

# GAZETTE

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Marketing guru Matthew Moore gave the keynote address at the Law Society's annual conference in Barcelona last month, where delegates heard that they would have to change to survive in a new competitive age. Conal O'Boyle reports

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In the last of our series of articles on the *Family Law (Divorce) Act, 1996*, Rosemary Horgan considers the question of maintenance, lump sum orders, financial compensation orders and succession rights



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# How much per hour?

To lying awake at night thinking of your case. Many solicitors may feel tempted to add this heading as a distinct part of their bill of costs. Many lawyers have lost sleep worrying about their clients' affairs. The issue of lawyers' fees is contentious but, as Abraham Lincoln noted in *Notes for a law lecture* in 1850, fees are important 'far beyond the mere question of bread and butter involved'. Lawyers' fees raise the issue not only of a fair return for services rendered, but also issues pertinent to the administration of justice in a democratic society.

The 1997 edition of *European Counsel 3000*\* noted that in Ireland the hourly rate for solicitors had increased since the 1995 survey, and the lowest rate outside Dublin was £80 an hour for a partner. An hourly rate quoted in relation to litigation cases varied between £150 and £170 an hour in Dublin while regional firms charged around £90 an hour for a partner. In general terms, the average hourly billing rates in Dublin for a solicitor partner were considered to be between £100 and £250 and between £50 and £120 for an assistant. Outside Dublin, the hourly rate for a partner was up to £150 and up to £90 for an assistant. In debt collection cases, the survey revealed that the normal practice is to charge an hourly rate and up to 15% of the amount recovered whether or not the losing side meets some of the costs.

## Competitive market

*European Counsel 3000* advises a client seeking legal services in Ireland to be prepared to ask for a quotation and to negotiate. The authors note that the market is competitive and there are now several firms that are well able to service international clients. The survey noted that the Law Society now has the power to investigate when the client complains that the bill of costs is excessive or that the service is inadequate.

The section on fees in *European Counsel 3000* in relation to England and Wales is rele-

vant to Irish lawyers. English lawyers were stated to be perceived as being among the most expensive in Europe. Their reliance on team work and the nature of their services contribute to the costs. In relation to charging for legal services, apparently most firms base their fee on an hourly basis. Unless the client agrees otherwise, these firms take into account other factors (apart from time spent on a case) such as the value of the subject matter, the character of the work, the impor-



tance of the matter to the client and the outcome. There is a wide range of interpretations on what 'uplift' can be justified on these grounds: the amount can be as high as 100% in complex matters.

It was noted that many firms in England and Wales, as in Ireland, have substantial overheads. However, there was generally room for some negotiation. Most firms were stated to be willing to discuss alternative billing arrangements. Firms may agree to a 'blended' rate, a rigid cap, or a fixed fee for a standard transaction. Both parties were advised to be clear about what was covered for the fee quoted. The advice to clients was to define exactly what you want and who will be acting on the matter.

In England and Wales, it was

noted that several law firms were building substantial advocacy departments. It was considered that this could have advantages, especially where interim relief is sought, but clients were advised to check the individual lawyer's experience. In complex matters, some clients were adopting the tactic of retaining a Queen's Counsel but using a Solicitor-Advocate as a junior in the case. Average billing rates were stated to be between £180 and £400 for a solicitor partner and £100 to

£300 for an associate, with 'uplifts' for urgency, length, value and responsibility.

## Supply of lawyers

Linked to the issue of billing per hour is the supply and availability of lawyers. The US Bureau of Labor Statistics has estimated that in the period 1994 to 2005, jobs for lawyers will grow by 28% – more than twice the average of all occupations. Those jobs, sparked by increased corporate work, will not necessarily pay off in higher incomes, according to experts. Corporate clients and corporate legal departments will continue cost containment policies that are forcing a decline in what they are willing to pay for legal services.

The projection of the US Bureau of Labor Statistics is quite

surprising given the current impression among the legal profession in the United States and in Ireland that there are already too many lawyers pursuing too few jobs. Some, indeed, might ask how accurate the Bureau's projections have been over the years. Apparently the answer is 'accurate but conservative'.

## Growth in demand

The *US National Law Journal* (17 February 1997) argued that the main factor responsible for the projected growth in demand for lawyers was the growth in the general level of business activity. In relation to business activity, it was considered that there would be increased legal work in the following areas, employee benefits, health care, intellectual property, sexual harassment, the environment and property. Ralph Savarese, Managing Partner of Washington DC's Howrey & Simon (said to be one of the fastest growing litigation firms in the United States), was quoted as saying that 'as the nation continues to shift to a technology-based economy, the world becomes more complex, and that over time as the world becomes more complex, the need for additional lawyers increases'.

I conclude with words from a celebrated judge. Bacon, on taking his seat as Lord Keeper on 7 May 1617, considered in relation to lawyers' fees that he must 'leave it to the conscience and merit of the lawyer'. Ultimately, the client is looking for a quality service. The words of John D Stanhope could be written on the reception doors of many legal offices: 'The bitter taste of poor quality remains long after the sweet taste of low price is forgotten'.

\* *European Counsel 3000* (1997 Edition) is published by L&C Publishing Ltd, 90 Battersea Business Centre, 103-109 Lavender Hill, London SW11 5QL, England (tel: 0044 171738 2303). **G**

Dr Eamonn Hall is Chief Legal Officer of Telecom Éireann plc.

# Is the law keeping pace with white-collar crime?

There are no reliable statistics on the extent of fraud in Ireland, but there are estimates – and these vary wildly.

The Small Firms Association estimated last year that £225 million was lost in fraud over the previous three years by the country's 150,000 small businesses. In the previous year, 230 of the country's leading companies reported losses through fraud of £9.4 million, according to a survey by accountants KPMG. Both the direct and indirect implications for job losses in failed companies can only be guessed at.

It is almost two years since the Minister for Justice Nora Owen agreed that it would be a significant improvement if offences of dishonesty were consolidated in one Act. This would be better than having various offences 'spread about among numerous original and amending statutes, some of which date well back into the last century'.

Among the legislation that we still must depend on are the *Debtors (Ireland) Act* of 1872, the *Falsification of Accounts Act* of 1875, the *Forgery Act* of 1913 and the *Larceny Act* of 1916.

Tighter laws would have made it more difficult for the Taylor, Goodman, Greencore, Merchant Banking and CountyGlen scandals, among others, to have visited our national dailies – and, far more seriously, some foreign dailies. Particular circumstances applied in each of these controversies so we dare not assume that there was fraud involved.

But the court-appointed inspector in the CountyGlen case, Frank Clarke SC, did contend that transactions worth more than £1 million at the company were

'fraudulent from the start'. And the Greencore report five years ago did suggest that a claim for manufacturing tax relief by Sugar Distributors Limited was fraudulent and that certain documents prepared to support a purported share issue were forgeries.

Tighter laws might also make it more difficult for 'a deliberate policy in the Goodman Group of companies to evade payments of income tax by way of under-the-counter payments to employees' amounting to more than £4 million – the words quoted belong to Mr Justice Hamilton in his report on the beef processing industry.

Mrs Owen is not the only senior Government figure to admit the need to tackle the reality of modern fraud, including the abuse of information technology. The Director of Public Prosecutions, Eamonn Barnes, has long been calling for new measures to tackle fraud.

## National Bureau of Fraud Investigation

Some of the recommendations of the Advisory Committee on Fraud, which was chaired by Peter Maguire SC, have been implemented. The most significant may be the establishment of the Garda National Bureau of Fraud Investigation in April 1995. This internal Garda office has been provided with professional legal and accounting expertise and must be an improvement on the old Fraud Squad which, according to reputation, did not even have a fax machine.

A further improvement is the *Companies Act, 1990* with its investigative procedures in sections 7, 8 and 14, the latter two of

which were used to try to explore certain vital aspects of CountyGlen and Greencore affairs. Moreover, implementation of the *Investment Services Directive* of the European Union by the *Stock Exchange Act, 1995* provides further protection for investors.

## Ad hoc law reform

But even the fairly recent Taylor investments affair shows how inadequate laws remain when challenged. Sections of the *Investment Intermediaries Act, 1995* had not been implemented. It also shows the inadequacy of *ad hoc* law reform after shortcomings are highlighted.

A new Law Reform Commission is due to be appointed soon. One of the reports by the outgoing commission was called *Report on the law relating to dishonesty*. Published in 1993, most of its 71 recommendations remain unimplemented. One recommendation, for example, referred to the right to silence. If it was desired to have more prosecutions for fraud, then the Garda should have better investigatory powers, as in England. There, under 1987 legislation, a suspect may be required to provide answers to the Serious Fraud Office. These answers cannot be used against the suspect in court unless false information was provided.

Indeed, all of seven years ago, a leading senior counsel, Paul Carney SC, now a Judge of the High Court, also called for our fraud legislation to be updated. He quoted an example from an old edition of the *Archbold* law text, which indicated both the type and scale of crime when the legislation which we still use was first drafted.

It referred to intent to defraud by obtaining sacks of potatoes 'by

falsely pretending that (the accused) was a dealer in potatoes and that, as such dealer in potatoes, he then was in a large way of business and that he then was in a position to do a good trade in potatoes and that he was able to pay for large quantities of potatoes as and when the same might be delivered to him'. As he noted, any serious scam in potatoes today would probably involve futures contracts for a nation's crop to be traded across international boundaries.

## Waiting for legislation

The laws that have been enacted have largely been in response to particular situations. The promised new major legislation against fraud in this country is still awaited. This may indeed be because of pressure of work.

Legislation that has been enacted in the fight against the criminal in the business community includes the *Insurance Act, 1989*, *Insurance Intermediaries Act, 1991*, the *Criminal Damage Act, 1991*, the *Criminal Evidence Act, 1992* and the *Criminal Justice Act, 1994* (which created the offence of money laundering).

These are items of serious legislation in the fight against what is called 'white-collar crime'. But, as noted by Desmond Guilfoyle, the liquidator last year of Mark Synnott (Life and Pensions) Brokers, it is also vital that this legislation is enforced.

Mr Synnott is the only person ever sent to jail in this country for fraudulent trading. Who really believes that he was such an aberration? G

Pat Igoo is principal of Patrick Igoo and Company.

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# Time for the insurance industry and lawyers to work together

In the April issue of *The Gazette*, Law Society Director General Ken Murphy commented on the significant progress that had been made in reducing delays in Dublin and provincial Circuit Courts in recent months. According to Mr Murphy, this had been achieved through both the appointment of additional judges and the introduction of various administrative changes that have streamlined the system.

The insurance industry is heartened by such developments. The Irish Insurance Federation has always argued that greater resourcing of the courts system was essential in order to tackle the serious backlog that had developed in the hearing of personal injury cases. Previously, delays of between two-and-a-half and three years were common in Circuit Court personal injury cases and there is little need to state the obvious implications such delays had for the general level of claims costs faced by insurers. And, as we all know, high claims costs inevitably lead to high insurance premiums.

## Problems in pre-trial procedures

But there are other aspects of the current courts system, in particular pre-trial procedures, which continue to contribute to the overall costliness of personal injury litigation. A number of these were identified in the recent Deloitte & Touche *Report on the economic evaluation of insurance costs in Ireland* and included:

- The 'unnecessary duplication'

of expert witness reports (Deloitte & Touche recommends that it should be mandatory that such reports be shared)

- The absence, in workplace accident claims, of what Deloitte & Touche refer to as a standard Accident Report Form for use in evidence. In other words, the consultants are recommending standardisation of the way accidents are recorded by employers in the workplace and subsequently documented in evidence for personal injury cases
- The current three-year time-frame in which to make a personal injury claim. Deloitte & Touche considered that this can make claims difficult or impossible to adequately defend and the report recommends that there should be an obligation to make a claim within six months
- Under current lodgement rules, all monies lodged in Circuit and High Court actions are placed on deposit through the agency of the court at a very low rate of interest. Deloitte & Touche recommends that a commercial bank should be invited to take over management of lodgements at realistic rates of interest.

The insurance industry has long argued the need for refinements to the system of adjudication of personal injury cases to speed up the processing of cases and to reduce costs. The Deloitte & Touche report has made a valuable contribution to the debate and we hope



Nessa O'Mahony: huge variation in level of solicitors' fees

that its proposals which aim to streamline the system are acted upon by Government as quickly as possible.

## Consultation with the legal profession

There is, of course, a long history of consultation between the insurance industry and the legal profession on ways to streamline the system. The IIF/Bar Council/Law Society Joint Working Party first began meeting in 1989 and in the intervening period has made submissions to the Department of Justice on issues related to legal procedure.

The Federation believes that much can be gained from continued consultation, and that there are many other issues that would benefit from a joint approach. For example, on the issue of bonding of lodgements, the IIF would like to see an amendment of the court rules which would allow insurers defending cases on behalf of policyholders to be entitled to issue a bond or guarantee in place of the physical lodgement of monies in court. If this were permitted, it would do away with the need to seek amendments in relation to the interest rate payable on monies lodged in court and deposited with approved banks.

## Circuit Court fees

Of course, although streamlining the legal system would make a significant contribution to a reduc-

tion in insurance claims costs, and help create an environment where insurance premiums were lower, so too would the introduction of greater consistency in the level of professional fees. There remains a huge variation in the level of fees allowed by county registrars in respect of solicitors' professional fees in Circuit Court personal injury actions.

IIF members believe the best solution to the problem is the creation of a uniform, standardised scale applied to Circuit Court solicitors' fees and the Federation made a submission to the Minister for Justice two years ago, recommending exactly that.

The Department has not yet responded to the IIF submission, but the Federation will continue to lobby on the issue. Currently, over 90% of new personal injury cases handled by insurers start in the Circuit Court, and the level and variability of the fees payable create major problems for insurance companies. A fee scale already exists for District Court cases, so why not for Circuit Court fees?

Few people would disagree that the high cost of motor and liability insurance in Ireland places a heavy burden on individuals and businesses. Some of the factors underlying this situation – the number of road and workplace accidents, for example – are already being addressed through long-term campaigns involving effective enforcement of existing legislation and safety promotion. However other factors, such as the costly and cumbersome nature of some aspects of personal injury litigation, remain untackled. It is in all our interests to ensure that the valuable work currently being done to reform the courts system is extended to embrace all areas where problems exist. **G**

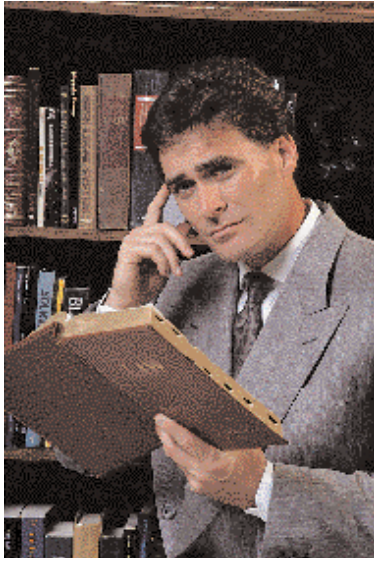
*Nessa O'Mahony is Public Relations Officer with the Irish Insurance Federation.*

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# Legal agency in tax scam investigation

**S**olicitors' clients will not be hit by the suspected fraud carried out by a Dublin-based legal agency, the Law Society has said. The agency took money from solicitors to pay stamp duty for their clients but instead of handing the payments over to the Revenue Commissioners the agency is believed to have printed counterfeit stamps on the title deeds. The Garda Bureau of Fraud Investigation has seized counterfeit stamp-duty stamps worth £250,000 and stamp-making equipment.

The full scale of the alleged



Ken Murphy: 'No losses to home-buyers'

fraud is not yet known, but the Revenue Commissioners have confirmed that so far the total

value of the counterfeit stamps discovered on title documents is £15,500. The Society has been meeting solicitors who supplied title documents to the agency and has placed a solicitor member of staff in the agency's office to oversee the orderly return of the title documents and all other legal papers.

Commenting on the investigation, the Society's Director General Ken Murphy said: 'It is the Society's firm belief that the problems which have arisen will be resolved without any loss to the home-buyers concerned'.

## Bright new horizons for solicitors

**T**here are now numerous opportunities for solicitors to expand and diversify their range of business activities, according to Paul Coulson, chief executive of Yeoman International Group. Speaking to over 100 solicitors and business people at the launch of the Law Society's *New Horizons* programme last month, Coulson said that areas of potential growth included fund administration, corporate tax, regulatory compliance and lobbying and they were equally relevant and accessible to private practitioners and in-house lawyers.

But solicitors may be missing out on opportunities to exploit these markets, he warned. For example, 'the compliance area is in danger of being monopolised by accountants, even though solicitors are eminently qualified', he said. The perception, whether justified or not, that solicitors were short on numeracy skills placed



Geraldine Hynes, Careers Adviser, with Paul Coulson and Senior Vice President of the Law Society Laurence Shields

them at a great disadvantage, said Coulson, and moves by the Law School to redress this problem needed to be widely publicised.

During his lively and thought-

provoking presentation, Coulson described his own career path from his early days as an accountant with Price Waterhouse to the establishment of Yeoman. He remarked that 'many professionals transferring into business do so on foot of an existing client relationship'. He also explained why he believes that the transition has been easier for accountants than for solicitors.

The Law Society's Senior Vice President, Laurence Shields, concluded the formal proceedings by outlining the ways in which the Law School has expanded the apprentices' training courses to include financial and management modules. Donal O'Connor, senior partner in Price Waterhouse, wished success to the programme on behalf of his firm which is sponsoring the events. The *New Horizons* programme has been developed and organised by the Career Development Committee.

## CRO 'on brink of collapse'

**T**he Companies Registration Office seems to be on the verge of collapse, the President of the Law Society has told Enterprise and Employment Minister Richard Bruton. In a letter to the Minister, Frank Daly says the CRO is facing a 'grave situation', and pointed out that following a computer collapse in March it was impossible to incorporate a company for a number of weeks.

While praising the work of CRO staff in the face of considerable pressure, Daly commented that 'it is obvious that an inefficient and unreliable system of incorporating and registering companies can only reflect badly on the country and provide a disincentive to business people to comply with the requirements of our companies legislation'.

*The full text of the letter is reproduced in the Briefing section on page 27.*

## Government waives copyright on Acts

**T**he Government is to make the copying and reproduction of all Acts of the Oireachtas and statutory instruments copyright-free. Anyone, including commercial publishers, will now be able to reproduce the text of this legislation without having to pay a royalty or seek prior permission.

According to Commerce, Science and Technology Minister Pat Rabbitte, the decision reflected recent developments in information technology, particularly the use of the Internet and the Worldwide Web. The decision, however, does not extend to Government publications generally. These remain covered by section 51 of the *Copyright Act*, 1963.

## Compensation Fund payouts

**T**he following claim amounts were admitted by the Compensation Fund Committee and approved for payment by the Law Society Council at its meeting last month: Dermot Kavanagh, 2 Mary Street, New Ross, Co Wexford – £22,790; Michael Owens, 5 Lower Main Street, Dundrum, Dublin 14 – £102,996.50; Malocco & Killeen, Chatham House, Chatham Street, Dublin 2 – £135,000; Francis G Costello, 51 Donnybrook Road, Donnybrook, Dublin 4 – £2,000; John K Brennan, Mayfield, Enniscorthy, Co Wexford – £2,000; Jonathan P T Brooks, 17/18 Nassau Street, Dublin 2 – £114,579.



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# Younger members feel 'under-represented'

The Law Society is not doing enough to look after the interests of young solicitors, according to a survey carried out by the Younger Members Committee. The survey found that 65% of the 230 respondents felt that they were inadequately represented by the Law Society Council. Top of the list of suggestions for improving the position was increased participation of younger members on the Council. 'Improved communication' and 'more meetings outside Dublin' were the next most popular remedies.

Perhaps more worryingly for

the Council, 21% of the respondents said that they would not contact the Law Society if they needed help, while 14% said they had no idea what functions the Law Society Council performed. Some 85% said they had never represented their views to the Society.

On a more positive note, 80% said they were aware of some of the functions of the Society's committees, while only 9% were completely in the dark. On the question of which were the most effective committees, the 36% who responded picked Convey-

ancing, followed by Disciplinary, Compensation, Taxation, Practice Management, Litigation, Education and Family Law.

And there was some good news for the Younger Members Committee: 88% of respondents were aware of its existence, though 64% admitted that they were unaware of what it actually did. The questionnaire was sent out to all solicitors who had qualified within the previous five years.

A fuller report on the results of the questionnaire will appear in the next issue of the *Gazette*.

## Death and taxes

The Revenue Commissioners have published a booklet on the tax implications arising on a death. The booklet *What to do about tax when someone dies* is aimed at both taxpayers and practitioners and describes general terms and procedures relating to the passing on of property following a death. It also sets out the main tax exemptions and reliefs which apply to surviving spouses and includes examples of how to calculate the tax.



Copies of the booklet are available from any Tax Office or from the Revenue Forms and Leaflets Service on 01 878 0100 (24 hours).



Pictured at the presentation ceremony for the Diploma in Legal French were (from left): Brendan Nagle, Jean Solito (Alliance Française), Patrick McCann, Kevin O'Connor, Raphael King, Treasa Kelly, Luke Brockie (Alliance Française), Rebecca Johnson, Frank Griffin, Gavan Carty, Declan Gilsonen, Deirdre Fox (Law School), Annick Masselot, Janine Phair, Marianne Péreen.

The 11-month course was run in association with Alliance Française

## New rates for Four Courts consultation rooms

A new one-hour rate of £20 has been introduced for the Four Courts consultation rooms as a result of requests from members. The two-hour rate will remain at £30. The new rate is subject to cash or credit card payment on the spot to reduce administration. The objective is to provide better value for shorter consultations and also to ensure that rooms are freed up as quickly as possible so as to ensure greater availability at peak times.

A cancellation charge has also been introduced for 'no shows'. Failure to fulfil or cancel a booking in advance will result in a full charge.

The Premises Committee of the Society is currently reviewing various options in regard to improving the facilities at the Four Courts and, in particular, the standard of the rooms in the basement. It is intended to start work on these rooms during the long vacation.

## BRIEFLY

### Tax consolidation proposals

The Government has published a White Paper draft of the *Taxes Consolidation Bill, 1997*. When the Bill is enacted, all income tax, corporation tax and capital gains legislation will be contained in one single Act. According to Finance Minister Ruairi Quinn, the legislation will be more accessible and user-friendly and will be available on CD-Rom as well as in a printed version.

### Year 2000 problem

The Department of Enterprise and Employment is to run a Year 2000 information and awareness campaign in the coming months to warn companies about the problem (see *Gazette*, Jan/Feb, page 28). The Department also hopes to involve representative bodies such as IBEC and ISME in the campaign.

### Law Reform Commission appointments

Four new members have been appointed to the Law Reform Commission. They are Arthur Plunkett, Deputy Senior Legal Assistant, Attorney General's Office (full-time member), Rt Hon Turlough O'Donnell QC, retired Lord Justice of Appeal (Northern Ireland) (part time), Patricia Rickard-Clarke, Solicitor, McCann Fitzgerald (part time), and Hilary Anna Delany, law lecturer, University of Dublin.

### CLASP charity walk

CLASP (Concerned Lawyers for the Alleviation of Social Problems) has organised a sponsored charity walk on Sunday 25 May. Anyone interested in taking part should contact Josepha Madigan on 01 668 9143 or Morrough O'Rourke on 01 872 4403.

### Younger members' Soccer blitz

The annual Soccer Blitz organised by the Younger Members Committee will take place at Blackhall Place in July. The committee hopes as many teams as possible will become involved, particularly non-Dublin-based members. Entry forms and further details will be published in the next edition of the *Gazette*.

**Taking out a franchise has become an increasingly attractive way of getting into business, and many franchise operations fare better than their small business counterparts. But, as Bill Holohan explains, the small print of franchise agreements can leave the franchisee with all the risks but only some of the benefits**



Between 1992 and 1995, the number of franchise operations in this country doubled. There are now 90 franchise systems operating here, and some of the major new players include Harry Ramsden's (the British traditional fish and chip shop chain), Nevada Bob's (the US golf store chain) and Pierre Victoire (the French Bistro-style restaurant chain). Most of the franchise systems have come to this country from the UK and the United States – only 16% are primarily Irish systems.

With an estimated turnover of £202 million in 1995, franchising is big business. The sector currently provides direct employment for nearly 5,000 people, and there are also a significant number of additional jobs in industries supplying the franchise sector.

So why would someone who is running a successful business want to grant franchises to other people when they could simply expand the business themselves? The answer is that expanding a business requires capital and resources (including time and energy). From a franchisor's point of view, franchising the business provides potential for growth (and income) without a lot of the attendant risks. It's a cost effective way of expanding the business because the franchisee's capital considerably reduces the capital investment required by the franchisor. In return, the franchisor will have to provide a range of continuing services to the franchisee including field support, training, performance monitoring, and general business advice.

Before deciding to buy into a franchise, over three quarters of franchisees will have spent up to six months researching the business. The usual sources would be the Irish Franchise Association or the British equivalent. Both can offer a wealth of information in relation to franchising in Ireland. Moreover, the Small Firms Association has established a franchisors' network since October 1995 and is also willing to help. Information can also be gleaned from franchise publications and advertisements and exhibitions.

### **The franchise agreement**

While surveys show that just over half of franchisees consult an accountant before proceeding with their plans, very few talk to their solicitor or their banker before being presented with a franchise contract. As someone who has had to deal with franchisees who had entered into arrangements without the benefit of professional advice, I am constantly amazed





# choosing: easy as

# ABC?

at the number of people who will spend up to £50,000 on a franchise package (and perhaps risk losing all of that investment because of an improvident investment) without first talking to a solicitor.

The most important thing to emphasise to clients is that a franchise agreement is a legally-binding contract. Franchisees, having signed a contract and committed themselves to its terms, cannot afterwards complain that their understanding of it was different or that they were led to believe certain things either by the franchisor or by other people, including other franchisees.

Any well-drawn franchise agreement will provide that the contract itself incorporates all of the terms of the full agreement between the parties and any statements made in negotiations are deemed to be overwritten by the terms in the contract. Generally speaking, the franchise agreement will cover a number of issues, including the franchise territory or area, the term or length of the agreement, the franchise fees, the obligations of the franchisor and franchisee, and conditions for termination of the agreement.

Some 84% of franchise agreements in Ireland define an exclusive territory for the franchisee which is usually based on a defined geographic area. The term of the agreement is rarely under two years, with five years the norm. Generally, fees are paid by means of an initial front-end fee to cover the initial grant and/or training, together with an on-going payment amounting to a percentage, ranging between 6% and 12% of turnover, as an on-going fee for the franchisor.

### **Franchisee not a free agent**

It is important to remember that even though the risk in the business started by a franchisee lies entirely with them, the franchisee is not a free agent. Under the terms of a standard franchise contract, he commits himself to carry out certain duties and promises to the franchisor. In layman's terms, it could be said that the arrangement gives the franchisee all of the risks and some of the benefits of joining a successful partnership.

A franchise is not, however, a partnership in the legal sense. While the franchisees will run their own businesses, they will be very much subject to certain controls and dictates of the franchisor and this must be understood when approaching the contract. Some of these commitments are for the franchisor's benefit and for the protection of the franchisor's intellectual property (copyright and service or trade marks) and business know-how.



**Training.** Not only should initial training be provided by the franchisor for the franchisee and his staff, but the contract should provide that the franchisor agrees to give on-going training, advice and management assistance. A good franchise does not involve the payment of a large front-end fee by the franchisee in return for a package with nothing more after that. Any good business system is constantly developing, and the contract should incorporate conditions whereby the franchisor agrees to update the franchisee periodically and give on-going advice and assistance. Also, the franchisee must expect to be contractually bound to notify the franchisor of any developments which they have made or improvements which they have thought of. Ronald McDonald, for example, was thought of by a McDonald's franchisee.

**Periodic payments.** In return for all that he gets from the franchisor, the franchisee must make continuing periodical payments to the franchisor. This is usually – but not exclusively – in the form of a percentage of the gross sales figure. Sometimes franchisees, after a period of time, feel that they are not getting value for their money and that 'anyone could run this business'. That might be true, and before entering the contract franchisees should carefully evaluate what they are getting for their money. This, again, is where legal, banking and accounting advice is so important.

### Termination and consequences

There can be no guaranteed success in any business and, while hoping and planning for the best, the franchisee should be conscious of the consequences of failure. They should also be advised about the consequences of terminating the agreement. Restraint of trade clauses are particularly important. Basically this is a contractual promise whereby the franchisee will agree that in the event of the agreement being terminated before the normal period has run its course, or because of the franchisee's breach of the agreement or for some other specified reason, the franchisee will not operate a similar type of business either for a specified period or within a specified radius. A franchisee might wish to challenge this type of clause in the courts.

The attitude of the Irish courts as distinct from the English courts is to hold such clauses as contrary to public policy, null and void, and therefore unenforceable. There are exceptions, of course, and if good and valid reasons can be shown then a reasonable restraint of trade clause will be upheld.

The court examines each case on its own merits. If the clause can be



## Top Ten franchises

There are approximately 90 franchise systems operating in this country. A recent survey found that out of the ten most recognised franchise systems in Ireland, five were Irish. The top ten in ranking order were:

- 1) Bewleys
- 2) McDonalds
- 3) Kentucky Fried Chicken
- 4) The Body Shop
- 5) Burger King
- 6) Extra Vision
- 7) Abrakebabra
- 8) Golden Disks
- 9) Eddie Rockets
- 10) Levi Store

shown to be reasonable and to be for the protection of the franchisor to stop franchisees from suddenly running away with

all of the franchisor's business know-how, techniques, technical data, skills and so on, then the clause could be upheld. An argument could be put forward that it is reasonable that the franchisor should not be frustrated from trying to stop a former franchisee from using the know-how and business techniques while the franchisee has effectively stolen the magic business formula and sets off to make money. More and more, the courts are willing to uphold restraint of trade clauses in franchise agreements and to protect the rights of the franchisor.

The franchisee might find it strange when given a franchise agreement by the franchisor to find the franchisor insisting on an all-or-nothing package in relation to the franchise agreement. This in itself is not a bad thing. The franchisee should remember that if they are in a position to negotiate special exemptions and deviations from the standard form of contract which might be prejudicial to other franchisees, then other franchisees in turn might negotiate derogations and exemptions which could be prejudicial to them!

To a large extent, the role of the solicitor might well be simply to advise the franchisee comprehensively about the nature of the commitment they are undertaking. It is in the interest of the franchisee that a franchisor will be able to hold other franchisees to the terms of the contract so that the public reputation and well-being of the franchise network as a whole is not affected. **G**

*Bill Holohan is a partner in the firm of G J Moloney & Company and is legal advisor to the Irish Franchise Association.*

## Sources of information

- The Irish Franchise Association, Hambleden House, 19-26 Lower Pembroke Street, Dublin 2 (tel: 01 678 5199).
- British Franchise Association, Thames View, Newtown Road, Henley-

on-Thames, Oxon RG9 1HG, England.

- Small Firms Association Franchisors' Group, Confederation House, 84-86 Lr Baggot Street, Dublin 2 (tel: 01 660 1011)

## Sources of finance

The initial leader in the area was Ulster Bank (relying on the experience of its UK parent, NatWest). Its franchise operation is headed in Ireland by Michael Bradley, Ulster Bank, 33 College Green, Dublin 2 (tel: 6777623). Ulster Bank was the first lending bank in Ireland to have an understanding of the franchise business and was therefore more amenable to granting loan facilities to potential franchisees than other banks. The wisdom of this policy is borne out by the fact that some 90% of franchise businesses are still in operation after three years, whereas the majority of

non-franchise businesses will fail during that initial three-year period.

Hot on the heels of Ulster Bank came Bank of Ireland, whose Franchise Unit at its head office in Baggot Street, Dublin (tel: 01 6615484) is headed by Conor Patten, Manager, Business Banking. Taking up the lead shown by Ulster Bank, Bank of Ireland has produced specialised documentation for the benefit of potential franchise customers including the book *How to evaluate a franchise*, prepared by Martin Mendelson, one of the UK's leading franchise lawyers.

Some solicitors are making the most of the technology available to them, but many have so far been either unwilling or financially unable to make the commitment to a computerised office.

Yet sooner or later every firm is going to have to embrace the information revolution if it wants to compete. In the first of a series of articles on IT, Grainne Rothery looks at the basic hardware you will need

# Byting the bullet

**A**lthough most Irish solicitors have at least one computer in their offices, many of these seem to be used solely by the secretary and only as a glorified typewriter. In sharp contrast, US lawyers have been quick to integrate technology with their everyday work. For example, a recent survey carried out by Microsoft and the American publication *The Internet lawyer* found that 71% of US lawyers were using computers to access the Internet for communications, marketing and research purposes.

But according to John Shaw, chairman of the Law Society's Technology Sub-committee, the Irish profession's attitude to technology is about to change. He believes that the Internet, and e-mail in particular, are set to take off as a result of the general business benefits they bring – and because clients are encouraging more firms to use them.

'Many commercial clients are using e-mail as their primary form of communication', he says. 'We see e-mail becoming unavoidable over the next 18 to 24 months and thus mirror-



## The basic hardware

Standard computer specifications change on an on-going basis so state-of-the-art equipment very quickly becomes yesterday's model. Most PCs, however, should be upgradeable. At the moment, standard PCs use the Pentium chip with at least 120 Mhz of processing power. It is also normal now to buy a PC with between 8 megabytes and 16 megabytes of RAM (Random Access Memory) as well as at least one gigabyte of hard disk storage space. In general, the higher the Mhz and the RAM, the faster the PC will perform. While a lot of software will work quite well on 486 machines with 4 Mb of RAM, more powerful software will require more power. Likewise, an operating system such as Windows 95 requires more power than Windows 3.1 or DOS.

Most of the current generation of PCs have multimedia facilities, including a CD-ROM drive, sound card and built in speakers. Quite a lot of legal information is now stored on CD-ROM so having such a drive may be very useful. Most PCs can be upgraded to include an internal or external CD-ROM drive.

PC prices generally range between £1,000 and £2,000 depending on specification.

Backing-up data generated on a PC is critical to any business but is often overlooked. The floppy disk is the most basic storage medium but is limited as regards the amount of information it can store. Other options, each of which will require further investment in a storage device, include QIC tape, 4mm DAT tape, removable disks such as a Zip drive, writeable CD-ROM and large optical drives. Drives for these media can cost anything from £100 to £3,000. As a general rule, the more expensive the drive, the more capacity it will provide.

ing the pattern of the fax machine ten years ago'. Many observers believe that growth in the use of the Internet will be the driving force in encouraging solicitors' firms to either implement an IT strategy or at least to upgrade their existing systems.

### Secure e-mail services

Because of the confidential nature of documents passed between solicitors and barristers, security has been a critical factor in limiting the take-up of electronic communications. But

over the past few years the Law Society's Technology Sub-committee has been working with the firm LawLink to develop an information and communications service for the legal profession. This has resulted in the establishment of *SecureMail*, a secure e-mail service which cannot be accessed externally and so allows the profession to send and receive confidential files. The main benefit of communicating by e-mail is speed, although the ability to review and modify files without having to retype them is an added advantage.

In addition to its e-mail facilities, LawLink provides direct access to the Companies' Office, Company Formations International, the Land Registry, the Legal Diary and the Irish Trade Protection Association. By carrying out an electronic name or folio number search, for instance, a solicitor can search the Land Registry files and download relevant information to his or her own computer.

As well as specialised pay-as-you-use services like LawLink, the Internet contains many databases, including legislation, which would



## Printers

The printer market has changed dramatically over the past few years with the result that a basic laser printer can now be purchased for less than £500. A laser printer for use in a busy office will more typically cost around £1,000. While lasers are still regarded as the best option for high quality, high volume and high speed work, low-end inkjets have the advantage of being able to print in colour. Most inkjets cost less than £500.

It is important to take account of both the purchase and the on-going price of consumables, such as toner and ink cartridges. Lasers generally cost more to buy but have cheaper running costs.

## Connecting to the Internet

While many of the new multimedia PCs are sold with internal or external modems as part of the package, existing PC users will need to buy a modem separately if they want to connect to the Internet. Modem speeds have a bearing on the time it takes to transmit data or to download information from the Internet. Anyone using the Internet on a regular basis will find a slower modem

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## Networking the office

In larger offices, there may be advantages to connecting computers together to allow two or more users to share information. As well as enabling a number of PC users to share documents, a network will also allow them to share equipment, such as the printer. The two basic categories of networking are peer-to-peer and client/server. Peer-to-peer networking is probably the most suitable option for smaller practices as it simply involves installing a network card on each PC and linking the machines together by cable. The networked PCs will also need to run on an operating system such as Windows for WorkGroups.

A client/server system is generally recommended for networks consisting of ten or more PCs. Such a system basically consists of a powerful central file-server PC surrounded by a number of desktop PCs. All of the main information for the network is held by the server which can be accessed by any of the PCs. The individual PCs are also able to store their own information independently of the network.

## Voice recognition software

Voice recognition or dictation systems aimed specifically at the legal profession have been available for a number of years and are gradually improving in quality. In addition to voice recognition software, systems normally include a microphone which is connected to the computer and acts as the input device. The user speaks into the microphone and the words are transcribed as they would be if the text was typed. A voice recognition package for lawyers will normally consist of up to 120,000 words including specialised legal vocabulary. The user can also add in frequently-used words or macros not already contained in the vocabulary.

be particularly relevant to the legal profession. It can also be used as a marketing tool, with service providers giving Internet subscribers space on the service to create their own web pages. While only a handful of Irish law firms are currently availing of this facility, the creation of such pages is common practice in the United States. Web sites typically contain marketing information but can also include other less commercially-oriented data to attract people to the site.

### Programs for the profession

Apart from everything the Internet provides, there are numerous other personal computer (PC) applications – many of them developed specifically for the legal profession – which can help to improve levels of efficiency within a practice. Word-processing, of course, continues to be the fundamental PC application, and most new IBM-compatible PCs are shipped with Microsoft's latest operating system, Windows 95. John Shaw says that while WordPerfect has traditionally been favoured by solicitors, many are now also using Microsoft Word. Both WordPerfect and Word are available on the Windows 95 platform.

Accounting software is another widely-used application, and some packages have been customised for use by solicitors, while case management software has been developed to help solicitors automate common logistical procedures. One area of case support which has been automated for a long time is debt collection where, despite all the different procedures, a certain number of criteria tend to repeat them-

selves. Conveyancing also typically involves a high repetition of sequential procedures and is another discipline where case support software has become popular.

There are also various case management packages for wills, trust and probate functions which can either be packaged together or bought as separate systems. In addition to these dedicated systems, there are a number of other general software packages designed to make the practice's support work a little easier.

As with other businesses, marketing and mail-shot packages have become popular among practices trying to consolidate and expand their client-bases. These packages can be used for basic mail-shotting jobs, such as sending out Christmas cards or newsletters. If the software is integrated with other IT applications within the company, it is possible to build up a history of each client and to mail-shot them with information or invite them to functions that are relevant to their particular requirements or interests.

Given the huge differences in work, practice size and systems currently in place, IT requirements for solicitors' firms vary considerably. Firms considering investing in or upgrading computer systems should also consider existing levels of computer literacy, the numbers of people who need to access information and the kind of data that needs to be computerised. Before deciding on the kind of system to put in place, it is always a good idea to examine current procedures and to analyse how they could be improved, if at all, by being computerised. This kind of exercise will help to determine who actually needs to have a computer and the kind of applications which will help make the firm more efficient.

The amount of money that the firm is prepared to spend on IT will play a part in the extent to which any new system meets the requirements of the users. When budgeting for the system, it is important to consider a number of important extras such as training, support and maintenance. Although computerising can involve high expenditure, the benefits of increased productivity and efficiency should not be underestimated. **G**

*Grainne Rothery is a freelance journalist specialising in technology issues.*

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# London

**If money makes the world go round, then the world of the London lawyer is spinning rapidly these days. There is a shortage of solicitors in a number of disciplines, and some newly-qualifieds can attract up to £45,000. So can Irish solicitors break into this lucrative market and what skills are in demand? Kyran FitzGerald reports**

International stock markets may be suffering from the jitters, but London's financial services sector is enjoying renewed growth. City law firms are benefiting from the trend and have never been busier. Last year, for example, English law firms earned a record £300 million from mergers and acquisitions activity, a rise of around 50% on the previous year.

The spin-off effect is reflected in the jobs market, with a surge in demand for lawyers with skills in the commercial and banking fields. Increasingly, such lawyers are being sought not merely by law firms with strong commercial practices, but also by a growing number of companies with their own in-house practices.

## Paying over the odds

A further impetus has been provided by the arrival in London of a number of US-based firms which have decided to open up branches in the City. Typically, they have shown scant respect for the traditional remuneration structures and have been prepared to pay way over the odds for people with the 'right stuff'. An added twist to the tale stems from the decision by a number of the Big Six accountancy firms to set up their own legal practices.

But perhaps the most dramatic development has been the decision by the top law firm, White & Carter, to offer up to £45,000 to a select group of newly qualified lawyers. While there is no suggestion that London City law firms will attempt to match this type of offer, it is clear that all the leading English firms are going to have to raise the amounts they offer to candidates. And some recruitment specialists believe that, over the longer term, a

more fundamental review of salary packages may be required.

So to what extent, if at all, is this burgeoning demand for legal skills spilling over into this country?

Recruitment specialists all agree that the large London law firms are now having to spread their nets overseas across a variety of common law jurisdictions from Australia to Ireland, but demand for non-British talent is largely confined to the commercial area (though there is some interest in people with saleable skills in the commercial property area, in particular). The focus is on younger lawyers with up to five years' experience, and most London firms appear to have a preference for lawyers drawn from the top five or six Dublin firms.

While real shortages exist within the City law firms, there are vacancies for overseas lawyers interested in working, at least initially, as in-house lawyers. According to Andrew Golding, legal recruitment executive with ZMB (Zarak MacRae Brenner), 'the London legal market is now probably the biggest in the world, having overtaken New York, its only other real rival'.

The arrival of the American firms has given the market a major boost. Many of these firms have decided to use London as a base for their growing activities in Eastern Europe and Central Asia. In the latter region, oil and gas exploration activity is growing, so lawyers with deal-making skills in the energy field are now much sought-after.

Other growth areas are telecommunications and software. A huge number of companies are setting up in England's version of Silicon Valley around Reading. This has led to an increased workload for

solicitors experienced in preparing software agreements. Ireland's booming software industry has increased the exposure of Irish lawyers to this field of activity. Intellectual property law is another area of increased activity.

Golding believes that Irish candidates tend to fare well at job interviews because, it seems, we do have the gift of the gab after all. 'The Irish lawyers I have dealt with have all been confident speakers', he says. 'They can sell themselves'.

'As the recruitment market here in the UK becomes increasingly buoyant, the opportunities for Irish lawyers with corporate experience have never been better', says Mark Fussell of Daniels Bates Legal in Birmingham. 'Commercial firms throughout England and Wales are eager to recruit candidates with a strong academic background and quality commercial experience, and are particularly keen on lawyers from the Republic'.

Anil Shah of Daniels Bates in London agrees. 'The London market in particular offers outstanding opportunities for candidates with banking and corporate experience who wish to work in practice or in industry, while salaries are also at an all-time high'.

According to Penny Stephenson, a consultant with legal recruitment specialists Michael Page Legal, the market is at its busiest since the late 1980s. Firms are particularly keen on people with skills in the corporate, banking, pensions and information technology areas.

## Desperate for new talent

And demand is not confined to the leading City law firms. The medium-sized firms with large corporate practices are also desperate for new talent. Around 40 London firms would fall into this category. (A medium-sized firm in London terms is one with anywhere from 20 to 80 partners.) The top London City firms are by any standards enormous. The biggest is Clifford Chance with around 2,000 staff on its books, including over 200 partners and some 600 lawyers.

ZMB's Andrew Caulfield, however, sounds a note of caution. 'The prospects for lawyer





# calling

general practitioners are not that great', he warns. While areas such as litigation are also experiencing growth, the demand for personnel is being satisfied from within the British market. There is, however, demand for commercial property expertise.

'The firms are looking for people who have acted in large merger and acquisition deals, or in fund-raising transactions', Caulfield says. 'In the banking area, there is an interest in people with experience of secured lending, syndicated loans or asset financing, for example, dealing with ships or power stations'.

He also points out that the London market is subject to ever-changing cycles, or swings in demand. 'Some time ago, there was a move away from people with broad corporate experience towards those with specialist experience. Then, two or three years ago, there was a swing back towards commercial legal generalists. Now, there is a bit of a move back towards the specialists'.

In Caulfield's view, people should not be scared away from the big City firms because of their sheer size: 'You will be working in a very small practice area in the firm and you will be expected to work for two or three partners'.

One drawback, though, is that you are likely to end up in a highly specialised and narrow field. Indeed, this is one reason why many lawyers have been quitting the top firms to move to outside corporations as in-house lawyers. In such a position, they also tend to have greater control over the hours of work and over the work itself.

## Opportunities in-house

According to Jane Foster of recruitment agency Lawrence Simons, people in the in-house sector work much longer hours than they would if they went to work for a private company. Opportunities for Irish people do exist in the in-house sector, but the real gaps are in the large legal firms themselves, she adds. Irish candidates seeking in-house positions are best advised to gain experience in a City law firm first.

According to Andrew Caulfield, a solicitor with two years' experience of commercial practice can expect to earn 'in the low to mid £30,000 range'. Someone at senior assistant level can look for anywhere between £60,000 and £80,000, while a lawyer clambering onto the partner-

ship ladder can expect to make over £100,000 in one of the leading firms.

For her part, Jane Foster estimates that a person with one year's experience and upward could expect to make in the low £30,000 range while someone with five years' experience of commercial practice can expect £50,000 to £60,000.

## American presence

Currently, the top ten English law firms are offering £28,000 to £29,000 to newly-qualified lawyers in the top academic bracket, while medium-sized firms are offering £26,000 to £28,500. The Americans, however, have torn up the salary rule book, and their presence in the market is increasingly significant. There are now around 30 branch offices of US law firms in London, around 15 of which are actively looking for new recruits, according to Peter Thompson of Michael Page Legal.

'The big non-law firms pay a salary that is roughly the same as that on offer from the big City law firms', he says, 'but they also offer pensions, bonuses and cars. The law firms have been much less imaginative in their approach to remuneration though this is beginning to change. Some big City firms now offer pension deals and are talking about offering bonuses. But no City firm offers a car because this is not seen as tax efficient'.

A recent salary survey of banking lawyers in the UK Law Society's *Gazette* revealed that there is now such a shortage of lawyers specialising in derivatives and capital markets work that the banks are offering bonuses of up to 100%. Heads of legal departments within organisations are now earning an average of £50,000, together with a bonus of 60% on top.

Meanwhile, the banking in-house lawyers enjoyed the benefit of a pension plan and health insurance, the survey found. Most also benefited from mortgage subsidies and life insurance. Four out of five heads of department were given a car or car allowance, while 13% of in-house lawyers also received stock options. Nice work if you can get it.

So what sort of lawyer can expect to get his hands on all this gravy? For a start, it helps to be young. 'There is a shortage of lawyers at the two to four year experience level', says Penny Stephenson of Michael Page Legal. 'This is due to the fact that many young

people were laid off during the last recession and few were taken on'.

The shortages, it seems, are particularly evident in niche areas such as pensions – not a glamorous field, but one where activity is particularly high now that a new UK *Pensions Act* is about to come into force.

ZMB's Andrew Caulfield believes that firms are 'looking for people who are experienced, but not too experienced; people in practice for three to six years'. More experienced than that is seen as too expensive.

In his opinion, the fact that a candidate is Irish is no handicap these days. 'We have placed every candidate coming to us from one of the top Dublin firms'.

Ireland is regarded as a 'good training ground'. But, he adds, a move across the water to a partnership would only be possible for the tiny minority who are in a position to bring their client-base with them.

ZMB believes there is a definite preference for people from the top five Dublin firms, but Penny Stephenson of Michael Page legal disagrees: 'It is pretty irrelevant where you come from as long as you have relevant corporate experience. However, if you have only dealt with domestic Irish issues, such skills will not be that transferable'.

As with any other highly paid position these days, it is important to know how to sell yourself, not least because selling skills are important tools of the trade in the increasingly cut-throat legal market.

'Marketing skills are seen as critical now', says Stephenson. 'People need to demonstrate that they have presented seminars, written newsletters, written in law bulletins, and wined and dined clients'. But track record remains at the core of the selection decision. The hiring firm will be looking for recognisable client names and evidence of good drafting skills.

So how long can the current buoyant market last? The general view is that it is set fair for the foreseeable future. 'God knows how long it will last', Penny Stephenson says. 'Some say three years. My gut feeling is that it is looking pretty good and we would expect it to continue for at least another year to 18 months'.

Kyran FitzGerald is a freelance journalist.





# Barcelona '97

## Marketing in the new millennium

**Marketing guru Matthew Moore was the main speaker at the Law Society's annual conference in Barcelona last month, where delegates heard that they would have to change to survive in a new competitive age. Conal O'Boyle reports**

**'M'**arketing is the hard business answer to hard business problems', according to solicitor Matthew Moore, Head of Management Training at UK consultants Central Law Training. Speaking on *Marketing for lawyers in the new millennium*, Moore warned delegates that although lawyers were uncomfortable with the notion of marketing, they would have to adapt their traditional methods of thinking and working if they were to survive in the new competitive environment. He then went on to identify four principles that would help firms survive:

- **Expertise is not enough.** Clients are increasingly demanding more for their money and want added value from the services they are paying for
- **The personality of the firm is crucial.** Established contacts have always been a prime source of work. Now, where the main distinctions between firms are price and personality, firms should try to compete on personality
- **Firms must recognise the threat of substitutes.** 'We are increasingly having to see ourselves as part of the professional services sector', he said. 'We have to recognise that there are threats from outside that we have to take seriously'. These include the banks, accountants and others in the financial services area
- **Firms must recognise the risks of price competition.** Firms must take active steps to counteract the risks of falling profits as a result of increasing price competition. In the longer term, changed practices such as the use of technology will become essential.

The corollary of all this, he added, was that law firms would now have to be managed as businesses. This would mean business plans and marketing strategies. 'Marketing', said Moore, 'is the response to the changes in Society that we are all part of. We need to promote ourselves individually and as a profession'.

To the four common elements of the 'marketing mix' – *product, place, price, and promotion* – Moore suggested adding another four 'p's': *personality, presentation, professionalism and process*. *Personality* was singled out as the most important of the latter elements. Given that the legal 'product' is hard to assess, the choice of legal adviser often comes down to personality. Moore recommended that partners and staff should be *obliged* to involve themselves in some form of community activity – for example, by joining a political party, a local golf club or engaging in charity work – in order to raise

the firm's profile.

*Presentation* applied as much to the state of a firm's premises or the quality of its correspondence as to any promotional literature it might prepare. While *professionalism* is already recognised by most solicitors as a crucial concept, *process* is harder to pinpoint. Moore likened it to going into a firm and feeling that it was functioning well. 'Process', he said, 'simply consists of ensuring that the participants do and achieve what they set out to do'.

Successful firms were those that got the balance right between the eight elements of the marketing mix.

Moving on to planning, Moore recommended that firms should draw up a strategic plan but 'should not go over the top'. A three to five year plan should be sufficient. Market research – much of which firms could do themselves, simply by talking to clients – would establish what improvements needed to be made, while the marketing plan would set out an action plan for the year.

When drawing up a marketing plan, advised Moore, firms should adopt the same disciplines they use for their financial budgets. In fact, he added, the two should be considered together: 'If we want to achieve a 5-10% increase in billing income, what marketing objectives do we need to achieve?'

'We are entering a phase of winners and losers', he concluded. 'The better organised firms and those that take meeting client demands seriously are those that will finish this millennium on a more confident basis'. **G**



All the presidents' men: Frank Daly with his predecessors as Law Society President, and (above) the villa at Torre dels Lleons where the formal reception and dinner were held



# Family Law (Divorce) Act, 1996

In the last of our series of articles on the *Family Law (Divorce) Act, 1996*, Rosemary Horgan looks at the question of maintenance, lump sum orders, financial compensation orders and succession rights



## Till debt do

**P**art III of the *Family Law (Divorce) Act, 1996* deals with preliminary and ancillary orders which may be made in or after proceedings for divorce. Maintenance provision on divorce, as on judicial separation, may be looked at in two stages: *maintenance pending suits* and *post-divorce periodical payments and lump sum orders*.

**Maintenance pending suits.** The court can make an order requiring either of the spouses to make either periodical payments or lump sum payments to the other spouse for his or her support and for the benefit of a dependent member of the family. Payments on behalf of the dependent member of the family can be made to any person specified in the order. Periodical pay-



ments relate to the period from the date of the divorce application until the date of the divorce decree. Periodical or lump sum payments in the *pending suit* category are for the 'support' of the spouses and for the 'benefit' of a dependent family member.

'Dependent member of a family' means a child of either or both spouses, or in relation to whom either or both spouses is *in loco parentis*. The age limit is under 18, or under 23 if in full-time education, and there is no age limit if the dependent person is suffering from a serious mental or physical disability that makes the child's financial independence virtually impossible.

It is worth mentioning that Article 41.3.2 of the Constitution refers to 'any children of either or both of [the spouses]'. It does not limit the consideration of children to 'dependent' children and the definition of dependent member of the family under the 1996 Act would not seem to embrace the children of either spouse where the other is neither *in loco parentis* nor treated that child as a member of the family.

**Post-divorce periodical payments and lump sum orders.** These orders can be made on the granting of the decree of divorce or at any time thereafter on application by either of the spouses or by a person on behalf of a dependent family member. This may seem odd in that divorce terminates the legal relationship between the spouses, and in most other jurisdictions this fact would fundamentally alter the nature of the financial relief available after divorce.

Section 10 of the 1996 Act clearly states that the grant of the divorce decree dissolves the marriage and that the parties are free to marry again. The grant of the decree does not alter the parental joint guardianship rights of the parents, nor does it alter the financial obligations of the spouses merely because they are no longer spouses. Indeed, as has been stressed in earlier articles,

the court has an 'enabling' rather than a 'mandatory' jurisdiction in relation to divorce.

**Periodical payments.** Periodical payments may be defined in terms of the amount, period and times of payment. They may also be secured. As they can be ordered either on the granting of the decree or at any time thereafter, the period of 'exposure' is significant. Divorce in Ireland will not determine with any degree of certainty or permanence the financial responsibility of the spouses *vis-à-vis* each other or a dependent member of their family.

Section 13(4) provides that the payments shall begin not earlier than the date of the application and end on the death of the person in whose favour they are made. They also cease on the remarriage of the recipient spouse in so far as they relate to that person. A person who has remarried may not apply for personal relief, but co-habitation would appear to have no effect on eligibility to apply.

The court can make an attachment of earnings order at the same time as making the periodical payments order if it is satisfied that the paying spouse is someone to whom 'earnings' fall to be paid. It shall give the paying spouse the opportunity to make representations either in relation to the fact that they are in receipt of 'earnings' or in relation to the fact that they would indeed honour the terms of the order without the necessity of making an attachment of earnings order.

**Lump sum orders.** The court can order a spouse to pay a lump sum to cover any liabilities or expenses reasonably incurred by the other in maintaining themselves or dependants before making application for a periodical payments order. Such an order can also be granted to a person who makes an application for the benefit of a dependent member of the family.

A lump sum order may be payable in one or

more instalments and may also be 'secured' to the satisfaction of the court.

Section 26 of the 1996 Act allows the court to discharge existing maintenance orders made prior to the application for divorce or alternatively deem them to be the same as orders made under corresponding provisions of the *Divorce Act* and thus liable to variation. Under section 22, the court can vary a maintenance pending suit order, a periodical payments order, a secured periodical payments order or a lump sum order in so far as it relates to outstanding instalments or requires the instalment to be secured. It can be seen, then, that the court has extensive residual powers in relation to preliminary and ancillary orders after the granting of the decree of divorce. The book is never – or hardly ever – closed.

In deciding whether to exercise its powers under the above sections, the court has a duty under section 20 to ensure that such provision as is proper having regard to the circumstances exists or will be made for the spouses and any dependent member of the family. Without limiting this general duty, the court must take into account the list of factors set out in section 20(2)(a) to (l) for spouses and section 20(4)(a) to (g) for a dependent member of the family. Practitioners will have become very familiar with these factors since 1989 and there are a few additions – the value of a benefit (for example, benefit under a pension scheme) which would be lost by virtue of the decree of divorce, the rights of any person other than the spouses but including a person to whom either spouse is remarried, the terms of a separation agreement still in force and entered into by the spouses.

The family law civil bill, affidavit of means and affidavit of welfare prescribed by the Rules (SI no 84 of 1997) give practitioners ample opportunity for highlighting the various factors relevant in each case.

Practitioners will be aware that in many cases the 'relief' practically available is inadequate or non-existent. The new one parent family payment replaces the current lone parent's allowance, deserted wife's benefit, deserted wife's assistance and prisoner's wife's benefit. This payment is means tested (earnings less

# we part

than £12,000) and continues notwithstanding the divorce decree.

There is an onus on a spouse to make, and continue to make, appropriate efforts to ensure support by the other spouse. In this regard, practitioners should be aware of the fact that the *Social Welfare Code* obliges spouses and parents to maintain the dependent spouse and children.

There is also an obligation on the recipient spouse to contribute to the Department of Social Welfare maintenance so received to offset in whole or in part the allowance paid to them by the Department. The Maintenance Recovery Section of the Department can pursue a 'liable relative' independently and serve a 'determination order' on them, seeking a specific contribution towards the cost of providing their spouse or former spouse with an allowance. The Department can apply to court for an order of court directing payment by them towards the cost of paying the allowance to their spouse. It is therefore not possible to settle or compromise proceedings by way of a settlement which provides a lump sum or property adjustment order in lieu of continuing maintenance.

Neither the *Divorce Act* nor the *Social Welfare Code* allow a clean break on the issue of continuing support. Practitioners would be well advised to obtain from the Department of Social Welfare explanatory leaflets LR 15 and LR 7 which are available free of charge and set out the position clearly and concisely.

**Financial compensation orders.** This is similar to section 11 of the 1995 Act and allows the court to provide an insurance-based solution to the problem of loss of financial security through separation or divorce. The order may be made on the granting of the decree or at any time afterwards, and it endures until the death or remarriage of the person in whose favour it is made. It may not be made in favour of someone who has remarried. These orders are subject to variation under section 22. The grounds for making the order are that:

- The financial security of the applicant spouse or the dependent member of the family can be provided for either wholly or partially by doing so, or
- The applicant spouse or dependent member of the family would forfeit the opportunity or possibility of acquiring a benefit and this loss can be compensated for wholly or partially by doing so.

If it is possible to establish these grounds, then the court can order the other spouse to do one or more of the following things:

- 1) To effect a life insurance policy for the benefit of the other spouse or a dependent member
- 2) To assign either the whole or a specified part of an existing policy to the other spouse or a person on behalf of a dependent member
- 3) To continue to pay the premiums on the policy.



The court can make a financial compensation order in addition to, or in substitution for, orders for periodical payments and lump sum orders, property adjustment orders, miscellaneous ancillary orders and pension adjustment orders. This could be a very useful section to offer by way of substitution and to encourage the court to make an order under section 18(10).

**Providing for one spouse out of the estate of the other.** It was common practice for settlements under the *Judicial Separation and Family Law Reform Act, 1989* and separation agreements to contain extinguishment or mutual renunciation of rights under the *Succession Act, 1965*. Practitioners sought to achieve as clean a break as possible for their clients. The philosophy of the *Family Law Act, 1995* saw a shift in policy on the issue of extinguishment of succession rights on judicial separation. The old mandatory section 17 was replaced by a promissory section 14 of the 1995 Act. When the divorce is granted, there is no need for an order in respect of *Succession Act* rights as the parties are no longer 'spouses'.

Section 18 of the 1996 Act empowers the court to consider whether it should make an order for provision out of the estate of the deceased spouse, having regard to the rights of any other person with an interest in the matter, if it is satisfied that proper provision was not made for the applicant during the lifetime of the deceased spouse for any reason other than the conduct of the applicant spouse.

Such an application must be made within six

months after representation is first granted. There is a statutory onus on the personal representatives of the deceased to make a reasonable attempt to bring notice of the death to the attention of the other spouse concerned. Where the surviving ex-spouse makes an application for relief under the section, the personal representatives may not distribute the estate without the leave of the court until it has decided whether to make or refuse an order. The ex-spouse must notify the personal representatives of his or her intention to claim under the section within one month of serving the notice on them.

If, after due notification, no application is made within one month of the notice being served on the ex-spouse, then the personal representatives may distribute the estate. The personal representatives will escape personal liability by adherence to the rules; however, the ex-spouse may follow the assets into the hands of the person receiving them. It is likely that the time limits would be construed strictly against the ex-spouse and so the latter right to trace would only arise in exceptional circumstances.

In deciding whether to make an order under this section, the court must consider all the circumstances of the case, including:

- a) Any order, periodical payments order, secured periodical payments order or lump sum order or a property adjustment order made, and
- b) Any devise or bequest made by the deceased spouse to the applicant.

Furthermore, the provision made by the court on an application under this section, together with the value of an order set out at (a), shall not exceed in total the legal right share which the ex-spouse would have received had the marriage not been dissolved. Relief under this section is not available in favour of an applicant ex-spouse who has remarried. The section provides no relief for a dependent member of a family as they would retain their rights under section 117 of the *Succession Act, 1965*.

On granting a divorce or at any time thereafter, the court on the application of either spouse may make an order that either or both spouses shall not be entitled to apply for relief under this section, if it considers it just to do so. As suggested earlier, practitioners could try to persuade the court to make an order under section 18(10) that either or neither spouse be entitled to apply for relief under this section, on the basis that a financial compensation order is in place. **G**

*Rosemary Horgan is solicitor-in-charge at the Legal Aid Board and a member of the Law Society's Family Law and Civil Legal Aid Committee.*



# Committee reports

## PROFESSIONAL GUIDANCE

### Solicitors empowered to administer oaths

As solicitors will be aware, every practising solicitor was conferred with the powers of a commissioner for oaths pursuant to section 72 of the *Solicitors (Amendment) Act, 1994* with effect from 4 November 1994. It has been suggested that the attention of members should be drawn again to the duties of solicitors administering oaths.

The Chief Justice regulates the administration of oaths. Mr Justice Liam Hamilton issued the following memorandum on 22 December 1994. It is reprinted here to highlight again several important aspects of the matter. This memorandum is also printed at page 578 of the *Law Directory 1997*.

### Urgent and important memorandum to all practising solicitors

**Re: Section 72 of Solicitors (Amendment) Act, 1994 (Exercise of the powers of a commissioner for oaths by practising solicitors)**

On the enactment of the *Solicitors (Amendment) Act, 1994* on 4 November 1994, the provisions of section 72 thereof came into effect. Section 72 gives to 'every solicitor who holds a practising certificate which is in force ... all the powers conferred by any enactment or statutory instrument ... on a commissioner for oaths'.

A solicitor who holds a practising certificate that is in force (hereinafter referred to as 'a practising solicitor') who is also a commissioner for oaths **may** con-

tinue to refer to himself/herself in the jurat as a 'commissioner for oaths'.

A practising solicitor who is not also a commissioner for oaths shall refer to himself/herself in the jurat as a 'practising solicitor'.

Therefore, the following would be the revised adaptable standard form of jurat:

*Sworn/Declared by [name of deponent] this ..... day of ..... 19..... at ..... in the City/County of ..... before me a commissioner for oaths/practising solicitor, and I know the deponent/declarant.*

*.....  
Commissioner for  
Oaths/Practising Solicitor*

### Please note the following:

- 1) A practising solicitor who is not also a commissioner for oaths, in exercising his/her powers pursuant to section 72, is subject to all the Acts, regulations and rules of practice to which a commissioner for oaths is subject.
- 2) Section 72(2) requires that a practising solicitor 'shall not exercise the powers conferred by this section in any proceedings in which he is solicitor to any of the parties or in which he has an interest, or in contravention of any relevant condition' (that is, in contravention of any condition to which his/her practising certificate may be subject).
- 3) Apart from the express statutory prohibition in section 72(2) in relation to exercising the powers of a commissioner for oaths in proceedings, a practis-

ing solicitor (whether or not also a commissioner for oaths) **cannot** exercise such powers in any conveyancing, probate, commercial or other matter in which he/she is a solicitor to any of the parties thereto or in which he/she has an interest.

- 4) The definition of 'solicitor' in section 3 of the *Solicitors (Amendment) Act, 1994* includes 'a firm of solicitors'. Therefore, in exercising his/her powers pursuant to section 72, a practising solicitor (whether or not also a commissioner for oaths) **must** regard himself/herself as having an interest in any proceedings or in any conveyancing, probate, commercial or other matter in which his/her principal, partner, associate, consultant or assistant is engaged as a solicitor or has an interest.

- 5) **Fees.** A practising solicitor who is not a commissioner for oaths, in exercising his/her powers pursuant to section 72, is subject to the same regulations as to fees as is a commissioner for oaths. The current fees payable to a commissioner for oaths are provided for in Part VI Appendix W of the *Rules of the Superior Courts 1986* as amended by substitution by the *Rules of the Superior Courts (No 4), 1990* (SI No 281 of 1990), as follows:

'i) On taking an affidavit, affirmation or declaration: £3

ii) On marking exhibits therein referred to and required to be marked – for an exhibit or exhibits (irrespective of number): £1

iii) On attesting the execution of a bond: £3'

- 6) Every practising solicitor exercising his/her powers pursuant to section 72 must at all times be fully aware of the importance and solemnity of the proper exercise of such powers, and be conscious that 'misconduct' (for the purposes of the *Solicitors' Acts 1954 to 1994*) includes a contravention of (*inter alia*) section 72.

*Liam Hamilton, Chief Justice*

## COMPANY AND COMMERCIAL LAW

### Companies Registration Office

As reported in last month's *Briefing*, the CRO computer crashed in early March. In view of the seriousness of the situation, the President has written to the Minister for Enterprise and Employment as follows:

*Dear Minister,*

*I write concerning the grave situation facing the Companies Registration Office. From time to time in the past few years, the Law Society has made representations on this matter, but the situation is one in which the CRO appears to be on the brink of virtual collapse.*

*What has brought matters to a head is the computer crash which occurred in the CRO in early March. For a period of several weeks:*

- *It was not possible to incorporate a company*
- *The register of business names registered since mid-December*



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## FAMILY LAW

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## COURTS AND COURT OFFICERS ACT, 1995 THE JUDICIAL APPOINTMENTS ADVISORY BOARD APPOINTMENT OF ONE JUDGE OF THE CIRCUIT COURT

Notice is hereby given that one vacancy is due to arise in the Office of Ordinary Judge of the Circuit Court and that the Minister for Justice has requested the Board under Section 16 of the Act to exercise its powers under that section and to make recommendations pursuant to it.

Practising Barristers or Solicitors who are eligible for appointment to the Office and who wish to be considered for appointment should apply in writing to the Secretary of the Board, Office of the Chief Justice, Four Courts, Dublin 7, for a copy of the application form. Completed forms should be returned to the Board's Secretary on or before Wednesday the 7th May, 1997.

Applications already made in respect of vacancies in the Office of Ordinary Judge of the Circuit Court will be regarded as applications for this and all subsequent vacancies in the Circuit Court unless and until the Applicant signifies in writing to the Board that the application should be withdrawn.

Applicants may at the discretion of the Board be required to attend for interview.

Canvassing is prohibited.

Dated the 23rd April, 1997.

SECRETARY  
JUDICIAL APPOINTMENTS ADVISORY BOARD

1996 was lost

- The search function on the computer was corrupted.

These immediate problems have now been redressed, but what if they recur? I understand that a new computer system is to be installed by the end of the year, but what guarantees are there that there will not be another full scale collapse in the system?

In the 1970s, the CRO rightfully considered itself one of the most efficient of the public offices with which solicitors or the public would deal. However, in the 1980s and 1990s, the mushrooming of the corporate activity and compliance legislation was not matched by sufficient investment in CRO facilities. In the late 1980s, just as the Companies (Amendment) Act, 1986, began to bite, with the requirement to file accounts, staff numbers were cut and counter service at lunchtime was withdrawn.

So, for example, we have a situation where:

- Access to the CRO computer is frequently unavailable
- Company charges delivered for filing over a year ago are only now being registered
- Some documents (such as certain company prospectuses) are not always scanned into the system with the result that it can be difficult to access them.

There are over 260,000 companies on the register, of which approximately 95,000 are dissolved, leaving 165,000 or so live companies, each of which is required to deliver in any year 165,000 annual returns, irrespective of whether they are private or public, limited or unlimited.

I acknowledge the expert and diligent work undertaken by CRO personnel, in the face of the considerable pressures upon them. However it is obvious that an inefficient and unreliable system of incorporating and registering companies and ancillary documents can only reflect badly on the country and provide a disincentive to business people to com-

ply with the requirements of our companies legislation.

*I should be obliged to know what plans there are for the provision to the CRO of the resources to comply with its obligations laid down by law and its ambitions as set out in its mission statement in the 1995 Companies Report (P46943):*

*'to maintain and enforce an effective business regulatory system, which facilitates the operation and expansion of business and assists consumers through appropriate legislation'.*

*I will be pleased to hear from you at your convenience.*

## TAXATION

### Tax Briefing

*Tax Briefing*, published by the Revenue Commissioners, aims to keep tax practitioners aware of and up-to-date on Revenue thinking and practice on a variety of administrative and taxation issues. The following extracts from *Tax Briefing*, issue 25 (February 1997) are reproduced here by kind permission of the Revenue Commissioners.

### Young Trained Farmer Relief

In his Budget speech on 22 January 1997, the Minister for Finance announced that the Young Trained Farmer Relief is being extended for

a further three years. It will apply to instruments executed on or after 1 January 1997, and on or before 31 December 1999. There is no change in the basis on which the relief will be granted.

Instruments will be stamped and the relief granted on the basis that the relevant legislation will be included in the *Finance Act, 1997*. In the event that the relevant legislation is not enacted or there is any change in the conditions governing the relief, it may be necessary to return instruments to the Capital Taxes Office for review.

### CGT: valuation of unquoted shares

In all cases involving a disposal of unquoted shares, where the disposal or acquisition was other than by way of a bargain at arm's length, a valuation of the shares is required. In future these valuations must be accompanied by a newly introduced *Form SVCGT*. The form *SVCGT* must be completed by the taxpayer or his/her agent. Practitioners should note that:

- A separate *SVCGT* must be completed in respect of each valuation relating to a particular disposal.
- A copy of the accounts for the 12-month period ending prior to the valuation date must be submitted with each valuation.

Supplies of these forms can be obtained from local tax offices or from the Revenue Forms & Leaflets Service on (01) 8780100.

## PRACTICE MANAGEMENT

### ISO 9002/Q-Mark

In May, the Practice Management Committee will issue a pack on ISO 9002 and Q-Mark accreditations. The pack will be in a questions and answers format and the objective is to answer most of the basic questions asked by solicitors in regard to these certificates such as: what are the benefits? how long will it take? how much does it cost? The pack will also contain a listing of solicitors who have achieved these marks and a list of consultants and accreditation agencies that have assisted solicitors in achieving these marks.

- Another firm of solicitors has achieved the ISO 9002 accreditation - John A Sinnott & Co. They say they started out reasonably cynical about its value but that they now believe that it was well worth the effort. Well done to John Murphy and all his staff in Enniscorthy!

### Practice comparison survey

There has been a significant response to the article on *Practice comparison: how are you doing?* in the last *Gazette* (page 29). The committee is significantly revising and shortening the questionnaire which is likely to encourage solicitors to respond to this survey. Additional information can be sought and analysed in future

## PRACTICE NOTE

### Stamp duty

The *Finance Bill* just published has extended the period to 1 May at which deeds for residential property can be stamped at the lower rate of stamp duty provided there was a written contract for sale signed prior to 23 January 1997.

- It is suggested that such deeds should be lodged for adjudication so as to avoid the necessity to raise requisitions as to the adequacy of stamp duty at a later date.
- Where such deeds have already been stamped, but not adjudicated, it is important to retain with the

deeds an original of the contract for sale as evidence of the date of the contract.

- In future dealings with residential property where the deed has been stamped at the lower rate of duty prior to 1 May 1997 and has not been adjudicated, it is important for a purchaser's solicitor to raise a requisition and seek evidence as to the adequacy of the stamp duty paid.
- A voluntary assurance where there has been no separate contract in writing is stampable at the full new rate of stamp duty.

*Taxation Committee*

years if necessary. The committee would like to thank all firms who contacted it in this regard. Further details will be issued shortly.

## Office manual

An office manual recommending various administrative procedures that could be implemented in practices will be issued to all firms in June. It will cover the key areas of: firm structure; personnel; post and communications; office procedures; standards; client care; accounts procedures; and fire and safety. It will also include a large number of forms and precedent employment contracts. The publication has been kindly sponsored by the Solicitors Mutual Defence Fund. The manual will also be available on disk at a later stage.

Cillian MacDomhnaill

## ARBITRATION/ YOUNGER MEMBERS

### Arbitration seminar

The Arbitration Committee, in association with the Younger Members Review Committee, hosted a seminar on the topic of arbitrations at Blackhall Place on 25 March. There was an excellent response to the seminar and 70 participants attended. The seminar ran from 9am to 1pm and nearly 20% of those attending came from outside the Dublin area.

The committees are very grateful to the speakers who attended and put so much into the event. Bernard Gogarty, Gary Byrne and Kevin Kelly took the first session between them, and they were followed after 11am by Alison Fanning, Timothy Boucher Hayes and Robert Connon. Maurice Curran acted as chairman.

The response to the topic is such that it clearly ought to be addressed again in the future and if any member wishes to make a contribution in the area, either committee would be delighted to hear from them.

Philip Joyce

## Notes of the *Finance Bill*, 1997

### 1) Income tax

The Single Person Allowance is increased to £4,000 (from £3,800) and to £8,000 for a married couple. Most of the other allowances have also been increased.

### 2) Stamp duties

The *Finance Bill* imposes new higher rates of stamp duty on disposals of residential property of a certain value. These rates are:

- a) Between £150,000 and £160,000 – 7%
- b) Between £160,000 and £170,000 – 8%
- c) £170,000 and over – 9%

The new rates also apply to new houses or apartments with a floor area more than 125 sq metres, if the site has a value in excess of £150,000 or the site value and the construction costs exceeds £600,000 (section 89).

### 3) Residential property tax

The *Finance Bill* provides for the abolition of residential property tax. 1996 was the last year in which residential property tax was payable (section 101). Though the tax has been abolished, the existing tax clearance arrangements in the case of sales of houses above a specified value threshold are being maintained.

### 4) Capital acquisitions tax (inheritance tax & gift tax)

**Agricultural relief (section 104).** The value of agricultural relief is reduced by 90% for capital acquisitions tax purposes where *agricultural property*, as defined, is received by an individual who is deemed to be a farmer within the meaning of the legislation. The beneficiary receiving the agricultural property must retain it for six years, otherwise all the tax relief will be lost. If the property is sold after six years but within ten years, then part of the tax relief is clawed back.

**Business relief (section 107).** The value of any relevant *business property* is reduced by 90% for capital acquisitions tax purposes. The relief is lost if the relevant business property is sold within six years of receiving it. Part of the relief is clawed back if the relevant business property is sold after six years, but within ten years of receiving it.

**Heritage houses (section 106).** The *Finance Bill* reduces the period during which a *heritage house* or garden must be open to the public in order to qualify for exemption from capital acquisitions tax. For the year 1997 and subsequent years, the period of 90 days (including not less than sixty days during the Summer months) is reduced to 60 days (including not less than 40 days during the Summer months).

**Exemption of certain transfers from capital acquisitions tax following the dissolution of a marriage (section 110).** A gift or inheritance taken by virtue or in consequence of a court order, by any spouse who was a party to the marriage concerned is exempt from any capital acquisitions tax.

### 5) Capital gains tax (section 48)

Where, in consequence of a court order or a deed of separation, a person disposes of certain assets to his or her spouse or former spouse, a charge to capital gains tax will not arise. Further, the Bill provides that where the spouse

or former spouse to whom the disposal is made subsequently disposes of the asset, he or she shall be treated as having acquired it on the same day and at the same cost as the other spouse, thus providing maximum indexation relief.

### 6) Value added tax

The Bill contains a number of provisions to ensure that VAT on property cannot be avoided by VAT exempt bodies such as banks and insurance companies. The provisions in the Bill aim to combat avoidance schemes, whereby VAT chargeable on leases taken out by exempt companies and which is non-recoverable is being avoided.

### 7) Scholarship schemes (section 9)

The *Income Tax Act, 1967* gave exemption from income tax in respect of certain scholarship papers. The Bill continues the current exemption in respect of recipients, but allows a benefit in kind charge to be applied in certain cases (for example, to parents in respect of a scholarship to their child under employer sponsored schemes), where the scholarship does not conform to certain requirements.

### 8) Gifts made to third level institutions (section 14)

The Bill provides for a relief from tax for gifts of money made to certain third level institutions which are to be used for the purposes of projects approved by the Minister for Education.

### 9) Urban renewal scheme (section 23)

The Bill extends a number of deadlines in relation to the current urban renewal scheme. Firstly, it extends the qualifying period from 31 July 1997 to 31 July 1998 for partly-completed projects, including projects in enterprise areas. This extension will only apply in those cases in respect of which a local authority can certify that at least 15% of the total cost of the project had been incurred by 31 July 1997. The Department of the Environment has issued guidelines to help developers seeking an extension.

### 10) Relief for investment in film (section 26)

Section 35 of the *Finance Act, 1997* provided a scheme for tax relief for qualifying investments made in qualifying film production companies, by persons not connected with such companies. The relevant investments must be made in a qualifying period commencing 23 January 1996 and ending for company investors on 22 January 1999 and for individuals on 5 April 1999. These reliefs have been increased in the *Finance Bill*.

### 11) List of tax defaulters to be published quarterly with effect from 1997 (section 126)

The Revenue Commissioners will now compile lists of tax defaulters on a quarterly basis and publish each list in *Iris Oifigiúil*.

### 12) Corporation tax (section 37)

The *Finance Bill* reduces the standard rate of corporation tax with effect from 1 April 1997 from 38% to 36%.

Taxation Committee



## FAMILY LAW AND CIVIL LEGAL AID

### Practice Direction

The committee wishes to draw the attention of solicitors to the

following Practice Direction which applies to property transfer orders made under section 9 of the *Family Law Act, 1995*. 'Where an order is sought under section 9 of the *Family*

*Law Act, 1995* or any order requiring the transfer of property, practitioners should state in the pleadings the registered owners of the property, the folio number and county, if any, and the

address of the property. Where these details are not available at the drafting of the pleadings, practitioners must hand in such details to court at the time the order is being made'.

## LEGISLATION UPDATE: 15 FEBRUARY – 15 APRIL 1997

### ACTS PASSED

No Title of Act and date passed

- 2 **European Parliament Elections Act, 1997 (24/2/97)**  
Consolidates with amendments the enactments and regulations relating to the conduct of European parliamentary elections.  
**Commencement date/s:** Commencement order/s to be made
- 3 **Decommissioning Act, 1997 (26/2/97)**  
Enables effect to be given to the Report of the International Body on Decommissioning which was presented to the Irish and British governments on 22/1/96  
**Commencement date/s:** Commencement order/s to be made
- 4 **Criminal Justice (Miscellaneous Provisions) Act, 1997 (4/3/97)**  
Amends the law relating to proceedings in criminal matters in the District Court and for that and other purposes amends the *Courts of Justice Act, 1924*, the *Criminal Justice Act, 1951* and the *Criminal Procedure Act, 1967*. Amends section 32 of the *Criminal Justice Act, 1994*, relating to the procedures to be adopted by designated bodies in the carrying on of their business in order to prevent and detect laundering offences under s31 of the 1994 Act – thereby giving effect to article 11 of Council Directive 91/308/EEC on money laundering (the other provisions of the Directive were implemented in the *Criminal Justice Act, 1994*).  
**Commencement date/s:** 4/3/97 for all sections except sections 3 to 10, 12 and 18 which come into operation on 4/4/97 (per s21 of the Act).
- 5 **Irish Takeover Panel Act, 1997 (12/3/97)**  
Provides for the designation of a Takeover Panel to monitor and supervise takeovers and certain other transactions in relation to securities in certain companies.  
**Commencement date/s:** Sections, other than ss5(3), 7(1), (2), 9-15, come into force on 14/4/97 (per SI No 158/1997).
- 6 **Courts Act, 1997 (20/3/1997)**  
Increases the maximum number of ordinary judges of the High Court from 19 to 22.  
**Commencement date:** 20/3/97
- 7 **Dublin Docklands Development Authority Act, 1997 (27/3/1997)**  
Provides for the establishment of the Dublin Docklands Development Authority for the renewal of the Dublin Docklands Area and for the continued development in the Custom House Docks Area of the financial services sector. Amends the *Urban Renewal Act, 1986*.  
**Commencement date/s:** Sections 1-7, 10, 14-17, 38(3) and 57: 27/3/97; remaining sections: 1/5/97 (per SI No 135/1997. Establishment Day: 1/5/97 (per SI No 136/1997).
- 8 **Central Bank Act, 1997 (31/3/1997)**  
Provides for a range of measures relating to the powers and obligations of the Central Bank, including the regulation of payment systems, cross-border credit transfers and bureaux de change. Amends and extends the *Central Bank Acts 1942 to 1989* and other enactments.  
**Commencement date:** 9/4/97 (per SI No 150/1997).
- 9 **Health (Provision of Information) Act, 1997 (1/4/1997)**  
Enables the Minister for Health to proceed with the establishment of population registers for national programmes of screening for breast cancer and cervical cancer. Also enables the National Cancer Registry Board to continue collecting data from hospitals relating to all forms of cancer.  
**Commencement date/s:** 1/4/97
- 10 **Social Welfare Act, 1997 (2/4/1997)**  
Provides for increases in the rates of social insurance and social assistance payments as announced in the Budget.  
**Commencement date:** 2/4/97 and various commencement dates – see Act.
- 11 **National Cultural Institutions Act, 1997 (2/4/1997)**  
Establishes statutory boards to manage the National Museum and the National Library and provides for other matters relating to the national heritage.  
**Commencement date/s:** Commencement order/s to be made.

### SELECTED STATUTORY INSTRUMENTS

- 31/1997 **EC (Commercial Agents) Regulations, 1997**  
Confirms that after termination of an agency agreement a commercial agent shall be entitled to compensation under Art 17(3) of Council Directive 86/653/EEC which was implemented by *EC (Commercial Agents) Regulations, 1994* (SI No 33/1994).
- 72/1997 **Telecommunications (Miscellaneous Provisions) Act, 1996 (Commencement) Order, 1997**
- 93/1997 **District Court Rules, 1997**  
Consolidation of the District Court Rules. Comes into operation on 1 May 1997.
- 99/1997 **Control of Horses Act, 1996 (Commencement) Order, 1997**  
18 March 1997, is the date on which the Act, other than part IV, comes into operation. Part IV comes into operation on 5 March 1997.
- 103/1997 **Consumer Information (Advertisements for Concert or Theatre Performances) Order, 1997**  
Provides that in advertisements for a public concert or theatre performance the admission price must be indicated and, separately, any additional charges and the circumstances in which such additional charges are payable.
- 106/1997 **Courts (No 2) Act, 1986 (Commencement) Order, 1997**  
Brings section 1 (District Court procedures for the examination of debtors as to means) and section 9 (amending the *Enforcement of Court Orders Act, 1926*) into operation on 1 May 1997.
- 109/1997 **Telecommunications (Miscellaneous Provisions) Act, 1996 (Commencement) (No 2) Order, 1997**
- 110/1997 **Telecommunications (Miscellaneous Provisions) Act, 1996 (Commencement) (No 3) Order, 1997**
- 118/1997 **Circuit Court Rules (No 2) of 1997 (Adoptive Leave Act, 1995)**  
Prescribes Circuit Court procedures in respect of applications brought under s39 of the *Adoptive Leave Act, 1995*, for the enforcement of decisions of a rights commissioner or determinations of the EAT pursuant to the said Act.
- 120/1997 **National Council on Ageing and Older People (Establishment) Order, 1997**  
Established under the *Health (Corporate Bodies) Act, 1961*, as amended by s22 of the *Health (Amendment) Act, 1996*, to advise the Minister for Health and other Ministers on all aspects of ageing and the welfare of older people. Succeeds the National Council for the Elderly which is being wound up.
- 121/1997 **Local Government (Planning and Development) (No 2) Regulations, 1997**  
Amends the Second Schedule (Exempted Development) to the *Local Government (Planning & Development) Regulations, 1994* (SI No 86/1994). Provides that, subject to certain limitations, the addition of antennae for mobile telephony to an existing radio mast is exempted development. The replacement of masts is also exempted development subject to complying with certain requirements.
- 123/1994 **Child Abduction and Enforcement of Custody Orders Act, 1991 (Contracting States) (Hague Convention) Order, 1997**  
Specifies Contracting States to the Convention on the *Civil Aspects of International Child Abduction, 1980*.
- 124/1997 **Child Abduction and Enforcement of Custody Orders Act, 1991 (Contracting States) (Luxembourg Convention) Order, 1997**  
Specifies Contracting States to the *European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children, 1980*.
- 133/1997 **Waste Management (Licensing) Regulations, 1997**  
Provides for the commencement and operation of the system of licensing by the Environmental Protection Agency of waste disposal activities under the *Waste Management Act, 1996*.
- 137/1997 **Waste Management (Planning) Regulations, 1997**  
Specifies certain matters to be addressed in a waste management plan made under s22 of the *Waste Management Act, 1996*.

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## News from the EU and International Affairs Committee

Edited by T P Kennedy, Education Officer, Law Society

# Free movement of lawyers in the EU?

Many lawyers in the European Union are keen to provide legal advice and assistance to foreign clients or locate themselves in another State (right of establishment). A significant barrier to the right of establishment (Article 52) and the freedom to provide services (under Articles 52 and 60(3)) consists of national requirements that access to certain 'regulated' trades or professions depends upon qualifications, which nationals of other Member States are unlikely to possess. Various attempts have been made to make it easier for lawyers to provide services more broadly or to help lawyers move more easily between Member States.

Initially the Commission sought to solve this problem on the basis of harmonisation. It tried to obtain agreement from all the Member States on the minimum standard of education and training necessary for a qualification in that field. For each sector two directives were to be passed: one specifying the general level of the education and training necessary to pursue that activity or profession, and the second listing the qualifications and diplomas awarded in the various Member States which satisfied those conditions for recognition. These directives were mostly in the medical sphere – doctors, nurses, pharmacists and veterinarians – but they also covered activities

such as small craft, food and beverage, wholesale, intermediary, retail and coal-trade industries. To gain agreement on such directives proved a lengthy task and in some sectors, where national traditions varied widely, it proved impossible. The Architects Directive alone took 17 years to pass.

The harmonisation programme was accompanied by a number of tentative legislative attempts to liberalise the provision of professional services. One of these was the Lawyers Services Directive. This is a very short directive giving lawyers established in one Member State the right to provide legal services in other Member States. It has

been implemented in a very restrictive way by almost every State. For instance, Article 5 provides that Member States may require the visiting lawyer to be introduced to the court where services are to be provided and to work in conjunction with a lawyer practising within that court's jurisdiction. All Member States have exercised the 'working in conjunction' requirement.

In *Commission v Germany* (Case 427/85) [1988] ECR 1123, the German implementation of this provision was challenged by the Commission as being too restrictive on the visiting lawyer and too generous to the local lawyer. The court held that the

## Common Agricultural Policy conference

A major international conference on recent developments in the EU's Common Agricultural Policy will be held in Dublin Castle on Friday 27 June to Saturday 28 June. The conference has been organised by the Academy of European Law Trier in association with the Law Society, the Attorney General, and the Irish Centre of European Law at Trinity College, Dublin.

### Speakers scheduled for the first day include:

- Minister for Agriculture Ivan

Yates: *Decision-making in the CAP*

- Professor Alan Matthews, Economics Department, TCD: *Structures and instruments created by the CAP*
- James O'Reilly SC: *Milk quota*
- Jurgen Mensching, Head of Unit, DG IV (Competition): *Farming co-operatives and competition*
- Kieran Bradley, Senior Legal Secretary to Advocate General Nial Fennelly: *Genetically modified agricultural products.*

### Speakers scheduled for the second day include:

- Siegfried Reinke, Co-ordination Unit for Combating Fraud, European Commission: *Subsidy fraud*
- Anthony Whelan, Legal Secretary to Advocate General Nial Fennelly: *Impact of the Habitats Directive*
- Mary Minch, DG VI (Agriculture): *Impact of GATT and WTO*
- John Cooke, Judge at the Court of First Instance:

*Direct actions before the European Court of First Instance*

- Anthony M Collins, Barrister: *Enforcement of Community law rights.*

The conference costs £100 including lunch on Friday (£75 for academics and lawyers under the age of 30).

Further information and registration forms for the conference are available from T P Kennedy at the Law Society (tel: 01 671 0200).



requirement had been designed to enable the visiting lawyer to carry out his tasks on behalf of his client effectively. The court found incompatible with Article 5 the German requirements that the local lawyer had to be appointed as representative of the visiting lawyer's client and that the visiting lawyer could not present a case in court or make a prison visit without the presence of the local lawyer.

This directive was introduced into Irish law by the *European Communities (Freedom to Provide Services) (Lawyers) Regulations 1979* (SI 58 of 1979). The regulations require rights of audience before the Irish courts to be exercised in conjunction with an Irish solicitor or barrister. They also prohibit lawyers from other Member States from providing involvement in conveyancing or probate and administration work.

## **Mutual recognition of qualifications**

As progress on harmonisation had been so slow, in 1984 the Community decided on a new approach. The Commission decided to approach the problem not from the perspective of harmonisation but on the mutual recognition of qualifications. This new approach was not to apply to individual professions but to all areas of activity where a higher education diploma was required.

Directive 89/48 (1989) OJ L19/16, based on these principles, came into effect on 1 January 1991. It creates a 'general' system for 'mutual recognition' of higher education diplomas. Its basic thrust is that, if a national of a Member State wishes to pursue a regulated profession in any Member State, the competent authorities in that

State may not refuse permission on the grounds of inadequate qualifications if the person meets certain conditions. The directive applies only to regulated professional activities, though it is sufficient if the activity is regulated in only one of the Member States.

The directive applies to higher education diplomas awarded on

completion of professional education and training of at least three years' duration, or the equivalent period part time. Where the taking up and pursuit of a regulated profession is subject to the possession of a diploma in the host State, the competent authority of that State may not refuse to authorise a national of a Member State to take up and pursue that profession on

## **Diploma in applied European law**

This diploma is aimed at solicitors and other lawyers (apprentices, barristers and law clerks) with little or no knowledge of European law. The course will provide practical training in the basics of the subject and then lead on to more specialised areas. The course will run on Saturdays and is scheduled to start in January 1998. More details are available from T P Kennedy (tel: 01 6710200).

the same conditions as apply to its own nationals, provided the applicant holds a diploma required in another State for the pursuit of the profession in question, or has pursued that profession for at least two years in a State which does not regulate that profession (Article 3). Thus, all professionals whose qualifications are within its scope will be entitled to recognition of their qualifications within the other Member States.

The host State may also require an 'adaptation period' not exceeding three years where:

- Matters covered by the applicant's education and training differ substantially from those covered by those of the State, or
- The activities regulated in the host State are not regulated in the applicant's State of origin, or
- The profession regulated in the host State comprises activities which are not pursued in the State from which the applicant originates.

Instead of the adaptation period, the applicant may opt for an aptitude test. For professions whose practise requires precise knowledge of national law and in which giving advice on national law is an essential and constant aspect of that activity, a State may stipulate either an adaptation period or an aptitude test. This means that the various legal professions are entitled to insist on an aptitude test.

The legal professions throughout Europe have expressed a fondness for aptitude tests. These have proved to be very difficult. For instance, Germany requires lawyers to take three written examinations of five hours each on civil law, public or criminal law and one other paper from a choice provided. In addition, there is an oral examination comprising of a 50 minute presentation and a 40 minute discussion on professional conduct.

The Irish implementing measure was the *Solicitors Acts 1954*

and 1960 (*European Community Regulations 1991* (SI 85 of 1991)). These regulations allow for the admission of solicitors from Northern Ireland and England and Wales. All other EU lawyers are required to sit an aptitude test. This consists of five written papers and an oral examination in professional conduct. The written papers are in: 1) constitutional law and, at the option of the applicant, either criminal law or company law; 2) contract and tort; 3) land law and conveyancing; 4) probate and taxation; and 5) solicitors' accounts.

On foot of these regulations, large numbers of English and Northern Irish solicitors have qualified as Irish solicitors. The English and Northern Irish law societies introduced a similar requalification process for Irish solicitors and very large numbers have availed of it. Very few lawyers have qualified through taking the aptitude test: to date, two German lawyers and two Scots solicitors have qualified as Irish solicitors through passing this examination.

### Establishment Directive

To overcome these difficulties, a draft directive on establishment for lawyers was proposed by the CCBE (the representative body of European bar associations and law societies). It proved difficult for the CCBE to agree on a common proposed text. The proposed directive has been accepted by the Commission and passed by the European Parliament and is currently being discussed by the Council. The Council may propose amendments to the directive and these would have to be considered by the Parliament. Even if the Council favours the proposal in its current form, it is unlikely to be finally accepted for a number of years.

The proposed directive would entitle a lawyer to practise in another Member State under their home title for three years, so an Irish solicitor could set up a firm in Dusseldorf as long as he described himself as an Irish

solicitor. The visiting lawyer is required to register with the competent authority of the host State. The visiting lawyer is entitled to give advice on the law of his home State on European or international law and on the law of the host State. Conveyancing and probate work are excluded from the remit of the visiting lawyer in the United Kingdom and Ireland. The visiting lawyer is subject to the disciplinary rules for lawyers in that State and can be required to take out professional indemnity insurance or become a member of a professional guarantee fund.

If the visiting lawyer can then demonstrate competence in an area of the host State's law, he would automatically be entitled to apply for membership of the professional body of the host State. This demonstration of competence cannot involve any element of examination.

In the initial draft, the professional association in the host State was given very limited grounds on which it could refuse to admit the visiting lawyer. Some States are pressing for more explicit powers of refusal and this is the subject of further discussion.

## Conferences and seminars

### Queensland Environmental Law Association

**Topic:** *Negotiating the environmental Web*

**Date:** 14-17 May

**Venue:** Great Barrier Reef Resort, Cairns, Australia

**Contact:** Toni Slater (tel: 00 61 7 3832 4865)

### Academy of European Law

**Topic:** *A new EU block exemption regulation for franchise agreements?*

**Date:** 15 May

**Venue:** Dusseldorf, Germany

**Contact:** 00 49 651 147100

### International Bar Association

**Topic:** *Oil and gas in the next millennium*

**Date:** 19-20 May

**Venue:** Windsor, UK

**Contact:** 00 44 171 629 1206

**Topic:** *Seminar on international financial law*

**Date:** 22-24 May

**Venue:** Prague, Czech Republic

**Contact:** 00 44 171 629 1206

**Topic:** *Infrastructure projects*

**Date:** 26-28 May

**Venue:** Eilat, Israel

**Contact:** 00 44 171 629 1206

### Solicitors' European Group

**Topic:** *Latest developments in EU merger control*

**Date:** 20 May

**Venue:** Law Society of England and Wales, London, UK

**Contact:** Fiona Morris/Sarah Harden  
(tel: 00 44 171 320 5784)

## Recent developments

### COMPETITION

#### De minimis agreements

The Commission has recently published a draft notice on agreements of minor importance (1997 OJ 29/3). Under the previous notice, agreements involving less than 5% market share and a turnover of 330 million Ecu were regarded as having minimal impact and therefore did not fall foul of Article 85(1). These thresholds have been changed to 5% market share for horizontal agreements and 20% market share for vertical agreements. The turnover threshold has been removed. The notice does not apply where competition is restricted by the cumulative effect of parallel agreements.

#### State aid

The Commission recently decided that payments made to the Portuguese television channel RTP (Radiotevisão Portuguesa) by the Portuguese Government did not constitute State aid. The aid concerned was given to ensure coverage of the entire State, including Madeira and the Azores, the keeping of archives, broadcasting religious programmes and the financing of a public theatre. The Commission decided that financing these activities did not amount to State aid as it did not involve an advantage free of charge. In return for the funding, RTP was obliged to perform these non-competitive activities.

### EMPLOYMENT AND SOCIAL POLICY

#### Gender discrimination

In *Handels-og Kontorfunktionærernes forbund i Danmark, acting on behalf of Helle Elisabeth Larsson v Dansk Handel & Service, acting on behalf of Føtex Supermarked A/S* (Case 400/95), Advocate General Colomer proposed that the court should find a dismissal contrary to Directive 76/207 on equal treatment. The employee had been dismissed due to absences from work, in excess of the normal sick leave period, resulting from an illness which had appeared during maternity leave.

#### Free movement of workers

In *Commission v Belgium* (Case 344/95), the court held that a number of Belgian regulations were in breach of Article 48 of the treaty providing for free movement of workers. Belgian law provided that a non-national was obliged to leave Belgium after a period of three months if he had not found work. This rule was held to directly contravene Article 48. Belgian law also made obtaining a residence permit more onerous for a non-national. The court found that these rules

were in breach of Article 48 and Directive 68/360 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families.

#### Public sector exception to free movement of workers

The restrictive interpretation of the public services exception has recently been re-affirmed by the Court of Justice in three joined cases: *Commission v Grand Duchy of Luxembourg* (Case 473/93), *Commission v Kingdom of Belgium* (Case 173/94) and *Commission v Hellenic Republic* (Case 290/94). Luxembourg, Belgium and Greece had engaged in a blanket exclusion of non-nationals from jobs in such areas as health, transport, teaching, post and telecommunications and the distribution of water, gas and electricity. In Greece, the exclusion extended to membership of the Athens Opera and municipal and local orchestras. The court has held that these posts were too remote from the specific activities of the public service to avail of the Article 48(4) derogation. It therefore held that Luxembourg, Belgium and Greece had acted in breach of Article 48.

#### Transfer of undertakings

In *Aye Sützen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* (Case 13/95), the court ruled on 11 March that a woman engaged in cleaning operations and who is dismissed following the loss by her employer of a cleaning contract cannot necessarily claim to be an employee of the new company entrusted with that activity. The court held that Directive 77/187 concerning the transfer of undertakings ensures continuity of employment within an 'economic entity'. The loss of a service contract to a competitor does not, by itself, disclose the existence of a transfer within the meaning of the directive. The undertaking previously entrusted with the contract does not, on losing a customer, thereby cease fully to exist, and it cannot be considered that a business or part of a business belonging to it has been transferred to the new holder of the contract.

In *Pedro Burdalo Trevejo and Others v Fondo de Garantía Salarial* (Case 366/95), Advocate General Cosmas on 20 February proposed that the court should not give the benefit of the *Transfer of Undertakings Directive* to an employee where the transfer took place when the directive had not yet taken effect in the State concerned.

In *Jorn Ulstein and Per Otto Roiseng v Asbjørn Møller* (Case E-2/96), the EFTA court considered the factors which indicate whether there is a transfer with-

in the meaning of the directive. The court held that although the absence of a direct contractual relationship between the transferor and transferee did not exclude the directive's application, a mere succession of two contracts for the provision of the same or similar services would not, as a rule, be sufficient for there to be a transfer of an undertaking, business or part of a business. The decisive criterion was whether the business in question was transferred as a going concern with its own identity and whether it retained this identity after the transfer.

### ENVIRONMENTAL LAW

#### Landfill of waste

The Commission has brought out a draft proposal for a directive on the landfill of waste. This proposal is to ensure that landfill sites in the EU meet minimum requirements so as to ensure that waste is not disposed of in facilities with low standards of environmental protection. A landfill operator would be required to obtain a permit from a designated national authority. To be granted such a permit, the landfill would have to comply with the requirements set out – the proposal specifies the type of waste and the manner of its disposal. The directive would also lay down maximum limits on the amount of organic waste which can be disposed of in landfill sites.

#### Major accident hazards

A directive has been adopted on the control of major accidents involving dangerous substances. The directive broadens the scope of a previous directive so that the provisions apply to all establishments where dangerous substances are present in sufficiently large quantities to create a major accident hazard. All establishments containing large amounts of hazardous substances will be subject to strict safety procedures and will be required to produce a safety report at five-yearly intervals. Copies of the report will have to be sent to the competent authority in each Member State.

### GENERAL PRINCIPLES

#### Proportionality

In *Eckehard Pastoors, Trans-Cap GmbH v Belgian State* (Case 29/95), the court found on 23 January that the sums demanded by Belgium of non-resident lorry drivers charged with road traffic offences as security for costs and fines were disproportionate.

### LITIGATION

#### Cross-border service of documents

Member States have reached agreement on a convention to clarify the procedure for serving judicial and extra-judicial documents in other Member States in civil and commercial matters. A draft convention has been prepared and is currently with the European Parliament.

#### Brussels Convention

In *MSG v Les Garvières Rhénanes SARL* (Case 106/95), the court ruled on 20 February on the interpretation of Articles 5(1) and 17 of the convention. The case turned on a time charter for the hire of a vessel which had been concluded orally. The court held that the fact that one of the parties remained silent in the face of a commercial letter of confirmation from the other containing a pre-printed jurisdiction clause and repeatedly paid invoices containing a similar clause was deemed to constitute consent to the jurisdiction clause as this was consistent with a practice in the area of international trade in which the parties were operating and the parties ought to have been aware of that practice. The court also held that an oral agreement on the place of performance that is not designed to determine the place where the person liable is to perform his obligations but to establish that a particular court has jurisdiction is not governed by Article 5(1). It falls under Article 17 and will be valid only if the requirements of that article are complied with.

In *Francesco Benincasa v Dentalkit Srl* (Case 269/95), Advocate General Colomer proposed on 20 February that the parties to a franchise agreement concerning the opening of a commercial establishment could not be regarded as consumers within the meaning of Articles 13 and 14 of the convention. He also opined that a jurisdiction clause in a contract would give a court jurisdiction under Article 17, even where the action brought before the court seeks a declaration that the contact concerning that clause is invalid.

In *Petrus Wilhelmus Rutten v Cross Medical Ltd* (Case 838/95), the court considered the interpretation of Article 5(1). The court held that the 'place ... where the employee habitually carries out his work' where an employee carries out his work in more than one Member State is the place where the employee has established the effective centre of his working activities. In identifying that place in this case, the court took into account the fact that he spent most of his working time in one State in which he had an office where he organised his activities for his employer and to which he returned after each business trip to other Member States.





# ILT Digest

## of legislation and superior court decisions

Compiled by David P Boyle

### ADMINISTRATIVE

#### **National Cultural Institutions Bill, 1996**

This Bill has been amended in the Select Committee on Social Affairs. (See also (1996) 14 ILT 266.)

#### **Freedom of Information Bill, 1996**

This Bill has been amended in committee and passed by Seanad Éireann. (See also (1997) 15 ILT 41.)

#### **Public Office Bill, 1997**

This private member's Bill, as introduced by Trevor Sargent TD, aims to provide that members of either House of the Oireachtas may not hold or continue to hold membership of Údarás na Gaeltachta or any county council, county borough council, borough commission, urban district council or town commission. Under the Bill, a member of Údarás na Gaeltachta would not be entitled to hold or continue to hold membership of any county council, county borough council, borough commission, urban district council or town commission. The Bill also aims to make further provision in relation to membership of more than one county council, county borough council, borough commission, urban district council or town commission.

#### **Harbours Act, 1996 (Commencement) Order 1997 (SI No 95 of 1997)**

This order brought into operation

parts II, III and certain provisions of parts I, V and VI of the *Harbours Act, 1996* in relation to specified port companies, as well as certain provisions of part VI relating to harbour authorities and local authorities, with effect from 3 March 1997.

#### **Registration of Births Act, 1996 (Commencement) Order 1997 (SI No 45 of 1997)**

This order appoints 1 October 1997 as the day on which the *Registration of Births Act, 1996* shall come into operation.

### AGRICULTURE

#### **Diseases of Animals (Bovine Spongiform Encephalopathy) (Amendment) Order 1997 (SI No 79 of 1997)**

This order amends the *Diseases of Animals (Bovine Spongiform Encephalopathy) (No 2) Order 1996* by subjecting to licence the incorporation of poultry offal in any feeding stuff intended for feeding to animals or the holding of poultry offal or any feeding stuff in which poultry offal has been incorporated on the premises used for the manufacture of feeding stuff intended for feeding to animals. The order came into operation on 18 February 1997.

#### **Diseases of Animals (Bovine Spongiform**

#### **Encephalopathy) (Specified Risk Material) Order 1997 (SI No 80 of 1997)**

This order introduces controls on specified risk material, as defined in article 2 of the order, for the purposes for the control of BSE. The order came into operation on 21 February 1997.

### ALIENS

#### **European Communities (Right of Residence for Non-Economically Active Persons) Regulations 1997 (SI No 57 of 1997)**

These regulations govern the granting of leave to land and the application for and issuance of residence permits in relation to nationals of Member States (other than the United Kingdom) who are students, retired persons or other economically non-active persons and their accompanying dependants. The regulations also create offences and provide for related matters.

### ANIMAL WELFARE

#### **Wildlife Bill, 1997**

This private member's Bill, as introduced by Tony Gregory TD, aims to amend the *Wildlife Act, 1977* with a view to outlawing fox hunting and other field sports involving foxes.

### BANKING

#### **Central Bank Bill, 1996**

This Bill has been amended in the Select Committee on Finance and General Affairs and passed by Dáil Éireann. (See also (1996) 14 ILT 267.)

### COMPANY

#### **European Communities (Public Limited Companies Subsidiaries) Regulations 1997 (SI No 67 of 1997)**

These regulations give legal effect to Council Directive 92/101/EEC which amends the Second Directive (Formation and Capital of Public Limited Companies) to apply conditions on the purchase of shares in a plc by subsidiaries of that plc. Directive 92/101/EEC is already substantially implemented by part IX of the *Companies Act, 1990* and the present regulations propose to complete the implementation by extending the definition of subsidiary for the purposes of part IX of the *Companies Act, 1990* and applying additional requirements of the Directive to directly controlled subsidiaries. Additionally, the requirements on directors to disclose information about acquisition by a plc of its own shares are extended to acquisition by a subsidiary (as redefined) company of shares in its parent plc. The regulations came into operation on 1 March 1997.

## CRIMINAL

**Decommissioning Bill, 1996**

This Bill has been amended in the Select Committee on Legislation and Security and passed by both Houses of the Oireachtas. (See also (1997) 15 ILT 19.)

**Criminal Justice (Miscellaneous Provisions) Bill, 1996**

This Bill has been passed by both Houses of the Oireachtas. (See also (1996) 14 ILT 220.)

**Punishment of Aggravated Robbery Bill, 1997**

This private member's Bill, as introduced by John O'Donoghue TD, aims to create an offence of aggravated robbery which is defined as robbery committed by a person who has with him or her, at the time of commission of the offence, any syringe or needle made or adapted for use and intended to intimidate or cause injury to any person. A first conviction on indictment under the Bill would result in a sentence of between five years and life imprisonment. A second or subsequent conviction on indictment (for an offence committed subsequent to the date of a first conviction) under the Bill would result in a sentence of between seven years and life imprisonment. A third or subsequent conviction on indictment (for an offence committed subsequent to the date of a second conviction) under the Bill would result in a sentence of life imprisonment. Possession of any syringe

or needle made or adapted for use and intended to intimidate or cause injury to any person would also be an offence.

**Non-Fatal Offences Against the Person Bill, 1997**

This Bill, as presented by the Minister for Justice, seeks to repeal the greater part of the *Offences Against the Person Act 1861*, taking account of the report of the Law Reform Commission on that Act. The Bill aims to codify in statutory form and in modern language the offences of: assault; assault causing harm; causing serious harm; and threats to kill or cause serious injury; as well as a range of new offences relating to criminal conduct involving: syringes; coercion; harassment; demand for payment of a debt causing alarm; poisoning; endangerment; false imprisonment; and abduction of a child by parents or others.

**Criminal Evidence Act, 1992 (Sections 14 and 19) (Commencement) Order 1997 (SI No 66 of 1997)**

This order brings sections 14 and 19 (insofar as it relates to section 14) into operation with effect from 3 March 1997. Section 14 empowers a court, in physical or sexual abuse cases where evidence is being given through a television link by a person under 17, to appoint an intermediary to convey questions to the witness if the court is satisfied that it is in the interests of justice to do so, having regard to the age or mental condition of the witness. The intermediary may,

where necessary, convey the questions in a manner appropriate to the age and mental condition of the witness. Section 19 applies section 14 to persons aged over 17 with mental handicap.

**Criminal Justice Act, 1994 (Section 37(1)) Order 1997 (SI No 63 of 1997)**

This order specifies, in accordance with section 37(1) of the *Criminal Justice Act, 1994*, states which are declared to be a party to the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*. The order came into operation on 3 March 1997.

**Criminal Justice Act, 1984 (Electronic Recording of Interviews) Regulations 1997 (SI No 74 of 1997)**

These regulations provide for the electronic recording of interviews with suspects detained under: section 4 of the *Criminal Justice Act, 1994*; section 30 of the *Offences against the State Act, 1939*; section 2 of the *Criminal Justice (Drug Trafficking) Act, 1996*; or section 2 of that Act as modified by section 4(3) where the suspects are detained in Garda stations in which equipment has been installed for this purpose. The regulations came into operation on 1 March 1997.

## ELECTIONS

**European Parliament Elections Bill, 1996**

This Bill has been passed by both

Houses of the Oireachtas. (See also (1996) 14 ILT 200.)

## EDUCATION

**Universities Bill, 1996**

This Bill has been amended in the Select Committee on Social Affairs. (See also (1996) 14 ILT 220.)

**Youth Work Bill, 1997**

This Bill, as presented by Bernard Allen TD, Minister of State at the Department of Education, defines youth work as a programme of activity designed for the purpose of providing developmental and educational training so as to assist the personal and social development of young persons. The Bill aims to: define the functions of Education Boards regarding youth work; establish a Youth Work Committee in each Education Board; detail the policy, budget, research, monitoring and assessment of functions of the Minister for Education regarding youth work; establish a National Youth Work Advisory Committee; enable the allocation of grants for youth work; and establish a voluntary Youth Council in each of the functional areas to be prescribed by the Minister.

## EMPLOYMENT

**Employment Equality Bill, 1996**

This Bill has been passed by Dáil Éireann. (See also (1996) 14 ILT 200 and opposite at **Equality**.)

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### **Organisation of Working Time Bill, 1996**

This Bill has been amended in the Select Committee on Enterprise and Economic Strategy. (See also (1997) 15 ILT 20.)

## **ENVIRONMENT**

### **Litter Pollution Bill, 1996**

This Bill has been amended in the Select Committee on Finance and General Affairs. (See also (1997) 15 ILT 20.)

### **Freedom of Environmental Information Bill, 1997**

This private member's Bill, as introduced by Noel Dempsey TD, aims to enable members of the public to gain access, subject to certain limitations as outlined in sections 6 and 7 of the Bill, to information relating to the environment where such information is held by public authorities or any person under the control of a public authority and having public responsibilities for the environment. If passed, the Bill would establish an appeals officer to hear appeals arising out of the proposed legislation.

### **Shannon River Council Bill, 1997**

This Bill, as presented by Senators Brendan Daly and Michael O'Kennedy, aims to establish a body to be known as the Shannon River Council to co-ordinate the activities of authorities, agencies and bodies connected with the protection, conservation, management, water management and control of pollution in the Shannon River catchment.

### **European Communities (Natural Habitats) Regulations 1997 (SI No 94 of 1997)**

These regulations give effect to Council Directive 92/43/EEC on the conservation of natural habitats of wild fauna and flora. The Minister for Arts, Culture and the Gaeltacht is empowered to designate special areas of conservation and an obligation is placed on all

ministers, local authorities and other State bodies to have regard to the provisions of the regulations in carrying out their powers and functions under certain enactments under their control.

## **EQUALITY**

### **Equal Status Bill, 1997**

This Bill, as presented by the Minister for Equality and Law Reform, aims to outlaw discrimination in the non-employment areas of: education; provision of personal property and services; disposal of land; accommodation; and partnerships. The Bill specifies grounds on which discrimination would be prohibited: gender; marital status; family status; sexual orientation; religion; age; disability; race (including colour, nationality, and ethnic or national origin); and membership of the travelling community. Sexual and other harassment would be prohibited in the areas covered by the Bill and, if passed, it would introduce measures to deal with discrimination by registered clubs against members or applicants for membership. Claims of discrimination (other than those concerning registered clubs) would be dealt with by the Director of Equality Investigations from whom appeal would lie to the Circuit Court. The Equality Authority (known as the Employment Equality Agency until the passing and commencement of the *Employment Equality Bill, 1996* (see also (1996) 14 ILT 200 and above at **Employment**)) would be given an extended remit covering discrimination in both employment and non-employment areas. The Minister would also be empowered to make regulations concerning access to transport facilities for disabled persons.

## **FAMILY**

### **Occupational Pension Scheme (Family Law Act, 1995) Regulations 1997 (SI**



## No 64 of 1997)

The *Family Law Act, 1995* provides, in section 12, that the court may make a pension adjustment order on or following the granting of a decree of judicial separation. Section 5(4) of the *Pensions Act, 1990* (as inserted by section 4 of the *Pensions (Amendment) Act, 1996*) provides for regulations specifying guidelines for the purposes of section 12 of the 1995 Act. These regulations, provide, *inter alia*, for the manner in which a contingent benefit, a designated benefit, a residual benefit or a transfer amount payable on foot of a pension adjustment order are to be calculated, together with the manner of calculating the actuarial value referred to in section 12(10) and the amounts referred to in section 12 (25) of the 1995 Act. The regulations came into operation on 31 January 1997.

## FISHERIES

### Fisheries (Commissions) Bill, 1997

This Bill has been passed by both Houses of the Oireachtas.

## HEALTH AND SAFETY

### European Communities (Cosmetic Products) Regulations 1997 (SI No 87 of 1997)

These regulations update the law in relation to the manufacture, mar-

keting and sale of cosmetic products and consolidate into one set of regulations the laws in relation to cosmetic products. The regulations prohibit the placing on the market of cosmetic products which, under normal conditions of use, are liable to cause damage to human health. The presence in cosmetic products of certain listed substances is either prohibited absolutely or permitted subject to certain restrictions. Positive lists of colouring agents, anti-microbial preservatives and ultraviolet sun-screen filters are established which, subject to compliance with any prescribed restrictions, are permitted to be used. Labelling requirements are set out and, with effect from 1 March 1997, full ingredient labelling will be required for all cosmetic products placed on the market. The use of ingredients tested on animals after 1 January 1998 with a view to use in cosmetic products is prohibited, but this date may be extended depending on progress in the development of satisfactory alternative methods of testing. The regulations also lay down information which must be kept available to the control authorities by the manufacturers and initial importers of cosmetic products (including particulars relating to the composition, quality and safety of the products, as well as information on the claimed effects and undesirable effects together with an assessment on safety for human health). The regulations, in accordance with the provisions of article 3, come into operation on various dates between 1 March 1997 and 1 July 1998.

## HEALTH SERVICES

### Health (Provision of Information) Bill, 1997

This Bill, as presented by Senator Maurice Manning, aims to enable the Minister for Health to proceed with the establishment of population registers for national programmes of screening for breast and cervical cancer. The Bill would also allow the National Cancer Registry Board to continue collecting data relating to cases of all forms of cancer. This proposed legislation is required so that the proposed screening programmes comply with the *Data Protection Act, 1988*.

## INTERNATIONAL AID

### International Development Association (Amendment) Bill, 1997

The International Development Association is an arm of the World Bank which provides loans to the world's poorest developing countries on highly concessionary terms. The association was founded in 1960 and the funds for such loans are obtained principally by periodic 'replenishments' which are, in effect, grants provided by the association's richer member countries. This Bill, as presented by the Minister for Finance, aims to enable the State to make a total payment of £13,000,000 to the Eleventh Replenishment of the International Development Association.

## PLANNING AND DEVELOPMENT


### Dublin Docklands Development Authority Bill, 1996

This Bill has been amended in the Select Committee on Finance and General Affairs and passed by Dáil Éireann. (See also (1997) 15 ILT 21.)

### Local Government (Mandatory Listing of Historic Buildings and Protection of Historic Interiors) Bill, 1997

This private member's Bill, as introduced by Eoin Ryan TD and Síle de Valera TD, aims to oblige planning authorities to compile lists of buildings within their areas which are of special architectural interest and to designate conservation areas within which any works involving the treatment of the interior or exterior of a building (whether listed or not) shall not be exempted development. A duty would be imposed on the owner or occupier of any building which is either listed or is in a conservation area to ensure that the building does not become endangered. The Bill would amend current planning legislation by providing extra protection for the interior of a listed building. The Bill, if passed, would create offences carrying a maximum penalty on conviction on indictment of a fine of up to £100,000 (together with a further fine of £5,000 for each day thereafter that the offence is not remedied) and/or a term of imprisonment not exceeding three years.

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### **Local Government (Planning and Development) Regulations 1997 (SI No 78 of 1997)**

These regulations amend the second schedule to the *Local Government (Planning and Development) Regulations 1994* which prescribe development which is exempted development for the purposes of the *Local Government (Planning and Development) Act, 1963*. The present regulations provide that, subject to certain limitations, the addition of antennae for mobile telephony to an existing radio mast is exempted development. The replacement of an existing radio mast is also exempted development provided, *inter alia*, that the replacement does not exceed the height of the original mast. The regulations came into operation on 13 February 1997.

## **PRACTICE AND PROCEDURE**

### **Courts Bill, 1997**

This Bill, as presented by Senator Maurice Manning, aims to increase the statutory maximum number of ordinary judges of the High Court from 19 to 22. The explanatory memorandum notes that the annual salary cost of a judge of the High Court and support staff is £131,600.

### **Rules of the Superior Courts (No 1) of 1997 (SI No 52 of 1997)**

These rules make provision for an addition to O 22 of the *Rules of the Superior Courts 1986* of a new sub-rule 10(10) to provide for applications for approval of awards proposed to be made by minors to any tribunal.

### **Rules of the Circuit Court (No 1) of 1997 (SI No 84 of 1997)**

These rules provide for procedures, and set out forms, in relation to the making of applications to the Circuit Court under the *Judicial Separation and Family Law*

*Reform Act, 1989*, the *Family Law Act, 1995*, and the *Family Law (Divorce) Act, 1996*. The rules also specify the forms to be used for the purposes of certificates required by sections 5 and 6 of the *Judicial Separation and Family Law Reform Act, 1989* and sections 6 and 7 of the *Family Law (Divorce) Act, 1996*. They revoke and replace the *Rules of the Circuit Court (No 1) of 1989* and the *Rules of the Circuit Court (No 1) of 1994*. The present rules came into operation on 27 February 1997.

### **Solicitors (Professional Practice, Conduct and Discipline) Regulations 1997 (SI No 85 of 1997)**

These regulations provide that a solicitor may not act for both vendor and purchaser in the sale and purchase of a new residential unit where the vendor is the builder, or associated with the builder, of the unit. This prohibition will not apply where the vendor and purchaser are associated companies or where the vendor is related to the purchaser by blood, adoption or marriage. The regulations came into operation on 1 April 1997 but will not affect conveyancing transactions where the solicitor was engaged to act before that date.

## **PRISONS**

### **Prisons Bill, 1997**

This private member's Bill, as presented by Liz O'Donnell TD, aims to amend the law relating to the management and regulation of prisons and places of detention and custody. The functions in respect of the maintenance, management and control of prisons and custodial accommodation (heretofore exercised by the Minister for Justice) would be transferred to the Prison Service – a separate executive body to be established under the proposed legislation. The Bill would also, *inter alia*, provide for the appointment of an Inspector of Prisons and amendments to the law relating to temporary release.

## **PUBLIC SERVICE**

### **Public Service Management Bill, 1997**

This Bill, as presented by the Minister for Finance, seeks to introduce the statutory basis for a new management structure for the civil service. The intention of these reforms is to increase management effectiveness, transparency of departmental operation and accountability of civil servants. Under this structure, specified tasks would be assigned to secretaries general (currently departmental secretaries) who would also have managerial responsibility for their departments. Each secretary general would prepare a strategy statement specifying, *inter alia*, the objectives, 'outputs' and strategies of the department. Once approved by the relevant Minister, these statements would be made available to the public within a specified period. Arrangements would be put in place for the formal assignment by secretaries general of specific tasks to other officers or grades of officers within a department to ensure that staff at various levels have a clear idea of what is expected of them. The appointment of so-called 'special advisors' to Ministers would be placed on a statutory footing and the Bill would, if passed, allow certain public officers to become corporations sole (which, at present, only applies to Ministers).

## **SOCIAL WELFARE**

### **Social Welfare Bill, 1997**

This Bill, as presented by the Minister for Social Welfare, aims to introduce a number of changes in terms of rates and types of scheme under the social welfare code as well as providing, *inter alia*, for changes in the functions of the National Social Service Board.

## **TELECOMMUNICATIONS**

### **Telecommunications (Miscellaneous Provisions) Act,**

### **1996 (Commencement) Order 1997 (SI No 72 of 1997)**

This order brings section 14(2) of the *Telecommunications (Miscellaneous Provisions) Act, 1996* into operation with effect from 7 February 1997. The section repeals certain provisions of the *Postal and Telecommunications Services Act, 1983* relating to the corporate governance of Telecom Éireann.

### **European Communities (Telecommunications Terminal Equipment) Regulations 1997 (SI No 73 of 1997)**

These regulations give effect to Council Directive 91/263/EEC, as amended by Council Directive 93/68/EEC, on the approximation of the laws of EU Member States concerning telecommunications terminal equipment, including mutual recognition of their conformity.

## **TRANSPORT**

### **Merchant Shipping (Commissioners of Irish Lights) Bill, 1997**

This Bill arises out of the decision of the High Court in *Patrick Keane and Anor v An Bord Pleanála, the Commissioners of Irish Lights and Ors* (a decision of Murphy J, 4 October 1995, upheld by the Supreme Court on 18 July 1996) to the effect that the powers of the Commissioners of Irish Lights under the *Merchant Shipping Act 1894* could not be interpreted to include the provision of radio-based aids to maritime navigation which were unknown at the time of enactment. The Bill, as presented by the Minister for the Marine and passed by Dáil Éireann, aims to empower the commissioners to continue to provide such modern technological aids in the interests of maritime safety and also to make further provisions in relation to the functions of the commissioners. The Bill, where appropriate, would also give retrospective effect to these powers.

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# Continuing legal education

## Essential pension planning: tips and traps

Venue: **Jury's Hotel, Dublin**  
Date: **Wednesday 21 May**

Time: **5-7pm**  
Fee: **£35 per person**

**M**ost solicitors do not plan for retirement until it is too late! The object of this seminar is to equip you with the awareness and knowledge to plan your financial future. The main focus of this seminar will be on the planning of a pension from the perspective of you, the consumer. The need to take an active role in your pension planning, and not merely to rely on your broker or insurance company will be highlighted. Awareness about financial issues has been heightened in recent years and now more and

more people are no longer prepared to accept products offered to them without closer scrutiny.

Among the questions to be addressed at the seminar are the following:

- Does the Pensions Act, 1990 affect pension planning?
- What is the legal structure of pensions?
- What are the tax advantages in taking out a pension?
- What criteria apply in choosing your pension investment?
- How will you ensure that your financial position is secure in

the event of premature retirement due to ill health or redundancy?

- What is the role of the independent adviser and what are the advantages of fee-based advisers over those on a commission basis?
- What options are available if you are unhappy with the way your pension is being managed or its performance?
- Why is it important not only to compare the performance level of pensions but also the underlying cost of one product against another?

### Consultants:

**Jill Kerby**, *Family Money Correspondent, The Irish Times*

**Kevin Finnucane**, *Solicitor, Director and Legal Adviser, Coyle Hamilton Ltd and Chairman, Association of Pension Lawyers in Ireland*

**Charles Meredith**, *Solicitor, Retired Senior Partner, McMahon & Tweedy, Solicitors, Dublin*

**Jim Cotter**, *Former President, Irish Brokers Association, Growth Investments Limited, Dublin*

## The essentials of personnel management

Venue: **Jury's Hotel, Dublin**  
Date: **Wednesday 28 May**

Time: **2-6pm**  
Fee: **£55 per person**

**T**he object of this seminar is to provide practitioners with an insight into the core skills of personnel management. The course will assist practitioners in developing a positive personnel policy in line with the needs of their practices. The format of the seminar will include lectures and case studies.

The seminar will focus on the following issues:

- Human resource objectives and strategies
- Recruitment and selection of staff
- How to motivate for improved performance and to motivate staff to higher levels of responsibility
- Performance management and appraisal
- Delegating work and responsibility

- How to understand, avoid and resolve conflict
- How to promote positive employee relations.

**The course leader, Mary Hanson**, is a training consultant who specialises in selection interviewing, performance appraisal and the development of personnel policies for leading business organisations and professional bodies. She has run a number of training pro-

grammes for the IMI. She has also run a series of management development programmes for the European Commission. She previously held posts both as a training specialist and Personnel Manager with the Institute of Public Administration and was Employee Development Manager with Bank of Ireland Lifetime Assurance.

*Places available on this course are strictly limited.*



# Effective time management

Venue: **Jury's Hotel, Dublin**  
Date: **Wednesday 4 June**

Time: **2-5.30pm**  
Fee: **£55 per person**

The object of this seminar is to assist you to use your time more effectively as a resource. It will enable you to acquire the necessary skills to minimise time traps with a view to maximising your professional effectiveness. It will be of assistance to all busy practitioners.

Among the issues to be addressed at the seminar are the following:

- The key to managing time
- Optimum scheduling of your day and week
- How to establish and work to the longer term priorities
- How to balance time between competing priorities
- The key elements of effective delegation
- Dealing with interruptions
- How to minimise time wasters
- Strategic planning/action plan-

ning for improved effectiveness. The course leader, **Dr Tom McConalogue**, is a management development specialist and organisational consultant. He specialises in developing interpersonal skills including communications, delegation, motivation and time management. He also works as a process consultant with organisations managing their own strategic or cultural changes. He is a member of the fac-

ulty of the IMI where he runs management development programmes. He also works as a consultant in a variety of public, private and non-profit organisations. He has a wide experience of working in different cultures, including overseas in the USA, Africa and the Middle East, most recently in Cyprus, Iran and Thailand.

*Places on this course are strictly limited.*

## Stress management: tips and traps

Venue: **Blackhall Place**  
Date: **Tuesday 10 June**

Time: **5-7pm**  
Fee: **£35 per person**

Stress is a widely used but little understood term. In essence, it occurs when there is a mismatch between a person's interpretation of the demands being placed on him or her and the ability to cope with those demands. Thus, stress is not tied to a situation but to an individual's interpretation of a situation.

The social system of the western world is founded largely on the work ethic. Since most of us spend at least a third of our lives in some sort of job, work is a major aspect of our lives.

The nature of a solicitor's practice which encompasses high work load, the constant necessity to meet deadlines, financial worries,

the need to work long hours, relationships with clients, colleagues and staff and administrative duties would indicate that stress in the profession is a relatively commonplace phenomenon. Indeed, it has now been clearly established that stress is the trigger mechanism for many illnesses.

The object of this seminar is to enable practitioners to identify the causes, signs and effects of disabling stress. It will also seek to identify methods of managing and preventing organisational stress.

The seminar will focus on the following issues:

- The main sources of stress in the work place

- The emotional, psychological, physical and behavioural effects of stress
- Methods of minimising or eliminating stress and its effects
- Dealing with overload
- The major techniques for changing sources of stress:
  - time management
  - delegation
  - prioritisation
  - conflict management
- Methods of increasing your tolerance of stress
- How to design an action plan to replace stress reactions by a more positive response.

The course leader, **Professor Ciaran A O'Boyle**, is Professor of Psychology in the Medical School of the Royal College of Surgeons in Ireland. He is consultant psychologist to Aer Lingus, to the PARC Group, to the Irish Defence Forces and to the International Air Transport Association. He is a management training consultant for the WHO. His major training specialisations are in applied psychology and stress management. He has run stress management courses for leading business organisations and professional bodies. He has recently lectured on this subject to members of the Law Society of Northern Ireland.

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# Annual conference Barcelona '97



Ward McEllin, John Shaw and Law Society past president Adrian Bourke at the Fiesta de Torre del Lleons



Cork contingent: President Frank Daly with Mary McSweeney and Etta Barrett. Also pictured are Richard Martin, Justin Condon, Terry English, John Dwyer, Daphne Barr and Jerome O'Sullivan



Elizabeth Bourke, Ruth Bourke, Mo Comyn, Nicholas Comyn and Ann McEllin



Past president Andrew F Smyth (centre) with Pat Dunleavy, Louise Dunleavy, Gillian Rankin and Alastair Rankin, President, Law Society of Northern Ireland



Frank Daly with his two new friends Mañuel and José



Maura O'Byrne, John Jermy, Walter O'Byrne and Pat Daly





At the launch of the *New Horizons* programme in Blackhall Place were Rachel Curran, Geraldine Hynes, Law Society Careers Adviser, Philippa Howley, John Costello and Raymonde Kelly. (See also page 7)



Pictured at the presentation ceremony for the Diploma in Legal French: Deirdre Fox, Law School, Jean Solito and Luke Brockie from the Alliance Française, Education Committee chairman Pat O'Connor, Law Society President Frank Daly and Tiddgh O'Sullivan, President, Alliance Française. (See also page 9)



The Corporate and Public Services Solicitors Association held its inaugural conference in Dublin's National Gallery last month. Pictured are the association's council members: (front row) Maria Browne, Caroline Conroy, Anne Counihan, President, Patricia O'Shea, Ethna McDonald and Orla O'Neill; (back row) Enda Toomey, Secretary, John McDaid, Barry Donoghue, Martin Sills, Treasurer, and David O'Hagan



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# Book reviews

## Anti-discrimination law in Britain

Colin Bourn and John Whitmore

Sweet and Maxwell Ltd (1996), Cheriton House, North Way, Andover, Hants SP10 5BE, England. ISBN: 0 421 564 202.

Major changes to Irish anti-discrimination law are due shortly with the enactment of the *Employment Equality Bill, 1996* and the *Equal Status Bill, 1997*. Our new legislation will prohibit discrimination on grounds of gender, marital and family status, sexual orientation, religion, age, disability, race and for being a member of the traveling community. Arising from our membership of the European Community, we have had employment equality legislation prohibiting discrimination on grounds of sex (and marital status).

This book is timely for an Irish audience as Great Britain (including Northern Ireland) has had anti-discrimination law in respect not only of gender and marital status but also on grounds of race and disability and, of course, religion with the fair employment legislation in Northern Ireland. This book will provide a very useful basic text to help us in the early stages of our new legislation.

The book is divided into ten chapters, starting with a very useful introduction to the legal framework of equality law. This is a very useful and interesting overview of equality law in Great Britain; for example, it has an excellent section on the EC Directives on equal pay and equal treatment with some of the relevant case law. The chapter then finishes on perhaps a more sombre note in stating that Britain was not a signatory to the Social Policy Agreement of the Maastricht Treaty, but the authors point out that this does not put the clock back or undermine the existing provisions of the equality directives.

Chapter 2 is a very useful chapter on sex and race discrimination. It looks at recent case law from the European Court of Justice, for example, *Webb* (pregnancy and women working on fixed-term contracts), *Gillespie* (maternity pay), *Dekker* (refusing a pregnant woman employment), and *Enderby* (indirect pay discrimination). It also sets out the basics of handling discrimination cases based on grounds of an individual's 'national origin' and includes a full exposition of the leading cases of *Mandla v Dowell Lee* (House of Lords) and *CRE v Dutton* (Court of Appeal) on establishing whether an ethnic group exists or not. This text should assist in understanding the application of the wider grounds

of discrimination as provided in our new legislation.

A full chapter is devoted to disability discrimination which is also good background reading in preparation for our own legislation. Chapter 8 considers discrimination outside employment. This is useful within the context of our *Equal Status Bill* as Great Britain has had similar legislation for a number of years so there is a good introduction to the case law associated with such legislation.

For the future, there is an interesting section on monitoring of employment data, consideration of quotas, 'target-setting', positive action and contract compliance – a term originating from the United States which is commonly used to describe procedures used

by governmental agencies to ensure that companies to which they give contracts to supply goods and services are pursuing equal opportunities as employers.

Of course, this book like many other British employment textbooks, uses shorthand references to their legislation, such as SDA, RRA, EOC, CRE, DDA, which to an Irish reader is confusing.

This book is recommended as a good introduction to the wider grounds of statutory discrimination in employment and the provision of services. Lawyers interested in anti-discrimination and social law should find it not only useful but interesting too. **G**

*Frances Meenan is a Dublin-based solicitor.*

## Divorce in Ireland: the options, the issues, the law

Kieron Wood and Paul O'Shea

The O'Brien Press (1997) 20 Victoria Road, Dublin 6. ISBN: 0-86278-534-3. Price £8.99 paperback

Neither a sexual revolution nor enlightened legislation can eliminate the taboo of divorce. So wrote Alvarez in *Life after marriage* (1981). Divorce, noted the author, is like a ghost, chilly and half-perceived, even in those to whom religion no longer means much and society does not accuse. Pride, or the superego, takes over where the Church and community leave off.

Kieron Wood, barrister, well-known to readers as the former religious affairs correspondent and, subsequently, legal correspondent for RTE and Paul O'Shea, solicitor, who has a particular interest in family law, deliver to readers in the words of

Mrs Justice Catherine McGuinness, who wrote the foreword, 'a wide ranging summary of remedies available to those suffering from the tragedy of marriage breakdown'.

In a short note here, one can only refer briefly to certain features of the book. Separate chapters consider civil nullity, judicial separation, divorce, the family home, pensions and tax, as well as other subjects. There is also a separate section providing a synopsis of the *Family Law (Divorce) Act, 1996*.

An interesting feature of the book is the compilation of what may be termed sample 'precedents'. The book contains a sample separation agreement, civil

nullity petition, judicial separation application, affidavit of means and an affidavit of discovery. There is also glossary of legal terms and a list of useful addresses.

Kieron Wood and Paul O'Shea have written a book that may be read with profit by both lawyers and lay persons. It does not purport to be an exhaustive legal textbook but an 'at-a-glance' guide, presenting a clear and practical explanation and a rich source of information on an important area of the law that will impinge directly or indirectly on the lives of many of us. **G**

*Dr Eamonn Hall is Chief Legal Officer of Telecom Éireann plc.*

## Gale on Easements

Editors: Jonathan Gaunt QC and Paul Morgan QC

Sweet & Maxwell Limited (1997), Cheriton House, North Way, Andover, Hants SP10 5BE, England. Price: stg £125

**G**ale on Easements was first published in 1839, prompted partially by the passing of the *Prescription Act 1832*. Even by 1839, this terse but awkward piece of legislation had engendered at least as much 'doubt and confusion' as it had purported to dispel. Gale rued the comparative dearth of decided case law on easements in his attempt to distil the subject in a book. Nowadays, there is no shortage of case law. The difficulties begotten by the *Prescription Act*, however, remain.

This is the first edition of *Gale* in 11 years. In broad terms it follows a format similar to previous editions.

Editors Gaunt and Morgan, themselves practising senior counsel, acknowledge the potential shortcomings of a text, however erudite, written in the

leisurely style of 150 years ago for practitioners of law in the busy and urgent modern world. In deference to this, they have introduced numbered section headings which are summarised at the start of each chapter. The table of cases alludes not to pages but to these paragraph numberings.

Perhaps it is unavoidable, in preparing a modern edition of an historic reference work after many previous editions, that editors will produce more an accumulation than a synopsis. Notwithstanding their tip of the cap to the exigencies of fraught modern practitioners, editors Gaunt and Morgan acknowledge having 'come greatly to respect the impeccable summaries and informed examination of the decided cases' and their manner of proceeding demonstrates this. Sometimes one encounters the

'and then there was ...' style of approach, notably in the chapter on rights of way. At 623 pages (including all references), and costing £125, the 16th edition of *Gale on Easements* is a weighty proposition.

There is much to get through, but this edition is well presented, capably indexed and rewards the attention it demands.

Irish readers should be circumspect. Little, for instance, is to be garnered of relevance to an Irish practitioner from the chapter on party walls and access to neighbouring land.

Also, primarily on account of the preponderance of leasehold titles in this jurisdiction, and in part as a result of the delay in enacting the *Prescription Act, 1832* in Ireland until 1858, in certain marked regards Irish law has followed its own course. In par-

ticular, the decision of the English Court of Exchequer in *Bright v Walker* (1834) that a title claimed under the *Prescription Act*, in order to be effective, must bind the fee simple, has never rested easily in Irish law. This issue was explored by the Irish courts in *Beggan v McDonald* (1877). The two jurisdictions also notably differ, in decided cases, on whether the tenants of a common landlord can claim prescriptive rights over the property of each other.

In summary, this is a valuable addition to the literature of property law, but should be studied carefully in conjunction with the relevant chapters from Irish property law textbooks. **G**

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*Albert Power is Director of Education and Principal of the Law Society's law School.*



## LOST LAND CERTIFICATES

### Registration of Title Act, 1964

An application has been received from the registered owners mentioned in the schedule hereto for the issue of a land certificate as stated to have been lost or inadvertently destroyed. A new certificate will be issued unless notification is received in the Registry within 28 days from the date of publication of this notice that the original certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the certificate is being held.

(Register of Titles), Central Office,  
Land Registry, Chancery Street,  
Dublin

(Published 2 May 1997)

**Regd owner:** Cornelus Doherty;  
Folio: 2870; Land: Tullintowell;  
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**Regd owner:** Denis K O'Brien and  
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**Regd owner:** John Butler (deceased); Folio: 4810R; Land Prop 1 - Cloniffeen, Prop 2 - Cloniffeen; Area: Prop 1 - 0a 1r 32p, Prop 2 - 1a 2r 20p, Co Kings  
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## WILLS

**Ryan, Richard Fr**, deceased, late of Garranbehy, Rosbercon, New Ross, Co Wexford. Would any person having knowledge of a will executed by the above named deceased who died on 7 September 1983, please contact James P Coghlan & Company, Solicitors, New Ross, Co Wexford, tel: 051 421301, fax: 051 422793

**Walsh, Thomas**, deceased, late of Listerlin, Tullogher, Co Kilkenny. Would any person having knowledge of a will executed by the above named deceased who died on 15 August 1980 please contact James P Coghlan & Company, Solicitors, New Ross, Co Wexford, tel: 051 421301, fax: 051 422793

**Smyth (Smith), Thomas**, deceased, late of 5 Commons East, Drynam Road, Swords, Co Dublin. Would any person having knowledge of a will executed by the above named deceased who died on 26 August 1996, please contact Francis Fitzpatrick & Company, Solicitors, 11 Upper Mount Street, Dublin 2, tel: 6613657, fax: 6765434

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**Egan, Thomas**, deceased, late of 5 West View, Corrduff, Blanchardstown, Dublin 15 and formerly of 139 Phibsboro Road, Dublin and also formerly of Lorcan Road, Santry, Dublin. Would any person having knowledge of a will executed by the above named deceased who died on 31 August 1996, please contact Messrs Fair & Murtagh, Solicitors, Main Street, Moate, Co Westmeath, tel: 0902 81120, fax: 0902 81749

**McCarthy, George**, deceased, late of 64 All Saints Road, Dublin 5. Would any person having knowledge of a will, including a will dated 29 April 1990, executed by the above named deceased who died on 11 February 1997, please contact Baynes & Company, Solicitors, 4 Lombard Street East, Westland Row, Dublin 2, tel: 6712384, fax: 6712881

**McLoughlin, Thomas**, deceased, late of 8 Bulfin Gardens, Kilmainham, Dublin 8. Would any person having knowledge of a will executed by the above named deceased who died on 6 March 1996, please contact Sheil, Solicitors, 36 Charles Street West, Dublin 7, tel: 6715577, fax: 8725071

**Carey, Anthony** (otherwise Tony Carey), deceased, late of Sunnyside, Kilkullen, Curragh, County Kildare

(otherwise Ballysax Hill, Curragh, County Kildare). Would any person having knowledge of a will executed by the above named deceased who died on 14 March 1997, please contact Reidy Stafford, Solicitors, Newbridge, Co Kildare, tel: 045 432188, fax: 045 433019 (ref. TJS)

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