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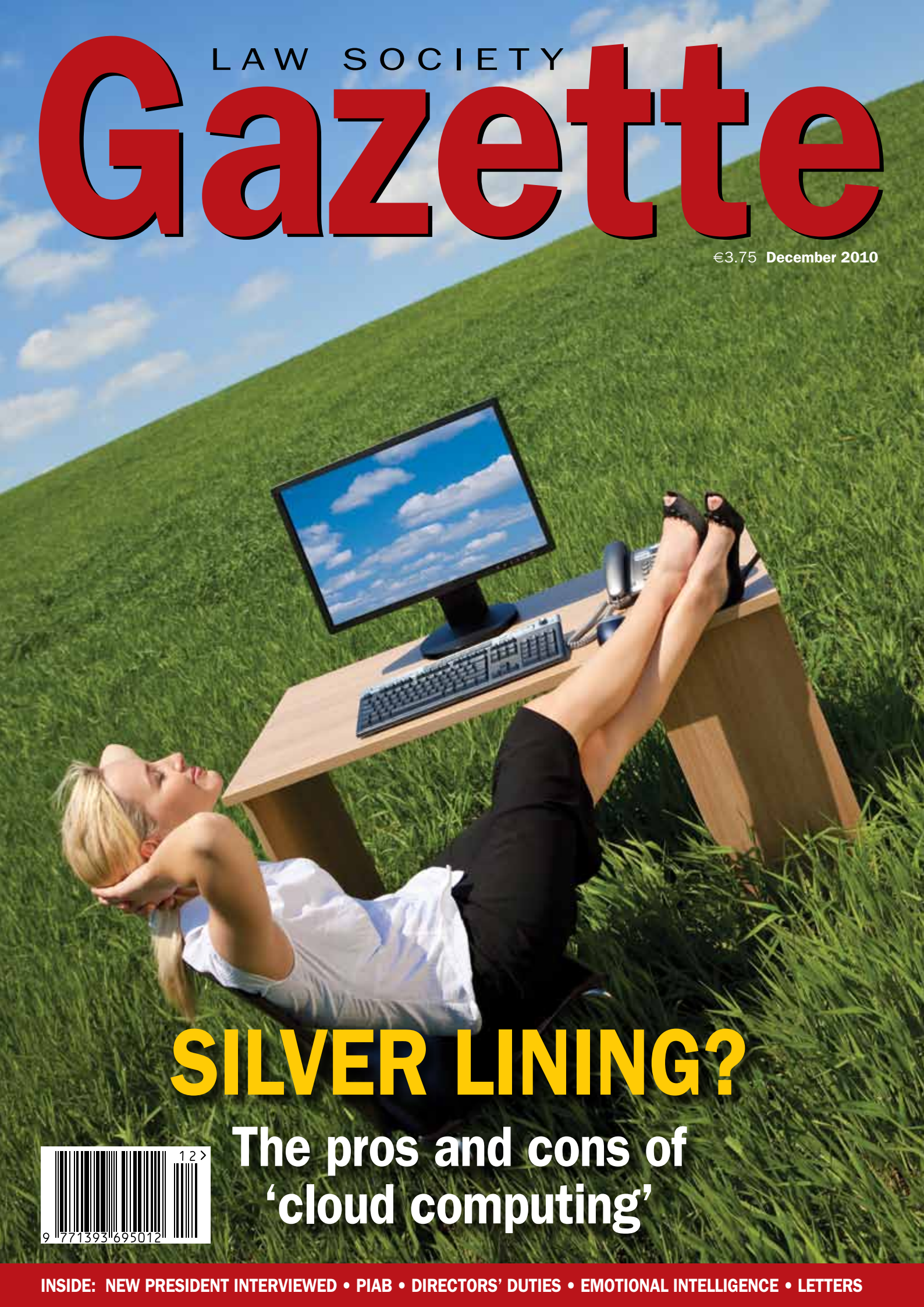

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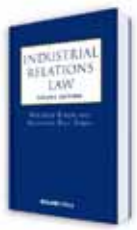

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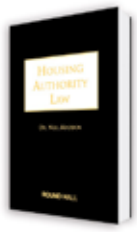

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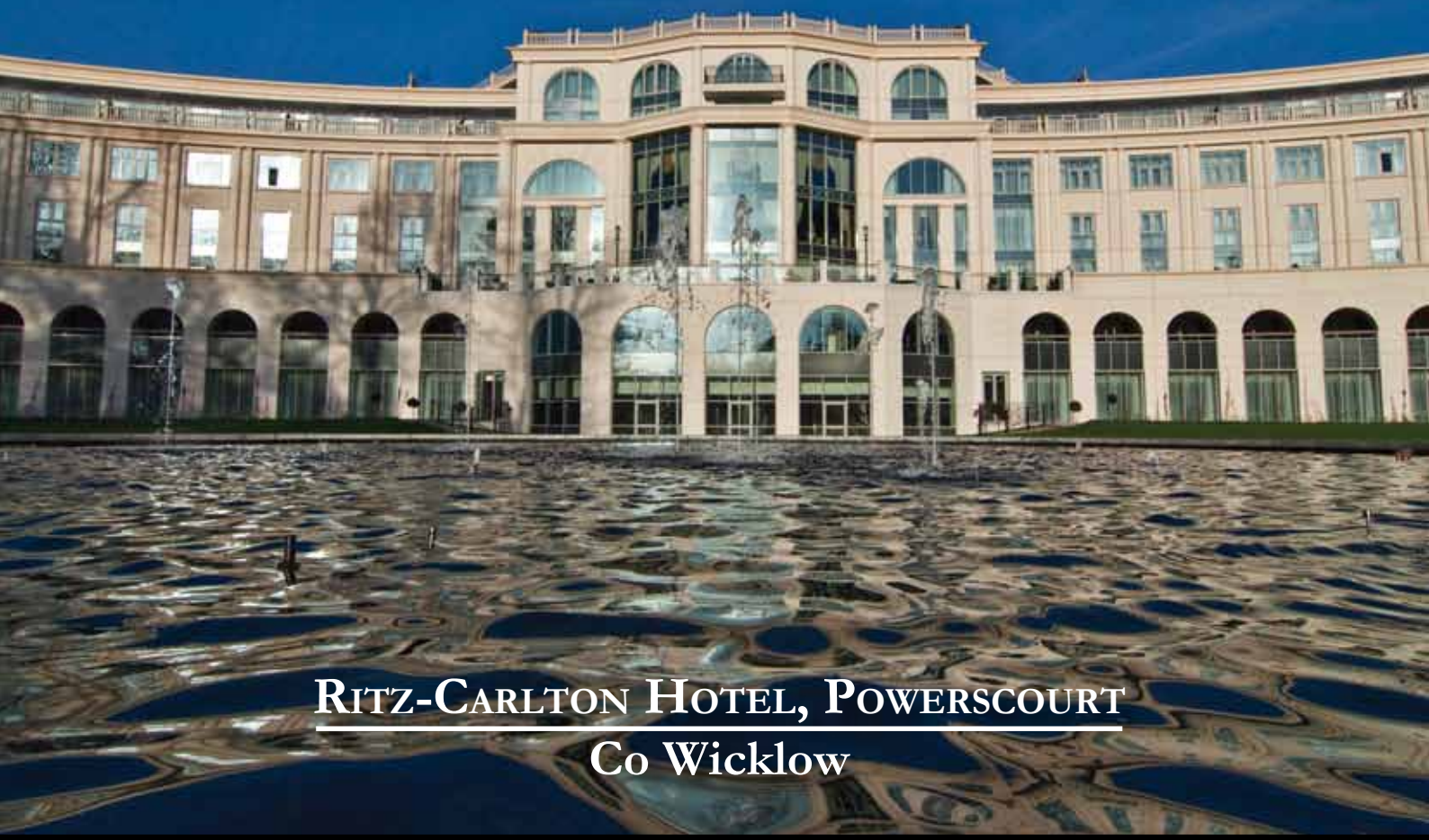

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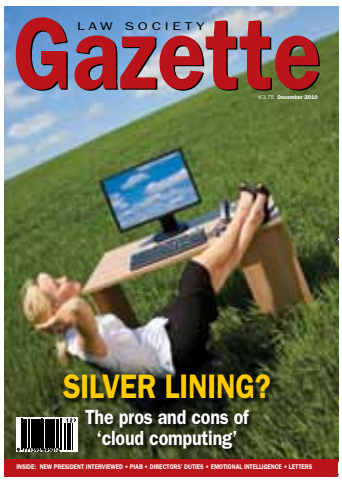

On the cover

You can't keep your nose to the grindstone with your head in the clouds, but you can keep your eyes on the road and your hands upon the wheel of technology

PIC: THINKSTOCK

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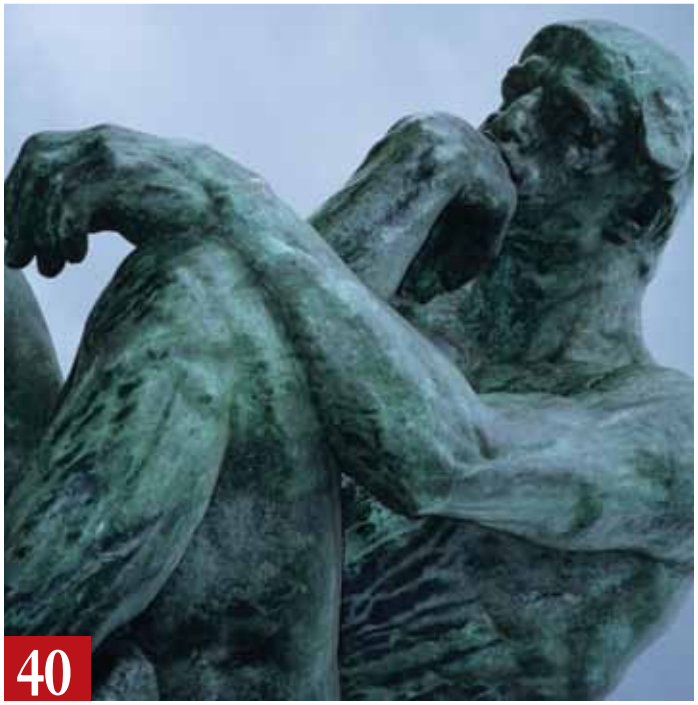

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CORK

Fergus Long (Ronan Daly Jermyn) took over from Eamon Murray as president of the Southern Law Association on 2 November. Members recently contributed €15,000 for the purchase of a specially adapted vehicle for a colleague who is suffering from MS. Well done to all concerned.

DONEGAL

Alison Parke tells me of a seminar from 5-6pm on Wednesday 8 December at Gallagher's Hotel, Letterkenny. Solicitor Roisin M Doherty will discuss family law in light of the *Civil Partnership Act* and certain rights and obligations as a result of the *Cohabitants Act 2010*. The seminar is free, with one hour of CPD training available.

Following the AGM on 17 November, the offices of president, secretary, CPD coordinator and social secretary continue to be filled by Mairin McCartney, Niall McWalters, Alison Parke and Joanne Carson respectively. Garry Clarke is a new committee member, while Brendan Twomey remains as PRO.

DUBLIN

Stuart Gilhooly assumed the presidency of the 4,000-strong DSBA early in November. Geraldine Kelly becomes vice-president. Other officers are John Glynn (secretary) and John Hogan (finance). The new incoming members elected at the DSBA AGM were Danielle Conaghan (Arthur Cox), Deirdre McDermott (Denis Finn), Elaine Given (Gallagher Shatter) and Robert Ryan (Doherty Ryan).

The DSBA was delighted to hold a seminar very recently on the residential tenancies legislation, at which a revised recommended letting agreement drafted by the association was launched and is available on disc for purchase (see www.dsba.ie).

A seminar on Retirement and Cessation of Practice was held recently in the Rochestown Hotel, Cork. Organised by the combined bar associations of Munster, the extremely popular event was sponsored by Deloitte. Issues discussed included regulatory issues, PII, valuation of practices and taxation. The speakers were *(l to r)*: Brian O'Brien (Deloitte), Eamon Murray, John O'Flynn and John Elliot (Registrar of Solicitors)

KERRY

The AGM of the Kerry Law Society takes place on 5 December, followed by the annual dinner. John Galvin says that they have had an extremely busy year due to many seminars being organised, especially on the theme of PII. "It has indeed been a very hard year on the members of the Kerry Law Society. One of our members died after a long battle with illness and, unfortunately, another member died in tragic circumstances. This reminds us all of the pressures that we are under as of the moment."

LOUTH

Following the recent AGM, the bar association officers are Tim Ahern (president), Elaine Connolly (secretary), John McGahon (treasurer) and Fergus Mullen (PRO). Fergus was recently appointed state solicitor for the county.

LIMERICK

Elizabeth Walsh presided over the recent AGM, when a new officer board was elected. She is looking forward to the District Court practitioners' Christmas dinner on 9 December.

MAYO

The Mayo Solicitors' Bar Association (MSBA), under the leadership of new president Evan O'Dwyer, will host a series of seminars dealing with the topic of stress. At the successful opening seminar, Dr Brendan O'Cochlain (consultant cardiologist) and Dr John Connolly (consultant psychiatrist) addressed a large gathering from Mayo, Sligo, Roscommon and Galway. The next seminar takes place in late December, when Law Society representatives will address members on regulations, enforcement and complaints.

Following the recent visit of a Law Society delegation and a commitment given to bring to Council the question of domestic undertakings, there has been a huge level of support shown by sister associations throughout the country. In simple terms, the MSBA believes that there is more risk to rural practitioner from domestic undertakings.

The association has recently introduced text alerts for members to keep them updated on relevant news, meetings, events and topical issues.

TIPPERARY

I was delighted to see that, at the recent Tipperary Solicitors' Bar Association AGM, Fred Binchy (Binchy Solicitors, Clonmel) was elected president. A pity it couldn't have been next year, when another Binchy, Fred's brother Donald, would be assuming the top job in Blackhall Place! Patrick Kennedy (Patrick J O'Meara & Co, Thurles) was elected vice-president. Joe Kelly (James J Kelly & Son, Templemore) was re-elected unopposed as treasurer, as was Ronan Kennedy (Kennedy Frewen O'Sullivan, Tipperary) as secretary. The TSBA held its annual Christmas dinner at Chez Hans in Cashel.

WATERFORD

The new president of the Waterford Law Society (WLS) is Gerard O'Herlihy (Nolan Farrell Goff) who takes over from Bernadette Cahill. Bernadette has agreed to continue with organising local CPD events. Gerry will be assisted by Johanna Geary (secretary). Rosa Eivers (Dobbyn & McCoy) continues as treasurer, while Tom Murran (Council member) is PRO. The WLS is continuing its discussions with the Courts Service about provision of an additional courtroom in the city. G

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

Society elects John Costello as president for 2010/11

John Costello has begun his term as president of the Law Society of Ireland for the year 2010/11, with effect from 5 November 2010. He is joined at senior executive level by senior vice-president Donald Binchy and junior vice-president Kevin O'Higgins.

John is a consultant in the private client department at the law firm Beauchamps, which has offices at Sir John Rogerson's Quay, Dublin 2. He has over 25 years of experience in wills and probate, tax planning, wards of court, powers of attorney and other legal issues affecting the older person. He also practises in family law and charity law. John will serve a one-year term as president of the 12,000-strong solicitors' profession until November 2011.

A native of Clonskeagh, Co Dublin, he is the eldest son of Declan and Joan Costello. He has two brothers and two sisters. His father, Declan, served as a TD for a total of 22 years, as attorney general for four years and as president of the High Court for three years. His grandfather, John A Costello, served as attorney general of the Irish Free State and as taoiseach on two occasions. John has three children, Laura (19), Eleanor (18) and Mark (16).

Educated at both primary and secondary levels in Gonzaga College, Dublin, he graduated with a BCL law degree from University College Dublin in 1975. He qualified as a solicitor in 1977, when he joined the law firm McCann FitzGerald (of which his uncle Alexis FitzGerald was a founder).

He commenced his career practising with senior partner Robert Johnston in private client work. He then moved to JG O'Connor in Clare Street, Dublin, where he worked in general practice from 1986-'88. He became a full-time tutor in the Law School at Blackhall Place from 1988-89, subsequently moving to the law firm of Eugene F Collins, where he headed up the private client department for 20 years. His move to Beauchamps occurred in July 2009.

New Law Society president for 2010/11, John Costello, with senior vice-president Donald Binchy and junior vice-president Kevin O'Higgins

John became a member of the Council of the Law Society of Ireland in 1993. During his time on Council, he has chaired the Law Reform Committee and the Guidance and Ethics Committee. During his tenure as chairman, the Law Reform Committee produced the *Charity Law Report* in July 2002. This report, which recommended a radical overhaul of charity legislation, had many of its recommendations incorporated in the *Charities Act 2009*. He served for many years, also, on the Education Committee and the *Gazette* Editorial Board.

He is author of a best-selling textbook entitled *Law and Finance in Retirement*, which was published in March 2000 and again in 2002. He is a director of St Michael's House and has lectured extensively to members of organisations caring for persons with an intellectual disability. He has also given legal assistance to the Alzheimer Society of Ireland for many years.

Council election 2010

The scrutineers' report of the result of the Law Society's annual election 2010 is as follows:

"As there were 15 nominated candidates for the annual election, no ballot of members took place.

"The following candidates were declared elected: Donald Binchy, Maura Derivan, Gerard J Doherty, Patrick Dorgan, Eamon Harrington, Barry MacCarthy, James MacGuill, James B McCourt, Simon Murphy, Michelle Ní Longáin, Daniel E O'Connor, Gerard O'Donnell, Michael Quinlan, John P Shaw and Brendan J Twomey.

"As there was only one candidate nominated for each of the two relevant provinces (Leinster and Ulster), no ballot of members took place. The candidate nominated in each instance was returned unopposed: Leinster – Andrew J Cody; Ulster – Margaret Mulrine."

Career support website upgrade

The Career Support section of the Society's website has just been upgraded and a wide range of information and other online tools and supports have been added within the members' area.

An extensive range of guidelines and information is now available, grouped under the following categories:

- Updates on opportunities,
- Guidelines on job seeking,
- Sample documents/CVs,
- Working abroad information,
- Self-employment options.

In addition, access is also provided to a whole host of career-management tools and supports. DVDs on effective interviewing can be viewed, and there are exercises for improving psychometric assessment performance, as well as a wide range of self-appraisal tools.

Materials provided at job-seeking training seminars and workshops that took place over recent months can be accessed also on the website. So, too, can outputs from the information evenings that explored work opportunities outside of traditional jobs in practice.

'Expand', an online career development/job-seeking programme specially structured for Irish solicitors, remains available. This programme is equally relevant to all solicitors – regardless of experience or current employment status.

To access the members' area of the website, you need only your solicitor number and password. If you need any assistance with either of these, contact a member of the Society's IT team on 01 672 4800, or email webmaster@lawsociety.ie.

New practice tools for members

A new practice and risk-management resource has been launched by the Practice Management and Client Care Task Force. Located in the members' area of the Society's website, a selection of template tools can be downloaded to help members manage their practices. Tools include:

- An undertakings' register template,
- A 'critical dates' register template for litigation cases,
- A tool for monitoring work in progress, and
- Customisable instruction sheets.

To access this new online resource, log in to the website's members' area using your solicitor number and password. Select 'best practice and guidance', then 'practice and risk management'. If you need help with logging in, visit the online 'help' section, or contact: webmaster@lawsociety.ie.

The new online initiative arose at a task force meeting, when it was agreed that it would be helpful to develop some simple guidelines and tools to enable firms to implement practice and risk-management procedures. Earlier in the year, the SMDF had published a newsletter to assist colleagues in establishing basic risk-management procedures in order to help firms secure insurances at the best possible premium. The aim was to improve management standards in practices – thereby limiting the risk of exposure to actions for negligence as much as possible. The task force focused its efforts on the four principles of good practice management as laid out in the newsletter:

- Draft a letter of terms and conditions,
- Set up a register of undertakings,
- Implement file reviews (guidance will issue shortly in relation to this), and
- Manage critical dates.

The task force also wanted to provide a central area for practice managers to be able to locate existing practice and risk-management precedents and guidelines already available on the Society's website.

Easily adapted

The task force recognises that not all firms decide to avail of case-management systems. These new tools, however, can be adapted for use on less sophisticated systems – and even on a manual basis, if required. The task force strongly recommends, however, that all firms should acquire a case-management system that is suitable to individual practices. Ideally, the tools that have been developed by the task force should form part of an integrated case-management system. This will have the positive impact of increasing efficiency and lessening workload.

It is worth noting that a well-maintained 'work-in-progress' list, containing the kind of information referred to in the suggested precedent, would go a long way towards meeting many of the critical risk-management requirements.

The task force recognises that the development of risk-management strategies and tools can be frustrating for members, and appear to be a distraction from the main work carried out by solicitors. The task force considers, however, that a properly developed risk-management standard will, in the medium-to-long term, not only help in meeting insurance requirements, but will also help to increase efficiencies, productivity and profit in solicitors' practices. That said, it is important to strike a balance between risk-management processes and the need to conduct the main business of the practice!

The task force wishes to stress that the development of risk-management strategies and tools is an ongoing work in progress. Any suggestions about how to improve the policies and precedents in the online resource would be most welcome.

USA opportunity for newly qualifieds

An opportunity has just recently opened up that provides an opportunity for newly qualified solicitors to live and work in the USA for a period of one year.

The 12-month Work USA Work Programme has been extended and, as part of that, people qualifying with the Law Society can now apply for, and take up, a one-year working visa. However, this must be applied for and taken up within 12 months of qualifying.

This visa opportunity is part of the overall J-1 exchange visitor visa programme. Students traditionally use J-1 visas to live and work in the USA during summers when in college – but this visa opportunity stands apart as an initiative intended for people who are finished study and who now want to gain work experience.

Indeed, it is a requirement of this visa programme that participants must work in a job related to the area in which they have been studying. There is no need to have a job fixed up in advance of applying for the visa, or before arriving in the USA, but there are good facilities for making contact with companies who have registered their interest in taking on someone through this programme.

People who previously had J-1 visas or who participated in other USA internship programmes can still qualify for this visa opportunity – once they meet all eligibility requirements. Detailed information is available at www.usavisa.ie/12-month-usa-work-programme.

Attorney General's Office refuses to submit to independent job analysis

For many years, the Law Society has complained of blatant discrimination against solicitors in their complete exclusion from appointment to certain positions in the Attorney General's Office. Indeed, the full text of a detailed exchange of letters on the subject between the Society's director general Ken Murphy and the then attorney general, Michael McDowell SC, was published in the *Gazette* in November 2000.

Once again, in mid 2008, advertisements were published for the positions of Advisory Counsel Grade III in the Attorney General's Office. The advertisements provided that candidates "must have significant experience as a practising barrister in the state". By implication, although solicitors can be appointed as High Court judges – indeed a solicitor could actually be Attorney General – no solicitor would be able to perform this role. These jobs were for barristers only.

The then Law Society president, James MacGuill, adopted a new tack when his representations to the Attorney General, Paul Gallagher SC, received the usual response.

Gallagher: barristers only as advisory counsel to AG

Murphy: "Unfair, indefensible and contrary to the public interest"

MacGuill made a formal complaint, on behalf of the Society, to the Commission for Public Service Appointments, setting out detailed arguments as to why the exclusion of solicitors from these positions was not merely unfair and contrary to the public interest, but also contrary to the legal principles under which public appointments are made. As the Commission for Public Service Appointments is the guardian of these principles, MacGuill asked for a statutory review to be undertaken of the appointments to Advisory Counsel Grade III in the Attorney General's Office.

After some consideration, the commission suggested that both the Office of the Attorney General and the Law Society agree to the Public Appointments Service undertaking an independent job analysis of the role of Advisory Counsel Grade III. The Law Society enthusiastically agreed to this approach. However, recently, and after a considerable passage of time, the Office of the Attorney General finally confirmed that it would not agree to such an independent review.

The director general, Ken Murphy, has now written on behalf of the Society to the Director of the Commission for Public Service Appointments to say that the Law Society is very disappointed with this response. He wrote: "We are disappointed, because we believe that any independent review, by a suitably qualified expert, would demonstrate the position of the Office of the Attorney General in this matter to be unfair, indefensible and contrary to the public interest.

"One would have expected that any organisation with confidence in the validity and objective merits of its case would be happy to submit to an independent assessment of this nature," he continued. "It seems to the Society to be extraordinary that the Office of the Attorney General, of all offices of the state, should refuse to engage in the independent job analysis exercise recommended by the public appointments service in this case."

In his letter of 16 November 2010, the director general formally requested the Commission for Public Service Appointments to complete the investigation of the Society's complaint and to issue a report as soon as possible.

Trainee numbers down 38% since 2007

The annual September intake of new trainees at the Law School fell again in 2010. The total number of trainees commencing the Society's Professional Practice Course Part I, combining those commencing in the Society's law schools in both Dublin and Cork, was 413. This is a 38% reduction on the 671 who commenced in 2007.

Analysis on a county-by-county basis of the solicitors' firms who have provided these students with their training contracts reveals that 77% of trainees are with firms in the city and county of Dublin. This is broadly similar to the figures in recent years: 2009 (74%), 2008 (78%) and 2007 (74%). The counties with the next largest numbers of firms with trainees are Cork, Galway, Kildare, Limerick and Clare, in that order. Two counties, Laois and Kilkenny, have no new trainees this year. Wexford, Offaly and Leitrim have just one each.

Counties where the number of training places has fallen most in recent years include Mayo and Donegal. Mayo had 14 trainees commencing in 2007, but has just three in 2010. The equivalent numbers for Donegal are ten in 2007 and two in 2010.

Director general of the Law Society, Ken Murphy, remarked: "The fall in the number of new trainees reflects the fact that over 1,000 solicitors are estimated to be unemployed. By any objective standards, the supply of solicitors in this jurisdiction considerably exceeds demand. If the numbers entering the profession is declining substantially, it can be seen as market forces at work. It is an adjustment to a new reality," Murphy added.

Britain's Legal Ombudsman is open for business

Readers of *The Irish Times* recruitment section on 19 November may have noticed an advertisement for the position of Legal Services Ombudsman, *writes Trish Flanagan*. The ombudsman is described as "an independent officer, to oversee the handling by the Law Society and Bar Counsel [sic] of complaints by clients of solicitors and barristers and to monitor and report on the adequacy of the admission policies of both professions … The ombudsman will be appointed for a period of up to six years. In view of its projected workload, the position is to be filled on a part-time basis (three days a week)."

Across the water, the Legal Ombudsman for England and Wales opened for business on 6 October 2010. Established under the *Legal Services Act 2007*, this new independent and impartial public body simplifies the system for members of the public to bring complaints against legal professionals.

Until now, up to eight different organisations handled complaints, including the Law Society and the Bar Council. The new body, based in Birmingham, brings all legal services complaints handling together under one roof, and replaces the Legal Services Ombudsman and the Legal Complaints Service.

The Legal Ombudsman is managed by the Office for Legal Complaints, which, in turn, is accountable to parliament through the Lord Chancellor. It has formal powers to resolve complaints about all legal professionals – solicitors, barristers, law costs draftsmen, legal executives, licensed conveyancers, notaries, patent attorneys, probate practitioners, registered European lawyers, and trademark attorneys.

Britain's chief ombudsman, Adam Sampson

Its mission is "to resolve legal complaints in a fair, open, effective, shrewd and independent way" and it hopes to finalise complaints within three months of receipt. A consumer of legal services is advised to try and resolve the issue with his or her legal professional first, before referring the matter to the Legal Ombudsman.

Chief ombudsman Adam Sampson said: "We know that, most of the time, lawyers provide a good service. But sometimes things can go wrong. When they do, people must have access to someone they can have confidence in to put things right. That is our job – to resolve complaints quickly and fairly."

The aim is to resolve complaints informally, where possible, but there is no obligation to investigate all complaints received. When a matter is investigated, a recommendation report is prepared and put to the complainant and the lawyer. Once both parties have had the chance to comment, the report is then passed to the ombudsman to make a decision. If the ombudsman decides that the service provided was unacceptable, he can request that the legal professional put it right. Alternatively, he can declare that the lawyer provided a satisfactory service.

As the Legal Ombudsman only focuses on the level of service provided, a consumer can simultaneously pursue a parallel court action for professional negligence. If misconduct is involved, the Legal Ombudsman can refer that aspect of the complaint to the relevant regulatory body. A lawyer or consumer unhappy with a decision of the ombudsman has the option of judicial review.

There is no fee for consumers – the Legal Ombudsman is funded by a levy on legal professionals through their regulatory bodies. A flat case fee of Stg£400 is charged to legal professionals, unless a complaint is resolved in favour of the legal professional and the Legal Ombudsman is satisfied that they took all reasonable steps to try to resolve the complaint under their own procedures.

Although the office has already opened, there are some aspects of its operation that have yet to be finalised. Under the *Legal Services Act*, the Legal Ombudsman has the power to publish reports of its investigations and decisions.

The Legal Ombudsman expects to deal with more than 100,000 cases a year. On the first day of business, it had nearly 500 enquiries. For more information, see www.legalombudsman.org.uk.

COMPANY LAW INDEX NOW ONLINE

The publication of an electronic index to Irish Company Law Cases 2001-2008 has been sponsored by the Arthur Cox Foundation, writes *Michael Carrigan (chairman of the Arthur Cox Foundation Board)*. The index, arranged by subject, includes comprehensive details of company law cases for this period, including citations for reported cases, BAILII links to full text judgments (where available), and keyword abstracts.

A supplement for 2009 accompanies this index. The supplement will be updated on an ongoing basis, as case entries become available, and will be merged into the main index at the end of each year. Case entries are provided by the Law Reporting Council.

The index is available in the member's area of the Law Society's website, www.lawsociety.ie, and is also available on the Diplomas' *Moodle* to assist students on the Diploma in Corporate Law and Governance.

The Arthur Cox Foundation is a charitable trust, set up over 40 years ago as a memorial to the late Arthur Cox, solicitor. The foundation's funds have been used over the years to assist the writing and publication of Irish legal textbooks and in the development of electronic databases of Irish legal materials. For further information on the foundation, see www.lawsociety.ie/Pages/Consumer-Interest/Charities.

What else can I do? Just ask LawCare

Many of the recent calls to the LawCare helpline are about being made redundant or being asked to work fewer hours per week, *writes Mary B Jackson (LawCare co-ordinator for Ireland)*. Often, the caller is in a state of shock or anger, citing previous employment records and a lack of notice or preparation for bad news.

When someone calls the LawCare helpline (which is free and confidential), we give both emotional support and practical advice. On our website (www.lawcare.ie), there is guidance on redundancy. This includes 100 suggested other careers to encourage lateral thinking. Many lawyers will say, "I don't know what else to do – I can only be a lawyer". But the fact is that a lawyer is a highly skilled, qualified person, usually both literate and articulate, with very transferable skills.

I know personally of three lawyers who have become teachers; some who are now working as 'know-how' experts in their own field; one who is heading up a very large legal advice centre; and one who has become a fashion designer. There is also the young Irish author, Ronan O'Brien, a criminal lawyer from Dublin, who has had his first novel, *Confessions of a Fallen Angel*, published and, doubtless, is now writing a second.

John Mortimer QC died in January 2009. I watched the last television programme he made about his view on life. One of his premises was that you should take the risk, change your career and see where it might lead. He, of course, gave up being a barrister to become an author and created his alter ego, Rumpole of the Bailey, who remains a timeless legal figure in the world's imagination.

As Ophelia says in *Hamlet*: "We know what we are, but know not what we may be". The potential inside each human being is limitless. While I was surfing the net for quotes relating to the legal profession (sadly most of them negative), I came across an article by Patrick Andrews, previously a lawyer, but now a business consultant and writer. He took the big risk, 'the road less travelled', and is now running his own company. He talks about his struggles within the legal profession – a conflict he describes as "a basic conflict between my values and my work". As he was wrestling with this, "fate stepped in to rescue me. I was offered redundancy, since the department was being wound down, and I accepted with some relief. I left the company, destination unknown."

All has been for the best, as so often happens. What can seem a disaster at the time can, if you are not afraid to grasp opportunities open to you, quite literally lead on to bigger and better things. To use President Obama's words: "Yes, you can."

If you need immediate local help, you can contact the excellent Career Support Service headed up by Keith O'Malley on 01 672 4800, or email careers@lawsociety.ie. I recently attended one of their many careers advice workshops and can vouch for their help and professionalism.

Alternatively, LawCare offers support and advice to lawyers facing problems, such as stress, depression and addiction to alcohol or drugs through its free and confidential helpline on 1800 991 801. You may also visit the comprehensive website at www.lawcare.ie.

PRIZE BOND DRAW RESULTS FROM 5 NOVEMBER

3 x €500: bond number 1969 (Leo Loftus, Bourke Carrigg & Loftus, Teeling Street, Ballina, Co Mayo); bond number 2215 (John Kieran and Robert Kieran, John C Kieran & Son, Castle Street, Ardee, Co Louth); bond number 1685 (Donal O'Hagan, Donal O'Hagan & Co, Court House Square, Dundalk, Co Louth). **3 x €275:** bond number 2301 (James A Murphy, Huggard Brennan & Murphy, 2 Rowe Street, Wexford); bond number 2258 (Denis McDowell, McDowell Purcell, The Capel Building, Mary's Abbey, Dublin 7).

Gazette shortlisted for Irish Magazine Awards 2010

The *Law Society Gazette* has been shortlisted for the Irish Magazine Awards 2010. The *Gazette* is included in two categories:

- Business to Business Magazine of the Year (more than 5,000 circulation)' and
- Editor of the Year – Business to Business Magazines.

Other good news for the legal profession is that *Parchment*, produced by the publishers of *House and Home* for Dublin Solicitors' Bar Association, has also been shortlisted in the 'Business to Business Magazine of the Year (less than 5,000 circulation)' as well as the 'Editor of the Year – Business to Business Magazines' category. Council member Stuart Gilhooly is up for a 'Journalist of the year' gong. The announcement of winners takes place at a ceremony in the Four Seasons Hotel on 2 December 2010.

Not wishing to stand still, the *Gazette* team has been working hard in the background over the past two months to rejuvenate the *Gazette*. Expect a new size, new content and a new style early in the New Year. We look forward to hearing your comments on the revamped publication when it launches. In addition, the *Gazette* will be redeveloping its website in the first quarter of 2011, in order to take account of new developments in e-publishing.

The ECHR at 60: changes to come

November 2010 marked the 60th anniversary of Ireland and nine other states signing the *European Convention on Human Rights and Fundamental Freedoms* (ECHR) in Rome, *writes Des Hogan, solicitor and deputy chief executive of the Irish Human Rights Commission*. The Strasbourg Court, established under the ECHR, is now arguably the most widely recognised international judicial body and is charged with monitoring respect for human rights by the 47 member states in the Council of Europe.

Applications against states for human rights violations can be brought before the court by other states (for example, *Ireland v United Kingdom* concerning internment and ill-treatment) or by individuals (for example, *Norris v Ireland*, which led to the decriminalisation of homosexuality).

The next two years will be pivotal for the future of the court. Earlier this year, Switzerland hosted a high-level ministerial conference that adopted the *Interlaken Declaration* on reform of the court. The immediate impetus for the conference and the reform process is the backlog of cases, now standing at 140,000, as the ECHR becomes more widely known and its jurisprudence more far reaching.

As the reform process unfolds, other factors are also at play, including the desire of some states to limit the scope of the court's review of national decision making and, indeed, the right of individual petition, as commonly understood. The interventions of several states reflect a view in some European capitals that domestic courts should only be subjected to scrutiny in exceptional cases.

National human rights institutions, such as the Irish Human Rights Commission, and civil society organisations are attempting to moderate some of these proposals. The principle of 'subsidiarity', which emphasises that domestic authorities are better placed than the Strasbourg court to review and adjudicate on local facts, is at issue. This is nothing new, of course. Articles 1, 13 and 35 of the convention require the exhaustion of domestic remedies before a case can be brought to Strasbourg. The court makes clear that it is not a 'fourth instance' court to review each decision of domestic courts – unless it impacts on convention rights.

A recent note by the court's jurisconsult draws the distinction between EU law 'subsidiarity', which refers to a "competitive subsidiarity" between the competing powers of the EU and its member states – and ECHR 'subsidiarity', which refers to a "complementary subsidiarity" under an internationalist or supervisory approach.

Interlaken commits states to a number of measures to streamline cases going before the court. Cases involving the ECHR should be addressed in domestic courts, thus ensuring effective subsidiarity through available domestic remedies. Thus, not only cases involving Ireland but also judgments addressed to other respondent states must now be taken on board – the purpose being to prevent repetitive applications and, so, reduce the court's caseload.

In relation to EU accession to the ECHR, under proposals discussed in Strasbourg this month, the EU may become an automatic co-respondent in cases where there is an EU dimension. This will bring significant changes to how cases are argued in Strasbourg, with an applicant potentially facing two respondents where there is an EU dimension.

PAMODZI – PROMOTING THE RULE OF LAW

Originally founded in 2007, the joint Law Society and Bar Council 'Rule of Law' initiative has collaborated with like-minded organisations around the world to advance collective knowledge of the relationship between rule of law, democracy, sustained economic development and human rights.

The project has recently gained formal footing in the shape of a newly incorporated charitable company called Pamodzi – Promoting Rule of Law. The word 'pamodzi' means 'unity' or 'together' in Nyanja, a language of southern Africa. The name was proposed by the Mr Justice Garrett Sheehan, who has had particular involvement in Zambia and is an ardent advocate of the ideals upheld by this project. Pamodzi represents the project's commitment to working in unity with the people it serves.

In recent years, projects have addressed the broad spectrum of the rule of law – from capacity development of national judiciary, to enhancement of legal aid at a community level – and have spanned the globe from Kosovo to Malawi, South Africa to Bosnia.

Assisting participants with the commercial law training course for disadvantaged lawyers in Cape Town in September 2010 were: Michael Irvine, Turlough O'Donnell, Michael Carrigan, Cillian MacDomhnaill and Rachel Power

Pamodzi is now looking to expand on these projects, while crucially operating as a point of contact and support for those starting their own projects abroad. It is seeking enthusiastic and committed individuals to get involved, identify new projects, and assist with research and fundraising.

Pamodzi – Promoting Rule of Law will officially be launched at its next quarterly meeting on Thursday, 27 January 2011, in the Distillery Building. It will be a chance to hear more about its work, meet with those involved and see how you can contribute. For further information, visit www.pamodzi.ie. Alternatively, email r.power@pamodzi.ie to register an interest or sign up for its newsletter.

Shannon – taking child

Geoffrey Shannon, the Law Society's deputy director of education, has been appointed chairman of the new Adoption Authority. He speaks with Mark McDermott about his new role

The Law Society's deputy director of education, Geoffrey Shannon, has been appointed chairman of the Adoption Authority of Ireland. His appointment was announced on 1 November.

Geoffrey – a solicitor and the Law Society's senior lecturer in family and child law – is already the special rapporteur for child protection, child law expert to the National Longitudinal Study of Children in Ireland, and the Irish expert member of the Commission on European Family Law. On top of all that, he is a prolific author and has recently published his latest book on child law, which the Chief Justice describes as "an exceptional work on the law of the child".

The secret of his success? Putting in long hours, being very organised, prioritising his work – and enjoying immensely what he does. Most mornings, his alarm clock goes off at 6am. During the next two hours, he does most of his writing.

Independent views

A Galwegian from Salthill, Geoffrey regards himself as a 'townie'. Educated in the 'Jes' – Galwegian shorthand for the Jesuit's Coláiste Iognáid – he was given the opportunity to form independent views. "That was encouraged," he says. He got his first taste of childcare as a teenager, when his parents opened their home to children in need of respite care. "You got a glimpse of how some children weren't as fortunate, perhaps, and that had a really profound impact on my development."

In University College Galway, his first degree was a B Comm, which he swiftly added to with an LLB. While completing his training as a solicitor, he simultaneously achieved a first-class honours LLM in child protection. His thesis? A critical review of the child protection system in Ireland, focusing on residential and foster care – "the type of areas that I was later to become involved in". His PhD research was in the area of adoption.

Was he affected by what he came across while researching the child protection system? "I was horrified. I remember my supervisor encouraging me to publish my research. What I was beginning to discover at that stage was that our child protection system was deeply flawed and that there were huge gaps in the law. There was an opportunity for me to identify those gaps and to plug them by suggesting reform. I've spent quite a number of years since then agitating for reform."

Within the past decade, Geoffrey's work and expertise began to receive recognition at home and abroad. Earlier this year, he was shortlisted for the international CCBE Human Rights Lawyer 2010 in recognition of his contribution to children. In 2003, he was appointed as the independent legal expert to the Department of Health and Children on future developments in adoption. "This was a real opportunity to provide a framework as to where we should go with adoption," he says. "I think that it has now been realised in the context of the *Adoption Act 2010*, which came into force on 1 November. It has taken us over half a century to update our adoption laws," he grumbles.

> ***"We always talk about Ireland being a country that is child loving, yet it has failed, in my opinion, to protect the rights of children adequately in its Constitution"***

He believes that the new adoption legislation will have a huge impact on adoption, "because we've moved from a situation where adoption was adult-centred to a situation where it is now child-centred".

On the topic of adoption, he is passionate: "Adoption is about children – nobody has a right to adopt. A child has a right to a family and sometimes we forget that. When adoption was introduced in Ireland in 1952, remember that 96.9% of all the children born outside of marriage were adopted, which is a startling statistic. In 2009, there were only 67 domestic adoptions, less than 1%. It really shows us how society has changed. Inter-country adoption wasn't even on the radar at that stage. We introduced inter-country adoption really as a humanitarian response to the plight of abandoned children in Eastern Europe. We now have a piece of legislation that deals with both domestic and inter-country adoption.

"I'm unambiguously supportive of inter-country adoption, but I think that we now have a world-class piece of legislation and I think what we need to do is to implement that in accordance with the 1993 *Hague Convention*."

No oversight

What's next on his agenda? "We're now moving to creating a framework for inter-country adoption. Prior to the enactment of the new legislation on 1 November, the approach was that you got your licence to adopt – your declaration of eligibility and suitability – and you were left to your own devices. There was no oversight of the adoption process. So we didn't really know what happened once the child arrived back in this jurisdiction." Under the new legislation, the Adoption Authority will have a pivotal role in ensuring that the process is conducted in a child-centred fashion.

"Over the last two years, I have seen a very significant difference between how we deal with domestic adoption and inter-country adoption. There is a different standard of assessment and that's not good enough, because, regardless

law by the hand


PIC: SIOBHAN BYRNE PHOTOGRAPHY

of whether a child is adopted from abroad or adopted within Ireland, the same standard should apply, the same system should apply. There should be uniformity in the way we deal with all adoptions ."

He refers to Ireland's role in inter-country adoption in the 1940s and '50s, "when we didn't exactly cover ourselves in glory in the context of the way in which children were sent abroad. What we should have uppermost in our minds is that we shouldn't compound the errors of the past."

He believes that Ireland has now put in place a framework to deal with inter-country adoption in order to ensure that it takes place in the best interests of children. Basic safeguards like consents should be provided, he says.

What are the most pressing child and family law issues for Ireland at present? "My view is that we need to be honest and we need to look at where we're going. Certainly, it has taken us far too long to ratify the 1993 *Hague Convention*. Sometimes change in this area occurs at a pace that I think is unacceptable, because, what we seem to forget is that childhood doesn't stand still while we make vital decisions in relation to children's lives.

"I have to say that I've been enormously critical at the delay in bringing forward a proposal to amend our Constitution to enshrine the rights of the child. The fact that this was mooted in 1993 and the fact that we still haven't brought a wording to the people is deeply regrettable."

He points out that the central theme of the *Ryan Report* and the *Murphy Report* was the invisibility of children. "That's why I think there is a need to have a referendum, so that we can, in our fundamental law, put the child at the centre of our Constitution. The legacy of all of these inquiries should be that we have a greater visibility of children – and that can only occur in our Constitution.

"What kids have been asked to do is to accept the crumbs from the constitutional table. We always talk about Ireland being a country that is child loving, yet it has failed, in my opinion, to protect the rights of children adequately in its Constitution. Rather than commissioning new reports – and we have all the reports we need – the time for action is now." G

It's been a privilege –

The recent *Akzo Nobel* case has significant practical implications for in-house counsel. Colin Babe surveys the damage

On 14 September 2010, the Court of Justice of the EU gave its long-awaited judgment in the case of *Akzo Nobel Chemicals Limited and Akcros Chemicals Limited v European Commission*. Sadly, the decision was not the one for which we had hoped. Following the opinion that Advocate General Kokott had issued earlier this year, the court decided not to recognise the protection of legal professional privilege for advice given by in-house lawyers in EU competition law investigations – regardless of the lawyer's status in the EU member state system.

The background to the case is well known at this stage. During the course of an investigation by commission officials, conducted in February 2003 at Akzo's premises in Eccles, Manchester, a dispute arose between the commission officials and Akzo over certain documents, which Akzo asserted were privileged. The documents included:

- A two-page typewritten memorandum from the general manager of Akcros Chemicals Limited (a related company) to one of his superiors, containing information gathered by him in the course of internal discussions with other employees for the purposes of obtaining outside legal advice in connection with the competition law compliance programme put in place by Akzo Nobel, together with manuscript notes referring to contacts with a lawyer of the appellants, including mention of his name ('Set A'), and
- Handwritten notes allegedly made by Akcros's general manager during discussions with employees and used for the purpose of preparing a typewritten memorandum, and two emails exchanged between Akcros's general manager and Akzo Nobel's coordinator of competition law, who was a member of the Netherlands Bar ('Set B').

The commission rejected Akzo's argument that both sets of documents were privileged. The commission's position was subsequently backed up by the Court of First Instance in its judgment on 17 September 2007. This decision was then appealed before the Court of Justice.

Two-limbed test

Central to the Court of Justice's reasoning in rejecting Akzo's arguments in the appeal was the case of *AM&S Europe v Commission*, which was decided by the same court nearly 30 years ago and which set out the following two-limbed test for legal professional privilege:

1) The relevant communications are made for the purpose of a client's right of defence, and
2) The exchange must be between a client and an "independent" lawyer – that is to say, "lawyers who are not bound to the client by a relationship of employment".

In the *Akzo* case, the Court of Justice stated that an in-house lawyer, despite enrolment with a bar or law society and professional ethical obligations, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his or her client. Therefore, in the court's view, an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client.

> ***"Plainly, any claims that a document that contains advice from an in-house counsel is privileged will not now stand up in the context of a competition law investigation conducted by the European Commission"***

The decision has attracted a barrage of criticism from a number of different quarters. For instance, the chief executive of the Law Society of England and Wales, Desmond Hudson, said: "In-house lawyers are the front-line guarantor of compliance. It is sad that, while the EU strives to legislate for higher standards of corporate governance and risk management, the decision of the court, in effect, rejects this key tool in achieving this aim."

In Mr Hudson's view, the court had missed its opportunity to recognise how the role of the in-house lawyer had changed since the last occasion it had been considered by the court in the *AM&S* case. (See the Law Society of England and Wales press release, 14 September 2010.)

J Daniel Fitz, the former chairman of the board of the Association of Corporate Counsel in Britain, expressed the view that "the ECJ ruling has serious ramifications, as it denies in-house attorneys and multinational businesses in Europe and elsewhere the critical legal counsel on competition law matters that companies working in today's global legal marketplace require" (see the ACC press release, 14 September 2010.)

What now for in-house lawyers?

This is all very fine and good, but unless it is shot down by the European Court of Human Rights, or overtaken in the form of an EU directive or regulation recognising the importance of legal professional privilege to in-house counsel in certain member states, the decision stands. Where does that leave in-house lawyers now?

Plainly, any claims that a document that contains advice from an in-house counsel is privileged will not now stand up in the context of a competition law investigation conducted by the European Commission. Paradoxically, as commentators such as Vincent Power have pointed out (see *Law Society Gazette*, July 2010, p58), Ireland's Competition Authority would still recognise such a privilege in any investigation that it conducted into a breach of EU law. In addition, outside of EU competition law, the concept of legal professional privilege remains in place under Irish law and will still apply to advice given by in-house counsel in other areas, as long as he or she is acting in the role of a legal advisor.

the *Akso Nobel* fallout

The European Court of Justice in Luxembourg

In practical terms, cases involving legal professional privilege along the lines of the *Akzo* case have been rare. However, it is important to recognise that materials that are waived/produced in an EU competition law investigation are now waived/accessible for other purposes – and this is particularly significant in light of the growing cooperation among regulators. Indeed, materials that most lawyers and clients would assume are privileged because they were generated by lawyers recognised in their 'home' jurisdictions and would be privileged there (for instance the US, Canada or Australia) are vulnerable to seizure in an EU Commission competition law investigation. This point was part of the decision in the *AM&S* case.

Therefore, it would seem that the combined effect of *Akzo* and *AM&S* decisions have the most far-reaching implications for legal departments located within large multinational companies. Often such legal departments are globally integrated, so confidential documents are often stored and are accessible in document-management systems or legal department intranet sites without a full appreciation of whether they are privileged in each jurisdiction in which they can be accessed. It is advisable to conduct a full review of these document systems in this context, together with the IT infrastructure, and consult with the IT department in order to see what technical safeguards can be utilised to protect privileged documents, on a jurisdiction-by-jurisdiction basis. It is good practice to have a protocol for communicating legal advice with an appropriate header, such as 'privileged and confidential' or 'attorney client privileged and work product protected'.

The net impact of the *Akzo* decision will be, insofar as EU competition law only is concerned, that in-house counsel will have to consider and weigh up the advantages of engaging external counsel who, as 'independent' lawyers, will still enjoy the protection of legal professional privilege in relation to their advice. This will, of necessity, entail significant additional legal costs, time, and duplication of effort. Set against the backdrop of these dark recessionary times in which we live, it is regrettable that the Court of Justice failed to see the bigger picture. It is even more regrettable that it did not recognise that the world has moved on in the time since the *AM&S* decision. G

LOOK IT UP

Cases:

- *AM&S Europe Limited v Commission of the European Communities* (case 155/79, European Court of Justice, 18 May 1982)
- *Akzo Nobel Chemicals Limited & Akcros Chemicals Ltd & Ors v Commission of the European Communities* (cases T-125/03 and T-253/03, Court of First Instance, 17 September 2007)
- *Akzo Nobel Chemicals Limited & Akcros Chemicals Ltd & Ors v European Commission* (case C-550/07 P, opinion of Advocate General Kokott, issued 29 April 2010)
- *Akzo Nobel Chemicals Limited & Akcros Chemicals Ltd & Ors v European Commission* (case C-550/07, European Court of Justice, 14 September 2010).

Colin Babe is a solicitor and chairman of the Law Society's In-House and Public Sector Committee.

Our human rights record

Ireland is to be examined by the United Nations' Human Rights Council in October 2011, as part of the Universal Periodic Review, writes Joyce Mortimer

The Universal Periodic Review (UPR) is a unique process that involves a review of the human rights records of all 192 UN member states once every four years. The review is a state-driven process, under the auspices of the United Nations' Human Rights Council (UNHRC). It provides the opportunity for each state to declare what actions they have taken to improve the human rights situations in their countries and to fulfil their human rights obligations. The process is designed to ensure equal treatment for every country when their human rights situations are assessed.

Ireland's UPR assessment will take place in October 2011. This will give Ireland the opportunity to assess and reflect on the state of human rights protection here. Preparations for this review are already taking place, with the Office of the High Commissioner for Human Rights requiring information from relevant stakeholders six months in advance of the review. As a result, the deadline for Irish stakeholders to provide their information is 21 March 2011.

Calls for contributions

Already, the Irish Human Rights Commission (IHRC) and the Irish Council for Civil Liberties (ICCL) have initiated calls for contributions that will inform their respective reports. The UPR process gives civil society the opportunity to have an input into Ireland's examination by providing invaluable evidence of human rights protections at ground level.

The IHRC has stated that it will submit its own report for the UPR process in March 2011. It is seeking contributions from the public and other stakeholders and, to this end, is running a consultation process from 1 October to 17 December 2010. To assist in the consultation, the IHRC is providing support to anyone wishing to contribute. Information will be provided about the UPR process and how to prepare a report.

The ICCL has established a steering group composed of organisations that will coordinate a civil society response to Ireland's examination. This steering group will be conducting a number of awareness-raising activities in an effort to encourage input from civil society to the UPR process. The ICCL states: "As part of the examination, the Irish state can be held to account for its past performance. We can also use the examination to promote awareness of international human rights standards in Ireland."

What is the UPR?

The UNHRC is an intergovernmental body within the United Nations' system. It was created by the UN General Assembly in accordance with resolution A/RES/60/251. The main purpose of the council is to investigate situations of human rights violations and to make recommendations to the General Assembly.

On 18 June 2007, the UNHRC adopted its institution-building package, which provides it with the necessary mechanisms to carry out its human rights work. These mechanisms include:

- The Universal Periodic Review,
- The Advisory Committee,
- The Complaints Procedure, and
- The Special Procedures.

The UPR is a new and unique element of the UNHRC, which allows for the periodic review of the human rights situations in all of the 192 member states, once every four

ONE TO WATCH: NEW LEGISLATION

Central Bank Reform Act 2010

On 28 September 2010, the Minister for Finance made an order commencing most of the provisions of the *Central Bank Reform Act 2010*, with effect from 1 October 2010. The act provides for the unification of the existing Central Bank and the Irish Financial Services Regulatory Authority, with the new title of Central Bank of Ireland.

The new act provides for a system of compliance with standards of fitness and probity. The regime applies with respect to individuals performing a "controlled function". There is a separate regime for those carrying out "preapproved controlled functions".

Controlled functions

According to section 21, a regulated financial service provider shall not permit a person to perform a controlled function unless the regulated financial service provider is satisfied, on reasonable grounds, that the person complies with the standard of fitness and probity, and the person has agreed to abide by any such standard. The bank has the power under the new act to make regulations prescribing functions that are to be controlled functions.

The bank may prescribe a function as a 'controlled function' if it is a function in relation to the provision of a financial service and is:

- Likely to enable the person responsible for its performance to exercise a significant influence on the conduct of the affairs of a regulated financial service provider,
- Related to ensuring, controlling or monitoring compliance by a regulated financial service provider with its relevant obligations, or
- Likely to involve the person responsible for its performance in the provision of a financial

human rights watch – time to reflect

years. The reviews involve examinations of the human rights practices and violations in all member states.

This mechanism gives states the opportunity to give an account of the actions being undertaken to protect and promote human rights in their countries. A UPR working group started operating in April 2008. Its aim is to review all member states by the end of 2011.

On what is the UPR based?

The working documents that will be used in Ireland's review are:

- The report prepared by the Irish state,
- The report prepared by the Office of the High Commissioner on Human Rights, containing information included in reports of treaty bodies, special procedures, observations and comments

service by a regulated financial service provider in one or more of the following ways:

i) The giving of advice or assistance to a customer of the regulated financial service provider in the course of providing, or in relation to the provision of, the financial service,
ii) Dealing in, or having control over, property of a customer of the regulated financial service provider to whom a financial service is provided or to be provided, whether that property is held in the name of the customer or some other person,
iii) Dealing in or with property on behalf of the regulated financial service provider, or providing instructions or directions in relation to such dealing.

The act provides that a controlled function that is carried on by a person or a partnership or an entity that is not a regulated financial service provider remains a controlled function.

According to article 20(4), a controlled function remains a controlled function even if:

a) It is carried on at an office or location outside the state,
b) It is carried on at the office or location of another person, whether or not the other person is a regulated financial service provider, or
c) It relates to a business of a regulated financial service provider established in the state, conducted by that provider outside the state.

The new act also provides that a function may be prescribed as a controlled function in relation to a specified class or classes of regulated financial service provider, or in relation to regulated financial service providers generally.

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by the state concerned and other UN documents, and
- Information from other stakeholders, for example, non-governmental organisations and national human rights institutions (which are summarised by the Office of the High Commissioner in a single document).

What will be reviewed?

The institution-building package adopted in 2007 explicitly states that the review will examine human rights compliance under the following instruments:
- The charter of the United Nations,
- The *Universal Declaration of Human Rights*,
- Human rights treaties ratified by Ireland,
- Voluntary pledges and commitments made by Ireland, and
- Applicable international humanitarian law.

The working group

The working group is composed of all 47 states that are members of the HRC and chaired by the president of the UNHRC. This group is assisted in reviewing the state reports by a 'troika' – a group of three states nominated to act as rapporteurs. The troika prepares comments and questions on the report, but does not actually have a specific role during the interactive dialogue. The review stage consists of a three-hour interactive dialogue between a high-level delegation representing the state under review and member and observer states of the UNHRC.

NGOs can attend the working group, but cannot take the floor to participate. The three-hour working group results in the production of a report prepared by the troika with the involvement of the state. This report includes a summary of the interactive dialogue and responses, recommendations, and voluntary commitments by the state. The Irish state can then either accept or refuse recommendations – however, both accepted and refused recommendations will be included in the report. After the review, a half an hour is allocated for adoption of the report.

"As part of the examination, the Irish state can be held to account for its past performance. We can also use the examination to promote awareness of international human rights standards in Ireland"

What happens after review?

Ireland will have a duty to implement the recommendations laid out in the final report. It will be reviewed again in four years' time, and this follow-up review will assess action taken on the previous recommendations. The UNHRC shall address situations of persistent non-compliance with the UPR procedure.

In this respect, it should be noted that the council has failed to respond to a large majority of human rights violations, which has had an obvious impact on its credibility. As a consequence, and in order to enhance its effectiveness, the HRC is currently undergoing a process of review itself. Fundamental changes will need to be made to increase efficiency in implementation. It has been argued that the UNHRC needs to act constructively to address findings of human rights violations by member states. Also, the council needs to enhance its engagement with national human rights institutions and non-governmental organisations, as their participation in the UPR is vital. It has been suggested that such bodies should have a right to intervene during the process of review, as they are key players in promoting human rights globally.

It will be interesting to see how successful and effective the UPR in Ireland will be. It is hoped that this type of routine self-examination, coupled with regular international examination and recommendations, will drive positive social change and enhance human rights protection. The IHRC and ICCL will have an important role to play in engaging the public in the consultation process. G

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

FIND OUT MORE

For more information on the Universal Periodic Review, see:
- www.ohchr.org/EN/HRBodies/UPR
- www.ihrc.ie/international/universalperiodicreview.html;
- www.iccl.ie/the-universal-periodic-review.html

Pre-approval controlled functions

The bank may prescribe by regulation a controlled function as a pre-approval controlled function, if the function is one by which a person may exercise a significant influence on the conduct of a regulated financial service provider's affairs. In prescribing such a function, the bank may describe or identify the function by reference to a title commonly used for a person who performs the function.

The act provides that the bank may, pursuant to that subsection, prescribe a controlled function as a pre-approval controlled function if the bank is satisfied that the prescription of the function as a pre-approval controlled function is warranted on the grounds of the size or complexity of the regulated financial service provider or its business and is necessary or prudent in order to verify the compliance by the regulated financial service provider with its relevant obligations.

Miscellaneous

The new act includes a number of detailed changes to existing legislative provisions. These technical amendments are laid out in the schedules to the act and include, for example, the removal of responsibility from the bank for the promotion of the development of the financial services industry in Ireland. The national consumer agency shall promote the interests of consumers of financial services by providing information in relation to financial services, including information in relation to the costs to consumers, and the risks and benefits associated with the provision of those services, and promoting the development of financial education and capability. G

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

letters

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

Ulster Bank mortgage condition anomaly

From: John Redmond, Fitzsimons Redmond, Solicitors, Grand Canal Quay, Dublin 2

The Ulster Bank Ireland Limited housing loan mortgage conditions (2009 version) are, at first glance, on a par with the mortgage conditions used by the other main lenders in the home mortgage market – but, on a closer reading, it should be noted that condition 11, which lists the instances in which the total debt becomes repayable, includes at condition 11(f): "On the expiration of one month's notice given by the lender to the borrower".

Accordingly, the loan can be called in at any time at the whim of the bank, without any default on the part of the borrower or any change in the borrower's circumstances or ability to service the loan.

There is no comparable condition in the Irish Banking Federation General Housing Loan Mortgage Conditions (version 1.0 2009) or, in my experience, in the conditions currently used by the other main lenders in the home loans market.

When I raised the matter with the bank and suggested that this condition was not appropriate, I was advised that this was a condition of the loan and that, if the borrower did not like it, he did not have to take up the loan – that is, take it or leave it.

The condition should be brought to the attention of borrowers, and they should be advised to look at alternative sources of funding where this is possible.

Architects' qualifications and EU law

From: Christophe Krief, CK Architecture, Palmerstown, Dublin 20

In August this year, I lodged a complaint to the European Commission against section 22 of the *Building Control Act 2007*, because this part of the act discriminates against some of the experience that I gained while working in Britain. I believe that the European Commission is now in contact with the Irish government through the EU pilot scheme to discuss this matter.

The reason for this letter is that I was recently provided with a file containing Dr Gerard Hogan's legal opinion in relation to the *Building Control (Amendment) Bill 2010* and its incompatibility with EU law. This opinion was emailed to members of the government by the director of the Royal Institute of Architects of Ireland.

Supporters of the bill are concerned with the content of the opinion, because it states that the *Building Control (Amendment) Bill 2010* is not compatible with EU law. I have practised as an architect during the last 17 years, and I have been attentively following the evolution of the profession within the European Union. I understand that European law does not control the use of the title 'architect' within each European state, but that it imposes the recognition of some professional qualifications within the European Union.

Directive 2005/36/EC on the recognition of professional qualifications does not impose a minimum standard for practising architecture within a state. The directive only sets standards of qualifications for the purpose of allowing freedom of movement within the EU.

I consulted Directive 2006/123/EC relating to the provision of services within the EU. It appears to me that this directive gives instructions to facilitate the movement of services proposed by self-employed and small companies within the EU. In respect of the architectural profession, it includes a reference to Directive 2005/36/EC on the recognition of professional qualifications.

In the Republic of Ireland, registered architects do not have recognition abroad. Only full membership of the Royal Institute of Architects of Ireland (RIAI) gives such a privilege. The suffix 'MRIAI' is listed in Directive 2005/36/EC for the recognition of Irish architects within the EU.

The RIAI recently created a new suffix, 'MRIAI (Irl)'. It will be used by practitioners who register as architects through the *Building Control Act 2007*, without holding a qualification that is in compliance with the European directive.

The issue that did lead to the draft of the *Building Control (Amendment) Bill 2010* is related to the assessment of self-trained architects set up by the RIAI. These assessments are very onerous, and they do not consider the qualities and skills acquired by established architects. It is thought that many mature architect members of the

RIAI would not be successful in these assessments, because they require the skills and knowledge of newly qualified professionals rather than those of mature and established architects.

The *Building Control (Amendment) Bill 2010* was drafted to remedy to this problem, but it was never drafted to allow self-taught architects in Ireland to practise abroad. The *Building Control (Amendment) Bill 2010* is only supposed to replace the existing registration system for self-trained architects as per the *Building Control Act 2007*, which is financially and practically inadequate.

In Denmark and Sweden, as previously in Ireland and the Netherlands, self-trained architects are permitted to practise, and this does not appear to be in conflict with EU law. In the same way, the *Building Control (Amendment) Bill 2010* is proposing to allow professionals with seven years of experience in the field of architecture to register for the purpose of practising in Ireland. This does not represent the highest professional standard within the EU, but this is not the lowest standard either.

In Britain, the system for architectural services is such that the practice of architecture is open to everyone and only the use of the title 'architect' is protected. The Irish system for architectural services is organised in such a way that it does not allow non-registered practitioners to work lawfully. The problem resides mainly in the self-certification procedure. While in Britain the state delivers certificates of compliance with planning and building regulations, it is the privately-appointed architects who do so in the Republic of Ireland.

In the Netherlands, a very practical examination exists for self-trained architects, and part-time courses are available to achieve registration. This facility is not available in Ireland. The cost of the Irish Architects' Register Admission Exam (ARAE) is €11,500, plus €2,000 for optional lectures. The cost of the Dutch equivalent is €3,500. The Irish ARAE would require the applicant to stop his current activities for weeks or months for the purpose of preparing and attending examinations. The Dutch equivalent would allow someone to prepare for a two-day examination during the evening.

There is concern among self-trained architects about the RIAI misleading the public in relation to European law imposing standards for the registration of architects in Ireland. In fact, European law only sets standards for the mutual recognition of qualifications and freedom of movement on this matter. If the document in my possession is authentic, Dr Gerard Hogan's legal opinion is that the *Building Control (Amendment) Bill 2010* is not compatible with EU law. However, Dr Hogan has not provided any relevant reference that would confirm his opinion, and supporters of the bill are wondering why. G

Escaping the 'lobster pot'

Bankruptcy in Ireland is still viewed as an ignominious form of legal limbo, but there have been proposals for reform. Bill Holohan assesses the case for change

The Law Reform Commission (LRC) published a 443-page paper on personal debt management and debt enforcement in Ireland in September 2009 and an interim report in May 2010. In the 2009 paper, the LRC reviewed, in a comprehensive way, the law of personal insolvency in Ireland, exposing how the current law evolved to deal with bankruptcy and insolvency of traders, but it concluded that it is both inappropriate to and unsuitable for dealing with the more recent emergence of large-scale non-trader/consumer insolvency. The LRC therefore urged a major re-vamp of bankruptcy law and practice in Ireland, involving the creation of a new system of personal insolvency law in Ireland and, in particular, a statutory non-court-based settlement scheme being introduced that would supplement (though not completely replace) the court-based scheme that operates under the *Bankruptcy Acts 1988 and 2001*. The key principles of the new system would be an 'earned debt discharge' through an instalment payment scheme, open access for honest and long-term insolvent debtors, legally binding debt settlements, a reasonable standard of living for debtors and their families, and a discharge period of reasonable length (shorter than the 12-year period under the *Bankruptcy Act 1988*).

The European Commission has also been examining this issue and, in October 2007, it produced a paper entitled *Overcoming the Stigma of Business Failure: The Second Chance Policy*. This involved a review of insolvency law within the EU and, on a scoring system devised by the commission, Britain came out tops in terms of the number of measures already adopted, while Austria came out on top for proposed measures. Marks were awarded for reduced restrictions and better legal treatment for bankrupts, shorter discharge periods, and streamlined procedures (these being the terminologies used in the commission's paper) – Britain got a total of five marks and Austria seven. Meanwhile, Ireland got only two marks – but this was based on an incorrect assumption that there was a system of automatic discharge from bankruptcy after 12 years in Ireland, which there is not. The LRC describes the Irish law as "outdated and ineffective", saying that it is "exposed as unsuitable to providing solutions for the realities of a moderate credit society".

> ***"Once in the 'lobster pot' of bankruptcy, it can be difficult to get out. Anyone who is made a bankrupt remains a bankrupt, even after they die, unless discharged by order of the High Court"***

Legal limbo

Undeniably, bankruptcy is still viewed as an ignominious form of shameful legal limbo. As recently as a few years ago, a High Court judge said that "bankruptcy carries with it enormous penal and prejudicial implications for the person affected, be he a public representative, businessman, director of a company, member of an association or even as a person who has to seek employment or endure social or other opprobrium as a consequence of becoming bankrupt and being involved in its procedures thereafter". An EU study on consumer over-indebtedness and consumer law in the European Union has also described the Irish system as "totally inappropriate and hardly ever used by debtors or creditors in respect of consumer debt". The EU has taken the view that business closure and bankruptcy, and re-entry to the business world by bankrupts, are something that is natural and are not a synonym for fraud, even if a very small number of bankruptcies would appear to involve an element of fraud. However, the general public perception of bankruptcy in Ireland is of it being a quasi-criminal affair rather than a rehabilitation process to allow entrepreneurs to re-enter the business world, having learned the lessons of failure first time round.

What has been described as the "overly long 12-year discharge period and the prohibitive cost of the procedure" has also come in for attack and criticism. The necessity to petition the High Court does make it an expensive procedure for creditors and, before any creditor considers bringing such an application, they have to consider whether there are going to be enough assets available to pay (a) the costs of High Court petition proceedings, (b) the costs, fees and expenses of the official assignee in bankruptcy (including stamp duty on any realisations), (c) the preferential creditors in the bankruptcy, and (d) then have something left over to share among the creditors generally, including the particular creditor bringing the application. The lack of an effective system of inquiring into a debtor's assets before bankruptcy makes this a crystal-ball exercise at the best of times.

Once in the 'lobster pot' of bankruptcy, it can be difficult to get out. Anyone who is made a bankrupt remains a bankrupt, even after they die, unless discharged by order of the High Court. There is no automatic right to discharge. A bankrupt cannot be discharged until there are enough funds to pay items (a) to (d) mentioned above. (A 2005 challenge to the constitutionality of this

viewpoint

# of bankruptcy

legislation was, on the particular facts of the case, dismissed as being moot, though the pleadings in the case did not refer to the *European Convention on Human Rights* as incorporated in Irish law, and undoubtedly the matter remains open to challenge.) There is a provision for discharge if all the creditors agree, but this is unlikely in practice. There is also a provision for discharge where at least 60% of the creditors in number and value agree to accept a payment to allow the bankrupt to be discharged. If, however, the bankrupt does not have the wherewithal to pay items (a) to (d), then they are effectively confined to bankruptcy for life.

Striking a balance

The LRC has taken the view that Irish bankruptcy law does not comply with the criteria established in a recommendation to the committee of ministers to member states on legal solutions to debt problems, published in 2007, and consequently the LRC has recommended that the 1988 act be comprehensively reviewed and amended to harmonise Irish bankruptcy law with modern international practice and insolvency standards. The LRC has said that, after 20 years of the 1988 act regime, the opportunity now exists to bring Irish bankruptcy law more in line with our European partners, while striking a fair balance between the interest of creditors and debtors, and to allow bankrupts to rehabilitate themselves and re-enter the market as entrepreneurs. In its May 2010

interim report, it recommended, as a first step, the reduction of the conditional discharge period from 12 years to six years.

The *Civil Law (Miscellaneous Provisions) Bill 2010*, published on 30 August, provides for limited proposals for amendments to the *Bankruptcy Acts*. Section 21 proposes a reduction in the conditional discharge period from 12 years to six years and to provide for automatic discharge of bankruptcies existing for 20 years or more, with any property of the bankrupt that remains vested in the official assignee in bankruptcy being returned to the bankrupt and re-vested in him or her, subject to provision having first being made for the payment of expenses, fees and costs of the bankruptcy, and any preferential payments. Section 21(6) proposes to amend section 85(4) of the 1988 act by reducing the conditional discharge period from 12 years to six years for a bankrupt whose estate has, in the opinion of the court, been fully realised. The same conditions that currently attach in respect of the 12-year period would continue to attach to the new six-year period. If bankrupts can pay items (a) to (d) above, they could be discharged and freed from all the restrictions that apply to bankrupts. Six years is still well beyond the period recommended by the LRC and the EU. In Britain, for example, following the changes made in the *Enterprise Act 2002*, a non-fraudulent bankrupt can be discharged after as little as one year, while those who do not cooperate or who acted fraudulently can be subject to restrictions for up to 15 years. The objective is to allow debtors to rehabilitate themselves as quickly as possible.

Section 21(3) of the bill is a restatement of section 85(3) of the 1988 act, which provides that a bankrupt will be entitled to a discharge when provision has been made for payment of items (a) to (d) above, the bankrupt paying one euro in the euro with such interest as the court may allow or has obtained the consent of all the creditors. In a composition with a percentage offer being put to creditors and accepted by the requisite majority of them, he or she will be entitled to a discharge when he or she complies with section 41 of the 1988 act.

Section 21(4) of the bill clarifies section 85(3) of the 1988 act in regard to obtaining the consent of creditors. Section 21(5) of the bill restates section 85(4) of the 1988 act. Section 21(7) of the bill clarifies the existing law in the 1988 act.

Inequality of treatment

While the introduction of an automatic unconditional discharge after 20 years is welcome, in principle, the period is still extremely long and certainly exceeds the period recommended by the LRC and the EU Commission. It preserves, for example, the possibility that a bankrupt, coming into property 19 years after his or her adjudication, where a judgment debt was 11 years' old on his adjudication, might find any property he acquires or inherits being claimed by the official assignee as after-acquired property to satisfy his/her then 30-year-old debt, whereas a non-bankrupt debtor would find claims against him or her in respect of their judgment debts statute barred after a period of 12 years. This inequality of treatment may be open to constitutional challenge. As of 31 August 2010, some 327 bankrupts would be discharged under this 20-year rule. G

Bill Holohan is the senior partner in Holohan Solicitors, Cork and Dublin, and is the co-author of Bankruptcy Law and Practice in Ireland *(Round Hall).*

Head in

Cloud computing is the biggest 'new new thing' in business IT systems. Reamonn Smith forecasts the risks, opportunities and things you should know

The term 'cloud computing' covers diverse types of information technology (IT) services being developed and offered to businesses by technology outfits. Most overviews of cloud computing start with an acknowledgment that the definition of cloud computing is a matter of debate.

I propose to side-step the semantics by quoting Robert Gellman, from his report entitled *Privacy in the Clouds: Risks to Privacy and Confidentiality from Cloud Computing*, carried out for the World Privacy Forum: "The definitional borders of cloud computing are much debated today. For present purposes, cloud computing involves the sharing or storage by users of their own information on remote servers owned or operated by others and accessed through the internet or other connections."

Whereas the term 'motor vehicle' doesn't distinguish between a bus, a car, a motorbike or an articulated lorry, it does convey the fact that the object has wheels and an engine. Similarly, the term 'cloud computing' only tells you that you are accessing computer services through a network and that data is stored remotely on property and systems that are generally owned by a third-party service provider.

An example of one of the many different flavours of cloud computing is the way gmail or hotmail works. Your emails are stored remotely, and you access them over the internet through the service provider's software, which is also stored and run remotely.

Hi-ho silver lining

Most small and medium-sized businesses do not include IT and facilities management among their core skills. Time spent by the organisation's leaders (for example, partners in a solicitors' practice) or specialists in other areas (for example, individual solicitors) on managing, procuring, researching and maintaining IT systems is time inefficiently spent.

Furthermore, information technology purchasing and implementation creates problems and expenses for businesses. There is the question of whether you should future-proof, and save future costs by upgrading to hardware specifications, software packages and licensing models that may exceed your future requirements. This creates a risk of over-spend. Furthermore, because each office can have a unique configuration of hardware, software and network structure, there is a risk of delay, downtime and additional costs with any upgrade or switchover.

Cloud computing creates the opportunity to outsource virtually all of these problems. Where part of a system is outsourced, it is up to the provider to deal with any problems. For instance, if you buy remote server space, then it might be up to the provider to make sure that the hardware is up to date, that hardware failure of one server will not bring the system down, and that the software is up to date and not vulnerable to viruses.

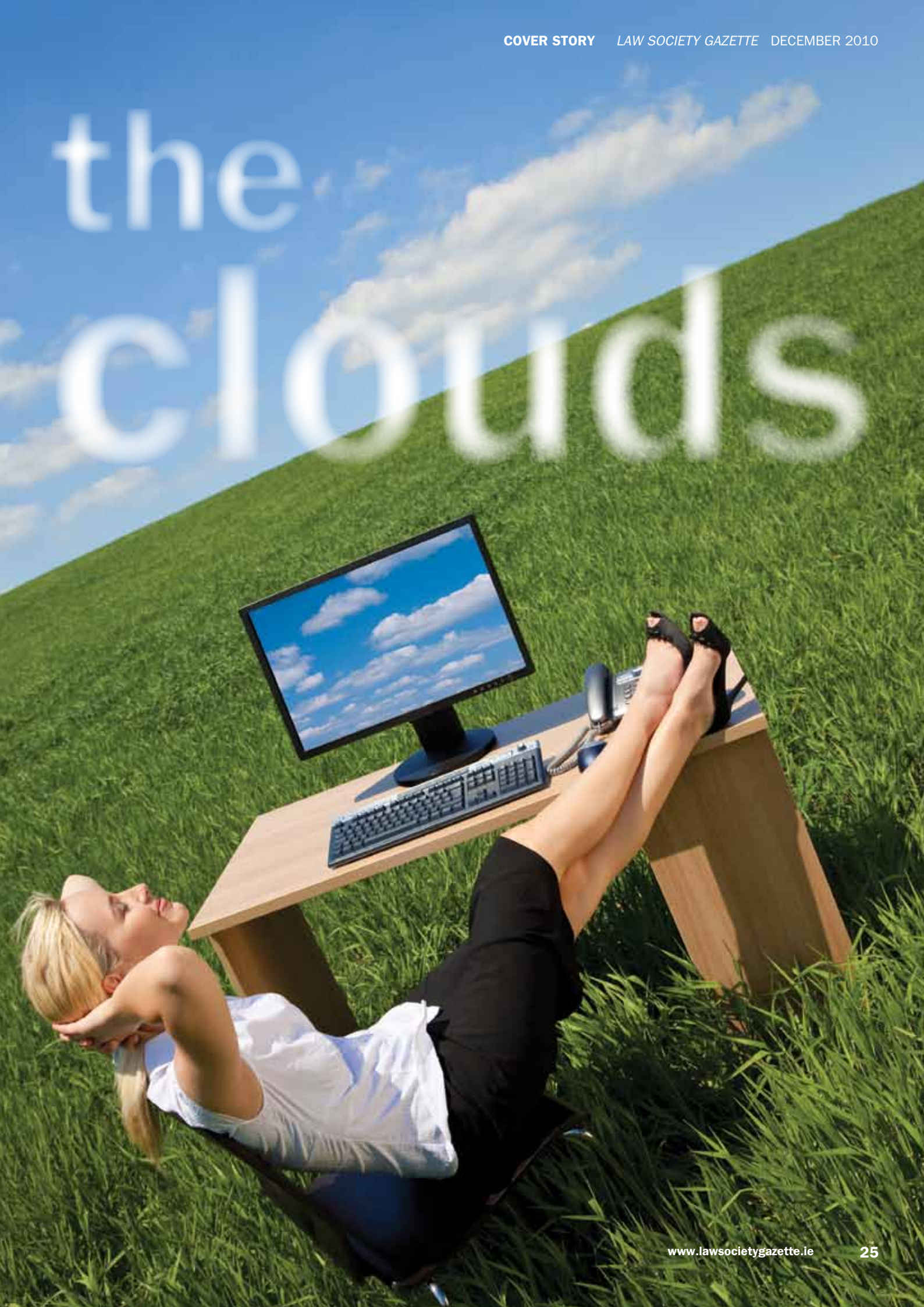
If you outsource back-up, then it should be up to the service provider to make sure that there is enough disk space for the back-ups, that the back-ups are in a secure location, that the back-ups are not deleted, and so on. If one outsources email, then the service provider can – among other things – implement encryption, ensure that only the correct people can access emails, make email accessible from anywhere, enforce storage limits, and ensure that you will not have to buy a new server if your email storage requirements increase substantially.

Generally, the person subscribing to a cloud service pays as he goes. Capital expenditure (on servers and software) is avoided and resources are easily scaled up or down. The need for expertise and knowledge of IT systems is reduced, and different systems can be tried out at a low cost. One gets the benefit of the cloud provider's expertise and the reassurance that the provider is dealing with similar systems for other people.

MAIN POINTS

- Outsourcing IT services
- Opportunities and risks associated with 'cloud computing'
- Legal and regulatory issues

the clouds



Experts usually manage security and anti-virus systems. Moreover, there is often much greater redundancy than in a normal office network: data can be stored on multiple machines, so that you don't even notice if one of these machines breaks down.

Savings in time and expense – and with a probably superior system – make cloud computing almost too good to be true. Of course, nothing in life is that simple, especially if one has the solicitor's habit of looking around corners.

Get off my cloud

As solicitors well know, you often don't get what you pay for if you fail to properly check out the product and the seller and if you don't get the right contract terms in place.

With cloud-computing solutions, one must satisfy oneself that the cloud provider (CP) has the wherewithal to deliver the service, that the contract meets your requirements, and that there is a mechanism whereby you can exit with continuity, whether by choice on your part or whether because of changes on the cloud service provider's side.

The European Network and Information Security Agency has published an excellent report, entitled *Cloud Computing – Benefits, Risks and Recommendations for Information Security*. It classifies the risks associated with cloud computing into three categories: policy and organisational, technical, and legal.

Even reading through some of the top risks identified in the report's introduction is instructive:

- *Loss of governance:* The client cedes control to the CP on a number of issues that may affect security. At the same time, service level agreements may not offer a commitment to provide such services on the part of the cloud provider, thus leaving a gap in security defences.
- *Lock-in:* It may be technically difficult for the customer to migrate from one provider to another or to migrate data and services back to an in-house IT environment because of differences in the systems used. This can create a dependency on a particular CP for service provision.
- *Isolation failure:* Because cloud computing necessarily involves different clients storing their data on the same hardware owned by the CP, there is a risk of a failure of the mechanisms separating storage, memory, routing and even reputation between different tenants.
- *Compliance risks:* Investment in achieving certification (for example, industry standard or regulatory requirements) may be put at risk by migration to the cloud, depending on the standard in question and what is being offered from the CP.
- *Management interface compromise:* Because the management interface of a CP is generally accessible through the internet, there is a risk that such security may be breached.
- *Data protection:* It may be difficult for the cloud customer (in its role as data controller) to effectively check the data-handling practices of the CP and thus be sure that the data is handled in a lawful way. This problem can be exacerbated where the data is transferred between different CPs. The party providing cloud services to a client may itself be renting server space and infrastructure from another provider.
- *Insecure or incomplete data deletion:* A request to delete a cloud resource may not result in true wiping of the data. Adequate or timely data deletion may also be impossible either because extra copies of data are stored (but are not available) or because the disk to be destroyed also stores data from other clients.
- *Malicious insider:* While usually less likely, the damage that may be caused by malicious insiders is often far greater. Cloud architectures necessitate certain roles that are extremely high risk. Examples include CP system administrators and managed security service providers.

> **"One of the big reasons that cloud computing is such a hot topic is because it is an example of the 'green-tech' that is going to save the world"**

Additional risks can be associated with the type of wor k and information handled by the person availing of cloud services. A solicitor, like many other professionals, has additional obligations of confidentiality that may not apply to others. Some of the information handled is very sensitive, commercially and otherwise. The risks faced include monetary liability, regulatory discipline, statutory obligation, insurance costs and reputational damage.

Cloud nine

Considering the seriousness of the risks involved, it is important that cloud customers:

- Conduct proper due diligence to make sure that the CP has the capacity to deliver, and
- Ensure that they have the benefit of an appropriate contract, generally termed a 'service level agreement' (SLA), which provides for all of the technical requirements, legal protection, rights and compliance provisions that are needed.

The due diligence process should primarily deal with technical matters, but should also deal with matters that will have an impact on legal aspects of the SLA. For instance, issues such as whether the CP has subcontracted any of the services (such as data hosting) to third parties, what the contractual structure of any such relationship is, and the jurisdictions where data will be stored (and the laws of those jurisdictions) will all have an impact on the SLA.

In carrying out its due diligence and negotiating

(or reviewing) its SLA, a cloud customer must also, of course, take into account the legal and regulatory environment to which the cloud customer is subject. Does the proposed arrangement satisfy insurers' requirements? Does it meet regulatory and ethical requirements? Does it comply with data-protection laws? Does it comply with all contractual duties and other obligations to third parties?

In some circumstances, a cloud customer may decide to amend its contractual relationships with third parties in order to allow the cloud customer to avail of cloud services. For example, a law firm might amend its terms of engagement to provide that its clients consent and agree to their data and information being stored in other jurisdictions. Indeed, it might be a good idea to insert such a provision in terms of engagement now, in preparation for the future!

Clouds on the horizon

Unfortunately, the cloud-computing industry has not reached a level of maturity where there are standard due-diligence checklists or standard conditions for SLAs. One might speculate as to the reasons for this: there are many different flavours of cloud services, and one size doesn't fit all; a CP's due diligence package and SLA is an important aspect of its commercial offering, so it keeps them confidential; some CPs are so large that they can offer their services on a 'take it or leave it basis'; some CPs do not want the industry to be one that takes on liabilities to SMEs; and some CPs (particularly free ones) want the freedom to use the information they host to generate profits.

At the same time, there are indications that CPs want there to be a clearer regulatory and legal environment. Whereas the legal issues around cloud computing are not new, they do need to be simplified if businesses are going to take up this opportunity in the numbers that CPs hope. In his address to the Brookings Institute on 20 January 2010, Brad Smith, vice-president and general counsel for Microsoft said: "In order to make the cloud a success, those of us in the industry need to pursue new initiatives to address issues such as privacy and security. At the same time, the private sector cannot meet all of these challenges alone. We need Congress to modernise the laws, adapt them to the cloud, and adopt new measures to protect privacy and promote security. That's why we've concluded that we need a cloud computing advancement act that will promote innovation, protect consumers, and provide the executive branch with the new tools needed for a new technology era. We need Congress and the administration to address three issues in particular: privacy, security, and international sovereignty."

It is to be hoped that the EU will also take initiatives in relation to cloud computing, as it has previously done in relation to data protection and e-commerce. Indeed, one of the main recommendations of the January 2010 EU Commission expert group report, *The Future of Cloud Computing – Opportunities for European Cloud Computing Beyond 2010*, was that "the EC, together with member states, should set up the right regulatory framework to facilitate the uptake of cloud computing". However, no draft legislation or framework exists, and the European legislative process can be very slow.

In the meantime, the lack of an appropriate regulatory environment, standard due-diligence checklists, and standard SLAs are an economic barrier to vibrant young technology companies providing cloud-based technology solutions to enterprises that need a greater level of protection than is currently on offer. The costs of developing such offerings and dealing with due-diligence queries and contract negotiations may be beyond the financial resources of a start-up.

Professional service providers who wish to avail of the efficiencies of cloud services may decide that they are not equipped to conduct due diligence or agree SLAs without the help of specialist consultants. This is an impediment to Irish businesses reducing their costs and increasing their competitiveness through the adoption of cloud technologies.

Markets have dealt with these issues before, in relation to the construction industry, through a combination of standard contracts and statutory enactments starting in the 19th century. Let's hope that Ireland is at the forefront of market-friendly legislation and contractual innovation this time. The race is on...

Mr Blue Sky

One of the big reasons that cloud computing is such a hot topic is because it is an example of how much more efficient economies – and indeed human society – can be through the pooling of resources using networks. It is an example of the 'green-tech' that is going to save the world. Analogous initiatives include efforts to pool energy resources by allowing small producers to sell back into the grid, thereby reducing energy waste at the micro level. Some say that the future of Western civilisation depends on concerted efforts on all fronts to reduce energy consumption, and particularly to reduce energy waste.

It is notable that one of the winning ideas for the high-profile 'Your Country, Your Call' competition was entitled the 'Data Island Strategy'. The political will, both nationally and supranationally, to support initiatives such as the smart grid and cloud computing is huge. The Irish government is determined that Ireland should be at the forefront of this IT revolution, with cloud computing and data centres forming an important part of the *Technology Actions to Support the Smart Economy* report. The momentum behind cloud computing is so great that the question is not whether it will become ubiquitous, but how this will come about. It is already underway. G

Reamonn Smith is a member of the Law Society's Technology Committee and a solicitor with the Dublin law firm Smith Foy & Partners.

A president with pedigree

The Law Society's new president is John Costello. Mark McDermott spoke to him about his remarkable legal pedigree, the influence of the Jesuits on his life, his work with incapacitated clients, and his plans for the presidency

John Costello will be the first to tell you that he has led a fortunate life. His pedigree as a lawyer is well nigh impossible to compete with – something akin to Perry Mason meets Usain Bolt. His father, Mr Justice Declan Costello, was a TD in Dáil Éireann for a total of 22 years, was attorney general for four years (1973-77) and president of the High Court for three years (1995-98). His grandfather, 'reluctant taoiseach' John A Costello, served as taoiseach on two occasions and also as attorney general of the Irish Free State (1926-32).

John was fortunate in his education, too. He attended primary and secondary school in the Jesuit's Gonzaga College in Dublin. While he agrees that the influence of the Jesuits on his life has been significant, he is quick to point out that the example of his parents and grandparents have been equally potent.

"The Jesuits certainly were highly educated men. It took 13 years of training to become a Jesuit, so they were all, generally, quite intellectual people. That aside, the Jesuits felt that you were to go out into society and use your talents – whatever they might be – for the betterment of your fellow citizens. They encouraged their pupils to get involved in whatever way their abilities could help the community at large. So, in fact, the Jesuit philosophy and the philosophy of my parents were very consistent. They all firmly believed that if you came from a privileged background, you should put something back into society."

This 'social conscience' philosophy had a strong influence on his father's decision to go into politics. "My dad's foray into politics started at 26, the same year he got married. At this time, he was a practising barrister, so he really had two careers running side by side. He was extremely busy."

How did his mother Joan feel about his dad entering politics in their nuptial year? "Well, obviously, I wasn't around," jokes John, "but my mother was very encouraging of my dad, because she agreed strongly with what he was advocating – that being social justice and helping the less well off in society. My father wrote the *Just Society* policy document in 1965/66 for Fine Gael and, so, he really went into politics, I suppose, to try and help the less well off. He devoted his whole career to that aim, and my mother would have been very supportive of that."

'Father of the Bar'

His memories of his grandfather are more hazy: "I remember him as a loving grandfather, but I do not remember him as a politician. I do remember when I was in the Four Courts on a guided tour. I went into one of the courts and my grandfather was there, in his 80s, addressing the court. I would have been about 18 at the time, but I was struck by the huge admiration that the judge and all the other barristers had for him, because he was the 'Father of the Bar', as well as being a superb advocate. They were treating him with great respect, and everything he said was being listened to very carefully. He worked, up to the end, as a barrister. He was 84 when he died. His first love, really, was the law, even though he had been a TD for over 30 years and had been taoiseach.

"Looking back at my dad's career, I believe – as with my grandfather – that his first love was the law. He became attorney general in Liam Cosgrave's government in the 1970s, and he wanted to use his position there as a reformer. As attorney general, he introduced the Law Reform Commission and the Office of the Director of Public Prosecutions. It was unusual for an attorney general to get involved in law reform but, as he was also a TD, he was allowed to contribute fully at Cabinet meetings.

"He was involved in the Sunningdale talks in December 1973, and I remember the huge amount of

MAIN POINTS

- Nature and nurture
- Social justice as a noble cause
- Befriending the elderly
- His plans as president

SLICE OF LIFE

Most influential person throughout your life?
My parents and my schoolteachers.

Who do you look up to?
One of my heroes is Fr Peter McVerry, and I have a lot of time for the former governor of Mountjoy Prison, John Lonergan. They both speak up for the underprivileged. It's not a popular thing to do.

How do you chill at weekends?
I have three grown children – Laura, Eleanor and Mark – and enjoy spending time with them. I like the theatre and cinema and play bridge and tennis. I've been playing tennis for over 30 years with the same tennis four every Wednesday night.

What do you most love about your work?
When you've helped a client and you feel that they're happy with your service. That's the most satisfying.

Favourite football club?
I support Coventry City, which has given me a lot of heartache over the years. When I was in school, they had an Irish manager, Noel Cantwell. They're now fifth in the championship, so things are looking up!

Pet hates?
When a colleague on the other side is unnecessarily antagonistic. I really find that difficult, because we've a difficult job to do without adding that into the equation.

Favourite alternative career?
A teacher or lecturer.

Favourite place in the world?
The most spectacular place I ever visited was Kashmir, India. I found the Indian people fantastic, wonderful and charming.

work and effort that went into that. Also, as attorney general, he represented the Irish government in Strasbourg when it took a case against Britain for the ill-treatment of prisoners in the North of Ireland. They won the case – it was a superb victory."

Did John ever feel any pressure from his dad or grandfather to go into politics? "No, I was never pressured to go into politics, and I think I would have found it difficult to sacrifice my principles or views just for the sake of politics. I was never really attracted to it as my profession; rather, I was attracted to the law, believing it to be the best way to assist people with legal problems and make a positive contribution to society in general."

Despite his excellent primary and secondary education, he is adamant that when it came time to leave school, he was not certain what he wanted to do. "When I had crossed out what I didn't want to do, I was left with law!" Did he enjoy being a student of law? "I remember first year in UCD – we only had seven lectures a week, seven…! One of the benefits of a law degree, though, was the extensive background it gave you in law and, of course, you got to meet many future colleagues."

Friend of the elderly

Anyone who knows John will know about his great interest in the elderly and the legal subject of incapacity. It all started with weekly visits by his school's branch of St Vincent de Paul to the Royal Hospital in Donnybrook. "That gave me a great interest in the elderly, which overlaps with my probate work, where you're dealing with a lot of elderly people. This interest developed into my work on incapacity, because a lot of older people get Alzheimer's or dementia or have strokes."

He began promoting enduring powers of attorney before they became legal in the *Powers of Attorney Act 1996*. "I remember myself and Brian Gallagher and Michael Murphy met the Justice officials drafting the legislation for the enduring powers of attorney, and they took on board a number of our suggestions. It would, no doubt, have become law at some stage, but I'd like to think that we hastened it somewhat.

"I remember one of the defects of the legislation, whereby attorneys were not permitted to make healthcare decisions. We discussed it with the officials in the department. They were horrified at this suggestion, because they said, if attorneys could make healthcare decisions, that could lead to euthanasia. They genuinely believed that!

"Attorneys who act for elderly, incapacitated clients and who hold enduring powers of attorney are permitted only to manage their clients' financial affairs and, possibly, make minor personal-care decisions," he adds. "But if a serious medical decision has to be taken, for example, for an intrusive operation, or it comes down to decisions regarding quite serious medication, attorneys have no legal authority whatsoever to give guidance to the medical carers on such matters."

After 17 years on Council, and now wearing the mantle of president, what are John's plans for his year

WARD OF COURT CASE: 1995

"I was fortunate to be instructed by the family in this tragic case. The ward in this case was a woman in her mid-40s who, some 23 years previously, suffered very serious brain damage in the course of what should have been a routine gynaecological operation. Since then, she had been near PVS in an Irish hospital, where she had been kept alive by means of a life-support feeding system.

"The Supreme Court decided that this feeding system could cease. The Supreme Court majority accepted that the true cause of death in the event of withdrawal of nourishment would be the original injuries sustained.

"The mother of the ward was a strong practising Catholic and only initiated the case after much theological and legal advice.

"I was privileged to be involved in this case of huge importance."

in office? "I'm very honoured and extremely grateful for the opportunity. I am conscious that we're living in very difficult times and feel that my theme for the year should be to assist the Society in its representative role, in whatever way possible."

Most vulnerable

During his inaugural speech to Council, John spoke about the most vulnerable in the solicitors' profession, specifically newly qualified solicitors and sole practitioners, and those in practice who wish to retire. "I'm conscious that our colleagues are very vulnerable at the moment. It doesn't matter what firm you're in. In my opinion, there will have to be a lower number of sole practitioners and more mergers in the interest of survival. A lot of sole practitioners do a wonderful job and, in fact, I value their freedom. In these days, the sole practitioner is the human and personal touch of the profession, which can be missing, perhaps, in the larger firms, so there's a significant role for the sole practitioner. But I'm concerned for those who are practising on their own – due to circumstances, not choice. They may have been made redundant and had to set up on their own. They are the most vulnerable of our colleagues.

"In addition, many sole practitioners who are having difficulty surviving financially can feel isolated. I would encourage such solicitors to form networks, either in the local community or outside of that, possibly in networks of between six to 12 fellow sole practitioners, who would meet regularly and give support in any way possible to each other. Maybe the Society could help in establishing such networks. These practitioners should also be active in their bar associations.

"Such networks could also form part of a peer review regime – critically important now in the new risk-management environment. Sole practitioners could assist each other in improving the risk-management practices in their offices. These practices could also consider 'cohabitation arrangements' with other colleagues – such as sharing offices, staff, computers, risk-management procedures and legal information.

"The support of sole practitioners, who represent 45% of firms, should be one of the priorities of the Law Society. I would like to organise a meeting of sole practitioners in the Law Society to discuss some of these issues."

John also speaks of his desire to extend the Society's existing mentoring scheme to all newly qualified solicitors who would wish to have a mentor. "Newly qualified solicitors are extremely vulnerable, because their career paths start off very rocky in a lot of cases, and so they may need the advice of a mentor quite independent of their firm."

"The Jesuit philosophy and the philosophy of my parents and grandfather were very consistent. They all firmly believed that if you came from a privileged background, you should put something back into society"

Alternative route

Another of John's major themes will be to focus on developing areas of alternative dispute resolution (ADR) and mediation. "What I would like to do would be to bring together the three or four relevant Law Society committees that would be interested in progressing ADR, and to look at how the Society can promote the concept, based on the Law Reform Commission report just published. I believe that ADR should be mandatory in many family law cases and, speaking informally to Circuit Court judges about such cases, they would think similarly."

What would he hope to be able to say about his term as president when it's completed? "I'd like to say that I went out and met as many of my colleagues as I could, listened to them, took on board their concerns and worries, and at least tried to introduce a way forward. We have to let our colleagues know that we're concerned – we wish to meet with you, we want to listen to your concerns, and we would like to hear your suggestions as to how we, as a Society, can help you. I don't believe that the Law Society has all the answers – our colleagues might have more answers than we have – and I think we should respect that." G

Seismic

Two seismic High Court decisions relating to Injuries Board cases have had mixed results for claimants. Stuart Gilhooly surveys the damage and gets writing for therapy

MAIN POINTS

- Lodging of claims and medical reports
- Statute-barred pleadings
- Interpretation of section 11(1) of the 2003 act and PIAB rules 3(1) and 3(3)
- The issue of costs

The counselling had been going so well. The PIAB-traumatic stress disorder was under control, and I hadn't felt the need to write an Injuries Board-related article in over a year. And then it happened. Two major High Court decisions in the space of four months, and the cold sweats started again. The nightmares and flashbacks to 2004 were back, so my therapist said the best thing was to write it all down, get it out of my system. So here goes.

The first case arose out of a much-encountered problem since the introduction of PIAB. One of the most controversial aspects of the entire system has been the requirement to enclose a medical report with the original application in order to formally register the claim and stop the statute running.

Since 2004, a number of claimants and their solicitors have found it impossible to obtain a medical report before the time for lodging the claim has expired, thus resulting in much panic and threats – before the PIAB has usually relented and allowed the claim to be deemed received and complete for the purposes of the *Personal Injuries Assessment Board Act 2003* without such a report. This has generally occurred only in circumstances where the claim was on the verge of being statute barred.

However, some claimants have lodged the application, but have failed to enclose the medical report, or received a dispensation for doing so from PIAB, before the statute has run. Essentially, they had not obtained a letter deeming the claim received and completed before the expiry of the two-year period.

This has inevitably resulted in defendants in subsequent court proceedings pleading that the claim is statute barred. Up until 15 June 2010, such a plea does not appear to have been litigated – but this was to change in the case of *Tara O'Callaghan v Laurence Hannon*, in a judgment delivered in the High Court by Mr Justice George Birmingham. This does not appear to have been reported to date, but a transcript of the judgment was taken at the time.

The claim arose out of an accident that occurred on 27 April 2004. Because of the complicated transitional arrangements relating to the change in the statute following the *Civil Liability and Courts Act 2004*, the statute in this instance did not run out until 30 March 2007. A personal injuries summons was not issued until 24 June 2008. The issue at stake, therefore, was whether or not the statute had stopped running while the claim was in the PIAB process and, in particular, whether the provision of a medical report was necessary in order to achieve this.

The plaintiff's solicitor in this instance submitted the application on 5 April 2006 without a medical report, and the PIAB responded on 10 April 2006, stating: "We acknowledge receipt of your recent correspondence. However, we require additional information before the application can be accepted

as complete." It then proceeds to set out a list of documentation, chief of which is the medical report.

It is not clear from the judgment, but it seems to be self-evident that the medical report was not lodged prior to the statute running on 30 March 2007. On the face of it, therefore, the claim appears to be statute barred, but this case has exposed a serious lacuna in the legislation, which has in fact been apparent from the outset but, for some reason, has never been rectified by the PIAB.

A matter of interpretation

The net issue in the case relates to the interpretation of section 11(1) of the 2003 act and PIAB rules 3(1) and 3(3). Section 11 essentially states that a claimant shall make an application under this section to the board for an assessment to be made under section 20 of his/her relevant claim, that such application shall be in a form specified by rules made under section 46, and be accompanied by such documents as may be so specified.

The rules were made – the relevant ones are rules 3(1) and 3(3). Rule 3(1) states that an application shall:

a) Be made in writing or by electronic mail,
b) Contain such information as may, from time to time, be specified by the board, and
c) Be accompanied by documentation as set out by the section, which includes a medical report.

The crucial provision is rule 3(3), which provides that "in relation to a relevant claim, the date for making an application under section 11 of the act for the purposes of section 50 shall be the date on which an application in the form specified in sub-rule 1(a), containing information specified in sub-rule 1(b), is acknowledged in writing as having been received by the board".

In other words, providing the documentation, as set out in sub-rule 1(c) (including a medical report), is not required for the purposes of stopping the clock pursuant to section 50. Mr Justice Birmingham so found and determined that the claim was not statute barred.

As it is a judgment delivered *viva voce*, it is not fully reasoned in the manner one would expect from a written judgment, but there is little doubt about his rationale and, further, that it is absolutely correct.

A note of caution though – practitioners should not use this as a reason not to provide the medical report with the application. In theory, a different High Court judge could reach a contrary conclusion in a more formal manner. While this is unlikely, having regard to the clear nature of the wording, anything is possible in litigation. Furthermore, it is open to PIAB to simply repeal rule 3 by passing a new set of rules by way of statutory instrument. In the circumstances, the wisest course is to continue

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LOOK IT UP

Cases:

- *Grzegorz Plewa and Krzysztof Giniewicz v Personal Injuries Assessment Board* (2008/1128JR and 1385JR)
- *O'Brien v Personal Injuries Assessment Board* ([2008] IESC 71)
- *Tara O'Callaghan v Laurence Hannon* (High Court, unreported)

Legislation:

- *Civil Liability and Courts Act 2004*
- *Personal Injuries Assessment Board Act 2003*

to provide a report with the application before the statute runs and, if this is not possible, to ensure that PIAB deems the application received and completed, in writing, before the statute runs.

Issue of costs

The second significant case relates to the issue of costs in the PIAB process. Before 2007, the PIAB provided no costs to any claimant but, in that year, was overcome with generosity and began to award costs in situations where it deemed the claimant to be "vulnerable". These awards have been haphazard at best and do not appear to follow any discernible pattern.

The inconsistency shown by the PIAB eventually raised the ire of two Polish claimants, Grzegorz Plewa and Krzysztof Giniewicz. In the case of the former claimant, a professional fee of €2,000 plus VAT was sought in addition to €350 for translation services. The sum of €350 was awarded for translation, but nothing for legal fees. The second claimant sought legal fees of €1,000 plus VAT plus postages, and so on, of €100 plus VAT, together with a similar claim for translation fees. He too was awarded the translation fees in the amount claimed, but only €400 plus VAT towards legal fees.

Both men sought reasons for the decisions relating to the legal fee deductions. In the case of Mr Plewa, the board simply stated that they did not feel the fees were "reasonably and necessarily" incurred, which is the requirement for such an award under section 44 of the 2003 act.

Mr Giniewicz received a slightly different response and was told by the board, after being pressed by the claimant's solicitors, that costs awarded were all that were reasonably and necessarily incurred, and such costs were awarded as a result of the issue of identifying the correct defendants, which had been particularly troublesome in this case.

Both men brought a judicial review, which was heard by Mr Justice Sean Ryan, following which a joint written judgment was delivered on 19 October 2010 (*Grzegorz Plewa and Krzysztof Giniewicz v Personal Injuries Assessment Board*).

"Providing the documentation, as set out in sub rule 1(c) (including a medical report), is not required for the purposes of stopping the clock pursuant to section 50"

The judge dismissed the judicial reviews on the grounds that "the applicants had not established any failure by the respondent to comply with the act of 2003, nor were they able to demonstrate any breach of fair procedures, unlawful fettering of discretion, unreasonableness, objective bias or other ground to invalidate the board's decision".

While the judgment is lengthy, the essential reasoning behind his decision is that the board had demonstrated that they had considered the applications for costs, had provided costs towards translation in both cases, and provided costs in the case where they deemed legal issues had arisen. He determined that no case had been made for higher costs in either case.

'A very harsh view'

This is undoubtedly a very harsh view of the many difficult issues facing claimants when making a claim, such as the statute, advice on the reasonableness of an award and, in at least one of these cases, the seriousness of the injuries and the long-term consequences for the claimant, in addition to the potentially egregious sanctions that can follow from failing to beat such an award in court.

However, the claimants in this case and, presumably also Mr Justice Ryan, were hamstrung by the Supreme Court decision in the *O'Brien* case, from which the judge quoted extensively. He referred to the *dicta* of both Macken J and Denham J, the latter of whom went so far as to say "a claimant cannot recover his costs for legal representation at PIAB" (compare with section 53).

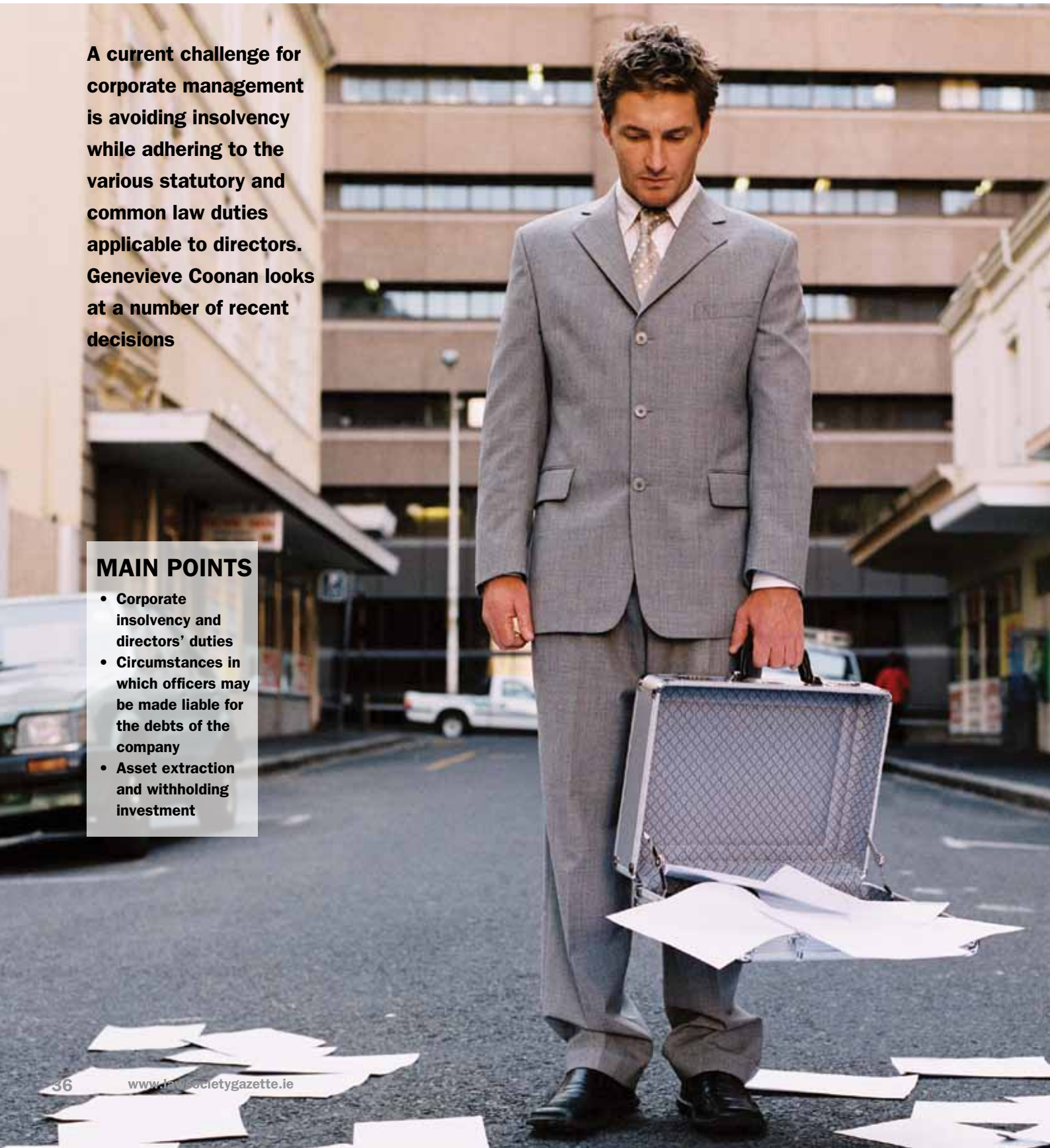
The applicants had begun the judicial review proceedings before the decision was handed down by the Supreme Court in December 2008 and, following that decision, always faced an uphill battle to persuade the court that costs should follow in any circumstances.

So, two fairly seismic decisions with mixed results for claimants. And so glad to have got that out of my system. Here's to a quiet 2011. G

Stuart Gilhooly is president of the Dublin Solicitors' Bar Association and a Council member of the Law Society.

CALL OF

A current challenge for corporate management is avoiding insolvency while adhering to the various statutory and common law duties applicable to directors. Genevieve Coonan looks at a number of recent decisions



MAIN POINTS

- Corporate insolvency and directors' duties
- Circumstances in which officers may be made liable for the debts of the company
- Asset extraction and withholding investment

DUTY

It comes as no surprise that the amount of liquidations is rising during the recession – 1,012 companies collapsed between January and August of this year, an increase of 14% on the same period in 2009. Court-ordered liquidations alone rose from 77 in 2008 to 128 in 2009. Heightened scrutiny surrounding corporate insolvency often raises questions as to whether directors have abided by all of their duties, particularly where the imposition of personal liability can provide a panacea to disgruntled company creditors. While it is clear that the vast majority of companies are becoming insolvent for reasons falling outside the control of their management, the increase in the number of liquidations has revealed that some officers are still finding it difficult to abide by their obligations under the companies legislation. This article examines the circumstances in which such officers may be made liable for the debts of the company, or made the subject of a restriction/disqualification order.

Failing to file tax returns

Officers who fail to ensure that the company files its tax returns may find themselves the subject of a restriction order. Although a failure to file returns for a relatively limited period will not, of itself, result in restriction, the selective payment of liabilities, the total disregard of tax obligations, or the use of tax monies to finance troubled companies can indicate irresponsible conduct. Furthermore, directors cannot absolve themselves of responsibility for such failures by categorising themselves as non-executive directors or by disclaiming any participation in management.

In *Re James Murphy & Sons Ltd*, restriction orders were made against the respondent directors, as they had decided in early 2008 to continue trading, despite being fully aware of the fact that the company was hopelessly insolvent. The company had also failed to file any VAT returns after February 2005, nor had it made any VAT payments for a significant period of time. In rejecting the second respondent's defence that she was not involved in company management at any stage, Finlay Geoghegan J noted that she had consented to act as a director and had thus acknowledged her legal duties under the *Companies Act*s and at common law: "Those common law duties … include informing oneself about the affairs of the company and joining with co-directors in supervising and controlling them. A person who agrees to act as a

director takes on those minimum duties set out above. It is not possible to find that a person such as the second-named respondent has acted responsibly in the conduct of the affairs of the company, as a director, by not participating in the running of the company."

These sentiments were later echoed by Fennelly J in *Re Mitek Holdings Ltd*, when he said that "even non-executive directors of companies must be increasingly conscious, in the times we live in, that they cannot be mere ciphers or purveyors of votes at the whim of management".

Thus, while the duties of non-executive directors will, in general, be less extensive than those of executive directors, they are not free to abdicate all responsibility to the company, and certain basic standards must be met, including, it seems, ensuring that tax returns are filed.

It should also be noted that a failure to abide by one's common law and statutory duties is not an absolute prerequisite to the making of a restriction order. In *Re Mitek Holdings Ltd*, Fennelly J noted: "It is certainly of assistance to consider the scope of the duties of a director, but section 150 is not concerned with the breach of duties to the company alone. It is broader."

Filing false tax returns

Knowingly filing a false tax return may result in the making of a disqualification order or, worse yet, an order imposing liability for the company's debts under section 297A. In *Re PSK Construction Ltd*, the company's managing director was alleged to have engaged in both fraudulent and reckless trading when he decided to under-declare and underpay the company's liability to the Revenue to the amount of approximately €2 million. In such circumstances, section160(2)(c) of the 1990 act affords the court a discretion to disqualify an officer. Accordingly, the respondent was disqualified for seven years. Although he claimed that under-declaring the company's liability was a temporary measure, the fact that the company was hopelessly insolvent at the time he made this decision meant he had no reasonable grounds for believing the company would be able to trade out of its difficulties and eventually pay the Revenue in full. Finlay Geoghegan J was satisfied that the purpose underlying the decision to under-declare was a fraudulent one – that is, to induce the Revenue to believe that the amount due by the company was less than was actually the case.

She was not satisfied, however, that the other company director had engaged in fraudulent or reckless trading, as she did not have sufficient knowledge of the company's financial position when the decision was made to under-declare the company's liability. Nor would the court "deem" her to have traded recklessly under section 297A(2)(a). It was not satisfied, having regard to the general knowledge, skill and experience that might reasonably be expected of the second respondent, that she ought to have known that under-declaring the company's tax liability would cause loss to the company's creditors: "She was an employee of the company with responsibility for the pricing of materials and stock, administration of the office and related paperwork, but with no accounting expertise or qualifications. She also accepted what [the first respondent] told her, 'that this was a temporary measure and that the Revenue arrears would be paid in full when the cash-flow problem was straightened out'."

However, the court was nevertheless satisfied that the second respondent's complicity in the making of the under-declarations over a five-month period meant she was unfit to be concerned in the management of a company and, accordingly, she was disqualified for five years.

> ***"It is essential, particularly in cases involving troubled companies, that officers endeavour to abide by their legal responsibilities and, where necessary, seek legal advice in that regard"***

Books of account

Officers may be found liable for the company's debts under section 204 of the 1990 act where proper books of account have not been kept. However, a causal link must exist between the failure to keep said books and the liquidator's inability to recover the debts. In *Re PSK Construction Ltd*, Finlay Geoghegan J refused to make the respondents personally liable for all or part of the company's debts, as "the collection of debts due on construction contracts in the winding up of a construction company is notoriously difficult". Nevertheless, the court held that the respondents were jointly and severally liable in the sum of €21,447 – this being the liquidator's estimation of the additional costs incurred in the liquidation in reconstituting the books of account.

Asset extraction

A failure to provide investment monies to a company that is in examinership, when combined with the siphoning off of the assets and capital of said company, can result in a finding that officers have acted irresponsibly and, in turn, be made the subject to a restriction order.

The case of *Re Mitek Holdings Ltd* concerned the Mitek group of companies (formerly the Antigen group), which had gone into examinership in 2001. A scheme of arrangement had been formulated whereby a Canadian company, Miza Inc, and a British group of companies, the Goldshield group, would invest approximately IR£24 million in the Mitek group. Of these monies, IR£17 million was to be used to pay off

the creditors of the group, while the remainder was to be used to buy out the principal shareholders.

However, the examinership process inevitably failed, as Miza Inc and the Goldshield group did not provide the promised investment. The group was unable to pay its creditors, became insolvent and went into liquidation. The liquidator sought restriction orders against the majority shareholder, president and CEO of Miza Inc and its executive vice-president, both of whom had been appointed directors of each company comprising the Mitek group. It was that they had acted irresponsibly in permitting Miza Inc to diminish the companies' asset base by extracting fixed assets and working capital to the value of approximately €2.8 million, as a result of which the group was unable to pay its creditors the monies due under the scheme of arrangement. Furthermore, he alleged irresponsibility in proposing a scheme of arrangement to the High Court that was dependent on investment from Miza Inc, when they had not in place funding for Miza Inc that would permit such investments to be made.

The High Court made restriction orders against both appellants, and they appealed to the Supreme Court. In dismissing the appeal, Fennelly J concluded that the appellants' failure to ensure that the promised investment was paid to the group, combined with the extraction of its assets and capital, constituted irresponsible behaviour. The respondents had failed to respond to the liquidator's complaints regarding the failure of either of the joint-venture purchasers to invest in the companies, stating: "The fact is that, whoever was responsible, no new capital was subscribed."

He also rejected the explanation that these monies were "inter-company and corporate overhead allocations and/or transfers, as was normal practice in the Miza group of companies". This argument ignored entirely the separate corporate existence of the Irish companies and their entitlement to their own property. Fennelly agreed with the trial judge's conclusion that there had to be evidence that the appellants had given real consideration to the issue of whether these transactions were in the interests or benefit of the Irish subsidiaries. In refusing the appeal, he said: "The appellants have provided no evidence of independent consideration of the rights and property interests of the Irish company. It may indeed be normal and permissible, within a group of companies, to take account of group policy. That does not mean that the property of one company can simply be transferred, at the behest of the parent, to another company in the group. That would be to ignore entirely the separate existence of each company. The expression 'inter-company and corporate overhead allocations and/or transfers' used by the appellants is meaningless in the absence of some form of objective and lawful justification. Even if there were proper documented and quantified justification, a large question would arise as to whether the Irish companies were in a position to make corporate group contributions when they were unable to meet their basic obligations to normal creditors under the scheme of arrangement."

There is little doubt that the number of court applications concerning misconduct on the part of company management will rise alongside the increase in corporate insolvency. With that in mind, it is essential, particularly in cases involving troubled companies, that officers endeavour to abide by their legal responsibilities and, where necessary, seek legal advice in that regard. G

Genevieve Coonan is a barrister.

LOOK IT UP

Cases:

- *Re James Murphy & Sons Ltd* (unreported, High Court, Finlay Geoghegan J, 19 April 2010; [2010] IEHC 115)
- *Re Mitek Holdings Ltd* (unreported, Supreme Court, 13 May 2010; [2010] IESC 31)
- *Re PSK Construction Ltd* ([2009] IEHC 538; unreported, High Court, Finlay Geoghegan J, 7 December 2009)

Emotional intelligence (EI) is a precious character trait that can add significantly to your bottom line. How can you spot it? How can you make sure your people have it? And can you do anything if they don't? Donal Cronin gets all positive

Emotional

Following Tony Blair as prime minister was never going to be easy. On paper, however, Gordon Brown ticked a lot of boxes. A senior minister with vast experience, intellectually brilliant, a decade as Chancellor of the Exchequer – who could bring more to the role? Those who worked closely with him, of course, knew that he also ticked a few other boxes: dour, demanding, difficult – plain hard going. But surely those (personal) traits would hardly get in the way of his being an effective prime minister?

Within a short time of achieving his dream, anyone could see that it wasn't working for Brown. All of his ambition, his experience, his technical ability and sheer persistence did not add up to success in the new job. And, as Tony Blair has since said in his autobiography: "It was never going to work … Political calculation, yes. Political feelings, no. Analytical intelligence, absolutely. Emotional intelligence, zero."

A whole series of other factors, no doubt, contributed to Brown's challenges and difficulties as prime minister. But there can be little doubt that Tony Blair put his finger on a critical one, lack of emotional intelligence – that ability (among other things) to interact easily and well with others.

Shine a light

You know from experience in your practice the benefits of having a few positive people around – people who are cheerful, pleasant and optimistic. Yes, of course, they must have the technical ability to do their job. That's a given. But once that is there, it is then such a bonus when they also happen to be positive. They bring a cheerful atmosphere to work; they get on well with colleagues and with clients; they're straightforward and uncomplicated; you have no difficulty asking them to do things; nothing is too much trouble, and they just get stuck in. In the current climate, when you need people pitching in as never before, that sort of person is vital.

You may also know the flip side of that coin: the person who always starts with the negative; they have a ready moan for every situation; they can give you 20 reasons why something shouldn't be attempted – by them or by anyone else; they'll be the first to say "I told you so" when it doesn't work; and you hesitate before asking them to do the smallest thing. Even at the low end of scale, their behaviour makes simple interactions unpleasant and time-consuming. And one such toxic person can create a bad atmosphere faster than half a dozen positive people can create a good one. A client recently said to me of one such member of staff, "you can almost smell the tension when they're there – you're aware of it the minute you walk through the door." The problem with that sort of atmosphere and tension is that it affects the performance and productivity of the entire team and, ultimately, your bottom line.

In any context where people need to work together, emotional intelligence oils the wheels and contributes to a more positive and productive working environment, which in turn contributes to the success of your practice. So what is this emotional intelligence? How can you spot it? How can you make sure your people have it? And can you do anything if they don't?

Far away eyes

Southwest Airlines in America is a case study in selecting the right people to create a positive corporate culture. Southwest was co-founded in the late '60s by Herb Kelleher. For almost

rescue

MAIN POINTS

- Emotional intelligence – what is it?
- EI as a contributor to your practice's success
- The selection process

the next 40 years as CEO and then chairman, he grew the airline to be one of the top two or three in the world. Today, it has more than 3,000 flights every day and has continued to be one of the world's most profitable, even throughout the recession.

One remarkable aspect of the airline is the staff culture that Kelleher engendered. Staff in Southwest are famous for being light-hearted and not taking themselves too seriously. In the early days, they often made headlines for singing the in-flight announcements. But though they might take themselves lightly, they never took the job – or the key issue of safety – lightly. Southwest has an outstanding safety record.

Kelleher had very clear views on the people he wanted working for his company. Even before the concept of emotional intelligence became popular, he was looking for people who had certain qualities. He said simply: "You hire for attitude, you train for skill." He knew that if you start with people who are positive and enthusiastic, you get results more quickly and you don't waste time every day with difficult people who will consistently obstruct you.

David Maister, the British author and management consultant, tells recruiters to look for "the ones with the shining eyes". He maintains that a small percentage of interviewees have in-built enthusiasm and commitment, and they're the ones to recruit because they will never say "that's someone else's job". They'll never be the ones whining in the kitchen over coffee, and they'll always be the ones who come up with smart solutions to emerging problems.

Soul survivor

When you're taking someone on, no matter what the role – and particularly in the current climate, where everyone is working harder – you need to recognise the impact this person will inevitably have on the entire team. The smaller the team, the bigger the impact – particularly if you pick the wrong person. If they don't pull their weight, if they're negative, if others end up doing more than their fair share as a result, and if the manager seems unable (or unwilling) to tackle the bad behaviour, you end up with a whole team of unhappy people. You need to invest time in your selection process. You can't afford not to.

You will do all of the obvious checks – academic

LOOK IT UP

Literature:

- Daniel Goleman, *Emotional Intelligence: Why It Can Matter More Than IQ*
- Aubrey Daniels, *Bringing Out the Best in People*
- Ferdinand F Fournies, *Coaching for Improved Work Performance*
- Mark M Maraia, *Relationships Are Everything: Growing Your Business One Relationship at a Time*

START ME UP

Countless books have been written on the topic. But it was Professor Daniel Goleman who put it highest on the agenda in the mid '90s with his best-selling book, *Emotional Intelligence*. He described a series of behaviours that indicate the presence of emotional intelligence – behaviours such as high levels of motivation, the ability to control impulses, empathy for others, and a positive and hopeful outlook.

In academic circles, the concept of another type of 'intelligence' generated huge debate and criticism. The criticism centred on the case being made for the ability of emotional intelligence to predict work performance – but without scientific evidence for this claim. Many also believed that the behaviours and characteristics described as 'emotional intelligence' belonged in the area of personality traits – and that already widely available personality assessments could tell you just as much as any assessment of 'emotional intelligence'.

Notwithstanding the academic debate, Goleman's book had a huge impact on executive recruitment and it is now common practice to use some form of emotional intelligence assessment before making potentially costly recruitment errors.

qualifications, experience, technical ability, and so on. You may then need to add another dimension where you assess how this person will fit in with the rest of your team. Essentially, you are asking: "Will I be happy to have this person around every day? Will the rest of the team be happy?"

Some form of EI assessment can be very helpful. It will examine factors such as self-awareness – how well they understand themselves and their impact on others. It will assess their assertiveness – how comfortable they are in asking straightforwardly for what they want. It will give an insight into their interpersonal skills, their ability to handle stress, their adaptability – all areas where you need as much insight as possible before making your decision.

The CEO of one client company always meets shortlisted candidates for senior positions for a 'social' coffee as part of the selection process. "It's time well spent," he believes. "I need to get a sense of what they're like outside the interview room. And my assessment of some shortlisted candidates has changed, based on that coffee. What am I looking for? Simple things – do they have a sense of humour? Do they listen?"

Good listening is one very positive indicator you should always look for when selecting new people. People who get on well with others listen. They listen positively. Non-listeners are non-developers and non-contributors. It is extremely difficult to develop a non-listener into an effective team member. And in a crisis situation, a non-listener is lethal, because he or she is already reacting even before they hear all the key information.

"You hire for attitude, you train for skill ... if you start with people who are positive and enthusiastic, you get results more quickly"

(I can't get no) satisfaction

All well and good if you are selecting new people. But what if, among the people you already have, you realise you have some deficits in emotional intelligence? Do you have someone, for instance, who has too many small conflicts with colleagues – and possibly even with clients? Do you find yourself discussing their 'attitude' problem? Are you aware that other colleagues don't like working with them, citing 'personality differences'? And because the problem seems to be in a vaguely 'personal' area, no one is quite sure whether it can be addressed or, if so, how?

Well, address it you must. It is one of the regular queries we get from managers: "Can I talk to someone about this personal stuff? And how will I do that without it being very embarrassing for both of us?"

First, it is your responsibility if you manage this person. Emotional intelligence on your part (as manager) is not about being 'nice' all the time – it is about confronting problems like this when you see they exist, and knowing how to have such a discussion in a calm and assertive way.

You need to give this person feedback. You need to identify the precise behaviours you are seeing that are causing the problems. You need to be able to cite specific examples. "When your colleagues make a contribution at meetings, you cut across them before they finish, and always with a negative. At our marketing meeting this morning, you did that twice."

Behaviour is not personality. This is not a personal attack. Discuss with them the impact that their behaviour is having and agree with them the appropriate behaviours you would like to see in the future.

The outcome may surprise you. The feedback may be welcomed. And if your emotionally intelligent intervention makes one person more positive and productive, then that can only be good for the team, your clients, and ultimately, your practice. G

Donal Cronin is a director at Carr Communications.

books

Strikes: An Essential Guide to Industrial Action and the Law

Mary Redmond and Tom Mallon. Bloomsbury Professional (2010), www.bloomsburyprofessional.com. ISBN: 978-1-84766-548-5. Price: €150.

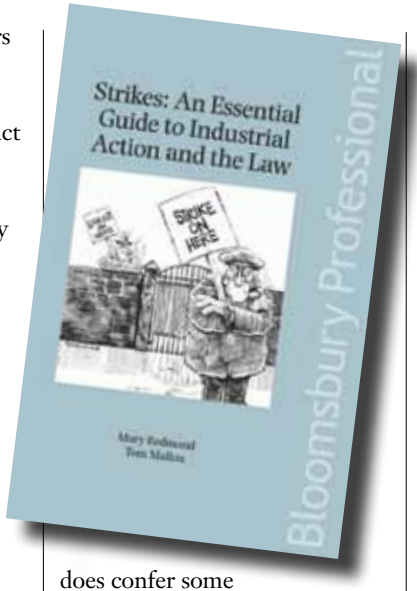
This is a timely publication, which deals with a relevant subject in a context of unprecedented economic unrest in Ireland. Trade disputes law is very much a discrete and specialist branch of employment law, and the authors' expertise in labour law and industrial relations is reflected in this work.

The text traces the evolution of industrial action in Ireland through the passing of the important *Trade Disputes Act 1906*, the Constitution, the *Industrial Relations Act 1990*, up to the present day. It focuses on the lawfulness or otherwise of industrial action, analysing the crucial influence of the 1937 Constitution on trade disputes, before studying the various torts that arise in this area, such as inducement to breach of contract and intimidation. The closing chapters of the text deal with the minutiae of trade disputes, including picketing, injunctions to restrain same, and other industrial action.

Of relevance to practitioners is the third chapter, which examines the association between strikes and the contract of employment. The authors point out that, while there has been little judicial commentary regarding the effect that industrial action has on the contract of employment, it is, undoubtedly, a central issue.

Of particular interest is the analysis of the significance of the Constitution in the area of law governing industrial action. Article 40 contains the fundamental rights provisions such as freedom of association, which is conferred on all citizens, as well as unspecified or unenumerated rights under article 40.3, which have evolved through judicial interpretation. Seminal cases such as the *Educational Company of Ireland v Fitzpatrick* and *Meskell v CIE* are particularly notable in the analysis.

It is noteworthy that Irish law does not recognise a right to strike *per se*; however, the law does confer some qualified immunity from suit for those wishing to strike, and it is through the interpretation of the Constitution, and particularly the right to associate, that this implied right has evolved. Furthermore, there is no legal entitlement to picket in Irish law but, again, the Constitution guarantees liberty for citizens to assemble peaceably, and chapter 10 provides an excellent analysis and commentary on the subject of picketing.



For most practitioners, certain areas of this publication will be more relevant than others. However, the excellent treatment of injunctions at chapter 11 will be instructive to all, not only because of the relevance of this aspect of industrial action, but also because of the examination of injunctions *per se*.

All in all, this book neatly balances the necessary detail and explanation of the law of industrial action for practitioners and non-practitioners alike. Suffice it to say, this is an essential text for all employment law practitioners, as well as those involved in any way in industrial relations. A particular bonus is the draft pleadings provided by Mr Mallon at the end of the book, which he has generously shared with his readers. G

David O'Riordan is a partner in the Dublin law firm Sherwin O'Riordan.

NEW TITLE

Competition Law: A Practitioners Guide

by Nathy Dunleavy BL , Consultant Editor, Paul Sreenan SC

This new title is unique in EU competition law in that it is framed in a Questions & Answers format with the focus on issues that arise frequently in practice but at the same time, providing full coverage of the law, with extensive referencing. Any practical guide must consider the national perspective, given the decentralisation of enforcement of the EU competition rules and the increasing role of national courts and competition authorities. This book extensively covers the national aspect from the perspective of both the UK and Ireland, covering the rules on private enforcement, including criminal aspects. It also covers UK and Irish domestic competition law and the inclusion of these will provide an invaluable comparison for practitioners, given the many similarities in these two common law jurisdictions.

Includes the following case law

EU

- No privilege for in-house lawyers in EU competition investigations – C-550/07 *Akzo* (Sep 10)
- Actual anti-competitive effects not required to show a breach of Article 102-T-155/06 *Tomra* (Sep 10)
- First cartel settlements by the Commission (May & July 10)

UK

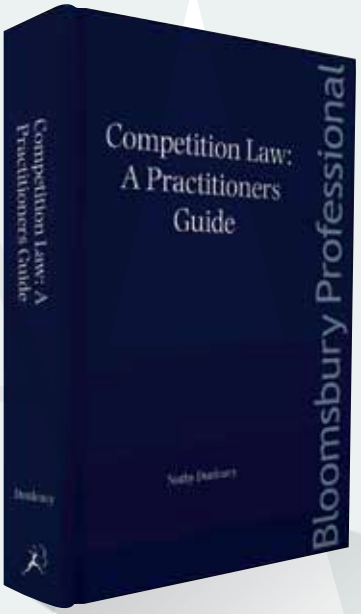
- Jurisdiction in private damages actions – *Cooper Tire* (2010) EWCA Civ 864 (July 10)
- Antitrust class actions – *Emerald v BA* (2009) EWHC 741 (Ch) (Apr 09)
- Employee liability for competition fines – *Safeway v Twigger* (2010) EWHC 11 (Comm) (Jan 10)

Ireland

- Abuse of dominance by local authorities – *Panda* (Dec 09)
- Criminal sanctions for breach of competition law – *Duffy* (2009) 3 IR 613 (Mar 09)
- First High Court decision on a merger – Rye (2009) IEHC 140 (Mar 09)

Features at a glance

- 800-page full coverage practitioner's guide to EU Competition Law
- Covers substantive and procedural rules in depth
- Structured in Questions & Answers, with Summaries
- Key Sources, including cases, on a CD
- Added national perspective of UK and Ireland
- Fully updated to October 2010 with case law of the EU courts, the English Courts, the CAT and the Irish courts
- Covers Articles 101 and 102, Mergers, Public and Private Enforcement, State Aid and Article 106
- Extensive commentary on the intersection with the Public Procurement rules
- Detailed coverage of Criminal Law and Enforcement aspects in UK and Ireland



What this book will do for you...

- Provides answers to competition Law questions that frequently arise in practice.
- Bullet point summarises quickly guide the reader to the important issues
- Key sources are listed for each question, identifying the most important legislation and case law.
- Comes with a CD-ROM which gives you on-line access

This book will appeal to both experts of competition law and to lawyers who may encounter competition law less frequently but need to be aware of key issues and developments (particularly true for in-house lawyers), as well as judges, competition authorities, policy makers and students.

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Child Law (second edition)

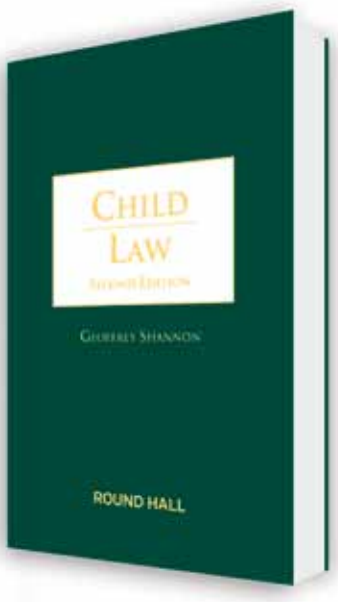
Geoffrey Shannon. Round Hall (2010), www.roundhall.ie. ISBN: 978-1-8580-052-49. Price: €425 (incl VAT).

The law relating to children in Ireland has grown and developed at an unprecedented rate in recent years. The large volume of domestic legislation and case law in this area led to the recent publication of the second edition of Geoffrey Shannon's *Child Law*.

Mr Shannon needs no introduction to anyone practising in the area of family and child law. In addition to being a prolific writer on these subjects, he also enjoys an exceptionally high profile as independent special rapporteur for child protection, newly appointed chairman of the Adoption Authority, and the Irish expert member of the Commission on European Family Law.

In the preface to this book, Mr Shannon stated that his main objective was "to focus attention on the cataclysmic developments in child law over the last decade and to provide practitioners with a user-friendly resource to help them practise in this evolving area of the law". Mr Shannon's book has certainly achieved this in dealing with all aspects of the Irish child law system in a thorough and comprehensive fashion.

The book is a *tour de force* on all aspects of Irish child law. It contains 16 chapters and 18 appendices, ranging from the legal status of the child in Irish society to an analysis of relevant international and European Community law. The book also deals extensively with the position of children in need and children in care. The involvement of children in the court process, both civil and criminal, is also addressed in detail. Separate chapters are devoted to the topics of adoption, child abduction and immigration, and the author also carefully reviews the position of children in private custody, access and maintenance disputes. The final chapter looks at the future of



the family and the child under Irish law. This includes a most interesting discussion on the advent of assisted reproductive technologies and the myriad legal and ethical difficulties that they create.

Throughout the book, Mr Shannon also identifies lessons learned and recommendations for reform in the area of child law. In his foreword to the book, Chief Justice John L Murray notes that "this adds to the value of the work, promoting as it does, in this context, reasoned debate and discourse which may be a catalyst for change in at least some of the directions signposted by the author ... It stands out as an impressive and much-needed reference on the law as it relates to one of our nation's most valued resources".

The author is to be congratulated on this excellent publication, which I would wholeheartedly recommend to practitioners, academics and students alike. In common with Mr Shannon's other books, this will certainly be an indispensable resource for all those who practise or have an interest in this area. G

Hilary Coveney is a partner in Matheson Ormsby Prentice and chair of the Law Society's Family Law Committee.

PIC: JASON CLARKE PHOTOGRAPHY

The President of the Royal College of Surgeons, Professor Eilis McGovern, was a guest speaker at the Law Society's parchment ceremony for newly-qualified solicitors on 21 October 2010, where she spoke about the concept of professionalism. Guests of the Law Society included *(front, l to r)*: Norville J Connolly (president, Law Society of Northern Ireland), Mr Justice Nicholas Kearns (President of the High Court), Gerard Doherty (then Law Society president) and Prof Eilis McGovern. *(Back, l to r)*: Eleanor Kearns, director general Ken Murphy, Joe Duignan, Sinead Connolly, then senior vice-president John Costello, Jane Houlihan and deputy director general Mary Keane

An accredited mediator skills training course run by the Centre for Effective Dispute Resolution was hosted in Cork recently by the Southern Law Association (SLA). Those attending included *(front, l to r)*: Baria Ahmed (CEDR), Miryana Nesic (CEDR), Debbie Moore (Comyn Kelleher Tobin), Edna English (English & Associates) and Richael O'Driscoll (barrister). *(Back, l to r)*: Justin Condon (Murphy & Condon), Danny McFadden (CEDR), Ray O'Neill (Raymond St John O'Neill & Company), Richard Hammond (Hammond Good), Julian Kahn (Coakley Moloney), Diarmuid Cunningham (Comyn Kelleher Tobin), Pat Dorgan (Coakley Moloney), Mortimer Kelleher (Barry Turnbull & Company), then SLA president Eamon Murray (Eamon Murray & Company)

PIC: DEE BAUMANN PHOTOGRAPHY

At the AGM of the Southern Law Association on 2 November at the Society's law school, Washington Street, Cork, were the SLA council members (2009/10), with *(front, l to r)*: Ken Murphy (director general), Gerard Doherty (then Law Society president), Eamon Murray (SLA president), Fergus Long (incoming SLA president) and Don Murphy. *(Second row, l to r)*: Jonathon Lynch, Fiona Twomey and John Sheehan. *(Third row, l to r)*: Mortimer Kelleher, Patrick Dorgan and John Costello. *(Back, l to r)*: Patrick Mullins, Richard Hammond, Sean Durcan and Peter Groarke

PIC: SUSAN KENNEDY, LENSMEN

At the launch of new Certificate in Capacity, Mental Health and the Law on 9 November at Blackhall Place were *(l to r)*: Freda Grealy (diploma manager), Gary Lee, Ciaran Craven, Judge Frank Clarke, Law Society President John Costello and Áine Hynes

Dublin-based solicitors, Dillon Solicitors in Rathfarnham and Paul W Treacy & Co in Marlborough Street, applied earlier this year for the national 'Excellence Through People' human resource standard. Both firms were successful in their goal. At the awards ceremony on 1 November 2010 were *(l to r)*: Michael McDonnell (FÁS), Piaras Neary and Sharon Treacy (Paul W Treacy & Co), Minister Sean Haughey (minister of state with responsibility for training), Paul O'Toole (FÁS director general), Miriam Dillon and Brendan Dillon (Dillon Solicitors)

student spotlight

Irish team rides to gold at WUEC

Irish Universities Equestrian team members jumped out of their socks to take gold in the combined team event in the World University Equestrian Championships in Korea at the end of October. The team came second in the showjumping competition and won silver medals in the individual combined (overall) event, as well as individual dressage.

The team, comprising Sara Glynn (Dublin IT), Ben Crawford (Queen's University Belfast), Nicola Fitzgibbon (Trinity College Dublin) and reserve Suzie Cave (Open University), emerged victorious after three days of gruelling competition.

Sara (22) stole the show, reaching the team and individual finals in the dressage event. Ben (23), who is studying engineering in Belfast, had been the reigning World University Champion, but his eighth place finish in the showjumping and 12th place in the dressage saw him secure fourth place overall. Nicola (23) finished in seventh place overall, having achieved a tenth place in showjumping and 17th place in dressage.

Winning gold for Ireland at the WUEC in Sangju, South Korea, from 29-31 October were *(l to r)*: Sara Glynn (Dublin IT), trainee solicitor and chef d'équipe Natalie Quinlivan, Suzie Cave (Open University), Nicola Fitzgibbon (Trinity College Dublin) and Ben Crawford (Queen's University Belfast). Natalie was a participant in the WUEC in both 2006 and 2008

Irish chef d'équipe and trainee solicitor Natalie Quinlivan was delighted with the perfo rmance

"We were so close two years ago and, although Ben had won the individual medal, we were disappointed not to have collected more.

"We came back this year more prepared. The riders put the effort in over the last few months and it really showed throughout the entire tournament. Three riders in the top ten in showjumping and a medal in the dressage really set up a fantastic result. It was the consistency across the entire delegation that resulted in this achievement.

"Thanks must go to CUSAI, Horse Sport Ireland and IURCA as well as the riders and their own universities who helped to fund the event." The Irish squad was supported by Dubarry Ireland, Elite Saddlery, Equestrian Jewellery, Horseware and TRI.

Irish Delegation: athletes – Ben Crawford, Nicola Fitzgibbon, Sara Glynn, Suzie Cave (reserve); team manager – Natalie Quinlivan (trainee solicitor, PPC II); team trainer – Sue Shortt.

Trainees building for the future

Last July, a group of trainee solicitors from Arthur Cox headed for Southern Zambia as part of the Arthur Cox Mwandi Project. The project was set up in 2008 to support rural communities in this impoverished region. Now in its third year, it has grown from strength to strength, with 21 trainees travelling this summer to the remote villages of Masese, Limpumpu and Lutaba.

The project focuses on building for the future and is driven by the needs of the local people, who work alongside the trainees. This interaction empowers the community and creates an impetus to maintain and preserve the work that's done. Support for the project comes from the charity Magis (formerly Slí Eile), which prepares the group for the trip and links them with local leaders in advance of their arrival. Trainees are then responsible for the logistics and carrying out work on the ground. This year, they benefited enormously from the continued participation of one of the Mwandi Project co-founders, Martin Cooney. Martin, now an associate with Arthur Cox, was on his third trip to Zambia.

A total of 21 trainees from Arthur Cox travelled to southern Zambia to take part in the Mwandi project

Students at Limpumpu school say 'thanks'!

The Masese medical clinic

Health, mind and body

The medical clinic in Masese serves 4,500 people in the greater Mwandi area. In 2008, the clinic failed to meet the most basic hygiene standards. However, following substantial renovation work and investment in 2008 and 2009, including the installation of solar panels to provide electricity, the enormous infrastructural task of providing running water was finally realised this year. This involved commissioning a borehole 70 metres deep, erecting a three-metre water tower and installing plumbing.

Approximately 2km from Masese, the Limpumpu school has 13 teachers and caters for 550 students, with limited resources. Many pupils travel long distances on foot to avail of the school's UN-s ponsored feeding programme. Since 2008, the project has contributed supplies and stationery to the school, but, with attendance so high, new desks and materials were needed to meet a serious shortage.

Despite their hardship, the children create an uplifting atmosphere at the school. The older pupils helped make the desks and continued the job in the weeks after the trainees left. In all, 100 desks, sports equipment, stationery and supplies were provided.

The final task centred around the agri-project in the village of Lutaba, 60km outside Mwandi. This initiative aims to create self-sufficiency by teaching farming techniques to the community to help them overcome the difficulties encountered by climate change and desertification. The project assisted by laying the foundations to extend these facilities and providing funding for a borehole and water pump, bringing a reliable source of clean water to the area.

Cultural exchange

Key to the experience of the trainees and the local community is the cultural exchange that takes place. By working side by side in the day and sharing the *craic* and *ceol* at night, the trainees and community became ever closer and ever more determined to continue the project's work.

Meeting the needs of the people of Mwandi requires significant fundraising by the trainees, who have this year alone raised €30,000. As the trainees cover all their own costs and expenses, every penny goes to the project. If you would like to contribute to the ongoing work, visit www.mycharity.ie/event/the_mwandi_project. G

Newly qualified solicitors at the presentation of their parchments on 16 July 2010

ALL PICS: JASON CLARKE PHOTOGRAPHY

Mr Justice Nicholas Kearns (President of the High Court), Gerard Doherty (then President of the Law Society), Eamon Gilmore TD (leader of the Labour Party) and Ken Murphy (Director General) were guests of honour at the 16 July 2010 parchment ceremony for newly-qualified solicitors: Grace Armstrong, Kathleen Byrne, Matthew Byrne, Domhnall Canney, Aoife Counihan, Declan Crosby, Darren Doyle, Helena Feehan, William FitzGerald, Aidan Flahavan, Leanne Flanagan, Beth Fortune, Patrick Fox, Kevin Gahan, Maurice Galvin, Helen Gatenby, Gwen Griffin, Andrew Groarke-Keenan, Eimear Guiney, Maire Guiney, Kathryn Harnett, Siobhan Hegarty, Paula Keaney, Orla Keenan, Ciara Kelly, Margaret Lynch, Rory MacEneaney, Evonne Man, Lisa Matthews, Aoife McDonagh, James Moore, Eoin Mullowney, Peter Murphy, Darran Nangle, Jane O'Connell, Aidan O'Driscoll, Terence O'Malley, Maire O'Neill, Jillian O'Shea, Anthony O'Sullivan, Donna Ponsonby, Rosemary Rodgers, Sean Rooney, Johnny Rowley, Alan Ryan, John Sadlier, Marguerite Sinnott, Clare Tighe, Frances Waterhouse, Niamh White and Hermi Wildenboer

Newly qualified solicitors at the presentation of their parchments on 22 July 2010

Ms Justice Mary Finlay Geoghegan (High Court), Gerard Doherty (then President of the Law Society) and Ken Murphy (Director General) were guests of honour at the 22 July 2010 parchment ceremony for newly-qualified solicitors: Gabrielle Barrett, Martha Bates, Fiona Baxter, Olan Buckley, Ronan Burke, Heather Burns, Tristan Conway Behan, Ann-Marie Corcoran, Ronan Cotter, Valerie Coughlan, Alison Coughlan, Karena Coughlan, Lydia Cullen, Michelle Cunningham, Kate Curneen, Tina Curran, Lorna Daly, Suzanne Delahunt, Dermot Dempsey, Laurie Fitzpatrick, Elizabeth Gallagher, Rhona Griffin, Theresa Ham, Gillian Hanratty, Larina Hayes, Ruth Higgins, Laura Holmes, Stephen Holst, Peter Jones, Caitriona Keane, Marcus Kennedy, Eoghan Kenny, Keelin MacDonald, Aoife Martin, Eamon McDonagh, Ashling McGing, Corinna Mitchell, Fintan Morahan, Orla Morgan, Brendan Murphy, Bronagh Murray, Gemma Newell, Michelle Ní Ghaboid, Deirdre Nolan, Jessica Nowlan, Killian O'Brien, Andrew O'Callaghan, Helen O'Connor, Mark O'Leary, Daragh O'Malley, Yvonne O'Neil, Peter O'Neill, Niamh O'Reilly, Avril O' Reilly Healy, Ciaran O'Shaughnessy, Fleur O'Shea, Brendan O'Sullivan, Emer O'Sullivan, Hugh Phelan, Susan Roe, Catriona Sharkey, Patricia Shaw, Andrea Sullivan, Michelle Timon, Katie Toher, Michael Twomey, Nicola Walsh and Ciara Walsh

Newly qualified solicitors at the presentation of their parchments on 9 September 2010

Mr Justice Brian McGovern (High Court), Gerard Doherty (then President of the Law Society), Peter Power TD (Minister of State for Overseas Development) and Ken Murphy (Director General) were guests of honour at the 9 September 2010 parchment ceremony for newly-qualified solicitors: Donnacha Anhold, Shehzad Bajwa, Tom Browne, April Cahalane, Sharon Concarr, Patrick Conliffe, Gerard Creedon, Martin Crehan, Sarah Cronin, Elizabeth Crowley, Grainne Crowley, Kim Cullen, Dean Cunningham, Sharon Curley, Melanie Devine, Sinead Dooley, Cian Duane, Bryan Fitzmaurice, Elaine Fox, Donal Gallagher, David Galvin, Cliodhna Geraghty, Edel Golden, Norette Hayes, Treasa Howell, Ross Jackson, Aoife Kavanagh, Peter Kearney, Maeve Kelleher, Richard Kelly, Elizabeth Keyes, Pamela Kilcoyn, Joanne Lane, Alan Lynch, Matthew Malone, Aine McCarthy, Eoin McDonald, June McGinn, Ian McSweeney, Robert Meagher, Deirdre Murphy, Ruairi O'Brien, Maeve O'Connor, Padraig O'Connor, Alanna O'Doherty, Conor O'Dwyer, Marissa O'Keeffe, Daithi O'Leary, David O'Malley, Niamh O'Regan, Aisling J O'Sullivan, Sinead O'Toole, Cecilia Ogle, Michelle Quilligan, Karol-Ann Randles, Timothy Riordan, David Russell, Jennifer Ryan, Emily Sexton, Aoife Shanahan, Sarah Shearman, Elaine Silke, Thomas Smyth, Rachel Solanki, Caroline Stack, Ann-Marie Teehan, Aoife Toner, Aoife Walsh and Emma Weld-Moore

Newly qualified solicitors at the presentation of their parchments on 21 October 2010

Mr Justice Nicholas Kearns (President of the High Court), Gerard Doherty (then President of the Law Society), Professor Eilis McGovern (President of the Royal College of Surgeons) and Ken Murphy (Director General) were guests of honour at the 21 October 2010 parchment ceremony for newly-qualified solicitors: Brian Allen, Gordon Anton, Derina Bannon, Valerie Barlow, Karen Bohane, Eleanor Anne Bruen, Thomas Conway, Timothy Cooke, Donna Crampsie, Calvin Crilly, Antoinette Cusack, Helen Deignan, Jonathan Flynn, Fergus Foody, Ann Fox, Raymond Gannon, Aoife Griffin, Ronan Hayes, Matthew Hedigan, Mark Hyland, Bruneau Jean Pierre Joseph, Vanessa Lawlor, Emily Loughlin, Claire Ailish Lyons, Conor MacNally, Eva Massa, Aoife McCarrick, Aoife McCarthy, Jane McCullough, Sarah McDonald, Jennifer McSharry, Cathal Mooney, Andrea Neilan, Jean O'Donovan, Susan O'Sullivan, Georgina Robinson and Allison Ryan

council report

Law Society Council meeting, 5 November 2010

New Council members

The Council welcomed its new members – who are all nominees of the Southern Law Association – Laetitia Baker, Kieran Moran and Roger Morley, and wished them well for their term of office.

Taking of office of president and vice-presidents

The outgoing president, Mr Gerard Doherty, addressed the Council. He expressed his gratitude to the Council for the great honour of having elected him as president and for the opportunity to represent the profession at home and abroad and to meet colleagues from other jurisdictions. He could attest that it was a wonderful and enriching experience. He thanked both of his vice-presidents, whose assistance throughout the year had been quite extraordinary.

He recorded his deep admiration for the staff of the Society and for the depth of talent available within the Society. To the director general and deputy director general, he expressed his particular gratitude for their assistance, guidance and support. He extended his best wishes for the forthcoming year to John Costello, the incoming president, together with vice-presidents Donald Binchy and Kevin O'Higgins, and expressed his confidence that they would represent the profession admirably.

Mr John Costello was then formally appointed as president. He paid tribute to Gerard Doherty, who had guided the profession through one of the most traumatic years of its history. He commended him on his involvement with the PII Task Force, which had to make difficult and important decisions over the previous two years, and for the establishment of the Commercial Undertakings Task Force, which had made an overwhelming case for the abolition of commercial undertakings. He noted that Mr Doherty had always spoken with great eloquence, clarity, and conviction and had represented the Society with enormous dignity.

Mr Costello expressed an intention to focus on the most vulnerable within the profession at this time – that is, newly qualified solicitors and sole practitioners/principals – and to develop programmes of practical benefit and assistance to them. In addition, he hoped to progress the consideration of issues of relevance to clients at the end of their lives, including guidelines on the assessment of testamentary capacity. He also hoped to promote ADR in certain areas of practice and to promote practical legal assistance by practitioners for clients in debt or mortgage arrears. Mr Costello urged that the Council would not become paralysed by the mood of the moment, but would display the audacity to believe that, despite the enormous problems facing the profession, it could help colleagues to move forward with courage, confidence and conviction.

The senior vice-president, Donald Binchy, and the junior vice-president, Kevin O'Higgins, then took office and expressed their support for the Council and the president for the coming year.

Outcome of 2010 AGM

The Council noted that the two motions notified for consideration by the annual general meeting had been withdrawn by the proposer and seconder on the basis that they would be given further consideration by the Society.

Bank guarantee scheme

The Council approved a notice to be placed on the Society's website in relation to the bank guarantee scheme and solicitors' client accounts.

Professional indemnity insurance

Eamon Harrington reported that Quinn Insurance had notified the Society that it would not be writing professional indemnity insurance business for 2011. While this was not good news for the profession, neither was it a cause for alarm. Quinn Insurance was in administration and, accordingly, had a limited amount of capital available. The administrators had decided to apply that capital elsewhere. He also clarified that Royal & Sun Alliance had not withdrawn from the Irish market because of the reintroduction of the Assigned Risks Pool, but had sought substantial changes to the minimum terms and conditions, which could not be acceded to. The Council agreed that an e-bulletin should issue to the profession informing them of the current position. G

practice notes

PRACTISING CERTIFICATE 2011: NOTICE TO ALL PRACTISING SOLICITORS

Why you need a practising certificate

It is misconduct and a criminal offence for a solicitor (other than a solicitor in the full-time service of the state) to practise without a practising certificate. Any solicitor found to be practising without a practising certificate is liable to be referred to the Solicitors Disciplinary Tribunal.

Practising certificate application forms

Application forms for solicitors in private practice will be forwarded to the principal or the managing partner in each practice, rather than to each solicitor.

When you must apply

A practising certificate must be applied for on or before 1 February in each year in order to be dated 1 January of that year and thereby operate as a qualification to practise from the commencement of the year. It is therefore a legal requirement for a practising solicitor to deliver or cause to be delivered to the Registrar of Solicitors, on or before 1 February 2011, an application in the prescribed form duly completed and signed by the applicant solicitor personally, together with the appropriate fee. The onus is on each solicitor to ensure that his or her application form and fee is delivered by 1 February 2011. Applications should be delivered to the Regulation Department of the Society at George's Court, George's Lane, Dublin 7; DX 1025 Four Courts.

What happens if you apply late?

Any applications for practising certificates that are received after 1 February 2011 will result in the practising certificates being dated the date of actual receipt by the Registrar of Solicitors, rather than 1 January 2011. There is no legal power to allow any period of grace under any circumstances whatsoever.

Please note that, again during 2010, a number of solicitors went to the trouble and expense of making an application to the High Court for their practising certificate to be backdated to 1 January because their practising certificate application was received after 1 February.

The Regulation of Practice Committee is the committee of the Society that has responsibility for supervising compliance with practising certificate requirements. A special meeting of this committee will be held on a date after 1 February 2011, to be decided, to consider any late or unresolved applications for practising certificates. At this meeting, any practising solicitors who have not applied by then for a practising certificate will be considered for referral forthwith to the Solicitors Disciplinary Tribunal and will be informed that the Society reserves the right to take proceedings for an order under section 18 of the *Solicitors (Amendment) Act 2002* to prohibit them from practising illegally.

If you are an employed solicitor

Solicitors who are employed should note that it is the statutory obligation of every solicitor who requires a practising certificate to ensure that he or she has a practising certificate in force from the commencement of the year. Employed solicitors cannot absolve themselves from this responsibility by relying on their employers to procure their practising certificates. However, it is the Society's recommendation that all employers should pay for the practising certificate of solicitors employed by them.

Some of your details are already on the application form

The practising certificate application form will be issued with certain information relating to each solicitor's practice already completed. This year, such information will include the relevant fees due by each solicitor, with the exception of those solicitors of 70 years or over; such solicitors should deduct €58 from the fees noted on their application form, as they will not be covered under the provisions of the Solicitors' Group Life Cover Scheme.

Law Directory 2011

It is intended that the *Law Directory 2011* will note all solicitors who have been issued with a practising certificate by 9 February 2011 (not those who have applied by 9 February 2011). Therefore, in order to ensure that your practising certificate issues by 9 February 2011, you should ensure that the application form you return to the Society is completed correctly. If it is not completed correctly, it will be necessary to return the form, which may result in delaying the issue of your practising certificate, despite the fact that you had applied for it prior to 9 February 2011.

What you can access on the website (www.lawsociety.ie)

A blank application form for obtaining a practising certificate is downloadable from the practising certificate section in the members' area. (This area is accessible by using your username and password: for assistance, please visit www.lawsociety.ie/help.) Alternatively, the form can be completed on-screen and printed out for signing and returning to the Society with the appropriate fee. In addition, you may request a form to be emailed to you by emailing l.darling@lawsociety.ie.

If you are ceasing practice

If you have recently ceased practice or are intending to cease practice in the coming year, please notify the Society accordingly.

Acknowledgement of application forms

Please note that it is not the Society's policy to acknowledge receipt of application forms as received.

Duplicate practising certificate

Recently, an increasing number of solicitors have requested a duplicate practising certificate for the purpose of presenting their practising certificate to the firm's reporting accountant. A fee of €50 will be payable in respect of each duplicate practising certificate issued for any purpose.

John Elliot,
Registrar of Solicitors
and Director of Regulation

PAYMENT OF COUNSEL'S FEES

There has been a significant increase within the last 12 months of complaints received from the Bar Council in relation to claims from counsel for outstanding fees.

The Society has always taken the view that a solicitor is not personally responsible for the discharge of counsel's fees, but equally it is recognised that solicitors have a duty to use their best endeavours to recover fees that are properly due to counsel. At the very least, solicitors should be able to demonstrate that they have written to their clients requesting payment, followed up any such requests, and alerted clients to the possibility of issuing proceedings for the recovery of the outstanding fees and, where there is a reasonable prospect of recovery, issuing and prosecuting such proceedings.

Further, it may well be held to be misconduct in situations where solicitors have utilised any money received towards their own fees, to the exclusion of counsel.

It is clear that, in many cases, the reason for non-payment is due to the general economic climate, which has affected the ability of clients to pay outstanding fees either to their solicitors or barristers. In such circumstances, where there is little or no prospect of recovery, most solicitors and their counsel agree that there is little to be gained in issuing legal proceedings. However, there are cases where counsel believes that proceedings should issue irrespective of the potential for recovery and, in such cases, the Complaints and Client Relations Committee have taken the view that, prior to the issue of those proceedings, the solicitor is entitled to seek from counsel an indemnity against any costs thereby incurred.

Complaints and Client Relations Committee

NOTIFYING INSURERS IN RTA CASES

The Society is aware of recent judicial comments to the effect that solicitors create an exposure for themselves if, at the time of receiving instructions in an RTA matter, they fail to advise clients to notify their insurance company of any convictions, impending prosecutions, or any incidents that might result in possible prosecution, even if the insured has not yet been summonsed or convicted.

The Society is of the view that solicitors should advise clients to review their policy document and/or speak to their broker to establish what is required in order to comply with their obligations to disclose any relevant circumstances under the terms of their particular policy. Practitioners should maintain a file note of their advices to the client in this regard.

Litigation and Criminal Law Committees

SECTION 68 LETTERS

The Complaints and Client Relations Committee wishes to remind practitioners that the definition of 'client' in the *Solicitors (Amendment) Act 1994* includes "a beneficiary to an estate under a will, intestacy or trust". Accordingly, beneficiaries are entitled to receive a section 68 letter.

For the guidance of the profession, it should be noted that, when considering complaints from beneficiaries who complain to the Society that they did not receive a section 68 letter, the Complaints and Client Relations Committee acknowledges the distinction between those beneficiaries out of whose share of the estate costs will be deducted (usually sole or residuary beneficiaries) and any other class of beneficiaries.

Complaints and Client Relations Committee

EXTENSION OF COMPULSORY REGISTRATION TO DUBLIN AND CORK

As of 1 June 2011, compulsory registration will be extended by virtue of SI no 516 of 2010 to counties Dublin and Cork.

This means that registration will then be compulsory in all counties.

Conveyancing Committee

PROHIBITION ON 'PARENTAL INDEMNITY' SETTLEMENTS IN PERSONAL INJURY CASES

Practitioners are reminded that a solicitor instructed to make a personal injuries claim on behalf of a person who is not of full age cannot settle that person's claim without first issuing proceedings in the appropriate court and having the terms of the settlement ruled by the court. This is a statutory obligation imposed by SI no 99/1990 (*Solicitors (Practice, Conduct and Discipline) Regulations 1990*), the purpose of which is to prohibit what is known as a 'parental indemnity' settlement – that is, a settlement of a perceived non-serious case involving a minor by payment of an agreed amount to the parent(s) of the minor by the defendant's insurance company, without proceedings being issued and without court approval, or the lodging of the amount in court, in consideration of which the parent(s) give a written indemnity to the defendant/insurance company concerned, which can be produced in the event that the minor sues the defendant when he/she reaches full age. Practitioners are advised to familiarise themselves with the full content of SI 99/1990 in this regard.

Litigation Committee

legislation update

12 October – 12 November 2010

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

SELECTED STATUTORY INSTRUMENTS

Adoption Act 2010 (Commencement) Order 2010
Number: SI 511/2010
Contents note: Appoints 1/11/2010 as the commencement date for all sections of the act.

Adoption Act 2010 (Consent to Adoption Order) (Forms) Regulations 2010
Number: SI 519/2010
Contents note: Prescribes consent forms under s26 of the act.
Commencement date: 2/11/2010

Adoption Act 2010 (Establishment Day) Order 2010
Number: SI 512/2010
Contents note: Appoints 1/11/2010 as the establishment day for the act.

Adoption Act 2010 (Pre-placement Consultation Procedure) Regulations 2010
Number: SI 520/2010
Contents note: Prescribes forms under s17 of the act, to be used in circumstances where an adoption placement is deferred for the purposes of allowing the father or guardian of a child make an application to court under s6A or s11(4) of the *Guardianship of Infants Act 1964* (as inserted by the *Status of Children Act 1987*).
Commencement date: 3/11/2010

Adoption Act 2010 (Register of Intercountry Adoptions) Regulations 2010
Number: SI 521/2010
Contents note: Prescribes the form and particulars to be contained in entries in the register of intercountry adoptions.
Commencement date: 3/11/2010

Adoption Act 2010 (Section 85) (Fees) Regulations 2010
Number: SI 518/2010
Contents note: Sets out fees prescribed under s85 (searches in the index to the Adopted Children Register) of the act.
Commencement date: 2/11/2010 . G

Prepared by the Law Society Library

justis update

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

COMPANY

Winding-up

Petition to wind-up company – contest over appointment of liquidator – disclaimer of lease – whether improper disposition of company assets – whether director acting ultra vires *– whether winding-up by court should be substituted for creditors' voluntary winding-up – factors to be considered* – Companies Act 1963.

The company was put into liquidation through a voluntary process of winding-up. The liquidator declared that the assets of the company were not sufficient to meet all of its creditors. The most onerous obligation of the company was a term of 23 months left to run on a lease it had entered into with the petitioner. The petitioner applied to have the creditor's voluntary winding-up replaced by a court-ordered winding-up and for such alternative relief as was, in the court's view, appropriate.

Ms Justice Laffoy treated the alternative relief sought by the petitioner as an application for directions under section 280 of the 1963 act, holding that the main and probably sole target of the winding-up was the liability of the company under the lease. The court also expressed concerns in relation to the conduct of the winding-up to date. However, the issues that arose could be adequately addressed in the creditors' voluntary liquidation process, with appropriate directions, without the necessity of having a compulsory winding-up by the court (*Re Balbradagh Developments Ltd* ([2009] 1 IR 597) considered).

***In Re Larkin Partnership*, High Court, 22/3/2010,** [2010] 3 JIC 2203

CONTRACT

Building contract

Licence – contractual licence – injunction – interlocutory injunction – injunctive relief seeking to expel contractor from site pending completion or determination of building agreement – whether contractual licence still subsisting – whether contractor has licence to remain on building site until paid – whether agreement entered into by company binding on receiver – whether receiver having right to terminate contractual licence of builder.

The fourth defendant appointed the first defendant to be receiver and manager of all the undertaking, property and assets charged by a mortgage in respect of a construction development. By a separate deed, the third defendant appointed the first defendant as its agent of all the undertaking, property and assets charged by the mortgage, so that he should have the powers conferred on the bank as mortgagee under the mortgage and at law, including power to enter and take possession of the property that was the subject of the mortgage. On his appointment, the first defendant took possession of, and effectively secured, the development. By the time the first defendant was appointed as receiver, the position, according to the first and third defendants, was that construction had to all intents and purposes been completed, although the plaintiff's position was that the works had not been completed under the building agreement. The plaintiff had suspended work on the development as of 21 December 2007 until outstanding payments due to it had been made. On 14 April 2008, the plaintiff issued a summary summons against the fourth defendant, claiming payment of €328,297.88, being the balance of monies due and owing by the fourth defendant to the plaintiff in respect of works done and services rendered. The plaintiff subsequently issued a plenary summons against the defendants claiming, among other things: (a) that the first and second defendants had been appointed "as the receiver" on foot of the mortgage and had unlawfully entered the development as trespassers and secured the same, thereby expelling the plaintiff, and that by reason of trespass and of waste the plaintiff has suffered loss and damage; (b) that the trespass was "instructed by" or "colluded in" by the third defendant and the fourth defendant, as a result of which the third defendant and the fourth defendant "are also guilty of trespass and waste" and conspiracy to commit trespass and waste, by reason of which the plaintiff had suffered loss and damage; (c) that the first, second and third defendants induced the fourth defendant to commit a breach of contract, namely the unlawful taking back of the development and the breach of the plaintiff's contractual licence to remain on the development until the completion of the works and/or any lawful termination of the building agreement, it being pleaded that: (i) the works had not been completed, and (ii) the building agreement had not been terminated and the plaintiff had not operated clause 34(b), so that the building agreement still subsisted and the plaintiff was entitled to continue to possess the development until completion of the works; (d) that there was €328,297.88 due and owing to the plaintiff by the fourth defendant pursuant to architect's/surveyor's recommendations … and (f) that "as the funder" of the building agreement, the third defendant owed a duty of care to the plaintiff to ensure that the fourth defendant complied with the terms and conditions of the building agreement, but, in breach of that duty of care, failed to ensure that the fourth defendant established the guarantee account and, further, the third defendant was in breach of its duty of care by failing to ensure that the plaintiff continued in possession of the development until the completion of the works, which the plaintiff alleged had not been completed. The first, second and third defendants brought applications to strike out the plaintiff's claim. The plaintiff also brought a motion seeking an interlocutory injunction restraining the defendants from expelling it from the site.

Ms Justice Laffoy made an order striking out the plaintiff's claims against the second defendant as being an abuse of process; an order dismissing the plaintiff's application for an interlocutory injunction against the first, second and third defendants; an order striking out the plaintiff's claims against the first defendant; and an order striking out the plaintiff's claims against the third defendant, holding that the building agreement did not create any equitable right in favour of the plaintiff that would prevent the mortgagee from enforcing its rights under the mortgage. The contractual licence in the

building agreement existed to enable the plaintiff to fulfil its obligations to the fourth defendant, whose obligation, in turn, was to pay the plaintiff for performing its obligations. In reality, the breach of contract for which it was alleged the fourth defendant was liable was his failure to make payment to the plaintiff. The exercise of its rights under the mortgage by the third defendant, including the taking of possession by the first defendant of the development on foot of the powers in the mortgage, did not interfere with the performance by the fourth defendant of his contractual obligation, which it was alleged had been breached. When the mortgage had been created, and before the third-named defendant was in a position to exercise its statutory rights as the registered owner of a charge under the *Registration of Title Act 1964*, the third defendant and a receiver appointed by the third defendant had a contractual licence to enter, take possession of, and manage the development pursuant to the terms of the mortgage. The first defendant, as receiver, in exercise of his powers on foot of the mortgage, was entitled to enter the development and take possession of it to the exclusion of the plaintiff and notwithstanding whatever rights the plaintiff had against the fourth defendant under the building agreement. Damages would be an adequate remedy for the plaintiff, and the balance of convenience favoured the refusal of the injunction.

***Moylist Construction Ltd (plaintiff) v Doheny (defendant)*, High Court, 21/4/2010,** [2010] 4 JIC 2101

PRACTICE AND PROCEDURE

Tort

Constitutional law – convention rights – prison conditions – whether the alleged breaches of constitutional rights resulting from the prison conditions amounted to a cause of action in damages.

The applicant sought a declaration and resulting damages that his detention at the respondent's prison was a violation of rights under article 40.3.1 of the Constitution, including his personal right to bodily integrity, his right not to have his health placed at risk, and his right not to be subjected to torture, inhuman or degrading treatment or punishment. The applicant claimed, alternatively, that the prison conditions gave rise to violations of his article 3 and article 8 rights under the *European Convention on Human Rights*, engaging, respectively, questions of inhuman and degrading treatment and the right to private life. Essentially, the applicant claimed that the absence of in-cell sanitation, alleged unhygienic conditions, and the necessity to engage in 'slopping-out' procedures gave rise to a violation of his constitutional and ECHR rights. The applicant also maintained that the prison regime caused or rendered symptomatic his pre-existing susceptibility to colorectal complaints and had a depressive effect on him. The applicant had his own cell while serving his prison sentence and did not make any complaints regarding his medical condition.

MacMenamin J refused the application, holding that that the applicant's claim had many attributes of a personal injuries claim in the law of torts and, consequently, the defences in the law of torts such as *volenti not fit injuria*, foreseeability, and contributory negligence could arise. From the evidence given, it was clear that the ventilation, sanitation and hygiene regime at the prison fell significantly below the standard one would expect at the time. However, the applicant did not raise complaints with the respondent or any prison staff about his medical condition, and consequently the respondents were never adequately apprised as to his prior condition. The rights asserted by the applicant herein could not be absolute. Furthermore, the established norms of tort law were not adequate to fairly and justly address the range of issues that arose in this case. Those issues went further into the realm of rights only protected under the Constitution. It was necessary, in consideration of each alleged wrong, to balance the positive against the negative aspects of the applicant's detention. There was no violation of the applicant's negative right to be protected against inhuman or degrading treatment, and furthermore there was no evidence that the purpose and intention of the restrictions and privations was punitive, malicious or evil in purpose. Furthermore, the evidence did not establish that the conditions of detention *per se* were such as to seriously endanger the applicant's life or health, and nor were his rights of privacy or human dignity violated to a degree sufficient to give rise to a cause of action. Although the medical evidence established that the conditions of imprisonment caused a reoccurrence of the applicant's medical complaints, his complaint in this regard failed because the respondents did not know and could not have reasonably known of the applicant's prior medical history. Furthermore, taking all issues individually and cumulatively, there was no breach of article 3 or in conjunction with article 8 by reference to any established Strasbourg decision.

***Mulligan (applicant) v Governor of Portlaoise Prison and Others (respondent)*, High Court, 14/7/2010,** [2010] 7 JIC 1401

Renewal of summons

Unconditional appearance – error – out of jurisdiction – serious prejudice – good reason – other good reasons – order 8, rule 2 of the Rules of the Superior Courts 1986.

The plaintiff, an employee of the second-named defendant, claimed damages for personal injuries suffered at work. The plaintiff sent a summons to the defendant, whose registered office was in Sweden, and the summons was insufficiently and wrongly addressed, such that the plenary and concurrent summons was received three-and-a-half years after the accident. An order was granted by the High Court renewing the plenary summons in 2008 and then thereafter an unconditional appearance was entered. The defendant sought orders discharging the appearance entered by mistake and an order pursuant to order 8, rule 2 of the *Rules of the Superior Courts* setting aside the order renewing the plenary summons. The issue arose as to whether the plaintiff had made reasonable efforts to serve the defendant and whether there were other good reasons to know whether the plaintiff intended to sue the defendant, such that renewal could be ordered, and whether serious prejudice would result to the defendant from the renewal of the summons. No employees had witnessed the accident. An accident report was in existence.

McMahon J held that the court was of the view that there was "good reason" for renewing the summons of the plaintiff. Any errors committed by the plaintiff's solicitor were no greater than the errors of the solicitor for the defendant. The application of the first-named defendant would be refused, as there was no serious prejudice to the first-named defendant in confirming the renewal order made earlier.

***Jackman (plaintiff) v Getinge AB & Others (defendants)*, High Court, 27/2/2010,** [2010] 2 JIC 2701 G

BRIEFING

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

Recent developments in European law

EMPLOYMENT

Case C-45/08, *Gisela Rosenbladt v Oellkering Gebäudereinigungsges mbH*, 12 October 2010. German law provides that clauses on automatic termination of employment contracts on the ground that an employee has reached retirement age may escape the prohibition on discrimination on grounds of age. The power to adopt such clauses may be entrusted to the social partners and implemented by a collective agreement. Ms Rosenbladt worked as a cleaner for 39 years. When she reached 65, the retirement age, her employer gave her notice of the termination of her contact. She brought a case in the German courts arguing that this termination was discrimination on grounds of age. The German court asked the Court of Justice whether the automatic termination of an employment contract at normal retirement age is consistent with the prohibition on discrimination on grounds of age laid by Directive 2000/78/EC. The CJ held that a clause on automatic termination of an employment contract on the ground that an employee is eligible to retire creates a difference of treatment based directly on age. It then considered whether there is any justification for that difference of treatment. Such a measure does not establish a regime of compulsory retirement. It allows employers and employees to agree, by individual or collective agreement, on a means of ending employment relationships on the basis of the age of eligibility for a retirement pension. Such clauses on automatic termination have been part of the employment law of many member states for a long time and are in widespread use in employment relationships. They strike a balance between different interests in the complex area of employment relationships. Striking this balance must, in principle, be considered to justify, "objectively and reasonably" within the context of national law, as provided in the directive, a difference in treatment on the ground of age. It does not appear unreasonable for the authorities or the social partners of a member state to take the view that clauses on automatic termination of employment contracts may be appropriate and necessary in order to achieve legitimate aims. The clause applicable to Ms Rosenbladt is not based solely on a specific age, but also takes account of the fact that she was entitled to financial compensation in the form of a retirement pension.

Case C-499/09, *Ingeniørforeningen i Danmark acting on behalf of Ole Andersen v Region Syddanmark*, 12 October 2010. Danish law grants a severance allowance to workers who have been employed in the same undertaking for at least 12 years. That allowance is not paid to workers who, on termination of the employment relationship, may draw an old-age pension under an occupational pension scheme, even if the person concerned intends to continue working. Mr Andersen worked for the Region Syddanmark from 1979 until his dismissal in 2006. He was aged 63 at the time and did not wish to retire. He claimed payment of the severance payment and this was refused, as he was entitled to draw a pension. His trade union brought an action in the Danish courts claiming that the legislation discriminated on grounds of age, which is prohibited by Directive 2000/78/EC. The Court of Justice held that the legislation operated a difference of treatment based directly on grounds of age. It then considered whether that difference of treatment can be justified. The severance allowance aims to facilitate the move to new employment for workers who have many years of service with the same employer. The Danish restriction was based on the general rule that persons entitled to draw an old-age pension leave the labour market. It also ensures that employees do not claim both the severance allowance and an old-age pension. The objectives pursued by the allowance of protecting workers with many years of service in an undertaking and assisting them in finding new employment are legitimate employment policy and labour market objectives. In principle, the measure must be regarded as justified "objectively and reasonably" within the context of national law. The court then considered whether the restriction is proportionate to the objectives that it pursues. It found that the exclusion from the severance allowance of workers who will receive an old-age pension from their employer is not manifestly inappropriate to achieve these objectives. However, the court considered that the restriction goes beyond what is necessary to achieve these objectives. It excludes from the severance allowance not only workers who will actually receive an old-age pension from their employer, but also all those who are eligible for such a pension who intend to continue to work. In going beyond what is necessary to achieve the social policy objectives pursued by the provision, it is not justified.

HEALTH AND SAFETY

Case C-224/09, *Criminal proceedings against Martha Nussbaumer*, 7 October 2010. Directive 92/57/EEC on the implementation of minimum safety and health requirements at temporary or mobile construction sites provides that, for any construction site where more than one contractor is present, the client or project supervisor must appoint a coordinator for safety and health matters. This person is responsible for the implementation of the general principles of prevention and the safety of workers. The client supervisor or the project supervisor must see that a safety plan is drawn up where works involve particular risks for the safety or health of workers. Under the implementing Italian legislation, the requirement to appoint such a coordinator and draw up such a plan does not apply to private works for which planning permission is not required. In 2008, an inspection was carried out on a construction site for the replacement of the roof of a private house. The protective railing, the crane, and

the workforce were provided by three difference contractors, who were present on the site at the same time. No permission was required for these works. The Italian court asked the Court of Justice whether the Italian legislation was in conflict with the directive. The CJ held that the directive sets out unequivocally the requirement to appoint a health and safety co-ordinator on any construction site on which more than one contractor is to be present and therefore does not permit any derogation from that requirement. Such a coordinator must be appointed irrespective of whether the works are subject to planning permission or whether the work on the site involves particular risks. Thus the directive precludes national legislation such as the Italian legislation in question.

INTELLECTUAL PROPERTY

Case C-467/08, *Padawan v SGAE*, 21 October 2010. The *Copyright Directive* (2001/29/EC) provides that the exclusive right to reproduce sound, visual or audiovisual material belongs to authors, performers and producers. Member states may authorise private copying on condition that the right holders received "fair compensation". The implementing Spanish legislation allowed the reproduction of works already circulated where a natural person reproduces for his private use works that he has accessed legally. A flat-rate payment for each method of reproduction was to be paid by manufacturers, importers or distributors to the bodies responsible for the collective management of intellectual property rights. SGAE is the relevant Spanish body. It claimed payment of this levy from Padawan, a company that markets CD, DVD and MP3 devices, for digital media marketed between 2002 and 2004. Padawan refused, arguing that payment of the levy was contrary to the directive. A Spanish appeal court asked the Court of Justice what criteria are to be taken into consideration to determine the amount of, and the collection system for, "fair compensation". The CJ held that "fair compensation" must be regarded as recompense for the harm suffered by the author as a result of the unauthorised reproduction of his work. That harm is the basic criterion for the calculation of the amount of compensation. The directive requires a "fair balance" to be maintained between right holders and users of the protected subject matter. In principle, it is for the person who did the copying for his own private use to make good the harm by financing the compensation to be paid to the right holder. The harm resulting from each private use, considered separately, may be minimal, so that no obligation for payment arises. There may also be practical difficulties in identifying private users and making them pay compensation to right holders. In those circumstances, it is open to member states to institute a private copying levy payable by persons who have digital reproduction equipment, devices and media. The making available to private users of such equipment is the precondition for natural persons to obtain private copies. There is nothing to prevent the amount of the levy being passed on in the price to the consumer, so that ultimately the private users bear the burden, thus respecting the "fair balance" requirement. However, a private copying levy is compatible with the requirement of "fair balance" only where the reproduction equipment and devices are liable to be used for private copying and are likely to cause harm to the author of the protected work. The indiscriminate application of such a levy to all types of such equipment and devices, including cases in which such equipment is acquired by persons other than natural persons for purposes clearly unrelated to private copying, is incompatible with the directive. G

PROFESSIONAL NOTICES

WILLS

Barker, Patrick (deceased), late of 15 Castleview, Kilmore Road, Artane, Dublin 5, who died on 18 September 2010. Would any person having any knowledge of the whereabouts of a will executed by the above-named deceased please contact Marcus Kennedy, Sheehan & Co, Solicitors, 1 Clare Street, Dublin 2; tel: 01 661 6922, fax: 01 661 0013, email: kennedym@sheehanandco.ie

Boner, Catherine (deceased), late of Carnmore Road, Dungloe, Co Donegal, who died on 26 July 2002. Would any person having knowledge of the whereabouts of the original will, dated 7 February 1972, or any other will made by the above-named deceased, please contact Michael Tracey, solicitor, 61/63 Dame Street, Dublin 2; tel: 01 679 1550, fax: 01 679 0390, email: traceylaw@eircom.net

Browne, Francis (orse Frank) (deceased), late of 53 Coill Dubh, Naas, Co Kildare. Would any person having knowledge of a will executed by the above-named deceased, who died on 31 August 2010, please contact Coughlan White O'Toole, Solicitors, Moorefield Road, Newbridge, Co Kildare; tel: 045 433 332, fax: 045 433 096, email: orooney@coughlansolicitors.ie

Greene, Doreen (deceased), late of Moyglare Nursing Home, Maynooth (formerly late of 1 Ballinteer Gardens, Dundrum, Dublin 16). Would any person having knowledge of a will made by the above-named deceased, who died on 16 October 2010 at James Connolly Memorial Hospital, Blanchardstown, Dublin 15, please contact Sarah R Scally & Co, Solicitors, Suite 238, The Capel Building, Mary's Abbey, Dublin 7; tel: 01 804 9848, fax: 01 804 9816, or email enquiries to legal@sarahscallyandco.eu

Monaghan, Brian (deceased), late of 118 Foxfield Park, Raheny, Dublin 5. Would any person having knowledge of a will made by the above-named deceased, who died on 19 February 2010 at the Mater Private Hospital, Eccles Street, Dublin, please contact Sarah R Scally & Co, Solicitors, Suite 238, The Capel Building, Mary's Abbey, Dublin 7; tel: 01 804 9848, fax: 01 804 9816, or email enquiries to legal@sarahscallyandco.eu

O'Sullivan, Augustine (deceased), late of 76 Capwell Road in the city of Cork. Would any person having knowledge of the whereabouts of a will executed by the above-named deceased on 1 October 1971, who subsequently died on 28 February 1984, please contact FitzGerald, Solicitors, 6 Lapps Quay, Cork; tel: 021 427 9800, fax: 021 427 9810, email: law@fitzsols.com

O'Sullivan, Donal (deceased), late of 18 John Redmond Street in the city of Cork. Would any person having knowledge of the whereabouts of a will executed by the above-named deceased on 16 July 2003, who subsequently died on 2 February 2010, please contact FitzGerald, Solicitors, 6 Lapps Quay, Cork; tel: 021 427 9800, fax: 021 427 9810, email: law@fitzsols.com

Pender, Terry (deceased), late of 93 Brian Avenue, Marino, Dublin 3, and formerly of Oak Avenue, Royal Oak, Santry, Dublin 9. Would any person having knowledge of a will executed by the above-named deceased, who died on or about 9 June 2010, please contact Early & Baldwin, Solicitors, 27/28 Marino Mart, Fairview, Dublin 3; ref: MOD/10946; tel: 01 833 3097, fax: 01 833 2515, email: info@baldwinlegal.com

Smith, Amanda Bridget (deceased), late of 20 Oldtown Road, Santry, Dublin 9. Would any person who has knowledge of any will executed by the above-named deceased, who died on 16 January 2010 at 20 Oldtown Road, Santry, Dublin 9, please contact McDowell Purcell, Solicitors, The Capel Building, Mary's Abbey, Dublin 7; tel 01 828 0600, email: mail@mcdowellpurcell.ie; (file ref: SMI021/0001)

Synott, Elizabeth (otherwise Lily) (deceased), late of Bedford House, Church Street, Balbriggan, Co Dublin (now Hamilton Park Care Facility, Balrothery, Balbriggan, Co Dublin) and previously of Regina Coeli Hostel, Morning Star Avenue, Brunswick Street North, Dublin 7 and Flat 9, 33 North Circular Road, Dublin 7. Would any person having knowledge of a will executed by the above-named deceased, who died on 19 April 2010, please contact Nora Collier, Patrick Tallan & Co, Solicitors, The Haymarket, Drogheda, Co Louth; DX 23009; tel: 041 983 8708/9, fax: 041 983 9111, email: noracollier@patricktallan.ie

MISCELLANEOUS

I have clients who wish to purchase an on or off-licence and have funds available for an immediate sale. If you have any appropriate licence to sell, please contact Mary Dorgan, solicitor, 96 South Mall, Cork; tel: 021 427 6556, fax: 021 427 5408, email: marydorgan@securemail.ie

TITLE DEEDS

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by Joseph O'Reilly

Take notice that any person having an interest in the fee simple or in any superior interest in nos 39/40A Henry Street, Dublin 1, comprised in folio DN162411F, being a portion of the property comprised in a fee farm grant dated 15 August 1859 from Ann Worthington to Fanny Susanna Shury Daniel, Eliza Stanton Daniel and Emily Gould Sams, which reserved a perpetual yearly rent of £13.17.10 (all pre-decimal Irish currency), now €17.63.

Take notice that the applicant, Joseph O'Reilly, intends to submit an application to the county registrar for the city of Dublin at Áras Uí Dhálaigh, Inns Quay, Dublin 7, for the acquisition of the fee simple and any intermediate superior interest or interests in the aforesaid property and that any party asserting that they hold the said fee simple or any such superior interest in the aforesaid property is called upon to furnish evidence of title to the under-mentioned within 21 days from the date of this notice.

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

Date: 3 December 2010

Signed: William Fry (solicitors for the applicant), Fitzwilton House, Wilton Place, Dublin 2

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

Take notice that any person having any interest in the fee simple estate or any superior interest in no 13 Albert Avenue, Bray, Co Wicklow, comprised in folio WW3826L, being the property comprised in a lease dated 25 March 1873 and made between Matthew Quinn of the one part and Margaret Holton of the other part for the term of 900 years from 28 March 1873, subject to the yearly rent of £15 (€19.05) and in a lease dated 28 February 1941 and made between James Power of the one part and Michael Power of the other part for the term of 500 years from 29 September 1940, subject to the yearly rent of £3 (€3.80).

Take notice that the applicant, Paul Mulligan, intends to submit an application to the county registrar for the city of Dublin at Áras Uí Dhálaigh, Inns Quay, Dublin 7, for the acquisition of the fee simple and any intermediate superior interest or interests in the aforesaid property, and that any party asserting that they hold the said fee simple or any such superior interest in the aforesaid property is called upon to furnish evidence of title to the under-mentioned within 21 days from the date of this notice.

In default of any such notice being received, the said applicant intends to proceed with the application before the said county registrar at the end of 21 days from the date of this notice and will apply to the registrar for such directions as may be appropriate on the basis that the person or persons beneficially entitled to all the superior interests up to and including

the fee simple in the said property are unknown and unascertained.
Date: 3 December 2010
Signed: CS Kelly & Co (solicitors for the applicant), Market House, Buncrana, Co Donegal

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of the land and premises known as the Presbyterian Church, Palace Street, Drogheda, in the county of Louth: an application by the Education Board of the Presbytery of Dublin and Munster
Take notice that any person having an interest in the freehold estate or any superior or intermediate interest in the property known as the church premises and out offices erected thereon, situate at Palace Street, parish of St Peter, Drogheda, county of Louth, being the land demised by an indenture of fee farm grant dated 11 June 1897 and made between the Reverend Thomas Prince Hill of the first part and the Education Board of the Dublin Presbytery of the other part in perpetuity, but subject to payment of a yearly fee farm rent of £12.02, payable by two equal half-yearly payments on every first day of May and every first day of November in each year.

Take notice that the Education Board of the Presbytery of Dublin and Munster intends to apply to the county registrar for the county of Louth for the acquisition of the freehold and all intermediate interests in the said property, and any party asserting that they hold an interest therein is called upon to furnish evidence of their title to the undersigned solicitors 21 days from the date of this notice.

In default of any such notice of interest being received, the Education Board of the Presbytery of Dublin and Munster intends to proceed with the application before the county registrar at the end of 21 days from the date of this notice and apply to the county registrar for the county of Louth for such directions as may be appropriate on the basis that the persons beneficially entitled to all or any of the superior interests in the said property are unknown or unascertained.
Date: 3 December 2010
Signed: McKeever Taylor (solicitors for the applicant), 31 Laurence Street, Drogheda, Co Louth

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) Act 1967* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of the *Landlord and Tenant (Amendment) Act 1984* and in the matter of an application by Michael O'Shea and Elizabeth O'Shea and representatives of Lucas Estate
The applicants hold all that and those the hereditaments and premises situated at Bohercael (otherwise Boheereen Cael) in the town, parish and urban district of Killarney, barony of Magunihy, and county of Kerry, the site of which is more particularly delineated on the map annexed to an indenture of reversionary lease made on 8 July 2009 between Padraig Burke, the county registrar for the county of Kerry, of the one part, and the applicants of the other part ('the reversionary lease') and thereon coloured green ('the property') for the residue of the term demised by the reversionary lease, being a term commencing on 28 July 2006 and expiring on 30 April 2087, subject to the rent thereby reserved and the covenants on the part of the lessee and conditions therein contained.

The applicants are entitled to purchase the interest of the respondents and any superior interest (if any) in the property, in that: the said property consists of permanent buildings on land and does not include any land not covered by those buildings; the permanent buildings are not an improvement within the meaning of s9(2) of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978*; the permanent buildings were not erected in contravention of a covenant in the lease; and the applicants hold the said property on foot of the reversionary lease (condition 10.6, *Landlord and Tenant (Ground Rents) (No 2) Act 1978)*; the reversionary lease was granted subsequent to the expiration of a previous lease, dated 6 October 1888, made between Elizabeth Leader Lucas and others and John Curran,

PROFESSIONAL NOTICE RATES

RATES IN THE PROFESSIONAL NOTICE SECTION ARE AS FOLLOWS:

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

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

ALL NOTICES MUST BE PAID FOR PRIOR TO PUBLICATION. CHEQUES SHOULD BE MADE PAYABLE TO LAW SOCIETY OF IRELAND. Deadline for Jan/Feb *Gazette*: 19 January 2011. For further information, contact the *Gazette* office on tel: 01 672 4828 (fax: 01 672 4877)

**Subject to budget announcement on 7 December 2010*

PROFESSIONAL NOTICES

RECRUITMENT

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

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

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

and the said previous lease would have been a lease to which part 2 of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* would have applied (condition 10.5, *Landlord and Tenant (Ground Rents) (No 2) Act 1978*).

The persons entitled to the interest of the landlord on foot of the reversionary lease are unknown and unascertained. In the circumstances, there are difficulties in procuring a conveyance of the interest of the respondents in the premises comprised in the reversionary lease.

Take notice that the applicants will make an application to the county registrar of the above circuit and county to have the following matters determined by his arbitration, that is to say: to determine the right of the applicants pursuant to the provisions of the said acts to acquire the fee simple in the property; to determine the purchase price to be paid in respect of such acquisition; for an order pursuant to s8(3) of the *Landlord and Tenant (Ground Rents) Act 1967* appointing an officer of the court to execute a conveyance of the fee simple in the property for and on behalf of the respondents to the applicants; for an order for the payment of the purchase money payable on foot of the said conveyance into this honourable court; for such further or other award or orders or determinations as to the county registrar may seem fit, including an order as to costs.

Please note that the hearing before the county registrar will take place on 10 January 2011 at Killarney Courthouse at 10am.

Date: 3 December 2010

Signed: Niall Brosnan & Co (solicitors for the applicants), 5 St Anthony's Place, College Street, Killarney, Co Kerry

RECRUITMENT

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Our client is a high profile law firm and is now looking to recruit high calibre finance lawyers. Ideally you will have a background in capital markets and banking and now wish to continue your career in a highly profitable firm with an excellent culture. A firm committed to excellence in the training and development of its lawyers, you will learn rapidly while acquiring invaluable skills within a growing area. Clients of the firm are assured of a commercial approach together with the experience and technical excellence necessary to structure and implement their financing transactions. The firm advises both lenders and borrowers on a broad range of finance transactions including asset finance, banking, derivatives and structured finance. Excellent terms on offer for this role. **Contact sharonswan@makosearch.ie Ref: S1121**

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Our client is fast becoming a leading global player in the aircraft leasing sector, leveraging off the strong financial backing of its owners and the extensive trading history and senior industry relationships of its management team. Due to their fast paced growth, a need exists to hire a transaction lawyer based in Dublin. The transaction lawyers' primary responsibility is managing all transactions from letter of intent to final binding contract. The successful candidate will ideally have a strong legal and commercial background with proven experience in aircraft leasing and aircraft financing. You will have responsibility for managing the negotiation and completion of aircraft leasing, financing and acquisition transactions.
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CONSTRUCTION — €Excellent

Our client is a recognised practice with a reputation for its complex property and project work and has an enviable and impressive client base. An experienced construction lawyer is sought to handle a caseload of both contentious and non-contentious matters on behalf of household name retailers as well as landlords and developers. The right candidate will have a proven track record and excellent technical ability but will also have the passion and drive to actively promote and grow this firm's offering. In turn, you will be rewarded with a competitive salary and package as well as having the benefit of being an active participant in the firm's strategic growth.
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CORPORATE PARTNER/ASSOCIATE — €200k + Benefits

Our client wishes to recruit an associate or salaried partner to join an already successful commercial team. This firm stands out for its collegiate culture, the strength of its management team and its consistent level of profitability. Here is a unique platform where the ideal canidate can play a lead role in further shaping and developing the corporate and commercial practice. Being a long established firm, it has credibility in the market place and has various interests within the public and private sectors with particular emphasis on transactional work. This is a key appointment and one that the senior management team are keen to get right. If you are looking for a senior appointment and want to work for a practice with a genuine commitment to its staff and clients this is the firm for you. **Contact sharonswan@makosearch.ie Ref: S1124**

BANKING — €Negotiable

An excellent opportunity has arisen for a senior lawyer to join a leading banking team within a large dynamic law firm. Having worked within the banking and finance sector, you will have particular experience of securitisation, property acquisition and finance experience. You will be skilled at providing general banking and governance advice and at executing transactional work with attention to detail. You will be ambitious and eager to form part of a team that is fast becoming a force to be reckoned with. Reporting directly to the partner of the group, there will be a defined route to partnership for the appropriate individual. You will benefit from working in a collegiate and pro active environment and will be rewarded by a competitive salary and good bonus potential.
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COMMERCIAL LITIGATION — €100k Benefits

This firm is looking to recruit an ambitious lawyer who has experience in the area of commercial litigation. This firm has an overall reputation of excellence in this area and is looking for a solicitor to take over and assist in the running of high profile, high value cases. You will be familiar with high court practice and procedure including the commercial courts and will be comfortable in other areas of dispute resolution including arbitration and alternative dispute resolution. You will also have sufficient experience to manage your client and provide advices as to the best possible outcome and the potential pitfalls including costs. You will also be interested in further developing this area of practice over the next few years. You will have gained experience within a well established law firm and have strong academics.
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PROCUREMENT — €Excellent

An outstanding opportunity has arisen within a dynamic mid tier firm to hire a procurement solicitor. The firm has a strong reputation in the arena of project finance and construction. You will have expertise in one of the following sectors, rail, water, waste and/or energy and more specifically dealing with projects and procurement matters. You will be familiar with the preparation, negotiation and review of various documentation including funding and corporate documents and will be able to advise clients in a competent and informed way. You will have gained experience within a well established law firm/ in house with strong academics and an eagerness to bring your career to the next level. This role offers a varied client portfolio together with a highly competitive remuneration package. **Contact carolmcgrath@makosearch.ie Ref: C1127**

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Our client is one of Ireland's largest, most progressive and fastest growing commercial firms. The firm has a very strong regulatory/ compliance department which not only stands on its own but provides crucial services to the banking, corporate and insurance departments. The firm is looking for an experienced compliance/regulatory lawyer. You will have experience in the authorisation of new entities, UCITS and dealing with various financial institutions in the implementation of various regulations and directives including MiFid and money laundering. You will work closely with the partner in further developing this practice area and servicing existing business. This role offers a varied and challanging portfolio which is reflected in a highly competitive remuneration package.
Contact carolmcgrath@makosearch.ie Ref: C1128

For opportunities in Ireland or overseas, please contact carolmcgrath@makosearch.ie on 01 685 4018 or sharonswan@makosearch.ie on 01 685 4017 or visit www.makosearch.ie

New Openings

Private Practice – Partnership

Significant opportunities exist in the following practice areas and a client following is not essential:

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Funds
Insolvency
Professional Indemnity
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Tax

Private Practice – Junior to Senior Associate

Our clients are searching for high calibre candidates with experience in:

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Banking – Senior Associate
Corporate – Associate to Senior Associate
EU/Competition – Associate
Funds – Junior (Must have strong academics and prior exposure to Funds work in training contract)
Funds – Associate
Funds – Senior Associate
Insurance (Contentious & Non-Contentious) – Associate to Senior Associate
Professional Indemnity – Associate to Senior Associate
Commercial Litigation – Associate to Senior Associate
Tax – Senior Associate

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