

The Brief



The Official Journal of the Irish Institute of Legal Executives

2020/21 ISSUE



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Legal Disclaimer

The Brief adopts an independent and inquiring approach towards the law and the legal profession. It is published for the benefit of members of the Irish Institute of Legal Executives and therefore aims to keep them properly informed of developments in the law and legal practice.

As part of this objective, The Brief will act as an authoritative source of information on Institute activities and policies. From time to time The Brief may cover controversial issues. The editorial team shall have the final decision on matters of editorial policy or content but always strive to preserve and to enhance the good name of the Irish Institute of Legal Executives and its members.

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EDITORIAL TEAM

We the Editorial team hereby extend many thanks to all of those who contributed articles as well as photographs for this Edition of the Official Journal of IILEX – "The Brief".

Your contribution and interest in being involved is much appreciated and makes all of the difference towards the production of a quality publication. Deepest appreciation and thanks is extended to Sarah Hayes, LLB (Hons.) in Irish Law of Leap Technology who assisted in sourcing a very insightful and most professional article for inclusion in the Brief. All of our members and others should really enjoy reading the many interesting features and viewing the various exciting photographs kindly supplied by you,

If you have any social or current events coming up in the near future that you would like to see advertised or written about on the IILEX Website, or furthermore, maybe for inclusion in the next Edition of "The Brief", then please feel free to send information, photographs and other images to the following address:-

The Irish Institute of Legal Executives.
22/24 Lower Mount Street, Dublin 2 DX No. 15
Telephone: - (01) 890 4278 Email - info@iilex.ie www.iilex.ie

Congratulations and well done all.

Mary B. O'Dwyer, FIILEX
Director of PR/Communications
Editor

Front cover photograph: - Helen McEntee Minister for Justice and Equality.

Kind permission of the Department of Justice and Equality.

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President's Address

Dear Members,

I hope this finds you all safe and well. Nothing feels more important than health and happiness no matter what the world throws at us.

2020 was a difficult year and 2021 continues to present significant challenges with COVID 19 and the impact it has on IILEx, its members, our economy and the way we go about our lives. The changes will be long lasting and profound. The Institute has survived challenges and adversity in the past and has grown over the past thirty-three years. We are confident that this growth will continue.

The delay in the publication of the Brief 2020 was due to the impact of COVID 19. The Brief is reliant on articles from you our Members and due to the Pandemic and the tireless work of our members to support their colleagues in finding new and innovative ways of working articles were slower to reach us in 2020 than in previous years. Rather than produce a copy of the Brief in 2020 that we weren't entirely happy with, the Board of Directors of IILEx decided to combine the 2020 and 2021 publications. The Board of Directors have considered online publications in the past and in particular this year we felt that there may be an appetite for a digital version of the Brief rather than a physical copy. The Board sent an Email out to its Members for feedback in relation to online publication and the feedback from members overwhelmingly underlined that the majority wish to receive a hardcopy of the Brief, the Directory and their Membership Certificate.

I want to acknowledge the tireless work the Board of Directors have put in during this difficult year. As with every other organisation across the world we had to adapt quickly to the changing times. For the Institute this meant setting up our monthly meetings by Zoom; organising the AGM 2020 by Zoom; attending online meetings for the Property Registration Authority's Customer Focus Group; liaising with Griffith College to assist in their expansion and adaptation to a larger eLearning facility for our members and future members; arranging an online talk for members and students. The Institute has continued to liaise with the Legal Services Regulatory

Authority by making Submissions on behalf of Legal Executives at every invitation by the Legal Services Regulation Authority.

I am very pleased that Griffith College Dublin and Cork continue to provide Legal Executive Graduates. I congratulate all of those Students who graduated during the year 2019 and 2020 and look forward to having them as full members of the Institute in the future.



I want to thank everyone for their continued support and all the hard work my fellow Directors have been putting in despite the adversity facing us all.

Every one of us have faced challenges this year whether that be personal or professional. Adaptation has become essential for our continued progression, development and growth as an Institute.

We welcome any suggestions/ideas you may want to share with the Board. We can be contacted at info@iilex.ie and we can also be found on LinkedIn and Facebook through our home page at www.iilex.ie.

Finally, I would like to take this opportunity on behalf of the Board of Directors of iilex to thank everyone for their continued support. We all know what it feels like to miss our family and friends during this global pandemic so let us all look to 2021 with a positive, healthy and productive attitude.

Kind regards,

Deirdre Littrean-Butler, FIILEx
President
Irish Institute of Legal Executives

Would you like to tip the scales in your favour?



If you are currently working in a legal environment you may be eligible to become a Legal Executive and obtain membership of the Irish Institute of Legal Executives - (IILEX) a corporate body formed in 1987, incorporated in 1992 whose Board of Directors consists of Legal Executives.

The primary aim of the Institute is to act as a regulatory body, which in conjunction with Griffith College based in Dublin and Cork provide a system of legal training and examination for the purpose of achievement of recognised professional qualification such as the current Diploma in Legal Studies and Practice (QQI) for those engaged in legal work.

Applications for enrolment for membership must be made on the prescribed application form which is available from the Institute's registered office address:

The Irish Institute of Legal Executives
22/24 Lower Mount Street, Dublin 2

as well as the Institutes' Website at:
www.info@iilex.ie



Irish Institute of Legal Executives

All relevant information relating to the Irish Institute of Legal Executives – IILEX as well as membership is also available on the Website. The Irish Institute of Legal Executives would be delighted to hear from you in the near future.

You need us for direction; We need you for strength and resources

For an application form visit www.iilex.ie or contact 01 890 4278 or info@iilex.ie

Griffith College Dublin

Graduation and Conferring Ceremony 2019

Diploma in Legal Studies and Practice - (QQI Level 7 (Special Purpose Award) -2019

The Graduation and Conferring Ceremony of graduates of the Diploma in Legal Studies and Practice - (QQI Level 7 Special Purpose Award) took place at the Conference Centre in Griffith College Dublin on Thursday 7th November 2019. This Course is delivered by Griffith College Professional Law School and conducted in conjunction with the Irish Institute of Legal Executives - (IILEX).

The opening address of this event was made by Professor Diarmuid Hegarty, President of Griffith College who warmly welcomed to the Graduation and Conferring Ceremony all graduates both Irish and International and their families, friends, Directors of the Irish Institute of Legal Executives - (IILEX) as well as other invitees.

Directors' of the Irish Institute of Legal Executives-- (IILEX) were delighted and honoured to receive the kind invitation to attend at this event and wish to sincerely extend thanks to Professor Diarmuid Hegarty, President of Griffith College for such and the hospitality shown. Directors in attendance representing the Irish Institute of Legal Executives--(IILEX) included Frank Crummey, FIILEX., (Hon. Life Member of IILEX), and Deirdre Butler FIILEX., President of (IILEX), Gabriel Canning FIILEX., Vice-President of (IILEX) and Mary B. O'Dwyer FIILEX., Director

of PR/ Communications of (IILEX). It was once again most pleasant and interesting to meet up with and converse with various graduates, members of the academic staff of Griffith College and other invited guests present.

Congratulation and best wishes are extended to Anna Rowland, who was awarded with the Frank Crummey Perpetual Cup for her great achievement as best student of the year 2019 in the Diploma in Legal Studies and Practice (QQI) Level 7 - (Special Purpose Award). However, due to unforeseen circumstances Anna could not attend at this ceremony but will be formally presented with the Frank Crummey Perpetual Cup at date and time that is suitable to both Anna and Griffith College. Well done Anna and continued future success.

A total of twenty-six (26) students were conferred with Diplomas in Legal Studies and Practice - (QQI) Level 7 (Special Purpose Award). Students were formally presented with their respective parchments by the President of Griffith College, Professor Diarmuid Hegarty who congratulated each on their great achievement as well as wishing them every success and happiness in their future careers and lives ahead. The Irish Institute of Legal Executives - (IILEX) also extend their good wishes and every future success to all graduates of this Diploma Course.



Diploma in Legal Studies and Practice students 2019 and Academic Staff of Griffith College, Dublin including Josephine Feehily, now Chair of the Pensions Commission, Professor Diarmuid Hegarty, President of Griffith College, Karen Sutton, Head of the Law Faculty, Griffith College, Dublin and Mary O'Dwyer, PR/Communications Director of IILEX.

Directors of the Irish Institute of Legal Executives – (IILEX) were again delighted to learn of and to witness the number of students graduating and thus acknowledging the sustained interest in the pursuance of this Diploma Course. This is truly a success story and an excellent outcome for both the Irish Institute of Legal Executives – (IILEX)) in combination with Griffith College. Well done to all of those involved.

A very special feature of the ceremony was witnessing Josephine Feehily the chair of the Policing Authority- (former Revenue Commissioner) being presented with Griffith College's prestigious Distinguished Fellowship Award by Professor Diarmuid Hegarty President. This award is Griffith College's highest honour and is presented to those who have made a significant contribution to society over a period of time.

In addition, compliments are extended to all staff including staff of the Examinations' Department of Griffith College- (GCD) who as per usual worked very diligently and professionally displaying an enormous duty-of -care in organising the logistics in putting in place this entire most professional and memorable event. Well done to all involved.

Directors' of the Irish Institute of Legal Executives – (IILEX), are at all times mindful and truly appreciative in being closely associated and engaged with Griffith College over many years. Continued success for the future is wished to Professor Diarmuid Hegarty, President of Griffith College including wonderful academic staff and others in their much celebrated and excellent work.

Finally, on having read this Report, maybe you or people you may know would like to pursue a legal course of studies in Griffith College and if so, you can receive information by contacting the following - **www.griffith.ie/law**

Due to Covid 19 restrictions the 2020 Graduations in Griffith College were held virtually rather than in the usual manner.

Mary B. O'Dwyer FIILEx.

*Director of PR/Communications- IILEX
Editor of the Official Journal of IILEX – "The Brief "*

Sad Farewell To A Former Member

It is with more than a tinge of sadness that we say farewell to former Fellow Member *MICHAEL GILMARTIN* RIP who passed suddenly in December last.

Michael played no small part in assisting in the formative years of the Institute along with fellow colleagues, Joe Menton, David Somers, Gabriel Canning, Peter Doyle, Frank Crummey to name but a few. I believe the Institute today would not hold the professional status it does within the legal profession if it were not for individuals like Michael who worked tirelessly and without personal gain to ensure the Institute got due and proper recognition for all its members throughout.

Michael, a native of Belleek on the Donegal/ Fermanagh border, embarked on his legal career by joining the well-established firm of solicitors Bowler Geraghty & Co based on Ormond Quay in Dublin. Soon the partners in the firm discovered that not only was Michael very professional in his work but he had an irresistible charm, coupled with the occasional "twinkle in his eye," he would unpretentiously draw you in.

Alas - after a number of years Michael felt the need to make his own footprint in the economic world but to remain within the legal profession which he enjoyed thoroughly. In the early 80's Michael rented and eventually purchased a large property on the quays, successfully trading under the name "Legal & General". In addition, and to demonstrate his natural

entrepreneurial skills he acquired a retail outlet within the Four Courts building itself. These two strategically located retail outlets were to prove the cornerstone of Michaels successful business where every solicitor and barrister in the country could easily find what they needed - from a barrister's notebook or more importantly to the latest edition of a book on criminal law or property law be it published in Ireland or very often in the UK. In a short period of time, and again to further demonstrate his entrepreneurial skills, Michael discovered there was a "niche" for legal accounting software exclusive for the legal profession. With this new and innovative software, the business was providing a service to the legal profession around the whole country. When Michael eventually reached his retirement years he decided, with great pride and joy, to pass the business reins over to his son John, himself a qualified solicitor. It can be said that it was never a case of all work and no play with Michael and he made sure he could spend time with his family, play rounds of golf and enjoy socialising with his friends who not surprisingly, held him in high esteem.

Finally, we wish to express our deepest condolences to Michael's wife Margaret, sons John, Michael and extended family.

*Damien Lynam
Retired Legal Executive
State Solicitor's Office*



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***From One Legal Executive to Another: Career
Insights from the highly accomplished
Niamh Wade, with Commentary from his
eminence Justice Michel Peart***

With Sarah Hayes

Niamh Wade works in the long-established and well known Pearts Solicitors & Town Agents, based in Dublin city, and has enjoyed a very successful career as a legal executive. Having made the transition from a career in marketing to working in the legal industry, she has had a colourful career marked with great accomplishments.

Niamh utilises her previous experience by handling the marketing of the practice alongside her duties as a legal executive. The work she does in her role is integral to the success of this well-esteemed and thriving firm.

In a forthright and funny manner, Niamh has kindly shared an account of her career to date, along with some valuable insights into the working life of a legal executive. She speaks of her memories growing up surrounded by prominent practitioners who inspired her to make her own contribution to the legal world.

What inspired your interest in law?

I have been surrounded by inspiring legal people my whole life. My mum, Valerie Peart is a Solicitor, as was my Grandad, Denis R. Peart and my uncle, Mr Justice Michael Peart also worked as one before becoming the first Solicitor in Ireland to be appointed as a High Court Judge in 2002. Together they all played a massive part in the development and success that is Pearts Solicitors & Town Agents. As a family business, which has been run by both my parents for the past eighteen years, with Mum acting as Principal and my dad (who is an accountant) as the Financial Director, I have had various little stints working in the office since the age of 16. However, when I left school, I didn't follow the legal path. I ended up obtaining a degree in Tourism Marketing and had a very colourful career in hospitality, media and publishing, marketing, PR and event management before returning to work full time in Pearts over two and a half years ago. There were various reasons which drew me back in, including the desire to work in a job where I felt my work really mattered and I was helping people. I had originally contemplated a career in nursing when I left school but after two days of work experience in a hospital, I realised it would not be for me, but I have huge respect for those who do work in that role. With law, I feel I can assist in making a difference to people's lives...sans blood and needles! Once back full time, I decided I should really understand the law better and in September 2018 I undertook the very

intense Diploma in Legal Studies in the Kings Inns, which I have thankfully, just passed! The plan now is to sit the Entrance Exams in August for the Barrister at Law Degree which is due to kick off in October. With the work that I do, I am very lucky that I get to see the courts in action a lot, and how the various roles work within the courts which has also been very influential in my career path.

What do you like most about your work as a legal executive?

I get to have a great variety of work because I split my time between the town agency business based on Ormond Quay and the private client branch in Rathmines, assisting two to three solicitors. At the moment, while court work is minimal due to Covid19, I am mainly based in Rathmines providing assistance on private client files. I really enjoy the diversity between personal injury and conveyancing matters, and seeing how the cases develop and succeed over time. While my role is often quite paperwork heavy, we thankfully use LEAP legal software which has been very helpful and has made the administrative side of case work extremely efficient. I really enjoy being part of the team and overall, I feel my role is an integral part of the success of the whole team and the various cases involved.

What do you find to be the most exciting and rewarding aspects of your role?

I have always found joy in helping people and get a satisfaction for going above and beyond, which is often required. At times, the administrative side of the legal world can be quite arduous with a lot of paperwork, such as preparing booklets of pleadings, but when you see how important the information is in assisting a case, especially a medical negligence case or a serious personal injury matter, it is very satisfying to know that you had a part to play in that, even if just in preparing the documents. I also find attending interesting matters in court very exciting, especially non-commercial matters and cases involving lay litigants as they can bring a human-interest element to the proceedings.

Can you share some tips for other legal execs on how to make their working life easier?

Ask your employers to get LEAP legal software, or something similar! It has certainly helped my working life in the private client branch. And, be organised from the start of a new client file, especially one which will likely end up needing booklets of pleadings for court. Also, do not be afraid to ask questions. When it comes to the law, there can be no room for error and even a clerical error could make the difference between a case being won or lost.

What have been the high points of your law career to date?

The first time I got to make an adjournment application in court was definitely a high, especially as it was granted too! Also, having had to attend Counsel on many occasions, I have been privy to first-hand judgments in the Supreme Court and Court of Appeal which have later been reported on in the newspaper.

Can you speak a little on your experiences working in the courts day-to-day?

This is one of my favourite parts of the job. It brings so much variety and you often get to witness incredible legal minds at work. Like all cases, there are the tough, emotional ones which can be hard to take, and then there are the days where I could have done with a strong coffee in court! I have been fortunate to sit in all types of courtrooms, from the District Court right up to the Supreme Court. Some days I might only have to attend on a quick motion that is adjourned within minutes, while other days I might have to sit in on a lengthy hearing.

Personally, I find these more challenging as you have to take a lot of handwritten notes! On occasion, I will have to make a short application, which is always a little nerve-racking, especially when you are in a very full court room. As we attend Counsel on behalf of our solicitor clients who are based around the country, we have a very special role to play in representing them and assisting their Counsel, and sometimes will get to meet the clients involved in the case themselves. Monday's are always very busy but thankfully we have a WhatsApp group so we can keep each other posted on who becomes available to attend on another matter, or if there are last minute papers needing to be filed and brought to a court room. There have been days when I wished I had roller skates on! Hopefully when all of this Covid-19 business is finished the courts can return to normal, as I certainly miss the buzz of it. The variety of people and their roles, the personalities and the certain traditional 'old school' elements of the courts bring a charm to it all.

Is there anything you might like to share that you wish you had known at the start of your career?

It definitely would have helped to have studied the law already and the rules of the Superior courts!

What advice could you give to legal executives that are just starting on their career path?

Don't be afraid to ask questions, read up on areas of procedure that you are not sure of, be friendly to everyone and take deep breaths when the printer or photocopier decides to have a meltdown just before your deadline! Also, the Registrars in the courts can be very helpful should you have missed what the Judge directed or not managed to take note of an adjournment date.

As a legal executive who also manages the marketing of your firm, are there any tips you can share for others on ensuring that they are integral to the growth of the firms they work for?

If someone, like myself, has had a career change, or worked in a different company, the chances are that they have learned a variety of transferrable skills or have something else they can bring to the team. It is all about teamwork at the end of the day and a 'can do' attitude and willingness to learn will all help.

Are there any keys to success that you can share from your experience working in a thriving law firm? What are the things that help drive growth and success for firms?

Teamwork, and a respect and appreciation for the various levels of knowledge and experience in the company. Tricky situations and last-minute problems will often arise, but it is important to remember that there is always a solution! The key is to communicate properly and never be afraid to ask for assistance. Good staff morale is very important, as is knowing when it is the right time to treat your colleague to a coffee!

When I was in college a lot of students had particular judges they favoured, for instance I loved reading the judgments of Ms Justice Susan Denham and Ms Justice Marie Baker. Is there a particular Justice whose rulings you admire?

Judgments of my uncle, Mr Justice Michael Peart, used to crop up a number of times in the manuals of the Kings Inns over the course of my studies and I have to say, I did rather enjoy them, and felt proud too. In addition to that, I found myself on a number of occasions concurring with Chief Justice Frank Clarke in his judgments, too.

Pearts law firm is highly commended within the legal community for its remarkable successes, in particular the great contribution to the jurisprudence of Ireland made by Mr Justice Michael Peart during his time on the bench. Could you share with us what are the values he would feel are most important for legal practitioners? In response to this question, Niamh kindly reverted to Mr Justice Peart for a direct comment.

Justice Peart: *"The most important values for members of the legal profession whether they are solicitors, barristers, or legal executives are total honesty and integrity in all their dealings with their clients, their professional colleagues, and with the Courts. Clients must be able to trust their solicitor and barrister, and legal executives too of course if they are dealing with the client.*

Professional Integrity is the hard currency of all branches of the legal profession, and without it the system of justice will simply break down. This is why the profession is highly regulated in the public interest.

*Added to these core values must be a capacity for **hard work** – often above and beyond the call of duty – and sometimes unpaid!"*



Firms using LEAP make more money

Work from home with LEAP

Interviewed by Sarah Hayes

Product Consultant

48 Mount Street Upper, Dublin 2,

Mobile: 0877088178



“Entering the Four Courts”

*Limited Edition of Fine Art Print officially launched at the King’s Inn,
Henrietta Street, Dublin 7 on Tuesday 26 November 2019*

(Permission for publication by kind courtesy of Paul & Maria Hanna, Hanna Fine Art)



Mary Robinson

*First Woman President of Ireland
3rd December 1990 – 12 September 1997*

Entering the Four Courts

*Published to mark the centenary of the Sex Disqualification (Removal) Act 1919
and to celebrate the role and contribution of women to the legal profession in Ireland*

Susan Denham

*First Woman Chief Justice of Ireland
25 July 2011 – 28 July 2017*

The Irish Women Lawyers Association - in association with the Bar of Ireland and Irish Legal News - is delighted to release Hanna Fine Art’s print of Irish artist Stephen McClean’s original oil on canvas,
“Entering the Four Courts”.

This print is being published in a limited edition of only 250 prints to mark the centenary of the Sex Disqualification (Removal) Act 1919 - which enabled women to become barristers, solicitors, jurors and magistrates - and to celebrate the role and contribution of women to the legal profession in Ireland over the last 100 years.

As you can see from the attached pictures, every print in the edition has been individually hand-signed by Mary Robinson, first female President of Ireland and Susan Denham, first female Chief Justice of Ireland.

The print will raise funds and awareness for **Breast Cancer Awareness** and the **Denham Fellowship**. It was formally released on 26th November 2019 at the King’s Inns. Anyone who would like to make further enquiries about one of these historical prints please contact Maria Hanna on 085 112 2388 or email modernirishart@btinternet.co.

An Overview of Trump's 2016 Right Wing Populist Election Campaign - Mark Davis



The 2016 Election of Donald Trump would not have been successful without a populist campaign that many Americans related to. Trump thrived on highlighting and reiterating the importance of issues of cultural and social conflict which proved successful due to his election and since the inception of his campaign, he started a political brand so strong that he created a permanent re-election campaign since the start of his announcement of his candidacy (Levinthal – 2019).

Trump ran his campaign on rhetoric that some considered to be racist and white supremacist in nature (Bobo – 2017), which is inherent to American Culture despite huge efforts for the advancements of minorities over the past decades and the perceived racial harmony led by two consecutive Obama Administrations. A difference between Trump's campaign thriving on issues of race to past administrations was that the suspect community of Black Americans was replaced with Muslims, in an age of conflict within the Middle East, Terrorist Attacks and Islamic Fundamentalism. Trump ran his campaign successfully engaging with issues of race by highlighting the worsening economic equality of ordinary Americans against issues of immigration and security threats etc, by intensifying political partnership with political actions committees, non-profits for Trump, with the creation of a Trump 'Make America Great Again' branding, and by highlighting the failure of Hillary Clinton's campaign as being only for the elite and failing to champion the interests of middle class Americans. Trump's campaign was successful as racism is a well routed shameful part of US society, politically, socially and within everyday life. The 'MAGA' symbolism, as Bobo (2017) states was a 'dog whistle' to protect white privilege in America against threats of immigration, Islam and inadequate economic policy from the Democrats which many Americans found mistrust in. Trump preyed on White Americans as he was reminiscent of the 'American Dream' days of 1945 to 1973 which saw an income gap decrease between the richest and poorest members of society until the Great Recession of the 1980s. This rhetoric of the glory days of America destroyed by the political elite, the creation of a political brand, and the fact that the US was predicted to have a white minority by 2040 due to immigration and globalisation, and the unfortunate dependence on racial division in American politics led to a successful populist campaign for Trump. "...with the United States probably becoming a majority-minority population by 2040. In fact, we hit one important benchmark five years ago, when the majority of new births in this country were children of colour. Experimental research shows that when presented with evidence of these demographic trends, many white Americans tend to express a sense of threat from minorities and a greater emotional animosity toward them" – (Bobo- 2017) (pp. 95).

As stated, the campaign that Trump ran in 2016 created a long lasting and successful brand of 'Make America Great Again', and with this since the campaigns inception and throughout to his inauguration he has had a permanent campaign of re-election. During Trump's inauguration he already declared his candidacy by issuing a 'Form 2' (Levinthal – 2019), allowing his campaign money to be raised four years in advance. There have been 57 campaign rallies to date, all funded by the Trump Campaign's money, creating a strong populist brand and most recently with the 'promises made, promises kept' slogan referring to his policies which he enacted. The endless marketing of his political brand

successfully stems from Trump's origins as a lucrative Business Expert, resulting in pro Trump Political Action Committees (PACs) and Non-Profits being set up supplying an endless flow of money to the campaign. The Republican National Committee (RNC) has funded 23.5 million dollars for his 2020 campaign to date, no other presidential campaign to date has had such a large re-election campaign take place so soon. Trump obviously benefits from this endorsement and flow of money, but he has stated he does not need this money to succeed as he believes he has the interests of most Americans in mind regardless (Levinthal – 2019). His brand power has led to a new form of right wing populism which is mobilized using social media, and has led to new forms of online activity, blogging, activism and even memes promoting Trump. The US political system is unlike any other due to its two-party system with the larger and earlier involvement of candidate roles has allowed right wing populism to thrive through the Trump campaign and Trump's rhetoric on highlighting of issues of cultural conflict such as terrorism.

Trump's brash discourse on radical Islamic Terrorism has led to his campaign thriving on the fears of ordinary Americans. Trump's discourse on terrorism, as Stamenković (2017) states, uses conceptual metaphors drawn from different human experiences, an example being "Hillary Clinton's support for violent regime change in Syria has thrown the country into one of the bloodiest civil wars anyone has ever seen—while giving ISIS a launching pad for terrorism against the West - (Donald Trump) (June 22, 2016). This rhetoric of Trump has led to a successful right-wing populist campaign regarding the cultural conflict of terrorism, among the use of other conceptual metaphors on other issues, which allowed the American Middle Class to relate to his rhetoric and sympathise with his campaign. This rhetorical method has been used regarding terrorism before within the Bush Administration justifying the interventions of Iraq and Afghanistan after 9/11, an event which brought the issue of terrorism to the forefront of political campaigns.

The success of Trump's campaign was built on issues of populism, cultural and social conflict and due to the campaign highlighting issues combined with the creation of a highly profitable political brand and early campaigning for 2020, Trump was elected on the 8th of November 2016 with 306 electoral votes against Hilary Clinton with 232 electoral votes, despite Clinton winning the popular vote with 48 percent against Trump with 47 percent. Trump was inaugurated and sworn in as President of the United States on the 20th of January 2017.

Mark Davis. BA International Relations (DCU), MPhil International Peace Studies (Trinity College Dublin). Faculty Administrator, Faculty of Law, Griffith College Dublin.

Bio

Mark Davis is a Faculty Administrator for the Law Faculty at Griffith College Dublin. Mark started his position with Griffith College in November 2019 after completing his Master's Degree. The above contribution was an extract from Mark's Masters Dissertation entitled "Cultural and Social Conflict and the Rise of Right Wing Populism: The Clash of Civilizations?". The extract is an overview of Trump's 2016 Election campaign, which may be a particularly interesting look back as we await a new era of American Politics with the Election of Joe Biden and Kamala Harris in 2020. The dissertation focused on two case studies of the US and Sweden which have seen major uprisings in right wing populism over the past number of years and in this dissertation Mark used Samuel Huntington's "Clash of Civilizations" theory and aspects of Cultural and Social Conflict on how they mobilized this form of populism in these two case studies.

Probate:

How to file a Statement of Acceptance or Rejection of Inheritance in Poland without leaving Ireland

A Polish national is required to file a Statement of Acceptance or Rejection of Inheritance (*Oświadczenie o Przyjęciu lub Odrzuceniu Spadku*) within six months from the date s/he becomes aware of her/his duty to do so (i.e. becoming aware of a death in the family).¹ It should be stressed here that a Statement must be filed in the event of either the existence or non-existence of a Final Will and Testament of the deceased person. It is paramount that an applicant familiarise her/himself with Art. 927 §2 of the Polish Civil Code (*Kodeks Cywilny*), as it may be applicable to her/him and/or her/his close relatives (i.e. already born and/or unborn child(ren)).²

Unfortunately, Polish law is not as simple as it seems when it comes to filing the said Statement in Polish courts. Under the Polish Civil Code an applicant is required to file the Statement in person along with other legal requirements.³ However, if someone is unable to travel to Poland, here are some steps which may assist a person to complete the process without the necessity of travelling to Poland.

To complete the process of filing relevant paperwork an applicant will need the following:

- (a) Original and sworn Statement made before the Polish Consul.
- (b) Additional letter from a Polish notary addressed to a relevant court in Poland. If you are unable to find a notary in Poland, you can compose a letter yourself.
- (c) Original Death Certificate.
- (d) Any other documents (if any) that are required by Polish courts.
- (e) Your Polish passport/National ID Card.

PROCEDURE:

1. Go to the official website of the Polish Consulate in Dublin and download their template of the Statement.⁴

2. Complete the template based on your personal situation (acceptance or rejection of the inheritance). If you know the address(es) of your siblings, please enter same on the form. If you do not know it (or do not wish to write any), simply write 'address unknown.'
3. Make an appointment with the Polish Consul using the official website of the Polish Consulate to get your Statement signed, dated and sworn.⁵ Alternatively, you can use the services of your local solicitor or notary public.
4. Next, depending on your situation, you will have to:
 - (a) Find a competent notary (*notariusz*) in Poland who will compose an appropriate letter to file your sworn Statement on your behalf. A family member in Poland might be able to find you a good and reliable notary.
 - (i) Post your original, sworn Statement to your notary (or to a family member) by registered post.
 - (ii) Ensure that your notary files all the documents in the relevant court on your behalf, and confirms that the process is fully completed.
 - (iii) Cover notary's fees.
 - (iv) Cover court fees; or
 - (b) Do it yourself:
 - (i) Compose a basic letter to file your sworn Statement. Sample letters can be found at the links in the footnote below.⁶ Alternatively, you can check the official website of the relevant court, if you know where exactly to file your completed documents.⁷

¹ Art. 1015 §1 ustawy z dnia 23 kwietnia 1964 roku Kodeks cywilny (tekst jedn. Dz.U. z 2014 roku, poz. 121 z późn. zm.) and <https://www.arslege.pl/kodeks-cywilny/k9/s2055/>

² Art. 927 §2 ustawy z dnia 23 kwietnia 1964 roku Kodeks cywilny (tekst jedn. Dz.U. z 2014 roku, poz. 121 z późn. zm.) and <https://www.arslege.pl/kodeks-cywilny/k9/>

³ Art. 641 ustawy z dnia 17 listopada 1964 Kodeks postępowania cywilnego (tekst jedn. Dz.U. z 2014 roku poz. 101 z późn. zm.)

⁴ <https://www.gov.pl/web/irlandia/odrzuzenie-lub-przyjecie-spadku>

⁵ <https://secure.e-konsulat.gov.pl/Uslugi/RejestracjaTerminu.aspx?IDUSLUGI=5&IDPlacowki=151>

⁶ http://rzeszow.sr.gov.pl/boi/ulotki/Wzor_wniosku_o_stwierdzenie_nabycia_spadku.pdf and <https://radom.sr.gov.pl/container/wniosek-o-stwierdzenie-nabycia-spadku.pdf>

⁷ <http://www.sopot.sr.gov.pl/wniosek-o-stwierdzenie-nabycia-spadku-po-1-osobie/>

- (ii) Ensure that you list any relevant attachments (*załączniki*) and legal basis (*podstawy prawne*) in your letter. However, legal bases are not always mandatory – this depends on Polish forms in various regions.
- (iii) Contact your relatives in Poland and asked them to contact the relevant court office to confirm that they will be able to file all the documents on your behalf (they will have to pay a fee when filing your papers). It might be helpful for them to highlight the fact that you are unable to attend in person to file the Statement in Court. Remember to post all the documents (signed and dated) by registered post – you do not want them to go missing. Sometimes it is possible to pay a fee (*opłata skarbową*) online and to send all your documents by registered post to the Court – please note that this option must be confirmed with the relevant court office first.

If a current postal address is provided to the court when filing the documents, please be advised that under Polish law, the Court may (or may not) send an applicant a letter requesting her/him to attend at Court in Poland on a specific date in respect of her/his filed Statement. The Court's request is not mandatory and is at the Court's discretion. Generally, if the Statement is straightforward (fully completed, stamped, sworn, dated and without any potential legal complications or challenges) an applicant should not be compelled by the Court to attend any court hearings regarding her/his inheritance.

To obtain free legal advice regarding your Statement, you can contact the Civil Legal Section in the Polish Consulate in Dublin. The rest of the process is, unfortunately, your own responsibility as Polish law does not – at the moment – allow the Consul (or her/his staff) to file any paperwork in Poland on your behalf in this particular legal matter.

An applicant should note that a signed and sworn Statement before the Polish Consul is legally valid in Poland.⁸ Beware of incorrect information given by notaries in Poland who may inform you that they are not

able to file documents on your behalf and/or that the signature of the Polish Consul is invalid. Finally, it is worth pointing out that using a local solicitor or notary public in Ireland to witness your signature on the Statement might prove insufficient in Poland. Despite having an apostille (*nostryfikacja*) on the sworn Statement, it may not be accepted by the courts in Poland. This procedure remains a grey area in Polish law and *de facto* an applicant throws her/himself at the mercy of the Court. However, if anyone wishes to use the apostille option (from the Department of Foreign Affairs and Trade or notary public), it should be first confirmed with the relevant Polish court office that this document will be accepted by them. Furthermore, an applicant will bear any costs of a sworn/certified translation of the apostille from English to Polish. Also, anyone is free to retain a registered agent in Ireland to deal with the issue of filing documents in Poland but this option is at the applicant's own risk. It should be kept in mind that the onus is on the applicant to file the Statement (*Oświadczenie o Przyjęciu lub Odrzuceniu Spadku*) within a six-month time period with a Polish court pursuant to the Polish Civil Code (*Kodeks Cywilny*) Late filing or no action at all will have its legal repercussions. If the documents are filed incomplete and/or filed incorrectly, an applicant will be forced to start the process of filing from the beginning.

Simon Urbanski BBus, MA
Commissioner for Oaths and Legal Executive



⁸ Art. 28 ust. 1 pkt 2 ustawy z dnia 25 czerwca 2015 roku Prawo konsularne (Dz.U. z 2015 roku, poz. 1274 z późn. zm.)

Relative Grounds – Earlier Trade Mark Rights

Throughout most countries around the world, when a business undertaking applies to register a trade mark as a registered trade mark, it will find that the statutory regimes governing the trade marks element of Intellectual Property, regulate what are known as earlier rights.

Intellectual Property offices always advise applicants, prior to applying to register a trade mark, to conduct pre-application searches of registered trade mark databases such as the World Intellectual Property (WIPO) database or the database held by European Union Intellectual Property Office or individual countries trade mark registers.

The idea to conduct a pre-application search is to avoid encroaching on another undertaking's earlier registered trade mark rights thereby obviating contentious litigation. The concept revolves around whether the applicant's proposed trade mark is identical or similar, to that of another undertaking's earlier trade mark rights and whether such would lead to a likelihood of confusion or likelihood of association.

UNREGISTERED TRADE MARKS

For a business undertaking proposing to register a trade mark in common law jurisdiction countries such as the United States, Ireland, the UK and other such countries, the notion of anticipating an earlier right for an unregistered trade mark to avoid contentious litigation is difficult given there is no official register to search, albeit there are specialist agencies, such as Carratu and Cerebus, who carry out common law searches by checking trade directories, business and company registers. The CRO is also a source of such information given a requirement to register "business names" pursuant to the Registration of Business Names Act 1963 and S.I No. 339 of 2016 (Business Names Regulations 2016).

In Ireland there is no legal obligation to apply to register a trade mark as a registered trade mark. An owner of an unregistered trade mark may rely on the Law of Passing Off in the event another undertaking utilises an identical or similar "get up" to their unregistered trade mark.

The purpose of this article is to explain statutory earlier trade mark rights and to explain how in contentious cases examiners of the Intellectual Property Office of Ireland ("IPOI") or the Courts determine such disputes.

TRADE MARKS ACT, 1996 (NUMBER 6 OF 1996)

In Ireland, the Trade Marks Act 1996 (as amended), regulates the statutory element of trade mark protection.

Section 6 (1) of TMA 96 defines a trade mark as "any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings".

Section 6 (2) of TMA 96 reads "without prejudice to subsection (1), a trade mark may, in particular, consist of words (including personal names), designs, letters, numerals of the shape of goods or of their packaging".

Section 11 of the TMA 1996 provides that an "earlier trade mark" means a registered trade mark or one which is

pending on either the IPOI register, the EUTM register or on the international register, which has a date of application for registration earlier than that of the applicant trade mark.

NICE CLASSIFICATION

Readers should be aware when an applicant trade mark owner applies to register their trade mark as a registered trade mark they must identify the NICE classification of goods or services, to which the application will apply. The NICE Agreement concluded during 1957 at Nice, France and its subsequent editions establishes an international system for the purposes of registering trade marks and service marks. The NICE classification has from 1 to 34 separate class headings to classify different goods and has from 35 to 45 separate class headings for different services.

The NICE classification system is an important element when it comes to determining contentious "earlier trade mark rights" disputes given the concepts of "identical" and "similar" trade mark rights and "identical" and "similar" goods or services.

Whether the goods or services are similar depends on the facts of each case. An intellectual property office adjudicator or a Court usually compares the defendant's goods or services as they are used with the goods or services of the applicant's goods or services. The case of **Canon Kabushiki Kaisha v Metro Goldwyn Mayer (C-39/97 [1999] 1 CMLR 77, 95)**, is an important case in this regard. The ECJ held "all the relevant factors relating to those goods and services themselves should be taken into account. Those factors include, inter alia, their nature, their end users, and their method of use and whether they are in competition with each other or are complementary."

IPOI EXAMINATION OF AN APPLICATION TO REGISTER A TRADE MARK

An examiner with the IPOI will consider a trade mark owner's application as acceptable for registration when the examiner has determined the application passes the Absolute Grounds (section 8 (1) of TMA 1996) and Relative Grounds (section 10 of TMA 1996) tests. The proposed application is then published in the two-weekly official IPOI journal of patent, design and trade mark related applications and other issues. This gives notice to allow those undertakings who hold earlier registered trade mark rights or those who hold unregistered trade mark rights to oppose the application. There is a strict three-month deadline, from the date of publication in the IPOI official journal, to apply to the IPOI to oppose an application to register a trade mark.

SECTION 10 OF TMA 1996 – RELATIVE GROUNDS FOR REFUSAL OF REGISTRATION

Readers should refer to the various sub sections of Section 10 of TMA 1996 to understand same but for the purpose of this article Section 10 (2) of TMA 1996 is set out below:

Section 10 (2) of the TMA 1996 reads "a trade mark shall not be registered if because -

- (a) *It is identical with an earlier trade mark and would be registered for goods or services similar to those for which the earlier trade mark is protected, or*

(b) *It is similar to an earlier trade mark and would be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,*

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association of the later trade mark with the earlier trade mark is protected”.

CASE LAW

The English & Wales High Court case of **Wagamama v City Centre Restaurants Plc [1995] FSR 713** and the decision of Laddie J is pertinent. This case involved the Plaintiff, the Japanese restaurant chain bringing both a trade mark infringement and passing off case against the Defendant. The Defendant utilised a trade mark RAJAMAMA which the Plaintiff claimed amounted to an infringement of its mark WAGAMAMA. The Plaintiff succeeded in its claim. Laddie J held that one kind of confusion likely to occur between the two marks was that some consumers would think that the businesses were associated. The case is important in how the Court arrived at its decision. The Court indicated: -

“the Judge brings to the assessment of marks his own, perhaps idiosyncratic, pronouncement and view or understanding of them. Although the issue of infringement is one eventually for the Judge alone, in assessing the marks he must bear in mind the impact the marks make or likely to make on the minds of those persons who are likely to be customers for goods or services under the marks. Not all customers are the same. It is therefore sometimes of assistance for the Court to hear evidence from witnesses who will help him to assess the variety of ways in which members of the target market will pronounce the marks and what, to them, will be the visual or phonetic impact of the marks. When considering infringement, it is also necessary to bear in mind the possible impact of imperfect recollection on the part of members of the target market...”

The European Court of Justice (ECJ) decision in the case of **SABEL BV versus Puma AG, Rudolf Dassler Sport (case C-251/95)** is another pertinent case when considering contentious “Opposition” or “Invalidity” earlier trade mark rights cases. The Judgment of the Court on 11 November 1997 was a reference for a preliminary ruling from the German Court concerning the Directive 89/104/EC on the approximation of laws relating to trade marks and in particular on the topic *“likelihood of confusion which includes the likelihood of association”*.

The decision further developed the Court’s reasoning in the Wagamama case in setting out what tests to use when it comes to determining the average consumer purchasing decisions. The case of **Sabel BV versus Puma AG** is repeatedly referenced by Declan Doyle, acting for the IPOI Controller, in his numerous written grounds “Opposition” judgments published by the IPOI.

The facts of the case are that **Sabel BV** applied to register as a trade mark in Germany a device mark depicting a bounding cheetah and the word **SABEL** for, inter alia, leather and imitation leather products made therefrom and for clothing. The applications were opposed by **Puma AG, Rudolf Dassler Sport (“Puma”)** on the ground that it was the proprietor of an earlier pictorial mark which illustrated a bounding puma, attached to its sporting clothing & shoe products.

Readers should refer to points 22 to 26 of the ECJ judgment for a full understanding of it. For the purpose of this article and issues of space the relevant sentences are:

“The likelihood of confusion must therefore be appreciated globally, taking into account all factors relevant to the circumstances of the case”. (point 22).

“That global appreciation of the visual, aural or conceptual similarity of the marks in question, must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components....” (point 23).

“In that perspective, the more distinctive the earlier mark, the greater will be the likelihood of confusion....” (point 24).

Readers should note that, in addition to the Trade Marks Act 1996 (as amended), the examiners in the IPOI operate under the supporting Trade Marks Rules 1996 (as amended). Pursuant to section 43 (2) of the Trade Marks Act 1996 (as amended) and pursuant to Rules 18 (1) to 23, any person may, within the prescribed time from date of publication of the “accepted for registration application to register a trade mark” in the IPOI journal, give Notice to the Controller of opposition to the registration, which must be in writing in the prescribed manner.

The recently published written grounds – Opposition case of **Akzo Nobel Coatings International BV v Therma-Cote Inc** (see the IPOI web page www.ipoi.gov.ie) illustrates how an IPOI examiner determines contentious “Opposition” cases.

The Applicant (**Akzo Nobel Coatings International BV**) made an application to register “**DULUX TRADE THERMACOAT +**” as a trade mark for NICE classification 2 (which deals with paints, coatings and varnishes etc), which application for registration was accepted and advertised in Journal 2329 dated 22 March 2017.

Pursuant to section 43 of the Act, a Notice of Opposition to application was filed on 21 June 2017. The Opponent (**Therma-Cote Inc**) referred to its ownership of a European Union Trade Mark (EUTM) registration for its trade mark “**THERMACOTE**”. The Opponent based its grounds of opposition to the applicant’s registration under section 10 (2) (b); section 10 (3) and under section 10 (4) (a) of TMA 96.

The Opponent’s declarant in his Statutory Declaration (pursuant to the requirements of Rule 20) indicated his company for the past 30 years developed and produced a line of technologically advanced weather barrier and protective coatings to building structures and has a significant market presence throughout Europe under its “**THERMACOTE**” products and provided sales figures from 2013 to 2017 to vouch same. The declarant further provided an instance of confusion between his company product and the Applicant’s “**THERMACOAT+**” product and exhibited an e-mail to vouch the e-mail sender was confused and the Applicant’s product was related to his company product. The declarant further exhibited e-mail notifications from the Applicant company to illustrate it clicked its company “**THERMACOTE**” advertisements. The declarant maintained the Applicant was aware of its “**THERMACOTE**” product before the Applicant launched its “**THERMACOAT+**” product and applied to register the “**DULUX TRADE THERMACOAT+**” mark.

The Applicant’s declarant in his Statutory Declaration (pursuant to the requirements of Rule 21) by way of 11 exhibits outlined his company history of the “**DULUX**” trade mark. The declarant declared the “**DULUX**” trade mark was registered and first used in Ireland in 1931 and registered

with the UK Patents Office during 1930 and first registered as a EUTM in 1996. The declarant further declared that the “DULUX TRADE” mark is his company product line specifically targeted at the professional painter and experienced consumer. The declarant indicated that the “DULUX TRADE” has been registered as an EUTM since 2016 and that it was registered in Ireland in 1992.

For the purpose of this article, and not in line with the Examiner’s full written judgment, my summary of this case will only deal with **Section 10 (2) (b) – likelihood of confusion** to explain the reasoning behind his decision. The examiner highlighted four requirements which must be met in order for an objection under this section (10 (2) (b)) to succeed, namely that;

- (1) there must be an “earlier mark”.
- (2) the goods of the applicant must identical with or similar to those in respect of which the earlier trade mark is protected.
- (3) the mark applied for must be similar to that earlier trade mark.
- (4) there must be a resultant likelihood of confusion on the part of the relevant consumer.

The Examiner indicated the first two requirements were met and then proceeded with his analysis of his comparison of the marks, mindful of the ECJ judgment in the case of *Sabel BV v Puma AG and Rudolf Dassler Sport case (C-251/95)*.

The Examiner opined that there was some visual, aural and conceptual similarity which related to the common “THERMA” element. The examiner further held the “COTE” and “COAT” elements also share an aural similarity.

The examiner further held there were also visual, aural and conceptual differences. The Opponent’s mark did not contain the words “DULUX” and “TRADE” nor “+” (plus) symbol.

The Opponent’s trade mark agent argued that the “+” (plus) symbol did nothing to put distance between the two marks and should be ignored and argued that “THERMACOAT” is the dominant element of the Applicant’s mark and that it is visually similar to his client’s “THERMACOTE” mark and the terms “DULUX” and “TRADE” were not sufficient to outweigh the similarity. The Opponent’s trade mark agent provided case law to back up his argument.

The Applicant’s trade mark agent argued the marks are dissimilar across all three criteria, the only similarity being in respect of one of the three words namely “THERMA”. The Applicant’s trade mark agent opined the shared common elements are very limited and that the elements that differ have a very high level of distinctiveness and outweigh the limited similarities.

The Examiner agreed with the Applicant’s trade mark agent. The examiner opined when comparing the marks as a whole, which he stated he is obliged to do, the differences are obvious.

The examiner opined that the Applicant’s mark contained three words and a mathematical symbol as compared with a single word for the Opponent’s mark. The examiner held that none of the Applicant’s three words are the same as the Opponent’s single word mark, notwithstanding the

Opponent’s word mark is repeated in the third word of the Applicant’s mark. The examiner held that while there is some similarity, the level of same was low. The examiner’s examination of the verbal test highlighted an identical sound to the third word of the disputed mark but he opined that this accounted for only a third of the verbal element and therefore held the marks share a low level of aural similarity.

The examiner then proceeded with his analysis of the shared common element, namely the word “THERMA”. While the word has no dictionary meaning, it is generally known to convey heat retention, heat insulation and heat resistance. The examiner broke down the competing marks by indicating both begin with word “THERMA” with both the competing marks having different endings “COAT” and “COTE”. He gave an analysis of the meanings of both these words as well.

The examiner was of the view that the Applicant’s mark would be seen as being descriptive of goods, relating to heat retaining / resistance in a building. The examiner opined that the Opponent’s mark given its ending “COTE” is not descriptive of the goods and hinted this appears to be the reason it settled on “THERMACOTE” instead of the more descriptive “THERMACOAT”.

Given the examiner’s analysis of the words “COTE” and “COAT” he opined that conceptually “THERMACOTE” is dissimilar to “THERMACOAT” and further added when the other elements of the Applicant’s mark are added to the mix, the dissimilarity increases and assessed the level of conceptual similarity between the two marks as extremely low.

The examiner having held the similarity between the marks as extremely low given his analysis of the visual, aural and conceptual similarities, proceeded to an analysis of the global assessment of the likelihood of confusion, which is outside the scope of this article.

The examiner ultimately held the prior registration of the Opponent’s mark did not constitute grounds for refusal of the application to register “DULUX TRADE THERMACOAT+” and dismissed the Opposition.

In summary – a review of all the IPOI Examiner’s “written grounds” decisions when it comes to earlier trade mark rights “Opposition” cases illustrate the frequency of cases wherein “likelihood of confusion” is such a critical issue. Such a review also highlights the importance of the ECJ decision in **Sabel BV versus Puma AG** and the tests it outlined when it comes to determining such disputes.

AUTHOR

Martin Tierney FIIEx is a Director of the Irish Institute of Legal Executives. Martin holds a B.A (Hons) in Business Studies, a Diploma in Accounting & Finance (ACCA), a LL.B (Hons) in Irish Law and a Diploma in Intellectual Property & Information Technology Law (Law Society of Ireland). He is an Irish & European Union Registered Trade Mark & Design Attorney (Controller of the Intellectual Property Office of Ireland, Kilkenny). Martin works as a litigation legal executive and trade mark agent with LawPlus Solicitors.

Conferring and Graduation Ceremony of the DSL&P Course 2019 at Griffith College Cork



Seated (lt-rt): -Karen Sutton, Head of Law Faculty, GCD, Nicholas McMurry, Programme Director Law Faculty, GCC, Noel Daly, Deputy Head of Griffith College Cork, Professor Diarmuid Hegarty, President of Griffith College, Linda Mellerick, Distinguished Graduate 2019 and Tomás Mac Eochagáin, Director and Head of Academic Programmes at Griffith College.

Standing- Rows 2&3; - Graduates of the Diploma in Legal Studies and Practice (QQI Level 7 Special Purpose Award) 2019.

Caught on Camera

*Frances Fitzgerald - MEP
together with Fintan Hudson
FIILEX, Director of IILEX,
Mrs. Denise Hudson
in attendance at the
Dun Laoghaire Chamber
of Commerce Lunch
in Dun Laoghaire, Co. Dublin
on Christmas 2019*



*Minister Simon Harris TD,
Minister for Further Education, Higher
Education and Science with
Fintan Hudson FIILEX, Director of IILEX
following an interview with Minister Harris
for inclusion in a broadsheet of the Irish South
African Association in Capetown, SA.*

Public Interest Law Alliance – Challenging Injustice, Championing Change



Over fifty years since it was established, FLAC (Free Legal Advice Centres) has developed a continuously evolving multi-dimensional strategy in its campaign for access to justice. Our strategy for access to justice includes a telephone and information line, and a network of legal advice clinics in 71 locations around the country. We have broadened our services to include dedicated services for the Traveller and Roma community and, as an independent law centre, litigate in the public interest. FLAC also engages in research, and advocates for policy and law reform in areas of law that most affect marginalised and disadvantaged individuals and groups. We are very aware that none of our strategies can replace or are a substitute for a properly resourced legal aid scheme and we continue to advocate for a root and branch review of the current scheme.

In more recent years, a core part of our strategy has been PILA – the Public Interest Law Alliance. While it has no one definition, we see public interest law as a way of working with the law for the benefit of vulnerable and disadvantaged people, communities and groups and for the protection of their human rights. Public interest litigation and legal processes have been utilised on behalf of individuals and marginalised groups in many ways by FLAC and by a broad range of organisations, lawyers and individuals for years. FLAC's vision was an alliance that would connect, coordinate and support all of the key stakeholders who want to use the law to maximum effect to achieve social change. In 2009, FLAC embarked on a new project with a particular focus on developing the environment for public interest law in Ireland. PILA was born.

This year, to highlight some of the change achieved through PILA over a decade, we launched 'Challenging Injustice, Championing Change: PILA Impact Report 2009-2019'. Over that time our broad based alliance has grown to 150 social justice organisations, which includes 10 Independent Law Centres, 350 barristers, close to 40 law firms, 5 in-house legal teams, and 15 universities and law schools.

The ethos of lawyers volunteering their services to NGOs has developed to such an extent that 310 social justice organisations have received direct legal assistance through PILA's flagship activity, the Pro Bono Referral Scheme. This has strengthened many organisations who are grappling with increasing regulatory and corporate governance requirements. It has also allowed them to use the law in new and exciting ways, only some of which are profiled in the report.

PILA has been instrumental in nurturing a burgeoning culture of pro bono in Ireland, to the point that we have seen the appointment of two dedicated Pro Bono Associates. Another key development demonstrating this shifting attitude to structured pro bono within law firms has been the rise of the 'Impact Project' which sees PILA partner a law firm with an NGO and train lawyers in an area outside of their expertise. The design of Impact Projects which serve marginalised communities is bringing new players firmly into the access to justice arena on issues such as homelessness, asylum and domestic violence.

PILA has also been working with its legal partners to agree and launch **Pro Bono Pledge Ireland**, the first collaborative effort in Ireland to articulate the shared professional responsibility of lawyers to promote access to justice and provide pro bono legal assistance to those in need. The Pledge provides a common definition of pro bono, a commitment to a minimum aspirational target of 20 pro bono hours per lawyer per year and a mechanism to benchmark progress through annual reporting of anonymous pro bono data. This comes at a time when the Office of Government Procurement has also included a pro bono condition in tenders for legal services, which should also prove a significant incentive to the development of pro bono legal work.

Of course, since the report was written, the context has changed significantly. In the first six months of this year, referrals to the Pro Bono Referral Scheme have increased by 50% with the devastating impact of COVID-19 on already vulnerable communities reflected in both the scale and type of referrals received. Throughout this crisis, PILA has been uniquely positioned to help partners at an organisational level face unprecedented challenges in delivering services. We have also assisted undocumented workers denied social welfare, single parents with access to their children, victims of domestic violence who have become homeless, children with a disability unable to access adequate education, and vulnerable residents in Direct Provision.

We anticipate that the full impact of the pandemic will only be felt in the coming months and years and, with our legal partners, we believe we will be well positioned to substantially increase the pro bono services available to NGOs and, more importantly, the people they work with.

For more information on PILA, and to sign up to its fortnightly public interest law e-Bulletin, please visit www.pila.ie.

Rachel Power
PILA & Strategic Development Manager

Lockdown in South Africa

On the 25th of March at 8pm, President Cyril Ramaphosa appeared on our TV screens, courtesy of the South African Broadcasting Company, and advised all citizens and persons resident in South Africa (including visitors) that with effect from midnight on Thursday 26th March 2020 the country was going into full lockdown. Full lockdown in South Africa prohibited persons from leaving their home at any time during the day or night, the only exception was to go to buy groceries at the supermarkets which were permitted to remain open, attend a pharmacy or a medical appointment. We were not allowed to go for walks or exercise outside our property. In addition, there was a full ban on the sale of Alcohol and tobacco. I don't smoke but I am partial to a glass of wine and especially in South Africa, where they produce some very very lovely wines.

Our position, my wife Denise and I, was that we were scheduled to travel back to Ireland with Emirates on the 30th March, overnight stay in Dubai, and then travel onto Ireland on the 31st March. Needless to say, we were quite taken aback by the announcement by President Ramaphosa as we had no notification of any alterations from our airline, so one can only assume that they were not aware also. In any event we made several calls to our airline and to be fair they were not in a position to assist. I have built up a strong relationship with our Embassy in Pretoria, when I was an executive director of the Irish Red Cross, and on the council of the Irish South African Association. To say staff in the Irish Embassy were helpful is an understatement, they worked very closely with the Dutch and French Embassies in arranging repatriation flights. We had hoped that the restrictions at the airports would be lifted and that we would be able to travel back with Emirates as planned, and we kept in regular contact. However, after some six weeks and with Emirates personnel advising us that it might be September before they would be able to resume flights, we decided to rely on the Embassy. There is a misconception that being repatriated is free and picked up by the taxpayer, the truth is that the flights are more than double the normal fare.

We got a call from the Irish Embassy on the 23rd April to advise us that we were to be included on the passenger list of a KLM flight from Capetown which was being arranged by the Dutch Embassy and

with the assistance of the French Embassy agreed to take it, and within the hour all documents were emailed to our home. The documents included tickets, letter from the Dutch Ambassador confirming our travel arrangements, and also a letter from the Irish Ambassador clearing us to travel from our home to the meeting point in Capetown, as travel outside your home was prohibited and you had to make your own way to the meeting point. Fortunately, our neighbour kindly agreed to drive us direct to the meeting point.

On Saturday 25th April our neighbour Carl collected us from our home at 4.30am and drove us to the meeting point in Capetown, which was the new football stadium built for the football world cup in 2010. We arrived at 5.15am, and said our goodbyes to our neighbour, and the last person we have been able to give a proper hug to in the last year. There were taxis, coaches and cars arriving constantly with hundreds of people, and we were all obliged to queue up outside the stadium. We were brought through in an orderly fashion but with dignity and compassion by French and Dutch personnel. We had our documents checked to make sure all was in order, and then we were ushered through to a medical centre to have our temperatures taken and basic medi-check, not the swab test. If you did not pass this test, that is if you had a temperature, you would be sent packing, and forfeit the cost of the flight. Needless to say, there was a lot of tension amongst people getting their temperature taken. In addition, as the repatriation flight was to convey us from Capetown to Amsterdam, you had to arrange your own onward flight to Dublin or wherever. If you had no proof of the onward flight, again you would not be permitted to enter the plane in Capetown airport. We had been fortunate in being able to get an onward flight with KLM to Dublin from Amsterdam. To my knowledge, I am not aware if any person was refused permission to board the plane at Capetown airport. Before departing to the airport in a convoy of coaches, we were given, all of us, packed lunches and which were generous and most welcome by the Dutch officials. They assured us that they would make our trip as pleasant as possible, because it was going to be a very long day and we had quite an arduous journey ahead of us. There were in excess of three hundred people travelling, most of them French and Dutch, I believe there were about twenty Irish people travelling including ourselves. A

large number of people had to be brought down from Johannesburg by coach, as there were no repatriation flights from that city. The journey took them some twelve hours by coach, they had been travelling since the day before. At all times we were obliged to wear masks, as mask wearing was mandatory from the beginning of lockdown in South Africa, and there was ample sanitisers from day one in South Africa, and brought home additional masks and sanitiser for our family, as they had informed us that they were hard to come by in Ireland.

When we were on the coaches and as we drove out of the belly of the stadium into daylight and travelled through a deserted Capetown city, it was so unreal, not a person in sight and many army trucks present on the streets. It reminded me of those movies where there had been an insurrection or warzone and people were being ferried in coaches to safety.

I don't think I will ever forget the experience, as I have been coming to Capetown for over eighteen years now and have never seen it so deserted and lifeless.

We reached the airport around 8.30am, and had to stay on the coach as they were only allowing one coach empty at a time, in order to restrict the amount of people entering the building and checking in for the flight, as they had only a limited amount of staff at the check in desks. We were on the coach for at least an hour and it was getting quite stuffy, and in particular with the masks on. There was meant to be social distancing on the coaches, but it did not work. In any event we eventually were allowed off the coach and were able to check-in, and our bags were going straight to Dublin as were on a KLM flight to Dublin. At departures there were no shops open, no duty free etc, you could not get any beverages or water except from a machine. We were the only flight going out on the 26th April, and we boarded at about 11 am and were in the air before noon. All seats on the plane were the same fare, but because I am over 70 years of age, they kindly seated us in business class, which did indeed make a very long flight less stressful and

more comfortable. The first leg of our flight was from Capetown to the French island Reunion out in the Indian Ocean, where we landed and were required to stay put for two hours, we were not allowed off the plane. A new crew and pilots took over at Reunion as the crew and pilots who had flown down from Amsterdam to Capetown, never left the plane in Capetown, and had to be relieved on Reunion, as they had exceeded their time frame. We then took off from Reunion to Amsterdam, and which took a further eighteen hours, but once again we were provided with a hot meal and beverages, no alcohol, and the attention and service by the stewards was wonderful, as they could see how tired and stressed people were.

One passenger did take ill, not the virus, and fortunately there was a doctor on board to assist. Masks were worn for the entire flight.

We arrived in Amsterdam at 6am and again the airport was almost deserted, with the exception of us disembarking from the Capetown flight. We were able to get coffee and teas at a take away. Our flight to Dublin was at 9-20am, and took about two hours. When we arrived in Dublin, again deserted, we were ushered through immigration swiftly, and collected our bags. Our daughter, Victoria had driven our car to the airport in Dublin, and was waiting for us outside. No hugs, no kisses just a big, tearful welcome home & then jumped into her own car with her partner and they headed off back to Greystones. I drove the two of us home, and we were so relieved and delighted to be back in Greystones, and where we isolated for the next 14 days. Our family were so relieved that we got home, as they were so afraid that if one or both of us contacted the virus, they would not be able to travel down to South Africa to us, and they feared the worse. When I look back now, it was quite a frightening ordeal to be overseas in lockdown away from your loved ones, and worry and fear as to when you will get back to Ireland. We appreciate the kindness and assistance we received from many people in the Irish Embassy who are still there, and together with the wonderful assistance of the French and Dutch Embassies, the EU is not such a bad place.

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Secret Trusts: A Historical Accident or Effective Weapon Against Unfairness?

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INTRODUCTION

Of all the remedies developed in Equity, the “secret trust” certainly sounds the most exotic and seems to arise straight from the pages of an Agatha Christie novel. Historically, secret trusts allowed a testator to make provision for somebody who he or she did not wish their family to be aware of, e.g. an extra-marital relationship or child.

It applies when a testator leaves property in a will to a legatee and, on the face of the will, the legatee appears to take the property entirely. However, behind the scenes, the testator, during his life-time, has communicated an intention to the legatee that the legatee would hold the property on trust for someone else not mentioned in the will. Secret trusts can, in turn, be divided between fully secret and half secret trusts. For the purposes of this Article, I will focus solely on the former.

TESTAMENTARY FORMALITIES

In order to justify the fact that fully secret trusts do not comply with the normal formalities required for inheriting under a will, the courts have traditionally deemed them to be “dehors”, or outside the will. This simply means that if, on the face of the will, the testator leaves the gift to the legatee and the legatee has agreed to hold the gift on secret trust for the ultimate beneficiary, the ultimate (secret) beneficiary’s interest is **not** considered to form part of the will. Once the strict formalities under the Succession Act 1965 for a valid will are satisfied in relation to the legatee, the gift will be upheld by the courts. This remains the case even if the beneficiary also acts as a witness to the will.¹ Where a secret trust fails, the property is held on resulting trust for the deceased’s estate.² So in other words, the residuary beneficiaries are benefited.

The reason the courts enforce and recognise secret trusts is to ensure that the formalities of the Succession Act 1965 are not used as a vehicle for fraud. In other words, it would be unconscionable for a legatee to induce a testator to leave him a gift in his will by a promise to hold it as secret trustee and then to keep the gift for himself

on the basis that the requirements of the Succession Act 1965 are not met. This point was confirmed in *McCormack v Grogan*³ where Wood V.C. held:

“Where a person either expressly promises, or by his silence implies, that he will carry out the testator’s intentions into effect, and the property is left upon the faith of that promise or undertaking, it is in effect a case of trust.”

This was also confirmed in more recent times in *De Bruyne v De Bruyne*⁴ where Patten LJ noted that equity will regard it as against conscience for a legatee to deny the terms upon which he received a gift.

THE TEST

In order to establish the existence of a valid secret trust, the beneficiary must satisfy a three-fold test. In the leading case of *McCormack v Grogan*,⁵ Lord Westbury established the following:

- i. There must be an intention on the part of the deceased during his lifetime to create a trust.
- ii. There must be a communication of this intention to the intended recipient of the property during the lifetime of the deceased.
- iii. There must be acceptance by the recipient during the life time of the deceased. However, acceptance by the recipient will be assumed once the communication is made to him and the recipient does not object.

(a) Intention and Communication

In *Walgrave v Tebbs*,⁶ the secret trust was not upheld because it was not communicated to the legatee during the lifetime of the testator.

Again, in *Re Boyes*,⁷ the secret trust was not upheld. Kay J confirmed that, in order for a secret trust to be established, not only the fact of the trust itself but also the terms of the trust must be communicated to the trustee during the testator’s lifetime. The trustee, in turn, must accept his obligations under the trust at this time.

However, it is not necessary to show that the testator communicated his intention to create a secret trust to

¹ *O’Brien v Condon* [1905] 1 IR 51.

² *Re Boyes* (1884) 26 Ch D 531.

³ [1869] LR 4 HL 82.

⁴ [2010] 2 FLR1240

⁵ [1869] 4 HL 82

⁶ [1855] 25 L.J. Ch. 241.

⁷ [1884] 32 WR 630.

the legatee *prior to the making of the will*. Once it can be shown that the testator did not change his will after notifying the legatee of his intended secret trust, this is equivalent to making the will in reliance on the promise of the legatee to comply with the terms of the trust: *McCormick v Grogan* (1869).⁸

(b) Sufficiency of Communication

However, there does not have to be communication of all the terms of the trust during the lifetime of the testator. The level of communication made by the testator during his or her lifetime must be considered *sufficient* in order for the courts to impose a secret trust. In *Re Keen's Estate* (1937),⁹ a sealed envelope was delivered to the intended trustee during the lifetime of the testator containing the terms of the trust with a direction that the envelope was not to be opened until the deceased's death. The court found this to be a sufficient communication.

(c) Acceptance

In terms of the legatee, acceptance of the trust obligation can be implied.¹⁰ For example, if the legatee, by his silence, had led the testator to believe that he had accepted the trust obligation, then a court will imply acceptance and will not allow his silence to be used as a reason to defeat a secret trust.¹¹

WHAT HAPPENS IF THERE IS A GROUP OF LEGATEES?

One problem that arises is where a testamentary gift is made to more than one trustee but the testator's intention as regards the gift is communicated only to *some and not all of the trustees* during his lifetime. This arises where a testamentary gift is made to a group of legatee who hold the gift as co-owners of the property. The traditional position on this issue was set out by Farwell J in *Re Stead* (1900)¹²

"If A induced B either to make, or leave unrevoked, a will leaving property to A and C as tenants in common, by expressly promising or tacitly consenting, that he and C will carry out the testator's wishes and C knows nothing of the matter until after the testator's death, A is bound but C is not bound: ... If however the gift were to A and C as joint tenants, the authorities have established a distinction between those cases in which the will is made on the faith of an antecedent promise by A and those in which the will is left unrevoked on the faith of a subsequent promise. In the former case the trust binds both A and C: ... the reason being that no person can claim an interest under a fraud committed by another; in the latter case A and not C is bound: ... the reason stated being that the gift is not tainted with any fraud in procuring the execution of the will. Personally I am unable to see any difference between a gift made on the

faith of an antecedent promise and a gift left unrevoked on the faith of a subsequent promise to carry out the testator's wishes."

(a) Tenants in Common

This means, in the case of tenants in common, that only the tenants to whom the testator's intentions were communicated during his lifetime are bound by the trust.

(b) Joint Tenants

In the case of joint tenants, a distinction is drawn between two situations.

First, if a joint tenant has accepted the trust prior to the execution of the will, then all joint tenants are bound by the terms of the trust. Second, if however, acceptance of the trust did not take place until *after the will was executed* only those joint tenants who had been directly informed of and accepted the secret trust were bound by it.

The Irish courts have taken a similar approach.¹³

Conclusion

Therefore, while at first, it may seem that a secret trust is indeed a rare bird of equity, it is in fact a very practical and established remedy in our courts. While the reasons for a testator to avail of this device are likely to have changed in recent decades, this does not diminish the jurisdiction of the courts to enforce them whenever they feel the provisions of the Succession Act 1965 are being used in an unconscionable manner. As such, far from being a concept now confined to the pages of an Agatha Christie novel, the secret trust is still an effective remedy and unlikely to disappear entirely from the Chancery List of our courts any time soon.

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⁸ (1869) LR 4 HL 82.

⁹ [1937] Ch 236.

¹⁰ *Ottway v Norman* [1971] 3 All ER 1325

¹¹ *Moss v Cooper* [1861] 4 LT 352.

¹² [1900] 1 Ch 237 at 241.

¹³ *Geddis v Semple* [1903] 1 IR 73. In this case, Walker LJ also stated that an 'innocent' tenant in common might be bound by the trust if it could be established that the testator was induced to make the gift by the promise of a co-tenant.

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