THE WRIT

THE LAW SOCIETY OF NORTHERN IRELAND

THE EZINE OF THE LAW SOCIETY OF NORTHERN IRELAND

ISSUE 238 Winter 2021

THIS ISSUE

The Society welcomes its new President, Brigid Napier

New liquor licensing laws in Northern Ireland

Guidance on ownership of documents, liens and associated issues

An Interview with Feargal Logan, Joint Manager, Tyrone GAA

THE LAW SOCIETY OF NORTHERN IRELAND

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Introduction

A new edition and a new President! Brigid Napier was elected as the Society's new President on 24 November, and we wish her every success for the year ahead – a year when the Society will celebrate its Centenary. More news on that will follow early in the New Year.

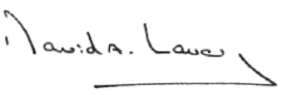
Brigid assumes the Presidency following Rowan White, who was only the fourth President to hold that position for two years. It was the unanimous wish of Council last year that Rowan would serve for a second year in the interests of continuity and also in the hope that his second year in office might see some return to normality following the disruption caused by the Covid-19 pandemic. Unfortunately, the coronavirus looks like it is not going away any time soon and it continued to cast a shadow over Rowan's second year in office apart from a brief interlude when the situation eased somewhat during the Summer.

The Society was very fortunate to have Rowan White as its President during two uniquely challenging years. On behalf of the staff of the Society I would wish to acknowledge how grateful we are to have had his steady hand on the tiller throughout this time.

This Christmas issue of the Writ is packed with interesting and relevant articles, and because of the introduction of new page-turning technology they should be more easily accessible than they would have been in the previous long format. My thanks go to our Head of Library & Information Services, Heather Semple, for her dedication to making each successive issue of the Writ even better than the last.

In this issue you will meet two of the newest members of the Society's Senior Management Team. Jamie Warnock has joined us from the Northern Ireland Department for the Economy to become the Society's Head of Policy & Engagement. Darren Patterson joins us from Grant Thornton and succeeds Anne Devlin as Head of Professional Development. We wish Anne every success as she leaves the Society after 14 years of dedication to professional education in order to pursue other interests.

In conclusion, I would like to wish all our readers every happiness for Christmas and the New Year.



David A. Lavery CB
Chief Executive

Contents

Introducing Law Society President Brigid Napier

Brigid Napier graduated from Queen's University Belfast in 1985 and joined her father in the family practice of Napier & Sons, a firm established by her grandfather in 1930. Since its inception, the firm has been renowned for its expertise in Insolvency and Brigid proudly took up this mantel, becoming one of only 3 solicitors in the jurisdiction to be licensed as an Insolvency Practitioner. She is currently a Director in Napier Solicitors and advises on all aspects of Personal and Corporate Insolvency and is regularly appointed as a Trustee in Bankruptcy or Liquidator in complex insolvencies. Brigid's daily work as a practising solicitor with over 30 years' experience involves working at the coalface with individuals and businesses in crisis.

One of Brigid's key goals is to give back to the profession and to encourage and inspire her peers as well the next generation of lawyers. From an early stage in her career, Brigid was involved in the Young Solicitors Association, and was a popular speaker at the Institute of Professional Legal Studies. She is particularly proactive in promoting women in the law and was proud to take part in the Law Society's mentoring programme. In recognition of her dedication to this cause, Brigid was honoured to receive the "Best in Professional Services Award" from Women in Business Northern Ireland. She also undertook bespoke training with the Institute of Leadership and Management and attained Advanced Coaching status.

Brigid cherishes her client relationships and values integrity, loyalty and professionalism. She also understands the highs and lows, and the trials and tribulations of private practice in the SME sector as well the personal sacrifices which many have to make for career advancement. This insight has informed her contribution to the work of the Law Society as both an advocate for members and a regulator. She was elected to the Council of the Law Society of Northern Ireland in 2017 and has since served as a member of a number of regulatory committees, including the Professional Conduct Committee and as Chair of the Professional Liability Committee.

In her free time, Brigid has a passion for travel with recent, pre-pandemic trips to Argentina and India, aimed at expanding her horizon and learning more about other cultures. Closer to home, Brigid enjoys hosting and entertaining friends and colleagues as well as exploring the sights and sounds of Northern Ireland, relishing long walks in Portstewart or the Mourne mountains.

Brigid sits on the Board of Leukaemia & Lymphoma NI which will be the President's Charity of the Year.

President's Message

It is an honour to write my inaugural message to you as your President. As I begin my term in office I do so mindful of the continuing pressures that face the Society. Still, I believe that there are very many reasons for us to be optimistic as we prepare to celebrate our centenary in 2022.

My optimism stems from the knowledge that the one constant over the last 99 years of the Law Society's existence is its ability to embrace change and to adapt to the economic, political and social challenges the Society has faced, no more so than during the current Pandemic. This has required an agility of mindset, systems and practice on the part of the whole profession which was unprecedented. The continuing fallout from Covid has led to a displaced workforce, which has become our default working norm. It has also required us to fast-track law tech in our practices.

The younger members of the profession in particular have been affected by the changes in practice thrust on them by Covid. It is incumbent on those of us with experience behind us to properly mentor, nurture and support our new solicitors and to ensure that we hand the baton on to guarantee the continued success of the profession. Indeed, the well-being of the entire profession will be at the forefront of my year in office.

Our increasing use of law tech also brings with it challenges. We live in an everchanging world of social media, a time of cyber bullying and a cancel culture. As lawyers we have a duty to defend freedom of speech, to advocate for justice and to have an abhorrence of abuse, intimidation and bullying whether cyber-related or not.

Our reliance on technology also means that we all are living with the spectre of our systems and security being compromised, and we know that crisis management and disaster planning are essential to protect our clients and our practices.

However, I firmly believe that the members of this profession are more than up for these challenges and welcome them as an opportunity to grow and strengthen as we move into the next Centenary.

During my year as President I am committed to communicating more effectively with you as members on issues of importance and on the work of the Council. We have begun the process by making Council meeting minutes available to members on our website. We also plan to deliver a new website next year ensuring greater online engagement with you. I want to build collegiality with all of our members to make us stronger together as a group than as individual solicitors. Putting "Members First" is high up on my Agenda, evidenced by the recent appointment by the Society to a newly created post of Head of Member Services. Alison Grundle and I look forward to engaging with you and hearing your views during the course of the year. I would also welcome Jamie Warnock, newly appointed Head of Policy and Engagement and Darren Patterson, Head of Professional Development to the Society. You will read more about their profiles in this edition of the Writ.

In its' Centenary year the Society has an exciting range of projects and activities aimed at celebrating the role of solicitor in society generally and in the legal profession as a whole. More details about these events will follow in due course.

I am conscious of the enormous contribution made in the past 99 years by so many previous Presidents of the Society. As this year's President, I am extremely proud to be following in the footsteps of my grandfather, James Napier, and my great uncle. Michael Bready. However, I am equally proud to be the 10th female President of the Law Society, particularly in its centenary year. The redoubtable Thomasena McKinney was the first female President in 1978, demonstrating that the Society was well ahead of its time in appointing female solicitors to the office of President. Indeed, in order to demonstrate how progressive the Law Society of Northern Ireland has been in appointing female figureheads, research has shown that the Law Society of England and Wales (membership of 195,679) has had 6 female Presidents; the Law Society of Scotland (membership of 12,000) has had 5 female Presidents and the Law Society of Ireland (membership of 13,196) has also had 5 female Presidents. The membership of the Law Society of Northern Ireland is currently 6,000.

During my time as President I will continue the work of the Society in promoting the excellence of the solicitors' profession at home and abroad, emphasising the value of independent legal advice and access to justice for the entire community.

I have had the unique experience of being your Junior Vice President for two years, seeing at first-hand the diversity and demands of the role of President. I conclude by assuring you that I will represent all of your interests to the best of my ability.

The Presidential and Chief Executive Team of the Law Society of Northern Ireland. From left: David A. Lavery CB, Chief Executive; Brian Archer, Junior Vice-President; Brigid Napier, President; Rowan White, Senior Vice-President and Brian Speers, Treasurer.

Law Society Council Dinner

Left to right: Retired Lord Chief Justice – Sir Declan Morgan; I.Stephanie Boyce – President Law Society of England & Wales; Michelle Ní Longáin, Senior Vice-President, Law Society of Ireland; Rowan White – President, Law Society of Northern Ireland; The Right Honourable Dame Siobhan Keegan - Lady Chief Justice for Northern Ireland; David A. Lavery CB - CEO, Law Society of Northern Ireland; Peter May – Permanent Secretary; Ken Dalling – President, Law Society of Scotland.

Rowan White, President, Brigid Napier, Junior Vice-President and David A. Lavery CB - CEO, Law Society of Northern Ireland (LSNI).

David A. Lavery CB - CEO, LSNI, The Right Honourable Dame Siobhan Keegan and Rowan White, President LSNI.

John Comerton with Judge Burgess.

Mandy Kilpatrick, David A. Lavery CB and Jacqui Durkan.

Mr Justice O'Hara, Brigid Napier, HHJ Kinney and Paul Andrews.

Ruairi Gillen, James Turner, Lorraine Keown, David A. Lavery CB; Paddy Mullarkey.

The Right Honourable Dame Siobhan Keegan - Lady Chief Justice for Northern Ireland.

Rowan White, President, Law Society of Northern Ireland.

Reg Rankin, Michael Robinson and Peter May.

Richard Craig, Emma Hunt and Darren Toombs.

Anthony Harbinson, Brigid Napier and Alison Grundle.

President Rowan White and Deputy Lord Mayor Alderman Tom Haire.

Alastair Rankin, Heather Semple and Presiding District Judge Duncan.

Colin Gowdy and Alan Hewitt.

Jamie Warnock,
Head of Policy & Engagement

As part of the programme to restructure the Society's Senior Management Team, Jamie Warnock joined us in July as Head of Policy and Engagement, bringing with him a wealth of political and policy experience gained in the Civil Service, both here and in Whitehall. Here, Jamie reflects on his first experiences of working in the Society and his plans for the Policy and Engagement Department.

It is genuinely hard to believe that I joined the Law Society only a few months ago, given the variety of issues I've been involved in, the amount of new things I have learned and many brilliant people I've met and worked with since coming on board.

By way of introduction, I will first confess that I am not a solicitor nor a law graduate. Although I am married to a solicitor, which without doubt gives me a unique viewpoint on the trials and tribulations of a solicitor operating in Northern Ireland today. Career-wise, I am fortunate to have had many varied and interesting roles – after almost six years as a private client stockbroker I moved into public service where among other things I delivered numerous policies and pieces of legislation both here and in Westminster, ran grant schemes and was involved in political talks and negotiations. I worked in several areas related to justice and the legal profession and worked closely with solicitors and barristers for many years, including on several high-profile judicial reviews. All of this is valuable experience to draw upon in my new role with the Society.

My second confession is that I did not realise the wide range of topics and stakeholders covered by the Society in its role representing the profession. I had naively thought that my work would be focussed within the legal world and, in terms of Government, with the Department of Justice. And I have indeed spent lots of time so far engaging the DoJ on matters such as Legal Aid, Brexit and Covid recovery. I had no appreciation, however, for the breadth of activity beyond the traditional legal topics and indeed beyond NI that I would become involved in. So far, amongst other things, I have dealt with issues as diverse as The Troubles Pension Scheme, Free Trade Agreements with Australia and New Zealand and recently I've had to turn my attention to the vital issue of sewer connections! I have also spent quite a bit of time on the issue of climate change and was delighted to help facilitate our Society's partnership with the Law Society of Scotland on the COP26 event in Edinburgh in October.

In retrospect, I should not have been surprised at the variety of topics my work entails as this is simply a reflection of the importance and prevalence of the solicitor profession across society. What this highlights though, is that the profession is likely not as well understood by the general public or more specifically by those in Government as it should be. A key objective for me and the Policy & Engagement Department therefore is to raise awareness of the vital role the profession plays and ensure that the voice of the profession is heard and is as influential as it can be.

Looking ahead to 2022, it is shaping up to be a busy year for Policy and Engagement as we look to ensure the Society is an assertive and authoritative voice for the solicitor profession. Our Centenary year coincides with the Northern Ireland Assembly elections and we will be working hard to ensure those standing for election hear and understand the concerns of the profession. In support of the Centenary, we have commenced a piece of research to capture and highlight the solicitor profession's significant contribution to the Northern Ireland economy, with the bulk of this work to take place in the first few months of next year and a report due in Spring.

We are also in the process of establishing two new special interest groups – the Climate Justice Group and Law Tech Working Group. These will operate under the leadership of the Future of the Profession Committee and look to spearhead the profession's approach to climate change and technological change respectively. The Society is currently recruiting members for both groups and I would strongly encourage those with an interest in these important issues to put themselves forward to join. These new initiatives sit alongside the excellent work that the Department will continue to do, engaging Government, responding to public consultations, supporting the Law Society Council and facilitating the work of the Policy Committees that many of you will be familiar with. I look forward to updating you on our progress in future editions of the Writ and our various communication channels.

In all our work, I am determined to ensure that the work of the Policy & Engagement team is focussed on what matters to the solicitor profession. That is no easy task in a profession with so many diverse views and I urge members to get in touch at *policy@lawsoc-ni.org* if issues arise that we can assist with.

Lastly, I'd like to take this opportunity to wish you all a happy and restful Christmas and a prosperous New Year.

THE LAW SOCIETY OF NORTHERN IRELAND

The Law Society of Northern Ireland ('the Society')
Non Contentious Business Committee
Practice Note 2021/1

Issued by the Non Contentious Business Committee to provide guidance in relation to the issue of the charging and agreement of professional fees by a solicitor in an estate where that solicitor is also acting as the sole executor (hereinafter called the "Solicitor-Executor"). This guidance also extends to all estates where a "Solicitor-Executor" has control as executor and includes estates where more than one solicitor or principal in a solicitor's practice is appointed as executor regardless of whether the practice is a sole trader, partnership, a limited liability partnership or a limited liability company or if the "Solicitor-Executor" is a trustee company owned or controlled by such a solicitor or solicitor's practice.

Practice Note 2021/1

The Society will consider whether a solicitor has complied with this guidance in any relevant matter before the Society concerning the professional practice or conduct of a Solicitor-Executor. A Solicitor-Executor may be asked by the Society to justify a decision to deviate from this guidance.

This guidance uses the terms "must," and "should" throughout to contextualise how to understand the various directions. The terms have the below meanings:

Must – a requirement or other mandatory provision. You must comply, unless there are specific exemptions or defences provided for in relevant legislation or regulations.

Should – good practice for most situations. These may not be the only means of complying with the requirements and there may be situations where the suggested course of action is not the best course of action. If you do not follow the suggested course of action, you must be able to justify why your alternative course of action is appropriate, in the particular instance.

The Committee hereby directs that:

1. The Solicitor-Executor must take all necessary steps to ensure the professional fees proposed to be charged are reasonable in accordance with all relevant legislation, published guidance and case law.

2. The basis upon which the professional fees are to be calculated and the Solicitor-Executor's terms of business should be sent to the residuary beneficiaries at the outset of the administration of the estate.

3. The Solicitor-Executor should take particular care in the event that he/she is aware or ought reasonably to be aware that any residuary beneficiary is a vulnerable person and/or may be unaware of appropriate charging rates. In such event the Solicitor-Executor should consider whether it is also appropriate to advise such a residuary beneficiary to seek independent legal advice in relation to the proposed professional fees at the outset of the administration of the estate.

4. The Solicitor-Executor's consideration of the matter, his/her decision and the reasons for his/her decision whether it is appropriate so to advise such a residuary beneficiary should all be appropriately recorded.

5. If such independent legal advice is sought by such a residuary beneficiary, it ought to be paid for by that residuary beneficiary and not by the estate.

11 November 2021

Annual Dinner 2021

The Culloden Estate & Spa in Holywood was the venue for the Law Society of Northern Ireland's Annual Dinner which was held on 25 November 2021. Over 220 solicitors attended the dinner including 55 newly admitted solicitors.

Speeches were delivered by the Society's new President, Brigid Napier, guest speaker, former President of Ireland, Mary Robinson and Chris J. Coulter, of A & L Goodbody speaking on behalf of the newly admitted solicitors.

The Society's new President, Brigid Napier welcomed the newly admitted solicitors to the Law Society of Northern Ireland, outlined her Presidential programme for the year ahead and her support for her chosen charity of the year, Leukaemia & Lymphoma NI.

During her key-note address President Robinson took time to reflect on her political and humanitarian career, her contribution to the debate around climate change and to offer some words of advice and guidance to the newly qualified solicitors gathered in the room.

*A selection of photographs from the event can be viewed by clicking **here**.*

(L-R) Brigid Napier, Mary Robinson and David A. Lavery CB.

Brigid Napier.

Mary Robinson.

Rowan White.

Chris J. Coulter.

Darren Patterson,
Head of Professional Development

While the legal profession has undergone significant change in recent years, the next decade will also see profound reforms across the profession. Firms will need to transform how they attract, develop, retain and change talent in order to succeed. The Law Society of Northern Ireland remains committed to supporting Members in preparing to meet these key challenges. This is reflected by the recent appointment of a new Head of Professional Development. Darren Patterson took up post in October and is responsible for transforming the Society's professional development offering to Members, from their entry as trainee solicitors, throughout their ongoing learning journey during their professional careers. Darren brings a wealth of experience to the role having previously worked across multiple sectors in the areas of people development and change management.

Developing Talent Now and for the Future

Prior to joining the Society, Darren spent over three years as Associate Director within Grant Thornton Ireland where he helped to establish the firm's People and Change consulting practice in Belfast, Dublin and Waterford. His work spanned large-scale transformation programmes and standalone People & Change projects within Government & public sector, financial services and banking, transport and infrastructure, energy and education. Darren has also worked for global consulting firms PwC and EY where he led on a broad range of services to clients across UK and Ireland. In addition to his consulting background, Darren spent ten years with two of Northern Ireland's largest companies, Translink and Northern Ireland Water, in a variety of leadership roles. During his time in industry he delivered strategically significant cultural transformation and behavioural change programmes aimed at addressing complex organisational and sectoral challenges, such as:

- Attracting and retaining talent in a competitive labour market and managing succession in key leadership roles, whilst still delivering high quality services;
- Managing increasing demand for services;
- Driving organisational performance, in particular in the face of rising expectations of customers and stakeholders;
- Delivering effective and efficient organisational funding, and demonstrating value for money, in the face of increased scrutiny;
- Realising the opportunities presented by new technologies and the need to be responsive and agile.

The Society is presently developing an ambitious strategy centred on providing real value to Members. This is supported by its new operating structure of which Professional Development is a critical component.
The work of the Society's Professional Development team has traditionally focused on the training and admission of solicitors and for their ongoing learning. Going forward, the team will provide a strong focus on the experience of Trainee and Newly Qualified Solicitors and enhancing the Society's Continued Professional Development (CPD) offering.

A review of the Solicitor Trainee programme is planned for early 2022 that will engage both Trainees and Masters with the objective of enhancing the overall experience for both groups and generating an ongoing future pipeline of diverse talent for the profession.

While there is a key focus on engagement with all Members across the profession, specifically the Professional Development team will be seeking to further engage with Newly Qualified Solicitors to help support how they learn, develop and connect at the outset of their professional careers.

More broadly, the Society will develop a combination of approaches, resources and techniques that will help all Members manage their own learning and growth. The future focus of the Society's CPD proposition will centre on results – the benefits that professional development can bring to solicitors in the real world.

The Society understands CPD is an investment that Members make in themselves but often its benefits are overlooked during the busy day-to-day operations of being a solicitor. It's an important message the Society's Professional Development team will be communicating and reinforcing.

As Darren explains
" CPD adds real value as a way of planning your development that links learning directly to practice. It can help you keep your skills and knowledge up-to-date and prepare you for greater responsibilities. It can boost your confidence, strengthen your professional credibility and help you become more creative in tackling new challenges. Perhaps the most important message is that one size doesn't fit all. Wherever you are in your career now and whatever you want to achieve, your CPD should be exactly that: yours. I am delighted to take up my new role as Head of Professional Development with The Law Society of Northern Ireland. I look forward to working with colleagues and Members on the admission of newly qualified solicitors to the profession and their continuing professional development throughout their careers."

British and Legal Information Institute

Many members will be aware of **BAILII** (the British and Irish Legal Information Institute), a portal of legislation and caselaw available free of charge at *www.bailii.org.* This is part of a Commonwealth-wide resource under the umbrella organisation, WORDLII.

Since its inception 20 years ago, coinciding with the exponential growth of legal information becoming available on the internet, BAILII has been growing in scope and popularity. The Law Society of Northern Ireland is pleased to provide BAILII with support in terms of financial sponsorship in order to maintain the database and develop the scope of the website

The Society's Librarian, Heather Semple, has been appointed to the Advisory Council of BAILII as the Northern Ireland representative. BAILII is currently undergoing a period of transition, which is outlined in the article below written by Jules Winterton, the Chief Executive of BAILII.

Should members have any comments about BAILII please contact *heather.semple@lawsoc-ni.org*

BAILII – the next ten years

Jules Winterton,
CEO of BAILII

Jules Winterton on BAILII's historic – and ongoing – role in facilitating access to justice

In December 2020 BAILII, the British and Irish Legal Information Institute celebrated its 20th anniversary. We are looking forward to continuing and enhancing our services. The announcements by the Ministry of Justice and The National Archives in June this year about a planned new service for 'important' judgments and 'cases of legal significance' from England and Wales have caused some confusion about BAILII's ongoing role. This article outlines BAILII's historic contribution to facilitating access to justice and our future plans.

Access to justice

BAILII has long played a key role in the international movement calling for free access to law as means to promote the rule of law and access to justice. For many years, we have campaigned for the need to improve access to judgment data and the information flow by which it reaches the public through more comprehensive, speedy and structured judgment data for the benefit of all users. BAILII loads new judgments within hours of receipt. Usage is anonymous, requires no log on or registration, and there are no cookies, trackers or analytics.

We will continue to play our part in ensuring that free legal information services are seen to be appropriately independent. BAILII will remain an independent charity and the largest free internet provider of primary legal materials in the United Kingdom. We take very seriously our role in helping people to understand and use the law. We are determined not only to ensure that public access to case law from jurisdictions throughout the UK and Ireland is maintained, but also to develop our service to help users, and their lawyers and advisers, to interpret content.

Enhancing the service

In addition to continuing to publish all our current range of materials, BAILII has been working on plans to add valuable additional content.

An important development is our evolving initiative to provide access to high-quality fully indexed legal commentary and academic analysis alongside and interlinked with primary materials. We look forward to discussions with blog authors, legal commentators, and academic writers to offer them an additional route to share their insights and reach wider audiences as this project develops.

BAILII is also updating and enhancing its OpenLaw service, liaising with academic specialists, to support legal education. The service identifies and links to judgments of leading cases by topic for law students. These judgments will

include nutshell descriptions to assist in understanding at a glance the significance of the cases. An example is the updated list for torts. The project was originally funded by JISC, at the time the Joint Information Systems Committee of the Higher Education Funding Council, and continues with the assistance of the Institute of Advanced Legal Studies (IALS).

Supporting research

Part of our mandate is a commitment to support research in legal information. We sponsor an annual lecture by leading members of the judiciary and eminent academic lawyers, most recently Professor Richard Susskind. BAILII is also collaborating with an Oxford University research project team investigating the implications of AI for law. We expect that the findings of the research will assist MOJ/HMCTS and BAILII build robust data governance structures and inform future decisions on how data might be shared for AI applications and under what conditions.

Looking to the future

The forthcoming creation of a government archive for data analysis and for future generations is a major step forward for England and Wales. It is one for which BAILII has long advocated and is actively supporting, while maintaining all of our own content and services.

Currently, judgments in England and Wales are distributed directly by judges to interested parties including publishers. The addition of a new publisher of judgments is always welcome but BAILII hopes that this new role for The National Archives will not reduce the range of recipients of this direct distribution, or adversely affect the speed or selection of cases made available for publication. This would compromise both independence and access to the law.

BAILII is grateful to all its stakeholders, including the Bar and the legal community more widely, for their continuing support for our free, easily accessible and independent service – and one we plan to enhance further still.

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*The Law Society of Northern Ireland is grateful to **Counsel** magazine for permission to reproduce this piece.*

Our reach

BAILII's services have been available throughout the pandemic with staff working from home. Demand spiked during lockdown – in 2020, page views increased by 3 million to 79 million and downloads increased from 3.7 million to 5.4 million.

BAILII contains 102 databases covering 10 jurisdictions comprising 169+ gigabytes of legal materials and over a million searchable documents. Over 35,000 items are added each year (rather fewer during 2020 as a result of the effects of the pandemic on court hearings). These derive from many sources: actively sought from courts and individual judges, from collaborative digitisation projects such as the case papers of the Judicial Committee of the Privy Council, donated by or licensed from partners and supporters, in addition to judgments sent directly by Judges.

BAILII covers materials from England and Wales, Scotland, Northern Ireland and from the Republic of Ireland, one of the few common law jurisdictions within the EU. BAILII's current scope extends to the decisions of the European Court of Justice and the European Court of Human Rights, to other jurisdictions including Jersey, and we have recently reached agreements to publish the judgments of commercial dispute resolution courts applying English law. Judgments of the Abu Dhabi Global Market courts and the Qatar International Court have been added and other courts are under consideration. BAILII's international links to partner legal information institutes around the world through membership of the Free Access to Law Movement allow users to extend their search even further (*http://www.commonlii.org/, http://www.lawcite.org/*).

The Meeting Space at Law Society House officially opened

The Meeting Space at Law Society House has been officially opened by The Lady Chief Justice the Right Honourable Dame Siobhan Keegan and the Justice Minister, Naomi Long MLA.

Speaking at the opening the Justice Minister said:

"I welcome the opening of these state of the art facilities and the additional capacity the space will provide for mediations which, in appropriate cases, can enhance access to justice and improve outcomes. I have prioritised action on Alternative Dispute Resolution in plans being taken forward for the modernisation of the civil justice system, with the aim of making the system more accessible as well as fairer, more proportionate and more responsive.

I recognise enhancing the use of ADR can go a long way to achieving those objectives and I am delighted to see the continued steps being taken by the Law Society to further support its use."

The Meeting Space

At Law Society House

From left: Rowan White, then President, Law Society of Northern Ireland; Minister for Justice, Naomi Long MLA; Lady Chief Justice, The Right Honourable Dame Siobhan Keegan and David A Lavery CB, Chief Executive, Law Society of Northern Ireland at the official opening of The Meeting Space.

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Resolutions and Mediation

Brian Speers,
Solicitor, Mediator,
Chair, Law Society
Mediation Service

On 6 September 2021 Lady Chief Justice Keegan gave the opening of the new term address.

Covering a wide range of matters, including highlighting the need to embrace and develop technology, the new Lady Chief Justice also mentioned the importance of early resolution of proceedings in the civil court.

Indeed, in the published version of her speech she said, 'I am also keen to pursue a greater emphasis on early resolution more generally.' She noted that too often resolution is addressed, 'only at the last minute at the door of court.' She rightly concluded, 'there are potential savings, both human and financial, in the early resolution of disputes.'

She went on to mention two aspects – early neutral evaluation and the development of a bespoke resolution court within the family division.

The Lady Chief Justice did not, so far as I read in the published version of her speech, mention mediation. I believe that this is because mediation is now so entrenched in the Civil Justice system that it did not need a specific mention. The Gillen Review of Civil Justice certainly recognised that mediation was an integral part of Civil Justice.

Indeed, mediators acting as neutral parties, suitably trained in facilitation, effective listening and the generation of ideas can greatly assist the resolution of many civil and commercial matters.

However, there is some debate about the appropriateness of sitting Judges assuming the role of mediators or expressing a view in the hope that it might influence the parties to resolve differences. Our Judiciary rightly command a position of respect and influence. Mediation is a forum where parties should be free to express their own views and come up with ideas for resolution of disputes that work for them and is generally regarded as a voluntary arena where there is no pressure on parties to accept guidance or direction from the mediator. Where Judges are involved in seeking to either make suggestions or influence parties by perhaps predicting outcomes, there can be a danger that the parties are actually influenced by the respected figure addressing them and providing their observations.

In a recent article following the publication of the Civil Justice Council's Report on the desirability or otherwise of compulsory ADR, well-known mediator and author Tony Allen, also expressed some concern about Judicial figures becoming involved in mediation. He quoted from the views of Lord Justice Thorpe in a judgment dealing with early neutral evaluation or the parallel family division process of judicial Financial Dispute Resolution (FDR).

Tony Allen referred to the judgement in *Rose -v-Rose* 2002 EWCA Civ 208 where Lord Justice Thorpe said, *'the art of mediation depends upon qualification and training. Years of experience in a specialist litigation field are no substitute for that training and qualification. Very few of the Judges whose duty it is to conduct FDR hearings will have had any training and qualification as mediators. However, those who have long experience in a specialist field of litigation are supremely well qualified to offer what is widely known as early neutral evaluation.'*

After describing the process of early neutral evaluation including an objective risk and analysis of costs involved, Lord Justice Thorpe went on to say, *'beyond those methods there may be dangers in Judges overestimating their ability to bring about a compromise by the use of other forms of mediation for which they have received no training.'*

Where parties are encouraged to take part in a process involving the Judiciary it should be made clear that this is not mediation but a different process. The Law Society Mediation Service can offer experienced solicitor mediators trained in mediation and the facilitative model of exploring with parties what are their interests and what outcomes would best work for them.

It is hoped that the interest of the Lady Chief Justice in early resolution will allow for exploration of the benefits of various approaches to early resolution including early neutral evaluation and will consider the appropriate way of conducting the Specialist Resolution court as it is described.

However, one also hopes that the value of a fully independent neutral mediator trained and experienced will be able to supplement and be acknowledged as another appropriate and desirable approach.

THREE ANGLES ON MEDIATION

Michael Wilson,
Elliott Duffy Garrett

There are different ways to experience mediation. One as a client, another as a legal representative, and the third as the mediator. I have been fortunate to have experienced all three. What is notable is that while they all have a part in the mediation process, each has a very different perspective.

Mediation provides the opportunity for parties to resolve all types of dispute in an efficient and professional manner, and often within a short timescale. As mediation is increasingly seen as a normal part of the dispute resolution process, the benefits for a client are self-evident. For the solicitor mediation is an invaluable process because it allows the client, with the assistance of the mediator, to be central in seeking an all-embracing resolution of their dispute. My advice to legal representatives is to resist the temptation to over analyse the issues in dispute or seek to make pure legal points no matter how relevant and informative they may be in any parallel litigation process. Mediation offers a neutral time and space and a huge opportunity for clients to resolve their dispute. Encouraging a client to place its trust in the mediation process and encouraging a desire to settle is an important part of the process. Not only does a resolution save costs, but the outcome is often more all-embracing than would be available within the usual scope of litigation. What client would not be happy to achieve such an outcome?

I have also been the client in mediation which was a very different experience. I was the Trustee of a Will settlement which gave rise to some complex issues arising from the deceased's ownership of the entire shareholding of a company, and his widow's claim against the estate arising from the provision the deceased had made for her. At the same time as trying to address the widow's claim, there was a pressing need to sell the company as the testator had gifted his shareholding to charity. The dispute was referred to early stage mediation. As the client I had to resist the instinct to see the mediation process through the lens of a solicitor and look narrowly at legal issues and potential legal outcomes. Happily, the relationship with the widow had remained cordial at all times and with the assistance of the mediator the focus was very firmly set on seeking to resolve the issues., leading to a successful outcome. This not only resolved all issues with the widow but did so in a manner that was respectful of her loss.

Finally, an accredited mediator will always ensure that the parties are aware that the process is theirs, and that it is confidential and facilitative so that any decision making will be left to them. As a mediator I can have no decision making authority, however, I will offer a structured, but nonetheless flexible, process for the parties to make best use of in seeking mutually satisfactory solutions.

Mediation belongs to those in dispute. It is not about rights and wrongs is in a pure legal sense but with the goodwill of the parties, the support of their legal representatives, and the facilitative assistance of the mediator, there is always a real opportunity of resolving a dispute on a lasting basis and one which delivers the benefits of an agreed outcome against the uncertainties of any ongoing adversarial, and considerably more costly, legal process.

LAW SOCIETY OF NORTHERN IRELAND

CLINICAL NEGLIGENCE PRACTITIONERS' GROUP

Ann McMahon
Head of Practice and Procedure

The Society re-launched its Clinical Negligence Practitioners' Group in December 2018 with just under 100 members. It now has an impressive 170 members who either practice in this area of law or have an interest in it. Although one of the aims of the group was to offer an opportunity to network this has been curtailed in terms of face-to-face meetings since the pandemic and public health restrictions were introduced in 2020. However, the CPD programme for members has gone from strength to strength year on year. Many areas of clinical practice have been covered including preparation of special loss, dental injuries, the nurse expert, abdominal injuries, annual case law updates, medical negligence in the ED and many more. The Group has continued to promote good practice and ensure that members are up to date with developments. Notably the CNPG Board completed a revision of the 2012 Protocol for Clinical Negligence Litigation which was published in September 2021. Mr Justice McAlinden and Board members delivered training on the new arrangements.

The Group is led by a Management Board which is a sub-group of the Society's Contentious Business Committee. In advance of this year's Annual Mini Conference, Board elections were held. Five candidates put their hats in the ring and LSNICNPG were asked to vote for two plaintiff and two defendant representatives to constitute the Board and maintain its delicate balance of competing views in this area of practice. The new Board term commences in January 2022 and the members are Patrick Mullarkey, Marysia Kelly, Roger McMillan and Mark Harvey. The positions of Chair and Vice Chair will be filled at the first Board meeting. Dates for delivery of CPD have been secured for 2022 and details will issue to LSNICNPG members. The Board will continue to engage with other stakeholders in this area of practice and plan to continue engagement with LSANI to look at ways to streamline processes.

Changes to Liquor Licensing finally introduced

Seamus McGranaghan,
Director O'Reilly Stewart

Amidst the turmoil of what is now almost two years since the first measures were brought in to tackle the Covid-19 pandemic, an important piece of legislation affecting our licensed trade here was introduced on 1st October this year.

The Licensing and Registration of Clubs (Amendment) Act (Northern Ireland) 2021 has been some years in the making. Indeed, back as far as 2012 a public consultation was originally launched to garner opinion on licensing reform. Stop-start local government since then has not helped in moving this forward over the years.

The new legislation represents the single greatest change to our licensing laws since 1996 and while it will not please everyone, it undoubtedly represents an improvement for those in the trade and brings NI more in line with our counterparts in the UK and in Europe.

Headline changes brought about by the legislation are as follows;

Removal of Easter Restrictions

Previously, premises were only allowed to serve alcohol between 5-11pm on Good Friday with restricted hours on Easter Saturday and Sunday. Those restrictions have now been removed, treating Easter weekend like any other. This situation has been particularly problematic and visible with premises frequented by international tourists who are often bemused by our restricted serving times.

Additional Hours

Late hours until now have been to 1am Monday-Saturday and 12 midnight on Sundays. The new law sees Sundays treated like any other day while pubs and hotels can now apply to open to 2am, so an extra hour, up to 104 nights a year. In addition, those smaller pubs who don't currently have ability to open beyond 11pm, would be able to do so until 1am. Drinking up time is extended from 30 minutes to an hour so in effect, a pub or hotel availing of all the new applications will be able to open to 3am rather than the current 1.30am.

Our practice has seen limited uptake in these additional hours so far, which perhaps is not surprising giving the difficulties and extra costs already facing pubs and hotels. The application process itself is likely to cost operators in the region of £2000 between court fees, newspaper advertisement costs and legal fees and they then have to take into consideration the additional operating costs of remaining open for longer.

Major Events

What exactly constitutes a major event is yet to be known. It will be at the discretion of the Department and will relate to events 'attracting significant public interest.' There is clearly a possibility that this definition could be subjective but one would think that prior outdoor concerts and major golfing events would fall under such a definition. These currently take place via occasional licences which, in our opinion, can often be a legal grey area but is currently permitted by the courts. Major events will also have flexibility in their opening hours.

Cinemas

Cinemas will be allowed to apply for a liquor licence, as they can do already in Great Britain. They will come under the umbrella of 'places of entertainment' so the provision of alcohol will have to be ancillary to the showing of movies. We expect the courts might take a conservative approach to licensing cinemas with designated licensed areas within the theatre and dedicated points of sale. We have already had enquiries from cinema operators who are keen to apply for this licence as soon as they can.

Alcohol Producers Licence

The new legislation creates a new category of licence holder, a 5(1)(m) licence. This will allow producers to sell alcohol which is produced in their premises for consumption off their premises i.e. visitors to a brewery or distillery will be able to buy a bottle of whiskey or beer to take home with them. It will also allow the producer to provide samples of their product to persons on a tour. Importantly it also allows producers to sell their products away from their premises at food and drinks fayres or events that 'wholly or mainly promote food, drink or craftwork produced in Northern Ireland or relates to agriculture in Northern Ireland'.

Removal of Children's Certificates

Currently under 18s are not allowed on a licensed premises unless it holds a children's certificate under Article 59. The process to obtain one is thought to be overly bureaucratic and unnecessary. From now on, the requirement to hold a children's certificate will be done away with and instead the law will read that persons under 18 are not allowed on a licensed premises unless it is during a time when meals and beverages suitable for persons under that age (including water) are also available.

Premises will also be able to apply to be licensed for underage functions. This deals with the issues that have repeatedly arisen over the years with underage discos and school formals taking place at hotel premises.

Children will also be able to remain on licensed premises past 9.30pm for a private function e.g. weddings. Until now, it has been illegal for children to stay past that time, even at weddings, although in reality the law is rarely, if ever, enforced. This now regularises the position, albeit children must be accompanied by a parent/guardian.

Review of the Surrender Principle

This review would be of high importance to the holder of a 5(1)(a) (pub) or (b) (off-licence) licence. At present, the court system operates a 'one in, one out' process. You cannot apply for a 5(1)(a) or 5(1)(b) licence without purchasing an existing licence and surrendering it to the court as part of your application. This means such licences hold a certain value, they could be as much as £100,000 or more depending on location and circumstances and they are often used as bank security in the same way as a property itself is. This position and the value attached to a licence leads to expensive and time-consuming contested licensing applications whereby existing licence holders object to a competitor coming on to their turf. The new legislation provides for a full statutory review of the laws and of this principle, which could have a seismic impact on the licensed trade here. For example, if the surrender principle was to be done away with, how would licence holders be compensated for the loss of value of their licence? Would there be a government compensation scheme etc? What would replace it? The new legislation puts in place the first steps for this to be looked at although I would suspect we are still some way off getting to a point where the principle will be changed.

PRACTICE ADVICE NOTE 2021 NO 2

The purpose of this Practice Advice Note is to provide the relevant jurisprudence around a particular topic. Please note that this should not be construed as legal advice and it is up to each practitioner to interpret this note according to the facts of each case.

Guidance on Ownership of Documents and Liens and associated issues

1. Ownership of documents on file

1.1 The issue around who holds the right of ownership of documents within a case file often generates many queries to the Society. Questions or uncertainties often relate to whether the whole file or certain documents contained within it either belong to the solicitor or the client.

1.2 Halsbury's Laws of England (6th edition) summarises the position on the ownership of documents as:

"Documents coming into existence in the course of business transacted under a retainer, and either prepared for the benefit of the client or received by the solicitor as agent for the client, belong to the client. However, documents prepared by the solicitor for his own protection or benefit, and letters written by the client to the solicitor, belong to the solicitor".

1.3 Firms' terms and conditions can set out which documents belong to the client and which belong to the firm as a matter of contract. The issue of ownership of documents can also be set out in initial engagement letters.

1.4 If there is no contractual agreement between the client and the firm regarding the ownership of documents, then generally, documents can be split into two categories of ownership. These are summarised in the table below:

Documents usually owned by the client	Documents usually owned by the solicitor/firm
• Original documents sent by the client (except where ownership or the title was intended to pass to the firm) • Documents produced by the client. • Documents sent or received by the firm when acting as the agent of the client (e.g. third-party communications, giving or receiving of instructions between the client's other advisers). • Draft formal documents and deeds. • Final versions of documents when acting as a professional adviser to the client e.g. agreements or written representations. • Documents prepared by a third party during their relationship with you and paid for by the client e.g. experts' reports and opinions of counsel.	• Documents prepared for the firm's own benefit or protection e.g. copies of letters written to the client. • Original letters sent from the client to the solicitor. • Documents prepared to carry out work e.g. notes taken of meetings/telephone calls, drafts and working papers. • Internal communications including emails. • Accounting records. • Instructions.

1.5 It should be noted that there is no distinction between hard copy and electronic documents (even if the form has changed) and they can subsequently fall into one of the two categories outlined above.

1.6 Ownership rights can often also depend on the relationship between the solicitor and the client, when the document was created and its purpose, and the capacity in which the solicitor is acting.

Relevant case law

1.7 There are some cases which consider the rights of access to the files of professional advisors. Central to these cases is the extent to which the relationship between the professional and the client is one of principal and agent or otherwise. The two leading authorities regarding the characterisation of the relationship between professional advisers and their clients are:

- *Leicestershire CC v Michael Faraday & Partners* [1941] 2 KB 205
- *Chantrey Martin v Martin* [1953] 2 QB 286

1.8 The case *Mortgage Business plc and another v Thomas Taggart and Sons* [2014] NICh 14 provides important guidance relating to categories of documents and their ownership.

1.9 In this case, there was consideration of whether the exchange of correspondence between two parties where its essence is not confidential between the two parties should be provided upon request. It was held that as a general principle, a client should be entitled to ask for copies of the exchange of correspondence between the parties to the proceedings, if the client has lost same. This would also apply where the client is unsure if it had a full set of correspondence, and it could therefore ask to inspect the correspondence file and take copies of any correspondence which it did not have. However, this right as a client is qualified. In requesting the documents, or access to them, the client is putting the former solicitor to trouble and expense. Subsequently, it was held that where a client believes their own files are incomplete, they are entitled to see and copy these but would have to pay the professional fees of a solicitor to the extent that a solicitor has had to spend time checking the files and of clerical assistance to the extent to which that is required in the course of furnishing copies.

1.10 There was also a dispute surrounding pre-completion searches, which are necessary for the protection of the borrower but also of assistance to the lender. It was held that lenders who have not kept the pre-completion searches having forwarded them to the purchaser/borrowers after inspection, are entitled to get access to them on payment of proper professional costs.

1.11 In relation to other relevant documents, it was held that the solicitors acting for borrowers are entitled to be paid for its time if asked, to send the documents to the lenders. It was held that a solicitor is entitled to:

- charge his normal professional fees for going through the files and selecting what is to be disclosed;
- charge for his secretary's time in photocopying any materials that are sent and for the postage or delivery costs.

1.12 It was also held that if the lenders chose to inspect and take copies, they will be liable for any reasonable costs incurred by the solicitors acting for borrowers as a result of the search, including the presence of a solicitor in the room while the files are being inspected.

Requests for documents

1.13 If you receive a request from a client to provide documents that belong to the firm, it is recommended that you act reasonably in light of the particular circumstances surrounding the request.

1.14 However, there are exceptions to this and circumstances where this may vary. This is explained further in the sections below.

2. Transfer of files and liens

2.1 A further difficulty arising from ownership issues relates to the transfer of files. This issue is often brought to light when the client themselves or another representative request or demand that a file or certain documents be handed over to them. This is an area which has created disputes and has been contested in courts. Subsequently case law can be used to provide guidance in this area.

2.2 Clients are entitled to terminate the retainer at any time. A solicitor where they know that they cannot accept instructions or that they must cease to act in any cause or matter they shall give adequate and clear notice of that fact to the client. Once this takes place, the solicitor is entitled to bill the client for any work done up until the date of the termination of the retainer. If the bill is discharged, then the solicitor is required to hand over all of the client's papers and documents.

2.3 However, under common law, solicitors have a general right to retain property already in their possession until costs owed have been paid. This is known as a 'retaining or general lien' and is associated with deeds, papers or personal chattels which have come into the solicitor's possession whilst acting in their professional capacity and which are the client's property.

2.4 The lien does not extend to:
- A client's original will;
- A deed in favour of the solicitor but reserving a life interest and power of revocation to the client;
- Original court records;
- Documents which did not come into the solicitor's hands in his capacity as solicitor for the person against whom the lien is claimed or his successors[1].

2.5 Where a retaining lien exists, the client does not have the right to inspect documents or to take copies of them. Delivery of documents which the client requires will be ordered upon payment of the solicitor's costs being secured, as by payment into court, or delivery may be ordered to enable property to which the documents relate to be preserved.

Position regarding change in solicitors and liens

2.6 Rules around the exercise and transfer of a solicitor's lien have been developed through case law. The basic rule was set out in *Ismail v Richards Butler (a Firm)* [1996] 2 All ER 506 that: "a solicitor has the general right to embarrass his client by withholding papers in order to force him to pay what is due and the court will not compel him to produce them at the instance of his client".

2.7 Rights in respect of the original lien do not disappear, but can be modified according to whether the solicitor themselves discharges the retainer or it is discharged by the client. Subsequently, rights relating to liens differ depending on who the retainer has been discharged by.

Discharge by client

2.8 If a retainer has been discharged by the client, (other than for the reason of misconduct) the solicitor's lien is virtually absolute. This means that the solicitor is entitled to keep any papers or property until costs have been paid (*Leo Abse & Cohen v Evan G Jones (Builders) Ltd* (1984) 128 Sol Jo 317, CA). Subsequently, in this scenario, the solicitor is under no obligation to produce, deliver or allow the inspection of documents.

Discharge by solicitor

2.9 On the other hand, it was set out in *Robins v Goldingham* [1872] LR 13 Eq 440 that "it is well settled that where a solicitor is discharged by the client he has a lien for his costs upon the papers and in his hands, and can retain them till

[1] Halsbury's Laws of England, (Fifth Edition, 2005) p.188

he is satisfied; but it is different where the discharge is by the solicitor".

2.10 If a solicitor discharges themselves in the course of ongoing litigation, the court usually orders the solicitor to hand over the papers it held to the new solicitor, on the undertaking of the new solicitor to preserve the lien on the papers for costs and to redeliver the papers at the end of litigation.

2.11 In *Gamlen Chemical Co (UK) Ltd v Rochem Ltd* [1980] 1 All ER 1049, Goff LJ stated "the overriding principle being that a solicitor who has discharged himself is not allowed so to exert his lien as to interfere with the course of justice". Templeman LJ stated: "Where the solicitor has himself discharged his retainer, the court then will normally make a mandatory order obliging the original solicitor to hand over the client's papers to the new solicitor against an undertaking by the new solicitor to preserve the lien of the original solicitor". However, he went on to outline exceptions to this general rule, "in exceptional cases the court might impose terms where justice so required.... Much would depend on the nature of the case, the stage which litigation had reached, the conduct of the solicitor and the client respectively, and the balance of hardship which might result from the order the court is asked to make".

2.12 Subsequently, it appears that the key principle is that the order of the court should be made in the way which best serves the interests of justice.

Legal Aid considerations

2.13 Pre-certificate costs and disbursements would fall under the category where a lien arises in respect of work done on the instructions of the client. However, once a legal aid certificate has been issued, the situation alters as the assisted person's solicitor has a statutory right to be paid out of the legal aid fund.[2]

2.14 If the client has been in receipt of legal aid and files are being transferred to a new solicitor, the issue in relation to fees is the transfer of the Legal Aid Certification. In these circumstances, the Society would encourage the speedy delivery of the report on case and the transfer of papers.

Considerations for successive solicitors

2.15 Successive solicitors should explain to the new client that they are liable for the costs of the former solicitor up until the date they ceased to act for them.

2.16 The new solicitor may also wish to consider the financial position of the client and any potential consequences for themselves.

Multiple clients and documents

2.17 Further issues may arise in relation to the ownership of documents regarding multiple clients. This may be the case where the solicitor cannot continue to act for multiple clients due to a conflict of interest.

2.18 Subsequently, care must be taken when copying or delivering documents, and issues of confidentiality and duties of disclosure must be considered.

2.19 The file should be split into the parts relating to each client or any provision of documents should be with the consent of the client. Common documents can be copied to all clients. If a lien is exercisable, the solicitor cannot prejudice one client.

2.20 If one client requests a file where fees are still owed by the other, the file should be forwarded under reservation of the lien.

2.21 Each client has the right to inspect documents of which they have a proprietary interest and to receive copies at their own expense.

3. Court directions

3.1 An application for an order can be sought from the court to direct the solicitor to hand over the client's papers to the new solicitor. The order is restricted to documents in the possession of the solicitor. Where the client continues in person, the court may order the documents to be handed over to an officer of the court.

3.2 Solicitors as officers of the court are subject to its supervisory jurisdiction and the court can therefore interfere with the enforcement of the common law lien on equitable principles.

3.3 The court can make an order as they see fit having regard to the overall interests of justice. It was held in *Slatter v Ronaldsons* [2001] All ER (D) 251 that "there is no reason, in principle, why in appropriate circumstances, the court should not be able to interfere in the enforcement of the common law lien, on equitable principles, even where it is the client rather than the solicitor who has terminated the retainer".

3.4 If the retainer is terminated by the client, this is normally a substantial factor in favour of non-interference with the solicitor's lien, however, ultimately it will depend on the circumstances of the case and why the retainer was discharged.

3.5 Leggatt J in *A v B* [1984] 1 All ER 265 stated that the court should weigh the below two matters:

a) That a litigant should not be deprived of material relevant to the conduct of his case and so driven from the judgment seat, if that would be the result of permitting the lien to be sustained, and

b) That litigation should be conducted with due regard to the interests of the court's own officers, who should not be left without payment for what is justly due to them'.

3.6 The case *Donaghy v JJ Haughey Solicitors Ltd* [2019] NICh 1 considered an application whereby the plaintiff sought an order for delivery up of papers and files held by their former solicitor in circumstances where the solicitor refused to deliver them on the basis of a lien for payment of their costs. In her judgement McBride J noted that Solicitors as officers of the court are "subject to its supervisory jurisdiction and the court can therefore interfere with the enforcement of the common law lien on equitable principles".

3.7 A list of non-exhaustive factors for consideration by the court were set out

[2] Cordery on Legal Services, Division F General Principles, Section 2 Recovering Fees, C Solicitor's lien

in the case of *Donaghy v JJ Haughey Solicitors Ltd* [2019] NICh 1which included:

- When, why and who ended the solicitor/client relationship?
- The nature of the case
- The stage litigation has reached
- The conduct of the solicitor and client respectively
- The balance of hardship which might result from the order the court is asked to make
- The fact the value of the solicitor's lien is likely to be considerably diminished if the papers required for pending litigation are handed over.

3.8 In the case of *Donaghy v JJ Haughey Solicitors Ltd* [2019] NICh 1, it was considered that the appropriate test for the exercise of the court's jurisdiction was the overall interests of justice and the question of whether the solicitor or client terminated the retainer was but one of the relevant factors the court had to consider in the exercise of its overall discretion. In determining the order which best serves the interests of justice, McBride J weighed the above factors, balancing the plaintiff's right "not to be driven from the judgment seat" against the right of the solicitor to be paid what is justly due to him.

3.9 In this particular case, it was found that the defendant solicitor terminated the retainer. However, the termination took place in a context where the client was not co-operating in the enforcement of the Terms of the Settlement and had made a complaint against the solicitor. The solicitor had subsequently sent their bill of costs, which remained unpaid.

3.10 In reaching the her judgment, McBride J found that the plaintiff in the case would not be "driven from the judgment seat" if the lien was sustained. This was due to a number of factors including:

- the plaintiff did not require the papers to defend other ongoing proceedings;
- the plaintiff had sufficient information available to them from the papers already in her possession;
- it was noted that a separate claim could have been brought against the defendant for negligence and/or breach of contract; and
- to direct the delivery of papers would have been tantamount to giving pre-action discovery.

3.11 On the other side of the balance, it was considered that an order requiring the solicitor to hand over the papers on the terms suggested by the plaintiff would substantially diminish the value of their lien. Financial hardship was also considered as a factor, and it was held that an order for delivery of the papers on the basis of an undertaking by the plaintiff to give security for costs would not cause them financial hardship.

3.12 McBride J found that the order which best met the interests of justice was to order that the plaintiff executed a charge in favour of the defendant as security for payment by the plaintiff to the defendant of all costs due to the defendant, either as agreed between the parties or as assessed by the court on taxation, on foot of its bill of costs, the defendant should deliver up to the plaintiff's solicitor the plaintiff's papers and the file held by the defendant relating to certain matters.

4. General Data Protection Regulations, Subject Access Requests and liens

Data Protection Act 2018 and UK General Data Protection Regulations

4.1 The position under the Data Protection Act 2018 is that the Act takes precedence over a lien. Therefore, if your client requests access to their personal data, this will **override** any right you have to hold a lien over their personal data.

Subject Access Requests (SARs)

4.2 A subject access request is the right of an individual to request a copy of any personal data held on them. This request can be made either verbally or in writing. As well as a copy of their personal data, the individual is also entitled to receive confirmation of whether their data is being processed and other supplementary information.

4.3 Before responding, you should check the identity of the person making the request and remove any third-party information from the material.

4.4 To comply with subject access requests, you must:

- Respond to the request without undue delay and within one month of receipt of the request (the time limit should be calculated from the day you receive the request until the corresponding calendar date in the next month. If the corresponding date falls on a weekend or public holiday, you have until the next working day to respond.)
- Provide information in a concise, transparent, intelligible and easily accessible form
- Use clear and plain language
- Respond electronically, if the request was made by same means, unless asked otherwise

4.5 In most cases, a fee cannot be charged to comply with a subject access request. However, a 'reasonable fee' can be charged for the administrative costs of complying with the request if it is manifestly unfound or excessive, or an individual requests further copies of their data following a request.

4.6 If a Subject Access Request (SAR) is made under Articles 12 and 15 of the UK General Data Protection Regulations (GDPR), you may have to share information if you are asked for access to an individual's personal data contained within a client's file.

4.7 The requested information can be extracted and presented in its original format with other information redacted or as a new document. There is no requirement to provide the full document. This is because the scope of a SAR extends to giving a right of access only for the personal data of the individual making the request, and applies only in relation to that specific personal information. Subsequently, there is no obligation to provide full copies of documents.

4.8 **Further details** about SARs is available on the ICO website - *https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/individual-rights/right-of-access/*

JURISDICTION TO REVIEW, VARY OR RESCIND ORDERS UNDER ARTICLE 371 OF THE INSOLVENCY (NI) ORDER 1989

Craig Dunford QC

Art. 371 of the Insolvency (NI) Order 1989 ("the Order") provides that: *"The High Court may review, rescind or vary any order made by it in the exercise of the jurisdiction under this Order."* This provision reflects an equivalent power found in section 375(1) of the Insolvency Act 1986 ("the Act") (applicable in England, Wales and Scotland), which reads: *"Every court having jurisdiction for the purposes of the Parts in this Group may review, rescind or vary any order made by it in the exercise of that jurisdiction."*

This short provision has, however, given rise to a question which has yet to receive a definitive answer in the authorities which have touched on it, namely, whether a Judge can exercise this power in respect of a decision made by a Master (or, in England & Wales, a District Judge).

Rule 7.03 of the Insolvency Rules (NI) 1991 reads as follows:

Judge and Master

7.03. - (1) The following applications shall be made direct to the Judge-

(a) applications for the committal of any person to prison for contempt;
(b) applications for injunctions or for the modification or discharge of injunctions;
(c) applications for interlocutory relief or directions after a matter has been referred to the Judge;
(d) appeals from an order or decision of the Master;
(e) applications pursuant to Article 107 (sanctioning dispositions made after commencement of winding up of company);
(f) ....
(g) applications after an administration order has been made, pursuant to Article 27(3) (for directions) or Article 30(3) (to discharge or vary the order, etc.); and
(h) applications pursuant to Article 18(3) (to stay a winding up or discharge an administration order or for directions where a company voluntary arrangement has been approved).

(2) Subject to paragraph (1), unless the Judge has given a general or special direction to the contrary, the jurisdiction of the court to hear and determine an application may be exercised by the Master, and the application shall be made to the Master in the first instance.

(3) Where the application is made to the Master he may, after giving any necessary directions, refer to the Judge any matter which he thinks should properly be decided by the Judge, and the Judge may either dispose of the matter or refer it back to the Master with such directions as he thinks fit.

(4) Nothing in this Rule precludes an application being made directly to the Judge in a proper case.

(5) Subject to this Rule, anything to be done under or by virtue of the Order or the Rules by, to or before the court may be done by, to or before the Judge or the Master.

(5A) The Master may authorise any act of a formal or administrative character which is not by statute his responsibility to be carried out by the Principal Clerk or any other officer of the court acting on his behalf in accordance with directions given by the Chancery Judge.

(6) The following Rules of the Court of Judicature Rules do not apply in insolvency proceedings—

(a) except as provided by paragraph (7), Order 32, rule 11; and
(b) Order 32, rule 12

(7) In Order 32 of the Rules of the [Court of Judicature] the exceptions from the powers of a master—
(a) to hear proceedings under section 7(1)(a) of the Human Rights Act 1998 in respect of a judicial act, as defined in section 9(5) of that Act referred to in paragraph 1(O) of rule 11; and
(b) to hear proceedings in which there is an issue which may lead to the Court considering whether to make a declaration of incompatibility under section 4 of the Human Rights Act 1998
shall apply to the Master (Bankruptcy) in relation to insolvency proceedings.

In *Papanicola v Humphreys* [2005] 2 All ER 418, Laddie J held that s. 375 of the Act gave the Court a wide discretion to review, vary or rescind any order made in the exercise of bankruptcy jurisdiction. The onus fell on the Applicant to demonstrate the existence of circumstances which justified the exercise of the discretion in his favour, and those circumstances had to be exceptional. The Court would require something new to justify the overturning of the original order, and there was no limit to the factors which might be taken into account. They might, for example, include changes which had occurred since the making of the original order, and significant facts which, although in existence at the time of the original order, had not been brought to the Court's attention at that time.

Papanicola was approved and applied by the Chancellor in *HM Revenue & Customs v Cassells* [2009] BPIR 284, in which it was noted that in exercising its discretion under s. 375 of the Act, the court must consider the following propositions (all derived from *Papanicola*):

- the section gave the court a wide discretion to review, vary or rescind any order made in the exercise of the bankruptcy jurisdiction;
- the onus was on the applicant to demonstrate the existence of circumstances which justified the exercise of the discretion in his favour;
- those circumstances had to be exceptional;
- the circumstances relied on had to involve a material difference to what was before the court which made the original order; in other words there had to be something new to justify the overturning of the original order;
- there was no limit to the factors which might be taken into account, which could include changes which had occurred since the making of the original order and significant facts which, although in existence at the time of the original order, were not brought to the court's attention at that time; and
- where the new circumstances relied on consisted of or included new evidence which could have been made available at the original hearing, those, and any explanation by the applicant given for the failure to produce it then or any lack of such explanation, were factors which could be taken into account in the exercise of the discretion.

But who should conduct the review? In Schaw Miller & Bailey *Personal Insolvency: Law & Practice*, paragraph [3.75], the following commentary appears:

Ordinarily the review should be conducted by the same judge who made the order under review; but, where appropriate, another judge of co-ordinate jurisdiction has power to conduct the review: *Mond v Hammond Suddards* [2000] Ch 40 CA. In *Re SN Group plc* [1994] 1 BCLC 319 the vacation judge refused to review a winding-up order made by the registrar on the ground, amongst others, that the role of a High Court judge in such cases was restricted to an appellate function. However, in *Re Dollar Land (Feltham) Ltd* [1995] 2 BCLC 370 a winding-up order made by the registrar was rescinded by a High Court judge without explicitly addressing the question of jurisdiction, and the deputy judge in *Re Piccadilly Property Management Ltd* [1999] 2 BCLC 145, having addressed the point, concluded that he did have jurisdiction to review a decision of an inferior court. He emphasised that very few cases would be proper cases for a party to seek a review in a court superior to that in which the order was made; in the ordinary course an aggrieved party should seek his review from the same judge in the same court as made the order otherwise he should appeal to the superior court

If this commentary is correct, then it is clear that an application under art. 371 of the Order should, in the ordinary course, be made to the same judge who made the original order. Gowdy & Gowdy (*Individual Insolvency: the law and practice in Northern Ireland*) go further, however, offering this commentary regarding review jurisdiction under art. 371, at paragraph 1.24: *"The judge may not review a decision of the master".* The authority cited for this comment is *Re Maugham* (1888) 21 QB 21. This case examined the jurisdiction to review, rescind or vary any order conferred by s. 104 of the Bankruptcy Act 1883. The relevant part of the judgement of Cave J in that case reads (pages 22-3):

CAVE, J. I think that this appeal should be allowed; the judge had no authority at all to make the order which he did, and even if he had the authority he ought not to have exercised it. In the first place, the order dismissing the petition was made by the registrar, and the application to rescind it was made to the judge. In my opinion the order which the learned judge then made was clearly illegal. There is not a vestige of a pretence for saying that a county court judge can be asked to review the order of the registrar any more than for saying that a registrar can be asked to review the order of a judge. Each of these authorities has his own work, and under s. 104 can review, vary, or rescind his own order; their jurisdiction is distinct, and to hold that the one can vary or rescind the order of the other would be to give an appeal not given by the statute, and which does not exist. The judge himself seems not to have been unaware of this objection, for in his judgment he said that if the registrar had been aware of the true facts of the case he would have referred it to him. But this is a mere assumption, which cannot possibly give the judge jurisdiction.

Re Maugham was considered in *Re a debtor (No 39 of 1974), ex parte Okill and anr v Gething and anr* [1977] 3 All ER 489. At pages 496-7, Goulding J said this:

One last matter must be mentioned as counsel, though not seeking to rely on it, very properly brought it to our notice, namely the jurisdiction of the judge to make the order he did. Both the receiving order and the adjudication were made in 1974 by the county court registrar. In *Re Maugham* a Divisional Court consisting of Cave and A L Smith JJ set aside an order by a county court judge rescinding, under s 104 of the Bankruptcy Act 1883(now replaced by s 108 of the 1914 Act), an order in bankruptcy previously made by his registrar. The Divisional Court held, and its decision has now stood for almost a century, that a judge cannot under the section review, rescind or vary a registrar's order, nor a registrar a judge's order. The reasoning of A L Smith J was expressed in terms wide enough to apply, in our opinion, as well to annulment of an adjudication under s 29 of the 1914 Act as to recission or review under s 108 of the 1914 Act. On the other hand, a court similarly constituted decided *Re Lord Clifton* less than two years after *Re Maugham*. In *Re Lord Clifton*, a county court judge had declined to disturb an adjudication and a receiving order made by the registrar. Cave J affirming his judgment used the following language from which A L Smith J expressed no dissent (7 Morr 59 at 62, 63):
'There were no facts on which the County Court judge could annul the adjudication, and with regard to a review of the order of adjudication and the receiving order, that was not within the province of the County Court judge, but an application of that kind ought to have been made to the registrar.'
In the present state of authority, therefore, it seems that the order under appeal was within the learned judge's jurisdiction, so far as regards the annulment of the adjudication, but it is at least questionable whether he had power to rescind the receiving order, dismiss the petition, and give directions consequent on the rescission of the receiving order. Counsel for the debtor was disposed to agree that, if successful here, he ought to seek a confirmatory order from the registrar.

The commentary in Schaw Miller & Bailey *Personal Insolvency: Law & Practice*, paragraph [3.75], cites several authorities in relation to this point, in particular *Re SN Group plc* [1994] 1 BCLC 319 and *Re Piccadilly Property Management Ltd* [1999] 2 BCLC 145. Neither *Re Maugham* nor *Re a Debtor (39 of 1974)* were referred to in either judgment.

So what is the proper approach here, given the inconsistencies exhibited by the caselaw? It is respectfully submitted that the better view remains the opinion expressed at the end of paragraph 3.75 of Schaw, Miller & Bailey, taking into account the commentary in Gowdy & Gowdy and the authorities relevant to that commentary, namely that whilst a superior judge does have jurisdiction to review a decision of an inferior judge, this course would be proper in only a very few, exceptional cases; in the ordinary course, an aggrieved party should seek his or her review from the same judge in the same court which made the order – otherwise, an appeal should be pursued to the superior court.

Social Security in the Spotlight: Litigating for Social Change

Margaret Carson,
Law Centre NI

Margaret Carson highlights some important social security cases of the last twelve months.

Over the last year, Law Centre NI has acted in several cases that have led to important decisions on social security law which have wider significance to the UK and EU. This note highlights three cases in which Law Centre NI has sought to challenge unfairness in the social security system. In the first case, Law Centre NI challenged the rules on Bereavement Support Payment on behalf of a widower and his young family. The second case challenged the rules on fast-track access to social security benefits for people with a terminal illness. Finally, a reference to the Court of Justice of the European Union sought to establish whether principles of EU law apply to EU nationals with pre-settled status who claim Universal Credit.

Bereavement Support Payment

Michael O'Donnell v. Department for Communities [2020] NICA 36

Mr O'Donnell's wife, Pauline, was diagnosed with Friedreich's Ataxia, a progressive degenerative disorder, from childhood. Mrs O'Donnell was unable to work during her working life due to her severe disability. While she did not pay any Class 1 or 2 national insurance contributions during her working life, she was credited with contributions due to her incapacity for work. When Mrs. O'Donnell's condition declined, Mr. O'Donnell gave up work to care for his wife and children. Following Mrs. O'Donnell's death in July 2017, Mr. O'Donnell found himself struggling financially and applied to the Department for Communities for Bereavement Support Payment (BSP).

BSP gives financial help to a surviving spouse or civil partner to help them deal with the more immediate costs caused by the death of their partner. There are two rates of BSP: standard and higher. The higher rate is payable where there are dependent children of the family. It can entitle the claimant to an initial payment of £3,500 and up to 18 monthly payments of £350.

The Department declined Mr O'Donnell's application for BSP. Its reasoning was that Mrs. O'Donnell had not paid national insurance contributions during her working life. The Department based its decision on sections 29 and 30(1)-(3) of the Pensions Act (Northern Ireland) 2015 ('the Pensions (NI) Act') which require actual payment of contributions.

While Mrs O'Donnell had been credited with national insurance contributions, she had not actually paid them. Her credited contributions did not, therefore, satisfy the eligibility requirements of Pensions (NI) Act. With the assistance of Law Centre NI, Mr. O'Donnell appealed the Department's decision to the Appeal Tribunal.

Before the Appeal Tribunal, Law Centre NI argued that the effect of sections 29 and 30(1)-(3) of the Pensions (NI) Act was unfair and discriminatory. Law Centre NI argued that the Pensions (NI) Act breached Mr O'Donnell's human rights, namely Article 14, when read with Article 8 and Article 1, Protocol 1 of the European Convention on Human Rights (ECHR). The Tribunal referred a question on the compatibility of the Pensions (NI) Act with the ECHR to the Court of Appeal.

Court of Appeal decision

In August 2020, the Court of Appeal gave judgment in Mr O'Donnell's case. The Court agreed that the effect of sections 29-30(1)-(3) of the Pensions (NI) Act was discriminatory. The Act had the effect of treating the family of a deceased person, who was never able to work, the same as the family of a deceased person who chose not to work. This similarity in treatment, the Court decided, was discriminatory and could not be justified.

The Court of Appeal held that sections 29 and 30(1)-(3) of the Pensions (NI) Act were incompatible with Article 14, when read with Article 8 and Article 1, Protocol 1 ECHR. The Court concluded that section 29(1) should be read and given effect so that the national insurance contribution condition is treated as met if the deceased was unable to comply with section 30(1) throughout her working life due to disability.

The Court referred the case back to the Appeal Tribunal for a decision on the award. Subsequently, the Department revised its decision and awarded Bereavement Support Payment to Mr. O'Donnell.

Terminal illness

Department for Communities and Department for Work and Pensions v. Lorraine Cox [2021] NICA

In August 2021, the Court of Appeal in Northern Ireland gave judgment in the case of *Department for Communities and Department for Work and Pensions v. Lorraine Cox* [2021] NICA.

This case concerns the Special Rules on Terminal Illness (SRTI) which apply to claims for Personal Independence Payment (PIP) and Universal Credit (UC). In order to qualify under the SRTI, a claimant must satisfy the definition of 'terminally ill' according to Article 87(4) Welfare Reform (Northern Ireland) Order 2015 ('Welfare Reform Order') and Regulation 2 and Schedule 9, paragraph 1 of the Universal Credit Regulations (Northern Ireland) 2016 ('UC Regulations'). The definition requires the claimant to establish that they are suffering from a progressive illness where death in consequence of that disease can reasonably be expected within six months.

Lorraine Cox is a young mother who was diagnosed with Motor Neurone Disease in September 2018. Ms. Cox, who is unable to work due to her medical condition, applied for PIP and UC. The Department decided that her claim did not come under the SRTI. Although Ms. Cox has a confirmed diagnosis of Motor Neurone Disease, a progressive, terminal disease, her neurologist was unable

to say that her death was expected within six months. She, therefore, did not satisfy the definition of 'terminally ill' under the Welfare Reform Order or UC Regulations.

High Court decision

In July 2020, Law Centre NI represented Ms. Cox in a judicial review of the Department's decision: *In the matter of an application by Lorraine Cox for leave to apply for Judicial Review* [2020] NIQB 53. The High Court found in favour of Ms. Cox.

Mr Justice McAlinden decided that Article 14 ECHR applied to Ms. Cox's case. He further decided that the difference in treatment between Ms Cox, a person suffering from a progressive illness whose death was not reasonably expected within six months, and a person, also suffering from a progressive illness, whose death was expected within six months, but who survives for longer, could not be justified.

Mr Justice McAlinden concluded that the SRTI breach Article 14 ECHR when read with Article 8 and Article 1, Protocol 1 ECHR. In October 2020, the High Court awarded Ms Cox £5,000 in damages for *'upset, distress, annoyance, inconvenience, worry and humiliation'.*

Court of Appeal decision

The Department for Communities and the Department for Work and Pensions appealed the High Court's decision. Following a hearing in March 2021, in which Law Centre NI represented Ms Cox, the Court of Appeal allowed the appeal.

Lord Chief Justice Morgan, delivering the judgment of the court, accepted that Ms. Cox's case comes within the ambit of Article 14 ECHR. The Court decided, however, that the difference in treatment between Ms. Cox and a person suffering from a progressive illness whose death was reasonably expected within six months, was justified.

In his reasoning on justification, Lord Chief Justice Morgan referred to recent consideration of the definition of 'terminal illness' by Parliament in 1990 and 2010. He referred to the various options open to policy makers in determining the definition, including a test based wholly on clinical judgement. Lord Chief Justice Morgan considered that the Court is not in a position to consider all the factors which would be required to alter the current definition.

He concluded:

'The legislature has been involved in a detailed consideration of where to draw the line in this welfare benefit in 1990 and 2010. There has been continuing review of that decision since 2018. The Minister intends to submit a further proposed amendment to the Northern Ireland Assembly which will provide an opportunity for debate and reflection by the legislature. This is an area where considerable weight should be given to the views of the primary decision maker. These choices are for the political process and not for the courts'.

Proposed legislative change

The Court of Appeal's judgment followed shortly after Communities Minister, Deirdre Hargey, **announced that she will extend the terminal illness provision in social security benefits from six months to 12 months**. This move was echoed by the UK Government in July 2021 (see **Justin Tomlinson MP statement to Parliament on 8 July 2021**. Notably, the Scottish Government's approach goes further by adopting a definition of terminal illness based on clinical judgement (see **Guidance for doctors and nurses completing benefits assessment under special rules in Scotland (BASRiS) Form for Terminal Illness v1.0 Advice from the Chief Medical Officer, The Scottish Government, July 2021)**. In November, legislation will be introduced into the Assembly[1] to implement change. Law Centre will continue to monitor how the changes work in practice so that terminally ill claimants get the support they need when they need it most.

Pre-Settled Status

CG v. Department for Communities in Northern Ireland (Case C-709/20)

On 15 July 2021, the Court of Justice of the European Union (CJEU) gave judgment in *CG v. Department for Communities in Northern Ireland* (Case C-709/20). Law Centre NI represented CG. The background to the case is that CG is an EU citizen who moved to Northern Ireland several years ago with her, now estranged, partner. She is a mother of two small children, who were born in Northern Ireland. In June 2020, CG was granted pre-settled status under the UK Government's EU Settlement Scheme. As a person with pre-settled status, CG has a right of residence in the UK.

Also in June 2020, CG made a claim for Universal Credit (UC) to the Department for Communities. The Department refused her claim on the basis that she does not meet the basic qualifying criteria for UC under Regulation 9 of the Universal Credit (Northern Ireland) Regulations 2016 ('UC Regulations'). Regulation 9(3)(d)(i) UC Regulations excludes from eligibility anyone whose right to reside in the UK is based solely on a grant of pre-settled status.[2] CG appealed to the appeal tribunal.

At the time the Department made its decision in CG's case, the UK had not left the EU and EU law continued to apply in the UK.[3] Article 18 of the Treaty on the Functioning of the European Union (TFEU) provides that discrimination by EU Member States against EU citizens on the grounds of nationality is unlawful. Articles 20 and 21 TFEU provide that EU citizens have the right to move and reside freely in other Member States. However, this right is qualified. One qualification is found in Article 24 of Directive 2004/38/EC ('the Citizens' Rights Directive'), which provides that Member States do not have to provide social assistance (i.e. welfare benefits such as UC) to EU citizens before they obtain a permanent right to reside.

At her appeal hearing on 21 December 2020, CG argued that as a recipient of pre-settled status, her temporary right of residence meant that she should be regarded as in Northern Ireland for the purpose of Article 9 UC regulations and therefore entitled to receive UC. She argued that the Department's refusal of her claim constituted discrimination on the ground of nationality contrary to Article 18 TFEU. The Department argued that under national law, pre-settled status does not in itself confer any rights to social benefits, which are subject to their own eligibility conditions.

Recognising that CG's case raised a point of EU law, the appeal tribunal made a preliminary reference to the CJEU asking whether the UC Regulations, in excluding CG from eligibility for UC, are unlawfully discriminatory on the grounds of nationality, either directly or indirectly, under Article 18 TFEU, and if they are indirectly discriminatory, can they be justified.

Decision of the Court of Justice of the European Union

In its judgment, the CJEU acknowledged that as CG is an EU citizen who exercised her right to move and reside in the UK, her case fell within the scope of EU law and therefore, she could, in principle, rely on the prohibition on discrimination in Article 18 TFEU. The CJEU stated, however, that Article 18 only applies in its own right to situations where the TFEU does not lay down specific rules on non-discrimination. The CJEU noted that the Citizens' Rights Directive contains a specific expression of the principle of non-discrimination. The Court went on to consider whether the Citizens' Rights Directive prevents Member States from applying rules that treat people in CG's situation differently to nationals of the Member State.

The Court acknowledged that Article 24(1) of the Citizens' Rights Directive requires that EU citizens residing in another Member State on the basis of the Directive enjoy equal treatment with nationals of the Member State. However, in respect of access to social assistance, an EU citizen can only claim equal treatment if their residence complies with the conditions of the Directive. In support of this, the Court referred to its previous decision in *Dano, C-333/13.*

The Court reasoned that for periods of residence longer than three months but less than five years, the right of residence is subject to Article 7(1) of the Citizens' Rights Directive. Article 7(1)(b) provides that economically inactive citizens are obliged to have sufficient resources for themselves and their family. Member States can, therefore, refuse social assistance to economically inactive EU citizens who do not have sufficient resources to claim a right of residence under the Citizens' Rights Directive.

In the Court's view, the financial situation of each claimant should be examined without taking account of the social benefits they have claimed. On the basis of this examination, it can be determined whether the claimant meets the condition in Article 7(1)(b) (i.e. sufficient resources) and whether they can rely on the principle of non-discrimination in Article 24(1) of the Citizens' Rights Directive.

Turning to CG's case, the Court decided that on the basis of information provided to it by the Appeal's Service, CG does not have sufficient resources, is likely to become an unreasonable burden on the social assistance system of the UK and therefore cannot rely on the principle of non-discrimination in the Citizens' Rights Directive.

That assessment, according to the Court, cannot be called into question by the fact that CG has a right of temporary residence under national law which was granted without condition as to resources. To permit such claimants to rely on the principle of non-discrimination when they do not satisfy the conditions under the Citizens' Rights Directive, would, in the Court's view, give them broader protection that they would have enjoyed under the Directive.

Article 37 of the Citizens' Rights Directive permits Member States to establish more favourable rules than those laid down by the Directive. However, where it does so, such rules are not made in implementation of the Citizens' Rights Directive. It is, therefore, open to the Member State to decide on the consequences of the rules it establishes.

The Court concluded that Article 24 of the Citizens' Rights Directive does not preclude a Member State from establishing rules that exclude economically inactive EU citizens without sufficient resources and with only a temporary right of residence from social assistance such as UC.

Charter of Fundamental Rights of the European Union

Having ruled out application of the right to equal treatment under the Citizens' Rights Directive, the CJEU acknowledged that as CG's case is within the scope of EU law, the Charter of Fundamental Rights of the European Union applies. Where a Member State grants a right of residence in cases such as CG's, the Member State is obliged to comply with the provisions of the Charter.

The Court stated that a host Member State must ensure that EU citizens with a right of residence, and who are vulnerable, can live in dignified conditions. The Court particularly highlighted Article 1 (human dignity),[4] Article 7 (respect for private and family life)[5] and Article 24 (rights of the child)[6] of the Charter.

The Court concluded that for a claimant such as CG, a Member State must check that a refusal to grant social assistance does not expose them, and their dependent children, to the risk of violation of their Charter rights or render them unable to live in dignified conditions. In making this assessment, the Member State is entitled to take into account all means of assistance provided by it for the benefit of the EU citizen and their family.

CG's case will now return to the appeal tribunal for determination. The question for the appeal tribunal will be whether the Department's refusal of UC exposed CG to a risk of violation of her fundamental rights enshrined in the Charter and whether it leaves her, and her children, in a situation where they are unable to live in dignified conditions.

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1 *Agenda Item Ministerial briefing on the Social Security (Terminal Illness) Bill (niassembly.gov.uk).*

2 Regulation 9(3)(d)(i) was added to the UC Regulations by the Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations (NI) 2019 in May 2019.

3 The Withdrawal Agreement provided for the continued application of EU law for a transition period ending at 23.00 on 31 December 2020. This was given effect by s1A European Union (Withdrawal) Act 2018, inserted by the European Union (Withdrawal Agreement) Act 2020.

4 Article 1: Human dignity 'Human dignity is inviolable. It must be respected and protected'.

5 Article 7: Respect for private and family life 'Everyone has the right to respect for his or her private and family life, home and communications'.

6 Article 24: The rights of the child '(1) Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. (2) In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. (3) Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.'

Community Foundation announces £300k match fund for Gifts in Wills

The Community Foundation for Northern Ireland has launched an innovative new match funding initiative for 'Gifts in Wills'. David Lavery the CEO of the Law Society of Northern Ireland, Mr Justice Huddleston, Trustees and Executives at the Foundation with invited guests attended a Reception in Law Society House, the first of a number of information sessions to kick-start the scheme.

The £300,000 'Gifts in Wills' match fund, developed with the support of and in consultation with professional advisors, is the first of its kind in the UK. The new fund will match charitable gifts with an additional 50%, up to a maximum of £50,000. At the recent launch the Community Foundation outlined the rationale behind the match fund and some insights about legacies and bequests in Wills locally.

While we know that people in Northern Ireland are among the most generous in the UK, with around 70% of us donating to charities, only 20% of people here have made a Will. This is significantly less than the UK average of 53%. Perhaps it is the fact of facing our own mortality by indicating what we want to happen to our property when we're no longer here that we want to avoid, however what is certain is that it leaves many families in difficult situations. And as a result of this, there are millions of pounds left in the ether each year which could be doing huge amounts of good in society.

The Community Foundation is an organisation that exists to help address this issue. Encouraging philanthropy is a key area for the Foundation. The 'Nudge' report, carried out by Cabinet Office Behavioural Insights Team in 2013, highlighted that when solicitors simply mentioned to people that leaving a gift to charity was an option, the percentage of people who did so rose from just 5% to 10%. They rose again to 15%, when people were also asked if there were any charities that they were passionate about. An additional £1 million of gifts was left to charities in Wills because of the 6-month trial alone demonstrating that solicitors have an enormous opportunity to encourage more giving.

L-R David A. Lavery CB, CEO, John Gordon, Trustee, Community Foundation, Siofra Healy, Fund Development Manager, Community Foundation, Mr Justice Huddleston, Marcus Cooper, Fund Development Manager, Community Foundation.

The Legacy Match Fund is an opportunity for gifts in Wills to go even further. To take advantage of the fund, you or your client should make contact initially with the Foundation's Fund Development Manager, Marcus Cooper to find out more about the fund and to establish your client's interests and the finer details.

While the Community Foundation is primarily known as a grant making organisation, they have knowledge and expertise in managing 'donor advised' funds, both revenue and endowment in perpetuity. Remaining flexible and able to meet needs well into the future, the Foundation offers additional security to donors and fundholders, an important part of any legacy.

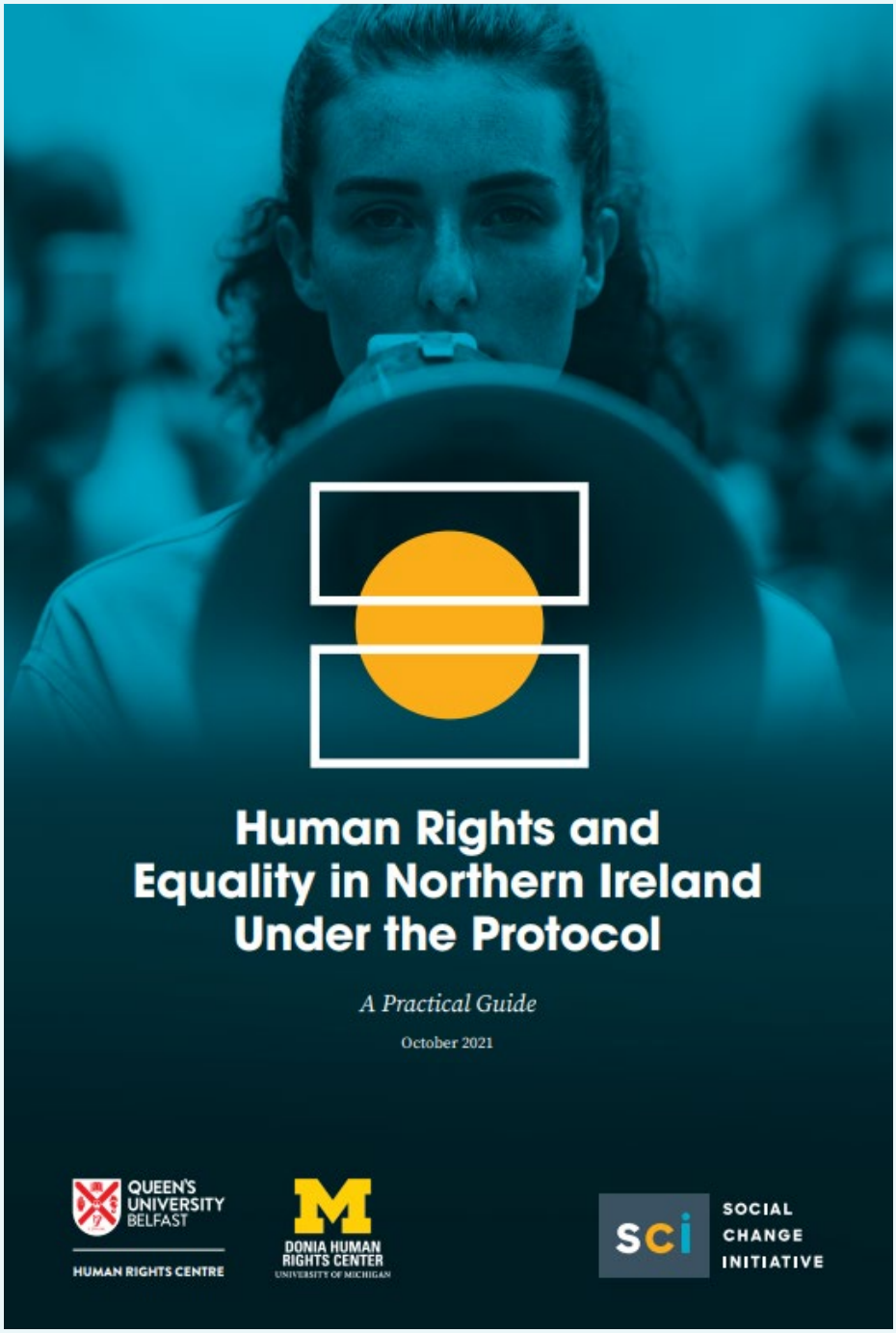
These are some of the key points about the match fund initiative:

- All gifts in Wills, large or small, are appreciated and become part of our 'Fund for the Future' - leveraging substantial social value, helping communities in need and driving social change
- The Community Foundation will match at 50% gifts from £20k to £100k
- A gift in a Will of £30k or above will establish a new named fund (an alternative to setting up a charitable trust)
- The maximum match amount is £50k
- A fund in perpetuity can be established with a donation of £100k or more
- The Legacy Match Fund has £300k to match Gifts in Wills over next 3 years
- The Fund is designed to support local issues and / or places in Northern Ireland
- It is designed to support a range of organisations based in a place or on a central theme, for example, children with disabilities, older people or mental health

The Foundation will be running a series of regional roadshows in early 2022, inviting local solicitors to meet the team and learn more about this unique legacies-match fund proposition.

To find out more contact Marcus at *marcus@communityfoundationni.org*

A Practical Guide to Human Rights & Equality in Northern Ireland under the Protocol



There has been considerable concern that the UK's exit from the European Union may weaken existing human rights and equality mechanisms in Northern Ireland.

A new Guide examines the provisions contained in two important agreements put in place to address these concerns: the Ireland-Northern Ireland Protocol and the Trade and Co-operation Agreement (TCA).

The Guide was produced by the Northern Ireland-based Social Change Initiative, the Human Rights Centre at Queen's University Belfast and the Donia Human Rights Centre at the University of Michigan.

It is hoped that the Guide will serve as a a useful resource for anyone interested in protecting and advancing rights in Northern Ireland.

It includes an examination of the provisions of the Protocol and the TCA, plus case studies examining scenarios on how the new agreements could be used to ensure the protection of existing rights and equality measures.

An international audience attended an online event to launch the Guide, which is available here: *https://www.socialchangeinitiative.com/human-rights-and-equality-in-northern-ireland-under-the-protocol-a-practical-guide*

The mechanisms created by the Protocol have given the Northern Ireland Human Rights Commission (NIHRC) and the Equality Commission for Northern Ireland (ECNI) a key role in ensuring there is no diminution of rights, safeguards or equality of opportunity.

Chief Commissioner at the NIHRC Alyson Kilpatrick and Chief Commissioner at the Equality Commission Geraldine McGahey spoke at the launch event.

Alyson Kilpatrick said the Guide would be a valuable resource to the public and to professionals.

"The commitment to the protection of rights and equality was central to the Belfast/Good Friday agreement," she said.

Chief Commissioner at the Equality Commission Geraldine McGahey said the rights protections contained in the Protocol deserved closer consideration.

"It has not got a lot of media coverage. It is negative aspects and concerns about the Protocol that we hear most about, rather than this particular important aspect – the Protocol article 2 and how it can benefit everyone's rights here in Northern Ireland."

Disposals of UK Residential Property – report and pay Capital Gains Tax within 60 days

In this digital age, HMRC has placed an emphasis on tax being reported and paid using their various platforms, the latest of which is the new reporting requirements for capital gains realised by UK resident individuals on UK residential property.

From 6 April 2020, UK resident individuals, including Personal Representatives ('PRs'), must report disposals of UK residential property, and pay the tax due on that disposal, within 60 days (from 27 October 2021) of date of disposal. The date of disposal for this purpose is the completion date as opposed to the date of exchange of unconditional contracts (although the date of exchange of unconditional contracts is still the date of sale for CGT).

It is important to highlight that a report and pay CGT return is required even if any of the following apply:

- a gain does not arise on disposal;
- a capital loss is suffered;
- you have registered for self assessment; or
- you have no tax to pay

The return can be amended once submitted (within 12 months of submission), but it can only be amended for events that had occurred at the date the return was originally delivered.

Submitting the CGT return, does not affect the need to submit a Self Assessment return in the normal way (ie, by 31 January following the end of the tax year), the disposal will also need to be included on the self assessment return with final CGT calculation.

Payment of the tax

In addition to submitting the CGT return within 60 days, the tax due on the disposal of the residential property must also be paid (ignoring any other CGT disposals) within 60 days. This tax is referred to as notionally due, and treated as a payment on account of the final CGT liability for the year.
If there are Capital Losses available when the residential property is disposed if/ before the return is submitted they can be set against the gain arising when calculating the tax liability.

Submission of the CGT return

This new 60 day "Report and pay Capital Gains Tax ['CGT']" requirement brings about additional digital challenges for yourselves and your clients. Agents can, and should where possible, prepare and submit the report and pay the CGT return on behalf of individuals and personal representatives. However, before the agent can do this, the individual/ PR must create a report and pay CGT account.

Further information and instructions on how to create the report and pay CGT account can be found at: *https://www.gov.uk/guidance/capital-gains-tax-for-non-residents-uk-residential-property#how-to-report-disposals*

Finally, 'digitally excluded' clients can call the HMRC Extra Support Helpline for help in creating a report and pay CGT account. It is our understanding that the helpline will assist such clients to register for an account and will provide them with a UK Property Account reference which they can share with their Agent.

We would be happy to discuss the above with you and provide assistance if required. Please contact Angela Keery, Head of Tax, Baker Tilly Mooney Moore on 028 9032 3466 or by email *angelakeery@bakertillymm.co.uk.*

bakertilly
MOONEY MOORE

Commonwealth Lawyers' Association Medal

The Society is pleased to have commissioned and gifted a Presidential Medal to the Commonwealth Lawyers' Association in perpetuity to recognise the work of the Association in maintaining and promoting the rule of law within the Commonwealth.

Pictured receiving the Medal from the Society's then President, Rowan White, is Brian Speers, the current Commonwealth Lawyers' Association President. Brian is also a current Council member and former President of the Law Society of Northern Ireland.

Society congratulates Jenny Moore on winning In-House Lawyer prize

The Law Society of Northern Ireland offers its congratulations to Jenny Moore, solicitor with Danske Bank who has been named In-House Lawyer of the Year at the Next 100 Years Inspirational Women in Law Awards 2021.

Commenting, Jenny said:

"I am honoured to receive this award for advancing equality and diversity and wish to thank Next 100 Years, and in particular its founder, Dana Denis-Smith.

Over the next decade we want to accelerate the pace of change by encouraging collaboration across the profession, improving the visibility of women in law and supporting the women lawyers of the future. I look forward to continuing that collaboration."

An interview with Feargal Logan, Partner, Logan and Corry Solicitors and Joint Manager of the Tyrone GAA Team.

The Society is delighted that one of its members has enjoyed success as joint manager of the Tyrone GAA team who secured victory in the All-Ireland finals and are the proud holders of the Sam Maguire Cup. We interviewed Feargal and asked him to reflect on the success.

1. **You've achieved the ultimate success as joint Tyrone manager - what is next for you?**

   Repeat the achievement! Much like in our profession, after one case is finished, you just have to move to the next one and keep going, so it really is a case of more of the same, hopefully.

2. **What aspects of being a solicitor have you been able to use in your role as joint Tyrone manager?**

   Believe it or not, there is quite a bit of cross over and obviously communication skills are of the utmost importance. Time management is the biggest challenge in both fields – and a few alternative dispute resolution experiences can come in handy along the way.

3. **What's tougher the courtroom or the half time changing room?**

   Again, the Courtroom and the half time changing room have certain similarities and can both present tough challenges. You have to think on your feet; read your own situation and clients/players, then get ready to face the opposition, read them and most importantly, get ready to face the "people in the middle" Referees/ Judges who are the ultimate Arbiters in all matters!

   Plenty to think about in short windows of time and the post-match analysis, with the benefit of hindsight, can make us all look like fools.

4. **You're a regular contributor to the Society's Sports Law Conference - how important is it in the CPD calendar?**

   The Sports Law Conference really is, for myself and a lot of others, one of the highlights of the CPD year. As we know, the law is everywhere in society and the intersection between the sporting world and the legal world is most interesting. The insight provided by the contributors to the Conference every year never ceases to amaze me. Anyone with

an interest in sport would enjoy the conference and find themselves fascinated with the interaction of the legal and sporting worlds. Retired Judge Nixon, Keith McGarry, Jennifer Ferguson, Susan Duffy and Patricia Kirk, deserve great credit for their work.

5. How has your professional and private life changed since winning the All-Ireland?

Winning the All-Ireland certainly puts one somewhat in a glare of publicity but I don't think so and indeed hope that my life will continue much as before. I am blessed with a strong family, busy work life and a challenging sporting environment, all of which seems to work. In a sense, long may it continue!

6. When was last time you bought a pint?

Post All-Ireland, there is no requirement to pay for a pint in Tyrone! The difficulty is getting the time to enjoy one!

We are undoubtedly all, including our own profession, living in very challenging times.

Christmas is coming and I hope it provides a welcome break for everyone and we all get to enjoy a safe, restful and happy end to the year, in anticipation of a bright year ahead in 2022!

LAND REGISTRY
NOTE TO PRACTITIONERS 3/2021

The Society has received the following Practice Note from Land Registry:

Land & Property Services
THE LAND REGISTRY

REGISTERED HOUSING ASSOCIATIONS

BACKGROUND

Registered Housing Associations were introduced in 1976 to provide rented accommodation to groups with support requirements and they are the main developers of new social housing for rental in Northern Ireland. At present the Department for Communities ("the Department") is responsible for the funding and regulation of Registered Housing Associations.

Restrictions on the disposal or charge of lands as set out in Article 13 of the Housing (Northern Ireland) Order 1992 have been historically registered in Land Registry when lands have been acquired/charged.

CURRENT LEGISLATION

An amendment to Article 13 came in to effect on 29th August 2020. From and including this date it is no longer necessary for a Registered Housing Association to obtain the consent of the Department to dispose or mortgage land and a restriction on title is not required. Land Registry is no longer registering such restrictions.

CANCELLATION OF RESTRICTIONS

Where a practitioner seeks to cancel a Registered Housing Association restriction an entry should be made on the Form 100 stating "Cancellation of an Article 13 restriction". No fee is required for such a cancellation.

C Farrell

CHRISTINE FARRELL
Registrar of Titles
14th October 2021

NEW CALL, CHECK AND CONFIRM LEAFLET LAUNCHED

The Law Society of Northern Ireland has launched a new version of their successful 'Call, Check and Confirm' leaflet.

https://www.lawsoc-ni.org/DatabaseDocs/new_4589250__call_check_and_confirm_1021.pdf

The leaflet provides those involved in buying a house with clear guidance on how to avoid scammers stealing their deposit money.

The Society is encouraging all members of the public who are involved in buying a house to please read the leaflet.

Members may also wish to download the following images and insert on their email signatures and websites/social media channels.

ALWAYS CALL, CHECK and CONFIRM before transferring any money online

CALL
The person / solicitor / bank using a known phone number

CHECK
If they sent you an email about a change in bank details at last minute

CONFIRM
The correct bank details and arrangements before you send any money

As your solicitor firm we will **never** change our bank account details during a transaction or email you at the last moment.
If you get an email asking you to send your money using new bank account details **call, check and confirm with us using our main phone number.**

CALL
CHECK
CONFIRM

'Paying the Price of Cyber-crime' Webinar

The Law Society of Northern Ireland has launched **'Paying the Price of Cyber-crime'** - a free webinar aimed at solicitors and their staff. The Society is providing this webinar in light of the increasing threat of cyber-crime now facing solicitor firms and their clients in Northern Ireland.

The webinar provides comprehensive, timely and important information from Willis Towers Watson, Xperience Group and the PSNI on:

1. **The Current cyber-crime threat level**
2. **The impact of cyber-crime on solicitor firms and their clients**
3. **The impact of cyber-crime on the Master Policy**
4. **The benefits of purchasing cyber-crime insurance cover**
5. **How solicitor firms can best protect themselves and their clients.**

The Society is encouraging all solicitor firms, solicitors, and staff to watch the free cyber-crime webinar which can be used to support in-house training.

Please click here to watch the webinar
https://vimeo.com/manage/videos/632145254/daa86c95a6

From the Courts - abstracts of some recent case law

Below please find headnotes and links to the full text of selected judgments from the High Court and Court of Appeal.

Please note that these headnotes are for guidance only.

CRIMINAL LAW

R V JEFFREY ANDERSON

Reference by the DPP in respect of convictions of sexual assault, voyeurism and assault occasioning actual bodily harm. - whether the suspension of the sentence was unduly lenient. - access to and discussions with Judge in chambers without the presence of the defendant. - judicial guidance on sentencing prior to the plea and transparency in sentencing remarks. - open justice. - requirement to adhere to the Rooney guidance. - HELD that leave granted for the reference, but application dismissed

COURT OF APPEAL
10 MAY 2021
MORGAN LCJ, TREACY LJ, SCOFFIELD J

R v WILLIAM HUTCHISON

Defendant pleaded guilty to murder and sentenced to life imprisonment. - period of time to be served in custody before consideration for release by the Parole Commission. - defendant's record and assessment of dangerousness. - sentencing principles. - HELD that the appropriate tariff is 21 years as the minimum term to served

CROWN COURT
22 OCTOBER 2021
HHJ MILLER

FAMILY LAW

SB (A MOTHER) V A HEALTH AND SOCIAL SERVICES TRUST

Appeal from a decision of a Judge who declined to make a declaration that the respondent Trust had breached the a.8 rights of the appellant and her child by prohibiting the appellant from physically holding the subject child the day after she was discharged from hospital after the child's birth and prohibiting skin to skin contact for a period of four weeks. – child was in the care of the Trust and with foster parents. - mother required to wear full PPE. - risk assessment and risk of exposure to Covid-19. – whether interference with a.8 ECHR rights struck a fair balance between the Trust's interest in the protection of health and the interests of the mother and child. – whether parties had the necessary access to information from the Chief Medical Officer at relevant times. – HELD that appeal dismissed

COURT OF APPEAL
31 AUGUST 2021
MORGAN LCJ, TREACY LJ, O'HARA J

SM V LM

Appeal pursuant to a.166(1) of the Children (NI) Order 1995 against a Judge's denial for direct contact and instead making an order for indirect contact for all of the children in the family, including those who were over 16 years. - whether the Judge erred in law in failing to consider the range of alternatives available, in failing to proceed from the point that there is a presumption in favour of direct contact for a father when parents have separated, in giving sufficient weight to the quality of preceeding contact. - whether the Judge breached a.8 ECHR right to family life. - whether the decision of the judge, which was not dependent on the assessment of witnesses, was vitiated by an error in the balancing exercise of the relevant and competing factors. - HELD that appeal dismissed

HIGH COURT
29 SEPTEMBER 2021
ROONEY J

IN THE MATTER OF STEFAN (A MINOR)

Child placed with his mother residing at her maternal great aunt's home with the latter undertaking a supervisory role of the mother's care and contact with the child. - repeated breaches of the placement and safety care plan on the part of the mother when she absented herself from the home. - child removed by the father into his care in the home of his parents and subject to interim care order. - Trust seeks a supervision order and the father seeks a residence order to which the Trust does not object. - extent of mother's contact with the child. - HELD that supervision, residence and care orders are made as indicated

HIGH COURT
29 SEPTEMBER 2021
ROONEY J

JUDICIAL REVIEW

IN THE MATTER OF AN APPLICATION BY JR 131 FOR JUDICIAL REVIEW

Whether, and in which circumstances, it is open to a district judge to hold an *inter partes* hearing in relation to an application for a non-molestation order ("NMO") in cases where the factual circumstances giving rise to the application are also the subject of ongoing criminal investigation or an extant or anticipated criminal proceedings.- allegations of rape, sexual assault and administering poison. - whether breach of respondent's common law right to fairness and right to fair trial under a.6 ECHR. - whether it is procedurally unfair to require a respondent to a NMO application to defend that application at the same time as that individual is facing a criminal investigation or criminal charges for the same behaviour on which the NMO is grounded. - HELD that the application for judicial review of the district judge's decision will be dismissed. - Guidance for future cases included in the judgment

HIGH COURT
31 AUGUST 2021
SCOFFIELD J

IN THE MATTER OF AN APPLICATION BY JR169 FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Application for an order of Mandamus and/or injunction compelling the police to remove bonfire materials which had been assembled prior to the 11th night bonfire on the peace line. - application complained that the police were unwilling to act against those responsible for constructing the bonfire and ensuring the materials were removed from the site before they could be ignited. - guidance on how the recurring problem of bonfires in general in Northern Ireland, and bonfires on the peaceline in particular, might be resolved. - a.8 ECHR. - HELD that the police decision to refuse to intervene and try and dismantle the bonfire once it

had been constructed was not unlawful. - leave to apply for judicial review refused
HIGH COURT
21 SEPTEMBER 2021
HORNER J

IN THE MATTER OF AN APPLICATION BY THE NORTHERN IRELAND HUMAN RIGHTS COMMISSION FOR JUDICIAL REVIEW

Provision of abortion services in Northern Ireland. - applicant challenges the failure of the Secretary of State for Northern Ireland to ensure, pursuant to powers under the 2019 Act that women are provided with abortion and post abortion care in all public health facilities expeditiously and that relevant guidance is provided, and that the Executive Committee and Minister of Health should agree to commission and find abortion and post abortion care in all public health facilities expeditiously and provide relevant guidance. - declaratory relief sought that the Secretary of State's failure to engage expeditiously under the Northern Ireland (Executive Formation etc) Act 2019 ("the Act") is unlawful. - declaratory relief sought that the Executive Committee and Minister for Health's failure to make provision for abortion and post abortion care is a breach of a.8 ECHR. - HELD that between April 2020 and March 2021 the Secretary of State failed to comply with his duties under the Act; claim for judicial review against the Minister of Health and the Northern Ireland Executive Committee dismissed
HIGH COURT
14 OCTOBER 2021
COLTON J

OV V BOARD OF GOVERNORS OF ABBEY CHRISTIAN BROTHERS SCHOOL

Appeal from a decision of a Judge dismissing an application for leave to apply for judicial review on the basis that it was out of time and there was no good reason to extend time. – selection of students for secondary level education. – applicant failed to achieve admission to any of the schools he sought. – criteria for admission. – child is of Lithuanian national origin. – delay in judicial review proceedings. – whether the application has been brought within three months from the date when grounds for the application first arose. – whether there were good reasons to extend time. – finding of discrimination by the Judge establishes an arguable case on the basis of indirect discrimination makes the case exceptional. – potentially meritorious claim for judicial review which should not be barred by virtue of the time issue. – HELD that time extended and leave granted
HIGH COURT
13 SEPTEMBER 2021
KEEGAN LCJ, MAGUIRE LJ, COLTON J

PLANNING

IN THE MATTER OF AN APPLICATION BY HARTLANDS (NI) LIMITED FOR JUDICIAL REVIEW

Application for judicial review of a decision of Derry City and Strabane District Council ("the Council") brought by a development company. - challenge to a decision notice indicating refusal of a planning application for development of a site for social and affordable housing. - procedures to be adopted by district councils in the determination of planning decisions after the development control function was passed to them pursuant to the Planning Act (NI) 2011. - applicant challenges the Council's Planning Committee Protocol which prevented councillors from voting in respect of the planning application. - whether decision was unreasonable or irrational on various planning-related grounds relating to what it contends was flawed advice given to councillors by the Council's planning officers. - challenge to the provisions of the Council's Standing Orders upon which the Council relied on refusing to engage the "call-in" process on the basis that the relevant provisions of the Standing Orders were ultra vires. - relevant planning and legal principles. - housing need and the land available to meet it. - road access. - HELD that the applicant's application for judicial review allowed on the voting issue, Planning Committee's decision quashed and decision remitted back to the Council for reconsideration. - HELD that the applicant has not satisfied the court that the Committee erred in its assessment of the planning merits
HIGH COURT
4 OCTOBER 2021
SCOFFIELD J

SOCIAL SECURITY

THE DEPARTMENT FOR COMMUNITIES AND THE DEPARTMENT FOR WORK AND PENSIONS V LORRAINE COX

Special Rules on Terminal Illness ("SRTI") prescribing the mechanism in the social security system for the payment of Personal Independence Payment ("PIP") and Universal Credit ("UC") benefits for the assessment of those who satisfy the definition of "terminally ill". - appellants argue that the trial judge erred in respect of his assessment of status of the respondent. - respondent argued that the award of just satisfaction awarded by the trial judge was inadequate and the decision of the judge should be upheld since the appellants discriminated against the respondent. - meaning of "terminal illness". - a.14 ECHR. - issue of status. - HELD that welfare benefit is the subject of review via the political process. - appeal allowed and cross-appeal dismissed
COURT OF APPEAL
3 AUGUST 2021
MORGAN LCJ, TREACY LJ, MCCLOSKEY LJ

SUCCESSION LAW

NORMAN WILSON AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SANDRA WILSON (DECEASED) V MARK WITHINGTON

Application for Expedited Pre-Proceedings Freezing Injunction pursuant to s.91 Judicature (NI) Act 1978 or the inherent jurisdiction of the court. - relief sought is an order restraining the respondent from selling, disposing of or diminishing the value of a Spanish property. - applicant is the widower of the deceased and sole executor of the estate. - Spanish property was acquired by the deceased and her son, the respondent, with each owning an undivided half share. - deceased and respondent made wills. - whether the deceased's undivided half share falls into the residuary estate and is to be distributed accordingly. - respondent claims that the Spanish property was held as joint tenants and therefore the deceased's interest passed to him by operation of the doctrine of survivorship. - respondent claims entire beneficial interest. - estoppel. - whether the Court has jurisdiction to grant the relief sought. - whether the test for pre-proceedings has been met. - whether the applicant has satisfied the necessary criteria for the grant of an injunction. - HELD that relief granted by an order restraining the disposal or dissipation of the Spanish property until further order of the court
HIGH COURT
30 JUNE 2021
HUMPHREYS J

The Meeting Space

At Law Society House

For Bookings:

Telephone:
028 9622 7437
Email:
meetingspace@lawsoc-ni.org
Website:
themeetingspaceni.co.uk