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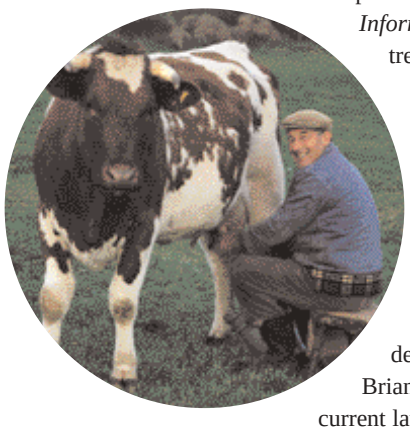

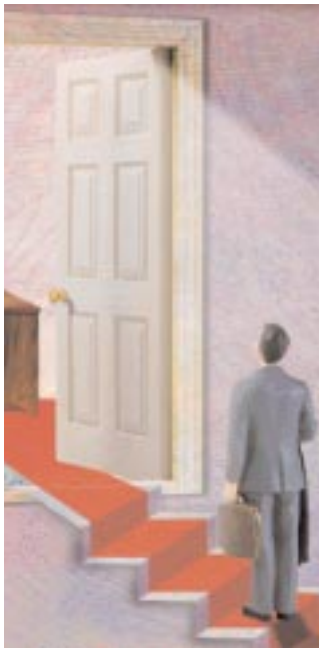

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One victory – but storm clouds on the horizon

Before going on to deal with some of the pressing issues which the profession must face up to over the coming months and years, I think it would be appropriate to highlight one small victory the Law Society has won in recent weeks. As most of you will know from the last couple of issues of the *Gazette*, the Society has been fighting to reverse a Government decision to exclude solicitors from competing for the position of legal adviser in – ironically enough – two of the State's major equality bodies. I am pleased to be able to report that as a result of our representations the Government has had a rethink and will be readvertising the posts shortly – and solicitors will be welcome to apply! *(For more on this story, see page 13.)*

But, that said, there are a number of clouds on the horizon which threaten the public interest, solicitors and their clients. The proposal of the Minister for Justice, Equality and Law Reform to designate solicitors, accountants and auctioneers under the provisions of the *Criminal Justice Act, 1994* is not in the public interest. In the case of lawyers, it seeks to erode the traditional and constitutional right of their clients to confidentiality and privilege.

Another concern is the growing trend towards multi-disciplinary practices. While the Law Society has firmly set its face against the introduction of MDPs for very sound reasons, we must be mindful that they are being created in other jurisdictions. The debate on such entities continues in the United States of America, Australia and some European countries. The Law Society has a working group which will continue to monitor developments worldwide and report to the Council in due course on how we should deal with the issue of MDPs in this country.

Urgent issues for law reform

The Society's Law Reform Committee has recently published two reports on areas of law in need of update and reform: domestic violence and mental health *(see page 11 of this issue for more on this)*. One of the dark and mysterious areas of Irish society remains the inadequate protection currently provided to people held in mental institutions or who suffer from psychiatric and psychological illnesses. A new *Mental Health Act* is long overdue.

The Society's report proposes that measures should be introduced to protect people with mental illnesses from abuse, neglect or exploitation, and further suggests that the courts be given the power to make Adult Care Orders which would give greater protection to vulnerable patients. It goes on to suggest measures to protect the property of people who are incapable of managing their own affairs, while at the same time suggesting that the wardship procedure be considerably simplified.

One suspects that if there were votes in the care of people with mental illness, a Bill would have been brought before the Oireachtas long before now. There is an urgent need for reform in this particularly sensitive and socially-difficult area.

Solicitors (Amendment) Bill, 1998 and solicitor advertising

The Law Society has welcomed the Government's proposal in relation to restricting advertising by solicitors, particularly in personal injury matters, which is the main feature of the *Solicitors (Amendment) Bill, 1998*. Some forms of advertising and touting have regretfully spoiled and smeared the good name of solicitors. The Bill, which the Government promised to have enacted at the end of last year, is awaited eagerly by the Law Society. The measures contained in the Bill must be enacted by the Government soon for otherwise the momentum which led to the introduction of the Bill will be lost.

On the conference circuit

In July, I had the honour of representing the profession at the 50th anniversary conference of the Law Society of Scotland, which was held in Edinburgh. I attended the American Bar Association's conference in Atlanta and the Canadian Bar Association's conference in Edmonton last month.

The problems that lawyers in all jurisdictions face are broadly similar. I was struck by the genuine interest shown by the members of the various associations in jurisprudence and the development of the legal profession and the law in their jurisdictions. That is as it should be. We must constantly test our accepted traditions and principles for relevance in the modern world.

Our profession, though it has a rosy future, must remain relevant (and where necessary become more so), must move with the times, and keep pace with changes in the way that society is structured and governed. Solicitors must be conscious that the services we provide are of the quality expected by our clients. The legal profession must continue to be accountable and transparent in its dealings while at the same time providing quality legal services to our clients, without whom we cannot survive.

The backlog at the Land Registry

The fact that there are 57,000 dealings outstanding at the Land Registry is frightening. This organisation, which is gearing up to become an efficient semi-State body, and which has a monopoly in the service that it provides, is starved of adequate personnel to work efficiently. The surplus shown in the Land Registry accounts over the years has not been fully and properly applied towards improving the service for the public. Simply put, there is no logical reason why additional staff cannot be sanctioned by the Government for the Land Registry. The Trojan work done by the registrar and her staff is being grossly undermined by the failure of Government to adequately staff the service – which is, after all, self-financing. Action is needed now.

Patrick O'Connor,
President

Why plain English could spell the end for latin lovers

The 1996 *Divorce Act* was a radical new statute which will fundamentally affect the lives of tens of thousands of people. Yet, like so many pieces of Irish legislation, it was drafted in terms which render it incomprehensible to everyone except lawyers.

Take, for example, section 36(b), which says: 'Subsection (1) of section 115A of the *Finance Act, 1993* (which was inserted by the *Finance Act, 1994* and provides for the abatement or postponement of probate tax payable by a surviving spouse) shall apply to property or an interest in property the subject of such an order as it applies to the share of a spouse referred to in the said section 115A in the estate of a deceased referred to in that section or the interest of such a spouse in property referred to in that section, with any necessary modifications'!

The convoluted phrasing and lack of punctuation marks may make lawyers happy, but it hardly makes for clarity in the law.

Even other Europeans have spotted the problem of Irish legalese. In June, Christopher Arend of the Frankfurt law firm Oppenhoff & Radler complained that Irish lawyers were frequently sesquipedalians whose verbiage negated their semantic verisimilitude!

He told members of the Corporate and Public Services Solicitors' Association in Dublin: 'Drafting contracts should not be an exercise for the lawyers to see how many thoughts and words they can cram into a single sentence. Too many words and too many thoughts lead to ambiguities. Ambiguities lead to misunderstandings, and misunderstandings can lead to unnecessary litigation'.

Now the Law Reform Commission, in its consultation paper *Statutory drafting and interpretation: plain language and the law*, has proposed an end to such obtuse verbosity. (The publication of the paper can hardly be described as a spur of the moment decision; the Law Reform Commission first proposed examining possible improvements to statutory drafting 23 years ago!)

Are lawyers 'locking up their trade secrets in the safe of an unknown tongue'?

Mental gymnastics

The 132-page report, published in July, criticises what one judge called the 'dismal opacity' of Irish legal language. It cites a 158-word sentence in the 1992 *Social Welfare Act* which 'repeats a litany of benefits at least five times, and uses many words and phrases which add nothing to the meaning … Long, meandering sentences like these force the reader to do mental gymnastics'.

The commission also censures the unnecessary use of anachronistic terms like 'hereby', 'thereto' and 'aforesaid', of excessively formal words like 'furnish' instead of 'give' or 'save' instead of 'except' and of superfluous phrases like 'as the case may be' and 'that is to say'. (But even the report's authors fall into the trap of using phrases like 'On behalf of the respondents, it was submitted that …', instead of 'Murphy argued that …'.)

The paper calls for the use of shorter sentences, familiar vocabulary and clearer grammatical structures in drafting legislation. Among its provisional recommendations are:

- The adoption of standard drafting practices to aid clear and effective communication
- The consolidation of statutes
- New rules for statutory interpretation, and
- Changes in the layout of statutes, including the insertion of purpose statements and headings, to make them easier to read (or, in the words of the commission's press release, 'to facilitate readability').

But Ireland is not alone in seeing the need for a change in the way lawyers write, speak and think. In England and Wales, legalese and Latin legal terminology are also being replaced with plain English. Since last April, under guidelines laid down by the Lord Chancellor, terms such as *ex parte*, *inter partes* and *in camera* have been replaced by their English equivalents of 'without notice,' 'with notice,' and 'in private'. The plaintiff is now called the claimant, *Mareva* injunctions are known as freezing injunctions and *Anton Pillar* orders are called search orders.

The changes follow a long battle led by the Plain English Campaign. In the foreword to its 1996 book *Language on trial*, Lord Alexander of Weedon QC pointed out: 'Words are the tools of a lawyer's trade. To use complex, time-hallowed expressions can sometimes give legal certainty. But on other occasions, it may just be no more than a comfort and a substitute for clear thought. To speak or write simply demands a clear and confident understanding of the law'.

Lord Weedon cites – as a 'master of crystal clarity' – Lord Denning, who opened one judgment with the words: 'It happened on April 19 1964. It was bluebell time in Kent'. (Some of Lord Denning's other judgments might not bear such close scrutiny.)

Trade secrets

The book criticises lawyers for their wordiness, their use of long sentences, their preference for passive verbs and their excessive formalism. It complains about lawyers' use of legal Latin and French and cites the observation of American expert David Mellinkoff: 'What better way of preserving a professional monopoly than by locking up your trade secrets in the safe of an unknown tongue?'

Like it or not, lawyers across the Irish Sea are going to have to start using ordinary English. The new rules have been welcomed by the Plain English Campaign, which says they are 'a stunning victory for plain English. Courts will be run for the public instead of the lawyers, and for the 21st century instead of the 16th'.

Maybe it's time the same thing happened here. *Mutatis mutandis*, of course! G

Kieron Wood is a practising barrister. Formerly an award-winning journalist, his own simplified glossary of legal terms may be seen on his web site at http://welcome.to/barrister.

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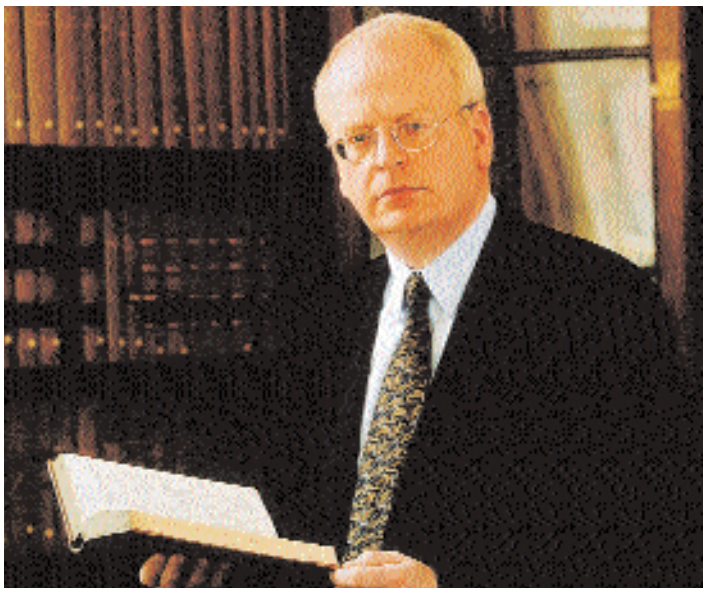
Heavy responsibilities for new AG

The members of the Incorporated Council of Law Reporting for Ireland (founded in 1866) assembled in the Benchers' Room at the Four Courts on Monday 9 June 1997 to hold their annual general meeting. Michael McDowell SC, TD, was the council's chairman. Elsewhere in Dublin's RDS, the marathon count to determine the fourth seat in Dublin South East continued. There already had been three days of rechecking and recounting; at one stage on the Monday, 27 votes separated the outgoing deputy, McDowell, Finance Spokesman for the Progressive Democrats, from John Gormley of the Green Party. It was reported that teams of lawyers, solicitors and barristers scrutinised each ballot paper, including eight senior counsel allied to the Progressive Democrats and four supporting the Greens.



New Attorney General Michael McDowell: 'a helmsman of the law'?

Front page news

There was widespread speculation of a High Court challenge to any result from the count. Nobody expected Michael McDowell to turn up in the Benchers' Room to chair the council's meeting. After all, the marathon count was front page news in all the newspapers and was continuing. As the vice-chairman of the council, I waited until 4.15pm and proposed, in the absence of the chairman, to adjourn the meeting. Suddenly, McDowell arrived and took the chair; nobody mentioned the ongoing election count. It was business as usual. Then the item of the election of officers came up on the agenda. After four years at the helm of the council, McDowell's term of office had expired. He insisted that he would stick to the convention that the chairman holds office for a period of four years. Tributes were paid to the outgoing chairman.

It was a difficult time for a man rarely out of the media spotlight. The day before, Sunday 8 June 1997, Declan Lynch, a correspondent with the *Sunday Independent*, had written that Michael McDowell had become 'the Lord Lucan of the [general election] campaign, not just for his pungent rhetoric, but because he [was] also a victim'. What did Lynch mean in writing McDowell was a victim? The correspondent elaborated:

'He is as much a victim of his birth and circumstances as the lone parent in Darndale, in whom, not surprisingly, he takes a keen interest. The direction of his life has been established since conception, and before that. It is the path of noblesse oblige, *where a man actively takes a substantial cut in wages in order to run the country on behalf of those who are incapable or undesirable'.*

Incidentally, McDowell's grandfather was Eoin MacNeill, founder of the Irish Volunteers, the man who tried to call off the 1916 Rising and later became Minister for Finance and Education. McDowell's granduncle was James MacNeill, Governor General of the Irish Free State in the 1930s.

'Rottweiler' label

Lynch, the *Sunday Independent* correspondent, undoubtedly conscious of the unfair 'rottweiler' label attached to McDowell and the incredible description of him as one of the 'nastiest pieces of work' ever to crawl into Dáil Éireann, concluded:

'For this indefatigable work in the public interest, at considerable personal expense, Michael McDowell experiences a level of class discrimination which can only be compared to that which is endured by the Travelling Community'.

McDowell lost his Dáil seat; his political career was in considerable doubt. Yet on Saturday afternoon, 17 July 1999, Michael McDowell received his seal of office from the President of Ireland, in the presence of Taoiseach Bertie Ahern, and became the State's 27th Attorney General.

Great office of State

What are the powers and duties of the Attorney General? He is, of course, the Government's chief legal adviser. But is he merely a hired lawyer?

The significance of the independence of the office of the Attorney General must be emphasised. Professor Casey in *The Irish law officers* (1996) quoted WT Cosgrave's view that the Attorney General occupied a position in which he should not be subject to political domination or control: 'He should fulfil the duties of his office, and the administration with which he is charged, with almost judicial discretion and independence'.

Subsequently, in the celebrated case of *McLoughlin v Minister for Social Welfare* ([1958] IR 1), Ó Dálaigh J, a former Attorney General, noted that the Attorney General was 'an independent constitutional officer'. The words of Kingsmill Moore J, in the same case, are engraved in the minds of many law students but are worthy of repetition here:

'The Attorney General is in no way the servant of the Government, but is put into an independent position. He is a great officer of State, with grave responsibilities of a quasi-judicial as well as of an executive nature. The provisions for his voluntary or forced resignation seem to recognise that it may be his business to adopt a line antagonistic to the Government, and such a difference of opinion has to be resolved by his ceasing to hold the post, probably with repercussions on the political plane. But while he is in office, he holds – and if he is to do his duty and discharge his responsibilities must hold – an independent position. He is specifically excluded from being a member of the Government, which again underlines his special position'.

In a sense, these obligations impose heavy responsibilities on the new Attorney General. There may well be tensions between the AG's role in providing independent, almost impartial, advice and the Executive's desire to receive legal advice which might facilitate the implementation of its policies.

The Attorney General also represents the public interest in appropriate legal proceedings. Professor Casey considers whether this concept of being guardian of the public interest constitutes a power, with discretion, on the one hand, or a duty, on the other. This point remains to be settled.

Anyone whose office is described as a great office of State, with grave responsibilities of a quasi-judicial as well as of an executive nature, a guardian of the public interest, must be regarded as a helmsman of the law. G

Dr Eamonn G Hall is Company Solicitor of Eircom plc.

Letters

Time to name and shame insurance companies?

From: Sheil Solicitors, Dublin

Are any members of the profession interested in joining me in a little competition to see how long it takes insurance companies to provide settlement cheques for plaintiffs?

At the moment, the longest it has taken between date of settlement and receiving the monies is 82 days. Perhaps we should be able to exchange the identities of the appropriate insurers in an effort to embarrass them into becoming somewhat more efficient.

Imagine if we took 82 days to pay our client monies! Perhaps it is time we insisted on payment of the settlement cheque and the cost cheque (when both have been requisitioned/agreed) within, say, four weeks, failing which proceedings should issue for damages for breach of settlement. I have had to do that on a number of occasions and it works!

Dumb and dumber

From: Nicholas Hughes, Cork

The late Mallow solicitor, Gerard Regan, was a popular and easygoing practitioner who had a ready excuse for all his clients. One was prosecuted for having an unlicensed bull. At first glance, the excuse seemed reasonable. 'My client kept this scrub bull so that when he saw him following the heifer, he would know that it was time to send for the AI man'.

Judge Henry Conner was not easily taken in. 'Was the bull put on his word of honour until the man arrived?' he enquired, with just a hint of asperity.

Nicholas Hughes wins the bottle of champagne this month.

New corporate image's crowning glory

From: John MT King, King's Solicitors, Dublin

I received the Law Society's circular of 16 July about the Society's new corporate image. Presumably the crest appearing on the front of the circular is the new crest referred to.

It quite beggars belief that the governing body of solicitors of the courts of a long-established democratic republic would voluntarily hold out a crown as being worthwhile or pertinent to their members or the citizens whose rights their members should vindicate.

Under our constitution, all laws stem from the people and all rights belong to the people as of absolute right. A crown signifies people having no rights other than as granted to them by way of grace and favour from royalty and further implies that royalty is the only conduit between rightness and justice and the people.

I think that the adoption of a crown is such an indication of slavery at one end and persecution at the other as to leave the mind restless.

As one of the few things I have ever asked, perhaps the Council members would care to respond to my comments.

Your views

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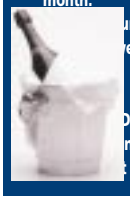
A bottle of the finest champagne will go to the reader who sends in the funniest contribution to *Dumb and dumber* each month.



ur examples of the wacky, eird and wonderful to the Editor, *Law Society Gazette*, Blackhall Place, Dublin 7, or you can fax us n 01 672 4801, or e-mail us c.oboyle@lawsociety.ie

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- Deirdre Flannery, Bank of Ireland International Finance Limited
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- James Barry, National Toll Roads
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Frank Buttimer, Solicitor

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- Dangers for practitioners advising clients in custody
- Application to non-subversive offences
- Government review of all Offences Against the State legislation

SPEAKER: James MacGuill, Solicitor

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Booking forms should be returned to Colette Carey, Solicitor, Criminal Law Committee, Law Society, Blackhall Place, Dublin 7, to be received no later than 28 September 1999. Please note that the seminar will be cancelled if there are insufficient bookings.

More protection needed for mentally ill, says Law Society

Greater protection must be given to mentally ill people who have been committed to a mental institution against their will, according to a new report from the Law Society's Law Reform Committee. The report argues that there should be an automatic review of decisions to detain and treat such patients. At the moment, Irish law does not comply with the European *Convention on human rights*, which means that mentally ill people do not receive the same standards of protection in Ireland as they would in many other countries.

The report, *Mental health: the case for reform*, was launched recently at a press conference in the Law Society's Blackhall Place headquarters.

According to Law Reform Committee Chairman, Brian Gallagher: 'The rights of the mentally ill have been swept under the carpet for too long'.

Among its many recommendations, the report argues that the Mental Health Review Board proposed by the Government should be given extensive powers to overturn committal decisions. Also, the board should be empowered to review decisions made on behalf of patients who can't make decisions for themselves (for example, in relation to medical treatment). It notes that 'the *Mental Treatment Act, 1945* did not deal with the issue of informed consent to treatment of detained patients and it was widely assumed that consent to treatment was not required of an involuntarily detained patient'.

Law Reform Committee Chairman Brian Gallagher launches the mental health report: 'The rights of the mentally ill have been swept under the carpet for too long'

The report also proposes that measures should be introduced to protect people with mental illnesses from abuse, neglect or exploitation. It suggests that the courts be given the power to make Adult Care Orders, similar to Child Care Orders, which would grant greater protection to vulnerable patients.

Commenting on the publication, Brian Gallagher said: 'Our legal terminology remains couched in such mediaeval terms as "lunatics" and "wards of court". In many ways, our mindset remains mediaeval too. The rights of children have received long-deserved attention in recent years. The Law Society wishes to put the rights of the mentally ill at the top of the agenda. They have languished at the bottom for too long'.

(*An edited version of* Mental health: the case for reform *will appear in next month's* Gazette*)*

Council election deadlines

Pursuant to bye-law 6(4), the Council of the Law Society has agreed that the final date for receipt of nominations of candidates for the annual and provincial elections should be Monday 4 October 1999, and that the close of poll date should be Thursday 4 November 1999. In accordance with the bye-laws, the Council also fixed the close of business on Thursday 14 October 1999 as the deadline by which canvassing literature must be received by the Society and Friday 5 November 1999 as the date of the election count.

Big vote for change to 'long vacation'

A clear majority of lawyers would prefer to see the courts' summer recess switched from August/September to July/August, if the results of the *Gazette* survey on the issue are anything to go by. Readers voted by more than three to one in favour of the change, which was one of the options put forward by the Working Group on a Courts Commission (see *Gazette*, July, page 7).

Commenting on the results of the survey, Law Society Director General Ken Murphy said that the massive vote in favour of change was 'not surprising' given that July is a school holiday while September is not. 'Although neither the Society's Litigation Committee nor the Council have as yet taken any formal position on this, from conversations with members of both I would be surprised if their views did not broadly reflect the results of the survey', he added. 'It remains to be seen whether the Courts Service Board, when established in its final form, finds time to consider this issue as recommended by the Denham Working Group'.

Gazette survey on court vacations

July/August recess: 65 in favour (solicitors: 54; barristers: five; other readers: six)

August/September recess: 18 in favour (all solicitors)

BRIEFLY

Compensation Fund payout

The following claim amount was admitted by the Compensation Fund Committee and approved for payment by the Council at its meeting in July: Conor McGahon, 19 Jocelyn Street, Dundalk, Co Louth – £740.

Irish Legal History Society AGM

The annual general meeting of the Irish Legal History Society will be held on Friday 8 October, in the Faculty of Law, UCD, at 4.45pm. Following the AGM, at 5.15pm, Professor Fergus Kelly of the Dublin Institute for Advanced Studies will deliver a paper entitled *A 14th century legal innovator: Giolla Na Naomh MacAodhagain*, and Dr John McCarthy of the Department of Medieval History, UCD, will deliver a paper entitled *To follow the late precedents of England: the first Irish impeachment proceedings in 1641*.

SOS from Swords CIC

The Citizens Information Centre in Swords, Co Dublin, needs more solicitors to help out with its legal advice service which operates every Thursday evening from 7-8.15pm. The service is currently staffed by local solicitors who volunteer their time once a month, but demand for the CIC's free and confidential service means that it urgently needs more volunteers. Anyone interested in helping out should phone Deirdre on 01 8406877 or 840 9714.

Refugee Lawyers' AGM

The Refugee Lawyers' Association will hold its annual general meeting on Tuesday 28 September at the Ormond Hotel, Ormond Quay, Dublin 1. The association is open to all lawyers who have an interest in refugee law. Further information on the AGM and details about membership can be obtained from Emer O'Sullivan, Murrough O'Rourke Solicitors, on 01 872 4511.

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Government backs down over 'discriminatory' equality posts

The Government has reversed its decision to exclude solicitors from applying for two positions as legal advisers in the State's leading equality bodies, following angry representations from the Law Society (see *Gazette*, June, page 11). The Society had been incensed that competition for the two posts in the Equality Authority and the Office of the Director of Equality Investigations had been confined to barristers only.

Describing the bar on solicitors as 'discrimination without justification', Law Society President Patrick O'Connor protested to the Office of the Civil Service and Local Appointments Commissioners, who had placed the advertisements in national newspapers. He also wrote directly to the Minister for Justice, John O'Donoghue, expressing his anger and concern over the exclusion of solicitors from the legal adviser posts.

Last month, the commissioners wrote to O'Connor, saying that the Minister for Justice, Equality and Law Reform had 'reviewed the requirements for the posts and has decided to broaden the eligibility criteria to include legally-qualified persons other than barristers'. And they added: 'The competition as originally advertised in May last will not now proceed any further. A new competition to fill both vacancies, reflecting the revised regulations, is scheduled to be advertised in September'.

O'Connor: 'A victory for commonsense'

Reacting to the news of the Government's climbdown, O'Connor said: 'This is a victory for commonsense. The education and training of solicitors is in every way the equal of that of barristers. I hope we will never again see a situation arise where the Government or Civil Service discriminates against one branch of the legal profession in favour of the other'.

Church services to mark start of the legal year

As usual, the opening of the legal year will be marked by a number of church services, representing all of the major religious denominations in this country. Details of these, along with the relevant contact numbers, are set out below. There will also be an ecumenical service on 7 November (Citizenship Sunday) at 11am in Dublin's Christchurch Cathedral, and a coffee morning for lawyers from both branches of the profession in the King's Inns on Monday 4 October at 11.15am.

SERVICE	DATE
Catholic Mass, St Michan's, Halston Street, Dublin 7 (tel: 01 8730925)	Monday 4 October, 10am
Joint Protestant service, St Michan's, Church Street, Dublin 7 (tel: 01 8724154)	Monday 4 October, 10.15am
Combined Jewish service, The Synagogue, Terenure, Dublin 6	Saturday 2 October, 11am
Muslim service, Mosque and Islamic Centre, 163 SCR, Dublin 8 (tel: 01 4533242)	Friday 1 October, 12.45pm (Clonskeagh Mosque)
Greek Orthodox Church, 46 Arbour Hill, Dublin 7 (tel: 01 6779020)	Sunday 3 October, 11am
Coptic Orthodox Church, 5 The Pines, Herbert Road, Bray, Co Wicklow (tel: 01 2866809, 2865834)	Sunday 3 October

BRIEFLY

ICCL welcomes *Human Rights Commission Bill*

The Irish Council for Civil Liberties has said that the Government's recently-published *Human Rights Commission Bill, 1999* 'could usher in a whole new era of protection for human rights'. But it added that it was 'concerned' at suggestions that the commission might be headed by a High Court judge; instead, says the ICCL, it should be headed by someone who has worked with the deprived and the marginalised in order to win the confidence of those communities.

Child-abduction charity seeks lawyers

An embryonic charity that aims to give practical advice to the families of abducted children wants to compile a list of lawyers who have experience of such cases or are willing to work in the area. The Irish Centre for Parentally-Abducted Children (ICPAC) is the brainchild of MEP Mary Banotti and hopes to be up and running within a couple of months. Lawyers who want to be included in ICPAC's information pack listing can contact Banotti on 01 662 5100 (fax: 01 662 5134, e-mail: mbanotti@europarl.eu.int).

NEWS FROM THE MEMBER SERVICES DEPARTMENT

Good news for Law Society affinity credit cardholders

Affinity credit card provider MBNA recently announced a reduction in its standard interest rate to Law Society members from 19.9% to 16.9% – one of the lowest rates available on the market. This compares favourably to AIB at 22.83% and Ulster Bank at 22.56%. The Law Society Visa card also offers a credit limit of up to £15,000 on the standard card and £25,000 on the gold card. Cardholders receive free purchase protection insurance for up to 100 days on most major purchases, no liability for lost or stolen cards and no annual fee. The Society receives a benefit for every new applicant, which is used to improve services to members. Further details are available from MBNA on 1800 409 510.

New healthcare cash plan

Employee benefits specialists now recommend cash plans in addition to private health insurance. For a small weekly fee, these schemes help members recover some of the costs not provided for by VHI and BUPA. IPT Financial Services has recently negotiated a healthcare cash plan on behalf of Law Society members with one of the country's main providers – the Hospital Saturday Fund. The scheme is designed to provide low-cost cover for routine but often expensive medical costs. All members will shortly receive a mail-shot detailing the terms and conditions of the scheme. For more information, contact IPT's Liz O'Brien on 01 604 8461.

New pension booklet

The Law Society receives regular enquiries about its pension scheme from members. As most solicitors are aware, the Society's Retirement Scheme is administered by Bank of Ireland Trust Services under the supervision of the Solicitors' Retirement Fund Committee. A new booklet outlining the details of the scheme and incorporating many of the recent *Finance Act* changes is currently being prepared and a copy will be sent to each member in mid-September. Any member wishing to join the scheme should contact Brian King of Bank of Ireland Trust Services on 01 604 3627.

Claire O'Sullivan,
Member Services Executive

Get up stand u

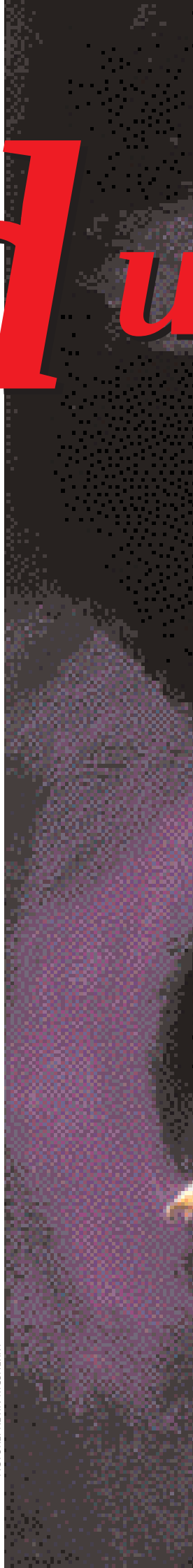
The days of 'don't rock the boat' are gone. In the era of flatter corporate structures and team-based organisations, management want to hear what staff have to say and are prepared to pay for assertiveness training to prove it. Trevor Morton explains why encouraging your staff to stand up for themselves is actually good for business

Contrary to popular belief, people are not born assertive. The traits that mark each of us out as either dominant or passive are assimilated during the formative years of our lives. Class, family, social environment and our gender all play a part in determining our social make-up, casting us in the role of leader or follower, star performer or member of the chorus. The role we take on is frequently a mask: subservient in some situations, dominant in others.

For generations, categorising people as worker or manager, boss or secretary, executive or clerk served an industry-based society well. But the hierarchical organisations of old are fast disappearing as businesses evolve to become flatter, more team-oriented structures. 'Command-and-control' is being replaced by team-based working, where all players must be capable of making their contribution. The principles of keeping your head down and saying nothing, of 'not rocking the boat', are no longer acceptable where the contribution of all players is critical to quality and productivity.

With people now recognised as the intellectual stock of any organisation, empowering them to perform to their full potential requires the same care and attention once confined to machinery of the industrial age. Evidence of this can be seen in the increasing number of organisations that are using assertiveness training as one of a number of techniques to develop 'people' skills.

The need for assertiveness training is not confined to colleagues who seem shy or reticent to speak out at meetings. It is a skill equally applicable to all dispositions and across all levels of seniority. The staff member who is never short of something to say – and ready to interject with bright ideas at every opportunity – is, likely as not, convinced that he or she always knows best and may be covering their tracks. The fear of rejection, or the wish for constant acceptance and recognition by fellow staff, managers or clients, may account for the constant volley of seemingly good ideas. With a touch of aggression, the same individual can become a dom-



PICTURE: KEVIN MCSHERRY

inant and potentially destructive character within a group. The hallmark of this individual is the suppression of ideas and suggestions from colleagues or – worse still – from clients. This leads to frustration, job dissatisfaction and reduced performance by colleagues and downright dissatisfaction when a client is involved.

But the purpose of assertiveness training is not to produce homogenised individuals who neither speak out too much nor too little. It aims to enable each individual to interact with others to best effect, allowing everyone to make their contribution to a discussion. Acquiring a balance of assertion skills requires training. Simply being told to 'be more assertive', presumably by someone who already is, achieves nothing. It can easily backfire, turning a passive, non-assertive individual into an ill-equipped aggressor. Startled and bewildered colleagues will run a mile as the new Jeckyll and Hyde character mauls peers and managers alike in a vain attempt to assert himself.

Inspiring people to perform at their best is paramount for most successful firms

According to Sue Cammish, a consultant at leading international training company TMI: 'The need for assertiveness training often comes to light during staff appraisals. It can surface as the root cause of job dissatisfaction. For the passive individual, sitting on ideas that don't get heard, or being seen as a pushover by colleagues, may be the underlying cause of frustration and stress'.

Creating productive team players

Assertiveness training is just one element of a number of people-development techniques that can be critical to business growth and success: inspiring people as individuals, within teams and across the whole organisation, to perform at their best is regarded as paramount for most successful firms. Investing in assertion skills should not be reserved just for staff progressing up the management hierarchy; the goal should be to create productive team players and business professionals earlier in their career rather than later.

The common starting point among training companies offering assertion skills training is the principle of bringing out personal self-confidence. This requires individuals to confront their own inner feelings about how they perceive themselves. Assertion training teaches them to challenge instilled beliefs, such as 'manners maketh the man' or 'win at all costs'. Once you are able to recognise your inner feelings in a particular situation, the result is a more controlled reaction.

All training companies view self-awareness and inner confidence as the key to assertion. Progress only begins when an individual feels that their opinions are equally as important as those of their colleagues – eliminating the 'push-over' factor. When staff have learned to handle their feelings, confident self-expression becomes possible for them. Conviction and belief are reinforced through simple statements such as 'I believe' or 'in my opinion' as opposed to the 'I say that we …' or 'You must do …' approach of the overly-aggressive. From a foundation of self-confidence comes good communications.

Body language, too, contributes to managing and controlling assertion. The goal here is to control posture and facial gestures, not to achieve dominance but to make the other person feel at ease. Most training companies strongly promote 'active listening skills'. According to TMI's Sue Cammish: 'This does not mean simply restating what the other person has said. A constructive dialogue comes about through building empathy. Recognising other people's needs is paramount to all good communications'. The goal, says TMI, is to create a 'win-win' situation. This means resolving a difficult situation by creating shared goals. Translated into customer satisfaction terms, this means that all parties are working to the same end.

Teaching people 'situational diagnostics' is an approach designed to overcome their in-built acceptance of the notion that 'the boss is always right' – simply because he or she is the boss. Assertiveness training teaches individuals to analyse the situation they find themselves in and, if necessary, consciously avoid being the doormat. This approach extends to overcoming gender stereotypes where the man is, first, the boss and, second, is always right. 'Role play is a significant part of assertiveness training', says Cammish. 'Without it, it would be like trying to learn to use a new piece of software without ever going near the PC'.

In many training scenarios, staff are exposed to conflict situations requiring them to put into practice the concepts they have just learned. They are also encouraged to come to the course prepared to explore their own personal situations, often the source of some underlying dissatisfaction within their working environment. In a professionally-led workshop, staff are able to cast off the inhibitions that may have constrained them in the past. It's not uncommon to hear comments such as 'I never thought I had the courage to do that …' after they have taken part in what can be emotionally-charged situations. Having experienced a command of assertion techniques first hand, delegates can return to their professional lives bringing confidence to their dealings with clients or working more productively with fellow team members.

Assertiveness training extends to knowing when to give praise and when to criticise. Used in excess or ineptly, either approach can be destructive. Genuine praise that has been deservedly earned can motivate a colleague's performance to new levels; criticism handled the wrong way can de-motivate them and compound the poor performance that instigated the critique. An inept criticism of a client or member of another department can have far-reaching implications. For any aspiring line manager, a command of both the verbal and non-verbal aspects of assertion are invaluable in managing the dynamics of a team situation.

On a one-to-one level, staff can be taught to use assertion skills to root out causes of dissatisfaction among colleagues. A better and more productive working environment will be established if staff are able to explore the causes of a grievance or problem, using active listening. Colleagues who are experienced in the awareness and control of their inner feelings will also be better equipped to handle criticism without feeling de-motivated.

Any organisation considering an investment in training needs to believe that the benefits will be tangible. Interaction with clients is without doubt the time when the firm is most exposed. An aggressive manner and attempts to railroad the client in any given direction will soon produce an ex-client. Likewise, a passive manner where the client's comments and opinions are accepted without discussion, will result in the client questioning your professional integrity.

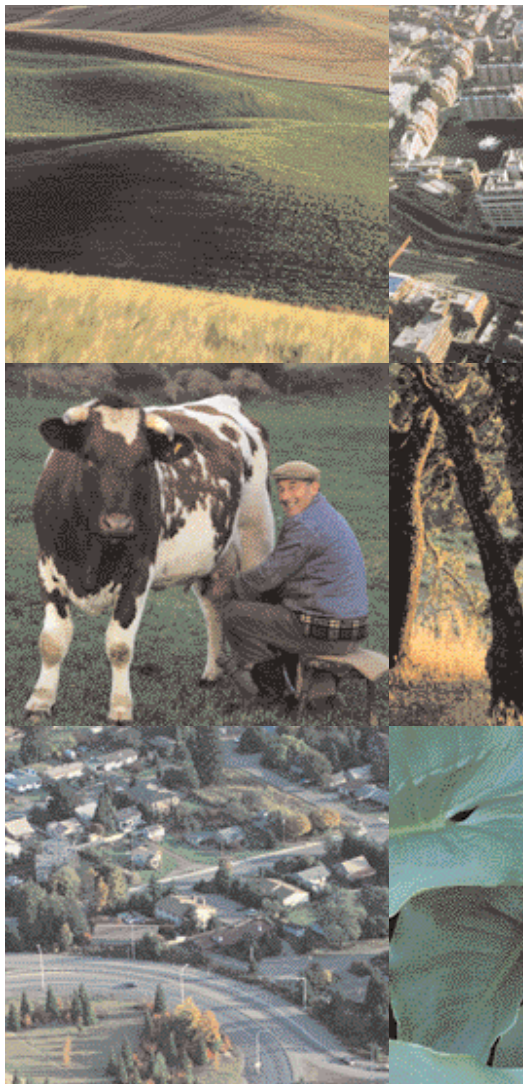
By definition, wherever there is a winner, there is a loser. In client situations, professional relationships can be severely tested. For the new team-based organisations of the 1990s and beyond, this approach stifles productivity. Whether you see yourself as a bully or a doormat, client or colleague, assertiveness training is worth consideration. G

Trevor Morton is a UK-based training consultant and freelance writer.

How rural plan

Blas

The planning system relies on the use of rural housing policies to prevent the spread of towns and cities. But the recent Supreme Court decision in the Great Blasket Island case may have profound implications for local authorities trying to halt the ever-increasing urban sprawl, as Vincent Farry reports



Councils throughout Ireland adopt development plans every five years in order to control and manage growth. These plans usually contain 'rural housing policies' which prohibit new housing in agricultural areas in order to limit suburban sprawl and so help to shape Irish towns and cities.

These policies restrict non-agricultural development within rural areas, and applications for permission for housing in the countryside are generally refused. However, individuals who satisfy certain criteria based on family characteristics are exempt from this prohibition.

Following the recent decision in *An Blascaod Mór Teoranta and Ors v Minister for the Gaeltacht and Ors* (Supreme Court, Barrington J), this distinction between categories of applicant for planning permission may be unconstitutional and may have repercussions for the planning process.

Rural planning policies

Under the planning system, land is 'zoned' for particular purposes in development plans and the zoning designation of a parcel of land must be read in conjunction with accompanying tables which specify which activities are permissible, possible or prohibited within each zone. It must also be interpreted in the light of other policies which can be instructive on matters of plan interpretation.

Each council or corporation adopts policies which are considered appropriate to the circumstances pertaining to their area. Although there is no exact form which a development plan must take, all such documents must be prepared in accordance with certain statutory requirements and as a result are generally similar nationwide.

Land-use tables relating to agricultural areas generally prohibit new houses within the countryside unless the applicant for permission has a genuine need to live on the land, adjudged in terms of family characteristics (such as a farmer, a relative of a farmer or a person who has spent a considerable time in the rural community). City dwellers or townspeople usually fail this test and permission is refused.

Applicants for planning permission for such developments are therefore treated differently on the basis of their family characteristics, their relationship with existing locals and the length of time for which they have owned their land. It is the basis of this differentiation which *An Blascaod Mór Teoranta and Ors v Minister for the Gaeltacht and Ors* calls into question.

Facts of the case

The *An Blascaod Mór National Historic Park Act, 1989* sought to establish a national park on the Great Blasket Island and s4 empowered the Commissioners of Public Works to acquire land on the island, by agreement or compulsorily. This power of compulsory acquisition did not apply to two categories of landholding:

a) Land owned or occupied by a person since 17 November 1953 and who was ordinarily resident on the island before that date
b) Land owned by a relative of a person under heading (a).

As the term 'relative' includes lineal descendants of any person who owned or occupied land on the island and was ordinarily resident on it before 17 November 1953, the number of individuals whose land were excluded from this power of compulsory acquisition was extremely large.

Equality of citizens

Article 40 of the Constitution states, among other things, that all citizens shall be held equal before the law, that citizens' personal rights shall be respected and that property rights shall be protected from unjust attack. But this guarantee is qualified, importantly, by a provision allowing the State to consider differences of physical and moral capacity and social function.

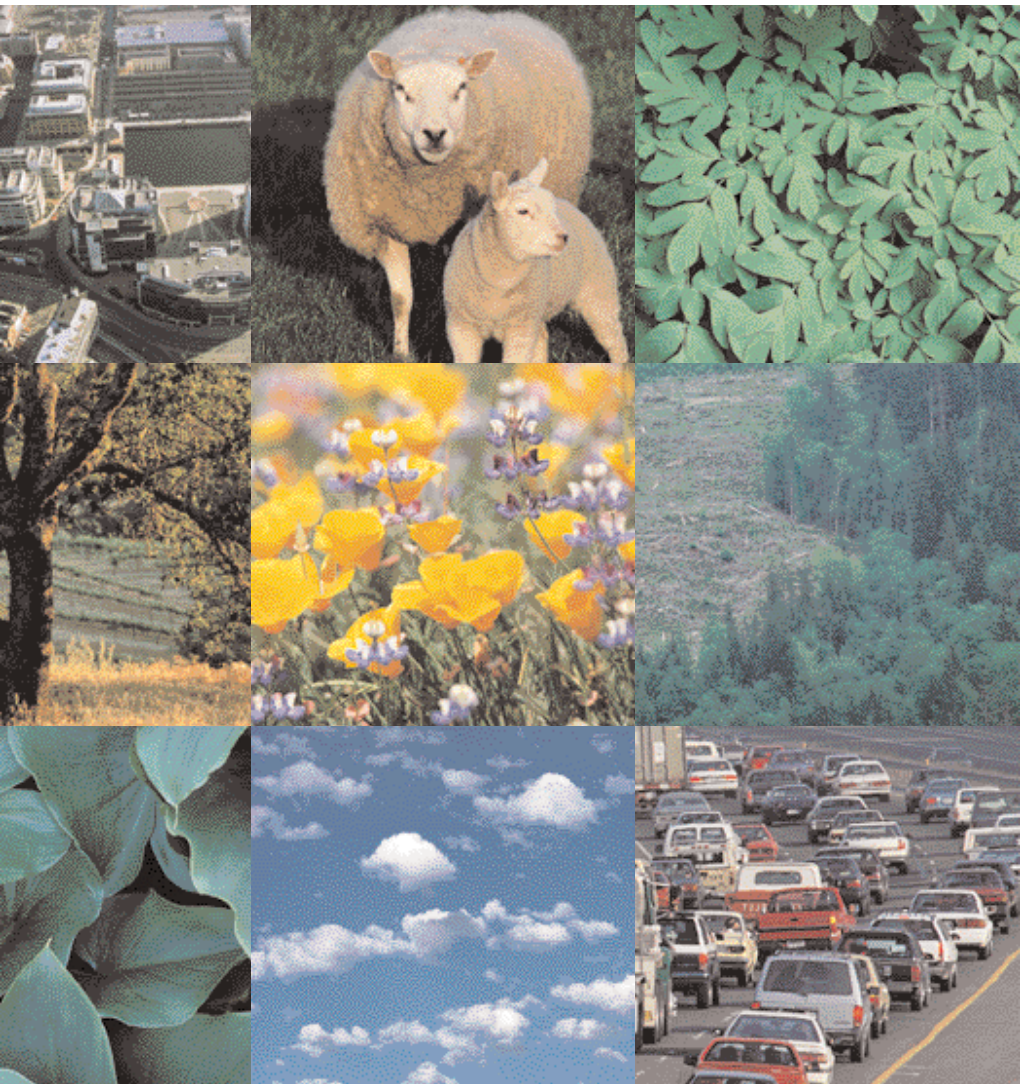
The plaintiffs in this case, who did not satisfy the exemption criteria of the Act and whose lands were therefore liable to be compulsorily purchased, argued that the exemption clause contained in section 4 was based on lineage or pedigree and that such a distinction contravened the equality guarantee of the Constitution.

According to the State, the historical and cultural features of the Great Blasket Island, which stemmed largely from characteristics existing before 1953, justified the distinction effectively between natives and their relatives on one hand and persons with no historical link to the island on the other.

The judgment

The judgment of the Supreme Court, handed down by Barrington J on 27 July 1999, considered the issue of equality for all citizens and endorsed Walsh J in *Quinns Supermarket v Attorney General* ([1972] IR 1). This latter decision had held that Article 40 is not a guarantee of absolute equality for all citizens in all circum-

nning became a sket case



stances but is a guarantee against inequality based on the assumption that some individuals or classes of individuals are superior to others, based on their human attributes or their ethnic or racial, social or religious background.

The Supreme Court also cited *Brennan & Ors v Attorney General* ([1983] ILRM 449) which confirmed that, notwithstanding the safeguard of Article 40 of the Constitution, the legislature could lawfully discriminate for legitimate purposes such as the classification of citizens into adults and children, employers and workers, teachers and pupils and so on.

Barrington J then held that the classification contained in s4 of the Act was too narrow and without legitimate purpose. The distinction was suspect as it was based on a principle of pedigree which has no place in a democratic society committed to the principle of equality. Legislation must be pedigree blind as well as colour blind or gender blind except when those issues are relevant to a legitimate legislative purpose.

The court concluded that the plaintiffs had been unfairly treated compared with people who owned or occupied and resided on the island prior to November 1953, together with their descendants. The court agreed with the trial judge that the Act was invalid in light of the provisions contained in the Constitution.

Rural housing policies revisited

Councils' rural housing policies discriminate between citizens in that permission for new dwellings within rural areas will usually be granted only where applicants satisfy certain characteristics. Permission is normally refused for rural housing where the applicant fails such tests. Indeed, even when permission is granted to an applicant who satisfies the council's criteria, a condition is often imposed requiring the dwelling to be first occupied by a member of the rural community.

Notwithstanding differences between local councils, these criteria relate to the length of time for which a particular applicant for permission has owned land, to the family characteristics of that applicant and to whether that person has ties with the local community. These characteristics bear more than a passing resemblance to those which were found to be unconstitutional in *An Blascaod Mór National Park Act, 1989*. It is on the basis of this similarity that councils' rural housing policies which distinguish between individuals on the arguable basis of pedigree can be questioned.

With the exception of these rural housing policies, the personal characteristics of applicants for planning permission are not considered in the assessment of a proposal. The fact that a particular family is large is not relevant to an application for a house extension. Similarly, permission cannot lawfully be refused on the basis that a particular individual has a poor track record in completing previous developments. To this extent, the rural housing policy tests are anomalous within the planning system itself.

The planning system relies on rural housing policies in order to control the spread of towns and cities, especially those located adjacent to the capital. A strict adherence to (and application of) this policy is essential to the containment of such areas since a more liberal approach would result in increased urban-generated housing within the countryside.

It now appears that this policy, which is of considerable strategic importance, may be founded on a principle of pedigree which is at variance with the Constitution. Although a challenge to this approach is not particularly likely, given commercial considerations, continued reliance on such a test could prove risky. G

Vincent Farry is the principal of planning and development consultants Vincent JP Farry and Associates.

Certificate in Legal German
Zertifikat Deutsch für Juristen

Law Society of Ireland

The Law Society is delighted to announce its second course in *Legal German* in co-operation with the Goethe-Institut Dublin. The course will commence in September 1999 and consists of two terms. At the end of the course, the participants may obtain a Certificate In Legal German, issued by the Goethe-Institut Dublin as proof of linguistic proficiency in the legal field.

Course dates:

1st Term	27.09.1999 - 29.01.2000 (2 weeks Christmas break)
2nd Term	07.02.2000 - 10.06.2000 (2 weeks Easter break)

Course times: 18.00-18.45, 19.00-19.45
2 teaching units @ 45 minutes,
once per week

Venue: Goethe-Institut
Language Department
62 Fitzwilliam Square
Dublin 2

Participants: Solicitors, barristers,apprentice solicitors and others with a good knowledge of German

Staff: All teachers are native speakers, fully qualified and experienced.

Assessment: will take place on Wednesday, 22.09.1999, 18.00-20.00 or Thursday, 23.09.1999, 12.00-14.00.

Course aims:
On completion of the programme, successful participants will be in a position to conduct business ably and proficiently with German-speaking lawyers and business people. They will also have acquired an excellent knowledge and understanding of the German legal system. Practitioners will benefit from the application of their professional and language skills and apprentices will enhance their career prospects by undertaking the programme.

Course contents:
Studienfach Rechtswissenschaft
Grundrechte
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Die Organe der Europäischen Gemeinschaft
Zivilrecht
Rechtsanwaltspraxis
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Gewerblicher Rechtsschutz
Gerichtsbarkeit

Course material: Legal textbooks, law books, legal documents, videos, newspapers

Price: (6-13 participants) £530 each
(14-20 participants) £370 each

If you want to take part in the course *Legal German*, please fill in the attached pre-course language assessment application form (the assessment is free of charge).

If you have any further queries, please do not hesitate to contact the Goethe-Institute at 01-661 8506

CERTIFICATE IN LEGAL GERMAN
PRE-COURSE LANGUAGE ASSESSMENT APPLICATION FORM

Name: _____ Position:

Firm: _____

Address: _____

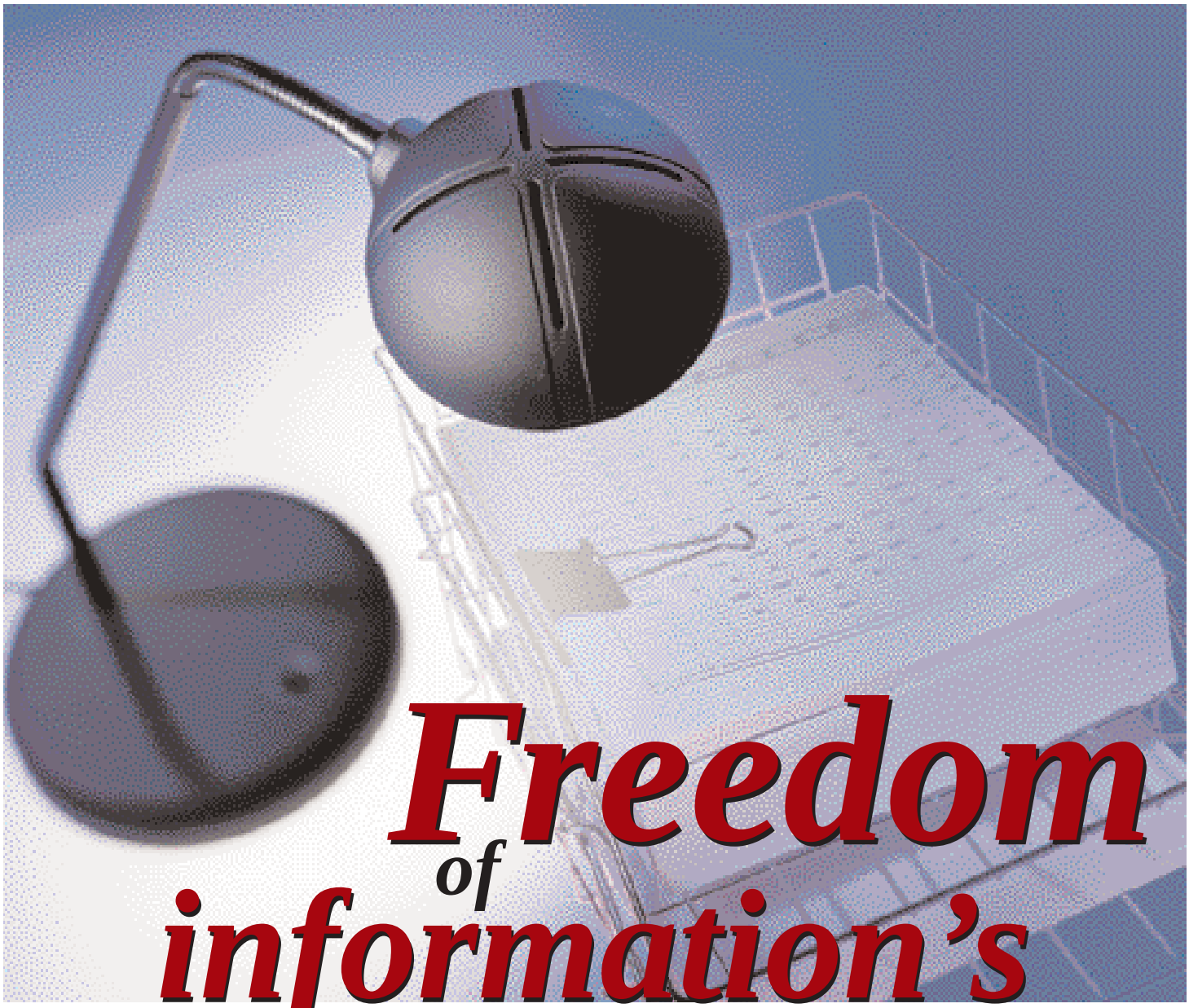
Telephone: _____ Fax: _____

I wish to apply for the pre-course language assessment on: _____

Wednesday, 22 September 18.00-20.00 ☐ or Thursday, 23 September 12.00-14.00 ☐

Signature: _____ Date: _____

The final date for receipt of application for language assessment is Monday, 20 September 1999.
Please return application form to: Goethe-Institut, Language Department, 62 Fitzwilliam Square, Dublin 2



Freedom of information's first year

The Information Commissioner's first annual report provides the most comprehensive insight into the use of the *Freedom of Information Act* so far. David Meehan discusses the trends highlighted in the report and analyses some of the more significant disputes that have come before the commissioner

It is well over a year since the *Freedom of Information Act, 1997* came into effect. Even at this early stage, it is clear that the Act has made a significant, if not overwhelming, impression on the public. The Information Commissioner has estimated that, when we have statistics applicable to the full complement of public bodies for a full year, the real annual level of use is likely to be around 8,000 requests – which is double the current rate. If this turns out to be the case, it would indeed be impressive by international standards. Current rates here lie midway between those for requests to Canadian and Australian federal authorities. The commissioner's estimate of future use will actually place us marginally ahead of Australia.

The Information Commissioner's report covers the activities of the office to the end of 1998. This skews its relevance towards central government and away from the entities that have been regulated only since 21 October 1998 – local government, health boards and State-sponsored bodies. The statistics are also somewhat distorted by the fact that at least half of the appeals to the commissioner relating to 1998 applications were not concluded in that year.

During 1998, 3,699 freedom of information (FOI) requests were made to public bod-

ies. By the end of the first quarter of 1999, 312 valid reviews of public body decisions relating to those requests were submitted to the commissioner (that is, 8.5% of all requests). In the event, the commissioner accepted 179 of these into the review process in 1998.

The great bulk of reviews accepted by the commissioner – totalling 148 – concerned complete or partial denials of access to information. There were only three requests for a review of charges, which suggests that fees are rarely used to obstruct requests. Interestingly, 23 requests for review originated from third-party objectors to disclosure on the grounds of privacy or confidentiality. The remaining five reviews were made under section 18 of the Act, the procedure which requires public bodies to give reasons for acts of theirs which affect third parties.

By the end of 1998 the commissioner had concluded 57 reviews. Of these, 41 resulted in a decisive outcome, with 24 binding decisions and 17 settlements. The outstanding 16 cases were not proceeded with.

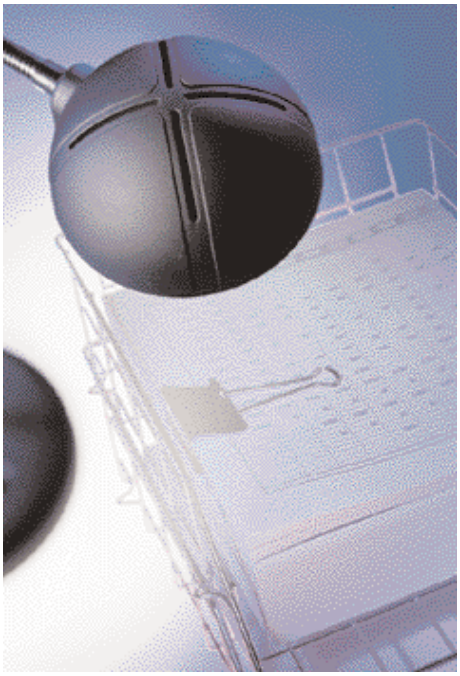
Perhaps the greatest interest in the annual report surrounds the types of disputes which have been resolved by the commissioner. By mid-July 1999, the text of 38 decisions on 42 individual reviews had been published on his home page (www.irlgov.ie/oic/decns.htm). The texts of the 20 decisions made between 21 April and 31 December 1998 were published in volume 1 of his *Decisions under section 34 of the* Freedom of Information Act, 1997.

Selected decisions

Personal information. Sixteen personal information cases concerned public sector recruitment and promotion, benefits and conditions of employment. One other case related to probate litigation, another to veterinary records held by the Department of Agriculture and Food in a regulatory capacity, and two further instances in relation to social welfare matters. Three reviews sought by business people also touched on personal information.

Case 98086 was an attempt by livestock owners to retrieve information held on them by the Department of Agriculture and Food in order to glean potential reasons for the withholding of a brucellosis grant while an investigation into certain practices was being conducted.

Bearing in mind the reasonable requirements of investigators, the commissioner permitted access to a district veterinary office report on the cattle at the heart of the investigation, with certain details of third parties deleted from them. A further report of the Forensic Science Laboratory contained information on alleged tampering with tags. The commissioner decided that releasing this report could impair or prejudice the investigation being undertaken as well as possible prosecutions and so refused access.



Early days for the FOI regime, but the commissioner has expressed reservations about the public's engagement with the process

Business information. As with personal information, the government interface with business and commerce has proven to be wide-ranging. Case 98098 (Mark Henry and the Department of Tourism, Sport and Recreation) involved a request for documentation relating to the tender process for the putative National Conference Centre which Bord Fáilte was organising.

The problem for the requester, one which ultimately defeated his appeal, was that Bord Fáilte was not subject to the FOI Act. He had to pursue the documentation by applying to the Department of Tourism, Sport and Recreation which had a representative on the independent management board overseeing the tender. The commissioner decided that information in the possession of the department official on the board was held as a member of the board. Accordingly, the department did not technically hold the documentation.

This case highlights two problems. First, one of the most fundamental flaws of the FOI Act is its non-application to a large number of State entities, including in this instance Bord Fáilte. Second, as the applicant argued, what was the official doing on the board other than representing the department's interests? The commissioner accepted the department's argument that the official was 'appointed to bring his experience to the mix of expertise on the board'.

Cases 98049, 98056 and 98057 (Henry Ford & Sons Ltd, Nissan Ireland and Motor Distributors Ltd and the Office of Public Works) is one of the commissioner's most complex decisions published to date. It concerned access to documents relating to a tender for army vehicles organised by the Office of Public Works (OPW). The OPW had already granted access to records revealing the names of the four successful tenderers, the tender price, and the number and type of vehicle involved. It was this decision to disclose that was appealed to the commissioner by three of the tenderers. The arguments advanced were that the prices offered had been given in confidence and were commercially sensitive.

The commissioner decided that the issue of confidentiality applied only during the tendering process, not after its conclusion. He did accept the argument that disclosure of price was commercially sensitive and could cause disruption to existing business relationships. However, he invoked a countervailing argument of serving the public interest through promoting open and accountable government, in this case concerning the use of public funds. The commissioner upheld disclosure of the information sought from the OPW. One of the three review parties has since appealed this decision to the High Court on a point of law.

Government affairs. Access to records has been tested at most government levels. Case 98040 featured a request for all e-mails received or sent over a three-day period by the Taoiseach and his private secretary and programme manager. The Department of the Taoiseach released all but six of these e-mail items. On review, the commissioner reversed the department's decision to withhold four of the e-mails relating to cabinet meeting dates, a visit by European Commission President Santer and foreign engagements of the Taoiseach. A fifth item related to a draft speech by the Taoiseach which had in the event been released on internal review. The outstanding e-mail contained the agenda for a cabinet meeting. The commissioner determined that the section 19 exemption on government meetings applied and upheld the department's refusal.

In Case 98041, the applicant sought from the Department of Environment and Local Government records concerning meetings of the Dublin Electoral Area Boundary Committee, a body not covered by the FOI Act. As the department held the records sought by the applicant, and as the committee was at the time of the review defunct, the commissioner decided that the records were formally in the control of the department and should be released. The commissioner did

point out, however, that the department had been right to withhold access during the lifetime of the committee at which stage the latter, and not the former, had control over the records.

Records concerning the expenditure of health boards and voluntary hospitals were the subject of Case 98078. The Department of Health and Children threw part III of the Act at the requester, a *Sunday Tribune* journalist. It cited an array of exemptions relating to deliberations and functions of public bodies, law enforcement, information obtained in confidence, commercially-sensitive information, protection of personal information and State financial and economic interests.

The commissioner rejected the invocation of practically all of these exemptions, or determined that in the event of conflict the public interest warranted disclosure. Consequently, he directed that access be granted to practically all the records, subject to deletions from a limited number of records to protect the identity of patients. The commissioner upheld the department's refusal in one instance – where the disclosure of unreleased proposal-type information might reveal the negotiating positions or plans of health boards.

In another instance, a *Sunday Times* journalist requested from the Department of Enterprise, Trade and Employment records prepared by Forbairt, the IDA and Shannon Development concerning 'companies in which jobs are at risk'. As would be expected in such a sensitive scenario, the department refused access on the grounds that these contained commercially-sensitive information which had, furthermore, been given in confidence.

In Case 98100, the commissioner decided that disclosure could indeed 'prejudice a company in the conduct of its business'. Access to financial and commercial information – such as losses incurred, trading and financial difficulties, future purchases, sales of assets and future development plans – were deemed to be particularly problematic. The commissioner upheld the department's refusal, deciding that the public interest would not be served by access. He also held that the records sought contained confidential information, and that this constituted a second ground for refusing disclosure. One *caveat* was entered: information from these records in the public domain at the time of the request did not fall within either of the exemptions, and hence a number of specific records had to be released.

These are early days for the freedom of information regime in this country. Emerging patterns reflect an increasing share of personal requests, something the Information Commissioner expects to become even more pronounced in the coming years. The commissioner has at the same time expressed reservations about the public's engagement in the FOI process. He hopes that the media in particular will adopt a high profile, both in stimulating public interest and in holding the State up to some kind of accountability.

The use of FOI by business is also modest. Bearing in mind the limitations imposed by the Act, this is not at all surprising. The extension of the Act in 2000 to FÁS, Forfás, Enterprise Ireland, IDA Ireland, the Health and Safety Authority and the telecommunications and electricity regulators, among others, should help address some of these concerns. G

David Meehan is a Dublin solicitor and environmental consultant.

Tax tre
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Recent legislation has introduced new intricacies into the tax regime governing development land. Brian Bohan outlines the current law and highlights key changes and reliefs

The tax treatment of development land is both difficult and complex. It can take the form of capital gains tax (CGT) on its disposal or income tax/corporation tax on dealing in or developing land, including gains of a capital nature.

Definition of development land. The *Finance Act, 1982* introduced specific provisions relating to changing capital gains on the disposal of development land. The legislation is now contained in sections 648-653 of the *Taxes Consolidation Act, 1997* (TCA). These were made more complex by the *Finance (No 2) Act, 1998*. The regime applies to the disposals made on or after 28 January 1982.

'Development land' is defined as land in the State whose sale price or market value on the appropriate date exceeds the current-use value of the land on that date. This is extended to include unquoted shares which derive their value (or the greater part of it) directly or indirectly from such land. The definition does not apply where the shares are quoted on a recognised stock exchange.

To understand this definition, it is necessary to define 'current-use value'. This means the land's market value, calculated on the basis that on the date of disposal it was (and would remain) unlawful to carry out any development within the meaning of section 3 of the *Local Government (Planning and Development) Act, 1963*, other than development of a minor nature. In relation to unquoted shares deriving their value (or the greater part of it) directly or indirectly from land, the current-use value means the shares' value, calculated on the same basis.

'Development of a minor nature' means development (not carried out by a local authority or statutory undertaker) which under section 4 of the *Local Government (Planning and Development) Act, 1963* is exempted development for the purposes of the 1963 and 1976 *Local Government (Planning and Development) Acts*.

'Statutory undertaker' is defined by section 2 of the *Local Government (Planning and Development) Act, 1963* as a person authorised by a British or Saorstát Éireann statute, or Act of the Oireachtas, or under a statutory order, to construct, work or carry on a railway, canal, inland navigation, dock, harbour, gas, electricity or other public undertaking.

'Development' is defined by section 3 of the *Local Government (Planning and Development) Act, 1963* and 'exempt development' is defined by section 4, as extended by the *Local Government (Planning and Development) Regulations 1994*.

The definition of development land does not require that any development takes place or is imminent. It can cover agricultural land as well as derelict urban sites. It can also cover existing buildings. The price determines what is development land, or the market value in certain other cases (such as a gift).

This definition is imperfect. If a builder pays a farmer £100,000 an acre for land he intends developing, this clearly fits the definition. No property, other than development land, is priced at £100,000 an acre. But another farmer might be willing to pay £20,000 an acre for two fields which he needs to give him adequate road frontage. If the current-use value of those fields is £2,000 an acre, they are 'development land', because the price paid is more than the current-use value. And the definition does not require planning permission to have been granted or even mooted. Developers might buy the land for future use.

Indexation. Having established the development land's market value, or its sale price, in all cases it is necessary to divide the acquisition or base value of that land between its current-use value and its development or 'hope' value. If the land was acquired before 6 April 1974, it will be revalued at that date and the market value thus ascertained is sub-divided into current-use value and development value.

If a principal private residence is included in

EXAMPLE 1

Harry bought land on 1 July 1979 at a cost of £30,000, including all costs. At the time, the land was agricultural but there was a 'hope' value of £5,000 included in the sale. On 3 April 1999, Harry sold that land for £600,000 (costs of sale: £20,000). The calculation of tax is as follows:

Proceeds of sale (1/3/99)	£600,000		
Costs of sale	£20,000		
Net proceeds of sale	**£580,000**		
Value on acquisition (1/7/79): £30,000			
Current-use value	£25,000		
Indexation 3.090		£77,250	
'Development' value	£5,000	£5,000	**£82,250**
Gain			£497,750
Annual allowance			£1,000
Taxable gain			**£496,750**

The rate of tax applicable to development land is 40%. If planning permission (even outline permission) has been granted for residential purposes, the rate of tax is 20%. Often, contracts for sale will be made subject to the granting of planning permission for residential purposes. Such contracts are conditional, and no sale takes place until the condition is fulfilled. Once that happens, the sale goes ahead and the 20% rate will apply.

EXAMPLE 2

If money is spent on enhancing the property after the acquisition, that will be allowed when calculating the taxable gain. But this expenditure is not indexed. In Example 1, Harry spent £100,000 in laying drains and other improvements to prepare the property for development. These costs will not be indexed.

Net proceeds of sale	£580,000	
Indexed CUV	£77,250	
'Development' value	£5,000	
Enhancement expenditure	**£100,000**	**£182,250**
		£397,750
Annual allowance		£1,000
		£396,750

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the development land's sale, it is necessary to apportion the proceeds to ascertain the proportion attributable to the principal private residence, and to further apportion that apportioned figure between current-use value and 'development' value, both ascertained on the date of sale. In the computation of tax, only the current-use value will be indexed **(see Examples 1-4)**.

Principal private residence. Section 604 TCA provides that an individual gets relief on the sale of his principal private residence. But this relief does not apply to any part of the gain reflecting 'hope' value or development value. Section 604 (12) TCA restricts the relief to the gain made if the property were both bought and sold and owned solely as a residence.

In the event of the sale of a property which includes a principal private residence, the calculation of the taxable gain is divided into two parts:

1) The gain on the disposal of the property in total is calculated in the normal way (as development land), and
2) The gain (if any) applicable to the principal private residence as a principal private residence is then calculated using current-use values, both at the date of acquisition (or 6 April 1974, if applicable) and at the date of disposal, which must be ascertained.

The gain applicable to the principal private residence, as a residence, is exempt and so will reduce the full gain calculated at (1) above **(see example 5)**.

Roll-over relief (section 597 TCA). This applies where certain qualifying assets are sold and the proceeds are reinvested in similar qualifying assets within specified periods. The qualifying assets must have been bought for trade purposes. Land is one such qualifying asset. But under section 652 of the TCA, it has not applied to development land since 28 January 1982, with six exceptions:

- Certain sporting bodies may claim the relief on the sale of their sports grounds, if the proceeds are reinvested in other sports grounds
- Racecourses are entitled to roll-over relief if certain conditions are met, including the fact that the land must have been owned by the racecourse for at least five years before the sale and used for racing or to provide facilities for persons associated with it
- Roll-over relief is available on development land sold on or after 6 April 1995, provided that the relevant local authority gives a certificate that the land is subject to a use that is:
  a) inconsistent with the protection and improvement of the amenities of the general area, or
  b) otherwise damages the local environment.
- The certificate must be in accordance with guidelines issued by the Minister for the Environment
- Roll-over relief will apply to farmland sold to an authority with compulsory purchase powers if it is used only for farming and the sale allows the authority to build, widen or extend a road or part of a road or for ancillary purposes. A compulsory purchase order is not needed once the authority has compulsory purchase powers. A negotiated sale in these circumstances will also qualify
- Land used by an authorised greyhound track in the provision of appropriate facilities or services for greyhound racing may be entitled to roll-over relief, notwithstanding that the land is development land, if the disposal is made on or after 6 April 1998. An authorised greyhound racetrack means a track licensed under section 2 of the *Greyhound Industries Act, 1958*. The lands should have been owned by the authorised greyhound track for a period of five years ending with the disposal date and should have been used by it to provide facilities for greyhound racing during that period, and the new assets should also be used by it and owned by it for the purposes of providing similar facilities. Remember that section 597(11)(b) TCA, dealing with a person who ceases carrying on one trade and begins to carry on another within a period of two years, does not apply to a disposal of development land by an authorised greyhound racetrack
- Under the *Dublin Docklands Development Act, 1997*, section 28(1), roll-over relief applies to a sale on foot of a compulsory purchase made by the Dublin Docklands

EXAMPLE 3

In relation to shares which derive their value from development land, the current-use value of the shares will be taken to be the shares' value, assuming development of the company lands was impossible. Harry bought shares in a private company on 1 July 1979 at a cost of £30,000. The assets of the company comprises land with a market value of £30,000. The current-use value was £25,000 on the date of the purchase, and the 'development' value was £5,000. On 1 March 1999, Harry sold the shares for £400,000.

Proceeds of sale	£400,000	
Less costs of sale	£1,000	
Net proceeds of sale	**£399,000**	
Current-use value of shares	£25,000	
Indexation 3.090		
Indexed current-use value	£77,250	
Development value of lands	£5,000	£82,250
Gain		£316,750
Annual allowance		£1,000
Taxable gain		**£315,750**

But if the company did not own the lands at the date of the acquisition of the shares, there should be no restriction on indexation.

EXAMPLE 4

In the last example, Harry (instead of purchasing the shares) subscribed £30,000 for shares in a company on 1 July 1979. A month later, the company purchased land for £30,000 (including costs and stamp duty). In March 1999, Harry sold his shares for £400,000.

As the company did not own the land when Harry bought the shares, no question of apportioning between current-use value and development value arises on 1 July 1979. It cannot be assumed that his money would be used to buy land, nor can the purchase be backdated to the date of subscription. Accordingly, indexation should apply to the full base cost.

Net proceeds		**£399,000**
Value at 1 July 1979	£30,000	
Indexation 3.090		
Indexed value		£92,700
Gain		**£306,300**
Annual allowance		£1,000
Taxable gain		**£305,300**

Development Authority. Unlike farmland acquired for road development, there must be a compulsory purchase order under section 28(1) above.

Retirement relief (sections 598 and 599 TCA 1997). Once all the other conditions in the above sections are complied with, the legislation cannot prevent retirement relief applying to development land. In the event of a sale within six years of claiming this relief under section 599, a clawback of the relief applies, giving rise to two claims to CGT: the tax on the disposal in respect of which the relief was claimed, and the tax on the disposal giving rise to the clawback of the relief.

Disposal of development land under £15,000. The rules relating to development land do not apply to an individual in a year of assessment if the total consideration from the sale of development land in that year does not exceed £15,000. Husband and wife are treated separately in this regard.

Lands sold zoned for residential development or with planning permission for residential development. The normal CGT rate on disposals of development land is 40%. This includes the sale of shares deriving their value from development land. But in certain cases the normal 20% rate applies. These include disposals of: lands for which planning permission for residential development has been granted between 23 April 1998 and 5 April 2002 (*Finance (No 2) Act, 1998*, section 3); and land sold between 10 March 1999 and 5 April 2002 which has been either zoned or granted planning permission for residential purposes (section 91, *Finance Act, 1999*).

The land must have full or outline planning permission. The 20% rate can be availed of where the sale is conditional on residential planning permission being obtained. The sale does not take place until the planning permission is granted, so it falls within the relieving provisions of section 3. At the disposal date, therefore, planning permission for residential purposes would have been obtained. If the land has already been zoned for residential purposes, there is no need for a conditional contract.

The 20% rate also applies to development land sold between 10 March 1999 and 5 April 2002 to:

- A housing authority, within the meaning of the *Housing (Miscellaneous Provisions) Act, 1992*, section 23, where it is certified that the land is being acquired by the authority for housing purposes, or
- The National Building Agency Limited, or
- A body approved under the *Housing (MP) Act, 1992*.

The 20% rate does not apply to shares deriving their value (or the greater part of it) from development land. These are subject to the 40% full rate. If such land is not sold until after 5 April 2002, the rate will rise to 60%. This will apply not only to land with planning permission for residential purposes but also to land zoned for residential purposes.

The 20% rate does not apply to disposals between connected persons, for example, relatives, companies under the control of the vendor and so on, nor to disposals relating to other types of development lands (for example, commercial, industrial). The 40% rate will apply where the contract is conditional on planning permission for development other than residential development.

EXAMPLE 5

Harry bought a property, including a house, of .75 acres on 1 July 1979 for £45,000. The acquisition's incidental costs were £2,500. Harry began living in the house at that time. On 1 March 1999, he accepted an offer of £450,000 for the property from a developer who intended to build an apartment complex on the site. The incidental costs of sale were £10,000. The current-use value as a residence on the date of sale was £200,000.

First, calculate the taxable gain as if no relief is available.

Proceeds of sale		£450,000
Less costs of sale		£10,000
Net proceeds of sale		**£440,000**
Acquisition cost	£45,000	
Incidental costs	£2,500	
	£47,500	
Indexation 3.090		
Indexed value		£146,775
Gain		**£293,225**

Second, calculate the gain on the residence as a residence, that is, on its current-use value.

Current-use value on sale		£200,000
Less apportioned costs		£4,444
Net proceeds of sale		**£195,556**
Acquisition cost indexed as above		£146,775
		£48,781

This is the gain attributable to the principal private residence and, accordingly, it is exempt from tax.

Full gain		£293,225
Less exempt gain		£48,781
		£244,444
Annual allowance		£1,000
Taxable gain		**£243,444**

If there was a 'hope' value on acquisition, the acquisition cost and incidental expenses must be apportioned. In this example, if the 'hope' value on acquisition was £10,000, the calculation of the 'exempt' gain is as follows:

Net proceeds of sale, as before			£195,556
Current-use value on acquisition	£35,000		
Proportion of costs	£1,944		
	£36,944		
Indexation 3.090			
Indexed current-use value	£114,157		
Development value: £10,000			
Proportion of costs: £556		£10,556	£124,713
			£70,843

This is the gain attributable to the principal private residence and, accordingly, it is exempt from tax.

Losses. Losses on disposals of development land are 'ring fenced' and are only available against gains on sales of similar land. They cannot be set against normal gains.

Merger relief. Section 615 TCA gives relief on the transfer by an Irish-resident company of all or part of its business to another Irish-resident company when both companies merge, insofar as the transfer relates to corporation tax on chargeable gains. Originally, the legislation excluded CGT on disposals of development land on mergers, as such gains were not chargeable to corporation tax, but this ceased in 1992. The overall effect is to extend section 615 TCA relief between Irish-resident companies to include development land.

The disposing company is deemed to dispose of the development land at cost (or value at 6 April 1974, if acquired before that date), including subsequent enhancement expenditure, and the acquiring company acquires the land at that cost (including the enhancement expenditure) and inherits the same acquisition date as the transferring company, preserving indexation relief on the current-use value. This relief only applies where the merger is for *bona fide* commercial reasons and does not form part of any arrangement for the avoidance of a liability to income tax, corporation tax or CGT.

Capital acquisitions tax

Development land has no particular relevance in capital acquisitions tax (gift tax or inheritance tax). It is merely an aspect of valuation and if, say, agricultural land has development value, it will be reflected in its valuation. This will not prevent agricultural relief from applying.

Difficulty arises where the development land is disposed of within the ten-year clawback period and is not reinvested (*Capital Acquisitions Tax Act, 1976*, section 19(5)). In that instance, two charges to tax arise: tax arising on the loss of agricultural relief applying on the valuation date, and CGT on the land's disposal.

These are computational problems and there is no double-tax relief between the two charges under section 63, *Finance Act, 1985*. Under the *Finance Act, 1999*, section 202 (inserting a new section 41(2A) into the *Capital Acquisitions Tax Act, 1976*), any interest on such clawback of tax will apply only from the date of sale.

If the donee or successor is a 'farmer' for tax purposes on the valuation date, he will benefit from agricultural relief. If instead of selling the land he develops it himself and retains it, he will not lose that benefit. G

Brian Bohan is a member of the Law Society's Probate, Administration and Taxation Committee and a former President of the Institute of Taxation.

How to hold Bright you

As the Celtic Tiger roars on, young solicitors have never had it so good as far as job opportunities are concerned. So how can law firms encourage their brightest and their best to stay with them when there are so many others out there willing to pay top dollar? Stuart Gilhooly suggests some answers

After the crisis of three years ago when there were so many calls within the profession to limit entry to the Roll of Solicitors, those cries have died down to a whimper. Where once the Law Society maintained a register of solicitors seeking employment, they now maintain a register of employers seeking solicitors.

With so many opportunities available, there are plenty of assistant or associate solicitors who are looking for a better deal. And when they are offered a better salary or improved benefits, they are happy to move on.

The gap between equity partnership and assistant/associate status remains a large one, and for many different reasons that gap may not be one that either the young solicitor or the existing partners may want to fill. If so, what can managing partners/principals do to ensure that their assistant or associate solicitors do not join the current employment carousel?

There are really two main options: tax-friendly bonuses and commission-based incentives. Instead of increasing salary levels – which might not match the firm's budget – it may make more sense to offer the solicitor tax-free or tax-efficient alternatives. Some of these are discussed below.

Payment of VHI subscriptions. This is a common benefit, and if an employer makes a VHI subscription payment on behalf of any employee, the taxable benefit is the actual amount of the subscription paid. As VHI contributions attract tax relief at a standard rate, the taxable benefit qualifies for relief, but there is a tax cost to the individual as the benefit will be taxed at marginal rate.

Company car. This is a far more lucrative benefit and has the advantage that it is a very attractive inducement to the employee but has the decided disadvantage of being a benefit-in-kind and as such is highly taxed. But there is a way that the tax payment can be reduced. It involves the firm making a contribution towards the running expenses of the vehicle in the form of a gross bonus payment which would give the employee the net amount of the contribution. In other words, the bonus payment to the employee is calculated to exactly offset the benefit-in-kind charge, leaving the employee with no tax liability and allowing the firm to obtain tax relief on the bonus payment while also paying for the running expenses of the car at practically no loss to either party.

Business conferences and travel. This is a very straightforward benefit which many solicitors already make use of. No tax liability arises where a training course or business conference is paid for by the employer and for which the employee is required to attend by the firm. This would cover the Law Society Annual Conference, which for the last two years has been held abroad, and also the Society of Young Solicitors' conferences which are held around the country twice a year.

Mileage allowance. Where the employee uses his own car, he is entitled to a mileage allowance which is subject to restrictions by the Revenue Commissioners. This would really only apply where the employee clocks up a lot of miles.

Staff suggestion award scheme. This operates on the basis of an employee making a suggestion to improve company efficiency and effectiveness. The suggestion must be made outside the scope of the employee's normal duties and the scheme must be approved by the Revenue Commissioners, which they are generally slow to do.

Inducement payment. Where a payment is made to an employee in consideration of a personal sacrifice, as opposed to payment in anticipation of performance of the duties of employment, no tax liability should arise.

Pension schemes. Employee pension schemes were almost unknown in small and medium-sized practices in the past. They are now becoming more common simply because they are the single most effective way of attracting and keeping staff. Although pension contributions made on an employee's behalf will act as golden handcuffs in most cases, they need not be the shackle that most people fear. In the event of a job-change, an employee's own contributions are transferable to another job or to an appropriate fund while the employer's contributions are generally transferable only after five years. Last year's Budget again raised the thresholds for maximum contributions qualifying for tax relief, so at the very least a pension scheme facilitates tax-efficient saving. It can also provide financial security to an employee and increased stability to a firm.

Slice of the pie

These suggestions are by no means exhaustive, and while they may be attractive to the firm they may not have the same appeal to the employee. A young solicitor with abundant ambition and in a market where the opportunities are plentiful may want something a little more lucrative. He may want the rewards which he believes are commensurate with the work done. In short, the young associate may want a slice of the pie. Of course, this is common in all professions and is a natural progression as the years go by and as the employee gains more responsibility, expends more work hours and increases his skill level and importance to the firm.

The most obvious and common step is full partnership. Principals are naturally reluctant to share the spoils and the power but, of course, giving up equity need not mean giving up control. It is possible to create junior and senior partnerships with greatly varying rights and benefits. The benefits and disadvantages of partnership have been the subject of many volumes of literature and I do not intend to add my uneducated view to those in a much better position to advise. Let us assume, therefore, that the firm may not be prepared to take on a full partner. So what are the alternatives in that situation?

Well, it seems that a large number of firms

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throughout the country are already offering commission-based incentives as a compromise. This does not involve handing over equity or partnership status, which in turn brings with it tax implications; it simply means that a young associate will be remunerated in accordance with the work that he or she does.

There are a number of ways in which this can work and it is merely a case of deciding which method will suit your firm. The most ideal scenario is one where the associate shares in a percentage of the firm's overall incoming fees. This is really only suitable for a smaller firm, however, for obvious reasons.

A second, but less satisfactory, example is where the young solicitor receives a percentage of the fees generated by the work which he does alone. But this can lead to discord. The result is often that the most lucrative files are then sought by the associate but kept by a partner or principal who does not want to lose a portion of such a large fee. This can mean that delegation of files becomes an exercise in avarice rather than a sensible distribution of the workload. Another obvious consequence is overwork.

Notwithstanding this, some firms operate such a system very well, with the award of a bonus at the end of the year if a certain target in fees is met, and clearly the difficulties outlined do not arise. A sensible compromise in a larger firm is to offer a percentage of fees earned by a whole department of which the associate is a member.

These suggestions can be tailored to suit the needs of the individual solicitor and firm. The commission or bonus would generally be paid together with a basic salary, and the associate can remain as a PAYE worker simply by paying income tax at the appropriate rate without the added complications and necessary responsibility that partnership brings.

Finally, there is the issue of salary itself. The disadvantage of simply paying a salary without a bonus is that it adds no incentive to the employee and gives no reward for work which he has carried out. The main advantage for both parties is certainty, which will suit a certain type of individual.

Huge disparity in earnings

Some months ago the Younger Members' Committee carried out a salary survey among young solicitors (see *Gazette*, May, page 15). One of the messages the survey brought home was that there is a huge disparity between what some young solicitors are earning and those of their peers. As a result, in today's market young solicitors are seeking proper remuneration and financial incentives to remain in their current jobs. If they do not get it, they will move on to where they will.

In the final analysis, an employer can only pay what he can afford and that is why the tax-friendly incentives may be more realistic. We should also remember that money is not everything and that a good working environment can make up for a lighter pay packet in the same way that no amount of money can persuade anyone to stay in a poor working environment. Overall, the message seems to be that young solicitors will stay – but they need to be given a reason. G

Stuart Gilhooly is a solicitor with the Dublin firm of HJ Ward & Co. This article was written with considerable assistance from solicitor Brian Bohan, who is a member of the Society's Probate, Administration and Taxation Committee.

Council reports

Report on Council meeting held on 4 June 1999

Proposed designation of solicitors pursuant to section 32 of the *Criminal Justice Act, 1994*

The Director General referred to recent newspaper reports indicating that the anti-money-laundering provisions in the *Criminal Justice Act, 1994* would be extended to apply to solicitors during the month of June. He had contacted the department to express the Society's concerns and had been informed that the relevant statutory instrument was being prepared by the Parliamentary Draftsman, but that the Society would be consulted in advance of any further moves. John Fish reported that, at European level, the CCBE was making representations to have lawyers excluded from the new directive because of the fact that the jurisprudence in relation to legal privilege varied throughout the EU and because of the difficulties of distinguishing between legal advice and legal assistance. Moya Quinlan said that it was unacceptable that the Society should hear about the department's proposals through the media. Keenan Johnson said that designation represented a fundamental attack on the independence of the profession and, if necessary, an emergency meeting of the Council should be convened to discuss the matter. Ward McEllin said that the principle of confidentiality was fundamental to the profession and any efforts to undermine that principle should be resisted.

Monitoring Committee for the new Refugee Legal Service

The Council affirmed its nomination of Noeline Blackwell as a member of the Monitoring Committee for the new Refugee Legal Service.

Local authority solicitors

The Council noted that the Local Government Management Services Board had been given formal notice of the decision of the Council to exercise its negotiating rights on behalf of its members employed as full-time solicitors within the local government service.

Independent Adjudicator

The Council unanimously approved the appointment of Eamon Condon as Independent Adjudicator for a further term of two years.

Ad hoc legal aid scheme for Criminal Assets Bureau cases

On the recommendation of the Criminal Law Committee, the Council agreed to issue a general recommendation to solicitors not to take on any new cases under the ad hoc legal aid scheme (CAB) until proper fees were forthcoming under the scheme.

Legal advisers in equality bodies

The Council noted a recent advertisement for the position of legal adviser in the Office of the Director of Equality Investigations and in the Equality Authority, both of which were confined to barristers. The Society's objections to the exclusion of solicitors had been raised by the President in a letter of complaint to the Secretary General of the Civil Service and Local Appointments Commission. The matter had also been raised in the Dáil in response to which the Minister had stated that 'the work for which the legal advisers are sought is in the domain of activity normally reserved for barristers and for which they are suitable because of their training and work experience'. The Council agreed that the President should continue to press the issue.

International Bar Association

The Society's representative on the International Bar Association, Laurence K Shields, reported on the Council meeting of the IBA, which had been held in Boston earlier in the week. The IBA Council had discussed the issue of MDPs and had agreed to discuss the issue of commercialism v professionalism and ethics at the next meeting of the Council. The IBA budget had been approved, the management committee had been elected and reports had been made by chairmen of committees.

Companies (Amendment) (No 2) Bill, 1999

On the proposal of the Business Law Committee, the Council agreed that the President should write to the Minister for Enterprise, Trade and Employment expressing concerns about section 42 of the *Companies (Amendment) (No 2) Bill*, which would, effectively, abolish the concept of shelf companies and could also be a serious disincentive to businesses locating in Ireland.

CCBE

The Council unanimously approved the nomination of John Fish as Second Vice-President of the CCBE. The Council noted the contents of a discussion document in relation to the harmonisation of training for lawyers in the EU and agreed that it should be examined by the Education Committee and the Curriculum Development Unit. Geraldine Clarke noted that an amendment to the annex to the *VAT directive* was due shortly and, hopefully, would reflect the representations made by the CCBE in relation to VAT on legal services.

Report on Council meeting held on 16 July 1999

Motion: *Future of the profession* discussion document

'That this Council notes the discussion document on the Future of the profession *prepared pursuant to the* Report of the Law Society Review Working Group 1995 *and resolves that it be made available to the profession and discussed with bar associations, together with the responses to the document from the relevant Society committees, with a clear statement that the document does not represent Council policy.'*

Proposed: Michael Irvine
Seconded: Walter Beatty

The motion was approved by the Council and it was agreed that bar associations should be asked to furnish their views on the discussion document by 31 October 1999.

Proposed designation of solicitors pursuant to section 32 of the *Criminal Justice Act, 1994*

Deputy Director General Mary Keane reported that the draft regulations designating solicitors would not be furnished by the Department of Justice, Equality and Law Reform until the week commencing 26 July, at the earliest. The department had been told, and had accepted, that the Society could not respond to any proposals for designation without a thorough consideration by the Council.

John Fish reported on European developments. He said that a detailed response had been filed on behalf of the CCBE with the European Commission regarding the proposed directive to extend the existing money-laundering directive to the legal profession. The draft charter prepared by the Secretariat-General of the Commission for adoption by European professional associations in supporting the fight against organised crime had been amended to incorporate submissions made by the CCBE. And on 29 June he had addressed the Legal Committee of the Council of Europe, on behalf of the CCBE, in relation to a draft recommendation by the committee to the council on the rights of lawyers to exercise their profession in Europe. The CCBE's principal concerns related to a suggestion that the recommendation might incorporate exceptions to the principle of lawyer/client confidentiality.

Working group on eligibility for appointment as judges of the High and Supreme courts

The President reported that the Minister for Justice, Equality and Law Reform had indicated that the drafting of a Bill to give effect to the recommendations of the working group would 'commence shortly'. The Society would continue to press for the early introduction of the necessary legislation.

Services to mark the commencement of the law year

The Council discussed the services held to mark the commencement of the law year and concluded that the President should attend whichever service he preferred, that the Society should not arrange a lunch to mark the occasion and that the list of services being held should be published in the *Gazette*.

Form 17 – Land Registry

The Chairman of the Conveyancing Committee, John Harte, raised concerns regarding the short notice given to practitioners by the Land Registry on its introduction of a new Form 17. While the committee had been consulted in relation to the contents of the form, it had not been consulted in relation to the date of its introduction. Letters had issued earlier that week to solicitors in counties Dublin, Galway, Mayo, Sligo, Clare and Roscommon enclosing the new Form 17 and indicating that, from 19 July 1999, the new form must be used when lodging applications for registration relating to land located in those counties. Dealings on the old form would not be accepted from that date onwards. Orla Coyne said that the DSBA had also been consulted in relation to the contents of the new Form 17, but not in relation to the launch date. She agreed that insufficient notice had been given to practitioners. Keenan Johnson suggested that the Land Registry might be asked to accept both the old and the new form for a transitional period. The Council agreed that the President should contact Catherine Treacy to discuss the matter.

MDPs

The Council noted that the Law Society of England and Wales and the American Bar Association were both involved in on-going consultation and discussion with their members on the issue of MDPs. The Council agreed that it was time for the Society's working group to re-address the issue in the light of global developments.

Commission on the Private Rented Residential Sector

The Council approved the appointment of Anne Colley as the Society's representative on the Commission on the Private Rented Residential Sector being established by the Minister for Housing and Urban Renewal. G

PRACTICE NOTES

Section 7, *Courts Act, 1964*: *Superior court rules*

Practitioners are reminded that in order to stop the Statute of Limitations running against them, civil bills must not only be stamped and issued in the local Circuit Court office but service **must** also be effected either by a designated summons server or by registered post, as appropriate. Time will continue to run until the civil bill is served. Failure to serve proceedings will therefore result in claims becoming statute-barred.

Litigation and Arbitration Committee

Ad hoc legal aid scheme: CAB cases

The Council of the Law Society recently issued a general recommendation to practitioners not to take on new CAB cases where the ad hoc legal aid scheme was to be applied, pending the introduction of an appropriate legal aid fee structure. The Criminal Law Committee is pleased to advise members that a new fee structure has been negotiated with the Department of Justice, Equality and Law Reform, effective from 29 July 1999. The new fees will apply to new CAB cases and to those which are currently under way but where claims have not yet been submitted. Details of the scheme are available from the secretary to the committee.

Criminal Law Committee

Late stamping of instruments

Section 94 of the *Finance Act, 1991* provides that where an instument is chargeable with stamp duty, the duty must be paid within 30 days of the first execution thereof. For instruments that are presented for stamping after that time, the following penalties apply:

1. A fixed penalty of £20
2. Where the unpaid duty exceeds £20, interest at the rate of 1% a month or part thereof
3. Penalty surcharge for the late stamping of:
   a) 10% of the unpaid duty where the instrument is presented not later than six months after the date of first execution
   b) 20% of the unpaid duty where the instrument is presented not later than 12 months after the date of the first execution, and
   c) 30% of the unpaid duty where instrument was stamped more than 12 months after the date upon which it was first executed.

The Revenue Commissioners on a concessionary basis allow an additional 14-day period beyond the statutory 30-day time limit before imposing penalties for late stamping. The former concession whereby the Revenue Commissioners will automatically mitigate the penalty surcharge on the first or second occasion in any calendar year that a solicitor presents a document for late stamping has now been withdrawn by the Revenue Commissioners and no longer applies.

The Revenue Commissioners are empowered by section 15(3) of the *Stamp Act, 1989* to remit any penalty payable on stamp duty that they think fit. An application for mitigation of penalty must be made in writing to the Revenue Commissioners following payment of the stamp duty and be supported by documentary evidence where appropriate.

The Revenue Commissioners have indicated that they will consider applications for mitigation on a case-by-case basis, take account of all relevant circumstances giving rise to delays and mitigate the penalty in full or in part if they conclude that to impose the full penalty would be unjust or unreasonable.

A person dissatisfied with the decision or an application for mitigation may have the matter re-examined by a more senior officer, and if the response is still unsatisfactory the matter can be further addressed under the Revenue's internal review procedures where a senior officer who has had no previous involvement with the case will review the papers.

Ultimately, having examined all appeals, if a solicitor feels that a case has not been properly considered, then the matter can be brought to the attention of the Probate, Administration and Taxation Committee of the Law Society.

Probate, Administration and Taxation Committee

Probate Office practice directions

The following practice directions have been received from the Probate Office.

1. To facilitate the implementation of a new computer system in the Probate Office, practitioners are **requested from 1 July 1999 to lodge a copy of the oath** (that is, the original and one copy) when lodging papers for a grant. The following existing requirements should also be noted.

i. *The heading on all oaths* should contain the following information:
   a) The name of the deceased and any variations of same
   b) the address of the deceased and any former address (particularly an address given in the deceased's will)
   c) Occupation of the deceased

ii. The oath should contain the name, address and occupation of the applicant. In any case where the applicant's address differs from that given in the deceased's will, this should be explained in the oath (for example, 'formerly of ...' or 'erroneously stated in will as of')

iii. If oaths are completed by hand, all details should be fully legible

iv. All oaths should contain *a full filing clause* as this will provide the solicitor's name and address to which the grant is to be posted.

2. Preparation of wills

The following guidelines are suggested for the preparation of wills by word-processors, IBM personal computers, laser printers and so forth. These guidelines have been agreed with the Law Society's Technology Committee.

Wills prepared on single sheets, with writing on one side only, should be bound in the traditional methods. These include:

a) Ribbon or tape
b) Staples covered over by heavy adhesive material
c) Brass eyeletts.

Each page containing written material should be numbered in the following manner. In the case of a will consisting of ten separate sheets with writing on one side of each sheet, each written page should be numbered page 1 of 10, page 2 of 10, and so forth.

The suggested attestation clause would read as follows: 'Signed and acknowledged by the above-named testator as and for his last will and testament in the presence of us both present at the same time who in his presence at his request and in the presence of each other have hereunto subscribed our names as witnesses, this will having been printed on the front side only of the foregoing ten sheets of A4 paper'.

The shortened form of attestation clause may, of course, be used: 'Signed by the testator in the presence of us and signed by us in the presence of the testator'. The statement regarding the content of the will must, of course, be added.

3. Applications cannot be made by post

Practitioners should note that pursuant to order 79, rule 3 of the *Rules of the superior courts*, applications to the Probate Office for grants must be made personally or through town agents, but cannot be made by post. Applications by post to the district registries is permitted.

4. Engrossment of wills

The Probate Office will accept photostat copies of wills for inclusion in the grant of probate. Where a will is not fully legible, a typed engrossment should be lodged. All copy wills should be certified by the solicitor for the applicant as being a true copy of the original.

5. Charitable bequest forms

Where there are charitable bequests in a will, a charitable bequest form setting out details of such bequests should be lodged with the papers when applying for a grant. These forms are available in the Seat Office of the Probate Office.

6. Order of executors on grant

The Probate Office will follow the order of executors as set out in the will unless requested to do otherwise.

7. Schedule of assets (CA24 A3 and so on)

The Probate Office does not require copies of vouching documents (such as bank statements) to be lodged with the copy schedule of assets. But where a question on the CA24 is answered by stating 'see attached', a copy of the 'attached' document should be lodged. The copy schedule of assets should be certified by the solicitor for the applicant to be a true copy of the original. The *original* certificate for the High Court should be lodged.

8 Probate motion list

Practitioners are requested to notify the Probate Office by not later than close of business on the Thursday preceding the Monday probate list of any motion in that list which will not be proceeding on that day.

Probate, Administration and Taxation Committee

LEGISLATION UPDATE: 15 JUNE – 9 AUGUST

ACTS PASSED

Architectural Heritage (National Inventory) and Historic Monuments (Miscellaneous Provisions) Act, 1999
Number: 19/1999
Explan-memo: Yes
Contents note: Provides for the establishment of the National Inventory of Architectural Heritage on a statutory basis. The inventory is a systematic recording of the architectural heritage of the State which commenced in 1990 in response to the requirements of the *Convention for the protection of the architectural heritage of Europe* (the *Granada convention*). The Act creates legal rights of access to property for the purpose of establishing the inventory, and places obligations on sanitary authorities in respect of registered historic monuments which are the subject of dangerous building notices
Date enacted: 6/7/1999
Commencement date: 6/7/1999

British-Irish Agreement (Amendment) Act, 1999
Number: 16/1999
Explan-memo: No
Contents note: Makes provision in relation to the supplementary agreement between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland constituted by an exchange of letters dated 18/6/1999, which amends the *British-Irish Agreement on Implementation Bodies* done at Dublin on 8/3/1999
Date enacted: 25/6/1999
Commencement date: Commencement order to be made (per s3(3))

Courts (Supplemental Provisions) (Amendment) Act, 1999
Number: 25/1999
Explan-memo: Yes
Contents note: Makes provision for payment of pensions to the persons who vacated office in April 1999 as a judge of the Supreme Court, as a judge of the High Court, and as a county registrar. Provides for arrangements concerning spouse's and children's pensions in respect of each such person upon his death
Date enacted: 13/7/1999
Commencement date: 13/7/1999

Electricity Regulation Act, 1999
Number: 23/1998
Explan-memo: Yes
Contents note: Provides a regulatory framework for the introduction of competition in the generation and supply of electricity. Provides for the establishment of an independent Commission for Electricity Regulation, which will license and regulate the generation and supply of electricity, and authorise the construction of new generating plant. The commission will also oversee access to the transmission and distribution systems. Gives effect to Directive 96/92/EC. Amends and repeals certain provisions of the *Electricity (Supply) Act, 1927*, and provides for related matters
Date enacted: 11/7/1999
Commencement date: 14/7/1999 (per SI 213/1999); 14/7/1999 appointed as the establishment day (per SI 214/1999)

Horse and Greyhound Racing (Betting Charges and Levies) Act, 1999
Number: 24/1999
Explan-memo: Yes
Contents note: Provides for a range of charges to recoup to the Irish Horseracing Authority (IHA) and Bord na gCon revenues lost to them by the reduction in off-course betting tax and the abolition of the on-course betting levies. Amends and extends the *Greyhound Industry Act, 1958*, the *Irish Horseracing Industry Act, 1994*, the *Betting Act, 1931*, s8, and the *Intoxicating Liquor Act, 1962*, s18, and provides for related matters
Date enacted: 11/6/1999
Commencement date: 25/7/1999 (per SI 211/1999)

Immigration Act, 1999
Number: 22/1999
Explan-memo: Yes
Contents note: Provides powers, principles and procedures regarding the deportation of non-nationals. Deals with the situation arising out of the Supreme Court decision in *Laurentiu v Minister for Justice, Equality and Law Reform, Ireland and the Attorney General*, 20/5/1999, which held that section 5(1)(e) of the *Aliens Act, 1935*, which provides for the making of deportation orders, is inconsistent with the Constitution. Amends the *Aliens Act, 1935*, and provides for the confirmation by statute of the existing Aliens Orders with certain exceptions. Amends the *Refugee Act, 1996* to provide for the establishment of the Refugee Advisory Board and the Refugee Appeals Tribunal and provides for related matters
Date enacted: 7/7/1999
Commencement date: 7/7/1999 for all sections except s11 (amendment of *Refugee Act, 1996*), for which commencement order/s will be made (per s11(2))

Local Government (Planning and Development) Act, 1999
Number: 17/1998
Explan-memo: Yes
Contents note: Amends and extends the *Local Government (Planning and Developments) Acts, 1963 to 1998* to provide for the greater protection of buildings and structures of special architectural, historical, archaeological, artistic, scientific, social or technical interest
Date enacted: 30/6/1999
Commencement date: 1/1/2000 (per s42(3))

Minerals Development Act, 1999
Number: 21/1999
Explan-memo: Yes
Contents note: Amends and extends the *Minerals Development Acts, 1940 to 1995*. Includes within the definition of 'State minerals', for the purposes of the *Minerals Development Act, 1940*, minerals and mineral rights acquired by the Irish Land Commission under various Acts; amends s20 of the *Minerals Development Act, 1979* so that, henceforth, the right to compensation for the working of privately-owned minerals cannot be transferred separately from the ownership of such minerals; and provides for related matters
Date enacted: 7/7/1999
Commencement date: 7/7/1999

National Disability Authority Act, 1999
Number: 14/1998
Explan-memo: Yes
Contents note: Establishes the National Disability Authority (NDA) which will function as an expert body dedicated to research and development of disability issues and as an independent monitoring body reporting to the Minister for Justice, Equality and Law Reform
Date enacted: 8/6/1999
Commencement date: 8/6/1999; establishment day order to be made (per s3)

Qualifications (Education and Training) Act, 1999
Number: 26/1999
Explan-memo: Yes
Contents note: Establishes an administrative structure for the development, recognition and award of education and training qualifications in the State; establishes the National Qualifications Authority, the Further Education and Training Awards Council and the Higher Education and Training Awards Council and defines their functions. Dissolves the National Council for Educational Awards; repeals the *National Council for Educational Awards Act, 1979;* amends the *Regional Technical Services Act, 1987*, and provides for related matters
Date enacted: 13/7/1999
Commencement date: Commencement order/s to be made (per s1(2))

Regional Technical Colleges (Amendment) Act, 1999
Number: 20/1999
Explan-memo: Yes
Contents note: Provides for the dissolution of the company known as the Institute of Technology, Blanchardstown Limited, and the establishment, on a statutory basis, of the Institute of Technology, Blanchardstown. Places the institute within the institute of technology sector and provides for the application to it of the legislation which governs institutes of technology – the *Regional Technical Colleges Acts, 1992 and 1994*. Amends the *Vocational Education Act, 1930* in relation to the composition of certain vocational education committees, and provides for related matters
Date enacted: 6/7/1999
Commencement date: 6/7/1999; establishment day order to be made (per s2)

Road Transport Act, 1999
Number: 15/1999
Explan-memo: Yes
Contents note: Amends and extends the law in relation to road transport; amends ss12 and 16 of the

Road Traffic Act, 1961, and confers additional powers on Córas Iompair Éireann (CIE). Provides for a duration of up to five years for haulage and passenger operator licences; provides that licensed operators must have adequate parking space and operating premises in the State for the vehicles operated under the licences; replaces the existing vehicle plating procedure with transport discs issued centrally by the Department of Public Enterprise, and provides for related matters
Date enacted: 23/6/1999
Commencement date: Commencement order/s to be made (per s24(1))

Sea Pollution (Amendment) Act, 1999
Number: 18/1998
Explan-memo: Yes
Contents note: Gives effect to the *Oil Pollution Preparedness, Response and Co-operation Convention (OPRC), 1990,* which was adopted by the International Maritime Organisation, a subsidiary organisation of the United Nations. Amends the *Sea Pollution Act, 1991*, and provides for related matters
Date enacted: 30/6/1999
Commencement date: Commencement order/s to be made (per s19(3))

Twentieth Amendment of the Constitution Act, 1999
Explan-memo: Yes
Contents note: Inserts a new Art 28A into the Constitution to give constitutional recognition to local government and to provide for periodic local elections
Date enacted: 23/6/1999
Commencement date: 23/6/1999

SELECTED STATUTORY INSTRUMENTS

Acquisition of Land (Assessment of Compensation) Fees Rules 1999
Number: SI 115/1999
Contents note: Prescribe the fees to be charged in respect of an application for the nomination of a property arbitrator, and in respect of an award by a property arbitrator
Commencement date: 1/5/1999

Companies Amendment Act, 1999 *(Commencement) Order 1999*
Number: SI 144/1999
Contents note: Appoints 24/5/1999 as the commencement date for the Act

District Court* (Child Trafficking and Pornography Act, 1998) *Rules 1999
Number: SI 216/1999
Contents note: Amend order 34 of the *District Court rules 1997* (SI 93/1997) by the inclusion of a form of information and search warrant under the *Child Trafficking and Pornography Act, 1998*
Commencement date: 26/7/1999

District Court (Ejectment) Rules 1999
Number: SI 218/1999
Contents note: Amend order 47 ejectment proceedings of the *District Court rules 1997* (SI 93/1997) by the addition of a rule allowing the renewal of a warrant of possession, pursuant to s86 of the *Landlord and Tenant Amendment Act 1860*, if not issued within six months of the date of the order
Commencement date: 26/7/1999

District Court* (Housing (Miscellaneous Provisions) Act, 1997*) Rules 1999
Number: SI 217/1999
Contents note: Insert a new order 99A procedure under the *Housing (Miscellaneous Provisions) Act, 1997* into the *District Court rules 1997* (SI 93/1997) which prescribe the procedure to be followed in applications to the District Court for exclusion, site exclusion and other allied orders under the *Housing (Miscellaneous Provisions) Act, 1997*, as amended by the *Housing (Traveller Accommodation) Act, 1998*
Commencement date: 26/7/1999

District Court (Small Claims Procedure) Rules 1999
Number: SI 191/1999
Contents note: Insert a new order 53A small claims procedure into the *District Court rules 1997* (SI 93/1997), and increase the monetary limit of a small claim from £600 to £1,000
Commencement date: 1/7/1999

District Court* (Taxes Consolidation Act, 1997) *Rules 1999
Number: SI 234/1999
Contents note: Amend order 38 of the *District Court rules 1997* (SI 93/1997) to provide a form of application and order under s908A of the *Taxes Consolidation Act, 1997*, as inserted by s207 of the *Finance Act, 1999*. This section extends the power of the Revenue Commissioners to inspect books or records of financial institutions in the investigation of an offence under the Act
Commencement date: 3/8/1999

European Communities (Freedom to Provide Services) (Lawyers) (Amendment) Regulations 1999
Number: SI 132/1999
Contents note: Consequent on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union, these regulations extend to lawyers from those countries the *European Communities (Freedom to Provide Services) (Lawyers) Regulations 1979 to 1986*, which give effect to Directive 77/249 so as to enable lawyers from other EU Member States to pursue professional activities in the State by way of provision of services
Commencement date: 17/5/1999

European Communities (Telecommunications Infrastructure) (Amendment) Regulations 1999
Number: SI 70/1999
Contents note: Provides that a licensed programme service provided by means of any television transmission system licensed under the *Wireless Telegraphy Acts, 1926 to 1988*, including cable and MMDS television systems, is exempted from the requirement to also have a telecommunications licence for the provision of the services specified in a licence under those Acts
Commencement date: 25/3/1999
Leg-implemented: Dir 95/51; Dir 96/19; Dir 90/388

European Communities (Voice Telephony and Universal Service) Regulations 1999
Number: SI 71/1999
Contents note: Gives effect to Directive 98/10 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment, and amends SI 15/1998, giving effect to Directive 97/33 on interconnection in telecommunications, with regard to ensuring universal service and interoperability through application of the principles of ONP
Commencement date: 15/4/1999
Leg-implemented: Dir 97/33; Dir 98/10

Finance Act, 1999 *(Commencement) of Section 117(1)) Order 1999*
Number: SI 178/1999
Contents note: Appoints 1/7/1999 as the commencement date for s117(1) of the Act (rate of excise duty on bets)

Food Safety Authority of Ireland Act, 1998 *(Part IV) (Commencement) Order 1999*
Number: SI 204/1999
Contents note: Appoints 5/7/1999 as the commencement date for part IV (other than s50(7)) of the Act

Postal and Telecommunications Services (Amendment) Act, 1999 *(Commencement) (No 2) Order 1999*
Number: SI 220/1999
Contents note: Appoints 15/7/1999 as the commencement date for s10 of the Act, and as the date of repeal of certain provisions under ss3(1) and 3(2) of the Act

Rules of the Superior Courts (No 2) (Discovery) 1999
Number: SI 233/1999
Contents note: Substitute a new order 31, rule 12, in relation to discovery into the *Rules of the superior courts*
Commencement date: 3/8/1999

***Social Welfare Act, 1999*: commencement orders**
7/4/1999 for s22 (means test for self-employed fishermen claiming unemployment assistance) (per SI 89/1999)
7/4/1999 for part IV (introduces new means-tested farm assist scheme for low income farmers to replace the existing smallholders unemployment assistance scheme) (per SI 90/1999)
6/4/1999 for ss19, 21, 23 and 24 (per SI 91/1999)
3/6/1999 for s11 (respite care grant) (per SI 160/1999)

Taxes Consolidation Act, 1997 *(Section 372) (Commencement) Order 1999*
Number: SI 205/1999
Contents Note: Defines 1/7/1999 to 31/12/2001 as the qualifying period in s372L for the purposes of the business of tax incentives in the areas qualifying for the rural renewal scheme

Prepared by the Law Society Library

Personal injury judgments

Employer liability – negligence – breach of statutory duty – issue of nature of employment

Case

Samuel Shinkwin v Quin-Con Limited and Nicholas Quinlan, High Court, Cork, before Mr Justice Smith, on 25 April 1998.

The facts

On 3 August 1993, Samuel Shinkwin was working on an electrical circular saw. His right hand came in contact with the circular saw with the result that his index, middle and ring fingers of the right hand were amputated to varying degrees.

Now he has three short stumps instead of three fingers. His right thumb has also been stiffened at the top joint; the result is a right hand with very poor function and with virtually no grip. The loss of the three fingers also constituted a significant cosmetic disfigurement.

Mr Shinkwin was born on 11 November 1972 and left school at 15 years of age. In the year 1988/89, he did a training programme with FÁS. Subsequently, he had some work experience with Quin-Con Limited. Sometime later, he was contacted by the son of Nicholas Quinlan, one of the defendants, and was offered a job which he accepted when he was then 17 years of age.

Proceedings were issued by Mr Shinkwin against both defendants named above. The defence denied liability. Mr Shinkwin alleged that he was at all material times in the lawful employment of both defendants or either of them and was then under the specific control and supervision of Nicholas Quinlan's firm. In effect, it was argued, Mr Quinlan was his employer and also an agent for Quin-Con Limited.

In evidence at the trial, Mr Shinkwin stated that there was no guard on the circular saw. He did not consider the dust extractor to be a guard. Nicholas Quinlan junior, the son of Nicholas Quinlan senior, stated in evidence that he did not show Mr Shinkwin how to adjust the guard.

Mr Shinkwin's case against Nicholas Quinlan was that he was a manager of a small family-run business and that Nicholas Quinlan senior was in and out of the machine shop where he was working on a regular basis. It was also stated that sometimes Nicholas Quinlan senior even helped him out with the work he was doing and that on many occasions Quinlan senior saw him using the saw and setting up this particular 'jig'.

The judgment

Smith J gave judgment in the High Court in Cork on 25 April 1998. Having outlined the facts, he stated that counsel on behalf of the second-named defendant, Nicholas Quinlan, submitted that there were two questions for the consideration of the court. The first question was whether Mr Shinkwin, the plaintiff, was employed at all by the second-named defendant, Mr Quinlan, and, if not, then whether the second-named defendant owed a duty of care to Mr Shinkwin in so far as the condition of the circular saw was concerned.

Counsel on behalf of the plaintiff submitted that Nicholas Quinlan was negligent in failing to train properly and/or warn Mr Shinkwin in relation to the dangers inherent in the work that he was obliged to perform. Counsel submitted the principles of law laid down in the case of *Donoghue v Stephenson* that one must take reasonable care to avoid acts or omissions which can reasonably be foreseen to injure 'one's neighbour' applied in the case. Counsel submitted that Mr Shinkwin was 'the neighbour' in so far as Nicholas Quinlan senior was concerned and that he, Quinlan senior, was in breach of his duty of care which he owed to Mr Shinkwin. The judge noted that Quin-Con Limited had now gone into liquidation. It had no assets. In fact, Mr Shinkwin himself became a worker in Quin-Con Limited's factory as a young recruit at age 17 years of age. This was his first job. He knew nothing about safety regulations or what precautions he should take for his own safety. He knew nothing about the limited liability of Quin-Con Ltd.

Smith J was satisfied that Mr Shinkwin received no training in the work he was obliged to do. He was satisfied that he received no warnings as to the dangers that were inherent in the work that he was obliged to perform. The judge was satisfied that the system of work was unsafe; the circular saw had no effective guard. The judge noted that it appeared that Mr Shinkwin was probably employed by Quin-Con Ltd that had gone into liquidation and which had been negligent in failing to provide a safe place of work and a safe system of work. What concerned the judge most was the relationship between Nicholas Quinlan senior and Mr Shinkwin.

Smith J stated that Mr Shinkwin regarded the second-named defendant, Nicholas Quinlan, as his boss. The judge held that the second-named defendant, Nicholas Quinlan, did owe a duty of care to Mr Shinkwin as manager of the factory premises and he failed in that duty in that he failed to provide proper training for Mr Shinkwin, and failed to warn him of the dangers inherent in the work he was obliged to perform. He failed to ensure that the guard was at all times properly adjusted over the saw and failed to ensure that the saw was switched off at all times when the 'jig' was being moved. The judge held there must be a finding of negligence against both defendants and he was satisfied that there was no evidence of any contributory negligence.

Smith J noted that it was possible for Mr Shinkwin to perform certain categories of work of a light nature; heavy manual work and clerical work were out as he was obliged to write, as such, with his left hand.

The judge noted Shinkwin could drive and could possibly do some light security work but his further earning capacity in his opinion was reduced by about 50%. If employable at present, he could earn £200 to £300 a week. His earning capacity at present was reduced to £125 a week. The judge noted this was a loss he would suffer for the rest of his life. An actuary, giving evidence, stated that the total sum for future loss of earnings came to £138,500. There was also loss of wages to the date of the trial (four and a half years from the accident) at approximately £175 a week which the judge worked at £9,000 a year for four and a half years, making a total calculation in that regard of £40,500. In general damages, the judge awarded £125,000. The total sum awarded came to £304,000.

Counsel for Mr Shinkwin asked for judgment and costs against both defendants. Counsel for the defendant asked for a stay. He stated that it was obviously a point of law in the case as to whether *Donoghue v Stephenson* was applicable and on that basis he asked for a stay in the event of an appeal. The judged granted the stay for 21 days from the date a notice of appeal might be served and, if so, the stay would continue on the usual undertakings in relation to interest.

Solicitors for Mr Shinkwin: Noonan, Linehan Carroll.
Solicitors for the defendant: McCourt Mullane & Co.

Public liability – negligence – contributory negligence – footballer – loss of prospects as a soccer player

Case

Garvan O'Sullivan v Telecom Éireann and the Mayor Alderman and Burgesses of the Borough of Drogheda, before Mr Justice Barr, judgment of 7 December, 1998.

The facts

On Saturday 25 May 1996, Garvan O'Sullivan, then 19 years of age, babysat with his parents for a married brother. In the early evening, having completed the task of babysitting, the three set out to walk home. They decided to stop on the way at a local pub for a couple of drinks. Garvan O'Sullivan drank two pints of Guinness. Then all three continued on their way home at about 9pm.

The three walked along the footpath with Garvan O'Sullivan in the middle. It was a sunny May evening and, close to a junction of another road at right angles, the three reached a rectangular manhole cover owned by Telecom Éireann.

It was alleged that Garvan O'Sullivan caught his foot in the raised lip of the right side of the manhole cover when he was walking over it. He fell and fractured his right tibia.

A consultant engineer who examined the cover found that there was a lip on the right hand side of the cover, as Garvan O'Sullivan would have approached, of 5/8 of an inch. Mr O'Sullivan suffered a fracture of his right tibia and also a fracture of the fibula.

It was necessary for an orthopaedic surgeon to insert a nail through the marrow which was secured by screws at either end. Mr O'Sullivan was hospitalised for ten days and then discharged on crutches. He returned to hospital for removal of the screws after a few months.

At a medical examination on 28 February 1997, Mr O'Sullivan was sore at the fracture site and required medication for pain relief. He had a slight right-sided limp due to shortening of 1/5 of an inch of the tibia.

The judgment

Barr J delivered judgment on 7 December 1998. Having outlined the facts, the judge stated that the raised lip of 5/8 of an inch on the manhole cover was not immediately obvious and did not look significant of itself. The area in the vicinity did not look hazardous even though, in general, it was not very well kept and according to the judge could not be described as having 'a tidy towns appearance about it'.

Telecom Éireann had conceded negligence and an issue in dispute was Mr O'Sullivan's alleged contributory negligence, particularly in failing to keep a proper look out and allegedly being so inebriated that he was unable to appreciate and avoid an apparent danger. Barr J accepted Mr O'Sullivan's evidence and that of his father, described as 'a patently respectable conservative parent', that Mr O'Sullivan was not affected by alcohol at that time.

The judge also accepted the evidence of the consultant engineer who stated that it would be difficult to see the offending lip which was not immediately obvious. Mr O'Sullivan did not notice and was unaware of its existence until he fell. In all the circumstances, Barr J held there was no evidence of contributory negligence on the part of Mr O'Sullivan.

Secondly, there was an issue relating to an earlier accident. The judge referred to a football accident in November 1995 and noted that Mr O'Sullivan had made a full recovery from that injury, and it appeared that he was on the threshold of complete fitness when his right tibia was re-fractured in the present accident. He noted that the plaintiff was sore at the fracture site and, although he had a slight right-sided limp, this had no permanent significance. But the judge noted that Mr O'Sullivan still suffered some soreness at the fracture site but this should settle down in time according to the orthopaedic surgeon.

The most significant *sequelae*, according to the judge, was that Mr O'Sullivan had some restriction in the movement of the right subtalar joint beneath the ankle. An orthopaedic surgeon stated that there would be no further improvement in that regard.

The judge noted that this was not a serious disability in itself but it had important repercussions for Mr O'Sullivan's career as a footballer because running on a rough surface would cause pain. An orthopaedic surgeon had expressed the view, which was accepted by the judge, that there were three factors which ruled out a serious footballing career for Mr O'Sullivan in the future:

- The combination of fractures which the plaintiff had sustained
- The gravity of the operations required
- The permanent damage to the subtalar joint.

Barr J noted that the remaining feature of Mr O'Sullivan's injuries comprised extensive scarring of the leg relating to the operations carried out by the orthopaedic surgeon. They would obviously be liable to friction damage related to Mr O'Sullivan's work as a fitter. This had already happened and he required to take care to avoid friction.

The judge accepted the orthopaedic surgeon's evidence for Mr O'Sullivan that the plaintiff had suffered a degree of disablement resulting from the second accident which ruled out the possibility of him being able to pursue a serious career as a soccer player, which was a great ambition in Mr O'Sullivan's life. The judge also accepted the evidence of two soccer experts that Mr O'Sullivan had shown at junior level, and later at senior level, a consistent, outstanding talent as a player but also exceptional qualities of leadership which added to his all-round capacity and expertise.

But for his injury in 1996, according to the judge, Mr O'Sullivan might have built a great career in soccer via the premiership in England and the Republic of Ireland national side as a few of his contemporaries had done. Alternatively, accordingly to the judge, Mr O'Sullivan might have enjoyed substantial earnings with less exalted clubs in England. Failing that, a third alternative might have been open to him which would have been to join an Irish senior soccer club as a semi-professional and play in the FAI premiership for about 15 years.

The judge was satisfied as a probability that Mr O'Sullivan would have achieved at least the third alternative – a career as a semi-professional soccer player.

Evidence had been adduced to the court about the earnings of an Irish semi-professional footballer; the judge also had the benefit of actuarial evidence. The judge recognised that the principle in *Reddy v Bates* loomed large in the assessment of future loss of earnings in the area of professional sport. He accepted that a soccer player may continue with the level required for the FAI premiership perhaps until aged 35. However, in a given case, youthful enthusiasm may wane and there was a continuing significant risk of serious injury which may cut short a player's career at senior level at any time.

Taking all into consideration, Barr J assessed damage for future loss of earnings for Mr O'Sullivan as a semi-professional footballer at £30,000. The judge took into consideration another aspect of Mr O'Sullivan's loss of a serious career in football arising out of his injury which resulted in damages. The judge held that Mr O'Sullivan was entitled to be compensated for the shattering of his long-held ambition to succeed in professional soccer and for the loss of achievement, satisfaction and pleasure which such a career would have provided. He assessed that loss at £25,000.

He stated that there remained the question of general damages for the injury itself, including the substantial scarring of the right leg, the permanent injury to the talus joint and the distressing, difficult operation treatment which the injury entailed. He assessed damages for pain, suffering and disablement to date at £18,000; pain, suffering and disablement in the future at £12,000. Together with specials of £1,125, the total amount awarded was £86,125. **G**

Solicitors for Mr O'Sullivan: Berkery & Co.
Solicitor for Telecom Éireann: Dr Eamonn G Hall.

These summaries were compiled by Dr Eamonn G Hall, Solicitor, from Reports of personal injuries *from Doyle Court Reporters, 2 Arran Quay, Dublin 7.*

ILT digest

of legislation and superior court decisions

Compiled by David P Boyle

ARBITRATION

Proceedings stayed to permit arbitration

- Where each party is sufficiently familiar with the building trade for the court to conclude that the parties expected and knew that an arbitration clause would govern the contract, the court will stay proceedings pending the arbitration.

The plaintiff claimed a sum on foot of a contract to supply roofing to the defendant. The parties had met to discuss the contract. The defendant claimed that the contract was to be as per the main conditions of the RIAI contract, which included a standard arbitration clause. The defendant sought to have the proceedings stayed pending arbitration. In granting the relief sought, it was held that:

- Each party was sufficiently familiar with the trade for a court to conclude that the parties expected and knew that the clause would govern their contract
- Having agreed the terms on which the roofing subcontract would be awarded, it would be extremely unlikely that experienced contractors would have contemplated that a contract would be performed, other than one which was governed by the appropriate contract
- The contract entered into between the parties provided for an arbitration clause.

Lynch Roofing Systems (Ballaghaderreen) Limited v Christopher Bennett and Son (Construction) Limited (Morris J), 26 June 1998

COMMUNICATIONS

Postal and Telecommunications Services (Amendment) Bill, 1998

This Bill has been passed by Dáil Éireann.

COMPANY

Winding up by court not permitted

- Where the assets of a company are small and there is no general sense of grievance among the creditors, the court will exercise its discretion and refuse a winding-up by the court.

The company, C, was grossly insolvent and was wound up voluntarily as it was unable to pay its debts. The largest creditor claimed to be owed far more than shown in the statement of affairs and petitioned for C to be wound up by the court. It was alleged that certain matters merited investigation and that this should not be done by the company-appointed liquidator. In refusing the relief sought, it was held that:

- The *mala fides* alleged in the case were the *mala fides* of the petitioner's management and this was not for the liquidator to investigate
- The assets of the company were very small, compared with the liabilities, and there was not a sense of grievance among the creditors. This justified the principle that while the making of a winding-up order is discretionary, the order should be made only if the creditors have a legitimate sense of grievance.

Re Eurochick (Ireland) Limited (In Voluntary Liquidation) (McCracken J), 23 March 1998

Restriction against director granted

- The respondent director failed to discharge the obligations associated with limited liability in not ensuring the safety of all the books and records of the company in liquidation, despite the fact that it had ceased trading.

The liquidator, L, applied pursuant to s150 of the *Companies Act, 1990* to have the respondent restricted from acting as a director of a company for a period of five years. The plaintiff had been a director of two companies, now in liquidation, namely C1 and C2. In making the orders sought against the respondent, it was held that:

- The court did not accept the statement of affairs prepared by the respondent in relation to C2
- C1 continued to trade and to supply C2 at a time when the respondent knew both companies to be insolvent
- The respondent had ensured to pay all its trade creditors without reason or justification
- Having regard to the financial condition of C1 and C2, the drawings made by the respondent in the sum of £106,800 was not the action of a responsible director
- The respondent failed to discharge the obligations associated with limited liability in not ensuring the safety of all the books and records of C2, despite the fact that it had ceased trading
- There was no doubt that the respondent traded at a time when he knew that C1 and C2 were insolvent
- That such conduct on the part of the respondent was improper and, if not actually dishonest, was certainly irresponsible.

La Moselle Clothing Limited (In Liquidation) v Soulahi (Shanley J), 11 May 1998

COMPETITION

Restrictive covenant not an agreement between undertakings

- Ordinary restrictive covenants are outside the scope of the

doctrine of restraint of trade. The Supreme Court held that a restrictive covenant whereby the purchaser of land agreed not to have a licensed premises on the land was not an agreement between undertakings within the meaning of s4(1) of the *Competition Act, 1991*.

Section 4(1) of the *Competition Act, 1991*, so far as relevant, prohibits and renders void all agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State, or in any part of the State. Section 3 defines undertakings as a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service. The defendant purchased three sites from the plaintiffs in 1987 and constructed and operated a shopping centre thereon. Each contract of sale contained a covenant that the defendant would not have a licensed premises of any nature on the property so long as FT, his successors or assigns, remained the proprietor of the public house located opposite the site. The plaintiffs instituted these proceedings when the defendant commenced selling beer and spirits at a supermarket in the shopping centre. The High Court granted the plaintiffs an injunction restraining the defendant from using the premises as a licensed premises for the sale of beer and spirits. On appeal to the Supreme Court, the defendant submitted that the restrictive covenant was an unreasonable restraint of trade and, in addition, was in breach of s4(1) of the 1991 Act. In dismissing the defendant's appeal, it was held that:

- Ordinary restrictive covenants are outside the scope of the doctrine of restraint of trade. Restraint of trade implies that a party has contracted to give up some freedom which he would otherwise have had. The applicant party buying or leasing land has no previous right to be there, and when taking possession of that land subject to a restrictive covenant does not give up right or freedom which he previously had
- The restrictive covenant did not constitute an agreement between undertakings within the meaning of s4(1) of the 1991 Act. The restrictive covenant did not relate to any licensed premises operated by the defendant at the time it was entered into and so was not an agreement within the meaning of s4(1). If the defendant was not operating any licensed premises at that time, then the defendant was not an undertaking within the meaning of s4(1)
- While the restrictive covenant could be said to affect that part of the State which would be the catchment area for a trader carrying on business on the property concerned, the interests of those in the catchment area were not affected by the covenant since there was no restriction on the defendant operating a licensed premises on any other site in the area in competition with the plaintiffs
- The purpose of the 1991 Act was to deal with unfair trading and not restrictive covenants.

Sibra Building Company Limited v Ladgrove Stores Limited (Supreme Court), 8 May 1998

CONSTITUTIONAL

Child has right to know identity of mother

- The right to know the identity of one's natural mother is a basic right flowing from the natural and special relationship existing between a mother and her child. It is not, however, an absolute or an unqualified right; its exercise can be restricted by the constitutional rights of others and by the requirements of the common good.

The Circuit Court stated a case, pursuant to s16 of the *Courts of Justice Act, 1947*, involving certain questions of law that had come before the court by way of an application for a declaration of parentage made under s35 of the *Status of Children Act, 1987*. In answering the case stated, it was held that:

- The jurisdiction of the Circuit Court was set forth in the *Courts (Supplemental Provisions) Act, 1961*, the third schedule of which clearly indicated the local and limited nature of the jurisdiction of the Circuit Court and the fact that such jurisdiction had to be conferred by statute
- The legislation did not confer jurisdiction on the Circuit Court regarding constitutional interpretation and in particular regarding the duty of ascertaining and declaring the constitutionally-guaranteed personal rights of the citizen
- The Circuit Court and District Court were obliged to uphold the Constitution and to respect, defend and vindicate the personal rights of the citizen. The Circuit Court was under an obligation to protect the constitutional rights of individuals, whether expressly recognised by the Constitution or declared by the superior courts to be unenumerated rights recognised by implication by the Constitution
- It was the intention of the framers of the Constitution that all matters pertaining to the interpretation of the provisions of the Constitution had to be decided by courts whose jurisdiction was derived from the Constitution. For that reason, only the superior courts had the jurisdiction to ascertain and declare the existence of previously unascertained and undeclared constitutional rights
- While s35 of the *Status of Children Act, 1987* allowed a person to apply to the court for a declaration that a named individual was his or her parent, the section could not be interpreted as to include a right to a declaration against an unnamed person, or a right to be informed as to the identity of his or her natural parents. In view of the fact that the applicant did not name or identify the person alleged to be the natural parent, her proceedings had to be struck out
- The right of a natural child to know the identity of his or her natural parents was not one of

the unenumerated rights which had actually been ascertained and declared
- The right to know the identity of one's natural mother was a basic right which flowed from the natural and special relationship which existed between a mother and her child
- The right to know the identity of one's mother was not, however, an absolute or unqualified right – its exercise could be restricted by the constitutional rights of others and by the requirements of the common good. Its exercise was restricted in the case of children who had been lawfully adopted in accordance with the provisions of the *Adoption Act, 1952*, as the child became the member of the adoptive family as if he or she had been their natural child
- The applicant and the plaintiff had been fostered and were thus not in the same position as children who had been adopted. They remained the children of their natural mothers and were entitled to the benefit of such rights as arose from such a relationship
- While the applicant and the plaintiff enjoyed the constitutional right to know the identity of their respective natural mothers, the exercise of such a right could be restricted by the constitutional right to privacy and confidentiality of the natural mother. Whether they were so restricted depended on the circumstances of the case and whether either of the natural mothers wished to exercise their right to privacy
- Whether the plaintiff's right to ascertain the identity of her natural mother could be successfully invoked depended on whether it had to be granted precedence over the countervailing constitutional and legal rights which might be asserted on behalf of the natural mother. If it transpired that the plaintiff's constitutional right did outweigh the rights of her natural mother, it followed that she was entitled to obtain relief under s35 of the *Status of Children Act, 1987*
- The Circuit Court would have to evolve and adopt a procedure whereby it could hear the views of natural mothers, without disclosing their identities to their natural children, and then decide whether it was an appropriate case to disclose the identity of the natural mother
- In reaching the determination, the Circuit Court was entitled to consider the circumstances giving rise to the natural mother relinquishing custody, the present circumstances of the natural mother, the attitude of the natural mother, the respective ages of the mother and child, the reasons why the child wished to know the natural mother's identity, the present circumstances of the child and the views of the foster parents, if alive.

I O'T v B (Supreme Court), 3 April 1998

COSTS

Costs in interlocutory applications to be reserved to trial judge

- While there is no rule of court or even of practice, the normal procedure on the hearing of an interlocutory application was to reserve the costs to the trial judge.

The plaintiff entered into a licensing agreement with the defendant. The defendant covenanted with the plaintiff that it would, among other things, use its best endeavours to procure and/or proceed with applications for patents already filed. The plaintiff, anxious that the time limits in respect of one of its patents was running out, wrote to the defendant saying that the European patent application had not been proceeded with and would lapse unless, among other things, a comprehensive response was given to the examiner's objections. The plaintiff then sought interlocutory relief obliging the defendant to abide by the terms of the licence. The defendant gave an undertaking to ensure that the patents were protected and the plaintiff sought no further relief in the proceedings. Costs were awarded to the plaintiff. The defendant appealed the decision and contended that these proceedings should not have been brought against two of the three defendants, as these two companies were not parties to the said licensing agreement. In dismissing the appeal, it was held that:
- While there was no rule of court or even of practice to that effect, the normal procedure on the hearing of an interlocutory application was to reserve the costs to the trial judge
- The court retained discretion to deal with costs in what appeared to be the most just manner possible
- If the plaintiff had not been ordered to pay the costs of the proceedings, an entirely unnecessary trial would have had to take place simply in order to determine the issue of costs
- The position was that if the plaintiff was to preserve its rights under the agreement, it was left with no option but to issue the proceedings
- The defendant was represented by one team of solicitors and counsel and the undertaking was given by counsel acting for all three defendants, between whom there was at least a close relationship.

Dubcap Ltd v Microcrop Ltd (Supreme Court), 9 December 1997

CRIMINAL

No appeal from decision of trial judge as to venue of trial

- It was in the interests of a fair and efficient administration of justice that there should not be a right of appeal from a decision of a trial judge as to the venue of a trial before a trial commenced.

The applicant sought judicial review of the first-named respondent's decision not to transfer a criminal trial from Cork to Dublin. The applicant contended that the first-named respondent had erred in law in not transferring the case due to the large amount of publicity the case had attracted. The applicant also challenged the constitutionality of s32 of the *Courts and Courts Officers Act, 1995*. He contended that it contravened the provisions of Art 34.3.4º of the Constitution. Section 32 provided that there was no right of appeal to the High Court from the refusal of a judge of the Circuit Court to transfer a criminal trial. The applicant contended that Art 34.3.4º provided that there was a constitutionally-guaranteed right of appeal from all orders of courts of local and limited jurisdiction, of which the Circuit Court was one. In refusing the reliefs sought and in upholding the constitutionality of the impugned provision, it was held that:
- On the evidence, the first-named respondent could not be faulted in the exercise of his discretion not to transfer the case from Cork to Dublin
- Art 34.3.4º did not confer a universal right of appeal from all decisions of the Circuit Court
- It was in the interests of a fair and efficient administration of justice that there should not be a right of appeal from a decision of a trial judge as to the venue of a trial before a trial commenced
- Such a right of appeal was likely to delay proceedings and was open to much abuse
- The presumption of constitutionality was not rebutted in this case.

Todd v Judge Murphy (Geoghegan J), 15 May 1998

DAMAGES

Undeclared income not to be taken into account

- It would be contrary to public

Donkeys are part of Ireland's heritage

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For further details please contact:

Paddy Barrett, Manager, The Donkey Sanctuary, (Dept ILT),
Knockardbane, Liscarroll, Mallow, Co. Cork.
Tel (022) 48398 Fax: (022) 48489
E-mail: donkey@indigo.ie UK Registered Charity Number 264818

IRISH KIDNEY ASSOCIATION

Donor House,
156 Pembroke Road,
Ballsbridge, Dublin 4.
Tel: 01 -668 9788/9
Fax: 01 - 668 3820

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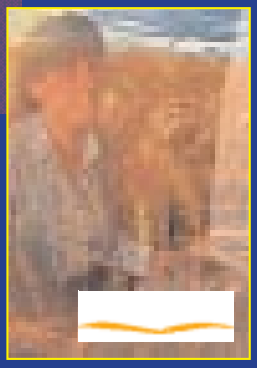

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COURTESY OF THE LEADING MANAGEMENT ACCOUNTS PACKAGE FOR LEGAL FIRMS

policy to assess the loss sustained by the dependants of a deceased on the basis of income which the deceased had not declared to the Revenue Commissioners.

The plaintiff's husband, F, died of injuries which he sustained when he was struck by a large stone which came through the windscreen of his car. The plaintiff alleged that the stone was propelled from between the rear twin tyres of the first-named defendant's lorry. The first-named defendant gave evidence that he had delivered blocks to a building site shortly before the accident and that he had checked his rear twin tyres for stones before leaving the site. F was a self-employed dental technician. Evidence was given on behalf of the plaintiff that F earned £6,000 more in the tax year before his death than he had declared to the Revenue Commissioners. In awarding the plaintiff the sum of £274,500, it was held that:

- The evidence established to a very high degree of probability that the stone which injured F was propelled from the gap between the rear twin tyres of the first-named defendant's lorry. The stone had become lodged between the rear twin tyres of the lorry at the building site
- It was foreseeable that a lorry with twin tyres might pick up a large stone or rock while on a building site. If the first-named defendant had carried out an adequate inspection of his tyres before leaving the building site, he would have found the stone. Accordingly, the first-named defendant was negligent
- Public policy considerations precluded the court from taking F's undeclared income into account in quantifying the loss sustained by his dependants.

Fitzpatrick v Furey (Laffoy J), 12 June 1998

EMPLOYMENT

Protection to be given to whistleblowers?

A private member's Bill has been introduced which aims to:

- Provide protection from civil liability to employees who make certain disclosures 'reasonably and in good faith' in relation to the conduct of the business and affairs of their employers
- Prohibit the penalisation of such employees by their employers, and
- Set out the persons to whom disclosure may be made and the categories of matters in relation to which such disclosure is permissible.

Whistleblowers Protection Bill, 1999

HEALTH SERVICES

Health (Eastern Regional Health Authority) Bill, 1998

This Bill has been amended in the Select Committee on Health and Children.

INTELLECTUAL PROPERTY

Copyright changes proposed

A Bill has been presented which, if passed, will effect a comprehensive overhaul of the existing law on copyright. The measures proposed include:

- A listing of the works in which copyright subsists
- Establishing when copyright arises in the context of sound recordings, cable programmes and so on
- Defining what is meant by 'author'
- Specifying the term of protection in relation to various types of works
- Dealing with moral rights
- Providing for remedies and penalties, and
- Legislation in relation to rights and performances and databases.

Copyright and Related Rights Bill, 1999

INTERNATIONAL AID

Bretton Woods Agreements (Amendment) Bill, 1998

This Bill has been passed by Dáil Éireann.

PLANNING AND DEVELOPMENT

Art 17 notice considered

- Failure to comply with an art 17(2) notice puts in abeyance the power of the planning authority to grant or refuse permission until 14 days after compliance with the notice.

An application for planning permission was made by L Ltd. An objection was made by the applicant on the grounds of inadequate and misleading advertising. The respondent served a notice under art 17 of the *Local Government (Planning and Development) Regulations 1994* requiring further advertisement but L Ltd took no steps to comply with this notice. The respondent purported to grant the planning permission and L Ltd challenged this decision. In granting the relief, it was held that:

- An art 17(2) notice remains effective until it is either quashed by the court or is complied with
- A consequence of the provisions of arts 17 and 39 is that the power of the planning authority to grant or refuse permission is put in abeyance by the service of an art 17(2) notice until 14 days after compliance with the notice
- The issue of whether the power to grant or refuse permission is postponed until after the requirements of an art 17(2) notice has been complied with is a pure matter of law and the court is the appropriate tribunal in which the applicant should seek relief.

Ardoyne House Management Company Limited v Bardas Átha Cliath (Morris J), 6 February 1998

Measures against developers of new estates?

A private member's Bill has been introduced which aims, among other things:

- To ensure that developers who have not completed a previous housing estate be refused planning permission for a subsequent estate, and
- To create a cause of action against such developers.

Local Government (Planning and Development) (Amendment) Bill, 1999

PRACTICE AND PROCEDURE

Security for costs considered

- In an application for security for costs, the real question was whether the inability of the company to meet the costs of successful defendants arose from the very facts of the complaint made in the proceedings.

The plaintiffs were related companies and were engaged in a building programme. The first-named defendant, the bank, financed the plaintiffs' building operation. In 1989, the plaintiffs were unable to meet their liabilities as they fell due. The first-named defendant, after consulting with its accountants, the second-named defendant, entered into a new agreement with the plaintiff. Under the terms of the agreement, the first-named defendant was to

provide additional finance to enable the plaintiffs to complete their building programme. As long as there was money due and owing from the companies to the first-named defendant on foot of the loan, the first-named defendant was entitled to insist on the appointment of a quantity surveyor, the third-named defendant, and an auctioneer, the fourth-named defendant. The businesses of the companies did not prosper and a receiver, the fifth-named defendant, was appointed over the properties of the two companies. The plaintiff instituted proceedings claiming that the defendants had managed the affairs of the company so badly that the business had been 'run into the ground' and that the assets of the company had been sold at an undervalue. The defendant sought an order for security for costs pursuant to s390 of the *Companies Act, 1963*. All defendants, except the fifth-named defendant, were awarded an order for security for costs against the plaintiff. Both the plaintiff and the fifth-named defendant appealed that decision. In allowing the appeal of the plaintiff only in respect of the first-named defendant and the second-named defendant, and allowing the fifth-named defendant's appeal, it was held that:

- An application for security for costs was an interlocutory motion and would usually be made when the facts of the dispute had yet to be established
- The mere fact that a plaintiff was impecunious was never, on its own, a reason for awarding security for costs against him
- Insolvent limited liability companies were in a different category as the liability of their shareholders was limited
- The real question was whether the inability of the company to meet the costs of the successful defendants arose from the very facts of which complaint was made in the proceedings
- At this interlocutory stage, the plaintiff had made out a *prima facie* case that the acts complained of, as far as the first-named defendant and the second-named defendant were concerned, were responsible for the inability to pay the defendants' costs in the event of their being unsuccessful in the proceedings
- Prior to the engagement of the third-named defendant and the fourth-named defendant, the plaintiffs were insolvent and, therefore, unable to meet an order for costs against them, in the event that the third-named defendant and the fourth-named defendant were successful in their defence.

Lismore Homes Limited (In Receivership) v Bank Of Ireland Finance Limited and Lismore Builders Limited (In Receivership) v Bank Of Ireland Finance Limited (Supreme Court), 11 February 1998

Order for further and better discovery refused

- An order for further and better discovery should only be made to clarify an ambiguity or remedy a problem which might exist in the interpretation of the original order.

Discovery was made by the defendants in 1989. The action proceeded to trial but a re-trial was ordered and, prior to trial, the plaintiff sought further and better discovery in order to bring the discovery up to date. The defendant also sought an order seeking third-party discovery against the plaintiff's bank arising from cross-examination of the plaintiff in the first trial. In not making an order in relation to further and better discovery, and affirming the order for discovery, it was held that:

- It was not appropriate for the court merely to make an order for further and better discovery in order to bring the discovery up to date. To make such an order, the court must be satisfied that documents which should have been discovered were not, and in reality this type of order should only be made for the purpose of clarifying an ambiguity or remedying a problem which might exist in the interpretation of the original order
- If documents had come into the hands of the defendants which should be discovered then, without the necessity of an additional order, they were governed by the provisions of the order of the master made in 1989
- If the accounts did exist, then they were potentially of relevance in going to the credit of the plaintiff if the accounts were to show that the answers the plaintiff made to counsel at the hearing were false.

Murphy v Times Newspapers Limited (Morris J), 23 March 1998

Renewal of summons refused

- It is not a good reason to renew a summons simply to prevent a defendant from availing of the Statute of Limitations. The Statute of Limitations had to be available on a reciprocal basis to both sides of any litigation.

The defendant appealed an order of the High Court of 17 February 1997 in which the court refused to set aside an order that had been granted by the High Court on an *ex parte* application by the plaintiff, renewing a plenary summons that he had issued outside the 12 months during which a summons had to be served. In allowing the appeal, it was held that:

- The *Rules of the superior courts* specified that a summons could be renewed if reasonable efforts had been made to serve the defendant, or for 'other good reason'
- No efforts had been made to serve the defendant during the required 12 months in this case
- There was a wide discretion in the High Court to renew a summons but there had to be good reason
- There was no good reason to explain the delay. The plaintiff claimed that he had been let down by a solicitor, M, but that had nothing to do with the defendant. The court had to make an order that rendered justice between the two immediate parties to the litigation
- It was not a good reason to renew a summons simply to prevent the defendant from availing of the Statute of Limitations. The Statute of Limitations had to be available on a reciprocal basis to both sides of any litigation.

Roche v Clayton (Supreme Court), 8 May 1998

SOCIAL WELFARE

Social Welfare Bill, 1999

This Bill, implementing changes to the social welfare system, has been passed by Dáil Éireann.

SPORT

Irish Sports Council Bill, 1998

This Bill has been passed by Dáil Éireann.

TORT

Hearing loss 'green book' not followed

- While s4 of the *Civil Liability (Assessment of Hearing Injury) Act, 1998* provides that the court must consider the approach adopted by the Report of the Expert Hearing Group, it does not impose a duty upon the court to adhere strictly to this approach. The court ought to take into account that the enactment of s4 of the 1998 Act represents an endorsement by the legislature of a particular system for assessing hearing disability, but it is for the court to determine

the most appropriate method of assessing the plaintiff's hearing disability in each individual case. The system set out in the green book should be applied, unless the court is satisfied that another system would be more appropriate in the circumstances.

The plaintiff's action was one of many instituted by members of the Defence Forces claiming damages for noise-induced hearing loss and tinnitus sustained in the course of their service. The Department of Health and Children established an expert group to make recommendations on an appropriate system for the assessment of hearing disability arising from hearing loss. The report of the expert group ('the green book') set out a system for assessing hearing disability and a method for classifying tinnitus. Section 3 of the 1998 Act provides that judicial notice shall be taken of the green book in all proceedings before a court claiming damages for personal injury arising from a hearing injury. Section 4 of the 1998 Act provides that in all proceedings claiming damages for personal injury arising from hearing loss and tinnitus, the courts shall, in determining the extent of the injuries suffered, have regard to the hearing disability assessment system and the method for classifying tinnitus set out in the green book.

The plaintiff was 59 and had served in the FCA from 1956 to 1972 and in the Permanent Defence Forces from 1972 to 1996. He was unaware of any difficulty in hearing until 1993 when a routine medical examination disclosed that he had a hearing threshold of 40dB at 4,000Hz. He complained of difficulty in hearing, particularly in the presence of background noise and in group conversation. He also complained of tinnitus. His hearing loss represented a 2% hearing disability on the green book system. In giving judgment for the plaintiff in the sum of £3,000, it was held that:

- Section 3 of the 1998 Act enabled the court to treat the contents of the green book as evidence in proceedings to which the 1998 Act applies
- While s4 of the 1998 Act provided that the court must consider the approach adopted by the green book, it did not impose a duty upon the court to adhere strictly to the approach. The court ought to take into account that the enactment of s4 represents an endorsement by the legislature of a particular system for assessing hearing disability, but it is for the court to determine the most appropriate method of assessing the plaintiff's hearing disability in each individual case. The system set out in the green book should be applied, unless the court is satisfied that another system would be more appropriate in the circumstances
- The provisions of the 1998 Act did not constitute a fetter on the exercise of judicial discretion. The green book provided a fair and reasonable system for assessing the hearing disabilities of litigants and the court had power to deem the system inappropriate where the evidence established that it ought not to be applied to a particular plaintiff
- The court was not satisfied that the plaintiff suffered from tinnitus. The plaintiff had a very minor noise-induced hearing loss which represented a 2% hearing disability on the green book system.

Greene v Minister For Defence (Lavan J), 3 June 1998

TRANSPORT

Road Transport Bill, 1998

This Bill has been amended in the Select Committee on Public Enterprise and Transport. G

News from the EU and International Affairs Committee

Edited by TP Kennedy, Legal Education Co-ordinator, Law Society of Ireland

Reform of European competition policy: EC White Paper (Part 1)

In the recently-published White Paper on the modernisation of the rules implementing articles 85 and 86 of the *EC treaty* (Commission programme no 99/027), the EC Commission proposed the introduction of a directly applicable exemption system – that is, a system which would allow national courts and competition authorities to apply article 81(3) of the *EC treaty*.

As it currently stands, the EC Commission, together with the national courts of the Members States, are primarily responsible for the enforcement of the prohibition provided for in article 81(1) of the *EC treaty*. However, as a procedural matter, regulation 17/62 provides that only the EC Commission can grant exemptions under article 81(3). Under these circumstances, parties to an agreement which could possibly qualify for exemption have been obliged to notify their arrangements to the EC Commission. However, as a practical matter, the EC Commission does not have the resources to deal with the number of notifications which it receives, and this has left many a client waiting anything up to five years for a formal decision granting an exemption. In the words of Barry Hawk:

'No competition authority in the world has the resources to examine the vast number of vertical agreements (and licenses) whose enforceability has been called into question by the overbroad application of article 85(1) … The notification system set up in regulation 17 has never worked and never will work. Like the 1976 *Restrictive Practices Act* in the UK, the notification system serves mostly to increase the transaction costs and transfer income from firms to outside antitrust lawyers. It has no redeeming enforcement virtues and should be scrapped'.
(Hawk, *System failure: vertical restraints and EC competition law*, 1995 CMLR 973 at page 984)

Despite the fact that there is only a remote chance of receiving a formal decision, many companies and lawyers continue to notify agreements wherever there is a possibility that they might infringe article 81(1). The reason for this is twofold: first, notification confers immunity from fines by the EC Commission; second, if an agreement is ever challenged as unenforceable, the party seeking to uphold the agreement is considered to be in a better position if the agreement has been notified to the EC Commission.

Since the introduction of regulation 17/62, piecemeal efforts at reforming the system have been made by the EC Commission which have had the dual purpose of decreasing its workload and assisting in the efficient use of its resources. These efforts at reform include the following:

- The introduction of block exemptions
- The publication of notices
- The issue of comfort letters
- The application of the principle of 'Community interest'.

A number of these tools have assisted in the reduction of enforcement costs and the number of notifications made to the EC Commission has decreased. However, these 'fire fighting' responses have also presented a number of disadvantages. For example, the system of group/block exemptions has meant, in certain circumstances, that the drafting of an agreement becomes a pigeonholing exercise rather than an analysis of the actual anti-competitive effects which the agreement produces. On the other hand, however, the introduction of the block exemptions has provided legal certainty for the business community. This is more than can be said for the EC Commission policy of issuing comfort letters (a letter which states that the EC Commission intends taking no action under the competition rules and is closing the file) and/or the publication of notices (documents which explain Community policy on a particular matter but have no legally binding effect). While these administrative responses have, to some degree, reduced the burden of the EC Commission, they appear to have achieved results only in the short term. It has now become apparent that more radical reform is needed and it is such radical reform which has been proposed in the recently published White Paper.

Enhanced role for the national courts

At paragraph 100 of the White Paper, the EC Commission notes that the national courts' powers are severely limited by the monopoly to exempt which it holds (for example, undertakings can in practice bring court proceedings to a halt by lodging a notification with the EC Commission). In order to deal with the inadequate powers which the national courts hold, the EC Commission has proposed that undertakings should be able to invoke article 81(3) as an argument in their defence. It explains that this new ground of defence would allow undertakings to obtain immediate civil enforcement of those of their restrictive practices which satisfy the conditions of article 81(3) and, on the other hand, would enable complainants to obtain damages more quickly where they are victims of illegal agreements. Finally, the EC Commission proposed that, except where an appeal is lodged, judgments granted by the national courts in respect of article 81(3) should have the force of *res judicata*.

Such a proposal is to be welcomed from the EC Commission. It has in the past been widely criticised for guarding the right of

exemption for itself as this monopoly has meant that a coherent economic analysis in the national courts was nearly impossible. As an alternative to the current proposal, the abolition of the bifurcation of article 81 by amendment of the treaty has been considered by many commentators. The EC Commission, however, stressed in its Green Paper on vertical restraints (Com (96) 721 final) that this was not an option. It would also be possible to place the complete economic analysis under article 81(1) and allow non-competition policies to operate under article 81(3), for example, environmental and industrial policy. This latter proposal has not, however, been considered by the EC Commission as a viable alternative.

Enhanced role for the national competition authorities

In relation to the national competition authorities, a threefold approach is proposed:

- That the EC Commission allow the competition authorities to apply article 81(3)
- That the national authorities be empowered to withdraw the benefits of a Community block exemption, and
- That an authority considering a case, whether at Community or national level, must be in a position to pass a file on the case to another authority, including any confidential information that might be used in procedures for infringement of the Community competition rules.

Consistency and coherency?

In decentralising the current system, there is always the risk of inconsistent application of the competition rules. The EC Commission, aware of this possibility, has at paragraphs 101-107 of the White Paper outlined both procedures which it already uses in order to ensure consistency in the application of articles 81 and 82 and also a number of new proposals. Rules, currently in use, for the resolution of conflicts between the EC Commission and the national/authorities include the following:

- Once the EC Commission has initiated procedures, adopted a decision no longer open to appeal, or which has been confirmed on appeal, the national courts are bound to avoid conflicting decisions
- Where a national authority/national court has adopted a positive decision/judgment which is no longer open to appeal, or has been confirmed on appeal, the EC Commission can always intervene to prohibit the agreement. This is subject to the principle of *res judicata* that applies to the dispute between the parties themselves, which has been decided once and for all by the national court
- Where an authority/national court makes a negative decision, the EC Commission does not normally intervene
- Where a decision of a national authority or court is open to appeal or the decision on appeal is pending, the EC Commission may at any time adopt a contrary decision. In that case, the principle that conflicting decisions must be avoided will apply to the appellate body.

The White Paper also proposes the following for future resolution of conflicts:

- Effective use of articles 226 by the EC Commission and article 234 by the national courts
- Competition authorities should be obliged to inform the EC Commission of cases in which articles 81 and 82 are to be applied by them and of any plans by an authority to withdraw the benefit of a Community block exemption. Finally, the EC Commission should still have the possibility of taking a case out of the jurisdiction of the national competition authorities
- A reinforced role for the Advisory Committee on Restrictive Practices and Dominant Positions
- In relation to the courts, the EC Commission should be put on notice of proceedings in which articles 81 and 82 are invoked before the courts so that it is made aware of any problems of textual interpretation or *lacunae* in the legislative framework. In addition, the EC Commission should be allowed, subject to the leave of the court, to intervene in judicial proceedings that come to its attention.

New role for the EC Commission

Just as it is proposed to alter the role of the national courts/authorities, the EC Commission also considers that its own role should be redefined within the new system. Ultimately, however, it is not proposed to change the EC Commission's role as guardian of the treaties and guarantor of the Community interest. This it intends maintaining by intensifying its effort in the area of the drafting of notices and guidelines to explain its policy and provide guidance for the application of the Community competition rules by national authorities. The White Paper also proposes the introduction of a Community regulation which would prevent national legislation from prohibiting or varying the effects of agreements exempted by Community regulation. Finally, the EC Commission in the White Paper also suggests that where a transaction raises a question which is new that the EC Commission should be allowed to give a decision.

The White Paper also proposes that the EC Commission's powers of enquiry should be strengthened. It is currently the case that if the EC Commission wishes to carry out investigations, the national authorities assisting it must, in most of the Member States, secure a court order in order to overcome any opposition on the part of the undertaking to be investigated. This system has proved particularly cumbersome where several undertakings from several Member States are involved. The White Paper, therefore, proposes that provision should be made for the granting of a pan-European order in one of the community courts. The White Paper also suggests that the procedures followed during investigations be strengthened – for example, that EC Commission officials be empowered to ask the undertaking's representative or staff any questions that are justified by and related to the investigation and that any answers given in the course of the investigation could be brought within the scope of the penalties for supplying incorrect information.

Finally, the White Paper refers to the important role which the EC Commission should continue to play in the processing of complaints submitted to it. The EC Commission intends, in this regard, to publish an explanatory notice on complaints so as to facilitate and encourage the lodgement of complaints. The White Paper proposes in particular introducing time limits and a simplified procedure for the handling of complaints together with rules regarding interim measures. What will be particularly welcomed by lawyers practising in the area is the introduction of a four-month time limit by the end of which the EC Commission would be required to inform the complainant of the action it proposed to take on a complaint.

It would appear that there is no viable alternative to decentralisation, given the huge administrative burden which the EC Commission has for some time been forced to carry. In the words of the Select Committee on the European Community of the UK's House of Lords:

'The number of cases requiring resolution under Community rules will continue to rise and there is in the longer term no alternative to this form of decentralised administration'.

(*Enforcement of Community competition rules*, session 1993-1994, first report at point 132)

However, the circumstances under which exemption powers are delegated is of the utmost

importance if the integrity, consistency and coherency of the current system is to be maintained. It is for this reason that the EC Commission is interested in opening a pan-European debate on the way in which the new national powers are to be managed and administered. The EC Commission has, therefore, requested observations and comments on any aspect of reform proposed in the White Paper before 30 September 1999.

Part 1 of this paper deals with some of the significant procedural reforms which are proposed in the EC Commission White Paper. Part 2 will deal with the substantial reforms of EC Commission's policy towards vertical restraints, with a particular emphasis on the black list in the proposed single group exemption for all vertical arrangements. G

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RECENT DEVELOPMENTS IN EUROPEAN LAW

DIRECTIVES

Direct effect

Annalisa Carbonari and Others v Universita degli Studi di Bologna and Others, Case C-131/97, judgment of 25 February 1999. The case concerned Directive 75/363, as amended by Directive 82/76. These directives concern co-ordination of provisions in respect of activities of doctors. Directive 82/76 imposes an obligation to provide appropriate remuneration for periods of training in medical specialities. Neither directive defined appropriate remuneration, specified the methods by which it was to be fixed or fixed the body to pay it. The ECJ considered whether the directives could have direct effect. The court held that Member States had a wide discretion in determining the body to pay remuneration. Thus, the measures were not unconditional. It went on to refer to its decisions in *Van Colson* and *Marleasing*. It said that it is for a national court to determine to what extent all provisions of national law could be interpreted after the implementation date of these directives in the light of the wording and the purpose of that directive in order to achieve the result pursued by it. The national court should, therefore, determine the level of appropriate remuneration and the institution to pay it. The ECJ reminded the national court that if the duty of interpretation did not suffice, State liability in damages should be considered. Retrospective application of the implementing measure would remedy the harmful consequence of its belated implementation. However, the national court should ensure that reparation of the loss or damage sustained by the beneficiary was adequate.

Bayerische Motorenwereke AG (BMW) v Ronald Karel Deenik (Case C-63/97) [1999] 1 CMLR 1099. For the facts of this case see below. The *Trademark directive* should have been implemented in Belgium by 31 December 1992. It was not actually implemented until 1 January 1996. This case arose between those two dates. The implementing legislation provides that any appeal against a decision reached before 1 January 1996 had to be settled in accordance with the rules applicable prior to that date even if the appeal judgment was to be given after that date. The ECJ held that the legislation was valid but was subject to the overriding duty of the national appeal court to interpret domestic law consistently with the directive, as the directive should have been implemented at that time. The court then went on to a substantive consideration of the provisions of the directive.

ENVIRONMENTAL LAW

The Commission is proposing a directive relating to ozone in ambient air. It will introduce target values for ozone emissions with requirements to monitor ozone concentrations in ambient air and to report to the public on the findings of that monitoring.

INTELLECTUAL PROPERTY

Trademarks

Bayerische Motorenwereke AG (BMW) v Ronald Karel Deenik (Case C-63/97) [1999] 1 CMLR 1099. Directive 89/104 establishes that once goods are placed on the market by or with the consent of the trademark owner, he cannot prevent the resale of goods bearing that mark within the EU. It also provides that the trademark owner has the right to affix the trademark to the goods. This cannot be performed lawfully by another without the consent of the trademark owner. Deenik specialised in the repair and supply of second-hand BMW cars. He was not an authorised distributor of new BMW cars. BMW argued that he had used the BMW trademark in advertising his business in the Netherlands. The ECJ held that using a trademark without the proprietor's consent for informing the public that the user carried out the repair and maintenance of goods protected by the trademark made use of the mark, contrary to article 5(1)(a) of the *Trademarks directive*. However, the court held that BMW could not rely on the directive to prevent Deenik from using the trademark. In relation to its sale of second-hand cars, the exhaustion of rights principle in article 7 prevented BMW from restricting the free resale of goods it had lawfully put on the market. Deenik was justified in using the mark, as it was the only means open to him of communicating his specialism as a reseller of BMW cars. He could also use the mark to advertise his servicing business. The ECJ looked to article 6(1)(c), which provides that a third party can lawfully use a trademark where necessary to indicate the intended purpose of a product or service, provided that the use was in accordance with honest practices in commercial matters.

LITIGATION

Non-contractual obligations

The *Rome convention* determines the law applicable to contractual obligations. Non-contractual obligations are currently subject to national private international law rules. The Commission has announced that it will propose a regulation setting out a common set of rules on the law applicable to non-contractual obligations. The parties will be free to choose the applicable law but, in the absence of such a choice, the law will be that of the state which has the strongest links with the act creating the obligation. This presumption can be rebutted by certain factors, such as place of residence. The proposal will not apply to family law, intellectual property and succession.

References to the ECJ

Nour Eddline El-Yassini v Secretary of State for the Home Department, Case C-41/96, judgment of 2 March 1999. The ECJ held that the UK Immigration Adjudicator was a court or tribunal for the purpose of making preliminary references to it under article 234 (ex-article 177). The office was established by law. It was permanent and determinations were made in accordance with the law. Procedure before the adjudicator was *inter partes*. Reasons for the adjudicator's decisions had to be given. The decisions were binding and in certain cases could be appealed to the Immigration Appeal Tribunal. The Lord Chancellor appointed adjudicators for a renewable ten-year or a one-year term depending on whether they sat on a full-time or a part-time basis. During their period of office, they enjoyed the same guarantees of independence as judges.

TORT

Product liability

The *Liability for defective products directive 1985* has now been extended to cover primary agricultural products (such as meat, fruit and vegetables). This is to be implemented by 4 December 2000. Thus, the scope of the Irish *Liability for Defective Products Act, 1991* must be extended to agricultural products by this date. G

The *Brussels II convention*

This two-part article examines why the issue of family law is now being addressed as part of the phenomenon of European integration, considers the success of the *Hague divorce convention* and reviews the impetus for a new convention on matrimonial matters

The *Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters* (the *Brussels II convention*) is a new private international law convention, modelled on the *Brussels convention*, establishing rules of international jurisdiction and recognition of judgments in at least some family matters, particularly divorce. The system of the convention is similar to that of the *Brussels I convention*: in cases falling within its scope, there is generally a uniform set of rules of jurisdiction and automatic recognition of judgments within the EU. As this development has not as yet been assimilated into domestic law, we can merely examine the background to the convention, including, among other things, the *Hague convention on recognition of divorces and separation.*

The original *Brussels convention* provides that it applies to 'civil and commercial matters'.[1] It does, however, comprehensively detail those areas to which the convention's rules were not to be extended. The first mentioned exclusion under article 1 is family matters: 'The status and legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession'.

Two principal reasons for the family exclusion can be advanced. First, the *EEC treaty* was not a body of law which had as its objective the regulation of family law matters but rather at the securing of the economic freedoms thereunder. More importantly, however, there were the difficulties caused by the divergences between the Member States in the regulation of family law matters. This disparity was likely to be troublesome in light of the principle of automatic recognition in the convention,[2] the judge of one state would be reluctant in enforcing a foreign judgment under law that would have been at variance with the law of his own state.[3] Hartley notes:

'The matters are probably excluded because they are personal matters in which questions of public policy, morality and social philosophy are likely to be important. Consequently, judges would be unwilling to depart from their own national conceptions and would therefore find it difficult to accept the principle of automatic recognition of foreign judgments'.[4]

Jenard states that if family matters had been included: '[I]t would have been difficult for the enforcement state not to re-examine the rules of jurisdiction at the enforcement stage. This in turn would have meant changing the nature of the convention and making it much less effective'.[5]

The *Jenard report* referred to the resumption of discussions on all excluded matters once the convention had entered into force.[6] This did not occur until December 1993. This delay was an acknowledgement of the real practical problems in this area.

The *Hague conference*

The *Hague conference on private international law* encountered similar difficulties in its review in the 1960s. It is submitted that an assessment of its conclusions and the subsequent convention is most instructive in the present context, if only to demonstrate the problems inherent in attempting to bring uniformity in this field.

The *Hague conference* decided in 1960 to have its secretariat carry out studies designed to facilitate the preparation of a convention addressing matters of personal status. As with the *Brussels II convention*, it was decided to focus on matrimonial proceedings (divorce and legal separation). What became clear very quickly in the discussions that followed was that political, religious and social issues were never far removed from the legal debate. It is submitted that this in turn significantly impacted upon the genre of convention, which the individual Member States sought. This can be gauged from the comments of Professor Anton, a member of the United Kingdom delegation to the conference:

'Was it the purpose of the proposed convention to constitute a line of defence against the propensity of parties to seek divorce in the country where it is most easily obtained, irrespective of their connection with that country, the practice described as "forum shopping"? Or was its purpose rather to reduce the incidence of "limping marriages", the list, that is, of persons being married in one country and divorced in another'.[7]

The proponents of the former purpose, that is, the avoidance of 'forum shopping', were broadly in support of the adoption of a so-called 'double convention' – in summary, a convention based on direct rules of jurisdiction. Under instruments of this genre, the rules of jurisdiction laid down are applicable: they have to be applied by the court with *seisin* and any departure from these rules may be challenged by a party to the action.

On the other hand, a single convention contains indirect rules of jurisdiction which do not directly bind the courts in the state in which the judgment is originally handed down. They are taken into account only in relation to recognition and enforcement proceedings. Such a convention merely indicates that if the state of origin has utilised the listed jurisdictional criteria, then its ruling should be recognised and enforced in other Member States. That said, there is nothing to prevent a state from applying its own rules of jurisdiction, which will not be recognised and enforced by another state.

The delegates of the states favouring a restrictive divorce policy supported a double convention supported by choice of law rules.[8] It would, however, have been very difficult to seal the gap between those states that applied the law of the forum and those states that applied the law of the parties' nationality to the dispute.[9] It was therefore decided not to prejudice the conclusion of a single convention by being over-ambitious in seeking a double convention at the outset.[10] The result of all this was the *Hague convention on the recognition of divorces and legal separations*[11] which provided various indirect grounds of jurisdictional competence.

In accordance with the general procedural principle of *actor sequitur forum rei*, the habitual residence of the respondent in the state in which the divorce was given is accepted as a suitable basis for the assumption of jurisdiction.[12] The habitual residence of the petitioner may similarly be accepted as a jurisdictional foundation, but only if supported by other fortifying conditions, either that the habitual residence has continued for a period of at least one year[13] or that the parties last habitually resided together in the habitual residence of the petitioner.[14]

Nationality is the other main ground of jurisdiction adopted under the convention but is not,

in itself, a sufficient ground for founding jurisdiction, save where both of the parties are nationals of the state of origin. Where jurisdiction is founded upon the nationality of the petitioner, three variations of supporting factors are attached. The basis of such principles is to make sure that the jurisdiction dealing with the divorce itself has sufficiently strong social connections to the marriage.

The success of the *Hague divorce convention* is difficult to gauge. The convention introduced innovative ideas such as consolidating domicile and habitual residence under the same convention[15] and the necessity of 'fortifying factors' mentioned above. However, one important measure of the success of any convention is the number of ratifications which it attracts. The *Divorce convention* has to date been ratified by 15 states, namely the United Kingdom, Australia, the Czech Republic, Egypt, Italy, Finland, Denmark, Cyprus, the United Kingdom, the Netherlands, Portugal, Norway, Switzerland, the Slovak Republic and Sweden. Clearly, it is a European convention plus Australia and Egypt. Of the states which were involved in the negotiations, an important number of non-European states (the United States, Canada, Japan, Israel and Turkey) and European states (Austria, Greece, Ireland, Spain, France and Germany) have not ratified it. A broader convention covering both jurisdiction and recognition and enforcement of judgments in matrimonial matters therefore seemed necessary.

Impetus for a new convention

The impetus for a new convention on matrimonial proceedings was a long-standing difficulty between France and Germany covering divorce jurisdiction and recognition. As Professor Anton stated:

'[T]he anarchy in the treatment of divorce in private international law has quite serious social inconveniences … the validity of second marriages, the legitimacy of the children of such marriages and rights deriving from the law of matrimonial property or of succession may all depend on whether, from system to system, recognition is accorded to a divorce'.[16]

Indeed, the acute nature of the problem of recognition in this jurisdiction can be gleaned from the recent unreported High Court decision of McGuinness J in *GMcG v DW*.[17] This situation has now been addressed, in part, in the *Brussels II convention* which is to 'take up the principles and general orientations of the *Brussels convention*'.[18]

Subsidiarity and the *Brussels II convention*

Article 3b EC provides the definition of subsidiarity as enunciated by the Maastricht deliberations. This measure states, among other things, that 'in areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the effects of the proposed action, be better achieved by the Community'. This concept, or at least the philosophy underlying it, is formally incorporated into the treaty on European structure. The preamble to the *Treaty on European Union* outlines the aspiration of the states to: 'continue the process of creating an even closer union among the peoples of Europe in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity'. Article A TEU also states that 'decisions be taken as closely as possible to the citizen'. The objectives of the union are at the same time to be achieved, 'while respecting the principle of subsidiarity as defined in article 3b of the treaty establishing the European Community'.[23]

What, then, is the significance of 'subsidiarity' in terms of any extension of the European Union into matrimonial matters? As the Court of Justice will have, in principle, jurisdiction to interpret the *Brussels II convention*, then subsidiarity as a principle of community law is relevant to its interpretation and may well prove to be a factor in constraining its scope. In the context of article 3b EC, the concept of subsidiarity suggests two distinct legal concepts. First, the need for action at Community level has to be satisfied;[24] second, the action taken must be proportionate to the objectives sought.[25] The latter is certainly relevant in the present context. This can be taken as requiring the general application of the proportionality test, which is manifest in the general principles of law of the Community.[26]

It is therefore evident that any action adopted pursuant to the provisions of the *Brussels II convention* must not exceed what is necessary to obtain the objective sought.[27]

The second part of this article will examine the substantive provisions of the Brussels II convention *and assess its ability to deal with matrimonial matters.* G

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Footnotes

1 *See P Beaumont (ed),* Anton and Beaumont's civil jurisdiction in Scotland: *Brussels* and *Lugano* conventions, *(2nd ed, 1995), paragraphs 3.07–3.026.*

2 *See* Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, *27 September 1968, 1972 OJ (L299) 32, article 26.*

3 *See report by P Jenard on the convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, 1979 OJ (C59) 1,10, hereinafter* Jenard report *(quoting as an example the differences in the divorce laws of the various Member States).*

4 *See TC Hartley, 'The recognition of foreign judgments in England under the jurisdiction and judgments convention', in* Harmonisation of private international law, *EEC 103, 103 (K Lipstein, ed, 1978).*

5 Jenard report, supra *note 3, at 10.*

6 Ibid, *at 11.*

7 *AE Anton, 'The recognition of divorces and legal separations', (1969) 18 ICLQ 620-643 at 620.*

8 Ibid, *at 624.*

9 *See Palson,* International encyclopædia of comparative law, *vol III, chapter 16, 126* et seq.

10 *See Anton,* supra *note 7, at 623.*

11 *See the text at (1970) and Cmnd 6248 and the official report by Hellet and Goldman,* Acts and documents of the Eleventh Session *(1968), book II, 209.*

12 *Article 2(1) of the convention.*

13 *Article 2(2)(a) of the convention.*

14 *Article 2(2)(b) of the convention.*

15 *Article 3.*

16 *See Anton,* supra *note 7, at 622.*

17 *[1999] 1 IJFL 26.*

18 *Council of the European Union, press release 7760/94 (Press 128) of Justice and Home Affairs Council meeting of 20 June 1994.*

23 *Article B of the* Treaty on European Union.

24 *Article 3b (paragraph 2) EC.*

25 *Article 3b (paragraph 3) EC.*

26 *See Weatherill and Beaumont,* EC law *(1993), at 225-226 and Case 114/76,* Bela-Michle v Graras-Farm *([1979] 2 CMLR 83).*

27 *See Case 15/83* Deakavit Nederland v Hoofdpredudekchap *([1984] ECR 2171) at 2185.*

Conferences and seminars

Academy of European Law
Contact: (Tel: 0049 651 937370)

Topic: *Biotechnological inventions: legal protection and limits*
Date: 14-15 October
Venue: Trier, Germany

Topic: *Legal aspects of tourism and travel in the European single market*
Date: 21-22 October
Venue: Trier, Germany

Topic: *International private law in the single market: The Europeanisation of liability law*
Date: 25-26 October
Venue: Trier, Germany

Topic: *Current developments in European distribution law: panorama after the Green Paper*
Date: 4-5 November
Venue: Trier, Germany

Topic: *Licensing contracts under European cartel law*
Date: 8-9 November
Venue: Trier, Germany

Topic: *Telebanking and cyber-money in the European single market*
Date: 15-16 November
Venue: Trier, Germany

Topic: *Current developments in European fiscal law*
Date: 18-19 November
Venue: Amsterdam, The Netherlands

Topic: *The Community trade mark: caselaw of the Boards of Appeal of the Office for Harmonisation in the Internal Market*
Date: 18-19 November
Venue: Alicante, Spain

AIJA (International Association of Young Lawyers)
Contact: Gerard Coll
(tel: 01 667 5111)

Topic: *Annual congress 1999*
Date: 22-27 October
Venue: Brussels, Belgium

Topic: *Private-public partnership*
Date: 20-21 November
Venue: Warsaw, Poland

European Lawyers' Union
Contact: Gérard Abitbol
(tel: 0033 0491 338195)

Topic: *European social law*
Date: 15 October
Venue: Marseilles, France

Law Society of Ireland
Contact: TP Kennedy
(tel: 01 672 4802)

Topic: *European law healthcheck*
Date: 16 October
Venue: Blackhall Place, Dublin

European Law Healthcheck 1999

SATURDAY 16 OCTOBER 1999
Law Society of Ireland, Blackhall Place, Dublin 7

10.00-10.10	**REGISTRATION AND COFFEE**	
10.10-10.50	**Money laundering and solicitors** John Fish (Arthur Cox) LECTURE HALL	
10.55-11.35	**Free movement: recent developments** John Handoll (William Fry) LECTURE HALL	**Electronic commerce** Robert Corbet (Mason Hayes & Curran) BLUE ROOM
11.40-12.20	**Recent developments in employment law** Gary Byrne (BCM Hanby Wallace) LECTURE HALL	**Electronic signatures** Anne-Marie Bohan (Matheson Ormsby Prentice) BLUE ROOM
12.25-1.00	**SANDWICH LUNCH – Members' Lounge**	
1.05-1.45	**Cross-border litigation** Roderick Bourke (McCann FitzGerald) LECTURE HALL	**Practical issues in EC law** Alan McCarthy (A&L Goodbody) BLUE ROOM
1.50-2.30	**Competition update** Denis Cagney (Matheson Ormsby Prentice) LECTURE HALL	**Environmental law update** Deborah Spence (A & L Goodbody) BLUE ROOM

ORGANISED BY THE EU AND INTERNATIONAL AFFAIRS COMMITTEE

Name: _____

Address: _____

_____

Telephone no: _____ Solicitor/apprentice/student/other [Please circle as appropriate]

Cheque/money order for £65 [£35 – apprentices/students] attached. Send to:
TP Kennedy, Legal Education Co-ordinator, Law Society of Ireland, Blackhall Place, Dublin 7.

Taoiseach does the honours at new Education Centre

An Taoiseach Bertie Ahern formally laid the foundation stone for the Law Society's new £5.2 million Education Centre at a ceremony in Blackhall Place in July. The new state-of-the-art Law School will be able to accommodate over 300 trainee solicitors annually and is expected to open its doors in September next year. The Society's extensive post-qualification training courses will also be based in the new building.

Addressing the 200 distinguished guests at the foundation-laying ceremony, An Taoiseach praised the solicitors' profession for its 'invaluable contribution to the development of our legal system and indeed more generally to the development of social and political life in this country'. And he added: 'The old ways may indeed be best but the new ways must also be embraced. It is clear that the Law Society is to the forefront and is giving a lead to its members where education, training and innovation are concerned'.

'It is good to know', he concluded, 'that the Law Society is taking on the challenge of the new millennium'.

Law Society President Patrick O'Connor described the ceremony as 'an important day in the history of the Society' and said that it was the culmination of 'a long, intensive and often difficult process of analysis and debate'.

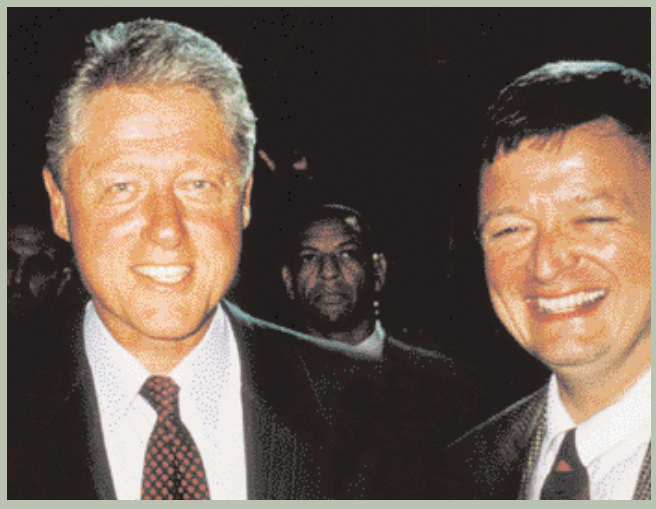
'With the laying of the foundation stone of the new Education Centre', he said, 'we are all privileged to see a little into the future for which so many of us, in our different ways, have striven over so many years. It is a future filled with excitement and challenge – a future to which we look forward with eagerness, and hope, and the promise of better things to come'. G

If you want to get ahead, get a hat
An Taoiseach Bertie Ahern does his bit for the building trade, helped by President Patrick O'Connor and Director General Ken Murphy

Law Society President Patrick O'Connor speaking at the ceremony to mark the laying of the foundation stone for the new Education Centre, watched by An Taoiseach Bertie Ahern and Law Society Director General Ken Murphy

President Mary McAleese and husband Dr Martin McAleese were guests at a recent dinner in Blackhall Place, hosted by Law Society President Patrick O'Connor and his wife Gillian.
(below) President McAleese gets the inside story on the Law Society's new Education Centre

Bill and Pat's Excellent Adventure



The Leader of the Free World visited the American Bar Association conference in Atlanta, Georgia, last month – and so did US President Bill Clinton. At least Bill can still see the funny side, as he shares a joke with Law Society President Patrick O'Connor

Poker faces at Blackhall Place

The Law Society is running a unique 'gambling' event at Blackhall Place on 14 October which, depending on interest, could become a fixed entry in the annual legal diary! This will be an opportunity for 150 solicitors and friends to participate in a most enjoyable evening, with the odds-on chance of sharing in a guaranteed prize fund of £2,000.

Those of you who are old enough to remember may have fond memories of the evening poker sessions in the Four Courts, presided over by the near-legendary Willy O'Reilly. The President has commissioned a memorial trophy in Willy's honour and we hope that it will be as sought-after a prize as a place around the poker table was in his heyday.

On a more serious note, one of the main objectives of the event is to raise funds for a charity which is doing Trojan work to facilitate the peace process at this critical moment in the history of this island. Co-operation Ireland (formerly Co-operation North) works to promote practical co-operation and communication through cross-border exchange and dialogue programmes involving young people, community groups, business and the media.

So I would call on you to come out in numbers to support a good cause, while at the same time enjoying a great night out. It's a win-win proposition! But remember: places are limited, so for more information contact Co-operation Ireland's Harriet Kinahan or Fiona Cunane on 01 661 0588 (fax: 01 661 8456, e-mail: harriet@co-operation-ireland.ie).

Tony Ensor,
Senior Vice-President

Wicklow Bar Association
Law Society President Patrick O'Connor and Director General Ken Murphy recently visited the Wicklow Bar Association. (Front row, *l-r*) Gus Cullen, Neville Murphy, Cyril Tarrant, Patrick O'Connor, David Tarrant, Ken Murphy, Marie Byrne, Denis Hipwell, Brendan Connolly; (back row, *l-r*) Patrick O'Toole, Joe Maguire, Declan Whittle, Karl Carney, Donal O'Sullivan, David Lavelle, Laurence Cullen, Deirdre Bourke, Brian McLoughlin, Niamh McKeever, Bernard O'Beirne, Andrew Tarrant, Mark Felton and Rory Benville

Lady golfers win equality of silverware
Law Society President Patrick O'Connor presents the new *President's Perpetual Trophy* to the Lady Solicitors' Golf Society. The men-only Solicitors' Golf Society has been playing for a President's Prize for many years. There are now over 80 members of the Lady Solicitors' Golf Society

SYS conference

The Society of Young Solicitors' spring conference was held on 19-21 March 1999 at Dromoland Castle Hotel, Co Clare. The lecture session featured Eamonn Leahy SC and Patrick Sweetman. Eamonn Leahy dealt with the topical issue of tribunals, examining the history of tribunals from 1679 to the present day, while Patrick Sweetman dealt with recent developments in conveyancing practice. The next SYS conference will be held on 19-21 November in the Rochestown Park Hotel, Cork.

Galway Law Alumni Association
Blackhall Place was the venue for the first meeting of the newly-formed Dublin branch of the NUI Galway Law Alumni Association. Over 100 Galway graduates attended the event, which was addressed by Dr Ruth Curtis, Vice-President of NUI Galway, President Patrick O'Connor and NUI Galway law lecturer Tom O'Malley. (*L-r*) Tom O'Malley, Mr Justice Seán Delap, Patrick O'Connor and Dr Ruth Curtis

Rosemary Nelson memorial meeting
A memorial meeting was held in Blackhall Place in July to pay tribute to the work of Rosemary Nelson, the Lurgan solicitor murdered by Loyalist paramilitaries earlier this year. Among the speakers were UK solicitor Gareth Pierce, Mary Lawlor of Amnesty International, Paul Mageean from the Committee on the Administration of Justice, Bar Council Chairman John MacMenamin and Law Society President Patrick O'Connor. Christy Moore was among those who provided music at the meeting. (*L-r*) Gareth Pierce, Paul Mageean and Patrick O'Connor

Call to arms for apprentices

As the leaves fall, a new moot court season opens. Apprentices are invited to test their mettle as advocates. Your future career on the bench is at stake!

Mooting is mock court advocacy. Participants are formed into teams of four or five. They are then given a fictitious complex legal problem. They prepare detailed arguments on the problem, presenting the case from the perspective of both sides. The written arguments are judged and marked. The moot then moves to the oral presentations. Two speakers from each team present arguments before a panel of (usually) three judges. The judges are generally lawyers with an interest in or experience of the area of law concerned. They can be academics, practising lawyers or judges. Judges are free to make interventions and ask questions. The degree of freedom that they exercise in this regard varies from competition to competition. Apprentices down through the years have shown a relish for the cut and thrust of this very demanding form of advocacy.

Capitol effort for Irish team

Legal Education Co-ordinator TP Kennedy with the Law Society's apprentice mooting team of Marsha Coghlan, Alan Roberts and Peppe Santoro (all from A&L Goodbody), Geoff Moore (Arthur Cox) and John Meade (McCann FitzGerald) in Washington DC. The team was competing against 62 others in the finals of the world's largest most prestigious moot court competition, the annual Philip C Jessup International Law Moot Court. Ranking in the top ten teams on overall score and in the top 20 on round points, the Irish team topped many prestigious international law schools, such as New York University and the London School of Economics. The winner of the competition was the National Law School of India at Bangelore, with the University of Pretoria, South Africa, coming second.

Apprentices are invited to consider participation in the following:

Jessup International Law Moot Court Competition

This competition involves a team of five preparing 25 pages of legal arguments on each side of the question and then presenting oral arguments (each speaker presents for 20 minutes). The problem for 1999/2000 concerns legal issues arising from the testing of drugs by companies in developed states on subjects in developing states. It looks at the obligations of developing states to protect the health and lives of their citizens balanced against the need to defeat preventable disease.

The apprentice team will compete in the Irish competition against teams from the universities and the King's Inns. The winning Irish team then represents Ireland in the international rounds of this competition in Washington DC in April 2000. The Law Society has a very impressive track record in this competition.

Bar Council/Butterworths National Moot Court Competition

This is an Irish law moot court competition involving all the universities and professional law schools in the state. Teams of four present written and oral arguments on issues of Irish law. The two teams in the final round argue their case in the Supreme Court before judges drawn from the Irish and Northern Irish bench. It is hoped that the winning team will travel abroad to compete against the winning team of another national moot court competition.

If any apprentice wishes to get involved in either of these competitions, please contact TP Kennedy, Legal Education Co-ordinator, Law School, Law Society, Blackhall Place, Dublin 7 (tel: 01 6724802). No previous public speaking experience is necessary – just a willingness to invest hard work and research in the project. Evening meetings will be organised for volunteers for either competition. G

Franco-Irish Lawyers' Association

The Franco-Irish Lawyers' Association recently held a conference at Blackhall Place entitled *French lawyers: their training and professional practice*. The conference was chaired by Mr Justice John Blayney, former judge of the Supreme Court, and the speakers were Leîla Anglade of UCD's Law Faculty, and Stéphane Kuzmin of law firm Arthur Cox, both of whom are French *avocats*.

The speakers described the different legal professions in France. The *avocats* form the largest group of lawyers practising in France and perform the role of advocate before the courts as well as being general legal advisers. The smaller profession of *notaire* has no right of audience in the courts but enjoys a monopoly in certain areas, principally non-litigious areas such as conveyancing and probate. The rigorous training of both professions was outlined and a survey of average hourly fees was distributed.

Pictured at the recent Franco-Irish Lawyers' Association conference were Mr Justice John Blayney, the association's president Mary Casey, Law Society President Patrick O'Connor, Leîla Anglade of UCD's Law Faculty, Stéphane Kuzmin of Arthur Cox, and the association's vice-president Fabienne Henry

The association's next conference is expected to take place in October, and members will receive details nearer the date. New members are welcome and details can be obtained from Fabienne Henry (01 6685041, e-mail: fabienne@indigo.ie). G

The Law Society/Bar Council Liaison Committee recently met in Blackhall Place to discuss matters of common interest to both branches of the legal profession. (*L-r*) Junior Vice-President Gerry Griffin, Deputy Director General Mary Keane, Director General Ken Murphy, Litigation Committee Chairman James McCourt, President Patrick O'Connor, Immediate Past-President Laurence K Shields, Bar Council Chairman John MacMenamin, Peter Somers BL, Gerard Durkan and Jerry Carroll, Director of the Bar Council

CLE seminar on new disclosure rules

Pictured at the recent CLE seminar (held jointly with the Irish Medical Organisation) on the new disclosure rules were (*l-r*) Patrick Groarke of the Law Society's Litigation Committee, Litigation Committee Chairman James McCourt, Director General Ken Murphy, and Tony Martin, A&E consultant at University College Hospital, Galway

Supreme Court hosts first-ever parchment ceremony

36 newly-qualified solicitors received their parchments at a ceremony in the Supreme Court in July. This was the first time that such a conferring had been held in the highest court in the land. At the reception in the Four Courts' Round Hall after the ceremony were Director General Ken Murphy, John Newall of the Law Society of Scotland and President Patrick O'Connor

Redesign for Law's School's professional course

The Society's Law School recently held an open evening to outline the objectives and educational philosophy that underpin the new redesigned professional course. Pictured at the presentation were Law Society President Patrick O'Connor and Law School Co-ordinating Solicitor Sylvia McNeece

CONTINUING LEGAL EDUCATION
AUTUMN/WINTER SCHEDULE

SEMINAR	VENUE	DATE
ESSENTIAL CONVEYANCING FOR PRACTITIONERS	Great Southern Hotel, Eyre Square, Galway	10/17/24 September *and* 1 October 1999
THE ESSENTIALS OF PERSONNEL MANAGEMENT	Jury's Hotel, Cork	14 September 1999
LITIGATION REMEDIES FOR CONVEYANCING PRACTITIONERS	Limerick Inn Hotel	5 October 1999
ACQUISITIONS AND MERGERS OF SOLICITORS' PRACTICES	Blackhall Place, Dublin 7	6 October 1999
NEW PENSION OPTIONS FOR THE SELF-EMPLOYED	Blackhall Place, Dublin 7	12 October 1999
PENSIONS & THE FAMILY LAW ACTS	Fitzpatrick's Hotel, Tivoli, Cork	14 October 1999
MEDICAL NEGLIGENCE	Blackhall Place, Dublin 7	21 October 1999
SHAREHOLDERS AGREEMENTS	Imperial Hotel, Cork	28 October 1999
NEW HOUSES	Blackhall Place, Dublin 7	4 November 1999
FAMILY LITIGATION *POST* BRUSSELS II CONVENTION	Blackhall Place, Dublin 7 *and* Imperial Hotel, Cork	10 November 1999 23 November 1999
BASIC CAT FOR PRACTITIONERS	Hodson Bay Hotel, Athlone	15 November 1999
SETTING UP IN PRACTICE	Blackhall Place, Dublin 7	17 November 1999
TRUSTS	Blackhall Place, Dublin 7	25 November 1999

For further information, please see CLE brochure enclosed with this month's *Gazette or* telephone the CLE department on 01 6724802 or fax 01 6724803. Suggestions for CLE seminars are always welcome.

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 September 1999)

Regd owner: Terence McGovern, Moneensauran, Glengevlin, Carrick on Shannon, County Cavan; Folio: 12359; Lands: Moneesauran; Area: 75.48 acres; **Co Cavan**

Regd owner: David Barry; Folio: 34940; Lands: situate in the part of the townlands of Lagile and Moanlahan, Barony of Imokilly and County of Cork; **Co Cork**

Regd owner: Sheila Harte and Donal Harte; Folio: 12677; Lands: property situate in part of the lands of Carrigane, Elector Division of Carrigtohill, Barony of Barrymore and County of Cork; **Co Cork**

Regd owner: Jeremiah Lenihan; Folio: 930; Lands: Part of the lands of Coolnakilla, situate in the Barony of Barrymore, County of Cork; **Co Cork**

Regd owner: Timothy and Alma Murphy; Folio: 23461F; Lands: known as a plot of ground situate in the Townland of Ballycannon, Barony of Cork; **Co Cork**

Regd owner: Margaret Perry; Folio: 39331F; Lands: a plot of ground known as 'Sonas', 43 Laburnum Drive, situate in the parish of St Finbar's, County Borough of Cork; **Co Cork**

Regd owner: Jessica and Bettina Stutchbury; Folio: 40820F; Lands: part of the townland of Carrigillihy, Barony of Carbery West (East Division), County of Cork; **Co Cork**

Regd owner: Luciano Tavolieri; Folio: 60353; Lands: property situate in the townland of Lisnahorna, White's Cross, County of Cork; **Co Cork**

Regd owner: Mary C (Maura) Twomey (deceased); Folio: 35734F; Lands: property known as 15 Friars Road, situate in the parish of St Nicholas, City of Cork; **Co Cork**

Regd owner: Patrick James McGee, Tamur, Pettigo, County Donegal; Folio: 32102; Lands: Tamur; Area: 12.72 acres; **Co Donegal**

Regd owner: Daniel Joseph McHugh, Ballintra, County Donegal, and also Drimark, Donegal, County Donegal; Folio: 39613; Lands: Rossnowlagh Lower; Area: 0.33 acres; **Co Donegal**

Regd owner: Ann Rodgers, Conlin Road, Killybegs, County Donegal, and also Fintra Road, Killybegs, Co Donegal; Folio: 18095F; Lands: Fintragh; Area: 0268 hectares; **Co Donegal**

Regd owner: John White, c/o Annie McGlinchey, Gortahork, Killygordon and Dreenan, Ballybofey, County Donegal; Folio: 23558F; Lands: Gortahork; Area: 1.10 hectares; **Co Donegal**

Regd owner: The County Council of the County of Dublin; Folio: 5479; Lands: property situate in the Townland of Stephenstown and Barony of Balrothery East; **Co Dublin**

Regd owner: Michael Martin; Folio: 1646 and 1648; Lands: Townland of Broghan and Barony of Castleknock; **Co Dublin**

Regd owner: Teresa Raftery, Shankill House, Shankill, Co Dublin; Folio: 15109; Lands: Shankill and Barony of Rathdown; Area: 8.795 hectares; **Co Dublin**

Regd owner: Southern Properties Limited; Folio: 12; Lands: Townland of Kingstown, Barony of Rathdown; **Co Dublin**

Regd owner: Sean Gardiner, Coolraugh, Craughwell, Co Galway; Folio: 5723; Lands: part of the lands of Aggard More containing 24a 1r 39p or thereabouts and part of the lands of Killora containing 2a 1r 32p or thereabouts; **Co Galway**

Regd owner: Henry Holmes; Folio: 17985; Lands: Monasterevan, Barony of Offaly West; **Co Kildare**

Regd owner: Michael Kiernan; Folio: 20106F; Lands: Monread South and Barony of Naas; **Co Kildare**

Regd owner: Lilian Ivy Kirby; Folio: 17702 and 18469; Lands: Calverstown and Barony of Narragh and Reban East; **Co Kildare**

Regd owner: Anthony Browne; Folio: 426L; Lands: Parish of St Nicholas (plan 142); **Co Limerick**

Regd owner: Mary Frazer; Folio: 15656; Lands: Townland of Killinane and Barony of Coshlea; Area: 9 Perches; **Co Limerick**

Regd owner: John King and Michael King; Folio: 700; Lands: Townland of Danganbeg and Barony of Glenquin; **Co Limerick**

Regd owner: Patrick Moloney (deceased); Folio: 21921F; Lands: Townland of Toomaline Lower and Barony of Coonagh; Area: .304 acres; **Co Limerick**

Regd owner: Kathleen Regan, Lisduff Hill, Longford; Folio: 9433; Lands: Lisduff; Area: 0.125 acres; **Co Longford**

Regd owner: Andrew Mullen and Siobhan McDonnell, 141 Ashfield View, North Road, Drogheda, and 141 Ashfield Green, Drogheda, County Louth; Folio: 15145F; Lands: Mell; **Co Louth**

Regd owner: Michael Conway, Cashel, Ayle, Westport, Co Mayo; Folio: 47172; Lands: Townland of Carrowbaun and Barony of Murrisk; Area: 0a 1r 33p; **Co Mayo**

Regd owner: John Scahill and Delia Scahill as limited owners, Kiltober, Cloonfad, Ballyhaunis, Co Mayo; Folio: 51991; Lands: Townland of Ballykilleen and Barony of Costello; Area: 26a 2r 39p; **Co Mayo**

Regd owner: Samuel Victor Wilkie and Ann Wilkie, 31 Carrickhill Road, Portmarnock, Co Dublin; Folio: 990F; Lands: Townland of Lankill and Barony of Murrisk; Area: 1a 1r 18p; **Co Mayo**

Regd owner: Phyllis Doggett, Abelstown, Stackaller, Navan, Co Meath; Folio: 18620; Lands: Abelstown; **Co Meath**

Regd owner: Francis and Doreen McGoey, Obertstown, Tara, County Meath; Folio: 5862F; Lands: Oberstown; Area: 0.688acres; **Co Meath**

Regd owner: Robert and Orla O'Doherty, 18 The Rise, Dunshaughlin, Co Meath; Folio: 24834F; Lands: Johnstown; **Co Meath**

Regd owner: Desmond Toole, The Strand, Ratoath, Co Meath; Folio: 1638; Lands: Ratoath; Area: 3.563 acres; **Co Meath**

Regd owner: Patrick Finnegan, Drummond, Inniskeen, County Monaghan; Folio: 7906; Lands: Treagh; Area: 18.975 acres; **Co Monaghan**

Regd owner: Julie Gilhooly, Nuremore Hotel, Carrickmacross, Co Monaghan; Folio: 15069; Lands: Drummond Otra; Area: 2.250 acres; **Co Monaghan**

Regd owner: Michael Gerard Maguire, Clontask, Drumully, Clones, County Monaghan; Folio: 2050F; Lands: Clontask; Area: 0.75 acres; **Co Monaghan**

Regd owner: Bernard Colgan (deceased); Folio: 2995; Lands: Stonestown and Barony of Garrycastle; **Co Offaly**

Regd owner: Henry John McKeon; Folio: 130; Lands: Kilcummin and Barony of Garrycastle; **Co Offaly**

Regd owner: Patrick Daly; Folio: 17557; Lands: Cullenagh; Area: Prop 1 – 49.871 acres, Prop 2 – 10.325 acres; **Co Queens**

Regd owner: Michael Regan, Kiltybranks, Lisacul, Castlerea, Co Roscommon; Folio: 10588; Lands: Kiltybranks containing 19 acres 0 roods and 10 perches; **Co Roscommon**

Regd owner: James Gilgan (deceased), Skreen, Co Sligo; Folio: 6013; Lands: Townland of Masreagh and Barony of Tireragh; Area: 18a 0r 0p; **Co Sligo**

Regd owner: Gerard Carew; Folio: 34921; Lands: Lewagh More and Brittas and Barony of Eliogarty; **Co Tipperary**

Regd owner: Richard Liston; Folio: 19214; Lands Derryfadda and Barony of Eliogarty; **Co Tipperary**

Regd owner: Anthony O' Mara; Folio: 37879; Lands: Cullenagh and Barony of Owney and Arra; **Co Tipperary**

Regd owner: Martin Sadlier; Folio: 22354; Lands: Lisheen Beg and Barony of Clanwilliam; **Co Tipperary**

Regd owner: Donal Taylor; Folio: 586L; Lands: President Kennedy Park and Barony of Thurles; **Co Tipperary**

Regd owner: Jeremy W and Bridget Brittain; Folio: 4306F; Lands: Townland of Reanclogheen, Barony of Decies within Drum; Area: 2.423 acres; **Co Waterford**

Regd owner: Thomas Coyne, Cappaboggan, Kinnegad, County Meath, and Milltownpass, County Westmeath; Folio: 1248; Lands: Cappaboggan; Area: 28.344 acres; **Co Westmeath**

Regd owner: James Molloy, Clonmore, Lismacaffrey, County Westmeath; Folio: 3995; Lands: Clonmore; Area: 3.188 acres; **Co Westmeath**

Regd owner: Joseph and Margaret Norris, 78 Willow Close, Athlone, County Westmeath, and Blyry, Moyderum, Athlone, County Westmeath; Folio: 2059F; Lands: Kilmacuagh; **Co Westmeath**

Regd owner: Margaret McLoughlin; Folio: 7498; Lands: Tuckmill Upper, Barony of Talbotstown Upper; **Co Wicklow**

Regd owner: Patrick Kelly; Folio: 1543; Lands: Knockeen and Barony of Shillelagh; **Co Wicklow**

WILLS

Byrne, Michael Joseph, late of Shanganagh, Dublin Road, Malahide, Co Dublin. Would any person having knowledge of a will executed by the above named deceased who died on 26 May 1998, please contact A&L Goodbody, Solicitors, 1 Earlsfort Centre, Hatch Street, Dublin 2, tel: 01 6613311 (Ref JAC)

Conroy, Una (otherwise Winifred Bernadette) (otherwise Conry) (deceased), late of 22 Ranelagh Road, Dublin 6, retired civil aervant, and also of 17 Ard na Mara, Salthill, Galway. Any solicitor having a will for the late Una Conroy (otherwise Conry) (deceased), who died on 2 March 1999, might please notify L O'Connor & Co, Solicitors, 196 Upper Salthill, Galway, tel: 091 525346, fax: 091 526474, DX 4538 Mary Street, Galway. Our file ref: CM/MS/3065

Davis, Patrick (deceased), late of 27 Walkinstown Parade, Dublin 12. Would any person having knowledge of the original will of the above named deceased who died at 27 Walkinstown Parade, Dublin 12 on 27 May 1998, please contact AT Diamond & Co, Solicitors of 217 Clontarf Road, Dublin 3, tel: 01 8330168, 8335916, 8333792, fax: 01 8334126

Donoghue, John Patrick (deceased), late of Carrigallen, Co Leitrim and The Lines, Finstanton Road, Finchley, London. Would any person having knowledge of a will of the above name deceased who died on 11 June 1997, please contact FJ Gearty & Co, Solicitors, 4/5 Church Street, Longford

Faughnan, Thomas Martin (DR), late of 7 Ardoon Villas, Upper Salthill Road, Galway (formerly of No 3 The Elms, Mount Merrion, Blackrock, Co Dublin, and formerly of 67 Merrion Square, Dublin 2). Any person having knowledge of a will executed by the above named deceased who died on or about 10 July 1999, please contact Sean A Mahon & Co, Solicitors, Market Square, Roscommon, tel: 0903 27350

Ferguson, Margaret (otherwise Gretta), late of 25 Euston Street, Greenore, County Louth. Would any person having knowledge of a will executed by the above deceased who died on 7 September 1987, please contact Wilkinson & Price, Solicitors, Main Street, Naas, County Kildare, tel: 045 897551, fax: 045 876478

Gallagher, Daniel Joseph (deceased), late of 43 Eastcott Hill, Swindon, Wiltshire, England. Would any person having knowledge of any will executed by the above named deceased who died on 5 March 1999, please contact O'Gorman Cunningham & Co, Solicitors, 16 Upper Main Street, Letterkenny, Co Donegal, tel: 074 24828, fax: 074 21900

Gillan, Michael (deceased), late of 69 Ignatius Road, Drumcondra, Dublin 9. Would any person having knowledge of a will made by the above who died on 17 February 1999, please contact O'Connor Walshe, Solicitors, Merchant's House, Merchant's Quay, Dublin 8, tel: 01 6793941

Guckian, Mary Brigid (deceased), late of 243 Howth Road, Killester, Dublin 5. Would any person having any knowledge as to the whereabouts of a will dated 24 January 1987 of the above Mary Brigid Guckian please contact John Nolan and Company, Solicitors, 11 Parliament Street, Dublin 2, tel: 6770743, fax: 6798420

Handy, Brigid (deceased), late of 20 Lea Road, Sandymount, Dublin 4. Would any person having knowledge of a will of the above named deceased who died on 29 June 1991, please contact O'Connor, Solicitors, 8 Clare Street, Dublin 2, tel: 01 6764488, fax: 01 6766764 (Ref JL)

Handy, John Edward (deceased), late of 20 Lea Road, Sandymount, Dublin 4. Would any person having knowledge of a will/codicil of the above named deceased who died on 1 July 1991, please contact O'Connor, Solicitors, 8 Clare Street, Dublin 2, tel: 01 6764488, fax: 01 6766764 (Ref JL)

McGrath, Patrick, late of 24 Davitt Street, Tipperary Town in the county of Tipperary. Would any person having any knowledge of a will executed by the above named deceased who died on 9 March 1999 at his residence at 24 Davitt Street, Tipperary Town, please contact m/s English Leahy & Associates, Solicitors, St Michael Street, Tipperary, tel: 062 52577, fax: 062 52729

Murphy, Maire (deceased), late of 7 St Peter's Court, Phibsboro, Dublin 7. Would any person having knowledge of the will of the above named deceased who died on 15 July 1999 please contact Abercorn, Solicitors, 38 Pembroke Road, Dublin 4, tel: 01 6670088, fax: 01 6670100

Murphy, Pauline (née Delahunty), late of 15 St Joseph's Park, The Lough, Cork. Anybody knowing the whereabouts of the will of the above named deceased who died on 18 May 1998 please contact Fachtna O'Driscoll, O'Flynn Exhams & Partners, Solicitors, 58 South Mall, Cork, tel: 021 277788

Naughton, Sean (otherwise John), late of Larkfield House, Monksland, Athlone, in the county of Roscommon. Any person having knowledge of a will executed by the above named deceased who died on or about 11 May 1999 please contact Sean A Mahon & Company, Solicitors, Market Square, Roscommon, tel: 0903 27350

Nee, Joseph (deceased), late of Briarhill, Castlegar, Galway. Would any person having knowledge of a will of the above named deceased who died on 1 May 1999, please contact William F Semple & Company, Solicitors, Lough Corrib House, Waterside, Galway, tel: 091 567371

O'Connell, Eugene (deceased), late of Currandulla Nursing Home, Currandulla, Co Galway (formerly of Kinnity, Birr, Co Offaly). Would any person having knowledge of a will executed by the above named deceased who died on 3 March 1999, please contact Messrs Geraghty & Company, Solicitors, Eyre Square, Galway, tel: 091 565258/9; fax: 091 568777

O'Connor, Patrick (deceased), late of New Street, Abbeyfeale, Co Limerick, and formerly of No 25 Ballykeeffe Estate, Limerick City. Would any person having knowledge of a will of the above named deceased who died on 10 December 1998 at New Street, Abbeyfeale, Co Limerick, please contact Dennison, Solicitors, Main Street, Abbeyfeale, Co Limerick, tel: 068 31169, fax: 068 31614

EMPLOYMENT

Recently-qualified male solicitor seeks PQE in Dublin area. Mid-fifties, retired after 30 years in the publice service. Own insurance and practising certificate. Practical experience considered more important than remuneration. **Reply Box No 60**

Solicitor with minimum two years' experience to work in property department. Salary range £30K. **Reply to Box No 70**

Newly-qualified solicitor. Salary range £20K. **Reply Box No 71**

Solicitor required for practice in County Tipperary, with at least one year's post-qualification experience in general practice, particularly conveyancing, probate and taxation work. **Reply to Box 72**

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Please forward CV to:
Ms Patricia Hughes,
Office Manager

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Solicitor, currently full-time lecturer on law degree course, seeks position in research and/or training in Dublin firm, especially company/commercial law area, full-time or part-time, $6^1/_2$ years' experience as researcher in major Dublin law firm, including setting up and maintaining internal research systems, researching legal problems for practitioners, in-house training, writing for law publiciations etc. **Reply to Box No 76**

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NOTICE

To clear up the considerable confusion that has arisen, and for the avoidance of doubt, I wish to make it clear that I have no connection, direct or indirect, with the firm of Solicitors run by Tom Flood, Solicitor, practising under the style of "Esmond Reilly Solicitors," with an address at Dargan House, Fenian Street, Dublin 2.

I practice on my own account, and under my own name, at Broomfield Business Park, Malahide, Co. Dublin.
Tel: 8464222
Fax: 8464220
E.mail: esmond@securemail.ie

Care should therefore be taken to differentiate between the two firms and to ensure that all communications are directed to the correct firm.

Signed: Esmond Reilly
Solicitor,
Malahide.

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

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Apprentice solicitor seeks post-professional course change of master to Cork city/county in Feb 2000. Mature female, BCL LLB, Dip Arb (UCD), computer literate, office experience, e-mail: apprentice@ireland.com, tel: 086 2246720 or **Box No 70A**

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