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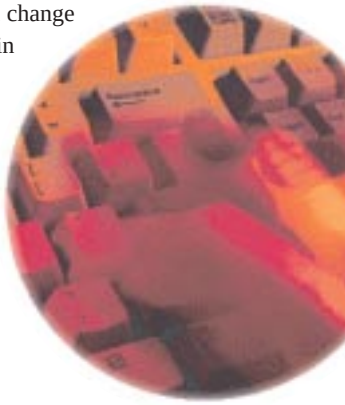

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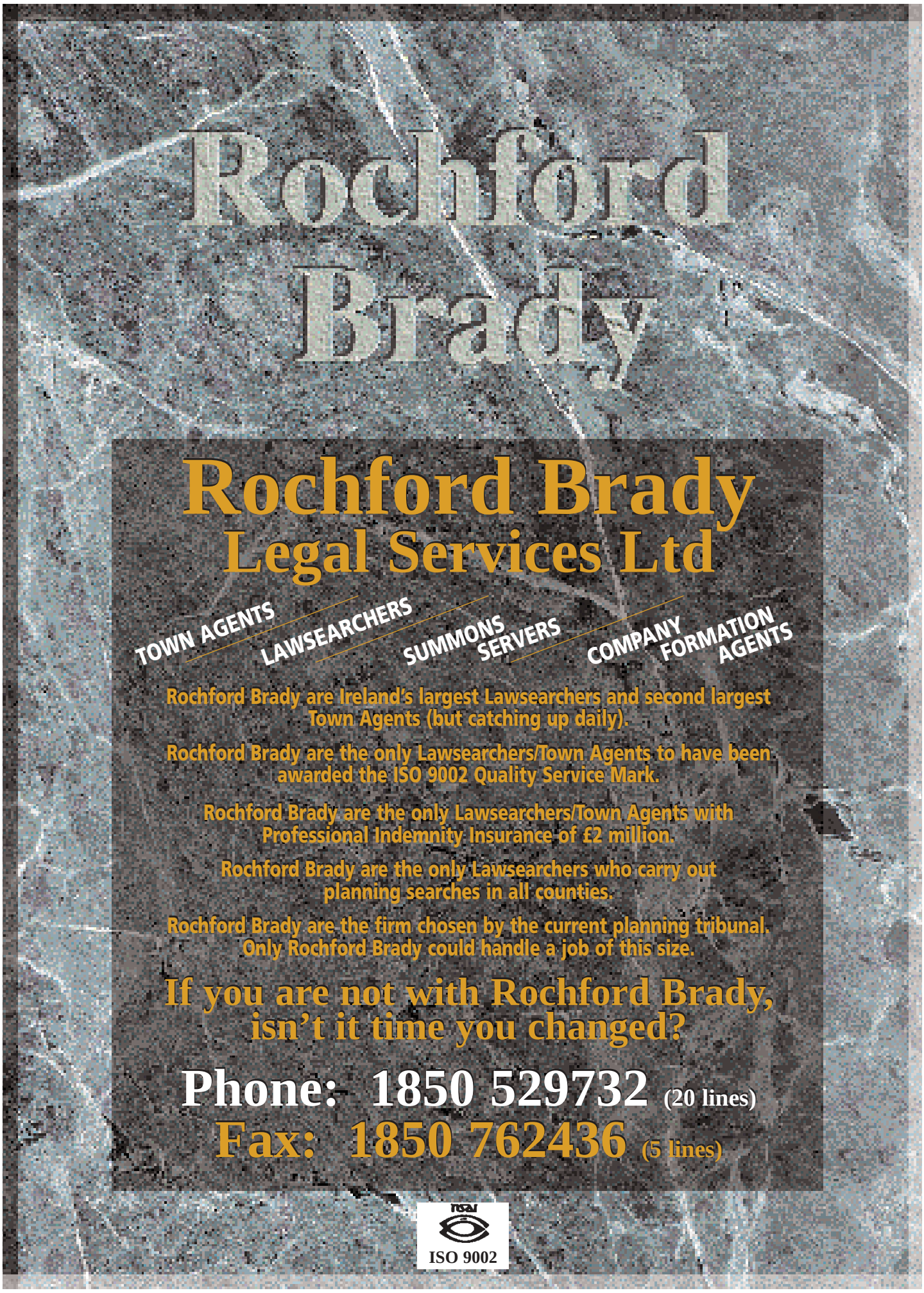

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Financial services and the legal profession

As you'll see from the report on page 9 of this month's issue, on 11 March I welcomed large numbers to the *New Horizons* business breakfast hosted by the Law Society and sponsored by Price Waterhouse. In my introduction of the guest speaker, Michael Buckley, Managing Director of AIB Capital Markets, I indicated that the success of the financial services sector in Ireland over the last ten years had been truly remarkable. I pointed out that it had been created by the vision and tenacity of a few and that it was the collective challenge to all of us to ensure its continued success in entrepreneurial mode, unburdened by undue bureaucracy.

I was proud to say then, and to repeat now, that the members of our profession have played their part in an active, constructive and concrete way in building and creating this success. As President of your society, I acknowledge and pay tribute to the role of our members who have participated in this great accomplishment of our times.

Michael Buckley, in his speech, praised the solicitors' profession for its great role in the creation of that enormous success, the International Financial Services Centre. He called on our profession to now play a role in its development over the next ten years, and I am glad to report that the Council has agreed with my proposal to appoint a task force to review this area, to liaise with the Government committees and others, and to consider and work positively towards ensuring that the next decade will be just as successful as the past ten years.

National Crime Forum

I congratulate our colleague, Professor Bryan McMahon, on taking the chair of this important initiative of the Minister for Justice. I wish him well on all our behalves in his endeavours. Your society has committed itself to supporting this initiative, and James MacGuill is a member of the forum. The Criminal Law Committee is presently working on a written submission to the forum on behalf of the profession.

Recently there has been a certain amount of criticism of people who have reduced their tax rates by investing in approved investments which generate tax relief. I need hardly remind the critics that many of the large number of cranes that are visible from Blackhall Place are a result of those tax incentives, which have also contributed to the creation of what has become known as the Celtic Tiger.

It is unfair to criticise those who have legitimately invested in investments which generate tax relief. It is unfortunate that many of the developments in this area which were financed by investors who put some of their disposal income at risk and were rewarded with a tax saving should now be classed as tax dodgers. If the reliefs need to be revisited, then by all means the reliefs should be revisited – but those that have legitimately taken advantage of the reliefs offered should not be criticised for doing so.

Annual conference

Due to the unprecedented number of colleagues who wished to attend our conference in Florence, the organising committee, chaired by Gerry Griffin, and I are very upset at our inability to accommodate all our colleagues. We have endeavoured to do as much as possible. I look forward to welcoming all those travelling to Florence. See you at the Piazza Del Duomo.

Mr Justice Brian Walsh

Finally, during the last month the death occurred of Mr Justice Brian Walsh. He was a beacon in the Irish legal profession and helped in particular to develop the people's rights under the Constitution. The same words used long ago by the *Times* in an obituary of unparallelled eulogy, referring to the passing of Christopher Palles, the Lord Chief Baron of the Court of the Exchequer in Ireland, appear entirely appropriate: 'A long, eminent and honourable life, devoted to the betterment of social institutions and to elucidating and clarifying our legal system, has been closed'.

Laurence K Shields
President

Oliver Wendell Holmes and a judicial affair

To some, this piece may appear sensational. But there is a serious issue at stake. Supreme Court Justice, Oliver Wendell Holmes, is revered as perhaps the best-rounded mind and personality in American life. Soldier, lawyer, judge and philosopher, he has exerted more influence than any other judge in the common-law world. In fact, Holmes towers over all other American judges and most American historical personages in the context of the scholarly and popular literature that he has engendered.

Married and childless, Holmes was among the handsomest of men and enjoyed the company of many lady admirers. The issue is whether Holmes's private life is relevant to his public life and reputation. Is any judge's private life, is any politician's private life, relevant to the public performance of their duty?

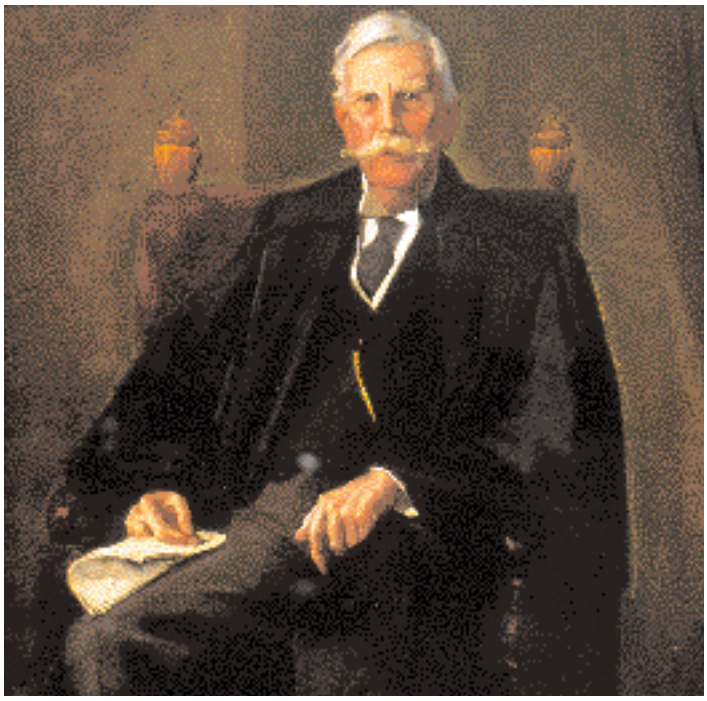
Born in 1841, wounded in the American civil war, a classical scholar, practising lawyer, professor at Harvard Law School, appointed to the Massachusetts Supreme Court at the age of 41, Holmes was elevated to the US Supreme Court at the age of 61.

With his zest for life hardly diminished, he retired from the Supreme Court in 1932 in his 91st year. He felt like a schoolboy, without the obligation of attending school. But he knew that the end would come and waited serenely for the final call. It came on 6 March 1935. Had he lived another two days, he would have been 94.

Extra-marital romance

Holmes's extra-marital romantic life had not been considered in the early works on the judge. Daniel J Kornstein noted that Holmes had been portrayed as an ascetic, almost mythical paragon, with a perfect untroubled 60-year marriage. Now we know that Holmes, 'like Zeus, occasionally came down from Olympus for passion', Kornstein observed (NYSBJ, 1992).

John S Monagan, whose 1988 book on Holmes opened a vista in Holmes scholarship, noted that Holmes's 'relationship with women was a central element in his life'. He sought association with a variety of sympathetic and attractive women. As Holmes matured in years, his attraction for women (according to Monagan) continued as his fame widened, his physical appearance became more impressive and his charm matured. A significant part of Holmes's romantic life was his relationship with Lady Clare Castletown, one of the Cork St Legers, daughter of Lord Doneraile, and married to Bernard Fitzpatrick, Lord Castletown.



Holmes: does the nature of his relationship with women matter?

She was introduced to Holmes in 1889, a relationship developed, and in 1896, at the age of 55, Holmes visited Doneraile Court and Lady Clare, then aged 43. Leaving for the United States on 22 August 1896, he wrote to her every day on ship and posted all the letters in a bunch in Boston. The correspondence continued until Lady Clare's death in 1927. Holmes intended that the letters would be destroyed and he burned Lady Clare's letters; although requested to do likewise, fortunately for historical reasons, she did not do so.

It appears that some of Holmes's letters were discovered in Doneraile Court in recent times and Lady Doneraile presented these letters to the Harvard Law School library in 1967.

Talk passes: letters remain

G Edward White, one of America's esteemed legal scholars, in his 1993 biography of Holmes, notes that in the first stages of the Holmes-Castletown relationship, judging from Holmes's part of the correspondence, both parties demonstrated a degree of infatuation. Having heard from Lady Castletown, Holmes wrote to her on 5 September 1896:

'I have this moment received your most adorable letter. It is what I have been longing for and is water to my thirst. You say and do everything exactly as I should have dreamed. I shall keep it and when I am blue and you seem far away I shall take it out and read it and be happy again. I do not forget easily, believe me – and your letter was all that was wanting to assure me that we should abide together.'

The correspondence continued, and in May 1897 Holmes received an 'adorable long letter' from Lady Clare which prompted him to reply:

'Time has only made our intimacy more settled, more certain. Is it not so? When I read between the lines I do not mistake, do I? You have the gift of hints that may mean much or nothing. I take them to mean much. I think I shall keep your affection always.'

Holmes visited Doneraile in 1898 and subsequently professed timeless devotion to Clare. In a subsequent letter, he wrote:

'Separation from you is made bearable to me by the belief that we can now defy time and distance ... But I long to hear you repeat again and again that you do also – that it will not be different when you have become accustomed to separation ...'

Holmes visited Ireland again and met Lady Clare and Canon Patrick Sheehan, parish priest of Doneraile, who also became friendly with the judge. Lady Clare died in her sleep in March 1927. A friend sent to the judge a touching report of her funeral which appeared in *The Cork Examiner*.

We must not read too much into the correspondence. Holmes was devoted to his wife and it is not suggested here that he was unfaithful to her. G Edward White notes that Holmes searched for intimacy, but in a 'flirting' manner. In many ways, his life was his wife and his work. Control, according to White, was one of the 'linchpins of Holmes's conception of intimacy'.

Does the nature of Holmes's relationships with women matter? There are those who argue that the private life of a person is intertwined with his or her public office. Others argue that a person's private life is private, a matter for his or her conscience, provided that the public person does not break the law or preach what he or she does not practise. I consider that a person's private life is private – a matter for his or her conscience. G

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

A comma can make all the difference in European terms

Almost without you realising it, European Community law comes before the average lawyer on a daily basis, regardless of his or her areas of practice. Apart from competition law, agriculture and customs matters, this contact with Community law will be through EC directives. Yet, since directives are implemented through national legislation, the likelihood is that most lawyers will look only at the relevant Act or statutory instrument and will not think it worthwhile to be bothered looking at the EC directive on which the national law is based. This might seem logical. But there are times when the use of Community law will benefit your client greatly.

Interpreting national law

Admittedly, it is national legislation which is generally the source of your client's legal rights and obligations. But it is important always to remember that the national law must be interpreted and applied so as to be consistent with any underlying EC directive. Indeed, the European Court has ruled that, when interpreting and applying national law, every national court must presume that the State had the intention of fulfilling entirely the obligations arising from the directive concerned.

Three questions should arise in the mind of the inquiring lawyer: first, is there an EC directive governing the matter in issue? second, what interpretation is to be given to the directive in question? and, third, does the national law properly implement the directive? While it is generally recognised that the national law must be interpreted in line with the directive, what is often ignored is the problem of interpretation of the directive itself.

The rules governing interpretation of directives are relatively clear: Community legislation is to be interpreted teleologically – that is, by having regard to its objectives; it is to be interpreted so as to be consistent with the *EC Treaty* and with general principles of Community law such as proportionality. Derogations are normally to be interpreted strictly: reference should be made to the preamble of the legislation to determine its meaning and purpose.

Different versions

Most importantly, however, it is often not enough to look solely at the English language version of a directive in order to grasp its meaning. EC legislation is drafted in each of the official languages of the Community, all of which are equally authentic. An interpretation of a provision of EC law thus involves a comparison of the different language versions in order to arrive at a common, or 'proper', meaning.

Now, admittedly, most lawyers

Conor Quigley: not uncommon for EU law to be poorly worded

are not going to go to the trouble, each and every time they are faced with a question of law, of tracking down 11 different language versions of a directive. But just consider the following scenario which formed the basis of a judgment of the European Court of Justice a few months ago.

Council Directive 79/112/EEC concerns the labelling of foodstuffs. The English language version stipulated such labelling must indicate the 'name and address of the manufacturer or packager, or of a seller established within the Community'. However, the Italian version omitted the comma and required the indication of the 'name and address of the manufacturer or packager or of a seller established within the Community'. The implementing Italian decree followed this version. Thus, on the face of it, the Italian legislation was wholly in conformity with the directive.

Clever defence

A problem was spotted by a clever defence lawyer when his client was prosecuted by the Italian authorities for selling a certain foodstuff, the labelling of which indicated solely the name and address of the producer who was established outside the Community. By comparing the different language versions in English, French, Dutch and German, the Court of Justice declared that the comma was vital to establishing the proper interpretation. Thus, the condition of establishment within the Community applied only to the reseller, and not to the manufacturer or packager. The defendant was acquitted.

Unfortunately, it is not uncommon for EC legislation to be poorly worded or badly translated. It is a sad fact of life that the care which goes into the drafting of the final version of Irish or British legislation is not always emulated by the Community institutions. The vigilant lawyer should always bear this in mind. G

Conor Quigley is a barrister practising at Brick Court Chambers, Brussels and London, specialising in European Union law.

Low standards in high places

From: Irene Lynch, Department of Law, University College Cork

I was very surprised, as indeed were a number of my colleagues, to see the first headline on the March *Gazette*: *Your Girl Friday: how to find the best legal secretaries*.

Describing a highly skilled, usually extremely hardworking, member of staff of any solicitor's office in such pejoratively sexist terms is so blatantly discriminatory as to be almost laughable. Not only that, the editorial team in the Law Society do not seem to be aware of the terms of the *Employment Equality Act, 1977* which prohibits employers from describing any particular post in terms which imply that it is only suitable for a man or a woman. If we find such low editorial standards in the Law Society, what can we expect elsewhere?

The editor replies:
As far as we are aware, the terms of the Employment Equality Act, 1977 *do not apply to magazine headlines. Nevertheless, it's good to know that political correctness is alive and kicking in Cork.*

Anyone for a house exchange?

From: TM Treston, Brisbane, Australia

My wife and I are giving consideration to spending a period of ten to 12 weeks in Ireland. The period we have in mind would be the months July to November inclusive. We would not wish to stay in a large city. The thought has occurred to us that there may be Irish practitioners who would welcome the opportunity to spend an extended holiday in Australia. If so, a house exchange proposal might appeal to them. Anyone interested in such a suggestion can contact me at the following address: TM Treston, Quinlan Miller & Treston, Solicitors, Commonwealth Bank Building, 240 Queen Street, Brisbane 4000, Australia (tel: +07 3229 4366, fax: +07 3221 0015).

Your views

Your letters make your magazine and may influence your Society. Send your letters to the Editor, *Law Society Gazette*, Blackhall Place, Dublin 7, or you can fax us on 01 671 0704.

Dumb and dumber

From: Patrick J Farrell, Patrick J Farrell and Co, Co Kildare

I wrote to a well-known Dublin medical consultant some years ago for a report on a young nurse who was struck by a car while cycling to work. In due time the report arrived with a covering note which stated: 'I have looked very carefully and there is no sign of her'.

After reading this sentence several times and failing to make any sense of it, my own letter requesting the report caught my eye. In the course of it, my typist had written: 'She was injured and is still under your car'!

From: McCann FitzGerald, Dublin

The following was obtained off the Internet and claims to be actual statements made during court cases.

Judge: 'I know you, don't I?'
Defendant: 'Uh, yes'.
Judge: 'All right, how do I know you?'
Defendant: 'Judge, do I have to tell you?'
Judge: 'Of course. You might be obstructing justice not to tell me'.
Defendant: 'Okay. I was your bookie'.

From a defendant representing himself:
Defendant: 'Did you get a good look at me when I stole your purse?'
Victim: 'Yes. I saw you clearly. You are the one who stole my purse'.
Defendant: 'I should have shot you while I had the chance'.

Judge: 'The charge here is theft of frozen chickens. Are you the defendant?'
Defendant: 'No, sir, I'm the guy who stole the chickens'.

Lawyer: 'How do you feel about defense attorneys?'
Juror: 'I think they should all be drowned at birth'.
Lawyer: 'Well, then, I think you are obviously biased for the prosecution'.
Juror: 'That's not true. I think prosecutors should be drowned at birth too'.

Judge: 'Is there any reason you could not serve as a juror in this case?'
Juror: 'I don't want to be away from my job that long'.
Judge: 'Can't they do without you at work?'
Juror: 'Yes, but I don't want them to know it'.

Defendant: 'Judge, I want you to appoint me another lawyer'.
Judge: 'Why?'
Defendant: 'Because the Public Defender isn't interested in my case'.
Judge (to Public Defender): 'Do you have any comment on the defendant's motion?'
Public Defender: 'I'm sorry, Your Honor, I wasn't listening'.

Judge: 'Please identify yourself for the record'.
Defendant: 'Colonel Ebenezer Jackson'.
Judge: 'What does the "Colonel" stand for?'
Defendant: 'Well, it's kinda like the "Honorable" in front of your name. Not a damn thing'.

Judge: 'You are charged with habitual drunkenness. Have you anything to say in your defense?'
Defendant: 'Habitual thirstiness?'

Defendant (after being sentenced to 90 days in jail): 'Can I address the court?'
Judge: 'Of course'.
Defendant: 'If I called you a son of a bitch, what would you do?'
Judge: 'I'd hold you in contempt and assess an additional five days in jail'.
Defendant: 'What if I thought you were a son of a bitch?'
Judge: 'I can't do anything about that. There's no law against thinking'.
Defendant: 'In that case, I think you're a son of a bitch'.

Patrick J Farrell wins the bottle of champagne this month

LAWLINK

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*LawLink UK**

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4 Fitzroy Sq., London W1P5AH. Tel: 0171-3801500, Fax: 0171-3801550. SecureMail: lawlink@securemail.co.uk.

Lawyers 'key to IFSC growth'

Lawyers have a key role to play in growing Ireland's lucrative international financial services sector, according to Michael Buckley, Managing Director of AIB Capital Markets. Speaking at the latest Law Society *New Horizons* business breakfast in Dublin's RDS, he said the industry had grown by 15% last year and is set to double in size over the next five years.

'The legal profession has a very important role to play in assisting the Irish authorities with defining suggested regulatory reform as well as in proposing new legislation which will increase Ireland's competitiveness', he said.

He also pointed out that many solicitors are directly involved and employed in the International Financial Services Centre (IFSC), as well as the industry generally. His own firm employs at least 20 practitioners in non-traditional work such as securities, treasury, funds and custodial services.

In his talk, *The IFSC – where to from here?*, Buckley warned that new incentives and products would have to be offered to potential IFSC companies before the marketing deadline expires in December 2000. He argued that after this date, few companies will want to set up in the IFSC until corporation tax is slashed to 12.5%. 'This will create a marketing void unless we rethink what the IFSC has to offer and put some new products and incentives on the table', he said.

He called for the laws relating to the funds industry to be reviewed and reformed to ensure that this country stays an attractive location in which to set up and administer funds.

The *New Horizons* programme is organised by the Law Society's Career Development Committee and sponsored by accountants Price Waterhouse.

Law Society President Laurence K Shields (centre) with Price Waterhouse Managing Partner Donal O'Connor and guest speaker Michael Buckley at the *New Horizons* business breakfast

Society to publish ISO guide

The Law Society is due to publish a guide to the ISO quality management system shortly. *ISO 9000 and legal practices*, produced by the Society's Practice Management Committee, will be available for distribution over the coming weeks.

The guide gives an overview of the international quality standard and what members will need to do to get accreditation. It describes the benefits of ISO, which include:

- More effective staff training
- Better communication through a standardised practice system for practice management
- Better public relations
- More satisfied clients
- Lower costs through lower insurance premiums and greater efficiency in accredited firms.

Members should note that the standard does not purport to offer superior legal advice; rather, it makes it clear to customers that a firm's management is organised and consistent. Further information about the guide is available from Liz O'Brien, Member Services Executive (tel: 01 671 0711).

LawLink connects to UK

Internet provider LawLink is expanding into the Britain. The company, which provides a secure e-mail service for solicitors in this country, launched its UK service at the recent solicitors' technology exhibition in Birmingham's NEC.

LawLink is 30% owned by the Law Society of Ireland, which has endorsed its *SecureMail* e-mail service as the industry standard for Irish lawyers. According to LawLink director Stewart Thompson, the company is now discussing the possibility of having its services endorsed as the industry standard in Britain with the Law Society of England and Wales, and the Law Society of Scotland.

An estimated 350 Irish firms are currently using the service, with approximately 40 joining each month. It is also being used by the Department of Health, and several banks and building societies.

BRIEFLY

Software changes hands

IVUTEC, the Irish-based professional practice management software developer, has taken over the *Italax* program from Orchard Software Ltd. *Italax* claims to be the most commonly-used software in Irish solicitors' firms. The company's managing director Dermot Mooney has pledged to develop the program while keeping it easy to use.

EU legal programme

The Council of the Bars and Law Societies of the EU will launch *The programme of legal and judicial co-operation* on 15 June next. The project is designed to respond to the EU's need to train legal practitioners in the legal and judicial co-operation in Europe. For further information, contact Cristina Coteanu-Bompard, Council of the Bars and Law Societies of the European Community, Rue Washington 40, B-1050 Bruxelles (tel: 0032 2 640 4274).

Banking seminars in May

Cardiff-based consultants Lawyers' Planning Services are holding two half-day seminars in Blackhall Place, Dublin, on 21 May. The seminars, *Your real bottom-line* and *How to improve your banking* cost stg£175 but anyone booking both seminars gets an automatic 10% discount (tel: 0044 222 398161).

Volunteers needed to man enterprise stand

The Law Society has taken a stand at the *Enterprise Experience '98* exhibition which runs from Friday 24 April to Sunday 26 April in the National Exhibition Centre at Cloghran, near Dublin Airport. The stand is the initiative of the Image of the Profession Committee which feels that the Society should be more proactive in publicising the services the profession can supply to entrepreneurs. Volunteers are urgently required to man the stand for shifts of about two hours. Anyone interested in helping out should contact Andrea MacDermott or Catherine Kearney on 01 671 0711.

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Solicitors' protective practice denied

Law Society Director General Ken Murphy has hit out at allegations that solicitors will refuse to sue their fellow professionals. The claim, made during a recent case in Galway District Court, was denied this month by Murphy, who rejected suggestions that members operate a protective practice among themselves.

'There are always solicitors available to sue other solicitors in meritorious cases', he said. 'Any member of the public who believes their solicitor has been negligent or who believes they have a good case to bring against a solicitor for any reason can contact the Law Society, which maintains a panel of solicitors who are prepared to act in such cases'.

Ken Murphy: 'there are always solicitors available to sue other solicitors'

'The names of solicitors in the locality who are prepared to act in such cases will be supplied. Whenever a good cause of action lies against a solicitor, another solicitor will always be found, with the assistance of the Law Society if necessary, to institute proceedings and bring the case to court', he said.

The 'protective practice' claim was made during a hearing in Galway District Court in which Athenry private investigator Alfred Doherty was attempting to recover £1,420 in fees from local firm, VP Shields and Son. Doherty complained to the court that he had been told by his solicitor that it was 'doubtful' if any law firm would take a case against another. He was forced to represent himself.

Judge Albert O'Dea said it was 'outrageous' that any solicitor would make such a statement, and condemned lawyers for operating what he claimed was a protective practice.

New duty of care on conveyancers

Conveyancing solicitors acting for the vendors of a property now owe a duty of care to the purchaser following the recent precedent-setting *Doran* judgment, where a couple who bought a £25,000 site in Wicklow won the right to sue the vendor's solicitors after an eight-year court battle.

In the Supreme Court, Mr Justice Keane ruled that Terence and Maureen Doran were owed a duty of care by Bray solicitors Joseph Maguire and Co, the firm that acted for the sellers in the deal. Mr Justice Keane said that where a vendor's solicitors were aware that a neighbour had already made claims over the land, and that there was a threat of litigation, they at least assumed some responsibility for the information about these claims.

A fuller examination of this landmark case will appear in next month's *Gazette*.

Society and Smith welcome ad curbs

Law Society Director General Ken Murphy and Minister for Defence Michael Smith have both welcomed the Government decision to proceed with the drafting of legislation to amend the law on solicitor advertising.

'The proposal to amend the law represents a pragmatic compromise. While some advertising will remain, it will have to conform to a specific format', the Minister said.

In January, the Law Society Council unanimously agreed to support legislation to ban solicitor advertising for personal injury work.

'The Society believes that this advertising has greatly diminished the public esteem in which the profession is held', said Murphy. 'Maybe we will hear the ambulance-chaser jibe less frequently in future'.

He confirmed that the Society had held a number of meetings with the Department of Justice on the draft legislation. 'However, it is very much the Government's Bill, not the Society's', he said.

Pay boost for apprentices

Apprentices are due a pay increase following the Law Society Council's approval of a revised recommended salary scale. The new recommended rates are: £135 gross a week for the first six months after completing the professional course, £145 gross a week for the second six months, and £155 gross a week for the remaining period. While there is no strict obligation on a master to pay an apprentice before the apprentice attends a professional course, the Council recommends that the apprentice be paid £105 gross a week. These rates came into force from 1 March.

BRIEFLY

Would you credit it?

In the month since the Law Society launched its credit card, 476 members applied for the *Visa* card and most of these have already been approved. Several have been issued and the holders are using them. The card offers a credit limit of up to £15,000 standard and £25,000 gold. There is free purchase protection insurance, no liability for lost or stolen cards, no annual fee, and 19.9% annual percentage rate (variable). Anyone using the card for anything available from Members' Services will have their name entered in a free prize draw at the end of the year.

Family lawyers to unite

The fifth Family Lawyers' Association annual conference and AGM will be held in the Great Southern Hotel, Rosslare, Wexford, from 15 to 17 May 1998. The conference will focus on two issues: the *Children Act, 1997*, and non-marital co-habitation and the law. For further information, contact Mark Graham, Ormond Quay Law Centre, Dublin 1 (tel: 01 8724133), Jennifer Curry (tel: 01 829 0000) or Sora O'Doherty, Law Library (tel: 01 7023989).

Copyright crooks face five-year jail terms

Breaches of copyright law will earn prison sentences of up to five years for offenders under a new law set to be enacted by next July. Trade and Consumer Affairs Minister Tom Kitt revealed recently that the Government has approved tough new penalties for criminals who flout intellectual property rights. The newly-drafted *Copyright (Amendment) Bill, 1998* proposes to jail offenders for up to five years, or fine them to a maximum of £100,000, or both. Kitt vowed that the Bill would be passed no later than July of this year.

(See also Get with the program, *p20)*

Gam

The Irish Stock Market has broken all previous records over the last five years. But is it a safe bet for the private investor or just the financial world's answer to Las Vegas? Barry O'Halloran dons his red braces and finds out

Betting on the stock market seems like the ultimate gamble. Prices fluctuate every day, leaving some investors counting their winnings and others counting the cost of an expensive flutter. Worse still, a 'Black Monday' style crash can wipe millions off the value of shares, leaving companies and their stakeholders reeling.

On the face of it, many other investment options seem safer than going into this financial answer to Cheltenham, but is that actually the case? In fact, it's not. The stock market offers the best chance of getting a good return for any investor willing to look at the long to medium term.

In Britain, City guru and group economic adviser to Barclays, Michael Hughes, produces a yearly study comparing share performance with that of Government bonds – traditionally the safest bet for an investor. His latest findings show that the chances of stocks outperforming these safe bets are as high as 96%.

Risk for returns

Taking any period of ten years since 1918, he says that gilts have beaten shares only three times, and cash investments have only given a better return than the stock market on two occasions. So it seems there is no contest if you are prepared to stick it out for the long term.

The story in this country is much the same. According to Mark Donnelly of Goodbody Stockbrokers' private clients' service, depending on the circumstances, shares can be an attractive alternative. 'Over the longer term they have consistently outperformed other investments like cash and property', he says.

Shares are the riskiest type of investment and to take such a risk you have to get a high return. Obviously some stocks will collapse and others will rocket ahead. But in the long term, they still offer a high return.

Last year, shares on the Irish Stock Market increased in value by 50%. In other words, every £1 invested at the beginning of 1997 was worth £1.50 by the beginning of this year. Davy Stockbrokers' *Guide to the Irish equity market* shows that the market's value has more than tripled over the last five years, earning investors an average annual return of 30% over the same period.

Comparing last year's market performance with what you would have received on deposit, which would only be around 5% to 6% at the most, it is clear that shares can be very worthwhile.

bling on the stock market

At this stage, opinion is divided on whether the market can keep steaming ahead in this fashion. Some are predicting that the ISEQ index of Irish shares will break new records this year, while others say that prices are already over-stretched and that the only way the index can go is down. But market analysts are a bit like astrologers – no two of them will come up with the same predictions.

Dealers say that the value of some stocks is stretched at the moment, so there could be some volatility in the short term, but they stress that there are plenty of stocks that still offer good value. Also, there may be a number of them that do not look attractive just at the moment, but may be attractive in the long term.

So the real secret of success on the markets is not to go in hoping to make a quick killing, but to invest for the medium or long term. Your investment will go through highs and lows, but if you hang in there it should ultimately reward you for your patience.

The dominant investors on the Irish market are the big financial institutions, pension funds and life companies. But dealers say there is plenty of anecdotal evidence to indicate that more and more private individuals are now putting their spare cash on publicly-quoted companies.

At least one reason for this is the poor return offered by cash deposits. Low interest rates may be good news for borrowers, but they are bad for savers, some of whom are earning only small amounts on the money they have left on deposit with the banks. 'Because we have low inflation and low interest rates, we are seeing more and more people moving their cash into equities', says Goodbody's Mark Donnelly.

Getting in the door

So if you are thinking of joining this rush to the trading floor, how do you get in the door? Most stockbrokers have a private clients' service which specialises in dealing with individual investors. They will advise you on where to put your money and will act as your dealer, which means they will buy and sell shares on your behalf.

You can allow the broker full discretion to make all the investment decisions. In this situation, they have to follow rigorous guidelines relating to income, risk, tax and other issues as set down by the client. The brokers also have to notify any change to the investor.

The other option is an advice service. Here, the brokers act as advisers, taking into account the same requirements mentioned above. In this

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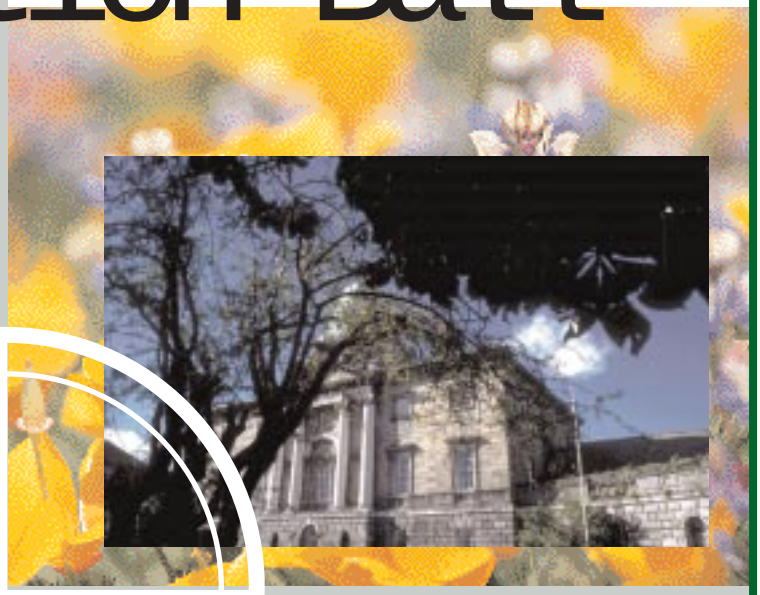

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case, the final decision is up to you, and once your mind is made up the brokers act on your instructions.

In both situations, the brokers should provide you with regular valuations of your investment. It's also worth noting that if you do not want your name on the shareholders' register, which is a public document, stockbrokers will provide a nominee to hold the stake for your benefit.

On the other hand, if the deal is a one-off – for example, if you are selling Norwich Union shares granted to you last year before the company's flotation – then you can opt for a straightforward execution service. Here, the intermediary has no involvement beyond simply buying or selling shares on your instructions and taking a commission.

The Stock Market: the ultimate gamble?

Dealers recommend that to get the best value you should have at least £10,000 to invest. The advantage of having a comparatively large sum like this to play with is that it gives the broker the chance to spread the cash through a number of stocks in a bid to minimise risk and maximise earnings. However, not all private individuals have this kind of money, and it is not that unusual for people to invest much smaller amounts.

Different deals

Obviously, brokers are not philanthropists, and all charge commissions for their services. These may vary according to the amount of money you are investing and the level of business you do with the company. For example, charges could range from 1.65% on the first £10,000, 1% up to £20,000 and 0.5% after that. But this should not be taken as a hard and fast rule.

Brokers will offer different deals depending on the kind of service you are looking for and the amount of money you are investing, so it makes sense to shop around. Also, you should ensure that any investment intermediaries you deal with are properly accredited.

The market itself is divided into a number of sectors, basically:

- Industrials, which includes companies like Smurfit and CRH
- Financials, made up of the banks and insurance companies such as Irish Life
- Food, mainly the large co-ops which have been floated over the last 15 years, for example, Kerry and Golden Vale, and
- Exploration, which includes a range of Irish companies involved in mining and exploration either at home or abroad.

Not all of the listed companies fit precisely into these sectors, which themselves are only broad categories whose overall performance may not reflect how particular stocks are doing. The official gauge for measuring equity performance is the ISEQ index, which is compiled by the Irish Stock Exchange. It includes all shares listed on the official market and the Developing Companies Market (DCM). Most of these are registered in Ireland, but it also includes nine Northern Irish companies with a listing in Dublin.

The index is based on the quoted companies' market capitalisation, which varies according to their share price. A company's market capitalisation is the total value of all the shares if they were cashed in at the same time. The ISEQ is updated regularly, one of the latest stocks to be included was British-based Norwich Union, the mutual which floated last June, delivering a windfall to thousands of Irish savers.

When it actually comes to putting your money somewhere, there are a number of things that advisers take into account. Because the success of your investment depends purely on how the stock performs, which in turn depends directly on how profitable the company is likely to be, then you look at your chosen investment's prospects for the future.

This may be easy to work out. For example, any company in the construction industry is doing well out of the building boom and is probably a good bet for the coming year at least. But it is not so easy when you consider that most of the companies quoted in Dublin have large interests in other countries and in parts of the world where the economy is either more volatile than here, or is just not performing as well.

Market analysts say that any business active in this economy has good prospects, but that should not be the only factor that influences the choice of investment. 'We would say that companies with a lot of exposure in the Irish economy are obviously good value at the moment', one says. 'But that's not all you should look at. We also look at how well-managed a company is and at its strategy for future growth. At the moment, most Irish shares represent good value. Companies like Kerry, CRH, and Waterford/Wedgwood remain attractive', he adds.

Davy Stockbroker's forecast for this year predicts that the smaller stocks are likely to out-perform all others on the market over the next 12 months, leaving even giants like AIB and Smurfit in the shade. The firm is backing companies like Arnotts, Jury's, Ryanair and United Drug to make big gains in 1998.

Of the larger companies, Davy says that Smurfit, Waterford, Clondalkin, Fyffes and Lamont should do well, while the brokers say that in the financial sector insurance companies offer a cheap alternative to the banks, whose strong performances have pushed up their prices.

The DCM may also offer good opportunities. This is an alternative market designed for smaller, newly or recently-floated companies which do not qualify for a full listing. The volumes, or amount, of shares traded by each DCM company tend to be smaller and prices may also be cheaper.

It can offer good prospects to private investors. One of the DCM's recent success stories was recruitment specialist Marlborough plc which was floated last October and subsequently applied for a full listing after taking over a British firm, Walker Hamill. Its share price almost doubled during that period and the company earned a very good return for its investors.

Taxing thoughts

Any income you make from an investment is subject to tax. Dividends paid to you on your shares by the company qualify for income tax, while profits from selling shares qualify for capital gains tax (CGT). But you can cut your liability by putting your money in a special portfolio investment account. This is a scheme designed to encourage private investors to invest in Irish stocks by offering them tax breaks.

A single person is allowed to place up to £75,000 in a special portfolio, while married people are limited to £150,000. Both income and capital gains are taxed at 10%. Thus, if someone places £10,000, and the value of their holding increases by £1,000, they pay £100 CGT, or if they receive £2,000 in dividend income, they pay £200 in income tax.

So it does seem that using your spare cash to stock up on shares is a good idea. In any case, you have to admit that playing the market is likely to be far more exciting than putting your money in the post office. G

The corporate killi

In the eyes of the great British public those responsible for five major disasters which left 473 people dead and many others injured have never been brought to justice. But recent proposals from the UK's Law Commission to create a new offence of 'corporate killing' could soon change all that, as Paul Burnley and Kirsty Gomersal explain

Ten years ago 167 people died in the tragedy on the Piper Alpha oil rig. In 1987, 31 people were killed in the King's Cross fire, while 35 people perished in the Clapham rail crash of 1988. The sinking of the *Herald of Free Enterprise* in 1987 resulted in 188 deaths while the sinking of the *Marchioness* two years later saw 51 people lose their lives.

Remarkably, in each instance, no successful prosecution for manslaughter against the company or the individuals who make up the company was able to be mounted in the United Kingdom. Why is that so? It took a further tragedy last year – the Southall rail crash in which seven people died and 160 were injured – for the British Government to act. Moves have now been made which, in future, should make it easier to prosecute UK firms for manslaughter and potentially to bring to justice those responsible for the deaths.

The British Home Secretary, Jack Straw, supported by Deputy Prime Minister, John Prescott, is pressing for the introduction of a new offence of 'corporate killing'. Company directors could also be prosecuted and be liable for unlimited fines and imprisonment if they are found to have failed to ensure the health and safety of those affected by their activities.

Controlling mind

The present UK law demands that, in prosecuting a corporation for manslaughter, it is necessary to identify a 'controlling mind' and, as such, it has been notoriously difficult to pinpoint one person who caused the death or deaths.

The failure of the law to avenge those killed by management failures has been criticised for some time. There has been a great deal of speculation about the criminal law's ability to protect employees and the public from the activities of corporations and to punish corporate offenders. Recommendations for the creation of an offence of 'killing by gross carelessness' to replace the present offence of corporate manslaughter were made by the Law Commission in March 1996 after many years of discussion and debate.

ng fields

The reason for the law's failure is that the current offence has developed case by case over the centuries and is still tainted by preconceptions which existed in the 17th century. It was not until the early part of this century that the procedural rule that a defendant had to appear in the dock to answer a charge was defeated by legislation which stated that corporations could appear in court and plead through a representative. Until that time, the fact that a corporation could not physically appear in court excluded them from criminal jurisdiction.

'Who is to blame?'

It was also thought that a company could not be guilty of a crime as it had no body or mind and therefore could not have a guilty intent. It is only recently that the law has been further refined so that a company can be found criminally responsible for the acts of those representing the directing mind and will of the company and who effectively controlled what the company did. This has still not satisfied the press or the public. 'Who is to blame' still echoes down the corridors of coroner's inquests and public hearings into a tragedy.

The present corporate offence is that of 'involuntary manslaughter'. It is not possible to prosecute a company for voluntary manslaughter or murder as the penalty is imprisonment and a company cannot be sent to jail. Involuntary manslaughter covers cases where there was no intention to kill or cause serious injury, but the law considers that the person causing death was in some other way to blame. A conviction for manslaughter is possible as it is punishable by a fine. It is necessary to prove that the decisions made by the directing mind of the company (or the failure to make decisions) caused the fatality.

So far in the UK only a handful of cases have been brought to trial for corporate manslaughter. In May 1992, P&O Ferries was tried for manslaughter following the sinking of the *Herald of Free Enterprise* off Zeebrugge in 1987. Mr Justice Sheen, who conducted a full investigation into the disaster and its causes, concluded that the fault lay with the directors whom he described as a 'vacuum at the centre of the company'. The company was described as being infected 'with the disease of sloppiness' from top to bottom. At the coroner's inquest, despite the direction from the coroner, the jury returned a verdict of unlawful killing.

The subsequent trial of the company and several individuals was stopped by the judge even before the prosecution had closed its case. The Crown failed to prove the key element: that directors and senior managers (the people representing the controlling mind of the company) had formed the necessary criminal intent or had acted in a grossly negligent way in that they ought to have known that there was a serious and obvious risk that the ship would sail with open bow doors. In essence, for the company to be convicted of manslaughter, the individual defendants would also have to be guilty.

Despite the damning Sheen Inquiry, it was always going to be an uphill struggle to prove the case against P&O. The overwhelming difficulty was identifying the 'controlling mind'. The more diffuse the corporate structure, the more difficult this can be to define. However, the decision by the British Director of Public Prosecutions to prosecute the company was hailed as a major step towards corporate accountability and gave the courts the opportunity to confirm that, where the evidential burden was discharged, the offence of manslaughter could be established against a company.

First successful prosecution

The first successful prosecution for corporate manslaughter occurred in December 1994. After four young people drowned in the Lyme Bay canoeing tragedy, the company responsible for their fatal trip (OLL Limited) was convicted of corporate manslaughter and fined £60,000. In this instance, it was possible to identify a 'controlling mind'. The company's managing director, Peter Kite, was also found guilty of the children's manslaughter and jailed for three years. He was said to be grossly negligent in ignoring the warnings of former

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Date:	Thursday, 7th May, 1998
Format:	4.30 - 5.30 pm - Registration and Light Refreshments
5.30 pm sharp -	Presentation by Peter McDonnell followed by Question & Answer session
Seminar Ends -	7.00 pm
Venue:	The President's Hall, The Law Society, Blackhall Place, Dublin 7
Cost:	£75 (individual rate), £65 per person (group rate) Includes light refreshments on arrival and seminar notes.

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employees who left because of concerns about safety at the centre; he was also said to have provided inadequate training and to have employed insufficiently qualified people.

A further successful prosecution was secured in September 1996 when Jackson Transport (Ossett) Limited and its former managing director were found guilty in Bradford Crown Court following the death of an employee who had been cleaning chemical residues from a tanker. Alan Jackson was sentenced to one year's imprisonment.

Both Jackson and the company were also found guilty of two offences under the *Health and Safety at Work Act 1974* (HSWA) for failure to secure the safety of employees. The Act contains similar provisions for failing to ensure the safety of third parties, for example, customers. Such a conviction carries an unlimited fine following conviction in the Crown Court and a potential two-year jail sentence for a director found guilty of the offence. It is also possible for a director convicted in the Crown Court to be disqualified from acting as a director for up to five years. This represents a potential 'double whammy' for companies and a 'triple whammy' for directors. It remains to be seen whether companies will be prosecuted under both the HSWA and any new offence, but it is likely that the impetus for a prosecution for corporate manslaughter will be used where prosecution under the HSWA seems inappropriate or inadequate.

The Law Commission's proposed new offence of 'corporate killing' is defined as killing by gross carelessness or where the conduct falls well below what could reasonably be expected. A company would be liable under this offence if a management failure resulted in death and that failure constituted conduct which failed to ensure the health and safety of those affected by the company's conduct. The convicted company would be liable to an unlimited fine and to remedy the fault which led to be accident.

Genuine corporate liability

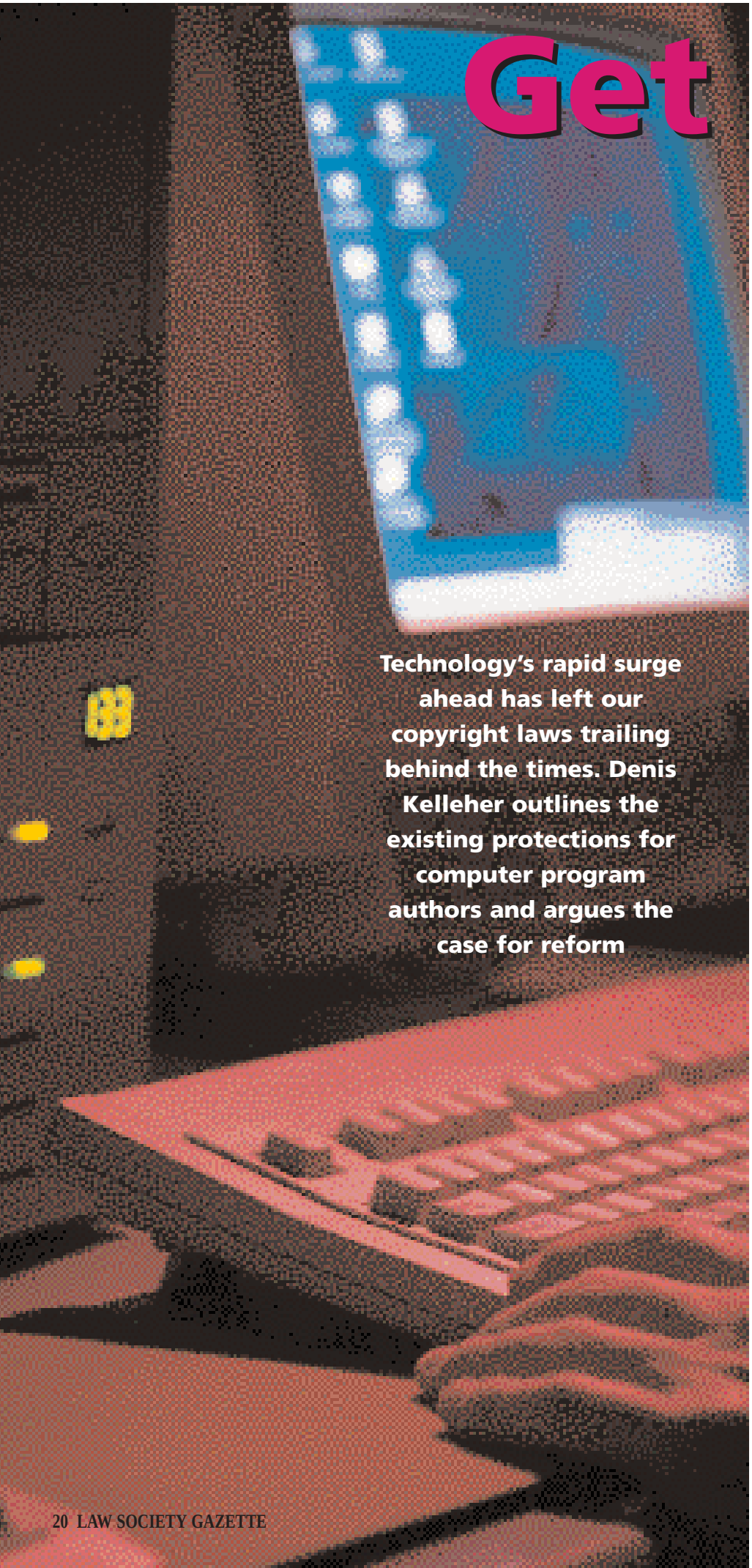
The conviction of companies responsible for deaths should be easier under the proposed new offence. A successful conviction will no longer depend on the identification of the 'directing mind'; rather, the question will be whether the corporation was grossly careless in that it should have been aware that there was a risk of death or serious injury and, secondly, that its conduct fell well below what could reasonably be demanded in dealing with the risk. There should now be genuine corporate liability as opposed to individual liability. What is 'reasonable' will depend on the individual circumstances of each case and will be a matter for a jury, but it will include factors such as the cost and practicality of taking steps to reduce or eliminate the prevalent risk.

If the proposals are implemented, it will be the conduct of the company which is questioned as opposed to the status and identification of those responsible for it.

So what about prosecuting individual directors for manslaughter? The Law Commission makes no suggestions about this, but it is likely, given the present mood of the British courts, that such prosecutions will continue alongside corporate prosecutions. However, while the change in the law with regard to the corporate offence may result in more successful prosecutions, it is unlikely that the situation will change with regard to those ultimately responsible for any death. How far that will satisfy public anger remains to be seen.

In a large diffuse company, such as P&O, it can be difficult to identify those ultimately at fault. It is undoubtedly easier for a director of a small company to be prosecuted because the management structure is simpler and he is more easily identifiable. So while companies face the stigma of being branded corporate killers, senior executives of large companies are unlikely to be pursued. Strange as it may seem, it is the directors of smaller businesses who are more likely to face a custodial sentence than the directors of large companies who may be just as liable – if not more so. G

Paul Burnley is a partner and Kirsty Gomersal is a solicitor in the Leeds office of the UK law firm Eversheds.



Get with t

Technology's rapid surge ahead has left our copyright laws trailing behind the times. Denis Kelleher outlines the existing protections for computer program authors and argues the case for reform

Computer programs are valuable commodities which cost millions of pounds to create but just a few pence to copy. The great demand for new programs and the high rewards for their creators make this a very financially rewarding industry for anyone involved. But if a computer program is successful, then many people will try to copy it. They may reproduce the whole program and sell it without giving the author any royalties, or they may copy parts of it to improve their own competing programs.

In Ireland, computer programs are protected by copyright law in the same way as literary works such as books. This is a very strong protection but the law is convoluted. Computer programs derive their basic protection from an EU directive implemented in Ireland as SI 26/1993, which essentially protects computer programs as literary works under the *Copyright Act, 1963*.

This means that anyone wishing to assert his rights over a computer program, or a part of it, has to refer to three separate laws to establish those rights. Conflicts and contradictions inevitably arise between the different provisions, a problem compounded by the fact that the EU is committed to comprehensively amending copyright law.

The anticipated arrival of EU legislation and the need for Ireland to agree to revisions of the *Berne convention* and the new World Trade Organisation (WTO) treaty on copyright may tempt the Irish legislature to wait before reforming our law. This ignores the fact that the *Copyright Act, 1963* was never written for computer programs or the other products now being created for the Internet and other technologies. It is badly out of date and in need of reform.

Programs written by Irish people are protected by the Act and programs written by Europeans have to be protected under Irish and European law. But the *Copyright (Foreign Countries) Order*, implemented in 1996, extends the Act's protection to literary works first published, either before or after the making of the order, in any country of the Berne Union, the *Universal copyright convention* or the WTO, including America, where most programs are written.

This was passed because the 1963 Act's drafters never thought that marketing and exploiting the works of American authors of any kind would be a multi-million pound industry in Ireland over 30 years later and that it would be used to protect that business. In the same way, if

the program

the drafters and legislators of 1963 had even heard of a computer program they would not have realised that the Act would in time be used to protect 1990s' technology. Using the Act to protect modern technology is inappropriate and it would have been better to introduce a new *Copyright Act* in 1993 rather than relying on the sticking plaster of a statutory instrument.

One difficulty caused by the Act is contained in section 27(3). This makes it an offence to knowingly make or hold a plate (defined as 'including a stereotype, stone, block, mould, matrix, transfer, negative or other appliance'). It is unclear whether or not holding a computer program or a part of a computer program for copying would be an offence.

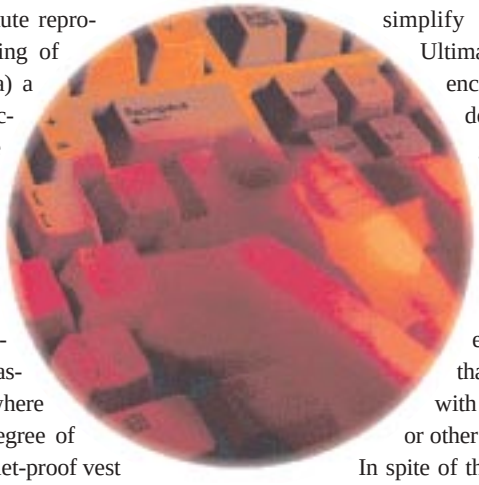
Trivial penalties

At any rate the penalties are trivial when compared with the sums which may be made by selling pirated copies. Anyone summarily convicted of selling or distributing infringing copies shall be liable to a fine of £100 per copy on his first offence and in any other case liable to the same fine or to imprisonment for not more than six months. But the fine cannot exceed £1,000.

This leniency should be contrasted with the situation in the United States where the *Copyright Felony Act 1992* provides that a person who 'wilfully and for purposes of commercial advantage or financial gain reproduces or distributes within a 180-day period at least ten unauthorised copies ... of one or more copyrighted works with a collective value of more than $2,500' will face up to five years in prison and a fine of $250,000 for a first offence.

But the major challenge for Irish courts is the task of devising a test for deciding whether or not a computer program has been copied from another. This probably cannot be met by legislation. Copyright disputes may take two basic forms. In the first, a work is pirated or simply copied with no effort made to disguise it. The challenge is not to prove that copying occurred, but to catch the pirate. The second is more complex: here, elements of one computer program will be copied and included in another to compete with the original. The alleged copier will be easy to identify, but proving that they have copied may be difficult.

The test for deciding whether or not copying occurred was laid down by Costello J in *Houses of Spring Gardens v Point Blank Ltd (1984)* IR 611 where he adopted a test developed by Wilmer LJ in *Francis Day and Hunter Ltd v Bron*: 'In order to constitute reproduction within the meaning of the Act, there must be (a) a sufficient degree of objective similarity between the two works and (b) some causal connection between the plaintiffs' and the defendants' work'.



This test is straightforward in itself and it was easily applied in the case, where there was a very large degree of similarity between the bullet-proof vest designed by the plaintiff and that which the defendant claimed to have designed. Thus, it was easy to establish a causal connection between the products.

But deciding whether or not one computer program is sufficiently similar to another is a difficult task. Programmers learn from one another's successes and failures, and the fact that all programs must run on standard operating systems mean that some elements will have to be identical and the 1993 regulations specifically allow for this.

Identical elements

Judges and lawyers may find it difficult to decide whether certain elements are identical and whether that similarity stems from copying; or whether programmers used similar methodologies; or whether the elements' form was determined by other factors, such as the constraints of the computer hardware for which the program was designed.

Unfortunately, American cases do not offer any easy solution. The so-called 'abstraction-filtration-comparison' test developed there in *Computer Associates International Inc v Altai* is difficult to apply and, arguably, by concentrating on the dissection of a program's elements misses the wood for the trees.

A major challenge in a computer copyright dispute will be the difficulty of explaining the technology. The courts will rely particularly on the evidence of experts, and lawyers and judges will have to educate themselves so that this does not become dependence. The danger in these disputes is that the questions will be decided by whichever side can best explain the technology rather than on the merits of the case.

Another potential difficulty is that while lawyers will inevitably try to clarify technological terms, there is a danger that they will oversimplify complex issues. Ultimately, time and experience will allow the courts to deal with computer programs with the same ease as other areas such as company law. But for now it is important to realise that protecting computer programs raises new questions of law that have yet to be dealt with satisfactorily in Ireland or other jurisdictions.

In spite of these problems, the determination with which computer program owners intend to pursue those who pirate or plagiarise their works should not be doubted. The managing director of an English computer company was recently sentenced to a two-and-a-half-year prison sentence after his company sold 46 pirated copies of Novell software.

Both Microsoft and Novell are targeting those who illegally copy their software in Ireland and have won injunctions against those whom they believe have been infringing their copyright. This jurisdiction provides strong copyright protection for computer programs and other works, but reforms are needed to ensure that the law is clearly implemented.

Pressure on the Irish Government to reform Irish copyright law is increasing. The US government is concerned, and in December 1997 the EU published its *Proposal for a European Parliament and Council directive on the harmonisation of certain aspects of copyright and related rights in the information society.* If and when this legislation is passed, it will need to be implemented here, but this can be done by a regulation.

It is unclear how long this will take, but the Oireachtas should not be allowed to use it as an excuse for failing to legislate and reform existing copyright law. Ultimately, the EU will legislate for all aspects of copyright and intellectual property, but this process might take years – if not decades – to complete. It is unwise and unrealistic to expect that a piece of legislation dating back to 1963 will be adequate to deal with all the changes in both technology and the law which will be encountered in the years to come. G

Denis Kelleher is a Dublin-based barrister and co-author of Information technology law in Ireland *(Butterworths, 1997).*

Firing you
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One recent US partnership case has turned out to be a pot-boiling tale of greed, fear, loathing and fiduciary duties. And, as Michael Twomey points out, the principles of partnership law highlighted by the case of *Beasley v Cadwalader, Wickersham & Taft* could equally apply here

The New York firm of Cadwalader, Wickersham & Taft is supposed to be the oldest law firm in the United States. In 1989, James Beasley was admitted as a partner to the firm and proved himself to be 'an extraordinary rainmaker and a skilled litigator'. Beasley was a partner in the firm's Florida office, and for a number of years after his arrival the business was very successful – the profit-share of each partner increasing year-on-year after 1989. But in 1993, the partners' profit-share declined and the Florida office made a loss for the first time since Beasley's arrival.

This state of affairs upset the 'younger, more productive partners' who controlled a lot of the firm's business, but felt that they were not getting credit for it. They decided to turn their sights on other partners who didn't bill or hustle at the same pace as themselves. They did this by putting pressure on the firm's management committee to do something about the fall-off in profit-share. The committee came up with 'Project Right Size' which was 'aimed at identifying less productive partners for elimination from the partnership'. The project was designed to improve the continuing partners' profit-share by sacking some of the most unproductive partners and keeping the more productive ones.

The watershed was a clandestine all-day management committee meeting. Before the meeting, co-chair Donald Glascoff asked all members to submit lists of less productive partners for discussion. Only five of the 12 members chose to submit such a list – all of the Florida partners appeared on at least three lists and one appeared on all five.

Soon after this meeting, the management committee decided to close the Florida office. The day after this decision was reached, the management committee informed the Florida partners. When the Florida partners refused the offer of voluntarily withdrawing from the firm in return for a return of their capital contributions and three months' severance pay, the firm forcibly closed the office and employed an armed guard to look after it.

Beasley was one of the Florida partners who entered negotiations with the firm regarding the terms of his departure. When agreement could not be reached, he instituted proceedings against Cadwalader for, first, a breach of the partnership agreement's terms and, second, a breach of fiduciary duty (*Beasley v Cadwalader, Wickersham & Taft*, Florida Circuit Court, 23 July 1996, CL-94-8646, AJ 1996, WL 438777).

Breach of partnership agreement

As in Irish partnership law, there is no automatic right in US law to expel a partner from a firm. Surprisingly, the Cadwalader partnership agreement did not contain any express right to expel a partner. In fact, before its decision to close the Florida office, the management committee had a memorandum indicating that it had no authority to expel the Florida partners.

In closing the Florida office, the management committee chose to ignore this, as well as failing to consult the firm's experts on partnership law or even consult the terms of the agreement. As there was no right in the partnership agreement to expel a partner, the Florida court had little difficulty in holding that Beasley's expulsion was a breach of the agreement.

Breach of fiduciary duty

Beasley also claimed that the partners had breached their fiduciary duty to him by the manner in which they disclosed the plans to close the Florida branch and their motives for wanting to expel him as a partner.

In response to this claim, the partners in Cadwalader claimed that they had not expelled Beasley but that they had simply closed the Florida branch of the firm and offered Beasley a transfer to New York.

The Florida court found that the firm's offer to move Beasley to New York 'was not a good-faith offer of continued partnership' and its actions in 'deciding to terminate the Florida partners and to close the Florida office constituted an anticipatory breach of the partnership agreement'. The court noted that a majority of the partners could have amended the agreement to include a power to expel a partner. But for the sake of expediency, the management committee chose to 'bend to the will of the disgruntled partners by expelling others to whom they owed a fiduciary duty'.

Cadwalader also claimed that Beasley had been planning to leave the firm anyway – it transpired that he had entered discussions in this regard with some associates, and did not tell his partners. Cadwalader alleged that Beasley's failure to reveal his discussions to leave the firm was a breach of his fiduciary duty to it and that this defeated his claim. The Florida court held that it would not be equitable to allow Beasley's discussions with his associates about leaving the firm to stand as a defence to Cadwalader's conduct. Judge Cook added an American refinement to the maxim that *he who comes to equity must do so with clean hands* when he stated that 'if Beasley had dirt under his fingernails, Cadwalader was up to its elbows in the dung heap'.

It was also alleged by the management committee's chairman that the firm's decision regarding the Florida partners was not a breach of fiduciary duty since it was in the overall interests of the firm. He explained his view of the position prior to the Florida closure as follows: 'There was a fear, there is a fear, there always will be a fear, that highly productive partners can leave, go to another place and get more money. And life is not made up of love; it is made up of fear and greed and money – how much you get paid in

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large measure. Unless we didn't get Cadwalader's profitability to where it was with our competitors' firms, my great fear was that people were going to leave and that we would not be able to sustain ourselves'.

Judge Cook rejected outright the argument that Project Right Size was in the firm's overall interests, noting that 'it was a gross breach of fiduciary duty for some partners to throw others overboard for the expediency of increased profits'.

Punitive damages

Judge Cook awarded damages of more than $3 million for the breach of both the partnership agreement and the fiduciary duty. Most of this award was for payment for Beasley's share in the firm at the date of his expulsion and his share of the firm's profits between the date of expulsion and the date of the court's order. However, $500,000 of the $3 million was awarded in punitive damages for the manner in which the partners had expelled Beasley and the reason for the expulsion.

As regards the manner of his expulsion, Judge Cook felt that punitive damages were justified since Beasley was expelled (with no expulsion provision in the partnership agreement) by partners who:

- Had ignored the terms of an internal memorandum on the invalidity of such an expulsion
- Failed to consult their own partnership law experts
- Didn't even bother reading the terms of the partnership agreement.

As regards the reason for Beasley's expulsion, Judge Cook felt that punitive damages were justified since the motive for his expulsion was 'for the express purpose of increasing the compensation available to the other partners'.

While Irish law firms have not reached the stage where ideas like Project Right Size become commonplace, it may be comforting to know that many of the principles applied by the Florida court in *Cadwalader* are equally applicable in Ireland. This is because, like US law, Irish law provides that a majority of the partners in a firm cannot expel a partner unless there is an express agreement between all the partners to that effect (section 25 of the *Partnership Act 1890*).

In the absence of such an agreement, or even where one exists, any expulsion of a partner in Ireland will be subject to the fiduciary duties owed by partners to each other. According to McWilliam J in *Williams v Harris* (unreported, High Court, 15 January 1980 and Supreme Court [1980] ILRM 237), 'equitable principles are to be applied to partnership matters and a fiduciary relationship existed between the plaintiffs and the defendants during the continuance of the partnership'.

Thus, in dealing with the expulsion of a partner (or any aspect of the partnership relation), partners are required to exercise a fiduciary duty towards each other. This will require every partner to treat his co-partners with, in the words of Gannon J in *Re Murph's Restaurant* (1979 ILRM 141), 'equality, mutuality, trust and confidence'. Where this is absent, as was clearly the case in *Cadwalader*, the partners will be in breach of the fiduciary duty and liable for any loss to the innocent partner.

However, not all of the principles applied by the Florida court are likely to find favour in Ireland. We have not yet reached the situation in Ireland, where punitive damages of $500,000 will be awarded for the manner of, and the motive behind, a partner's expulsion. G

Michael Twomey is an Irish solicitor researching a book on partnership law in the United States, with the support of the Rodney Overend Educational Trust.

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Discretionary trusts can be useful tax-planning mechanisms, but the legal and technical issues need careful analysis. Eamonn O'Connor outlines how to maximise their potential benefits

A 'discretionary trust' is defined in section 2 of the *Capital Acquisitions Tax Act, 1976* as any trust whereby, or by virtue or in consequence of which, property is held on trust to apply, or with a power to apply, the income or capital or part of the income or capital of the property for the benefit of any person or persons or of any one or more of a number or of a class of persons whether at the discretion of trustees or any other person and notwithstanding that there may be a power to accumulate all or any part of the income (see below for extended definition for discretionary trust tax purposes).

A charge to capital acquisitions tax (CAT) arises *inter alia* where a beneficiary becomes 'beneficially entitled in possession' to any benefit from a trust. This generally occurs when assets or an interest in assets are appointed out of the trust. The trustees decide when the charge to CAT arises because the assets are appointed out of the trust at the discretion of the trustees.

An appointment by a trustee which is a gift will be subject to the annual small gifts exemption in section 53 of the *Capital Acquisitions Tax Act, 1976* which currently is £500. In addition, the 75% rate of tax on gifts will apply.

An inheritance arises where a beneficiary becomes entitled to a benefit where:

1) The trust was created by will

2) By a disposition made within two years of

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the date of death of the disponer. If the discretionary trust has been set up within two years from the date of settlor's death, any appointment out of it will be deemed to be an inheritance. In the event of the discretionary trust having been set up more than two years prior to the death of the settlor, then all appointments including appointments made within two years of the date of death and after the date of the settlor's death will be gifts and subject to the normal small gifts exemption and 75% rate of tax subject to (3) below

3) An *inter vivos* disposition which takes effect on death. When the benefit is taken under a disposition *inter vivos* limited to come into operation on a death, then there is a deemed inheritance. Where a beneficiary becomes entitled in possession to any benefit under a discretionary trust, they are obliged to file a self-assessment CAT return within four months of the date of the benefit. The beneficiary is primarily liable for payment of the tax and secondary liability attaches to the trustees. However, trustees can be obliged to discharge a life tenant's liability where the life tenant does not have any assets with which to discharge the liability. Trustees in this situation do not have any right of recovery from the life tenant. Normally, however, a trustee does not appoint to a beneficiary until the *quantum* of the liability has been agreed and discharged to the Revenue.

Appointment of capital or income

If a discretionary trust makes regular yearly payments to a beneficiary, these payments may well be deemed income in the hands of the beneficiary, whether paid out of capital or income. By contrast, a once-off payment to a child of the settlor on the occasion of, for example, her marriage, may well be treated as capital in her hands even where made out of the trust fund's accumulated income (see *Brodies Will Trustees v IR Commissioners* 17 TC 432). In the UK, the courts have considered whether such payments are income or capital in the context of an assessment to income tax raised by the UK Inspector of Taxes.

Estate planning and discretionary trusts

A discretionary trust can be a useful tax planning tool, as the following examples show:

1) As the charge to CAT only arises when assets are appointed out the trust, it is possible for the trustees to determine when the actual charge to CAT arises
2) Those who wish to make special provision for family members with special needs can set up discretionary trusts to hold assets, with the trustees deciding ultimately how the assets should be appropriated
3) A bachelor uncle can create a discretionary trust by will, thereby giving the trustees wide powers to benefit the objects of the trust. These may include nephews/nieces of the testator, some of whom might not yet be born at the date of his death. This means that maximum use can be made of the tax-free thresholds. This results in maximum use of the £24,340 threshold
4) Certain Irish government stock acquired by trustees of a discretionary trust and held by the trustees for three years can be transferred to a non-domiciled non-ordinarily-resident beneficiary without any charge to CAT. It should be remembered that government securities can be placed in a discretionary trust as a means of completing the three-year period of ownership as between the disponer and the trustees
5) By placing agricultural property in a discretionary trust as a 'holding operation' while the donee's assets are rearranged to facilitate a successful section 19 agricultural relief claim.

Discretionary trust tax: general

The levies which apply to discretionary trusts are as follows:

a) A 6% levy on the settlor's death (increased from 3% with effect from and after 11 April 1994, section 143 of the *Finance Act, 1994*). This may be postponed as described below, and
b) An annual levy of 1% on 5 April each year following the imposition of the 6% levy (excluding the first such date following the imposition of the 6% charge). The trustees are deemed to have become beneficially entitled in possession to an absolute interest in the trust property and the accumulated income, if any, as remains subject to the discretionary trust on the latest date above.

The definition of 'discretionary trust' in section 2 of the *Capital Acquisitions Tax Act, 1976* is extended for the purpose of the discretionary trust tax. The definition is as follows:

'*Discretionary trust* means any trust whereby, or by virtue or in consequence of which, property is held on trust to accumulate the income or part of the income of the property, or any trust whereby, or by virtue or in consequence of which, property (other than property to which for the time being a person is beneficially entitled for an interest in possession) is held on trust to apply, or with a power to apply, the income or capital or part of the income or capital of the property for the benefit of any person or persons or of any one or more of a number or of a class of persons whether at the discretion of trustees or any other person and notwithstanding that there maybe a power to accumulate all or any part of the income'.

Initial 6% charge to discretionary trust tax

Discretionary trust tax arises under the will of the disponer/settlor or under an *inter vivos* discretionary trust on the death of the disposer/settlor (subject to the exempting provisions in section 106 of the *Finance Act, 1984*) where under or in consequence of a disposition property becomes subject to a discretionary trust other-

wise than for full consideration in money and monies-worth paid by the trustees. Where property becoming subject to a discretionary trust on or after 31 January 1993, the trust is deemed to take an inheritance on the latest of the following dates or events: 31 January 1993; the date on which the property becomes subject to the discretionary trust; the date of the disponer's death; the date on which there ceases to be a principal object under the age of 21 years.

Any trust whose settlor is dead seeking to avoid the initial charge should terminate the trust before the day preceding the 21st birthday of the youngest principal object of the trust. If the trust is terminated on the date of the 21st birthday of the youngest principal object of the trust, then the initial charge is payable. Before 31 January 1993 the age requirement of the principal object was 25 years.

Any trust seeking to avoid the initial charge should terminate the trust prior to the day preceding the 21st birthday of the youngest principal object of the trust (see **Example 1**).

A 'principal object' in relation to discretionary trusts is: a) the spouse of the disponer; b) the children of the disponer; c) children of a deceased child of a disponer (but only where the deceased child has pre-deceased the disponer).

The initial 6% charge will revert to 3% if within a period of five years from the date of the initial charge the entire trust is wound up and the beneficiaries become absolutely entitled in possession. Any refund made by the Revenue Commissioners will not carry interest.

In the event of the discretionary trust having been chargeable before 31 January 1993 to the initial charge to discretionary trust, it will not become subject to a charge again under section 106(4) of the *Finance Act, 1984*, due to the age requirement of a principal object of a discretionary trust being reduced from 25 to 21 years.

Annual 1% charge to discretionary trust tax

The legislature also introduced an annual 1% levy (see above) on the taxable value of discretionary trusts under section 106 of the *Finance Act, 1986*. The 'chargeable date' in relation to any year is 5 April of that year. A 'chargeable discretionary trust' means a discretionary trust in relation to which: a) the disponer is dead, and b) none of the principal objects of the trust are under the age of 21 years (section 255 of the *Finance Act, 1992*).

If a discretionary trust becomes subject to the initial charge of 6% it also becomes chargeable to the 1% levy as the definitions and requirements are identical, unless the total fund is appropriated out to a beneficiary before the 1 April on which the 1% charge would apply. But where there is a decision to pay

EXAMPLE 1

X by will settles property on discretionary trust for his children Y and Z in 1997. At the date of creation of the discretionary trust, Y is aged 19 and Z is 23. All of the assets in the discretionary trust must be appointed out not later than the date immediately preceding the 21st birthday of Y, the youngest child, in order to avoid the initial 6% charge.

income to objects of the trust for a period of not less than five years (for example, between the ages 18-23), then the annual charge of 1% is avoided.

Exemptions

Exemption from the initial charge and annual charge is available to trusts set up exclusively for charities, superannuation schemes, registered unit trust schemes within the meaning of the *Unit Trust Act, 1972* and trusts for the upkeep of certain houses/gardens.

Discretionary trusts which are created for the benefit for one or more named individuals specified in the discretionary trusts who, because of age or being incapable of managing their affairs, are also exempt. In order for the trust to qualify for the exemption, all of the individual/individuals must come within the category of person/persons who qualify for the relief.

Taxable gifts/taxable inheritances

A 'taxable gift' means in the case of a gift taken under the discretionary trust where the disponer is domiciled in the State at the date of the disposition under which the donee takes the gift or at a date of the gift or was (in the case of a gift taken after his death) so domiciled at the time of his death, the whole of the gift; and in any other case so much of the property of which the gift consists as is situate in the State at the date of the gift.

A 'taxable inheritance' means in a case where the disponer is domiciled in the State at the date of the disposition, usually the date of death under which the successor takes the

EXAMPLE 2

X, who was domiciled in Saudi Arabia, creates a discretionary trust which contains exclusively UK assets. Subsequently, he obtains an Irish passport, moves to Ireland, and dies domiciled here. None of the objects of the trust are domiciled in Ireland, but nevertheless on an appointment made after his obtaining Irish domicile, a charge to CAT will arise.

inheritance, the whole of the inheritance and in any other case where at the date of the inheritance the whole of the property comprising the inheritance was situate in the State, the whole of the inheritance (see **Example 2**).

Before 17 June 1993 a charge to gifts tax and inheritance tax arose if the proper law of the disposition was Irish law.

Income tax

The trustees of a discretionary trust are liable to income tax on all income arising at the standard rate of 26% without any deduction for allowances/reliefs. Where income of a discretionary trust is not distributed within the year of assessment or within 18 months from the end of the year assessment then a surcharge is levied at the rate of 20%.

This is provided for in section 13 of the *Finance Act, 1976*. In computing the surcharge a deduction is made for management expenses of the trust which are properly chargeable to income. Consequently, it is important to bear in mind that where income of a discretionary trust is not distributed within the stipulated periods set out in section 13 of the *Finance Act, 1976* the surcharge will apply. The distribution of income can have CAT consequences

Capital gains tax

Where a settlor settles property on trustees he is deemed by section 15 (2) of the *Capital Gains Tax Act, 1975* to have made a disposal of the entire property. Such a disposition would not be a bargain at arm's length and accordingly the disposal proceeds in the case of the settlor must be taken as being the market value of the assets at the time when they were settled on the trustees.

Likewise, the trustees are treated as acquiring the assets at market value. By contrast, if the settlement is set up on death it does not give rise to any capital gains tax (CGT) arising on the transfer to the discretionary trust.

Trustees are deemed to be a single continuing body, and as such may dispose of assets in the same manner as any other person. When that body of persons disposes of an asset either a gain or a loss will arise for CGT purposes.

Whether such a gain is chargeable, or a loss allowable depends on the residence or ordinary residence of the trustees and whether the assets are specified assets as set out in section 4 of the *Capital Gains Tax Act, 1975*, namely:

1) Land in the State
2) Minerals in the State or other assets in relation to mining or minerals or the searching for minerals
3) Assets situated in the State which are used in or for the purposes of a trade carried on in the State through a branch or agency
4) Exploration rights on the continental shelf.

The absolute appointment of assets by the trustees to a beneficiary is a disposal by the trustees at market value. The appointment of an interest in an asset is neither a disposal nor part disposal, except where the interest passing is an absolute interest.

When a person becomes absolutely entitled to any of the trust property, any unused losses accruing to the trustees in respect of that property in so far as they are not used by the trustees up to that date are treated from then on as accruing to the person who becomes entitled to the property – that is, the appropriate object of the trust.

Interaction of CGT and CAT

Where trustees dispose of an asset with a consequent liability to CGT and CAT is payable by the appropriate beneficiary, section 63 of the *Finance Act, 1985* provides for a credit to be given against the CAT liability arising in respect of any CGT liability arising where both taxes have been triggered by the 'same event'. In this regard it is important to note that a 'disposition' for CAT purposes may also be a 'disposal' for CGT purposes. Consequently, it is important to be mindful that the credit is available resulting generally in a significant saving in tax.

Stamp duty

There may not be any stamp duty or if stamp duty is payable it will be at the nominal rate. However, if assets are settled on a discretionary trust during the settlor's lifetime, stamp duty is payable in the normal way on the value of the assets passing into the discretionary trust. Where assets are appointed out of the discretionary trust, for example by gift, then the normal rates of *ad valorem* duty will apply to the appropriate documents.

Irish government stock exemption

Section 57 of the *Capital Acquisitions Tax Act, 1976* (as amended by section 140(1) of the *Finance Act, 1978*) provides for an exemption from gift tax or inheritance tax and the government stock is not taken into account in computing the tax provided that:

1) The stock is owned by the donor/testator for three years immediately before the date of the gift or inheritance. Both the donors' and trustees' period of ownership of the appropriate government stock are combined to establish the three-year qualifying period of ownership
2) The stock is comprised in the gift or inheritance at the date of the gift, or the date of the inheritance and also at the valuation date
3) The donee or successor is neither domiciled nor ordinarily resident in the State at the date of the gift or inheritance.

There is a total exemption if the disponer is not domiciled and ordinarily resident in the State at the date of the gift or the date of the inheritance. The exemption is not available to trustees in relation to the charge to discretionary trust tax.

Avoidance of initial and annual levy

The definition of 'discretionary trust' as set out in section 105 of the *Finance Act, 1984* contains an exemption from the initial 6% levy and the annual 1% levy for property in relation to which a person is beneficially entitled to an interest in possession (that is, a life interest). In order to avoid the initial and annual levies a life interest can be created which would have a capitalised value of less than the donee/successor's exemption limit. This will have the effect of removing the appropriate property from the 6% initial and 1% annual discretionary trust levies.

Section 103 of the *Finance Act, 1986* contains an anti-avoidance provision where it is not possible to avoid the annual 1% charge by appointing assets out of a discretionary trust for a period of less than five years or if the appointment is subject to a revocation.

Section 60 life assurance policies

These are policies taken out to discharge CAT. The trustees of a discretionary trust should be aware that to avail of the benefit of section 60 life assurance policies, assets must be appointed out of the discretionary trust within 12 months of the appropriate death, otherwise the benefit of these assurance policies will be lost.

Dependent relatives

Payments out of a discretionary trust towards the maintenance of a dependent relative are exempt from the charge to CAT subject to the conditions contained in section 58, *Capital Acquisitions Tax Act, 1976* as amended.

Section 19, *CAT Act, 1976*

Agricultural relief within the meaning of section 19 of the *Capital Acquisitions Tax Act, 1976* is available where agricultural property passes from a discretionary trust to an appropriate beneficiary. The donee or successor must be 'a farmer' within the meaning of section 19 in order to obtain the relief. Section 19 agricultural relief is not available on the transfer of agricultural property to trustees as the latter are not 'individuals' within the meaning of section 19 of the *Capital Acquisitions Tax, 1976*.

Section 125, *Finance Act, 1995*

Business asset relief is also available to reduce the market value of relevant business assets as defined by 90% for CAT purposes. Relevant business assets include unquoted shares in an Irish company meeting conditions. The relief does not apply to discretionary trust tax or probate tax.

Despite the 6% initial and 1% annual levies, discretionary trusts still have attractions. But the legal and tax legal issues need careful analysis. Ultimately the decision as to whether a discretionary trust is the best vehicle will depend on the facts of each case.

The prudent use of a discretionary trust should result in a deferral of CAT. But during the period when the assets are retained in the discretionary trust, the value of those assets will generally have increased by the time the trustees appoint in favour of the trust's objects. This can, of course, lead to a higher CAT charges than might have been the case when the discretionary trust was created.

However, the trust's beneficiary object will be able to compensate for the higher incidence of CAT as his own CGT base-cost will reflect the value of the assets at the date of their appointment in his favour. This will, clearly, reduce his exposure to CGT when he ultimately disposes of the assets. G

Eamonn O'Connor is a solicitor with the Dublin firm SS&E Reeves and a member of the Law Society's Taxation Committee.

Deals on W

What's the best option for financing a new company car? Paul O'Grady looks at the wide range of packages available and gets a steer on good deals for your wheels from the professionals

You have decided to get a company car for your practice or business. You haven't operated one before and your own car and those of your employees are personally owned and financed. What options do you have for financing the business vehicle?

The short answer is a multitude. The finance advertising you look at speaks of low annual percentage rates, tailored packages and offers you the choice between purchasing, leasing or contract hire.

Question number one is whether you want to buy or lease the car. The issue here is whether you want to list it as an asset on your balance sheet. If you do, you have the freedom to sell at any time, but you are taking on the risks involved in vehicle depreciation.

Larry Dunne, leasing director of Walden Motors and President of the Vehicle Leasing Association of Ireland (VLAI), says: 'There may be good accounting reasons for choosing a particular type of financing option. The accounting treatment can vary from plan to plan, so if the appearance of your accounts is important to you, particularly in terms of accounting ratios and asset values, then it is vital that you choose your finance plan carefully'.

If you choose to buy the vehicle, the next question is whether to pay cash or use some form of credit. All credit has a cost and you will have to compare the cost of the schemes that suit your circumstances. Buying for cash uses capital that could be put to better use, such as expanding the business, while setting up an overdraft or a bank loan may take up one of your major credit lines, giving the same net effect as using cash.

Getting the finance

In the current market, getting finance is generally not a problem. Each of the main banks has an asset finance subsidiary in addition to their branch network. The building societies are very active in the market, and some companies such as Woodchester specialise in vehicle financing. Add in the vehicle distributors' finance companies such as Ford Credit, the credit unions and the fact that most vehicle dealerships are now registered intermediaries for finance products, and you have a seriously competitive market.

That's the good news: these people want to lend you money. The bad news is that the plethora of new finance products on the market means that it takes time and effort to find out which option is right for you. There are three main types of finance and lease plans. They are:

- **Purchase:** where you pay cash up-front or take on a hire purchase (HP) agreement. Using this method you either own the vehicle right away or have the option to own it
- **Finance leases:** you can choose fixed term, flexible or balloon leasing and you will fund the cost of the vehicle, but never own it
- **Operating leases:** a contract hire agreement where you only pay for the depreciation cost and agreed maintenance of the vehicle.

The devil's in the detail

Under HP, the vehicle is hired for a fixed period and repayments are made by installments to cover the total cost of the vehicle plus interest less the final purchase fee. As Dunne explains: 'The vehicle is shown as a fixed asset on your balance sheet throughout the period of the agreement and for accounting and tax purposes it is treated as though you own it outright. The amount owing is normally shown as a liability and the interest charge is set against taxable income over the term of the contract. For tax purposes, you can claim writing-down allowances on the allowable capital cost of the vehicles'.

A variation of HP is balloon hire purchase which defers part of the capital cost (the bal-

wheels

loon) until the end of the agreement. But you should bear in mind that with any purchase plan you take the hit for depreciation.

So what's the difference between a finance lease and an operating lease? The answer lies in who takes the risk on the depreciation of the vehicle. In a finance lease, you bear the risk. If the price you get for the vehicle does not match the settlement figure or the balloon payment, then you have to come up with the difference.

Under an operating lease, however, you only pay for the depreciation and the interest and then the vehicle goes back to the leasing company at the end of the agreement. Any drop in the value, estimated or otherwise, is absorbed by the leasing company.

Which lease?

Fixed-term leasing is the most straightforward scheme available. Basically, you pay a rental over an agreed period, usually the vehicle's useful life, and then you can get up to 100% of the proceeds of its the sale at the end of the lease. You can also opt for service and maintenance contracts.

Flexible leasing is much the same product with an option to end the lease after an agreed initial period, usually 12 months. At the end, you or the leasing company can sell the vehicle and you will get a rebate on your rentals if the sale price of the vehicle exceeds the outstanding amount of the lease and costs incurred. In both fixed-term and flexible leasing options, you can choose to extend the period of lease for a nominal (so-called 'peppercorn') rental.

A first cousin of the flexible lease is the balloon lease. Here, part of the capital cost, plus VAT, is deferred to the end of the lease to be recovered from the sale of the vehicle. Naturally, should the sale of the vehicle not achieve the necessary amount, you've got to stump up the difference again.

Get off your assets

Contract hire, which is also known as an operating lease or full-service leasing, offers businesses the opportunity to operate vehicles with the minimum of fuss and with the least intrusion into their accounts as they do not have to be shown on the balance sheet. These types of agreements give the full use of the vehicle including, usually, the costs of servicing, maintenance and tyres. Road tax is normally included and automatically renewed as is AA or RAC-style breakdown cover protection.

'Contract-hire agreements can be constructed to suit every business requirement, eliminating the customer's responsibility for depreciation risks, maintenance costs and administration', says Larry Dunne.

Frank Moore, sales manager with Lease Plan Fleet Management Services, a specialist provider of vehicle management solutions, says: 'Operating leases are the way of the future. Companies are increasingly showing their desire to move their vehicles off their balance sheets and let the finance companies take the risk on residual values. The reduced administration burden is also a big advantage where a maintenance contract is also incorporated'.

The taxman

The Revenue Commissioners treat finance packages in two different ways and the crucial question is whether there is either a right or an option to buy the vehicle. If there is, then the Revenue Commissioners treat the finance package as a purchase plan for income and corporation tax.

In this instance, capital allowances can be claimed (instead of depreciation) on a reducing balance at 20% of the allowable cost which is currently £15,500 for new cars. There is no limit on commercials. The interest part of the

payment can be set against tax, depending on the type of purchase plan you have chosen.

On leases where you have no option or right to buy the vehicle, the full amount of the rentals is allowable against cars costing less than the current limit of £15,500. (Only a proportion of the cost is allowed for more expensive cars.) Rentals are allowable on a time-of-use basis.

Where a vehicle is sold at the end of a lease and a surplus is made, the rebate of the rentals is treated as taxable income. Where the vehicle is traded in, the amount of the trade-in is allowed for tax purposes to be spread over the term of the lease.

If you choose to purchase your vehicle by HP and the vehicle automatically transfers to you at the end of the agreement, you must pay VAT at the outset of the agreement on the capital cost of the agreement. No VAT is payable on the financing cost.

'If you choose a lease', Dunne advises, 'the absolute VAT cost is higher since VAT is payable on the total rentals, including interest. However, a cashflow advantage can be obtained since the VAT is charged and paid as part of the rentals over the period of the lease, rather than being paid in full at the outset as is the case with purchase plans'.

Check list

Before you make a decision on which of the many financing products suits your firm best, think carefully about the following issues:

- Do you know how much interest you are going to pay over the full term of your agreement?
- Is the length of agreement more suitable to you or the finance company?
- Is the payment pattern likely to throw up difficulties at certain times of the year? If so, you can usually negotiate a repayment pattern that suits you better
- Do the initial rentals or the deposit require VAT to be paid at the outset?
- What are the excess mileage and wear and tear charges? (These apply particularly to operating leases)
- What level of maintenance charge and maintenance cover applies?
- Which additional services are included? (for example, is road tax included?)
- Who takes the hit on depreciation: you or the finance company?

Last, but not least, talk to the professionals. Most Society of the Irish Motor Industry dealerships now have fleet or business vehicle specialists whose job is to give you independent advice on which finance package is best for you. A full list of the members of the VLAI and an excellent booklet on vehicle financing can be obtained from their office in Glenageary, County Dublin (tel: 01 285 4619). G

Paul O'Grady is editor of Irish Motor Industry *magazine, the official journal of the Society of the Irish Motor Industry.*

A fair day's pay?

Where does the money earned by your practice go, and does your method of charging allow you to maximise profits? In the second article on the Law Society's first benchmarking exercise, Barry O'Halloran looks at spending and profit

One of the key aims of the Law Society's first-ever practice comparison survey was to allow member firms an opportunity to measure or benchmark themselves against similar practices and work out how they could improve their profitability and growth prospects.

The Society and its independent adviser, InterCompany Comparisons, have just finished analysing the financial information supplied by the 26 firms which took part in the survey and, once again, the results have thrown up plenty of food for thought.

Average net profits for the last three years were £133,000, £111,000 and £113,000 respectively. While these figures look quite high, the Society's Finance and Administration Director Cillian MacDomhnaill stresses that it is difficult to establish this one way or the other because the survey is based on such a small sample of firms. **Table 1** shows the results after the figures were analysed. **Table 2** shows the minimum and maximum profits over three years.

Practitioners frequently ask if they are charging enough, or too much, and they wonder what others are charging. The real answer is that there is no correct amount, but you should look for enough to cover overheads and reward yourself and your firm.

A Law Society Cost Committee survey found in 1994 that the average cost of running a solicitor's office was £78 an hour. Bearing this in mind, you should note that most professionals' charges break down as one-third to cover overheads, one third to cover a reasonable salary for the person providing the service and one third for profit.

Table 3 shows that this approach was being taken by the firms which took part in the survey. Average net profit came to 31%, 25% went on salaries and 44% was allocated to overheads. **Table 4** shows the hourly rate charged by the respondents.

Turnover per partner/solicitor averaged £89,633 with a minimum of £4,500 and a maximum of £297,200. **Table 5** shows how this profit is distributed to partners and principals with assistants and without assistants.

Table 1

NET PROFIT (AFTER TAX)

	25	Median 50	75
1996	£30,067	£59,666	£117,747
1995	£41,032	£70,778	£156,989

Median is the middle value in a range. The upper and lower points represent 75% and 25% respectively, that is, the median for the top and bottom halves of the sample.

Table 2

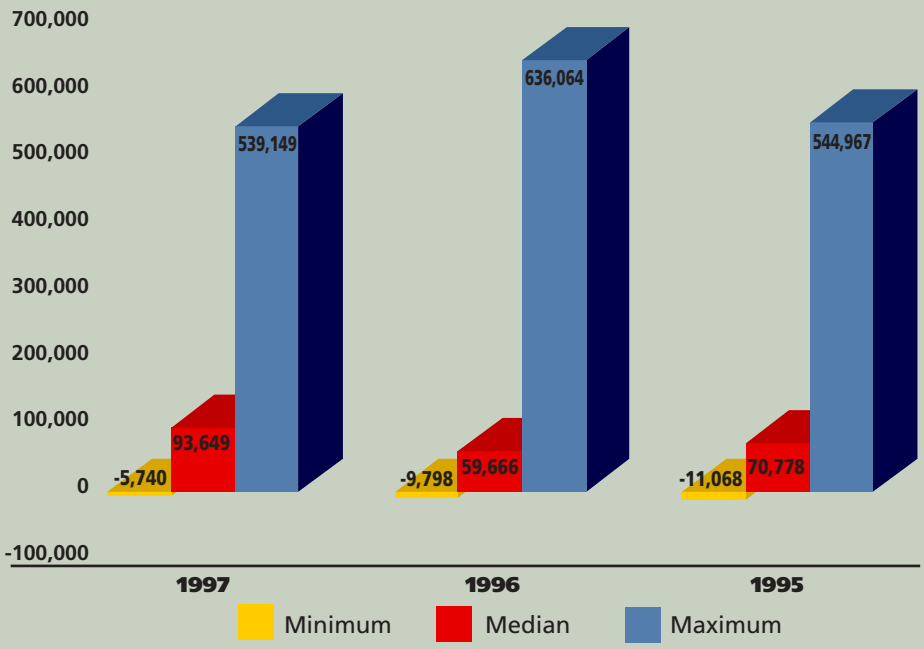


Table 3

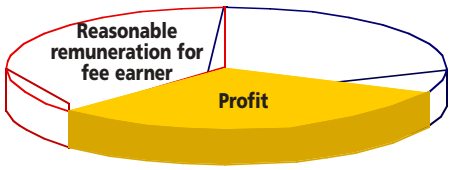


Table 4

CHARGE RATE PER HOUR

	25	Median 50	75
Partner/principal	£68	£93	£113
Assistants	£61	£80	£105

Table 5

	25	Median 50	75
Partners	£46,234	£82,500	£105,873
Principal/no assistants	£13,000	£40,000	£65,000
Princpals with assistants	£33,750	£62,500	£155,000

Table 6 shows the main categories of expense and the average amount spent on each. There were no great surprises here. Overall computer costs and depreciation accounted for 7.5% on average, rent and rates for 8.2%. Professional indemnity insurance and practising certificate fees accounted for almost 4%. **Table 7** shows the balance sheet summary for the average firm at the year's end.

The lesson to be learned from this exercise is that the key issue is profitability of fees rather than the charges themselves. While fees are essential, an over-emphasis on an individual fee level can be counter-productive as it may cause:

- Fee earners to keep work that should really be passed on to others
- Partners doing work that should be done by someone else
- Solicitors with management responsibilities focusing too much on that role.

Profitability should be measured after allowing for fee earners' and support staff salaries. A standard partner's/principal's salary should be included at roughly £35,000 a year. Overheads are not being taken into consideration and firms should be asking themselves what level of overheads are reasonable for a business of their size.

The survey was launched a year ago and focused on the following areas:

- Practice size, location and premises tenure
- Personnel (fee-earning and non-fee-earning) recruitment, remuneration and benefits
- Partnership structure
- Market structure – that is, revenue per hour, revenue type in terms of fees and number of clients
- Market profile – that is, private, commercial and so on
- Finance and accounting structure
- Expenditure and profits.

It was originally meant to be carried out across nine sub-categories, made up of various-sized practices in Dublin, other urban centres and rural areas. Unfortunately, the small number of respondents made it impossible to do this.

Both MacDomhnaill and Peter Coyne of InterCompany Comparisons argue that this is the first step in a process that will eventually paint a very complete picture of the profession across all areas, practice sizes and sectors. The information will allow all firms to compare or benchmark their performance against their peer group and establish how they are performing, and if improvements need to be made.

The Practice Management Committee intends to carry out a much more comprehensive benchmarking exercise this year, but MacDomhnaill argues that for this to be successful, and to provide the profession with meaningful feedback, a large number of firms must respond to the survey.

Table 8 shows how the survey will divide up the profession into sub-sectors. In terms of size, there are three categories, beginning with firms with one to two partners up to those with over six. Geographically, firms will be split into Dublin-based, urban (meaning Galway, Waterford, Cork, Kilkenny and Limerick) and rural.

The survey will not require the completion of detailed forms. Managing partners/principals will be presented with a *pro forma* requesting information relating to size of practice, staff levels, staff turnover etc. They will be asked to append the most recent year's financial accounts. The Practice Management Committee will not have access to information about individual firms. This will be processed by an independent third party, InterCompany Comparisons, which will only report its aggregate findings to the committee.

MacDomhnaill stresses that the exercise will be very worthwhile for the participating firms and for the profession as a whole. 'If sufficient firms participate in the survey, it will mean that meaningful data can be produced for each of the sub-categories', he says.

'Participating firms will receive a report outlining the findings of the survey and how they perform against the industry average. This will give you a benchmark against which to measure your performance and hopefully make improvements where necessary'. G

Table 6

Expenditure item	Average	% of Spend
Finance charges	£3,088	1.4%
Light/heat/power	£2,751	1.2%
Computer expenses	£4,260	1.9%
Computer equipment	£7,660	3.5%
Motor & vehicle	£7,335	3.3%
Repairs & renewals	£4,001	1.8%
Maintenance	£3,473	1.6%
Agents' fees	£1,457	0.7%
Telephone	£6,995	3.2%
Cleaning	£1,606	0.7%
Leasing	£4,430	2.0%
Consultancy	£9,496	4.3%
Training	£1,877	0.8%
Audit fees	£2,878	1.3%
Library	£2,028	0.9%
Professional indemnity and practising cert	£8,307	3.7%
Stationery	£6,037	2.8%
Postage	£4,949	2.2%
Salaries	£98,050	44.3%
Marketing/advertising	£3,099	1.4%
Rates	£2,398	1.0%
Rent	£16,005	7.2%
Bad debts (written off)	£3,592	1.6%
Depreciation – fixtures and fittings	£7,127	3.2%
Depreciation – buildings	£1,065	0.5%
Depreciation – computer	£4,209	1.9%
Insurance – public liability	£831	0.4%
Insurance – general	£1,943	0.9%

Table 7

END OF YEAR BALANCE SHEET SUMMARY

	Mean	% of total balance sheet
Debtors	£72,414	6%
Work in progress	£32, 145	2%
General creditors	£15,860	2%
PAYE/PRSI outstanding	£2,323	0%
VAT outstanding	£9,384	0%
Partner's income tax	£41,720	1%
Outstanding borrowings	£67,922	4%
Lease obligations	£6,836	0%
Capital and reserves	£50,328	3%
Cash in hand/bank	£187,465	14%
Total current assets	£292, 085	27%
Total current liabilities	£291,287	28%
Fixed assets	£57, 556	5%
Partners' capital accounts	£94,798	8%
Bad debts provision	£9,351	0%

Table 8

SIZE (NO OF SOLICITORS)

	1-2	3-5	6+
Dublin			
Urban*			
Rural			

*Galway, Waterford, Cork, Kikenny and Limerick

Council report

Report on Council meeting held on 22 January 1998

1. Motion: Salaries for apprentices

That this Council approves the revised scale of recommended salaries for apprentices, to apply from 1 March 1998, as set out below:

- *£135 gross per week for the first six months after completion of the professional course*
- *£145 gross per week for the second six months*
- *£155 gross per week for the remaining period.*

That this Council also approves a revised salary guideline of £105 gross per week for apprentices working in their masters' offices prior to attendance on the professional course.

Proposed: Owen Binchy
Seconded: Michael Peart

The proposers said that the proposal had been approved by the Education Committee and represented a £20 increase on the recommended scale set in 1994. Pat O'Connor, in reply to questions from Andrew Dillon, confirmed that the Deed of Apprenticeship contained a covenant that the master would pay the recommended scale. He also reiterated the Council's very strong and long-standing opposition to payments to prospective masters to make apprenticeships available. The Council approved the terms of the motion.

2. Motion: Law reform

That this Council calls on the Government to immediately implement any outstanding Law Reform Commission reports, particularly in the areas of land law and conveyancing law, succession law and debt collection where such legislation can be introduced without any cost to the Government.

Proposed: John Costello
Seconded: Michael Peart

At the suggestion of the President, it was agreed by the proposers that the motion should be adjourned to the Council meeting on 8 May 1998 for reports from the Law Reform Committee and Conveyancing Committee. It was confirmed that the Law Reform Committee had already arranged a meeting with the Law Reform Commission.

3. Army deafness cases

The President reported that this issue had been receiving enormous publicity with both the Minister for Defence and the Society making public statements on an almost daily basis. On 20 January 1998, the Director General had appeared on the RTE TV programme *Prime Time* and deserved congratulations on his performance. Meetings had been held within the Society on a regular basis in response to unfolding events. On 20 January 1998, the President and Director General had a meeting with the Minister for Defence for an hour and a half at the Minister's office. The Minister had expressed strong views in relation to the entire matter and had asked the Society to deliver a 50% reduction in the fees being charged in these cases, following which he would consider providing the Society with some evidence of alleged misconduct by solicitors. The President had subsequently written to the Minister asking him to furnish to the Society any evidence in the Minister's possession of misconduct on the part of any solicitor as a matter of urgency. In relation to fees, a meeting with representatives of the 40 solicitors' firms acting for substantial numbers of plaintiffs in these cases had been convened for 23 January 1998. Obviously, any decision in relation to a reduction in fees was a matter for the firms concerned. There followed a lengthy debate to which 21 Council members made contributions. It concluded with an expression of full confidence in the President and the Director General in their continued dealing with the on-going controversy.

4. Solicitor advertising

The President said that, since the December Council meeting, the Society had been advised of a Government decision 'to prohibit solicitors advertising their services, at least in relation to personal injuries'. On 21 January 1998 he, together with the Director General, Michael V O'Mahony and Mary Keane, had met officials of the Department of Justice to discuss the legislation which would give effect to this Government decision. A lengthy debate ensued to which 16 Council members contributed on various aspects of this issue. In conclusion, the Council unanimously endorsed the view that it would support legislation to ban solicitor advertising for personal injury

work. No wider ban would be supported by the Society, however, as the solicitors' profession had to be free to compete on a level playing field in the competitive market it shared with other service providers.

5. Payment by lending institutions for work done by borrowers' solicitors

Colm Price, past chairman of the Conveyancing Committee, addressed the Council to introduce a recommendation of the Conveyancing Committee prior to a full debate on the issue at the Council meeting on 26 March 1998. Mr Price emphasised that the Conveyancing Committee was not by any means 'soft' on lenders. On the contrary, during 1996 the committee had negotiated with the lenders and, by the end of that year, the certificate of title system had been restored to its initial purpose, with solicitors being required to certify purely in relation to title matters. All matters not related to title, such as credit-worthiness, loan repayment arrangements, property valuations and all insurance matters were the responsibility of the lender and not of the borrower's solicitor. Section 125 of the *Consumer Credit Act* prohibited lenders charging fees to borrowers in relation to investigation of title. Following a thorough consideration of the matter, it was now the unanimous view of the Conveyancing Committee that payment should not be sought from lending institutions for work done by borrowers' solicitors. The acceptance of fees for mortgage security work would have inherent dangers of imposing a general duty of care on solicitors in relation to lenders. This was the recommendation of the Conveyancing Committee. Whether it was accepted or not was a policy matter for the Council to decide.

6. Multi-disciplinary practices

The President reported that he, the Director General and John Fish had recently attended a meeting at the offices of the Law Society of England & Wales to review a useful and informative discussion paper on this subject. The President, with the approval of Council, then established a working group whose terms of reference would be to:

i. Examine and report to the Council, by 8 May 1998, on the issues affecting (a) the profession, (b) the public, and (c) the Law Society arising from the establishment of multi-disciplinary practices/ partnerships.
ii. Consider what steps, if any, the Law Society should take in light of the above.

7. Persons with disabilities

Ernest Cantillon proposed that the Society establish a new committee to address issues which arose for persons with disabilities. These included education, wills, trusts, criminal responsibilities, powers of attorney and health entitlements. He envisaged the new committee analysing these issues and producing a user-friendly booklet or brochure for both carers and members of the profession. The Council endorsed Mr Cantillon's proposal.

8. Establishment directive

Michael Irvine noted that the EU establishment directive had been passed and had to be enacted into Irish law by 1999. Consideration of the implications of the directive was added as a specific item on the Council action plan.

9. Anniversary ball

The President reported that an anniversary ball to mark the Law Society's 20th year in Blackhall Place would be held on 17 July 1998.

Committee reports

TAXATION

TAX BRIEFING

The following extracts from *Tax Briefing*, issue 30, February 1998, are reproduced by kind permission of the Revenue Commissioners.

Cash receipts basis of accounting for VAT

Practitioners will recall that last July the annual turnover threshold for eligibility for the cash receipts basis was increased from £250,000 to **£500,000**. There is a cashflow benefit to be obtained by qualifying traders in changing to a cash receipts basis of accounting for VAT.

Some practitioners have expressed concern that, at the time of changing to the cash receipts basis, a trader might be obliged to account for VAT twice in relation to the same supply – initially during the taxable period when the invoice issues and subsequently in a later taxable period when payment is received. This is not correct. Where VAT in relation to a supply has already been accounted for prior to authorisation to use the cash basis, no further liability arises when payment is subsequently received (section 14(1A)(b) of the *VAT Act* refers.)

Practitioners dealing with clients who wish to change to the cash receipts basis should notify their local tax office giving details of their turnover for the last 12 months and an estimate of their likely turnover for the next 12 months.

CGT clearance certificate

Under current legislation, if the consideration for the disposal of certain assets exceeds £100,000 the vendor must obtain a clearance certificate from Revenue, otherwise the purchaser must deduct 15% from the purchase price. An Irish tax resident is entitled to a certificate on the basis of his residence while a non-resident must pay any CGT arising before a certificate is issued. With the recent increase in house prices a considerable amount of administrative work is being generated by this requirement. It is proposed to increase the limit to **£150,000** to simplify the administrative burden on taxpayers and on the Revenue.

Small gains annual exemption limit

The current capital gains tax exemption limits are £1,000 per individual and effectively £2,000 per married couple. The Budget announced that from 6 April 1998 the small gains exemption limit would be £500 per individual irrespective of marital status. It has been decided to increase this to £1,000 a year. The *Finance Bill* provides for this revised amount.

Tax clearance

Solicitors and barristers operating under the criminal legal aid scheme are not, at present, subject to tax clearance procedures. The *Finance Bill*, therefore, includes a provision which will facilitate the extension of such procedures to solicitors and barristers under the free legal aid scheme.

Tax relief for company donations to eligible charities

The *Finance Bill* provides that tax relief for company donations to eligible charities will apply to *all* charities and not just domestic charities as announced in the Budget.

Commencement rules for income tax

Sections 65 and 66 of the *Taxes Consolidation Act, 1997* set out the tax assessment rules which apply to traders and professionals commencing business. There is evidence of abuse in this area whereby some individuals have artificially contrived to keep substantial amounts of income outside the charge to tax. Provisions are now included in the *Finance Bill* to remedy this situation. They provide that the trading profits of the second year running from 6 April to 5 April will be taxable in full in all cases.

Income tax, CGT: self-assessment pay and file rules

The *Finance Bill* proposes to amend the current provisions under self-assessment for the payment of preliminary income tax and the filing of tax returns by harmonising the deadlines by which the tax is paid and tax returns are filed. It is proposed to unify these deadlines at 30 November on and from 30 November 1999. The effect of these proposals is illustrated by the following example:

Pay preliminary tax for 1999/2000
Existing deadline: 1 Nov 1999
Proposed deadline: 30 Nov 1999
File return for 1998/99
Existing deadline: 31 Jan 2000
Proposed deadline: 30 Nov 1999
Pay balance of tax for 1998/99
Existing deadline: 30 April 2000
Proposed deadline: 30 April 2000.

The Revenue have also undertaken to reduce the amount of documentation required to be filed by taxpayers with the return under the new self-assessment arrangements. There will be consultation with practitioners through the Tax Administration Liaison Committee in implementing these new pay and file arrangements.

The *Finance Bill* also provides that CGT will also be paid **in full** on 30 November after the tax year in which the gain was made. At present, payment of 90% is required on 1 November after the tax year, with the balance payable the following 31 January or, if later, within one month of the assessment being made.

There will also be changes to the direct debit system for payment of preliminary tax to allow instalments to be aligned with the tax year rather than the calendar year as at present. These changes will take effect for the tax year 1999/2000.

Practice notes

Voluntary dispositions/bankruptcy

Requisition 15 of the 1996 edition of *Requisitions on title* bears the above heading.

The Conveyancing Committee has decided in the light of opinions received that requisition 15 be amended by the deletion of 15c for the reasons set out in this practice note. Accordingly, it should no longer be necessary to furnish a bond if the requirements below are fulfilled.

Requisition 15c at present states '... if the disposition was made within the past two years, an insurance bond equal to value of the property' should be furnished. The present wording was arrived at because it was felt in the opinion of the committee to be desirable in the light of section 59(1)(a) of the *Bankruptcy Act, 1988* which states as follows:

'Any settlement of property, not being a settlement made before and in consideration of marriage or made in favour of a purchaser or encumbrancer in good faith and for valuable consideration shall:

a) If the settlor is adjudicated bankrupt within two years after the date of the settlement be void as against the official assignee and ...'.

The section says 'void' and further does not contain an express provision giving protection to purchaser for value without notice whereas there is such protection given under section 59(1)(b) '... if the settlor is adjudicated bankrupt at any subsequent time within five years after the date of the settlement ...'.

As stated, it was thought that the *Bankruptcy Act, 1988* had changed the earlier *Bankruptcy (Ireland) Amendment Act 1872* as amended. It has, however, long been accepted that the use of the word 'void' in fact means 'voidable' and why the opportunity was not taken in the 1988 Act to clarify this is not entirely clear. The courts have always accepted that in this context 'void' means 'voidable' and that anyone who claims under a settlement who is a purchaser for valuable consideration without notice has a good title which indeed can be forced on a purchaser (*re: Carter and Kenderdines Contract [1897] 1 CH776*).

The net issue would appear to be that if the settlor was made a bankrupt within two years of the date of the settlement and the official assignee in bankruptcy availed of section 59(1)(a) in order to set aside the voluntary conveyance by the settlor, would this have the effect of depriving a purchaser of a good title to the property? Secondly, if the setting aside of the settlement would not prevent a purchaser getting a good title because he is a *bona fide* purchaser for value without notice, what criteria must the purchaser satisfy in order to come within the terms of the definition?

The essential elements therefore are valuable consideration, good faith and the absence of notice whether actual or constructive. Accordingly, therefore, section 59(1)(a) did not change the law which has existed since 1883 which is that a voluntary settlement would not be void against the settlor's trustee in bankruptcy from its date but could only be void against the trustee from the date on which the trustee's title accrues. Up to that point, the disponee of the voluntary settlement would have a voidable (not a void) title and if the property comprised in the settlement were sold to a *bona fide* purchaser for value without notice the title of the purchaser would be good as against the trustee.

The donee will be acting in good faith if he has no notice of any fraud or fraudulent preference being intended even if such was the intention of the settlor at the time.

The onus of proof of a lack of good faith and a lack of valuable consideration is on the official assignee. The person taking under or relying on a gift must at all times have acted *bona fide*, which means in the absence of any dishonesty or any attempt to defraud another person.

In effect such person must have no notice of any fraud or fraudulent preference being intended by the settlor. What is therefore necessary when dealing with a voluntary conveyance is to obtain the information necessary to show that at the time of the disposition the settlor was in a position to discharge any debts that he or she might have had. It is the long-established practice of taking a declaration of solvency. It is necessary that the assets of the settlor be sufficient to discharge all his debts without recourse to the property comprised in the settlement.

For a definition of what constitutes a purchaser for value without notice, one should look at section 3(1), *Conveyancing Act 1882* which states that a purchaser will not be affected by notice of any instrument, fact or thing unless *inter alia* it would have come to the knowledge of his solicitor had such enquiries and inspections been made as ought reasonably had been made by the solicitor. What the appropriate enquiries and inspections are will of course depend on the circumstances of each case.

The other Act which is relevant in this regard is the *Conveyancing Act (Ireland) 1634* and sections 10 and 14 thereof which deal with dispositions intended to delay, hinder or defraud creditors. Such dispositions are void save where made *bona fide* for good consideration and in this regard see requisition 15a. Accordingly, it is suggested to amend requisition 15 to read as follows:

15. Voluntary disposition/ bankruptcy

If there is a voluntary disposition on title furnish now in respect of each such disposition:

a) A statutory declaration from the disponer that the disposition was made bona fide *for the purpose of benefiting the disponee and without intent to delay, hinder or defraud creditors or others or, if this is not within the reasonable procurement of the vendor, confirmation that the vendor was not aware of any such fraudulent intent*

b) If the disposition was made within the past five years, evidence by way of statutory declaration of the disponer that at the date of the disposition the disponer was solvent and able to meet his/her debts and liabilities without recourse to the property disposed of

c) A bankruptcy search against the disponer.

Please note in paragraph (b) above that, in accordance with the *Bankruptcy Act, 1988*, ten years has been changed to five years.

Conveyancing Committee

Certificates of title in residential (non-commercial) conveyancing

It has come to the attention of the Conveyancing Committee that some lending institutions are requesting solicitors to sign 'acceptance of instructions' and are issuing 'instructions to solicitors' or are otherwise issuing loan packages containing documentation suggesting that a borrower's solicitor also acts for the lending institution.

Under the certificate of title system agreed between the Law Society and the lending institutions, the obligations of the borrower's solicitor are set out in the approved guidelines as issued with the approved forms of undertaking and certificate of title. No other documentation should be accepted or used by practitioners, nor should they accept or sign any documents which appear to be extraneous to the agreed documentation or which suggest either expressly or impliedly that the solicitor also acts for the lender. In the ordinary course of events, the profession will be given due notice of any agreed changes to the certificate of title system.

Solicitors are also reminded of the procedures regarding stage payments and the supplemental stage payment undertaking which requires a solicitor giving the undertaking to a lending institution to ensure that before any stage payment in excess of the amount covered by the HomeBond is paid, title to the property (including the right to immediate possession) must pass to the purchaser.

Conveyancing Committee

New houses: HomeBond and deposit cheques

Practitioners acting for purchasers are reminded that, where it is a condition of the contract that the deposit be released to the vendor, then in order for the purchaser to avail of the protection afforded by HomeBond the deposit cheque should be made payable to the party who is registered under the HomeBond scheme.

Therefore, where booking deposits have already been paid by the purchaser to an agent or to someone other than the party registered with HomeBond, confirmation should be given by the vendor's solicitor that this money has been passed on to the registered party.

Purchasers' solicitors should also ensure that the *original* HB10 is in their possession before the deposit cheque is passed on to the vendor's solicitor (made payable to the registered party). If the original HB10 is not available, confirmation should be furnished by the vendor's solicitor that any deposit paid will be held by them as stakeholder until the original HB10 (with schedules attached) is in the purchaser's solicitor's possession.

Conveyancing Committee

LEGISLATION UPDATE: 1 JANUARY – 15 MARCH 1998

ACTS PASSED

Referendum Act, 1997
Number: 1/1998
Contents note: Establishes an independent Statutory Referendum Commission which will provide information to the electorate on the subject matter of a referendum.
Date enacted: 26/2/1998
Commencement date: 26/2/1998

SELECTED STATUTORY INSTRUMENTS

District Court (Criminal Justice) Rules 1998
Number: SI 41/1998
Contents note: Give effect to the provisions of the *Criminal Justice (Miscellaneous Provisions) Act, 1997*, with the exception of provision of a seal for the District Court. In addition, three other matters are provided for: (a) the amendment to the form 24.7 (list of witnesses); (b) the addition of rule 11 to order 25 which concerns the recital of charges in a warrant or a recognisance; (c) the amendment to order 38 regarding applications to the court to detain or further detain cash seized under the *Criminal Justice Act, 1994*.
Amends: *District Court Rules 1997* (SI 93/1997)
Commencement date: 15/3/1998

District Court (Family Law) Rules 1998
Number: SI 42/1998
Contents note: Set out the procedure to be followed and the forms to be used in applications under the *Family Law Act, 1995* and the *Family Law (Divorce) Act, 1996*.
Amends: *District Court Rules 1997* (SI 93/1997)
Commencement date: 15/3/1998

Fisheries (Amendment) Act, 1997 *(Commencement) Order 1998*
Number: SI 46/1998
Contents note: Appoints 26/2/1998 as the commencement date for certain specified provisions – see SI.

Guardianship of Children (Statutory Declaration) Regulations 1998
Number: SI 5/1998
Contents note: Prescribe the form of the joint statutory declaration to be made by the mother and father of a non-marital child who wish the father to become a guardian of the child jointly with the mother in accordance with the *Guardianship of Infants Act, 1964*, s2(4) (inserted by the *Children Act, 1997*).
Commencement date: 1/02/1998

Organisation of Working Time (Breaks at Work for Shop Employees) Regulations 1998
Number: SI 57/1998
Commencement date: 1/03/1998

Organisation of Working Time (Code of Practice on Compensatory Rest and Related Matters) (Declaration) Order 1998
Number: SI 44/1998
Contents note: Prescribes a code of practice on compensatory rest periods for the purposes of the *Organisation of Working Time Act, 1997*, s6.
Commencement date: 24/2/1998

Organisation of Working Time (Exemption of Transport Activities) Regulations 1998
Number: SI 20/1998
Commencement date: 1/3/1998

Organisation of Working Time (General Exemptions) Regulations 1998
Number: SI 21/1998
Contents note: Prescribe that persons employed in the activities specified in the schedule to these regulations shall be exempt from the application of ss1, 12 and 13 of the Act which deal respectively with daily rest, rests and intervals at work and weekly rest, subject to being granted equivalent compensatory rest. Such persons shall also be exempt from the application of s16 of the Act which deals with nightly working hours.
Commencement date: 1/3/1998

Referendum Commission (Establishment) Order 1998
Number: SI 53/1998
Contents note: Establishes a referendum commission to provide information to the electorate on the 18th Amendment to the Constitution (which will enable the State to ratify the *Amsterdam treaty*).
Commencement date: 2/3/1998

Rules of the Superior Courts (No 1) (Solicitors (Amendment) Act, 1994) 1998
Number: SI 14/1998
Contents note: Provide for an amendment and additions to order 53 of the *Rules of the Superior Courts* in regard to procedures in disciplinary and related matters arising under the *Solicitors Acts, 1954 to 1994*.
Commencement date: 2/02/1998

Terms of Employment (Additional Information) Order 1998
Number: SI 49/1998
Contents note: Provides that where, under the *Terms of Employment (Information) Act, 1994*, an employer is required to provide an employee with a written statement of certain particulars of his or her terms of employment, such statement shall, after 1 March 1998, include details of the times and duration of (and any other terms and conditions relating to) the rest periods and breaks referred to in the *Organisation of Working Time Act, 1997*, ss11, 12 and 13, that are being allowed to the employee.
Commencement date: 1/3/1998

Trustee (Authorised Investments) Order 1998
Number: SI 28/1998
Contents note: Replaces the previous list of investments in which trust funds may be invested, as set out in the *Trustee (Authorised Investments) Act, 1958*, with a new list. Also specifies conditions which are to apply to the investment of trust funds.
Commencement date: 9/3/1998

Prepared by the Law Society Library

Solicitors' Benevolent Association

134th Report and Accounts

Year 1 December 1996 to 30 November 1997

The Solicitors' Benevolent Association, founded in 1863, is the profession's voluntary charitable body. It consists of members of the profession throughout Ireland who contribute to our funds, and its aim is to assist members or former members of the profession and their spouses, widows, widowers, families and dependants who are in need. The association provides advice and financial assistance on a confidential basis and functions independently of both Law Societies.

There are currently 23 directors, three of whom reside in Northern Ireland, and they meet monthly in the Law Society's office, Blackhall Place. They meet at Law Society House, Belfast, every other year. The work of the directors, who provide their services entirely on a voluntary basis, consists in the main of reviewing applications for grants. Directors also make themselves available to those who may need personal or professional advice, a service which has increased during the last year.

The activities of the association are helped not only by individual or special subscriptions but also by organised groups of the profession, including bar associations and the Younger Members' Committee.

You will see from the accounts that the amount paid out in grants during the year was £188,111 and it was only possible to pay out this sum due to the generous donations, legacies and the proceeds of fund-raising events received by the association. The subscriptions from members are not sufficient to meet all the demands and, accordingly, it was necessary for the directors to increase the annual subscription for members by £5 for the coming year.

The directors are grateful to both Law Societies for their support and, in particular, wish to express thanks to Francis D Daly, Past President of the Law Society of Ireland, Alistair J Rankin, Past President of the Law Society of Northern Ireland, Ken Murphy, Director General, John Bailie, Chief Executive, and all the personnel of both societies.

I wish to express particular appreciation to all those who contribute with the fee for their practising certificate, to those who make individual contributions and to the following:

Dublin Solicitors' Bar Association; Southern Law Association; Waterford Law Society; Limavady Solicitors' Association; County Cavan Solicitors' Association; Limerick Bar Association; Mayo Solicitors' Bar Association; West Cork Bar Association; Tipperary & Offaly Bar Association; Kerry Law Society; State Solicitors' Association; Faculty of Notaries Public; The Law Society; Publishers of the *Lawyers' Desk Diary*; Irish Document Exchange; Younger Members' Committee.

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

Thomas A Menton, Chairman

RECEIPTS AND PAYMENTS ACCOUNT 1 DECEMBER 1996 TO 30 NOVEMBER 1997

	1997		1996	
Receipts	**IR£**	**IR£**	**IR£**	**IR£**
Subscriptions	133,157		33,512	
Donations	40,582		27,388	
Investment income	25,630		25,463	
Bank interest	451		862	
		199,820		187,225
Payments				
Grants	188,111		187,260	
Bank charges	1,547		1,635	
Administration expenses	13,100		10,870	
		(202,758)		(199,765)
Deficit for year before Special events proceeds		(2,938)		(12,540)
Maracycle	–		716	
Concert: 1 October 1996	–		3,225	
Irish conveyancing precedents publication	701		4,566	
Golf outings	–		1,982	
		701		10,489
(Deficit) for year before legacies		**(2,237)**		**(2,051)**
Legacies		38,350		20,000
Surplus per year		£36,113		£17,949

ACCOUNTING POLICIES

a) Accounting convention

The accounts have been prepared under the historical cost convention. The currency used in these accounts is the Irish Pound as denoted by the symbol IR£.

b) Receipts and payments

Receipts and payments are recognised in the accounts as they are received and paid.

c) Investments

Investments are stated at cost less provision for any permanent diminution in value.

d) Sterling

Assets and liabilities denominated in sterling are converted to Irish Pounds at the rate of exchange prevailing at the balance sheet date. Income and expenditure denominated in sterling are converted to Irish pounds at the average exchange rate prevailing during the year.

The rates applicable for the year ended 30 November 1997 were:

	IR£	Stg£
• Year End	1	0.8805
• Average	1	0.9372

ACCOUNTANTS' CERTIFICATE

We have prepared the Receipts and Payments Accounts set out above for the period 1 December 1996 to 30 November 1997 from the accounting records and information and explanations supplied to us. In our opinion, the accounts are in accordance therewith.

Coopers & Lybrand,
Chartered Accountants,
Dublin

DIRECTORS AND OTHER INFORMATION

Directors
Chairman: Thomas A Menton
Deputy Chairman: Brian K Overend

Trustees (*ex officio* directors)
Brian K Overend
John M O'Connor
Andrew F Smyth
Rosemary Kearon
John Sexton

Metropolitan directors
Rosemary Kearon
Sheena Beale
Gerald Hickey
Noelle Maguire
John M O'Connor
Colm Price
John Sexton
Andrew F Smyth

Provincial Directors
Desmond Doris, Belfast
Robert M Flynn, Cork
John Brian Garrett, Belfast
Colin Haddick, Newtownards
Carmel Jenkins, Mayo
Niall D Kennedy, Tipperary
Frank Lanigan, Carlow
Brendan J Lynch, Carrick-on-Shannon
Etta Nagle, Cork
Michael O'Connell, Tralee
Thomas D Shaw, Mullingar
Patrick F Treacy, Tipperary

Secretary
Geraldine Pearse

Bankers
AIB plc
37/38 Upper O'Connell Street
Dublin 1
and
First Trust
31/35 High Street,
Belfast BT1 2AL

Accountants
Coopers & Lybrand
Chartered Accountants
George's Quay
Dublin 2

Stockbrokers
Bloxham Stockbrokers
2-3 Exchange Place
IFSC
Dublin 1

Offices of the Association
The Law Society
Blackhall Place
Dublin 7

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

News from the EU and International Affairs Committee

Edited by TP Kennedy, Education Officer, Law Society

Sexual discrimination and equal pay provisions

The European Court of Justice (ECJ) has given its decision in *Lisa Jacqueline Grant v South-West Trains Ltd* (Case 249/96), 17 February 1998. It held that a refusal to grant travel concessions for an employee's partner of the same sex is not discrimination prohibited by Community law.

Ms Grant is an employee of South-West Trains. The company gives free travel or travel concessions on its network to its employees. These benefits are also given to an employee's spouse, or to a partner of the opposite sex if there has been a meaningful relationship between them for at least two years.

Ms Grant's predecessor had obtained travel concessions for his female partner. Ms Grant was in a long-standing homosexual relationship and requested the travel concessions for her female partner. South-West Trains refused on the basis that such concessions were only granted to a spouse or a partner of the opposite sex. Ms Grant then brought proceedings before an industrial tribunal in Southampton, arguing that the refusal constituted discrimination based on gender, contrary to Community law on equal pay for men and women (article 119 of the treaty and the equal pay and equal treatment directives). The industrial tribunal referred questions to the court concerning the interpretation of these provisions. It asked whether a refusal to grant travel concessions in these circumstances amounted to discrimination on grounds of gender, prohibited by Community law.

In his opinion (see *Gazette*, November, p40), Advocate General Elmer recommended that the court rule that article 119 had been breached and that there had been an act of discrimination based on gender. He said that the concessions were conditional on the co-habitees being of the 'opposite sex' to the employee. Thus, the granting of the concessions were based on the gender of the employee and the co-habitee.

However, the court reached a different conclusion. It considered three main issues. First, it considered whether the limitation of the travel concessions to co-habitees and spouses of the opposite sex was discrimination based directly on the gender of the worker. It refused to follow the recommendation of the Advocate General and held that the measure was not discriminatory. It pointed out that it applied equally to a male worker living with a male co-habitee as to female co-habitees. Thus, the rule applied in the same way to male and female workers.

The court then went on to consider whether Community law requires that stable relationships between two persons of the same sex should be treated by employers as equivalent to marriage or to stable relationships outside marriage between persons of opposite sex. The court held that it did not. There is nothing in Community law requiring the approximation of homosexual relationships to marital relationships. National law was not of assistance as the Member States have widely diverging rules on this issue. It also noted that the European Commission on Human Rights does not consider homosexual relationships as coming within the scope of the right to respect for family life under the *European convention on human rights*. For all these reasons, the court held that Community law does not equate stable same-sex relationships with opposite-sex stable or marital relationships. This can only be done by the introduction of legislation.

Finally, the court considered whether in the light of its case law and international conventions discrimination based on sexual orientation could be treated as discrimination based on sex, prohibited by article 119 and Community legislation. It held that Community law does not cover such discrimination.

The court pointed out that under the *Amsterdam treaty*, the Council would be able, acting on a proposal from the Commission and after consulting the European Parliament, to take measures with a view to eliminating various forms of discrimination, including discrimination based on sexual orientation. G

EU competition law investigations

Your client telephones early in the morning. He tells you that there are officials from Directorate General (DG) IV of the European Commission at the reception desk of his company. He wants to know what to do. What do you advise him?

Legislative background

Articles 85 and 86 of the *Treaty of Rome* contain the most important of the rules in competition matters. In broad terms, article 85 prohibits anti-competitive arrangements between undertakings where such an arrangement has an effect on trade between Member States, while article 86 prohibits the abuse of dominance by an undertaking having a dominant position in the market.

Council Regulation 17/62 entrusts the Commission with the enforcement of competition law and policy. DG IV of the Commission deals with this, and in particular it is directorate A of DG IV which is responsible for investigations. Article 14(1) of the regulation allows the Commission to 'undertake all necessary investigations' into undertakings and associations of undertakings, and to this end it is empowered to:

- Enter the undertaking's premises, land and means of transport
- Examine and take copies of the books and other business records
- Ask for oral explanations on the spot.

Preliminary points

The role of the Commission in these investigations should be noted. It is the investigator, prosecutor and adjudicator. Your attitude and that of your client should be informed by this simple truth. Your client's behaviour towards

Recent developments in European law

BANKING

The Commission has proposed a banking code directive to consolidate the 19 banking directives. This directive will not amend their substantive provisions. A number of banking directives have been left outside the scope of this proposal: those dealing with deposit guarantee schemes, the prohibition of money laundering, capital adequacy and the accounting directives.

COMPETITION

The Commission had adopted a decision condemning Unilever's practice of 'freezer exclusivity' in Ireland. Unilever is the leading supplier of ice cream in Ireland, with a market share exceeding 85%. The company supplied freezer cabinets to retailers without charge, but subject to the condition that they are used exclusively for storage of Unilever's products. The Commission has found that this results in many outlets being in a position to sell only Unilever ice cream products. Market research revealed that retailers are unlikely to replace existing freezer cabinets or install additional ones, so Unilever's competitors are unable to sell their products through a large proportion of retailers with Unilever freezer cabinets.

Thus, the decision found that the exclusivity condition for supply of the cabinets infringed article 85 of the treaty. The Commission also found that Unilever was abusing its position of market dominance in Ireland, contrary to article 86, by inducing retailers to enter into these agreements.

Mars had first complained to the Commission in 1991. In light of Commission objections in 1993, Unilever had modified its distribution agreements: it had introduced a hiring option, which could have resulted in direct ownership of the freezers by the retailers. However, this change had not taken place.

ENVIRONMENTAL

The Commission has proposed a directive on noise emission by equipment used outdoors, such as construction machines (excavators and compressors), garden machinery (lawnmowers and chain saws) and working equipment on municipal vehicles (domestic refuse collection vehicles). It covers 55 types of equipment used in the open air. This directive will update and replace the nine current directives covering separate groups of machinery. Its objective is to reduce noise exposure and noise nuisance. Noise from machines such as dumpers, graders and mobile cranes will be subject to limits for the first time, while existing limits have been tightened by three to six decibels for machinery such as compressors, tower cranes and hand-held concrete breakers. It proposes that machines should be marked with their guaranteed maximum noise emission level.

ROAD SAFETY

The Commission has proposed a draft directive requiring Member States to supplement the annual roadworthiness test on commercial vehicles (introduced by Directive 96/96) with random roadside inspections. The proposal prescribes a three-stage inspection. First, visual inspection of a passing vehicle by a trained vehicle examiner. If the examiner suspects that the vehicle is inadequately maintained, the inspection proceeds to the second stage. This involves a visual inspection of the parked vehicle and a check on its roadworthiness documents. If the examiner still suspects the vehicle is unroadworthy, the inspection proceeds to the third stage. This involves a thorough examination of the vehicle for irregularities such as bald or damaged tyres, inoperable lights or inadequate braking. If the vehicle does not comply with the required standard or is found to present a serious risk to the driver or other road users, the vehicle can be banned immediately from use on the public roads.

TAXATION

The ECJ considered the compatibility of certain Austrian levies with Community law governing VAT in *SPAR Österreichische Warenhandels AG v Finanzlandesdirektion für Salzburg* (Case 246/96), 19 February. The case concerned a levy imposed by the Austrian government which is designed to finance chambers of commerce and the Federal Chamber of Commerce. It is payable by all individuals or companies carrying on finance, credit, insurance, transport or tourism business and whose turnover exceeds two million Austrian scillings. The levy is assessed by the amounts payable by way of VAT on supplies of goods or other supplies made by other traders to the taxable party for his business. The levy is currently set at 3.9% and is collected by the tax authorities under the procedures laid down for the collection of VAT.

SPAR sought to have the decision imposing the levy on it set aside. The national court made a reference querying the compatibility of the levy with the Sixth Directive 77/388, which introduced a uniform basis of assessment for national turnover taxes. Article 17 provides that the taxable person can deduct from the tax for which he is liable the VAT payable or paid on goods and services used for his taxable transactions. Though the levy was assessed on the VAT payable, it was not deductible from the VAT payable by the company. Article 33 of the directive does not prevent a Member State from introducing taxes or charges other than turnover taxes.

The Court of Justice held that the levy was not a turnover tax. It found that the levy did not impose a charge on the movement of goods and services and did not affect commercial transactions in a manner comparable to VAT. The levy was calculated on the goods and services made to the company by his suppliers, rather than those supplied by him. Thus, the basis of imposition of the levy was not on the amount obtained from the transactions carried out by the company. The court held that the levy did not exhibit the essential characteristics of VAT and was not precluded by the directive. be sold throughout the EU.

the Commission officials will have a direct bearing on their decision and, more importantly, on the level of fines imposed should a breach of the competition rules be discovered. You are not dealing with a police force which will ultimately hand over the adjudication of the issue to a judge. For this reason, you should be reluctant to advise your client not to co-operate with the officials and you should certainly encourage all of his staff to be positive and polite with the officials and to co-operate in whatever way necessary.

Obviously, if you can attend at your client's premises immediately, you should do so. However, there are a number of matters which may be dealt with on the telephone in the event that you cannot attend immediately.

Is your client obliged to let the officials in?

The first matter for consideration is whether the officials are acting pursuant to article 14(2) or article 14(3) or regulation 17(62). Your client will probably have been handed an authorisation by the officials with an explanatory note attached. It will be clear from this authorisation under which section of the regulation they are proceeding.

Article 14(2) is sometimes known as the 'mandate' procedure, although this term is misleading as the simple authorisation under which they are acting has no compulsory effect. Your client is not obliged to submit to an investigation in this instance. If he refuses to allow the investigation to continue, the officials will simply minute this refusal and go away (probably to return with stronger authorisation).

Under article 14(3), the officials will be acting on a formal Commission decision. In this instance, your client is obliged to submit to the investigation and you should advise him of the fines and daily penalties involved in not doing so. Fines range from 100 to 5,000 ECUs for failure to submit to an investigation, with the Commission tending towards the maximum figure. It would be inadvisable for your client not to co-operate in this instance. Should he persist, the officials have no power to enter this premises against his will unless the Competition Authority has actually obtained a warrant to enter from the District Court.

You should also check whether the national authorities are present at the investigation, as they have a right to be and would normally attend. The Commission is obliged under article 14(4) to consult with the competent authority of the Member State and, while that authority does not have the right to veto an investigation, failure to consult would render the decision to investigate invalid.

What are they looking for?

Maybe your client knows exactly what they are looking for; maybe not. If there is something to hide, you should be told immediately as co-operation with the officials at an early stage may significantly decrease the level of fine imposed at decision stage.

Your client may not know what they are looking for. It may help to find out whether any other firms have been raided at the same time. In some instances, the Commission decision will be addressed to a number of firms, particularly if complicity is suspected between them. If the decision does not name other firms, it may be useful for your client to telephone his friends in the industry to confirm whether or not they have been raided.

In any event, the Commission will not show its hand. Indeed, in the explanatory note it says that it cannot be 'required to enlarge upon the subject matter as set out in the decision or to justify in any way the taking of the decision'.

Will the officials wait for a lawyer?

Paragraph 6 of the explanatory note recognises the right of the company to consult a legal adviser during the investigation. However, officials will not unduly delay the investigation waiting for a lawyer, especially if the undertaking has in-house lawyers. The Commission's attitude appears to have been approved in *National Panasonic (UK) Ltd v Commission* (Case 136/79) [1980] ECR 2033. The ECJ ruled that where Commission officials did not wait for the company's lawyer to arrive, the Commission had not infringed the company's fundamental rights. There is no cut-and-dried definition of 'undue delay'; it will depend on the particular circumstances of the case and, in particular, your client's attitude to the officials and possibly his attitude to them in any dealings he may have had with them in the past.

Each situation will differ but it is important that you get to your client's premises as quickly as possible and, if you can, talk on the telephone to the officials and establish that they will wait for you to arrive before continuing with the investigation.

Advice and procedure at your client's premises

If the officials awaited your arrival, you must now advise your client as to his duties and obligations with regard to the investigation.

The Commission has decided that submission to an investigation involves a positive duty on the firm to co-operate and provide the documents received by the officials. Your client is obliged to do much more than simply allow the officials to search the premises. If they specify a particular document or documents, your client is obliged to assist them in obtaining this document. However, it seems clear that your client is under no obligation to provide a list of documents to the officials.

Can they take documents away?

The officials may only inspect the original documents and ask for copies to be made. You should take three copies of any documents requested by the officials: one for the officials themselves, one for your client and one for yourself. In this way, you can easily keep track of the documents in which the Commission is interested and this may be very helpful later.

Can the officials ask questions?

From the text of article 14(1), it is obvious that the officials can ask for oral explanations on the spot. In *National Panasonic*, the court indicated that these questions should pertain to the records and matters arising therefrom relating to the subject matter of the investigation. It must not be a fishing expedition. Your client should limit his answers accordingly. These explanations may be minuted at the request of your client or the Commission officials. It is sensible that any conversations with the officials should be minuted, and that there should be someone present either from your firm or from your client's firm capable of accurately recording these minutes.

Your client cannot simply designate one member of staff to deal with the officials as he may not be competent to offer explanations on a particular point. A refusal to provide a competent member of staff may be deemed non-co-operation and may be subject to a fine or penalty.

Is there protection against self-incrimination?

There is no mention in regulation 17 of any right on the part of a firm not to incriminate itself. The Commission will punish the concealment of incriminating documents with fines and daily penalties. The company does not have a right to withhold the very documents which prove its participation in an infringement. If it had such a right, this would totally negate the officials' investigation. However, it may be possible to argue that an individual or company may refuse to incriminate itself where to do so would risk exposure to criminal law penalties.

Legal professional privilege

In *AM & S Europe v Commission* (Case 155/79) [1982] ECR 1575, the court held that some, but not all, correspondence between a client and an independent lawyer based in the EU are privileged, but that dealings with an in-house lawyer or a lawyer in a third country are not. Furthermore, communications with an independent EU-based lawyer are only privileged if they are made for the purposes of, and in the interests of, the client's right of defence. Communications with in-house lawyers are not generally privileged. However, in *Hilti v Commission* (Case T 7/89) [1991] ECR II 1711, the court held that in the very limited case of an internal memorandum prepared by an in-house lawyer reporting what an independent lawyer said, privilege does attach.

If your client feels that a document is privileged, he must claim it, giving a reason or explanation to the official as to why he thinks so. He must not show them the document. If they accept his explanation, that is the end of the matter. If they do not, your client should still refuse to produce the document. In that event, the official will make a formal decision demanding production of the document and this may be reviewed by the ECJ's Court of First Instance. In this way, the matter can be decided without the officials actually seeing the document for which privilege is claimed.

Can your client protect professional secrets?

Your client may be under investigation as a result of a complaint by a third party. He will therefore be anxious to ensure that any documents containing 'business secrets' which are copied by the Commission will not be revealed to that third party, or indeed to another company under investigation or intervening in the investigation. Article 20(2) of regulation 17 recognises this right. It provides that the Commission shall not disclose any information acquired as a result of this regulation which is covered by the obligation of 'professional secrecy'. There is no precise definition of professional secrecy but it would cover production secrets and processes, customer and distributor lists and marketing plans. In a notice issued in January 1997, the Commission differentiates between 'communicable' and 'non-communicable' documents. Your client must claim protection for the particular document at the time of the investigation. If the Commission officials agree that it contains business secrets, they will note this fact and, subject to some of the exceptions, this will render the document non-communicable. If the Commission officials disagree, all your client can do is have the document or documents marked, insist that the official make a formal decision that it is not going to be offered the protection of business secrets which may be reviewed by the Court of First Instance.

The protection offered by the recent notice against disclosure of business secrets is not absolute. Where the secrets themselves provide evidence of an infringement of competition law, the Commission believes that it must balance the need to disclose it against the harm which might result from disclosure. It will take the following facts into account:

- The relevance of the information to determining whether or not an infringement has been committed
- Its probative value
- Whether it is indispensable
- The degree of sensitivity involved (to what extent the disclosure of the information harms the interests of the firm), and
- The seriousness of the infringement.

When the officials have left and your client and yourself have had an opportunity to reflect, it is important to set up a meeting to discuss what documents they have copied and taken away and also to discuss the minutes of any conversations with the officials. Your client should decide whether there are any documents which they have not copied, which may show his firm in a better light. If so, these documents should be communicated to the Commission.

Advise your client in relation to fines. Fines may be imposed up to one million ECU or 10% of the turnover of your client's company for the preceding year. There may be applications to be made by you to the Court of First Instance to determine issues of privilege, self-incrimination or business secrets. Consider setting up a meeting with the Commission officials to discuss their findings.

Thinking to the future, advise your client in relation to setting up a compliance programme based on a competition audit by you or your firm. It won't be cheap, but it's cheaper than the fines. G

Noel O'Gorman is principal of O'Gorman and Co, Solicitors, Cavan.

Conferences and seminars

AIJA (Association of Young Lawyers)
Topic: *The international sale of goods and supply of machinery abroad*
Date: 4-6 June
Venue: Rome
Contact: Gerard Coll (tel: 01 6761924)

Topic: *Annual congress*
Date: 20-25 September
Venue: Sydney, Australia
Contact: Gerard Coll (tel: 01 6761924)

Topic: *Tax and company law: relationship between parent and subsidiary*
Date: 9 October
Venue: Milan
Contact: Gerard Coll (tel: 01 6761924)

Topic: *Multinational dimension of legal practice*
Date: 28 November
Venue: Prague, Czech Republic
Contact: Gerard Coll (tel: 01 6761924)

European Trade Law Association
Topic: *Developments in law, policy and procedure*
Date: 5 May
Venue: Brussels
Contact: 0044 171 453 54292

IBC
Topic: *Advanced EC competition law*
Date: 11-12 May
Venue: London
Contact: Patrick Dalton (tel: 0044 171 453 2146)

Topic: *Distribution, IP licensing and EC competition law*
Date: 4 June
Venue: London
Contact: Patrick Dalton (tel: 0044 171 453 2146)

Topic: *Intensive foundation course on EC competition law*
Date: 8-11 June
Venue: Luxembourg
Contact: Patrick Dalton (tel: 0044 171 453 2146)

Irish Centre for European Law
Topic: *Future developments in Community law on sex discrimination*
Date: 8 April
Venue: TCD
Contact: 01 6081081

Solicitors' European Group
Topic: *Energy liberalisation: EC law and Commission policy*
Date: 30 April
Venue: London
Contact: 0044 171 320 5791

Topic: *International anti-trust harmonisation initiatives*
Date: 21 May
Venue: London
Contact: 0044 171 320 5791

Topic: *Sport and competition law*
Date: 23 June
Venue: London
Contact: 0044 171 320 5791

Topic: *Recent developments: EU employment law and related issues*
Date: 8 July
Venue: London
Contact: 0044 171 320 5791

ILT digest

of legislation and superior court decisions

Compiled by David P Boyle

CRIMINAL

Child pornography measures proposed

A Bill has been presented which proposes to strengthen legislation aimed at protecting children from sexual exploitation.

- The two areas to be specifically targeted are child trafficking and child pornography
- The definition of 'child pornography' includes pornographic images which are generated by computer graphics and are not of real persons
- Maximum penalties under the proposed legislation would be a fine of up to £100,000 and/or up to ten years' imprisonment.

Child Trafficking and Pornography Bill, 1997

Mandatory minimum sentences for drug offences

The *Criminal Justice Bill, 1997* has been re-presented in the Seanad. If passed, the new Bill would provide for:

- The creation of a new offence relating to possession of drugs with a value of £10,000 or more for the purpose of sale or supply (it is envisaged that evidence of market value would be given by a member of the Garda Síochána or an officer of customs and excise)
- Mandatory minimum sentences of life or ten years, together with an unlimited fine, for specified offences, subject to certain exceptions
- The abolition of preliminary examinations
- Automatic enquiries by the courts as to whether drug trafficking offenders have benefited from their offences, and
- The giving of evidence by certificate.

Criminal Justice (No 2) Bill, 1997

EDUCATION

New Bill for non-third level education

Legislation has been presented relating to rights and duties arising in respect of education at the primary, post-primary, vocational and training and adult levels. If passed, the Bill will provide for:

- The recognition of schools for the purposes of funding by public funds
- The establishment of the Inspectorate on a statutory basis
- The establishment of boards of management of schools
- The establishment and role of parents' associations
- The functions of principals and teachers
- Appeals by students or their parents
- The making of regulations by the Minister for Education and Science
- The establishment of a National Council for Curriculum and Assessment, and
- Regulation of the State examination system.

Education (No 2) Bill, 1997

EMPLOYMENT

Changes proposed to Sunday working

A second private member's Bill has been presented which aims to increase protection for shop workers by making Sunday work optional as opposed to obligatory. If passed, the Bill will:

- Apply to shop businesses only
- Provide that an employee cannot be obliged to work on a Sunday without his or her consent
- Prevent discrimination against employees who refuse to work on Sunday
- Provide that at least time and a half shall be paid to employees who work on Sundays
- Ensure that the employer gives a minimum of four days' notice of the option to work before any one Sunday
- Provide that the employee must give at least three days' notice of his or her non-availability on the following Sunday, in default of which the employer may assume that the employee consents to work on the Sunday, and
- Provide for application to a Rights Commissioner by an aggrieved employee who may, if successful, be awarded a maximum of ten weeks' wages.

Protection of Workers (Shops) (No 2) Bill, 1997

Methods of pay calculation set out

The methods of calculating:

- The normal weekly rate of an employee's pay (ss20 and 23), and
- The appropriate daily rate of an employee's pay (s22) for the purposes of the *Organisation of Working Time Act, 1997* have been set out.

Organisation of Working Time (Determination of Pay for Holidays) Regulations 1997 (SI no 475 of 1997)

High Court bound by Labour Court findings of fact

- Under the 1974 Act, the High Court had jurisdiction to hear an appeal from a hearing or decision of the Labour Court on a point of law
- It is not a rehearing and the court is bound by the findings of primary fact made by the Labour Court. In the absence of an appropriate male comparator, it could not be said that there was indirect discrimination in any given situation.

Brides v Minister for Agriculture (Budd J), 21 July 1997

GARDA SÍOCHÁNA

New admission requirements

Regulations have been made which set out the new minimum educational requirements for the admission of persona as Garda trainees. The regulations are deemed to have come into effect on 8 May 1997.

Garda Síochána (Admission and Appointments) (Amendment) Regulations 1997 (SI no 470 of 1997)

INSURANCE

Knowledge that vehicle uninsured

When considering whether an individual should reasonably have known about the absence of insurance on a vehicle in which they were travelling, the issue is not whether a reasonable person have known, but rather should the particular individual, having regard to all the relevant circumstances, have known.

Curran v Gallagher (Supreme Court), 7 May 1997

LICENSING

Regulation of 'bouncers' proposed

A private member's Bill has been introduced which aims to regulate the activities of 'door supervisors' at licensed premises, including premises licensed under the *Public Dance Halls Act, 1935*. The Bill proposes:

- The introduction of a register of door supervisors
- A system of certificates of fitness, to be issued by the Garda Síochána, to enable persons to be entered on the register
- Criteria for registration and a system of appeal relating to the grant or refusal of such certificates
- A prohibition on the employment of non-registered persons as door supervisors in or about licensed premises, and
- A system of inspection to ensure compliance with the proposed legislation.

Door Supervisors Bill, 1997

PLANNING & DEVELOPMENT

Bord Pleanála to be expanded

A Bill has been presented which aims to allow for an increase the membership of An Bord Pleanála, currently restricted by statute to one chairman and five ordinary members. The Minister for the Environment and Local Government would be empowered to appoint additional members as necessitated by the levels of the board's work.

Local Government (Planning and Development) Bill, 1997

Clarification of local authority CPO powers regarding tunnels

Legislation has been introduced which will, *inter alia*, if passed:

- Clarify the power of local authorities, as road authorities, to compulsorily acquire a substratum of land for the construction and maintenance of a road tunnel as part of their powers under the *Roads Act, 1993*
- Amend the *Transport (Dublin Light Rail) Act, 1996* to expressly provide a similar power in connection with that legislation, should this prove necessary.

Roads (Amendment) Bill, 1997

PRACTICE & PROCEDURE

Abuse of process to re-litigate issue already determined

- Issue estoppel did not arise *per se* in this case. The status of the relevant findings related to whether or not it would be unjust in all the circumstances and an abuse of the process of the court to allow such findings to be revisited
- The concept of abuse of process applied irrespective of privity. When an issue had been determined by a court of competent jurisdiction, it was an abuse of process of the court to seek to have it re-litigated in new proceedings
- A judicial determination directly involving an issue of fact or of law disposed once and for all of the issue, so that it could not afterwards be raised between the same parties or their privies. This applied in circumstances such as the present where the plaintiff but not the defendants were the same as in the first action
- The plaintiff was seeking to re-open in the present proceedings an issue of fact which had been decided against it in the first action

The plaintiff issued two sets of proceedings concerning a proposed lead and zinc mine in Navan, Co Meath.

The first action was against the State and Tara Mines Limited, the latter being the operator of a lead and zinc mine adjacent to the Navan mine. In that first action, the plaintiff alleged that the State and Tara Mines Limited had wrongfully conspired together to inflict economic loss and damage to the plaintiff, to enable Tara to obtain the plaintiff's share in the Navan mine. In the High Court, the plaintiff's claims were rejected and the case against both defendants dismissed. A notice of appeal in that case was served by the plaintiff.

In the second set of proceedings, the plaintiff sought relief against the first named defendant who was the receiver appointed over the assets of Bula in 1986 and three other defendants who were the banks which had provided funds for funds for Bula's activities. The allegations against all were that they had been negligent, deceitful, in breach of contract and in breach of trust in their relationship with Bula.

In the present proceedings, the High Court ruled that findings which had been made in the first action and which were relevant to any issue in the present action, were not reviewable and the parties were not entitled to reopen them.

Bula Limited (In Receivership) v Crowley (Barr J), 29 April 1997

Bill admissible for construction purposes

- The court was entitled to investigate and look at what was the policy of the *Blascaód Mór National Historic Park Act, 1989*, and, in that narrow context, the court was entitled to look at what was the mischief sought to be addressed by the passing of this Act
- A Bill differed from the parliamentary records of debates
- The wording of the Bill could assist the court in framing a statement of the purpose of the Act.

The plaintiffs sought to have handed into court part of the 1989 *Blascaód Mór Bill*. The plaintiffs were of the opinion that the relevant section of the Bill would help in the interpretation of the words 'lineal descendant' contained in s4(4) of the 1989 Act.

Blascaód Mór Teoranta v the Commissioners of Public Works (Budd J), 1 July 1997

TAXATION

Whether loan constitutes temporary borrowings a question of fact

- The question whether a loan constituted temporary and fluctuating borrowings and was a revenue transaction was one of fact to be determined having regard to all the circumstances
- Findings on primary fact should not be set aside by the courts unless there was no evidence to support them.

Section 61 of the *Income Tax Act, 1967* provides that in computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of '(e) any loss not connected with or arising out of the trade ... (f) any capital withdrawn from or any sum employed or intended to be employed as capital in such trade'. The company in question carried on the trade of licensed vintner and restaurateur in Cork. The company borrowed to finance the purchase of the property from which it carried on the trade. Losses were incurred in connection with foreign currency transactions relating to the interest on and repayment of the loan. The Circuit Court submitted for the High Court's consideration the question of whether it was correct in law in finding that the company was entitled to bring into account, in computing its trading profits and allowable losses for corporation tax purposes, the amounts of the losses incurred on foreign currency exchange rates applicable to its borrowing. The High Court answered in the affirmative and found that the issue was one of fact for determination by the Circuit Court and there were no grounds justifying any interference with that determination. The plaintiff, on appeal to the Supreme Court, claimed, *inter alia*, that the High Court had erred in law in finding that the question in issue was one of fact rather than law. The appeal was dismissed.

Brosnan v Mutual Enterprises Ltd (Supreme Court), 8 July 1997

TRANSPORT

Changes in merchant shipping law

A Bill has been presented which aims to:

- Repeal and amend certain penal provisions in maritime law to reflect relevant International Labour Organisation conventions and the Council of Europe's Social Charter
- Bring domestic law on the registration of ships and recreational craft into line with the requirements of the European treaties
- Amend the provisions of the *Merchant Shipping Act, 1992* regarding the licensing of small passenger ferries, and
- Amend s680 of the *Merchant Shipping Act 1894* to bring penalties into line with current norms.

Merchant Shipping (Miscellaneous Provisions) Bill, 1997

Emily Comber (third from left), winner of the fifth Tormey & Co Law Scholarship for post-primary students, being presented with her prize by Justice Diarmuid O'Donovan. Also pictured are Barra Flynn, Principal, Tormey & Co (far left) and Catherine Murphy, Solicitor, Tormey & Co (far right). The Athlone-based firm runs the scholarship every year

LawLink's stand at the Solicitors' Exhibition, National Exhibition Centre, Birmingham. The company has launched its secure on-line services in Britain

President Mary McAleese pictured talking to Paddy Harte and Glen Barr, joint executive chairmen of the *A journey of reconciliation* trust, a cross-border initiative to honour all Irishmen who fought and died in World War One. Next November the trust plans to unveil a 100-foot Irish round tower in Messines, Belgium

Pictured launching the Society's ISO 9000 guide are (left to right): Cillian MacDomhnaill, Director of Finance and Administration; Conor Foley, Matrix Business Services, guidebook author; Law Society President, Laurence K Shields; Liz O'Brien, Members' Services Executive

Apprentices show their mettle in Moot Court

The Philip C Jessup Moot Court competition is well known to Irish lawyers, and is easily the most prestigious of its kind. Annually, teams from all over the world converge on Washington DC to debate the finer points of international law. The competition is organised by the American Society for International law and attracts over 70 entrants from all over the world. The standard of competition is extremely high.

Law Society teams have always maintained a high profile in the Jessup in the past and, happily, the tradition endured this year when an apprentice team – Cathryn Costello, Donal King, Philip Nolan and Patrick Walshe – defeated Trinity College and the King's Inns in the Irish qualifying round. Cathryn Costello was declared the best speaker in the competition and the team's written arguments won the best memorial award. It was a hugely satisfying result for us, following months of intensive research. Jessup teams argue for 45 minutes, and are constantly interrupted by judges anxious to catch a speaker out on some arcane aspect of the subject-matter. The Jessup demands that you be constantly on your toes – it is a most discerning form of advocacy.

The success of apprentice-advocates raises an interesting point in the debate on the merits of fusing the two branches of the Irish legal system. In mock-court competitions like the Jessup, Law Society teams have never failed to prove themselves to be the equals of their advocate peers when, as that beloved Law Library colloquialism goes, 'on their feet'.

The success of apprentice advocates is an indication – however minor – of the expanded role that solicitors could play in the courtroom. There is little to choose between a novice solicitor and a novice barrister in terms of fluidity of speech, confidence or ability to argue, and – of course – the same can be said of the qualified members of both sides.

We are no longer prepared to be described as the junior branch of the profession, nor should we be. If apprentice solicitors can excel in moot courtrooms, why should we doubt that solicitors proper can excel in real ones?

The team members would like to thank our offices: McCann FitzGerald, Arthur Cox, Mason Hayes & Curran, and Keans for their support. We also greatly appreciate the assistance of Cillian MacDomhnaill and Paula Sheedy of the Law Society. We would particularly like to thank our coach, TP Kennedy, who was immensely generous with both his time and his knowledge of the subject in hand.

Patrick Walshe,
McCann FitzGerald

Diploma in Legal French

The Diploma in Legal French is a course which has been offered by the Law Society and Alliance Française since 1995. A high level of fluency is expected of participants who, through interactive tutorials, learn about French law and the French legal system, while improving their standard of spoken French.

The conferring ceremony for the 1997 presentation of the course took place on Tuesday 24 March. Twelve candidates attended and completed the course in 1997, ten of whom attended for the conferring ceremony. The diplomas were awarded by the French Ambassador, Henri de Coignac, and the President of the Law Society, Laurence K Shields. The Vice-Chairman of the Education Committee, Michael Peart, in his opening remarks commended the participants on their hard work in participating in such a demanding course over a 12-month period. He encouraged others to follow where they had led.

His Excellency Henri de Coignac, French Ambassador to Ireland (fourth from left), Laurence K Shields, Law Society President, pictured with Tadhg O'Sullivan, President, Alliance Française, Mrs Vandoorne, director, Alliance Française and Michael Peart, Vice-Chairman of the Society's Education Committee and award recipients, Ercus Stewart, Nicola Tyson, Mary Casey, Paula Jennings, Paul Keane, Barry McCarthy, Sonya Morrissy-Murphy, Alan Millard, Barbara Slattery and Brian Leonard

This course is currently in its third year, with another group of solicitors, barristers and apprentices currently attending sessions on Saturdays and week-day evenings.

(From left) Laurence K Shields, President of the Law Society, His Excellency Henri de Coignac, the French Ambassador to Ireland and Michael Peart, Vice-Chairman of the Education Committee

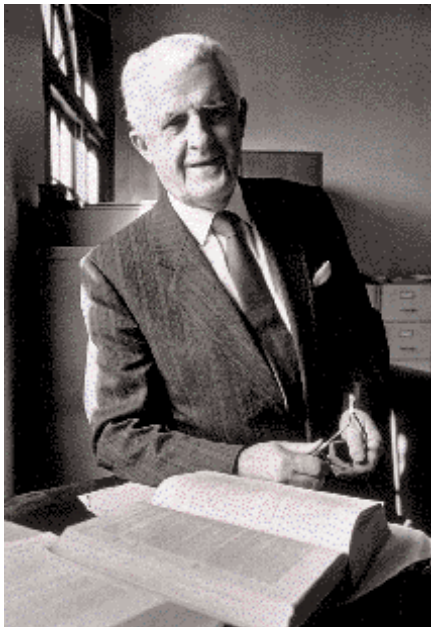
Brian Leonard is presented with his diploma by Laurence K Shields

Alan Millard is presented with his diploma by Laurence K Shields

Barbara Slattery is presented with her diploma by Laurence K Shields

OBITUARY

Mr Justice Brian Walsh



Mr Justice Brian Walsh: 1918 – 1998

Mr Justice Brian Walsh, former judge of the Supreme Court, judge of the European Court of Human Rights and one of the great helmsmen of Irish and European law, died after a short illness on 9 March 1998. He was in his 80th year.

On his appointment to the Supreme Court in 1961, the Taoiseach, Seán Lemass, remarked to the young 42 year-old appointee that he would like the Irish Supreme Court to become more like the United States Supreme Court. The Taoiseach, properly, never referred to the issue again, although he did mention the same issue to the new Chief Justice, Cearbhaill Ó Dalaigh, who was appointed the same day as Brian Walsh.

The Taoiseach had spoken to the converted: the young judge was interested in American jurisprudence and in the interpretative role adopted by the US Supreme Court. The jurisprudence of the US Supreme Court, sincerely-held Christian beliefs, and the view that the Constitution was essentially a natural law document exercised a profound influence on Irish law during the Walsh era.

Lawyers will remember Brian Walsh as one of the great exponents of personal liberty. Access to the courts, inadmissibility of evidence obtained in violation of a constitutional right, the guarantee of fair procedures, the concept that the Constitution is written in the present tense, the belief that if the Constitution provides a right, there automatically follows a remedy for breach of any right – these core principles were developed significantly and with powerful effect by Walsh J and his brother judges. Few persons will ever enjoy a judicial career such as Brian Walsh, a judge of three courts, the High and Supreme Courts of Ireland, and the European Court of Human Rights, with a span of about 40 years.

Judge Walsh's intellectual reputation was awesome. In a tribute, Mr Justice Declan Costello noted that it was his intellectual vigour that most lawyers encountered. 'Addressing a court in which he was a member, you would be lucky to survive five minutes before the incisive questioning began, because he enjoyed the cut and thrust of argument', he continued. Although the judge sometimes displayed the 'stern face', his total lack of pomposity and affectation, and his deep humanity, made any incisive questioning more easy to bear.

In October 1994, Judge Walsh delivered the re-dedication speech at the Law School of St John's University, New York, and received a doctorate in law. His speech on that occasion sums up his many years of reflection on the nature and purpose of law and, by implication, his own *raison d'être*. The function of the lawyer is to serve the cause of justice and the main function of law is to uphold the cause of justice. 'All lawyers have a prior and perpetual retainer on behalf of truth and justice', the judge proclaimed. In a magnificent finale, Judge Walsh concluded: 'All persons participating in the administration of justice must be regarded equally to be ministers in the temple of justice'.

One of the great ministers of the law, dedicated to the cause of truth and justice, has passed away from among us. Judge Walsh's life enriched the lives of many others. G

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

Book reviews

The Child Care Act, 1991

Paul Ward

Round Hall Sweet and Maxwell (1997), Brehon House, 4 Upper Ormond Quay, Dublin 7. ISBN: 1-899738-107-2. Price: £19.95

Paul Ward has produced the first book on the *Child Care Act* of 1991. It is a practical guide to the Act, providing explanatory notes to each section.

Prior to the enactment of the *Child Care Act, 1991*, the area of child care was governed by the *Children Act 1908*. Not surprisingly, it became increasingly clear through the late 1970s and 80s that this Act was simply not designed to deal with the needs of a modern society.

The last ten years have seen extensive development in the area of child care. It has evolved through case law, the development of practice and procedure in the district courts, and particularly through the introduction of the *Child Care Act, 1991*.

In 1989, the landmark judgment of the *State (D) v G* was handed down by the Supreme Court. The court ruled that cases pertaining to the welfare of children were of such importance that all the evidence to be relied upon, whether medical reports or otherwise, must be delivered to the solicitor acting on behalf of the parent/parents in the case in good time prior to the trial. Attention was also drawn by the Supreme Court to the fact that these proceedings are not fully adversarial; rather, that they are an inquiry into the welfare of a child.

In 1991, the Supreme Court handed down a judgment in the case of the *State (F) v Superintendent of Ballymun Garda Station and others*. In the course of his judgment, the Chief Justice stated that the rights of a child are unique and in a special category. The Chief Justice further noted that the continued absence of modern legislation in the child care area was a cause of great concern.

It is against this background that the *Child Care Act* was introduced, and it has resulted in a major overhaul of practice in the area. Brand new legislative concepts such as the appointment of a guardian *ad litem* for a child, and the joining of a child as a party to the proceedings, have been introduced. These two sections in particular have become very popular in their use, certainly in the Eastern Health Board area.

The *Child Care Act, 1991* has been fully operable since 1996. Paul Ward's book walks the reader through each section, providing useful notes and references to relevant case law and regulations.

This Act has spawned five different sets of regulations and Ward makes reference to these in the relevant sections. He also refers to the judgment of Mr Justice Geoghegan in the case of *PS v the Eastern Health Board*. This is as yet one of the only judgments handed down which includes extensive discussion of aspects of the Act.

The book does not attempt to analyse or criticise the legislation, and perhaps it's too early to attempt such a criticism. The bulk of the Act, in particular that part pertaining to procedural aspects of the removal of children into care, only came into being in October 1995.

However, one notable issue that Ward might have highlighted is that an interim care order can only be extended beyond eight days with the consent of the parent or parents. This limitation imposes a significant burden on practitioners, judges and court staff alike. It results in congested court lists; it wastes valuable court and practitioners' time, and legal aid resources.

For a practitioner who is new to child care, this book proves very useful. It draws the reader's attention to related matters where necessary. The legislation is included and the explanatory notes are clear and simple. For those who work in the area, it provides the legislation in an accessible format along with much helpful supplemental information. G

Sinéad Kearney is a solicitor with the Dublin firm Roger Greene & Sons.

European Community contract law (two volumes)

Conor Quigley

Kluwer Law International (1997), Sterling House, 66 Wilton Road, London SW1V 1DE. ISBN: 9041107185 (volume one), 9041107193 (volume two). Price: stg£156

This book is both important in what it tries to do, and practically useful because it succeeds. There is no European Community law of contract. The law of contract is a matter of private law – in this jurisdiction developed by courts in the common law, in other Member States part of the codified law of obligations. Rather than seeing this as a setback to a book entitled *European Community contract law*, the author takes this as his premise and sets out to describe how EC law affects contracts.

The effect of EC law on contract law is threefold.

First, there are substantive rules of Community law which apply to contracts in many areas. The author divides the most affected areas of contract into commercial contracts, employment contracts, consumer contracts, banking, credit and insurance contracts, and public contracts (public procurement). Within this broad range of contracts, the range of application is again broad. For example, Quigley lists the applicable legislation for employment contracts under the headings of the free movement of persons, equal treatment for men and women, employment law, safety and health at work, and social policy.

Second, there are rules of Community law that determine which law applies to contracts: the *Rome convention on the law applicable to contractual obligations* (19 June 1980), an international treaty which forms part of EC law, determines which law (Irish, English, Greek) applies to a contract.

Third, there are rules of Community law on jurisdiction and enforcement of judgments, which apply to (although are not confined to) contractual matters. These are the *Brussels convention on jurisdiction and the enforcement of judgments in civil and commercial matters*, made pursuant to article 220 (EC), and the *Lugano convention on jurisdiction and the enforcement of judgments in civil and commercial matters* (16 September 1988) which, essentially, extends the rules to the Member States of the European Free Trade Association.

The author expertly sets out all these effects in volume one, and then sets out all the applicable treaties and laws in volume two, so a lawyer can check against the primary sources. This makes the book a great resource.

There is a huge disparity between the volume of substantive Community law and the volume of litigation in Community law. Most of this disparity results from subject area: Community law affects the volume trade (crime, PI etc) only in certain particulars.

However, part of this results from the Community law point in a case being missed by lawyers. That is why a book like this is so important. It has conceptual importance because it is (to my knowledge) the first, indeed the origin, of a type of book for which there is a great need. Its practical importance is linked by the excellence of the book to that of contract law itself. G

Diarmuid Rossa Phelan is a Dublin-based barrister.

Guide to European company laws (second edition)

Julian Maitland-Walker

Sweet & Maxwell (1997), 100 Avenue Road, Swiss Cottage, London NW3 3PF, England. ISBN: 0 421 52670 X. Price: stg£95

Recent years have seen a proliferation of comparative law texts. These range from works on genuine trans-national legal issues, such as the application of the *Brussels convention on jurisdiction and enforcement of judgments* to works adopting a comparative approach to issues of national law such as property. Some of these works have a wide-ranging appeal while others are of interest to a much narrower audience. The *Guide to European company laws* falls into the latter category.

It provides a chapter by chapter overview of company law in each of the EU and EFTA Member States (except Iceland). It also briefly examines EU company law and considers the company law harmonisation programme. This second edition extends the reach of the book to a consideration of several Eastern European states.

The *Guide* facilitates easy comparison between various national systems of company law. In each national chapter, there is a review of the principal types of business organisation available, requirements of incorporation and its cost. Each national chapter is written in a uniform format to ensure that the reader can easily compare the main features of commercial enterprises in the states covered.

It is somewhat difficult to conceive of the market for this work. It would be of limited value to most practitioners. While the overview given of Irish law by Henry Ong and Stephen Hegarty is lucid and relatively comprehensive, it is necessarily limited in scope. It is no easy task summarising Irish company law in 27 pages. The overview of European initiatives is very limited – in the case of some of the company law directives confined to a one-line description. This is most unfortunate, as the cumulative effect of the EC initiatives is quite significant. It is to be hoped that a future edition will devote more space to coverage of EC company law and to a consideration of its success or failure.

One presumes that the target audience for this work is the executive whose business operates across national frontiers or corporate solicitors advising multinational companies. For such people, this book will be of considerable value. It will provide them with an overview of the legal constraints to which their operations or clients will be subject in different European states. However, if a more detailed legal analysis is required, they will be obliged to consult other texts or take local advice.

For other practitioners, it will be something of a curiosity item. Those solicitors possessed with a burning desire to discover the minimum share capital required of companies in Estonia or the incorporation requirements for companies in Portugal will enjoy this work; others will find it of limited interest. G

TP Kennedy is the Law Society's Education Officer.

The tax book

Alan Moore (consultant editors: Norman Judge and Sean Murphy)

Taxworld Ltd (1998), 73 Bachelor's Walk, Dublin 1. ISBN: 1 902065 00X. Price: £95 (book), £114.95 (CD-ROM), £152.50 (book and CD-ROM)

The *Taxes Consolidation Act, 1997* is a titanic enactment, surpassing its predecessor, the *Income Tax Act, 1967*, both in scale (1,104 sections and 32 schedules as against 561 sections and 19 schedules) and in scope; the 1997 Act encompasses not only income tax but also corporation and capital gains tax. Further, given its subject matter, the Act ranks as one of the most complex pieces of legislation on the statute book. Accordingly, lawyers advising on tax matters will confront the twin challenges of, firstly, locating the relevant provisions in the new legislation and, second, of interpreting those provisions.

The tax book by Alan Moore aims to help lawyers meet both of these challenges. The publication includes a destination table which allows the user to rapidly identify where, in the new Act, an old section or sub-section is now located. Alternatively, should a client or the Revenue refer to a section or sub-section in the new Act, the user can rapidly identify from the publication the old section or sub-section.

Useful though such features are, *The tax book* goes further by providing a plain English guide to each section and sub-section of the Act. Such guidance is frequently supplemented by detailed author's notes which make reference to Irish and English case law, Revenue statements of practice and equivalent British enactments. *The tax book* also provides over 300 worked examples.

It is important to realise that the book does not reproduce the actual legislation and while, as lawyers, many of us prefer to engage in our own process of interpretation, the author's notes provide useful background information for such a process. Further, the guidance provided is authoritative. Author Alan Moore, who previously edited *Tax Acts*, *VAT Acts* and *Capital Tax Acts*, was assisted by consultant editors Norman Judge, a former Tax Partner with KPMG and author of *Irish income tax*, and Sean Murphy, a former Principal Inspector of Taxes and Tax Technical Director with Ernst and Young. All three were members of the Taxes Consolidation Project team.

Uniquely, *The tax book* is also available on CD-ROM, which not only allows the user to cut and paste text directly on to a word-processor but will also allow the user to search any combination of words and phrases and to save search patterns and results for future use.

Used in conjunction with the *Taxes Consolidation Act*, *The tax book* in text and/or CD-ROM format provides a comprehensive guide which will be of benefit to all those who are concerned with taxation matters. G

Niall O'Hanlon BA (Hons) (Acct & Fin), (Comm Law), ACA AITI is a barrister specialising in taxation and commercial law.

Lawful occasions: the old Eastern Circuit

Patrick MacKenzie

Patrick MacKenzie (1991), Old Grange House, Old Grange, Narraghmore, Co Kildare. ISBN: 1-85635-024-X. Price: £6.99

Patrick MacKenzie was born in Dublin, called to the Bar in 1941, practised extensively in the Eastern Circuit, was called to the Inner Bar in 1972 and elevated to the Bench as a judge of the High Court in 1987. He has since retired and lives in the country. Since its first publication in 1991, Mr Justice MacKenzie's book has been on the best-seller list and reprinted on several occasions.

In his highly enjoyable memoirs, there are descriptions of the great and the good, the 'characters' who peopled the old Eastern Circuit and of the judges described on the cover of the book as 'some good, some bad – nearly all difficult'. Apart from the sheer enjoyment of reading the book, social and legal historians of the future will find interesting observations in these memoirs. Sean MacBride, a senior counsel and statesman of international renown, was described by the author as 'a very ponderous performer in the Circuit Court where alacrity and ability to shift one's ground is demanded'. The author describes Cecil Lavery as the most famous barrister in Ireland when the author was called to the Bar. Lavery was 'a man of great presence and fluency with a dynamic brain' who was subsequently elevated to the Supreme Court 'where he suffered several years of complete and absolute frustration', according to the author.

Judge Michael Comyn, Chief Justice Tim Sullivan, Mr Justice George Gavan Duffy, Judge Fawsett, Noel McDonald SC, Mr Justice Brian Walsh, Mr Justice Tom Finlay and Judge Bob hUadhaigh are all referred to in one context or another in the book.

MacKenzie praises the late Tommy Connolly as our greatest constitutional lawyer, while describing him as 'an admittedly heavy drinker who was never without a cigarette dangling from his lips, enveloping his not very well pressed suit in a snow storm of ashes'. The author noted that so absent-minded was Connolly that he had seen him with his pyjamas still under his trousers. 'The boys would carry the books into court and Tommy would launch into his argument.' The author notes that 'the dry law, moistened by classical allusions, left members of the Supreme Court flapping with the honey of his legal arguments'.

Judge Frank Roe is described as one of the best Circuit Court judges that ever sat in Ireland and who subsequently became President of the Circuit Court. The author notes that apart from hearing cases, horses and racing were his prime interests in life. Everyone was made at ease before Judge Roe and he ran 'an extremely happy, sensible court of justice'.

Mr Justice Ronan Keane is described as 'a very eminent judge, author and fine legal brain'. Maurice Gaffney SC is described as 'the most gentle of souls'. He is stated to bring 'a philosophical and metaphysical element into every case'. Mr Justice Fred Morris, now President of the High Court, Judge Joe Matthews, Mr Justice Frank Griffin, Simon O'Leary BL, now the Deputy Director of Public Prosecutions, Frank Alymer BL and Rex Mackey SC are some of the distinguished personages who are described by the author in his book.

Lawful occasions is a very entertaining book. The lively witticisms of Bench and Bar, the stories of the ordinary and extraordinary persons who come before the courts, are told with wit, humour and a sense of wisdom that will certainly entertain readers. G

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

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 3 April 1998)

Regd owner: Louth County Council; Folio: 9818; Land: Haggardstown; Area: 0a 1r 8p; **Co Louth**

Regd owner: John W McCann; Folio: 5078; Lands: Ballincurry; Area: 25a 0r 12p; **Co Longford**

Regd owner: Patrick Eugene Burke; Folio: 18160; Lands: Salt North, Leixlip; **Co Kildare**

Regd owner: Victor Cathcart, deceased, of 83 Cromwellsfort Road, Crumlin, Dublin; Folio: 5871; Lands: Townland of Commons in the Barony of Uppercross situate on the north side of Cromwellsfort Road; **Co Dublin**

Regd owner: Dieter Schitli; Folio: 55496; Land: Townland of Kilcrohane in the Barony of Carberry West (West Division); **Co Cork**

Regd owner: David O'Donoghue; Folio: 21454F; Land: Townland of Lisquinlan, Barony of Imokilly; **Co Cork**

Regd owner: John Lynch (deceased); Folio: 44471; Land: property, part lands of Ballydaniel More with the cottage thereon situate in the Barony of Barrymore, County of Cork, being property in said Folio; **Co Cork**

Regd owner: William Enright of 44 Queen's Street, Dublin (58/61 Cork Street, Dublin 8); Folio: 3821L; Lands: property situate on the west side of North Road in the village of Finglas, Townland of Finglas East and Barony of Castleknock; **Co Dublin**

Regd owner: Anne Marie Lee; Folio: 10383; Lands: Newtownmountkennedy, Barony of Newcastle; **Co Wicklow**

Regd owner: John and Anne Garde; Folio: 43653; Lands: Sarsfields Court, Barony of Barrymore; **Co Cork**

Regd owner: Joseph Haughton; Folio: 8932; Lands: Ballinderry, Barony of Carbury; **Co Kildare**

Regd owner: Marie E Cassell; Folio: 10546; Lands: Bray, Barony of Rathdown; **Co Wicklow**

Regd owner: John Thompson of 43 Oakway, Clondalkin, Dublin 22; Folio: 52086F; Lands: property situate to the West of Boot Road in the Town and Parish of Clondalkin; **Co Dublin**

Regd owner: John Lynch and Marie Lynch; Folio: 7978; Lands: Punchbowl, in the Barony of Bunratty Lower; Area: 5a 2r 20p; **Co Clare**

Regd owner: Liam O'Donovan; Folio: 28811; Lands: Townland of Rea, situate in the Barony of Carbery West; **Co Cork**

Regd owner: Texprint Limited (Limited Liability Company) of Unit 2 Baldoyle Industrial Estate, Baldoyle, County Dublin; Folio: 37742F; Lands: Townland of Baldoyle in the Barony of Coolock; **Co Dublin**

Regd owner: Mary Josephine Malone; Folio: 1133F and 2859F; Land: Fairyhall, Barony of Clanwilliam; Area: 12a 3r 23p and 7a 3r 24p; **Co Limerick**

Regd owner: Gerard Dunne and Karen Dunne of 100 Clanmaurice Road, Donnycarney, Dublin 9; Folio: 19609F; Lands: property known as 100 Clanmaurice Road situate in the Parish and District of Artaine; **Co Dublin**

Regd owner: Michael Parker and Marjorie Parker; Folio: 2836L; Land: the leasehold interest in the property situate on the south side of Glenthorn Drive in the Parish of St Annes Shandon and County Borough of Cork (lease dated 07/04/72); **Co Cork**

Regd owner: Maurice Moore; Folio: 18696; Land: Townland of Castletown, Barony of Kenry; Area: 6a 1r 9p; **Co Limerick**

Regd owner: Patrick J Quinn; Folio: 28961; Land: Greaghs; Area: 16a 0r 2p; **Co Donegal**

Regd owner: John Connor; Folio: 1330; Lands: Ballyhagan, Barony of Carbury; **Co Kildare**

Regd owner: Gerard O'Halloran; Folio: 4290L; Land: property situate to the south of Curaheen Road in the Parish of Saint Finbar's and County Borough of Cork being that comprised in said folio; **Co Cork**

Regd owner: Kathleen Healy; Folio: 10056; Lands: part lands of Nettleville Demesne situate in the Electoral Division of Cannaway, Barony of Muskerry East, Co Cork, (being 2 parts) and part lands of Loughleigh situate as aforesaid (being 1 part); **Co Cork**

Regd owner: Jim Brickley; Folio: 18538; Lands: part of the lands of Tawnies Upper, situate in the Electoral Division of Clonakilty, Rural Barony of Carbery East and County of Cork; **Co Cork**

Regd owner: Fergus McKenna; Folio: 10018F; Land: Aghangap; Area: 6.515 hectares; **Co Monaghan**

Regd owner: Joseph Mooney; Folio: 869; Land: part of the lands of Ballynagleragh; Area: 26a 1r 3p; **Co Clare**

Regd owner: Con Murphy, Very Rev Edward Canon Fitzgerald (deceased), Sean Og Murphy (deceased); Folio: 36657; Land: Townland of Underhill in the Barony of Carberry East (West Division); **Co Cork**

Regd owner: Feede Manufacturing Limited (Limited Liability Company) of 54 North King Street, Dublin 2; Folio: 805; Lands: Townland of Brazil in the Barony of Nethercross; **Co Dublin**

Regd owner: Patrick McCourt (deceased) and Anna McCourt; Folio: 201F; Land: Muchgrange; Area: 1a 2r 22p; **Co Louth**

Regd owner: James Hennessey; Folio: 15234; Land: Knockardagannon South; Area: 10a 3r 20p; **Co Queens**

WILLS

Quirke, Michael, deceased, late of Knockroe (or alternatively Ardroe), Caherconlish in the County of Limerick. Would any person having knowledge of a will executed by the above deceased who died on 6 March 1998, please contact John JM Power & Company, Solicitors, Hospital, Co Limerick, tel: 061 383105, fax: 061 383415

Cunnane, Patrick, deceased, late of 9 Marren Park, Ballymote, Co Sligo. Would any person having knowledge of the whereabouts of a will dated 23 January 1992, executed by the above named deceased who died on 13 December 1992, please contact Rochford, Gallagher & Company, Solicitors, Ballymote, Co Sligo, tel: 071 83309, fax 071 83467

Moore, Albert (otherwise George Albert) and Margaret, deceased, both late of Lower Meevagh, Downings, in the County of Donegal. Would any person having knowledge of a will, if any, of either of the above named deceased who died on 27 February 1996 and 23 October 1995 respectively, please contact Messrs McGinley & Company, Solicitors, Milford, Co Donegal, tel: 074 53233, fax: 074 53563

Murphy, Patrick, deceased, late of 7 Smyths Villas, York Road, Dun Laoghaire, Co Dublin. Would any person having knowledge of the whereabouts of a will of the above named who died on 8 April 1997, please contact O'Callaghan Cowhey, Solicitors, 93 Upper George's Street, Dun Laoghaire, Co Dublin, tel: 2803399, fax: 2809221

Phelan, Christy or Christopher, deceased, late of Ballymakee, Ballymacarbery, Clonmel, Co Waterford. Would any person having knowledge of the whereabouts of an original will of the above named deceased who died on 24 February 1998, please contact Murphy & Long, Solicitors, Lower Kilbrogan Hill, Bandon, Co Cork, tel: 023 44420, fax: 023 44635

McGrath, Francis, deceased, late of Boeshill, Pettigo, Co Donegal, retired farmer. Would any person knowing the whereabouts of a will of the above named deceased who died on 12 April 1985, please contact Brittons, Solicitors, Tirconaill Street, Ballyshannon, Co Donegal, tel: 072 51187, fax: 072 52057 (Ref Mc411/MK)

Fitzpatrick, William Anthony (otherwise Tony), deceased, late of 30 and 32 Monastery Walk, Clondalkin, Dublin 22. Would any person having knowledge of the whereabouts of a will executed by the above named deceased who died on 1 March 1996, please contact Karen O'Neill, Solicitor, Clondalkin Law Centre, Tower Shopping Mall, Clondalkin, Dublin 22, tel: 4576011, fax: 4576007

EMPLOYMENT

Highly organised, computer literate solicitor with over ten years' post-qualification experience in conveyancing, commercial lending, probate and practice management seeks position as solicitor with practice in the Mid West region. Reply to **Box No 30**

Locum solicitor (litigation) required in the Dublin 2 area from May to September 1998. Reply to **Box No 31**

Conveyancing overload? Experienced solicitor available to work on files in own home. Reply to **Box No 32**

MISCELLANEOUS

Northern Ireland agents for all contentious and non-contentious matters. Consultation in Dublin if required. Fee sharing envisaged. Offices in Belfast, Newry and Carrickfergus. Contact Norville Connolly, D&E Fisher, Solicitors, 8 Trevor Hill, Newry, tel: 0801693 61616, fax: 0801693 67712

Personal injury claims, Family law, criminal law and property law in England and Wales. We have specialist departments in each of these areas, and offices in London (Wood Green and Camden) and Birmingham. One of our staff is in Ireland for one week in every month. Legal aid available to clients that qualify. Contact David Levene & Company, Ashley House, 235-239 High Road, Wood Green, London N22 4HF, England, tel: 0044 181 881 7777, fax: 0044 181 889 6395, and the McLaren Building, 35 Dale End, Birmingham B4 7LN, tel: 0044 121 212 0000, fax: 0044 121 233 1878

London solicitors will advise on UK matters and undertake agency work. All areas. Corporate/private clients. Ellis & Fairbairn, 26 Old Brompton Road, South Kensington, London SW7 3DL, tel: 0044 171 589 0141, fax: 0044 171 225 3935

Agents – England and Wales. We are willing to act as agents for Irish solicitors in civil and criminal litigation. Contact: Olliers, Solicitors, Alderman Downward House, 2/3 The Birtles, Civic Centre, Wythenshawe, Manchester M22 5RF, tel: 0044 161 437 0527, fax: 0044 161 437 3225

Northern Ireland solicitors. Will advise and undertake NI-related matters. All areas corporate/private. Agency or full referral of cases as preferred. Consultations in Dublin or elsewhere if required. Fee sharing envisaged. Donnelly Neary & Donnelly, 1 Downshire Road, Newry, Co Down, tel: 0801 693 64611, fax: 0801 693 67000. Contact KJ Neary

Northern Ireland solicitors providing an efficient and comprehensive Legal Service in all contentious/non-contentious matters. Dublin-based consultations and elsewhere. Fee apportionment. ML White, Solicitors, 43-45 Monaghan Street, Newry, County Down, tel: 0801693 68144, fax: 0801693 60966

To rent: cottage in West Connemara surrounded by stunning views. Sleeps five. All mod cons. Local amenities include game fishing, horse riding, water sports and fine restaurants. Bed linen included. No children under 12. £400 per week. Tel: 041 61120 or 041 53535

LOST TITLE DEEDS

In the matter of the *Registration of Title Act, 1964* and of the application of Ita Thornton in respect of property known as 24 Meadow Vale, Blackrock, Co Dublin

Take notice that Ita Thornton of 24 Meadow Vale, Blackrock, County Dublin, has lodged an application for her registration on the Leasehold Register free from encumbrances in respect of the above mentioned property.

The original documents of title specified in the schedule hereto are stated to have been lost or mislaid. The application may be inspected at this registry.

The application will be proceeded with unless notification is received in the registry within 21 days from the date of publication of this notice that the original documents of title are in existence.

Any such notification should state the grounds on which the documents of title are held. The missing documents are detailed in the schedule hereto.

Dated 23 March 1998

M O'Neill, Chief Examiner of Titles

Schedule

Lease dated 2 August 1968 from Foxrock and Brewery Ltd to James E Thornton of the part of the property known as 24 Meadow Vale Estate, Blackrock, Co Dublin, which said lease is registered as a burden at entry no 24 of Folio 12598F of the Register, County Dublin

LANDLORD AND TENANT

In the matter of the *Landlord and Tenant (Ground Rents) Acts, 1967-1987*, between Michael Kelly (applicant) and the unknown or unascertained owner or owners (respondents)

To: the County Registrar, Circuit Court Office, Church Street, Longford, County Longford

Notice of application

Take notice that on 8 April 1998 at 3pm an application will be made on behalf of the above named applicant to the County Registrar sitting at Circuit Court Office, Church Street, Longford, in the County of Longford for:

1. An order determining the applicant's entitlement to acquire the fee simple and all intermediate interests in the dwellinghouse and premises known as the Old Teacher's Residence, Ballymahon, County Longford; and as more particularly described in the schedule hereto
2. An order determining the purchase price to be paid in respect of such acquisition
3. An order determining the person or persons entitled to receive the purchase money in respect of the acquisition and the amount each person is entitled to receive
4. In the event of any person required to join in the conveyance of the fee simple and all intermediate interests being unknown or unascertained or refusing to execute the conveyance, an order appointing an officer of the court to represent such person and to execute the conveyance for and on behalf of such person
5. Such further or other order or award as the County Registrar may think fit, and
6. An order providing for the costs of this application.

Which said application will be grounded upon the issue and service of this notice of application, the affidavit of Michael Kelly, the affidavit of Deirdre Gearty, the nature of the case and the reasons to be offered.

Dated 21 April 1997

Signed: FJ Gearty & Company, solicitors for the applicant, 4/5 Church Street, Longford, County Longford

Schedule

All that and those the plot of ground part of the Townland of Drinan situate in the Barony of Rathcline and County of Longford, containing .205 acres of thereabouts statute measure and as shown on the copy map annexed to an indenture of assignment dated 6 August 1996 and made between St Mel's Diocesan Trust of the one part and Michael Kelly of the other part and which property comprised the dwellinghouse and premises known as the 'Old Teacher's Residence', Ballymahon, in the County of Longford.