LAW SOCIETY
Gazette
€3.75 April 2009

BANK JOB:
Bankers' conduct and the law

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INSIDE: WORK ABROAD • PRACTICE CLOSURE COSTS • VALUATION AND SEPARATION • ROAD TRAFFIC LAW

Law Society of Ireland

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Law Society Annual Conference

17th/18th April 2009

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- CPD programme on SME/small trader insolvency on Friday afternoon (3 CPD hours)
- Gala dinner on Friday evening
- One night's bed and breakfast
- Conference business session on Saturday morning (3 CPD hours)
- Lunch on Saturday

Conference package (accompanying persons): €175

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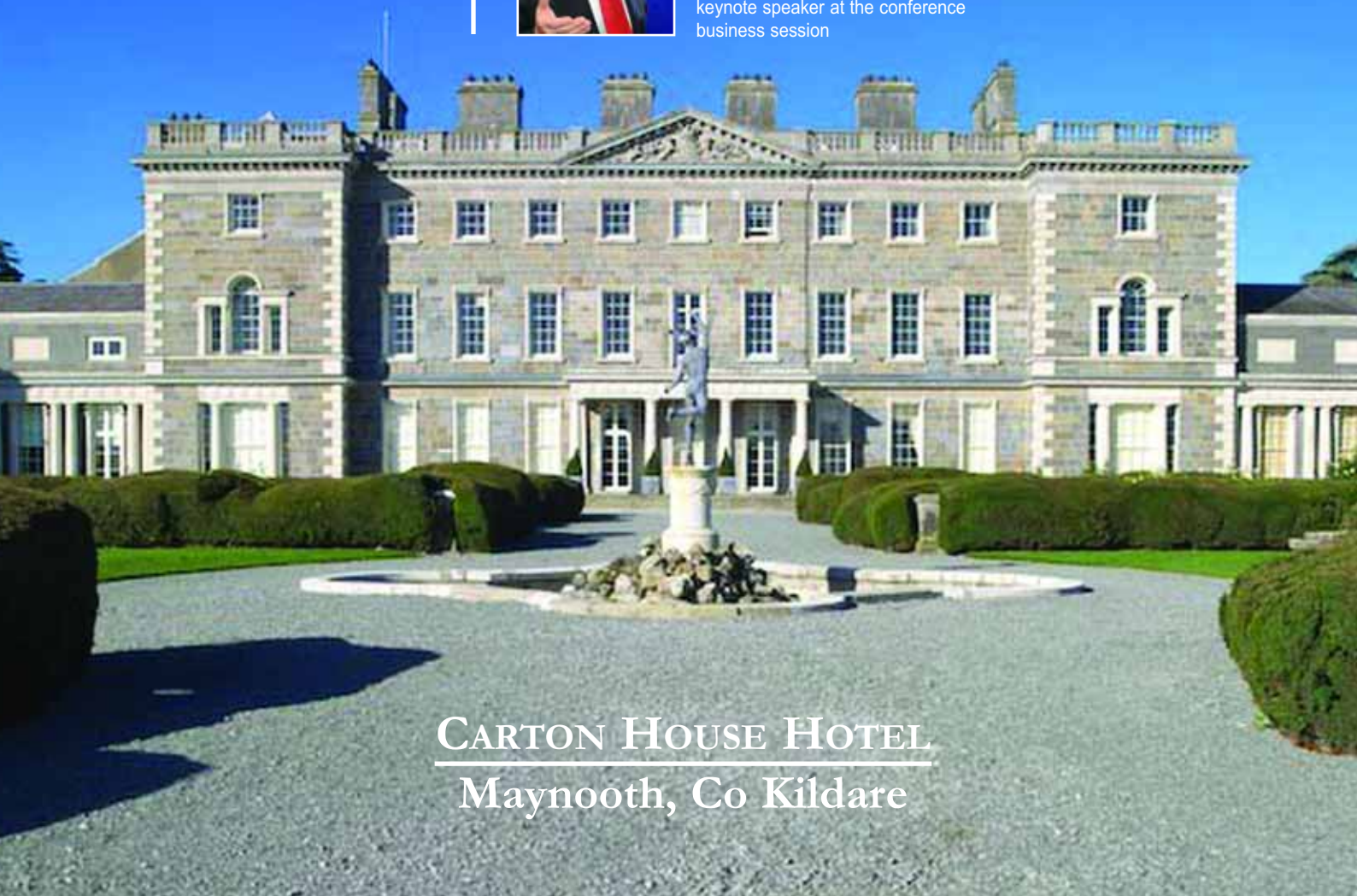
Please complete the reservation form included with this issue of the *Gazette* or reserve online at: **www.lawsociety.ie**

Queries to the conference secretariat – Rachel O'Hare, tel: +353 1 280 2641 or email: **lawsociety@ovation.ie**

Dermot Ahern TD, Minister for Justice, Equality and Law Reform will be the keynote speaker at the conference business session



Carton House Hotel
Maynooth, Co Kildare

Generating momentum

The clarion call of the moment is that we must all pull together – but one of the issues that faces us is how the Law Society as a body should respond. For good reasons, we do not endorse one political party over another and obviously we are not qualified to comment on international economic matters. Therefore, in our contact with the political world to date, we have firstly tried to inform all politicians about how the recession is affecting the profession, but we also have, in general, encouraged them to take such steps as are necessary in the public interest to deal with the crisis.

As professionals at the cutting edge of the commercial world, we are only too well aware that radical action is urgently required to regenerate economic activity, and we must expect some short-term pain for the collective good. Already the government has cut the fees paid by the state by 8%, and this will affect many practices, particularly those dependent on criminal legal aid (who have, in addition, forgone a long-promised increase of 2.5%). As lawyers, we are well acquainted with the notions of fairness and equity, and it seems to us that we must accept that such measures are necessary and proportionate.

"We can only learn by looking backwards and we can only live by looking forwards"

It is also apparent that there is no silver bullet and that many small steps and initiatives are required in order to generate momentum. Solicitors are, by their very nature, problem solvers, and one way we can put our shoulder to the wheel is by coming up with creative suggestions and initiatives to get things moving again.

Both individually and collectively, we have much to offer and, if you have an idea or suggestion, why not get in touch with us and maybe it can be developed into something that can be presented to the government? We can only learn by looking backwards and we can only live by looking forwards.

Practice management

You will shortly be informed about the changes to the certificate of title system for residential properties. I believe that the streamlining of the system will prove beneficial for all practices. I would encourage you to review your own internal practice-management systems so as to incorporate suitable steps, in particular in relation to the completion of registrations. It would also be a useful time to review any existing undertakings that are outstanding.

It is no secret that the banks are themselves reviewing all outstanding undertakings and, rather than grumble about having to reply to queries from a financial institution, colleagues should regard such a request as part of good practice management, particularly now that we all have a bit more time on our hands. I would therefore urge all practitioners to deal with outstanding queries in relation to undertakings in a prompt and professional manner.

Calcutta Run

One of the more pleasurable aspects of being your president is that I get to meet some very interesting people. During the last few months, I have finally got around to meeting two of the most impressive people in Ireland, namely John O'Shea and Fr Peter McVerry. As we struggle to come to terms with the recession and start to reassess our value systems, it is instructive to look at the incredible work that has been carried out for many years by these two great stalwarts. Their organisations, GOAL and the Peter McVerry Trust, are the worthy recipients of the profession's annual charity fundraiser, the Calcutta Run. The funding that we provide is a very important part of their financing, and it would be a great test for us to try and match the levels that we have achieved in previous years.

The Calcutta Run takes place at Blackhall Place on Saturday 16 May, and it really is a great day out. I would encourage as many of you as possible to partake but, even if you cannot attend, you can still send a donation, however small. Do it now – it will be guaranteed to make you feel better!

John D Shaw
President

On the cover

It's a dirty job, but someone's got to do it – and for a pittance, too. But recently the activities of some of the most altruistic and socially valuable members of society have come under unfair media scrutiny. Why should this be?

PIC: GETTY IMAGES

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LAW SOCIETY
Gazette
April 2009

REGULARS

1 **President's message**

4 **News**

10 **Analysis**
10 **News feature:** dealing with the banks
12 **News feature:** Complaints and Client Relations Committee, part 2
14 **Human rights watch:** right to liberty and crowd control
14 **One to watch:** *Code of Conduct for Lending Institutions*

18 **Comment**
18 **Viewpoint:** lawyers as censors?

41 **People and places**

47 **Student spotlight**

48 **Book reviews**
Arbitration Law and *Deference and the Presumption of Constitutionality*

50 **Tech trends**

53 **Briefing**
53 Council report, 27 February 2009
54 Practice notes
58 Legislation update: 20 January – 11 March 2009
60 SBA annual report
61 Solicitors Disciplinary Tribunal
63 Firstlaw update
65 Eurlegal: independence of the legal profession, part 1

69 **Professional notices**

71 **Recruitment advertising**

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FEATURES

20 **COVER STORY: Bank job**
There is no avoiding the current media focus on the conduct of certain bank officials. However, the question arises whether there are any legal implications arising from that conduct and, if so, what? Shelley Horan closes her accounts

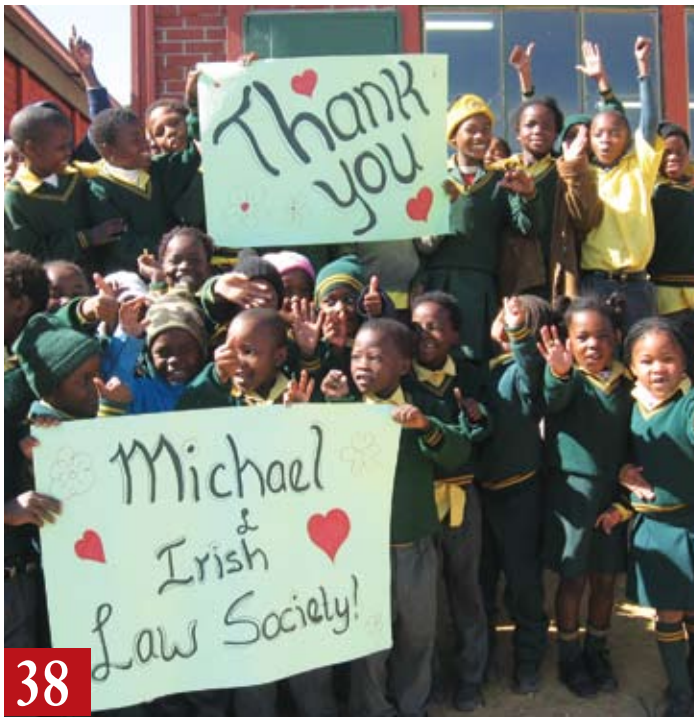
24 **Fight or flight**
In the second part of her two-part article, Deborah Flood looks at the legal recruitment market for newly qualified solicitors in Australia, China, the Middle East and, strangely enough, Norway

28 **Road to nowhere**
You should not underestimate the complexity of road traffic law. Those who take their knowledge of the area for granted and fail to keep up with recent developments may leave their clients exposed. Vincent Deane directs the traffic

32 **Long division**
Open and transparent financial disclosure is vital to building trust between parties and advisers in family law ancillary relief cases and will determine the ease with which a settlement can be reached, says Ann FitzGerald

35 **Seeking closure**
Opening a solicitor's practice is a relatively straightforward affair, but the decision to close can be fraught with myriad difficulties, warn Pat Howett, Nicola Darby and Therese Clarke

38 **Out of Africa**
The Law Society of Ireland has, for several years, been involved in assisting in the training of black South African lawyers from disadvantaged backgrounds. Michael Carrigan explains what's involved



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CAVAN

Martin Cosgrove's tenure as bar association president comes to an end shortly and already there is much speculation as to whether popular town solicitor, Rory Hayden, will be in a position to step up to the plate and put his name in the ring.

KILKENNY

Owen O'Mahony shares the frustrations of practitioners throughout the county as they experience further delays in the completion of the new courthouse in the city. Currently held up for archaeological reasons (Kilkenny is twinned with Tara, Athens and Alexandria), the completion dates are moving in the sands and are now a couple of years hence. Meanwhile, imagine the frustrations of having to travel to another county court for crime. Civil is carried on in the beautiful but entirely unsuitable Parade Tower of the Castle. The District Court business is conducted in a temporary building and appeals are held some distance away in Castlecomer.

DONEGAL

Alison Parke is the new CPD officer and reports a very successful seminar on insolvency practice. The president of the bar association, Brendan Twomey, hopes that colleagues throughout the county will be able to fulfil their entire CPD requirements from seminars offered throughout the county during the year. The association will be assisted in this task by newly appointed secretary Niall McWalters from O'Gorman Cunningham in Letterkenny. Meanwhile, colleagues were greatly saddened at the premature passing of Judge Miriam Reynolds. Although never having sat in Donegal, the late judge was for many years the state prosecutor throughout the county and was hugely popular.

PIC: DEE BAUMANN PHOTOGRAPHY

Attending the recent annual dinner of the Southern Law Association were *(l to r)*: Jerome O'Sullivan, Eamon Harrington and Fiona Twomey, all past-presidents of the Southern Law Association

DUBLIN

The Younger Members' Committee of the DSBA is checking the pulse, having carried out a work-related survey among their peers. Although the results have as yet to be collated, the response rate has been very positive and will be shared with the profession in due course.

The Family Law Committee of the DSBA is equally busy and will, in May, launch the first mediation course in the country. To be run over a six-day cycle, in four-day and two-day stints, this will be a must attend course for the specialist family lawyer and will accord accreditation status. Run as workshops in up to 24-person groups, the course will be run as a pilot. This high-end and unique course will be repeated in September and anyone interested should email: maura@dsba.ie.

Hopefully by the time you read this, the long awaited and much-needed 'Share Purchase Agreement' will have come on stream – fulfilling the DSBA's commitment to members by giving them what they want – precedents – which, when used judiciously, can greatly assist a practitioner and enable deals to be solidified that might otherwise be lost to a firm. John Hogan, Pauline O'Donovan, Sonya Manzer and, in the earlier heavy-lifting stages, Brendan Heneghan, deserve special commendation for bringing the matter to fruition – as does the rest of the drafting committee of the Business Law Committee.

The DSBA website has recently broken new ground with the installation of an online discussion forum. John Glynn assures me that this will not become a forum for the cranks and hoodlums of the type who infiltrate talk-radio shows, but will rather be password-enabled to allow members air matters of concern or interest to other colleagues who might be able to offer and share helpful advice and assistance.

Paddy Kelly recently held a workshop for the Consult a Colleague group, which was attended by solicitors around the country. They heard from colleagues about the type of issues and stresses volunteer solicitors can encounter when on duty. These volunteers deserve immense credit. The DSBA , through Consult a Colleague, work closely with LawCare.

This year's DSBA conference is being held in Chicago from 16-20 September 2009. Already we have strong expressions of interest from outside the Pale – the more the merrier! An interesting variant this year will be the fact that delegates travelling will make their own travel arrangements. There's a money-saving element that means that practitioners can tailor-make their own arrangements to suit themselves. If interested, please email kevinoh@indigo.ie.

Finally, the task force commissioned by Michael Quinlan and yours truly to assess the strengths and shortcomings of the association reported recently. It has now been carefully considered and its findings acted upon. Thanks are due to John O'Connor, Keith Walsh, Helene Coffey, Roudhán Killeen, our own Maura and, not least accountant Ray Ryan and venerable chairman Alan McCarthy. G

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

Numbers of practising certificates

The Law Society has published the total number of practising certificates for which application has been made in 2009 by the statutory renewal date of 1 February. The precise numbers of practising certificates on 1 February in 2008 has also been published for comparison purposes.

This table shows the number of practising certificates for the biggest firms of solicitors on both 1 February 2009 and 1 February 2008 – and the difference between these figures. The 1 February 2009 figure for Mason Hayes & Curran reflects the merger between that firm and Arthur O'Hagan, which took effect on 1 October 2008.

Director general Ken Murphy says: "The figures for the individual firms are published each year by the Society in the *Law Directory*. Our publication of this table now is not designed to prove any theory about the impact of the recession – whether the view tends towards the brighter or darker ends of the spectrum. We do it simply to place some hard factual information, to contrast with rumours, into the public domain."

Ken Murphy: "factual information'

Practising certificate analysis of the larger practices for 2008/2009

Firm name	Practising certs 1 Feb 2009	Practising certs 1 Feb 2008	Increase/ decrease
Matheson Ormsby Prentice	210	195	+15
Arthur Cox	207	193	+14
A&L Goodbody	206	193	+13
McCann FitzGerald	196	186	+10
William Fry	144	142	+2
BCM Hanby Wallace	113	102	+11
Mason Hayes & Curran (incorporating Arthur O'Hagan)	107	79	+28
Eversheds O'Donnell Sweeney	65	70	-5
Dillon Eustace	58	60	-2
Ronan Daly Jermyn (incorp RDJ Glynn)	57	54	+3
Eugene F Collins	51	49	+2
Beauchamps	46	52	-6

Protecting your place in the sun

People who own property abroad and who have a foreign mortgage on that property may not be aware that, if they fail to make repayments, they may in fact no longer be the owners of that property. This can arise when the overseas property is left vacant and formal notice and proceedings from the bank are served on the foreign property – as the bank is obliged and entitled to do – but such notices have been ignored by the property owners. Dublin solicitor Tom McGrath (Tom McGrath & Associates) advises that it is imperative that any owners of foreign property – whether investments or holiday homes – who are finding it difficult to keep up with their mortgage repayments, should maintain a line of communication with their bank, with a view to reaching some sort of agreement with them. Once the property has been repossessed and sold, there is no comeback against the bank.

"It's no defence to say that you didn't know about it because the letters from the bank were going to your home abroad. You must have someone collecting it for you."

GIFTS AND THE ELDERLY

The fourth practice note in the series to assist solicitors when instructed by elderly clients is published in this *Gazette* (p54). This month's topic covers situations where gifts are being made by the elderly person.

The duty placed on solicitors to protect these clients is onerous. James Cahill, chairman of the group reviewing these matters, explains: "The solicitor must ensure that the proposed gift does not constitute an improvident arrangement by the elderly person. For instance, the solicitor must investigate whether the client has retained sufficient assets to provide for their own future needs and for those of others who may be dependent on them."

Competing in the marketplace of ideas

In late January, Public Affairs Ireland hosted a conference entitled 'The state and the law', in Dublin's Conrad Hotel, *writes Tom Rowe*. In front of a significant crowd, Attorney General Paul Gallagher invoked Oliver Wendell Holmes' concept of the 'marketplace of ideas' in his opening speech. The American jurist advocated the open expression of views in order to find the best policy. Gallagher welcomed the conference as such an opportunity, to "review what we do and take on board new ideas" in relation to providing legal services and in dealing with legal issues and how they relate to the state. Other speakers included the president of the Law Reform Commission Mrs Justice Catherine McGuinness, the chairman of the Public Accounts Committee Bernard Allen, CEO of the Courts Service Brendan Ryan, and Lisa Broderick (Matheson Ormbsy Prentice), who addressed recent developments in litigation, dispute resolution and public law for the state and public authorities.

Lisa Broderick received an enthusiastic response for her presentation 'Decision-making and the disclosure of documents by public sector organisations – the impact of FoI, data protection and legal privilege'. Lisa spoke candidly on the knowledge she has gained working with public bodies. She listed some of the many reasons public bodies could find themselves subject to litigation. In such cases, the *Freedom of Information* (FoI) and *Data Acts* have resulted in individuals being able to access a lot of information without the intervention of lawyers, and the general public has become much more aware of their rights.

Broderick spoke of "the huge dread lawyers have when a client presents you with a [computer] hard drive which has a lot of emails on it. People have an ability to put in emails things which they never thought they would have to stand over in a court of law, such as explaining why they had four exclamation points after 'Another one!!!!' by way of reply to a complaint received from an individual." She stressed that staff must "beware of the dissemination of information". "Think before you copy 15 of your colleagues in an email" was her sage advice for the workplace.

Statistics show that 75-80% of FoI requests turn into claims

The fact that you or your employer is being sued does not prevent the plaintiff from lodging a FoI or data-protection request. The plaintiff is still allowed to exercise his or her rights under the legislation. "When dealing with *FoI Act* requests, it doesn't matter if you are fully aware that the person concerned is looking for the information as a stick to beat you with."

Statistics show that 75-80% of FoI requests turn into claims. The FoI process has "huge advantages for the plaintiff". It's convenient, straightforward, cheap, and there are no restrictions to which the document can be put after the event, unlike discovery. On the other hand, information gleaned through FoI is not an affidavit, and there are many exemptions.

For the benefit of the non-lawyers present, Broderick gave a run down of situations where information passed within a public body can remain confidential.

Under litigation privilege, once proceedings have been contemplated, anything that is generated from that day on in connection with that litigation is something over which you can claim privilege.

Legal advice privilege applies to any documents that exist before any litigation is contemplated. Broderick warned the civil servants that, in her experience, "everybody thinks that when they write to their lawyer it's covered, but we have advised public bodies to append any advice to any meeting minutes or internal memoranda, and refer to it as such: "If you try to paraphrase the advice from lawyers it can be discovered, as it is not a direct communication from the lawyer."

Regarding executive privilege and documents generated by the public service, the courts will make a decision based on public interest in making disclosure, versus the public interest in doing justice before the court. If the judge is satisfied that the public interest is greater, the court will override executive privilege.

Human rights vacancies for legal professionals

Human rights law is emerging as an important area of legal practice, both in Ireland and on an international stage. Opportunities to work, take part in an internship or volunteer in this area of law are increasing, but it is often difficult to find information on where such positions are available – and the type of vacancies that arise.

With this in mind, the Law Society's Human Rights Committee has compiled a list of organisations that offer jobs, internships and volunteer opportunities to legal professionals, and websites that specialise in human rights careers and vacancies.

The information is available on the Human Rights Committee page of the Law Society website, www.lawsociety.ie.

'Survival skills' initiatives for 2009

The Practice Management Task Force (PMTF) has launched three additional initiatives to help the profession – a web resource area, a free vodcast, and an interactive 'ready reckoner'.

A web-resource hub for practice management survival skills in the members' area of the Society's website was launched by the PMTF in late February 2009. Chair of the task force James MacGuill says: "It is anticipated that this section of the website will act as a hub for information to assist members when determining how to best handle the economic downturn. General information on practice management issues is also provided, together with free downloadable management tools. The task force hopes that members will find the new section of assistance and will also contribute to the continued development of the hub by submitting their own practice management ideas and any management tools that they have developed to the task force."

The section can be accessed by logging into the members' area with your solicitor number. The 'practice management' section is located under 'Society committees' in the website menu. If you do not have your solicitor number, please email the records department at l.dolan@lawsociety.ie, or telephone 01 672 4853.

Material that is currently available to download includes:

- Slides from the PMTF 2008 seminar series,
- Slides from the 2009 practice management 'Survival skills' seminar,
- Free vodcast of the PMTF 2008 seminar series,
- Information about how to start accepting credit-card payments,

The well-attended 'survival skills' seminar on 27 February is now available as a vodcast

- A list of Law Society library recommendations for further reading in the area of practice management.

The task force has released a free vodcast of its 'Survival skills' seminar, which took place in the Law Society on 27 February 2009. The vodcast can be downloaded in the 'practice management web resource' area on the Society's website (eligible for two hours' e-learning – management and professional development skills, 2009 CPD scheme).

The seminar focused on the fundamentals of practice management in the economic downturn, human resources obligations and possibilities of changing practice arrangements.

Chaired by PMTF chairman James MacGuill, the Law Society's president John D Shaw announced the Society's strategy for helping members to deal with the downturn in the economy. David Rowe, managing director of Outsource, considered current practice trends and ideas to ensure survival and progression. Brian Kiely (Poe Kiely Hogan) spoke about the experience of a recent merger. Emer Gilvarry (Mason Hayes & Curran) also discussed her experience of law-firm merger and practice

The Practice Management Task Force – launching new initiatives to help the profession

management issues and strategies. Vice-chair of the PMTF Michelle Ní Longáin (BCM Hanby Wallace) addressed the topic of emerging employment law issues for practices by providing guidance on options and obligations.

The Society's support services executive Louise Campbell detailed current services to help members during the economic downturn. Policy development executive Emma-Jane Williams demonstrated the new PMTF web resource area and the interactive 'ready reckoner'. First published by the Costs Committee in 1994, the ready reckoner is a formula for calculating how much it costs to run your office per hour. The PMTF has modified the reckoner and issued it in *Excel* format. It automatically calculates how much it costs to run your office per hour and contains tips for reducing costs, as well as suggestions for where to find more information on particular costs.

You don't need to be familiar with *Excel* to use the reckoner because all the necessary formulae have been inserted and the print settings adjusted.

Follow these simple steps:

- Log into the members' area of the Society's website,
- Select 'Society committees' from the navigation pane,
- Under 'Committees', select 'Practice Management TF',
- Select 'Downloads/ information',
- 'Right click' over the link 'ready reckoner' and select 'save target as' (in order to open it in *Excel* for optimum functionality),
- When prompted, save the document to your computer,
- Cost items are listed in the first column. (This list is not exhaustive and has been categorised into (i) office, (ii) practice and (iii) communication costs. Space has been left in each group for you to insert additional costs),
- Your cost-per-hour will be automatically calculated at the end of the reckoner,
- Read the tips/suggestions for reducing costs in the fourth column.

How you can help

Practitioners are welcome to contact the task force via Emma-Jane Williams, indicating any particular practice-management topics you would like to see addressed by the task force. Handy hints on how to manage a practice through a recession and details of your survival skills can be emailed to her. Or, if there are any management tools that you have deployed, please email information on these too, to e.willams@lawsociety.ie or tel: 01 672 4821.

‘Blended learning’ for the ‘time-poor’

Feedback received from diploma course participants has indicated that solicitors are looking for alternative ways to access the Education Centre’s programme of courses. Many ‘time-poor’ practitioners find it difficult to commit to travelling to and from the Law Society on a regular basis and are seeking alternative solutions.

The diploma team is aware, however, of the importance of direct access to lecturers and tutors and the establishment of a network of peer support. This is generally best achieved by onsite participation.

To accommodate these seemingly conflicting needs, the team has designed a number of ‘blended learning’ courses. Blended learning incorporates the best-practice elements of both on-site and online learning and provides practitioners with a directive course of study that promotes independent and interactive learning.

Blended learning courses combine periodic on-site lectures and workshops with a weekly online release of lecture materials. Online lecture notes are supplemented on occasion by podcasts and vodcasts (video podcasts). This type of learning requires a further element of academic support and so there are weekly online tutorials, during which time students have access to a course tutor to discuss the course materials released during the preceding week. The periodic on-site lectures and tutorials are held at times (usually on a Saturday afternoon) to accommodate those travelling from outside Dublin.

Podcasting – it’s not all about music, you know!

The technology used on blended learning courses may at first glance seem daunting for some participants. To ensure that all technological needs of participants are fully met, each blended learning course begins with an IT induction workshop. This introduces activities such as discussion forums, chat-rooms, podcasts and vodcasts. Furthermore, IT support is provided for the duration of the course, with a dedicated email address and contact telephone numbers provided to all participants.

The benefits of blended learning courses will suit practitioners who cannot travel to Dublin regularly. Learning is self-directed and self-paced, and students also get a chance to engage on a weekly basis with colleagues on the discussion forum and in the chatroom.

Five blended learning courses are on offer in the 2009/10 programme:

- Diploma in Employment Law (commencing 9 May 2009)
- Diploma in Commercial Litigation (23 May 2009)
- Diploma in Family Law (3 October 2009)
- Certificate in Criminal Litigation and Procedure (26 September 2009), and
- Certificate in Human Rights (10 October 2009).

For further information on these and all other diploma programme courses, please refer to the diploma programme pages on the Law Society website, or contact a member of the diploma team by emailing diplomateam@lawsociety.ie, or telephone 01 672 4802.

‘Mediation saves time and money’

Mediation saves time, money and business relationships, according to this year’s Irish Commercial Mediation Association’s (ICMA) annual conference on 6 March.

The ICMA also announced findings from a survey sent to the managing partners of more than 3,500 law and accountancy firms, as well as barristers and other professionals. The respondents said that the key advantage of commercial mediation was in cost savings, stating that their clients could save up to 70% compared with litigation.

Other key advantages mentioned were speed, control of the process, confidentiality and the preservation of business relationships. Respondents ranked mediation as their first preference in dispute resolution, putting it before conciliation, arbitration and litigation.

Due to growth in awareness and use of mediation, along with the sharp rise in the number of disputes, ICMA predict that the number of disputes that will be settled through commercial mediation will double over the coming year.

The Law Reform Commission has acknowledged the benefits of mediation and recommended that the principles are placed on a statutory footing. It has also recommended that a pilot court mediation scheme be established in the District Courts.

ICMA spokesperson Austin Kenny said: “Although commercial mediation is still relatively new in Ireland, there has been a significant increase in the number of cases dealt with through mediation in the last year. Cases are typically dealt with in a three-to-six-week period from commencing the process, which is significantly quicker then going to trial.

“The parties, through their direct involvement in the process, can often end up with a more creative solution than litigation can provide. The process creates the opportunity for important relationships to be repaired that could otherwise be damaged by litigation. In some cases an apology and/or explanation, rather than money, is central to disputes being resolved.”

Statistics available from the Irish Commercial Court indicate that almost 65% of cases referred to mediation last year were successfully settled. The ICMA survey showed a slightly higher success rate of approximately 70% over the last three years.

Heading them off at the pass,

Practitioners who are staring financial difficulty in the face should acknowledge this fact immediately, devise a plan of action and contact their bank – before *it* contacts them, advises Kieran Finnan

The value of all asset classes has fallen substantially over the last two years. People recently thought of as well-off now face major difficulties in funding their bank liabilities and in how they deal with the bank. This situation places most people under enormous stress and leaves them wondering how best to deal with their affairs.

It is important to approach these issues proactively and in a positive and realistic frame of mind. Structure your approach as follows:

- Face facts,
- Assess your family's living requirements,
- Realistically value your assets and, as importantly, your cash flow,
- Take a strategic view and plan a course of action,
- Contact the bank,
- Negotiate an agreement with the bank that is deliverable and quantifiable,
- Agree realistic timescales,
- Consider legal action.

Facing the facts

Those who find themselves in difficulties or have a view that they will be in difficulty within six or 12 months should personally acknowledge the fact as soon as possible and face up to the matter. It is far more preferable that this is done by the borrower themselves rather than being hauled in by the bank to face the music. At that stage, the bank has captured the moral high ground, will be in control, and will advocate any action they deem fit to ensure recovery of the debt, rather than dealing with the matter in a fair and balanced manner to the benefit of both parties.

Borrowers should take stock of their current position in a realistic manner, notwithstanding that currently there is no market for some assets that may have to be sold, particularly property. Value your assets realistically and take account of the fact that, if you were to purchase that asset today, how much you would be willing to pay. This is particularly relevant bearing in mind the deflationary background that is evident in the economy at the moment.

> ***"Borrowers should bear in mind that the one aspect that makes banks most anxious in terms of dealing with their clients is the absence of information, or being misled by their clients"***

Cash flow, not property values, is the single most important element in devising a debt-management strategy. Take a realistic view of your income, or your business's income, and what you estimate that income is going to be into the future. You should be pragmatic and realistic. If future income is bleak relative to a couple of years ago, that fact should be faced.

Assess what you and your family's living requirements are on a realistic basis and take account of all household, educational, children, motor and entertainment expenses. Take a realistic view of what it will take to meet your family commitments for the next year or two. Your spouse or partner should be included in this assessment.

Plan

Once all the information has been assimilated, you can formulate a strategic plan for dealing with the bank with clear goals over a specific time frame. Cognisance should be taken of the security held by the bank, the realisability of that security and if there are alternative methods of dealing with the debt, particularly in a property market that is currently non-existent.

The most important aspect of a strategic debt-management plan is cash flow, which, first of all, must meet your family's requirements, after which every effort will have to be made to facilitate the bank in its pursuit of its objectives. These objectives will be debt reduction and risk management. Be realistic in terms of timeframe and give yourself sufficient time to allow for the current uncertainties in markets at the moment.

Dealing with the bank

From a strategic point of view, when dealing with the bank, it is vital that the debtor has collated the above information and formulated a plan. You can proactively contact the bank to discuss the matter, rather than leave yourself in a position whereby the bank is calling you in to explain the current position and asking for your proposals. Borrowers should bear in mind that the one aspect that makes banks most anxious in terms of dealing with their clients is the absence of information, or being misled by their clients. If the bank forms this view, they will move accordingly to protect the position as perceived by them. This can often lead to the bank dealing with their clients in a harsher manner.

When meeting with the bank, advise them of your cash-flow position and projections,

before they come to get you...

Cowboys...

the realistic asset/liability profile, and your proposals for debt management over a specific timeframe. If your debt management strategy has been formulated in a manner that takes consideration of the bank's likely thinking on the matter, the bank should agree a future course of action for a realistic timeframe, taking account of the realities of the situation.

If the bank does not agree with your proposals, have alternatives available. However, given the current climate, be very cautious if the bank fails to agree on a future course of action. Consider the bank's motives and seek professional advice. After all, it is in the interest of all parties that the matter is dealt with in a framework that benefits both parties. After all, either side resorting to legal action will result in the losses to both sides being exaggerated.

Legal action

If matters cannot be resolved with the bank and legal action is imminent, it is vital that you face up to the fact of the matter and prepare your case well in advance. Needless to say, a solicitor should be engaged immediately and a barrister – preferably with a specialty in banking law. If the debtor is a solicitor, it is recommended that an independent solicitor act on their behalf.

Any technical banking issues surrounding the operation of the bank accounts, bank interest and fees charged, or items being unpaid should be assessed as part of the preparatory work of the case – and well in advance of any court hearings – and professional advice and guidance sought.

For those facing financial difficulties in terms of their bank borrowings, it is important that the realities of the situation are faced at an early date, that the groundwork is prepared, and a debt-reduction plan formulated.

You should proactively contact the bank and work with it by agreement in managing the debt-recovery strategy, while at the same time being cautious and giving due consideration to the tactics being employed by the bank.

In most circumstances, the banks will act reasonably where they believe that you are being reasonable, and both parties can work together to reduce the losses on both sides. However, walking blindly into the bank without a cohesive and realistic plan is akin to being fed to the wolves. G

Kieran Finnan is managing director of Finnan Financial Limited, independent banking consultants.

Powers of the Complaints and

Last month, we looked at what happens when a complaint is made to the Complaints and Client Relations Committee. In part 2, Simon Murphy explains the committee's powers and limitations

Since 1 January 2009, under the provisions of the *Civil Law (Miscellaneous Provisions) Act 2008*, there is – for the first time – a majority of lay people sitting on the Complaints and Client Relations Committee. The lay members are full voting members of the committee and, in order to form a quorum, there must be a majority of lay members present at each meeting.

The committee sits in three separate divisions, which operate independently of each other. Each division meets approximately every six weeks, the dates for each meeting being set at the beginning of the Council year. The starting time is at the discretion of the chairman of the division. In addition to its regular meetings, the committee also sits in plenary session, once or twice a year, to discuss policy issues.

The solicitor against whom a complaint has been made is given the option to attend or be legally represented. He may, in some instances, be required to attend if, for example, the correspondence discloses matters that, in the opinion of the investigating solicitor, require the solicitor's attendance before the committee. The committee may, on occasion, facilitate the attendance of a complainant. Where both complainant and solicitor attend, they are heard separately – the committee taking the view that its role is inquisitorial rather than adversarial. Committee decisions are usually made on a consensus basis.

Of course, it is absolutely in the interest of any solicitor against whom a complaint is made to cooperate fully and promptly with the committee or the complaints section, as the case may be.

The committee lays particular emphasis, in appropriate cases, on complaint resolution and may make recommendations to the solicitor with a view to achieving a satisfactory outcome for the complainant. This may involve adjourning an item and obtaining regular progress reports from the solicitor until the client's case is completed. A satisfactory outcome for the complainant may result in the withdrawal of the complaint, in which case, the committee may decide, at their discretion, to take no further action.

The committee may decide that there are no grounds to uphold a complaint, in which case the Society's file is closed and the complainant is reminded of their right to contact the Independent Adjudicator of the Law Society if they are dissatisfied.

Powers

If the committee decides that there is a valid complaint that cannot be resolved to the complainant's satisfaction or, having been resolved, still merits some form of action, the following options are open to the committee:

- In cases of inadequate professional services or excessive fees, the committee can exercise the powers available to it under sections 8 and 9 of the *Solicitors (Amendment) Act 1994*. The committee can, among other things, direct the solicitor to refund some or all of the fees paid by the client, hand the file over to another solicitor – notwithstanding the fact that there are fees due – or to take whatever action at the solicitor's own expense that the committee deems appropriate. By statute (section 11, *Solicitors (Amendment) Act 1994*), the solicitor has a right to appeal these decisions to the High Court within 21 days, following which the committee's direction becomes absolutely binding. Failure to comply with a binding direction may result in a referral to the disciplinary tribunal.
- If the committee decides that the complaint discloses *prima facie* evidence of misconduct, the matter may be referred to the disciplinary tribunal. The committee can also determine that a complaint is justified but is not of sufficient seriousness to warrant an application to the tribunal, in which case it can issue a written reprimand that stays on the solicitor's record for a period of three years.
- Under the provisions of the *Solicitors (Amendment) Act 2002*, the committee can require a contribution towards the costs of the investigation, up to a limit of €3,000.
- The committee can authorise an application to the High Court if it considers that the solicitor is obstructing the investigation of a complaint, or if a solicitor fails to produce a file for inspection, or if a solicitor is in breach or is likely to breach a provision of the *Solicitors Acts* or regulations.
- The committee can direct a solicitor to pay a client a sum not exceeding €3,000 as compensation for any financial or other loss suffered by the client.

"The committee may consider the number and nature of complaints made against solicitors in the preceding two years in the context of that solicitor's application for a practising certificate"

The committee may consider the number and nature of complaints made against solicitors in the preceding two years in the context of that solicitor's application for a practising certificate. The committee may decide to impose conditions on a solicitor's practising certificate or can refuse to issue a practising certificate if it believes that it is necessary to do so in order to protect or secure the interests of the solicitors' clients. Any solicitor in respect of whom the committee intends to make a decision in this context will be notified in advance and invited to make submissions, either orally or in writing, as to why his practising certificate should issue with or without conditions. These measures are not punitive in nature and are only exercised

Client Relations Committee

Spiderman: with great power comes great responsibility

for the purposes of client protection.

Complaints that cannot be dealt with

A complaint may be deemed inadmissible for a number of reasons, including the following:

- The complaint is out of time – by statute, the Society cannot investigate complaints of inadequate professional services or excessive fees where the services were provided and where the bill was furnished more than five years ago.
- If it is clear that a complainant is seeking compensation or damages over and above €3,000, it will be suggested to the complainant that they should consult with an independent solicitor with a view to issuing proceedings. Complainants should be made aware from the outset that the Law Society cannot make an award of compensation over €3,000, as an award of this nature can only be made by the courts. The Society maintains a list of solicitors, called the Negligence Panel, who are prepared to take proceedings against another solicitor, and this can be furnished on request.
- Complaints against judges or barristers.
- In general, the committee cannot deal with a complaint against a solicitor who is acting for a third party, for example, complaints from a purchaser about a vendor's solicitor, or from a plaintiff about a defendant's solicitor. There are exceptions, however – for example, if the complaint is endorsed by the complainant's solicitor or there is clear *prima facie* evidence of fraud or some other illegality. As stated earlier, a complaint by a recipient of an undertaking alleging breach of an undertaking will always be investigated.
- The investigation of a complaint is generally confined to matters that arise in a solicitor/client relationship. For example, a complaint from a trade creditor who is seeking payment from a solicitor would not be entertained.
- Complaints of inadequate professional services will usually be deferred if one of the parties issues civil proceedings that relate directly to the subject matter of the complaint.

"Any decision made in respect of a complaint is subject to review by the Independent Adjudicator"

In all cases that cannot be dealt with as a complaint, a response is issued by the Society explaining the reason why it cannot intervene and, in appropriate cases, providing details of where assistance may be available.

Independent adjudicator

Any decision made in respect of a complaint, whether at first instance by the Complaints Section or by the committee itself, is subject to review by the Independent Adjudicator of the Law Society. The adjudicator's role is to ensure that the Society has acted fairly and impartially in individual cases and also to review at regular intervals a random selection of files in order to maintain standards and improve procedures. The adjudicator is entitled to attend meetings of the committee as an observer only, and generally attends two or three meetings a year.

The role of the independent adjudicator is set to be shortly subsumed by the legal services ombudsman when that legislation finally passes. G

Simon Murphy is chairman of the Complaints and Client Relations Committee.

Crowd-control measures and

Crowd-control measures must meet certain criteria before they can be considered compatible with the right to liberty under the ECHR. Elaine Dewhurst assesses a recent British decision

One of the "features of a vigorous and healthy democracy is that people are allowed to go out on the streets and demonstrate" (Lord Hope), and crowd-control measures taken during such demonstrations have to meet certain criteria before they can be considered to be compatible with the right to liberty under the *European Convention on Human Rights*. So held the House of Lords in *Austin (FC) & another v Commissioner of Police of the Metropolis* ([2009] UKHL 5), where the appellant argued that she had been deprived of her liberty contrary to article 5 of the ECHR during a demonstration in Oxford Circus in London when the police enclosed a large number of people within a police cordon for a number of hours.

The Law Lords were sensitive to the fact that, if the applicant's claim was successful, it could severely restrict the actions of police during demonstrations to prevent injury or criminal damage. With this in mind, the House of Lords held that crowd-control measures adopted by the police in order to prevent a breach of the peace were not in violation of the right to liberty as long as the measures were not arbitrary, were resorted to in good faith, were proportionate, and lasted no longer than were necessary in the circumstances. However, the route by which the Law Lords came to this decision was a circuitous one and demonstrated the strength of the right to liberty and the protection against arbitrary detention under the ECHR.

The right to liberty

The right to liberty is a fundamental right under the ECHR as, without liberty, it is difficult to enjoy the other rights guaranteed by the ECHR. The key purpose of the right is to prevent arbitrary or unjustified deprivations of liberty. The starting point for any assessment of whether there has been a violation of this right is the proposition that a person should be free. The right is considered to be an absolute one, and the ECHR provides that no-one shall be deprived of this right, save in a limited set of circumstances set out in article 5(1)(a-f) and in accordance with a procedure prescribed by law.

Crowd control

In determining the applicability of article 5 to crowd-control measures, the House of Lords drew a distinction between a deprivation of liberty protected by article 5 of the ECHR and a restriction of movement protected by article 2 of protocol 4 of the ECHR (to which Britain is not a party and

ONE TO WATCH: NEW LEGISLATION

Financial Regulator's *Code of Conduct for Lending Institutions*

The Financial Regulator has published two codes of conduct under section 117 of the *Central Bank Act 1989*:

- *Code of Conduct for Business Lending to Small and Medium Enterprises* (SMEs) (with legal effect from 13 March 2009).
- *Code of Conduct on Mortgage Arrears* (legal effect from 27 February 2009).

The codes build on existing codes in the area and will be particularly useful in difficult economic times, when both small businesses and consumers are facing increasing problems in meeting their financial responsibilities.

Business lending to SMEs

The code applies to all business lending by regulated entities to SMEs. The code does not apply to credit unions.

Business lending includes overdrafts, loans, term loans, leasing, hire purchase and invoice discounting.

The code will not apply to lending to other financial institutions; syndicated, club or multi-lender transactions; or special purpose vehicles established for the purposes of a particular transaction.

Applications for credit

A regulated entity must:

- Consider an application on its own merit,
- Inform borrowers how long the process is likely to take,
- Maintain records of all applications,
- Have appropriate procedures in place to assess a loan application, and
- Where the application is approved, provide the borrower with confirmation of credit facilities granted and the terms and conditions, including those regarding default.

Security

A regulated entity must:

- Not impose unreasonable collateral requirements for providing credit facilities,
- Not impose unreasonable personal guarantee requirements,
- Explain clearly the possible implications for the guarantor of giving such collateral or personal guarantees,
- Ensure any enforcement of a personal guarantee over a principal private residence is in accordance with the *Code of Conduct on Mortgage Arrears*,
- Promptly return any security when all facilities have been repaid.

Declining/ withdrawing credit

A regulated entity must:

- Have procedures in place for handling arrears,
- Give the borrower reasonable time to resolve an arrears problem,
- Endeavour to agree an approach that will assist the borrower to resolve the problem,
- Advise the borrower of any possible impact of default on the other accounts of the borrower.

Complaints

Where a complaint is made and

human rights watch

the right to liberty

which is not, therefore, binding on Britain). Article 2 of protocol 4 provides for a qualified right to liberty of movement that can be restricted in the interests of public safety or to ensure the maintenance of public order.

The question that therefore arose for consideration was whether the actions of the police in this case were merely a restriction on the movement of the appellant or whether they amounted to a deprivation of liberty. The House of Lords held that whether there is a deprivation of liberty – as opposed to a restriction on movement – is a matter of degree and intensity. Account must be taken on a whole range of factors, including the specific situation of the individual and the context in which the restriction occurs. The House of Lords also held that it was helpful to have regard to the core or paradigm case of a person who is closely confined in a prison cell and to compare this with the case in question.

British police engaging in their own characteristic methods of crowd control

Another factor that the Law Lords considered relevant was the purpose of the restriction or the deprivation. It was considered that a balance should be struck between what the restriction/deprivation sought to achieve and the interests of the individual. The court referred to a number of cases where the European Court of Human Rights had utilised this principle of balance in deciding whether a case fell within the ambit of a fundamental right. Actions such as police questioning, humanitarian interventions, and the protection of the individual have all been balanced against the fundamental right of liberty to hold that the actions in each case did not fall within the ambit of article 5(1).

has not been resolved within five business days, the regulated entity must have in place a written procedure that ensures, at a minimum, that the regulated entity will:

- Acknowledge the complaint within five business days of receipt,
- Advise the complainant of the name of their point of contact within the organisation,
- Provide a regular update of the progress of the investigation,
- Attempt to investigate and resolve a complaint within 40 business days and, where it goes beyond this time, to inform the complainant of the anticipated timeframe for resolution,
- Advise, within five business days of the completion of the investigation, of the outcome and explain the terms of any offer or settlement being made.

Provision of information

A regulated entity must:

- Ensure all information provided is clear and comprehensible,
- Provide a fair and balanced description of the credit facilities being offered,
- Inform the borrower in advance of any changes to the terms and conditions of the credit facilities,
- Advise a borrower that the debt may be passed to another organisation or debt collection agency or that the debt may be sold on,
- Explain the basis on which interest is calculated,
- Notify borrowers promptly in relation to change in the interest margin,
- Advertise a general change in interest rates, and
- Issue regular statements to the borrower clearly displaying the interest rate applicable.

Code of Conduct on Mortgage Arrears

The code applies to the mortgage lending activities of all regulated entities operating in the state to consumers in respect of their principal private residence in Ireland.

Where a mortgage arrears problem develops, lenders must communicate promptly with the borrower, establish why the repayment schedule has not been adhered to, and establish how the situation should be rectified.

Where this action is unsuccessful, the lender must continue to make contact with the borrower and develop a plan for clearing the mortgage arrears that is consistent with the interests of both parties, taking into consideration the borrower's repayment capacity, previous payment history and any equity remaining in the property.

Where a third repayment is missed, the lender may issue a formal demand for either the full amount or for possession of the property and must advise the borrower in writing of the total amount of arrears, any excess interest and the conditions of charging for that interest, and the consequences of failing to respond, together with an estimate of the costs to the borrower of such proceedings.

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The House of Lords held that the more intensive the measure and the longer the period it is kept in force, the greater will be the need for it to be justified by reference to the purpose of the restriction if it is not to fall within the ambit of article 5(1). The House of Lords relied on the fact that, if the measure were not taken, the lives of people affected by mob violence might be at risk and this would be contrary to article 2 of the ECHR. Therefore, this case was clearly one where a fair balance must be struck if these competing fundamental rights were to be reconciled with each other.

Arbitrary deprivation

The House of Lords recognised the potential problems that might arise should the court find that crowd-control measures, such as those adopted in this case, fell within article 5. The respondent would have to show that the measures were justified by reference to the limited set of circumstances provided for in article 5(1) (a-f). The Law Lords noted that this would indeed be an unfortunate occurrence, as these limitations were not designed with such measures in mind. In practical terms, it would mean that, in every case, "the police would have to identify each and every individual in the crowd and determine whether it was necessary in his particular case for his liberty to be restricted". Naturally, in almost every case, this would be an "impossible exercise – especially in an emergency, when measures of crowd control were most needed to preserve life and limb and avoid serious damage to property".

Therefore, in order for such measures to avoid being prohibited by the convention altogether, certain conditions would have to be met. The measures taken must not be arbitrary. This meant that such measures must be resorted to in good faith, must be proportionate, and should not be enforced for longer than was reasonably necessary. The Law Lords considered that the measures taken in this case were imposed purely for crowd-control purposes, to protect people and property from injury, were necessary (as many of the demonstrators were bent on violence and impeding the police), and lasted for as short a time as possible. Therefore, article 5 was not engaged.

Effect of the decision in Ireland

The Lords' decision in this case was a pragmatic one, based on the importance of maintaining public order in cases of demonstrations where danger to life and property was threatened. Due to the fact that Britain is not a party to protocol 4, the possibility of utilising and basing the decision on the public-order justification under article 2 of that protocol did not arise. Therefore, the decision had to be based upon the existing interpretations of article 5 of the ECHR.

Should a similar situation arise in Ireland, however, a decision based on article 2 of protocol 4 might be possible should the actions fall within the definition of restriction of movement as interpreted by the European Court of Human Rights. In such cases, the actions of the police would more readily fall within the public-order justification allowed for under the protocol.

One of the most important principles to be gleaned from this case is the importance attached to the right to liberty under the convention. It also highlights the benefit of becoming a party to the optional protocols under the ECHR, as they provide a much wider range of rights and associated interpretations from the European Court of Human Rights to guide national courts in their assessment of state action. G

Elaine Dewhurst is the Law Society's parliamentary and law reform executive.

Where the arrears situation persists, the lender may reserve the right to enforce the mortgage agreement. However, it must wait at least six months from the time arrears first arise before applying to the courts to commence enforcement of any legal action.

The lender must notify the borrower when it commences enforcement proceedings.

Addressing a mortgage arrears problem

The lender must:

- Address each arrears situation on its merits.
- Take into consideration the borrower's overall indebtedness.
- Explore repayment measures with the borrower, such as:
  - changing the monthly repayment amount,
  - deferring repayment for a short period,
  - extending the term of the mortgage, and
  - capitalising the arrears and interest.
- Provide the borrower with a clear explanation of the alternative repayment arrangement that is being agreed.
- Continue to monitor the repayment arrangement.
- Advise the borrower that it is in his/her own interests to ensure that his/her income is being maximised and that a budgeted approach to expenditure is maintained. Where circumstances warrant it, the lender must refer the borrower to his/her local Money Advice and Budgeting Service (MABS).
- Liaise with a third party nominated by the borrower at the request and written consent of the borrower.
- Make the borrower aware of other options, such as trading down, voluntary sale or alternative refinancing.

Repossession

Repossession should not be sought until every reasonable effort has been made to agree an alternative repayment schedule with the borrower, except in circumstances where the borrower is deliberately not engaging with the lender.

Repossession may only come about by voluntary agreement with the lender, through abandonment of the property by the borrower without notifying the lender, or by court order.

Even where legal action is being taken to obtain an order for repossession, the lender must maintain contact with the borrower and, if agreement can be reached, the lender must enter into repayment arrangements and put a hold on proceedings in the event of agreed regular repayments being maintained.

The lender must inform the borrower that, irrespective of how the property is repossessed and disposed of, the borrower will remain liable for the outstanding debt, including any accrued interest and other charges.

The codes can be downloaded from www.financialregulator.ie. G

Elaine Dewhurst is the Law Society's parliamentary and law reform executive.

Law must control immense

The *Today with Pat Kenny* radio show recently aired a lively discussion on the topic of 'Lawyers as censors'. Journalist Justine McCarthy defended the main premise of her *Village* magazine article, while director general Ken Murphy spoke in defence of lawyers

"I am talking about the complicity by powerful lawyers with their powerful clients to subvert justice," was the highlighted quote in journalist Justine McCarthy's article in the most recent issue of *Village* magazine.

'Lawyers as censors' was the headline, and the article was illustrated by a cartoon of a shark in a suit carrying a briefcase and showing a mouth full of razor-sharp teeth.

The *Today with Pat Kenny* show emails me a copy of the article and asks if I want an opportunity to respond on behalf of the legal profession, as Pat is planning to give Justine a very substantial audience for her expressed views about the actions of lawyers as a "sort of 'censorship-by-bullying' that eats away at the very pillars of a healthy society – truth and accountability. That it masquerades as respect for the law makes it twice as disgusting."

"Yes," I tell the researcher. "I certainly want to respond to that."

The article is completely one-sided and this is a debate – a perennial debate – that has two sides.

Pat Kenny begins by asking if various scandals, in the country's banks, for example, had remained hidden for so long "because journalists are being muzzled by lawyers on behalf of their wealthy clients". He asks: "Are lawyers in effect new modern-day censors, or are they just protecting their client's good name?"

Justine McCarthy begins by acknowledging that there are plenty of good lawyers but complains of the culture whereby some solicitors will issue a threatening letter, often headed 'without prejudice', on behalf of wealthy businessmen to prevent truthful stories being published. "Even if you are right and you know you are 100% right, you cannot afford to go into court and prove you are right because these people have so much money. It is a suppression of the truth," she complains.

She instances a number of cases in which she says the public interest in knowing the truth has been suppressed by 'gagging writs', or what Pat Kenny calls "legal bullying".

> ***"The law of defamation is society's considered response to two competing interests. The right of free speech on one hand, and the right of the individual to preserve their reputation from unjust attack on the other"***

Lawyer as messenger

When given an opportunity to respond, I acknowledge both a high regard for Justine McCarthy as a journalist and an acceptance that the phenomenon of 'gagging writs' has long existed. However, I believe her argument loses much of its force through exaggeration and a failure to recognise the balancing of two rights, which is inherent in this debate.

I argue: "The law of defamation is society's considered response to two competing interests. The right of free speech on one hand, and the right of the individual to preserve their reputation from unjust attack on the other. Justine, at the end of her article, complains about 'shooting the messenger', namely the journalist. However, I think in her article she is involved in shooting the lawyer as the messenger. It may be that they are representing some powerful individuals, but lawyers act on the instructions of their clients – they don't act autonomously."

Pat Kenny quibbles with this assertion but allows me to continue to make two further points. The first is that lawyers act on both sides. The media organisation, the journalists, the newspaper, the broadcasting organisation – whoever it is – will have their own legal team to advise them on whether something can legally be published or not. The second point, one that most listeners would recognise, is that the power is by no means all on one side here. The media has immense power. The media has the power to destroy overnight somebody's reputation and good name forever.

So if, on the advice of their own legal team, the media organisation and journalist believe that what they are about to publish is true and can be substantiated, then why wouldn't they publish it? But the media has enormous power: "I remember somebody saying once that you shouldn't go to war with somebody who buys ink by the barrel. The media ultimately will have the last word. There is some basis to what Justine is saying here, but I think also that the media have immense power, and there has to be some legal control of it."

Law of defamation

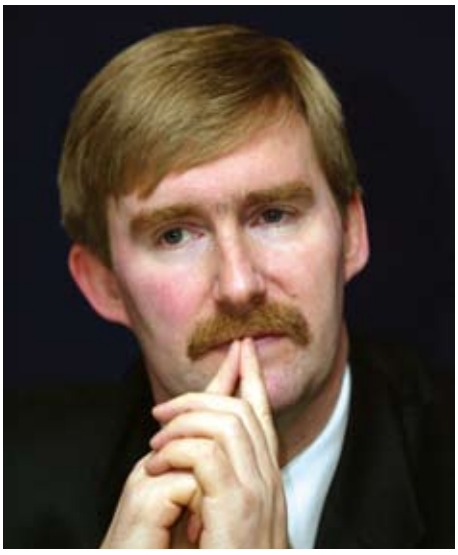
The discussion turns to how the law of defamation might be reformed, and I refer to the Law Reform Commission report produced as far back as 1991 and the bill currently before the Oireachtas, the main thrust of which I would fully support.

viewpoint

power of the media

Justine McCarthy: "lawyers are complicit with their powerful clients to subvert justice"

Pat Kenny: "are lawyers in effect new modern-day censors or just protecting their client's good name?"



Ken Murphy: "the law has to strike a balance. The media has the power to defame and destroy people"

Although Justine repeats her view that the use by lawyers of the current law and system "is causing censorship on a very serious scale and there has to be some way of getting around it", I point to the fact that juries nowadays are much less inclined to automatically find against the media. Fewer defamation cases are succeeding where they go to trial. Even when issues go before judges in applications for prepublication injunctions, the courts now have, on balance, decided in many cases to allow publication to take place.

Pat Kenny refers to the massive amount of time that Charlie Bird and George Lee of RTÉ had to devote to preparing for court hearings on 'the National Irish Bank saga', but I point out that, ultimately, publication took place in that case, action was brought and failed, and George Lee and Charlie Bird were fully vindicated. However, I add for balance, there are also cases where false publication occurs and where the legal work is very necessary in order to vindicate the good name of the defamed person.

> ***"I remember somebody saying once you shouldn't go to war with somebody who buys ink by the barrel. The media ultimately will have the last word"***

The on-air exchange, which lasts for half an hour, focuses on another aspect of litigation reform. However, although I acknowledge that what Justine is saying about there being a risk of truth being suppressed if the media succumbs to threats and gagging writs, the power is by no means all on one side, as she has suggested.

On the contrary, the law has to strike a balance. "The media has the power to defame and destroy people. There is an adage that everyone understands that 'prevention is better than cure'. It is better that defamatory statements are prevented in advance of publication rather than trying to repair the damage later."

So, in the end, a balanced and civilised exchange of views on a complex subject. Next time though, no cartoons of lawyers as sharks please! G

BANK

There is no avoiding the current media attention in relation to the conduct of certain bank officials. However, the question that arises is whether any legal implications arise from that conduct and, if so, what? Shelley Horan closes her accounts

This article looks at the potential offences that may arise, and the civil and criminal sanctions that may be imposed, for any breach by a bank official. Further considered are the powers of the Office of the Director of Corporate Enforcement and the Irish Financial Services Authority to inspect and sanction bankers in default.

Directors' loans

There is no doubt that directors' loans have been the source of great controversy and attention in recent times. Generally, loans to directors are a breach of s31 of the *Companies Act 1990*. However, two exceptions to that section may apply. First, s32(1) provides an exception where the loan does not exceed 10% of a company's relevant assets. Undoubtedly, given that banks have vast assets, it would be unlikely that a loan to a director would exceed 10% of a bank's assets. Secondly, s37 allows loans to directors where those loans are provided in the ordinary course of business and are given on terms no more favourable than they would be to a customer of similar standing. Undoubtedly, banks lend money as part of their business and so s37 would almost certainly apply. However, in order to come within s37, the bank would have to show that it provided the loan to the director on the same terms or using the same collateral as would have been provided to another customer of comparable standing.

Financial assistance

The next matter that has attracted media attention is the provision of loans to a bank's customers for the purchase of its own shares. Section 60 of the *Companies Act 1963* contains the basic prohibition against such conduct. However, exceptions do exist and s60(13) permits the lending of money where it is in the ordinary course of business. This exception would therefore encompass the business of a bank.

Insider dealing/market manipulation

Far-reaching EU legislation has been transposed into Irish law by virtue of the *Investment Funds, Companies and Miscellaneous Provisions Act 2005* and the *Market Abuse (Directive 2003/6/EC) Regulations 2005*. The offence of insider dealing prohibits the

MAIN POINTS

- Legal implications of bankers' conduct
- Directors' loans
- Financial assistance and insider dealing
- Legislative framework

JOB

provision of undisclosed information relating to financial instruments that is used to purchase or dispose of shares. It is conceivable that, where a banker invites certain bank customers to purchase its shares on an off-market basis, based on information not available in the public domain, that both parties may be guilty of insider dealing. The new offence of market manipulation is broadly defined and would capture situations where a person fails to disclose key information on its balance sheets or where that person has provided false or misleading signals to the market (such as transferring large deposits from one financial institution to another at financial year-end in order to artificially enhance the perceived financial health of the receiving institution). The penalties for breaches are extremely stringent. A person found guilty of an offence could be liable to ten years' imprisonment and/or a fine of €10,000,000. Further, persons guilty of either offence could be made civilly liable and be required to compensate affected persons or to account to them for any profits. It is worth further noting that the provision by a bank of undisclosed information in relation to a bank's shares to certain bank customers could give rise to a breach of the *Prospectus (Directive 2003/71/EC) Regulations 2005*.

Proper books of account

Companies are required, under s202 of the *Companies Act 1990*, to maintain proper books of account, and failures to disclose required information or the publication of false information would give rise to an offence. A breach could be punishable by unlimited liability on a director in default, and the commission of two or more offences could give rise to disqualification. However, a defence may arise where a competent person, such as an auditor, was charged with looking after the bank's books. It is worth also noting that offences also arise where a director provides false information or where a vital document is destroyed or mutilated under ss242 and 243 of the *Companies Act 1990*.

Deception and conspiracy

There are a number of express criminal offences that could also apply to a banking official in default. The *Criminal Justice (Theft and Fraud) Offences Act 2001* expressly includes offences by bodies corporate and their officers. The first offence is that of deception under s6 of the act, which involves providing false information with the intention of making a profit or causing a loss to another by inducing that person to do or refrain from doing an act. For example, a banking official who manipulates a bank's affairs and balance sheets, so that individuals are induced to purchase shares in the bank believing it to be in a healthier financial state than it is, could be guilty of an offence. A person guilty of deception could be liable to five years in prison and/or a fine.

The second relevant offence is that of false accounting under s10, which prohibits a person from acting dishonestly and with the intention of making a profit by providing false, misleading or deceptive accounting documentation. Undoubtedly, manipulation of a balance sheet could give rise to false accounting, and a person found guilty of an offence could be liable to a maximum of ten years in prison and/or to a fine.

Moreover, the common law offence of criminal conspiracy could arise where two or more financial institutions conspired together to commit an unlawful act, such as false accounting. For example, where two banks agree to temporarily transfer money from one bank to another in order to misrepresent the health of the receiving bank, criminal conspiracy to manipulate the market could arise. Further, where a person agrees with an officer of a bank to receive undisclosed information and purchase that bank's shares on the basis of this information, an offence of conspiracy to commit insider dealing could be made out. Ordinarily, a person guilty of conspiracy is liable to the maximum penalty for the commission of the unlawful act itself.

Criminal fraudulent trading

If a director is carrying on a business activity with the deliberate intent to defraud its creditors, he may be found guilty of criminal fraudulent trading under s297 of the *Companies Act 1963*, as amended. For example, a director guilty of the criminal offences of false accounting and/or deception could be liable to prosecution. A maximum prison sentence of seven years and/or a fine could be imposed for fraudulent trading.

It is worth noting that the proofs required for criminal offences at common law and pursuant to criminal statutes are significantly stricter than those provided for under the *Companies Acts*. In criminal

LOOK IT UP

Cases:

- *Countyglen plc v Carway* [1998] 2 IR 540
- *Fyffes v DCC* [2007] IESC 36
- *Re National Irish Bank Ltd (No 1)* [1998] 2 IR 540
- *Re National Irish Bank Ltd* [1999] 3 IR 145
- *Re National Irish Bank Ltd & Anor* [1999] 3 IR 190
- *Re National Irish Bank Ltd & Anor* [2006] ILRM 263

Legislation:

- *Central Bank and Financial Services Authority of Ireland Acts 2003, 2004*
- *Central Bank Act 1942*
- *Companies Acts 1963, 1990*
- *Company Law Enforcement Act 2001*
- *Criminal Justice (Theft and Fraud) Offences Act 2001*
- *Investment Funds, Companies and Miscellaneous Provisions Act 2005*
- *Market Abuse (Directive 2003/6/EC) Regulations 2005*
- *Prospectus (Directive 2003/71/EC) Regulations 2005*

Some people pay for this sort of thing. And some people don't pay at all...

proceedings, it would fall on the DPP to prove that the bank official in question committed the breach with the requisite intention to commit the unlawful act. By contrast, a presumption exists in the *Companies Acts* whereby a director is presumed to be in default unless he can prove otherwise, rendering offences under these acts much easier to prosecute.

Corporate enforcement

The Office of the Director of Corporate Enforcement (ODCE) was set up under the *Company Law Enforcement Act 2001* and the Director of Corporate Enforcement (DCE) has been given extensive powers to investigate and sanction any breaches of the *Companies Acts*. ODCE is independent in its functions, and members of the gardaí have been seconded to it, many of whom worked in the Garda Bureau of Fraud Investigation. The DCE is empowered to:

- Apply for a court-appointed inspector to investigate the affairs of a bank,
- Apply for a search warrant in the District Court to inspect premises, including a dwelling,
- Appoint an inspector without court involvement where it seeks the identity of persons who are financially interested in a bank, such as shareholders (it is noteworthy that s14 could be invoked to uncover the identities of individuals who were provided with bank loans to purchase a bank's own shares),
- Apply to disqualify a director where the director is guilty of fraud or dishonesty,
- Prosecute summary offences under the *Companies Acts* (it is noteworthy that the only body that can prosecute indictable offences under the *Companies Acts* is the DPP),
- Seek an injunction freezing the assets of a bank, its directors or others, and
- Refer its findings to the DPP and the Garda Bureau of Fraud Investigations.

"It is worth noting that the proofs required for criminal offences at common law and pursuant to criminal statutes are significantly stricter than those provided for under the Companies Acts"

It is worth observing that the appointment of an inspector can have severe consequences for a bank official. An inspector can examine persons on oath. In *Re National Irish Bank Ltd (No 1)*, it was held that even the constitutional rights to silence and privilege against self-incrimination do not affect this right. Further, in *Countyglen plc v Carway*, an inspector's report was held to have presumptive evidentiary effect in civil proceedings.

Financial regulator

The powers of the Irish Financial Services Regulatory Authority (IFSRA) are extensive and can be found in the *Central Bank Act 1942*, as amended. IFSRA can:

- Do anything necessary to perform its functions, such as bringing and defending legal proceedings,
- Hold inquiries where it believes that a financial service provider is guilty of a contravention,
- Summon witnesses and take evidence,
- Abide by the rules of procedural fairness, but it is not bound by the rules of evidence,
- Impose sanctions on bankers, such as monetary penalties.

Crucially, IFSRA has statutory immunity from liability unless bad faith is found to exist. However, an employee of IFSRA may be exposed to the tort of misfeasance in public office, which is not excluded.

Arising from the above, it is clear that there is a myriad of offences that could capture the activities of bankers. Further, it is clear that the regulatory bodies are endowed with extensive and far-reaching powers to investigate and sanction those perceived breaches of the legislation. However, as most of the legislation has yet to be invoked to date, this is, for the most part, territory not yet charted. It remains to be seen how these powers are put into practice and whether they will withstand judicial scrutiny. G

Shelley Horan is a Dublin-based barrister specialising in corporate and commercial law.

FIGHT or flight

In the second part of her two-part article, Deborah Flood looks at the legal recruitment market for newly-qualified solicitors in Australia, China, the Middle East and, strangely enough, Norway

MAIN POINTS

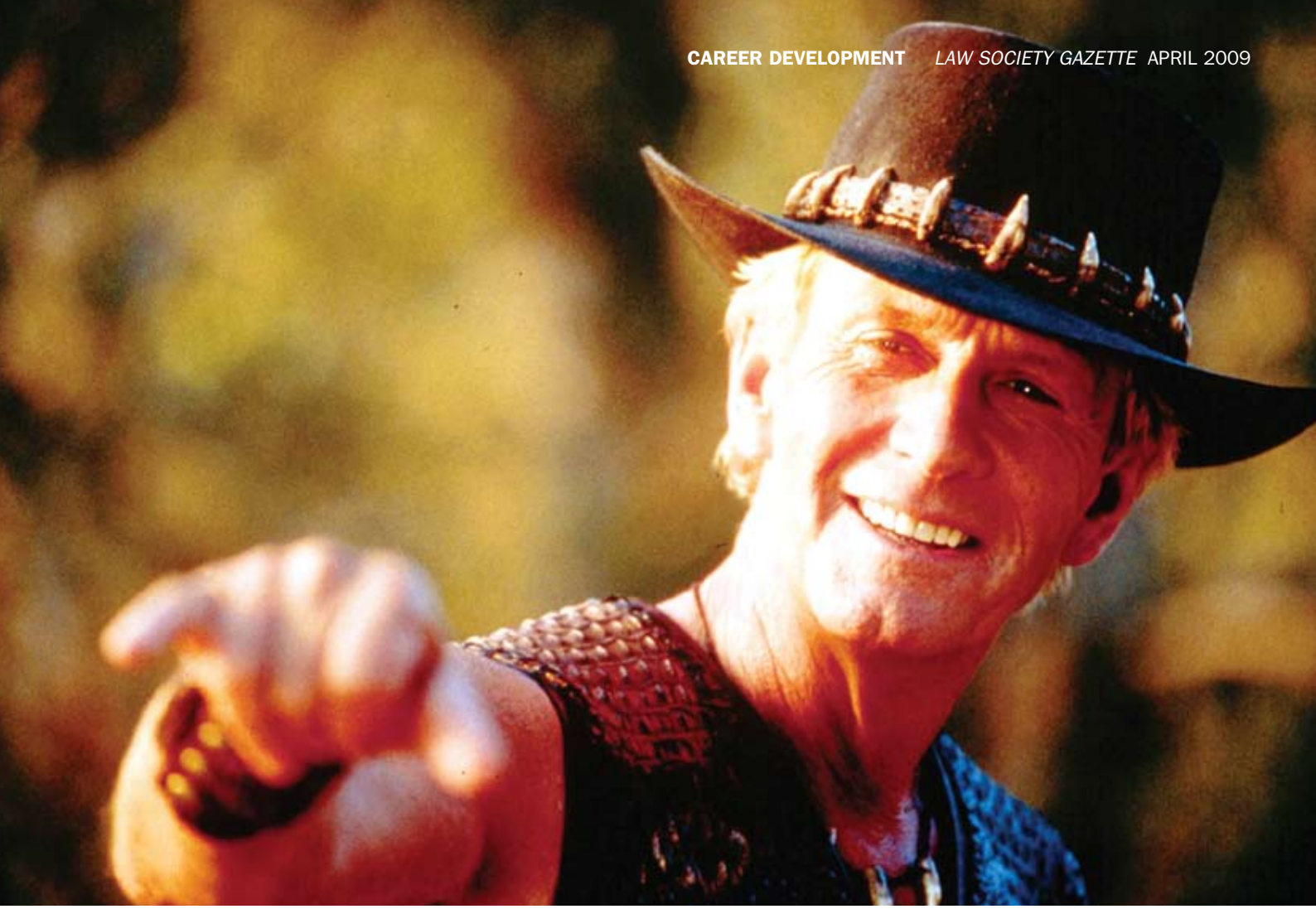
- Captain Cook
- Marco Polo
- Laurence of Arabia
- Santa's grotto

The best advice for those thinking of packing their bags and escaping the doom and gloom is to be well prepared. Remember that you will be competing with indigenous solicitors familiar with domestic law and with contacts already established in the local legal profession. Start the process early by submitting your qualifications to the legal assessment board of your chosen country before you depart. This will allow you time to arrange additional study before you depart, should it be required. The key to making a successful transition is to be realistic about the opportunities available and to try and gain as much experience and knowledge about the legal community in your chosen city or state before you go.

Barrier reef

Reportedly, unemployment among the professional sectors in Australia is significantly lower than in most of Europe. The Australian government predicts that there will be moderate growth for positions for solicitors in the immediate future, and that unemployment in the profession is below average compared with other skilled occupations. As a result, Australia has been drawing hundreds of young professionals from Ireland each month. Although not officially in a recession, jobs are far from plentiful. Realistically though, there do not appear to be many openings for newly-qualified solicitors (NQS) coming from Ireland. "To increase the chances of securing a job, an Irish solicitor would need at least a year of their training in the same practice area and plan to specialise in that area," advises legal recruitment agency Laurence Simons.

Ben Mostafa, an Australian law graduate from the University of New South Wales, advises Irish solicitors to be optimistic but also realistic if they are planning to make the move there. He warns that many firms are laying off junior associates, resulting in many of his fellow graduates finding it difficult to secure training contracts. Nevertheless, Lisa Keohane is an Irish solicitor who has been working in Melbourne in the same firm since she arrived 13 years ago. Her advice for young solicitors is to realise that, although Australia is a common law system, it relies on different case law, legislation, terminology and history. It's not unmanageable to grasp, but some courses in law when you first arrive would enhance your CV and increase your chances of finding employment. It is also worth noting that each state in Australia has different criteria for assessing foreign law qualifications. The Legal Profession Admission Board of New South Wales individually assesses each applicant's qualifications and practical legal experience to determine whether further additional study or practical training is required. An overview of the principles for assessing the qualifications of overseas lawyers can be found on www.lawlink.nsw.gov.au. Legal job listings are available on www.lawsociety.com.au/jobs. Be advised



Crocodile Dundee: great hunting skills are vital, whether tracking down crocs or that elusive job

that the Australian government insists that any person travelling on a year-long visa to Australia will be required to show they have AS$5,000 (c€2,500) before they arrive.

An alternative route is to firstly become admitted to the roll in New Zealand and then apply to be admitted in New South Wales under the Trans-Tasman mutual recognition principles. Applications can be sent to the New Zealand Council of Legal Education for a certificate of completion and a certificate of character. Details and an application form can be downloaded at www.lawsociety.org.nz/home/for_lawyers/regulatory/admissions. It is then necessary to make an application to the New Zealand High Court for admission. However, be advised that foreign applicants normally are required to sit six conversion exams in the foundation areas of law. These exams have been likened to the FE1 exams.

Brian Taggart from Tyrone first made the move to Wellington in New Zealand just over four years ago. With just over a million people, Wellington is similar to Dublin in population and has a close-knit legal community. Brian also found it had a good mix of job opportunities in the public and private sectors. He worked as a commercial lawyer in Wellington for three years and found the experience quite similar to working in a European law firm. He found contract and property law fundamentally different, however.

Brian recommends that newly-qualified solicitors should attend events run by the local law society or young lawyers' committee. He found the Wellington District Young Lawyers' Committee very welcoming and it gave him a head start in making connections in the legal community. Although not immune to the effects of the credit crunch, New Zealand does appear to have escaped 2008 without suffering the same ills as many Western countries. Whether this lasts will undoubtedly depend on the effects of the recession on its neighbour in the coming months.

Brian has now moved to Perth and is finding it difficult to secure employment. The effects of the economic downturn are now visible in Australia, with many employers not interested in sponsoring foreign workers. There is also talk of Australian immigration cutting back on the amount of visas available for skilled workers. The Tyrone man said he may be forced to move back to Wellington if it doesn't pick up.

The great wall

Although Australia and Canada are top of the list of destinations for many NQS, it's actually the non-English speaking and civil law countries that promise the best opportunities for solicitors. The Olympics brought increased prosperity to Beijing and a demand for professionals of all skills and talents. Since then, there has been a slowdown in the recruitment of professionals in all areas. However, solicitors with regional experience and language skills get first

preference. Solicitors from outside China are not permitted to practise Chinese domestic law – that is, attend court, practise litigation, conveyancing, and so on – as litigation and property are specialised areas in Asia and often require regional domestic experience. Instead, foreign solicitors register as foreign attorneys, and this requires a letter of good standing from China's law society. The main areas of practice for foreign solicitors are commercial, corporate, international and business law. Many US and British companies prefer to use law firms that are dually familiar with the law in their home jurisdictions as well as being proficient in practising within Chinese customs and laws. As a result, many international law firms now have offices here.

Sponsorship from a practice in China is required to obtain a visa to work. If you are intending to move to China or any other part of Asia, it is preferable to acquire experience in one of the main areas and start learning the language. Diarmuid O'Brien successfully made the transition to China after completing his apprenticeship at Gore & Grimes Solicitors. Diarmuid enrolled upon an EU/MOFCOM-sponsored programme, which saw part of the programme spent at the Beijing University of Foreign Studies learning Mandarin and business. Subsequently, Diarmuid underwent an internship for three months with Coudert Brothers in Beijing, which was the first international law firm to hold a practising certificate in China. Diarmuid believes there are opportunities available for Irish solicitors, albeit those with a desire to learn a new language, culture, and legislation.

This may be the only euro you'll ever see down under

"You will be competing with indigenous solicitors familiar with domestic law and with contacts already established in the local legal profession"

Hanging gardens

Those who thought the Middle East to be the region of infinite opportunities will be surprised by the reality. Like Ireland, Dubai's economic growth was heavily reliant on real estate and infrastructure and, similar to Ireland, it is currently facing an abrupt downturn in the economy. However, even at its height, Dubai's reputation as a country overflowing with job opportunities and a decadent lifestyle was greatly exaggerated. Recruitment of solicitors has dramatically declined in the past three to six months and now agencies are finding it difficult to find even seasoned lawyers employment in the country.

Realistically, there appear to be no jobs for newly-qualified solicitors in any field at present, and Mark Anderson of Laurence Simons recruitment in Dubai does not recommend any NQS to come out and try their luck. Many of the international firms and large domestic firms within Dubai tend to recruit directly from within their own firms and only recruit outside if they are looking for a lawyer with a specific speciality. Nevertheless, Mark believes the Middle East will recover faster from the current crisis compared with mainland Europe. How fast that recovery happens will ultimately depend on the level of global investment and market confidence.

In the meantime, any NQS hoping to take advantage of this when it does happen should attempt to gain experience in energy, projects or construction law.

Jingle bells

Amazingly, Norway is the only Scandinavian country expected to enjoy positive economic growth this year. With unemployment at 3.3%, it also boasts one of the lowest unemployment levels in the OECD. There appears to be a steady job market for advocates (solicitors), with the law society in Norway encouraging solicitors to come to Norway for employment. Even so, there are obvious obstacles facing Irish solicitors thinking of making

the move to Norway. Firstly, it is a civil law jurisdiction and there would be differences in legal competency to overcome. A further disadvantage is the preference for advocates to be bilingual. Still, if you're not afraid of a challenge and don't mind the two months of darkness each year, more information can be found by emailing dnapost@jus.no.

John Bull

Property law in England has recently imploded, with very few vacancies in private practice. Nevertheless, there are currently 285 Irish-qualified solicitors working successfully in England and Wales. In total, over a fifth of all solicitors currently admitted on the roll are trained in another jurisdiction. The Solicitors' Regulatory Authority regulates admission onto the roll in England and Wales. The regulations are currently under reform and new measures are at the consultation stage. The new scheme will replace the current *Qualified Lawyers' Transfer Regulations*. Under the current regulations, applicants must satisfy two requirements before being admitted onto the roll. Applicants must first pass a test in a number of subject areas and, secondly, satisfy a two-year legal experience requirement. However, there is the opportunity for qualified Irish solicitors to practise under their own title and become registered as foreign or European lawyers. Under this system, supervision by an admitted solicitor is required in specific areas such as conveyancing, probate and litigation. For further information on this and to view the proposed regulations, please see www.sra.org.uk/solicitors/qltt.page.

Green, green grass

A certainty is that NQS will have to make themselves available for employment at rates of pay that, in the recent times of prosperity, would have been considered unacceptable.

Even though NQS are bearing much of the brunt in the current economic climate, they appear to be in a better position than their older colleagues. "Their recent training and study allow them to be more flexible and not tied to the one area, unlike their older colleagues, who may have practised in the same area for decades," notes Law Society director general Ken Murphy.

Norway gets the seal of approval

Although there is no clear answer to the problems facing NQS, it appears that flexibility and creativity could be the solutions to enduring the current situation. Perseverance is vital! Whether an NQS decides to stay or go, they are facing an uncertain situation. It's only with skill, determination and optimism that NQS will be able to forge a career in these turbulent times. Even though it's an undesirable situation, it's one that many other professions around the world are also facing. G

Deborah Flood has a journalism degree from DIT and began her traineeship with Partners at Law in 2006. She began a secondment last summer, working for federal judges in Los Angeles.

ROAD TO

Practitioners must not underestimate the complexity of road traffic law, and those who take their knowledge of the area for granted and fail to keep up with recent developments may leave their clients exposed. Vincent Deane explores life in the fast lane

Robert Pierse, solicitor, commentator and author, recently criticised the lack of clarity in Irish road traffic law, which, he said, is in crisis. Practitioners are faced with a hazardous undertaking when giving advice on road traffic matters due to the sheer volume of legislation – acts, amending acts, statutory instruments and Superior Court case law (particularly for drink-driving offences). Solicitors will often embark on in-depth research into exotic areas of law and unusual criminal offences. However, there is a great temptation to rely on *pro forma* advices and to give in to a temptation that the law has not changed when it comes to more mundane road traffic offences. The following examples will illustrate why this approach is ill advised and sometimes perilous.

Dangerous driving

Section 6 of the *Road Traffic Act 2006* amended section 26 of the *Road Traffic Act 1994*, which itself was a substitution for section 26 of 1961 act (confused yet?). Section 6(1)(d) states:

"6 – (1) Section 26 (inserted by section 26 of the act of 1994) of the principal act is amended –
(d) in subsection (5)(b), by deleting subparagraph (i)."

This section is an example of an obscure piece of legislation, often overlooked by solicitors, which has important implications for a client charged with dangerous driving.

Section 6 abolishes judicial discretion to forego imposing a consequential disqualification, on a first conviction for dangerous driving, where good reason exists. Disqualification is now mandatory on conviction for dangerous driving.

This is a fundamental change in the law and, although the act is almost three years old, many practitioners only become aware of it when they are in court, representing a client charged with dangerous driving.

Insurance

One of the more confusing areas of road traffic law relates to the imposition of penalty points. The general rule is that, if a judge decides to impose a disqualification for a penalty point offence, then points do not accrue in respect of that charge. The reason for this is that, where a person is disqualified by way of an ancillary disqualification under section 27 of the *Road Traffic Act 1961*, penalty points will not apply due to the saving provision in section 2(8) of the *Road Traffic Act 2002*.

The disqualification that follows from a breach of section 56 of the *Road Traffic Act 1961* (no insurance) is consequential. While the court has a discretion not to impose a disqualification on a first offence, any disqualification imposed for no insurance is consequential rather than ancillary. The relevant provision is section 26(5) of the *Road Traffic Act 1961* as substituted by section 26 of the *Road Traffic Act 1994*.

What we can say with certainty is that the provisions of section 2(8) of the *Road Traffic Act 2002* do not apply to consequential disqualifications, of which no insurance is the most common. While it is the most common, it is not the only offence that does not have the protection of section 2(8). Another example is dangerous parking, which may result in mandatory disqualification for a second offence. The relevant statutory provision in this instance is section 26 of the *Road Traffic Act 1994* and the second schedule of that act.

Thus, before advising a client charged with

MAIN POINTS

- Dangerous driving
- Insurance and penalty points
- Drink-driving case law
- Time in custody

NOWHERE

Some areas of road traffic law are more complex than others

road traffic offences, practitioners should carefully check the legislation that applies to each offence to determine what type of disqualification may arise and advise accordingly.

Drink driving

The lack of clarity referred to by Mr Pierse is vividly demonstrated in drink-driving case law. Since 2003, it has been erroneously believed that gardaí must account in evidence for every minute the accused spent in custody, to prove that there was no delay in processing the accused in garda custody. This myth arose from two 2003 Supreme Court cases: *DPP v McNiece* and *DPP v Finn*.

The main point in *Finn* flowed from the evidence of the prosecuting garda, who said that he detained the accused in a room for 20 minutes before making the statutory requirement to provide a sample. He did not explain that this was for the purpose of the required 20-minute observation period. The garda's justification was simply that he was following guidelines. Hardiman J said this was "not a case of delay *simpliciter*", while Murray J (as he was then) described it as "a prescribed and conscious prolongation of an arrested person's period of detention in all such cases". Both judges were in agreement that the detention had not been justified and was thus unlawful at the time when the sample was provided.

The stark judgment in the *Finn* case was qualified

Talk about penalty points! But bypassing your solicitor may not be the prudent course of action

by the Supreme Court in *DPP v McNiece*. The prosecution sought to rectify its shortcomings in *Finn* by calling a witness from the Medical Bureau of Road Safety and the garda who operated the intoxilyser to give evidence to justify the 20-minute detention period. The intoxilyser garda gave evidence that he had learned, through his training with the Medical Bureau, that the 20-minute observation period was required best practice to ensure a valid and reliable sample at the earliest opportunity – that is, on the defendant's first attempt to give a sample. The Supreme Court held that the garda's evidence was sufficient to justify the 20-minute detention period.

Time in custody

The proposition that the prosecution should account for every minute of an accused person's time in custody was first referred to in passing by Hardiman J in *DPP v Finn*: "…this case, accordingly, does not raise such questions as whether every interval elapsing before some statutory purpose of detention is achieved requires positive justification, or whether some intervals are so short as not to call for positive justification even when challenged. I would reserve my position on that issue until it arises in an individual case."

This raised a question that appeared to have two possible, but conflicting, answers. From the defence perspective, it was argued that, if the prosecution were explaining the 20 minutes in *McNiece*, the remainder of the detention should also be explained. The prosecution argued that *McNiece* and *Finn* required only the explanation of a delay where there was a policy of a deliberate and conscious decision to delay processing an accused in every case without explanation. The reality, in my experience, was that district judges almost unanimously followed the defence argument. This in turn resulted in the prosecution leading evidence of the entire detention and not just established proofs. It wasn't long before clarification was sought in the High Court.

"Since 2003, it has been erroneously believed that gardaí must account in evidence for every minute the accused spent in custody"

The first case to reach the High Court was *DPP v Robbie Fox*. In an *ex tempore* judgment, Abbot J held that a seven-minute detention without an explanation was unjustified. Indeed, he felt anything over five minutes would require explanation. The DPP immediately appealed the decision to the Supreme Court (more about that shortly). However, pending the appeal, the prosecution was required to explain every twist and turn that may have arisen from a momentary lapse at the garda station. Failure to do so often resulted in dismissal without the defendant having to show any resulting prejudice.

The second case on the point is *DPP v Tim O'Connor*. Quirke J held that "the legality of the detention of an accused person must, in every case, be decided on its own particular facts. On the facts of this case, dismissal of the charge against the respondent on

that ground would only have been justified if either the legality of his detention had been challenged on behalf of the respondent, or evidence adduced caused sufficient concern for the learned district judge to commence a focused inquiry into the legality of the respondent's detention and directed towards reasonableness."

On the facts of the case, seven unexplained minutes did not constitute sufficient delay for a dismissal. The *O'Connor* case reduced the burden on the prosecution slightly, by requiring the defence to put the question of detention to prosecution witnesses. It was no longer sufficient to sit there and hope that the garda would not remember every minute from the night in question and then simply ask for a dismissal in line with the *Fox* case. However, the reality of prosecuting cases did not change. If prosecution witnesses did not explain each period of detention in evidence-in-chief, they would be required to justify every minute of the detention, in detail, during cross-examination.

In the case of *DPP v Roland Roper*, the prosecution were unable to account for at least 11 minutes of the detention (up to 17 minutes on one view of the facts). Birmingham J referred to the *O'Connor* and *Fox* cases. However, he also referred to *DPP v Finn*, where Murray CJ had stated (*obiter*) that he would be disinclined to consider a 20-minute delay *simpliciter* enough to make a lawful detention unlawful. Birmingham J held that the district judge had been wrong to dismiss the charge on the grounds that the accused had not been processed under custody regulations without unnecessary delay.

Incorrect view of the law

The question raised by Hardiman J in 2003 seems to have been resolved by the Supreme Court in *DPP v Robbie Fox*. Murray CJ, sitting with Hardiman J and Denham J, reversed the High Court judgment of Abbot J. It was held that the unexplained seven minutes did not make an otherwise lawful detention unlawful. The systematic delay of *Finn* and *McNiece* was distinguished from delay *simpliciter*.

While this matter has now been clarified, it demonstrates that for five years many – if not most – drink-driving cases were contested on what is now clearly established to have been an incorrect view of the law.

In conclusion, practitioners must not underestimate the complexity of road traffic law. The legislation is voluminous and there is a myriad of case law addressing discrete but important points. Practitioners who take their knowledge of the area for granted and fail to keep up to date with recent developments may leave their clients exposed to the unexpected consequences. My advice is assume nothing – forewarned is forearmed. G

Vincent Deane is a senior prosecution solicitor in the Office of the Director of Public Prosecutions.

LOOK IT UP

Cases:

- *DPP v McNiece* (Supreme Court, 14 July 2003)
- *DPP v Finn* (Supreme Court, 14 February 2003)
- *DPP v Robbie Fox* (High Court, 25 July 2005; Supreme Court, 22 July 2008)
- *DPP v Tim O'Connor* (High Court, 14 December 2005)
- *DPP v Roland Roper* (High Court, 30 July 2007)

Legislation:

- *Road Traffic Acts 1961, 1994, 2002, 2006*

LONG

Open and transparent financial disclosure is vital to building trust between parties and advisers in family law ancillary relief cases, and will determine the ease with which a settlement can be reached, says Ann FitzGerald

Full financial disclosure by both sides in family law ancillary relief cases is central to enable the parties reach a consensual negotiated settlement or to be ready for a court hearing.

It is abundantly clear that, in order to advise a client on what may constitute 'proper provision' for a spouse in a judicial separation or divorce case, the extent of the assets and liabilities must be centre stage – 'the size of the pot' – and until this has been determined with some certainty, it is impossible to advise a client on what would constitute a reasonable outcome.

Double entry

The *Circuit Court (Case Progression in Family Law Proceedings) Rules* (SI 358/2008) came into force as of 1 October 2008 and apply to almost all family law proceedings issued after 1 October 2008. Motions for directions and certificates of readiness are likely to become obsolete, and substantial powers have been granted to the county registrar to case manage and speed up the process between date of issue and date of hearing.

The purpose of 'case progression', according to sub-rule 38(3) of rule 4, is "to ensure that proceedings are prepared for trial in a manner which is just, expeditious and likely to minimise the costs of the proceedings and that the time and other resources of the court are employed optimally". The new rules are very extensive and introduce a whole new layer of litigation, designed to filter and manage proceedings in an effort to make better use of court time. Whether the rules will have the desired progressive effect of reducing delays and cost remains to be seen, and it will probably take at least 12 months before any clear trends emerge.

It is hoped that the new rules may reduce delays where discovery requests and orders for discovery are not honoured, in that the county registrar has been granted new powers (by virtue of the amended sub-rule 37(21) of rule 4). Firstly, the registrar has now the power to make an order for costs (under rule 4(38), paragraphs 21 and 22); and secondly (under sub-rule 38, paragraph 17), where the county registrar has concluded that there has been undue delay or default in complying with any order made or direction given, the registrar may list the case before the court and furnish a report to the court setting out the delay or the default concerned.

Bottom line

In family law litigation, valuation of assets is a crucial part of the dispute between the parties, and a large amount of court time can be taken up in hearing

You'll need to be able to know your assets from your elbow

DIVISION

evidence from the respective valuers. Time will tell whether this will be reduced with the advent of the *Case Progression Rules 2008* at Circuit Court level. This development is very welcome to busy practitioners. The expectation and hope is that it will have the effect of identifying and narrowing issues at an early stage, pre-trial. Up to now, certificates of readiness have been an imperfect means of doing so and frequently allowed a party to delay compliance, thereby forcing the other side to go down the slow and expensive route of a motion for directions to the court.

As the duty of the court is to ascertain the value of the assets at the date of the trial and thereafter decide what provision should be made out of these assets for the respective spouses, it is absolutely essential that the court be in a position to form a view as to value. Disputes in relation to the value of assets generally centre around property valuations and the valuations of shares in private companies.

Valuations should be updated right up to trial date although, at present, evidence of valuers has largely become surplus to requirements when no buyers can be found at any price. Difficult challenges now arise in dealing with valuations in a falling market. There have already been cases of settlements being revisited where properties were to be transferred from one spouse to another at a certain value, and the value has dropped considerably prior to implementation (see also 'Go your own way' in last month's *Gazette*, p22).

MAIN POINTS

- **'Proper provision' for a spouse in a judicial separation or divorce case**
- **Extent of the assets and liabilities**
- ***Circuit Court (Case Progression in Family Law Proceedings) Rules***

LOOK IT UP

Cases:

- *C v C* (2005 IEHC 276, Mr Justice O'Higgins)
- *F v F* (unreported, June 2002,
- *MK v JPK* (9 February 2006, Supreme Court, Mr Justice McCracken)
- *P v P* (2005, Mr Justice McKechnie, *ex tempore*)
- *SN v FN* (unreported, 8 December 2003, Mr Justice Abbott)
- *T v T* (2002 3IR 334 at 383, Supreme Court, Mrs Justice Denham)

Legislation:

- *Circuit Court (Case Progression in Family Law Proceedings) Rules* (SI 358/2008)
- *Family Law Act 1995*, section 18
- *Family Law (Divorce) Act 1996*, section 22

In the pre-recession case of *P v P*, a Cork couple had settled their dispute in relation to the family home, which was to be sold based on a value of €Y and the husband to receive €X from the proceeds of the sale. In the event, the property sold for a multiple of €Y prior to ruling, and the husband's lawyers sought to reopen the settlement and allow the case return to a full hearing. In an *ex tempore* judgment, Mr Justice McKechnie declared that the principle of fairness and 'proper provision' must apply and that his jurisdiction was to rule the case only if he was satisfied that there was 'proper provision' in place for both spouses. If not so satisfied, the judge was of the view that the settlement should be renegotiated.

Percentage settlements are often the safest approach, so as to avoid the necessity of a return to court. As values drop, many cases will now be about the allocation of debt, not equity, and who will bear the burden of such debt. In cases where a party has, for example, availed of a 100% mortgage on an interest-only basis, the wriggle room open to the court is severely curtailed. Extremely difficult, intractable disputes will become even worse as credit dries up and bankruptcy looms. It is best to seek the protection of a court order (as opposed to a separation agreement) and to allow the case go to a hearing where an acceptable settlement cannot be achieved.

In the pink

Banks will have to come on board in cooperating with a settlement in many instances, although banks may not be willing to reassign an existing security in order to bring a deal over the line. The banks are now regularly approached to facilitate a moratorium on a mortgage for six or 12 months in order to give a spouse time to sell a property in these challenging times. Where sales cannot be concluded, a settlement whereby the parties retain 'cross interests' in each other's properties may have to be agreed or a formula where the other party has a right to share in any uplift on sale in the next three to five years. The courts will not baulk at orders for sale of properties, yet this may be meaningless where no buyers can be found. Fire sales by auction may yet become options unheard of even up to six months ago.

It seems clear that the fall in the value of assets, together with the virtual impossibility currently of a sale of any asset, will make it more difficult for parties to conclude a full and final settlement in the current climate. At present, the parties are faced with putting in place short-term solutions in the hope that when economic conditions improve, more permanent arrangements can be finalised and a final settlement concluded. It is important, therefore, that practitioners are guarded in their approach to 'full and final settlement' clauses, particularly if the settlement does not reflect a reasonable final outcome for the client. Issues may also arise on whether a 'full and final settlement' clause agreed at judicial separation will hold good on divorce where there has been a radical downturn in the economic fortunes of one or other party at the time of divorce.

In some cases, where spouses have run a business or farm together, it may be necessary for the parties to continue their business relationship to reflect the commercial reality that the assets cannot presently be sold and that borrowing ability is severely curtailed. In the case of a company, a shareholders' agreement or other suitable partnership agreement may need to be considered. Equally, it may be that an agreement drawn up in settlement may have to be contingent upon finance being made available in order to implement an agreement, as further dispute may arise in the event that a party cannot secure the required finance. Parties may have to remain joint owners of assets for far longer than is desirable.

It has now become more common for cases to be re-entered, both in the High Court and in the Circuit Court, in circumstances where agreements put in place six or 12 months ago cannot now be implemented. Applications to vary pursuant to section 18 of the *Family Law Act 1995* or section 22 of the *Family Law (Divorce) Act 1996* may also be required. These sections deal with the possibility, in limited circumstances, of variation of previous court orders.

While there has been no Irish case law on these to date, there is substantial British case law on similar provisions. It is likely that the judiciary will have regard to these sections shortly, and a written judgment is awaited during 2009. G

Ann FitzGerald is a partner in FitzGerald Solicitors, Cork. This is an edited version of a lecture delivered on 6 December 2008 at the Thompson Round Hall Family Law Conference.

Seeking CLOSURE

Opening a solicitor's practice is a relatively straightforward affair, but the decision to close can be fraught with myriad difficulties, warn Pat Howett, Nicola Darby and Therese Clarke

MAIN POINTS

- **Responsibilities when closing a practice**
- **PII and run-off cover**
- **Other costs of closure**

Practitioners will be aware that, once you become a qualified solicitor and hold a current practising certificate, there are no restrictions to setting up a practice. The solicitor simply has to arrange professional indemnity insurance (PII) for the new firm, send in a 'commencement in practice' form to the Law Society, and she's ready to open for business.

Leaving practice, on the other hand, may be much more difficult. The day the first client walks in the door, the solicitor commits herself to responsibilities that will be difficult – and, inevitably, expensive – to set aside. A solicitor cannot leave practice until she divests herself fully of all her responsibilities and must continue to take out a practising certificate until the day she can demonstrate that her responsibilities have been taken care of and are at an end. For this reason, setting up in practice should only be undertaken as a long-term project.

Sale or transfer

Solicitors who plan to leave practice hope for a sale of their practice to another solicitor or firm. This takes care of some of the expenses that would otherwise be incurred and is obviously the neatest solution – but are there any assets to sell? Is there anything for which a buyer would be willing to pay hard cash? Is the work in progress – that is, ongoing work that has not yet been billed – likely to translate into collectible fees later on? What track record is there to indicate that profits can be made from the practice in the future? Is there an established client base, from which

RESPONSIBILITIES WHEN CLOSING A PRACTICE

A solicitor's responsibilities when closing a practice may include:

- Run-off professional indemnity insurance cover for at least six years,
- The proper transfer of all files, both current and closed,
- The proper transfer of professional undertakings,
- The proper transfer of electronic records,
- The proper transfer of client monies,
- Compliance with the terms of bank overdraft/loan, if applicable,
- Ongoing rent, if a fixed-term lease is still in existence,
- Employee rights.

it can reasonably be expected that new work will generate?

A solicitor leaving practice within only a few years of setting up is unlikely to have built up a significant asset. The work in progress is likely to be small. The clients are likely to be 'floating' rather than established. The reality may be that, once the proprietor closes the door for the last time, the practice will be gone.

If a sale of the practice cannot be achieved, the next best option would be the transfer of the practice to a colleague without any money being paid by the acquiring solicitor. The acquisition may even be subject to the acquiring solicitor being *paid* money because, for instance, they will incur storage charges for the files or because they have to undertake a labour-intensive file destruction exercise and arrange for confidential shredding.

If a sale or transfer is not possible, the reality is that, if you are the proprietor of a young, small firm, you will find yourself having to wind up the practice yourself. The result may be that you will be bearing the cost of continuing overheads, without ongoing income, and you will also have significant additional costs under many headings – for example, practising certificate and professional indemnity insurance costs.

Insurance

Solicitors' professional indemnity insurance (PII) cover is provided on a claims-made basis. A practice is covered only for circumstances or claims that are notified to the insurer during the period of insurance cover. After the cessation of a practice, claims may arise from work undertaken prior to the practice closure. Accordingly, solicitors need to acquire PII – called run-off cover – to protect themselves, their clients and their estate (if relevant) against claims that may arise after closing a practice. Under SI no 617 of 2007, solicitors are required to take out run-off cover for a period of six years following the closure of a practice, unless a succeeding practice, within the terms of the regulation, takes over – and even then, the circumstances of the take-over may, of necessity, require ongoing run-off cover to be maintained.

Thus, even though you have closed your practice and have no incoming revenue from it, you will continue to have the expense of run-off cover. Normally, such cover will be obtained from the insurer providing professional indemnity at the time of closure.

Where there is a continuing practice, retiring partners, solicitors and employees are covered by the ongoing firm's PII cover. Thus, run-off cover is an issue mainly, though not exclusively, for sole practitioners.

Cost of run-off cover

Some insurers provide run-off cover at 300-350% of the expiring premium for the practice (amounting to approximately €30,000, depending on the size of the practice). Other insurers charge an annual premium for the six years, which will depend mainly on claims experience and the levels of premiums in the marketplace on an annual basis.

There have been situations where solicitors have opened a practice, it has not worked out, and they have closed their practice in a relatively short period. Even though the solicitor has had very little fee income, she has had the expense of acquiring run-off cover for a six-year period, and at considerable cost.

Can run-off cover be avoided?

If a solicitor can sell the practice or pass on all the files to another practising firm, which becomes a 'succeeding practice' under the PII regulations, then there is no requirement to obtain run-off cover, as the acquiring practice's insurance gives cover.

However, some firms do not wish to take on unknown exposures when they acquire the business of a practice. They may require the vendor to take out run-off cover to reduce the risk to their own professional indemnity policy. Thus, in some cases, the option of avoiding run-off cover may have limited applicability.

Accordingly, before you open, close or merge a practice, consider the cost of run-off cover as part of your decision.

If you have already taken out a loan to fund your annual PII premium but have been finding the payments difficult to meet, then the prospect of having to fund a much larger premium for run-off cover may be an insurmountable problem. There are no obvious solutions. If your decision to set up in practice was because you became unemployed, it is clear that you may find yourself now facing a much greater long-term financial problem.

Even if you are in a position to obtain the six years' run-off cover, the reality is that claims may not come until the seventh, eighth or any subsequent year. The knowledge that, after six years, a solicitor continues to be exposed may cause many solicitors to have sleepless nights!

If you acted for a person with a disability (a minor, or a person lacking mental capacity), there is no limitation on the period within which you can be sued.

Notification and files

A solicitor is required to notify the Law Society in writing in relation to his or her cessation or retirement from practice. Notification should include the date

that the solicitor is ceasing or retiring from practice, and an address must be provided for any future correspondence issuing from the Society.

The Society should also be notified in writing of the disposal of practice files. In no circumstances should a solicitor who no longer holds a current practising certificate, or ceases practice, retain any clients' files or other documentation, for instance in private storage or at home.

The solicitor should identify in writing to the Society the solicitor(s) who have taken responsibility of his or her former practice files.

In the event that a solicitor transfers any files to a colleague, whether current files and/or files for storage only, she should ensure that the colleague understands that decisions relating to those files will be for the colleague to make.

Furthermore, if there is outstanding work to be completed for which the solicitor has already been paid, the solicitor may have to pay a colleague to complete the particular matters outstanding.

A solicitor may have costs involved in organising the destruction of files in a secure and confidential manner.

Clients' monies

A solicitor cannot continue to hold clients' monies if she is no longer the holder of a current practising certificate. If files are being transferred to a colleague in practice, the solicitor ceasing practice will have to transfer the clients' monies relating to those files to that colleague. If the solicitor cannot divest herself of clients' monies, she must continue to take out a practising certificate and PII until she succeeds in doing so.

Closing accountant's report

A solicitor is required to file a closing accountant's report to the date that the solicitor ceases to receive, hold, control or pay clients' monies. This report should be filed with the Society no later than six months after the relevant date.

Therefore, a solicitor should take into account the cost involved in continuing to file accountants' reports and a closing accountant's report to the Society, including the accountant's fees.

Informing the clients of the closure

When a firm is closing, the Law Society requires that there is prompt notification to all the clients of the practice. The cost of this exercise, including postage, must be considered.

Staff of the practice

Letting staff go always causes upset, not only for the staff who are losing their jobs, but also for the solicitor who will have built up a relationship with them. There is also a financial cost to be borne. The unfair dismissals and minimum notice legislation provides protection for all employees. It is important to ensure that, when dealing with the staff of a practice on the sale or wind-up of that practice, there is compliance with the provisions of the relevant legislation.

Redundancies

The sale or wind-up of a practice may be a redundancy situation. The solicitor, as employer, will be responsible for the redundancy payments. Where such situations arise, the solicitor should refer to the *Guide to Employment Legislation* in the 'Employment and Equality Committee' section of the members' area of the Society's website.

This article is intended as general guidance and does not constitute a definitive statement of the law. G

Pat Howett is pool manager of the Assigned Risks Pool, Nicola Darby is practice regulation administrator with the Law Society's Regulation Department, and Therese Clarke is senior solicitor in the Practice Closures Section of the Regulation Department.

"If you have already taken out a loan to fund your annual PII premium but have been finding the payments difficult to meet, then the prospect of having to fund a much larger premium for run-off cover may be an insurmountable problem"

OUT OF AFRICA

The Law Society of Ireland has, for several years, been involved in assisting in the training of black South African lawyers from disadvantaged backgrounds. Michael Carrigan explains what's involved

In 2002, four Irish solicitors and a Northern Irish accountant took off for South Africa to run a course on commercial law for South African lawyers from disadvantaged backgrounds. It was the culmination of discussions that had taken place between the Law Society of Ireland and the Law Society of South Africa. The core subject was the assistance that the Law Society of Ireland might be able to give South African lawyers from disadvantaged backgrounds in terms of skills development. The South African government had targeted the need for such assistance in its Black Economic Empowerment (BEE) programme.

Twenty-five places were made available during that first course in Pretoria. The participants were all lawyers chosen by the South African Law Society and had to meet the BEE criteria of a disadvantaged status. More than 80% were from a historically disadvantaged background – and at least 50% were women. The majority were sole practitioners, and few of them had any experience of commercial law.

Twice a year since then, similar courses have operated – the majority in Pretoria but some in Cape Town, Durban and East London. More are planned in the coming years. These courses are now being run in conjunction with the Irish Bar.

Their purpose is to give lawyers from disadvantaged backgrounds an introduction to commercial law and an opportunity to practise in this field, whether on their own account or with a recognised commercial firm. The intensive course is presented over six days and concludes with an examination and the awarding of certificates to successful participants.

While the Irish contributors to each course have given their services on a pro bono basis, the courses could not have been established without substantial funding obtained from Ireland Aid, whose objectives include giving assistance to certain education-related projects in South Africa and which has been enormously supportive of the project.

Major boost

In summer 2006, the project got a major boost when it was agreed to offer the two lawyers with the highest marks in the two 2005 exams the opportunity to come to Ireland to spend three months gaining practical experience in an Irish law firm. This development was, of course, only possible with the support and generosity of four Irish law firms, which were prepared to offer the South African lawyers this opportunity – namely A&L Goodbody, Eugene F Collins, Matheson Ormbsy Prentice (MOP) and William Fry. In the summer of 2007, four more South African lawyers from the 2006 courses were given a similar opportunity – this time through the generosity of Arthur Cox, BCM Hanby Wallace, CIÉ's law department and Ronan Daly Jermyn.

For all those South African lawyers who came to Ireland, it was the opportunity of a lifetime. All were hugely appreciative, not just of the experience, but of the support and friendship they received from their hosting firms. Veronica Da Silva, who was hosted by MOP, said: "I have always had a keen interest in commercial law and so I studied to attain a B Comm and law degree to fulfil my ambitions to practise in this field of law. It soon became apparent to me that there are many obstacles within this specialised area of practice in South Africa that could potentially thwart my ambitions.

"Historically, commercial law in South Africa is dominated by white males, which, as I'm sure you can imagine, presents a plethora of obstacles for a black female to overcome. My own inexperience, coupled

MAIN POINTS

- Commercial law course for South African lawyers
- A participant's experience
- Plans for the future

Africa: it might have scenic beauty in abundance – but educational opportunities can be scarce

with my feelings of being a black woman seeking opportunity and equality to practise in my chosen field in a white-male dominated world, presented their own obstacles and challenges."

Changing destiny

"I was faced with the choice of forever debating the obstacles and difficulties that appeared to thwart my ambitions, or doing whatever I could to change my destiny. I could certainly tell a lot of stories about the racism and prejudices that exist in our country, but in so doing I would resign myself to forever being one of its victims.

"Booker T Washington said: 'Moral worth is determined not by the degree to which one is a victim but by what one does to overcome that.' I realised that, if I wanted to succeed, then I must do my best to overcome the obstacles that hindered me – the first of which was victimising myself. I reaffirmed to myself that it was my ambition to practise commercial law and I decided to do whatever was necessary to enable me to successfully practise in that field. I made the best of the opportunities I had to practise law and continually searched for opportunities within commercial law.

"In October 2006, I was given the opportunity to be placed on the commercial law course, which was offered jointly by the South African Law Society and the Irish Law Society. This course took place in East London and focused on mergers and acquisitions. I found the course extremely beneficial in a number of ways: I networked with colleagues from different parts of South Africa; I was exposed to senior professionals from my chosen profession who shared their international knowledge, experience and wisdom; and I was able to undergo a week of intensive training in

mergers and acquisitions, gaining valuable knowledge, understanding and insight, particularly into commercial transactions. I returned to work boosted by the experience and determined to continue to pursue a career in commercial law.

"In January 2007, to my delight, I was informed that I had been selected to work in an Irish law firm in Dublin, together with three of my South African colleagues.

"I was assigned to Matheson Ormsby Prentice and spent three months in the corporate finance department. It was, without a doubt, the highlight of my career.

"I was assigned to two teams, headed by Paddy Spicer and Tim Scanlon, and predominantly worked with Paddy Spicer's team. I was particularly interested in the due diligence procedures, as most of the deals to which I had been exposed in South Africa resulted in litigation as a result of the failure to properly investigate the affairs of a company.

"I was blessed to have made many friends within Matheson Ormbsy Prentice, who cared, supported and nurtured me during my stay in Dublin, and I will always cherish fond memories of them all.

"I have returned to South Africa and my job here, armed with confidence and knowledge to face the challenges that lie ahead. I am more confident and assertive, demanding more meaningful tasks and have been provided with instructions in relation to commercial transactions and now face the real challenge of putting my learning into practice.

"I thank you all. Your generosity and support has contributed to making my ambitions to practice commercial law a real possibility, despite what appeared to be insurmountable obstacles. With your help and support, I have been able to overcome some of the obstacles that existed within myself. Through the experiences and training you have given me, I have gained in knowledge and confidence and, through the support of the Irish Law Society/South African Law Society's training project, I believe that I am better equipped to face the challenges that lie ahead."

"Historically, commercial law in South Africa is dominated by white males, which presents a plethora of obstacles for a black female to overcome"

Similar opportunity

It is hoped that another four South African lawyers will be given a similar opportunity to come to Ireland for experience in 2009 and 2010 and that four more Irish law firms will be found to host them.

The learning curve has, however, not been all one way. All of the Irish contributors to the courses have found it hugely rewarding. It has brought home to them not only the thirst for education of the course participants, but particularly the fact that knowledge, experience and opportunity, which we here in Ireland often take for granted, may be denied, or not so readily available, in many other countries around the world.

Boschkop Primary School says 'thanks'

It has also made them conscious of the poverty and lack of opportunity that afflict many in South Africa and has prompted a desire to help.

The Irish contributors to one of the courses in 2007 visited Boschkop Primary School, which is a school serving poor rural communities about 40 kilometres to the east of Pretoria. With some 900 children in the school, class sizes were a major problem, with some classrooms having more than 60 children per teacher. Donations from the Irish contributors to the courses over the years resulted in a new classroom and assembly hall being built, to the delight and appreciation of those running the school.

Last October, the Irish contributors to the course got the opportunity to go out to Atteridgeville, a huge township approximately the size of Cork city on the outskirts of Pretoria, and visit the Leratong Hospice, which was established by Fr Kieran Creagh in 2004 for people in the township suffering from AIDS. Fr Kieran, who had only recently returned after spending more than six months at home in Belfast recuperating from bullet wounds suffered in the course of a robbery at the hospice a year earlier (which left him close to death), gave us a tour of the hospice. He showed us the truly remarkable work that he and his staff are doing in the local community, much of it with the support of funding from friends and colleagues in Ireland.

Well worth a visit and well worth our support. G

Michael Carrigan is a partner in Eugene F Collins.

The annual general meeting of the Midland Bar Association took place on 17 February 2009 in the Annebrook Hotel, Mullingar,*(l to r)*: Matt Johnston (outgoing treasurer), Anne-Marie Kelleher (new treasurer), Ken Murphy (Law Society director general), John D Shaw (Law Society president), Mary Ward (new president), Fiona Hunt (outgoing secretary), and Brian O'Meara (new treasurer)

PIC: LENSMEN

Labour Party spokesperson on justice, Pat Rabbitte, was the guest speaker at the parchment ceremony at Blackhall Place on 12 March 2009 *(l to r)*: President of the High Court Mr Justice Richard Johnson, Pat Rabbitte TD and Director General of the Law Society Ken Murphy

PIC: LENSMEN

Guests of the Law Society on 26 February 2009 were *(front, l to r)*: Mr Justice Matthew F Deery (President of the Circuit Court), Mr Justice Richard Johnson (president of the High Court), John D Shaw (President of the Law Society), Paul Gallagher SC (Attorney General) and Judge Miriam Malone (President of the District Court). *(Back, l to r)*: Gerry Doherty (Senior Vice-President), Conor Maguire SC (Chairman of the King's Inns), Mary Keane (Deputy Director General), Dara Robinson (Council member), Ken Murphy (Director General), James MacGuill (past-President), James McCourt (Junior Vice-President) Mr Justice Michael Peart and Stuart Gilhooly (Council member)

PIC: PHOTOCRAFT

Attending the recent annual general meeting of Wicklow Bar Association were *(front, l to r)*: Pauline O'Toole, Ken Murphy (director general), Cathal Louth (Wicklow Bar Association president), John D Shaw (Law Society president), Rosemary Gantly (secretary WBA) and Bernie Goff. *(Middle, l to r)*: Gene Murphy, Denis Hipwell, Maria Byrne, Barney O'Beirne, William R Joyce, Karl Carney and Josephine Sullivan. *(Back, l to r)*: Tom Honan, Pat O'Toole, David Lavelle, Paddy McNeice, Karl Hutchinson, Christine Carroll, Shane Allen, Pat Jones, Doran O'Toole and Joe Maguire

Southside solicitors set sail

The 24th annual Southside Solicitors' Dinner took place in the Royal St George Yacht Club in Dun Laoghaire recently. The event was sponsored by recruitment consultants Benson & Associates.

Guests included President of the Law Society John D Shaw and his wife Eileen, President of the DSBA Kevin O'Higgins and his wife Dr Gaye Martin, guest speaker Mr Justice Paul Gilligan and his wife Mary Cantrell (a solicitor from Blackrock), Director General of the Law Society Ken Murphy and his wife Yvonne Chapman, Judge Hugh O'Donnell (Dublin Metropolitan District) and his wife Sheila, and Michael Benson of Benson & Associates.

Local solicitors were joined on the night by many of their colleagues from the bar.

ALL PICS: ROGER KENNY PHOTOGRAPHY

At the 24th Annual Southside Solicitors' Dinner recently were *(l to r)*: Clare McKenna, Frank Egan and Patricia Nolan

Enjoying the annual Southside Solicitors' Dinner were *(l to r)*: Nicola Dunphy, Jonathan Dunphy, John O'Doherty and Nicola O'Doherty

Michael Benson (Benson & Associates, main sponsor) and John D Shaw (President of the Law Society) at the Southside Solicitors' Dinner in Dun Laoghaire

At the Southside Solicitors' Dinner were *(l to r)*: Jacinta Enright, Karen Brennan, Ethna Ryan and Susan Gray

Catching up at the Southside Solicitors' Dinner were *(l to r)*: Charles Meredith, Fiona Lee and Kevin O'Higgins (President of the Dublin Solicitors' Bar Association)

Enjoying the get-together of southside solicitors were *(l to r)*: Mary Geraldine Miller BL, Mark Murphy BL and Aisling Crowley

at annual dinner

In Dun Laoghaire for the Southside Solicitors' Dinner were *(I to r)*: Helen Murphy, Charles Watchorn, Yvonne O'Gara and John Miller

At the Royal St George Yacht Club in Dun Laoghaire were *(I to r)*: Inge Clissmann SC, Marcus Daly SC and Liz Ryan

WLS welcomes new Circuit Court judge

Circuit Court Judge Alice Doyle attended a judge's dinner hosted by the Waterford Law Society (WLS) recently at La Boheme Restaurant in Waterford City.

The dinner was attended by members of the profession, including Tom Murran (Law Society Council member), Frank Hutchinson (state solicitor), Frank Heffernan, Danny Morrissey, John O'Donohoe, Neil Breheny, Rosie O'Flynn, Liz Dowling, and Deirdre McSweeney (secretary and treasurer of WLS, respectively).

WLS president Bernadette Cahill, on behalf of the society, made a presentation of Waterford Crystal to Judge Doyle. Director of legal services at Waterford Crystal, Sinead Gillen, represented the presentation sponsor on the night.

PICS: GARRET FITZGERALD PHOTOGRAPHY

At the WLS dinner in honour of Circuit Court Judge Alice Doyle were *(I to r)*: Tom Murran, Judge Alice Doyle, Bernadette Cahill (Waterford Law Society president) and Liz Dowling (secretary)

Judge Alice Doyle received a Waterford Crystal bowl from WLS president, Bernadette Cahill, on behalf of the society's members

Waterford Law Society marks judicial appointment

Waterford Law Society hosted its annual District Court Practitioners' Dinner last December at L'Atmosphere restaurant in Waterford City. The occasion also marked the appointment of David Kennedy as judge for the District Court area of Waterford City. Judge William Early also attended. The dinner was preceded by a reception in The Tower Hotel.

President of Waterford Law Society Bernadette Cahill welcomed Judge Kennedy to Waterford. The director of legal services at Waterford Crystal, Sinead Gillen, presented Judge Kennedy and Judge Early with crystal decanters to mark the occasion. District Court clerk Jack Purcell also attended.

A representative attendance of Waterford District Court practitioners included Frank Hutchinson (state solicitor), Graham Farrell, Valerie Farrell and Jill Walsh (Nolan Farrell & Goff), Kenneth Cunningham (Newell Quinn Gillen), Finola Cronin, Edel Morrissey and Rosa Eivers (Dobbyn & McCoy), Brian Chesser and Charleen O'Keeffe (Brian J Chesser & Co), Ellen Hegarty (Hegarty & Co), John O'Donohoe (O'Donohoe Hackett), Hilary Delahunty (HR Delahunty) and Olivia McCann (MJ O'Connor). Elizabeth Dowling, Orla Kenny and Sean Ormonde represented MM Halley & Son. The event was organised by Brian Chesser.

PICS: GARRET FITZGERALD PHOTOGRAPHY

Celebrating the appointment of Judge David Kennedy as judge for the District Court area of Waterford City were *(l to r)*: Frank Hutchinson (state solicitor for Waterford), Judge David Kennedy, Judge William Early and Brian Chesser

At Waterford's annual District Court Practitioners' Dinner last December were *(l to r)*: Rosa Eivers, Jill Walsh and Ellen Hegarty

Jack Purcell (District Court clerk), Judge David Kennedy, Sinead Gillen (director of legal services, Waterford Crystal) and Judge William Early at the annual District Court Practitioners' Dinner

'WITty' debate down Waterford way

Each year, the Waterford Law Society (WLS) sponsors a student award debate in Waterford Institute of Technology (WIT). This year's debate on 11 February debated the motion: 'Ignorance ought not to be a defence to reckless trading'.

Proposing the motion were WIT law students Tom Clarkin, Andrew Walsh, Emily Jane Bedingfield and Patrick McKee, while Geraldine Rogers, Michael Madders, Tommie Ryan and Colette Haycock opposed.

The debate was chaired by WLS president Bernadette M Cahill, while the adjudicators were Helen O'Brien (WLS), Walter O'Leary (law lecturer WIT) and Cephas Power (barrister).

The debate was a lively and spirited affair, with Emily Jane Bedingfield declared the winner. The WLS president presented Emily Jane with a gold medal, certificate and a cash prize.

The event was organized by Helen O'Brien on behalf of WLS and Deirdre Adams on behalf of WIT. Deirdre was assisted by Jennifer Kavanagh (law tutor), who provided support and guidance to the student participants.

PICS: GARRET FITZGERALD PHOTOGRAPHY

At the WLS-sponsored student debate in WIT were *(front l to r)*: Colette Haycock, Helen O'Brien (WLS), Emily Jane Bedingfield (debate winner), Bernadette M Cahill, WLS president), Deirdre Adams (law lecturer WIT) and Jennifer Kavanagh (law tutor WIT). *(Back l to r)*: Walter O'Leary (law lecturer WIT), Cephas Power (barrister), Tom Clarkin, Geraldine Rogers, Patrick McKee, Tommie Ryan, Andrew Walsh and Michael Madders

PIC: LENSMEN

At the Law Society on 4 March 2009 at a dinner held for guests from Tanzania were *(back, l to r)*: Mr Justice Mohamed C Othman, Nigel Clarke, Michael Irvine (past-president), Charles Mynethi, Ferdinand L K Wambali and H M Ekingo. *(Front, l to r)*: Elaine Dewhurst, David Nolan, Chief Justice Augustino S L Ramadhani, John D Shaw (President of the Law Society), Judge Katherine Oriyo and Mr Justice Garrett Sheehan

Paddy marks china anniversary

Paddy Caulfield is a familiar face to solicitors at the Four Courts. Not surprising, since the manager of the Law Society's consultation rooms there celebrated 20 years of service in the Four Courts at a presentation ceremony in mid March.

In fact, it's said that Paddy's combined service comes in at 28 years in total. During that period, while the core service has remained the same, he has seen some dramatic changes, including the introduction of colour photocopying, wi-fi access and catering service to the rooms.

The Law Society's director of finance and administration, Cillian MacDomhnaill, marks Paddy Caulfield's 20 years of service to members of the profession with a presentation on 20 March

He is currently working on a project that will enable firms to book consultation rooms online. This is expected to be up and running in the coming months. The new IT system will not replace Paddy's art of juggling rooms to accommodate everybody's needs though … so you will still need to be nice to him!

In any given year, the Four Courts' service has 12,000 room hires, produces 350,000 photocopies, and delivers 750 tea/coffee services to rooms. Well done, Paddy, and thanks for your dedicated and professional level of service down the years.

ON THE MOVE

Philip Lee appoints new partner

Philip Lee has ann-ounced the appointment of Andreas McConnell as partner. Before joining the firm, Andreas was head of corporate and commercial, as well as managing partner designate of a large and well-known Dublin law firm.

SLI names legal and underwriting director

John Glynn has been named legal and underwriting director of Select Legal Indemnities (SLI), an Irish-based company that provides legal indemnity and title insurance cover for property in Ireland and abroad. Prior to co-founding SLI, John worked with IFG.

Aiden Small appointed Of Counsel at McCann FitzGerald

McCann FitzGerald has appointed Aiden Small to the position of Of Counsel in its Banking & Financial Services Department at its Dublin office. Aiden trained with McCann FitzGerald and is a specialist in the regulatory and financial services sector. He rejoins the firm from Morgan Stanley, London, where he was a vice-president in the global capital markets department.

FREE software helps new practices contain costs, enhance efficiency

When Michael O'Connor started his own firm he needed an easy-to-use practice software solution. It had to be comprehensive, while also keeping costs to the bare minimum. eXpd8 allowed Michael to have his cake and eat it, too!

After 12 years in general practice, last January Michael O'Connor decided the time had come to take the plunge. "When you set up on your own you are still a solicitor – but you have to become a businessman as well and you're responsible for everything," he says.

After careful appraisal of many potential locations he settled on Swords in North County Dublin. It is Europe's largest suburb and even has its own court, while its proximity to his home in Portmarnock has drastically cut the time wasted travelling to and from the office.

Michael is confident he has the skills and experience to build a good practice here, even if the prospect is daunting. "You start by chasing your tail, finding the right premises, dealing with telecoms and such like. There are significant initial outlays, there's no-one to delegate anything to and far more time is spent on administration than I've been used to," he says. "But it's also very exciting."

Cost, competitiveness & efficiency

Michael also knows that setting up in business at this time requires a determined focus on his costs, competitiveness and efficiency. That's why he was delighted to discover that eXpd8 professional practice management software now provides a free first user licence to lawyers starting their own practice.

This means he has the full benefit of an exceptionally powerful and easy to use system which brings all critical information into one central, searchable screen. He was able to download the software for free and will only have to pay for the additional users he adds to the system as his business grows. What's more, even then eXpd8 will still keep his costs incredibly low through its innovative "pay-as-you-use" charge of €1 per user per day, payable monthly.

Free to law firm start-ups

"The absence of the usual large upfront cost for such a powerful piece of software makes eXpd8's offer unbeatable," claims eXpd8's CEO, Declan Branagan. The "first user free" offer, he says, is designed to reward the entrepreneurial spirit of lawyers taking the plunge into self-employment. "We like to see risk takers prosper and when they win, we win too. It's that simple," he says.

Fully Microsoft compatible, eXpd8 puts up-to-the second client and case information at the solicitors' fingertips, guaranteeing them access to all the information they need when they need it. Professional efficiency is enhanced and all time spent on a given task is recorded, helping the solicitor keep accurate records and meet Law Society requirements.

"I'm very impressed by just how user friendly it really is," Michael O'Connor says. "It simplifies my practice by keeping detailed track of literally everything to do with a client and you can show exactly what's been done for a client at the touch of a button. Today people expect transparency and time management accountability is going to be an important aspect of our business in the future. I can see the merits and advantage that eXpd8 will bring in this regard, in particular."

Declan Branagan, CEO eXpd8 in Michael O'Connor's new practice office

For information on eXpd8's start-up special offer visit www.eXpd8.com or call 01 8704 999.

To contact Michael A O'Connor Solicitors call 01 8957622 or email: michaeloconnorsolicitor@gmail.com

student spotlight

Dublin and Cork go head to head in moot court challenge

The 11 semi-finalists at the moot court competition in Cork were *(back, l to r)*: Denise Biggins, Eimear Ryan, Ryan Ferry, Deborah Delahunt, Mary O'Mahony, Brendan O'Connell and Sinead Forde. *(Front, l to r)*: Philip Flaherty, John Curran, Richard McNamara and Paul Kearney

The semi-final of the moot court competition for 2008 PPCI trainee solicitors was held in Cork on 26 February 2009, *writes Trina Murphy*. Four teams travelled from Dublin's Law School to take on two from Cork.

Judge Seán Ó Donnabháin kindly officiated in courtroom 2 of Cork's courthouse on Washington Street. He was ably assisted by president of the SLA Mort Kelleher and Ursula Kilkelly of UCC.

Court 1: Ryan Ferry v Sinead Forde and Brendan O'Connell.

The moot court competition finalists were *(l to r)*: Denise Biggins (Dublin), Paul Kearney (Cork), Ryan Ferry (Dublin) and Richard McNamara (Cork)

Court 2: Mary O'Mahony and Deborah Delahunt v Eimear Ryan and Denise Biggins.

Court 3: Paul Kearney and Richard McNamara v John Curran and Philip Flaherty.

The judging panel selected four individuals to go forward to the final on 10 March 2009 in Blackhall Place.

The finalists were Denise Biggins (Dublin), Paul Kearney (Cork), Ryan Ferry (Dublin) and Richard McNamara (Cork).

More next issue. G

books

Arbitration Law

Arran Dowling-Hussey and Derek Dunne. Round Hall (2008), 43 Fitzwilliam Place, Dublin 2. ISBN: 9781858004976. Price: €220.

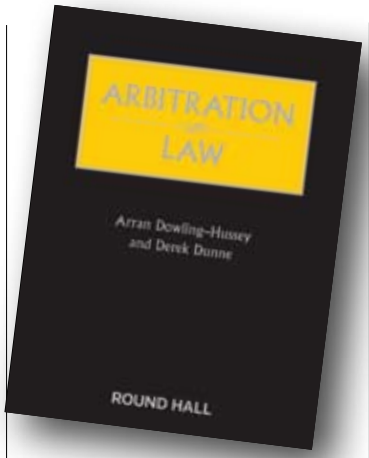
Arbitration Law comprehensively deals with the main issues that arise under current Irish arbitration legislation. It is a welcome addition to existing publications in the field of Irish arbitration law. The authors are to be commended for a well-structured book that facilitates a 'quick answer' on any aspect of arbitration.

Throughout the book, the authors focus on the arbitration legislation and relevant Irish case law, where any exists. In the absence of Irish case law on certain issues, the authors have looked to other jurisdictions, primarily England and Wales, for persuasive precedents that may be followed by the Irish courts. This is well-trodden territory for Irish arbitration law practitioners, given the scarcity of Irish court decisions on arbitration law issues.

Students and solicitors unfamiliar with arbitration will appreciate the detailed explanation of arbitration law in the first chapter. Arbitrators and practitioners involved in arbitrations may find the book useful for queries that arise in the course of their work, as the book deals with all aspects of an arbitral reference from commencement to completion.

A useful and practical inclusion in the book, and one that will be of benefit to practitioners, are the precedent pleadings for the most common applications to court under the *Arbitration Acts 1954-1998*.

On 9 June 2008, when the authors were putting the finishing touches to their book, the Department of Justice published the *Arbitration Bill 2008*. In some respects, this was unfortunate timing for the authors of this well-written book, as the purpose of the bill is to update the law relating to domestic and international arbitrations. The bill, when enacted, will repeal the three acts currently in force: the *Arbitration Act 1954*, the *Arbitration Act 1980* and the *Arbitration (International Commercial) Act 1998*. To the extent that it is possible, the authors have endeavoured to comment on the bill in its present manifestation, and they do that in the preface to the book.



The bill is based on the UNCITRAL *Model Law on International Commercial Arbitration*. Attorney General Paul Gallagher said, at the ICC Arbitration Seminar held in Dublin on 3 October 2008, that it is hoped that the bill would become law by summer 2009, though recent events may delay that timetable.

Given that the new legislation replicates or substantially restates many of the provisions and features of the *Arbitration Acts 1954-1998* and the common law principles underpinning arbitration, this work will remain very relevant. Even if the pending changes to the current arbitration regime become law, this book will continue to be a useful guide to arbitration practitioners. Indeed, the enactment into law of the existing bill, or a variation of it, will make it difficult for the authors to resist the call for an updated second edition.

Whatever happens with the new legislation, this is a valuable contribution to the library of Irish arbitration law and will be a reference point to which practitioners and arbitrators will turn for years to come. G

Joseph Kelly is chairman of the Law Society's Arbitration and Mediation Committee.

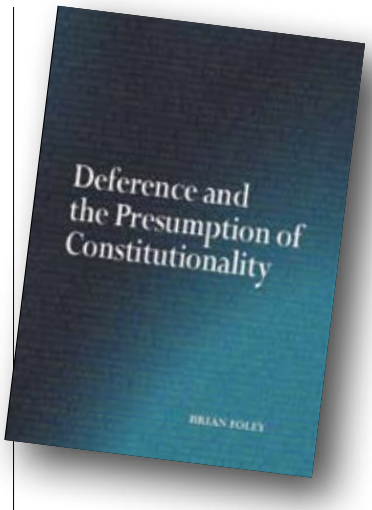
Deference and the Presumption of Constitutionality

Brian Foley. Institute of Public Administration (2008), 57-61 Lansdowne Road, Ballsbridge, Dublin 4. ISBN: 978-1-904541-76-9. Price: €80.

Brian Foley has produced an excellent and thought-provoking book on the constitutional concept of deference. Dr Foley explains deference as a situation where a decision-making body decides a case not on the basis of its own independent assessment, but by treating the decision of some other decision-making body as, in some degree, authoritative for its own decision. In the constitutional context, this can arise where a court defers either to the legislature's assessment of the extent of a constitutional right or to the legislature's assessment of reasons justifying the restriction of that constitutional right. It is thus clear that deference is a ubiquitous feature of constitutional litigation, well deserving of the sustained analysis that Dr Foley has now provided.

Dr Foley's treatise explores foreign and Irish law in depth. The author draws on his skills as a constitutional scholar and practising barrister to assess the role that deference, often *sub silentio* (without any notice being taken), plays in the resolution of constitutional disputes. He concludes that it may be appropriate for the courts to defer to the legislature in constitutional litigation, but such deference needs to be earned by the legislature. This leads him to his most controversial conclusion, namely that the presumption of constitutionality should be abandoned.

Not everyone will agree with all of Dr Foley's arguments. I myself have a nagging reservation about whether judicial deference can really be explained by reference to the concept of authority. The legislature, for the most part, does not consider constitutional issues when it legislates; the issue before the courts is therefore different from that before the legislature. In that



context, it is questionable whether the courts are treating the legislature's decision as in any sense authoritative. Rather, judicial deference seems to me – for better or worse – to be a substantive choice designed to uphold democratically approved measures.

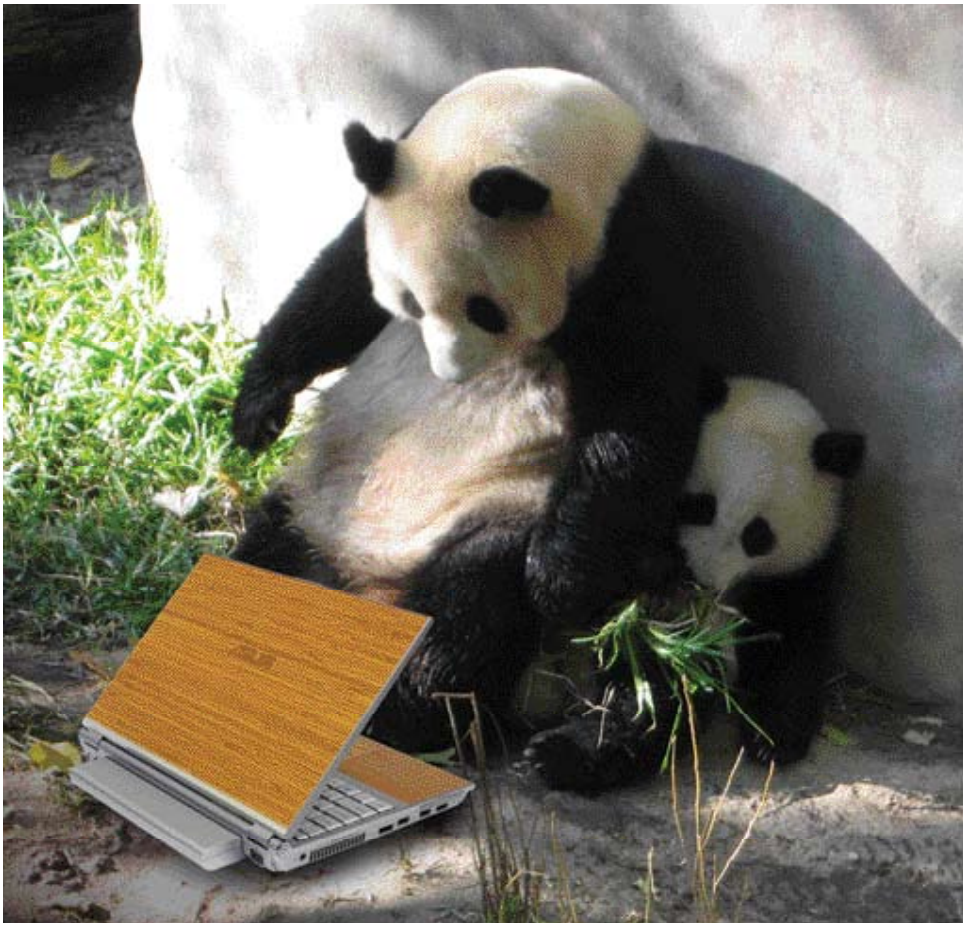
It would take far more space than is available in this short review to explore this reservation and do justice to Dr Foley's sophisticated arguments. At all times, the author puts forward his analysis with care and erudition. The breadth of comparative material on which he draws is staggering. Whether one agrees with the conclusions or not, Dr Foley has provided an essential analysis of one of the most important elements of constitutional adjudication. The rationale and variants of the concept of deference have not received sustained attention from the courts, yet they are frequently determinative of constitutional litigation. Dr Foley's excellent book has provided us all with the concepts and language necessary to understand the *sub silentio* choices being made by the courts in this regard. It ought to be read by all interested in constitutional law: judges, practitioners, students and academics. G

Oran Doyle is a lecturer in law at Trinity College, Dublin.

tech trends

Read all the technology news here first, in your glorious *Gazette*. Or not, as the case may be

Bears first, cuddly second



We were intrigued to read a few months ago that hardware giant Asus had done its bit for the oul' environment by making the housing for a notebook out of sustainable bamboo. We're not really sure how that'll save the polar bears, but still: heart, meet right place.

Pretty sure, though, that the same old toxic ingredients are in the innards of said beast. As in any laptop. And this bamboo beastie will presumably do all the other stuff that any other laptop would do, too. You can't really do modern tech these days without screwing some endangered butterfly. And proper order, we say: a butterfly is just a flamboyant daytime moth, with the same gooey stuff inside.

But the Asus U6V Bamboo is pretty. And so are pandas. They eat bamboo. A bit like Microsoft, we suppose.

Check out asus.com. The Asus U6V is available from laptopsdirect.ie for €1,257 including VAT.

Making a show of yourself

We're sure the market for real-time annotation of *PowerPoint* presentations and the like is a boom one. After all, you've probably spent hours putting together your slide show (or paying someone else to), so of course you'll want to grab a marker and draw marginal notes on your slides. Well, this product enables you to be that 'quirky and spontaneous' – and still look up-to-the-minute, tech wise.

It's a plug-and-play kit that allows you to transmit scribbles made with a digital pen on a high-tech interactive jotter to a PC, via a supplied Bluetooth-enabled USB key.

The pen can transmit up to six metres away, enabling you to sit where you like, not necessarily beside the computer.

The special paper has a frame of microscopic points printed on each page. These work as locators as you move the pen, which has a micro-camera under its ball-point – capturing the pen's position on the sheet 75 times per second. The coordinates are sent to the Papershow software, which instantaneously reproduces the writing's line.

So, seated at the conference table or standing facing your audience, your notes on the sheets can be instantly displayed on a large screen.

And if your penmanship is atrocious, don't worry: all Papershow sheets have both a central writing area and a toolbar on the right that can be used to improve your notes and give them a professional appearance.

For those who haven't finished their preparation, but still want to look flash.

See papershow.com. You can get the kit from Amazon for stg£119 or from your office supplies company (for example, Viking Direct have it for stg£100).

Proof is in the pudding for the paranoid

Who hit whom? Were his brake lights really working before you shunted him hard in the rear? This on-board camera aims to take the mystery out of such questions. It's a windscreen-mounted, high-quality digital camera that continuously records 20 seconds of what's happening in front of you, day or night. When triggered – whether by sudden impact, erratic cornering, hard braking or rapid acceleration – the RoadScan 'video event data recorder' saves a recording of the 14 seconds prior to and the six seconds following the triggering event.

You can also manually trigger the camera in order to capture the 'mine's bigger than yours' manoeuvres of drivers who should know better.

It's claimed that the unit, which continuously measures G-forces while the vehicle is in motion, helps to improve driver discipline and leads to increased fuel economy because motorists inevitably end up adjusting their habits to avoid triggering the device.

See roadscan.co.uk. Prices start at around €380.

Keep a firm grip on your stick

"Great idea," some would say. "About bloody time," others would. It seems a relatively simple idea: a USB stick with built-in security features, including password-protected hardware-based data encryption – so if yours happens to fall out of your drawers, the consequences won't be as dramatic as that time you dropped the soap in Mountjoy's showers.

We're getting one. After we invest in some soap-on-a-rope.

Check out www.safestick.co.uk. Prices start at around €45 for a 1Gb stick, but they go up to 32GB.

SITES FOR SORE EYES

All you'll ever need to know (www.wikihow.com). Want to know how to catch and cook a wild rabbit? Crochet an iPod cover? Become an academic philosopher? Train a feral cat? Or recognise bias in an article? Well, for almost anything you can conceive of (and a lot that you can't), this site has step-by-step 'how to' instructions. Once you start looking, you'll have to be prised away from your computer with a crowbar. There are instructions on how to do that, too.

But just in case... (www.fixya.com). Who keeps the manual for the central heating's timer? Or the bit of paper with your car radio's restart code? Not us. But these guys do. Fixya provides free tech support and help for gadgets, electronic equipment and consumer products, and their technical experts advise on fixing problems and provide instructions on the proper use of products, either by chat or message posting. Fixya also stores manuals and troubleshooting guides for over half a million products.

council report

Law Society Council meeting, 27 February 2009

Update on practising certificate numbers

The Council considered statistics that had been circulated in relation to the number of practising certificates taken out at 1 February 2009 and at 1 February 2008, which confirmed that there had been an increase of 2% in the number of practising certificates taken out on 1 February 2009 in comparison to the same date in the previous year. While the primary question being asked was the actual number of unemployed solicitors, the available statistics could not answer that question.

Meeting with '2008 solicitors'

The president reported on a meeting between the Coordination Committee and the ten student representatives from the 2008 class. They had suggested a number of initiatives the Society could take to assist newly-qualified solicitors who were out of work, including: (a) more CPD at a reduced rate, (b) advice on negotiating redundancies, (c) advice on setting up in practice, (d) mentoring, (e) reduced membership fees, (g) advice in relation to qualification in other jurisdictions, (h) advice on business development opportunities, (i) networking, and (j) advice on working in the corporate sector.

They perceived the appointment of a career development advisor as a good initiative and welcomed a contact person within the Society. They had acknowledged that there was no magic solution to the dilemma for newly-qualified solicitors and were very realistic about employment prospects.

Meeting with presidents, secretaries and PROs of bar associations

The president briefed the Council in relation to the recent meeting with presidents, secretaries and PROs of bar associations. The headline item on the agenda was the recession and the profession, which had been addressed under three principal strands: (a) practice management needs, (b) retraining needs, and (c) employment needs. In relation to (a), he had reported on the Practice Management Task Force's seminars, vodcasts and lecture materials, as well as proposed *Gazette* articles and CPD seminars, including a special seminar on 'Managing your career'. He had also briefed the meeting on approaches to government bodies to secure additional funding for courses and meetings with the Irish Banking Federation to emphasise the need for flexibility in providing financial supports to assist the profession.

In relation to (b), the president had reported on additional courses being introduced by CPD specifically tailored to retraining in areas where work was currently more plentiful, using online blended delivery methods. He had encouraged members to participate in Society electronic surveys seeking suggestions for courses. Useful precedents for a variety of legal areas were also available through the library.

In relation to (c), the president had reported on the proposed appointment of a career development advisor, the meeting with former class representatives from 2008, the establishment of an online 'jobseekers register', and the possibility of reduced membership fees for those members currently unemployed.

The president noted that the meeting had been a two-way process and the bar associations had put forward a number of interesting suggestions. The meeting had moved on to discuss a variety of matters, including solicitors' undertakings, public relations and media training, professional indemnity insurance issues, the outcome of *O'Brien v PIAB* and the Solicitors' Benevolent Association. It had been a very constructive meeting and he had been very heartened by the positive approach of colleagues throughout the country.

Meeting with Irish Banking Federation

The president reported on a recent meeting with the Irish Banking Federation Business Banking Committee. It had been a very constructive meeting, and the Society had emphasised that it wished to continue to work closely with the financial institutions and had asked that they would be conscious of the value of solicitors as clients and the need for flexibility in providing financial supports at this time.

The representatives of the Irish Banking Federation had acknowledged the difficulties being faced by members of the profession and were sympathetic to the points raised by the Society. They had mentioned that some individual solicitors might have over-extended themselves and said that those colleagues should address the issue directly and should approach their bank to discuss the possibility of financial restructuring. In addition, it was important that the profession understood the requirements placed on banks by the *Basle II Convention* in respect of the process for applications for extended facilities.

Membership fees

Gerard Doherty reported that the Finance Committee had approved an initiative to provide free membership for unemployed solicitors, although there was a certain amount of difficulty in identifying with accuracy those solicitors who were actually unemployed. Mr Doherty noted that there had been a significant increase of 60% in the uptake of the practising certificate and professional indemnity insurance financing schemes. Almost 500 firms and 150 individual solicitors had used the schemes to finance their practising costs for 2009. G

BRIEFING

practice notes

GIFTS: ACTING FOR AN ELDERLY CLIENT – GUIDELINES FOR SOLICITORS

1. Introduction

These guidelines are not intended as a general practice note for solicitors who act for clients in the transfer of property by way of gifts, but are intended to assist solicitors whose 'duties are onerous'[1] when acting for the elderly and often vulnerable client in such circumstances.

A Guide to Professional Conduct of Solicitors in Ireland states that a "solicitor should not accept instructions which he suspects have been given by a client under duress or undue influence. Particular care should be taken where a client is elderly or otherwise vulnerable to pressure from others."[2] Solicitors are in a unique position to build in protection for clients in relation to some forms of abuse when advising and drafting documents. A solicitor must identify clearly who the client is, and if it is an elderly person, then it is to that person to whom a solicitor owes a duty of care and must therefore act in their elderly client's best interest.

A solicitor who is advising an elderly client who proposes to make a substantial gift must ensure that the donor understands:

- The nature of the transaction and that it is a gift and not a loan.
- The consequences of making the gift and that it may reduce the income or opportunities for the donor because of the loss of capital.
- The extent of the gift – the donor should be aware of the scale of what he is giving away in the context of his overall assets. Has he made sufficient provision for his own needs at a later stage?
- The moral obligations that the donor has to other family members; that is, the donor should understand that other relatives who may not benefit from the gift may feel unfairly treated.[3] ('Other relatives' may include a moral obligation to make provision for an elderly sibling.)

A solicitor should also advise the client of other implications that may arise from the making of a gift. It may be necessary for the client to review, for example, any will that he or she has made or any existing contractual arrangements and, indeed, there may be taxation issues that need to be addressed.

2. Mental capacity

Clearly, a person must have mental capacity to make a gift and this should be established at the time of the gift. A solicitor should consider, ascertain and record whether the client has the necessary capacity to give instructions and enter the particular transaction. The level of capacity to make a gift will depend on the transaction.

In the case of *Re Beaney*,[4] it was established that to "have the requisite mental capacity to dispose of a major proportion of his assets, the donor must have the degree of understanding required … as high as that required by a will".

The level of understanding required with regard to a gift will vary depending on the value of the gift. Mr Justice Nourse in *Re Beaney* stated: "The degree or extent of understanding required in respect of any instrument is relative to the particular transaction which it is to effect. In the case of a will, the degree required is always high. In the case of contract, a deed made for consideration or a gift *inter vivos*, whether by deed or otherwise, the degree required varies with the circumstances of the transaction. Thus, at one extreme, if the subject matter and value of a gift are trivial in relation to the donor's other assets, a low degree of understanding will suffice. But, at the other, if its effect is to dispose of the donor's only asset of value and thus for practical purposes to pre-empt the devolution of his estate under his will or on his intestacy, then the degree of understanding required is as high as that required for a will, and the donor must understand the claims of all potential donees and the extent of the property to be disposed of."

Even where the value of an asset is insignificant, a solicitor must ensure that the client's understanding of a gift is that he or she is making an outright gift and the property is not simply being transferred for convenience. Where a solicitor is satisfied that the client in question has the mental capacity (which may be ascertained with the assistance of medical evidence) to make a gift, the solicitor's duty does not end there. A solicitor has a duty to ensure that the donor is acting free "from the impairment of the influence on his free will"[5] and to ensure that the client is not acting under any undue influence.

3. Undue influence

A solicitor, when instructed by an elderly client to transfer assets, should consider whether the client is making the decision freely or whether the client is not being subjected to pressure or undue influence. It is extremely important that the client is seen alone and free from any potential influence when expressing their wishes and explaining the reason for the proposed transfer of assets.

A solicitor who is receiving instructions from an elderly client for the first time should be 'put on inquiry' as to whether the client has already taken advice in the matter. If the client has received such advice, full enquires should be made of the potential client as to why new instructions are now being given to a second solicitor.

The equitable doctrine of undue influence allows a court to declare invalid any transfer of property from a vulnerable person where a dominant party has used the dominant position to bring about the transaction to his benefit that is out of proportion to the consideration provided.

There is a distinction at common law between **actual undue influence** and **presumed undue influence**. The courts have been reluctant to list the type of conduct that would amount to actual undue influence, but have held that it arises when one person takes advantage of a weaker party. The general legal principle is that the burden of proving an allegation of undue influence rests upon the person who claims to have been wronged. This is not the case where there is a **relationship** between the parties, which, as a matter of law, raises the presumption that undue influence has been exercised. Such relationships include that of solicitor and client or where a parent accepts a gift from a child. The presumption of undue influ-

ence may not arise where a gift is made by a parent to a child although, in such a case, the issue of an improvident transaction or the lack of provision for future needs does arise. (See under 5 below.) A relevant relationship also arises where one party is legally presumed to repose trust and confidence in the other. In cases of presumed undue influence, it is for the defendant to rebut the inference of undue influence. Accordingly, where the claimant is able to show that he or she had trust or confidence in the wrongdoer and acted to their manifest disadvantage, it is unnecessary to prove actual undue influence.[6]

The relationships that give rise to the presumption of undue influence are not confined to cases of abuse of trust or confidence. It also includes cases where a vulnerable person has been exploited. The doctrine of presumed undue influence has arisen where there has been "trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other".[7] It has also been held that it is not essential that the transaction should be disadvantageous to the pressurised or influenced person, either in financial terms or in any other way, although in the nature of things, the issue normally only arises where it can be shown that the transaction was disadvantageous either from the outset or as matters turned out.

As is clear from numerous cases, the law has adopted a sternly protective attitude towards certain types of relationship in which one party acquires influence over another who is vulnerable and dependent, and where substantial gifts by the influenced or vulnerable are not normally to be expected.[8]

4. Solicitor's duty

The courts have reviewed a solicitor's duty in cases of undue influence. In *Carroll v Carroll* ([1999] 4IR), Barron J, in accepting the principles laid down in *Powell v Powell* ([1900] 1 Ch), stated:

- A solicitor who acts for both parties cannot be independent of the donee in fact,
- To satisfy the court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing, it should be established that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person,
- The advice must be given with knowledge of all relevant circumstances and must be such as a competent advisor would give if acting solely in the interests of the donor.

Barron J went on to set out that a solicitor does not fulfil his obligation to his client by simply doing what he is asked or instructed to do. A solicitor owes such a person a duty to exercise his professional skill and judgement, and this means that a solicitor must consider what the appropriate advice to his client should be. In other words, a solicitor's role is more than just drawing up and registering the necessary deeds and documents to effect the making of the gift. A solicitor's duty is to ensure that the client fully understands the nature, effect, benefits, risks, and foreseeable consequences of making the gift.[9]

i) Conflict of interest – a solicitor must be aware of the possible **conflict of interest** if acting for both sides in a transaction involving a gift. While there is no rule that a solicitor should never act for both parties in a transaction where their interests might conflict, a prudent solicitor should ensure, particularly where a vulnerable elderly client is involved, that they have the benefit of independent advice. Appropriate advice (as already stated) also includes advising the client to obtain independent advice. Independent legal advice will not necessarily suffice to rebut the presumption of undue influence. Strong evidence is necessary to rebut it.[10] In addition, obtaining the written consent of both parties to a transaction that one solicitor should act for both parties does not absolve a solicitor from ensuring that no conflict of interest exists. Neither should the acceptance by any third party, such as a financial institution, of documentation putting them on notice of the lack of independent advice infer that no conflict exists. Should a conflict arise, a solicitor may only act for one party, otherwise the duty of confidentiality to the other may be jeopardised.

ii) Informed consent – it is not sufficient for a solicitor to show that a client was advised to obtain independent legal advice. If a client requests or consents to a solicitor acting for both parties to a transaction, there is an onus on the solicitor to ensure that the consent of the client is 'informed consent'. Informed consent means:

- The client knows and understands that there is a potential conflict,
- The client knows and understands that when a solicitor acts for both parties, the solicitor may be compromised in the ability to disclose all information received from one party, and the duty of confidentiality to the second party may be jeopardised,
- The client knows and understands that the solicitor may not be able to advise each client as fully as the solicitor would if the solicitor was not acting for both parties to the transaction.

It has been held, in cases where the presumption of undue influence has arisen, that, as a core minimum, the advice that a solicitor should be expected to give should cover the following matters:

- The nature of the documentation needs to be emphasised, and the practical effects of them if signed,
- The seriousness of the risks involved, including a discussion of the nature of the property involved,
- To point out that the potential donor (client) has a clear choice (a solicitor acting in the best interest of the client should bring the client through the choice options),
- Ascertain the precise wishes of the potential donor (why is the gift being contemplated, and if the client's objective can be achieved in some other way?).

An understanding of the documentation may be the first step in the exercise of a free choice whether or not to sign it, but it is not the point at which the law of undue influence is directed. A person may be fully informed as to the content of the document and its legal effect and yet be acting under undue influence of another when signing it.[11] A solicitor is therefore required to use his or her professional judgement in deciding how far they should go in probing a matter in order to be satisfied that the client is able to make a free and informed decision and is not merely agreeing to do what the wrongdoer wants.[12]

A solicitor has a duty to be satisfied that the client is free from improper influence and must therefore, first of all, ascertain whether the transaction is one that a client could be sensibly advised to enter into if free from such influence. If a solicitor is not so satisfied, then it is the solicitor's duty to advise the client not to enter into the transaction or to refuse to act further for the client.

A solicitor who has received instructions and is of the view that the client should not enter into the proposed transaction should set out clearly in writing to the client the reasons for the advice.

5. Future needs/improvident bargain

In advising an elderly client in relation to the gifting of assets, a solicitor should discuss with the client the provision for their future needs and ensure that the potential transaction is not an improvident one from the point of view of the elderly client. This will require a solicitor ascertaining from the client details of the assets (other than the potential gift), the value of those assets, the likely future income of the client and the general family circumstances.

In *Carroll v Carroll*, a factor that influenced the court to set aside the transaction was the fact that the transaction in question was an improvident one. Both the High and Supreme Courts found that the solicitor in question made no inquiries of Thomas Carroll Senior as to whether he had any other assets apart from the premises that were the subject of the transfer and that the advice given did not take into account all the relevant circumstances. No real consideration was given to the fact that the donor (a frail man in dependent circumstances) was disposing of all his real assets without reserving to himself (by way of a revocation clause or by way of charging the property with his maintenance and support) any protection for his own future.

Similarly, in *Hammond v Osborn and others*,[13] the court held that no consideration was given as to whether the assets the elderly man retained after the making of the gift would be sufficient to satisfy his future needs, which included affording care in the future. Nor was any consideration given to the extremely serious fiscal consequences of the realisation of his investments, which gave rise to a large liability for capital gains tax, which required to be funded from a very limited income. The court found in the case of the *Estate of Lily Louisa Morris deceased*[14] that the transaction in question was manifestly disadvantageous to Mrs Morris, in that she gifted her house and, in the circumstances, it was highly imprudent to do so.

6. Conclusion

Solicitors have, as was stated at the outset, an onerous duty when acting for vulnerable elderly clients. Each solicitor should ensure that they follow best practice to detect abuse and not facilitate it. Abuse can often be hidden, but a solicitor – in exercising professional skill and judgement and giving careful, considered and appropriate advice – can be instrumental in ensuring that the vulnerable client is not the subject of abuse and exploitation.

Subcommittee on Financial Aspects of Elder Abuse, Guidelines and Ethics Committee

Footnotes

1 *Special Trustees for Great Ormond Street Hospital for Children v Pauline Rushin*, 1 W
2 Second edition, p9
3 See Tolley's *Finance and Law for the Older Client*, STEP 2008 edition
4 [1978] 2 All ER
5 *Pesticcio v Huet and others* [2004] EWCA CIV 372
6 See Tolley's *Finance and Law for the Older Client*, H1.5
7 *Royal Bank of Scotland v Etridge (No 2)* [2001] 4AER
8 Ibid
9 See Tolley's *Finance and Law for the Older Client*
10 *Royal Bank of Scotland v Etridge*
11 *Banco Exterior International v Mann* [1995] 1 AER
12 *Kenyon-Brown v Desmond Banks & Co* (1999) 149 NLJ 1832
13 [2002] EWCA Civ 885
14 [2001] WTLR 1137

MARCH 2009 REVISION OF VAT SPECIAL CONDITION 3 IN LAW SOCIETY *CONDITIONS OF SALE*

The Society's Taxation and Conveyancing Committees have approved a revised version of Special Condition 3, which takes account of practitioners' experience of the new VAT regime since its introduction in mid-2008. The explanatory memorandum relating to the special condition has also been revised and both documents are available in the members' area of the Society's website, on the 'Conveyancing Committee' and the 'Taxation Committee' pages.

VAT issues in relation to property transactions can be extremely complex. Failure to apply the new VAT system correctly could result in serious and unexpected financial consequences for parties to a sale. Therefore, as the new Special Condition 3 has been tested in practice for only a limited period, practitioners are advised to exercise extreme caution when advising clients. If in doubt, an expert on VAT on property should be consulted. Please note that this revised version of the special condition (March 2009) may be subject to further revision over time. Practitioners are advised that any such amendments will be communicated to the profession in due course. G

NOTICE

SCHEDULING OF COURTS IN THE DUBLIN METROPOLITAN DISTRICT FOR 2009

EASTER VACATION, THURSDAY 9 APRIL TO TUESDAY 14 APRIL 2009

Court no 44, Chancery Street, shall sit Thursday 9 April 2009, Saturday 11 April 2009, Monday 13 April 2009 and Tuesday 14 April 2009, commencing at 10.30am to 5pm each day.

Court no 46, Chancery St, shall sit Thursday 9 April 2009, commencing at 10.30am to 5pm.

The court at Cloverhill, shall sit Thursday 9 April 2009 and Tuesday 14 April 2009, commencing at 10.30am each day.

Court no 41, Dolphin House, shall sit Thursday 9 April 2009 and Tuesday 14 April 2009, commencing at 10.30am each day.

FROM WEDNESDAY 15 APRIL TO FRIDAY 17 APRIL 2009

No cases are to be scheduled for the DMD and all outlying Dublin courts, with the exception of the following courts sitting for urgent business:

1) Court no 44, Chancery St,
2) Court no 46, Chancery St,
3) Court no 41, Dolphin House,
4) Court no 55, Smithfield,
5) Cloverhill,
6) Blanchardstown,
7) Dun Laoghaire.

DISTRICT COURT CONFERENCE OF JUDGES – FRIDAY 22 MAY 2009

The following courts will sit in the Dublin Metropolitan District for urgent business:

1) Court no 44, Chancery St,
2) Court no 41, Dolphin House.

TUESDAY 2 JUNE TO TUESDAY 9 JUNE 2009

One additional court sitting (possibly Court no 23, Public Records Building) to hear criminal cases.

AUGUST 2009 – REGULAR VACATION SITTINGS

Court no 44, Chancery St, shall sit each Monday, Tuesday, Wednesday, Thursday, Friday and Saturday, commencing at 10.30am to 5pm each day. Criminal business.

Court no 46, Chancery St, shall sit each Monday (except Monday 3 August 2009), Tuesday, Wednesday, Thursday and Friday, commencing at 10.30am to 5pm each day. Criminal business.

The court at Cloverhill shall sit each Tuesday, Wednesday, Thursday and Friday, commencing at 10.30am each day. Criminal business.

Court no 41, Dolphin House, shall sit each Monday (except Monday 3 August 2009), Tuesday, Wednesday, Thursday and Friday, commencing at 10.30am each day. Family law business.

Court no 55, Smithfield, shall sit for juvenile business each Tuesday and Thursday, commencing at 10.30am.

Court no 56, Smithfield, shall sit for criminal business (cancelling warrants) on Monday 31 August 2009, commencing at 10.30am.

Court no 50, the Richmond Courts, shall sit on Thursday 13 August 2009 and Thursday 27 August 2009 for the hearing of drug court business.

Court no 52, the Richmond Courts, shall sit for the hearing of criminal business from Tuesday 4 August to Friday 28 August 2009.

SEPTEMBER 2009

From Tuesday 1 September to Wednesday 30 September 2009: two additional criminal courts shall sit for the hearing of criminal business.

Notice of possible sitting dates – from Monday 14 September to Friday 25 September 2009: an additional court sitting for the hearing of drink-driving cases (to be confirmed).

MONDAY 5 OCTOBER 2009

To enable judges of the District Court to attend church service on Monday 5 October 2009, no cases are to be scheduled **until 2pm** in any of the Dublin metropolitan courts, and this includes Chancery Street and all outlying Dublin courts.

NATIONAL CONFERENCE OF JUDGES – FRIDAY 20 NOVEMBER 2009

The following courts will sit in the Dublin Metropolitan District for urgent business on that day:

1) Court no 44, Chancery St,
2) Court no 41, Dolphin House.

MONDAY 21 DECEMBER 2009

No cases are to be scheduled for the DMD and all outlying Dublin courts with the exception of the following courts sitting for urgent business:

Monday 21 December 2009:

1) Court no 44, Chancery St,
2) Court no 46, Chancery St,
3) Court no 41, Dolphin House,
4) Court no 55, Smithfield,
5) Cloverhill,
6) Blanchardstown,
7) Dun Laoghaire,
8) Court no 56, Smithfield, for the cancellation of warrants.

Tuesday 22 December 2009:

1) Court no 44, Chancery St,
2) Court no 46, Chancery St,
3) Court no 41, Dolphin House,
4) Court no 55, Smithfield,
5) Cloverhill,
6) Blanchardstown,
7) Dun Laoghaire.

CHRISTMAS VACATION

Wednesday 23 December to Thursday 31 December 2009: nine consecutive days commencing on 23 December – to be advised. G

BRIEFING

legislation update

20 January – 11 March 2009

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

ACTS PASSED

Anglo Irish Bank Corporation Act 2009

Number: 1/2009

Contents note: Provides for the nationalisation of Anglo Irish Bank. Provides for the transfer to the Minister for Finance of all the shares in Anglo Irish Bank and the appointment of an assessor to assess whether compensation should be paid in respect of the transferred shares, to determine the amount of that compensation, if any, and to provide for the payment of that compensation.

Date enacted: 21/1/2009

Commencement date: 21/1/2009

Charities Act 2009

Number: 6/2009

Contents note: Provides for the regulation of charitable organisations. Establishes the Charities Regulatory Authority and a public register of charities with which all charities operating in the state must register. Makes provision in relation to fundraising by or on behalf of registered charitable organisations. Dissolves the Commissioners of Charitable Donations and Bequests for Ireland on the establishment of the new authority and transfers its functions to the new authority. Transfers to the authority all the functions relating to charitable organisations or charitable trusts that were previously vested in the Attorney General. Repeals certain provisions of the *Charities Act 1961* and provides for related matters.

Date enacted: 28/2/2009

Commencement date: Commencement order(s) to be made (per s1(2) of the act)

Electoral (Amendment) Act 2009

Number: 4/2009

Contents note: Revises the Dáil and European Parliament constituencies and provides for the number of members to be elected for such constituencies. Amends the law relating to the Constituency Commission and provides alternative procedures for nomination of non-party candidates at European Parliament and local elections and provides for related matters.

Date enacted: 24/2/2009

Commencement date: 24/2/2009

Financial Emergency Measures in the Public Interest Act 2009

Number: 5/2009

Contents note: Introduces a number of financial emergency measures in the public interest. Provides for pension-related deductions from all public servants, for a reduction in fees for certain professional services provided to the state by external service providers, for changes in the early childcare supplement, and for the deferral of certain payments under the Farm Waste Management Scheme.

Date enacted: 27/2/2009

Commencement date: 27/2/2009

Gas (Amendment) Act 2009

Number: 3/2009

Contents note: Increases the statutory borrowing limit of Bord Gáis Éireann from €1.7 billion to €3 billion.

Date enacted: 17/2/2009

Commencement date: 17/2/2009

Investment of the National Pensions Reserve Fund and Miscellaneous Provisions Act 2009

Number: 7/2009

Contents note: Amends the *National Pensions Reserve Fund Act 2000* to enable the National Pensions Reserve Fund Commission to make investments in the public interest in listed credit institutions and amends the *Taxes Consolidation Act 1997* in relation to the taxation of such investments. Allows the Minister for Finance to direct the commission to make investments in listed credit institutions. Enables the minister to make additional payments into the fund and to transfer into the fund a shareholding or other interest held by him. These additional payments or transfers will count towards the requirement to make annual contributions to the fund in future years. Amends the *Securitisation (Proceeds of Certain Mortgages) Act 1995* to facilitate the winding up of a body established under that act. Amends the *Markets in Financial Instruments and Miscellaneous Provisions Act 2007* to provide for greater transparency in relation to certain kinds of trading in financial instruments and provides for related matters.

Date enacted: 5/3/2009

Commencement date: Commencement order(s) to be made for all sections of the act, except s3(d) and (e), which come into operation on 5/3/2009

Legal Services Ombudsman Act 2009

Number: 8/2009

Contents note: Establishes the office of the Legal Services Ombudsman, whose functions will be to investigate complaints about the handling by the Law Society and the Bar Council of complaints made to them by clients of solicitors and barristers, to review the Law Society and Bar Council complaints procedures, to assess the adequacy of the admission policies of the Law Society to the solicitors' profession and of the Bar Council to the barristers' profession, to promote awareness among members of the public of the Law Society and Bar Council complaints procedures, and to carry out any other duties and exercise any other powers assigned to the ombudsman by this act.

Date enacted: 10/3/2009

Commencement date: Commencement order(s) to be made (per s1(2) of the act)

Residential Tenancies (Amendment) Act 2009

Number: 2/2009

Contents note: Validates the appointments or purported appointments of certain members of the Private Residential Tenancies Board Dispute Resolution Committee established under section 159 of the *Residential Tenancies Act 2004* and validates any tenancy tribunal constituted or purporting to have been constituted under section 102 of the *Residential Tenancies Act 2004*. Validates all acts done or purporting to have been done by the dispute resolution committee or a tenancy

tribunal before the passing of this act.
Date enacted: 28/1/2009
Commencement date: 28/1/2009

SELECTED STATUTORY INSTRUMENTS

Companies (Auditing and Accounting) Act 2003 (Commencement) Order 2009
Number: SI 13/2009
Contents note: Appoints 27/1/2009 as the commencement date for section 36 of the *Companies (Auditing and Accounting) Act 2003*. Section 36 inserts a new section 192A, 'Statutory backing for disciplinary procedures of prescribed accountancy bodies', in the *Companies Act 1990*.

Copyright and Related Rights (Proceedings before the Controller) Rules 2009
Number: SI 20/2009
Contents note: Prescribe the procedures and the fees payable in relation to proceedings before the Controller of Patents, Designs and Trade Marks under the *Copyright and Related Rights Act 2000*.
Commencement date: 28/1/2009

Health Act 2007 (Section 103) (Commencement) Order 2009
Number: SI 27/2009
Contents note: Appoints 1/3/2009 as the commencement date for (a) section 103(1) of the *Health Act 2007* (except insofar as it relates to sections 55C and 55G(b) of the *Health Act 2004*) (inserted by section 103(1)); (b) section 103(2)(a) of the *Health Act 2007*; (c) section 103(2)(b) of the *Health Act 2007* (except insofar as it relates to 'Chief Inspector' in schedule 2A of the *Health Act 2004* (inserted by section 103(2)(b)). Section 103 provides for the making of protected disclosures by health service employees.

Irish Medicines Board (Miscellaneous Provisions) Act 2006 (Commencement) Order 2009
Number: SI 67/2009
Contents note: Appoints 27/2/2009 as the commencement date for section 26 of the act. Section 26 amends section 59(2) of the *Health Act 1970* to enable reimbursement for drugs prescribed by nurses under the drugs payment scheme.

Land Registration (Fees Relating to Discharges Lodged by Electronic Means) Order 2009
Number: SI 52/2009
Contents note: Provides that no fee shall be chargeable in respect of an application for the cancellation of an entry of a charge on the register of the property charged where such application (a) is lodged by electronic means in a manner approved by, and (b) which complies with the requirements specified by, the Property Registration Authority.
Commencement date: 2/3/2009

Medical Practitioners Act 2007 (Commencement) Order 2009
Number: SI 40/2009
Contents note: Appoints 16/3/2009 as the commencement date for the following provisions of the *Medical Practitioners Act 2007*, as amended by the *Health (Miscellaneous Provisions) Act 2007*: (a) section 3 and schedule 1, insofar as they are not already in operation; (b) section 7(2)(a), (b), (c), (d), (g) and (h); (c) section 36; (d) part 6 (ss37-56, 'Registration of medical practitioners'); (e) part 9 (ss71-85, 'Imposition of sanctions on registered medical practitioners following reports of Fitness to Practise Committee'), insofar as it is not already in operation; (f) part 10 (ss86-90, 'Education and training'), insofar as it is not already in operation; and (g) part 13 (ss104-109, 'Miscellaneous'), insofar as it is not already in operation, other than section 104(2), (3), (4) (insofar as it applies to section 104(3)(a)) and (5). This order brings into operation provisions of the act relating to the registration of medical practitioners, the role of the Medical Council and the Health Service Executive in relation to medical education and training, provisions implementing directive 2005/36/EC as amended by directive 2006/1000/EC on the recognition of qualifications (insofar as that directive relates to medical practitioners), and other miscellaneous provisions.

Public Health (Tobacco) (Retail Sign) Regulations 2009
Number: SI 57/2009
Contents note: Prescribe the sign that must be displayed at a premises where tobacco products are sold by retail.
Commencement date: 1/7/2009.

Public Health (Tobacco) (Self-Service Vending Machines) Regulations 2009
Number: SI 42/2009
Contents note: Regulate the sale by retail of tobacco products by means of a self-service vending machine on licensed premises or on the premises of a registered club.
Commencement date: 1/7/2009

Rules of the Superior Courts (Criminal Justice Acts 2006 and 2007) 2009
Number: SI 10/2009
Contents note: Amend the *Rules of the Superior Courts 1986* (SI 15/1986) to facilitate the operation of certain provisions of the *Criminal Justice Acts 2006 and 2007*. In particular, these rules amend order 58 ('Appeals and references to the Supreme Court'), order 84 ('Judicial review and orders affecting personal liberty'), order 84B ('Procedure in statutory applications'), order 85 ('Central Criminal Court'), order 86 ('Court of Criminal Appeal') and insert a new order 138 ('Applications under the *Criminal Justice Act 2006*').
Commencement date: 9/2/2009 G

Prepared by the Law Society Library

Solicitors' Benevolent Association

145th report and accounts

Year: 1 December 2007 to 30 November 2008

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

The amount paid out during the year in grants was €429,449, which was collected from members' subscriptions, donations, legacies and investment income. Currently there are 55 beneficiaries in receipt of regular grants, and approximately half of these are themselves supporting spouses and children.

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

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

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

- Law Society of Ireland,
- Law Society of Northern Ireland,
- Donegal Bar Association,
- Drogheda Solicitors' Bar Association,
- Faculty of Notaries Public in Ireland,
- Limavady Solicitors' Association,
- Sheriffs' Association,
- Southern Law Association,
- Tipperary and Offaly Bar Association, and
- Waterford Law Society.

To cover the ever-greater demands on the association, additional subscriptions are more than welcome as, of course, are legacies and the proceeds of any fundraising events. Subscriptions and donations will be received by any of the directors or by the secretary, from whom all information may be obtained at 73 Park Avenue, Dublin 4. I would urge all members of the association, when making their own wills, to leave a legacy to the association. You will find the appropriate wording of a bequest at page 32 of the *Law Directory 2009*.

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

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

Thomas A Menton, chairman

DIRECTORS AND OTHER INFORMATION

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

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

Secretary
Geraldine Pearse

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

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

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

First Trust, 31/35 High Street, Belfast BT1

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

Law Society of Northern Ireland, Law Society House, 90/106 Victoria Street, Belfast BT1 3JZ

Charity number: CHY892

NOTICE: THE HIGH COURT

Record no: 2008 no 69 SA

In the matter of Rosalyn Kelly, a solicitor practising as Rosalyn Kelly, solicitor, The Old Parochial House, Coole, Co Westmeath, and in the matter of the *Solicitors Acts 1954-2008*

Take notice that, by order of the High Court made on Monday 15 December 2008, it was ordered:

1) That the respondent solicitor shall be suspended from practising as a solicitor,
2) That the Law Society do recover the costs of the proceedings herein and the costs of the proceedings before the Solicitors Disciplinary Tribunal as against the respondent when taxed or ascertained,
3) That there be liberty to apply to the respondent under the Law Society rules for readmission.

John Elliot,
Registrar of Solicitors,
Law Society of Ireland,
February 2009

Solicitors Disciplinary Tribunal

Reports of the outcomes of Solicitors Disciplinary Tribunal inquiries are published by the Law Society of Ireland as provided for in section 23 (as amended by section 17 of the *Solicitors (Amendment) Act 2002*) of the *Solicitors (Amendment) Act 1994*

In the matter of Keith Finnan, a solicitor practising as Keith Finnan & Company, Solicitors, Humbert Mall, Main Street, Castlebar, Co Mayo, and in the matter of the *Solicitors Acts 1954-2002* [4346/DT53/08]
Law Society of Ireland (applicant)
Keith Finnan (respondent solicitor)

On 9 December 2008, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Failed to respond to the Society's correspondence, and in particular the Society's letters of 11 September 2007, 24 September 2007, 4 October 2007, 16 October 2007, 7 December 2007, 28 January 2008, 7 February 2008,
b) Failed to comply with the directions of the Complaints and Client Relations Committee, made at its meeting on 28 November 2007, to make a contribution of €400 towards the costs of the Society's investigation,
c) Failed to comply with the direction of the Complaints and Client Relations Committee, made at its meeting on 6 February 2008, that he attend the next meeting of the committee on 10 April 2008.

The tribunal ordered that the respondent solicitor:

a) Do stand censured,
b) Pay the sum of €3,000 to the compensation fund,
c) Pay the whole of the costs of the Law Society of Ireland, as taxed by a taxing master of the High Court, in default of agreement.

In the matter of Patrick Gillespie, a solicitor practising as P Gillespie & Company, Solicitors, at Bury Street, Ballina, Co Mayo, and in the matter of the *Solicitors Acts 1954-2002* [6919/DT43/07; High Court record no: 2008 no 47SA]
Law Society of Ireland (applicant)
Patrick Gillespie (respondent solicitor)

On 12 June 2008, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Failed to comply with undertakings given to the complainant's firm, dated 14 May

2002, in a timely manner or at all and, as of the date of the referral to the disciplinary tribunal, two of the items set out in his undertaking to the complainant remain outstanding,

b) Failed to comply with the notice served pursuant to the provisions of section 10 of the *Solicitors (Amendment) Act 1994* and dated 2 April 2007 in a timely manner or at all,

c) Failed to respond to the Society's correspondence and, in particular, the Society's letters to the solicitor dated 20 June 2005, 1 July 2005, 12 July 2005, 24 November 2006, 7 December 2006, 19 December 2006, and 16 April 2007 in a timely manner or at all,

d) Failed to attend a meeting of the Complaints and Client Relations Committee when required to do so.

The tribunal referred the matter forward to the High Court. On 20 October 2008, the President of the High Court ordered:

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

b) That the Law Society do recover the cost of the proceedings herein and the cost of the proceedings before the Solicitors Disciplinary Tribunal when taxed and ascertained.

In the matter of Martin J Kearns, solicitor, of 1 Devon Place, The Crescent, Galway, and in the matter of the *Solicitors Acts 1954-2002* [4403/DT72/07; High Court record no 2008 no 59SA]
Law Society of Ireland (applicant)
Martin J Kearns (respondent solicitor)

On 19 June 2008, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he failed to ensure that there was furnished to the Society an accountant's report for the year ended 30 November 2006 within six months of that date, in breach of regulation 21(1) of the *Solicitors' Accounts Regulations 2001* (SI no 421 of 2001) in a timely manner or at all.

The tribunal directed the Law Society of Ireland to bring such finding of the tribunal in respect of the respondent solicitor before the High Court in circumstances where the solicitor had not yet filed his report to the Society. The respondent solicitor had filed his accountant's report for the year ended 30 November 2006 prior to the High Court hearing date.

On 20 October 2008, the President of the High Court ordered that:

a) The respondent solicitor do stand censured,

b) The respondent solicitor do pay the fine of €5,000 to the Law Society of Ireland,

c) The Law Society do recover the cost of the High Court proceedings and the cost of the proceedings before the Solicitors Disciplinary Tribunal when taxed and ascertained.

The solicitor had filed his accountant's report for the year ended 30 November 2006 prior to the High Court hearing date. G

firstlaw update

News from Ireland's online legal awareness service
Compiled by Bart Daly for FirstLaw

CONTRACT LAW

Competition

Pharmacies – HSE agreement – community services – express contractual entitlement – reduction by defendant – whether breach of agreement.

The plaintiff pharmacies claimed that they entered a contractual agreement for the provision of community pharmacy services in the 1970s and that the defendant was in breach of its contracts with them by virtue of a decision to reduce the amount paid in the reimbursement of costs for community services drugs in 2006. The defendant denied that it was in breach of contract and alleged that the terms contended for by the plaintiff were void by reason of section 4 of the *Competition Act 2002*.

Finlay Geoghegan J held that the plaintiffs had a contractual right to receive payment under the terms of the originally concluded agreement. It was an express entitlement and no findings as to implied terms were needed. There was no issue in respect of section 4 of the *Competition Act 2002*. Counsel would be heard as to the claim for damages for breach of contract.

***Hickey and Others (plaintiffs) v Health Service Executive (defendant)*, High Court, 11/9/2008** [FL15641]

CRIMINAL LAW

Judicial review

Certiorari – *trial – converted into trial on indictment – whether DPP withdrew consent to summary disposal* – Criminal Procedure Act 1967, *as amended.*

The applicant appeared on charges before the District Court. The issue arose as to whether the District Court had jurisdiction and whether the DPP had withdrawn his consent to summary disposal. The District Court had accepted initially that the charges were minor. A garda had erroneously advised the District Court that the DPP had consented to the summary disposal of the case. The issue arose as to whether the DPP could direct trial on indictment pursuant to s4A of the *Criminal Procedure Act 1967*, as amended.

O'Neill J held that the application for judicial review of the decision of the District Court would be dismissed. There was no question of the district judge being directed to send the applicant forward. The judge had acted within jurisdiction and had had no other option.

***Gormley (applicant) v Smyth (respondent)*, High Court, 29/7/2008** [FL15671]

JUDICIAL REVIEW

Fair procedures – certiorari – *oral hearing – discovery – whether the decision of the respondent was arrived at in a fair manner and whether the request for discovery and an oral hearing ought to have been granted* – Central Bank Act 1942 – Central Bank and Financial Services Authority of Ireland Act 2004.

The applicant sought to have quashed, by way of *certiorari*, the order of the first-named defendant directing the applicant to refund the notice party €500,000 for three perpetual bank bonds purchased by the notice party, and also to refund all fees and commissions paid by the notice party in connection with the purchase of those bonds. The applicant alleged that the first-named respondent misconstrued his powers under the statute and fell into unconstitutional procedures. The order sought to be impugned arose out of a complaint made by the notice party to the effect that the applicant never properly or adequately explained the perpetual nature of the bonds to them. The deputy ombudsman initially determined the complaint in favour of the notice party, and the applicant unsuccessfully appealed that decision to the first-named respondent. The applicant challenged the procedures used by the first-named respondent, and particularly its decision refusing discovery and declining to hold an oral hearing. The applicant also complained that the deputy ombudsman was not properly authorised to act and, further, that the matter should have been dealt with by mediation prior to investigation and adjudication. The first-named respondent in his decision failed to indicate on which statutory ground he was holding against the applicant.

Charleton J quashed by *certiorari* the order of the first-named defendant made on 21/1/2008 and remitted the matter to him for the purposes of the complaint of Enfield Credit Union again being investigated and adjudicated upon, holding that, in the circumstances of this case and for the fair determination of the dispute as to what explanation was provided in relation to the nature of the bonds, there should have been an oral hearing. The first-named respondent erred in failing to provide the documentation sought by the applicant. The first-named respondent had discretion whether to hold mediation prior to investigation and adjudication. Mediation need only be embarked upon when it carries a reasonable prospect of achieving results. The remedy provided by the first-named respondent, consisting of an appeal from the deputy ombudsman to the respondent himself, was impermissible. Finally, the first-named respondent was required to stipulate what parts of the relevant legislation constituted his findings.

***J&E Davy trading as Davy (applicant) v Financial Services Ombudsman and Others (respondent)*, High Court, 30/7/2008** [FL15799]

MENTAL HEALTH

Habeas corpus

Voluntary patient – validity of admission order – well-being – independent judgement – mental disorder – role of doctor – whether order affected by failure to complete form appropriately.

The applicant had been committed for psychiatric health problems and the issue arose as to the validity of her original admission order. The safety of the applicant became a concern in the interim, and the applicant alleged that the doctor assessing her had not exercised independent judgement, in that the doctor had conferred with another doctor, and that the committal form had not been properly filled.

Hedigan J held that there was no evidence that the doctor had failed to exercise independent judgement and the substance of the order was unaffected. The application would be refused.

***W(F) (applicant) v Department of Psychiatry, James Memorial Connolly Hospital (respondent)*, High Court, 18/8/2008** [FL15692]

PRACTICE AND PROCEDURE

Discovery

Privilege – communications between client and solicitor for purposes of drawing up will – legal advice – legal assistance.

The plaintiff claimed to be entitled to property as a result of, among other things, a promise that he said was made to him by the deceased. The defendant delivered a full defence. The court made an order for discovery. However, almost all of the documents in the affidavit of discovery were subject to a claim of privilege. The issue in this application was whether communications between a potential testator and a solicitor, for the purposes of the solicitor concerned drawing up a will, could be said to be privileged.

Clarke J disallowed the claim of privilege, with the exception of redactions, holding that documents produced for the purposes of giving instructions for the making of a will were not, by reason of that status alone, privileged.

***Prendergast (plaintiff) v McLoughlin (defendant)*, High Court, 25/9/2008** [FL15708]

PRIVACY

Punitive and exemplary damages – constitutional law – Postal and Telecommunications Services Act 1983.

The plaintiff sought damages for wrongful invasion of privacy arising from a series of articles published as to the plaintiff and a priest and the circumstances of their relationship. The contents of telephone conversations were also published, which had been illegally obtained from a phone tap conducted by a private detective. The issue arose as to the public interest in such a publication and the impact of the publication on the plaintiff.

Dunne J held that the publication of the transcripts was in breach of the *Postal and Telecommunications Services Act 1983* and constituted a deliberate, conscious and unjustified breach of her right to privacy. Much of the material published was not in the public interest, including, in particular, the private telephone conversations. Punitive damages would be appropriate in light of the publications taking place over a period of three weeks to extract the maximum value out of the materials. The conduct of the defendant in the course of the trial was significant. In light of the facts and circumstances of the case, ordinary and aggravated damages in the sum of €60,000 for the breach of privacy was appropriate and a further €30,000 damages would be awarded for the use of transcripts of phone conversations that had been obtained unlawfully.

***Herrity (plaintiff) v Associated Newspapers (Ireland) Ltd (defendant)*, High Court, 18/7/2008** [FL15685] G

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eurlegal

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

Elements of independence of the legal profession – a European perspective

The following article is based on a paper delivered by former president of the CCBE, John Fish, during a conference in Warsaw in November 2008 on the general theme of elements of the independence of the legal profession.

Independence

While the need for an independent judiciary can be easily identified as an essential pillar in a modern democracy, less obvious, at least to the general public and to some politicians, is the use of that term in the context of legal practice and the supervision or regulation of lawyers.

In relation to the independence of lawyers in carrying on their activities as legal advisors, article 16 of the 1990 *UN Basic Principles on the Role of Lawyers*, although not incorporating the word 'independence', provides as good a definition as one is likely to get where it states: "Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics."

Another indication as to the nature of independence can be found in the opinion of Advocate General Leger in the celebrated ECJ *Wouters* case (Case C-309/99 ECJ), where he observed: "Independence requires lawyers to carry out their advisory duties and those of assistance and representation in the client's exclusive interest. Independence must be demonstrated *vis à vis* the public authorities, other operators and third parties, by whom they may never be influenced. Independence must also be demonstrated *vis à vis* the client, who may not become his lawyer's employer. Independence is an essential guarantee for the individual and for the judiciary, with the result that lawyers are obliged not to get involved in business or joint activities which threaten to compromise it."

What is interesting here is the reference to the role of the lawyer acting in the client's exclusive interest as constituting an essential element of the concept of independence.

Core values

It might be a matter for philosophers to debate the sources or indeed the conditions under which deontologies have been conceived and developed, but I think it is reasonable to conclude that the ethical duties of lawyers towards their clients and to society in general can be identified by reference to the various codes of conduct established by the bars and law societies and international organisations such as the CCBE and the IBA and which in turn contain the generally recognised standards of professional conduct to which lawyers, in the public interest, are expected to adhere.

While such codes may vary in detail, the main principles or core values are well summarised in the Council of Europe publication *The Role and Responsibilities of the Lawyer in a Society in Transition*. In its conclusions, the report of the meeting on which this publication was based stated that that, within the exercise of their duties, lawyers in all societies are bound by certain general principles, which include:

- Confidentiality,
- Avoidance of conflicts of interest,
- Avoidance of activities incompatible with the individual discharge of their duties.

A stark example of where such core values may have been undermined is to be found in the field of the European anti-money-laundering legislation. Although I will not dwell in detail on this particular legislation, nevertheless there are particular features of the legislation that challenge the principle of lawyers' independence.

Third Money Laundering Directive

The *Third Money Laundering Directive* (3rd MLD), currently being implemented by the national legislation of the member states and which replaces the *Second Money Laundering Directive* (directive 91/308/EC), contains a number of provisions regarding the steps to be taken by lawyers when acting in certain financial transactions on behalf of clients in order to combat the threat of the proceeds of crime being used within the financial system.

Central to the implementation and operation of the anti-money-laundering regime are the following obligations to be imposed by member states on lawyers:

- The obligation to inform the relevant national authority of a suspicion,
- The obligation to promptly supply the relevant national authority with all necessary information, and
- The obligation not to disclose the fact that such information has been supplied to the national authority.

These requirements are set out in articles 22 and 28.

Although the implementation of these provisions have given rise to some difficult issues of interpretation, especially having regard to the manner in which national procedures protect the disclosure of information passing between a lawyer and his client, it has to be recognised that these provisions now form part of European jurisprudence and, in many instances, if not all, non-compliance can result in criminal prosecution. (Article 23.2 of the 3rd MLD

exempts lawyers from reporting suspicious transactions where, among other things, the lawyer receives information "in the course of ascertaining the legal position for that client". See also the decision of the Belgian Constitutional Court of 10 July 2008, case nos 4279, 4327 and 4336, and the decision of the French Conseil D'Etat of 10 April 2008, case nos 296845 and 296907.)

As previously mentioned, the principles of confidentiality and the avoidance of conflicts of interest are to be found in various codes of conduct, as in the CCBE code of conduct (see www.ccbe.org/index.php?id=32&L=0), where, as regards confidentiality, article 2.3.1 states that "it is of the essence of a lawyer's function that the lawyer should be told by his or her client things which the client would not tell to others, and that the lawyer should be the recipient of other information on a basis of confidence". The article then sets out the nature and extent of this obligation.

Similarly, as regards conflict of interest, article 3.2.1 provides that "a lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict or a significant risk of a conflict between the interests of those clients". The remainder of the article describes in further detail the nature of conflicts and also provides that "a lawyer must cease to act for both or all of the clients when a conflict of interests arises and also whenever there is a risk of a breach of confidence or where the lawyer's independence may be impaired".

Confidentiality

As regards the first core value, namely the confidential nature of the client/lawyer relationship, it seems a long time ago since we in the CCBE debated the consequence of the introduction by the EU of these provisions into national laws. As a result of the intense lobbying conducted by the CCBE and others, the impact of the reporting obligation was to some extent ameliorated by the qualification that a lawyer would not be required to report in what may loosely be described as privileged circumstances. Despite this, the fundamental concerns regarding the wedge that the state has driven between the lawyer and his or her client remain.

It has been argued most forcefully by supporters of the regime that the evils of money laundering far outweigh any reservations that lawyers might have regarding their independence and their relationship with clients. In any case, so they will argue, is it not the position that any concerns relating to confidentiality or the professional secret have been more than adequately catered for by the exclusion from reporting in certain circumstances?

At the time the European Commission first proposed that lawyers should be brought within the reporting system as it applied to financial institutions, the CCBE and its member bars argued strongly that the responsibility for lawyers to avoid circumstances whereby they might become involved in a money-laundering activity should best left to be dealt with by bars under their regulatory powers and ethical rules. These arguments fell on deaf ears.

As far as I know, the suggestion that this matter might have been dealt with pursuant to the deontological rules of a bar rather than through statutory procedures was never fully explored. Thus, in recent times, the debate has tended to concentrate on the difficulties in the interpretation of the exempting provisions contained in the directive.

There cannot be any quarrel with the principle that a lawyer who knowingly participates in a money-laundering activity for or

Immanuel Kant: noted for his reflections on the ethics of duty

on behalf of a client should be in any way protected from criminal prosecution on the grounds of confidentiality. Neither should there be any quarrel with the principle that, in the event of a lawyer being found guilty, that the lawyer could be disbarred from practice. These sanctions should be a sufficient deterrent. However, it remains the case that that, even with the exemptions contained in the directive, the confidentiality of the client/lawyer relationship can no longer be regarded as absolute.

Conflict of interest

The second core value relates to the issue of conflict of interest. Although there has been considerable debate as to the parameters surrounding the issue of the confidentiality of the lawyer/client relationship, there has been less attention paid to the ethical position of a lawyer who, having made a report, is required to cooperate with the authorities in supplying further information.

As mentioned above, the 3rd MLD contains a specific obligation not only to cooperate with the authorities by supplying them with further information regarding the activities of the clients, but also an obligation not to reveal to the client that the lawyer is doing so (article 28.1). In other words, the lawyer is obliged by law to act against the interests of his client and in the interests of the state. Could one not come across a more clear-cut example of a pure conflict of interest?

Once again, the supporters of the regime will argue that, in order for it to be effective, it is essential that lawyers should act in this way, notwithstanding the core value involved. The view, which has been taken by the Law Society of Ireland, is that in the event that a lawyer feels compelled to report, he or she would have no option but to cease acting because of the inevitable conflict of interest involved. In following such advice, a lawyer could have a practical difficulty in avoiding the accusation that, by doing so, such a step could have the effect of 'tipping off' the client, apart from the painful risk of losing a client in circumstances where the client may be quite innocent.

Ethical rules

As I mentioned above, it had been strongly argued prior to the adoption of the 2nd MLD that, instead of lawyers being brought within the statutory reporting obligations in the same way as the financial institutions, it might have been more appropriate to deal with the issues through the ethical obligations imposed on lawyers through national codes of conduct. But this route raises the question: 'Are the ethical duties of a lawyer, who during the course of his professional activities on behalf of a client becomes aware that his client is using his services for criminal purposes, sufficiently strong enough to deter a client from doing so?'

Even if one is satisfied that the ethical standards are sufficiently strong to provide an effective deterrent, how would or could the profession deal with the issue of informing and keeping

the authorities informed by means of an appropriate ethical requirement? Clearly any such procedure would constitute derogation from the strict rules of confidentiality.

The ethical issues that confront the profession as a result of the anti-money-laundering legislation call for further examination in the light of the conflict between the ethical standards of the profession – as for example, set out in the CCBE code of conduct and, no doubt, reflected in national codes – and the moral issues of today. For example, where does the moral/ethical position of a lawyer lie where, in the case of acting on behalf of a client in a non-litigious situation, the lawyer becomes aware that a child might be in physical danger? Is it not right that the lawyer should immediately contact the authorities in these circumstances? Is there any real difference in moral terms in reporting in these circumstances and where the reporting relates to the use of the proceeds of crime in a financial transaction?

While it may well be that some national codes of conduct have been framed so as to permit lawyers to derogate from a strict rule of confidentiality in certain well-defined circumstances, do such codes go further by requiring lawyers to make disclosures in these circumstances?

Before departing from this aspect of the issue, I note that, under the terms of the directive (article 25), there is an obligation on the competent authorities (which in many cases would include bar associations and law societies) to inform the appropriate authorities of any suspicions they might have following inspections they may carry out as part of their regulatory role. G

John Fish is the former president of the CCBE. Part 2 of this article will be published in the next Gazette.

Recent developments in European law

HUMAN RIGHTS

Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, 3 September 2008. Mr Kadi, a Saudi Arabian national, and the foundation, established in Sweden, were designated by the Sanctions Committee of the UN as being associated with Osama bin Laden, Al Qaeda or the Taliban. Security Council resolutions provide that UN member states must freeze the funds and other financial resources controlled directly or indirectly by such persons or entities. The European Council adopted regulation 881/202, ordering the freezing of the funds and other economic resources of the persons and entities whose names appear in a list annexed that regulation. The list is regularly updated in order to take account of changes in the summary list drawn up by the Sanctions Committee, an organ of the Security Council. On 19 October 2001, the names of the applicants were added to the UN summary list and then placed in the list annexed to the EC regulation. They brought actions before the CFI for annulment of that regulation. They claimed that the council was not competent to adopt the regulation and that it infringed several of their fundamental rights, in particular, the right to property and the rights of the defence. The CFI rejected the applicants' arguments and confirmed the validity of the regulation. The court ruled that it had no jurisdiction to review the validity of the regulation, given that member states are obliged to comply with the resolutions of the Security Council under the *UN Charter* – an international treaty that prevails over EC law. The applicants appealed to the ECJ. The ECJ confirmed that the council was competent to adopt the regulation. However, it ruled that the CFI erred in law in ruling that the community courts had, in principle, no jurisdiction to review the internal lawfulness of the contested regulation. The review by the ECJ of the validity of any community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the *EC Treaty* as an autonomous legal system that may not be prejudiced by an international agreement. The review of the lawfulness of the community act is limited to the community act and not to the international agreement. A judgment given by the EC courts deciding that a community measure intended to give effect to a resolution of the Security Council is contrary to a higher rule of law in the EC legal order would not entail any challenge to the primacy of that resolution in international law. The community courts must ensure the review of the lawfulness of all community acts in the light of the fundamental rights forming an integral part of the general principles of community law, including review of community measures that are designed to give effect to resolutions adopted by the Security Council. The ECJ held that in this case, the rights of the defence, in particular the right to be heard, and the right to effective judicial review were not respected. The effectiveness of judicial review means that the community authority is required to communicate to the person or entity the grounds on which the measure is based. This must be done so far as possible either when that measure is decided on or, at the very least, as swiftly as possible after that decision, in order to enable those persons or entities to exercise, within the periods prescribed, their rights to bring an action. Prior communication of the grounds would be liable to jeopardise the effectiveness of the measures freezing funds and economic resources that must, by their very nature, have a surprise effect and apply with immediate effect. Nor, for the same reason, were the EC authorities required to hear the persons concerned before their names were included in the list. However, the regulation provides no procedure for communicating the evidence justifying the inclusion of the names of the persons concerned in the list, either at the same time as, or after, that inclusion. The applicants were never informed of the evidence adduced against them in order to justify the initial inclusion of their names in the list. This infringed their rights of defence, but also breached their right to a legal remedy. They were unable to defend their rights in satisfactory conditions before the EC courts. The court further concluded that the freezing of funds was an unjustified restriction of Mr Kadi's right to property. The regulation was adopted without giving any guarantee that would enable Mr Kadi to put his case to the competent authorities. The court annulled the regulation insofar as it froze the appellant's funds. G

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LOST LAND CERTIFICATES

Registration of Deeds and Title Acts 1964 and 2006

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

Property Registration Authority, Chancery Street, Dublin 7
(published 3 April 2009)

Regd owner: William Codd (otherwise William George Codd); folio: 3855F; lands: Downing and barony of Rathvilly; **Co Carlow**

Regd owner: K&L Diocesan Trust; folio: 8684F; lands: Kernanstown and barony of Carlow; **Co Carlow**

Regd owner: Maureen O'Loughlin; folio: 11666F; lands: Portrushen Upper and barony of Rathvilly; **Co Carlow**

Regd owner: John O'Neill; folio: 9764F; lands: Sliguff and barony of Idrone East; **Co Carlow**

Regd owner: Thomas Foley (deceased); folio: 5526F; lands: Moanduff and barony of Idrone West; **Co Carlow**

Regd owner: Arthur Flood, Carnogue, Ballyhaise, Co Cavan; folio: 1; lands: Carnoge; **Co Cavan**

Regd owner: Sean Kelly, Shercock, Co Cavan; folio: 5857F; lands: Lecks; **Co Cavan**

Regd owner: Martin Keogh; folio: 4653; lands: Lack West and barony of Clonderalaw; **Co Clare**

Regd owner: Patrick Kennedy (deceased), Breaha, Ballynacally, Co Clare; folio: 27544F; lands: townland of Breaghva West and barony of Clonderlaw; **Co Clare**

Regd owner: Daniel D Sullivan (deceased); folio: 12976F; lands: plot of ground situate in the townland of Glanaphuca and barony of Carbery West (west division) in the county of Cork; **Co Cork**

Regd owner: John J McKelvey and Patricia McKelvey, c/o James Boyle & Co, Solicitors, Stranorlar, Co Donegal; folio: 38845; lands: Kinnalargy; **Co Donegal**

Regd owner: Eugene Morgan (deceased) and Paula Morgan, Herenford Lane, Lehaunstown, Shankill, Co Dublin, and William Muldowney (deceased), 150 Kimmage Road West, Dublin; folio: 6316F; lands: townland of Rathmichael, barony of Rathdown; **Co Dublin**

Regd owner: Dermot Spencer, 58 Moyville Road, Raheny, Dublin 5; folio: 34064L; lands: property situated to the north of Tonlegee Road in the parish and district of Kilbarrack; area: 0.025 hectares; **Co Dublin**

Regd owner: John Whelan, Gerard McHugh, Dick Fields, Michael Delaney and John Costello; folio: 72160L; lands: townland of Kilbarrack and barony of Coolock; **Co Dublin**

Regd owner: Rose O'Driscoll, 69 St Assam's Avenue, Raheny, Dublin 5; folio: 68273F; lands: townland of Raheny; **Co Dublin**

Regd owner: Patrick O'Halloran; folio: 39369; lands: townland of Rosscahill West, Pribbaun and barony of Moycullen; **Co Galway**

Regd owner: Timothy Walsh (deceased); folio: 3523; lands: townland of Ower and barony of Moycullen; **Co Galway**

Regd owner: Timothy Walsh (deceased); folio: 2962; lands: townland of Moycullen and barony of Galway; **Co Galway**

Regd owner: Sheila Walker-Perez; folio: 55464; lands: townland of Lemonfield and barony of Moycullen; **Co Galway**

Regd owner: Derry Limited, Oldcastle Road, Ballyjamesduff, Co Cavan; folio: 61097F; lands: townland of Lough Cutra Demesne and barony of Kiltartan; area: 5.9337 hectares; **Co Galway**

Regd owner: Olive Dempsey, The Glebe, Craughwell, Co Galway; folio: 47964F; lands: townland of Dunsandle and barony of Loughrea; area: 21.883; **Co Galway**

Regd owner: Daniel Fallon and Margaret Fallon; folio: 2707L; lands: townland of Ballybaan Beg and barony of Galway; **Co Galway**

Regd owner: Liam Keady (deceased) and Anne Keady, 4 Parnell Avenue, Mervue, Galway; folio: 55710; lands: townland of Ballybaan More and barony of Galway; **Co Galway**

Regd owner: Brian Shaughnessy, Abbey Street, Loughrea, Co Galway; folio: 54903; lands: townland of Cosmona and barony of Loughrea; **Co Galway**

Regd owner: Timothy Riordan; folio: 7076F; lands: townland of Listry and barony of Magunihy; **Co Kerry**

Regd owner: Patrick O'Connor; folio: 20517F; lands: townland of Gortafadda and barony of Dunkerron South; **Co Kerry**

Regd owner: Thomas Bailey, Ciaran O'Connell; folio: 1757L; lands: townland of Ballard and barony of Tralee; **Co Kerry**

Regd owner: Francis Tyrrell, Clayton, Carbury, Co Kildare; folio: 1342; lands: townland of Clonkeen and barony of Carbury; **Co Kildare**

Regd owner: Edward Lennon; folio: 5829F; lands: townland of Freshford and barony of Crannagh; **Co Kilkenny**

Regd owner: Michael Funchion; folio: 3554; lands: Bolton and barony of Callan; **Co Kilkenny**

Regd owner: Fintan Phelan; folio: 16681F; lands: Maryborough and barony of Maryborough East; **Co Laois**

Regd owner: Patrick O'Connor and Sandra O'Connor; folio: 21545F; lands: townland of St Patrick's Road and barony of Limerick; **Co Limerick**

Regd owner: Patrick Doherty (deceased), Gorthbrack, Pullathomas, Ballina, Co Mayo; folio: 12661; lands: townland of Gortbrack North and barony of Erris; **Co Mayo**

Regd owner: Trustees of Ballintubber GAA Club; folio: 4688F; lands: townland of Carrowkeel and barony of Carra; **Co Mayo**

Regd owner: Daniel Donnelly and Marie Donnelly; folio: 6108F; lands: townland of Anneville, Clonard Old and barony of Moyfenrath Upper; **Co Meath**

Regd owner: Michael Farrelly and Carol Farrelly, 28 Marian Villas, Laytown, Co Meath; folio: 23825; lands: Ninch; **Co Meath**

Regd owner: Paul Kane and Alice Kane, 'The Arches', Golf Link Road, Mornington, Co Meath; folio: 7984F; lands: Mornington; **Co Meath**

Regd owner: Michael Kelly (deceased); folio: 14665; lands: Clonfinlough and barony of Garrycastle; **Co Offaly**

Regd owner: Michael J Keavney (deceased), Fairymount, Frenchpark, Castlerea, Co Roscommon; folio:

PROFESSIONAL NOTICES

9637; lands: townland of Mullaghnashee and barony of Frenchpark; **Co Roscommon**

Regd owner: Michael Noel Moran; folio: 25731; lands: townland of Cremully, Aghagad Beg, Castlecoote and barony of Athlone North; **Co Roscommon**

Regd owner: Art Nicolson, Glen, Coolaney, Co Sligo; folio: 10284; lands: townland of Glen (Leyny By) and barony of Leyny; **Co Sligo**

Regd owner: Francis William Richard Barlow, Riverstown, Boyle, Co Sligo; folio: 23677; lands: townland of Ardkeeran and barony of Tirerrill; **Co Sligo**

Regd owner: Matthew Dowdican and Mary Dowdican, c/o Diamond Bar, Tullaghan, Co Leitrim; folio: 5762; lands: townland of Bunduff and barony of Carbury; area: 1.8438; **Co Sligo**

Regd owner: Michael Walton and Margaret Walton, Kilmacowne, Sligo, Co Sligo; folio: 3066F; lands: townland of Kilmacowen and barony of Carbury; area: 0.3670 hectares; **Co Sligo**

Regd owner: Eamon Moloney and Majella Moloney; folio: 37160F; lands: townland of Toor and barony of Owney and Arra; **Co Tipperary**

Regd owner: Martin Dempsey (Junior); folio: 20580F; lands: Kyle Little and Garrymore and barony of Ballaghkeen North and Ballaghkeen South; **Co Wexford**

Regd owner: David Fallon; folio: 2377; lands: Lough and barony of Bargy; **Co Wexford**

Regd owner: Neil Hurley & Co Ltd; folio: 16440F; lands: Killeens and barony of Forth; **Co Wexford**

Regd owner: Murtha Joseph Sullivan (deceased); folio: 262; lands: Barracurragh and barony of Gorey; **Co Wexford**

Regd owner: Mayor, Aldermen and Burgesses of the Borough of Wexford; folio: 9935F; lands: south side of Bride Street and barony of Wexford; **Co Wexford**

Regd owner: John Roche; folio: 19390F; lands: Kiltrea and Newtown and barony of Scarawalsh; **Co Wexford**

Regd owner: Allan Auld and Brigid Auld, Crosscool Harbour, Blessington, Co Wicklow; folio: 11166F; lands: townland of Crosscool Harbour and barony of Talbotstown Lower; **Co Wicklow**

WILLS

Bergin, Michael (deceased), late of Derrylusk, Mountrath, Co Laois. Would any person having knowledge of a will executed by the above-named deceased, who died on 19 February 2009, please contact James E Cahill and Company, Solicitors, Market Square, Abbeyleix, Co Laois; tel: 057 873 246/873 1220, fax: 057 873 480, email: donalwdunne@securemail.ie

Dolan, Anne (deceased), late of 20 Delvin Park, Ferbane, Co Offaly, who died on 8 January 2009. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Byrne Carolan Cunningham, Solicitors, Main Street, Moate, Co Westmeath; tel: 090 648 2090, fax: 090 648 2091, email: bccsolrs@eircom.net

Gibbons, Thomas (deceased), late of Annabeg Nursing Home, Ballybrack, Co Dublin, and formerly of 4 Thorndale Court, Collins Avenue, Dublin 9; Boycetown, Dunsany, Co Meath; and 18 Coolatree Road, Beaumont, Dublin 9. Would any person having knowledge of a will made by the above-named deceased, who died on 24 February 2009, please contact Drumgoole Solicitors, 102 Upper Drumcondra Road, Dublin 9; DX 101 003 Drumcondra; tel: 01 837 4464 or email: info@drumgooles@ie

Harte, James V (deceased), late of 238 Larkhill Road, Whitehall, Dublin 9. Would any person having knowledge of a will executed by the above-named deceased, who died on 21 April 2008, please contact Sheridan Quinn Solicitors, 29 Upper Mount Street, Dublin 2; tel: 01 676 2810, fax: 01 661 0295

Jennings, Gerard (deceased), late of Main Street, Kilbeggan, Co Westmeath; Austin Friars Street, Mullingar, Co Westmeath; and Manila House, Mary Street, Mullingar, Co Westmeath, widower. Would any person having knowledge of a will executed by the above-named deceased, who died on 2 February 2009, please contact NJ Downes & Co, Solicitors, Dominick St, Mullingar, Co Westmeath; tel: 044 934 8646 or email: john@njdownes.ie

Leddy, James Joseph, (deceased), late of 42 Derry Park, Crumlin, Dublin 12 and formerly of 34 Moatfield Park, St Brendan's Estate, Coolock, Dublin 5, who died on 25 October 2004 at St James' Hospital, Dublin 8. Would any person having knowledge of the whereabouts of a will made by the above-named deceased please contact Sheena Lally, Office of the General Solicitor for Minors and Wards of Court, Court Services, 2nd Floor, Phoenix House,15/24 Phoenix St, Smithfield, Dublin 7; tel: 01 888 6231, fax: 01 872 2681

Leonard, James (deceased), late of Ballyhiague, Williamstown, Co Galway, who died on 14 April 2003. Would any person having knowledge of a will made by the above-named deceased please contact Claffey Gannon & Company Solicitors, Castlerea, Co Roscommon; tel: 094 962 0007, fax: 094 962 0522, email: alan@clafgann.com

Murphy, Mary Catherine (deceased), late of 9 Emmet Street, Sallynoggin, Co Dublin. Would any person having knowledge of a will made by the above-named deceased, who died on 9 June 2007, please contact Elizabeth Ward & Co, Solicitors, Clifton House, Lower Fitzwilliam Street, Dublin 2; tel: 01 661 3788, fax: 01 230 3855

Murray (née Russell) Margaret (Madge) (deceased), late of 75 Orwell Road, Rathgar, Dublin 6. Would any person having knowledge of a will executed by, or knowledge of the next of kin of, the above-named deceased, who died on 15 November 2008, please contact Miriam Tighe & Company, Solicitors, 3 The Village Centre, Lucan, Co Dublin; tel: 01 628 1755, fax: 01 628 0997

O'Toole, James (deceased), late of Shrewsbury House Nursing Home, 164 Clonliffe Road, Drumcondra, Dublin. Would any person having knowledge of a will executed by the above-named deceased, who died on 27 January 2008, please contact W St Clair Rice & Co, Solicitors, 103 Main Street, Midleton, Co Cork; tel: 021 463 1616, fax: 021 461 3128, email: rmorley@wscr.net

Venn, Olive (deceased), late of Middleton, Co Cork, and formerly of North Circular Road, Dublin 7. Would any person having knowledge of a will made by the above-named deceased, who died at Raheny House, Howth Road, Dublin 5 on 1 February 2009, please contact Mangan O'Beirne, Solicitors, 31 Morehampton Road, Dublin 4; tel: 01 668 4333, email: solicitors@manganobeirne.ie

Walsh, Irene (deceased), late of 11 Sli na Milaoise, Rathkeale, in the county of Limerick. Would any person having knowledge of a will executed by the above-named deceased, who died on 23 September 2007, please contact Michael B O'Donnell, Solicitors, Main Street, Rathkeale, Co Limerick; tel: 069 64600, email: mbodonnell@eircom.net

MISCELLANEOUS

Reduce your overheads – outsource your bookkeeping/accounts. Westside Bookkeeping Services. Specialising in all aspects of solicitors' accounts/payroll. Experienced bookkeeper available on a contract basis – on site. Excellent references available. Contact: Michelle Ridge at 087 293 0347, email: mridge@indigo.ie

TITLE DEEDS

Will anyone with information as to the identity and whereabouts of the successors in title of **Edmond Burke Roche** of Trabolgan in the county of Cork, in or about the year 1854, who granted a lease of certain lands and premises, being Curate's House at Whitechurch in the county of Cork, on 10 September 1854, please contact James J O'Donoghue & Co, Solicitors, Shournagh House, Tower, Blarney, Co Cork; tel: 021 438 1861, email: jamesjod@eircom.net

An Chuirt Chuarda – Circuit Court; Cork Circuit, county of Cork
In the matter of the *Landlord and Tenant (Ground Rents) Act 1967* as amended – notice of intention to acquire fee simple:
Reox Holdings Limited (applicants)
Reps Hamilton Estate (respondents)
1: Description of lands hereditaments and premises to which this notice refers:

all that and those the premises being part of number 19A South Terrace in the parish of St Nicholas and City of Cork.

2. Particulars of applicant's lease or tenancy: held under yearly tenancy subject to the payment of an annual rent of €7.

3. Part of the lands excluded: none.

Take notice that Reox Limited, being the person entitled under section 3 of the aforesaid acts, proposes to purchase the fee simple interest in the hereditaments and premises described in paragraph 1 herein, being the person now entitled to the lessee's interest in the said mentioned lease.

Date: 3 April 2009

Signed: Ronan Daly Jermyn (solicitors for the applicant), 12 South Mall, Cork

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by John Roberts and Julia de Bruin

Any person having a freehold estate or any intermediate interest in all that and those the plot at the rear of nos 22 and 24 Dollymount Avenue in the parish of Clontarf and city of Dublin, the subject of an indenture of lease dated 26 March 1945 between John Desmond C Oulton of the one part and Patrick George Ruxton of the other part for a term of 200 years from 29 September 1944 at a rent of £1 per annum

Take notice that John Roberts and Julia de Bruin, being the persons currently entitled to the lessees' interest under the said lease, intend to apply to the county registrar of the county of Dublin for the acquisition of the freehold interest and all intermediate interests in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid property is called upon to furnish evidence of their title to same to the below named within 21 days from the date of this notice.

In default of any such notice being received, the said John Roberts and Julia de Bruin intend to proceed with the application before the Dublin county registrar at the end of the 21 days from the date of this notice and will apply for such directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interests including the freehold reversion in the aforesaid premises are unknown and unascertained.

Date: 3 April 2009

Signed: Murray Flynn Maguire (solicitor for the applicant), 4-6 Pembroke Road, Dublin 4

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*.