GAZETTE

REGULARS

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Equality of opportunity

In last month's *Gazette* (page 11), you will have seen a report detailing objections raised by me with the Civil Service and Local Appointments Commissioners regarding two upcoming appointments.

On behalf of the solicitors' branch of the legal profession, I complained in the strongest possible terms at the appearance of an advertisement for two positions of legal adviser, one each in the Office of the Director of Equality Investigations and in the Equality Authority, on the basis that the eligibility for these positions was confined to barristers only.

A relic of history

The Council of the Law Society has had a considered view for many years that the exclusion of solicitors from State legal appointments, such as those of legal adviser in the two new bodies, is a relic of history which works contrary to the public interest. To exclude solicitors from even consideration for these positions as legal adviser is a form of discrimination without any objective justification. It is the view of the Law Society that the sole basis for recruitment for positions such as these should be whether a candidate, with legal qualifications, has the necessary experience and ability to do the job and not whether the candidate comes from one or other branch of the legal profession.

The argument 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'* as stated by the Minister for Justice, Equality and Law Reform in Dáil Éireann on 1 June is completely unjustifiable, logically indefensible and offensive to solicitors in its implicit belittling of their training, work experience and qualifications. The education and training of solicitors in Ireland is, to say the least, in every way the equal of that of barristers.

What is so special, so peculiar, so unique about the legal skills required for these legal adviser roles that a newly-qualified barrister who has never even received a brief would in principle be qualified for appointment but, by contrast, a solicitor, who might have decades of experience in this area of the law, might have prepared, advised on and perhaps even pleaded in the High or Supreme Court dozens of major relevant cases, might even have written a leading text-book on equality law and pleaded cases on the subject before the European Court of Justice would, in principle, simply because he or she was a solicitor rather than a barrister, be unqualified for these appointments to the State legal service?

It is ironic, indeed absurd, that one section of the Department of Justice, Equality and Law Reform is drafting legislation to make certain solicitors eligible to be judges of the High and Supreme Courts while another section of the same department insists that solicitors are incapable of being in-house legal advisers.

Further questions have been tabled in Dáil Éireann on the matter and I have written directly to the Minister expressing the Society's concerns. We can only hope that the belief in equality of opportunity which must, of necessity, be the driving force of both the Office of the Director of Equality Investigations and the Equality Authority will manifest itself by the obvious solution to this remarkable situation.

A woman's world

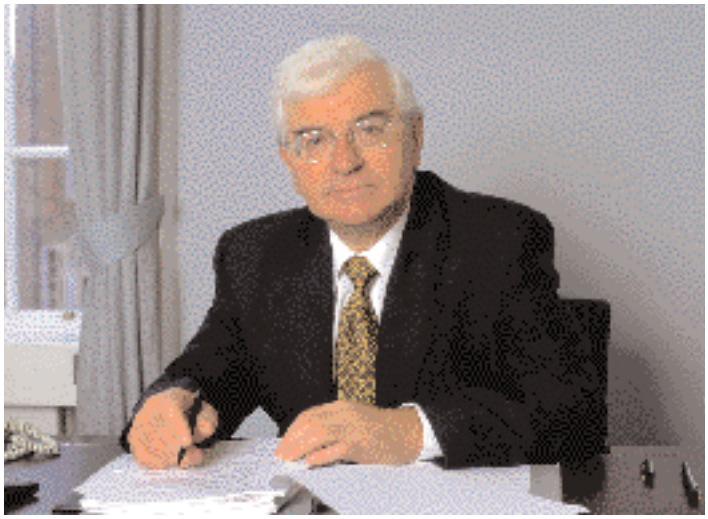
On a related theme, I am pleased to note that, in relation to entry to the solicitors' profession, there is no inequality of opportunity on the basis of gender, with more and more women qualifying as solicitors and, increasingly, choosing to commence or remain in practice. Statistics compiled recently show that, in every year since 1995, more women than men have been admitted as solicitors. At the end of June of this year, there were 2,695 women and 4,248 men on the Roll of Solicitors. Of these, 1,798 women and 3,209 men are practising within the profession. This compares with 852 women and 2,570 men practising as solicitors in 1989. Of the total 892 apprentice solicitors currently in the system, 519 are women and 373 are men.

The strength of any profession, including the one of which we are all privileged to be members, lies in the balance of qualities, experiences and skills brought by its individual members. This balance can only be achieved if there is an absence of barriers to access, whether on the basis of gender, colour or creed. In this regard, the solicitors' profession has nothing to fear from within and we will continue to strive to eliminate unjustified barriers being raised by those outside the profession who should know better. G

Patrick O'Connor
President

To prosecute or not to prosecute?

'I will not do that which my conscience tells me is wrong, upon this occasion, to gain the huzzas of thousands, or the daily praise of all the papers which come from the press. I will not avoid doing what I think is right, though it should draw on me the whole artillery of libels; all that falsehood and malice can invent, or the credulity of deluded populace can swallow.'
Lord Mansfield in *R v John Wilkes* ([1770] 4 Burr 2527, 2563)



DPP Eamonn Barnes: no-one should be prosecuted solely because of any anticipated public reaction to the decision

The issue of whether or not to prosecute a criminal offender is of crucial importance in the justice system. Justice is a cardinal virtue which, together with liberty, is the condition under which every man and woman can identify with society, feel at one with it and accept its rulings as his or her own. When injustice is done to another fellow human being, we do not merely hurt him or harm his interests but, according to one commentator, we add insult to injury. We are angry when we are hurt but indignant when treated unjustly.

The burden of responsibility for achieving a significant degree of justice in this country has fallen on the shoulders of Eamonn Barnes, the Director of Public Prosecutions, who is to retire from his position in September 1999. One of his most difficult tasks is to decide whether or not to prosecute. The DPP noted in his annual report (published in March) that the consequences of a prosecution for a defendant can and frequently do include irretrievable loss of reputation or employment, disruption of family relations and very substantial expense. If in fact the person charged is innocent, the resulting injustice is obvious. Mr Barnes noted that it was essential that every effort humanly possible be made to get this decision right.

The first stage in a decision of whether or not to prosecute is the determination of whether or not the evidence submitted establishes a *prima facie* case of guilt of a criminal offence in relation to an identified person. The DPP has noted that a *prima facie* case means a body of evidence on which a jury, properly instructed on the relevant law, could conclude beyond a reasonable doubt that the suspected person was guilty of the offence to be charged. He emphasises the word 'could', not 'would': the prosecutor can have regard only to admissible evidence.

Difficult questions

If the decision is that a *prima facie* case exists, a second stage or level arises for consideration. This presents more difficult questions for the prosecutor, who must consider whether or not the evidence considered to amount to a *prima facie* case is credible and reliable. Accusations can be made – and are made – for all sorts of reasons. The DPP noted that they can be unfounded or inaccurate without being deliberately so. They can sometimes be made maliciously. He also noted that the accusations can be made as a result of simple human error. Every case is unique and must be evaluated on its own merits.

Corroboration is a factor in deciding whether or not to prosecute. The issue often boils down to whether there is any substantial or persuasive reason to disbelieve the evidence or some essential element in it.

Sometimes there is the factor when the quality of mercy or the interests of justice may not result in the initiation of a prosecution. Such prosecutorial discretion is used sparingly. A predominant consideration, according to the DPP, is the public interest and the interests of justice. An important example is the granting of immunity for law enforcement or other public interest reason. Another example would be a decision taken in the best interests of the victim of a crime. Sometimes the public interest may indicate in some cases that the person suspected of first-time minor offences should not be prosecuted on the basis of being less likely to re-offend if they are not brought into the penal system.

Absolute impartiality

In his report, the DPP noted that prosecutorial decisions must be taken with absolute impartiality. This means that not alone should people not be immune from prosecution because of who they are or what they do, but also that all persons must be accorded precisely the same measure of justice by arriving at a prosecutorial decision. In particular, no-one should be prosecuted solely because of any anticipated public reaction to a decision to the opposite effect. These criteria deserve to be commended.

Eamonn Barnes was born in County Sligo in 1934. Having read history, politics, Roman law and jurisprudence at University College, Dublin, between 1953 and 1958, he was called to the Irish Bar in 1958. Between 1958 and 1966, he practised at the Bar and on circuit in the West of Ireland, covering all areas of litigation and arbitration, and in criminal matters acted exclusively for the defence.

In 1966, he joined the Office of the Attorney General with special responsibility for public international law, examination of proposed legislation, constitutional law and criminal prosecutions. He led the Irish delegations which in 1972 negotiated the terms of the extradition treaties which were subsequently ratified between Ireland and the United States and between Ireland and Australia. In 1975, he was appointed the country's first Director of Public Prosecutions. He has organised the office and established a centralised and uniform system of prosecution for this country, and was elected the first president of the International Association of Prosecutors for a three-year term at its inaugural general meeting in Budapest in September 1996. In 1997, he was appointed Adjunct Professor of Law at St John Marshall Law School, Chicago, and is a member of the supervisory board of the Association for European Law Enforcement Co-operation.

I can only conclude in the context of an assessment of Eamonn Barnes's quarter of a century as DPP with paraphrasing the words of Lord Mansfield. I will do justice and make decisions upon proper criteria. I will not do that which is against the responsibilities of my office to gain the huzzas of thousands or the daily praise of the newspapers and television media.

Eamonn Barnes has rendered great and noble service to Ireland and beyond. G

Dr Eamonn Hall is Company Solicitor of Telecom Éireann plc.

Applications are invited from suitably qualified persons to fill the position of

Director of Public Prosecutions

The office of Director of Public Prosecutions was established under the Prosecution of Offences Act, 1974. The function of the Director is the direction and supervision of public prosecutions and related criminal matters in accordance with the relevant legal provisions. The post of Director of Public Prosecutions which is a full-time Civil Service post will become vacant upon the retirement of the current Director in September 1999.

Applicants must:

- be a practising barrister or a practising solicitor,

  and
- have practiced as a barrister or solicitor for at least ten years.

Service for any period in a position in the Civil Service for appointment to which practice as a barrister or a solicitor was a necessary qualification, will be regarded as practice as a barrister or a solicitor for that period and persons while holding such positions will be regarded as practising barristers or practising solicitors as the case may be.

Salary £86,691 (net of appropriate contribution in respect of personal superannuation benefits)

Superannuation: There is provision for superannuation

The appointment will be for a term of seven years and will not be renewable.

Applications will be considered by the Committee established under the Prosecution of Offences Act, 1974 to select candidates for appointment to the office. Candidates may be interviewed; in such an event the Committee may, at their discretion, decide that a number only of the applicants shall be invited to attend for interview. The appointment will be made by the Government.

Application forms and further details of the terms and conditions which will apply may be obtained from:

Mr. Donagh Morgan,
Secretary to the Selection Committee,
Department of the Taoiseach,
Room 140, Government Buildings,
Upper Merrion Street,
Dublin 2.

Telephone (01) 6194121

E-mail Donagh_Morgan@taoiseach.irlgov.ie

Closing date for receipt of applications: 5.00 p.m., Friday, 9 July 1999

IBEC report ignoring 'real problem of negligence culture'

The Law Society has dismissed a recent report from employers' body IBEC on the level of compensation claims in Ireland as containing nothing new and continuing to ignore the real issue, which is the unacceptable level of accidents in this country.

'The real problem in Ireland is not a compensation culture – it's a negligence culture', said Law Society Director General Ken Murphy. 'IBEC says it wants to reduce the costs of personal injury claims, but it ignores the fact that the best way to do this is to reduce the shocking number of accidents in this country'.

The IBEC report argued that personal injury claims represent a disproportionately high cost for Irish employers and insurers, but the Society says that official statistics do not bear this out. Instead, it points to figures from the Health and Safety Authority (HSA) showing that workplace accidents (resulting in three or more days off work) increased by 25% between 1996 and 1998. Official statistics also show that there was a 44% increase in fatal workplace accidents in the single year between 1997 and 1998.

Murphy: 'IBEC missing the point'

'Rather than complaining about the system which enables the victims of these accidents to pursue their constitutional right to claim compensation for the injuries they have suffered, IBEC should concentrate its efforts on persuading its members to protect the health and safety of their employees', added Murphy.

Web site forum for members

The Society's Practice Management Committee is anxious to help practitioners who have a particular interest in any topic by providing them with the facilities to share information. The Society's new web site will allow this to be done easily.

Over the coming months, it plans to establish user groups in any area where practitioners wish to come together to share information or seek each other's help. This will be done by way of news groups on the web site, where messages posted by any member of the group can be read and replied to by other members of the group if they wish. Areas of interest might include family law, criminal law and capital taxes. While the accuracy of the information can never be guaranteed, this forum will give solicitors the chance to share information with those whom they wouldn't ordinarily get the chance to meet.

Anyone who wants to participate in any news group topic should e-mail Claire O'Sullivan on c.osullivan@lawsociety.ie to register their interest.

No more court 'vacations'

Irish courts will no longer have 'vacations' if one of the main recommendations from the Working Group on a Courts Commission is accepted by Justice Minister John O'Donoghue. But the group did not suggest ending holidays: it objected to the term 'vacation' itself, which it said was 'misleading, a misnomer, leads to misunderstanding of the situation, and should be abandoned'.

Instead, the court year should be divided into court terms and recesses. The main issue was access to the courts, which the working group said was maintained on a year-round basis for urgent cases.

The group argued that organising the legal year should be considered by the Courts Service when it is established. It also recommended that the service should consider switching the summer recess (or long vacation) from August/September to July/August, as most people holiday during the latter period.

The Law Society wants to canvass readers' views on this issue, so please take the time to fill out the form below and return it (a photocopy will do).

Would you prefer the summer 'recess' to occur in the month of (tick as appropriate): July/August ☐ August/September ☐

Name (optional) _____

Please indicate whether you are a solicitor ☐ barrister ☐ judge ☐ or other reader ☐

Please return to Ken Murphy, Director General, The Law Society, Blackhall Place, Dublin 7, by 10 August 1999.

BRIEFLY

Technology law updates available on-line

New legislation and precedents dealing with information technology law are available at a new web site edited by barristers Karen Murray and Denis Kelleher, the authors of *Information technology law in Ireland*. Its address is http://www.ncilr.ie/itlaw, and the site deals with the main areas influencing IT law, including copyright, intellectual property, privacy and data protection, e-commerce, computer misuse, the Y2K bug, and web sites and the law.

Business conference heads for Barcelona

Specialists from over 173 countries worldwide will contribute to the International Bar Association (IBA) business law section's annual conference in Barcelona, Spain, on 26 September to 1 October. One of the keynote speakers will be the EU's Commissioner for Competition, Karl van Miert. For more information, contact Anna Cavell at the IBA (tel: 00 44 171 629 1206, fax: 00 44 171 409 0456, or e-mail: confs@int-bar.org).

Meeting, Presidents' Hall, Blackhall Place, 10 July

A meeting to discuss the feasibility of relocating the Law Society's headquarters from Blackhall Place to a site adjoining the new Law School has been arranged by concerned members for Saturday 10 July at 10.30am at Blackhall Place. The meeting will also 'give some reflections on the Society at the Four Courts' and consider the impact of the 'Millennium Bug', leading to 'Why a Christian Alliance?'. For information, contact TCG O'Mahony on 01 6683282.

Simon to run hot fund-raiser

Dublin Simon Community is running a red-hot fund-raiser to mark the millennium. The organisation is running a week-long hike across the Sahara Desert from 19 to 26 February next year. The fee is £150, plus a minimum level of sponsorship. For information, contact Sahara Desert Hike (tel: 01 8720188).

Shining Starr questions judges' role in political probes

Judges should not be asked to lead investigations into the activities of politicians because it can compromise their own role, independent counsel Kenneth Starr has told the *Gazette*, *writes Barry O'Halloran*. Starr, whose five-year inquiry into President Clinton's links with a financial scandal and his marital infidelities led to the failed congressional bid to impeach the president, said that in the United States it was felt that the integrity and independence of the judiciary was threatened whenever its members stepped outside their constitutional role.

US independent counsel Kenneth Starr: 'There's real discomfort when judges are asked to take on something that may be seen as political'

Starr, a former US Circuit Court judge and Solicitor General, would not comment on the fact that two members of the Irish High Court are chairing probes into allegations of political corruption, but he pointed out that the American view of the role of the judiciary was quite different to the Irish one.

'In some countries, judges may carry on a variety of roles, but in our country there is real discomfort when judges are asked to take on something that may be seen as political, or where their involvement may have political implications', he said. 'That can compromise the integrity of the judicial branch of our constitution in the eyes of many people'.

He added that Americans expected their judges to be completely non-political in return for being promoted to the bench. 'That is the constitutional trade-off that we ask of them', he stressed.

While the report delivered by his own investigation is freely available on the Internet, Starr believes that the parliamentary privilege which allowed the US Congress to release it in this form should be exercised with responsibility. He argued that a balance should be struck between the interests of personal privacy and this privilege. 'I never believed that Congress would release the report in full, and I don't think anyone realised the implications of doing that', he said.

Starr was speaking exclusively to the *Gazette* after delivering the fifth Nissan Lecture in Trinity College, Dublin, recently. During his talk, he pointed out that his office still holds 'extremely confidential and sensitive' information relating to the Monica Lewinsky/Bill Clinton affair which was not included in the controversial report. He warned that in the future there could be enormous pressure to release information like this when it is gathered as part of any similar investigation.

But he also said he believed that the independent counsel system was inherently faulty and went against the spirit of the US constitution, if not the letter. The law under which he and other independent counsel were appointed included a 'sunset provision' under which it ceases to have effect. From 30 June last, no more independent counsel will be appointed but existing ones will continue their work.

Starr explained that the system was part of the Watergate legacy. Following that particular scandal, Congress passed the independent counsel legislation, which authorised their appointment by three federal appeal court judges. The American Attorney General is allowed to seek the counsel's appointment, and this cannot be judicially reviewed, but he has no discretion on whether or not to prosecute on the basis of the counsel's findings.

Starr said he wanted to see a return to the old special prosecutor regime, which he argued had worked effectively in many cases.

Sound of silence for audio tape initiative

A recent initiative aimed at helping solicitors keep abreast of current developments in the law has been suspended. *Sound Law*, an innovative legal update service by audio cassette, may be revived at some later stage – but only if there is sufficient demand. The tapes covered current legal news stories and also flagged important recent statutes and statutory instruments, while noting significant judgments from the courts.

In a review of the first audio tape in the *Gazette* (November, 1997), Patrick O'Connor, now Law Society President, noted that 'keeping up with the ever-changing legal system, statutes, regulations, court cases and law in general is extremely difficult … the tape goes a long way to helping you keep in touch'. But, for the time being at least, not any more.

BRIEFLY

McCanns strikes cross-border deal

Leading Dublin law firm McCann Fitzgerald has joined forces with Belfast solicitors L'Estrange & Brett to form the North South Legal Alliance which will provide an integrated service for businesses operating on both sides of the border. The alliance will handle cross-border mergers and acquisitions, financial transactions, and infrastructure projects. It will also deal with businesses with interests on both sides of the border, public/private partnerships and cross-border institutions.

McCann Fitzgerald chairman, Ronan Molony, said the alliance is designed to share both firms' expertise.

Judgments go on-line

Up-to-the-minute information on the judgments of Scottish courts is now available on-line. A new web site has been launched that includes a searchable database of opinions from the Supreme Court, the full text of judgments from the Courts of Session, and selected judgments from the High Court. Selected judgments from the Sheriff Courts will be added as the database is developed. The site can be found at *www.scot-courts.gov.uk*.

Licensing court date set for September

The yearly licensing District Court for the Midleton area in Co Cork (including Riverstown and Castlemartyr) will be held on Friday 24 September 1999 in line with order 81 of the *District Court Rules 1997*, the local District Court clerk has told the Law Society.

Compensation Fund payouts

The following claim amounts were admitted by the Compensation Fund Committee and approved for payment by the Council at its meeting in June. Conor McGahon, 19 Jocelyn Street, Dundalk, Co Louth – £943.03; Dermot Kavanagh, 2 Mary Street, New Ross, Co Wexford – £6,000.

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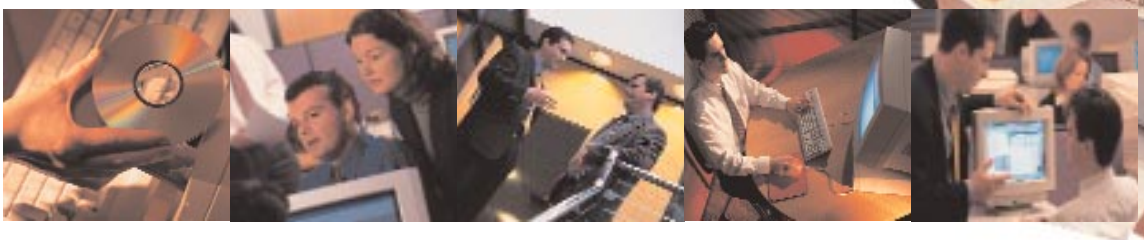

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DIPLOMA IN APPLIED EUROPEAN LAW

The Law Society of Ireland (with the support of the European Commission)

The diploma is designed for the following:

- Those with little or no knowledge of European law. The course provides coverage of the basics of European law and then moves on to address in more detail areas of European law of relevance to practitioners
- Those with *some* working knowledge of European law who wish to gain greater expertise in various specialist areas
- Those who may have studied European law in university or in preparation for the final examination – first part and wish to bring their knowledge up to date. The course focuses on the major changes made to European law in recent years.

COURSE PARTICIPANTS

The diploma is open to solicitors, barristers, apprentices and others with an interest in the subject.

TIMETABLE AND VENUE

The course will be provided in modular fashion on Saturdays following academic terms over the course of a year (approximately 20 sessions). The course will be held in Blackhall Place and will commence in January 2000 through to November. There will be a two-month gap in lectures for summer and two/three weeks for Easter. No lectures will be given on bank holiday weekends.

COURSE REQUIREMENTS

Persons wishing to obtain the diploma will be obliged to do a written assignment and pass an examination.

CERTIFICATE IN EUROPEAN LAW

Candidates may attend lectures without sitting the examination and will be conferred with a *Certificate in European law* if they attend at least 80% of all lectures.

LECTURING TEAM

Lecturers will be drawn from solicitors, academics and others with expertise in European law.

MATERIALS

Candidates will be provided with the materials necessary to study for the diploma and will not be required to buy textbooks.

MODULES

Participants will be required to attend modules in: a) *Introduction to European law*, and b) *European business law.* They will then have a choice of four of the seven other modules (with the option of attending all). Numbers interested in attending the course will dictate whether it is possible to offer all these modules.

Introduction to European law *(3 1/2 days)*

- Historical context and sources
- The treaties
- Community institutions and legislation
- Reading and interpreting Community legislation
- Fundamental principles
- General principles of Community law
- Incorporation of Community law into national law.

Business *(2 1/2 days)*

- The single market
- Customs duties and discriminatory taxation
- Free movement of goods and capital
- Freedom of establishment and free movement of services
- Public procurement.

Candidates will then be required to choose four of the following:

Introduction to competition law *(2 days)*

- Anti-competitive Agreements: article 85
- Abuse of a Dominant Position: article 86
- Irish competition legislation
- Enforcement
- Competition law and employment contracts.

Competition *(2 days)*

- Article 85(3): exemptions – individual and block exemptions
- Merger control
- State aids: articles 92-94
- Intellectual property and competition
- Position of Member States: article 90
- Extra-territorial application.

Consumer law *(2 days)*

- Consumer policies
- Product liability
- Food labelling and regulation.

Employment and social policy *(3 days)*

- Free movement of persons
- Recognition of qualifications
- Sex discrimination
- Acquired rights
- Recent developments.

Environmental law *(2 days)*

- European environmental law
- Irish implementation.

Litigation *(3 days)*

- Choice of law provisions in contracts and agreements: *Rome convention*
- Disputes over jurisdiction: *Brussels* and *Lugano* conventions
- Recognition and enforcement of foreign judgments: *Brussels* and *Lugano* conventions
- Court of First Instance
- Court of Justice
- References to the Court of Justice
- Enforcement actions
- Indirect challenges
- Remedies.

Human rights *(2 days)*

- *European convention of human rights and fundamental freedoms*
- Jurisprudence of the European Court of Human Rights.

FEE

The fee for the course is £490, which includes all materials and examination fees. £400 of the fee is refundable if the participant decides not to proceed with the course, and notifies the Law Society before 3 December 1999. There is a non-refundable booking deposit of £90 payable on application.

For further information, contact TP Kennedy, Legal Education Co-ordinator, Law School, Law Society of Ireland, Dublin 7 (tel: 01 6710200; fax: 01 6710064).

DIPLOMA IN APPLIED EUROPEAN LAW – APPLICATION FORM

Name: _____

Firm: _____ DX no: _____

Address: _____

Telephone no: _____ (Home) _____ (Work). Fax no: _____

What knowledge of European law do you have? _____

Professional qualification: _____ Year qualified: _____

Options chosen: 1. _____ 2. _____

(In order of preference) 3. _____ 4. _____

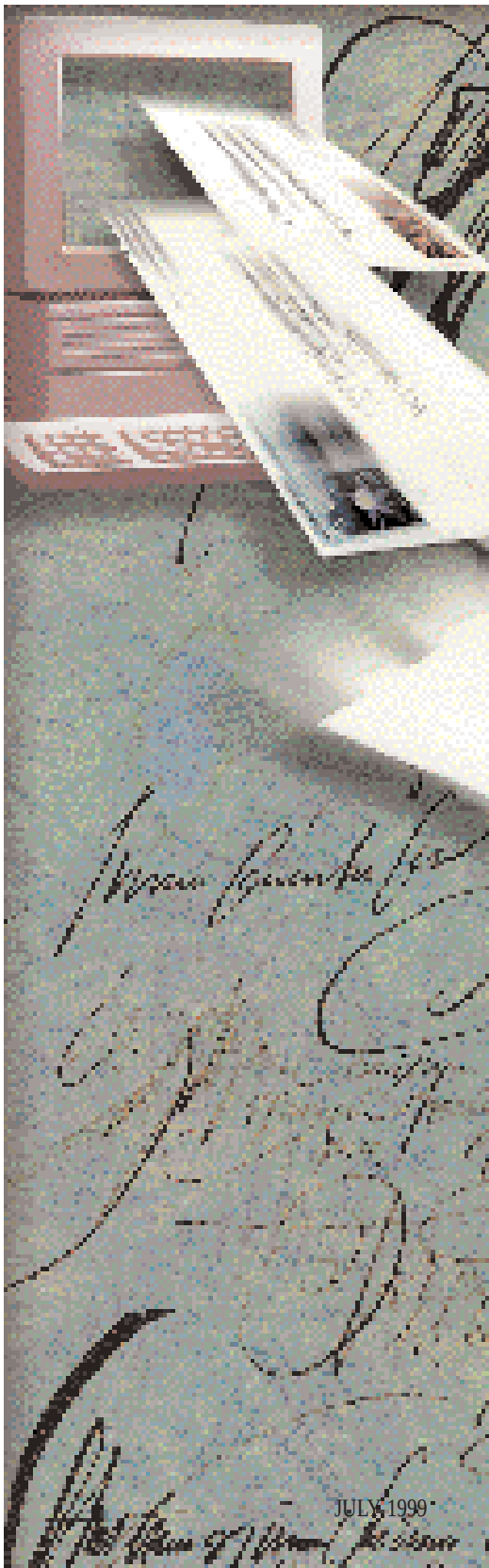
Signature: _____ Date: _____

I attach a non-refundable booking deposit of £90. Final date for receipt of applications: 19 November 1999.

Please return completed form to TP Kennedy, Legal Education Co-ordinator, Law School, The Law Society, Blackhall Place, Dublin 7.

Talking u

E-mail is quick, easy and fun to use, but its essential informality could land you in legal hot water, as a number of British companies have found to their cost. UK lawyer and computer specialist Nigel Hill points out the pitfalls surrounding this new technology and suggests some solutions to the problems of e-mail abuse



In an out-of-court settlement, Norwich Union paid stg£450,000 to Western Provident Association because of libellous comments on its internal e-mail system about Western Provident's alleged financial problems. In another British case in 1995, a policeman received 'substantial' damages in an out-of-court settlement with supermarket giant Asda when Asda staff posted an internal e-mail alleging that he was involved in refund fraud.

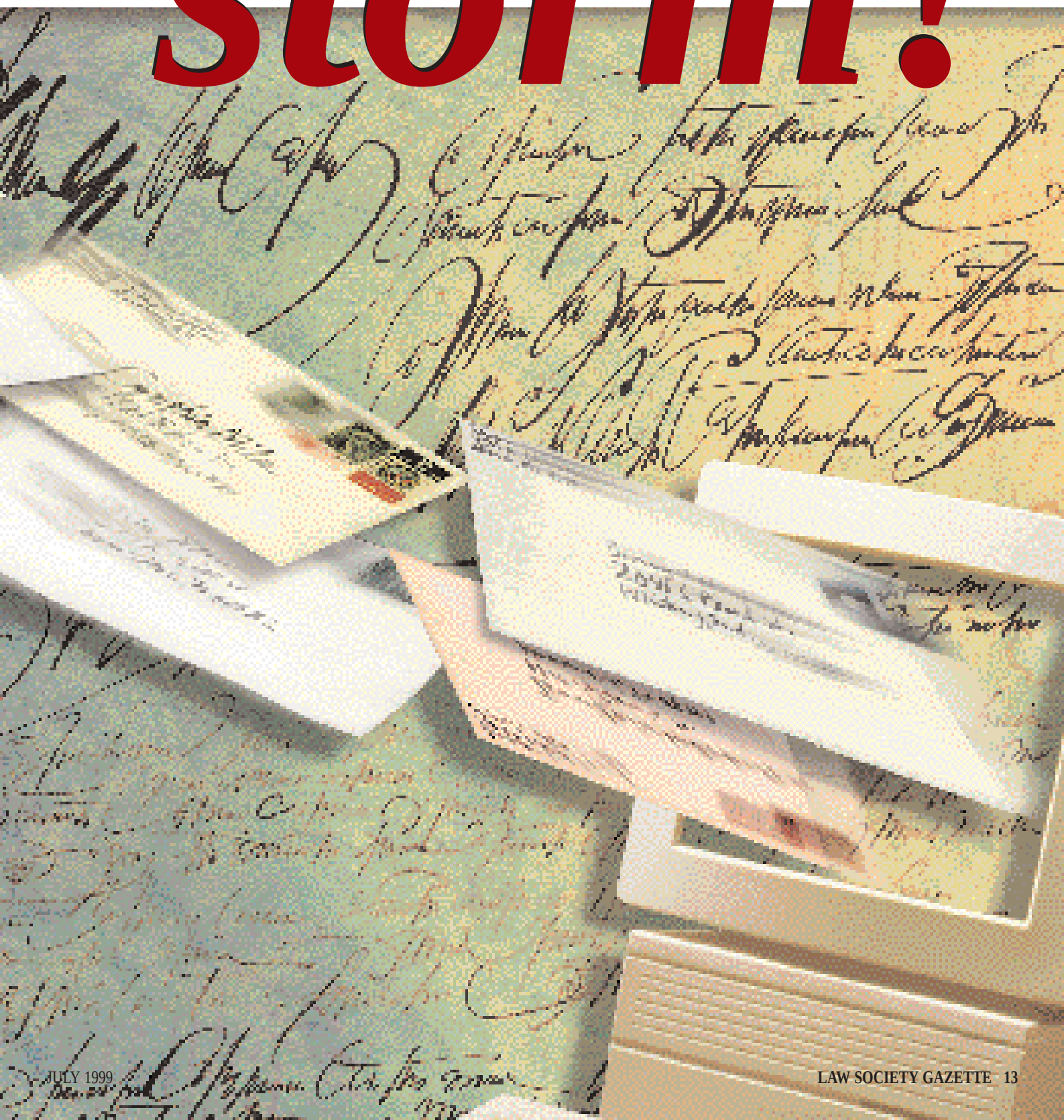
These cases highlight the danger of careless use of the e-mail system and serve as a grim reminder that companies can suffer heavily from abuses by their staff. Even if an act is expressly forbidden, an employer may still be vicariously liable for it if it was committed within the scope of the employment or for the purposes of the employer's business. In some circumstances, an employer may also be liable for the wrongful acts of his independent contractors.

Why is e-mail different?

But what makes e-mail different to any other medium of communication such as voice, fax or letter? There are some e-mail characteristics that create special factors. It is a very informal medium. Stylistically, it is closer to speech than a written communication, and yet there is a permanent written record. The author of an e-mail may adopt a stilted, abbreviated, conversational style and will typically take less care over the contents than he would with a letter. For some reason, people feel able to say things in an e-mail which they might not otherwise feel comfortable communicating face-to-face or in a letter. Because of the lack of direct physical confrontation on the Internet, in some news groups or lists the style of writing can range from frank to abusive. The expression 'flaming' has come to be used where someone lashes out abusively or rudely during a discussion. It is the combination of informality and lack of inhibition that creates a potentially dangerous situation.

In the context of defamation specifically, an instant one-to-many com-

p a storm?



munication – which can be endlessly and uncontrollably forwarded to others – obviously has the potential to cause greater damage to a person's reputation than a one-to-one communication. If an e-mail sent by an employee acting within the scope of his employment contains defamatory material, an employer may find himself vicariously liable in a subsequent action for defamation, even if the act of sending the e-mail was unauthorised.

One area where employers should take particular care is when disseminating information electronically (whether internally or externally) regarding the departure of an employee. An announcement which is potentially damaging to the employee not only raises issues of 'cyberlibel' but may also lead to a claim for 'stigma damages' under the principles laid down by the House of Lords in *Malik v Bank of Credit and Commerce International*.

Other risk areas to watch

Apart from defamation, there are a number of other potential abuses of the e-mail system by staff that may give rise to liability or some other loss or damage on the part of the employer.

Intellectual property rights. E-mail is sometimes used to send or receive unlicensed software or other material that infringes the intellectual property rights of a third party. Again, an employer could be liable if an unlicensed copy of software has been downloaded on his system, even if he has no knowledge of it.

Sexual harassment. E-mail is a common ingredient in workplace sexual harassment cases. The EC Commission's *Code of practice on protecting the dignity of women and men at work* has defined sexual harassment as 'physical, verbal or non-verbal conduct' which is 'unwanted, unreasonable and offensive to the victim' and which 'creates an intimidating, hostile or humiliating working environment for the victim'. Examples of unacceptable 'harassing conduct' in the context of e-mail cases include repeated and unwanted requests for a date, sexual innuendoes, other offensive or upsetting comments of a sexual nature and constant pestering on non-work-related matters.

Under section 41 of the UK *Sex Discrimination Act 1975*, an employer is liable for the acts of his staff in the course of employment, whether or not they are done with his knowledge or approval. Recent caselaw has extended employer liability for acts of sexual (and racial) harassment at work, both by employees and third parties (see *Jones v Tower Boot* [1997] and *Burton and Rhule v De Vere Hotels* [1996]). In order to defend an action for vicarious liability, an employer must demonstrate that he 'took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description'. Perhaps the introduction of a proper e-mail policy – and monitoring observance with that policy – will support such a defence in cases where e-mail is involved in sexual harassment cases.

Pornography. Criminal liability in the UK can arise under the *Obscene Publications Act 1959* for the publication of obscene material or possession of obscene articles for publication for gain. If the article is an indecent photograph of children, then it is illegal simply to be in possession of it. A photograph includes 'data stored on a computer disk or by other electronic means which is capable of conversion into a photograph'. In *R v Fellows and R v Arnold* (1996), the UK Court of Appeal decided that pornographic images downloaded to a bulletin board could be a photograph for the purposes of the *Protection of Children Act 1978* and that the data was distributed or shown, even though it was merely made available for downloading.

Aside from potential criminal liability, employers will not want their systems to be used for distribution of even lawful pornographic material. In one incident, Compaq Computer is reported to have dismissed 20 employees for distributing pornographic images downloaded from the Internet.

Practical issues to be addressed

Apart from liability issues, there are a number of practical issues that need to be addressed regarding the use of e-mail.

Private use. An employer may be concerned that staff will abuse the e-mail system by using it unduly for private purposes. There are two aspects to this: cost, and wasted staff time. As regards cost, whether or not there is a direct cost associated with sending a particular e-mail will turn on whether the employer uses a dial-up account or a leased line. With a dial-up account, a telephone call incurring a charge is made every time e-mails are sent or received. With a leased line, even though the cost is more or less fixed, some overhead will be involved in terms of use of system resources, and also because some Internet service providers charge according to e-mail volume. It seems sensible to allow employees reasonable use of the e-mail system for private use in much the same way as is usually the case with telephones. However, employers may wish to forbid the e-mail system being used for unauthorised bulk mailings that might put a strain on the system.

It may be hard to distinguish between private use and business use. If an employee contributes to a discussion in a news group on his specialist subject, does he do so in his private capacity or on behalf of the company? Although the employee may not use a corporate signature to the e-mail in such circumstances, his e-mail address may betray the identity of the company that he works for. This point may be important to the company if, for example, the employee gives negligent advice in a news group for which the employer may be vicariously liable. The employer may, therefore, wish to prevent staff from joining lists or contributing to news groups without approval.

Security. Because of concerns over the level of confidentiality of information transmitted over the Internet, employers will wish to consider whether there are any categories of information which they would not wish their employees to include in e-mails (for example, price-sensitive information, official secrets, trade secrets or information received under a duty of professional confidence without the client's permission to communicate by e-mail). In some cases, employers may wish to stipulate that certain categories of information should be sent only by secure encrypted e-mail or that e-mails be digitally signed.

Preventing employees from unknowingly disclosing confidential information through careless use of e-mail is one matter, but protecting confidential information from disenchanted employees is quite another. The e-mail system is an ideal medium for employee subterfuge. An employee preparing to compete against his present employer could quickly and unnoticeably carry off the company's confidential information by e-mail. While it may be difficult for an employee to take away physical copies of voluminous documents, drawings and financial information without drawing attention to himself, it may be relatively easy to move the digital equivalent off-site.

A separate security-related concern is more technical: careless management of the e-mail system may increase the risk that viruses are imported through e-mail attachments or Web or news group downloads unless they are properly virus-checked. A virus infection can be a costly and disruptive experience for any business. Proper use of virus-scanning software is a must, but is not the complete answer: all employees must be aware of the company's policy with regard to virus protection and of the consequences if they fail to adhere to that policy.

It is not difficult to see how e-mails may be accidentally misdirected. A simple mis-click of a mouse button could insert the wrong addressee into a mail message. The use of e-mail disclaimers (similar to those on fax sheets) is becoming more common. While the disclaimer may be of dubious legal validity in the absence of any contractual relationship between the sender and the recipient, the sender will be in a better position if the unintended recipient has notice of the potentially confidential nature of the e-mail and is advised what to do with it.

Record-keeping. Another matter to consider is the need to ensure proper record-keeping. Despite the proliferation of e-mail, the paperless office is some way off. Maintaining hard copy records is easy with a paper-based communication, but requires more discipline in relation to e-mail. Policies need to be formulated as to how e-mails are printed and hard copies placed on physical files. Legal and audit requirements should also be considered.

The fact that e-mail creates a discoverable document must also be borne in mind. In this context, employees should be aware that an apparently-deleted e-mail may be held on the system for some time or be accessible from back-ups. This can lead to embarrassment. In the celebrated Oliver North case in the United States some years ago, the investigators recovered e-mail from back-up tapes that North had attempted to erase. In this context, it is also worth noting that in the Norwich Union defamation case (mentioned above), the trial judge made an order that the offending e-mails be preserved and that Western Provident be given copies of them.

Compliance with disclosure requirements. There is also the need to comply with legislation regarding information that appears on business letterheads. There is no definition of a 'business letter' in the UK *Companies Act 1985*, but the better view is that official correspondence from a company will be a business letter whether it is sent on paper in the snail-mail, by fax or electronically by e-mail. There is no reason why a business letter should be confined to paper.

Introducing an e-mail policy

In view of all these issues, many employers are now taking steps to introduce corporate policies on the use of e-mail. Such a policy should contain the rules for proper use of the e-mail and will explain the consequence of non-compliance. The policy can be introduced as a matter of management prerogative, issued as a lawful instruction rather than as a contractual term of employment. This will ensure maximum flexibility and allow changes to be made to the policy without requiring staff consent.

It is important that staff are made fully aware of the fact that misuse of the e-mail system will have disciplinary consequences and that breach of the policy may lead to disciplinary action up to and including dismissal.

Monitoring the policy

Having an e-mail policy in place may not of itself remove the risk of employer liability or be a defence to any claim. However, the policy is intended to educate staff and alert them to the dangers – both for them and their employers – of abuse of the e-mail system. At the very least, the presence of the policy, coupled with the employer's determination to police it, should act as a deterrent.

Monitoring observance of an e-mail policy may involve 'e-mail snooping' – employers intercepting staff e-mails and reviewing them for compliance with the policy. This can be problematic because staff expect their e-mails to be private; rather like a telephone call, they do not expect their employer to be listening in. The solution is to make it clear in the policy that e-mail is not private and that it will be routinely monitored. By dispelling the expectation of privacy, employees should have no ground to complain about e-mail monitoring.

The need for a clear statement on this may also become desirable legally as well as from an industrial relations point of view. In most cases, e-mails which employers wish to review are stored on the company's own system. This will be the case in relation to internal e-mails and external e-mails that have already been downloaded. Employers have every right to review all material stored on their own system, including (perhaps private) e-mails addressed to its staff. To this extent, employee e-mail is 'owned' by the employer. There is no need for employers to attempt to intercept external e-mail from the public telecommunications system, which would be illegal. However, with the possible future implementation into English law of the *European convention on human rights*, the introduction of a right of privacy (article 8 provides that 'everyone has the right to respect for his private and family life, his home and his correspondence') will increase the need for a clear policy statement on the status of an individual's e-mail communications within an organisation. G

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First impres

You don't get a second chance to make a first impression. Your firm's image is all about lasting impressions – so getting it right first time is one of the most important exercises you will undertake in assuring commercial success. Deiric McCann gives you tips on how to arrange a corporate facelift

Many professionals think that their firm's image is something which is largely outside their control. It's not. There are three steps that will help you build an image which will foster your firm's success: the image, building an identity, and projecting your image.

The image

Before you can build an image, you need to decide what sort of image you want for your business. Ask yourself three questions.

1) **What sort of image should my business project?** If you were a banking institution, then you'd be seeking to project conservatism, low-risk and good standing. But if you were a Silicon Valley electronics company, then you'd want to project an image of innovation, pioneering and enterprise. On the other hand, a law firm needs to project such things as professionalism and confidentiality. Decide how you want your clients to see you and come up with one or two words that effectively capture the image you'd like to project
2) **Who are my target clients?** Whatever else you do, you must ensure that your image closely matches the one which potential customers have of themselves. Who are your target clients? Where do they currently go for legal advice? How much do they have to spend? If you were an hotelier, you wouldn't establish a luxury five-star hotel in a low-income area. There's simply no point in being the most expensive in your area if nobody there can afford you. Equally, you'd be squandering the potential (and the higher property costs) in a high-income area by establishing a budget hotel. For optimum success, be sure that there are enough of the type of customers you'd like to target to make the business work, and that the image you decide to project matches those potential clients closely enough to attract them to you
3) **Who is my competition?** Look at your most successful competitors. If you have an outstandingly successful competitor, then you'll want to figure out what aspect of their image fosters this success. Are they very reliable? Have they a strong service orientation? Have they a wide range of expertise? You'll need to adopt the most positive elements and enhance them with whatever you feel makes your business special. If your closest competitor's primary image is based on offering an extraordinarily wide range of specialisations, then you'll need to adopt this and enhance it with, say, your reputation for extremely friendly service and high levels of customer attention. Don't try to compete with successful competitors' images head on – assimilate them and improve on them.

Building an identity

So now you know what sort of image you'd like to project, you will have to build an identity which will allow you to project it effectively.

The logo. A good identity is about consistency. All of the ways in which you communicate with your customers must have a consistent and considered look and feel. That look and feel begins with a good logo. There are lots of other aspects to a company identity, but few are more important than your logo. When it appears over your door, on your business card, on your letterhead, in advertisements, on brochures and so on, your logo should instantly convey your desired image. For this reason, designing a logo is not for the layman. Get professional help. There is a myth that designers are very expensive: this needn't be so. Besides the large graphic design studios that might cost a little more, there are lots of freelance graphic designers that will work with you and help you craft a logo that works well for you. You'll find plenty in the *Yellow pages*. Don't skimp on your logo – in the long run, poor communication of your image will cost you more than a designer ever will.

Working with designers. Designers are like solicitors and other professionals: they work better when you have a good brief for them to follow. So before you sit down with your designer, do some thinking about the basics of your required logo. This will save your designer time and save you money. The main elements you need to think about are: taglines, colour, typefaces and graphics.

Taglines. Think of the main aspect of your image that sets your firm apart from your competitors, and will appeal most to your clients. Build a six or seven-word one-liner around

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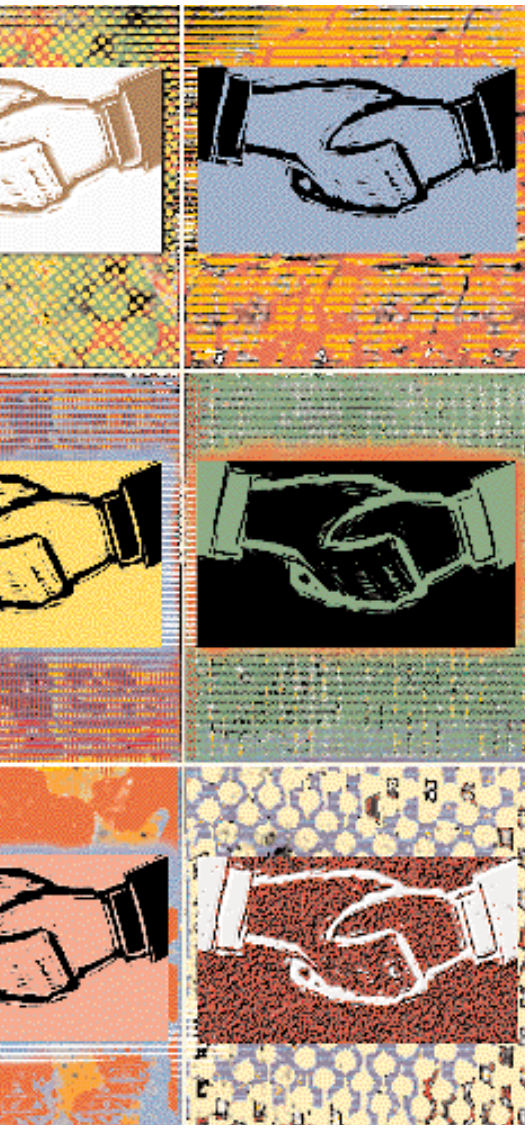


this key aspect of your image. With a tagline in place, the designer knows precisely what image their creation must project for you.

Colour. Colour is an important part of the image that your logo will highlight. Reds, yellows, oranges and other bright colours tend to suggest pioneering, trendsetting and fun, while colours such as blue, grey and darker greens tend to suggest a quieter, more mature and conservative image. Look at the dominant colours in bank logos – they say it all. What colours are appropriate to the image you've selected? Be careful not to be swayed by colours that you might like personally but that might be at odds with your intended image. A good way to begin is by thinking carefully about the sort of colours you certainly don't want to use: this will be a great help to your designer.

THE PSYCHOLOGY OF USING COLOUR

Using colour in business documents or for corporate identity purposes is not an artistic, subjective or personal form of self-expression. Colour in the working world has little to do with instinct, liking or creativity and everything to do with deliberate effectiveness. Research has shown that colours have psychological associations which are learned and may vary among national, social or cultural groups. For example, US studies have shown that lower income groups tend to prefer colours that are brighter than those chosen by upper income groups. But fashions change and that's why advertisers spend fortunes tracking the colour preference trends for their particular market segments.

In a marketing sense, colours communicate subliminally: red cars are perceived to be faster, whiteness in a supermarket conveys purity and hygiene, pale colours suggest low calories. Red and yellow rooms feel warmer, whereas blue rooms make us feel cooler. Red is known to be an exciting colour while green induces a feeling of calm. Orange shouts its presence so it communicates accessibility, informality and, thus, cheapness. Yellow is a cheerful colour but too much of it creates nervous tension (babies cry more in yellow rooms, apparently). Dark blue and black command authority, while grey suggests creativity and elegance (except for those who live in bleak climates where it suggests dirt and is seen as depressing).

Research in the United States has attempted to describe some of the psychological implications conveyed in basic colours.

- **Red:** hot, bloody, passionate, horrifying, revolutionary, dangerous, active, aggressive, vigorous, impulsive, crude, stop!
- **Yellow:** energetic, bright, optimistic, cheerful, sunny, active, stimulating, memorable, intellectual, cowardly, idealistic, caution!
- **Green:** natural, fertile, restful, calm, refreshing, financial, prosperous, youthful, abundant, healthy, envious, go!
- **Blue:** serene, calm, loyal, cool, tranquil, excellent, distant, conservative, deliberate, spiritual, hygienic
- **Dark blue:** romantic, moonlit, discouraging, stormy
- **Khaki:** military, drab, warlike
- **Pink:** fleshy, sensuous, cute, romantic, sweet, cloying
- **Orange:** warm, autumnal, gentle, informal, affordable, cheap
- **Brown:** earthy, mature, ripe, reliable, obstinate, solid, parsimonious
- **Purple:** royal, powerful, luxurious, churchly, pompous, ceremonial, vain, mourning, funereal
- **White:** cool, pure, true, innocent, clean, honest, simple
- **Grey:** neutral, secure, stable, mature, safe, wintry, discreet, old
- **Black:** authoritative, respectful, powerful, strong, evil, solemn, morbid, heavy, despairing
- **Gold:** sunny, majestic, wise, expensive
- **Silver:** high tech, moonlit.

These expectations, of course, are all generalisations. People can react to different colours in different ways depending on nationality, age, environment, experience, and social and economic class. The simplest rule of thumb in determining the use of colour is to use your common sense.

Typefaces. The image conveyed by the more formal typefaces used in newspapers is vastly different to that projected by simple handwriting typefaces, which is in turn different to the image portrayed by heavily stylised modern alphabets.

The typeface you choose is one of your logo's strongest image cues. If you know what sort of image you want project, your designer will be able advise on appropriate typefaces.

Graphics. You will find that designers are very adept at producing clever graphical representations of the message that you want to convey. If you do decide to use a graphic element in your logo, be sure that it is easy to understand, and that it still communicates your message, even if a potential customer doesn't 'get' the point of your graphic. In other words, use graphics to enhance a logo that uses words to convey your image – don't let the graphic dominate. It could confuse and project the wrong image.

Projecting your image

Your logo is at the heart of your firm's identity, and it will only successfully communicate your desired image if you use it effectively. It must appear on all signs, letterheads, invoices, business cards, envelopes and packaging. Look for all opportunities to use your logo in everyday situations.

You should also integrate your logo colours, ypefaces and graphics into other less obvious parts of the business. If your main logo colour is blue, then internal furnishing and decorating schemes, and even staff uniforms (if y have one) should be as well. tively projecting your image is all using absolutely every opportunity to put all aspects of that image in front of your target customers.

A key to projecting a consistent image to your customers is ensuring that your employees understand the image you are trying to project, what values it encompasses, and how that translates into everything they do. This needs to be integrated into every aspect of your business – from the way you answer the telephone to the way you deal with customers on a day-to-day basis.

Can I change my existing image?

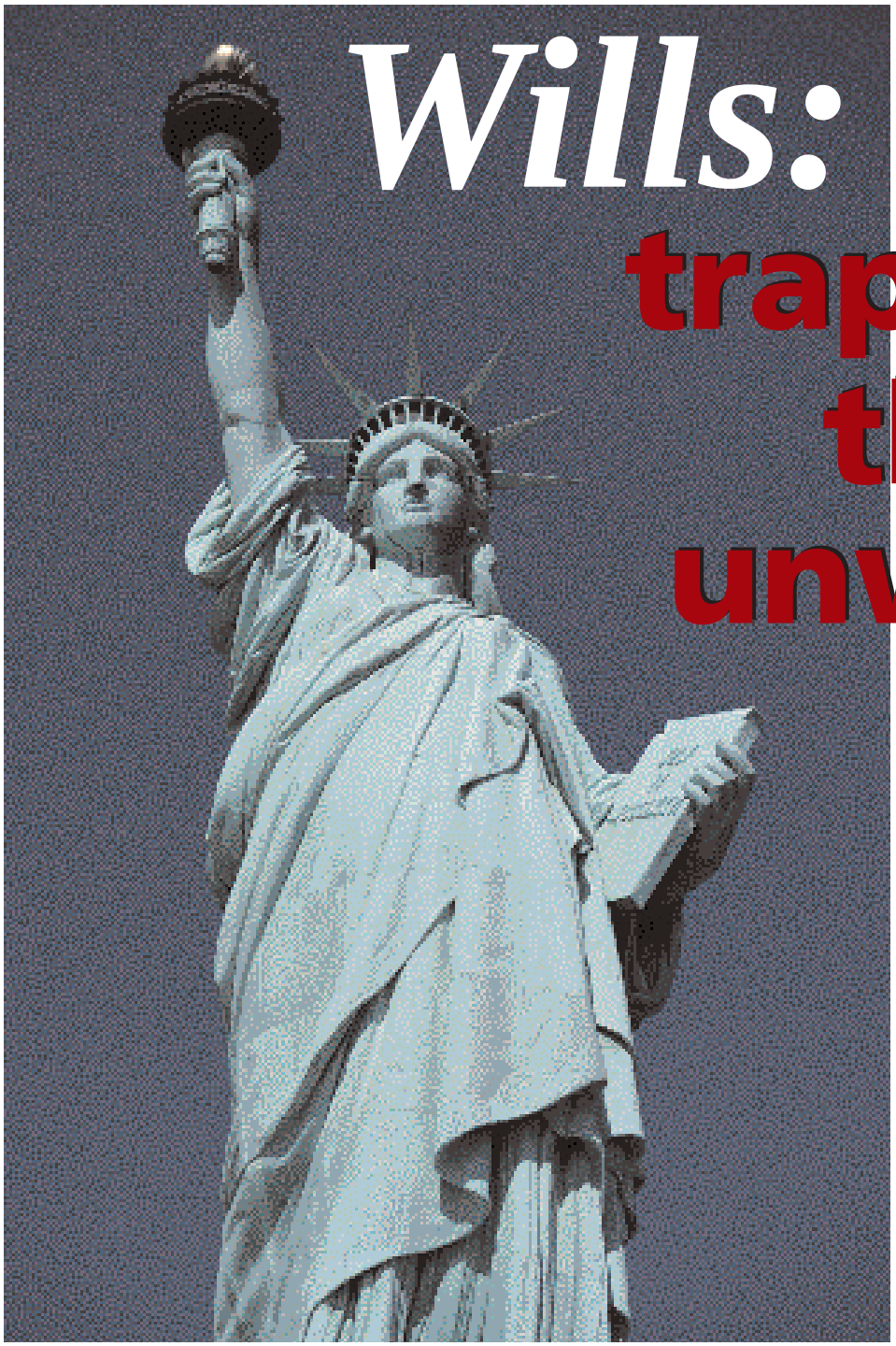
Absolutely. If your established identity has failed to build the image you desire to the level you'd like, then change it. You may be concerned that some elements of your existing identity are successful in their own right, and still relevant. For example, your logo may already be quite well known, even if it's not quite conveying precisely the image you'd like. Work out which parts of your current identity you'd like to keep, and then go through the exercise of creating your identity in the manner discussed above. When it comes to logo redesign, you'll find that working with your designer to come up with a new one that fits your new identity, but retains the better elements of the previous one, is a lot easier than you might have expected.

Your practice's image is something you need to review regularly as your business grows and expands, and your target customers mature or change. Take a look at it on a regular basis. Is the image you're projecting still what you need? Is the identity that got you to where you are now appropriate to your development over the next few years? If not, then fine-tune it.

Your firm's image is one of its most important assets. The small investment of time, effort and money you make in it now will realise far greater returns long into the future. Invest in your image now and make a lasting impression. G

Deiric McCann is the founder of Exsellence Consulting and a freelance writer.

Wills: traps for the unwary



If you're drafting a will for a green card holder, alarm bells should be ringing

The solicitors' profession is always extolling the virtues of making a will to the general public. But with a growing number of Irish people owning assets abroad, such as holiday homes, estate planning has suddenly become a lot more complicated. Richard Grogan highlights the tax traps that lie in wait for the unwary practitioner and suggests ways they can be avoided

Two issues regularly have an impact on estate administration: foreign assets and double-taxation relief (or, more precisely, the lack of a tax credit where relief could have been obtained if proper planning had been done). A third issue which could arise shortly is the potential charge to US federal estate tax against the estates of Irish people on their worldwide assets because they hold a US green card.

As the country becomes increasingly more prosperous, a growing number of Irish people are acquiring assets abroad, and particular care needs to be taken with settled land. In *Re Middeton's Settlement* ([1947] Ch 583) – which did not follow the Irish case of *Re Stoughton* ([1941] IR166) – the proceeds of a sale of Irish settled lands were re-invested in UK securities. Despite section 22(5) of the *Settled Land Act 1882*, it was held that for the purpose of UK taxation the securities were situated in the UK and therefore liable to UK tax. Following *Re Stoughton*, if the proceeds of UK settled lands are invested in Irish securities, they may well be treated not as Irish assets but as UK assets for Irish capital acquisition tax purposes. Practitioners should be especially vigilant when considering the appropriate locality for tax purposes of assets where the provisions of the *Settled Land Act* apply.

A common example of an asset owned abroad is a holiday home. When drafting a will for such clients, solicitors should take particular care to avoid the traps of unnecessary legal and tax costs which may arise due to an oversight in checking the local laws in the relevant jurisdiction and private international law as it applies to the conflict of laws from a taxation perspective.

The transmission of Spanish property, which is one of the most common forms of foreign property apart from shares, causes particular difficulties and is a good example of the pitfalls that can trap the unwary. It is quite common for an Irish will to leave the entire estate in trust or, alternatively, to pass the estate to executors on trust to sell the estate and to distribute the pro-

ceeds of the sale in a particular fashion. Alternatively, the estate may be left to a spouse as the sole beneficiary. In the case of Spanish property, such wills may cause a number of unforeseen problems.

Spanish law allows for only limited freedom of testamentary disposition. Unlike Ireland, where a testator has freedom of testamentary disposition subject to a spouse's legal rights and the potential for a section 117 claim, Spanish law has very definite rules on the transmission of real property on death.

Where an individual dies testate, leaving real property, Spanish law provides for the division of the property as follows:

- One-third passes to the children of the testator in equal shares absolutely
- One-third passes to the spouse of the testator for life, with the remainder in favour of such child or children as the testator shall decide, and
- One-third to whomsoever the testator wishes.

If an Irish will is at variance with these provisions, Spanish law simply imposes the local law.

In the case of someone who dies intestate, the Spanish laws of succession are also at variance with Irish law:

- Where a deceased dies leaving a spouse and children, the spouse receives one-third of the property for life, with the children receiving the remainder
- Where the deceased dies leaving a spouse only, the spouse receives a life interest in one-half of the property with the remainder passing to the parents of the deceased.

In cases of intestacy, the Spanish intestacy rules will apply and not our Irish rules in respect of that property.

The effect of all this is that the division of the remaining Irish estate may have to be altered to take account of these rights which are at variance with the Irish will or legal entitlements under Irish law. If an Irish will is used to pass property on death, it must be proved in the Spanish courts. Among other things, this involves the translation of the will into Spanish. The cost of translating such a legalistic document could be substantial.

The taxation issues

Unlike Ireland, where an executor is required, no such requirement exists in Spanish law. Legal title passes to the beneficiary under the terms of the will automatically. Where an Irish will is used and provides for the appointment of trustees or executors to whom the estate passes in 'trust' (including 'a trust for sale'), this may result in higher Spanish taxation being paid.

Take the case of a time-share apartment valued at £50,000 where there is a surviving spouse and three children: no Spanish tax is payable. But if the property passes to trustees or executors, then tax will arise. The reason for this is that under Spanish law the executors or trustees are deemed to have personally taken an inheritance absolutely, because Spanish law does not recognise the concept of trusts as we know them. If they are professional trustees or executors, they will receive the lowest reliefs from Spanish tax because they will be treated as having received an inheritance from a stranger. A second tax charge will arise in Spain when the property passes to family members, as they are deemed to have received a gift from the executors or trustees and not from the deceased.

The additional sting in the tail is that both of these tax events in Spain are also tax events in Ireland for capital acquisitions tax purposes. The reason is that our tax code follows the legal effect and not the form of the Irish will. Since under Spanish law the executors or trustees are deemed to have received an inheritance and subsequently to have made a gift, then (provided the deceased and their executors/trustees are Irish-domiciled), the tax code in Ireland creates a tax charge on the basis of the legal effect of the transfer of the property as determined under the local laws – in this example, Spain.

This may result in the spouse and children being deemed to have taken a gift from strangers rather than having received an inheritance from the deceased spouse or parent of one-third of the property. Equally, the executors or trustees may be deemed to have a taxable benefit for Irish capital acquisitions tax purposes. As a result, an inheritance which might only have created a probate tax charge may now create a mainstream CAT charge on passing the property which might otherwise have been exempt. Additionally, a full tax credit for the Spanish tax may not be available; instead, only what is called unilateral relief.

Double taxation

Ireland has a double-taxation treaty for capital acquisitions tax with only two countries: the UK and the USA. The mere fact of a double-taxation treaty does not mean there will be a full credit for the tax charged in another country on an asset in respect of the Irish tax on that asset. For example, in the UK if an estate is worth over stg£231,000, the balance is charged at 40%. If an Irish-domiciled individual has only, say, a UK estate which is worth stg£500,000 and he leaves it to his four children then, presuming the children had received no previous gifts or inheritances, there would be no Irish capital acquisitions tax while the UK inheritance tax would amount to stg£107,600.

The problem is more complicated in the case of property in countries where we have no treaty, and where relief under section 67 of the *CATA* is available only. The credit is the amount of Irish tax on that asset or the foreign tax on that asset, whichever is the lesser.

The issue in relation to double-taxation relief underlines the importance of structuring a will so as avoid double taxation as far as possible. For example, take the case of a person who bequeaths to a child his entire estate, worth £300,000 in Irish assets and £100,000 in foreign assets. If we presume a foreign tax of £35,000 or 35%, the credit will be:

- Irish tax on an estate worth £400,000 = £77,840 (effective tax rate 19.46%)
- Irish tax on foreign assets: £100,000 @ 19.46% = £19,460
- Unilateral credit: £100,000 x 19.46% = £19,460.

But if the will provided that the first specific benefit was the Irish estate and the foreign estate passed subsequently, then the 'Irish tax' on the foreign property would be £40,000 or 40%, and a full credit for the foreign tax of £35,000 would arise – which amounts to a saving of £20,540. By careful planning, the worst effects of double taxation can be avoided.

As practitioners, we not only have a duty to the testator but also to the beneficiaries, so it is important when planning estates with foreign assets to take into account the provisions of our double-taxation treaties and the provisions of section 67 of the *CATA, 1976* (unilateral relief) for non-treaty countries. Failure to do so could be costly to the beneficiaries of the estate.

Green card holders

With the greater movement of Irish people abroad, a number of clients will consider themselves lucky to have obtained a 'green card' from the United States. Solicitors acting in estate planning for such people should now be hearing alarm bells ringing following the US decision in *Barkat A Khan (deceased), Mohammed Aslam Khan (executor) v Commissioner* (75 Tcm 1597). The facts of the case are not particularly relevant and were peculiar to the case but it did highlight an interesting point. Where an individual obtains a green card and, on leaving the US, applies for a re-entry permit, this shows an intention to return to the States from 'a temporary visit abroad'. Some commentators are now arguing that applying for a re-entry permit establishes a 'domicile' in the States for US federal estate tax. The US federal tax authorities may now, following this decision, seek to tax the estates of such green card holders on their worldwide assets, even after they

have left the US. Suppose that a green card holder has returned to Ireland (having applied for a re-entry permit) and then dies, leaving his entire estate to a surviving spouse. There is no blanket exemption for the 'Irish' spouse from US federal estate tax, so a tax charge which would only have been levied on the US estate of the deceased might now be levied on his assets worldwide.

While the case in question is believed to be under appeal in the United States, it may well add a new twist to estate planning for green card holders. This is a developing area where special care will be required.

Avoiding the pitfalls

When dealing with a testator with foreign assets – or one who holds a US green card – there are some simple steps that can be taken to avoid traps which might otherwise catch the unwary.

1) When taking instructions, ensure that you obtain a full list of all foreign assets and their location
2) Ensure that the testator is made aware that our succession laws and tax laws may not apply to those assets and that specific legal and taxation advice should be sought in relation to the devolution of those assets under foreign law, both as regards succession rights rules and their also tax treatment
3) Make sure that separate wills, drafted by local lawyers, are made for each jurisdiction in which there are foreign assets (taking care that neither the Irish nor foreign wills revoke each other). The same obviously applies when a 'foreigner' moves to Ireland
4) Where the assets are situated in either the UK or the US (both double-taxation treaty countries) or situated elsewhere abroad, and the testator, his spouse and children are all Irish-domiciled, there may be additional tax costs since the same levels of relief under our capital acquisitions tax legislation are not available for those foreign assets under local tax laws
5) In the case of a green card holder, specific US tax advice should be obtained
6) When an Irish testator wishes to use an Irish will to dispose of foreign assets on death, he should be made aware of the additional legal costs that this may impose. You should also point out that the Irish will must comply with the foreign laws applicable to those assets and that this should be incorporated into the will.

When dealing with foreign property, estate planning can be quite complex, even for relatively small estates. It should never be assumed that our succession laws and tax laws will be mirrored in other jurisdictions. It may well be that failure to address these issues at the time of drafting the will could create complications in the administration of the estate and give rise to unforeseen legal or taxation pitfalls that could have been avoided.

As practitioners, we are qualified to deal with Irish succession and tax laws. Once we start dealing with foreign assets, we can often move into uncharted waters where what would be perceived as good and competent planning for an Irish estate may be the exact opposite in respect of foreign assets. If a client does not want to incur the expense of foreign lawyers or tax advisors, and provided the risks and limitations in drafting a will to cover those assets are clearly explained to him, then any subsequent complications are the result of the client's inaction only.

In dealing with foreign assets in any estate plan, there are traps for the unwary – but they are avoidable. This article is only a cursory overview of some of the issues which can arise and is intended simply to highlight the fact that, whenever foreign assets are involved, will-drafting can be a more complicated process than previously thought. G

Richard Grogan is a Dublin-based solicitor.

Not in my

Appealing the best laid plans of property developers has become a middle-class blood-sport in recent years. Solicitors can often find themselves on one side or the other in these environmental battles. Vincent Farry plots a course through our planning process

Local authorities reject one in every ten planning applications made in this country. Many of those decisions are appealed to An Bord Pleanála (the planning appeals board), along with a growing number of third-party appeals against decisions to grant permission.

Solicitors are often called on to act in these cases, and advising on the prospects of success – an issue which often arises in conjunction with costs – is difficult, because each case is assessed on its own merits. But recent trends can often provide a useful framework for advising clients (see **panel** opposite).

Anyone can appeal a council's planning decision. Such an appeal must be in writing, must be lodged within one month of the decision and must be accompanied by the correct fee. The submission must be complete when lodged and cannot be augmented at a later stage unless the board invites additional representations. It is open to any person who is not a party to the appeal (an 'observer') to make a submission, on payment of the correct fee. The rules governing appeals are mandatory, and any one that fails to comply with the requirements will be deemed invalid and treated as not having been made.

An Bord Pleanála administers appeals under planning, building and pollution legislation. The number it handled over the last five years rose sharply – from 2,249 to 3,845 annually over the 1993-97 period. While the number of refusals nationwide grew by 46% over this period, the volume of appeals increased by 71%. This demonstrates a growing dissatisfaction with council decisions, a willingness to pursue matters further and an increased public interest in planning and environmental issues.

While the board aims to decide appeals within four months (see **figure 1**), the increased caseload has created a backlog, leaving it with double the number of outstanding cases at the end of 1997 than at the end of 1993. Although developers may fear that delay forecasts failure, it is possible that the additional time taken to determine an appeal is not necessarily related to individual cases, but instead reflects the number of new appeals combined with the increasing backlog.

In contrast with the overall trend, the number of appeals by applicants has dropped over the past five years, indicating an increase in speculative applications or a greater readiness to negotiate with council officers on the part of applicants. The costs associated with appealing, together with the increasing delays in the system, may also be factors prompting a reduction in first-party appeals.

Overturning a decision

Developers whose applications have been refused by the council are unlikely to receive permission from An Bord Pleanála, and in 1997 less than one-fifth of unsuccessful applicants received permission on appeal. Furthermore, the pattern over the past five years suggests that it is becoming more difficult for developers to overturn council decisions to refuse permission (see **figure 2**).

Developers whose planning applications have been permitted by a council occasionally appeal against selected conditions. Although such cases relate only to particular conditions, these appeals are considered *de novo*, as if the planning application had been made to the board in the first instance. The board may limit its consideration of such cases to the disputed conditions, but to do so it must be satisfied with the principle of the original permission. It is therefore open to the board to refuse permission on appeal, notwithstanding a planning authority's decision to grant permission.

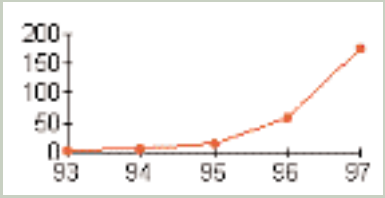
So developers should be advised that they risk losing their permission if they appeal selected conditions, and that statistically this danger is increasing. The proportion of cases where the board refused permission in an appeal against selected conditions has more than doubled in percentage terms over the past five years (see **figure 3**).

While the number of developers' appeals is falling, the number of third-party appeals is ris-

FIGURE 1

Appeal duration

appeals over four months



number of appeals

back yard

ing. This accounts for the increase in An Bord Pleanála's caseload. The percentage of successful third-party appeals against decisions to grant permission is also rising. Furthermore, where the board confirms the council's decision to grant permission, the conditions imposed are revised in two-thirds of these cases.

Developers and third parties may request that a particular appeal go to an oral hearing where all parties have the opportunity to be heard. The number of such requests constituted between 3%-4% of all appeals over the past five years. The board may agree to an oral hearing where it will aid the understanding of complex issues, or where cases concern important national or local issues. But the number of hearings has fallen over the past five years relative to the number of requests.

Approximately one in ten appeals lodged over the 1996-1997 period were deemed invalid for non-compliance with the appeal requirements. These appellants lose the right of appeal in relation to that particular application and must re-lodge it with the council, pay the appropriate fee and wait until the planning authority has determined subsequent applications before any new rights of appeal come into effect.

Clients often assess their chances of success on appeal in the context of the likely cost implications. Each case is determined on its own merits and the statistical likelihood that an appeal within a particular category might fail or succeed does not in itself imply that the same fortune awaits all future cases. Solicitors may want to consider the following issues when advising clients on whether or not to appeal a planning decision:

- Does the proposal conform with the development plan?
- Has the council assessed the planning application correctly in matters of fact and law?
- Has the council considered irrelevant factors?
- Has the council taken full account of all relevant issues?
- Has the council been consistent in its decision-making?
- Are there any site-specific factors which support or oppose the proposed development?
- Has the council given the correct weighting to each relevant factor?
- Would minor amendments to the proposal overcome some of the council's concerns?

Appealing against a planning decision can be a specialist task, not least in the application of the proper planning tests and in the preparation of a persuasive appeal submission. The option of retaining a consulting town planner should be considered by prospective appellants in assessing whether or not to appeal a particular decision. G

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

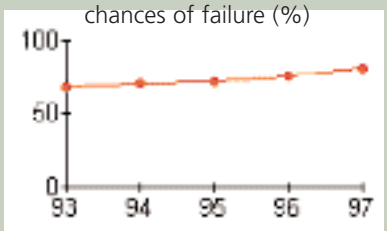
Planning appeals: the key points

- The number of planning appeals has risen sharply over the past five years, resulting in a growing backlog of undecided cases and causing delay for some appellants
- This increase in new cases is due to a significant rise in the number of appeals by third parties/objectors, while the proportion of appeals lodged by applicants or developers is falling
- Statistically, An Bord Pleanála is more likely to turn down a developer's appeal against a council's decision to refuse permission
- Although applicants/developers may be tempted to challenge particular conditions imposed on their permission by a council, such appellants are running an increasing risk of losing their entire permission
- Third-party appeals which challenge councils' decisions to grant permission are increasingly likely to succeed both in terms of securing a refusal and of altering the draft conditions.

FIGURE 2

First party appeals

chances of failure (%)

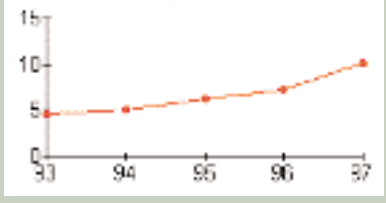


failed appeals

FIGURE 3

First party appeals

loss of permission



% loss

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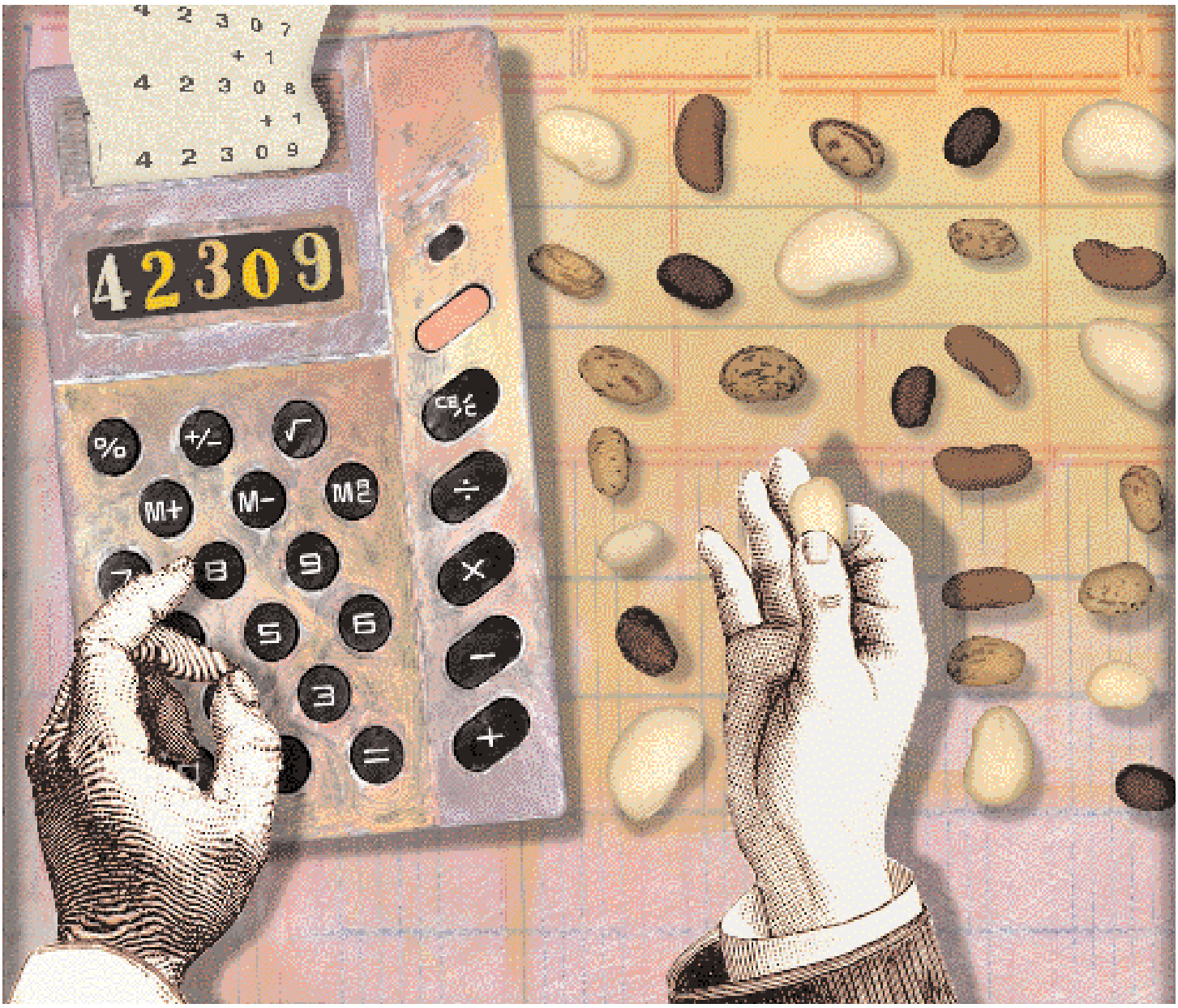
Accounting for change

Computerised accounting packages can save you money, time and even help boost your profits. But many solicitors have yet to switch from the old manual system. Grainne Rothery gives a step-by-step guide to making the transition

Traditional three-in-one accounting systems are still widely used in solicitors' firms around the country, but there is a wide range of computerised packages available for this task, and almost all practices could benefit from using them. Computerised accounting packages are increasingly sophisticated and have a number of advantages over manual systems: they're faster, more flexible and accurate; they offer greatly-improved access to data; and, significantly, they can provide valuable management information which contributes to greater productivity and, ultimately, profitability.

'From a business point of view, there are three main advantages to a good accounting package', says Seamus MacGiollariogh, director of Star Computers. 'First, they improve efficiency and allow staff to respond to clients quickly. Second, solicitors should be able to spend more time on fee-earning activities rather than analytical or administrative tasks. Finally, a good system will provide greater security of important data'.



Despite these benefits, most small to medium-sized firms, and even some larger practices, are soldiering on with their trusted manual systems. The reluctance to switch to computer-based systems is attributed to the profession's lack of enthusiasm for technology. 'Many small to medium-sized practices are slow to commit their accounts to computer because they are traditional firms that have never been pulled into the computer era', says one supplier.

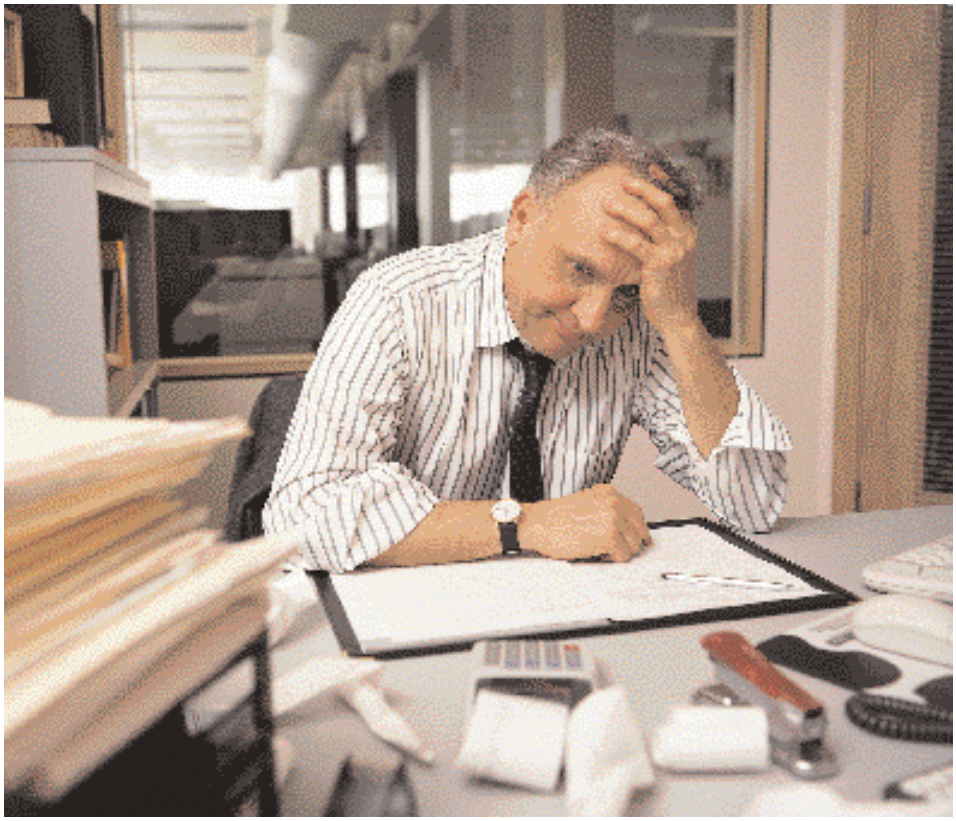
Most businesses use off-the-shelf accounting packages, but solicitors should use specialised legal products to meet the requirement to run client and office ledgers. These normally cost around £1,200 and may require additional outlay for training. They're actually cheap at the price, considering the size of the Irish legal market and the fact that developers must enhance and adapt their products to continue to meet legal requirements. The initial cost can be quickly recouped through substantial savings realised from a computerised system.

'Traditional manual accounting systems are cumbersome, inflexible and are so demanding of staff time and skills that accuracy, timeliness and completeness are sacrificed so that such systems tend to be mainly used to demonstrate past regulatory compliance in the areas of taxation and accounting rules', says Bryan O'Donnell, managing director of Harvest Software in Waterford. 'On the other hand, properly-designed computerised accounting systems improve the quality and timeliness of accounting information and provide many non-accounting management tools'.

According to Michael Gilmartin, managing director of Legal & General Office Supplies, the time saved using a computerised rather than a manual system can cut wage costs. He maintains that a book-keeper employed five days a week to keep a manual system up-to-date should only require two to three days to do the same work on a computerised package. 'It does not make sense for a busy firm to use a three-in-one system instead of a computerised package', he says. 'All solicitors using accounts software will find that they make more money. They can get on with their work, productivity is higher and there is less time-wasting.

'Everything you have on a PC should cut labour', he says. 'So if you have an accounts package, it should be linked to your case-management system. If you set up a case and issue an interim bill, this information should be sent automatically to the accounts system. Likewise, the accounts system should be linked to a time-recording module'.

Gilmartin maintains that the management information available from a PC package can help firms to identify the areas where they are making money. 'When setting up the system, you can define various areas such as probate, litigation and conveyancing', he says. 'It is then possible to calculate outgoings, incomings and the amount of time spent on each case if the system has time recording. Firms can work out each area's profitability'.



Many computerised accounts packages now include time-recording modules which keep track of the exact amount of time spent working on particular cases. 'Time recording is becoming more important', says Aidan O'Neill, sales and marketing manager of Ivutec, which developed the *Italax* package. 'Features like this allow solicitors to keep better track of their time and expenses. One British case-management software firm says solicitors can add 12.5% to their gross billings by tracking all their expenses'.

Choosing a package

First ensure that management and staff favour the move to a computer-based system. Computerised systems are most successful when they are used and understood by all the relevant people within a firm. If traditional methods are being used, there may be a reluctance to embrace new technology, and this will be reinforced by a lack of communication and instruction. Some suppliers recommend that one person be appointed IT manager or administrator.

A number of different legal accounting packages are available for Irish solicitors. Specific details of the actual packages and their suppliers are contained in the Law Society's guide, *Get connected*. Firms should consider their own particular accounting requirements before talking to suppliers.

'It's important to have a specification before talking to prospective suppliers', says Law Society investigating accountant Seamus McGrath. 'Firms that are thinking of upgrading should ensure that they understand their existing system. Although many solicitors are upgrading to more sophisticated software, it's important to ensure that they have got the full potential out of an existing system before moving on'.

'The Law Society does not recommend particular packages, so the firm should get their accountant to look at each package to check that it meets all the requirements', says Legal & General's Gilmartin. 'Most packages will do this, but certain aspects like the audit trail can cause complications. Prospective suppliers should be able to visit the auditor to provide a demonstration'.

Windows-based systems are more likely to integrate with other software. According to Justin Phelan, managing director of Keyhouse Computing: 'Tight integration with case management and other software is vital so that information can be communicated to and from the other applications. If it is integrated with time costing, for example, information will be fed directly through to the bills'. But he warns that time recording must be carried out consistently if it is to be fully effective.

Star's MacGiollariogh says that integration is the system's most important practical element. 'If a system is integrated, you should be able to put information into it once and access it from any of the modules, whether it's time recording, diary, file index, key date management or document management', he explains. Obviously, prospective purchasers should check very carefully what suppliers mean by the word *integration*. 'Full integration is more expensive, but the

benefits are enormous. Firms without fully-integrated packages will soon be returning to suppliers to look for it', he warns.

Service and back-up are vital, and purchasers should always feel that they can get quick answers to technical problems, particularly in the early stages.

'The supplier has to be able to provide a rapid response to Revenue requirements, changes in legislation and solicitors accounts rules', Phelan says. 'It's important to find out if the supplier has a regular development plan. You should be buying into a long-term evolutionary package as a matter of course. If the regulations change next year, a firm must be confident that the supplier will be able to respond quickly to the Irish situation. Sometimes, however, that's not a high priority for the developer. It's advisable to talk to existing users to find out what their experiences have been with the package and the supplier'.

Michael Gilmartin says that any good accounting software supplier should regularly meet users to get feedback on their systems. 'A good software house will take all points on board to see if they'll enhance the product', he says.

Training is crucial to the success of introducing a new system and should be treated as such when the cost of the investment is being calculated. 'The initial training is vital and should be carried out at the right time', says Law Society investigating accountant Seamus McGrath. 'There's no point carrying out the training a couple of months before the system is operating. Remember, the changeover between the manual and computerised systems can be very time consuming. It's also important that staff are fully aware of what the system can do'.

Y2K compliance

It is important to test your accounting system for Year 2000 compliance while there is still time to deal with any problems. According to Rick Deegan, managing director of BCL, full testing, including a roll-over test, should be carried out. 'This means that the system's time should be set to 23.59 and the date set to 31/12/99', he says. 'To check that your system is fully Y2K-compliant, several mock postings should be carried out and reports generated and checked thoroughly. Once you're satisfied, you can revert to your back-up to reinstate your current status'. Data must be backed-up before testing.

Many two-year date systems will read the year 00 as either 1900 or 1980 and will exclude postings into client accounts, for example, thus putting the system out of balance – with potentially disastrous consequences. According to Deegan, a four-digit year date is preferable. G

Grainne Rothery is a freelance journalist specialising in technology issues.

The basic computerised accounts package

The system design should contain system controls as standard and should also enable the user to set up operational controls.

System controls

Transactions must be kept perpetually in balance so the total of all the debits should always equal the total of all the credits. The system must be capable of being sectionally balanced. This means that the total of all the client balances in the client ledger must automatically agree with the balance on the client balances control account, which should also tally with the total of the balances recorded on client bank accounts.

The system should preferably be 'integrated' so that all appropriate records are updated as each entry is made. This means that if an outlay is entered on behalf of a client, all accounts, including client control, VAT, bank and nominal ledger are simultaneously updated.

Operational controls

While the system controls provide assurances on arithmetical accuracy, the information can still be incorrect. The greatest single operational control for accounting accuracy is the bank reconciliation. This allows verification against an independent source: the bank's record of the practice's transactions. In manual systems, this is a time-consuming and boring task which involves one-to-one comparison of each and every transaction with the bank statements.

A properly designed on-screen bank reconciliation system is essential to eliminate this drudgery. Other operational controls are generally supervisory in nature and are exercised by reviewing management reports.

Regulatory compliance

Systems should comply with the Law Society's accounting rules. This means, for example, separate recording and reporting for transactions on client and office accounts, regular reconciliations of control accounts and bank accounts.

Systems should also be able to provide information for taxation purposes, such as VAT returns and returns of third-party payments.

Solicitors have the option, in certain circumstances, of accounting for VAT on the basis of amounts received from clients, as opposed to on the basis of bills issued. The system should also cater for this option.

While not strictly regulatory, the date function must be Year 2000 compliant. It should also have euro functionality, so it can record euro and pound transactions in whatever is the base currency. Also, many so-called euro-functional systems do not cater for the eventual need to convert all the pound transactions already contained on the system into euros. This has to be done before 1 January 2002.

Management reporting

In general, management reports should allow the user to limit what is reported to just what is required. These parameters usually consist of the ability to specify ranges of clients, matters, dates, transaction numbers, nominal ledger accounts, partners and fee-earners, for example. The reports themselves, which are subjected to parameters decided by the user, should include:

- Lists of transactions, separating those on office account from those on client account
- Details of transactions on accounts in the client ledger and in the nominal ledger
- Lists of client and office ledger balances
- Lists of bills, paid and unpaid
- Monthly and year-to-date financial statements
- VAT return details and bank reconciliations
- Monthly statements to each client showing bills due and unpaid.

Using these reports, and applying the appropriate parameters, enables the generation of reports showing a wide range of scenarios such as, for example, bills furnished by the office, unpaid bills by fee-earner and new matters opened in the last month.

Desirable features

The system must be flexible and capable of expanding to provide additional features, such as time-recording and case-management modules. As well as single-user versions on one computer, there should be multi-user versions capable of running on network systems over a number of computers.

There should be a general link with generic word-processing programs to produce customised letters about particular subjects to particular clients. Likewise, there should be a general link with generic spreadsheet programs to produce reports in a particular format required by the solicitor but not provided by the system.

Clients should be set up on the system as a user-definable database so that the solicitor can pull out lists of those clients with particular properties (for example, a list of farmer clients with more than 500 acres, to be linked to the word-processing program for the purpose of sending out a personal letter on the subject of capital gains tax).

Other features include an interest calculator, which calculates interest in the same way as the banks do, for the purpose of allowing interest to those clients for which the solicitor is holding funds. Also desirable is the ability to set monthly and annual budgets of income and expenses and to monitor performance against these.

Finally, the system should be properly documented with operating manuals and context-sensitive help screens. Furthermore, the suppliers should be familiar with their product and should have an adequate accounting knowledge. G

Brian O'Donnell, Harvest Software

Negotiating the financial services minefield

'Product producers' 'business introducers' 'investment intermediaries' – what's going on in the financial services industry? And how can solicitors find their way through the maze of new regulations? Claire O'Sullivan explains how Solicitors' Investment Services can help

Many solicitors offer investment intermediary services to their clients and, in doing so, must take full account of the recent legislative changes which have occurred in this area. The provision of financial advice is now strictly regulated by the Central Bank. Following the passing of the *Investment Intermediaries Act, 1995*, banks and other institutions that accept money for investment ('product producers') are required to deal only with business introducers ('investment intermediaries') who comply with the provisions of the Act.

These business introducers must be properly authorised under the Act and have a letter of appointment from the product producer. The Act also specifies various conditions which apply to investment intermediaries seeking authorisation, including conforming to capital adequacy requirements, bonding, adhering to a code of practice on advertising and to another on safekeeping of client money and investment instruments.

In the past, credit institutions had little difficulty in appointing intermediaries and intermediaries had little difficulty providing investment advice in a virtually unregulated environment. Now, with tighter regulation by the Central Bank, such authorisation is less-readily given.

Except in limited circumstances, solicitors can no longer offer investment intermediary services unless they hold a letter of appointment from the institution with which they are dealing. There is a requirement to be a member of an approved professional body (the Law Society is not an approved professional body) and it is also necessary to put in place appropriate professional indemnity insurance to cover this type of activity.

IPT Financial Services, a division of Irish Pensions Trust Limited and trading as Solicitors' Investment Services (SIS), has been appointed by the Law Society to offer solicitors independent financial advice on behalf of their clients. SIS's objective is to assist solicitors on providing the best independent advice

Claire O'Sullivan: 'solicitors can now extend the range of services offered to their clients'

to clients on their investment options. Essentially, the service allows members to procure investment advice for clients, using the services of an approved independent broker, who will be the actual source of the financial advice, without the necessity for the member to comply with the myriad of new rules, regulations and associated administrative responsibilities of individual regulation required by the *Investment Intermediaries Act* and the *Investor Compensation Act.*

Members can now apply to register with SIS free of charge by completing an application form and adhering to the rules of the scheme. A professional financial adviser will then be allocated to the practice and will come and introduce himself or herself to the participating solicitor and their partners.

The role of the financial adviser is to provide assistance and advice, as the solicitor and his or her client needs it, dealing with both solicitor and client together as appropriate. With the assistance of SIS, the solicitor can also procure detailed investment reports, which will match their clients' needs and investment objectives to the products available in the marketplace.

Members will be paid for procuring financial services through a placement fee sharing arrangement with SIS. It is likely that once initial discussions are complete, members will be able to ascertain the placement fee on any specific financial package.

The range of SIS services include:

- Comprehensive analysis of a client's financial position
- Assistance in planning for future requirements
- Advice on debt clearance
- Assessment of the spectrum of investment products available and tailoring a portfolio to suit the individual client's requirements
- Disclosure of any costs.

In addition, SIS provides a wide range of financial products, including:

- Guaranteed investments, including An Post deposits, guaranteed income and growth bonds
- Unit-linked funds/unit trusts
- Tracker bonds
- With-profit bonds.

Procuring comprehensive and independent financial advice for clients will serve to enhance the solicitor's standing with them, maintain their loyalty and extend the range of professional services offered to clients.

To participate in SIS, members must complete an application form, which is available by telephoning SIS on 01 604 8474. Information is also available on the terms and conditions of registration. On accepting your application form, the adviser appointed to your practice will arrange a visit to explain the service in detail and discuss individual requirements. SIS also provides an extensive back-up service to members and a telephone helpline is available to deal with any queries or difficulties. G

Claire O'Sullivan is the Law Society's Member Services Executive.

Committee reports

PROBATE, ADMINISTRATION AND TAXATION

Finance Act, 1999: stamp duty – share transfers

The following is the full text of a letter sent to the committee by the Revenue Commissioners.

In general, the most common cases of share transfers to which the fixed duty of £10 applies are:

- Change of trustees
- Nominee to beneficial holder
- Beneficial holder to nominee
- Nominee to nominee
- Executor/administrator to beneficial holder

These transfers fall within the 'Conveyance or transfer of any kind not already described in this schedule' head of charge in the first schedule to the *Stamp Act 1891*, as amended. You will of course be aware that following the 1999 *Finance Act* no stamp duty liability arises in respect of such transfers executed on or after **25 March 1999**, if the stock transfer form contains the following certificate: *'It is hereby certified that the instrument is a conveyance or transfer on any occasion, not being a sale or mortgage'*.

Where the transfer contains this certificate, the exemption is 'automatically' granted – that is, there is no need to submit the transfer to Revenue.

Revenue has now given more thought to the practicalities of such certification. It has come to a view that, exceptionally, in those cases where the certificate in the precise wording as specified in the *Finance Act, 1999* is omitted from a share transfer form, but the existing certificate on the reverse of share transfer forms (both Irish and United Kingdom versions) has been properly completed and certifies that the transaction in respect of which the transfer is made is a transaction which is clearly not by way of gift, sale or mortgage, then it is prepared to accept such certification will be satisfactory for the purposes of the 1999 *Finance Act*. Such transfers are treated as exempt and do not need to be presented to the Revenue.

This administrative arrangement has been agreed with the Association of Corporate Registrars with effect from 16 June who will act accordingly. Although it is too late for inclusion within our leaflet SD6, we intend to include an article in the next issue of *Tax briefing* (September) and meanwhile create a flier outlining the procedure to be issued in all relevant cases.

In regard to a share transfer which effects a gift, it is not exempt but is chargeable to *ad valorem* duty under the 'conveyance or transfer on sale' head of charge by reference to the value of the shares transferred. Further, and in this connection it is to be particularly noted that although transfers by way of category L of the 'exempt certificate' on the reverse of the United Kingdom share transfer form, they are not covered by the exemption in the 1999 *Finance Act*; rather, they are treated as outlined above.

Brian McCabe, Principal Officer

A copy of the Revenue's *Stamp duty charges* leaflet (SD4) accompanies this issue of the *Gazette*.

Lodging of papers in Probate Office

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.

TAX BRIEFING

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Capital gains tax: clearance certificates

Procedure for obtaining CGT clearance certificates (CG50As)

The following is intended as a guide for practitioners and solicitors who wish to apply for capital gains tax clearance certificates on behalf of their clients.

Where the consideration for the disposal of certain assets exceeds £150,000 (for disposals prior to 27 March 1998, the limit was £100,000), the person paying that consideration must deduct 15% and remit it to the Revenue unless the vendor produces a CGT clearance certificate (form CG50A). The assets in question are specified in section 980(2) of the *Taxes Consolidation Act, 1997*. The most common form of such assets which practitioners and solicitors meet on a day-to-day basis are land and buildings.

Q1: How do I apply for a clearance certificate on behalf of my client?

Application is made on form CG50. Blank CG50s may be obtained on request from any tax office or by telephoning the Revenue Forms and Leaflets Service on 01 878 0100. This service is available 24 hours a day. The completed form should be sent directly to the inspector of taxes who deals with the tax affairs of your client (the vendor). It is very important that it is properly completed and sent to the inspector of taxes at the correct tax office as experience has shown that delays arise in processing applications because application forms are incorrectly completed and/or incorrectly addressed.

Note that CGT is not administered centrally like other capital taxes, such as stamp duty and capital acquisition tax. It is administered by the different tax offices spread around the country. For convenience, a list of the various tax offices with addresses and phone numbers is included at the end of this article.

Q2: When should I apply for a clearance certificate on behalf of my client?

At the earliest possible time. For instance, in the case of a sale, once a contract for sale is in existence, application should be made immediately. At the latest, applications should be posted so that they are received in the tax office at least *five working days* in advance of the closing date (this may mean actually posting the application six/seven days in advance of the closing date). The issue of a clearance certificate in time for the closing date cannot be guaranteed if the five-day rule is not observed. If the closing date on the contract for sale has elapsed at the time of making the application, confirmation will be required that the consideration has not passed, and a revised closing date must be specified.

Q3: What conditions must be met to obtain a clearance certificate?
The certificate (form CG50A) can be obtained if any one of the following conditions is satisfied:

- The person making the disposal is resident in Ireland, or
- No capital gains tax is payable in respect of the disposal, or
- The capital gains tax chargeable in respect of the disposal (and any previous disposal) of the asset has been paid.

In the latter two instances, you must demonstrate to the inspector, with supporting computation, payment and so on, as appropriate, that the relevant condition is satisfied. For example, in the case of an application by a non-resident person, you must show that either no CGT is payable or, if CGT is payable, you must attach a computation of the tax payable and pay any such tax together with any tax chargeable on any gain accruing in any earlier year on a previous disposal of the asset.

The grounds for the application should be clearly marked on the form CG50 and *only one option should be specified*.

Q4: What information is necessary when completing the application form?
The form is straightforward and contains detailed explanatory notes of what is required. To complete the form you will need to know and arrange for the insertion of (in the order required on the application form) the:

- Name and address of the tax office which deals with the tax affairs of the vendor (your client)
- Name, address and tax reference number of the vendor (your client)
- Consideration involved
- Full description of the asset
- Name and address of the person acquiring the asset
- Date of contract for sale (with copy contract attached)
- Date on which the vendor acquired the asset
- Grounds for application – that is, resident, no tax payable, tax already paid as appropriate
- Signature of the vendor
- Capacity in which application is made.

Q5: What do I do if I do not know the name/address of my client's tax office?
First, ask your client for the information. (If your client is a company, the company secretary should be able to provide the details.) The name and address of your client's tax office is available from either his annual tax-free allowance certificate, notice of assessment to tax and/or correspondence with his tax office. If you are still unsure, phone the local tax office (if phoning from a provincial region) or, if phoning from Dublin, phone the Central Telephone Information Office on 01 878 0000, explain the problem, giving the client's tax reference number and ask for the correct district/address.

Q6: What do I do if my client does not know his tax reference number?
Again, as for Q5 above, ask your client to examine his annual tax-free allowance certificate, notice of assessment to tax and/or correspondence with his tax office: the

PRACTICE NOTES

Offences Against the State (Amendment) Act, 1998
Practitioners are advised to exercise extreme caution when asked to attend on clients held under the above Act. Solicitors who are not thoroughly familiar with the implications of the Act *for legal advisors* are advised to consult with a colleague who has experience of the Act before attending on a client in custody. Particular difficulties arise for solicitors in relation to advising clients on the inferences which may be drawn under section 2 (membership of an unlawful organisation) and section 5 (failure to mention particular facts). It is important to note that certain provisions of the Act may be applied in circumstances where crimes other than subversive offences are under investigation.

Criminal Law Committee

Ad-hoc legal aid scheme: CAB cases
The Criminal Law Committee examined the provisions of the above scheme which was introduced in April 1998. Having monitored its implementation, the committee concluded that, given the nature of the work involved, both the fee structure and the level of fees payable to solicitors are inappropriate. The committee made representations to the Department of Justice, Equality and Law Reform on a number of occasions. The department responded by suggesting some minor adjustments to the scheme. However, the substantive issues remained unresolved when the expansion of the scheme was implemented in March 1999.

Having considered the matter further, and in the absence of any firm proposals regarding a restructuring of the scheme, the committee advised the Council of the Society of its concerns.

The Council recommends that solicitors do not take on new CAB cases where the ad-hoc scheme is applied. The Council further recommends that, given the nature of the work and in the absence of taxed costs, practitioners should refer clients to the Civil Legal Aid Board.

Criminal Law Committee

Criminal legal aid scheme
Criminal Justice (Legal Aid) (Tax Clearance Certificate) Regulations 1999 (SI No 135 of 1999)
The Department of Justice, Equality and Law Reform has advised that regulations have been made introducing an annual tax clearance procedure for solicitors and barristers on the criminal legal aid scheme panel. As from **1 August 1999,** new entrants to the panels must furnish a tax clearance certificate to the appropriate county registrar in order to be eligible for assignment of cases.

Practitioners who are already on the panel will be required to furnish tax clearance certificates to the relevant county registrar by **30 November 1999** and annually thereafter in order to retain their name on the panel. Application for a tax clearance certificate should be made to the Collector General's office in good time. It is important to note that the regulations provide that an application submitted to the Collector General by **15 October 1999** guarantees the existing member's retention on the panel where:

a) The Revenue has not made a decision on the application by 30 November 1999, or
b) The application has been refused, an appeal has been made as provided for in the regulations, which has not been determined or withdrawn on 30 November 1999.

Those practitioners who are currently on the legal aid panel will be issued with the an application form directly from the Department of Justice in early September. Panel members who do not receive a form at that time should make enquiries with the Courts Policy Section of the department.
An update will be published in the next issue of the Gazette.

Stamping and issuing of civil bills
Members are reminded that the provisions of section 7 of the *Courts Act, 1964* provide that where a civil bill is served by registered post, in circumstances in which there is no summons server assigned to the county in question, the civil bill is deemed to be issued at the time at which the envelope is posted.

The provisions of order 10 of the *Circuit Court rules* (as amended) apply subject to the provisions of the 1964 Act.

Litigation and Arbitration Committee

tax reference number will be shown on any such documentation. If the information is still not available, contact the local tax office as per Q5 above.

Telephone requests for details of either a client's tax reference or tax office should only be made after making every effort to obtain these direct from the client. Please also note that for security and confidentiality reasons, you may be required to provide some evidence that you are acting with the authority of the vendor.

Q7: What do I do if my client does not have a tax reference number?
There will be a small number of such cases. These might include cases where an individual's income is below the tax exemption limit (for example, an individual whose only income is an old-age pension) or where a person is non-resident and has no Irish income tax liability. In such circumstances the application will normally be processed in the local tax office for the area in which the applicant resides (if Irish resident). In the case of a non-resident person, the application will normally be processed by reference to the address in which the Irish resident agent (solicitor/accountant and so on) resides. Applications of this nature in relation to the Dublin area should be addressed to either:

- Dublin Tax (Income Tax) District (individuals/trusts), or
- Dublin Tax (Corporation Tax) District (companies/corporate bodies).

In provincial areas, applications should be directed to the local tax office. A list of tax offices is included at the end of this article.

Q8: Is a certificate required where the consideration is exactly £150,000?
No. A certificate is only required if the consideration exceeds £150,000.

Q9: Can an agent sign on behalf of a client?
No. The application must be signed by the person chargeable (that is, the vendor). In the case of an individual, the application should be signed by that individual. In the case of a company, it should be signed by the secretary of the company or other officer performing the duties of secretary. In the case of a corporation or other body of persons, the application should be made by the treasurer, auditor or receiver. For trusts or unadministered estates, the application should be made by the trustees or the personal representatives.

Q10: Where there is more than one vendor, who must sign the application?
In the case of the disposal of an asset where there are multiple vendors, a single application should be made and this should be signed by each of the vendors. The tax references of each of the vendors should be provided and the application may be sent to any one of the vendor's tax offices, which will process the application, liaising with other tax offices as necessary.

Q11: In the case of a husband and wife jointly assessed to tax, must each spouse sign the application?
In general, an application signed by one spouse only will be accepted.

Q12: Where the disposal is by an executor/administrator in the administration of an estate, where should the CG50 application be sent?
If tax returns were made on behalf of the deceased's estate – as distinct from the personal pre-death tax returns of the deceased – the application should be made direct to the tax office to which the estate's tax returns were made. If no tax returns were made on behalf of the estate, the application may, in practice, be made to the tax office that dealt with the pre-death tax affairs of the deceased. In all such cases, it would be helpful if the deceased's tax reference number was quoted. If the deceased did not have a tax reference, proceed as per Q7, having regard to the pre-death address of the deceased.

PROVINCIAL TAX OFFICES: ADDRESSES AND PHONE NUMBERS

Athlone Tax District,
Government Offices,
Pearse Street,
Athlone,
Co Westmeath.
Tel: 0902 92681

Castlebar Tax District,
Michael Davitt House,
Castlebar,
Co Mayo.
Tel: 094 21344

Cork Tax District,
Government Buildings,
Sullivans Quay,
Cork.
Tel: 021 966077

Dundalk Tax District,
Earl House,
Earl Street,
Dundalk,
Co Louth.
Tel: 042 32251

Galway Tax District,
Hibernian House,
Eyre Square,
Galway.
Tel: 091 563041

Kilkenny Tax District,
Government Buildings,
Hebron Road,
Kilkenny.
Tel: 056 52222

Letterkenny Tax District,
Government Offices,
High Road,
Letterkenny,
Co Donegal.
Tel: 074 21299

Limerick Tax District,
River House,
Charlotte Quay,
Limerick.
Tel: 061 318711

Sligo Tax District,
Government Offices,
Cranmore Road,
Sligo.
Tel: 071 60322

Thurles Tax District,
Stradavoher,
Thurles,
Co Tipperary.
Tel: 0504 21544

Tralee Tax District,
Government Offices,
Spa Road,
Tralee,
Co Kerry.
Tel: 066 21844

Waterford Tax District,
Government Buildings,
The Glen,
Waterford.
Tel: 051 873565

Wexford Tax District,
Government Buildings,
Anne Street,
Wexford.
Tel: 053 45555

DUBLIN TAX OFFICES: ADDRESSES AND PHONE NUMBERS

Dublin Tax (Income Tax) District,
1A Lower Grand Canal Street,
Dublin 2.
Tel: 01 661 6444
(self-employed individuals/trusts)

Dublin Tax (Corporation Tax) District,
Lansdowne House,
Lansdowne Road,
Dublin 4.
Tele: 01 668 9400
(companies)

Dublin Directors District,
Hawkins House,
Hawkins Street,
Dublin 2.
Tel: 01 677 5004
(company directors)

Dublin PAYE No 1 & PAYE No 4,
Áras Brugha,
9/15 Upper O'Connell Street,
Dublin 1.
Tel: 01 874 6821
(employees)

Dublin PAYE No 2 & PAYE No 3,
85/93 Lower Mount Street,
Dublin 2.
Tel: 01 661 6444
(employees)

Claims Section,
Áras Brugha,
9/15 Upper O'Connell Street,
Dublin 1.
Tel: 01 874 6821
(charities)

LEGISLATION UPDATE: 18 MAY – 14 JUNE

ACTS PASSED

Companies (Amendment) Act, 1999
Number: 8/1999
Contents note: Amends and extends parts IV and V of the *Companies Act, 1990* to permit stabilising activity in relation to the issue or sale of securities and provides for connected matters
Explanatory memo: Yes, with *Companies (Amendment) (No 3) Bill, 1999*
Date enacted: 19/5/1999
Commencement date: 24/5/1999 (per SI 144/1999)

Criminal Justice Act, 1999
Number: 10/1999
Contents note: Creates a new drug offence; amends the law relating to proceedings in criminal matters; amends the law relating to enforcement of penalties against drug traffickers; establishes rules relating to the sentencing of persons who have entered guilty pleas; provides for evidence by certificate in relation to exhibits; amends the law relating to the certification, for extradition purposes, of certain offences under the law of Northern Ireland and Scotland and the law defining the judges who have jurisdiction to hear extradition matters; abolishes the 'year and a day' rule; amends s4 of the *Criminal Justice Act, 1984*; amends the *Offences Against the State (Amendment) Act, 1998*; provides for the giving of evidence through a live television link by witnesses in fear or subject to intimidation; creates a new offence of trying to discover the whereabouts or any new identity of witnesses who have been relocated under the Garda Síochána witness protection programme; creates a new offence of intimidating witnesses and others; and creates a new power to enable the Garda Síochána to investigate offences by prisoners. Provides for related matters
Explanatory memo: Yes, with *Criminal Justice (No 2) Bill, 1997*, and with the *Criminal Justice Act, 1999*
Date enacted: 26/5/1999
Commencement date: 26/5/1999 for parts I, II (per SI 154/1999) and part VI; commencement order/s to be made for other sections (per s 2(2))

Criminal Justice (Location of Victims' Remains) Act, 1999
Number: 9/1999
Contents note: Provides for the setting-up of the Independent Commission for the Location of Victims' Remains established under the Agreement between the Irish Government and the Government of the United Kingdom, done at Dublin on 27/4/1999, to facilitate the location of the remains of victims of paramilitary violence killed prior to 10/4/1998. Amends s24 of the *Freedom of Information Act, 1997*
Explanatory memo: Yes
Date enacted: 19/5/1999
Commencement date: 26/5/1999 (per SI 155/1999)

Declaration under Article 29.7 of the Constitution (Extension of Time) Act, 1999
Number: 12/1999
Contents note: Extends the period of time from 12 months to 24 months within which a declaration may be made by the Government – under article 29.7 of the Constitution – that the State has become obliged, pursuant to the *British-Irish Agreement*, to give effect to the amendment of articles 2 and 3 of the Constitution as set out in article 29.7.3
Explanatory memo: No
Date enacted: 2/6/1999
Commencement date: 2/6/1999

Health (Eastern Regional Health Authority) Act, 1999
Number: 13/1999
Contents note: Provides for the establishment of the Eastern Regional Health Authority, three boards to be known respectively as the Northern Area Health Board, the East Coast Area Health Board and the South-Western Area Health Board, and an executive to be known as the Health Boards Executive. Provides for the dissolution of the Eastern Health Board and amends the *Health Act, 1970*, the *Health (Amendment) (No 3) Act, 1996*, section 6 of the *Health (Corporate Bodies) Act, 1961*, and certain other enactments
Explanatory memo: Yes, with the *Health (Eastern Regional Health Authority) Bill, 1998*
Date enacted: 2/6/1999
Commencement date: 2/6/1999; establishment day order to be made (per s3(1))

Irish Sports Council Act, 1999
Number: 6/1999
Contents Note: Establishes a statutory body, to be known as the Irish Sports Council or, in the Irish language, Comhairle Spoirt na hÉireann, to promote and encourage the development of sport in Ireland
Explanatory memo: Yes, with *Irish Sports Council Bill, 1998*
Date enacted: 18/5/1999
Commencement date: 18/5/1999; establishment day order to be made (per s4)

Local Elections (Disclosure of Donations and Expenditure) Act, 1999
Number: 7/1999
Contents Note: Provides for a statutory scheme for the disclosure of election expenses at local elections by candidates, political parties and third parties; requires candidates to disclose the source of funds used to meet election expenses; provides for research into electronic methods of recording and counting votes under the PR-STV election system, using the ballot papers from the 1999 European Parliament and local elections. Amends the *Local Elections Acts, 1974 to 1997*
Explanatory memo: Yes, with Bill as introduced and with Bill as passed by Seanad Éireann
Date enacted: 18/5/1999
Commencement date: 18/5/1999

Údarás na Gaeltachta (Amendment) Act, 1999
Number: 11/1999
Contents note: Amends s28 of the *Údarás na Gaeltachta Act, 1979*, in relation to the intervals at which elections of members of Údarás na Gaeltachta shall be held
Explanatory memo: No
Date enacted: 26/5/1999
Commencement date: 26/5/1999

SELECTED STATUTORY INSTRUMENTS

Aliens (Exemption) Order 1999
Number: SI 97/1999
Contents note: Exempts citizens of the United Kingdom of Great Britain and Northern Ireland from the operation of the *Aliens Act, 1935* and of the *Aliens Orders* made under section 5 of that Act
Commencement date: 20/4/1999

Civil Legal Aid (Refugee Legal Service) Order 1999
Number: SI 74/1999
Contents note: Provides that an appeals authority established by the Minister for Justice, Equality and Law Reform to determine appeals against a decision to refuse refugee status shall be a prescribed tribunal for the purposes of section 27(2)(b) of the *Civil Legal Aid Act, 1995*
Commencement date: 29/3/1999

Competition Authority (Witness Summons) Regulations 1999
Number: SI 137/1999
Contents note: Prescribe a procedure to allow the Competition Authority to summons witnesses under the *Competition Act, 1991* and the *Competition (Amendment) Act, 1996*
Commencement date: 27/5/1999

Criminal Justice (Legal Aid) (Tax Clearance Certificate) Regulations 1999
Number: SI 135/1999
Contents note: Provides for the application of tax clearance procedures to solicitors and barristers who operate under the criminal legal aid scheme
Commencement date: 1/8/1999

District Court (Attachment and Committal) Rules 1999
Number: SI 124/1999
Contents note: Insert a new order 46B (attachment and committal) in the *District Court Rules 1997* (SI 93/1997) which introduces a procedure of attachment and committal for contempt of a court order
Commencement date: 21/5/1999

District Court (Costs) Rules 1999
Number: SI 126/1999
Contents note: Amend order 51 of the *District Court rules 1997* (SI 93/1997) by inserting a new rule 6A which includes in the term 'actual and necessary outlay' a sum for miscellaneous outlay. This sum as set out in the schedule of outlays attached to the rules is to include postage, photocopying, registered post, fax and sundries
Commencement date: 21/5/1999

District Court (Custody and Guardianship of Children) Rules 1999
Number: SI 125/1999
Contents note: Amend order 58 of the *District Court rules 1997* (SI 93/1997) to include the provisions of the *Children Act, 1997*. The main amendments are to enable relatives of the child's parents or any person acting *in loco parentis* of the child to apply to the court for access to the child. The rules also take into account the provisions of the *Guardianship of Children (Statutory Declaration) Regulations 1998* which prescribe a form of declaration to allow the father of a non-marital child to be guardian of the child with the consent of the mother
Commencement date: 21/5/1999

Industrial Development (Enterprise Ireland) Act, 1998 *(Section 40) (Commencement) Order 1999*
Number: SI 127/1999
Contents note: Appoints 13/5/1999 as the commencement date for section 40 of the Act (designation of certain members of staff of An Foras Áiseanna Saothair (FÁS) to be transferred to and become members of Forfás)

Solicitors Act, 1954 *(Section 44) Order 1999*
Number: SI 133/1999
Contents note: Brings s44 of the *Solicitors Act, 1954,* inserted by s52 of the *Solicitors (Amendment) Act, 1994*, into operation in relation to the profession of solicitor in New Zealand. The effect of the order is that a solicitor qualified in New Zealand may be admitted as a solicitor in Ireland subject to the corresponding conditions under which Irish solicitors whose names are on the roll may be admitted to practice in that country
Commencement date: 1/6/1999

Prepared by the Law Society Library

Personal injury judgments

Negligence – road traffic accident – female driver – whiplash injury – psychiatric condition

Case

Noreen Foye v Liam Cusack and Others, High Court, before Ms Justice Laffoy, judgment of 13 February 1998.

The facts

On 13 February 1993, Noreen Foye, a nurse in her mid-30s, while driving her car home from work was involved in a head-on collision with another car which had weaved across the centre line of the road into her path. Ms Foye was wearing a seat belt.

As a result of the accident, due to both physical, psychological and psychiatric injuries, Ms Foye was absent from work as a registered psychiatric nurse with the Western Health Board for varying periods of months.

Ms Foye had received superficial facial abrasions and suffered from headaches which settled within a short time of the accident. The principal physical injury was of a whiplash-type nature which her general medical practitioner described as moderately severe but he anticipated that it would be resolved without lasting *sequelae* in 12 months. However, her neck symptoms persisted and disimproved rather than improved with the passage of time despite treatment with anti-inflammatory medication, analgesics and physiotherapy.

In April 1994, a consultant orthopaedic surgeon referred Ms Foye to the Blackrock Clinic for an MRI scan. The scan revealed a disc degenerative condition at C6/7 with relatively broad-based disc protrusion encroaching the right lateral neural foramina not fully pressing on the nerve. There was also a slight disc protrusion at C5/6 and C4/5. An orthopaedic surgeon in his report stated in 1997 that, clinically, Ms Foye had suffered soft tissue ligamentous injury with subsequent development of a disc lesion in the cervical spine. He stated that it was not possible to say when these degenerative changes occurred. However, he noted that as there was evidence of disc degenerative changes which had become symptomatic as a result of the injury, there would be a recurrent neck problem in the future.

A pain consultant to whom Ms Foye was referred by a neurosurgeon, stated in her report that the plaintiff had suffered soft tissue injury which caused some irritation to the nerves supplying the upper limbs but also suffered considerable stress as a result of the injury. Certain injection procedures were performed in 1996 which did help to relieve some of the pain in the neck and upper dorsal area. Hydrotherapy and intensive physiotherapy also helped to improve her condition considerably. However, Ms Foye was told to avoid any strenuous exercise or lifting of heavy weights, particularly in the course of her work as a nurse. She would also have to take medication occasionally to relieve pain.

Ms Foye attended a clinic in Killaloe, Co Clare, on a regular basis, and at the clinic she received reconstructive treatment, ultrasound, hydrotherapy and other treatments. Her general health was poor when she first consulted Dr Carmody, and he put her on a metabolic supportive programme and alternative medication to combat depression and induce sleep.

Ms Foye issued proceedings against various parties associated with the offending vehicle.

There was some dispute before the court as to the onset of certain psychiatric symptoms suffered by Ms Foye and what had triggered them. She had been treated for depression since November 1993. She suffered a recurrence of depressive symptoms, entered St John of God's Hospital in Dublin, and subsequently attended a stress-management course in that hospital. A psychiatrist was of the opinion that Ms Foye suffered from a traumatic depression. Treatment was commenced with anti-depressants at full dosage and reviewed on a regular basis. At a subsequent stage, Ms Foye was, according to the psychiatrist, symptom-free.

The plaintiff suffered another road traffic accident on 28 June 1997 which aggravated her psychological symptoms further. A psychiatrist was of the opinion that the resolution of the legal proceedings would aid her psychological recovery because she found visits to solicitors and medical specialists very stressful. The psychiatrist considered the prognosis for her psychological symptoms was favourable, although she was likely to suffer further relapses of depressive illness in response to significant stress and trauma.

A consultant psychiatrist who assessed Ms Foye on two occasions for the defence agreed that she suffered from, and had been appropriately treated for, depression. However, she questioned whether Ms Foye's psychological problems were attributable to the accident of 13 February 1993. The consultant psychiatrist identified a number of other stress factors which were regarded as significant in the genesis of Ms Foye's depressive symptoms

There was the issue of a 'break-up' of a long-term relationship with a boyfriend which ended in the autumn of 1993. The consultant psychiatrist concluded that Ms Foye's psychological symptoms were more likely related to this episode than to the accident.

Another factor was raised which may have aggravated stress. In November 1993, Ms Foye went to the assistance of a ward sister who had been dragged to the ground by a patient. The patient then caught Ms Foye around the neck and it was alleged that the neck went into spasm. Ms Foye was deemed unfit for work and was given an injection of IM Valium. She was out of work for 10 weeks.

A further factor which it was argued may have caused stress was work and studies. Ms Foye was working in St Mary's Hospital, Castlebar, as a psychiatric nurse in a geriatric ward. She was living in Spiddal and commuting to Castlebar for work. In May 1994, she was transferred to Swinford Hospital where her duties had been lighter from a physical point of view. Reference was made to the fact that she was studying for part three of the certified public accountancy examinations and that she had abandoned her studies because of the combination of her physical and psychological symptoms

It was submitted that in May 1995 there had been a fire in her home destroying her sitting room.

It was argued in court that a second road traffic accident which was not the subject of the present proceedings, in which Ms Foye skidded on loose chippings and her car overturned and landed in a ditch, had caused a further exacerbation of her psychological symptoms. She had difficulty sleeping, was anxious and irritable and had difficulty concentrating.

In September 1997, there was a further accident. The car in which Ms Foye was driving was rear-ended, but it was argued there was no significant event in the context of the proceedings before the court.

The judgment

Ms Justice Laffoy, having outlined the facts as above, delivered judgment on 13 February 1998. She noted that Ms Foye's car had been written-off in the accident and that liability in the case was not in dispute and so the judge had to deal with an assessment of damages only. In relation Ms Foye's car, Laffoy J noted that Ms

Foye had recovered in full under her comprehensive insurance policy and accordingly no claim arose in respect of car damage.

In relation to certain periods of absence when the Western Health Board had paid Ms Foye's salary, Laffoy J held that there was no evidence that Ms Foye accepted payment of salary for any of the periods of absence on the basis of reimbursement. She held that Ms Foye had not established that she was contractually liable to reimburse the Western Health Board for the salary paid to her during the periods of absence out of the damages awarded to her. Under the circumstances, she held that Ms Foye could not sustain a claim for loss of earnings against the defendants in the proceedings.

In relation to factors causing psychological stress to Ms Foye, the judge noted that the break-up of a long-term relationship with a boyfriend had left the plaintiff angry and bitter. She noted that this was an important relationship and that, while Ms Foye had been shown to be an unreliable historian (or, in the judge's view, a selective historian, although the judge believed that she was not deliberately selective), Laffoy J accepted the veracity of her evidence and was of the opinion that the break-up of the relationship – insofar as it was a factor in the onset of Ms Foye's psychological problems, if at all – was not a significant factor.

Referring to the incident at work in November 1993 when Ms Foye was attacked by a patient, the judge noted that this incident must have been of some significance in the progress of her psychological deterioration.

The judge referred to the stress of court proceedings and noted that a constant theme in the case had been the effect of the impending trial on Ms Foye. She noted that undoubtedly the imminence of the proceedings and the pressure of consultations with legal advisors and expert medical witnesses on both sides had exacerbated Ms Foye's stress. The judge noted that this particular stress factor would disappear in the immediate future.

Laffoy J noted that the defendants had emphasised the fact that up to May 1994, when an affidavit to ground an application to transfer these proceedings from the Circuit Court to the High Court was sworn, psychiatric disorder was not a feature of the case at all. The judge noted that there were, and are, multiple factors contributing to the onset of Ms Foye's psychological difficulties. The judge noted that there were 'chicken and egg' aspects in relation to many of the factors and that the physical symptoms were inextricably linked and intertwined with psychological difficulties.

Laffoy J held that the accident which was the subject of the proceedings was primarily responsible for Ms Foye's injuries and that the accident and the physical consequences of the accident were the primary triggers of her depression.

She noted, in the context of general damages, that Ms Foye was 36 years of age and had had a very bad five years, both physically and mentally, but had done her best to cope and to stay at work and that she must get credit for that. The judge noted that one should expect her to have put most of the *sequelae* of the accident behind her by the end of two years.

In relation to pain and suffering to date of the trial, the judge awarded £45,000, and for suffering in the future, the sum of £30,000. In relation to special damages and loss of income over the inability of Ms Foye to do night duty for two years, Laffoy J allowed the sum of £1,600 in full. In relation to medical expenses, the judge awarded the sum of £8,778 and also awarded £500 for travelling expenses, making the sum in total £85,878.

Counsel for the defendants asked for a stay, arguing that a small figure should have been awarded since it was a complex case interlinked with injuries in the different accidents and suggesting that the payment out should be relatively small, perhaps a figure of £25,000. Counsel for Ms Foye argued that if there was to be a stay, then it should be at least £50,000. Ms Justice Laffoy stated that she would give a stay upon terms that £45,000 was paid out. The judge put no stay on the order for costs.

Solicitor for Ms Foye: M Moran & Co, Castlebar, Co Mayo. Solicitor for the defendant: MacHales, Solicitors, Ballina and Belmullet, Co Mayo.

Negligence – breach of duty – supermarket – fall of box

Case

Maria Doyle v Superquinn Limited, High Court, Kilkenny, 25 November 1998, before Mr Justice Vivian Lavan.

The facts

A 28-pound box fell on Maria Doyle's neck from a height of seven to eight feet. Ms Doyle sued Superquinn Limited in the High Court for damages.

The judgment

Lavan J gave judgment on 25 November 1998 in the High Court in Kilkenny. He stated that he accepted the evidence of Maria Doyle, that she had a genuine injury. He accepted that she was worried about her condition and he accepted that the worry was adding to the problems and were stymying her recovery.

Lavan J observed, however, that once the case was over, he felt Mrs Doyle would take a year to recover. He noted that she was anxious to get back to work and considered that her employers have very fairly indicated that they were going to help. The judge noted that if she could get back to work in six months rather than 12 months all the better, but he was not making that a condition of his award.

The judge noted that he was satisfied that Mrs Doyle had suffered a major assault on her nervous system and for pain and suffering to date he awarded the sum of £15,000. In the context of on-going residual problems which may last beyond the year, he awarded £5,000 for pain and suffering in the future. Special damages amounted to £14,136. The total came to £34,137 and costs.

Solicitors for Mrs Doyle: John M Foley & Co, Solicitors, Bagnelstown, Co Carlow. Solicitors for the defendant: Gerard Meaney, Parliament Street, Kilkenny. G

These judgments were summarised by Dr Eamonn Hall, Solicitor, from Personal injury judgments *from Doyle Court Reports, 2 Arran Quay, Dublin 7.*

ILT digest

of legislation and superior court decisions

Compiled by David P Boyle

ADMINISTRATIVE

Western Development Commission established

1 February 1999 is appointed as the establishment day for the Western Development Commission.

Western Development Commission Act, 1998 *(Establishment Day) Order 1999* (SI No 9 of 1999)

Architectural Heritage (National Inventory) and Historic Monuments (Miscellaneous Provisions) Bill, 1998

This Bill has been amended in committee.

ARBITRATION

Removal of arbitrator considered

- The court's discretionary power to remove the arbitrator is likely to be confined to cases where the arbitration could not continue with the particular arbitrator in office, either because he had shown actual or potential bias or because his conduct had given serious grounds for destroying the confidence of one or both of the parties in his ability to conduct the dispute judicially or competently.

In January 1992, the first-named defendant entered into a contract with the plaintiff for certain electrical works to be carried out at the first-named defendant's factory. Following the completion of the works, a dispute arose between the parties as to the amount due to the plaintiff in respect of those works. The parties referred the dispute to an arbitrator, the second-named defendant. The arbitration commenced on 22 May 1995 and the second-named defendant gave a decision on the preliminary issue in which, *inter alia*, he excluded certain works from the reference, in an interim award dated 14 June 1995. Pursuant to an interlocutory application by the plaintiff, the Supreme Court made an order to the effect that the second-named defendant had jurisdiction to deal with all the matters concerned and, accordingly, the second-named defendant subsequently amended his award to that effect. The arbitration continued on the substantive dispute between the parties until 18 July 1995. The plaintiff instituted proceedings seeking, *inter alia*, the second-named defendant's removal under ss24 and 37 of the *Arbitration Act, 1954*. He sought an order that the arbitration agreement would cease to have effect and revoking the authority of the second-named defendant, appointed under the agreement. The plaintiff alleged misconduct and bias on the part of the second-named defendant and that he had failed to use all reasonable dispatch in the proceedings and in making an award. The plaintiff further contended that a dispute had arisen which involved a question of whether the plaintiff had been guilty of fraud raising the court's power pursuant to s39 of the 1954 Act. In dismissing the proceedings, it was held that:

- Insofar as it was the plaintiff's case that the matters constituted misconduct on the part of the second-named defendant, the plaintiff was estopped from pursuing such allegations at that time, given that in earlier proceedings no allegation of misconduct had been made against the second-named defendant
- The refusal of an arbitrator to exercise his discretionary power to make an interim award was not reviewable by the court
- In the amended interim award, the second-named defendant corrected the error on the face of the interim award in that he found that the whole of the work was within his jurisdiction. Nothing further was required in the amended interim award and there was no necessity to convene a hearing or to elicit submissions from the parties before the amended interim award was made
- There was no basis in law for the proposition that an arbitrator was under an obligation to communicate his conclusions to the parties as soon as he had reached them
- Given that the fundamental basis of the liability of the plaintiff and the first-named defendant was joint and several, that express provision was made for interim payments on account, on an objective construction of the appointment form it could not have been the intention to deprive the second-named defendant of the entitlement to have recourse to the first-named defendant for interim payments in the event of default on the part of the plaintiff
- The court's discretionary power to remove an arbitrator is likely to be confined to those cases where the arbitration simply could not be allowed to continue with the particular arbitrator in office, either because he had shown actual or potential bias, or because his conduct had given serious grounds for destroying the confidence of one or both of the parties in his ability to conduct the dispute judicially or competently
- It had not been established that the second-named defendant conducted himself in a manner which reasonably gave rise to the suspicion in the mind of an unprejudiced onlooker that justice had not been done
- An allegation that a claim under a contract was exaggerated or inflated without a further plea that the claimant in making the claim was being knowingly or recklessly false or dishonest was not an allega-

tion that the claimant was guilty of fraud.

Re Tobin and Twomey Services Limited v Kerry Foods Limited (Laffoy J), 22 April 1998

COMMUNICATIONS

Postal and Telecommunications Services (Amendment) Bill, 1998

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

Advertising for religious publications to be permitted?

In the light of a recent Independent Radio and Television Commission decision preventing the broadcast of an advertisement for a religious newspaper, a private members' Bill has been introduced which seeks to allow such advertisements where certain conditions are met.

Radio and Television (Amendment) Bill, 1999

COMPANY

Proposed new company legislation presented

The long-awaited Bill seeking to amend the *Companies Acts* has been presented. If passed, it will:

- Amend the *Companies (Amendment) Act, 1990* relating to examinership
- Amend the *Companies Acts, 1963–1990* in relation to the removal of the statutory audit requirement for certain private limited companies and partnerships
- Amend the law relating to Irish-registered non-resident companies, and
- Amend the provisions of s240 of the *Companies Act, 1990* and s16 of the *Investment Limited Partnerships Act, 1994.*

Companies (Amendment) (No 2) Bill, 1999

CRIMINAL

Anti-corruption measures proposed

A private member's Bill has been introduced which will, if passed:

- Provide for new offences of bribery and secret commission
- Introduce a presumption of corruption, and
- Introduce maximum penalties of a fine of £50,000 and/or up to seven years' imprisonment.

Prevention of Corruption (Amendment) Bill, 1999

EDUCATION

New training framework to be introduced?

A new Bill has been introduced which will, if passed:

- Establish an administrative structure for the development, recognition and award of educational and training qualifications within the State
- Establish the following bodies: National Qualifications Authority, Further Education and Training Awards Council and the Higher Education and Training Awards Council
- Dissolve the National Council for Educational Awards
- Establish and develop standards of knowledge, skill and competence, and
- Establish procedures for access, transfer and progression.

Qualifications (Education and Training) Bill, 1999

EMPLOYMENT

Parental leave dispute procedures set out

New regulations set out the procedures to be followed in relation to the hearing of disputes and appeals by a rights commissioner or the Employment Appeals Tribunal under part IV of the *Parental Leave Act, 1998.*

Parental Leave (Disputes and Appeals) Regulations 1999 (SI No 6 of 1999*)*

Millennium holiday granted

31 December 1999 has been appointed as a special public holiday in celebration of the millennium.

Organisation of Working Time Act *(Public Holiday) Regulations 1999* (SI No 10 of 1999)

Adoptive leave scheme held to be discriminatory

- An adoptive leave scheme, available to female employees only, constituted discrimination on the ground of sex, and did not fall within the statutory exemption for schemes relating to pregnancy or childbirth.

The respondent, who was employed by the applicant, adopted a child. His subsequent application for adoptive leave was refused on the ground that adoptive leave was available to female staff only. The Labour Court determined that the applicant had discriminated against the respondent by treating him less favourably than a woman would have been treated in similar circumstances. The applicant appealed the High Court's dismissal of its appeal on a point of law from that determination. Section 16 of the *Employment Equality Act, 1977* provides that nothing in that Act makes it unlawful for an employer to provide special treatment to women in connection with 'pregnancy or childbirth'. Council Directive 76/207/EEC, on the principle of equal treatment for men and women in access to employment, vocational training, promotion and working conditions, provides in art 2(3) that the directive is without prejudice to provisions concerning the protection of women, particularly as regards 'pregnancy and maternity'. The applicant contended that the word 'childbirth' in s16 of the 1977 Act included 'adoption', permitting the affording of more favourable treatment to a female adoptive parent. In dismissing the appeal, it was held that:

- European Community law took precedence over national law. National courts, in interpreting a provision of national law designed to implement the provisions of a directive, should interpret the national law in the light of the wording and purpose of the directive, to achieve the results envisaged by the directive
- The directive permitted derogation from the principle of equal treatment in working conditions. The Oireachtas, in enacting s16 of the 1977 Act, chose to exercise its discretion under the directive by limiting the exemptions from the Act's provisions to arrangements in respect of pregnancy or childbirth
- The provisions of s16 were clear and explicit and were incapable of being interpreted so as to include 'adoption'
- The adoptive leave scheme was clearly discriminatory against male persons, including the respondent.

Telecom Éireann v O'Grady (Supreme Court), 4 February 1998

ENVIRONMENTAL

Direct reliance on directive permitted

- Provided a directive is sufficiently unconditional and precise in its terms, its transposition into national law might, in some respects at least, be a formality, thus enabling individuals to assert rights arising from the directive itself.

The applicant sought, by way of judicial review, to quash a decision of the respondent to invite tenders for the provision of a system of drainage for Galway City and its environs. The respondent had proposed a scheme for the provision of screening of sewage and full secondary treatment of

the sewage. In November 1995, the Minister for the Environment approved the respondent's scheme and on 11 March 1996 the Minister for the Marine granted a lease of the relevant area of the foreshore. During the course of these proceedings, both parties disputed the date on which the application for the lease of the foreshore was made to the Minister for the Marine. The applicant submitted that the respondent did not comply with its obligations under the *Foreshore Regulations 1989*, which obliged local authorities or any other person carrying out certain developments to prepare an environmental impact statement (EIS). Even if the application for a lease had been made before the coming into force of the *Foreshore Regulations* as the respondent urged, the applicant submitted that the *Environment directive 1985* was directly applicable as to the results to be achieved during that period. The applicant further submitted that the *Habitats directive 1992* was directly applicable and the defendant failed to comply with its obligations under that directive to determine whether the project would adversely affect the integrity of the site and to obtain the opinion of the general public. The respondent submitted that any obligation to ensure, *inter alia*, that an EIS was obtained under the *Environment directive* and the *Habitats directive* was not directly applicable and imposed obligations on Member States only. The respondent was not, it urged, an emanation of the State for that purpose. In dismissing the appeal, it was held that:

- It was clear that, provided a directive was sufficiently unconditional and precise in its terms, its transposition into national law might, in some respects at least, be a formality, thus enabling individuals to assert rights arising from the directive itself
- Notice was given to the public of the proposed development and that the EIS was available for inspection free of charge and could be purchased by interested persons at the offices of the respondent
- The detailed proposals of which both Ministers ultimately approved were not furnished to them until after the coming into force of the *Foreshore Regulations*
- In every material and significant respect, the respondent complied with the requirements of the *Foreshore Regulations*
- It would not be a proper exercise of the court's discretion to grant the relief sought in these proceedings, although it might have been otherwise if non-compliance in the fullest sense with the *Foreshore Regulations* had, as its consequence, a breach of any principle of EU law
- The preparation of a further EIS, the notification of the public and of interested parties and so on would have been both a redundant exercise and would have delayed further the provision of a comprehensive system of drainage for Galway City and its environment
- The obligations arising under the *Habitats directive* were imposed on the Member States and not on the respondent, although they were acting as an organ of administration
- This was not an appropriate case in which to refer certain questions pursuant to art 177 of the *Treaty of Rome*, as the respondent did not dispute any of the principles of EU law.

McBride v Galway Corporation (Supreme Court), 24 March 1998

FAMILY

Question of whether declaration of parentage could have retrospective aspect discussed

- Where it was proved on the balance of probabilities that a person named in an application under the Act was the father of the applicant, then the court would make the order accordingly.

The plaintiff had applied pursuant to the *Status of Children Act, 1987* for blood samples to be taken from the plaintiff and the defendant. An order was made in 1993 providing for the defendant to provide the sample. By 1998, the sample had not been taken and the matter was re-listed before the High Court. The plaintiff's mother claimed to have had a child by the late PK. The defendant was the brother of PK, and the plaintiff was anxious to examine a blood sample from the defendant in order to prove that PK had been her father. The plaintiff then applied to the High Court pursuant to s35(8) of the 1987 Act for a declaration that PK had been her father. In reply, the defendant contended that the 1987 Act had no retrospective effect as PK had died in 1987, before the coming into operation of the Act. In granting the declaration sought, it was held that:

- Where an application pursuant to s35(8) of the 1987 Act was proved on the balance of probabilities, namely that a person named in the application was the father of the applicant, then the court would make the order accordingly
- There was a wealth of corroborative evidence supporting the plaintiff's application

- S35 of the 1987 Act was purely declaratory as to parentage and was not a retrospective piece of legislation
- The plaintiff was entitled to the declarations sought despite the fact that the defendant had failed to co-operate with the proposed DNA profiling.

GN v KK (Budd J), 30 January 1998

IMMIGRATION

New Bill seeks to deal with recent decision

A Bill has been presented which seeks to deal with the situation arising out of the decision in *Laurentiu v The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* (Geoghegan J, 22 January 1999) which held that s5(1)(e) of the *Aliens Act, 1935* (providing for the making of deportation orders) is inconsistent with the Constitution. The Bill, if passed, will provide powers, principles and procedures regarding the deportation of non-nationals and will also confirm by statute the existing *Aliens Orders*, subject to certain exceptions.

Immigration Bill, 1999

LANDLORD AND TENANT

Claim to new tenancy refused

- The terms of the agreements between the defendant and the vendor were very clear, namely that it was agreed that the relationship of landlord and tenant would not be created, and as no exclusive possession of the site was ever granted to the defendant, the length of possession could not in itself have affected the relationship created by the successive agreements by which possession of the site was permitted.

On 17 December 1996, the plaintiffs agreed to purchase certain premises in Cork from V. They purchased the site subject to a hiring and licence agreement between V and the first-named defendant, dated October 1994. The first-named defendant sold his interest in his agreement with V to the second-named defendant on 12 December 1996. The first-named defendant's agreement with V terminated on 30 September 1997. On that date, the first-named defendant served notice on V subject to s20 of the *Landlord and Tenant (Amendment) Act, 1980*. The first-named defendant claimed that a monthly tenancy had been created by the 1994 agreement and he claimed that grant of a new tenancy under part II of that Act. Alternatively, the first-named defendant claimed £1,000,000 in compensation. The first-named defendant then applied to the court in November 1997 for a new tenancy on the basis that he had been carrying on a business at the premises in excess of three years. In reply, the plaintiffs contended that the premises were not a 'tenement' within the meaning of the Act and that the 1994 agreement had not been a contract of tenancy. The plaintiffs argued that the agreements gave rise to the relationships of licensor and licensee only. The plaintiffs then served a motion for an injunction seeking to restrain the second-named defendant from trespassing on the said lands. The second-named defendant then raised a preliminary issue, namely, that the court had no jurisdiction to grant an injunction because of the proceedings pending in the Circuit Court under the 1980 Act. In denying that the second-named defendant was entitled to claim a new tenancy, it was held that:

- The High Court did have the necessary jurisdiction to adjudicate upon the injunction issue
- At all material times, V referred to its agreements with the first-named defendant as licences, and the sums payable under them as licence fees
- The terms of the agreements between the first-named defendant and V were very clear, namely, that it was agreed that the relationship of landlord and tenant would not be created
- No exclusive possession of the site was ever granted to the first-named defendant by V and the length of possession could not in itself have affected the relationship created by the successive agreements by which possession was permitted
- If the plain meaning of the agreement the first-named defendant signed was that he was a licensee, the first-named defendant could not now claim that, merely because he had erroneously argued the contrary, a contract of tenancy was created
- As the first-named defendant did not hold the site under a lease or a contract of tenancy, neither he nor the second-named defendant had a right to a new tenancy under the 1980 Act
- The second-named defendant was a trespasser on the site as s28 of the 1980 Act did not entitle them to retain possession of the site, and the plaintiffs were entitled to an injunction to prohibit continued occupation of the site
- The premises in question did not form a 'tenement' within the meaning of the 1980 Act and they were not ancillary or subsidiary to the main site. The second-named defendant was not entitled to claim a new tenancy.

Kenny Homes & Co Limited v Leonard (Costello P), 11 December 1997

PLANNING AND DEVELOPMENT

Infrequent concerts not a material change of use

- Land could have as part of its normal use different particular uses or activities, and the question whether particular activities formed part of the normal use was one of fact and degree in each case. For an activity to be seen as part of the normal use of the land, it had to be recurrent and account for a substantial part of the total amount of activities taking place on the land.

The plaintiffs were trustees of the Irish Rugby Football Union (IRFU) and were responsible for the control and management of its Lansdowne Road headquarters, which were located in a residential area. The grounds had been used for pop concerts from time to time. The defendant's view was that the holding of a proposed concert by the group U2 in 1997 would be an unauthorised use of the lands by the IRFU, and served a warning notice under s26 of the 1976 Act. It was agreed that the concerts would go ahead, and the IRFU undertook to institute these proceedings seeking declaratory orders regarding the staging of concerts in Lansdowne Road. The court had before it surveys by a number of experts on the impact of the concerts and other events on the locality. The relevant part of the 1976 Act provides that a warning notice in relation to an unauthorised use of land shall not be served after the expiration of five years from when such unauthorised use first commenced. The plaintiffs claimed that if the use of the lands for concerts was unauthorised, as a number of concerts had taken place on the grounds since 1989, immunity from a s26 notice began five years later in 1994. In finding that staging concerts was not part of the normal use of the premises, it was held that:

- The data and statistics gathered during the U2 concert were crucial in the determination of the question of material change of use. The alteration in the level of noise and the duration of the noise during the U2 concerts represented a material change of use from the holding of sporting fixtures in the

grounds and constituted a development. Whether there had been a material change of use was a matter of fact to be determined by the court in each case
- There was no exclusion in the definition of development for a temporary use
- Land could have as part of its normal use different particular uses or activities and the question of whether particular activities formed part of the normal use was one of fact and degree in each case. For an activity to be seen as part of the normal use of the land, it had to be recurrent and account for a substantial part of the total amount of activities taking place on the land
- Given the infrequent and rare occasions on which the land was used for musical events, it had not acquired this use as a normal use in addition to its use for the staging of sporting events.

Butler v Dublin Corporation (Morris P), 19 February 1998

Locus standi in planning matters considered

- There was a substantial distinction between having sufficient interest to make a particular type of application and establishing that there was an interest which had been materially affected sufficiently to warrant a particular legislative provision being established as unconstitutional at the behest of a particular applicant.

T was granted permission by the respondent for a hotel and office development in December 1996. T appealed to the respondent against some of the conditions attached to that decision. An oral hearing was conducted by the respondent in September 1996. An inspector's report was produced and submitted to the respondent. The applicant, a limited company, sought to quash the decision of the respondent granting that permission. It submitted, *inter alia*, that the respondent failed to comply with its obligations under the *Environment Impact Assessment (EIA) Regulations 1989* and s56(2) of the *Local Government (Planning and Development) Regulations 1994* in not following proper procedures and in failing to consider whether an EIA was required. The applicant also submitted that s23 of the *Local Government (Planning and Development) Act, 1976* required an inspection where the inspector had inspected the site to include an account of his inspection in his report to the respondent, notwithstanding that the inspector who conducted the oral hearing made a report of that hearing to the respondent. The respondent submitted that s23 should be interpreted to mean that where there was an inspection only, there had to be a report on the inspection, but that where there was an oral hearing only, a report on the oral hearing was required. In refusing the relief sought, it was held that:
- Traditionally, *locus standi* in planning cases had been interpreted widely by the courts
- The onus of proof in establishing that the respondent did not consider the question of environmental impact assessment pursuant to art 56(2) of the 1994 regulations, and thereby rebutting the presumption of validity of the respondent's decision, lay with the applicant
- The correct interpretation of s23 of the 1976 Act was that the respondent could direct either an inspection or an oral hearing. In an oral hearing, the inspector's primary task was to hold it in a fair and judicial manner and that he or she should not have to supplement the evidence given at hearing with material drawn from his or her own inspection of the site
- The applicant possessed the necessary *locus standi* to maintain judicial review proceedings in regard to planning matters generally, although somewhat different considerations arose in regard to the applicant's *locus standi* to challenge the constitutionality of a piece of legislation
- There was a substantial distinction between having sufficient interest to make a particular type of application and establishing that there was an interest which had been materially affected sufficiently to warrant a particular legislative provision being established as unconstitutional at the behest of a particular applicant
- In principle, a corporate body, or juristic person, could possess *locus standi* to impugn the legislation by invoking the relevant provisions of the Constitution
- At the time of the respondent's decision, the applicant was neither a property owner in the area affected by the development nor an upholder of social justice and the common good which affected that decision.

Lancefort Limited v An Bord Pleanála (McGuinness J), 12 March 1998

PRACTICE AND PROCEDURE

Question of whether statements to be given to accused considered

- The application for judicial review was undertaken during the currency of the trial because a need presented itself to urgently balance the hierarchy of constitutional rights including, in particular, the right to life. In the overwhelming majority of cases, it would be appropriate that any question of judicial review be left over until after the conclusion of the trial.

The applicant was charged with murder and was brought before the Special Criminal Court to be tried. The applicant sought disclosure of 40 statements which were not made available to him for inspection. The respondent claimed privilege in respect of these documents and contended that the disclosure of these statements would place the lives of those individuals who made them in grievous danger. The Special Criminal Court made a ruling during the currency of the trial allowing the applicant's defence team to have sight of some of the documents on the terms that they were not disclosed to the applicant without leave of the court. The respondent sought to quash the ruling by way of judicial review in the High Court. In allowing the relief sought, it was held that:
- This application for judicial review was undertaken during the currency of the trial because a need presented itself to urgently balance the hierarchy of constitutional rights including, in particular, the right to life. In the overwhelming majority of cases, it would be appropriate that any question of judicial review be left over until after the conclusion of the trial
- It was not any answer that the applicant had consented to his legal team having sight of the statements on the terms that they were not disclosed to him without the leave of the court. His current legal team could have been discharged at any time and there would not be a trial in accordance with constitutional justice if any subsequent legal representatives did not enjoy the full lawyer-client relationship with the applicant, but were under an obligation to keep secrets from him
- The Special Criminal Court had to examine all of the statements concerned and determine whether any of them might help the defence case, help to disparage the prosecution case or give a lead to other evidence. On the basis of that examination, the Special Criminal Court would determine which, if any, of those statements concerned had to be disclosed to the defence

- It was the function of every professional judge to adjudicate on the admissibility of evidence prejudicial to an accused person and to exclude it from his or her mind if it was not admissible according to the rules of evidence.

Director of Public Prosecutions v Special Criminal Court and Ward; Ward v Special Criminal Court (Carney J), 13 March 1998

High court without jurisdiction in article 177 referral once case decided

- The High Court enjoys no jurisdiction, whether of a discretionary or mandatory nature, to seek a preliminary ruling once the case has been decided and is no longer pending within the meaning of article 177.

Permission to develop a dump pursuant to the *Local Government (Planning and Development) Acts, 1963–1992* was refused by Kildare County Council. On appeal, the respondent granted permission subject to certain conditions. The applicant sought to set aside the decision of the respondent. The applicant submitted that the conditions requiring the carrying-out of a certain procedure had not been considered during the preparation of the environmental impact statement (EIS). The respondent submitted that an application for planning permission had to be made within two months from the giving of the impugned decision in accordance with s82(3A) of the *Local Government (Planning and Development) Act, 1963*, as amended by s19(3) of the 1992 Act, and that the above ground was relied upon by the applicant for the first time after the expiry of two months. The applicant contended that the question as to whether the EIS was adequate having regard to the requirements of EU law had to be referred to the Court of Justice pursuant to art 177 of the *Treaty of Rome*. In dismissing the appeal, it was held that:

- The purpose of the procedure under art 177 of the treaty was to enable a national court to obtain any guidance as to EU law which it required in order to decide the case pending before it
- The High Court enjoyed no jurisdiction, whether of a discretionary or mandatory nature, to seek a preliminary ruling once the case had been decided and was no longer pending within the meaning of art 177
- The time-limit imposed by s 82(3A) of the 1963 Act as amended by s19(3) of the 1992 Act was applicable to all proceedings in which a person sought to question the validity of decisions to grant planning permissions, whether the challenge was based on domestic law or EU law or a combination of both.

MacNamara v An Bord Pleanála (Supreme Court), 25 March 1998

REAL PROPERTY

Recision of contract for sale under clause 35 not permitted

- The vendor was not caught by the provisions of clause 35 of the general conditions and so was not in breach of it. The purchaser was not entitled, therefore, to rescind the contract of sale, as the impugned notices in the newspapers had not affected the lands either at law or in value.

The plaintiff was the owner of certain lands which he purported to sell to the defendant. After the sale, but before its conclusion, it emerged that the plaintiff had failed to notify the defendant of the fact that the lands in question had been subject to a designation as a natural heritage area. The defendant contended that the plaintiff had been under a duty to disclose this fact under clause 35 of the general conditions and sought to rescind the agreement. In the High Court, the plaintiff sought and was granted an order of specific performance of the contract for the sale of lands. The defendant appealed against that order to the Supreme Court. The defendant contended that the trial judge had erred in law in interpreting clause 35 and the effect of certain notices which had been published in the newspapers relating to the designation of the lands. He submitted that while the notices in the newspaper had merely been an indication of Ministerial intention, its effect was to diminish the commercial value of the lands and that, therefore, the notice should have been disclosed pursuant to the provisions of clause 35. In reply, the plaintiff submitted that the notices had had no effect on the value of the property. The plaintiff further contended that only notices issued by 'competent' authorities had to be disclosed under clause 35, and at no time had the Minister or the department been competent to issue the notices relating to the designation of the lands which were published in the newspapers. In dismissing the appeal, it was held that:

- To be 'competent' within the meaning of clause 35, an authority had to be expressly or impliedly authorised by statute or order to do what it was purporting to do

- Neither the Minister nor the department were at any material times competent authorities to designate natural heritage areas, or to issue legally-binding notices to that effect within the meaning of clause 35
- Clause 35 was a general clause approved by the Law Society, on the basis that it preserved a fair balance between the vendor and purchaser. It should, therefore, not be interpreted *contra proferrentem* against the vendor
- The notices did not affect the lands either at law or in value
- The plaintiff was not caught by the provisions of clause 35, and so the defendant was not entitled to rescind the sale.

Browne v Mariena Properties Limited (Supreme Court), 4 March 1998

Conveyance set aside on grounds of undue influence

The plaintiffs sought to have set aside a conveyance of a public house and accommodation to their brother by their father, on the grounds that it was procured by undue influence and was an improvident transaction. The 1990 conveyance, in consideration of natural love and affection, was from TC Snr to his son, TC Jnr, with a right of residence for the father. The plaintiffs were the personal representatives for the deceased father, and the defendant was the widow and personal representative of the son, also deceased. The conveyance was challenged on the grounds that the sisters of TC Jnr claimed that it had always been their father's intention that the children would share in the family's assets equally, an intention which was repeated by TC Snr after the 1990 transfer. It was not intended that any ownership in the property would be transferred by the 1990 deed to TC Jnr. The defendant acknowledged that the relationship between the donor and donee gave rise to a presumption of undue influence, but claimed that this presumption was rebutted, as the evidence established that the transaction was the result of the father's free exercise of will. In setting aside the conveyance, it was held that:

- While the presumption of undue influence could arise due to the relationship between a donor and donee of property, the law would not concern itself with insignificant transactions and the presumption arose only where one party derived a substantial benefit. The categories of relationship which would give rise to the presumption were not closed
- Where the presumption existed, it could be rebutted by evidence showing on the balance of probability that the transaction was the consequence of the exercise of the donor of his own free will. This evidence could be proof that the donor had received independent legal advice or competent lay advice
- The court had jurisdiction to set aside a deed on the ground that it was an improvident transaction
- The significant benefit obtained by the son from the transaction and the relationship between the donor and donee were such as to raise the presumption of undue influence
- The defendant had not established as a matter of probability that the transaction was the result of the free exercise of the donor's will so as to rebut the presumption. The court was not satisfied that at the date of the transfer the father had the necessary independent advice which would indicate a free-will transaction. It was probable that the donor did not truly understand or appreciate the nature and effect of the 1990 deed, and it appeared that no-one apart from the son knew the true nature of the 1990 transaction during the donor's lifetime. The 1990 deed of transfer would be set aside.

Carroll v Carroll (Shanley J), 5 March 1998

SUCCESSION

Capital money held in same manner and for same estates as land

- If the capital monies arising from the sale of the house could be said to have arisen under the *Settled Land Acts*, then by virtue of s22(5) of the *Settled Land Act 1882*, the capital money was held in the same manner and for the same estates and interests as if it was the land.

The plaintiffs were executors and certain beneficiaries under the deceased's will. They brought an application by way of special summons against the defendant, the major beneficiary under the will, for the determination of certain questions of construction arising from the will. The will had been admitted to probate and no question of its validity arose. The plaintiffs sought, *inter alia*, the determination of the court as to whether the defendant acquired an absolute estate or a life interest only in the estate of the deceased and whether the other named beneficiaries to the will were entitled to a remainder interest. It was held that:

- Having regard to the law relating to successive gifts of realty, it was immaterial that the house had been sold. Whatever the trusts were attaching to the house, all the same trusts now applied to the net proceeds of the sale
- If the capital monies arising from the sale could be said to have arisen under the *Settled Land Acts*, then by virtue of s22(5) of the *Settled Land Act 1882*, the capital money was held in the same manner and for the same estates and interests as if it was the land
- There could not be a vested remainder interest in personalty which was not for any purpose deemed to be realty but there could be successive interests if they had either been created in the form of a trust or if, irrespective of whether a trust was created or not, they were created by will
- The question of liability for breach of trust or misappropriation of assets could only be considered in the context of proceedings if and when breach of trust or misappropriation was alleged to have happened
- Following on the defendant's death, his personal representatives would have to account for the monies to the beneficiaries if they survived him and would be liable to them. In the event of any of the beneficiaries predeceasing the defendant, the defendant would become absolute owner in respect of that share in the personalty
- The beneficiaries were entitled to vested remainder interests in the proceeds of the realty and they were entitled to future executory interests in the deceased's personalty if they survived the defendant.

Roberts v Kenny (Geoghegan J), 10 March 1998

TAXATION

Finance Bill, 1999

This Bill has been amended in the Select Committee on Finance and the Public Service.

TRANSPORT

New rules to govern grant of taxi licences

With effect from 1 March 1999, new regulations amend the criteria to be used by licensing authorities for assessing applications for the grant of taxi licences and wheelchair accessible taxi licences.

Road Traffic (Public Service Vehicles) (Amendment) Regulations 1999 (SI No 51 of 1999) G

News from the EU and International Affairs Committee

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

Legal protection of biotechnology

Directive 98/44/EC was adopted on 6 July 1998. It is the most recent EU directive dealing with the legal protection of biotechnological inventions.

The need for the directive stemmed from the recognition that biotechnology and genetic engineering were playing an increasingly important role in a broad range of industries and the protection of biotechnological inventions was, and would continue to be, of fundamental importance for the Community's industrial development. It was also recognised that, in particular, in the field of genetic engineering, research and development require a considerable amount of high-risk investment, therefore only adequate legal protection can make them profitable. The fact that differences exist in the legal protection of biotechnological inventions offered by the laws and practices of the Member States and that these differences could create barriers to trade and therefore impede the proper functioning of the internal market was seen as another reason for the need to harmonise and clarify the legal protection of these inventions. However, while recognising the need to support and encourage biotechnology development, the directive contains checks and safeguards that acknowledge the fundamental rights as guaranteed by the *Convention for the protection of human rights and fundamental freedoms.*

Article 1.1 states that it is up to each Member State to adjust its own national patent law to take account of the provisions of the directive, and article 1.2 acknowledges that the directive 'shall be without prejudice to the obligations of the Member States pursuant to international agreements, and in particular the *TRIPs agreement* and the *Convention on biological diversity*'. The latter convention, which entered into force in December 1993, 18 months after it was opened for signature at the 1992 United Nations conference on environmental development in Rio de Janeiro, is a landmark in the environment and development fields. The objectives of the convention include the 'conservation of biological diversity', the 'fair and equitable sharing of the benefits arising out of the utilisation of genetic resources including appropriate access to genetic resources and appropriate transfer of relevant technologies'. These are some of the themes that Member States should give weight to when implementing this directive. *The Agreement on trade-related aspects of intellectual property rights* (TRIPs) came into force on 1 January 1995 as a result of the last round of GATT negotiations, which also gave rise to the establishment of the World Trade Organisation (WTO). It sets up a global system of intellectual property rights on biological diversity and it was designed to ensure that intellectual property rights could be universally applied to technologies.

This directive therefore endeavours to harmonise existing international legal agreements but it does not take precedence over them.

Article 4 outlines what is not patentable, including 'plant and animal varieties' and 'biological processes' for the production of plants or animals. However, inventions which contain plants or animals are patentable provided that the application of the invention is not technically confined to a *single* plant or animal variety (article 4.2).

Article 5.1 acknowledges that the 'human body at the various stages of its formation and development and the single discovery of one of its elements, including the sequence or partial sequence of a gene, cannot constitute patentable inventions'. This basically is in line with patent law generally – that is, that a mere discovery cannot in itself be patented. However, article 5.2 goes on to state that 'elements isolated from the human body or otherwise produced by means of a technical process' may constitute a patentable invention. The understanding behind this is that a lot of progress in the treatment of diseases has come about as a result of medicinal products that have come from elements isolated from the human body and that research aimed at obtaining such elements valuable to medicinal production should be encouraged by means of the patent system.

However, the directive makes clear in article 6 that inventions shall be considered unpatentable where their commercial exploitation is contrary to *'ordre public'* or 'morality', and article 6.2 explicitly identifies items that shall be considered unpatentable: processes for cloning human beings; processes for modifying the germline genetic identity of human beings; the use of human embryos for industrial or commercial purposes; and processes modifying the genetic identity of animals 'which are likely to cause them suffering without any substantial medical benefit to man or animal and also animals resulting from such processes'. This list is meant to be an illustrative list so as to provide the national courts and patent offices with a general guide to interpreting *'ordre public'* and 'morality' and is therefore not exhaustive. It is up to each Member State to interpret what is meant by *'ordre public'* and 'morality', respect for which is seen as particularly important in the field of biotechnology given the potential scope of inventions and their inherent relationship with living matters.

Chapter II deals with the scope for the protection of the directive. Although the directive recognises that an inventor should be 'rewarded' for his efforts by the granting of a patent and thereby encourage 'inventive activities', article 11 derogates from the scope of protection. The sale of plant-propagating material or breeding-stock material to a

farmer carries with it the right of the farmer to use the product of his harvest for propagation on his farm (but the extent and conditions of this derogation must be interpreted in light of article 14 of Regulation (EC) NO 2100/94) or to use the protected livestock for an agricultural purpose (the extent of this derogation shall be determined by national laws, regulations and practices – article 11.3).

It should also be noted here that it is understood by the directive that if the invention is based on biological material of human origin, then the person from whose body the material is taken must have had the opportunity of expressing free and informed consent in accordance with national law. This must be shown when the patent application is filed only if the national law to implement the directive contains such a provision. It is not an automatic consequence of the directive.

Chapter III deals with compulsory cross-licensing. Chapter VI concerns deposits, access and re-deposit of a biological material. A detailed analysis of both chapters is outside the scope of this article.

Under article 15, Member States shall bring into force the laws necessary to comply with the directive no later than 30 July 2000.

Article 16 is interesting in that it allows for a type of review of the implications of the directive. The Commission shall send the European Parliament and Council, every five years as from 30 July 2000, a report on problems arising between the directive and international agreements on the protection of human rights which Member States may have acceded to; the Commission shall send an annual report as of 30 July 2000 on the development and implications of patent law in the field of biotechnology and genetic engineering, and, within two years of entry into force of the directive, the Commission shall send a report assessing the implications for basic genetic engineering research of failure to publish or late publication of papers on subjects which could be patentable. The need for these reports is an acknowledgement of the rapid developments in biotechnology, how these developments can directly or indirectly affect the human being and the need to have these developments consistently monitored so as to respect the fundamental principles safeguarding the dignity and the integrity of the person and the human body in every stage of its formation.

The implications of this directive still remain to be tested. A lot will depend on how its provisions are interpreted by the Member States in their implementation of it. After all, who knows what developments will occur in the field of biotechnology between now and 30 July 2000! G

Kathleen Cass is an Irish solicitor working with the International Union of Biological Sciences in Paris.

Electronic signatures in the European Union

The European Parliament recently signed into law Directive 98/0325 on legal aspects of electronic commerce in the internal market. This directive enunciates 'the purpose of ensuring a high level of Community legal integration in order to establish a real area without internal borders for information society services'. The directive is just another addition to the growing *corpus* of legal measures which form part of the wider goal of facilitating a minimum electronic commerce threshold throughout the Community. This minimum standard is designed to ensure a better attainment of the free movement guarantees contained in the *European Union treaty* and to ensure that the competitiveness of the Community is not hindered by insufficient technological proficiency. The Commission proposal on a common framework for electronic signatures is another facet of this objective in its aim to put electronic signatures on a common legislative footing throughout the Union.

Commission proposal on a common framework

The stated objective of the Commission in their signatures proposal is '[to] remove obstacles, in particular, differences concerning the legal recognition of electronic signatures and restrictions on the free movement of certification services and products between the Member States'. The directive does not cover aspects relating to the conclusion and validity of contracts or other non-contractual formalities requiring signatures. Its ambit is limited to the legal recognition of electronic signatures. It sets out a detailed framework for the operation of the proposals contained in the directive, which are dealt with below.

The directive in practice

A 'digital' or 'electronic' signature is an electronic substitute for a manual signature, which involves the user creating a public and private key pair. The recipient is able to determine the identity of the person who sent the message by decoding it using the public key. One of the main difficulties with this system is that its viability depends on being able to determine with absolute certainty the identity of the individual using the public key. The proposal attempts to redress these precise concerns by prescribing a number of requirements pertaining to the signature itself which must be complied with if it is to be deemed valid. The signature must be uniquely linked to the signatory and be capable of identifying the signatory. The signature must also be created using means that the signatory can maintain under his sole control and be linked to the data to which it related in such a manner that any subsequent alteration of the data is revealed.

The directive envisages the establishment of certification authorities (CAs) throughout the Union. The function of these CAs would be to issue a 'qualified certificate' as part of their provision of electronic signature services. This 'qualified certificate' would be a digital attestation which links the signature verification device to a person, confirms the identity of that person and meets the specific attribute requirements to ensure the authenticity of the person. These latter requirements include, for example, VAT or other tax-registration numbers, an address or the existence of payment guarantees or specific licences.

These certificates are envisaged to have a variety of uses. The proposal suggests that certificates and electronic signatures might be used for authorisation purposes, for example, in order to access a private account. Further, once a certificate has been issued, the signature is entitled to recognition in all Member States of the EU.

Obligations imposed on Member States

Member States are obliged to ensure that an electronic signature is not denied legal effect, validity and enforceability solely on the grounds that the signature is in electronic form. Neither can the signature be denied legal effect if it is not based upon a qualified certificate, or not based upon a certificate issued by an accredited service provider. Member States must also ensure that electronic signatures, which are based on a qualified certificate, are recognised as satisfying the legal requirement of a hand-written signature. They must therefore be admissible as evidence in legal proceedings in the same manner as hand-written signatures.

Member States must ensure that by issuing a qualified certificate, a certification service provider is liable to any person

who reasonably relies on the certificate for accuracy of all the information contained in the qualified certificate and for compliance with all the requirements of the directive in issuing the qualified certificate. A Member State must also ensure that the person identified in the qualified certificate, held at the time of the issuance of the certificate, corresponds to the signature verification devices identified in the certificate.

In order to attain a recognised certificate, personal information must be provided to the CA, which provokes obvious concerns in respect of data protection. Article 8 obliges Member States to comply with Community initiatives pertaining to the regulation of data collection. Article 8(2) ensures that a CA may only collect data from the data subject and may only collect such information in so far as it is necessary. This data may not be collected or processed for any other purpose without the consent of the person who provided the data. The directive further sets down minimum requirements pertaining to the use of pseudonyms. Compliance with directives 95/46/EC on the protection of individuals with regard to the processing of personal data and 97/66/EC on the protection of privacy in the telecommunications sector is also mandatory.

Countries outside the EU

It provides a mechanism by which certificates issued by a certification service provider in a third country may be recognised as legally equivalent to certificates issued within the Union. They will only be recognised, however, if the certification provider in the third country fulfils the criteria laid down in the proposal or if a certification provider within the EU guarantees for the certificate in the same manner that it would for its own certificates. The proposal also allows for recognition if the third country certificate/certification service provider is recognised under either a bilateral or multilateral agreement.

The proposed date for implementation of the directive is 31 December 1999. At the time of writing, the directive had been temporarily shelved for further consideration by the parliament. However, some states within the EU have already taken measures to implement the terms of the proposal. The Department of Public Enterprise has promised legislation on electronic signatures in early Autumn. G

Marsha Coghlan is an apprentice solicitor with the Dublin solicitors' firm A&L Goodbody.

Conferences and seminars

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

Topic: *Fundamental economic rights in international law: Community law and WTO law*
Date: 2-3 September
Venue: Stockholm, Sweden

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

Topic: *The eco-label as a voluntary measure and consumer interests*
Date: 29-30 November
Venue: Trier, Germany

Topic: *Human rights and combating racism in the European Union*
Date: 4-5 December
Venue: Trier, Germany

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

Topic: *Annual congress 1999*
Date: 22-27 August
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

RECENT DEVELOPMENTS IN EUROPEAN LAW

AGENCY

Garry Parkes v Esso Petroleum Company Ltd ([1999] 1 CMLR 455). In 1993, Parkes entered into an agreement under which he would as a licensee occupy a service station and sell petrol produced by the owner of the station. In selling petrol, Mr Parkes acted as agent for Esso, though any goods sold from the shop or services provided by him were for his own account. The agreement was terminable without notice in the event that Parkes failed to adhere to his obligations. In May 1997, notice was given of immediate termination on the basis that Parkes had failed to keep the service station open for 24 hours each day, as required by the agreement. Was Parkes a commercial agent under the terms of the *Commercial agents directive*? Parkes argued that he could rely on regulation 4, under which the principal owes a number of duties to the agents which cannot be ousted by agreement. He also sought to rely on regulation 15, which requires a principal to give notice of not less than one year for termination of the agency. Article 1 of the directive defines a commercial agent as 'a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person ...'. Scott VC held that sales of motor fuel by Parkes were not carried out on an agency basis within the meaning of the directive. There was no negotiation in Parkes' sale of motor fuel. Motorists filled their vehicles and paid the price fixed by Esso.

COMPETITION

Consequences of a breach of article 85

Garry Parkes v Esso Petroleum Company Ltd ([1999] 1 CMLR 455). For the facts of the dispute, see under *Agency* above. Parkes argued that the terms of the agreement contravened article 85(1) of the *EC treaty*. One term of the agreement was that Parkes was obliged to sell, as agent for Esso, fuel supplied by Esso at prices notified by Esso to Parkes. Scott VC held that an agency agreement under which the commercial risk is on the agent comes within article 85(1). However, Parkes could not recover damages. The only way in which Parkes could have made any profits was under the agency agreement. Thus, he could not argue that he had suffered loss by reason of an inability to sell the products of competitors. Furthermore, an agreement which contravened article 85(1) was not simply void but illegal. Neither party to an illegal contract can recover damages from the other.

Reform of EU competition rules

The Commission has recently adopted a White Paper proposing fundamental reforms of enforcement of EU competition rules. The Commission proposes the abolition of the notification and exemption system laid down in regulation 17. It proposes a new regulation which would render article 85 directly applicable by the Commission, national competition authorities and national courts. These bodies would then have concurrent powers to apply EU competition rules. The Commission would play a central role in the network of national competition authorities. It could withdraw cases from national authorities, in particular, in cases where there was a risk of incoherent application of the rules. The handling of complaints is to be simplified. A time-limit of four months would be introduced within which the Commission would be obliged to inform complainants of whether it intends to investigate their complaint in detail.

EMPLOYMENT

Discrimination

Angestelltenbetriebsrat der Winer Gebietskrankenkasse/Weiner Gebietskrankenkasse (Case C-309/97), judgment of 11 May 1999. The Vienna Area Health Fund employs different categories of psychotherapists. In 1995, under a collective agreement, two different pay scales were agreed: a higher one for doctors and a lower one for graduate psychologists. Most of those receiving the lower salary were women. The Vienna Oberlandesgericht referred questions to the ECJ on the interpretation of EC law establishing the principle of equal pay for men and women for the 'same work'. The court held that although the psychologists and doctors performed seemingly identical activities, in treating their patients they draw on knowledge and skills acquired in very different disciplines. Even though both are engaged in psychotherapy, doctors are qualified to perform other medical tasks. Thus, the ECJ held that the two categories were not comparable in that they received different training and were equipped to carry out different tasks. The term 'same work' did not apply to this case.

Working time

Barber v RJB Mining UK Ltd, 8 March 1999, *The Times*. This case concerned the *UK Working Time Regulations 1998*, which implement Directive 93/104/EC. Regulation 4(1) provides that a worker's working time is not to exceed an average of 48 hours a week in any 17-week period. Regulation 4(2) imposes an obligation on an employer to take reasonable steps to ensure that working hours are not exceeded. Five colliery pit deputies worked in excess of 48 hours for 17 weeks. RJB wrote to them, seeking their agreement to opt out of the regulations. Regulation 5 gives an opt-out to employees. The employees refused but continued to work the additional hours. The employees sought declarations that they could not be required to work more than 48 hours a week and injunctions against RJB preventing RJB from requiring them to do so. RJB argued that regulations 4(1) and 4(2) should be read together. Thus, the total obligation on an employer is to take reasonable steps to ensure that the employee does not work more then 48 hours. Gage J rejected this argument and held that the two sections operated independently. Regulation 4(1) implies a term into every contract of employment under which an employee is entitled to refuse to work for a longer period than 48 hours. It imposed an absolute obligation on employers not to require employees to work more than an average of 48 hours a week.

FREE MOVEMENT OF PERSONS

Establishment

Centros Ltd v Erhvervs-og Selskabsstyrelsen (Case C-212/97), judgment of 9 March 1999. Centros Ltd is a private limited company in the UK which had never traded. The Danish Department of Trade refused to register a branch in Denmark on the grounds that Centros, which did not trade in the UK, was attempting to establish its principal establishment in Denmark by circumventing the national rules concerning, in particular, the paying-up of a minimum capital. Centros argued that it was lawfully formed in the UK and thus was entitled to establish a branch in Denmark pursuant to articles 52 and 58 of the treaty. The court held that the Danish refusal to register a branch of a company formed in accordance with the law of another Member State was contrary to articles 52 and 58. However, it held that Member

States are free to take measures for preventing or penalising fraud, where the company or its members are attempting by way of the formation of a company to evade their obligations towards creditors.

Workers

Citibank International plc v Kessler, 24 March 1999, *The Times*. Mr and Mrs Kessler are German nationals who moved to the United Kingdom. They purchased a property in Berkshire and borrowed £225,000 from Citibank, secured by a mortgage on the property. Kessler returned to work in Germany and tried to sell the property. Due to structural defects and a boundary dispute, the property was unsaleable. Kessler was forced to return to the UK and fell into arrears on the mortgage payments. Citibank sought to repossess the property. Kessler counterclaimed, relying on article 48 of the *EC treaty*. He argued that the provision in the mortgage whereby the property could not be let without Citibank's permission operated as a restriction on Kessler's ability to move within the EC and seek employment in another Member State. The Court of Appeal dismissed this argument. The court held that article 48 could not be relied on to imply a term into the mortgage that Citibank could not unreasonably refuse its consent to a letting of the property. It would be impossible to restrict the operation of such an implied term to mortgages involving a cross-border element. It also rejected a further argument that article 48 struck down the leasing restriction in the mortgage. It noted that previous cases involving standard form agreement, such as *Union Royale Belge des Societes de Football Association v Bosman* ([1995] ECR I 4921) had been confined to collective agreements regulating terms of employment. In this case, the obstacle to free movement arose from Kessler's wish to move back to Germany without discharging his loan in the UK and by Citibank's need to protect its security. These matters were unaffected by article 48. The restriction on leasing was crucial to the mortgage. If borrowers from other Member States were able to disregard the restriction, banks might become less willing to offer them mortgages. The result would actually be to restrict the free movement of workers which article 48 aims to encourage.

LITIGATION

Private international law

The Commission has proposed replacing two European conventions on private international law matters with EC secondary legislation – a regulation and a directive. This is proposed on foot of the *Amsterdam treaty*. The first of these is a regulation to replace the *Brussels II convention on jurisdiction, recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for joint children*. The second is a directive on the service of judicial and extrajudicial documents in civil and commercial matters. *The Brussels convention on jurisdiction and the enforcement of judgments in civil and commercial matters 1968* is currently being reviewed. When the amended convention has been agreed by the Council, this will also be introduced by way of secondary legislation. Thus, these instruments will enter into effect from the operative date in the instrument rather than depending on the date of ratification of a convention by individual contracting states. G

UCD launches new journal and criminology institute

Paul O'Connor, Dean of UCD's Law Faculty, with Attorney General David Byrne at the launch of the faculty's alumni journal *Law alumni UCD*. UCD also announced the establishment of a new Institute of Criminology, which will conduct empirical studies into crime in this country

Law Society President Patrick O'Connor and Director General Ken Murphy with the Council of the Dublin Solicitors' Bar Association who met in Blackhall Place recently. DSBA president Hugh O'Neill is pictured centre, front row

Diploma in applied European law conferring

The *Diploma in applied European law* is a course which has been offered by the Law Society since 1997. It covers the fundamentals of the law of the European Union and through optional courses addresses in more detail specialist areas of European law of relevance to practitioners. It is currently in its third year and has attracted some 150 participants since it started.

The conferring ceremony for the 1998 presentation of the course recently took place. Forty-five candidates attended the course in 1998, 25 of whom received the diploma, with a further eight receiving a certificate. Those who were conferred were Joy Compton, Mark Rasdale (diplomas with distinction), Ian Bell, Maura Butler, Myra Dinneen, Eithne Deane Sheridan, Joan Doran, Fergus Feeney, Patricia Gleeson, Damian McCarthy, Andreas McConnell, Michael Murphy, Thomas Nally, Thomas O'Donoghue, John O'Mara, Richard O'Sullivan, Colette Reid and Mary Celeste Lawlor.

The diplomas were awarded by Law Society President Patrick O'Connor. The Vice-Chairman of the Education Committee, Michael Peart, spoke with empathy (as a current participant on the course) of the commitment needed in sacrificing Saturdays. He emphasised the value of the course and encouraged the graduates to spread the word and to push others to enlist.

The 2000 course has been revised, with the addition of a new optional module in consumer law. The course is advertised on page 11 of this issue of the *Gazette*.

Pictured at a recent CLE seminar on injunctions were (*l-r*): Petria McDonnell, McCann FitzGerald; Mr Justice Peter Kelly; Michael Kennedy, BCM Hanby Wallace; Michael Tyrell, Matheson Ormsby Prentice; and Barbara Joyce, CLE co-ordinator, Law Society

Ms Justice Denham, Mr Justice Girvin and Mr Justice Barrington pictured with the winning team in the 1999 Butterworths/Bar Council National Moot Court Competition: the Institute of Professional legal Studies, Northern Ireland

Irish Solicitors' Golfing Society

The *President's Prize* took place at Tulfarris Golf Club, Blessington, on 28 May. The *President's Prize* was won by Pat Macklin, while the *St Patrick's Plate* was won by Tom Stafford. The *Director-General's Cup* was collected by David Allen. The *Captain's Prize* (Tommy Dalton) will take place at Limerick Golf Club on Friday 23 July. Anyone interested should contact the society's Honorary Secretary Henry Lappin on 01 829 0000.

President Patrick O'Connor with Irish Solicitors' Golfing Society's Tommy Dalton (Captain) and Henry Lappin (Honorary Secretary)

Gazette editor Conal O'Boyle presents reader survey prize-draw winner Fergus Goodbody with a voucher for a weekend for two in London

Chips are down for poker classic

The Law Society is to host a poker classic in aid of Co-operation Ireland (formerly Co-operation North) on 14 October, from 6-11pm, in the Presidents' Hall, Blackhall Place. Tickets for the *Co-operation Ireland Poker Classic* cost £100 a head, and there will be 25 tables with six players at each table. The classic will feature a winner-takes-all pot of up to £2,000 and runners-up cash prizes. The winning player will also receive the President's newly-commissioned *Willie O'Reilly Memorial Trophy*, named in honour of the former Four Courts stalwart whose poker schools achieved near-legendary status. For further information contact Co-operation Ireland's Harriet Kinahan or Fiona Cunnane on 01 881 0588 (fax: 01 661 8456, e-mail: harriet@co-operation-ireland.ie). Co-operation Ireland was formed to promote understanding and respect between people on both sides of the border.

CLASP summer party

CLASP (Concerned Lawyers for the Alleviation of Social Problems) will celebrate its 10th Anniversary with a big summer Party on 23 July in the Law Library Distillery Building, Church Street, Dublin 7.

CLASP was founded in 1989 by Solicitors and Barristers who were anxious to alleviate the plight of under-privileged young people living in the vicinity of Blackhall Place and the Four Courts. Since its foundation, the organisation has raised over £100,000.

Tickets for the summer party are available from Madigans, Solicitors (tel: 01 668 5008), AP Murrough O'Rourke, Solicitor (tel: 01 872 4379) and Sean O'Ceallaigh & Co, Solicitors (tel: 01 830 0565).

Fine Gael solicitor TDs recently visited Blackhall Place to meet the Law Society's senior officers. Pictured are *(front row, l-r)*: Jim Mitchell TD, Law Society President Patrick O'Connor, Alan Shatter TD, and Tom Enright TD; *(back row, l-r)*: John Shaw, Kevin O'Higgins, Deputy Director General Mary Keane, Director General Ken Murphy, Barry Donoghue, Michael V O'Mahony and Philip Joyce

Law Society President Patrick O'Connor and Director General Ken Murphy pictured at a meeting with the Irish Solicitors' Bar Association, London

Law Society President Patrick O'Connor recently hosted a dinner in Blackhall Place for solicitor Circuit Court judges. (*Front row, l-r*): Judge John Clifford, Judge Michael White, Patrick O'Connor, Judge John F Buckley and Judge P Frank O'Donnell; (*Back row, l-r*): Judge Bryan MacMahon, Director General Ken Murphy, Registrar of Solicitors PJ Connolly, Judge Pat McCartan, Senior Vice-President Tony Ensor and Deputy Director General Mary Keane

Curriculum Development Unit established in Law School

There is one element of the future evolution of professional legal education on which there has been universal agreement among all protagonists in recent debates in the Law Society, and that is the establishment of a Curriculum Development Unit within the Law School.

By a majority of three to one in a postal ballot of its members, the Law Society adopted the recommendations of the Education Policy Review Group Report of July 1998. Section 7 of that report recommends the establishment on a permanent basis of a Curriculum Development Unit to comprehensively review and monitor on an on-going basis the curriculum for the professional and advanced training courses and materials for each subject taught. It was recommended that the CDU report back to the Education Committee, giving it advice on these matters.

The current President of the Law Society acted swiftly in appointing the first members of the CDU, which has so far met three times. In the course of its review, the unit will examine the materials prepared by the Law School for the new-style professional course currently running in Dublin's Griffith College. The CDU hopes that a thorough review can take place in time for the first professional course to be run from the new Law School building being constructed on Hendrick Place.

The membership of the CDU reflects all areas of legal practice and also has the benefit of professional input from recognised educationalists, Nigel Savage of the Law School of the Law Society of England and Wales, and Dr Patrick Diggins of Drumcondra Education Centre. The other members of the unit are (in alphabetical order): Garrett Breen, A&L Goodbody; Jim Dennison, Dennison Solicitors, Abbeyfeale, Co Limerick; Dominic Dowling (chairman), Dowling Solicitors, Dalkey, Co Dublin; TP Kennedy, Legal Education Co-ordinator, Law School; Andrea Martin, Department of Legal Affairs, RTÉ; Patrick O'Connor, Law Society President; Roy Parker, McCann FitzGerald; and Albert Power, Director, Law School.

Members of the new CDU: (*front row, l-r*) Dr Patrick Diggins, Dominic Dowling, Nigel Savage; (*back row, l-r*) Jim Dennison, TP Kennedy, Albert Power, Garrett Breen and Andrea Martin

The unit has requested the Law Society Council to ratify the appointment of two further members, one a full-time solicitor tutor from the Law School and the other a recently-qualified solicitor.

At its next meeting, the unit intends to articulate its brief more precisely. The approach of the CDU will clearly be not only aspirational but also very practical in terms of the content, delivery and assessment of professional training in the Law School.

Any solicitor who feels that they would like to make representations or observations to the CDU concerning course content, materials or assessment procedures in respect of existing or future training delivered by the Law School is very welcome to do so. The most effective means of making such submissions would be to write to CDU Chairman Dominic Dowling or TP Kennedy, who is acting as secretary. Both can be contacted through the Law School.

The members of the CDU wish to assert their commitment to working in a way which is accessible to practitioners and Law School staff alike, and which will make a clearly thought-out and accountable contribution to the major developments which will be taking place in the professional training of solicitors by the Law Society over the next two years.

Andrea Martin

Parchment Ceremony at Blackhall Place

(Above) Law Society Senior Vice-President Tony Ensor pictured with his former apprentice, Ethel Deacon, who was admitted to the Roll of Solicitors at a recent parchment ceremony in Blackhall Place, and her mother Sarah Deacon

(Below) Law Society President Patrick O'Connor with brother and sister Kenneth and Olwyn Enright who were both admitted to the roll at the recent parchment ceremony. Also in the picture is Tom Enright, Fine Gael TD for Laois-Offaly, and his wife Rita

Dublin branch of Galway Law Graduates Association formed

The inaugural meeting of the Dublin branch of the NUI Galway Law Graduates Association will be held at 8pm on 14 July in the Presidents' Hall at Blackhall Place. The inauguration of the new Dublin branch coincides happily with the 150th anniversary celebrations of the NUI Galway Law Faculty. For further information about the NUI Galway Law Graduates Association, contact Michelle O'Gorman BL (065 51958) or apprentice solicitor Keith Walsh (01 455 4723).

Book reviews

Mareva injunctions and related interlocutory orders

Thomas B Courtney

Butterworths (Ireland) Ltd (1998), 26 Upper Ormond Quay, Dublin 7. ISBN: 1 85475 1077. Price: £75

Mareva *injunctions and related Interlocutory orders* has had, as the author explains in his preface, a long gestation period of some ten years. In the interim, Thomas Courtney wrote and published his splendid volume on company law, *The law of private companies* (1994).

His latest publication was completed in the summer of 1998, whereupon he accepted a position as a member of the Working Group on Company Law Compliance and Enforcement, of which I was chairman, and which reported in November last year.

The author's energy and drive, accordingly, is undoubted. Combining all these research activities with his role as editor of *Commercial law practitioner* and a very busy commercial law practice, Thomas Courtney is simply prodigious.

Having thus demonstrated my objectivity as a reviewer, I turn to the book itself.

Mareva injunctions and *Anton Pillar* orders, when first they were washed up on the shores of this Republic by the winds which blow legal change from our neighbouring island, were regarded with some suspicion. Pre-existing notions about constitutional rights in respect of property and doubts about the capacity of the courts to make freezing orders on property in anticipation of possible outcomes of court proceedings barely instituted were widely expressed. When *Anton Pillar* orders first came on the scene, there were even greater doubts expressed. As Courtney comments: '*Anton Pillar* orders are worthy of a study in themselves'.

Anton Pillar orders and *Mareva* injunctions have a common parentage, namely, the Master of the Rolls, Lord Denning, presiding over the English Court of Appeal. While there has been no decision about the constitutionality of granting *Anton Pillar* orders to search premises and seize materials on foot of an *ex parte* application, the European Court of Human Rights, in the case of *Chappell*, considered the legality of the English jurisdiction to grant such orders against the obligations of England under the *European convention on human rights.*

In its judgment, the court said: 'The court – quite apart from any question of the United Kingdom's marginal appreciation – entertains no doubt that the actual grant of the order was a necessary step in the effective pursuit by the plaintiffs of their copyright action'.

While it might be thought strange that an entire book should be devoted to *Mareva* injunctions and related interlocutory orders, the real importance of this work is that it explores in magnificent detail the underpinnings of a series of court orders which, taken together, amount to one of the cornerstones of a remedial jurisdiction on the part of the courts to prevent commercial fraud and to ensure effectiveness in the administration of justice.

If people can move assets to avoid justice, justice is denied. In a jurisdiction in which justice is frequently delayed (and arguably, on that account alone, denied), it would be scandalous if the courts did not hand down orders to ensure that the length and formality of court proceedings were not a smokescreen behind which the dishonest or irresponsible would wholly evade civil and commercial liability.

The strength of Courtney's work lies in its combination of theoretical and practical material. Practitioners who are contemplating interlocutory remedial steps for their clients in commercial matters will have every necessary assistance in this work. The old cliché that no lawyer who seriously practises in the field of commercial law can afford to be without this book is entirely true.

An interesting chapter is that concerning restraint of defendants from leaving the State. The historical writ *ne exeat regno* was a prerogative writ used by the English Crown for political or security purposes. Over the centuries, it developed into a civil remedy preventing people from absconding without paying their debts. The fusion of equity and common law by the *Judicature Acts* made the prerogative writ available, in theory, to all.

Enactment of the *Debtors Act (Ireland) 1872* provided a statutory basis for arresting and detaining persons likely to abscond from Ireland without paying their lawful debts unless and until they provided security. Under the *Companies Acts*, contributories in a winding-up are liable to be arrested to prevent them leaving the State. So also are defendants in bankruptcy proceedings.

The right to travel, which was identified in the *X case* (albeit in a different context) as a fundamental right guaranteed to Irish citizens under the Constitution must be put in the balance against any alleged right of creditors to corner their quarry. In large measure, the right to travel must be superior to a creditor's ordinary rights and is only capable of restriction in very narrow and limited circumstances where its exercise would defeat the administration of justice in a grave manner or amount to an evasion of the administration of justice in bad faith.

In an age of universal access to cheap international travel and movement of assets, and in the context of our membership of the EU, and bearing in mind the emergence of conventions for the enforcement of judgments throughout the EU, the balance may swing further against travel injunctions.

These and many other issues are considered at great length, at great depth and with great clarity in Thomas Courtney's book.

I thoroughly recommend it. G

Michael McDowell is a senior counsel and was chairman of the Working Group on Company Law Compliance and Enforcement.

Dismissal law in Ireland

Mary Redmond

Butterworths (Ireland) Ltd (1998), 26 Upper Ormond Quay, Dublin 7. ISBN: 1 85475 1573. Price: £65

The publication by Butterworths of Mary Redmond's *Dismissal law in Ireland* is testimony to the very significant developments which have occurred regarding the legal aspects of employment termination since the Law Society published her earlier *Dismissal law in the Republic of Ireland* in 1982.

This excellent, comprehensive book is essential reading for all practitioners in this area who wish to keep up to date with the myriad changes. Mary Redmond elegantly brings us through the historical background to the subject, from the days of master and servant to new concepts of teams and social partners. She also identifies the radical economic changes and the growing sophistication of the employment relationship.

The book expands on the application of the principles of constitutional and natural justice to the employment relationship, which is encapsulated in a citation from a judgment of Barrington J that: 'Dismissal from one's employment for alleged misconduct, with possible loss of pension rights and damage to one's good name, may, in modern society, be disastrous for any citizen. These are circumstances in which any citizen, however humble, may be entitled to the protection of natural and constitutional justice' ([1998] Volume 9 ELR 247).

The author deals with the most significant recent development in termination of employment law, which is the judicial departure from the norm that remedies such as specific performance, injunction or declarations of invalidity are not appropriate in respect of disputes relating to contracts of personal service. In particular, at chapter 10, she considers a series of recent High Court cases within the last three years where interlocutory injunction relief has been granted restraining a purported dismissal of an employee. The effect of such injunctions is to direct the employer to keep the employee on the payroll pending trial of the action.

As one would expect, there follows a logical sequence of treatment of the concepts of statutory dismissal, and the author gathers together relevant determinations of the Employment Appeals Tribunal, decisions from the courts in this jurisdiction, and, where relevant, from England and elsewhere.

New features are identified, such as the impending employment equality legislation as well as bullying and harassment, each of which are elements that can feature increasingly in such disputes. Interestingly, the *Organisation of Working Time Act, 1997* has the effect of protecting an employee who refuses to work hours in excess of those provided for in that legislation and allows an employee to make a claim under the *Unfair Dismissals Act, 1977* if he is dismissed for such a refusal.

The book also considers comprehensively (in chapter 18) the complex application of the *Transfer of Undertaking Regulations 1980* in the context of termination of employment, which are of increasing relevance to practitioners as more and more organisations are affected by changes in the workplace following a national or international merger or acquisition.

The appendices contain the primary unfair dismissals legislation, the relevant regulations as well as the latest statutory forms from the Employment Appeals Tribunal.

This book represents just about everything the concerned practitioner would need to know about dismissal law in Ireland and represents yet another milestone in the versatile and varied career of Mary Redmond, who has served the law and other sectors of Irish life with such distinction for so long. G

Terence McCrann is a partner in Dublin solicitors' firm McCann FitzGerald.

JUST PUBLISHED

Freedom of information: philosophy and implementation
Mary Doyle and Joseph Donnelly (editors)
Blackhall Publishing (1999), 26 Eustace Street, Dublin 2.
ISBN: 1 901657 37 X.
Price: £16.50 (pbk)

Holiday law in Ireland
Jonathan Buttimore
Blackhall Publishing (1999), 26 Eustace Street, Dublin 2.
ISBN: 1-901657-24-8.
Price: £22.50 (pbk)

Transfer of undertakings: employment aspects of business transfers in Irish and European law
Gary Byrne
Blackhall Publishing (1999), 26 Eustace Street, Dublin 2.
ISBN: 1-901657-14-0.
Price: £45 (pbk)

Pensions and trusteeship
Hugh Arthur
Sweet & Maxwell (1998), 100 Avenue Road, London NW3 3PF, England.
ISBN 0 752 001787.
Price: stg£125.

Local government constitutional and administrative law
Andrew Arden QC, Jonathan Manning and Scott Collins
Sweet & Maxwell (1999), 100 Avenue Road, London NW3 3PF, England.
ISBN: 0 421 551208.
Price: stg£150

Aggravation, mitigation and mercy in English criminal justice
Nigel Walker
Blackstone Press Limited (1999), Aldine Place, London W12 8AA, England.
ISBN: 1 85431 943 4
Price: stg£21.95

The ethics and conduct of lawyers in England and Wales
Andrew Boon and Jennifer Levin
Hart Publishing Limited (1999), 19 Whitehouse Road, Oxford OX1 4PA, England.
ISBN: 1-84113-018-4.
Price: stg£30 (pbk); stg£16 (hbk)

Digital media: contracts, rights and licensing
Alan Williams, Duncan Calow and Nicholas Higham
Sweet & Maxwell (1998), 100 Avenue Road, London NW3 3PF, England.
ISBN: 075200 4204.
Price: stg£120

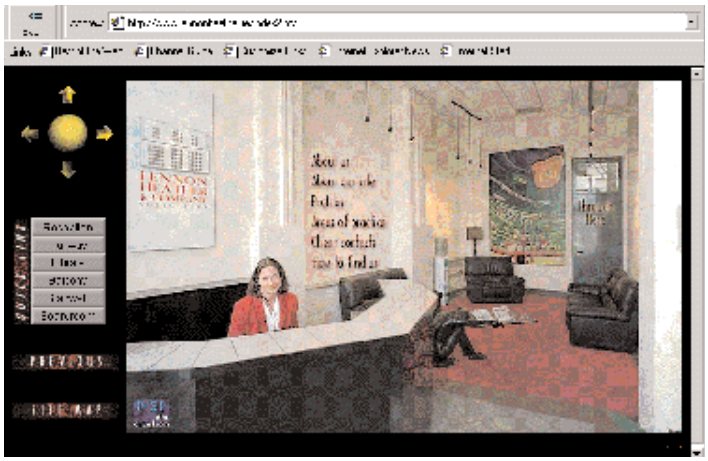
A guide to the *Scotland Act 1998*
Alan Page, Colin Reid and Andrea Ross
Butterworths (1999), 4 Hill Street, Edinburgh EH2 3JZ, Scotland.
ISBN: 0-406-98806-4.
Price: stg£34

The property rights of cohabitees
John Mee
Hart Publishing Limited (1999), 19 Whitehouse Road, Oxford OX1 4PA, England.
ISBN: 1-901362-76-0.
Price: stg£35

Webwatch

Recently, a number of law firms were affected by viruses which were wreaking havoc in the IT world. Christened *Melissa* and *Chernobyl*, the viruses caused untold damage as they swept quickly through the Internet.

The experience has at least forced many law firms to review procedures relating to virus protection and back-up of material. Ironically, many users affected by the virus have turned to the Internet for help. Visitors to www.miljenix.com will find what Miljenix terms 'fix-it' software, which for just £35 provides crash and virus protection and one year of free virus updates. Another popular anti-virus software is Dr Solomon's, which may be downloaded at www.drsoloman.co.uk/. Of course, anti-virus is just one factor to be considered when preparing for office melt-down. Regular backing-up of material is also crucial. This can be an expensive process. Happily, for firms with Web access, it is possible to back-up by copying materials onto a storage site on the Internet. This facility is to be found at www.backup.com/. For those requiring less than 10MB of space, the service is free. After that, fees are payable at very reasonable rates.



There's a great new addition to the World Wide Web from the Irish legal community, courtesy of Lennon Heather, Solicitors (www.lennonheather.ie/). The web pages have a marvelous open-space feel to them which gives the visitor the sense that they are actually stepping into the Lennon Heather offices. Their news section, however, indicates the importance of regularly updating a web site where the intention is to go for something more than a static 'brochure style'. But the firm's site breaks two golden rules of good web design. First, the pages must be quick to download; second, the content must be up-to-date. The news section still refers to Michelle De Bruin as expecting a FINA hearing sometime in April or May. Despite these shortcomings, the Lennon Heather site is undoubtedly the best offering yet from a law firm anywhere on the island.

While for many lawyers the Web is about quick access to legal information, it is also useful for recreational matters too. As we approach the holiday season, visits to web sites offering last-minute holiday bargains are a hot attraction. A new offering here is Bob Geldoff's web site at www.deckchair.com, which apparently can scan some 178 million flights in just 45 seconds. The site is awkward to use, however, and the stressed-out lawyer is better advised to try to find a break away at www.lastminute.com or www.bargain-holidays.com/. G

Mark Reid is a freelance journalist with a particular interest in the Web. He can be contacted on mark-reid@altavista.net.

LOST LAND CERTIFICATES

Registration of Title Act, 1964

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

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

(Published 2 July 1999)

Regd owner: Mary Walsh and Noel Walsh; Folio: 17126F; Lands: Kneestown and Straboe; Barony of Carlow and Rathvilly; **Co Carlow**

Regd owner: Cork County Council; Folio: 14230; Lands: Property situate in the Rural District of Fermoy, County of Cork; **Co Cork**

Regd owner: William Walsh; Folio: 6776; Lands: Part of the lands of Peafield (East Division of Templebodan) situate in the Barony of Barrymore; **Co Cork**

Regd owner: Michael Wall (deceased); Folio: 16912F; Lands: Situate in part of the townland of Carrigkilter, Barony of Imokilly; **Co Cork**

Regd owner: Seamus O'Sullivan (deceased); Folio: 17831; Lands: Part of the lands of Cloonbannin West, containing one acre situate in the Electoral Division of Skagh, Barony of Duhallow, County of Cork; **Co Cork**

Regd owner: Stephen Gillmore; Folio: 28052F; Lands: Townland of Hacketts and Barony of Rathdown situate on the East side of Killiney Hill Road in the Borough of Dun Laoghaire; **Co Dublin**

Regd owner: Patrick Gough and Timothy O'Flaherty; Folio: 100726F; Lands: Townland of Greenhills and Barony of Uppercross; **Co Dublin**

Regd owner: Adrian Parker; Folio: 108758F; Lands: Situate to the South side of Old Road in the parish of Lusk and town of Rush; **Co Dublin**

Regd owner: Laurence O'Neill and Colette Tobin; Folio: 97511F; Lands: Townland West side of Tandys Lane in the parish and town of Lucan; Area: not exceeding 0.2 acres or thereabouts statute measure; **Co Dublin**

Regd owner: William Cooper and Charles Pattison c/o Carter Smyth & Company, 1 Upper Ely Place, Dublin; Folio: 74 LSD; Lands: 48 Reuben Avenue, Dolphin's Barn situate in the parish of St James and South Central District; **Co Dublin**

Regd owner: Joseph McDermott; Folio: 2380; Lands: Townland of Boherboy (part) and Barony of Newcastle; **Co Dublin**

Regd owner: Michael Cafferkey and Aine Cafferkey, c/o Henry Concannon and Company, Solicitors, 9 William Street, Galway; Folio: 35247; **Co Galway**

Regd owner: Dominic Conway (deceased) and Gerard Dolan, Saint Mary's, Sligo; Folio: 10354; Lands: Townland of Curraghboy and Barony of Killian; Area: 0.352 acres; **Co Galway**

Regd owner: Michael Smyth (deceased), Kilmore, Tuam, County Galway; Folio: 878F; Lands: Townland of (1) Kilmore (2) Kilmore (3 undivided 20th shares); Area: (1) 25.306 acres and (2) 31.475 acres; Barony of Clare; **Co Galway**

Regd owner: Michael Buckley; Folio: (1) and (2) 25150 (3) 8512F (4) 7940F; Lands: Townland (1) Drommakee, (2) Crotta, (3) Crotta, (4) Crotta (part), Barony of Clanmaurice; Area: (1) 5 acres, 2 roods, (2) 8 acres, 2 roods and 26 perches, (3) 7 acres, (4) 3.5 acres; **Co Kerry**

Regd owner: John Cahill; Folio: 16374F; Lands: Duneany and Barony of West Offaly; **Co Kildare**

Regd owner: Thomas Browne; Folio: 3403F; Lands: Woolengrange and Barony of Gowran; **Co Kilkenny**

Regd owner: Patrick Ryan; Folio: 47R, 74R, 7604; Lands: Derrycloney and Barony of Portnahinch; **Co Laois**

Regd owner: James F Devanney and Mary Anne Rice, c/o Dermot Lavery & Company, Solicitors, Roden Place, Dundalk, Co Louth; Folio: 3277, 3647 and 8572; Lands: Kiltyfenaghty Glebe – Folios 3277 and 3647, Corry – Folio 8572; Area: 23.594 acres – Folio 3277; 1.219 acres – Folio 3647; 28.156 acres – Folio 8572; **Co Leitrim**

Regd owner: Martin John Molony; Folio: 1087 County Limerick; Lands: Townland of Rathmore South and Barony of Small County; **Co Limerick**

Regd owner: Anne Devenny, 46 Mountain View, Dunleer, County Louth; Folio 1121L; Area: 0a 0r 14p; Lands: Battsland; **Co Louth**

Regd owner: Sarah Mary O'Callaghan, Fort Road, Dowdallshill, Dundalk, Co Louth; Folio: 5329; Lands: Dowdallshill; Area: 0 acres, 0 roods, 20 perches; **Co Louth**

Regd owner: James C Preston, Knockleagh, Ballina, Co Mayo; Folio: 21130; Lands: Townland of 1) Farrandeelion, 2) Carrowkeribly and Barony of 1) Tirawley, 2) Gallen; Area: 1) 10a 3r 20p, 2) 2a 0r 20p; **Co Mayo**

Regd owner: Thomas Rochford, Folio: 17587 and 23693; Lands: Carha and Barony of Gallen; Area: 8a 3r 35p (17587); 10a 2r 0p (23693); **Co Mayo**

Regd owner: John Cahill, Curragh, Carnaross, Kells, County Meath; Folio: 12907; Lands: Curragh; Area: 1a 0r 15p; **Co Meath**

Regd owner: Michael Connolly, Lisanisk, Carrickmacross, County Monaghan; Folio: 2511L – Co Meath; Lands: Abbeyland South, Navan; **Co Monaghan**

Regd owner: Ciaran Burke, Grange, County Sligo; Folio: 10609F; Lands: Townland of Grange and Barony of Carbury; Area: 5.609 Hectares; **Co Sligo**

Regd owner: Patrick Dillon; Folio: 1675; Lands: Derrymore and Barony of Skerrin; **Co Tipperary**

Regd owner: Timothy Landers (deceased); Folio: 40240; Lands: Hoops Lot and Barony of Clanwilliam; **Co Tipperary**

Regd owner: Michael Hayes (deceased); Folio: 1821; Lands: Garraun and Barony of Eliogarty; **Co Tipperary**

Regd owner: Hannah Quinn; Folio: 10029F; Lands: Knockroe and Barony of Newcastle; **Co Wicklow**

Regd owner: Kenneth Heeney; Folio: 1085F; Lands: Sleamaine or Ballinvalla and Barony of Ballinacor North; **Co Wicklow**

WILLS

Boland, Patrick (otherwise Padraig), late of 6 Shamrock Terrace, North Strand, Dublin 3 (formerly of 49 Upper Gardner Street, Dublin 1). Would any person having knowledge of a will executed by the above named deceased who died on 20 September 1998, please contact FH O'Reilly & Co, Solicitors, The Red Church, North Circular Road, Phibsboro, Dublin 7, tel: 8303122, fax: 8303798

Boyce, Marguerite Louise (deceased), late of 25 Stafford Court, Landsdowne Green Estate, South Lambeth, London. Would any person having any knowledge of any next of kin of the above named person please contact Osborne MacGettigan & Co, Solicitors, Main Street, Milford, Co Donegal, tel: 074 53124, fax: 074 53272

Bolger, Henry William (deceased), would any person having knowledge as to the whereabouts of the will dated 1 May 1998 of Henry William Bolger, late of Liffey Lodge, Crosscool Harbour, Blessington, County Wicklow, who died on 2 January, 1999, please communicate with Arthur Cox, Solicitors, Earlsfort Centre, Earlsfort Terrace, Dublin 2, tel: 01 6180000 (Ref: WW)

Connell, Thomas (deceased), late of Derrymore, Caherlistrane, Co Galway, and Castlehackett, Belclare, Tuam, Co Galway, who died on 1 June 1948. Would any person having knowledge of the whereabouts of a will, please contact Messrs Gleeson and Kean, Solicitors, High Street, Tuam, Co Galway, tel: 093 24082, fax: 093 24088

Keenan, Bernard (deceased), late of Kiltyreeher, Killoe, Co Longford. Would any person having knowledge of a will of the above named deceased who died on 16 April 1999, please contact Connellan, Solicitors, Church Street, Longford Co Longford, tel: 043 46440, fax: 043 46020

Murdock, William Edward (deceased), late of Killoran, 48 Killiney Road, Killiney, Co Dublin. Would any person having knowledge of a will of the above named deceased who died on 24 December 1998, please contact Messrs Christie & Gargan, Solicitors, Equity House, 16 Upper Ormond Quay, Dublin 7, tel: 8726974/5, fax: 8726965

Quigley, James (deceased), late of The Bungalow, Castletown, Dundalk, Co Louth. Would any person having knowledge of a will of the above named deceased, who died on 10 February 1975, please contact Ahern & McDonnell, Solicitors, Roden Place, Dundalk, Co Louth, tel: 042 9335384, fax: 042 9339539.

EMPLOYMENT

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

Solicitor required for busy practice in West of Ireland large provincial town. 2/3 years' experience in conveyancing and litigation essential. Salary negotiable. **Reply Box No 61**

Solicitor, two-years' PQE, computer literate, seeks part-time position, Dublin 2 area. **Reply Box No 62 for CV**

Assistant solicitor required for busy West Cork Solicitor's Office. Excellent salary and conditions. Apply with CV to PJ O'Driscoll & Sons, Solicitors, 7 Emmet Square, Clonakilty, Co Cork

Sole practitioner in North County Wicklow has position for apprentice – may suit apprentice who wishes to change masters. **Reply to Box 63**

Recently-qualified solicitor seeks employment in Co Kildare, tel: 088 2168846

Post-professional course apprentice (returning to Law Society for advanced course May/June 2000) seeks position in Dublin firm, preferably city, with a view to getting conveyancing, probate and family law experience. If you feel you can offer a friendly, learning environment, please **Reply to Box No 54**

MISCELLANEOUS

Northern Ireland solicitors providing an efficient and comprehensive legal service in all contentious/non-contentious matters. Dublin-based consultations and elsewhere. Fee apportionment. ML White, Solicitors, 43-45 Monaghan Street, Newry, County Down, tel: 080 1693 68144, fax: 080 1693 60966

Northern Ireland agents for all contentious and non-contentious matters. Consultation in Dublin if required. Fee sharing envisaged. Offices in Belfast, Newry and Carrickfergus. Contact Norville Connolly, D&E Fisher, Solicitors, 8 Trevor Hill, Newry, tel: 080 1693 61616, fax: 080 1693 67712

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

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

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

Northern Ireland solicitors. Will advise and undertake NI-related matters. All areas corporate/private. Agency or full referral of cases as preferred. Consultations in Dublin or elsewhere if required. Fee sharing envisaged. Donnelly Neary & Donnelly, 1 Downshire Road, Newry, Co Down, tel: 080 1693 64611, fax: 080 1693 67000. Contact KJ Neary

Sole practitioner, small practice is interested in sharing facilities in Dublin 4 or Blackrock, County Dublin, Patrick Lane & Company, Chartered Accountants, tel: 01 2720532

Offices to let, Merchants Court, 24 Merchants Quay, conveniently located opposite the Four Courts, second floor office suite, 120 sq m (1,300 sq ft). Flexible lease terms, up to seven on-site car spaces. Contact Harrington Bannon, tel: 01 6611233

Seven-day ordinary clean licence for sale. Please contact Sweeney McGann, Solicitors, 67 O'Connell Street, Limerick, tel: 061 317533

Seven-day ordinary licence for sale in Co Roscommon. Apply to Gerard Kelly, Solicitor, O'Dowd Lyster Forde & Company, Solicitors, Boyle, Co Roscommon, tel: 079 62861