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The solicitors' profession and change

'The greatest thing in the world is not so much where we stand as in which direction we are moving'
Oliver Wendel Holmes.

An essential feature of any profession, and particularly that of solicitors, is service – not just to immediate clients but to the community in general. Ireland needs the service of intelligent, skilled, resourceful, educated and caring people more than it ever has, and I have no doubt that the voluntary community service given by many solicitors in many different ways is fully appreciated by the public at large. A new generation of lawyers, which will lead us into the new millennium, must reassert that traditional professional concern for the community and for society in general. While the State, its institutions and the law itself will not stand still, there must be a constant principle for all lawyers: namely, a determination to uphold the law and to do all in our power to ensure that justice is done – and is seen to be done – for all our citizens.

As the solicitors' branch of a legal profession develops, its culture and standards have undergone many changes. The character of the code of conduct for solicitors has changed from guidelines to etiquette between lawyers towards regulation and direction regarding competent and quality practice and behaviour towards clients. This is as it should be.

Deregulation and competition

Deregulation and competition inside the solicitors' profession and from outside agencies is the background to the ethical changes. It has, as a consequence, seen a move towards more open commercialism and away from altruistic professional ideals. These changes are not solely related to private practice, though it is seen in this area more readily.

Five thousand solicitors on the roll have taken out a practising certificate this year. There are a significant number of solicitors, approximately 700, working in the corporate and public sector. Yet 67% of practising solicitors in this country are sole practitioners.

Reflecting these changes, the Law Society, through its Guidance and Ethics Committee, has undertaken a complete revision of the *Guide to professional conduct for solicitors in Ireland*. It is hoped that the revised guide will be available later this year.

The Law Society of Ireland is apolitical. However, when it has a view on matters of public concern, it will express them. The independence of lawyers is the cornerstone of a full and proper democracy.

We must strive to ensure that there is full legal representation on an adequately structured fee-paying basis for asylum-seekers, minorities and other disadvantaged groups in this country.

Unacceptable practices such as gazumping in the housing market, inequities in the tax and social welfare systems, *lacunae* in the law of adoption, domestic violence and other similar problems are of great concern to solicitors. The Law Society is – and will continue to be – supportive of initiatives to improve the legal, social, economic, health and educational fabric of Irish society.

The Law Reform Committee of the Law Society of Ireland was established in November 1997 in order to identify and focus on specific areas of the law in need of updating and reform. It is in this context that the committee has undertaken an examination of Irish legislation on domestic violence and on its operation in practice. The committee presented a report on *Domestic violence: the case for reform* to the Minister for Justice, Equality and Law Reform on Wednesday 19 May. That report highlighted inconsistencies in the way our courts handle domestic violence cases. It made 12 recommendations, which hopefully will be accepted and acted upon in the short-term. For more on this, see page 9 and pages 29 to 34 of this issue.

The annual conference in Mayo

In a 'full-house' for the annual conference in Ashford Castle, Cong, Co Mayo, the delegates were addressed by Mrs Justice Susan Denham of the Supreme Court, John O'Donoghue, Minister for Justice, Equality and Law Reform, Maureen Gaffney, psychologist, broadcaster and writer, our colleague from Carlow, Frank Lanigan, Declan O'Neill, legal cost accountant, and Catherine Marshall, senior curator at the Irish Museum of Modern Art. The weather shone, the birds flew, the fish rose, the golf balls held, the bands played and 'the business was done'! Do make next year's conference a date for your diary.

Patrick O'Connor
President

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 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 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.

Is the Keane affair the media's Sheedy case?

The headlines are full of the word 'betrayal': Charles Haughey betrayed by a former lover, families betrayed by kiss-and-tell revelations, a newspaper group betrayed by its former star gossip columnist.

But amid the moralistic editorial tut-tutting and the salacious tittle-tattle about passionate love-making that shook the chandeliers, there is not a squeak of an apology for the biggest betrayal of all – that perpetrated on the public by a craven media, which found it less troublesome to connive in a political lie than to tell the truth.

The Terry Keane affair was the Irish media's Sheedy case. The implications of what was done – and not done – are no less disturbing. An essential role of the media in any democracy is to ask the awkward questions and to expose low standards in high places.

Terry Keane: journalists connived in the hypocrisy of her affair with former taoiseach Charles Haughey by staying silent

Media silence

And yet, for much of the past 30 years, this country's national newspapers, radio and TV stations colluded by their silence in political double-standards of breathtaking dimensions. The former taoiseach misled and deceived the electorate by publicly espousing family values and the importance of marriage while leading a private life which made a mockery of both.

By deliberately choosing not to expose that hypocrisy, of which many journalists were aware, the media collaborated in that deception. We are now being told that the Terry Keane revelations in the *Sunday Times* represent a crossing of the Rubicon in Irish journalism, a descent to the baser news values of the British tabloids. With respect, that is just a cop-out by newspapers that did not have the courage to do their job.

The issue at stake in the Haughey/Keane affair is not whether there should be prurient trawling through the private life of a politician to titillate the public and sell more papers. It is about something much more important: truth, honesty and political integrity – core values in a democracy. But rather than disturb a cosy consensus that kept the public in ignorance, the media ignored its overriding responsibility and looked the other way.

In some cases, that literally happened. Keane relates how, as Mr Haughey kissed her in full public view at Leinster House, after his election as taoiseach, the press photographers lowered their cameras. They were not alone in their misplaced discretion. Editors, leader writers and political correspondents all dropped their commitment to the truth when the same Mr Haughey stepped from his mistress's bed to issue a rallying call for the defence of marriage and traditional family values.

As leader of the largest political party in the State, his views had a major influence on the outcome of the 1986 divorce referendum, and he left no-one in doubt about where he stood. In a personal statement, he declared: 'I have an unshakeable belief in the importance of the family as the basic unit of society. My experience of life tells me that this is the best way to organise a society'.

At the time, Keane had been his mistress for 14 years and openly discussed the relationship with journalist colleagues. Was the electorate not entitled to know that the political leader preaching such high moral values in public was living by very different standards in private? The Irish media didn't think so, even if it meant that those unhappily trapped in broken marriages should remain trapped.

Dangerous adversary

So why did the editors and their newspapers stay silent, given what they knew? Was it just fear in the face of the most powerful man in the State who, as we now know, had let it be known elsewhere that he could be a dangerous adversary? The traditional explanation – 'that we don't go in for political muck-raking here, like they do in Britain' – sounds utterly unconvincing.

Recently, in a blaze of colour, the *Irish Times* offered its version of the Keane affair under a 72-point headline that read *Farewell, my concubine*. But when there were political double-standards at the highest level to be revealed, the paper was a lot more restrained.

Hurtful hypocrisy

Assistant editor Dick Walsh felt strongly about Haughey's hypocrisy on divorce. He told his own paper recently: 'I wanted to write about the affair in the *Irish Times* but was told I had no proof and that it would be hurtful to Mrs Haughey. How it could be more hurtful than the hypocrisy, I don't know'.

Today, in a climate of non-stop tribunals, investigative journalism is back in fashion. A series of scoops, from over-charging by National Irish Bank to the Sheedy affair, have shone a light into the dark corners of our society, reflecting credit on the courage and persistence of members of the profession.

Nevertheless, the connivance of a silent media with the brazen political hypocrisy of the Haughey era cannot be easily excused. Perhaps those who took that vow of silence should now follow the commendable precedent set by former *Evening Herald* editor Brian Quinn. He recently apologised for not having done more, as a working journalist, to expose the child abuse scandals in industrial schools like Artane.

As one of the minor players who looked the other way when Mr Haughey was playing his bogus morality card, I have no hesitation in admitting I was wrong. Now let's have some meaningful *mea culpas* from the editorial heavyweights of the time. G

Anthony Garvey is a freelance journalist who writes on the law and the media.

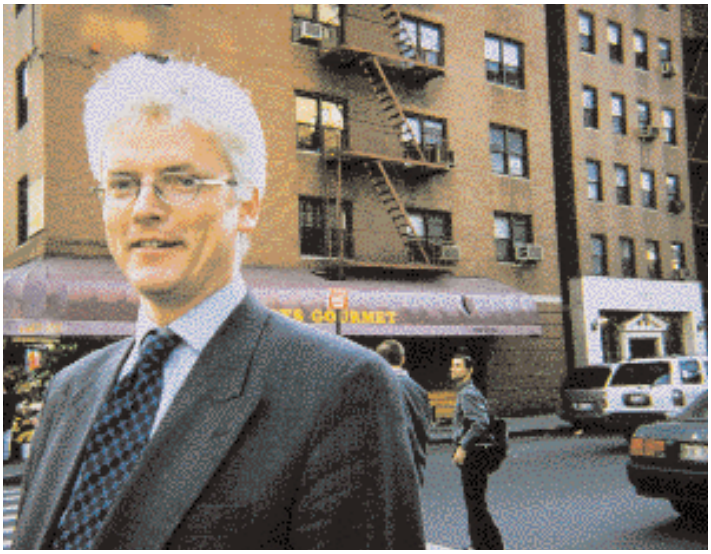
EC competition reform needs consideration

The European Commission has proposed a radical shake-up in the means of applying the rules of EC competition law concerning cartels and restrictive practices. It has recently issued a White Paper which proposes that many of the powers currently used by the Directorate General for Competition will be transferred to national courts and competition authorities.

Since the early years of the European Community, competition law has been supervised throughout the common market by the European Commission. Article 81(1) of the *EC treaty* – prior to the *Amsterdam treaty* coming into effect on 1 May 1999, this was article 85(1) – prohibits agreements which prevent, restrict or distort competition. Pursuant to article 81(3), such agreements can be exempted from the prohibition if they contribute to improving the production or distribution of goods or to improving technical or economic progress, while allowing consumers a fair share of the resultant benefit.

Rather than allowing national authorities to determine whether the exemption might apply to a given agreement, Regulation No 17/62 currently gives the Commission the sole right of exemption. In order to benefit from article 81(3), companies must notify their agreements to the Commission and seek authorisation. In order to reduce the number of notifications, the Commission issued so-called block exemptions as long ago as 1967. Where an agreement comes within the terms of a block exemption, it is deemed to be compatible with article 81(1) and so is permitted without the need for notification. (It might be noted that the Commission is also currently reviewing the scope of these block exemptions with a view to exempting even more agreements automatically.)

However, the complexities of modern technology and the advances, in particular, in areas such as telecommunications mean that many agreements cannot be straightforwardly categorised and exempted by reference to advance formulae. There remains a need to scrutinise individual agreements to determine whether they should be permitted, altered or prohibited. For the Commission, the problem is simple: in an enlarged European Union, they just don't have the manpower to cope. Nor does the Commission wish to become bigger by employing more staff. Rather, it wishes to concentrate on policy issues and on those cases having a major effect on trade in the internal market.



Conor Quigley: Solicitors should make their views known about the planned competition law shake-up

Accordingly, the solution proposed by the Commission is to transfer scrutiny of cartel agreements and restrictive practices to national courts and competition authorities. This is not wholly new. After all, article 81(1) and article 82 (formerly article 86, which prohibits abuses of dominance) are directly effective, so that a breach of them may be raised in actions in national courts. The court may enforce these provisions by injunctive relief or by awarding damages. In relation to article 81, however, the national court is restricted to determining whether the prohibition applies and whether a block exemption is available. It may not itself further determine whether the provisions of article 81(3) are applicable.

In the White Paper, the Commission discusses several options for reform. The essential aim is effective decentralisation, though it is not clear that the Commission has fully thought through the repercussions of its proposals.

'Radical change is necessary, but the ramifications of changing the system need to be more thoroughly explored'

On the one hand, uniform application of EC competition law throughout the Member States remains a priority. Yet it must be recognised that courts in different countries will be liable to interpret agreements and competitive restrictions in different ways. The Commission hopes to circumvent the need for this by issuing several guidelines and notices which will be used as reference material for the national courts, but these can only be of somewhat limited use in the context of innovative business practices. Equally, it can be recognised that the European Court of Justice might be asked to determine certain issues by the national court, but that will hardly lead to speedier resolution of the proceedings.

A further problem lies in the number of national competition authorities which might be called on to determine the effects of an agreement. Frequently, by the inter-State nature of EC competition law, the relevant agreement will involve several parties in different Member States. A competitor in one Member State may bring proceedings in that state and have a judgment which determines the legality of the agreement.

The Commission appears to be of the view that that would generally be the end of the matter, since the *Brussels convention on civil jurisdiction and judgments* would apply to restrict courts in other Member States from rehearing the matter. But that misses the point: the *Brussels convention* applies only to further proceedings between the same parties. It most certainly does not prevent a different competitor in another Member State from launching fresh proceedings. In these circumstances, the ability of the Commission to adopt a decision exempting the agreement from article 81(1) clearly leads to greater legal certainty. The abolition of this power, which is what the Commission now proposes, seems rather odd.

There is much in the White Paper which is of interest. Radical change is necessary, but the ramifications of changing the system need to be more thoroughly explored. The Commission has asked for comments to be submitted by 30 September 1999. Solicitors should think seriously about this issue and make their views known. G

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

Letters

One-stop shop for the devout?

From: Kieron Wood BL, Dublin

The President of the Law Society, in his message about religious services for the opening of the legal year (*Gazette*, May, page 3), points out that six services are currently held – for Catholics, Protestants, Muslims, Orthodox, Copts and Jews.

Mr O'Connor suggests that solicitors, barristers and the judiciary should use their influence to come together to hold a single service.

Would it be indelicate to ask whether the participants in this service would pray to Jesus Christ, Yahweh or Allah – or maybe to Mammon?

Days like this

From: Nicholas Hughes, Cork

Some years ago I was discussing the stresses and strains of practice with the late John Burke, a delightful older colleague, who was also disenchanted with the law. His proposed solution was to sell the practice and buy a farm. I pointed to the weather outside. There was a howling gale and the rain was bucketing down. 'What would you do on a day like today?', I asked. 'Very simple, my dear boy. On a day like today, I would go into town and annoy my solicitor'.

Your views

Your letters make your magazine and may influence your Society. Send your letters to the Editor, *Law Society Gazette*, Blackhall Place, Dublin 7, or e-mail us at c.oboyle@lawsociety.ie or you can fax us on 01 672 4801

Dumb and dumber

From: Padraic Courtney, Dublin

This is an accident report which was printed in the newsletter of the British equivalent of the Workers' Compensation Board. This is the bricklayer's report, purportedly a true story.

Dear Sir,

I am writing in response to your request for additional information in block #3 of the accident report form. I put 'poor planning' as the cause of my accident. You asked for a fuller explanation and I trust the following details will be sufficient. I am a bricklayer by trade. On the day of the accident, I was working alone on the roof of a new six-story building.

When I completed my work, I found I had some bricks left over which, when weighed later, were found to be slightly in excess of 500lbs. Rather than carry the bricks down by hand, I decided to lower them in a barrel by using a pulley which was attached to the side of the building at the sixth floor.

Securing the rope at ground level, I went up to the roof, swung the barrel out and loaded the bricks into it. Then I went down and untied the rope, holding it tightly to ensure a slow descent of the bricks. You will note in block #11 of the accident report form that my weight is 135lbs.

Due to my surprise at being jerked off the ground so suddenly, I lost my presence of mind and forgot to let go of the rope. Needless to say, I proceeded at a rapid rate up the side of the building. In the vicinity of the third floor, I met the barrel, which was now proceeding downward at an equally impressive speed. This explains the fractured skull, minor abrasions and the broken collarbone, as listed in section 3 of the accident report form.

Slowed only slightly, I continued my rapid ascent, not stopping until the fingers of my right hand were two knuckles deep into the pulley. Fortunately, by this time I had regained my presence of mind and was able to hold tightly to the rope, in spite of the excruciating pain I was now beginning to experience.

At approximately the same time, however, the barrel of bricks hit the ground and the bottom fell out of the barrel. Now devoid of the weight of the bricks, that barrel weighed approximately 50lbs. I refer you again to my weight. As you might imagine, I began a rapid descent down the side of the building. In the vicinity of the third floor, I met the barrel coming up. This accounts for the two fractured ankles, broken tooth and severe lacerations of my legs and lower body.

Here my luck began to change slightly. The encounter with the barrel seemed to slow me enough to lessen my injuries when I fell into the pile of bricks and fortunately only three vertebrae were cracked. I am sorry to report, however, as I lay there on the pile of bricks, in pain, unable to move, I again lost my composure and presence of mind and let go of the rope, and I lay there watching the empty barrel begin its journey back onto me. This explains the two broken legs.

Padraic Courtney wins the bottle of champagne this month.

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

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

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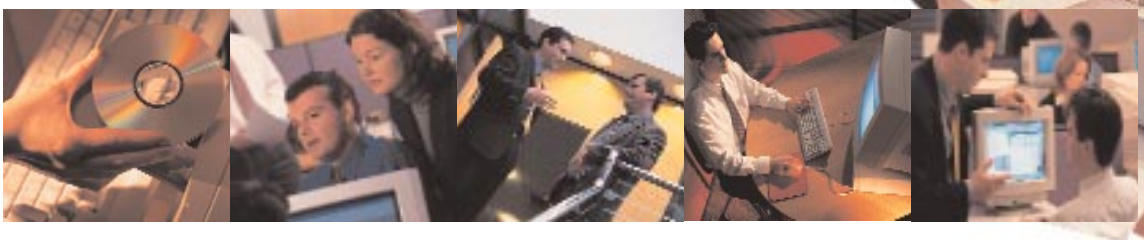

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New report argues case for domestic violence reform

Big variations in the way that the courts handle domestic violence cases have been identified in a new report from the Law Society's Law Reform Committee. Entitled *Domestic violence: the case for reform*, the study is based on a survey of solicitors working in the area of family law and is the first such research ever carried out in this country. It was launched at a press conference last month in the Law Society's Blackhall Place headquarters.

Among its many recommendations, the report argues that the courts need detailed guidance as to the evidence necessary to establish that abuse has occurred and suggests that family law judges need specific training to deal with such cases. For example, it found that 72% of solicitors said that, in cases dealing with physical abuse, the allegations were supported only by the victim's own evidence, while 26% said that the courts usually required both the applicant's evidence and medical evidence. Just 2% of respondents said that medical evidence was always required by the courts.

Commenting on this finding, the report says: 'There is a total absence of guidance as to the standard of proof necessary to establish abuse and, therefore, practice varies as between District Court areas. These findings demonstrate a marked lack of uniformity in court practice which inevitably renders the application of law uncertain and creates obvious difficulty for lawyers in advising clients'. It goes on to suggest that judges who deal with domestic violence cases would benefit from training.

The Law Society report also found that different District Courts took quite different views on determining whether there were sufficient grounds to grant a protective order (such as a barring order). In the survey, 12% of respondents said that it was always necessary to show 'physical' grounds, 51% said that these were 'generally necessary', while 36% said that physical grounds were 'sometimes necessary' before a court would grant an order.

'It is worrying', comments the report, 'that, in order to grant relief, many judges still require physical grounds or, at least, feel uncomfortable in the absence of such grounds, when these are no longer required under the *Domestic Violence Act, 1996*'. It adds that the courts need detailed guidance or criteria to help them determine whether or not to grant protective orders.

The report goes on to make a number of further recommendations for reforming the law on domestic violence. These include:

- Speeding up the return date for a full hearing when emergency barring orders have been granted at the request of one party in the absence of the other
- The establishment of regional family courts and the introduction of judicial training for judges handling domestic violence cases. The Law Reform Committee found empirical evidence that family law judges would greatly benefit from ongoing training and guidelines, particularly in dealing with evidence given by children
- An increased role for the Probation and Welfare Service in the provision of welfare reports and in supervising access arrangements and the allocation of adequate resources to fulfil this role
- The introduction of legislation allowing parents or elderly relations to apply for protective orders against abusive relations other than an adult child such as, for example, a son-in-law.

The committee has submitted its domestic violence report to the Department of Justice, Equality and Law Reform as part of its ongoing programme of law reform. *(See also page 29.)*

Notification of complaints to solicitors

The profession should note that the Registrar's Committee has authorised a change in the manner in which complaints to the Law Society are notified to solicitors.

Following receipt of a complaint, the Society's initial letter will not only be sent to the solicitor concerned but a copy will also be sent to the managing partner of the practice. The managing partner will be advised that the enclosures to the Society's letter (a copy of the client's letter of complaint and any other enclosures) have been furnished with the original correspondence to the solicitor named in the complaint. After this, any further correspondence from the Society will be sent to that solicitor, unless a request to the contrary is received from the managing partner.

This change is being introduced following representations to the Society that the principal of a practice should be put on notice of any complaints made against a solicitor in their firm.

Minister says judicial appointments Bill on the way

The legal provisions needed to qualify solicitors for appointment to the High and Supreme Court benches are likely to be included in a new Bill to be published soon by Justice Minister John O'Donoghue. He told the Law Society's annual conference in Ashford Castle, Co Mayo, that the necessary changes to the current law were part of the Government's legislative programme published last April.

The *Report of the working group on qualifications for appointment as judges of the High and Supreme courts* recently recommended that solicitors with ten years' experience of regular superior court litigation should qualify for appointment as judges of these courts.

'I am especially disposed towards the basic proposal, which is to extend eligibility for appointment to the superior courts to solicitors who satisfy certain requirements with regard to practice and experience', he said. 'I am currently finalising my detailed examination of the policy and legal issues arising from the recommendations of the report, with a view to bringing before the Government the scheme of a *Courts Bill* in the near future'.

Web site a big hit

The number of hits on the Law Society's web site increased by 25,000 within weeks of its relaunch earlier this year. An independent report from *Webtrends* shows that by the end of February, when the revamped site went on-line, the number of hits for the entire site had reached 45,565. By the end of the following month, it had reached 69,705.

The number of people who contacted the home page almost doubled during the same period – from 1,963 to 3,688.

BRIEFLY

Lewinsky lawyer to deliver Irish lecture

Kenneth Starr, the US prosecutor who uncovered the Lewinsky affair and was at the centre of the failed bid to impeach President Bill Clinton, will be in Ireland later this month. Starr will be the guest speaker at this year's Nissan Lecture in Trinity College Dublin on 22 June, where he will discuss *Constitutional structure and reform: lessons from America's age of independent counsels*.

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 April: Conor McGahon, 19 Jocelyn Street, Dundalk, Co Louth – £11,483.86; Dermot Kavanagh, 2 Mary Street, New Ross, Co Wexford – £110; James C Glynn, Dublin Road, Tuam, Co Galway – £11,100.

Solicitor wins arbitrators' chair

Deloitte & Touche solicitor Michael Moran has been elected chairman of the Irish branch of the Chartered Institute of Arbitrators.

Second expert witness conference planned

A second expert witness conference is planned by training firm La Touche Bond Solon for later this year. Following the success of its conference last year, the company, which trains expert witnesses, said it plans a second gathering at Dublin's Royal Kilmainham Hospital next November.

The conference will deal with the practical implications of the compulsory exchange of expert reports, confidentiality and the expert, and the new Courts Service. Managing director Caroline Conroy said: 'Following on from the first conference, it became clear that there is a need in Ireland for a forum where experts, lawyers and the judiciary can look at the role of expert witnesses in litigation'.

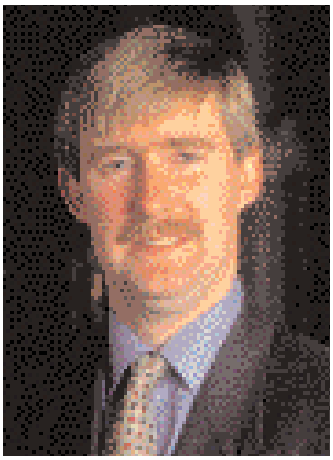
Society hits back at publicans' 'ambulance chaser' jibe

The Law Society has hit back at claims made by the Vintners Federation that 'ambulance chasing lawyers' are fuelling a 'compo epidemic', branding it 'a crude smokescreen' to divert public attention from recent price hikes in the bar trade.

The profession came in for heavy criticism at the vintners' annual conference in Donegal last month.

'Solicitors are sick and tired of being made scapegoats for other people's shortcomings', said Law Society Director General Ken Murphy. 'Solicitors don't make the law – and they don't make compensation awards. That's what the courts are there for. A judge is not going to award damages unless negligence has been proven in court.

'The real problem in Ireland is not a 'compo' culture: it's a negligence culture – and people are refusing to put up with it anymore. It's time the pub bosses took a little more responsibility for putting their own houses in order, instead of trying to blame others for their problems'.



Ken Murphy: 'Only a tiny fraction of 1% of these cases are spurious'

Pat Kenny: refereed a head-to-head between Murphy and VFI boss John Mansworth on his radio show

• Following the Society's strong rebuttal of the vintners' claims, Director General Ken Murphy and Vintners' Federation President John Mansworth went head-to-head on Pat Kenny's *Today* show on RTE radio. Murphy described the vintners' claims as 'ludicrous', pointing out that only 'a tiny fraction of 1% of these cases are spurious'.

'The real issue here is the level of health and safety that we generally tolerate in this country', he said.

'If there's a large number of claims against publicans, then, logically, since most of these cases either result in a settlement or an award of court, it is because there is a high level of negligent publicans'.

Indo tackled over 'unfair' article

The Law Society has complained to the country's biggest-selling daily newspaper, the *Irish Independent*, over an article unfairly emphasising the number of complaints made against the profession. In a letter to the paper's editor Vincent Doyle, Director General Ken Murphy slammed the piece, *Throwing the book at the bad solicitors*, printed last month.

'Given the extensive assistance which I and others in the Society provided to the journalist who wrote the article, it was particularly disappointing to see the pronounced emphasis on anything negative which could be said and the elimination or downplaying of anything positive about the Law Society or the profession in your article', he said.

'More than 99.5% of cases last year did not give rise to a complaint. The Society specifically asked to have this reported in the interests of balance, but it was omitted. Of the complaints actually made, a great many proved unjustified', he said. 'Of the 1,108 received, only 17 ultimately required to be forwarded by the Society to the Disciplinary Tribunal of the High Court.

'Your letter gave great prominence to the fact that the number of complaints to the Society last year was up by 8% over the previous year', Murphy added. 'However, what your reporter was also made aware of, and chose not to report, was that the number of complaints last year was down by no less than 11% from the figure for two years ago and was in fact the second-lowest level recorded in the last five years'.

'This downward trend is particularly remarkable in view of the enormous increase of approximately 300 new solicitors each year over the last five years and in view also of the huge increase in economic activity in the country generally over that period', Murphy stressed.

The story included extensive coverage of damaging statements about the profession made by an anonymous solicitor, whom the paper claimed was 'prominent'. Murphy declared that this was the most disappointing section of the piece and argued that it should not have been printed without identifying the man quoted.

'You should have identified this alleged "prominent solicitor" or omitted this section of the article', he argued. 'This type of dubious "reporting" smacks of the worst excesses of the tabloid press'.

Murphy's letter has not yet been published by the *Independent*.

Judges 'should play greater role in speeding up trial process'

Judges should help to speed up the trial process, encourage mediation instead of 'trial by combat' and have clear deadlines for delivering their decisions, Law Society President Patrick O'Connor has said. Speaking at the Society's Annual Conference in Cong, Co Mayo last month, O'Connor also called for family law judgments to be made public and argued that judges should have research assistants to help them in their work.

'Judges should have a role to play in helping to set the pace of litigation', he said. 'All too often cases can drag on for years, bringing the system and the legal profession into disrepute. Judges should have a greater role as "trial managers", setting timetables and deadlines to speed up the trial process. They could also, in appropriate cases, encourage parties in litigation to try mediation as an alternative. Trial by combat is not always the best answer for either party to litigation, and it can be an expensive, time-consuming and stressful experience – often with an unsatisfactory conclusion for all concerned'.

O'Connor: 'Judges should have a role in setting the pace of litigation'

O'Connor also said that less complicated cases could be put on a 'fast-track' mechanism by judges rather than waiting in the queue with other cases that would take much longer to resolve.

And he added: 'Judges should be subject to clear timetables for delivering their judgments. An early decision should be given, together with a brief outline of the reasons for it. This would then be followed by a more detailed written judgment within a defined period. This could happen in most cases.

'Essential to bringing efficiency and good management into the judicial system is the availability of research assistants for judges. They must also be given adequate time to consider, research and write their judgments. They must not be left, as sometimes seems to be the case nowadays, "fire-fighting" because of an unreasonable workload. Technology will help bring the system into the modern age, with judgments being made available more quickly and more publicly, whether on the Internet, the World Wide Web or otherwise.

'Transparency and openness are in the public interest', O'Connor concluded. 'For example, in family law cases (which are quite properly held in private) why can't the decisions be made available without including names or other information that would identify the parties? It would be most helpful, not only as precedents to lawyers but also to those thousands of people who are increasingly resorting to the law to resolve bitter custody battles, separations, maintenance orders and the like'.

Use of plain English in legislation urged

Any future Irish legislation should be written in plain English to ensure that the layman can understand it, according to Law Society President Patrick O'Connor. Speaking at the Burren Law School in Clare last month, Mr O'Connor said that the archaic terms used in much of the law we inherited from the English could hardly be seen as furthering the cause of justice for all.

'It seems to me that, just as the Rule of Law demands that retrospective legislation is to be avoided, the same must be true of unintelligible legislation', he said. 'If the community is expected to adhere to the law, it must be able to understand it. The opaque terms and archaic formulations that littered our inherited legislation could hardly be seen as furthering the cause of justice for all'.

And he added: 'It is not always necessary to sacrifice precision for clarity, and I earnestly hope that our legislators will embrace the notion of simple straightforward language when they come to draft legislation in the future'.

Mr O'Connor said that he had always regretted the fact that after Ireland won its independence 77 years ago 'we clung like drowning men to all the forms of administration and government that we inherited. It strikes me as an opportunity lost to tailor a new system, one that might have been a better fit for a country that had grown up'.

Equality bodies 'discriminating against solicitors', says president

The State's leading equality agencies have been accused of scoring an own goal after excluding solicitors from competitions for two legal adviser posts. Law Society President Patrick O'Connor has described the decision to confine applications for the £40,000-plus-a-year jobs to barristers as discrimination without any justification.

He was reacting to an advertisement for the position of legal adviser with the Equality Authority and with the Office of the Director of Equality Investigations, which stipulated that applicants must have been called to the Bar. It was placed in national newspapers by the Office of the Civil Service and Local Appointments Commissioners.

'To exclude solicitors from consideration for the position of legal adviser is a form of discrimination without any justification', O'Connor said in a letter to the commissioners. He added that the requirements should depend on the ability of candidates to do the job, not whether they were members of one branch of the legal profession.

In his letter, O'Connor pointed out that excluding solicitors from appointment as legal advisers in a number of Government departments, the AG's office and now the two equality bodies, worked against the public interest and was a 'relic of history'.

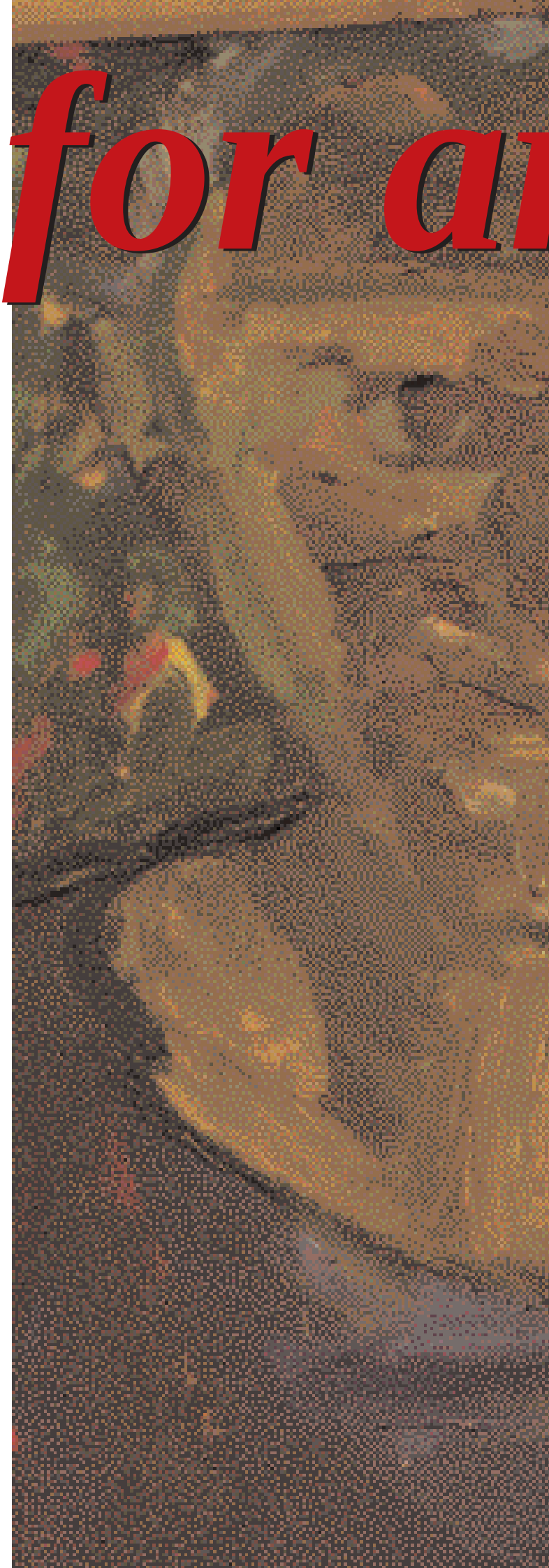
'There is a particular irony in excluding one branch of the legal profession from the new bodies which are to deal with matters of equality', he said.

Personal injury cases

Applications to list personal and fatal injuries cases in the High Court can be made on consent before the registrar, or on notice to the other party at 10.30am to the court on any Wednesday morning in term. The court warned this month that no cases will be listed without such an application, and pointed out that solicitors are not taking up the invitation to come in to court and call their cases for hearing. This does not apply to army deafness claims (list two cases), which are listed in numerical order.

Art for a

We don't know much about it, but we know what we like. It's art, and all of a sudden businesses are buying it to hang in their offices, showing off their good taste and supporting home-grown talent. But can it turn out to be an investment in itself? Barry O'Halloran paints the picture



Once upon a time, the only things you were likely to see hanging on a solicitor's wall were a calendar and a framed parchment certificate. If you were lucky, the boardroom in a large firm might have been adorned with a formal portrait of the founding partner, complete with Victorian collars, mutton-chop whiskers and piercing stare.

But now a completely different picture is emerging. Law firms, along with other Irish businesses, are beginning to spend money on art. And not just any old watercolour: they are buying the work of contemporary Irish artists. Some even have a policy of deliberately supporting home-grown talent.

Dublin solicitors' firm Mason Hayes & Curran regularly buys work from two galleries in the capital, the Rubicon and the Hallward. Managing partner Declan Moylan explains that several years ago the firm began buying works of art, setting out with a deliberate policy of targeting contemporary Irish work and supporting indigenous talent.

The firm has an art budget running to 'several thousand pounds', according to Moylan, and buys several works every year. The cost of each piece varies from three to four figures. This policy is partly inspired by Moylan's colleague, Colman Curran, an art lover, who makes many of the choices. The firm has been buying paintings regularly for the last four or five years, and intends to keep doing so.

Some of the well-known names hanging in Mason Hayes & Curran include Michael Kane, Margaret Morrison, Chris Banahan and Felicity Clear. 'We have a very good collection of Irish art, all of it contemporary', explains Moylan, adding that the paintings help to add a distinguishing touch to the firm's premises.

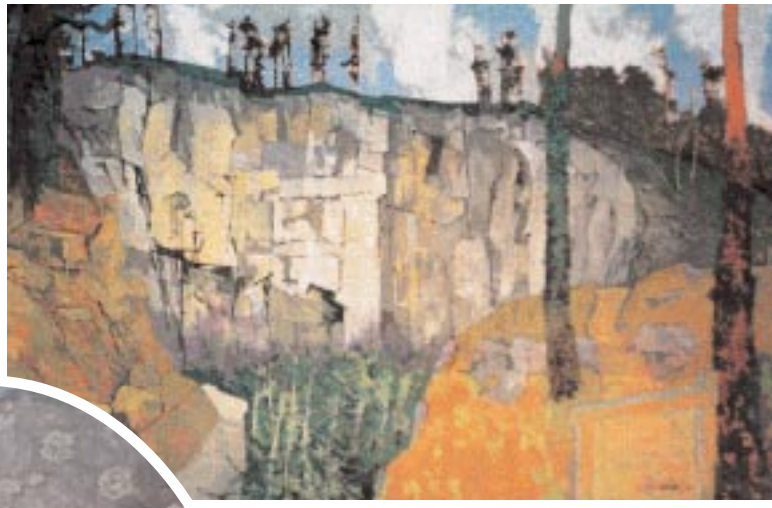
'The art that we buy reflects a certain image that we want the firm to project', he says. 'We feel it helps to distinguish us and our offices'. But he adds that none of the work is chosen with investment in mind.

'We do not buy with a view to getting a return on them in the future, because we do not intend to sell them. We see it as a cost-effective way of improving our office environment – and it's money well spent in that respect – but we don't see it as an investment'.

While Mason Hayes & Curran is motivated by a desire to make its offices look well and to support local talent, professional artists point out

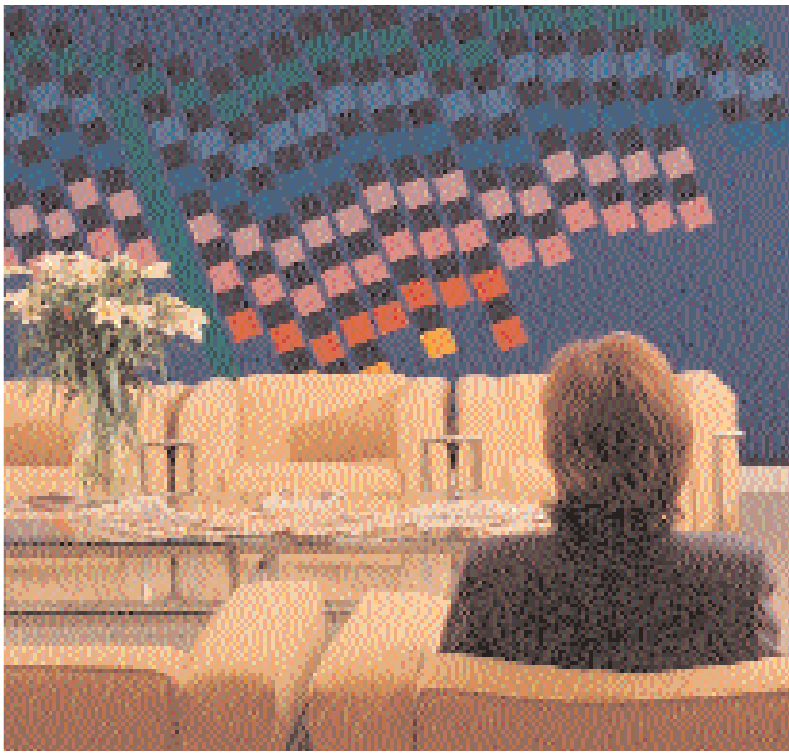
rt's sake?

PICS: ROSLYN BYRNE/LENSMEN



Far left: *Self portrait* by Michael Kane
(in Mason Hayes & Curran)
Inset: *Gypsy lady head IV* by Chris Banahan
(in Mason Hayes & Curran)
Above: *Landscape* by Michael Flaherty
(in Matheson Ormsby Prentice)
Below: *A certain detachment* by Felicity Clear
(in Mason Hayes & Curran)

Viridirium by Margaret Morrison (in Mason Hayes & Curran)



The tapestry by well-known textile artist Patrick Scott in Arthur Cox's main reception

that, at a certain level, buying a painting or sculpture is an investment. Architect-turned-artist, Ross Eccles, whose work can be seen in the Dublin office of solicitors Arthur Cox and in AIB's St Stephen's Green branch, says the reality is that art buyers are making an investment.

'If you are buying something worth, say, up to £500, you are probably doing it because you like the piece. But, really, when you get to £1,000 or more, that is an investment – and many business people regard it as such', he argues.

Buying wisely on expert advice

Caroline Molloy, who was among those involved in choosing the art bought by Arthur Cox when it moved premises two years ago, also says that none of the pieces were bought strictly for investment purposes. 'We bought wisely, and we got advice from interior designers, but we did not specifically treat it as an investment', she says.

Arthur Cox is much more coy than Masons about disclosing how much it spends on works of art. The firm says it does not have a set annual budget for art; instead, the firm buys pieces as needed, for example, when moving or expanding offices. Molloy says the practice has bought a number of individual works for its premises on Dublin's Earlsfort Terrace.

The firm purchased *Ponte de rialto*, a painting by Martin Mooney, and *Blowing in the wind*, a landscape by Kenneth Webb, which can be seen in its ground-floor reception, and also a set of architectural-style drawings by Mary Burke.

While most of the work has been bought from galleries or artists, the practice has commissioned some specific works, including a large tapestry hanging in the main reception area of its Dublin office which was specially commissioned from Patrick Scott, a well-known textile artist. It also arranged to have a painting done of its offices and this featured on its corporate Christmas cards.

When it comes to buying art, law firms seem to depend on one or two staff with an interest in the subject, who may be familiar with who's hot and who's not. Others, like Arthur Cox, may combine this approach with advice from galleries or interior designers.

Matheson Ormsby Prentice chose the art work displayed in its offices to fit the firm's overall image and, according to Joanna Banks, there was never any intention to get a return on the money spent. 'For example, we have two paintings in our reception area, and we put a lot of effort into making sure that they were in keeping with the overall scheme', she says.

The selection is made on the basis of a general consensus, which means the firm often gets work on approval before making a final decision. Once again, Matheson Ormsby Prentice has no specific budget for works of art, but the partnership has spent up to £10,000 or more on individual pieces, says Banks. She adds that the firm is prepared to pay for something it believes to be worth it.

This approach is not unusual in businesses. Graphic-designer-turned-art-student, Eve Parnell, points out that corporate buyers will either choose something on the basis of their office colour schemes, or because of its traditional appeal. 'Abstract works can be very popular because they are often colourful and match the company's overall colour scheme', she says. 'You can often tell when a painting has the kind of qualities that will sell'.

At the same time, more traditional work also sells well, largely because the tastes of corporate buyers tend to be conservative. She has sold abstract work to businesses in the past, but more recently sold a wildlife drawing to one Dublin company, which chose the work for its familiar theme. And Parnell, too, believes that art is bought for investment purposes. 'Nobody will buy something they think will depreciate', she argues.

Influential players in the market

Whatever about the potential return on investment, the business community now makes up an important part of the market for modern Irish art. Their activities have not created a boom in demand, but the fact that businesses generally have more spending power than individuals means that they are becoming increasingly influential players in the marketplace.

Young Dublin-based artists Felicity Clear and Clèa Van der Grijn acknowledge that this trend means that corporate buyers are making a big contribution to earnings in a profession not known for being particularly lucrative. 'Ten years ago, nobody bought art unless they were gay', Clèa Van der Grijn jokes. 'But business people are interested in buying. They seem to have more money and more space than in the past, and from a financial point of view that's great'.

She recently netted what is reckoned to be the biggest corporate commission in Irish art. Working in collaboration with fashion designer John

Landscape by Michael Flaherty (in Matheson Ormsby Prentice)

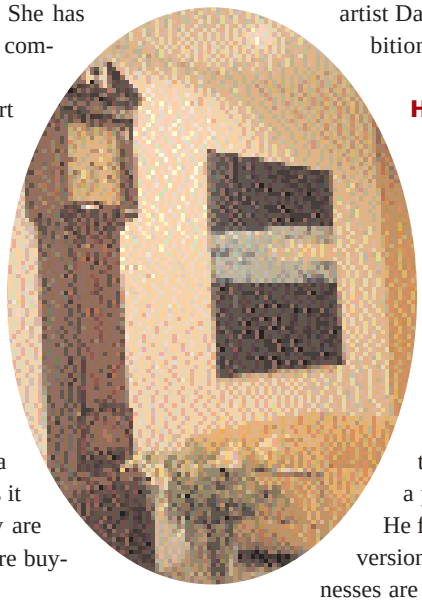
Brandon Bay by Michael Flaherty (in Matheson Ormsby Prentice)

Rocha, among others, she has been contracted to produce the paintings for the bedrooms, foyer and night-club in Dublin's Morrison Hotel, a plush five-star operation due to open soon on Ormond Quay on the city's northside. The deal is valued at £35,000.

While this is exceptional, she and Clear, with whom she shares a studio, can expect to earn anything from £500 to £2,000 for individual paintings, depending on their scale and the materials used. Felicity Clear's work is exhibited in Dublin's Rubicon Gallery and can be seen in one of Mason Hayes & Curran's conference rooms. She has many other clients among the business and corporate community.

'There are more businesses interested in buying art these days', she says. 'The buyers tend to be young people who would have emigrated in the past, but who have stayed on and now run their own companies. They are very confident and fashionable and are more willing to spend their money on art than businesses would have been ten or 20 years ago'. Several of her buyers include new Irish IT companies such as the Nasdaq-quoted Iona Technologies.

Clèa Van der Grijn feels that some buyers make their choices on the basis of fashion rather than on what they actually think is good. 'They may have a piece of work on the wall of their office which makes it look as if they collect paintings', she says, 'but they are not buying paintings because they love them. They are buying because they think they should have them'.



'The London phenomenon'

So can these young and fashionable buyers help to make or break artistic reputations? Irish artists are still waiting for signs of the so-called London phenomenon, which characterised the buying and selling of art in the British capital during the boom years of the 1980s.

This was sparked by advertising gurus Saatchi and Saatchi, who, along with Whitechapel-based gallery owner Jay Joplin, began singling out young artists, often still in college, and promoting their reputations among fashion-conscious buyers.

The young painters, most of whom were recent graduates from London's Goldsmith's art college (if not still students there), suddenly found themselves on the crest of a popular wave and getting very rich very quickly. The trend reached the point where potential art students were fighting to get into Goldsmith's in the hope that they would be 'discovered' by Saatchi and Joplin. Unfortunately, the wave crashed at its peak, leaving the young stars high, dry and burnt out. A notable beneficiary of this movement, and one of its few survivors, is British artist Damien Hirst, who is perhaps best known for his exhibitions of pickled animal carcasses.

How to boost an artist's reputation

So far there is no evidence that the boom in corporate art has prompted aspiring artists to make dawn raids the local butcher's shop, but on a smaller scale it is quite clear that some artists have seen their reputations boosted quite rapidly. 'There are a lot of painters who are dealer-created', artist Ross Eccles points out. 'The dealers find somebody young, buy up their work and stockpile it. Then, when they have enough, they start promoting their protégés and talking them up, which helps to create a demand for their work. That's very much a part of the art market here'.

He feels it is unlikely that Dublin will experience its own version of the London phenomenon, partly because businesses are not going to spend vast amounts of cash on art, and also because tastes here are likely to be far more conservative. 'Not everybody is going to like what you do, and when businesses are buying, a few people are likely to be involved in the process. They will decide on what they think suits their offices', he says.

Declan Moylan of Mason Hayes & Curran echoes this view. 'Not everybody will appreciate all the pieces that we buy', he observes. 'But that can be good as well, because it does get people in the firm talking. Really, there are only one or two people directly involved in choosing and buying paintings, but other people will say "I like that" or "I don't like this". Everybody has an opinion'. G

Finders keepers?

A recent Supreme Court decision on heir-locator agreements has restated the legal position on 'champertous' actions (where a person bankrolls a legal action by another for his own gain). Des Rooney discusses the background to this case and the traditional approach to champerty in this country

The enforceability of heir-locator agreements was considered by the Supreme Court in *Fraser v Buckle and others* (5 March 1996, on appeal by the plaintiffs).

The defendants, who resided in Ireland, were among the descendants of a deceased who died intestate in New Jersey in the United States. They were unaware of their potential entitlement until informed by the plaintiffs who described themselves as genealogists and international probate researchers. The plaintiffs entered into an agreement with the defendants under which the plaintiffs would reveal the identity of the deceased in consideration of the defendants giving to the plaintiffs one third of any sum they might inherit. The proper law of the contract (which determines its essential validity) was stated to be the law of England and Wales (the plaintiffs explaining that the Attorney General of New Jersey had a dislike for such activities).

The plaintiffs, after disclosing the identity of the deceased, embarked at their own expense on considerable preparation for the court proceedings in New Jersey, which proved to be successful for the defendants who inherited a net $763,758 between them. The defendants contended that the heir-locator agreement was unenforceable as being 'champertous' and that the plaintiffs should only be entitled to fees assessed on the basis of *quantum meruit* (literally, 'as much as he has earned').

'Champerty' is usually defined as 'the maintenance and finance by a person of a legal action or litigation in order to make a gain', and the English courts have ruled such agreements void even if they are governed by a foreign law which deems them to be valid (following the decision in *Rees v de Bernardy* [1986] 2 CH 437).

The US position

In the United States, the contingency fee arrangement is regarded as the strongest weapon in the hands of consumers when they do battle with large corporations or other defendants with substantial resources. But in the US, costs do not follow the event, as is generally the case in our system. So, instead of counsel and solicitors

being prepared to put effort into litigation in the expectation that if – and only if – their side is successful they will get their fees and costs from the unsuccessful party, the American model provides for a bargain to be made at the outset between the attorney and the client so that, if successful, the attorney will get a percentage of what is recovered in the suit. (In this country, the *Solicitors (Amendment) Act, 1994* prohibits percentage costs in contentious business other than debt collection.)

Supreme Court's decision

The Irish approach to champertous agreements was set out in the 1796 case of *Kenny v Browne*: 'It is a crime at common law to maintain a suit in which the man maintaining it is not interested, and the particular species of maintenance of which the applicant has been guilty is called champerty – that is, maintaining a suit in consideration of having some part of the thing in dispute'.

This view was upheld in the 1991 High Court decision in *McElroy v Flynn*, in which Blaney J followed the decision in *Rees v de Bernardy*, saying: 'I agree that a contract by a person to communicate information on terms of getting a share of any property that may thereby be recovered by the person to whom the information is to be given, and nothing more, is not champerty or void. But if the arrangement come to is not merely that information shall be given, but also that the person that gives it and who is to share in what may be recovered shall himself recover the property or actively assist in its recovery by procuring evidence or similar means, then I think the arrangement is contrary to the policy of the law and void'.

In dismissing the plaintiffs' appeal in *Fraser v Buckle and others*, the Supreme Court held that even if a contract was valid under its proper law it would not be enforced by Irish courts if it offended against Irish public policy. The court also noted that the law in Ireland in relation to maintenance and champerty had not undergone any sea-change since the last century.

Champerty and solicitors

In another recent Supreme Court judgment – *O'Keeffe v Linda Scales* (December 1997) – the question arose as to whether legal costs owing to the plaintiff's solicitor and included as an item of special damages was an unlawful and champertous maintenance of an action. In that case, it was held that the law relating to maintenance and champerty must not be extended in such a way as to deprive people of their constitutional right of access to the courts to litigate reasonably statable claims. Neither did the inclusion of costs to the plaintiff's solicitor as special damages contravene section 68 of the *Solicitors (Amendment) Act, 1994.*

The possibility that the action was being maintained in a champertous fashion was not a valid ground for stifling the cause or action in advance of the plenary hearing. If the defendant succeeded and it was established at trial that the proceedings were so maintained by the plaintiff's solicitor, it would be open to the defendant to sue him for all the damage suffered by her, including any costs awarded to her and not recovered or recoverable from the plaintiffs owing to their want of means. G

Des Rooney is solicitor with the Dublin solicitors' firm Arthur O'Hagan and Vice-chairman of the Law Society's Probate, Administration and Taxation Committee.

Buying a property in Portugal

Fun in the sun

One result of the continuing strength of the economy is the sharp increase in the number of Irish people buying holiday homes in the sun. Justin Ryan explains what is involved in purchasing a Portuguese property, particularly, in the Algarve, and pinpoints some possible pitfalls

Many people are justifiably cautious about buying a property overseas, not only because they may be unfamiliar with the language and the legal system but also because, for the most part, they have to rely on professionals they have never met before to guide them through the transaction. In this short article, I will try to explain the process in language that will be familiar to Irish lawyers, drawing comparisons to some of the stages involved in an Irish conveyance.

It should almost go without saying that the first step in buying a property in Portugal – or anywhere else for that matter – is to arrange for a full structural survey to be carried out on the property in question. Many of the dissatisfied owners that one meets on the Algarve are people who have taken the word of the seller or selling agent, paid over a non-refundable deposit and completed the contract without using a surveyor (and in many cases without using a lawyer). Just recently I came across a situation where a buyer discovered that a new roadway was planned to cut through his garden, taking away a corner of his swimming pool and passing within three metres of his kitchen window. He will only receive compensation for that portion of his land

that the road is taking and nothing for the fact that his house is effectively worthless. He saved himself approximately £300 on survey fees but this has cost him over £200,000 in real terms. He now understands why the seller convinced him that a survey was unnecessary!

Making the contract

After a satisfactory survey has been completed, it is necessary to make pre-contract enquiries at the local land registry office, the local council office and the local tax office. There is no national registry for property and everything has to be attended to locally at the relevant office to obtain copy documents. The seller will not have an original land certificate or title deeds as is the case in Ireland; title documents as we know them in Portugal consist of copies of extracts from the various registration departments.

A search should establish that the property is properly registered in the seller's name and that it is free of all charges and encumbrances. The land registry search will also determine the description of the property by the number of rooms and the land by square metres. It is important to ensure that the seller has not built any unauthorised extensions and that the building as it stands corresponds to that which is registered. The local tax office search will reveal the 'rateable valuation' and if there are any arrears of rates. Because the rates are a charge on the property, the buyer will be responsible for any monies owing, so it is important to ensure that all arrears have been cleared prior to completing the sale.

The description of the property by number of rooms and square metres should also be properly registered at this office. If the property, as it exists, has not been properly registered, the buyer can insist that the defects be remedied between exchange of contract and completion. This will of course depend on whether or not the defect can be remedied and the length of time it may take. This process would compare with an Irish application for retention but differs in that the approved retention must then be registered at the land registry and the local rating authority or tax department.

If the results of all searches are in order, a contract is prepared whereby the buyer will pay a deposit (usually 10%) to the seller and agree a completion date where the balance of the monies will be paid over and the ownership of the property will pass to the buyer. Under Portuguese law, if the buyer does not proceed to completion, he will forfeit the deposit; if the seller for some reason does not complete, he must refund twice the deposit to the buyer. The contract will also usually include a provision for specific performance. It will provide for an agreed completion date, and the forfeiture clause tends to concentrate the minds of all concerned. There is usually no provision for extending this date in the terms of the contract.

The period between exchange and completion depends on the particular circumstances of the parties involved and can be anything from a few days to a year, but the usual period is between four to six weeks. This period will depend on the particular requirements of the parties: for example, the seller may want to use the property for a further period or the buyer may not want to take possession too quickly.

Completion itself takes place at the office of the public notary, who is a government official. All parties to the transaction must attend in person or be represented by way of a power of attorney. The notary will need evidence that the buyer has paid the purchase tax (SISA). The seller will produce the papers for the property evidencing his title and the fact that the property has a habitation licence (which is equivalent to a certificate of compliance with planning permission). The seller will then be paid the balance of the purchase price and the buyer, seller and notary will all sign the *escritura*, which is the deed of transfer. The notary then enters the *escritura* in his records. Any number of copies of the *escritura* can be obtained, but the original never leaves the notary's office.

Registration of title

A few weeks after the *escritura* has been signed, the buyer's lawyer will get a copy from the notary's office and lodge it at the local land registry. Again, one can obtain as many certified copies of the entry in the land registry as one wants, but original documents of title as such are retained by the local registry. The effect of this is that it is the identification of the buyer and seller that is the control of ownership and not possession of any documents of title. There is a lot to recommend this system as the risk of losing or misplacing title documentation never causes a serious problem.

A common problem that arises with Portuguese property relates to the system of ownership. All property is held as tenants in common and this requires the actual transfer of the deceased's share on death. In addition, the succession laws do not allow anyone to disinherit their children, no matter what their circumstances. As a result, there are many parcels of land that cannot be sold or dealt with, because one of the children will not agree to the sale. More often than not, it is a case where one of the children has emigrated, say, to South America, and cannot be traced.

This is a system which is long overdue for reform and one need only think of the effects that similar inheritance laws would have had on Ireland which suffered from similar emigration problems over the last century.

Off-shore company ownership

A great deal of foreign-owned property is owned through off-shore companies in order to avoid the onerous taxes and charges involved in a purchase and sale, but this again depends on an analysis of the costs and benefits of each particular set of circumstances. Most properties over £150,000, however, tend to be owned off-shore.

Buying property through the vehicle of an off-shore company (or purchasing a property already owned off-shore) requires a different procedure but one with which Irish lawyers will be familiar. The majority of off-shore property-owning companies are located in jurisdictions based on English company law (such as Gibraltar or Guernsey) and are bought through a share-purchase agreement. The title to the property obviously still needs to be checked thoroughly even though the ownership of the property is not changing.

Such a company will usually be managed by an off-shore management agency which will provide nominee shareholders and directors. The nominee shareholders will issue declarations of trust in favour of the ultimate beneficial owners of the shares. On a sale and purchase, all that will be transferred is the beneficial ownership, and the nominee shareholders and directors will usually remain in place. The management company will file annual returns locally and for this service (and for providing the directors and so on) will make an annual charge which can vary from £400stg to £1,000stg depending on the jurisdiction.

If the property is already owned off-shore, the buyer avoids SISA tax and notary and registration charges of approximately 12.5% on all properties over £100,000stg. This is obviously a significant amount.

Buying in another country does not have to be difficult or stressful, as long as buyers follow all the same checks and procedures that they would do at home, such as obtaining a proper survey and employing a local lawyer to act on their behalf. G

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To each his own

Our friends have been losing patience with us. In the last two years, the State's failure to comply with international instruments dealing with copyright has been the subject of a US complaint to the World Trade Organisation and proceedings before the European Court of Justice. So, as Jonathan Newman reports, the recent publication of the 1999 *Copyright Bill* is a welcome development – even if it raises a number of problems

The *Copyright Bill, 1999* sets out a comprehensive copyright code some six times the length of the current 1963 *Copyright Act*. The wide impact of the legislation, the conflicting interests and the absence of an up-to-date UK model led the Department of Enterprise, Trade and Employment to take the exceptional step of earlier circulating the Bill in two drafts. The department has proven fairly responsive to the submissions made and is believed to be still open to persuasion on some aspects of the Bill.

New areas of protection

Performances and databases constitute the major new categories of protected matter under the Bill. Performers are granted a bundle of rights ('performers' rights') in their performances. 'Performance' refers to live performance by singers, actors or others of a literary, dramatic, musical or other work. The performance of a saxophonist from sheet music will therefore be protected, but not the unscripted act of an injured football player on the pitch.

The Bill gives original databases full copyright protection. A 'database' is a collection of individually accessible and systematically arranged independent works, data or other materials. The originality stipulation means that there must be some creativity shown in the selection or arrangement of the contents. Examples of this might include a CD-ROM containing descriptions of selected hotels in Ireland or containing an encyclopedia of entries on a topic by specially-selected authors.

If a database is not original, but there has been substantial investment in obtaining, verifying or presenting its contents, it will be granted a lesser form of protection called 'database right'. A business's customer listings or a CD-ROM of Irish statutes are examples. However, the EU's *Database directive* makes it clear that CD music compilations are not databases.

The general rule that the creator of a work, as its 'author', owns the copyright in the work is maintained. Previous exceptions which gave copyright to the commissioners of certain works have been abolished. Performers' rights are vested in the person who gives the performance, and, unusually, there is no exception in favour of a performer's employer.

Original database copyright will vest in the database's author, that is, the individual or group who compiled it. The result is that each group member will be entitled to exercise the copyright rights. But the scale of contribution entitling one to be a member of that group is left unclear: unfortunately, this is just the sort of point that tends to generate argument. The lesser 'database right' vests in the person who took the initiative in obtaining, verifying or presenting the contents of the database and who invested in that process.

The new Bill maintains the current periods of copyright protection, applying the author's life plus a period of 70 years to original databases. Database right initially lasts only 15 years, but this is renewable where cumulative alterations are made to the database which amount to a substantial new investment in it. Importantly, the EU *Database directive* provides that substantial *verification* of the contents will also suffice.

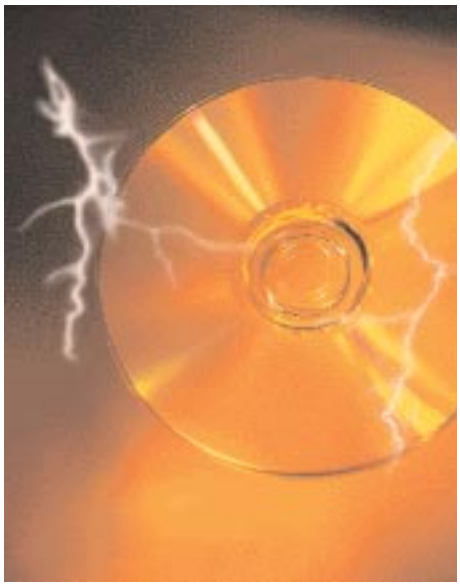
Performers' rights last 50 years from the date of the performance or a recording of it first being made available to the public.

The owner's rights

In a deeply flawed move, the Bill replaces the existing right of copyright owners to prevent a work's *reproduction* with the much narrower right to prevent its *copying*. 'Copying' implies facsimile copying. Many forms of unlawful reproduction of a work would not normally be termed copying – for instance, a sound recording of a musical performance is a 'reproduction' of the notated music performed, but it is not a 'copy' of it. All EU and international instruments refer to the illegality of reproduction and in failing to follow suit the State may well be in breach of its obligations.

A new omnibus right to exclusively 'make available to the public' a copyright work covers the familiar restricted acts of performing the work in public, broadcasting it and distributing copies of it. There are three new elements to this.

'The making available to the public of copies of a work in such a way that members of the public may access the work from a place and at a time chosen by them (including the making available of copies of work through the Internet)' will be a restricted act. This is a garbled version of a provision of the



Will the *Copyright Bill* make it harder to tackle those who import bootleg CDs?

1996 *Copyright treaty* which is directed at Internet infringement – already a serious problem for the music industry. However, the treaty intended that the act of simply putting copyrighted material on the Internet would constitute an infringement: as the Bill stands, only distribution of copies to users via the Internet would be unlawful. Perhaps even that is doubtful.

Second, the rental of a work without the payment of equitable remuneration to its author will become a restricted act. Finally, non-profit public lending will also be restricted, requiring libraries to pay royalties. However, the Minister appears to have reserved the power to exempt all such establishments from this requirement.

Performers are granted corresponding rights of reproduction and making available in respect of their performances. To these performers' 'property rights', the Bill then adds 'non-property rights', which are subject to limitations both on their transfer and enforceability. These non-property rights largely strike at the making and exploitation of unlicensed 'bootleg' recordings of live performances. However, the right to prevent others handling unlawful copies of recordings of performances is also labelled a 'non-property right'. This arbitrarily restricts the ability of performers to tackle those who, say, import unlawful copies of CDs. The property/non-property rights distinction has no basis in international or EU instruments and is just one of the many anomalies in the Bill's treatment of performers which leaves their rights under-strength.

The provisions in the Bill dealing with performers' rights, if implemented, may well violate the State's obligations.

The owners of a database right may prevent the transfer of the database's contents to another medium ('extraction'), which would cover saving it to hard disk or printing a substantial part of a CD-ROM statute database. The rightholder may also prevent a substantial part of the database being made available to the public ('re-utilisation'). One has to go to the *Database directive* to establish what this covers: Internet transmission, distribution of copies and rental are all restricted, but not lending.

The user's rights

The scope of national exemptions from copyright protection may well be curtailed by a new copyright directive currently before the European Parliament. Undaunted, the department expands the existing 'fair dealing' exemptions. The right to deal fairly in a work for the purposes of private study, private research, criticism, review or reporting current events displays three new key elements.

First, all works (most significantly sound recordings) are to be subject to this exemption. This runs counter to the industry view that any exemption permitting, say, the downloading of an individual digital copy of music from the Internet will create a general perception that digital music copying is 'fair game'. Second, a new definition of 'fair dealing' means that such dealing must be for a non-commercial purpose. This might, say, prevent a commercial television station using an excerpt of footage from a rival's news 'scoop'. Thirdly, the Bill makes clear that copying by a person for the benefit of a group of researchers or students is not fair dealing. This accords with the Bill's general prohibition on unlicensed mass photocopying.

Performers' rights are further watered down by an exemption permitting copying 'for private and domestic use'.

The creator's rights

One of the surprises of the finalised Bill is its grant of unwaivable moral rights to the creators of copyright works and performers. These include the right to be identified as the author of one's work (the paternity right). The manner of identification is unregulated, but it would appear that graphic designers and software programmers have the right to be identified on or in their works.

A further moral right is the right to oppose derogatory treatment of one's work prejudicing one's reputation (the integrity right). The right has been used on mainland Europe in respect of the crude insertion of advertisements in a broadcast of a Zefirelli film, and to prevent alterations to architects' designs.

These rights are significantly curtailed by the Bill in respect of employees' works, but not their performances. However, the per-

former's paternity right only requires identification *where practicable*. While all the employee-members of an orchestra may have to be identified on film credits, they need not be on radio or (possibly) in television credits.

Collecting societies

The Bill envisages the creation of collective licensing bodies in respect of all protected matter and establishes a register of licensing bodies. The Controller of Patents, Designs and Trade Marks retains his quasi-judicial role: in particular, he may, as is reasonable, confirm or vary proposed licensing schemes or disputed operational licensing schemes. The main criterion in assessing reasonableness is the need to avoid unreasonable discrimination between licensees.

Enforcement

Unlike its earlier drafts, the Bill contains fairly strong financial remedies. It retains the 1963 Act's conversion remedy under which infringing copies of a work are deemed to be the property of the copyright owner. This carries with it the implied power to seize the copies using reasonable force. A simple power to award aggravated and/or exemplary damages is substituted for the 1963 Act's ineffectual 'additional damages' provision.

The existing power of the District Court to order the Gardai to seize infringing copies being 'hawked' is enhanced by making hearsay evidence admissible and by making sources of information privileged. The *Copyright Bill* is a little confusing when it says that, where it is *not practicable* to apply to the District Court for such an order, the copyright owner may himself seize the infringing copies (subject to a range of limitations and conditions). However, as noted above, the copyright owner *already* has an implied power of seizure.

New offences are created in respect of items specifically designed for making copies, protection-defeating devices, and the provision of information to help circumvent rights protection measures. But there is a loophole in that it is doubtful whether it is an offence to place, say, an unlicensed music CD on a web site so that visitors can download copies.

The Bill provides that where (as in *PPI v Cody* [1998] 2 ILRM 21) ownership of copyright or database right is contested in infringement proceedings, issues of fact on this point may be separately heard by way of affidavit evidence. The existing presumption that copyright subsists in the allegedly infringed work and that the plaintiff owns it have been extended to criminal proceedings.

'In a deeply flawed move, the Bill replaces the existing right of copyright owners to prevent a work's reproduction with the much narrower right to prevent its copying'

But placing the onus of proof on the accused in relation to an issue of which the complainant has peculiar knowledge may fall foul even of the restrictive view of the presumption of innocence adopted in *O'Leary v Attorney General* ([1995] 2 ILRM 259). G

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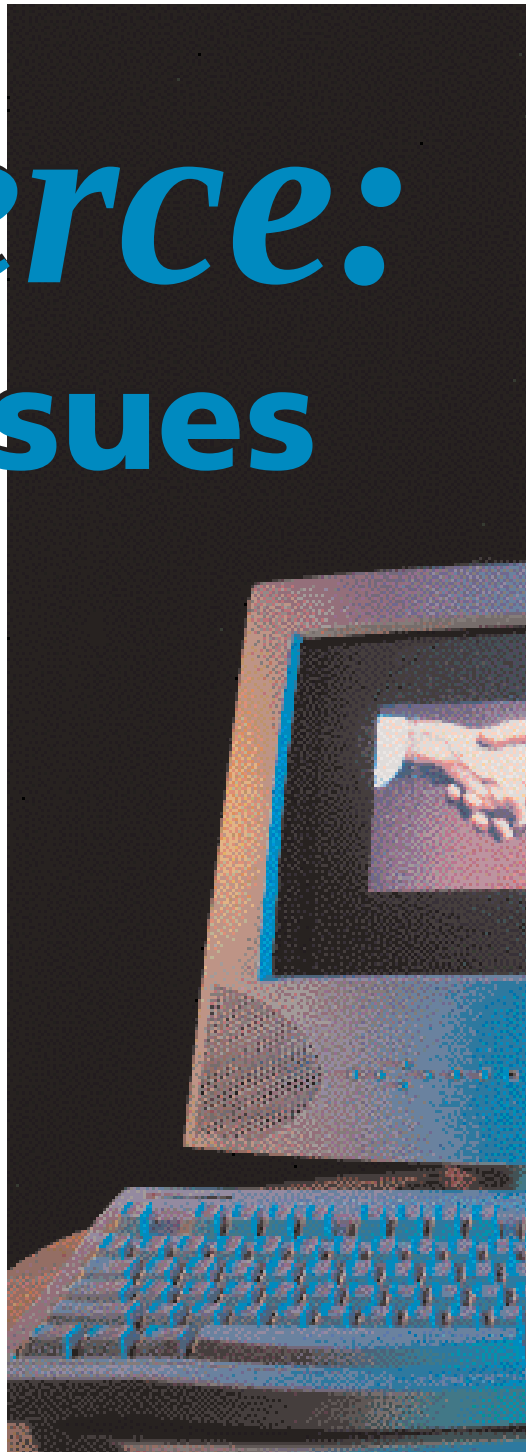
E-commerce: the legal issues



Europe is far behind the USA in its efforts to cash in on the potentially lucrative electronic commerce boom. But a proposed new directive could clear up some of the regulatory problems posed by the Internet and open the door to doing business on-line, as Karen Murray explains

The European Union has recently developed an interest in the Internet in general and electronic commerce (e-commerce) in particular. There are various reasons for this interest. First, the growth prospects for e-commerce appear to be very good. Second, it is no secret that European firms have been left behind in recent developments on the Internet.

Some commentators have estimated that e-commerce will earn £400 million for this country by 2001. But if e-commerce does reach anything close to its suggested growth potential, then it is essential that Europeans should be selling e-commerce goods and services – not just buying them. The blue-print for the EU's plans was set out in its 1997 *European initiative on electronic commerce*: since then, the EU has proceeded with a range of proposals. One of the most interesting is the *Proposal for a directive on the legal aspects of electronic commerce*. This aims to ensure the free movement of 'information society services' between Member States. These are defined as 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'.

One of the most annoying aspects of Internet use is 'spamming', the sending of unsolicited e-mail. Thousands, if not millions, of e-mails can be sent on the Internet at little or no cost. This seriously inconveniences the recipients, who may have to sort through large amounts of unwanted communications. It may also overload or disable the servers or other parts of the Internet.

In a US case, *Parker v CN Enterprises* (Tex, Travis County Dist Ct, 10 Nov 1997), the plaintiffs owned the Internet domain name 'flowers.com' which was used for their business. At the end of March 1997, the defendants sent 'unsolicited mass junk mailings' to a large number of e-mail addresses. To disguise their identities, they used the plaintiffs' electronic return address. Unfortunately, the defendants had sent many thousands of their spams to incorrect addresses, and these were returned to the plaintiff. The court said: 'This massive, unwanted delivery of the defendant's garbage to the plaintiff's doorstep inflicted substantial harm, including substantial service disruptions, lost access to communications, lost time, lost income and lost opportunities'. The plaintiffs won a permanent injunction preventing the defendant from repeating this mailing.

Unfair commercial practice

These problems have spread to Europe. In November 1997, a German court imposed a temporary injunction on unsolicited commercial messages illegally sent to a private e-mail address without the owner's consent. Commercial solicitation by internal electronic mail without permission was ruled to be an unfair commercial practice. The defendant was forbidden from engaging in similar spam activities in the future, and was warned that if he engaged in such activities he could face up to two years' imprisonment.

The proposal for a directive attempts to deal with this problem by stating that 'Member States shall lay down in their legislation that unsolicited commercial communication by electronic mail must be clearly and unequivocally identifiable as such as soon as it is received by the recipient'. This would allow users to identify spams and block or delete them automatically.

Electronic contracts

In common-law countries, contract law is an area in which judges and courts have traditionally been allowed to apply old laws to new technologies. This has worked successfully for hundreds of years and, until recently, legislative intrusions have been rare. One example of the

Europe is far behind the United States in the race to create a vibrant e-commerce industry

English courts adapting contract law to fit a new technology is *Entores v Miles Far East Corporation* ([1955] 2 All ER 493), where the Court of Appeal ruled that a contract made using telex machinery was valid.

Common-law countries might be tempted to let judges apply contract law to electronic transactions, but if the proposal for a directive is implemented, Member States will have to conform to it. In particular, they will have to ensure that the legal requirements applicable to the contractual process neither prevent the effective use of electronic contracts, nor result in such contracts being deprived of legal effect and validity on account of their having been made electronically (article 9(1)). Member States may stipulate that this provision will not apply to the following:

- Contracts requiring the involvement of a notary
- Contracts which, in order to be valid, are required to be registered with a public authority
- Contracts governed by family law
- Contracts governed by the law of succession.

Presumably, if a contract does not come within one of these four categories, it will have to be recognised in its electronic form. Article 10 continues with provisions which must be included in domestic legislation. These may not apply where agreement is reached between 'professional parties', which presumably means lawyers and others. Each Member States' legislation must state that the service provider has to clearly and unequivocally explain the manner in which a contract is formed electronically, before its conclusion. The information to be provided must include:

- The different stages to follow to conclude the contract
- Whether or not the concluded contract will be filed and whether it will be accessible
- The expedients for correcting handling errors.

Member States must provide in their legislation that the different steps to be followed for concluding a contract electronically will be set out in such a way as to ensure that parties can give their full and informed consent. Member States' legislation must provide that the service providers shall indicate any codes of conduct to which they subscribe and provide information on how those codes can be consulted electronically. Under article 11, Member States' legislation must state that, in cases where a recipient is required to indicate his acceptance by technological means, such as clicking on an icon, the following principles will apply:

- 'The contract is concluded when the recipient of the service:
  - has received from the service provider, electronically, an acknowledgement of receipt of the recipient's acceptance, and
  - has confirmed receipt of the acknowledgement of receipt
- Acknowledgement of receipt is deemed to be received and confirmation is deemed to have been given when the parties to whom they are addressed are able to access them
- Acknowledgement of receipt by the service provider and confirmation of the service recipient shall be sent as quickly as possible'.

Finally, service providers will have to make available to the recipient the means necessary to allow him to identify and correct handling errors.

If a wrong is committed on the Internet, the perpetrator may be impossible to identify or may be in another jurisdiction. Even if they can be sued for civil damages, and that judgment can be enforced, they may not have any assets to cover the award. In these circumstances, a local Internet service provider (ISP) can seem a more rewarding target for litigation. These claims could leave ISPs facing high costs in terms of both money and time. These costs would be passed on to users, making access more expensive and slowing down the information society's development.

On-line defamation

Defamation law poses one potentially serious problem. The service provider who maintains a web site or bulletin board may be a target for litigation. Recently, an English High Court ruled that ISPs are liable as publishers if they knowingly carry defamatory material on their servers (*Gazette*, last issue, page 13). In that case, Demon Internet are being sued in the UK by a lecturer, Laurence Godfrey, who claims that defamatory remarks were published by an unknown person from the USA on one of Demon's Internet chat rooms.

If ISPs are liable for defamatory statements made by their users, the cost of using the Internet will dramatically increase, with adverse consequences for the industry's development. The United States has already taken steps to deal with this potential problem. The *Federal Communications Decency Act 1996* exempts service providers, protecting them from liability for content contributed by third parties. The Act provides that: 'No provider ... of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider'. It adds that: 'No cause of action may be brought and no liability may be imposed under any state or local law that is inconsistent with this question'.

This provision was examined by the American courts in *Zeran v America OnLine Inc* (decision of US District judge TS Elliss, East District of Virginia, 21 March 1997). Zeran was the victim of a 'malicious hoax'. An unknown person used his name and telephone number for a series of notices on an AOL bulletin board advertising T-shirts and other items.

These had slogans glorifying the bombing of the Alfred P Murrah Federal Building in Oklahoma City in which 168 people were killed.

As described by Judge Ellis: 'This posting of the bogus notice on AOL's bulletin board, an act within the capacity of even novice Internet users, had its intended pernicious effect. Zeran was inundated with calls, most of which were derogatory and some of which included death threats and intimidation. On 25 April 1995, the day the notice first appeared, Zeran also received a call from a reporter investigating the advertisement of the tasteless T-shirts. Zeran informed the reporter that he was neither responsible for, nor associated with, the advertisement, and that he planned to contact AOL to demand prompt removal of the notice and a retraction. Zeran did this that same day, and an AOL representative assured him that the offending notice would be removed. As a matter of policy, however, AOL declined to post a retraction on its network. To his dismay, Zeran continued to be inundated with offensive and threatening telephone calls. Unable to suspend or change his telephone number due to business necessity, he was forced to tolerate the harassment and threats occasioned by the hoax'.

When the first notice was deleted by AOL on 26 April 1995, a new notice appeared on the same date, stating that some T-shirts had 'sold out' and announcing that several new slogans were now available. On the advice of AOL, Zeran called the FBI, but the notices continued to appear until 1 May 1995, advertising 'offensive Oklahoma City bombing paraphernalia, including bumper stickers, key chains and T-shirts, and even computer software and hardware packages'.

Zeran claimed that as a result he received a flood of offensive phone calls, one every two minutes. To compound his distress, the advertisement was broadcast by a radio station which encouraged listeners to call Zeran to register their disgust. As a result, Zeran's house was placed under protective surveillance by the local police and the calls did not subside to 15 a day until 15 May 1995. Zeran duly began a civil action against AOL, but it was held that this could not be sustained under the *Communications Decency Act*.

The *Proposal for a directive on the legal aspects of electronic commerce* contains several important provisions to exempt service providers from liability. Under article 12, the first provision applies when an information society service is provided which consists of information provided by the service recipient transmitted in a communication network, or the provision of access to a communication network. In this situation, Member States must stipulate that providers cannot be liable for the information transmitted under laws (unless they are subject to a prohibitory injunction) as long as they:

- Do not initiate the transmission
- Do not select the receiver of the transmission, and

- Do not select or modify the information contained in the transmission.

The transmission and provision of access are stated to include the automatic, intermediate and transient storage of the information transmitted, where this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission (article 12(2)).

The second provision applies to 'caching' of material. This is where an information society service which consists of information provided by the service recipient which is transmitted in a communication network such as an ISP. Under article 13, Member States must not impose liability on the provider (unless he is subject to a prohibitory injunction) for the automatic, intermediate and temporary storage of that information if it is performed only for transmitting the information efficiently to other service recipients, as long as:

- 'The provider does not modify the information
- The provider complies with conditions on access to the information
- The provider complies with rules regarding the updating of the information, specified in a manner consistent with industrial standards
- The provider does not interfere with the technology, consistent with industrial standards, used to obtain data on the use of the information, and
- The provider acts expeditiously to remove or to bar access to the information upon obtaining actual knowledge of one of the following:
  - the information at the initial source of the transmission has been removed from the network
  - access to it has been barred
  - a competent authority has ordered such removal or barring'.

This will exempt service providers from potential conflicts with copyright law, in particular conflicts which might arise under the *Proposal for a directive on copyright and related rights in the information society*.

Article 14 applies to the hosting of services. If an information society service is provided where information provided by a service recipient is stored, then Member States must provide in their legislation that the provider will not be liable (unless he is subject to a prohibitory injunction) for the information stored at the request of a recipient of the service, as long as:

- 'The provider does not have actual knowledge that the activity is illegal and, as regards claims for damages, is not aware of facts or circumstances from which illegal activity is apparent, or
- The provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information'.

Under an important exemption in article 15, Member States cannot impose a general obligation on providers, when providing the services covered above, to monitor the information which they transmit or store, nor a general obligation to actively seek facts or circumstances indicating illegal activity. This last provision will affect any targeted, temporary, surveillance activities required by national judicial authorities in accordance with national legislation to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences.

The law will inevitably have a major impact on the Internet. But the danger is that the EU is putting its regulatory cart in front of its technological horse. Europe is far behind America in the race to create a vibrant e-commerce industry: witness, for example, the recent efforts of German publisher Bertelsmann to catch up with the American success story that is Amazon.com. But even taking these concerns into account, if this proposal is implemented, it will probably be a positive move. In particular areas of concern, such as the liability of service providers, it will lessen the regulatory burden which they may otherwise face.

- **Last month the Law Society's Business Law Committee made a submission to the Department of Enterprise, Trade and Employment on the EU's proposed directive on the legal aspects of e-commerce.** G

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Finance Act, 1999

The Government's new *Finance Act* was published in March. Here, John Costello and Brian Bohan outline the major changes introduced by the Act and highlight those areas of particular interest to the practitioner

Tax credits and tax allowances. For the tax year 1999/2000, tax credits are being introduced. It is intended that tax credits will replace tax-free allowances entirely, but this will be done in stages. This means that in the year 1999/2000, there will be some allowances and some credits. At present, some allowances, notably mortgage interest allowance and health insurance allowance, are granted at the standard rate of tax. Effectively, a tax credit rather than a tax allowance is granted.

The first steps have been taken this year with the introduction of standard-rating for personal tax allowances and PAYE allowances. It is intended that allowances other than personal allowances – for example, dependent relative allowances, age allowances and so on – will be dealt with in next year's *Finance Bill*.

The effect of standard-rating these allowances is that even if you pay higher-rate tax (46%) on your income, you will only be allowed to claim these allowances at 24%. This will lead to an actual decrease in the value of the tax-free allowances for those people who have until now been able to effectively claim them at 46%, but the standard-rate band has been widened to compensate.

The band of taxable income chargeable to tax at the standard rate of 24% is widened to £14,000 for single and widowed persons and £28,000 for a married couple.

Special trusts for permanently incapacitated individuals for all tax years from 1997/1998. All income arising in respect of trust funds, where the funds were raised by public subscription on behalf of individuals who are permanently incapacitated from maintaining themselves, will be exempt from income tax subject to certain conditions. The Act also exempts these trusts from gift tax or inheritance tax (*see capital acquisitions tax below*).

Pension arrangements

Up to the present, people retiring were required to set aside 75% of their pension fund to buy a fixed-rate annuity that would provide a guaranteed income until they died. However, low interest rates meant that the amount of pension income that they could buy was much lower than it was even a year ago.

Finance Minister Charlie McCreevy: published the Bill in March

In his Budget speech last December, the Minister for Finance, Charlie McCreevy, announced changes to pensions for the self-employed that would take effect from 6 April 1999. These changes have been incorporated in the *Finance Act*. In addition to those changes, people up to the age of 30 are able to make contributions of up to 15% of their net relevant earnings to pension plans. Between the ages of 30 and 40 the limit is 20%, from 40 to 50 there is a 25% limit, and for those aged over 50 up to 30% of income may be contributed to the pension fund.

The following is a summary of the new arrangements for retirement provisions for the self-employed and others:

a) **Maximum contributions.** An earnings cap of £200,000 a year applies to the contribution limits. Therefore, the maximum contribution for an individual of 50 and over is £60,000 (30% of £200,000)

b) **Transfer of funds during the pension accumulation period.** Individuals have the option of transferring the funds accumulated with one insurer to another fund with another insurer

c) **Ownership of the fund on retirement.** On retirement, the individual can opt for either the existing (annuity) arrangement or the alternative new option (set out below). Under the new option, the fund is the property of the individual and, on death, his estate. Income tax or inheritance tax can apply in the event of death and the legislation should be read in detail

d) **Triggering the pension.** The old legislation provided that an individual must have exercised the option to take a pension between the ages of 60 and 70 years of age. The age limit of 70 years is increased to 75

e) **New options.** 25% of the accumulated pension fund is available as a tax-free lump sum. An individual can, however, opt for a lower entitlement than 25%.

If the pensioner already has a guaranteed income for life of £10,000 through pension or annuity, his pension fund can be transferred to an approved retirement funds (ARF). This can be any fund operated by a bank, building society, credit union or insurance company. It will be up to the individual to choose his own investment.

The pensioner will also be able to withdraw money from this fund as and when he chooses and could withdraw the whole amount. If, however, he does not have the minimum of £10,000 annual income, he will be required to place £50,000 of the pension fund into an approved minimum retirement fund (AMRF). The money in the AMRF cannot fall below £50,000 until he reaches the age of 75, after which it can be drawn down.

Irish registered non-resident (IRNR) companies. IRNR companies are frequently used by

non-residents for questionable business dealings abroad when they have no business connections with Ireland. The *Finance Act* contains an important provision which provides that, once a company is registered in Ireland, it will automatically be considered resident here for tax purposes. An exception to this rule is provided where the company or a related company is carrying on a trade in Ireland and either the company is ultimately controlled by residents of an EU Member State or a tax treaty country or the company or the related company is quoted on a recognised stock exchange.

The *Finance Act* provisions apply to new companies incorporated on or after 11 February 1999 and for existing companies from 1 October 1999. The companies covered by the exception will continue to be resident where they are managed and controlled.

Measures which affect property

Multi-storey car parks. The Act extends the termination date for relief in respect of expenditure to 31 December 2000, but only on projects outside the areas of Dublin and Cork corporations. The extension will apply where the relevant local authority certifies that at least 15% of the total cost of the project has been incurred by 30 June 1999.

Student accommodation. The Act provides for new tax incentives for the provision of student-rented accommodation. These incentives will be in the form of section-23-type relief which can be offset against all rental income.

Private convalescent homes. The Act introduces a new scheme of capital allowances for the construction or refurbishment of convalescent facilities as an alternative to hospital care for patients recovering from acute hospital treatment.

Childcare facilities. The Act provides for 100% capital allowances for expenditure on childcare facilities available on expenditure incurred on or after 2 December 1999.

Park and ride. The Act introduces accelerated capital allowances of 100% on the construction or refurbishment of park-and-ride facilities in the larger urban areas.

Seaside resort areas. Tax reliefs have been extended for a further six months – to 31 December 1999 – for the 15 designated seaside resort areas. This extension applies where 50% of the cost of the project is incurred by 30 June 1999.

Residential property tax clearance certificates. The Act increases to £200,000 the value threshold relating to the residential property tax clearance certificate procedure. The new threshold applies to house sale contracts executed on or after 5 April 1999.

Capital gains tax

Taxing off-shore trusts and gains. Section 88 amends chapter 3 of part 19 of the *Taxes Consolidation Act, 1997* by the insertion of new sections 579A to 579F. Section 579A provides for the attribution of chargeable gains accruing to an off-shore trust to beneficiaries who are resident or ordinarily resident in the State to the extent that they receive capital payments from the trustees of the trust. Where this section has application so as to so attribute trust gains to beneficiaries, the existing broadly similar provisions of section 579 will not apply.

Section 579B imposes a charge to tax where the trustees of a trust cease to be resident and ordinarily resident in the State. The trustees, immediately before migrating off-shore, are deemed, for the purpose of the *Capital Gains Tax Acts*, to have disposed of and immediately reacquired the trust assets.

Section 579C makes special provision where a trust migrates off-shore because of the death of a trustee or where a trust comes on-shore for a similar reason. If the trust within six months reverts to being on-shore, or, as the case may be, reverts to being off-shore, the charge to tax under section 579B because of the migration off-shore is limited to a charge in respect of certain trust assets – that is, assets disposed of between the death and the reverting to on-shore or off-shore status as appropriate.

Section 579D provides that there will be a secondary liability to tax on certain trustees where, as a result of the trustees of a trust migrating off-shore, a capital gains tax charge arises under section 579B. The secondary liability can be imposed on a person who was a trustee in the period of 12 months prior to the migration where that person was aware that there was a proposal that the trustees cease to be resident and ordinarily resident in that State.

Section 579E imposes a charge similar to that imposed by section 579B where a trust ceases to be liable to Irish capital gains tax because of the provisions of any double-taxation agreement. Section 579F deals with, for the purposes of section 579A, a situation where a capital payment is received by a beneficiary during a period to a trust migrating off-shore and a situation where a capital payment is received after a trust comes on-shore.

Section 89 substitutes a new section 590 into the *Taxes Consolidation Act, 1997*. This new section allows capital gains, which accrue to certain non-resident companies, to be attributed to persons in the State who are participators in the company.

Section 90 removes the exemption from capital gains tax for the disposal of an interest in a trust where the trust is or ever was an off-shore trust, or the trust is or ever was outside the charge to Irish capital gains tax by virtue of a double-taxation agreement.

Section 91 amends section 649A of the *Taxes Consolidation Act, 1997*, which deals with the rate of capital gains tax applying to disposals of development land. The changes are as follows.

The 20% rate is extended to disposals of land zoned for residential development under a county development plan. This is an alternative to the existing planning permission requirement. The 20% rate will also apply to land disposals to the National Building Agency and to the voluntary housing sector, to assist in expanding their role in providing owner-occupied and rented accommodation. These provisions will apply from 10 March 1999 to 5 April 2002.

Section 92 provides information powers in relation to trusts. A return to the Revenue Commissioners is required from certain persons being:

- A transferor of property to an off-shore trust, where the transfer is not at arm's length
- A settlor who is resident or ordinarily resident in the State and who creates an off-shore trust or a trust which is not subject to capital gains tax because of the provisions of a double-taxation agreement, and
- Certain trustees of a trust who were trustees of the trust prior to it migrating off-shore or prior to it otherwise falling out of charge to Irish tax.

Relief for investment in films. The Act contains a welcome extension of the reliefs for a further year to 5 April 2000.

Special portfolio investment accounts. The Act provides for an increase in the rate of tax applicable to special portfolio investment accounts from 10% to 20% with effect from 6 April 1999.

Special savings accounts. The limit on the amount which might be held in a special savings account has increased from £50,000 to £75,000.

Corporation tax rates. The Act provides for the intention to move towards the 12.5% level of corporation tax and the new rates of corporation tax for each financial year are as follows:

Year	Rate of tax
1998	32%
1999	28%
2000	24%
2001	20%
2002	16%
2003	12.5%

Capital acquisitions tax

The Budget in December signaled two changes to the capital acquisition tax code:

a) The aggregation date of 2 June 1982 was brought forward to 2 December 1998 (section 196)

b) The small gift exemption is increased to £1,000 with effect from 1 January 1999 (section 199).

In practical terms, the effect of these changes will not be great, although they have practical benefits. The moving-forward of the aggrega-

tion date reduces the need to keep records for CAT purposes.

Section 201. The provision will also be of benefit to those who may have already controlled the passage of wealth to the next generation. Many reliefs in the CAT code were introduced to facilitate the passing of wealth to a new and more active generation. The piece-meal dealing with the aggregation date will militate against this. The real benefit of this change is to those who delayed the transition.

Section 204. The increased annual exemption does give some tax planning opportunity, particularly for business property. A husband and wife can dispose of £2,000 a year to each child free of tax (five children would amount to £10,000 a year).

Section 200. In addition to the return normally required from the donee or successor, returns have to be made in the following circumstances:

a) A return can be called for from a donee or successor showing details of any taxable gift or inheritance taken by that donee or successor. A return can also be called from a person indicating that no taxable gift or inheritance was taken (in effect, a 'nil return')
b) With effect from 11 February 1999, a donor must make a return of any gift made by him where:
   i) the taxable value of the taxable gift exceeds 80% of the relevant threshold
   ii) the taxable value of the taxable gift increases the aggregate to a sum equal to or in excess of 80% of the relevant threshold, or
   iii) the 80% limit has already been breached.

   The return must contain:
   iv) details of all the property comprised in the gift
   v) the market value of the property, and
   vi) such other particulars as may be relevant.
c) With effect from 11 February 1999, the settlor, domiciled and living in the State, of a discretionary trust must, within four months of setting up the trust, send a return to the Revenue disclosing:
   i) the terms of the discretionary trust
   ii) the names and addresses of the trustees and the objects (beneficiaries) of the trust, and
   iii) the market value of the property becoming subject to the trust.

Section 202. Where a clawback of tax occurs for CAT purposes:

a) Sale of agricultural property within ten years of the date of the gift or inheritance and is not reinvested – section 19(5), CATA 1976
b) One of the conditions attaching to the exemption relating to items of national, scientific, historic or artistic interest – section 55, CATA 1976 – is breached (for example, sale other than to a specified institution or taking off public viewing)
c) Sale of relevant business property within ten years or such property ceasing to be relevant business property within that period – section 134, FA 1994
d) One of the conditions attaching to the exemption relating to heritage property of companies – section 166, FA 1995 – is breached.

The tax arising by reason of the clawback will carry interest from the date of the event giving rise to the clawback. The four-month break appears to apply. This has effect from 11 February 1999. In fact, this is legislation for a position which already applied by concession.

Section 203 amends section 51 CATA 1976. Details of any transfer or lease presented to or obtained by the Revenue under the provisions of section 107, FA 1994 (particulars delivered form for stamp duty purposes) will be *prima facie* evidence of all matters and things in such particulars in any appeal.

Section 205. Section 58, CATA 1976 deals with certain specified exemptions from CAT. Section 205 adds a further exemption.

Monies raised by public subscription for permanently incapacitated persons will be exempt from CATA, as will application of income by the trustees if they are held by a qualifying trust. This applies to such gifts and inheritances taken on or after 6 April 1997. 'Incapacitated individual' means a person totally incapacitated by reason of physical or mental incapacity who is incapable of maintaining himself. 'Public subscription' means subscription in money or other property raised, following an appeal, for the raising funds for incapacitated persons subject to one of two conditions:

a) The total subscribed must not exceed £300,000, or
b) No single contributor can subscribe more than 30% of the fund.

A qualifying trust is:

a) A trust established by deed
b) Exclusively for the benefit of one or more specified incapacitated individual or individuals
c) For whose benefit funds have been raised by public subscription
d) And which requires that funds so raised are applied for the benefit of that individual or those individuals at the discretion of trustees
e) In the event of the death of the individual or the last of those individuals, the undistributed trust fund must be applied for charitable purposes or be appointed in favour of the trustees of charitable bodies, and
f) None of the trustees can be connected with the individual or any of the individuals.

Therefore, by reason of section 12 and section 205:

a) Income received by the trustees is exempt from income tax
b) Income paid to the incapacitated individual or individuals is exempt from tax
c) Income arising to the incapacitated individual or individuals from the investment of funds is exempt from tax
d) The money received by the trustees and the application of those funds will be exempt from CAT.

Extension of Revenue powers

The *Finance Act* gives the following powers:

- Power to an authorised officer to require a person to produce or make available books and furnish information relevant to the person's tax liability
- Power to an authorised officer to apply to the High Court seeking production or availability of books and information from a person which are relevant to the person's tax liability
- Power to an authorised officer, when enquiring of the tax liability of any person, to seek from a third party books and information relevant to the tax liability of the person subject to enquiry
- Power to an authorised officer to apply to a judge of the High Court seeking books and information from a third party which is relevant to the tax liability of a person, including a group or class of persons. Before such an application is made, the authorised officer must have the consent of a Revenue Commissioner
- Power to an authorised officer to audit the DIRT returns of a relevant deposit taker (such as banks)
- Power to an authorised officer to carry out an on-site audit of a financial institution. Furthermore, under this section, as amended, an application can be made to a judge of the District Court for the issue of a search warrant in relation to any premises.

Stamp duty changes

The Act introduces a number of stamp duty changes, the most significant being the insertion of a revised first schedule to the *Stamp Act 1891* which reduces the number of instruments chargeable to the fixed-rate stamp duty of £10. The new first schedule applies to instruments executed on or after 25 March 1999. The Revenue Commissioners intend publishing a leaflet regarding the changes and the new certificates required. The leaflet will also clarify the wording of some of the certificates required by the *Finance (No 2) Act, 1998.* G

John Costello is Chairman, and Brian Bohan a member, of the Law Society's Probate, Administration and Taxation Committee. *This commentary is provided for information purposes only and the reader is directed to the* Finance Act *for a full narrative.*

COURSES • IN • LEGAL • FRENCH

Diploma in legal French

The Law Society and the Alliance Française are pleased to announce that the fifth *Diploma in Legal French* programme will begin in January 2000. Certified by the Paris Chamber of Commerce, the course will be taught by native French lawyers and lecturers. This diploma is a practical qualification and provides a comprehensive study of the French legal environment.

Course participants

The course is open to solicitors, barristers, apprentices and other interested parties.

Course content

The course is divided into legal French and general French modules. The legal French element represents two-thirds of the course and will include modules on the French legal system dealing with both civil and commercial law. The language modules will complement the legal syllabus and will include work on the oral and written skills essential to success in the diploma examination.

Course aims

The aim of the programme is that successful participants will be qualified to interact proficiently with French-speaking lawyers and business people. They will also have acquired an excellent knowledge and understanding of the French legal system. Practitioners will benefit from the application of their professional and language skills, and apprentices will enhance their career prospects by undertaking the programme.

Venue and timetable

Lectures will take place at the Law Society, Blackhall Place, on three out of four Saturdays each month between end-January and early-December 2000. There will be a two-week break at Easter and a summer break which will include the months of July and August.

Fee

The course fee is £700 per student, inclusive of course materials. An examination fee of £85 will be payable at a later date. *(There is also an examination-inclusive fee option of £775.)*

Entry criteria

Admission will be based on a pre-course language assessment which will take place at the Alliance Française on Thursday 25 November 1999 at 6.30pm and Saturday 27 November 1999 at 12 noon.

Preparatory course

A preparatory course for those interested in taking the assessment examination will begin in September 1999. It will be beneficial to those who have not had an opportunity to practise their French in the recent past and who wish to revise and improve their skills with a view to reaching the diploma's entry criteria.

A feature of this course will be the overview of the French legal system given by a lecturer from the diploma course. Apart from improving general French, the course will include the obligatory assessment prior to acceptance on the diploma course.

Venue and timetable

Lectures will be held at the Alliance Française, Kildare Street, Dublin2 , on Mondays from 20 September 1999 to Monday 22 January 2000. Classes will take place from 7.30-9.30pm. (The assessment times for this course are available from the Alliance Française.)

Fee

The course fee is £175 per student.

For further information on the diploma course, please contact TP Kennedy at the Law Society (01 6724802) or Louise Stirling at the Alliance Française (01 67617 32).

Diploma in legal French

Pre-course language assessment application form

Name: _____ **Qualification:** _____

Firm: _____

Address: _____

Telephone: _____ **Fax:** _____ **E-mail:** _____

Home address: _____

I wish to apply for the pre-course language assessment at the Alliance Française on

☐ Thursday 25 November at 6.30pm, *or*

☐ Saturday 27 November at 12pm

Signature: _____ **Date:** _____

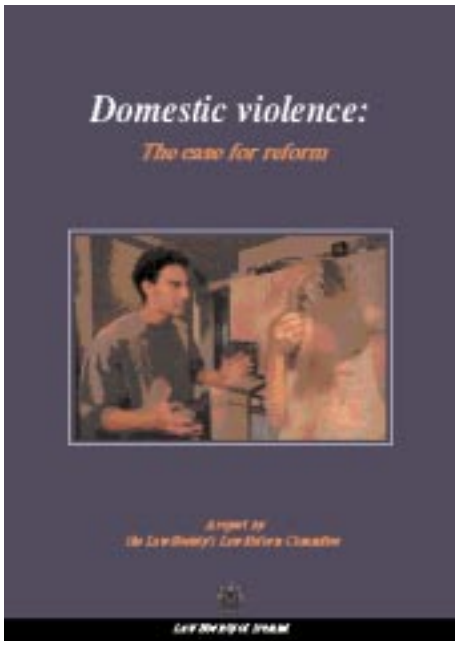
I enclose £15 assessment fee (Please make cheques payable to the Alliance Française)
The final date for receipt of applications for language assessment is **Monday 22 November 1999.**
Please return application and cheque to Louise Stirling, Alliance Française, 1 Kildare Street, Dublin 2.

Domestic violence: the case for reform

A new report from the Law Society's Law Reform Committee has identified a number of areas where our domestic violence legislation needs to be reformed. Much of the report was based on a survey of family law practitioners carried in last November's *Gazette*. The following is an edited version of the committee's report

The Law Reform Committee's survey took the form of a simple questionnaire which was published in the *Gazette* and further distributed to local bar associations. A total of 83 replies were received, representing approximately 100 practitioners (a number of replies contained the views of two or more solicitors working within a single law firm or community centre). The success with which the committee targeted those solicitors with the appropriate experience is illustrated by the actual survey results: 46% of respondents reported that they acted in between five and ten barring or safety applications each year, 28% acted in between ten and 20 such applications, and 25% acted in more than 20.

Before issuing the questionnaire, the committee had identified through research a number of provisions in the *Domestic Violence Act, 1996* where amendment would prevent injustice and help to achieve the Act's objectives. The survey was merely intended to test the extent to which the potential anomalies created by those provisions arose in practice.



Interim barring orders and early return dates

Under the *Domestic Violence Act, 1996*, the District Court may grant interlocutory relief, pending the determination of barring proceedings, in the form of an interim barring order. Interim orders will only be granted where the court is of the opinion that there are reasonable grounds for believing that the applicant or a dependant person is in immediate risk of significant harm and a protection order would not be sufficient for their protection. Therefore, the power to grant such orders must be considered a vital device for the effective protection of victims of domestic violence. However, as an interim order, which may exclude a respondent from his place of residence, can be granted on what amounts to a *prima facie* review of the evidence, and can even be granted *ex parte*, it is essential in order to prevent injustice that an early return date is set for the hearing to determine the barring application. The form of the interim barring order was amended in 1998 to include provision of a return date within the body of the order but no maximum period of delay was set down (SI No 201 of 1998).

Quite apart from the inherent injustice caused to the respondent, unreasonably long delays could conceivably result in serious legal consequences for the applicant. An analogous situation arose under the *Children Act, 1908*, where a substantial delay could occur between the *ex parte* proceedings taken by the health boards to take a child to a place of safety and the full hearing at which the parents could challenge the order. In *State (DC) v Midland Health Board*, Keane J noted that the delay could constitute an impermissible violation of parental rights.

The Law Reform Committee's survey found that, according to 43% of survey respondents, there was an average delay of 21 days to the return date. A further 4% experienced an average delay of 42 days, while 11% found it to be even longer. A mere 37% replied that they had an average wait of seven days for a return date. Though the survey was not designed to take account of regional variations, it is apparent that in some District Court areas respondents are experiencing unacceptably long delays.

In order to secure an early substantive hearing, respondents on occasion resort to making an application to have the interim barring order discharged under section 13 of the 1996 Act (under section 13(1)(c)(ii), the respondent may apply to have any order under the Act discharged where the safety and welfare of the victim does not require that the order should continue in force). Also, where the District Court clerk is prepared to certify that the case is an urgent one, the barring summons may be abridged down to two days' notice. However, neither solution is satisfactory.

Ex parte interim barring orders

The 1996 Act provides that where 'the court in exceptional circumstances considers it necessary or expedient in the interests of justice', an interim barring order may be made *ex parte*. Once again, this device is vital for the protection of victims in exceptional circumstances. However, while current District Court rules provide for 'information' to be sworn by the applicant on oath and in writing prior to the granting of *ex parte* relief, the 'information' subsequently received by the respondent may not contain all the evidence tendered in court during the interim *ex parte* hearing.

Under the Circuit Court rules, any *ex parte* application should be on affidavit and, if for some reason it is not, the respondent should be provided with a note of the evidence given at the hearing. 'Information' upon which a protection order or a barring order is given in an *ex parte* situation should automatically be made available to the respondent.

At present, one has to make an *ex parte*

SUMMARY OF RECOMMENDATIONS

1

That the District Court rules be amended to provide an automatic early return date for interim barring orders.

2

That the District Court rules be amended to require that *ex parte* applications for a protection order or an interim barring order be made on affidavit and that the respondent automatically be provided with a note of all the evidence given at the hearing. Also, that personal service of the barring summons be required in all cases or, at least, where the respondent is barred *ex parte*.

3

That the residence requirement be removed for cohabitees seeking a safety order and for cohabitees with sole ownership or tenancy rights in the home seeking a barring order. Also, that provisions be introduced permitting parents or elderly relations to apply for protective orders against abusive relations or persons other than an adult child. These should include safety or barring orders against such relations or persons residing in the home and safety orders against those residing elsewhere.

4

The introduction into the domestic violence legislation of a category of 'associated persons' who are entitled to apply for a safety order and the provision of a non-exhaustive list of such persons, to include those affected by or pending a decree of nullity and non-cohabitees with a child in common. Also, that 'associated persons' with sole ownership or tenancy rights in the home be entitled to apply for a barring order.

5

The introduction of either detailed statutory guidance or a list of criteria to be considered by the courts in determining whether to grant protective orders.

6

The provision of guidance as to the relevance and effect of the *O'B v O'B* judgment in the context of the new definition of 'welfare' contained in the 1996 Act. Generally, statutory guidance with regard to 'welfare'-based applications should be extended and clarified.

7

That further statutory guidance be provided regarding the standard of proof necessary to establish abuse.

8

That the Probation and Welfare Service be given a clear statutory role in relation to domestic violence cases and adequate resources to allow it to discharge its statutory functions.

9

That the Probation and Welfare Service be given an increased role in supervised access arrangements and that it be allocated adequate resources to fulfil this role.

10

That measures be introduced to encourage judges to use the procedure contained in section 9 of the *Domestic Violence Act, 1996*, permitting the courts to deal contemporaneously with issues of access, maintenance and other related issues, subject to adequate reasonable notice having been given to the respondent.

11

That a system of regional family courts be established.

12

The introduction of systematic judicial training in family law matters and on the topic of domestic violence in particular.

application (by preparing an *ex parte* docket) to obtain sight of the information which led to the granting of the order. Also, a note of any evidence given which strayed outside the factual details set out in the information should automatically be made available to the respondent. Frequently, respondents find themselves coming into court to defend proceedings though they are not aware of the statements made by the applicant which led to the granting of the order.

Under the District Court rules, service of the barring summons is by ordinary prepaid post. Personal service is clearly more appropriate where the respondent is barred *ex parte* and though, in practice, personal service is usually ordered by the court in such an event, there is no requirement do so. Also, where a case is certified as urgent and a summons served with very short notice, personal service should be a requirement.

Entitlement to relief: incomplete coverage

Though the 1996 Act has extended protection to a broad category of persons in domestic relationships, it is apparent that it does not cover every victim of domestic violence. Though there are constitutional arguments for some restrictions as to who may seek relief, a number of exclusions cannot be justified.

First of all, though the residence and ownership requirements[1] relating to a cohabitee applying for a barring order may be justified on the grounds that a less restrictive regime might amount to an infringement of the respondent's constitutional property rights, the residence requirement relating to a cohabitee seeking a safety order cannot.[2]

A safety order does not exclude the respondent from residing in his own home or deprive a respondent of any property entitlement. This requirement creates the anomaly that applicants in a homosexual or lesbian relationship, who could seek protection under section 2(1)(a)(iv), would enjoy a greater level of protection than non-married applicants in a heterosexual relationship.

However, it should be noted that in practice some district judges allow couples who do not satisfy the cohabitation criteria to apply under section 2(1)(a)(iv) while, on the other hand, some judges feel that they cannot. Similarly, there can be no constitutional justification for any residence requirement for a cohabitee seeking a barring order where the sole ownership or tenancy rights in the home are vested in the applicant or a relative of the applicant.

Also, while parents can apply for a safety order against an abusive adult child without preconditions, explicit protection for the elderly should be extended against other abusive relations or persons other than the victim's

adult child, such as a son-in-law. At present, such a relationship may be covered under section 2(1)(a)(iv), whereby an application can be made for a safety order by a person of 18 years and over who 'resides with the respondent in a relationship the basis of which is not primarily contractual'. However, the Act provides no protection where a respondent, other than an adult child, resides elsewhere. Such explicit protection would be particularly welcome in light of the rise in reported incidents of abuse of elderly people.

'Frequently, respondents find themselves coming into court to defend proceedings though they are not aware of the statements made by the applicant which led to the granting of the barring order'

Another category of persons overlooked by the 1996 Act is that of persons subject to a decree of nullity who fail to qualify as cohabitees. To apply as a 'spouse' under the legislation, the applicant must be or have been validly married to the respondent. Therefore, a person whose marriage has been annulled will not be eligible to apply. Further, there would seem to be considerable uncertainty surrounding the eligibility of an applicant pending nullity proceedings. Also, there is no protection under the 1996 Act for victims of violence where a couple has a child in common but does not cohabit.

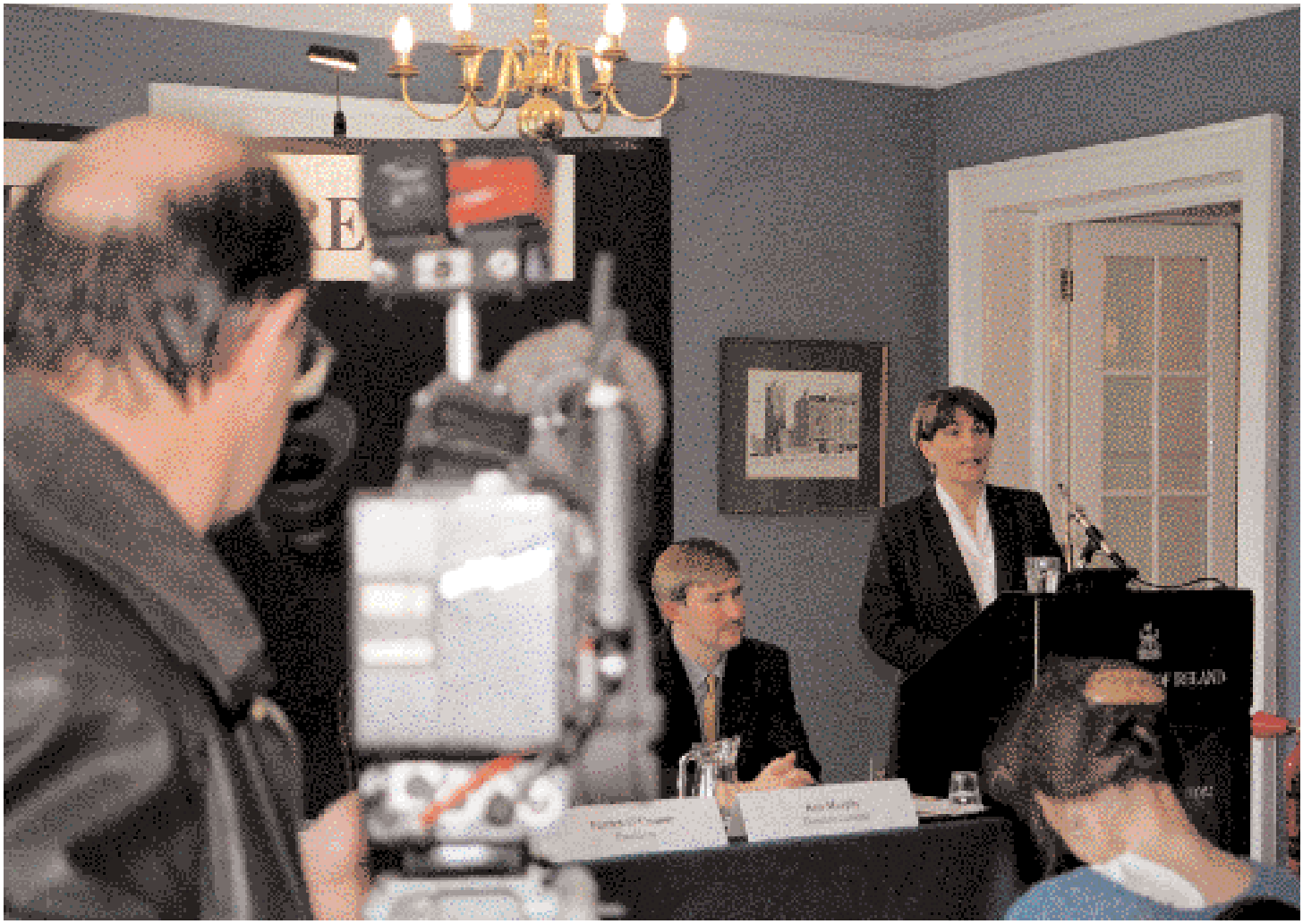
There is no reason why an unmarried parent who threatens or uses violence against the other should not be restrained using a safety or barring order. This *lacuna* in the legislation has been widely identified as one which urgently needs to be addressed. Such persons would not be protected as cohabitees nor under the 'catch-all' or 'other relationship' provision in section 2(1)(a)(iv) because, in order to qualify as an applicant under this provision, the victim must reside with the respondent. Also, though this provision covers a myriad of other relationships, such as that of adult siblings residing together, it only provides for the grant of a safety order, but not of a barring order, regardless of in whom the ownership or tenancy rights in the home are vested.

Statutory guidance

The 1996 Act contains no detailed guidance nor does it set down statutory criteria to be considered by the court in determining whether there are sufficient grounds for the grant of any protective order. The court is simply instructed to satisfy itself that it is 'of the opinion that there are reasonable grounds for believing that the safety or welfare of the applicant or any dependent person so requires'. Neither does it provide any clarification as to the circumstances in which it would be more appropriate to grant a barring order rather than a safety order and *vice versa* where either option is available to the court. Unfortunately, the opportunity has not yet arisen for the superior courts to give a definitive ruling in this area.

The Law Reform Committee's survey found evidence of practice differing as between District Court areas. When asked whether 'physical' grounds were necessary to secure relief in the respondent's court area, 12% of respondents replied that they were always necessary, 51% replied that they were generally necessary, but 36% answered that physical grounds were only sometimes necessary.

It is worrying that, in order to grant relief, many judges still require physical grounds or, at least, feel uncomfortable in the absence of



Law Reform Committee member Rosemary Horgan addressing a press conference at Blackhall Place, held to mark the launch of the domestic violence report

such grounds, when these are no longer required under the Act. Equally worrying is the fact that 11% of respondents answered that, in their experience, the factors needed to establish the grounds for obtaining protective orders were different for spouses than for non-spouses. These findings suggest that there is considerable divergence among District Court judges in the exercise of their discretion under sections 2 and 3 and that judicial training might prove beneficial.

The provision of detailed statutory criteria to guide judicial discretion is an approach adopted elsewhere in family law. The *Judicial Separation and Family Law Reform Act, 1989*, the *Family Law Act, 1995* and the *Family Law (Divorce) Act, 1996* each set down clear and detailed criteria for consideration by the courts in the exercise of discretion under the legislation. This makes it 'far easier for the practitioner to advise the client on the issues to be considered by the court when deciding whether or not to grant a particular relief'.[3]

Also, the introduction of detailed criteria would permit the use, where appropriate, of differential tests as to misconduct requiring the grant of protective orders. For example, it might be appropriate that the standard of misconduct giving rise to a barring order against an adult child who is an 'invitee' in the home may be of a less serious nature than that of a spouse with a 'right' to reside there.

Definition of 'welfare'

Under the 1996 Act, the definition of 'welfare' has been broadened for all applicants to include 'the physical and psychological welfare of the person in question'. However, there is uncertainty as to whether this new definition merely gives legislative effect to the Supreme Court decision in *O'B v O'B* ([1984] IR 182; [1984] ILRM 1) or whether it changes the considerations to be taken account of in welfare-based applications. It is quite clear from the statutory definition that physical violence is not required before a protective order is granted.

The Supreme Court accepted this in *O'B v O'B* but was divided over whether the respondent's conduct, which included 'rudeness by the husband in front of the children, a lack of sensitivity in his manner to her and efforts by him at dominance in running the home' and which resulted in 'tensions, strains and difficulties', amounted to 'serious misconduct on the part of the offending spouse – something wilful and avoidable which causes, or is likely to cause, hurt or harm not as a single occurrence but as something which is continuing or repetitive in its nature. Violence or threats of violence may clearly invoke the jurisdiction'.

While the majority found that the respondent's conduct fell within the 'ordinary wear and tear of married life' and so failed to amount to serious misconduct, Griffin J, dissenting, concluded that he had 'constantly indulged in … conduct which no woman should be required to put up with' and which 'was bound to have an adverse effect on the physical and emotional health of the wife and children'. Some have that Griffin J's approach is more in accord with the concept of welfare as now expressly defined in the 1996 Act, although it is generally agreed that, in the absence of statutory guidance, a Supreme Court decision under the 1996 Act would be necessary to clarify the position fully.[4]

Standard of proof

Similarly, there is a total absence of guidance as to the standard of proof necessary to establish abuse and, therefore, practice varies between District Court areas. The 1996 Act merely requires that the court be 'of the opinion that there are reasonable grounds for believing that the safety or welfare of the applicant or any dependent person' requires a protective order to be made (sections 2(2) and 3(2)(a)).

In cases concerning physical abuse, 72% of respondents to the survey replied that the allegations were generally supported by the evidence of the applicant alone, while only 26% reported that both the evidence of the applicant and medical evidence were usually required. Only 2% replied that medical evidence was always required.

In non-violent cases concerning emotional abuse, neglect or addiction, 59% replied that the abuse was generally supported by the evidence of the applicant alone, while 22% stated that both the evidence of the applicant and medical evidence were required. 18% reported that medical or other evidence was always required in such cases.

In relation to applications for interim barring orders, 35% of respondents reported that evidence and corroboration were generally necessary, while 59% replied that they were not. 4% reported that evidence and corroboration were sometimes necessary for the grant of an interim barring order.

These findings demonstrate a marked lack of uniformity in court practice which inevitably renders the application of the law uncertain and creates obvious difficulty for lawyers in advising clients. Judicial training in relation to domestic violence might also prove beneficial. Also, in considering and drafting statutory guidance on evidential requirements, the Department of Justice, Equality and Law Reform could contemporaneously explore the possibility of allowing victims to give evidence through a video link or from behind a screen. This might be appropriate where applicants are intimidated by the respondent's presence or are embarrassed to present the full facts of the abuse in court.

Law Society President Patrick O'Connor launches the report, watched by Law Reform Committee members Ann Leech and Rosemary Horgan, committee secretary Owen McIntyre and Director General Ken Murphy

Welfare reports

Welfare reports provided by the Court Probation and Welfare Service can bring independent expertise to bear on welfare issues. While the court has the power to order the provision of a report from any source and fix either or both parties with the associated costs, in reality many litigants cannot afford to fund a report, so the court is often deprived of the benefit of reports in cases involving impecunious litigants. Legally-aided litigants may, of course, have their legal aid certificates amended to allow for the commissioning of such reports, but the litigant of modest means who does not qualify for legal aid can rarely afford to bear the costs involved.

The Probation and Welfare Service has provided reports in family law cases since 1976, even though it did not have a statutory remit to do so in civil cases. The court or either of the parties to the proceedings could seek a report from the Probation and Welfare Service in order to bring independent evidence before the court. The ever-expanding workload of the service in the absence of increased funding led to tension between criminal law work (for which the service had a statutory remit) and the expanding non-statutory civil law/family law work. The service of providing reports was withdrawn in family law cases in 1996.

The service was given a limited statutory role in family law cases by virtue of section 40 of the *Judicial Separation and Family Law Reform Act, 1989*. Section 40 amended the *Guardianship of Infants Act, 1964* and provided for welfare reports in guardianship cases. There was, however, no statutory remit with regard to domestic violence cases as such. That section was repealed and replaced by section 47 of the *Family Law Act, 1995* which limited the provision of 'social reports' to the Circuit Court and High Court levels. The section was not limited to guardianship cases however, and dealt with a much wider variety of proceedings.

Section 47 of the *Family Law Act, 1995* entitles the court to give directions 'for the purpose of procuring a report in writing on any question affecting the welfare of a party to the proceedings or any other person to whom they relate from:

a) Such probation and welfare officer …
b) Such person nominated by a health board …
c) Any other person specified in the order.'

This provision may therefore be used to obtain a report on the welfare of a wide range of persons affected by the proceedings. The section further provides that 'the fees and expenses incurred … shall be paid by such parties to the proceedings concerned and in such proportions, or by such party to the proceedings, as the court may determine'.

The *Children Act, 1997* amends the *Guardianship of Infants Act, 1964* and provides that such reports can now be ordered at District Court level. In public law cases, section 27 of the *Child Care Act, 1991* gives the District Court and, on appeal, the Circuit Court, the power to procure reports on any question affecting the welfare of the child. These reports are provided by and funded by the health board.

Under section 7 of the *Domestic Violence Act, 1996*, the court has the power in domestic violence cases to consider the grant of an order under the *Child Care Act, 1991* and to adjourn the proceedings and order an investigation by the health board into the circumstances of any dependent person. This provision has been used in some District Court areas as a means of obtaining a welfare report at the expense of the health board where the parties are impecunious and there are serious concerns for the welfare of children or other dependant persons.

However, according to the committee's survey, the courts experience considerable diffi-

'There is a total absence of guidance as to the standard of proof necessary to establish abuse and, therefore, practice varies between District Court areas'

culty and delay in obtaining such reports. When asked whether health board social workers provided reports as ordered by the courts, 12% reported that they usually did so, 45% reported that they sometimes did so and 36% replied that they never did so. When questioned about delays in obtaining such reports, 20% of respondents reported average delays of six weeks, a further 20% reported delays of 12 weeks and 25% reported even longer delays.

Supervised access

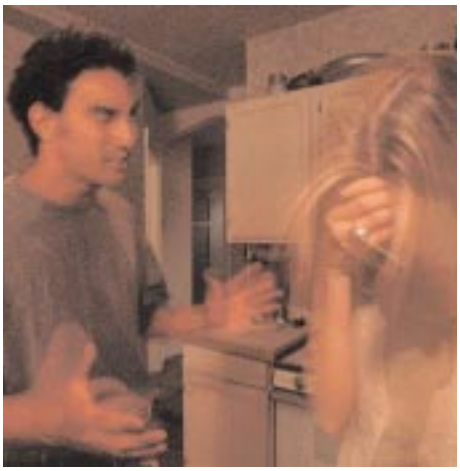
The committee's survey supports the important role of court orders providing for supervised access. When asked whether, after the grant of a barring order on grounds of domestic violence, access to children resulted in further problems, 67% of respondents replied that access often gave rise to problems, while 30% reported that access rarely did so. Only 1% of respondents reported that access arrangements never resulted in further problems.

Although the courts frequently make orders for supervised access arrangements, the Task Force on Violence Against Women considers that this supervision should be provided by a trained professional who is aware of the potential dangers in such situations. Therefore, it recommends that this service should be provided by the Probation and Welfare Service, which the task force reports 'has been found to be supportive, objective and professional in its approach, by women in abusive situations'.

With regard to supervised access, the reality for most people is that access takes place at weekends when neither the Probation and Welfare Service nor the health boards operate. In England, this issue is resolved by the provision of 'access centres' staffed by trained social workers or childcare workers. This arrangement also provides a safe environment for access to take place in situations where the long-term prognosis is for unsupervised access but a period of trust needs to be built up.

Applications under related Acts

With a view to streamlining proceedings, reducing costs and eliminating delays in family law cases, section 9 of the 1996 Act empowers the court, where an application is made to it under that Act, to deal contemporaneously with the issues of access, maintenance, restriction on conduct leading to the loss of the family home, the disposal of household chattels and orders under the *Child Care Act, 1991*. There is no need to institute separate proceedings under the Act concerned. However, in the case of maintenance matters, there is a requirement for the mutual exchange of particulars of property and income, and some District Courts will not deal with maintenance on an impromptu basis without statements of means being exchanged in advance.



However, the committee's survey has shown considerable reluctance among judges to deal with these associated matters during domestic violence proceedings. When asked whether the court would deal with these issues contemporaneously, 30% of respondents replied that it would never do so and 35% reported that it would only do so sometimes. Only 33% reported that the court would usually try to deal with these issues together.

This variation in practice creates uncertainty as to the practical outcome of domestic violence proceedings and creates difficulty for lawyers in advising their clients. Not possessing any information on why many judges decline to deal with related issues contemporaneously, the Law Reform Committee would suggest training for judges and any other measures which might encourage this 'fast-track' approach.

General recommendations

Regional family courts. The Law Society has consistently called for the establishment of regional family courts to which lawyers with considerable experience of family law could be appointed as judges. Similar recommendations have been made by the Law Reform Commission, the Task Force on Violence Against Women, the Working Group on a Courts Commission and are supported by empirical research undertaken by Women's Aid. Indeed, the Minister for Justice, Equality and Law Reform recently told a conference, at which Women's Aid presented the same research on domestic violence, that he would soon be considering a system of regional family courts.

Such an initiative should go a long way towards ensuring that domestic violence cases would be decided consistently and handled sensitively. A high level of expertise should develop among court officials dealing directly with victims, as would a coherent family law jurisprudence. Also, these courts could provide appropriate facilities to ensure the privacy and safety of applicants, such as private consulting rooms and video-link facilities. In addition, regional family courts could provide a structure for recording and compiling cases and judgments involving domestic violence which would contribute to the development of consistent practice and jurisprudence in this area.

Judicial training. In the absence of regional family courts, the need for judicial training in family law matters is exacerbated. The findings of the Law Reform Committee's survey, by highlighting judicial inconsistency in applying the substantive provisions of the 1996 Act and in relation to evidential requirements, would appear to support calls for judicial training. Also, the apparent reluctance among judges to deal with associated matters and to make orders under related legislation during domestic violence proceedings might suggest the need for on-going training in the area of family law. Further, respondents to the survey reported that 35% of District Court judges now interview children where they believe this to be appropriate.

While the committee supports this practice in principle, it believes that it is very important that judges are provided with guidelines and training on dealing with children and with the evidence of children. Judicial training for those involved in domestic violence cases, including the judiciary, has been recommended by the Task Force on Violence Against Women, and alluded to by Women's Aid.

The Law Reform Commission has strongly recommended that judicial studies on domestic violence be organised on a systematic basis and noted that, when made provisionally, this recommendation 'met with widespread approval from judges and other commentators'. The commission further suggested that such training should have an interdisciplinary element which would help the judiciary:

'a) To understand the complex area of family disputes within an holistic framework, and

b) To understand the approach and perspective of various professional groups and in turn to better evaluate their evidence'. G

Footnotes

1 *Under section 3(4), a cohabitee applying for a barring order must have lived with the respondent for a period of at least six months in aggregate during the period of nine months immediately prior to the application and must have a legal or beneficial interest not less than that of the respondent.*

2 *Under section 2(1)(a)(ii), a cohabitee applying for a safety order must have lived with the respondent for a period of at least six months in aggregate during the period of 12 months immediately prior to the application.*

3 *See Rosemary Horgan,* Domestic violence: a case for reform *[1998] 2 IJFL 9 at 11.*

4 *Alan Shatter,* Family law *(1997, fourth edition), Butterworths.*

Council report

Report on Council meeting held on 23 April 1999

Motion for consideration at the June meeting

'That this Council approves that the EU and International Affairs Committee ('the committee') enter into discussion with the Minister for Justice, Equality and Law Reform in regard to Directive 98/5/EC (the Establishment directive) in the terms of the draft prepared by the committee.'
Proposed: Michael Irvine
Seconded: John Fish

Motions considered

'That this Council approves the draft regulations providing for the establishment of a mandatory in-house complaints procedure in every firm of solicitors.'
Proposed: Francis D Daly
Seconded: John D Shaw

Francis D Daly referred to the draft regulations which had been circulated and said that they sought to reflect a more structured approach to complaints-handling by solicitors, with an increased emphasis on complaint-resolution at a local level. If approved by the Council, he suggested that they might be circulated to bar associations for their comments. The Council discussed the contents of the regulations and agreed that the views of the Practice Management and Guidance and Ethics committees should be sought, particularly as to whether the proposal should be adopted as a 'best practice' rule or as professional conduct regulations.

'Having regard to the UN Basic principles on the role of lawyers, *and the non-political concern expressed by the international legal community, that this Council supports the action taken by the International Bar Association in writing on 9 February 1999 to the Right Honourable Tony Blair MP and resolves to play its part by acceding to the request made to the Society by the International Bar Association to write to Mr Blair in like terms to seek to ensure that an independent judicial inquiry is carried out into the circumstances surrounding the murder of our colleague Patrick Finucane.'*
Proposed: James MacGuill
Seconded: Anne Colley

There was a comprehensive discussion of the issues connected with the terms of the motion, including: a) the recent murder of Rosemary Nelson; b) the contents of the report of the UN Special Rapporteur; c) the implications for the legal profession and the rule of law arising from the intimidation and harassment of lawyers; d) the necessity for respect and support for the authorities responsible for investigating and prosecuting crime on the island; and e) the need for public confidence in the impartiality of those authorities in the pursuit of peace and reconciliation on the island. With the agreement of the proposer and the seconder, the following amending resolution was unanimously adopted by the Council:

'Having regard to the UN Basic principles on the role of lawyers *and in particular Basic Principle 16 under which governments are obliged to ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference, and*

Having regard to the necessity to ensure that those authorities charged with the task of investigating and prosecuting crime on the island of Ireland must command the respect and support of the entire community and of the legal profession, and

Having regard to the self-evident fact that public confidence in the impartiality of such authorities plays an essential role in the pursuit of peace and reconciliation on the island of Ireland, and

Having regard to the conclusions and recommendations contained in the report of the United Nations Special Rapporteur with particular reference to the circumstances leading up to the murder of Patrick Finucane, and the grave concerns arising from the murder of Rosemary Nelson

That this Council calls on all such authorities:

1. *To take all necessary steps to implement the remaining recommendations of the United Nations Special Rapporteur of 5 March 1998, including the holding of an independent judicial inquiry to investigate the outstanding questions that remain in the case of Patrick Finucane, and*
2. *To ensure that the investigation into the murder of Rosemary Nelson is carried out to the highest possible standards.'*

'That this Council notes the discussion document on the future of the profession prepared pursuant to the report of the Law Society Review Working Group 1995 and resolves that it be made available to the profession and discussed with bar associations.'
Proposed: Michael Irvine
Seconded: Walter Beatty

The Council agreed that the views of the Society's committees should be obtained on the relevant sections of the discussion document and should be appended to the document, before discussion with the bar associations. It was also agreed that the document should clearly indicate that it did not represent Council policy. With the agreement of the proposer and seconder, the motion was amended to reflect these views. Responses from the Society's committees are to be received by 30 June.

Solicitors (Amendment) Bill, 1998

The Council approved a proposal from John D Shaw, Chairman of the Registrar's Committee, and Gerard Doherty, Chairman of the Compensation Fund Committee, that additional powers should be sought in the Bill to reflect the views expressed by the lay members on the Registrar's Committee and the Independent Adjudicator in their recent reports and to strengthen the Society's regulatory powers generally. The additional provisions to be sought are as follows:

- A power to apply to the High Court in circumstances where the Society believes that a solicitor is obstructing the investigation of a complaint by refusing,

Continued on page 49

Personal injury judgments

Road traffic accident – vehicle collision – married woman – neck and back injuries – assessment of damages

Case

Siobhan Jennings v Mary Begley and Sheila Grew, High Court, before Mr Justice Robert Barr, judgment delivered on 4 December 1998.

The facts

On 26 January 1995, Siobhan Jennings, a woman in her mid-30s, travelling as a front-seat passenger in a car and wearing a seat belt, was involved in an accident. The car she was in was struck on the driver's side by a mini-bus. She was thrown violently to her right and struck the door. Although she felt shocked, she felt no pain at that time. She was stiff the next morning and felt sore throughout her body. She went to her local doctor who prescribed analgesics for pain relief. Mrs Jennings subsequently developed headaches and dizziness, with blurred vision. She suffered painful attacks in her head for varying periods of two hours up to two days. These symptoms gradually resolved towards the end of 1997.

Mrs Jennings, married with two children aged 19 and seven, was the primary breadwinner of the family, working at the Cooley Distillery, County Louth, as an operative on an assembly line in the bottling hall. While the work was not heavy, it did involve constant repetitive movements. She returned to her pre-accident work full-time three weeks after the accident. She suffered continuing pain in her neck and back which necessitated lying on the floor for relief at home at lunchtime and in the evening.

She instituted proceedings against the defendants and testified at the trial that she remained unfit for her duties as a housewife which, in the main, were carried out by her husband and children. She testified that she was still dependent on daily analgesics to combat pain. In her evidence, she stated that in early 1998 she felt terrible and described herself physically as a wreck. She stated that she was obliged to lie on the floor during the mid-day break at work and take pain-killers four times a day prescribed by her GP. Her GP advised her to reduce her work-load. Stronger analgesics were prescribed for her as the pain was increasing.

Mrs Jennings moved to a three-day working week – Tuesday, Wednesday and Thursday – at her own request. On her days off, she stayed in bed until 1pm, had a bath, and then watched television (but not for any length of time, as sitting for a protracted period was painful). During the remainder of the day, she walked around and lay down. She testified that she replaced her ordinary bed with a water bed and that this helped her to sleep at night, which had been difficult.

The judgment

Barr J delivered judgment on 4 December 1998. Having stated the facts, he had no doubt that Mrs Jennings had given a very fair and truthful account of the serious on-going difficulties she had experienced since her accident. He described her as a patently honest, courageous, woman who had done her best in the interests of her family to soldier on at work under substantial difficulty. However, because of on-going pain and disablement, she was obliged to reduce her work-load. An orthopaedic surgeon who examined her three times for the defendants regarded her as being entirely genuine and a person who had not exaggerated her symptoms at any time.

The judge noted that the quality of Mrs Jennings's life had been greatly impaired. He accepted that an MRI scan had revealed a disk protrusion probably sustained in the accident which was liable to the onset of secondary degenerative change, and it was probable that she would have on-going symptoms of pain in her neck permanently.

The judge accepted that the experts ruled out operative treatment. Mrs Jennings would have to avoid heavy work and overhead lifting.

Barr J accepted that, in all probability, Mrs Jennings would never be fit for full work as an operative in the bottling hall at the Cooley Distillery. However, he considered that as the business seemed to be expanding significantly, an opportunity for promotion may present itself in the future. He considered that she may be suitable for appointment as a charge-hand or supervisor. As such work would be less physically demanding, it might allow her to return to her full working week.

The judge awarded general damages for pain, suffering, disablement and loss of enjoyment of life to the date of the trial, including the head injury and its consequences, at £50,000; pain, suffering, disablement and loss of enjoyment of life in the future at £75,000; future loss of earnings at £25,000; and costs of four months' leave of absence and expenses involved in having continuous therapy as envisaged by the orthopaedic surgeon at £15,000. Special damages were agreed, including the cost of the water bed, at £4,668, giving a total of £169,668.

Counsel for the defence sought for a stay in the event of an appeal. Barr J stated that in the ordinary course, it normally was a matter for the Supreme Court to grant a stay. However, in this case, as it was an assessment and it seemed to him that it would be advantageous for Mrs Jennings to have a substantial payment immediately, he would grant a stay on terms that £100,000 was paid within seven days from the date of the court judgment.

'Kart' race – collision of two karts at racing track – negligence and breach of duty – dispute over loss of earnings

Case

Patrick Casey v Noreen Barry, Munster Cycle and Car Club Ltd, Irish Karting Development Association and the Irish Automobile Club Ltd trading as the Royal Irish Automobile Club, High Court on Circuit in Cork, before Mr Justice John Quirke, judgment of 12 October 1998.

The facts

On 18 August 1991, Patrick Casey sustained injuries while push-starting a mechanically-propelled racing kart being driven by his wife, Eileen Casey, on a newly-constructed kart racing track at Watergrasshill, Co Cork. The kart race had been arranged for ladies and was organised and run by the Munster Cycle and Car Club Ltd and the Irish Karting Development Association Ltd under the auspices of, and subject to various rules laid down by, the Royal Irish Automobile Club.

Mr Casey alleged that he received injuries by reason of the negligence and breach of duty of Noreen Barry in relation to the driving, management, care and control of a racing kart on the day of the accident. In particular, he alleged Mrs Barry drove at an excessive speed in the circumstances and lost control of her vehicle and failed to keep any or

proper look-out. The consequence of that alleged negligence and breach of duty was that she crashed into Mr Casey and he sustained injuries.

He sustained fractures of the distal shaft of the left second metatarsal bone on the left foot and also a fracture at the base of the third left metatarsal bone on the same foot. The medical reports disclose that his leg was required to be immobilised in plaster of paris for about a month.

Medical advisers had been informed by Mr Casey that he had struck his head on the ground and had been rendered unconscious for a short period and was taken to Cork Regional Hospital by an unidentified doctor. Mr Casey was born on 14 May 1961, and was 37-years-old at the date of the trial. He is a married man but now separated from his wife and is the father of four children whose ages range from 13 to four years. He sued the driver of the colliding kart and the organisers of the race.

The judgment

Quirke J delivered judgment on 12 October 1998 in Cork and held it was not possible for persons appointed as officials by the Munster Cycling Car Club and the Irish Karting Development Association to adopt or take any measure to prevent the accident from occurring or to prevent the injuries which resulted from the accident. The judge accordingly found that no negligence had been proved on the part of the defendants other than Mrs Barry and dismissed the case against those defendants.

The judge noted that having heard Mr Casey in evidence over a protracted period of time, he was satisfied that the importance of the testimony of the unidentified doctor who treated him on the evening in question in Cork Regional Hospital, particularly as to his complaints in relation to the level of consciousness, would not have been lost upon Mr Casey or his legal advisers. The judge stated that he was uneasy about the accounts of both Mr and Mrs Casey in relation to Mr Casey's post-accident level of consciousness and it would have been preferable for him to adduce evidence on the part of the doctor who treated him immediately after the accident, or indeed anyone who admitted him or dealt with him in the Cork Regional Hospital.

Quirke J noted the evidence that Mr Casey's health subsequently deteriorated around the time when he and his wife developed profound marital disagreements. The judge considered that the marital condition subsequently dominated the clinical picture. The judge noted that there were significant and severe financial pressures in Mr Casey's life before the accident and stated that he was not satisfied that a full or complete or accurate history of Mr Casey's pre or post-accident circumstances had been furnished by Mr Casey or his wife to any of his medical advisers.

The judge was prepared to accept that the accident on 18 August 1991 caused Mr Casey's symptoms of anxiety and stress between December 1991 and January 1996, a period in excess of four years. He was satisfied that by January 1996 those symptoms had fully resolved and that any additional symptoms sustained by Mr Casey after January 1996 resulted from the breakdown of his marriage and were unrelated to the accident. The judge noted that some of the complaints may have been caused by financial pressures, but these were unrelated to the accident.

There had been a significant dispute at the trial of the action in relation to the loss of earnings and in relation to returns of Mr Casey's income to the Revenue Commissioners. The judge considered that sets of accounts maintained by Mr Casey were unreliable. He stated that he did not believe it was in accordance with public policy for the courts to rely on accounts which were different from those submitted to the Revenue Commissioners in support of claims for loss of earnings. In that context, he agreed with the principles set down by Ms Justice Laffoy in the case of *Fiona Fitzpatrick v Brendan Furey and the Motor Insurance Bureau of Ireland* (unreported and delivered on 12 June 1998).

The judge stated that he respectfully declined the invitation extended to him to give Mr Casey 'credit' for having allegedly and belatedly, in the words of his counsel, 'come clean' in relation to his income. The judge considered that by January 1996, Mr Casey had fully recovered from any symptoms which might have arisen out of the accident sustained on 18 August 1991, and the fact that he had ceased his business was not related to the accident. The judge rejected entirely Mr Casey's claim for loss of earnings.

In relation to general damages in respect of injuries to his foot between the date of the accident and December 1992, Quirke J awarded Mr Casey the sum of £10,000; in relation to the anxiety state which he sustained for the period between December 1991 and February 1996, he awarded him £15,000; and awarded him £960 to compensate him for the help which he took on for the period of eight weeks immediately after the accident. The judge stated that it had been indicated that Mr Casey wished to co-operate with the Revenue Commissioners. The judge intended to facilitate that co-operation by directing that the £25,960 which had been awarded to him be paid into court for a period of six weeks during which time the Revenue Commissioners may make such application as they deemed appropriate.

In relation to costs, he awarded Mr Casey costs but expressly disallowed certain costs including the costs of discovery and the costs of certain accountants, not because of anything that the accountants may have done which was in any way improper but because of the public policy in the matter and the fact that it was inappropriate that any claim should be advanced upon accounts of the nature presented. The judge certified for senior counsel. G

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

LEGISLATION UPDATE: 20 APRIL – 17 MAY

SELECTED STATUTORY INSTRUMENTS

European Communities (Environmental Impact Assessment) (Amendment) Regulations 1999

Number: SI 93/1999

Contents: Implements Directive 97/11/EC relating to environmental impact assessment into Irish law

Commencement date: 1/5/1999

Local Government (Planning and Development) Regulations 1999

Number: SI 92/1999

Contents: Amend the planning regulations 1994 to 1998 principally to reflect the provisions of Directive 97/11/EC relating to environmental impact assessment

Commencement date: 1/5/1999

Postal and Telecommunications Services (Amendment) Act, 1999 *(Commencement) Order 1999*

Number: SI 87/1999

Contents: Appoints 9/4/1999 as the commencement date for certain provisions of the Act.

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ADMINISTRATIVE

Further freedom of information regulations made

New regulations:

- Provide that requesters, having access to certain records of third parties by virtue of regulations made under s28(6) (such as those noted directly below), may access such records created prior to the commencement of the *Freedom of Information Act, 1997*, and
- Prescribe the classes of individual whose records will be made available to parents and guardians, and the classes of requester to whom the records of deceased persons will be made available, having regard to relevant circumstances and to guidelines made available by the Minister for Finance.

Freedom of Information, Act, 1998 *(Section 6(4)(b)) Regulations 1999* and Freedom of Information, Act 1998 *(Section 28(6)) Regulations 1999* (SI Nos 46 and 47 of 1999)

Applicant permitted to rely on original application for licence

- Where an applicant for a licence was misled by the licensing authority as to the necessity of paying a fee, it could not treat the application as invalid by reason of the failure to pay that fee.

The respondent published a notice in the press that applications were invited up to a certain date for the issue of taxi licences in the area. The applicant completed and delivered the application in time. Neither the notice nor the application forms mentioned the necessity of paying a fee with the application. The applicant objected to an extension of time for the submission of applications for the licences and was informed that his application was invalid in that he had completed the wrong forms and had failed to pay the application fee. He was later informed that the respondent was partaking in a review of the 1995 regulations and the respondent intended to publish a fresh notice in due course and to invite applications on new forms to be made available. The applicant obtained leave to apply for, among other things, declarations that the applications he submitted were valid, that the respondent was not entitled to re-publish the notice, and that the applicant had a legitimate expectation not to submit a fee at the same time as the application due to the assurances of the respondent that no fee was then required. The grounds were that the respondent acted *ultra vires* and in breach of statutory duty, that the decision was arbitrary, unreasonable and contrary to legitimate expectation, and that the 1995 regulations did not allow for re-publication of the notice inviting applications. In refusing to grant the declarations, it was held that:

- The forms provided to the applicant were defective in that they did not seek the information necessary for the respondent to determine eligibility for a licence in accordance with the 1995 regulations
- The lodgment of the fee specified in the regulations was an essential part of the scheme, but the fee did not have to be paid physically or contemporaneously with the application. It was sufficient if the fee was paid prior to the closing date for receipt of applications fixed by the authority
- While the fee was not paid in time, the applicant was misled by the respondent's representations on this matter, and it would be unjust to allow the respondent to treat his application as invalid by reason of the failure to pay the fee. The applicant was entitled to call in aid the doctrine of legitimate expectation
- The respondent could seek further information from applicants so as to apprise itself of the necessary information with a view to carrying out its obligations under the regulations
- If there was power to extend the time for applications, such power could only be exercised in circumstances where there were objectively justifiable reasons for so doing. The applicant had a legitimate expectation that, having complied with the respondent's requirements, his application would be considered in common with all other applicants who similarly complied. The applicant's legitimate expectation of the procedures being followed in accordance with the time limits specified would be infringed by the admission of another candidate after the closing date. Also, the extension could not be justified insofar as it was based on a legally-incorrect view of the status of the applicant's applications
- Participation in the Ministerial review of the regulations was a legitimate reason for not proceeding with the allocation of licences. If the respondent wanted to allocate licences in the future, it had to begin the whole process afresh and could not have regard to the applications already made.

Mulhern v Bundoran Urban District Council (Kelly J), 30 January 1998

BANKING

Bank held not to have breached duty of care in signing of security document

- Before a duty of care arose between a banker and a customer in relation to the signing of a security document, it was generally necessary for the banker to have chosen to have made some sort of representation to the customer.

The plaintiff claimed certain monies from the defendant on foot of a contract for security. The defendant did not dispute that the monies were due and owing but counterclaimed against the plaintiff, claiming that, in the circumstances, the plaintiff owed a duty of care to the defendant and that the plaintiff had breached that duty. In allowing the plaintiff's claim and in rejecting the defendant's counterclaim, it was held that:

- A contract creating security was not a contract of utmost good faith requiring full disclosure of all material facts by both parties
- Before a duty of care arose between a banker and a customer in relation to the signing of a security document, it was generally necessary for the banker to have chosen to have made some sort of representation to the customer
- A contract of security could be avoided if it had been induced by a material misrepresentation of fact made by the bank or its agent
- If it could be established that the plaintiff was under no obligation to act in any manner other than in its own interest, then no tortious duty of care could arise
- The defendant failed to establish any of the criteria required to establish that there was a tortious duty of care in the circumstances of this case.

Bank of Ireland v Lennon (Lavan J), 17 February 1998

CHILDREN

Return of children outside jurisdiction permitted

- The plaintiff had not acquiesced to the children's removal to Ireland, and his recourse to the Irish courts for the purpose of obtaining access to the children did not constitute acquiescence on his part.

The plaintiff was the husband of the defendant. He sought the return of his two children to Scotland where they had been habitually resident. He claimed that the defendant had removed the children to Ireland without his consent. She replied that she had removed the children with the plaintiff's consent and that to return them to Scotland would be to expose them to a risk of physical or psychological harm. She also contended that the plaintiff had acquiesced to the children's removal to Ireland as he had applied to the Irish courts for a custody order. In granting an order returning the children to Scotland, it was held that:

- The evidence submitted by the defendant did not support her contention that the plaintiff had consented to the removal of the children to Ireland
- The plaintiff had not acquiesced to the children's removal to Ireland and his recourse to the Irish courts for the purpose of obtaining access to the children did not constitute acquiescence
- The character of the plaintiff was not such as to expose either of the infants to a risk of danger or which would place them in an intolerable situation if they were returned to Scotland
- The plaintiff was, as a matter of urgency, to move in the Scottish courts for the purpose of determining the matters relating to the welfare of the children.

IK v JK (Morris P), 25 February 1998

COMMERCIAL

Faxing of stock transfer forms to be permitted

With effect from 1 January 1999, the transmission by fax of stock transfer forms is a valid instruction mechanism.

Stock Transfer (Forms) Regulations 1998 (SI No 546 of 1998)

COMPANY

Disclosure of company information to tribunals?

A private member's Bill has been introduced which, if passed, would permit the Minister for Enterprise, Trade and Employment to disclose to a tribunal of enquiry certain information required by the Minister under s19 of the *Companies Act, 1990.*

Companies (Amendment) Bill, 1999

CRIMINAL

Offence of false imprisonment considered

- Section 11 of the *Criminal Law Act, 1976* does not create a statutory offence of false imprisonment; rather, it deals with the penalties to be imposed on conviction for such offences. The *Non-Fatal Offences Against the Person Act, 1997* abolishes the offence of false imprisonment at common law and does not include any provision saving the prosecution of such offences at common law allegedly committed prior to the date when the 1997 Act came into force and which come to trial after that date.

The defendant was charged with, among other things, the offences of bank robbery, kidnapping and false imprisonment. In finding the accused guilty on certain counts, it was held that:

- Counts 1, 2 and 3 of the indictment related to charges of false imprisonment which were stated to be 'contrary to common law and as provided for by s11 of the *Criminal Law Act, 1976'*. However, the common-law offence of false imprisonment had been abolished by s15 of the *Non-Fatal Offences Against the Person Act 1997*, and s11 of the 1976 Act did not create a statutory offence; instead it dealt with penalties. The 1997 Act made no provision saving the prosecution of common-law offences allegedly committed prior to the date when that Act came into force but which came to trial after that date. Thus, the court could not consider counts 1, 2 and 3
- When considering the remaining counts, the issue for determination by the court was the credibility of the defendant's explanation that he had been coerced into participation in the robbery and that he had been an innocent victim forced to play his part through fears for his own safety and that of his family who he believed had been kidnapped
- It had been established to the satisfaction of the court that the defendant had not taken any steps to ascertain the whereabouts and safety of his sons for about five hours after the robbery. He had then failed to contact his mother-in-law, with whom his sons lived, but instead contacted his brother. There was no evidence to suggest that the defendant was suffering from any form of shock at this stage
- The court was satisfied that the defendant would not have assimilated and retained so much biographical information relating to the victim in the alleged prevailing circumstances and that the defendant had attempted to deceive the victim regarding his capacity as a driver. In addition, the court was satisfied that the victim's family had been photographed by the gang to underline the apparent similarity between their situation and that of the defendant's family. The court was also satisfied that the defendant had been shot in the leg subsequent to the robbery to bolster his story in that regard
- The establishment of the foregoing to the satisfaction of the court could only lead to the conclusion that the defendant's role in the robbery and related events was that of a volunteer.

People v Kavanagh (Special Criminal Court), 29 October 1997

Criminal Justice (United Nations Convention Against Torture) Bill, 1998

This Bill has been amended in committee.

EDUCATION

Commencement of part of 1998 Act

Sections 2-6, 13, 25, 26, 36, 37 and parts VII and IX of the *Education Act, 1998* came into effect on 5 February 1999.

Education Act, 1998 *(Commencement) Order 1999* (SI No 29 of 1999)

ELECTIONS

Local election expenses to be disclosed

A Bill has been presented which will, if passed:

- Provide for a statutory scheme for the disclosure of election expenses at local elections by candidates, political parties and third parties
- Oblige candidates to disclose the source of funds used to meet election expenses
- Oblige candidates to disclose any donation over £500, and
- Make provision for research into electronic methods of recording and counting votes under the current system of proportional representation by single transferable vote, using the ballot papers from this year's European Parliament and local elections.

Local Elections (Disclosure of Donations and Expenditure) Bill, 1999

EMPLOYMENT

Compensation under *Parental Leave Act, 1998*

A set of regulations prescribes, with effect from 10 February 1999, the method of calculating maximum compensation for the purposes of redress under part IV of the *Parental Leave Act, 1998*.

Parental Leave (Maximum Compensation) Regulations 1999 (SI No 34 of 1999)

FAMILY

Separation agreement is a bar to proceedings under *Judicial Separation and Family Law Reform Act*

- A separation agreement between parties is a bar to the institution by one of the parties of proceedings under the *Judicial Separation and Family Law Reform Act, 1989*, even though it may not contain an express covenant not to institute further proceedings.

Proceedings came before the court by way of a consultative case stated by the Circuit Court. The questions posed related to whether the applicant could seek a decree of judicial separation pursuant to the *Judicial Separation and Family Law Reform Act, 1989* where a deed of separation existed between the parties which relieved them of the duty to cohabit with the other. In answering the case stated, it was held that:

- While the 1989 Act had extended the grounds on which a decree of judicial separation could be granted and had widened the range of ancillary reliefs available to applicants, it had not altered the essential characteristic of decrees of judicial separation in that the parties remained husband and wife without an obligation to cohabit
- It had been settled law before the 1989 Act that, if a husband and wife entered into a separation agreement, it was a bar to subsequent proceedings for a divorce *a mensa et thoro*, even though it contained no express covenant not to
- The courts had enjoyed the power to enforce such separation agreements. In giving effect to the property arrangements in a deed of separation, the court was merely exercising its ordinary jurisdiction to grant decrees of specific performance in appropriate cases. The covenant which was usually included in such deeds – that the husband should permit his wife to live separate and apart and that he would not take proceedings for restitution of conjugal rights – would be enforced by injunction
- A settlement entered into after the institution of proceedings for a divorce *a mensa et thoro* precluded the institution of separate proceedings for judicial separation under the 1989 Act because the 1989 Act did not introduce a new cause of action but altered the title of the procedure of judicial separation. Thus, the principle that a separation agreement was a bar to the institution of proceedings for a divorce *a mensa et thoro* was applicable to proceedings instituted under the 1989 Act
- The Oireachtas had made it clear that the new and more elaborate reliefs available through the 1989 Act could only be obtained as ancillary relief in proceedings where a decree of judicial separation was being claimed. It followed that an applicant could not, by instituting such proceedings in a case where he had already been granted a divorce *a mensa et thoro*, or had entered into a separation agreement, obtain the ancillary reliefs
- A separation agreement was a bar to subsequent proceedings because, where it provided that the parties were to live apart, the granting of a decree would be superfluous. In addition, it would be unjust to allow one party unilaterally to repudiate the agreement
- A separation agreement was not a post-nuptial settlement within the meaning of s15(1)(c) of the 1989 Act.

PO'D v AO'D (Supreme Court), 18 December 1997

HEALTH SERVICES

Human reproduction measures proposed

A Bill has been presented which seeks to:

- Make provision for the establishment and maintenance by the Minister for Health and Children of a register of assisted human reproduction providers (such a service being defined in s1 as 'any process other than non-directive counselling by which medical or other diagnosis, treatment or research into human reproduction is carried on')
- Allow for the establishment of an ethics committee to advise on techniques of assisted human reproduction and their repercussions, and
- Render surrogacy agreements void and unenforceable.

Regulation of Assisted Human Reproduction Bill, 1999

HOUSING

Assessment of traveller housing needs

With effect from 3 November 1998, s6 of the *Housing (Traveller Accommodation) Act, 1998* is brought into force providing for the triennial statutory assessment of needs under s9 of the *Housing Act, 1988* to be carried out in an integrated and comprehensive way in relation to all the accommodation needs of travellers and in consultation with them.

Housing (Traveller Accommodation) Act, 1998 *(Commencement) (No 2) Order 1998* (SI No 428 of 1998)

INSOLVENCY

Whether sums had super-preferential status

- A condition precedent to the super-preferential status of any sum is that it be a sum deducted by the employer in respect of the employment contribution of the employee which remains due and owing by the employer.

The liquidator of the company sought directions from the court as to whether a particular claim of the Revenue Commissioners was entitled to super-preferential status pur-

suant to s120 of the *Social Welfare (Consolidation) Act, 1981* or whether the claim was entitled to preferential status pursuant to s285 of the *Companies Act, 1963*. The claim related to a sum of money which represented the sums which should have been deducted by the company by way of PAYE or PRSI from employee wages before the winding-up. In giving the liquidator directions, it was held that:

- A condition precedent to the super-preferential status of any sum was that it be a sum deducted by the employer in respect of the employment contribution of the employee which remained due and owing by the employer
- Neither s120(2) of the 1981 Act nor s16(2) of the *Social Welfare (Consolidation) Act, 1993* permitted a construction that super-preferential status could be afforded to sums which should have been deducted in respect of the employment contribution of an employee, but were not so deducted
- S16(2)(b) of the 1993 Act dealt with, and was restricted to, situations where employees were due remuneration prior to a winding-up but did not receive such remuneration from their employer. It had no application to the facts of the present case where employees did receive remuneration without deductions being made
- Even if it could be argued that s16(2)(b) of the 1993 Act had any application to the facts of the instant case so as to give the sum in issue a super-preferential status, it could not be invoked retrospectively so as to impair or affect rights existing in those parties with an interest in the winding-up of the company as of the date of the winding-up.

Re Coombe Importers Limited (In Liquidation) (Shanley J) January 28, 1998

INTERNATIONAL

UN personnel safety convention to be ratified

A Bill has been introduced which aims to:

- Give force of law to the United Nations *Convention on the safety of UN and associated personnel*, done at New York on 9 December 1994, and
- To provide for the punishment of offences against such personnel

Safety of United Nations Personnel and Punishment of Offenders Bill, 1999

Changes to authentication procedures for foreign public documents

With effect from 9 March 1999, changes come into effect in respect of the authentication/legalisation procedures for foreign public documents.

Companies (Forms) (Amendment) Order 1999 (SI No 14 of 1999)

Jurisdiction of courts not ousted in insurance case

- The agreement of jurisdiction contained in the contract of insurance did not fall within the ambit of article 12, and accordingly was contrary to article 12 and, in the circumstances, the jurisdiction of the Irish courts was not prorogued by virtue of article 17 of the *Brussels convention on jurisdiction and the enforcement of judgments in civil and commercial matters*.

In 1992, there was a fire at a meat-processing plant where £22 million worth of meat was destroyed. The plaintiff claimed a declaration that there was a binding contract of insurance in respect of the fire between him and the defendant as evidenced by a letter and cover slip dated October 1991. The plaintiff also claimed an indemnity on foot of the aforesaid contract, and payment of the indemnity. He invoked the jurisdiction of the court pursuant to art 8 of the *Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988*. The defendant contested the jurisdiction to hear and determine the claim and applied, pursuant to o12, r26, to have the service of the proceedings on it set aside on the grounds that the policy, if any, conferred sole jurisdiction to hear the claim on the French courts. The defendant contended that the plaintiff never fulfilled the conditions for the issuance of a policy of insurance and, if he had, then the policy would gave been governed by French law. In reply, the plaintiff contended that the agreement on jurisdiction, if any, was contrary to art 12 of the convention and, as such, was unenforceable. As such, the jurisdiction of the Irish courts could not be prorogued, and that the service of the proceedings on the defendant was valid. In the refusing the relief sought, it was held that:

- To have legal force, any agreement whereby the French courts were to have exclusive jurisdiction of the contract would have to be proved to be in existence, could not be contrary to art 12 of the convention and had to comply with the formal requirements stipulated in art 17, and all three requirements had to be answered in the affirmative before the jurisdiction of the Irish courts could be ousted
- In relation to each question, the onus of proof was on the defendant in order to override the plaintiff's choice of jurisdiction
- The general conditions of the French policies were incorporated into the cover note, including the conditions giving exclusive jurisdiction to the French courts
- The contract of insurance evidenced by the cover note contained an agreement conferring exclusive jurisdiction on the French courts
- It was for the national court to interpret the clause conferring jurisdiction invoked before it in order to determine which disputes fell within its scope
- Any jurisdiction agreement had to be limited to risks specified in art 12A of the convention
- The jurisdiction agreement in this case related to a contract of insurance which covered risks which were not within the ambit of art 12A
- The agreement of jurisdiction did not fall within the ambit of art 12 and, accordingly, was contrary to art 12 and, in the circumstances, the jurisdiction of the court was not prorogued by virtue of art 17.

Minister for Agriculture, Food and Forestry v Alte Leipziger Versciherung Aktiengesellschaft (t/a Alte Leipziger) (Laffoy J), 6 March 1998

INTERNATIONAL AID

Bretton Woods Agreements (Amendment) Bill, 1998

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

LICENSING

Age cards introduced

With effect from 19 April 1999, persons over the age of 18 shall be able to apply, via a garda station, for an identity card confirming that they have attained the legal age for the purpose of the purchase of intoxicating liquor. The scheme is voluntary and the cards will cost £5. Intoxicating Liquor Act, 1988 *(Age Card) Regulations 1999* (SI No 4 of 1999)

PLANNING AND DEVELOPMENT

Decision of An Bord Pleanála considered

- In establishing that the decision-making authority had acted irrationally, it was necessary that the applicant establish that the decision-making authority did not have before it any relevant material which would support its decision.

This was an application by the applicant for leave to apply for judicial review of a decision made by

the respondent to grant planning permission for a development at Dublin Port. Notwithstanding a recommendation by the inspector to refuse permission, the respondent granted permission. In making its decision, the respondent relied on, among other things, a traffic management plan prepared by the Port and Docks Board, which was not an exempt development and planning permission still had to be obtained. The applicant sought to challenge the respondent's decision as being unreasonable and one to which no reasonable authority would come. In refusing leave to apply, it was held that:

- In establishing that the decision-making authority had acted irrationally, it was necessary that the applicant establish that the decision-making authority did not have before it any relevant material which would support its decision
- The provisions whereby liberty to apply for judicial review must be brought on notice and whereby the applicant must establish substantial grounds were designed to ensure that at the earliest possible moment the court could refuse an application if the grounds were not substantial
- The reason given in the decision that the applicant had regard to the traffic plan for the area did not assume that that plan could be implemented immediately or that it had been authorised in some way, but was merely a statement that the respondent had regard to the fact that the plan existed as a plan
- It was very significant that the respondent did not impose a condition on the planning permission that the traffic management plan be implemented as such a decision could be said to be premature
- The respondent was entitled to take into account the fact that the plan existed and that there was an intent on the part of the port authority to do all in its power to provide for a proper flow of traffic in the area
- The applicant could not establish that the decision-making authority had before it no relevant material, as it had had evidence both from the Port and Docks Board and from the applicant for planning permission that the plan was adequate.

Irish Cement Limited v An Bord Pleanála (McCracken J), 24 February 1998

Local Government (Planning and Development) Bill, 1998

This Bill has been passed by Seanad Éireann.

PRACTICE AND PROCEDURE

Procedures on foreign documents

With effect from 3 March 1999, o 39 of the *Rules of the Superior Courts* is amended pursuant to:

- The *Convention abolishing the legalisation of documents in the Member States of the European Communities* (of 25 May 1987)
- The *European convention on the abolition of legalisation of documents executed by the diplomatic agents or consular officers* (of 7 June 1968), and
- The *Convention abolishing the requirement of legalisation of foreign public documents* (of 5 October 1961).

Rules of the Superior Courts (No 1) (Proof of Foreign Diplomatic, Consular and Public Documents) 1999 (SI No 3 of 1999)

Plaintiff permitted to proceed with claim for debt

- An action to recover monies due does not constitute either negligence and/or breach of contract and is thus not an action alleging wrongdoing.

The plaintiff issued proceedings seeking the repayment of monies from the defendant which it was alleged comprised capital advanced by the plaintiff to the defendant on various dates between December 1979 and March 1997. Two other actions were in being between the parties. The second action had been stayed pending an appeal in the first. An undertaking had been given by the plaintiff that further proceedings would not be mounted against the defendant in respect of any alleged wrongdoing. The defendant now sought a stay on the present proceedings on the grounds that the action was contrary to the spirit of the undertaking given. In refusing the relief sought, it was held that:

- The embargo imposed on future litigation related to claims based on wrongdoing, whereas the claim by the plaintiff in the present proceedings did not involve, directly or indirectly, any allegation of negligence or breach of contract
- The present proceedings were therefore outside the strict terms of the undertaking and did not offend the spirit of the undertaking
- The plaintiff was lawfully entitled to take all steps open to it to protect its position and that of the persons it represented. It was in the interest of the plaintiff to proceed for judgment against the defendant as soon as possible because there were other competing claims which could result in various substantial mortgages being registered against the defendant's property
- It would be unjust to inhibit the plaintiff from proceeding with this claim.

Bula Holdings v Bula Limited (In Receivership) (Barr J), 19 January 1998

ROAD TRAFFIC

Summons should not have been dismissed

- Where a District Court judge concludes that there is insufficient clarity in a summons, he or she is obliged to consider whether the summons should be amended or dismissed without prejudice and to enquire as to whether there would be any prejudice to the accused.

The respondent was charged with drunk-driving. At the hearing, the summons was dismissed on the grounds that the location of the alleged offence was not sufficiently described. A case was stated for the opinion of the High Court. In allowing the appeal by way of case stated and remitting the matter back to the District Court, it was held that:

- The decision that the place at which the offence charged was described with insufficient clarity is a decision on a question of fact and one with which, for the purpose of the case stated, the present court was not entitled to take issue
- In considering whether the District Court judge was correct in law, the present court was entitled to take into account that the judge had alternative powers to amend the summons or to dismiss it without prejudice to the accused being summonsed again
- When the District Court judge concluded that there was insufficient clarity in the summons, he was obliged to consider whether he should amend the summons or dismiss it without prejudice and was obliged to enquire as to whether there would be any prejudice to the accused by such amendment or by a dismissal without prejudice
- The District Court judge did not do so and, therefore, he was incorrect in law in proceeding to dismiss the charge.

Director of Public Prosecutions v Colfer (O'Donovan J), 9 February 1998

On-the-spot fines

New regulations prescribe the form of notice to be used by a garda in imposing an 'on-the-spot' fine and detail the amounts of the fines (between £15 and £50) as well as setting out the offences in respect of which such fines may be imposed.

Road Traffic Act, 1961 *(Section 103) (Offences) Regulations 1999* (SI No 12 of 1999)

Delay in serving drink-driving summonses excessive

- In inferring that an accused suffered prejudice from delay, a judge must take into account the nature of the offence, the cause of the delay and the possibility that the accused's defence might be impaired.

The defendant was alleged to have committed drink-driving offences contrary to the *Road Traffic Acts* in January 1996. While summonses in respect of these offences were issued in April 1996, they were not served and were returned for re-issue. In May 1996, the summonses were again not served and were returned for re-issue. The matter came on for hearing in the District Court in March 1997, whereupon the district judge dismissed the charges on the grounds that there had been excessive delay in the prosecution thereof, such as to infer that the respondent had suffered prejudice. This was an appeal by way of case stated of the decision of the District Court judge. In dismissing the appeal, it was held that:

- There was no doubt but that an accused person was entitled to trial with reasonable expedition – all the more so in respect of an offence for drunken driving where the consequences were extremely serious
- There could be many excusable reasons why a prosecution may be delayed beyond a time that might be considered appropriate
- In inferring that the respondent suffered prejudice from the delay, a district judge had to take into account the nature of the offence, the cause of the delay and the possibility that the respondent's defence might be impaired.

Director of Public Prosecutions v McNeill (High Court), 27 February 1998

SOCIAL WELFARE

Changes to social welfare system

A Bill has been presented which seeks to:

- Increase the rates of social insurance and social assistance payments and child benefit
- Alter the family income supplement and carer's allowance schemes
- Introduce a new farm assist scheme
- Provide for changes to PRSI announced in the last Budget, and
- Make other changes to the social welfare system.

Social Welfare Bill, 1999

TAXATION

Exemption granted to foreign charity

- While a foreign charity with no activities base in Ireland is not entitled to an exemption from income tax, a foreign charity which does have a base is entitled to it in respect of funds applied towards its Irish charitable activities.

Sections 333 and 334 of the *Income Tax Act, 1967* provide for tax exemptions for bodies 'established' within the State for charitable purposes. Proceedings came before the court by way of case stated from the Circuit Court on the issue as to whether the respondent could benefit from the exemptions provided for in those sections. In answering the case stated, it was held that:

- A limited geographical meaning should be given to the word 'established' in the relevant statutory provision. Thus, a foreign body would be unable to claim exemptions on income coming from within the State where that income was applied solely for foreign charitable purposes
- While the respondent was incorporated in the United States, it owned and ran a nursing home within the State. Having regard to this and to the fact that the exemption was only being sought in relation to the respondent's activities within the State, the respondent was entitled to the benefits conferred by ss333 and 334 of the 1967 Act.

Revenue Commissioners v Sisters of Charity of the Incarnate (Geoghegan J), 11 February 1998

VAT on reversion of lease considered

The purpose of s4(4) of the *Value-Added Tax Act, 1972* is to ensure that, on the grant of a lease for more than ten years, VAT, when chargeable, should be charged on the whole value of the property, both the part leased and the reversion. There is nothing in the provision to suggest that once the tax has been paid on the reversion, the reversion should no longer be regarded as being in the ownership of the taxpayer. The applicant appealed a decision of the High Court on a consultative case stated by the Appeal Commissioners. The issue for determination was whether a reversionary interest in relation to a lease for more than ten years remained in the tax net. If it did, then input credits claimed by the applicant by way of deduction under the provisions of s12 of the *Value-Added Tax Act, 1972* would be allowed. The High Court found that the applicant was not entitled to the input credits claimed, except in relation to expenses proved to have been incurred exclusively for the purposes of future taxable disposals and not pursuant to any covenant, clause or term in the existing lease. In allowing the appeal, it was held that:

- The provisions of s3(1)(f) were designed to make a trader who used part of his stock-in-trade for his own purpose to be liable for value-added tax on the goods so used. The effect was to charge value-added tax on a transaction which was not in the course of trade and which in the ordinary way would not have been so subject
- S4(4) of the 1972 Act clearly stated that the reversion on an interest disposed of should be deemed to be supplied for the purposes of s3(1)(f) of that Act
- The reality was that the purpose of s4(4) was to ensure that, on the grant of a lease for more than ten years, VAT, when chargeable, should be charged on the whole value of the property, both the part leased and the reversion. There was nothing in the provision that suggested that once the tax had been paid on the reversion that the reversion should no longer be regarded as being in the ownership of the taxpayer
- Thus, the credit inputs claimed by the applicant should be allowed.

Erin Executor and Trustee Company Limited (as Trustee of the Irish Pension Fund Property Unit Trust) v Revenue Commissioners (Supreme Court), 16 December 1997

Implementation of Budget '99

The *Finance Bill, 1999* has been presented, seeking to implement the measures proposed in the last Budget.

Finance Bill, 1999

TRANSPORT

New rules of the air prescribed

New rules of the air came into effect on 1 March 1999, revoking and re-enacting, with certain modifications and additions, the previous order of 1992.

Irish Aviation Authority (Rules of the Air) Order 1999 (SI No 20 of 1999) G

News from the EU and International Affairs Committee

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

The UK *Competition Act 1998*: a comparison with the Irish and EU competition regimes

The recent enactment of the UK *Competition Act 1998* represents a long overdue rationalisation of the UK competition regime towards a potentially more effective enforcement regime against anti-competitive practices, such as competitors fixing prices, market sharing or a firm with significant market power using that power to prevent competition or charge excessive prices. The previous UK competition regime had been criticised for being overly-cumbersome, complex and lengthy. The lack of adequate powers of investigation under the old regime was considered a particular weakness in that it prevented the detection of seriously anti-competitive cartels. This article will examine the Act by way of comparison to other competition regimes, particularly to the Irish and European regimes.

The Act purports to re-enact articles 85 and 86 type prohibitions of the *EU treaty* into UK domestic law which is the similar intention of the Irish *Competition Act, 1991* in regard to Irish domestic law. The UK Act is, however, far more detailed than its Irish counterpart.

Part 1 of the UK Act is divided into five chapters and the article 85 and 86-type prohibitions are contained in this part of the Act and are known respectively as chapter 1 and chapter 2 prohibitions.

Chapter 1 prohibition

Section 2 of the UK Act states, among other things: 'Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which:

a) May affect trade within the United Kingdom, and
b) Have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom

are prohibited unless they are exempt in accordance with the provisions of this part...'.

As with Irish legislation (section 4 of the Irish *Competition Act, 1991*), this prohibition on anti-competitive agreements largely follows articles 85(1) and 85(2) and does not require an effect on inter-EU trade. In contrast to Irish and EU legislation, section 3 excludes certain agreements from this prohibition as set out in schedules 1-4 of the Act. Also, as with both the Irish and EU legislation, the Act provides for a voluntary notification procedure whereby agreements may be notified to the Director General of Fair Trade (DGFT) who may grant an individual exemption from the chapter 1 prohibition to the notified agreement. The criteria for exemption are set out in section 9 and are the same as those in Irish and EU legislation.

The effect of such an exemption is that the DGFT is prevented from taking action against the notifying parties unless there is a material change of circumstances or the DGFT was misled. The DGFT also has the power to issue block exemptions for categories of agreements that satisfy certain specified criteria for exemption. The Act also permits the use of an opposition procedure in such block exemptions. This is similar to the EU regime.

Agreements which have been individually exempted by the European Commission or which are block exempt are also exempt from the chapter 1 prohibition. This exemption extends to agreements which would be block exempt were it not for lack of effect on inter-state trade. The DGFT may vary or cancel the parallel exemption.

These provisions underlie one of the primary objectives of the Act which is designed to rationalise the application of competition law in the UK, in particular

LATEST DEVELOPMENTS IN EUROPEAN LAW

On Saturday 16 October 1999, the EU and International Law Committee of the Law Society of Ireland is providing a European law 'health check' for solicitors. Speakers will provide coverage of the major developments in European law of relevance to solicitors. The speakers, who are solicitors who practice in the area being discussed, will provide an overview of topics being discussed. Topics to be covered will include:

- Solicitors and money laundering
- Cross-border litigation developments
- Recent developments in employment law
- Competition update
- Free movement of goods and persons: recent developments
- Electronic commerce update
- Information technology update
- Public procurement: recent developments
- Environmental law update.

The conference is scheduled to start at 10am and run through to 2.30pm on Saturday 16 October, with a coffee break and a lunch break. For further details, contact TP Kennedy, Education Officer, Law Society of Ireland, Blackhall Place, Dublin 7 (tel 01 6710200).

Venue: Law Society of Ireland, Blackhall Place, Dublin 7.
Cost: £65 (£35 for apprentices and students).

by ensuring that the UK regime operates as harmoniously as possible with the EU regime.

The Act also allows for an agreement to be notified for guidance as to whether the agreement is likely to infringe the chapter 1 prohibition. This does not have the same legal effect as an exemption but it does protect the parties from proceedings by the DGFT if he takes the view that the agreement does not infringe the prohibition. This is similar to the 'comfort letter' procedure under the EU regime and again shows a desire to harmonise with that regime.

Under the UK regime only agreements which have an appreciable effect on competition will be caught by the chapter 1 prohibition. This is known as the *de minimis* principle and is recognised under the EU regime. Draft *de minimis* guidelines for consultation are available on the OFT's website at *oft.gov.uk*.

Chapter 2 prohibition

Section 18(1) of the Act reads as follows: 'Subject to section 19, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom'. This is similar to the Irish and EU regimes except there is provision under the Act for excluding certain conduct. Also, unlike the Irish and EU regimes, conduct may be notified to the DGFT for guidance or a decision by the DGFT that it does not infringe the chapter 2 prohibition.

Rights of action under the UK Act

Aside from the express role of the DGFT and sectoral regulators to investigate and fine for breaches of the chapters 1 and 2 prohibitions the UK government has expressed the view that third parties will have the right to sue for damages and/or an injunction under the Act. Under the Irish regime before the passing of the *Competition (Amendment) Act, 1996*, only aggrieved parties and the Minister for Enterprise, Trade and Employment had a right of action for breaches of the *Competition Act, 1991*. It was felt that private actions would operate to restrict anti-competitive practices and, in addition, the Minister could appoint authorised officers to investigate breaches of the Act.

Very few private actions were subsequently brought probably because of the prohibitive expense of bringing High Court actions and only allowing an option for Circuit Court action in the case of abuse of dominance. Also, the Minister never took an action under the Irish Act. The Irish experience illustrates that for effective deterrence of anti-competitive practices a right of action must be given to an independent enforcement agency with the appropriate expertise and cannot be left exclusively in the hands of private parties. The UK regime recognises this.

Powers of investigation

Under Chapter 3 of the Act, the DGFT and sectoral regulators assume a role akin to that of the European Commission with powers of investigation and enforcement. Investigation procedures are modelled very closely on those of the Commission (contained in Regulation 17/62 as amended). This includes a power to search premises on foot of a search warrant issued by a High Court judge and, unlike the Irish regime, to enter by force and be accompanied by the police.

The criteria for granting such a warrant is 'reasonable grounds to suspect' a breach of the Act. Unlike the Irish regime, this means that only one court application is ever required for multiple simultaneous 'dawn raids'. One disadvantage to the UK regime, however, is that, unlike the Irish regime, there is no power to require answers to questions in relation to the firm's business or the documents found on the firm's premises in the course of the search. Also, unlike the Irish regime, it does not create criminal offences for infringements of the prohibitions.

Fines and appeals

The DGFT will be able to fine firms that breach the prohibitions by up to 10% of their annual turnover unless the agreement falls within the category of 'small agreements' – that is, non-price-fixing agreements where the parties have a small combined turnover and/or market share. Under the Act, a decision of the DGFT (or sectoral regulator) may be appealed to a specialist appeal tribunal called the Competition Commission. Appeals to the tribunal will be by way of complete rehearing. This is a wider form of appeal than the EU system where appeals are limited to judicial-review-type grounds and will therefore mean that appeals will focus more on substance than on procedural matters.

The UK Act gives a right of appeal to third parties with a sufficient interest in the DGFT's (or sectoral regulator's) decision or bodies representing such persons. Also, a wider range of third parties will be able to appeal than under the EU system. Any appeal beyond the tribunal lies to the Court of Appeal (and equivalent courts in Scotland and Northern Ireland) on points of law and level of penalty. This is in contrast to the Irish regime where sanctions for anti-competitive behaviour are imposed by the judiciary.

Guidelines and guidance

The Act requires the DGFT to provide advice and information about the application of the prohibitions, guidance on penalties and procedural rules. The guidance and guidelines are intended for business as well as legal practitioners. It is hoped that these guidelines will enable the Act and its implementation to be clearly understood by business which would allow for effective compliance programmes and avoid anti-competitive practices. This is similar to the EU regime where the Commission issues various notices setting out its guidelines on competition matters.

Transitional arrangements

Although the UK Act was passed into legislation on 9 November 1998, the commencement of the prohibitions (known as the 'starting date') will not occur until 1 March 2000. In the interim period, certain transitional arrangements are set out by the Act. Most agreements made prior to the starting date which comply with existing law may benefit from further concessionary periods of exclusion from the chapter 1 prohibition, running in most cases from the starting date. No transitional periods apply in respect of the chapter 2 prohibition. Also, for agreements made in the interim period it will be possible to obtain guidance prior to the starting date on the application of the chapter 1 prohibition and on whether the agreement is likely to infringe this prohibition when it comes into force and, if so, whether exemption is likely.

The reasons put forward for having this transitional period was that it would allow firms time to modify agreements and practices to comply with the Act and also prevent an avalanche of agreements been notified for exemption (which was experienced by the Irish, Dutch and Swedish competition authorities). As many of these firms would already be subject to the EU regime, and as the Act provides for publication of guidelines as well as guidance, one has to question the necessity of such an interim period.

The consistency principle

Section 60 of the UK Act states that the purpose of the Act is to 'ensure that so far as possible (having regard to any relevant differences between the provisions concerned), questions arising under this part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law to competition within the community'. The UK government has indi-

cated that general principles of Community law are to be imported into the Act under this section.

This provision has been criticised for not allowing a creative tension between itself and the EU regime for competition law development and for the UK regime not to have regard to other national EU laws. There are EU competition law principles that are vague and capable of further development. Other national laws within the EU influence the development of EU competition law and arguably the UK law should do likewise. Such interaction is evidenced in the United States between state and federal antitrust laws.

Sectoral regulators

In the UK there are regulators appointed to oversee deregulation of many former state monopolies in such areas as water, gas, electricity, rail and telecoms. The Act gives these sectoral regulators concurrent powers of investigation and enforcement with the DGFT. The Act also provides for liaison between the regulators and the DGFT so that there can be agreement on principles and on matters which each agency should investigate. This is in contrast to the Irish regime where there is no formal procedure for interaction between the telecoms regulator and the Competition Authority. (It should be noted, however, that the Irish telecoms regulator does not currently have statutory power to bring proceedings for breaches of the Irish *Competition Act*, although media speculation has suggested that such powers may be given to the regulator.)

Liaison between different regulatory bodies (especially where both have concurrent powers) is essential for two reasons: first, it prevents duplication of investigations and allows the agency to investigate the issues appropriate to the expertise of that agency; second, it helps achieve a coherent, consistent and unified approach to issues and such legal certainty is desirable from a business perspective.

Conclusion

The overriding purpose of the UK Act is to harmonise both substantively and procedurally the UK competition regime in line with the EU competition regime. It replaces a complicated and cumbersome competition regime and is a long-overdue reform. Insofar as it introduces an effects-based regulatory regime, it is to be commended. Such regulatory regimes have proven themselves as a credible and effective way to implement competition policy. The new regime will be better understood by EU competition lawyers in other jurisdictions. Also, the requirement for clear guidelines and guidance in relation to the operation and implementation of the Act by the DGFT will no doubt assist firms in reviewing their business practices.

Arguably, the EU experience teaches us that making provisions for individual and block exemptions to the prohibitions blunts the effectiveness of an effects-based competition regime by allowing anti-competitive structures and understandings to underpin exempted behaviour in certain markets. For example, the EU block exemptions for the motor industry have been criticised for allowing unjustified price discrimination throughout the EU and may well have assisted in allowing conduct which has subsequently been investigated by the Commission as a breach of EU competition law.

Rather than slavishly following the EU model, perhaps the United States model should have been seriously considered. There is no equivalent exemption procedure under US antitrust laws and US firms take compliance with antitrust laws probably more seriously than in any other jurisdiction. In the US, there is a greater awareness of the consequences of anti-competitive practices, namely, the stifling of an enterprise culture, lack of innovation and choice and the consumer being forced to pay more for products than would otherwise be the case.

In economic terms, a common feature of a competitive market is contestability where there are no significant impediments to entry and exit for competitors in that market. Also, a competitive market place will give rise to a more efficient allocation and use of resources as well as innovation which in turn gives rise to cheaper cost of production for goods and lower retail prices than would otherwise exist in a less competitive market place. Examples of this can be found in air travel and mobile telephony.

The UK Act cannot be described as innovative in the manner in which it seeks to combat anti-competitive practices. Time will tell whether it does enable speedy and effective uncovering of anti-competitive and abusive conduct which were the perceived shortcomings of the previous regime or whether the provisions for exemptions to the prohibitions will reduce the effectiveness of the reform. G

Daragh Daly is a solicitor with the Competition Authority. The views expressed in this article are those of the author only and do not purport to be those of the Competition Authority.

RECENT DEVELOPMENTS IN EUROPEAN LAW

CONSTITUTIONAL

Amsterdam treaty

The *Amsterdam treaty* entered into force on 1 May. The Member States completed their ratification procedures on 30 March.

EMPLOYMENT

Fixed-term work

The Commission adopted on 1 May a proposal for a directive on fixed-term work. The directive aims to apply the principle of non-discrimination to fixed-term workers on the same terms as it applies to permanent employees. It also seeks to establish a framework to prevent abuse arising from the use of successive fixed-term contracts. The directive is to be implemented within two years of its adoption by the Council.

LITIGATION

Limitation periods

Dilexport Srl v Amministrazione delle Finanze Dello Stato (Case 343/96), judgment of 9 February 1999. The case concerned limitation periods laid down by Italian law for recovery of overpaid sum. The overpayment occurred as the level of the charge contravened EC law. The ECJ reiterated the principles it has established in a succession of recent cases. It held that EC law does not prevent national law from making repayment of customs duties or taxes contrary to EC law subject to less favourable time limits and procedural conditions than those laid down for actions between individuals for recovery of overpaid sums. However, the time limits or procedural conditions must apply in the same way to EC and national law claims and must not make it impossible or excessively difficult to exercise the right to repayment.

References to the ECJ

Josef Köllensperger GmbH & co KG, Atwanger AG v Gemeindeverband Bezirkskrankenhaus Schwaz (Case 103/97), judgment of 4 February 1999. The ECJ held that the Tiroler Landesvergabeamt was a court or tribunal for the purposes of article 177. This body reviews procedures for the award of public supply and public works contracts and concessions. It was established by law on a permanent footing, heard *inter partes* proceedings, was independent and applied legal rules. Thus, it met the criteria established by the ECJ for it to qualify as a court.

EU merger rules applicable to transactions outside the EU

Gencor v Commission (T-102/96) judgment of 25 March 1999. Gencor Ltd is a company incorporated in South Africa. It operates in the mineral resources and metal industries. It has a 46.5% shareholding in Implats, another South African company. Implats brings together Gencor's activities in the platinum group metals sector. The remaining shares in Implats are spread among third parties. Lonrho plc is an English incorporated company which operates in various sectors, in particular in mining and metals. It has a 73% shareholding in Eastplats and Westplats, companies incorporated under South African law. These companies bring together its activities in the platinum group metals sector. Gencor has a 27% shareholding in these companies.

Gencor and Lonrho proposed to acquire joint control of Implats and then to grant Implats sole control of Eastplats and Westplats. Implats would then have had sole control of these companies. The effect of this would be to eliminate competition between these undertakings in platinum mining and production in South Africa as well as the marketing of platinum in the EC – the three undertakings have significant sales in Europe. The market would no longer be supplied by three South African platinum suppliers but by two (the new concentration and Amplats, the leading supplier worldwide). The South African Competition Board did not oppose the concentration in the light of South African competition law.

Gencor and Lonrho notified the series of agreements to the Commission. The Commission found the concentration incompatible with EC law as it would have led to a collective dominant position on the part of the concentration and Amplats in the world platinum market. Gencor applied to the Court of First Instance seeking to have that decision annulled.

Gencor argued that merger control regulation 4064/89 was concerned only with mergers carried out within the EC. It contended that the regulation could not be applied to a transaction relating to economic activities carried out in a non-Member-State and had been approved by the appropriate authorities of that state (South Africa). Therefore, Gencor argued, the regulation was inapplicable to the concentration, given that the main field of activity of the undertakings carrying out the transaction (in this case the mining and refining of platinum) was in South Africa. It argued that the principle of the territoriality of laws was a fundamental feature of public international law. This applied to the EC as it did to states.

The court rejected these arguments. It held that the regulation applies to all concentrations with a Community dimension. Under the regulation, a concentration has a Community dimension if a number of conditions relating to the volume of turnover, particularly in the Community, are met. For a concentration to have a Community dimension, the regulation does not require the undertakings to be established in the Community or that the production activities covered by the concentration should be carried out within the Community. The regulation emphasises sales within the Community rather than that or production. Gencor and Lonrho have combined sales in the Community of considerably more than 250 million ECU (the merger control regulation's threshold).

The court also pointed out the regulation's objective of ensuring that competition is not distorted in the common market. Concentrations which, while relating to activities outside the Community, create or strengthen a dominant position resulting in a less effective competition in the Community, fall within the scope of the regulation.

The court then turned to the public international law arguments. It applied the modified version of the 'effects doctrine' adopted in the *Woodpulp* decision. Therefore, it said that it was compatible with public international law to apply the regulation in view of the foreseeable, immediate and substantial effect of the concentration in the Community.

Finally, the court held that EC law applied to collective dominant positions and not only to individual dominant positions. There is a collective dominant position where the dominant position is held by the undertakings which results from the concentration (in this case Implats/Eastplats/Westplats) and one or more undertakings not involved in the concentration (in this case Amplats). The court reached this conclusion by relying on the objective of the regulation – to ensure that the process of reorganising undertakings as a result of the completion of the internal market does not damage competition. If the regulation applied only to concentrations creating a dominant position for the parties to the concentration, it would lose its effectiveness. G

Conferences and seminars

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

Topic: *Decentralised application of European antitrust law: should the European Commission give up its monopoly of exemption?*
Date: 10-11 June
Venue: Trier, Germany

Topic: *Co-operation in the area of education and the recognition of diplomas on a European level*
Date: 17-19 June
Venue: Trier, Germany

Topic: *European Community law: an introduction for young lawyers*
Date: 12-16 July
Venue: Trier, Germany

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: *Tourism law*
Date: 24-27 June
Venue: Capri, Italy

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

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

Catholic University of Louvain (Louvain-la-Neuve)
Contact: Beata Dunaj (tel: 0032 10 478531)

Topic: *European Community consumer law*
Date: 6-16 July
Venue: Louvain-la-Neuve, Belgium

European Lawyers' Union
Contact: Klaus-Ullrich Link (tel: 0049 711 4897923)
Topic: *Setting up companies in the European Union*
Date: 17-18 June
Venue: Dresden, Germany

Contact: Gérard Abitbol (tel: 0033 0491 338195)

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

IBC
Contact: (Tel: 0044 171 4535495)

Topic: *European air transport services and airports*
Date: 10-11 June
Venue: Brussels, Belgium

IIR
Contact: (Tel: 0044 171 9155055)

Topic: *Data Protection Ireland '99*
Date: 16 June
Venue: Dublin

Law Society of Scotland
Contact: (Tel: 0044 141 5531930)
Topic: *50th anniversary conference*
Date: 8-10 July

Solicitors' European Group
Contact: (Tel: 0044 1905 724734)

Topic: *Public procurement policy in the Community*
Date: 16 June
Venue: London, England

Topic: *Broadcasting, pay-per-view and sports competition law*
Date: 6 July
Venue: London, England

Continued from page 35

neglecting or failing to attend meetings or respond to correspondence

- A power to attach conditions to a practising certificate where a series of complaints have been made over the preceding two practice years
- A requirement that the Disciplinary Tribunal and the High Court take account of previous findings of misconduct
- A power to attend at a solicitor's office and inspect documents where the Society believes it is necessary for the purpose of investigating the capacity of a solicitor to carry on his practice or for ensuring the adequate protection of the solicitor's clients
- A power to issue a reprimand to a solicitor in appropriate cases
- A power to appeal a decision of the Disciplinary Tribunal that there is no *prima facie* case or no misconduct
- A requirement that the Disciplinary Tribunal make a finding in relation to each item complained of and to give reasons for each finding
- A requirement that the Society be notified of the fact and outcome of direct applications to the Disciplinary Tribunal. G

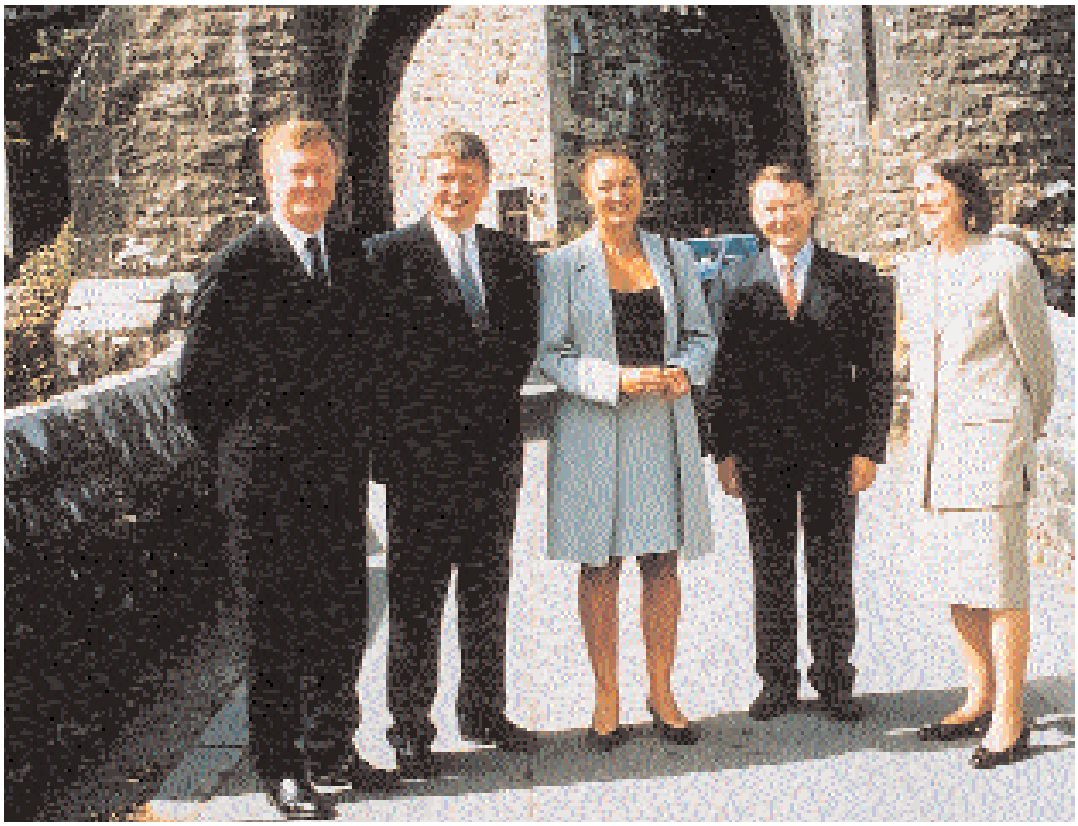
Irish Association of Law Teachers: mid-year meeting

The Irish Association of Law Teachers will be holding its mid-year meeting on Saturday 20 November in the Law Society buildings at Blackhall Place, Dublin 7.

It is hoped that panels will be held on the subjects of employment equality, international law, EC law, reform of civil procedure and legal education. Lecturers, solicitors, apprentices, barristers or others interested in presenting a paper (20 minutes approximately) should get in contact with the IALT. It would also like to hear from others who would like to suggest or indeed organise alternative panels.

All are welcome to attend. If you would like to volunteer a paper or an idea or simply obtain further details, contact TP Kennedy, Legal Education Co-ordinator, Law School, Law Society of Ireland, Dublin 7 (tel: 01 6724802; fax 01 6724803; e-mail tp.kennedy@lawsociety.ie).

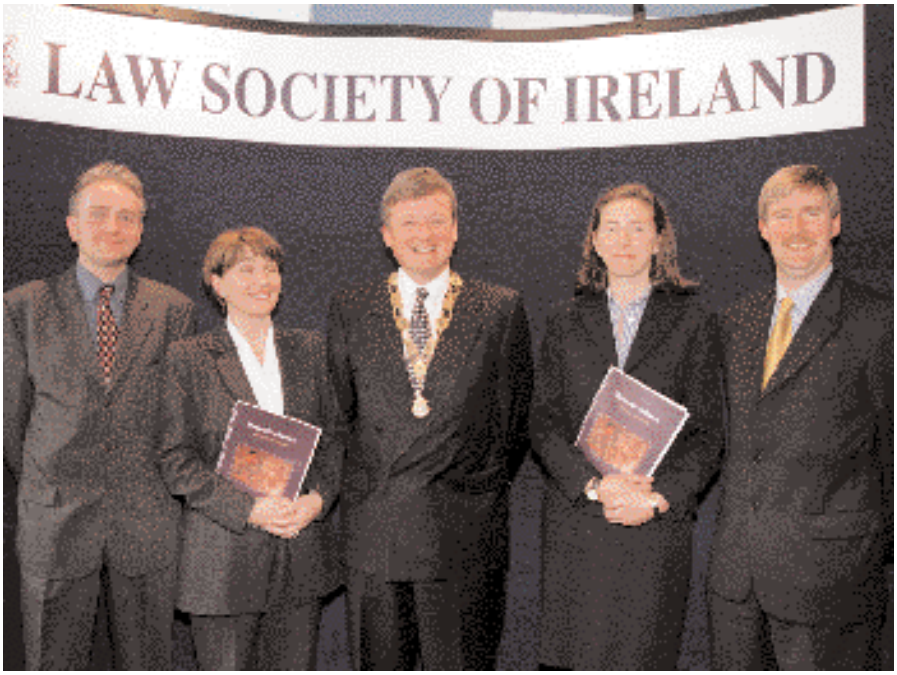
Law Society Annual Conference



Ashford Castle in Cong, Co Mayo, was the venue for the Society's annual conference which was held last month. The theme of the conference was *Lawyers in a changing Ireland*, and the speakers included Supreme Court judge Mrs Justice Susan Denham, the Minister for Justice John O'Donoghue, psychologist Maureen Gaffney and solicitor Frank Lanigan.

(Above): Taking a break from the conference *(left to right):* Justice Minister John O'Donoghue, Law Society President Patrick O'Connor, Maureen Gaffney, Frank Lanigan and Mrs Justice Susan Denham

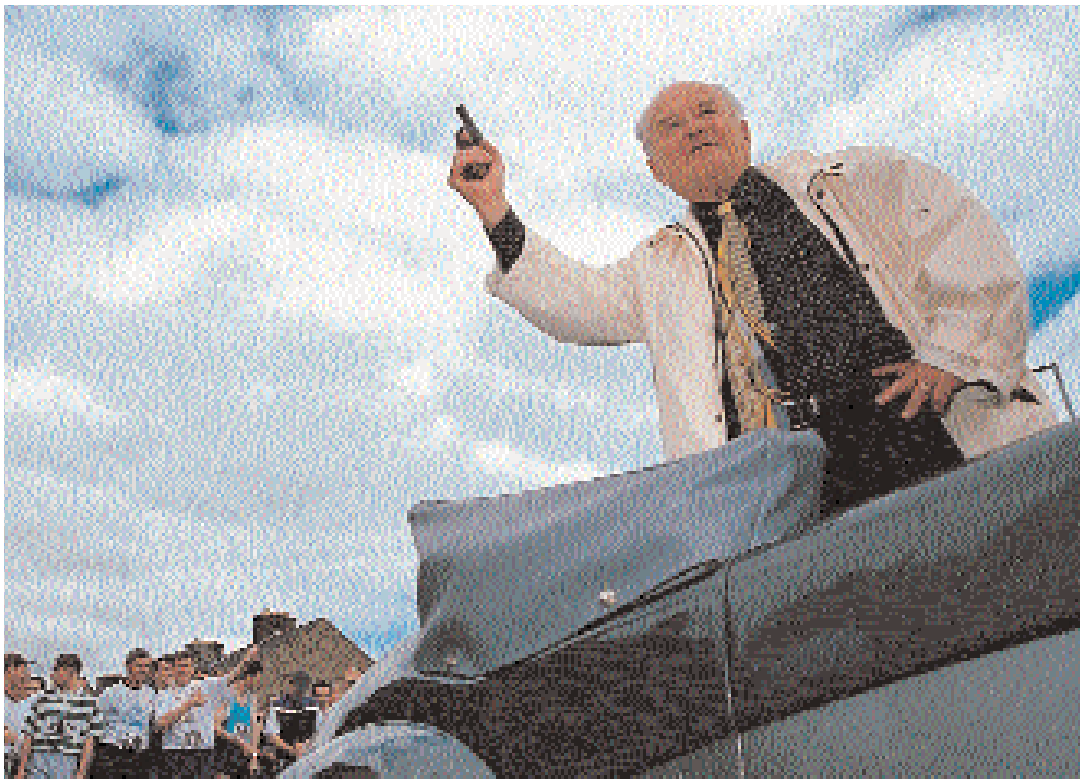
(Right): A photograph of the1959 annual conference in Killarney from *The Examiner* newspaper. That was the first time the Society ever held its conference outside of Dublin. Next year's conference will be held in the Spanish city of Seville. How times have changed!



At the launch of the Law Reform Committee's new report on domestic violence legislation were: committee secretary Owen McIntyre, committee member Rosemary Horgan, President Patrick O'Connor, committee member Anne Leech and Director General Ken Murphy

Carol Coulter has been appointed legal affairs correspondent of the *Irish Times*. She is pictured here with Law Society Director General Ken Murphy and President Patrick O'Connor

Calcutta Run 1999



Don't mess with a judge who packs a piece: Mr Justice Feargus Flood gets the Calcutta Run underway by inviting punks to make his day

After months, weeks, days (or, in some cases, hours!) of training by the participants, the big day finally arrived on Saturday 15 May. Over 500 runners and walkers presented themselves at the starting line at Blackhall Place. Staff from many of Dublin's solicitors' firms took part and some solicitors also travelled from around the country.

Mr Justice Feargus Flood was charged with the responsibility of bringing the participants under starter's orders, which he did with great style, and just after 2.30pm the race was on. The route took the participants into the Phoenix Park through the North Circular Road gate and then wound its way through the park before emerging through the gate at Parkgate Street and back to Blackhall Place. A heavy presence of gardai and stewards ensured that the participants had safe passage along the route.

The first man home was solicitor Gerry Dunne, with two of his friends, Gerry McGrath and Cathal Lombard, in a superb time of just over 32 minutes. The first of the mere mortals home was Hugh Beatty of McCann FitzGerald in approximately 37 minutes. The first lady home was the Law Society's own Grainne Butler in 38.40 minutes. The runners and walkers continued to make their way home over the following couple of hours.

Following the race, the participants wound down and relaxed at Blackhall Place, where there was plenty of food, drink and music on offer. To date, a little over £30,000 has been received and, when all of the sponsorship has been returned, it is hoped that the total will exceed £40,000.

A quick reminder to anyone who hasn't returned their card and money: could they do so as soon as possible? The organisers would like to thank the Law Society for hosting a most enjoyable day and everybody who helped out and took part.

Swinford Courthouse received a new look recently when Law Society President Patrick O'Connor presented the painting *A walk in Venice* by local artist John Brady to the courthouse. O'Connor made the presentation to mark his presidential year and it coincides with an initiative by Judge Harvey Kenny to enhance the look of the courthouse. Back row (*l-r*): solicitor Ward McEllin, Patrick O'Connor, Judge Harvey Kenny, artist John Brady, solicitor Brendan Donnelly and barrister Lorraine Scully; front row (*l-r*): solicitors Michael Keane and Mary Morris, barrister Tony O'Connor, solicitors Regina Hopkins, Una Gibbons, and Anne Leonard, and barristers John Jordan, Francis Comerford, Libby Maguire and Diarmuid John Connolly

Solicitor Mary Redmond at the launch of her new book *Dismissal law in Ireland* (published by Butterworths)

Law Society President Patrick O'Connor with British Lord Chancellor Lord Irvine of Lairg and Dean of the Law Faculty at UCD, Paul O'Connor, at a lecture given by the Lord Chancellor at UCD recently

CPSSA conference

This year's CPSSA council – back row *(left to right):* Ethna McDonald, Aideen O'Reilly, Barry Donoghue, Edward Hughes, Martin Sills, Patrick C Burke, Ian Long, Philippa Howley.
Front row *(left to right):* Maria Browne, Declan Sherlock, President Ann Counihan, Caroline Conroy, Isobel Cassidy

The Corporate and Public Services Solicitors' Association (CPSSA) is dedicating its conference this year to *Fraud, freedom and transparency*.

The conference will be chaired by Professor Brian McMahon and the speakers will include:

- Barry Galvin, Criminal Assets Bureau on asset seizure and white-collar crime
- Michael McDowell SC and former TD on corporate governance
- Paul Lavery, McCann Fitzgerald, on the *Freedom of Information Act*, and
- Christopher Arend, Linklaters Alliance, on plain language.

It will be held at the Radisson Hotel, Blackrock, Dublin on Friday 18 June. Fees will be £100 for members and £200 for non-members. For more details contact Jocelyn McDonnell, (tel: 01 6762266).

Diploma in legal French conferring

The *Diploma in legal French* is a course which has been offered by the Law Society and Alliance Française since 1995. A high level of fluency is expected of participants who, through interactive tutorials, learn about French law and the French legal system, while improving their standard of spoken French. It is a unique course in that the qualification is validated by the Paris Chamber of Commerce and is widely recognised.

The conferring ceremony for the 1998 course took place on Thursday 29 April. Nine candidates attended the course in 1998, five of whom attended for the conferring ceremony. The 1998 course was comprised of: Aidan Burke, Lisa Dempsey, Deirdre Mulligan, Deirdre Ni Fhloinn, Ann O'Brien Kerr and Ronan Wilson.

The diplomas were awarded by Law Society President Patrick O'Connor and the Director of the Alliance Française, Madame Christine Vandoorne. The Vice-Chairman of the Education Committee, Michael Peart, in his opening remarks, commended the participants on their hard work in participating in such a demanding course over a 12-month period. He encouraged others to follow where they had led. Madame Vandoorne spoke of the valuable co-operation between the Alliance and the Law Society. She felt that it was symptomatic of an opening-up to Europe on the part of the solicitors' profession.

This course is currently in its fourth year, with another group of solicitors, apprentices and others attending sessions on Saturdays in Blackhall Place. You can find an advertisement for the sixth course on page 28 of this issue. Readers are strongly urged to consider signing up.

Law Society President Patrick O'Connor and Education Committee Vice-Chairman Michael Peart at the conferring ceremony for students who completed the *Diploma in legal French*

Members of the Judicial Appointments Advisory Board pictured at a recent dinner at Blackhall Place hosted by Law Society President Patrick O'Connor. From left: John McMenamin, Bar Council chairman; Brendan Ryan, board secretary; High Court President Frederick Morris; Patrick O'Connor; Olive Braiden, Dublin Rape Crisis Centre; Circuit Court President Esmond Smyth; and John Coyle, Hygeia Chemical Ltd

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 4 June 1999)

Regd owner: Gerard Brady, Snakiel, Killeshandra, County Cavan; Folio: 13323, 13390; Lands: Ardra; Area: 8a 0r 10p of 13323; 29a 0r 10p of 13390; **Co Cavan**

Regd owner: Jeremiah J O'Brien (deceased); Folio: 405L; Lands: Property known as 'Clogher' situate on the east side of Clifton Avenue, Parish of St Anne's, Shandon, Cork City; **Co Cork**

Regd owner: David O'Sullivan (deceased); Folio: 517L; Lands: Part of the land of Huggarts-Land situate in the Barony and County of Cork; **Co Cork**

Regd owner: Cornelius Lucey; Folio: 31964; Lands: Situate in the townland of Teergary, Barony of Muskerry West, County of Cork; **Co Cork**

Regd owner: Daniel J Collins (deceased); Folio: 25086; Lands: situate in the townland of Kealfadda and Barony of Carberry West (West Division), County of Cork; **Co Cork**

Regd owner: John Batterbury; Folio: 12602; Lands: Part of the lands of Killissane, situate in the Electoral Division of Monanimy and Barony of Fermoy, County of Cork; **Co Cork**

Regd owner: Dermot Fox; Folio: 42306F; Lands: Townland of Gibbons and Barony of Uppercross; **Co Dublin**

Regd owner: Joseph Geraghty, Knockarasser, Moycullen, Co Galway; Folio: 1820; Lands: Townland of Knockarasser and Barony of Moycullen; Area: 56a 2r 0p; **Co Galway**

Regd owner: Francis Byrne and Geraldine Byrne; Folio: 18591F; Lands: Garvoge and Barony of Clane; **Co Kildare**

Regd owner: James Maher; Folio: 9151; Lands: Ballycarran Little and Barony of Crannagh; **Co Kilkenny**

Regd owner: Patrick Fitzpatrick; Folio: 7231 (closed) and 7234 (closed); Lands: Coolnabacky and Barony of Cullenagh; **Co Laois**

Regd owner: Catherine Molloy; Folio: 590F; Lands: Crossneen and Barony of Slievemargy; **Co Laois**

Regd owner: Patrick Kearney, Derrinloughan, Tullaghan, County Leitrim; Folio: 15880 and 17237; Lands: Derrinloughan and Wardhouse; Area: 11a 1r 29p (15880); 10a 0r 0p (17237); **Co Leitrim**

Regd owner: James Cunniffe, Farnagh, Carrick on Shannon, County Leitrim; Folio: 7136; Lands: Farnagh; Area: 4,775 acres; **Co Leitrim**

Regd owner: Michael Joseph Prendergast, Gowlaun, Kilkelly, County Mayo; Folio: 4867; Townland of Gowlaun and Barony of Costello; Area: 11a 0r 34p; **Co Mayo**

Regd owner: Stephen Walsh, c/o Michael Moran & Co, Castlebar, Co Mayo; Folio: 19567; Lands: Townland of Carrowmore and Barony of Murrisk; Area: 0a 2r 8p; **Co Mayo**

Regd owner: Stephen Moran, 3 Tara Place, Ashbourne, Co Meath; Folio: 1409L; Lands: Killegland; **Co Meath**

Regd owner: John Taylor, deceased; Folio: 1635; Lands: Garr and Barony of Warrenstown; **Co Offaly**

Regd owner: Daniel Egan (deceased); Folio: 1304F; Lands: Attinkee and Macoghlan's Island and Barony of Garrycastle; **Co Offaly**

Regd owner: Roger Brennan (deceased), Bunnageddy, Strokestown, Co Roscommon; Folio: 139R; Lands: Townland of Bunnageddy and Barony of Roscommon; Area: 29a 3r 19p; **Co Roscommon**

Regd owner: John Patrick Mitchell, Strandhill, Co Sligo; Folio: 23220; Lands: Townland of Larass or Strandhill and Barony of Carbury; Area: 0a 0r 23p; **Co Sligo**

Regd owner: David John Cahill (deceased); Folio: 4254; Lands: Lisbalting and Barony of Iffa and Offa East; **Co Tipperary**

Regd owner: Kathleen Kelly; Folio: 33733; Lands: Jessfield & Farranrory Lower and Barony of Slieveardagh; **Co Tipperary**

Regd owner: Joseph Gavaghan (orse Gavigan), Herbertstown, Crossakiel, Kells, County Meath; Folio: 4848; Lands: Brownstown; Area: 61.594 acres; **Co Westmeath**

Regd owner: James Corcoran; Folio: 11373F; Lands: Coolcots and Knockcumshin and Barony of Shelmaliere West; **Co Wexford**

Regd owner: Anthony P Maher (deceased); Folio: 15966; Lands: Enniscorthy and Barony of Enniscorthy; **Co Wexford**

WILLS

Brennan, William, deceased, late of Knockeenglass, Kilmanagh, County Kilkenny. Would any person having knowledge of a will of the above named deceased who died on 22 May 1998, please contact James Harte & Son, Solicitors, 39 Parliament Street, Kilkenny

Gill, Nora, deceased, late of Killeenhugh, Kinvara, Co Galway, and 22 Whitestrand Park, Galway. Would any person having knowledge of a will of the above named deceased who died on 25 April 1999, please contact Colman Sherry, Solicitor, The Square, Gort, Co Galway, tel: 091 631383, fax: 091 631993

Joyce, Frederick Noel, deceased, late of 85 Hollybrook Road, Clontarf, Dublin 3, and Elmgrove Nursing Home, Birr, County Offaly. Would any person having knowledge of a will of the above named deceased who died on 23 December 1997, please contact Messrs Desmond A Houlihan & Son, Solicitors, Birr, County Offaly, tel: 0509 20026, 20398

O'Neill, William, late of Gurranebane, Cahirciveen, County Kerry. Would any person having knowledge of the whereabouts of the above named deceased who died on 21 April 1998, please contact M/s JB Healy Crowley & Co, Solicitors, of O'Connell Street, Cahirciveen, County Kerry, tel: 066 9472009, fax: 066 9472742

Walsh, Daniel, deceased late of Ardore, Annascaul, Co Kerry. Would any person having knowledge of the whereabouts of the original will dated 9 May 1947 executed by the above named address who died on 19 November 1987, please contact Patricia Mallon & Co, Solicitors, 13 Sheares Street, Cork, tel: 021 274018

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MISCELLANEOUS

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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

Seven-day publican's licence, rural, required. Please contact Frank Lanigan Malcomson & Law, Court Place, Carlow

Churchtown Meeting House. Will anyone acting for the estate of Charles Going Malone or the estate of Olympia Hutton, the lessor and intermediate title-holder respectively, of Churchtown Meeting House, please contact Orpen Franks, Solicitors (ref: NC), 28/30 Burlington Road, Dublin 4, solicitors for the lessees who wish to buy out the freehold

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Wanted – *The Irish criminal process*, by Edward F Ryan and Philip P McGee (Mercier Press). Contact tel: 069 62969

For sale – ordinary seven-day publican's licence, without restrictions in the County of Mayo. Apply to Patrick J Durcan & Company, Solicitors, Westport, County Mayo, tel: 098 25100

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TITLE DEEDS

In the matter of the *Registration of Title Act 1964* and of the application of Richard Graham in respect of property in the county of Wexford
County: Wexford
Lands: Tara Hill
Dealing no: J3986/98

Take notice that Richard Graham of Crosswinds, Tarahill, Gorey, County Wexford, has lodged an application for registration on the freehold register free from encumbrances in respect of the above property. The original title documents specified in the schedule hereto are stated to have been lost or mislaid. The application may be inspected at this registry.

The application will be proceeded with unless notice is received in the registry within one calendar month from the date of publication of this notice that the original documents of title are in existence. Any such notice should state the grounds on which the documents are held and quote the dealing reference above.

Sean MacMahon, Examiner of Titles, 14 May 1999

Schedule
Assignment dated 15 September 1964 from William Smith to Richard V Graham.

In the matter of the *Registration of Title Act 1964* and of the application of Patrick Joseph Hughes and Anne Joephine Hughes in respect of property known as Number 8 Greythorn Park, Glenageary Road, Glenageary, County Dublin
Dealing no: 98DN06660

Take notice that Patrick Joseph Hughes and Anne Josephine Hughes both of Number 8 Greythorn Park, Upper Glenageary Road, Glenageary, County Dublin, have lodged an application for registration on the Register of Freeholders with absolute title free from encumbrances in respect of the above property. The original title document specified in the schedule hereto is stated to have been lost or mislaid.

The application will be proceeded with unless notice is received in the registry within one calendar month from the date of publication of this notice that the original documents of title are in existence. Any such notice should state the grounds on which the documents are held and quote the dealing reference above.

Schedule
Original deed of conveyance of 31 December 1974, made between WF Investments of the one part and Patrick John Hughes and Anne Josephine Donnellan of the other part.

John Deeney, Examiner of Titles, 15 April 1999

Estate of Liam McCormack
Would any person or parties who knows the whereabouts of the title documents to dwelling house known as 'Ardell', Ashbourne Avenue, South Circular Road, Limerick, residence of Liam McCormack (now deceased) and Mary McCormack, please contact Melvyn Hanley, Solicitors, 16 Patrick Street, Limerick, tel: 061 400533, fax: 061 400633