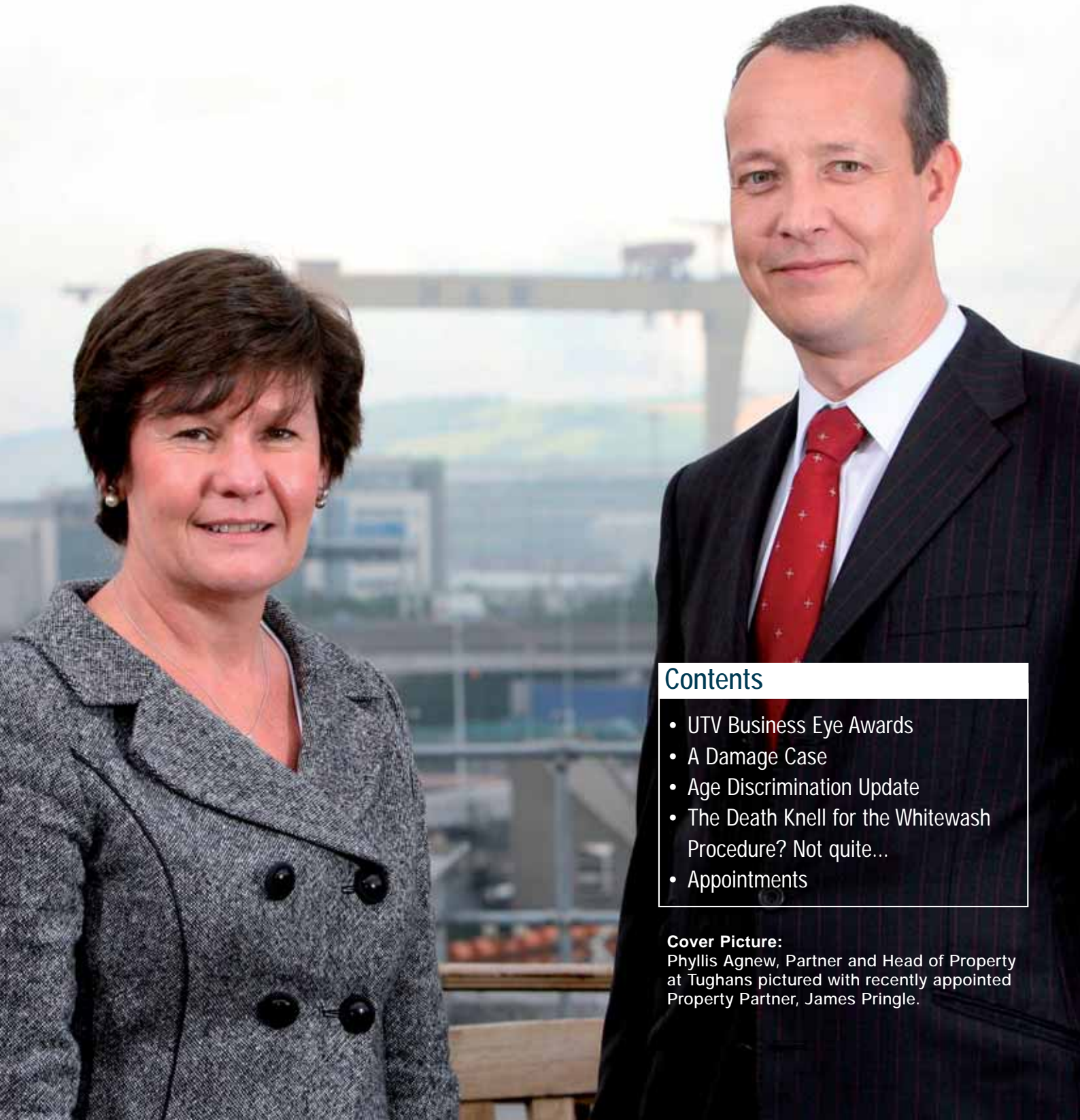


# In Brief



**Tughans**  
SOLICITORS



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### Cover Picture:

Phyllis Agnew, Partner and Head of Property at Tughans pictured with recently appointed Property Partner, James Pringle.



Grahame Loughlin  
Senior Partner

## Welcome to In Brief

In this issue, we have included articles on a number of topical issues which I hope will be of interest to you. Michael McCord addresses the subject of dilapidations, Ciara Dooris and Sharon McArdle look at recent developments in employment law and Fearghal O'Loan reviews the recent changes in the law relating to financial assistance. Details of several transactions and events with which we have been involved are also included.

A very pleasing recent development in the latter half of 2008 was the firm's high ranking in recently published, independently researched, legal directories – the Legal 500, UK Edition and in Chambers UK, a client's guide to the UK legal profession. In the Legal 500, we received Band 1 rankings for our four main practice areas and in Chambers we were

ranked in the highest band, Tier 1, in a total of eight practice areas. Sixteen members of staff were also noted in Chambers as being 'leading individuals' including five in our Corporate team.

On the subject of individual solicitors, I would also like to introduce you to some new members of staff who joined the practice over the Summer and start of the Autumn 2008 namely; Fionnuala Flanagan (Associate Solicitor, Property), James Pringle (Partner, Property), Gareth McCay (Associate Solicitor, Employment) and finally, Peter McGrath (Associate Solicitor, Commercial Litigation). Individual profiles are included on the final page of this newsletter.

As at previous Christmases, we chose to make a donation to charity

in 2008. Our two charities were The Lord's Taverners ([www.lordstaverners.org](http://www.lordstaverners.org)), with our contribution providing a specialised wheelchair to assist the charity with its transportation needs and Water is Life ([www.waterislifeint.org](http://www.waterislifeint.org)), an international charity set up to provide fresh drinking water for villages and communities throughout Africa. Staff were again very generous in their support of the annual Family Appeal with a total of 31 food hampers and numerous toys and gifts having been donated to St Vincent de Paul and The Salvation Army for distribution to those in need in our community.

Finally, may I take this opportunity to thank you for your business throughout the past year and to wish you and your colleagues every happiness and continuing success in 2009.

# UTV Business Eye Awards



Tughans recently received the 'Business Consultancy of the Year' Award at the annual UTV Business Eye Awards held at The Culloden Hotel, Co Down. Now in their second year, the awards recognise the contribution made by leading

businesses and individuals across a range of categories including 'Company of the Year' and 'Business Personality of the Year'.

Commenting on receiving the award Ian Coulter, Partner, said, "I am very

pleased that our firm has won this prestigious award. We continually strive to make a difference for our clients and not simply quote the law at them. We are therefore delighted that the firm has been honoured in this way."

Ian is pictured above (3rd from left) receiving the award from Hugh Donnelly (Bank of Scotland (Ireland)) and from Richard and Brenda Buckley (Business Eye).

# A Damage Case



By Michael McCord,  
Partner, Commercial  
Litigation

Whether you are a landlord or a tenant, one issue that should concern you come the end of any lease term is the question of dilapidations.

Most standard commercial leases will contain a covenant requiring the tenant to deliver up the premises to the landlord at the end of the lease term in repair.

Usually the parties will have drawn up a condition report at the start of the lease term detailing the state of the property at the start of the lease.

So what happens if the tenant comes to the end of the lease term and hands back the property in disrepair?

In practice, the landlord will usually settle for a payment calculated by reference to what it is going to cost him to fix up the property himself. Often tenants are happy to deal with dilapidations in this way. The landlord will appoint a surveyor. The tenant will appoint a surveyor. The two surveyors will examine the property and then get together to agree a fair figure.

But what if the landlord does not intend to re-let the property when he gets it back but wants to make structural alterations or even demolish the property altogether? Is he still entitled to pocket a sum for dilapidations from the tenant even though he has no intention of using the money to carry out repairs?

These cases are a lot more tricky. In England Section 18(1) of the Landlord and Tenant Act 1927 provides that no damages are recoverable from the tenant in these circumstances. But this legislation does not apply to Northern Ireland and there is no equivalent legislation here. As a result I have seen it argued that landlords are free to recover for dilapidations here even where they clearly have no intention of carrying out repairs.

My own view is that this cannot be correct. Yes the tenant is in breach of covenant for not handing back the

property in repair. Yes the landlord is entitled to recover damages for breach of the covenant to repair. But damages must be calculated by reference to the loss suffered by the landlord and if the landlord has no intention of carrying out repairs he has suffered no loss. In these circumstances my view is the landlord can recover only nominal damages if he is entitled to recover any damages at all.

For further information on any of the issues raised in this article, please contact Michael on 028 9055 3314 or by e-mail, michael.mccord@tughans.com

## On Eagle's Wing

We recently advised On Eagles Wing Limited on the acquisition of the assets and intellectual property for the musical stage play "On Eagle's Wing". The production enjoyed a very successful tour in 2008, taking in the Belfast Opera House, the Helix, Dublin and the Millennium Forum, Derry.



## Golf Network



Tughans advised Golf Network in relation to an endorsement agreement with Severiano Ballesteros. Seve will act in a dual capacity for the company; firstly he will endorse the MD brand as a whole, secondly and more importantly a range of MD Golf Seve signature golf equipment will be manufactured. This range of equipment will be jointly developed by MD and Seve. The company believes that having the expertise of such an iconic golfer will greatly improve its line of products.

# Age Discrimination and the Normal Retirement Age

By Ciara Dooris, Director,  
and Sharon McArdle,  
Associate Solicitor,  
Employment Department

## Introduction

As you may be aware, Regulation 30 of the Employment Equality (Age) Regulations 2006 (the "2006 Regulations") provides that employees who are 65 or older cannot claim that their dismissal amounts to unlawful discrimination where the reason for dismissal is retirement. This is provided their employer has complied with the retirement procedure set out in the 2006 Regulations.

The validity of the 2006 Regulations has recently been challenged by Age Concern in *The Incorporated Trustees of the National Council on Ageing (Age Concern England) -v- Secretary of State for Business, Enterprise and Regulatory Reform C-388/07* (Also known as the "Heyday Challenge"). In this case, Age Concern brought judicial review proceedings in the High Court of England and Wales, seeking a declaration that certain parts of the 2006 Regulations are ultra vires in that they do not properly transpose the Directive into national law including, in particular, Regulation 30. The High Court stayed the judicial review proceedings and referred a number of questions to the European Court of Justice (ECJ) for a preliminary ruling on the interpretation of the Equal Treatment Framework Directive.

## Summary of Advocate General's Opinion

The Advocate General delivered his opinion on 23 September 2008. In summary, his opinion on the questions referred by the High Court was as follows:

- the Equal Treatment Framework Directive is applicable to national rules on retirement;
- the Directive does not require Member States to list the kinds of differences of treatment on the grounds of age which may be justified;
- there is no significant difference between the test for justification in respect of direct and indirect discrimination;
- a national rule which permits employers to dismiss employees aged 65 or over on grounds of retirement can, in principle, be justified if the rule is objectively and reasonably justified in national law by a legitimate aim and the means, put in place to achieve that aim, are appropriate and necessary to achieve that aim.

## Dismissal on grounds of retirement

The Advocate General found that a rule providing for retirement as a fair reason for dismissal can, in principle, be justified under the Directive. He stated that such a rule may be objectively and reasonably justified in the context of national law, where



there is a legitimate aim relating to employment policy and the labour market and the means put in place to achieve that aim appropriate and necessary for the purpose.

## Implications for Employers

The Advocate General has rejected Age Concern's challenge that the UK's compulsory retirement age of 65 is illegal under EU law. However, this is not the end of the matter. Although the Advocate General's Opinion is highly persuasive, the ECJ is not bound to follow it. The ECJ's decision in the matter is still awaited and is expected later this year.

Tribunal cases which have been stayed pending the Heyday decision will continue to be stayed until the ECJ delivers its decision. After the ECJ delivers its decision, the matter will be referred back to the High Court to deal with the Judicial Review. At this stage, the High Court will have to consider whether the UK's compulsory retirement age of 65 may be reasonably and objectively justified in national law by a legitimate aim relating to employment policy and the labour market and is appropriate and necessary for that purpose.



Whether the UK's compulsory retirement age of 65 is objectively justified by a legitimate aim and is appropriate and necessary for that purpose could still be open to challenge. A recent survey by the Times estimated that 25,000 people who would be forced to retire at age 65 would be happy to stay on at work. A recent Chartered Institute of Personnel and Development (CIPD) survey found that almost 38% of individuals plan to carry on working beyond 65. Interestingly, of these, who said they did not plan to work beyond 65, 31% said they would think differently if their employer allowed them to work flexibly. This highlights the unsuitability of a compulsory retirement age and also begs the question, would a later retirement age of say, 75, be more acceptable or would leaving the setting of a compulsory retirement age to collective agreements or employers have a less discriminatory impact and accordingly be more proportionate?

For further information on the issues covered in this article, please contact either Ciara or Sharon on 028 9055 3300 or e-mail [ciara.dooris@tughans.com](mailto:ciara.dooris@tughans.com) or [sharon.mcardle@tughans.com](mailto:sharon.mcardle@tughans.com)



# Retail Property Forum and Awards, Dublin

In September, Shopping Centre Ireland held a new one-day event at the Conrad Hotel in Dublin. The forum which ran during the day focused on areas which are essential to successful retail property development. Phyllis Agnew, Head of Property at Tughans and Victoria O'Hara, Associate Director at Tughans, addressed delegates during the morning session together with colleagues Andrew Muckian and Karen Friel of William Fry Solicitors in Dublin.

An awards dinner, to recognise the contribution made by businesses and individuals to the success of the retail community, was held in the evening. Tughans and William Fry co-sponsored the award for Retailer of the Year, which was won by House of Fraser.

Pictured on the left: receiving the award is Ellenor Lennox (pictured centre) of House of Fraser with Andrew Muckian of William Fry and Phyllis Agnew of Tughans.



## Brid McColgan

Brid McColgan, an Associate Director in the Private Client Department, has now been accepted as a full member of STEP (Society of Trust & Estate Practitioners) and is now a registered Trust and Estate Practitioner (TEP). Brid is a member of the Northern Ireland branch of STEP, which is a worldwide, professional organisation with over 14,000 members in 60 countries.

## In deep water

It is fair to say that in the last year we suffered a degree of inclement weather. During one of our regular spells of torrential rain, one of our more intrepid solicitors was 'snapped' by an equally daring jogger during his daily commute. We are offering a £50 voucher towards a meal at James Street South Restaurant for the best caption to accompany this picture. All entries should be e-mailed to [pamela.brown@tughans.com](mailto:pamela.brown@tughans.com).

A copy of the competition rules is available on request. Closing date for receipt of entries is Friday 27 March 2009.



# The Death Knell for the Whitewash Procedure? Not quite...



By Fearghal O'Loan,  
Director, Banking &  
Finance

Given the recent changes to the law relating to financial assistance, there is a danger that directors, lenders and other counterparties to transactions may assume that share acquisitions can now be entered into without further thought. This note aims to explain the law as it now stands and to highlight those areas which should still be very carefully considered prior to completing any transaction.

With effect from 1 October 2008, the prohibition on the giving of financial assistance by a private company for the purchase of shares in itself or in a private company which is its holding company has been repealed by the implementation of the Companies Act 2006. This means that the complex and lengthy "whitewash" procedure by which directors of private companies had to swear a statutory declaration

as to the solvency of the company giving the financial assistance has been abolished. The prohibition on giving financial assistance will, however, continue to apply to public companies after 1 October 2008. It is important to bear in mind that any breach of the provisions regarding financial assistance is a **criminal offence** for both the company and any company officer in default.

Notwithstanding that the prohibition remains with respect to public companies, the current exemptions to the prohibition will be retained. The exemptions include the "principal purpose" exemption, the payment of lawfully made dividends, the allotment of bonus shares, lending money in the ordinary course of business and employee share schemes. The availability of these exemptions is subject to certain criteria being satisfied and professional advice should be sought before seeking to rely on any of these.

Although the Companies Act 2006 does not set out a replacement for the "whitewash" procedure and the intention is to simplify the procedure for private companies entering into transactions which would otherwise have been

prohibited, it is **essential** that directors bear in mind that the implementation of the Companies Act 2006 has only abolished the statutory restriction on the giving of financial assistance by private companies. Importantly, the Companies Act 2006 has not "legitimised" the underlying transaction and there are still significant issues which should be considered by the directors of the company giving the assistance. This means that transactions which would previously have required a whitewash cannot simply be effected without further thought. Each particular circumstance will depend on the exact structure of the transaction in question, but a number of the factors which are likely to be relevant are set out below:

1. The directors of the company giving the financial assistance should still ensure that the company has power and capacity to give financial assistance in its memorandum and articles of association since lenders are still likely to insist on proof of an express power to give such assistance.
2. Now that the Companies Act 2006 has introduced codified duties for company directors,
3. The directors of the company should also take steps to satisfy themselves as to the solvency of the company. This will generally require the directors to have considered the cash flow projections of the company and to have analysed the net asset position of the company.
4. Companies should also be careful to ensure that any financial assistance is not

including the duty to act in good faith and in a way which promotes the success of the company and for the benefit of its members as a whole (Section 172, Companies Act 2006), it is good practice to ensure that any decisions, and the reasoning for those decisions, are recorded in the board minutes of the company and ratified by means of a shareholder resolution. As it is essential that the giving of the financial assistance is in the best interests of the company, the commercial benefit to the company should be outlined in the company's board minutes and care should be taken to ensure that the directors have correctly identified that there is a commercial benefit to the company in entering into the transaction.

# The Death Knell for the Whitewash Procedure? Not quite... (continued)

considered to be an unlawful distribution or a reduction of capital. An unlawful reduction of capital may take the form of:

- a private company with insufficient distributable reserves making a gift of money to a shareholder so that the shareholder can purchase further shares in the company;
- a private company with insufficient distributable reserves making a loan to a shareholder with a view to the shareholder purchasing further

shares in the company where, at the time that the loan is made, the company is aware that there is no reasonable prospect of the borrower being able to repay it, with the result that the company would be required to make an immediate provision for this in its accounts;

- a private company issuing a guarantee or creating security or assuming a liability in circumstances where it is likely that such guarantee, security or

liability will be called upon or will fall due; and

- a target company being asked post-acquisition to provide a loan in order to refinance the acquisition debt of the purchaser in circumstances where the provision of such loan makes it necessary to make a provision for this in the company's accounts.

The much welcomed repeal of the financial assistance prohibition in respect of private company transactions

does not, however, mean that directors can proceed with share acquisition transactions without fully considering the transaction as a whole. Further, lenders will also be concerned to ensure that their lending and security structure is not tainted by any flaws in the underlying corporate deal and counterparties to the transaction will be concerned to ensure that the transaction is not subject to any vulnerability of being unwound at a later date.

## Key Point Summary

### General

- the prohibition on giving financial assistance still applies to public companies or, broadly speaking, to group structures where a public company is involved
- with effect from 1 October 2009, foreign companies are not subject to the prohibition on financial assistance but foreign law advice is still essential to ensure the jurisdiction of incorporation of that foreign company does not have a similar prohibition
- the exemptions to the prohibition will remain unchanged in substance (principal purpose, dividends, money lending, employee share structures) but care needs to be taken when relying on any of these as the availability is restricted
- as at 1 October 2008, the existing provisions of the Companies (Northern Ireland) Order 1986 and the Companies Act 1985 in so far as they relate to private companies have been repealed; these provisions continue to apply to public companies for the time being
- with effect from 1 October 2009 it is intended that Sections 677-683 Companies Act 2006 will come into force and replace the existing provisions of the Companies (Northern Ireland) Order 1986 and the Companies Act 1985.

### For directors of companies proposing to give financial assistance

- the repeal of the prohibition does not give carte blanche to give financial assistance without further thought
- the solvency of the company proposing to give the assistance should be verified; this will generally include cash flow and net asset position analysis
- the giving of the assistance must be in the best interests of the company (Section 172 Companies Act 2006, corporate benefit etc)
- the transaction must not constitute an unlawful reduction of capital.

### For lenders and other counterparties to the transaction

- the company must have power and capacity to enter into the transaction
- consideration of any vulnerability (transaction at an undervalue or preference) should be carried out.

For further information on any of the issues raised in this article, please contact Fearghal on 028 9055 3367 or by e-mail, [fearghal.oloan@tughans.com](mailto:fearghal.oloan@tughans.com)

# Appointments



## James Pringle

James Pringle recently joined the firm as a Partner in the property department. Previously a Partner in another local firm, James is experienced in all areas of commercial property including advising both major public and private clients on the acquisition, development and disposal of sites and investment properties. He also advises landlords and tenants in commercial leasing transactions involving office, retail, leisure and industrial premises and has experience in rent review arbitrations of ground rents as well as rack rents.

He has acted for a number of banks and financial institutions in taking security over assets and for borrowers in the granting of securities.

James is also experienced in insolvency matters, having acted for licensed insolvency practitioners in connection with IVAs, bankruptcy of individuals and winding up of companies.

In addition, he has experience in the area of liquor licensing, having acted for a Europe-wide chain of wholesalers, hotel chains and other corporate and private clients in the granting, renewal, transfer and surrender of licences.



## Gareth McCay

Gareth McCay has joined the employment department at Tughans. Gareth graduated in Law and Politics from Queen's University before completing the Legal Practice Course at Manchester Metropolitan University. He completed his training contract at Manchester firm JMW before returning to Northern Ireland to take up a post in Tughans' employment department in September 2008.

Gareth advises on a wide variety of employment law issues both contentious and non-contentious on behalf of employers and senior individuals. A keen sportsman himself, Gareth has an interest in Sports Law and is a Registered Football Association Lawyer.



## Peter McGrath

Peter McGrath obtained a degree in Law & Government from the University of Ulster at Jordanstown in 2003. He then spent a year studying at Villanova University, Philadelphia, USA before completing the Legal Practice Course at the UWE, Bristol Institute of Legal Practice.

After training with West London firm IBB Solicitors, he worked as a Solicitor with Irwin Mitchell of London.

Peter joined the Commercial Litigation team at Tughans in August 2008, where he advises on a wide range of commercial disputes.



## Fionnuala Flanagan

Fionnuala Flanagan has joined the property department at Tughans. Fionnuala graduated in 1999 from the University of Glasgow with a Scots Law Degree and obtained a Diploma in Legal Practice from the University of Dundee in 2004 and a Diploma in Commercial Conveyancing from the Law Society of Ireland in 2007. She qualified as a Scottish Solicitor with Smith and Valentine in South Ayrshire in May 2006 and joined Tughans in May 2008. She has experience in advising on the sale and purchase of commercial property, development projects and Landlord and Tenant law both in Scotland and Northern Ireland.

## Congratulations to...

Ian Coulter and his wife Vicky Dummigan (both Corporate) on the birth of their son Jack.

Toby McMurray and his wife Julie on the birth of their daughter Poppy, a sister for James.

Kathy McGillie and her husband Ian on the birth of their daughter Laura, a sister for James.

Anna Duke (Trainee) on her marriage to Jake Vangrove,

Louisa McCausland (Trainee) on her marriage to Mark Corry, Patrick Brown (Commercial Litigation) on his marriage to Susie Carson.

Naomi Dawson who qualified as a solicitor on 1 September 2008.

## Contact Us

If you require further information on any of the topics covered in this newsletter or would like to see specific areas covered in future issues, please contact Pamela Brown on 028 9055 3355 or email: [pamela.brown@tughans.com](mailto:pamela.brown@tughans.com)



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