knowledge of a will made by the above-named deceased, who died on 24 April 2020, please contact Bannon Solicitors, 3 The Paddocks, Main Street, Dunshaughlin, Co Meath; tel: 01 801 7871, email: info@bannonsolicitors.ie

Doran, Margaret (deceased), late of 53 Fassaugh Road, Cabra, in the city of Dublin. Would any person having knowledge of the whereabouts of a will executed by the above-named deceased on 12 October 2016, who subsequently died on or about 22 August 2018, please contact Doyle & Company, Solicitors, 123 Cabra Road, Dublin 7; tel: 01 838 3388, fax: 01 838 2028, email: mail@doyleandcompany.ie

Doyle, Martin (deceased), late of 167 Downpatrick Road, Crumlin Dublin 12. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact O'Brien Ronayne Solicitors, 5A Main Road, Tallaght, Dublin 24; tel: 01 424 6200, email: geraldine@obr.ie

RATES

PROFESSIONAL NOTICE RATES

RATES IN THE PROFESSIONAL NOTICES SECTION ARE AS FOLLOWS:

- **Wills** – €152 (incl VAT at 21%)
- **Title deeds** – €304 per deed (incl VAT at 21%)
- **Employment/miscellaneous** – €152 (incl VAT at 21%)

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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 November 2020 *Gazette*: 19 October 2020.**

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*.

Flanagan, Jean (deceased), late of Apt 21, Seapark, Mount Prospect Avenue, Clontarf, Dublin 3, formerly of 96 Mount Prospect Avenue, Clontarf, Dublin 3, who died on 6 January 2020. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Aoife Brown, O'Flaherty and Brown, Solicitors, Greenville, Athy Road, Carlow; tel: 059 913 0500, email: aoife@oflahertybrown.ie

Hoare, Michael (deceased), late of 184 Clonliffe Road, Drumcondra, Dublin 3. Would any person having knowledge of a will made by the above-named deceased, who died on 20 October 2018, please contact Bannon Solicitors, 3 The Paddocks, Main Street, Dunshaughlin, Co Meath; tel: 01 801 7871, email: info@bannonsolicitors.ie

Lydon, Peter (deceased), late of Rushmore Nursing Home, Knocknacarra, Galway, and formerly of Kingston, Taylor's Hill, Galway, who died on 26 July 2020. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact John O'Connor Solicitors, 168 Pembroke Road, Ballsbridge, Dublin 4; tel: 01 668 4366, email: info@johnoconnorsolicitors.ie

Morahan, Patrick (deceased) (retired garda), late of The Laurels, Ardcarne, Boyle, Co Roscommon, and formerly of Gortleck, Cootehall, Boyle, Co Roscommon, who died on 15 October 2019. Would any person having knowledge of the whereabouts of any will executed by the above-named deceased please contact Michael O'Dowd, O'Dowd Solicitors LLP, Bridge Street, Boyle, Co Roscommon; DX: 65001 Boyle; tel: 071 966 2861, email: info@odowdsolicitors.com, within a period of one month from the date hereof

Morrissey, Mary (deceased), late of 515 North Circular Road, Dublin 1, who died on a date unknown between 11 and 24 January 2020. Would any person having knowledge of a will executed by the above-named deceased, or purported to have been made by the above-named deceased, or if any firm is holding same, please contact Newell Gillen & Cunningham Solicitors, Parade House, South Parade, Waterford; tel: 051 874 352, email: info@ngcsolicitors.ie

Murphy, Margaret (deceased), late of Corpus Christi Nursing Home, Brigown, Mitchelstown, Co Cork, and formerly of 135 High Meadows, Gouldavoher, Limerick, who died on 25 March 2020. Would any person having knowledge of a will executed by the above-named deceased, or purported to have been made by the above-named deceased, or if any firm is holding same,

please contact Ken Molan Solicitors, 18 Upper Cork Street, Mitchelstown, Co Cork; ref: MUR096/0002; tel: 025 24118, email: info@molansolicitors.ie

Savage, Joan (deceased), late of Tinnapark, Kilpedder, Co Wicklow, who died on 14 August 2020. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Amy Fitzpatrick, Brendan Maloney & Company, Solicitors, Kilbride Cottage, Killarney Road, Bray, Co Wicklow; tel: 01 286 5700, email: amy@brendanmaloney.ie

Tuite, Vincent (deceased), late of 58 Craoibhin Park, Balbriggan, Co Dublin, who died on 11 June 2020. Would any person having knowledge of any will made by the above-named deceased please contact Max Tuite, tel: 083 395 6841, email: tuitemax123@gmail.com

MISCELLANEOUS

A well-established solicitors' practice in west Dublin for sale. Principal retiring. Expressions of interest to **box no 01/08/20**

TITLE DEEDS

In the matter of the *Landlord and Tenant (Grounds Rents) Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of the *Landlord and Tenant (Ground Rents) Amendment Act 2019* and in the matter of an application by Nigel Tolan in respect of a premises situate at Chapel Street, Crossmolina, Ballina, Co Mayo

Take notice any person having a freehold interest or any intermediate interest in all that and those the house and premises situate at Chapel Street, in the town of Crossmolina, townland of Carton Gilbert, barony of Tyrawley and county of Mayo (hereinafter called 'the property'), which said property is marked and outlined in red on a deed of assignment between Thomas Cawley of the one part and Anthony Tolan of the other part, dated 18 October 1921, being the property demised and held by a lease dated 23 December 1835 between Sir William Henry Palmer of the one part and James Daly of the other part for a period of 999 years at a rent of £7.76, payable on 1 May and 1 November in each year, and to the covenants on the part of the lessee and to the conditions therein respectively reserved, should give notice of their interest to the undersigned solicitors.

Take notice that Nigel Tolan of Knockalegan, Ballina Road, Crossmolina, Co Mayo, being the person now entitled to the lessee's interest in the property, intends to submit an application to the county registrar for the county of Mayo for acquisition of the freehold interest in the property, and any party asserting that they hold a superior interest in the property are called upon to furnish evidence of their title to the property to the undersigned solicitors within 21 days from the date of this notice.

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

Date: 2 October 2020

Signed: Adrian P Bourke and Company (solicitors for the applicant), Killala Road Business Park, Ballina, Co Mayo

In the matter of the *Landlord and Tenant (Grounds Rents) Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of the *Landlord and Tenant (Ground Rents) (Amendment) Act 2019* and in the matter of an application by Ellen Rowland in respect of a premises situate at Chapel Street, Crossmolina, Co Mayo

Take notice any person having an interest in the freehold estate or any lessors or intermediate interest in the lands and premises described as all that and those the premises situate at Chapel Street, in the town of Crossmolina, townland of Carton Gilbert, barony of Tyrawley and county of Mayo (hereinafter known as 'the property'), being the property which is the subject matter of a lease dated 23 December 1835 between Sir William Henry Palmer of the one part and James Daly of the other part for the term of 999 years at a rent of £7.76, payable on 1 May and 1 November in each year, and to the covenants on the part of the lessee and to the conditions therein respectively reserved, should give notice of their interest to the undersigned solicitors.

Take notice that Ellen Rowland of Castlehill, Ballina, Co Mayo, being the person now entitled to the lessee's interest in the property, intends to submit an application to the county registrar for the county of Mayo for the acquisition of the freehold interest in the property, and any party asserting that they hold a superior interest in the property are called upon to furnish evidence of their title to the property to the undersigned solicitors within 21 days from the date of this notice.

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

Date: 2 October 2020

Signed: Adrian P Bourke and Company (solicitors for the applicant), Killala Road Business Park, Ballina, Co Mayo

PRO BONOBO

SHOW ME THE MONET

The street artist Banksy's trademark could be at risk after he lost a case that an EU panel said was brought in bad faith and was undermined by a gift shop he set up, the BBC reports.

Banksy lost the case against a greetings card company, which argued it should be able to use an image of *The Flower Thrower* mural because of the artist's anonymity.

The card company challenged the artist's right to trademark the image. For a trademark to be valid, the holder must sell goods using the image.

The panel ruled against the artist because he could not be identified as the unquestionable owner of such works. "Banksy has chosen to remain anonymous and, for the most part, to paint graffiti on other people's property without their permission, rather than to paint it on canvases or his own property," the panel said.

THE ITALIAN JOB, PART 4

A murderer who escaped earlier this month from an Italian prison – for the fourth time – was found hiding in a sheep pen, BBC.com reports. Giuseppe Mastini (60) was on temporary release from a high-security prison in Sardinia when he disappeared on 6 September.

Mastini, who first escaped from prison in 1987, reportedly committed his first serious crime at the age of 11.

Following his escape in 1987, he spent two years on the run and, in that time, murdered a police officer, kidnapped a young girl, and committed dozens of burglaries.

In 2017, he escaped during day release from a prison in Piedmont. Three years earlier, he took advantage of day release to attend a Prodigy concert in Rome.

EXAM EXPERIENCE A PIECE OF…

A number of bar students in Britain resorted to urinating in containers over fears their online proctored exams would be terminated if they went to the toilet, *Legal Cheek* reports.

In response to the pandemic, the Bar Standards Board announced last May that students would sit their centralised assessments using an online proctoring system. Under the rules, students may have had their assessment terminated if they move away from their laptop or leave the room.

Trainee barrister Tian Juin See claims he was forced to urinate in a bottle in front of his laptop at home after he was told he could fail the two-hour and 45-minute professional ethics exam if he did not maintain eye contact with the screen. The student has since changed his bio on Twitter to "the guy who peed in a bottle during a bar exam".

TOGETHER IN ELECTRIC DREAMS

The 'driver' of a self-driving Tesla has been charged with speeding and dangerous driving after he was found asleep at the wheel as the car travelled at 140km/h on a Canadian highway, *The Guardian* reports.

Police said they received a complaint of speeding on 9 July near the town of Ponoka, Alberta. "The car appeared to be self-driving, traveling over 140km/h, with both front seats completely reclined and both occupants appearing to be asleep," the police said in a statement.

The driver was given a 24-hour licence suspension for driving while fatigued and is being charged with dangerous driving. g

AN BORD UM CHÚNAMH DLÍTHIÚIL
LEGAL AID BOARD

INTERNATIONAL PROTECTION SOLICITORS PANEL AND TRAINING

WHO WE ARE
We are the **Legal Aid Board**, an independent, publicly funded organisation providing civil legal aid and advice, family mediation services, and administering three ad-hoc legal aid schemes connected with criminal matters. We provide international protection legal services through our dedicated teams in our Dublin Smithfield, Cork Popes Quay, and Galway Seville house law centres. The law centre service is complimented by solicitors in private practice who have agreed to provide services on our behalf.

ABOUT THE PANEL
The panel covers legal assistance to asylum seekers in making their applications for international protection and permission to remain in the State, including at questionnaire and interview stage, appeal to the International Protection Appeals Tribunal, and representation in relation to permission to remain.

Please note that referrals of cases to the panel will be strictly limited in accordance with management guidelines. Where a law centre refers a case to the panel it is the applicant's decision as to which panel solicitor is engaged. For these reasons we cannot guarantee that any individual solicitor will receive any work on foot of their membership of the panel.

INDUCTION TRAINING PROGRAMME
The Board is creating a new panel in international protection cases. Existing members must re-apply and the Board will be in contact in this regard. We will hold induction training in November in conjunction with the UNHCR. This training is mandatory for new applicants (i.e. applicants who were not previously on the panel). The training will also be available to existing panel members. The programme will be held online over a number of sessions and will qualify for general CPD points.

REQUIREMENTS
You will be enrolled as a solicitor in the State and meet the other requirements in our terms and conditions for membership of the panel. **You will be required to have the necessary experience in the area of international protection law.** Solicitors may be required to demonstrate this to the Board's satisfaction.

If you are entered onto the panel you will be expected to comply with our Best Practice Guidelines when carrying out work on our behalf.

HOW TO APPLY
To apply submit a completed application in the format provided by e-mail (typed applications only) to **PPunit@legalaidboard.ie**. Copies of the application form and the terms and conditions of the Panel are available on our website (**www. legalaidboard.ie**). The terms and conditions include the fee structure that is being put in place.

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