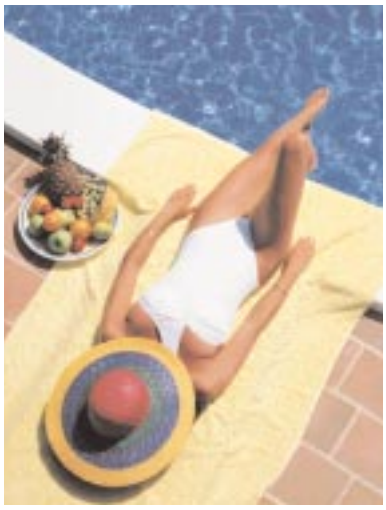
GAZETTE

REGULARS



Editor: Conal O'Boyle MA

Reporter: Maria Behan

Designer: Nuala Redmond

Editorial Secretaries:
Catherine Kearney, Andrea MacDermott

Advertising: Seán Ó hOisín, 10 Arran Road, Dublin 9, tel/fax: 837 5018, mobile: 086 8117116, E-mail: seanos@iol.ie.

Printing: Turners Printing Company Ltd, Longford

Editorial Board: Dr Eamonn Hall (Chairman), Conal O'Boyle (Secretary), Mary Keane, Pat Igoe, Ken Murphy, Michael V O'Mahony, Vincent Power

Published at Blackhall Place, Dublin 7, tel: 01 672 4800, fax: 01 672 4801.
E-mail: c.oboyle@lawsociety.ie Law Society website: www.lawsociety.ie

Subscriptions: £45 **Volume 93, number 9**

ROCHFORD BRADY
the only Irish provider of
ancillary legal services

ISO 9002

to be awarded the
ISO 9002

Rochford Brady

LEGAL SERVICES LTD

Are you paying too much for your Law Searching/Town Agency work?

Change to Rochford Brady with our 'one stop shop' service

(law searching and town agency under one roof)

WE CUT YOUR COSTS

OWNERSHIP/TITLE INQUIRY SPECIALISTS TOWN AGENTS LAWSEARCHERS SUMMONS SERVERS COMPANY FORMATION AGENTS

If you are not with Rochford Brady, isn't it time you changed?

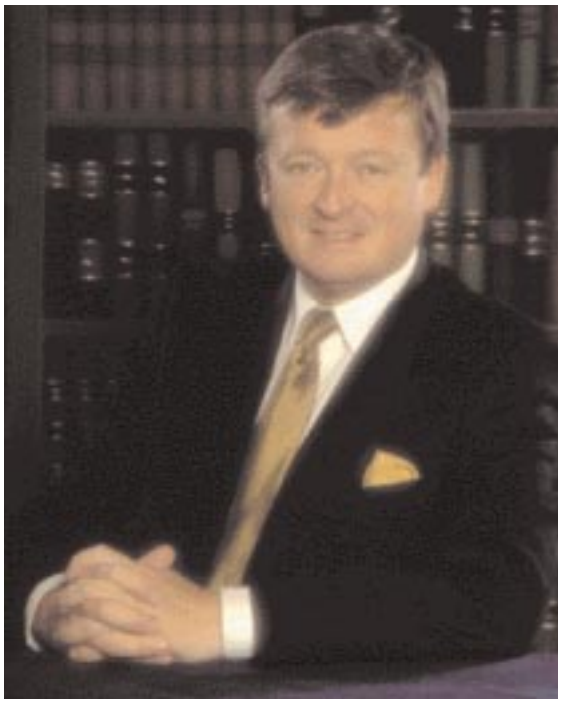
We offer monthly retainer fees for town agency work
Fixed/maximum prices for closing searches
Planning searches carried out in all counties

For our brochure

Phone: 1850 529732 (20 lines)
Fax: 1850 762436 (5 lines)

ROCHFORD BRADY
CUTTING YOUR COSTS

Over and out!



Well, this is it – my last message to you, my colleagues, as President. It has been a lifetime experience to have held the office of President of the Law Society of Ireland through the last year of this century and, indeed, the millennium.

It is the wish of every President to make a difference, not for the sake of it but to improve any shortcomings in the profession and to help it along. How is our profession doing? Never has practising as a lawyer been so much of a challenge. Making a living in competitive times while other businesses and professionals seek to enter into our traditional area of practice is challenging. Safeguarding the judicial system for everyone – from those who cannot afford financially to gain access to the courts and who badly need to have legal aid funding provided for them, to our dedicated judiciary who face attacks from the misinformed and the malicious – is a challenge.

Being a lawyer is an honourable profession; serving as your President for the past year was the highest honour of all.

Judicial independence

Our system of justice is one of the best in the world. While the public is becoming increasingly aware of judicial decision-making, high-profile cases have generated debate about judges' decisions. Debate is one thing; flawed attacks are another. Judges and the judicial system are under attack and are being challenged by those who disagree with their interpretation of the law.

Attacks in certain sections of the media are unwarranted and unfair. In our legal system, judges do not, and should not, speak out to defend their decisions. Therefore, it is the responsibility of lawyers and their representative organisations to respond to unjustified attacks against the judiciary and our legal system by reminding others that the role that judges play in our democratic constitutional system is to interpret and apply the law to the best of their ability. We must defend the independence of our judiciary, whether or not their decisions are popular or welcome. We must invite politicians, community leaders and members of the media to think twice before stirring up public emotions in the aftermath of an unpopular decision. There is simply too much at stake to allow intellectually-dishonest attacks to be levelled against the system which stands as a bulwark for the citizen against the power of the State. Let us remember that each day in Ireland hundreds of decisions are made by judges that are correct and uncontroversial.

A respect for each other is something that must exist between all lawyers. It is tempting when we receive a judgment contrary to our expectations or to those of our clients' to blame the judge. The disappointment of an outcome contrary to what we thought might happen should not be a cause to complain about the judiciary. It is important that we try to explain that judges are guaranteed independence in our constitution, that they do universally try to do the right thing. If we run down the judiciary and the legal system, then our clients – as members of the public – will think less of us, for we are an important part of the system.

The public have considerable confidence in the judiciary. The minor turbulence of the last 12 months has not dented that confidence. Judges have traditionally had respect from all lawyers. Lawyers also deserve that respect which has traditionally been afforded to us by members of the judiciary. The judiciary themselves who treat lawyers with respect send a strong message that lawyers should be respected by the public.

Ás Gaelige

You may have noticed that during the year I have made some use of the Irish language. I do not claim to be a fluent Irish speaker, but I do love our national heritage, of which our language is an important part. Nonetheless, I abhor the compulsion that has been forced upon us all to learn Irish. The compulsory learning of Irish has served neither Ireland nor her people well. It is long beyond time for Government to change its policy towards our national language and amend the *Solicitors Act, 1954*, which requires those who seek to become solicitors to sit two examinations in the Irish language 'except for persons who are over the age of 15 years on 1 October 1929'.

It is simply wrong and serves neither the country nor our profession well, to require solicitors to 'have a competent knowledge of the Irish language, that is to say, such a degree of oral and written proficiency in the use of the language as is sufficient to enable a solicitor efficiently to receive instructions, to advise clients, to examine witnesses and to follow proceedings in the Irish language' (section 40 (3)(c), *Solicitors Act, 1954*).

Appreciation and thanks

I express my appreciation and thanks to the Vice-Presidents of the Law Society who served with me, Anthony H Ensor and Gerard F Griffin, the members of the Council, the Director General, Ken Murphy, and all the staff of the Law Society whose help and assistance has made this a very memorable, stimulating and enjoyable year.

As I pass the ball to Anthony H Ensor, I know with confidence he will not drop it, and that the Society will be secure in a very safe pair of hands for the next year.

Good luck to you all, and may you have health, wealth and happiness for many years to come.

Patrick O'Connor,
President

from

The Solicitors' Mutual Defence Fund limited

A FUND OPERATED BY SOLICITORS, ONLY FOR SOLICITORS

- Competitive contribution levels
- Cover to IR£1,000,000 each and every claim
- Top-up cover arranged at competitive rates
- Surplus reinvested for the benefit of members
- Growing membership
- A commitment to giving the best terms and service to legal practitioners
- Proven track record

Unlike commercial insurers, who base premiums on the general claims experience across the professional indemnity spectrum, **the Solicitors' Mutual Defence Fund bases contributions on the claims experience of Irish solicitors only**

This is your fund for your professional indemnity needs

The Solicitors' Mutual Defence Fund limited

All enquiries to:
Margaret Moran, Solicitors' Mutual Defence Fund Limited, 25 Lower Leeson Street, Dublin 2
Telephone: (01) 676 3118 / 676 2597. Fax: (01) 661 2402

Why this country needs a *Whistleblowers' Act*

A new openness is sweeping the land. Where businessmen and bankers once took decisions with all the transparency of the Mafia's *omerta*, now they may have to justify decisions by trawling through the minutiae of their files with members of the Oireachtas – on live television. Meanwhile, civil servants are now more likely to be thumbing through the *Freedom of Information Act* rather than the *Official Secrets Act*.

So far there have been 13 inquiries into Irish business practices. There is at least a sense of shining a light into some obscure corners of Irish business, enabling ordinary citizens to get a glimpse of what has been happening in our midst.

Whistleblowers' Bill

One significant contribution to encourage openness in both business and public-sector organisations is the *Whistleblowers' Protection Bill, 1999*. Proposed by the Labour spokesman on Enterprise, Trade and Employment, Pat Rabbitte TD, the Bill has already passed the second stage and has the support of the Government, in principle at least.

The Bill contains a new set of statutory rights for employees (in both the private and public sectors) who report information of illegality or malpractice that they have discovered at work. Any employee who 'blows the whistle on fraud or malpractice will be entitled to protection against dismissal or any other sanction' by the employer. To qualify for the protection of the Bill, disclosures would have to be made 'reasonably and in good faith'.

In Britain, the *Public Interest Disclosure Act 1998*, known as the *Whistleblowers' Act*, has similar objectives – primarily to protect employees who disclose to the proper authorities any malpractices by their employers and others. Of course, in Britain, as here, there has already been protection against dismissal other than for lawful reason – which would not include dismissal for disclosing fraud or malpractice to the proper authorities. There, the Act has broadened and clarified the protection.

Employment contract clauses binding an employee not to disclose the company's affairs to outsiders do not extend to crime or iniquity. This was established as long ago as 1857 in the chancery court case of *Gartside v Outram*. In his Dáil speech on the new Bill, Pat Rabbitte quoted from the court's ruling that 'you cannot make me the confidant of a crime or a fraud and be entitled to close up my lips upon any secret which you have the audacity to disclose to me'.

But how far can a whistleblowers' Bill go in disclosing fraud and malpractice in commerce and public affairs? And will the Bill, which is likely to be enacted, really encourage people to come forward?

National Irish Bank

Last year's landmark Supreme Court ruling in the National Irish Bank case ironically highlights the major shortcoming in the Bill as drafted. In that case, NIB employees questioned whether they had the right to refuse to answer questions from inspectors appointed under section 10 of the *Companies Act, 1990* on the grounds of possible self-incrimination.

In his 41-page judgment, Mr Justice Barrington agreed with the High Court decision that they were not entitled to refuse to answer questions put by the inspectors or to refuse to provide documents. He clarified that any bank official's confession obtained by the inspectors would not generally be admissible at any criminal trial unless the confession was voluntary.

Pat Rabbitte TD: Will his *Whistleblowers' Bill* really encourage people to come forward?

The court thus provided an imperative to reply to the inspectors' questions while providing a protection that only a voluntary confession would be permitted as evidence at any criminal trial of the employees. And, where there is a court order to co-operate, there can be no reasonable grounds for discrimination or recrimination by an employer.

The importance of forcing those who may be aware of fraud or crime in general to make either an inculpatory admission or exculpatory denial has long been recognised in England. There, section 2 of the *Criminal Justice Act 1987* requires a suspect to answer questions from the Serious Fraud Office but, with exceptions, these answers are not admissible in any future criminal trial. But one significant advantage of section 2 is that answers provided may lead investigators to search and find original and admissible evidence. A second advantage is that it enables information to be given by people who are either unwilling or unable to give information unless legally required to do so.

Some 18 months ago, the Government approved the drafting of legislation to reform the law on fraud and 'white-collar' crime. The proposed *Criminal Justice (Fraud Offences) Bill* has since yielded to other priorities. The Bill is now being drafted by the Parliamentary Draftsman's Office and may be published by the end of the year.

The suspicions surrounding the scandals of this decade warrant that the Bill be given careful consideration. Legislative drafters should – and do – consider legislation in other jurisdictions. Two British Acts that are no doubt being examined are the *Criminal Justice Act 1987* and the *Theft Act 1968*.

The 1968 Act makes clear that an offence by a company 'with the consent or connivance' of any director, manager or similar officer will leave the individual open to be charged with the same offence. Passive acquiescence would seem to be sufficient. Such provisions provide a positive incentive to come forward.

Low deeds in high places

The forthcoming Bill could be used to require that any information that a company director or officer had, or should have, about fraud or illegality must be disclosed to the relevant regulatory body, such as the Central Bank, the Competition Authority or the Revenue Commissioners. Such a provision could respect the *dicta* of Mr Justice Barrington in the NIB case whereby any such required information would not be permitted in a criminal case.

US President Woodrow Wilson wrote that 'law is the crystallisation of the habit and thought of society'. This is as good a definition as any, and highlights the fact that our laws against low deeds in high places still have some catching up to do. The *Whistleblowers' Act* will be welcomed by a disgruntled populace as at least a belated recognition of a serious problem. G

Pat Igoe is the principal of Dublin-based solicitor's firm Patrick Igoe and Company.

Meteoric crash highlights regulatory problems for semi-States

'In late 1997, as part of a continuing programme of liberalisation of the telecommunications industry in Ireland – in turn driven by movement from the European Community – a competition was announced by the [Director of Telecommunications Regulation] for the award of a licence to operate a mobile telephone service in Ireland'.

With those words, Judge Macken began her High Court decision in *Orange Communications Limited v The Director of Telecommunications Regulation and Meteor Mobile Communications Limited* (4 October 1999). For the next 240-odd pages, the judge cascaded findings adverse to the director over a jungle of facts organic to the tender and evaluation process.

Those intrepid and interested enough may venture there alone. Even the judge admitted to not reading all the documents before her. But the judgment does bring home the problems inherent in regulating State-owned or newly-privatised industries. This case means that Ireland will enter the new millennium with only two mobile operators fighting over market share, leaving consumers with the choice and prices to match.

Ireland will enter the new millennium with only two mobile phone operators fighting over market share

Scope of the appeal

Judge Macken decided earlier this year that the scope of the appeal from the director to the High Court provided by the *Postal and Telecommunications Services Act, 1983* was 'a review-type appeal, perhaps slightly wider than judicial review *simpliciter*, as known in this jurisdiction, and by which the reasonableness of the director's decision is ascertained by reference only to the materials which she had before her, and none other, so as to permit the court to decide if her decision should be confirmed'. The director's decision was both administrative and expert in nature. Consequently, the relevant law in the case was administrative law, and when the High Court upheld Orange's claims, it remitted the matter back to the director 'for further consideration' but could not award the licence.

The High Court upheld Orange's claims on three grounds: unreasonableness, bias and failure to give reasons.

First, the director's decision to award the licence to Meteor was biased in the objective sense of giving rise to reasonable apprehension of bias. She was objectively biased in her approach to the following elements for which marks were awarded in the evaluation: binding commitments, low tariffs, subscriber contracts, bonus to distribution channels, guarantees from backers, changes in the drafts of reports and the strength of the consortium.

Each of the first three elements alone supported Orange's claim of objective bias; combined with the others, a reasonable person would apprehend significant bias to the extent that the decision could not justifiably stand.

Second, the decision of the director was unreasonable in the sense that a reasonable person would not have come to the sub-decisions reached in a number of areas which were critical to the overall decision, either alone or in combination. Third, the decision was bad in law because the director failed in her obligation to give full and proper reasons by providing only rankings and a summary report.

General interest

The judgment is of general interest in administrative law on three points. First, that the director could sub-contract out her functions of evaluation and be caught by her sub-contractor's perceived errors (for example, those of Andersen Management International). Second, that a finding of unreasonableness appears to flow from a finding of bias. Third, there is an analysis of the obligation to give reasons.

The case is also of tactical interest: the judgment lays emphasis on the oral evidence. Despite Judge Macken's decision of 18 March that the appeal was a review only, Orange appears from the judgment to have bolstered its case by introducing oral evidence to support its contention of bias and by cross-examining the director's witnesses.

More generally, and more obviously, the judgment is important because of the money involved. Nothing particularly new in that – except, perhaps, the amount. Orange and Western Wireless, the backers of the Meteor bid, are multi-billion pound public companies, and the award of the licence could have significant impact on their business.

More broadly still, the judgment highlights a fundamental problem in the governance of these massive industries which provide utilities to the people. The starting position in our legal system is that everything is permitted unless prohibited. However, specific laws did prohibit the provision of utilities by other than State-owned statutory companies such as Bord Telecom Éireann. Now, State-licensed companies can provide utilities, but no other company can. There will be few licenses. There is not open competition in the market; the open competition is in the tender for the licence.

Yet, though the State has put so much at stake on the licence mechanism, the High Court judgment indicates a meteoric crash in the State's ability to manage the process it has begun. It is a difficult job. The State is dealing with big, advanced, highly-organised and focused corporations, driven by the opportunity for profit. It will need to bring itself up to speed in order to serve the interests of the consumer and the citizen, and avoid dropping the ball in the sprint to an information-based economy.

The positive effect of the High Court judgment is that it shows the lengths to which the courts (and in that sense the State) will go to ensure that the process is a fair one. G

Note: At the time of writing, this judgment is the subject of a full Supreme Court appeal scheduled for 18 January 2000.

Diarmuid Rossa Phelan is a Dublin-based barrister.

Letters

Immigration solicitors urgently needed

From: Sue Richardson, Anti-Racism Campaign, Dublin

The Anti-Racism Campaign is seeking to contact solicitors and barristers with knowledge of immigration law and an interest in working with refugees and asylum-seekers. Since refugees have only relatively recently been arriving in substantial numbers, and the laws are becoming more restrictive and delineated, we have found it difficult to find many solicitors with knowledge of this area of law. There are now too many refugees and asylum-seekers needing assistance from the handful of solicitors who are fully conversant with this area and who have done brilliant work.

I would appeal to any interested solicitors to contact the Anti-Racism Campaign on 087 2338143 or 087 6996046 so that we can pass their names and telephone numbers on to the people who need their services. We would appreciate any help that you can give.

Top marks for *Powers of Attorney Act*

From: Walter Beatty, Dean, the Faculty of Notaries Public in Ireland

Approximately six years ago, this faculty was granted observer status to attend the twice-yearly meetings of the *Union Internationale du Notariat Latin*. Every year the UINL examines a number of legal topics which are of interest to the European members of the organisation.

I served upon the sub-committee that dealt with the topic of enduring powers of attorney. I feel it would be of interest to practitioners to know that the other members of the committee were most impressed by the *Powers of Attorney Act, 1996*. Their opinion was that the Irish statute law in relation to enduring powers of attorney was excellent. Indeed, they commented that it was better than the other statutory provisions which had been introduced by a number of the other European countries which reported to the sub-committee.

Alarming implication in superior court rules

From: Richard E McDonnell, Ardee, Co Louth

I refer to the warning in the practice note published in the August/September issue of the *Gazette* under the heading *Section 7, Courts Act, 1964: superior court rules* (page 32).

The implications are alarming: the rules would appear to mean that if a civil bill is issued in the local circuit office a few months before the three-year period elapses, all a defendant has to do is to avoid service for a few months (not too difficult a task) to defeat a claim.

The same situation obtains in the District Court. This rule does not appear to apply to the High Court. Surely this is an unsatisfactory situation and one that should be addressed urgently by the Litigation and Arbitration Committee?

BRIEFLY

ICCL calls for help

The Irish Council for Civil Liberties would like to hear from solicitors who are sympathetic to the needs of involuntarily-detained patients and would be willing to advise them, if necessary. Anyone interested can contact the ICCL on 01 878 3136.

New degree combines Irish and French law

The increase in Franco-Irish trade, as well as the increasing role of the EU on Irish affairs, has led to the need for more specialisation in law, tax and commercial affairs. In response, UCD's Law Faculty has launched a new degree, the BCL (law with French law). It enables students to spend their third year at a French law school, leading to an award of *Diploma in French law.*

Solicitor's application for reinstatement rejected by the High Court

An application by a former Galway solicitor for reinstatement to the Roll of Solicitors eight years after he had been struck off was refused by the High Court last month.

Frank Burke, who practised under the style and title of Frank Burke & Co, was investigated by the Law Society in 1985, and this investigation found that he had used client monies in breach of the *Solicitors' accounts regulations* and had allowed a deficit to occur on the client account. As a result of this enquiry, he was fined £20,000. Burke also acknowledged that he had frustrated the original enquiry and sought to mislead the Society's investigating accountant.

The Society referred Burke to the Disciplinary Committee, which then sought a High Court order striking his name from the Roll of Solicitors. This was granted in May 1991.

The Society opposed Burke's application for reinstatement. After a full hearing, the President of the High Court, Mr Justice Frederick Morris, refused Burke's application and, in a written judgment, stated: 'I am satisfied beyond any doubt that there is no evidence upon which I could conclude that he is a fit and proper person to practise as a solicitor. On the contrary, all the evidence shows that he is not, in as much as he is not fit to manage clients' money and therefore I conclude that it is not open to me to make an order'.

BRIEFLY

Ireland-Romania tax treaty

The Irish and Romanian governments have signed a double-taxation convention. If the convention is ratified by the Dáil and the Romanian parliament before the end of the year, it will come into force at the beginning of 2000. The text of the convention is available on the Revenue Commissioners' web site: http://www.revenue.ie.

IALT mid-year meeting

Irish Association of Law Teachers will hold its mid-year meeting at Blackhall Place on 20 November. There will be panels on European Community law (including updates in competition law), child law, procedural law and private law. For further information, contact IALT president Bruce Carolan on 01 402 3016.

Validity of Society's investigation upheld

A 19-day judicial review hearing of the High Court ended in a favourable ruling for the Law Society last month, when Mr Justice Kearns held that an investigation by one of the Society's investigating accountants into a Dublin solicitor's practice in 1993 was 'a proper one within the meaning of the *Solicitors' accounts regulations*'.

The proceedings were brought by Giles Kennedy, practising as Giles J Kennedy & Co, who had challenged an investigation under the *Solicitors' accounts regulations* initiated by the Society in 1993, arising out of which a decision had been made to refer him to the Disciplinary Tribunal of the High Court.

Kennedy brought judicial review proceedings to quash that decision, alleging that the investigation which had been conducted by the Society was unlawful and invalid. He argued that the Society's investigating accountant had conducted an 'unauthorised and unnecessarily wide trawl' through the files in his office, rather than merely sampling on a random basis for verification and vouching of financial records. It was submitted on behalf of Kennedy that a major consideration, if not the major consideration, underpinning the decision to investigate his practice was the question of fraudulent claims. It was further submitted, among other things, that investigation of fraud was not the business of the Law Society, but was a matter for the Garda Fraud Squad or possibly other agencies.

Dublin's Four Courts: scene of the 19-day hearing

It was submitted on behalf of the Law Society that the *Solicitors' accounts regulations* entitled an investigating accountant to unfettered access to the files of a solicitor and to look to the propriety of transactions on a client account. Where suspicions of fraud were aroused, the investigating accountant had a clear obligation to explore that matter fully. It was further submitted that there was no sense in which the Law Society, in an effort to reduce fraudulent activity among its members, could be said to be pursuing an unlawful or improper purpose once the entitlement to take fraud into account was present.

In finding against Kennedy on all issues argued in the course of the hearing, Mr Justice Kearns said: 'Where an investigating accountant stumbles across fraud, his obligation is, as far as may be practicable, to get to the bottom of it. This is not something which is spelled out in the regulations but which arises from the general law and from the principles and guidelines by which accountants bind themselves … Put simply, an auditor on encountering fraud, cannot simply pass from it'.

And he continued: 'If the investigating accountant, therefore, has the right and duty to consider and investigate fraud, the question arises as to when, if ever, he reaches a line or point beyond which he cannot go. In this regard, it seems to me that where an instance of fraud is uncovered in the accounts of a solicitor, the investigating accountant has a right and duty to explore any area of possible fraud which may be reasonably connected with the fraud found within the books, even if that connected area of fraud is not to be gleaned from the books themselves.

'In this case, such a reasonable connection did exist, because the same area of litigation was involved, the same individual who was in receipt of fraudulent payments within the office was in charge of personal injuries litigation and the payments were specifically made to him for client referrals, which was the very subject matter of the Law Society's concern in that they believed one Rossi Walsh, a notorious criminal, was at the time referring bogus personal injury claims to the applicant's office. For this reason, I believe that the extended investigation in this case was a proper one within the meaning of the *Solicitors' accounts regulations*'.

Mr Justice Kearns then went on to say: 'An investigation under the regulations should not be impugned unless it can be shown that the investigation of the books and records was merely a colourable device or cover for the pursuit of some other unauthorised or improper considerations. I do not believe that there was any irrelevant or improper consideration at work here'.

In summing up, the judge also found that there was no requirement for a *prima facie* case before the Society could begin an investigation of a practice under the *Solicitors' accounts regulations*. 'It can be done routinely and some inspections may be more extensive than others, if relevant concerns so dictate', he said. On the issue of client confidentiality/privilege, he said that this was governed by the resolution of the main issue as to whether or not the investigation was authorised under the regulations. Since he had ruled that the investigation was so authorised, 'no defence of client privilege can be raised in these proceedings'.

And he concluded: 'The investigating accountant was not, in her report, guilty of any behaviour which could invalidate her report on the grounds that it lacked objectivity or independence'.

Costs were awarded to the Society, with a stay pending appeal. The matter is being appealed to the Supreme Court.

In a brief statement after the High Court ruling, Law Society Director General Ken Murphy said: 'The Society welcomes the finding of the High Court against the applicant on all issues in this case. It is very important in the public interest that the Society's powers to investigate solicitors' practices have been confirmed by the court'.

LawTech exhibition

The annual LawTech exhibition and IT seminar will be held in Blackhall Place on Friday 5 November. The theme of this year's seminar, organised by the Practice Management/Technology Committee, is the continuing effects of the IT revolution on solicitors' practices. The seminar is entitled *Managing change: the Year 2000 and beyond*.

Galway Law Alumni reception

To celebrate the 150th anniversary of the enrolment of the first law students in Queen's College, Galway, the Galway Law Alumni in Dublin are hosting a Gala Reception in the Law Society, Blackhall Place, on Friday 26 November at 8pm. All Galway graduates are welcome.

The Legal Connection

Efficient - Profitable - Competitive

LET CK/OPSIS PROVIDE YOUR OFFICE WITH THE NUMBER ONE PRACTICE MANAGEMENT SYSTEM

The Law is your expertise, Information Technology is ours.
Let CK/OPSIS be your partners, to bring your practice into the next century

- Leading Irish Case Management System
- E-mail/Diary
- Network design & Installation
- Teleworking/Remote access
- Training & Support

Well "Practiced" Solutions!

CK Business Electronics

17-21 Temple Road
Blackrock, Co. Dublin
Tel: 01 2055388
E-mail: mary.mcevoy@ck-business.ie
http://www.ck-business.ie
CONTACT: MARY MCEVOY

OPSIS Ltd.

Unit 1C Stillorgan Ind. Park
Blackrock, Co. Dublin
Tel: 01 2942903
E-mail: opsis@iol.ie
http://www.opsis.ie
CONTACT: PAULA GIBSON

Sheedy journalist wins Society's media award

Barry O'Kelly, the reporter who broke the Philip Sheedy story that eventually led to the resignation of two judges and a county registrar, has been named Overall Winner of the Law Society's *Justice Media Awards*. The competition aims to reward outstanding journalism in the printed or electronic media which contributes to the public's understanding of the law, the legal system or any specific legal issue.

At a ceremony in the Law Society's Blackhall Place headquarters last month, the Attorney General, Michael McDowell, and the President of the Law Society, Patrick O'Connor, presented the prize to O'Kelly, a reporter with *The Star* newspaper. As Overall Winner, he received a Dublin Crystal vase and a cheque for £1,000.

The winners in each of the five other categories in the competition won a *Justice Award*, comprising a Dublin Crystal *Joyce* plate (and a £500 cheque), with the runners-up receiving a Certificate of Merit (and a cheque for £100).

Through a glass darkly: Barry O'Kelly accepts the prize as Overall Winner of the 1999 *Justice Media Awards*

The winner of the *Justice Award* in the **Daily Newspapers** category was Margaret E Ward of the *Irish Times* for her series of articles on William Geary, who was sacked from the Garda Síochána in 1928 for allegedly accepting a £100 bribe from the IRA. Geary, now resident in America, has always denied the charge and petitioned successive governments to re-open the case. As a result of her stories, the Government reviewed the Geary case and said he was entitled to have his good name and pension rights restored.

A Certificate of Merit went to Pat Brosnan of *The Examiner* for a two-part article explaining the ins and outs of an Irish divorce and how the children of separating couples are affected by the legal procedures involved.

In the **Non-Daily Newspapers** category, the *Justice Award* went to Tom Mooney of *The Echo* in Enniscorthy for his article *In strictest confidence*, which graphically highlighted the difficulties involved in extracting data from government departments – even when armed with a copy of the 1997 *Freedom of Information Act*.

Two Certificates of Merit were awarded in this category:

- Catherine Cleary of the *Sunday Tribune* for an article on sentencing policy
- Ted Harding of the *Sunday Business Post* for an article on the new *Planning Bill*.

In the **Magazine** category, the *Justice Award* went to the magazine that won the award last year, *Consumer Choice*. Carol-Anne O'Reilly's series of articles on a wide variety of legal issues meant that *Consumer Choice* has now won the top award in this category three times in total.

The Certificate of Merit was awarded to Liz Walsh of *Magill* for her article on the legal problems facing the adult victims of child abuse, entitled *Church and State unite to stonewall victims*.

The *Justice Award* in the **Radio** category went to Diarmaid MacDermott of the Ireland International News Agency for an interview on the *Today with Pat Kenny* show on the trial of four men charged with the murder of Garda Jerry McCabe.

A Certificate of Merit was awarded to Bill Meek of RTÉ for his series on people with disabilities, called *Not so different*.

The *Justice Award* for **Television** was presented to RTÉ's Mary Raftery for her *States of fear* documentary series. The judges called it 'the most powerful piece of broadcasting in many a year'.

Gazette scoops another prize

The *Gazette*'s Barry O'Halloran accepts a Certificate of Excellence from Enterprise and Employment Minister Mary O'Rourke at the *Irish Independent*/CIBI magazine awards last month. O'Halloran won the award in the best writing category for his article on corporate art in solicitors' firms (*Gazette*, June 1999). This is the fourth time in three years that the *Gazette* has won a CIBI award

O'Donnell Sweeney on the move

O'Donnell Sweeney, Solicitors, has acquired the lease on the A&L Goodbody office block at Earlsfort Terrace, Dublin 2. The firm will move from Fitzwilliam Place to their new offices in December.

Warning: Year 2000 and computerised accounts packages

The Law Society's Technology Committee would like to bring to the attention of members of the profession the dangers for their practices regarding their computerised accounts and the Year 2000 problem.

Many solicitors will have accounts packages that are not Year 2000 compliant. It will be the responsibility of each office to ensure that their system operates correctly on 1 January 2000. They should **immediately** contact their supplier to confirm whether their package is Year 2000 compliant and, if not, what steps will be taken to remedy the situation and when these will be put in place. This confirmation should be obtained in writing and the promised date followed up. If proper steps are not taken, the packages involved will not be operable after 31 December 1999. It will be very difficult to solve the problem at that stage as there will be a great shortage of computer personnel.

The Law Society does not have the resources to ensure that software suppliers take the necessary measures, and the regulatory authorities of the Society have made it clear that the onus lies with each office to ensure that their system is in order. The following points should be borne in mind:

- It is the responsibility of each office to ensure their accounts system works properly
- The Law Society does not have the resources to take part in remedying the problem
- There will be little chance of remedying the problem unless you formulate a plan of action now
- It is not enough to accept your software supplier's assurance. Follow the matter up until you receive your new software and have it fully approved by your own accountant.

¡Ay Cara

Buying property

A buoyant domestic economy and the pleasure of owning a property in the sun have made investment in Spanish property an attractive proposition for many Irish people. Rafael Berdaguer explains what's involved in buying the Spanish holiday home of your dreams – and how to avoid the possible pitfalls

If you are thinking of buying property in Spain, it goes without saying that you should use the services of a reputable real estate company to help you find a home that will meet your needs and your budget. And, with *caveat emptor* in mind, no deposit should be paid to anyone other than your Spanish lawyer until a prior inspection of the title and the necessary searches have been carried out. These should show that the property is registered in the seller's name, is free from any charges and encumbrances and that all the appropriate taxes have been paid. The lawyer can also undertake searches in the local council to verify the zoning of the surrounding plots to your property, especially when one of these is a green area.

Naturally, it is advisable for you to arrange a survey of the property, especially if it is more than ten years old. In Spain, the builder of a property is liable for any structural defects which occur within ten years of the issue of the architect's Certificate of Completion of Works. After this point, there is no remedy from the builder, so rectification of any potential problems can only be sought from the seller.

Private contracts

Once the searches have been conducted to your satisfaction, your lawyer will negotiate the terms of the contract with the seller or his lawyer. There are a number of different private contracts to be signed at this stage to secure the purchase of the property: deposit contract, contract of purchase and sale, option contract, and so on. The buyer will pay a deposit of around 10% when the vendor agrees to sell the property, and the transaction is generally completed within a fixed time-scale, usually four weeks. At this stage, the balance of the purchase price must be paid and the title deeds are then signed by the parties in the presence of a notary public.

The type of contract required will be assessed by your lawyer, but it's worth noting that not all private contracts will have the same effect. For example, the seller can pull out of the transaction by paying compensation to the buyer, usually twice the amount of the deposit paid. But this might be a very unsatisfactory outcome for the buyer who really wanted to acquire the property on which he paid a deposit. Such a situation can be avoided if your lawyer draws up a contract committing the vendor to sell the property on the agreed date once the remaining conditions of the contract have been met, especially the payment of the balance of the purchase price.

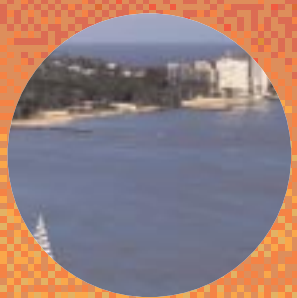
Property under construction

There's an obvious risk when buying property off the plans or under construction since it may not be completed by the due date – or, indeed, built at all. In order to protect the prospective purchaser from any of these eventualities, Spanish lawyers may well demand a 'bank guarantee' from the vendor under which any amounts handed over by the purchaser (plus interest) shall be returned to him should the property not be started by a certain date or not completed when agreed.

The specifications and plans of the property must be agreed and attached to the contract. If the property is within a complex, another plan of the common elements should be attached, showing the location of the gardens and the pool. I have come across cases where the developer retained the land where the pool or other common elements were supposed to be. In one such instance, the developer went bankrupt and the residents were left without a swimming pool because it had been acquired by a creditor in payment of his debt. The residents ended up having to buy it back from the creditor. That's why it's important to know which are the common areas of the development and to conduct a proper search to verify that these belong to the developer from whom the purchaser is buying the property.

mba!

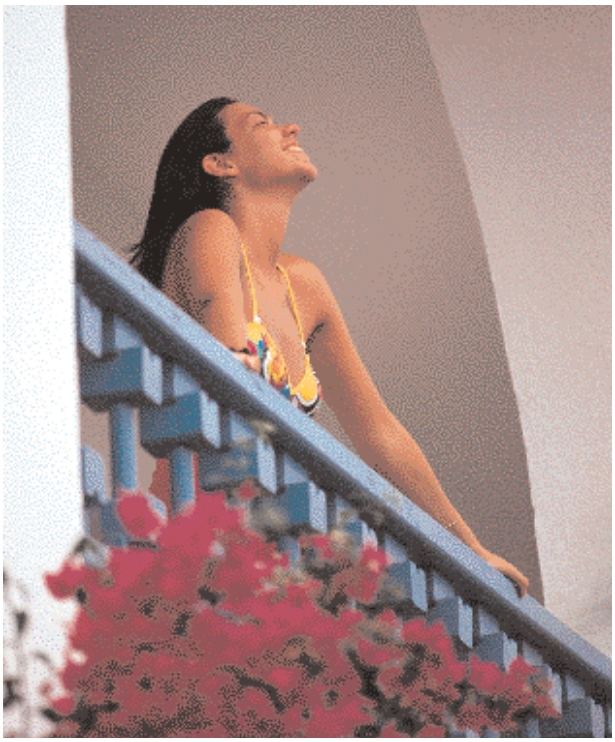
in Spain



Completing the sale

On the agreed completion date, the title deed or *escritura* is executed by the parties before a notary public and the title is vested in the buyer's name. Under normal conditions, the buyer makes the final payment upon completion before the notary. If the vendor is a non-resident, Spanish law obliges the buyer to withhold 5% of the purchase price and to pay this to the tax authorities as a payment on account of the vendor's capital gains tax (CGT) liability resulting from the sale. If this sum is not withheld and paid over to the tax authorities, the property conveyed will be liable for that CGT. This will be shown in the land registry books.

For his part, the vendor must produce a CGT assessment within four months from the completion date, and the withheld 5% will either be deducted from any tax to be paid or refunded (in whole or in part) if it exceeds the CGT due. The capital gains tax rate for non-residents is 35% on a net gain.



The original title deed will remain in the office of the attesting notary and he or she will issue an authorised working copy which must be processed by the purchaser for paying the taxes involved and registration in the local land registry. Taxes must be paid within 30 days of completion or else surcharges will apply.

Cost of acquiring property

The costs involved in acquiring a Spanish property are different, depending on whether it was bought from a developer or bought second-hand. In the former case, the buyer must pay 7% VAT plus 0.5% stamp duty; if the property is second-hand, then only transfer tax of 6% on the price agreed must be paid.

Apart from the transfer tax, the buyer must pay land registry fees and his own legal fees. The land registry fees are based on a scale and range from 35,000 pesetas to 150,000 pesetas, while legal fees vary from 1–2% of the purchase price.

In addition to these costs, there are also the notary's fees and a local tax known as the *plusvalía* to be paid. Although, strictly speaking, these should be paid by the vendor, it is common practice for the vendor to ask the buyer to foot the bill for all the taxes and disbursements on the transaction. The *plusvalía* is a one-off local tax on the increase in the value of the land on which the property is built since the last recorded transfer of ownership and is based on the value of the property for local rates purposes (*valor catastral*). I would strongly advise anyone buying a Spanish property to check the amount of this tax with their lawyer before agreeing to the vendor's request to pay it.

So, in summary, the buyer has to allow for an additional 10% of the purchase price to meet the transfer costs involved in the transaction.

Foreign company registration

Up until recently, there was a tendency to use foreign companies as a vehicle to register property bought by a non-resident in order to avoid paying the transfer tax and death duty. These could be avoided if the shares were exchanged abroad so the authorities would not know when the property was changing hands. Nearby Gibraltar did a booming business, with the result that there are now more companies registered in Gibraltar than there are people living there.

In response, the Spanish tax authorities passed a law obliging non-resident companies owning real estate in Spain to pay an annual tax of 3% on the value of such property for rates purposes. This *valor catastral* bears no resemblance to the real value of the property and normally does not exceed 50% of this. (For example, a property with a real value of 25 million pesetas may have a *valor catastral* of 10 million.) A few entities are exempted from paying this tax, such as non-profit organisations and companies which develop business in Spain and which can be differentiated from mere holding companies for Spanish property. However, it is still possible for a non-resident company to avoid this tax if both the company itself and the ultimate beneficiaries of the capital of the company are resident in a country which has a double-taxation treaty with Spain (with provision for exchanging information between the tax authorities of both countries).

Since the tax was introduced by the Spanish authorities, the number of foreign investors using an off-shore company for their investments has fallen dramatically. This is not really much of a surprise since 3% of the *valor catastral* can amount to a considerable expense and only those who for some reason do not want to disclose their names as beneficiaries of the property now choose such a route.

Making a Spanish will

Those who buy property in Spain are strongly advised to make a Spanish will confined to their Spanish assets as this will save their heirs having to translate, notarise and legalise any grant of probate or letters of administration issued in their own country. It will also allow them to simultaneously wind up the Irish and the Spanish estates of the testator.

Given the complexities of some types of Spanish transaction, you would be well advised to seek the services of a Spanish lawyer if you or your clients are considering investing in Spanish property. But then, as lawyers, you will know that already! G

Rafael Berdaguer is a lawyer with the firm Rafael Berdaguer Abogados, based in Marbella, Spain.

Accentuate the positive

Traditional disciplinary procedures work on the illogical premise that if an employer treats an employee progressively worse, the employee will get progressively better. So is there another way? Dr Mary Redmond outlines how a more constructive approach to employee discipline can make a difference

Traditionally, employer-employee disciplinary procedures are corrective. They provide for a series of punitive steps, which may be chosen or passed over, depending on the circumstances. The number of steps varies between three and five, the average being four. Typically, they are:

- A verbal warning, which is noted in the personnel file: the employee is told that if an infraction occurs again within a specified period, a written warning will follow
- A written warning, which is placed in the personnel file: the employee is told that if an infraction occurs again within a specified period, a second written warning or more severe disciplinary action will follow
- Suspension for a period of time without pay, with a record of this action placed in the personnel file: the employee is told that if an infraction occurs again within a specified period, dismissal will follow
- Dismissal.

A typical progressive system contains the additionally vital element of due process or fairness, allowing a right to representation (generally by a trade union or work colleague) which is usually confined to the steps following from the first written warning.

A warning is usually cleared after a specified time, usually six months, if there is no recurrence of the wrong.

The step-by-step system outlined above applies to issues of competence, capability and conduct (other than gross misconduct entitling an employer to dismiss an errant staff member without notice). In relation to suspected gross misconduct, a disciplinary procedure will typically involve precautionary suspension of the employee on full pay to enable the employer to carry out a full investigation. Once again, natural justice must be fully respected.

Depending on the outcome, appropriate disciplinary action will be taken (or not). A precautionary suspension needs to be distinguished from suspension without pay, which is a form of disciplinary action. This distinction should be clear in the procedures.

It is crucial for the employer to list all possible forms of disciplinary action other than warnings, suspension and dismissal in the contract of employment (for example, demotion, transfer, freezing of pay, reduction in salary and so on). Otherwise, it would be in breach of contract if it were to impose such sanctions. (For a comprehensive disciplinary procedure which the Employment Appeals Tribunal incorporated in full into its determination, see *Fogarty v Dunnes Stores Munster Company* [UD 548/1996].) It goes without saying that a list of employee wrongs should also be compiled, with the usual caveat that the list is 'not exhaustive'.

The constructive approach

A flaw in traditional disciplinary procedures is the illogical premise that if an employer treats an employee progressively worse, the employee will get progressively better. Some employers opt for a more constructive approach.

Although still rare in Ireland, the constructive approach is gaining ground, particularly (in my professional experience) among 'information age' companies with younger, skilled employees. For such employers, traditional disciplinary procedures are unbalanced, and reminiscent of master-and-servant-style relationships.

Even in an established traditional procedure, elements of a constructive approach can be grafted on.

A typical constructive approach can be summarised in this way. At the time an employee is taken on, the employer spends time ensuring that the new member of staff understands and accepts the values of the employer. This presupposes that the company has thematised its values and is clear about them. The employee may be asked not only to acknowledge receipt of standard contractual documents but also to sign a statement detailing and committing the employee to the employer's rules of conduct. Alternatively, this statement may be incorporated in the contract of employment.

The employer's values often centre around five themes: values to do with the business's customers or clients; its employees; its code of business conduct, internally and externally; its stakeholders; and community relations. Each theme is detailed in accordance with what mat-

'The constructive approach to staff discipline puts the onus fairly on the employee'

ters to the particular work environment and the company concerned.

Joining a company with a comprehensive set of values can be a differentiating factor in the jobs market for potential employees. Research shows that the most effective employees already have a strong sense of their own values. They are the ones that companies will probably want to attract.

If a meeting becomes necessary, say, because of the employee's poor performance in relation to a customer, it will resemble a 'refresher' course. The employer will discuss with the employee his recollection of the values for which he signed on. The employee will be asked if he remembers this commitment. At the conclusion of the meeting (and depending on the circumstances), the employee will be asked to restate that commitment. Continued failure will signify that he no longer wants to be employed by the company.

The employee will emerge from such a meeting with a clear choice: he may decide for or against trying harder, in line with the commitment he has made. If he had been dealt with under the traditional system, he would almost certainly feel punished.

If a second such meeting is necessary, the employee will be asked not to verbalise but to sign a reaffirmation statement of agreement and commitment. Right from the time the employee is hired, and through such meetings, he is explicitly accepting personal responsibility for his conduct.

If another meeting is appropriate, the employee is asked whether he wishes to remain employed with the employer. If he answers 'yes', he signs another statement which affirms his desire to remain employed, and reaffirms his agreement and commitment to the employer's values.

As in the traditional approach, only one 'stage' will be necessary if the employee is alleged to have seriously disregarded the company's value system.

Management training

Management needs training in the constructive approach for such meetings, although much of the groundwork will have been done at the time an employee is taken on.

The constructive approach places the onus fairly on the employee. He is given a choice to adhere to the employer's standards of conduct. These are stated explicitly and written down from the start of his employment. He is made aware of them and of the sort of employer he is joining. The constructive approach fits in with, and complements, anti-stress steps initiated by employers, such as comprehensive induction training for employees on relationships at work.

In the traditional approach, disciplinary procedures are detailed generally because it is a requirement under statute, and an employee is unlikely to read them. In the event of a breach, there is punishment.

In the final analysis, under the constructive approach it can be said that an employee effectively dismisses himself. That is not to suggest that in Ireland's unfair dismissal law there is any such a thing as 'self-dismissal'! But it is obvious that there are psychological, behavioural and legal differences between the constructive and the corrective approach.

It has been written that 'employee discipline is the real drama of labour relations … It is a method for the maintenance of authority by management'. The first sentiment is unwise, the second questionable, in the fast and ever-changing world of work. G

Dr Mary Redmond is a solicitor and author of Dismissal law in Ireland *(Butterworths, 1999). This article is an expanded extract from her book.*

ESOP

Share and

There is a whiff of resentment in the air. While employers, top professionals and property owners seem to enjoy the choicest cuts, the folks on the shopfloor feel they are being left with the scraps. Could employee share-ownership plans help spread the benefits of our current prosperity a little more evenly? Kyran Fitzgerald reports

Until quite recently, it had been thought that Partnership 2000 would be the last national deal of its kind to be negotiated for some time to come. Instead, there would in all likelihood be a return to free collective bargaining. Since the mid-90s, the industrial relations climate, at least in the public sector, has hardened appreciably. We have had the 'Blue Flu' go-slow among the gardaí and the first-ever nurses' strike.

But the picture is not all black. Firms are currently developing new 'gain-sharing' models. In a number of cases, they are being driven by the need to ensure the co-operation of employees with major programmes of change management within organisations. In many others, the driving force for such reforms lies in the increasingly tight labour market.

The renewed emphasis on profit-sharing arrangements has begun to improve the climate between the social partners, and there is a belief that Finance Minister Charlie McCreevy is holding in reserve the promise of tax concessions for a raft of employee stock-ownership arrangements. Such concessions will be used as a carrot, along with a further programme of generous income tax cuts across the board, to encourage the trade unions to buy into another national programme.

Ireland's first ESOP

The most adventurous and expensive experiment in gain-sharing is that undertaken at Telecom Éireann (now known as Eircom), the broad details of which are pretty well known by now. The employee share-ownership plan (ESOP) was formally endorsed by the company's 11,000-strong workforce a year ago. Under the agreement, the employees have ended up with a 14.9% stake in Telecom Éireann of which 5% is being handed over in return for changes in work practices.

An employee stock-ownership trust (ESOT) has been established. The trust is initially holding 9.9% of the company's shares. Part of the cost of the shares is being met by the company, which is providing £100m in what amounts to an accelerated payment in lieu of future pension contributions. Prior to completion of the deal, the company was responsible for funding staff pensions. Now, employees are to pay over 5.3% of salary towards their pension fund. The remaining part of the cost of the initial 9.9% stake is being met by the employee trust, which has arranged a loan of almost £100m from a consortium headed by a Swiss bank.

It will be some time, perhaps several years, before employees or former employees will actually get their hands on Telecom Éireann shares. In the meantime, notional allocations of shares will be made to the employees and to anyone who was an employee at the time the trust came into being.

These notional allocations are rather like the chips people are given in a casino. They will build up until the time comes for them to be cashed in. What is clear is that the rules governing these allocations have had to be drafted with great care so as to ensure that everyone is treated on the same basis. But what appears straightforward in theory can turn out rather differently in practice.

According to Maeliosa O'Culachain, manager and secretary to the Telecom Éireann ESOT: 'There has been a much higher commitment in terms of administration required than we expected'. She and the other trustees have been working closely with trust expert David Beattie, a partner in the law firm O'Donnell Sweeney.

The trust document has been drafted to cover tricky situations such as the death of an employee or a marital breakdown. The personal representatives of a deceased trust beneficiary will be

Everybody wants to get their hands on a piece of the Celtic Tiger

fables share alike

entitled to an allocation on behalf of those with claims on the deceased's estate. The trust has yet to agree a specific formula, though this should happen soon.

Legal formalities aside, it is clear that Telecom Éireann staff stand to reap a rich harvest. Employees may have to wait some time yet before they have shares in their hands but already they have a nice nest egg accumulating. No wonder a few people have wondered whether the Irish taxpayer, who poured billions into the company, has not been just a little short-changed.

Other incentives

In discussing terms such as ESOP and ESOT, it is important to be aware of the distinction between these concepts. ESOTs are still as rare as hens' teeth. One is up and running at Telecom Éireann, another has just recently got the go-ahead at ICC Bank.

On the other hand, approved profit-share schemes are quite common, and a number of these are described by the companies in question as ESOPs. But the full panoply of an employee trust with the power to borrow to acquire shares on behalf of the staff is not in place. Irish Permanent, for example, operates a successful approved profit-share scheme (APSS) which is described as an ESOP.

Such schemes are increasingly popular, being seen as a tax-efficient way of rewarding employees. If an employee receives shares in the company which they then hold on to for the required minimum period, they will almost certainly be far better off than if they were to receive a bonus taxable at the top income tax rate.

Under an APSS, employees are given the right to convert profit-sharing bonuses into shares in their employer company or its parent. All employees must stand to benefit. In this sense, the scheme differs from conventional share-option arrangements usually made available for select groups of key managers and other employees.

In this year's *Finance Act*, a new tax break was introduced for employees saving up to £250 a month over a fixed period of either three, five or seven years. The employees have the option of buying shares in their employer or of taking the proceeds as a tax-free lump sum. Irish Life has had such a scheme in place for quite some time. Employers are keen on save-as-you-earn arrangements as they do not cost them as much as a conventional profit-share arrangement.

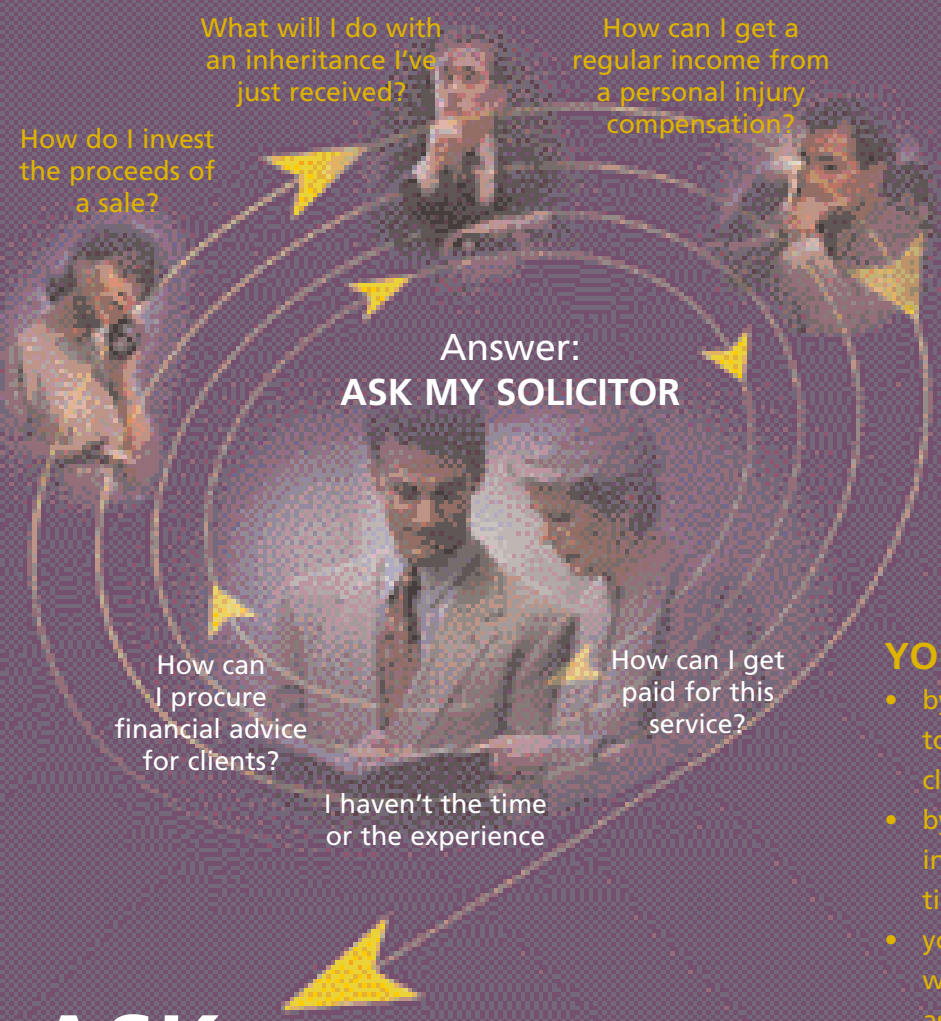
But the current system of tax breaks is not geared to the needs of privately-run companies, as John Bradley, head of KPMG Personal Financial Services, points out. 'Employees of quoted companies or their subsidiaries can avail of approved profit-share scheme tax breaks quite easily. As a result, indigenous Irish-owned technology companies competing in the same market are often put at a disadvantage'.

Creating a market

The problem is that shares in privately-owned Irish companies are not traded. APSS schemes are really only of value if there is a potential to float the company. The real obstacle is the difficulty in creating a market in the shares so as to allow for a profitable exit for the employee shareholder down the line. Many firms prefer to offer share options to a limited group of staff. If they are going to float, they usually do not want to see the jam spread among all the staff, though there are signs that this attitude may be changing somewhat under the pressure of labour market conditions. After all, these days top quality secretaries are almost as hard to come by as computer whiz-kids.

According to Liam Hennessy of Farrell Grant Sparks Consulting, which has advised trade union groups on a number of innovative employee stock-option arrangements, a small number of ESOTs are in the pipeline in the private sector. However, the amount of shares to be granted are not of the same order as in the case of Telecom Éireann or ICC Bank. This is understandable, as people who have built up a business are more reluctant to let go of too much of the fruits of their risk-taking. Yet smart bosses are now realising that it is better to have 80% of a large pie than to be left with 100% of a small one.

The Irish Software Association is pressing for the extension of tax breaks to share options across the board, arguing that this would allow Irish high-tech companies to head off growing labour inflation. In the case of share-option schemes restricted to a limited number of employees, 46% income tax liability applies. This has the effect of restricting their usefulness. As a result, the development of many Irish



ASK SOLICITORS INVESTMENT SERVICES

Telephone 604 8474 for details

YOU BENEFIT ...

- by extending the range of services to your clients, you can increase client loyalty
- by providing access to quality investment advice, client satisfaction will increase
- you can procure financial advice without the rules, regulations and associated administrative responsibilities of individual regulation
- you are paid through a 50/50 commission sharing arrangement

YOUR CLIENTS BENEFIT ...

- by being offered sound, impartial advice and practical help on how to invest their money wisely
- by knowing that their interests are safeguarded with care and consideration
- full commission disclosure
- whatever their investment needs, there is a service that will suit them

CAN YOU AFFORD NOT TO INVESTIGATE THE SERVICES AVAILABLE THROUGH SIS?

companies is being held back due to a shortage of skilled people.

The best guess, however, is that the Government favours a focus of tax breaks on schemes that benefit all employees. Last year the Institute of Taxation suggested to the Minister for Finance that a new profit-share tax break be introduced under which privately-owned companies would be allowed to use cash instead of shares in a new-style approved profit-share scheme arrangement which would be open to all employees in the firms in question. However, the Revenue remains suspicious of such proposals, fearful of undermining the tax base.

In the meantime, Irish firms are forced to resort to less satisfactory gain-sharing arrangements, the effect of which is frequently lessened by adverse market conditions. In some case, employees have found themselves with just a fraction of the expected bonus as a result of an adverse market shift outside the control of the company.

As things stand, gain-sharing arrangements in this country remain relatively modest by international standards. Typical pay-outs run to 4%–7% of basic pay, though in the case of multinational companies such as Intel profit-sharing bonuses can run to 15%–20%. In the field of structured employee share participation, it is the US-owned multinationals and the Irish State sector which lead the field.

The Telecom Éireann ESOT has broken new

ground, and now the ICC equivalent is almost in place. Once again, ICC employees can expect to end up with a 14.9% stake in the company, with the employee trust borrowing a large sum to buy part of the shares. The ICC arrangement is open to criticism in that one has to question just what sort of concessions in the area of new work practices ICC employees will be handing over in return for their 5% stake.

High price to pay?

An expensive precedent has been set at Telecom Éireann, however justified it may have been in the particular circumstances faced by the company. The taxpayer is paying a high price in return for State employee co-operation with a potentially lucrative privatisation programme.

Equally, trade unions such as MSF, IMPACT and the Communication Workers' Union have played a blinder on their members' behalf. What is clear is that important technical issues remain to be addressed in the case of ICC. It will not be a simple matter of just taking the Telecom Éireann precedent off the shelf. Telecom Éireann was being floated on the market, so the valuation issue was clear. In the case of ICC, however, it is possible that the privatisation could involve a purchase by a private buyer. Equally, a plc buyer might prefer to pay in cash rather than shares.

Under the law as it stands, this could present problems. Approved profit-share schemes are all about transferring shares to employees rather than giving them cash which, strictly speaking, would be taxable as a benefit-in-kind at the top tax rate. It is almost certain that further 'tweaking' in tax legislation will be required. As things stand, there has to be a market for shares held under an ESOT arrangement. The Institute of Taxation's proposals on this may well see the light of day.

Further State companies are waiting in line for privatisation, including the soon to be merged ACC and TSB, the RTÉ transmission network, Aer Lingus and the forestry company Coillte, to name but a few. The demand for the services of trust lawyers and accountants specialising in employee stock arrangements looks set to be pretty buoyant in the years ahead. G

Kyran Fitzgerald is a Dublin-based freelance business journalist.

CONTINUING LEGAL EDUCATION

AUTUMN/WINTER SCHEDULE

BASIC CAT FOR PRACTITIONERS	Hodson Bay Hotel, Athlone	15 November 1999
SETTING UP IN PRACTICE	Blackhall Place, Dublin	17 November 1999
FAMILY LITIGATION POST BRUSSELS II CONVENTION	Imperial Hotel, Cork	23 November 1999
TRUSTS	Blackhall Place, Dublin	25 November 1999
NEW PENSION OPTIONS FOR THE SELF-EMPLOYED	Imperial Hotel, Cork	30 November 1999
DISTRICT COURT PRACTICE & PROCEDURE	Blackhall Place, Dublin	2 December 1999
PENSIONS & THE FAMILY LAW ACTS	Jurys Hotel, Limerick	6 December 1999
THE PRINCIPLES OF PRACTICAL DRAFTING OF DEEDS IN CONVEYANCING TRANSACTIONS	Blackhall Place, Dublin	7 December 1999

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

And justic

The *Employment Equality Act, 1998* heralded the advent of a dramatic change in the way that corporate Ireland could select, recruit and subsequently treat its employees. But while it clarifies many areas, it leaves others open to interpretation, as Adrian Twomey explains

The *Employment Equality Act, 1998* repeals and replaces the *Anti-Discrimination (Pay) Act, 1974* and the *Employment Equality Act, 1977*. In the process, it significantly broadens the area to which domestic employment-equality law applies by outlawing previously permissible discrimination on a wide range of grounds. The specified grounds are: gender; marital status; family status; sexual orientation; religious belief; age; disability; race, colour, nationality, ethnicity or national origins; and membership of the travelling community.

Gender or marital status. The prohibition of gender-based discrimination and discrimination based on marital status is largely just a continuation of the ban on such discrimination originally implemented through the *Anti-Discrimination (Pay) Act, 1974* and the *Employment Equality Act, 1977*. For the purposes of the 1998 Act, there are five distinct categories of marital status: single; married; separated; divorced; and widowed. So it will, for example, be unlawful for an employer to treat a divorced employee differently to his or her colleagues simply because of that divorce.

Family status. The first really new 'ground' introduced by the 1998 Act relates to family status. Section 6(2)(c) of the Act prohibits discrimination between individuals on the basis that 'one has family status and the other does not'. According to section 2(1), one is regarded as having 'family status' where one has responsibility:

- As a parent or as a person *in loco parentis* in relation to a person who has not reached the age of 18, or
- As a parent or the resident primary carer in relation to a person of or over that age with a disability which is of such a nature as to give rise to the need for care or support on a continuing, regular or frequent basis.

The inclusion in the Act of such a provision is of particular benefit to lone parents who would not previously have been protected against employment-related discrimination arising from their status as parents.

Sexual orientation. Section 6(2)(d) of the Act prohibits discrimination between individuals on the basis that 'they are of different sexual orientation'. The enactment of the provision in question is consistent with a number of steps taken by the State in recent years to protect the rights of homosexuals. The *Unfair Dismissals (Amendment) Act, 1993*, for example, has the effect of deeming 'unfair' the dismissal of an individual because of his or her sexual orientation.

A prime example

The need for the extension of that kind of policy into the area of anti-discrimination law was highlighted by cases such as *McAnnellan v Brookfield Leisure Limited* (EEO12/93). In that case, the claimant was allegedly dismissed because of her sexual orientation. She was unable to pursue a case under the *Unfair Dismissals Acts*, however, because she had not completed the necessary one year's continuous service of her employers. Similarly, the Labour Court was unable to be of assistance to her when she brought a claim before it under the *Employment Equality Act, 1977* because that Act did not prohibit discrimination based on sexual orientation.

Religious discrimination. Section 6(2)(e) of the Act prohibits discrimination between individuals on the basis that 'one has a different religious belief from the other, or that one has a religious belief and that the other has not'. The term 'religious belief' is defined as including 'religious background or outlook'.

Age discrimination. Among the more important practical changes effected by the 1998 Act is the prohibition of age discrimination introduced by section 6(2)(f). For example, paragraph (f) prevents companies from pursuing recruitment policies that are designed to attract younger workers. Similarly, it prevents employers from eliminating large numbers of applicants for posts on the basis of age. A legislative development of this nature obviously has significant implications for personnel and human-resource management practice in Ireland.

The Act imposes some limits on the application of the age-discrimination ban. So, for example, section 34(3) provides that discrimination based on age will not be unlawful 'where it is shown that there is clear actuarial or other evidence that significantly increased costs would result if the discrimination were not permitted in those circumstances'. In addition, the Act says that an employer will not be regarded as having acted unlawfully if he discriminates against a person over the age of 65 or under the age of 18.

Discrimination based on disability. In 1996, the then Minister for Equality and Law Reform introduced a Bill which was very similar in its provisions to the 1998 Act. The inclusion in that Bill of a ban on discrimination based on a person's disability was one of the factors that contributed to its downfall. In holding the Bill to be unconstitutional, the Supreme Court said that:

'The Bill has the totally laudable aim of making provision for such of our fellow citizens as are disabled. Clearly, it is in accordance with the principles of social justice that society should do this. But, *prima facie*, it would also appear to be just that society should bear the cost of doing it ... The difficulty the court finds with the section is not that it requires an employer to employ disabled people, but that it requires him to bear the cost of all special treatment or facilities which the disabled person may require to carry out the work unless the cost of the provision of such treatment or facilities would give rise to "undue hardship" to the employer ... It therefore appears to the court that the provisions of the Bill dealing with disability, despite their laudable intention, are repugnant to the Constitution'.

(*In the Matter of Article 26 of the Constitution of Ireland and In the Matter of the* Employment Equality Bill, 1996, *(1997) 8 ELR 132)*

ce for all?

In the immediate aftermath of the Supreme Court's decision, there was some concern that the Government's response would simply be to omit the provisions on disability from the expected re-draft of the Bill. Section 6(2)(g) of the 1998 Act, however, does prohibit discrimination between individuals on the basis that 'one is a person with a disability and the other either is not or is a person with a different disability'.

The word 'disability' is very broadly defined for the purposes of the Act, going so far as to include, for example, 'the partial absence of a person's bodily functions' and 'a disability which ... previously existed but no longer exists, or which may exist in the future or which is imputed to a person'. While the definition used in the 1996 Bill was even broader, one would still have to be a very healthy specimen in order to fall outside the new, narrower definition.

Section 16(3) requires employers to 'do all that is reasonable to accommodate the needs of' persons with disabilities by providing special treatment or facilities, except where this would 'give rise to a cost, other than a nominal cost to the employer'. The reference to 'nominal' costs is presumably designed to address the concerns expressed by the Supreme Court and to avoid having the 1998 Act running into constitutional problems in the future. The rigour of the provisions relating to disabilities is also limited by section 34(3), which provides that discrimination based on disability will not be unlawful 'where it is shown that there is clear actuarial or other evidence that significantly increased costs would result if the discrimination were not permitted in those circumstances'.

Calculating costs

The Act gives no clear guidelines as to what is to be regarded as 'a nominal cost' or 'significantly increased costs'. There are two possible approaches that may be taken by the courts in interpreting these concepts. The first is to indicate a set figure above which costs will be regarded as being more than merely 'nominal'. The second is to determine the appropriate figures on the basis of the size and wealth of the company involved. For larger enterprises with substantial profit margins, once-off costs running to hundreds of thousands of pounds might, for example, be classed as 'nominal', whereas the expenditure of a sum of several hundred pounds could be regarded as 'significantly' increasing costs for the owner of a small corner shop.

Race, colour and nationality. Section 6(2)(h) prohibits discrimination between individuals on the basis that they are of a 'different race, colour, nationality or ethnic or national origins'. None of these terms are defined in the Act, although it would seem unlikely that the absence of definitions will give rise to serious or persistent problems.

While there is little evidence to suggest that such forms of discrimination have constituted a particular problem in Irish workplaces in the past, it would seem almost inevitable that the number of problems in this area will increase as the workforce becomes increasingly diverse in terms of race, ethnicity and so on.

Membership of the travelling community. Finally, the Act specifically prohibits discrimination between individuals on the basis that 'one is a member of the traveller community and the other is not'. It does not, however, include any definition of the term 'traveller community'. The potential difficulties which may arise on foot of the lack of such a definition are significant. According to the Travellers' Youth Service:

'The traveller population in Ireland is at least 24,000. The figure given by the [Central Statistics Office] of 10,891 has been acknowledged by the CSO, the Task Force on Travellers, and the Government [as not being] a true representation, as the CSO figures only took travellers to be people living in trailers/caravans on the roadside. They did not include travellers living in group housing or county council/corporation-provided housing. All groups involved in the study agreed [the number of travellers] was at least 24,000, if not more'.

An obvious question is prompted by such comments. If the State is unclear as to when one may or may not be classed as a member of the 'traveller community', how are employers to make the distinction with any reasonable degree of certainty? Such a question is unlikely to be satisfactorily resolved until some guidance is obtained from the courts. In the meantime, employers would seem to be well advised to be as inclusive as possible in terms of whom they classify as being afforded protection by the Act. G

Adrian Twomey is a barrister and lecturer in law at the National College of Ireland.

The art of givi

The traditional time for corporate gift-giving is fast approaching. In many business sectors it's common practice to send presents to valued clients, but how common – or advisable – is it for law firms to adopt this marketing approach? Maria Behan shops around for some answers

At a recent seminar on corporate gifts sponsored by the Australian Law Society, the speaker attempted to sway a sceptical audience by citing the wise men who presented the infant Jesus with gold, frankincense and myrrh. But is it wise for solicitors' firms to play the role of modern-day magi with their clients?

Unfortunately, there's no Star of Bethlehem guiding solicitors to the correct path when it comes to corporate gifts. Some firms embrace the practice as a way of demonstrating appreciation and cementing relationships; others view corporate gift-giving as wasteful at best and unethical at worst.

Frank Daly, senior partner at Ronan Daly Jermyn in Cork, was in the audience at that Australian seminar, but he remains unconvinced. 'I would find it embarrassing to "bribe" a client', he says. 'And I think that view is pretty widespread in the legal field'.

Widespread, perhaps, but not universal. According to Charles Searson of Searsons Wine Merchants in Monkstown: 'Some of the bigger firms we do business with have extensive gift lists, and a lot of thought goes into matching the gift with the recipient. And the smart, younger firms are doing the same thing'.

Other law firms adopt a middle-ground approach. 'We might take a client out to dinner or send a gift as a thank-you after a particular transaction, but we don't make a practice of giving out corporate gifts', says Denise Kenny, director of business development at the Dublin firm McCann FitzGerald. 'That wouldn't fit in with our way of doing business'.

Concerns and considerations

The main concern that many solicitors seem to have about corporate presents is that they might be viewed as improper. 'There's an industry fear that gifts can be perceived as bribes', says Ailsa McKinney, managing director of One 2 One Marketing in Dublin. 'But we don't send gifts to friends and relatives to bribe them, and that can be the case with business associates as well'.

Although many enterprises – both inside the legal field and beyond – are skittish about anything that might even hint at impropriety, especially given recent media coverage of shady dealings, McKinney says that client gifts won't be viewed with suspicion if companies follow some simple guidelines. The first rule of thumb is to send gifts only to clients with whom you have a long-term relationship. 'You'll simply look like you're thanking them, not bribing them', she maintains. Secondly, she says, intentions can be clarified by 'a well-worded note', which also makes the gift seem more thoughtful and personal.

One thing that's clearly off-limits is giving expensive gifts to prospective clients. 'That's another matter entirely', says McKinney. She believes the only time that any business should send presents to potential clients is in the course of a well-orchestrated marketing campaign and, even then, the gift should be small and 'clever', never lavish.

A different kind of scepticism about corporate gifts arises not from concerns about ethics, but the bottom line. Yet those who seek to mea-

ing

sure the return on investment from corporate presents will probably be frustrated. 'They're an added expense with a non-quantifiable return – like almost all advertising', McKinney says. But she adds that, like advertising, gift-giving can pay off. 'I advise clients that if they have the budget, they should engage in corporate gift-giving', she says.

Not all solicitors' firms see the value of gambling on uncertain results. 'We spend on advertising, but we haven't really given consideration to corporate gifts', says Cora Crampton, Office Manager at LK Shields in Dublin. 'I know some people are using mouse pads, calendars and

Gift possibilities

Whether you're looking for a present that's modest or lavish, traditional or offbeat, a good place to start is by contacting one of the companies that specialise in corporate gifts. The following is just a sample.

Adlantic Corporate Gifts. Specialising in promotional items, this company offers a wide range of products including golf windcheaters (£32 plus VAT, if bought in quantity) and leather wallets (£10–£15 plus VAT, depending on the quantity ordered and leather quality). If you opt to have items embossed with your firm's name, there will be a one-time set-up charge of about £35, and some gifts will carry an extra per-item charge (usually about £2) for embroidering or engraving. Tel: 01 276 2382; web site: http://www.adlantic-pro.com.

Alternative Gifts. To mark the change in the calendar – or a business relationship that's moving into the new millennium – this company has come up with a simple but elegantly presented set of two champagne flutes accompanied by a card marked '1999-2000' (£40 plus VAT). Tel: 01 283 2966 or 0902 76715.

Bewley's Hampers. Bewley's offers a range of food and wine treats, ranging from *The Victorian*, a wicker basket filled with cakes, sweets and a bottle of Hardy's Australian chardonnay (£26.50) to *The Millennium Gold*, a hamper of delicacies accompanied by a bottle of Krug champagne, eight John Rocha Waterford Crystal flutes and a matching cut-glass bowl (£1,210). The *Chocolate Box*, one of their most popular gift items, includes a range of chocolates and Skellig truffles (£47.50). Tel: 1800 210021; fax: 01 855 1644; web site: http://www.bewleys-hampers.ie.

Clonakilty Country Irish Food Hampers. Choices vary from *The Erin* hamper of tea, marmalade, salad dressings, mustards and chocolates (£25 plus VAT) to *The Aoife*, which includes two bottles of Chilean wine, Sheridan's Liqueur, port, Christmas cake, smoked salmon, cheese, coffee, wild Irish honey and chocolates (£120 plus VAT). Tel: 021 774 727; web site: http://www.dragnet-systemsie/dira/hampers/index.htm.

Dublin Crystal. This company specialises in hand-cut crystal gifts such as the *Dublin Suite* spirit decanter (£52.50 or £59 if engraved), clocks (£43.10; £48.40 if engraved), paper clip boxes (£10.40; £12 if engraved) and engravable paperweights (from £15 to £34.40). Tel: 01 288 7932; fax: 01 283 3227; web site: http://www.dublincrystal.ie.

Lorsha Design. If you're looking for something a bit different, this Newry-based enterprise specialises in hand-painted silk scarves (from £20), ties (from £30), waistcoats (from £80), and wall-hangings and framed pieces (both from £40). Tel: 028 30 250146; web site: http://www.wiredup.net/lorshadesign.

Searsons Wine Merchants. Searsons offers an array of libations, from two bottles of wine for £25 to a more lavish selection that includes five bottles of Louis Roederer Brut Premier and a sixth special bottle of Roederer vintage bubbly (£175). Tel: 01 280 0405; fax: 01 280 4771.

Sheila's Flower Shop. Flowers are a perennial favourite and the arrangements offered here start at £20. Tel: 1800 214114 or 01 676 1232; web site: http://www.sheilas.ie.

Note: Prices include VAT, unless otherwise indicated.

clocks, but there are probably better ways to market. We promote the firm brand as much as we can, but we like to get the firm's name out there in a subtle way'.

Given the nature of the profession, it's understandable that solicitors' firms want to market with subtlety – if they do any marketing at all. 'In general, legal firms don't do as much as other kinds of businesses', says McKinney. 'In one sense, they don't have to market themselves because, like a doctor, once they've established a level of service, they're likely to have a long-term relationship with their client'. Nonetheless, she feels solicitors can lose clients by resting on their laurels since there are often long gaps between opportunities to help a client with a commercial transaction, mortgage or a will – time that can erode loyalty.

Solicitors' attitudes to marketing in general have changed in recent years. 'It's regarded as a necessity now', observes McCann FitzGerald's Denise Kenny. 'We're doing a lot more client entertaining and producing more publications, such as newsletters and briefings on legal issues. We've also got a web site and we're running a lot more in-house client seminars. That's a big change from five to ten years ago when our primary marketing vehicle was our corporate brochure'.

Corporate gift-giving is part of McCann FitzGerald's marketing strategy, but only in the context of traditional legal-industry client thank-yous. 'We give out small tokens, like golf balls with our name at sports outings', Kenny says. 'That type of thing is fairly common in the legal field'.

Precision presents

If a firm decides gift-giving is the way to go, marketing consultant McKinney recommends a targeted approach. 'It shouldn't be a willy-nilly programme that includes your entire customer base every Christmas', she says. 'But if you focus on valued clients you want a lasting relationship with, it's a good way to increase an established loyalty'.

She advises firms to send their present to the person they deal with most at their client account. Gifts which bypass that primary contact in favour of a higher-up, such as a CEO, can cause offence. 'If you have the budget, send presents to both – if not, go with your key contact', she counsels.

Once the names on the gift list are decided, the next step is to decide which present is appropriate. There are many choices when it comes to corporate gifts, the most popular ranging from pens and calendars emblazoned with the firm's name to wine and food hampers. Whenever possible, a gift should reflect the recipients' interests, such as reading, golfing or gardening.

'Ten to 15 years ago, most people's idea of an appropriate corporate gift was a bottle of gin and a bottle of whiskey', says Charles Searson. 'The problem with gifts like that is that they're generic, and the giver isn't likely to be remembered'.

Still, it's important to strike a balance. 'A gift that's too personal may not go down well with clients', observes Denise Devitt, director of Dublin-based Bewley's Corporate Hampers. 'Ours are generally well received because they're not overly personal'.

Then there's the thorny issue of how much to spend on a gift. Spend too little in some circumstances and a client may not feel well thought of; spend too much in others and he or she may feel compromised. A well-chosen, moderately-priced gift is generally the safest course. 'If a gift is sufficiently special, you don't have to spend a fortune', Searson says, adding that one of the easiest and best ways of ensuring a gift's impact is to include a handwritten note. He also points out that early delivery for Christmas presents is a good idea since gifts – and their givers – may become blurred in the final days before the holiday.

Finally, consistency is important. 'If you send out gifts one year, recipients will expect them next year', Devitt observes. 'They'll be disappointed if they don't receive them'. G

Maria Behan is a Dublin-based freelance writer who specialises in business and technology issues.

Council report

Report on Council meeting held on 10 September 1999

Motion for consideration at October meeting

'That this Council is opposed to the practice by some builders/developers of including in building contracts for new houses that the purchase price be paid by way of stage payments and requests the Minister for the Environment and Local Government to make the necessary regulations to prohibit this.'

Proposed: John B Harte
Seconded: Sean Durcan

Motion: salary scale

'That this Council recommends a salary scale of £18,000 – £22,000 per annum for newly-qualified solicitors.'

Proposed: Hugh O'Neill
Seconded: Michael Carroll

The motion was unanimously approved by the Council.

Motion: *pro bono*

'That this Council appoints a committee/task force to make recommendations regarding the creation of a voluntary pro bono *scheme for the profession.'*

Proposed: John Costello
Seconded: Michael Peart

The Council approved the motion and agreed that the appointment of the members of the committee/task force should be dealt with by the incoming President in appointing his committees/task forces for the 1999/2000 Council year.

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

The Council considered the contents of a draft EU directive extending the provisions of the existing *Money-laundering directive* to 'independent legal professionals', among others.

Disciplinary Tribunal

The Council agreed that, in order to underpin the independence of the Disciplinary Tribunal of the High Court, arrangements should be made to source alternative accommodation for the tribunal and its secretariat at a location away from the Society's premises at Blackhall Place.

Fees: ad hoc legal aid scheme for CAB cases

James MacGuill reported that agreement had been reached with the Department of Justice, Equality and Law Reform in relation to increased fees under the ad hoc legal aid scheme for CAB cases. The President complimented the Criminal Law Committee on its success in this regard.

Mandatory CLE

Owen Binchy reported that a task force had been established, under the chairmanship of Michael Peart, to consider the introduction of mandatory CLE. The task force would report to the Council in due course.

Circuit Court rules

Gerard Doherty reported that consolidated rules were being sent by the Circuit Court Rules Committee to the Department of Justice, Equality and Law Reform in the near future. It was hoped that the department would introduce the rules without undue delay.

Scheme of Compensation for Personal Injuries Criminally Inflicted

The Council noted that the Department of Justice, Equality and Law Reform had invited the Society's views in relation to a review of the Scheme of Compensation for Personal Injuries Criminally Inflicted. It was agreed that a submission should be prepared by the Society's Parliamentary and Law Reform Executive, Owen McIntyre, in consultation with the Director General and the officers.

DPP

The Council extended congratulations to James Hamilton on his appointment as Director of Public Prosecutions. The Council also passed a vote of appreciation to Eamonn Barnes, the outgoing DPP, for his independence and integrity in the performance of his functions.

County registrars

The Council congratulated Patricia Casey and Susan Ryan on their appointments as county registrar for Carlow and Dublin respectively. G

Committee reports

PROBATE, ADMINISTRATION AND TAXATION

The subtlety of domicile: asking the right questions

Domicile is a common-law concept and usually understood as the place of a person's permanent home; it may be in a country where a person is resident and intends to stay or to which he or she intends to return. A person's domicile is relevant in determining whether a marriage or divorce is recognised. In the area of taxation, a non-domiciled person's foreign assets will not usually be subject to capital acquisitions tax (CAT), and their unremitted foreign income (other than UK) will not be subject to income tax. Also, a beneficiary neither ordinarily resident nor domiciled in Ireland is exempt from CAT on certain government stocks, subject to certain conditions.

Every person receives at birth a domicile of origin (usually that of the father) but may acquire a domicile of choice by the combination of residence and intention of permanent or indefinite residence (a wife's domicile of dependency on marriage has ceased to be part of Irish law). The domicile of choice may be lost by abandonment – for example, when a person ceases to reside in the country of domicile and to have an intention to return to it as a permanent home. On such abandonment, either a new domicile of choice is acquired or the domicile of origin revived. Domicile is not always obvious and is ascertained only after identifying and answering the correct questions.

In the case of *Proes v The Revenue Commissioners* (High Court, 1996, no 157R; Costello P, 5 June 1997), the appellant contended that she was not domiciled in the State and therefore not subject to Irish income tax on unremitted foreign income; the burden of proof fell on the appellant to establish that she had acquired a domicile of choice in England in 1940 and that she did not abandon her domicile of choice when she returned to Kinsale following the death of her husband or any time thereafter. The trial judge accepted that for some time prior to her late husband's death she had acquired a domicile of choice in England (she was a British subject and held a British passport).

Some 12 years prior to the death of her husband in 1982, they had bought a holiday home in Kinsale when circumstances had prevented them making extensive use of it. Following his death, the appellant had to vacate their apartment in London and she decided to stay in the house in Kinsale because it was the only place immediately available to her. She was also happy in Kinsale and would probably stay there as long as her health permitted. She envisaged that if she ceased to be able to look after herself and live alone, she would return to England to live closer to her daughters to whom she would have to look for support and assistance.

Over a number of years, she had looked at a number of houses with a view to buying, and in 1992 she finally purchased a house in London in which she had not actually resided as it required extensive refurbishment, which was in progress. Apart from a current account in Ireland, her main accounts and investments were maintained outside Ireland and she had Irish and UK health insurance; her daughters and grandchildren were domiciled in England.

At the conclusion of her evidence, in response to a question posed by the judge as to whether she considered the Kinsale house as her permanent home, the appellant replied: 'Yes, for the time being'. The trial judge was satisfied that the appellant and her husband had an English domicile from the date of her marriage until 1982; however, although he accepted the appellant did intend to return to England at some future time, she had nevertheless resided in Kinsale for over ten years. He considered that the issue which arose was whether despite the appellant's evidence as to her intentions for the future (which he accepted), her acts belied her intentions sufficiently to establish that she nevertheless intended to live indefinitely in Cork and had accordingly made a domicile of choice in Ireland.

On appeal to the High Court, Costello P determined that the trial judge had erred in the question he thought he was required to answer. The question which should have been posed was: 'Did Mrs Proes abandon her English domicile by a) residing in Cork and b) deciding not to return to live permanently in England?', and not: 'Did not Mrs Proes decide to live permanently in Ireland and thereby acquire a new domicile of choice?'. The Revenue argued that this was a distinction without a difference and that the determination that the appellant had decided to 'live indefinitely' in Ireland and thereby acquired a new domicile of choice meant that she had ceased to intend to return to live permanently in England and therefore had abandoned her English domicile.

Costello disagreed for the following reasons:

- The issue was whether, in light of all the evidence, it could be inferred that Mrs Proes had abandoned her English domicile, not only by ceasing to reside in England but by residing in Ireland and in ceasing to have an intention to return to England as her permanent home. The failure to address this issue meant that proper weight was not given to the very compelling evidence that no intention to abandon her English domicile had properly been inferred from the admitted facts
- It was clear that in 1982 the appellant had not decided to cease residing permanently in England and subsequent thereto never ceased to have an intention to so return, and that her intention to return to reside in London was not so

vague and indefinite as to justify the conclusion that her domicile of choice had in reality been abandoned
- The determination of the trial judge in accepting that the appellant was assessable from 1982 onwards was not consistent with his view that the length of her residence from 1982 was the decisive factor.

Costello P concluded that the trial judge was incorrect in determining that the appellant had acquired a domicile of choice in the State; she had acquired an English domicile of choice which she had not abandoned and, accordingly, at the relevant times her Irish domicile of origin had not revived.

Des Rooney, Vice-chairman, Probate, Administration and Taxation Committee

BUSINESS LAW

Four *Companies (Amendment) Bills*, and one Act

1999 has seen a flurry of proposed legislation on company law, with four Bills published and given a second reading. The Bills and their respective progress is as follows.

Companies (Amendment) Bill. This was introduced in February by Pat Rabbitte TD and sought to expand the list of authorised disclosee of reports of departmental officials appointed to investigate the affairs of a company, under part II of the *Companies Act, 1990*. The proposed addition was a tribunal of enquiry (such as the Moriarty Tribunal). This Bill did not progress beyond second stage, but at the committee stage of the No 2 Bill (*see below*) its provisions were incorporated into the No 2 Bill.

Companies (Amendment) (No 2) Bill. This was introduced in March by the Government and passed the committee stage in July. Its principal provisions are: i) clarification of the law on examinerships by tightening up the circumstances in which a company may be put under court protection; ii) removing the requirement for small companies (turnover under £250,000) to have auditors or an audit; and iii) providing for more stringent requirements for incorporation of companies to deal with the perceived menace of Irish-registered non-resident companies. Two items are deserving of special note.

First, the possibility of shelf companies is removed. It is proposed now that all companies when formed must identify the exact activity they will engage in, and the precise place in Ireland where that will take place. The Business Law Committee lobbied for this provision to be amended so as to enable shelf companies to be formed, with a deshelving resolution filed after the company commences commercial activities. These submissions were ignored.

Therefore, the Irish solution to the Irish problem will be that, on and from enactment of the new law, practitioners will be obliged to use non-Irish companies as shelf companies, such as Manx, BVI and Channel Island companies. The Business Law Committee is of the view that this provision, if enacted, will be a great leap backward. Rather than regulate Irish companies, instead there will be a proliferation of companies beyond Irish regulation (and maybe even, in some circumstances, capital duty).

Secondly, all companies must have either an Irish director or an Irish activity certified as such by the Companies Registration Office or a bond of £20,000 lodged with the CRO.

Companies (Amendment) (No 3) Bill. Of the quartet of Bills published, this is the only one as yet law, and is the *Companies (Amendment) Act, 1999*. This was published and enacted in May/June 1999 in advance of the Eircom plc (Bord Telecom Éireann plc) IPO. It facilitates stabilisation exercises after IPOs and other public offerings of shares. For a period of 30 days after the 'closing date' as defined, the managers of a public issue of shares are able to overallot and buy in the shares the subject of the issue, with a view to stabilising the share price and to avoid peaks and troughs.

Companies (Amendment) (No 4) Bill. This was introduced in late September 1999 by Ruairí Quinn TD and, like Mr Rabbitte's Bill earlier in the year, seeks to expand the class of disclosee of departmental inspectors' reports. This time it is proposed that Dáil, Seanad and joint Oireachtas committees should be authorised.

Possible consolidation?

In March, the Government adopted the *McDowell report* on company law enforcement. One of its proposals is a consolidation of company law, with biennial Bills, along the lines of *Finance Bills*, to defossilise the legislation. However, the first legislative excursion arising from the *McDowell report* is likely to be the Bill to institute the Office of the Director of Corporate Enforcement proposed in that report. This office, to be staffed by 30 officials and backed up by seven members of the garda, is expected to be in place by mid-2000.

Companies Acts, 1963 to 1999

This is the new collective citation of the *Companies Acts*.

www.cro.ie

The Companies Registration Office has a web site which has the most popularly-used CRO forms available for download. Further functions are being added and will be the subject of further announcements.

Business Law Committee

CONVEYANCING

Bank fees for Revenue guarantee

The Conveyancing Committee would like to thank those members of the profession who responded to its survey on the Revenue Commissioners' requirements for bank guarantees for solicitors' cheques for stamp duty. The results of the survey have been collated and are as follows:

a) 30 firms pay bank fees for this guarantee
28 firms do not pay a fee
4 firms pay no fee but give some other form of security
6 firms do not use the guarantee
68 firms responded

b) Of the 30 firms that pay a fee, 25 gave an indication of how much they pay:
5 pay a percentage of the amount guaranteed (4 @ 1% and 1 @ 0.75%)
1 pays a fixed sum per annum (£100) *plus* a percentage of the amount guaranteed (2%)
19 pay a fixed sum per annum (between £20 and £410)

£		
0-50	-	6 firms
51-100	-	4 firms
101-200	-	4 firms
201-300	-	2 firms
301-400	-	2 firms
401 +	-	1 firm

The committee thanks the bar associations for their co-operation and assistance in collating responses to the survey. It will report further in due course on any approaches made to the Revenue Commissioners in relation to this matter. In the meantime, the committee recommends to those practitioners who currently pay fees to their banks for this guarantee that they ask their banks to waive the fees.

Conveyancing Committee

Practice notes

High Court: assessment cases – country venues

On Monday 26 April 1999, a practice direction was re-issued by Mr Justice Frederick Morris, President of the High Court, with reference to 'short cases (a duration of one day or less) involving an assessment of damages only', and he set out the following provisions which shall apply:

- Such cases will, on the application of the plaintiff, be listed for trial on the Wednesday, Thursday or Friday of the last week of each sitting
- Applications may be made in respect of any such case which has been set down for trial, regardless of whether or not it has appeared in the published list
- **Applications for such listing must be made to the presiding judge at the call-over in Dublin which precedes the hearings in each country venue**
- This direction has been in effect in respect of all trials at country venues from Easter Term 1998.

This is being done in an effort to expedite the hearing of cases and has been the subject of consideration by the Litigation and Arbitration Committee. It is felt that there should be a positive response from solicitors and the committee would recommend that solicitors co-operate by submitting applications to have appropriate cases listed in accordance with the terms of the direction.

Litigation and Arbitration Committee

New *District Court rules*

District Court (Discovery of Documents) Rules (SI No 285 of 1999)
Practitioners should note the introduction of new *District Court rules* (order 46A) to regulate and expand the procedure of discovery in the District Court. The rules set out the procedure to be followed to obtain discovery, the sanction for failure to comply with an order for discovery and the costs which the court may award in both circumstances. The rules are operative from 27 September 1999.

District Court (Affidavits) Rules (SI No 286 of 1999)
New rules have been introduced to amend order 9 of the *District Court rules 1997* to allow a practising solicitor to sign an affidavit for use in the District Court. The new rules are operative from 27 September 1999.

Litigation and Arbitration Committee

New Circuit Court fees

Practitioners should note the introduction of a new *Circuit Court Fees Order* (SI No 292 of 1999) which provides for increases of between £1-£24 in fees chargeable in Circuit Court offices as and from 4 October 1999. The order also provides for the exemption from fees of family law proceedings.

Litigation and Arbitration Committee

Mortgage redemption figures

The Conveyancing Committee has received a significant number of complaints from members of the profession about difficulties being experienced in obtaining mortgage redemption figures from lending institutions. The main complaint is that provisional figures were given and lenders later revised the figures upwards, even though the solicitors had acted upon the basis of the figures furnished. In one case, a solicitor had actually parted with the sale proceeds of a property and had given an undertaking to procure a release of the mortgage which the particular lending institution refused to do without being paid further monies.

The committee would like to refer practitioners to practice notes previously published on this topic, in particular the practice note published in the *Law Society Gazette* in November 1990 entitled *S18 Housing Act, 1988: release of mortgages*, which has also been published in the *Conveyancing handbook*.

The Conveyancing Committee proposes taking this matter up with the lending institutions in an effort to resolve the current difficulties.

In the meantime, in order to assist practitioners, the committee recommends that the following letter be used by practitioners when seeking redemption figures from lending institutions. In the opinion of the committee, a borrower is entitled to be given a redemption figure which the lender will stand over (that is, one which is not stated to be provisional). Solicitors are reminded that if they give an undertaking to procure the release of a mortgage without having secured a statement of redemption figures which are not provisional or hedged in some way, they are putting themselves at unnecessary risk.

'Re Borrowers:
Property:
Account No:
Dear Sirs,
We act for the above named borrowers who have agreed to sell their property at the above address. We expect to be in a position to complete the sale shortly and accordingly would be glad if you could let us have details of the amount due to you as of the ... day of ...19/20 ... under the above account (or any other account or accounts that may be relevant) to enable you release or vacate all mortgages which either directly or indirectly affect the above property. When sending the figures to us, please let us also have a daily rate of interest.

Yours faithfully'

Conveyancing Committee

Enduring powers of attorney

A situation has been brought to the attention of the Conveyancing Committee whereby a donee of an enduring power of attorney which had not been registered sought to sell the property of the donor at auction. The special conditions in the contract provided that the closing date would be seven working days after the registration of the enduring power of attorney. No application had been made to the court for an order to effect the sale pre-registration. The committee was asked to consider whether this was good conveyancing practice.

The committee noted that until such time as an enduring power of attorney is registered, the power has not come into force. Therefore, the donee would have no power to execute a valid contract for the sale of the donor's property. In the above circumstance, the committee concluded that the course of action proposed by the donee of the enduring power was not in fact good conveyancing practice.

The committee wishes to point out to the profession, however, that, in an emergency, the donee can apply to the court for an order under section 8 of the *Powers of Attorney Act* for the exercise of the power by the court pending registration of the enduring power of attorney, and practitioners are recommended to consult the legislation before applying for such an order in appropriate cases.

Conveyancing Committee

New system for stamping deeds

The Conveyancing Committee has been informed by the Revenue Commissioners that a new computerised system for stamping deeds will shortly be introduced by them. Revenue have indicated that the system is currently being tested and that they hope that, all going well, it will be introduced on a phased basis over a two-week period, probably in November. Revenue have also stated that they will furnish information leaflets to the profession setting out full details of the new system prior to its implementation. In the meantime, the committee wishes to give practitioners a flavour of the new system as follows.

New features of the system include:

1) **Identifier number**

Each document presented for stamping will be allocated a unique identifier number which will be printed as part of the new 'printed string'. Any recorded information in relation to the document can be accessed by means of this identifier number. The information recorded on the electronic database will include the name and address of the solicitor acting in the case, the effective date of the document, the date of presentation for stamping, the consideration or value of the property, the relevant classification(s), the duty payable, any penalties due, payments received, date and type of stamping details, relevant details of the transaction taken from the PD form, details of certificate values, types of property transferred, relevant reliefs together with any mitigation of penalties granted or refused.

2) **Green stamps replaced**

The old familiar embossed green stamps will be replaced by a combination of a 'printed string', one or more embossed clear foils and a silver coloured securagrafix.

a) The printed string

i) Detail part of the string:

Documentation identification number will be ten numeric characters
Date document was stamped in the format dd/mm/yy

- Code representing the type of transaction (for example, C for conveyance, M for mortgage and so on). A complete list of the type of transactions and how they will be represented will be made available in the Revenue information leaflet
- Amount of duty paid in respect of that transaction. (Note that the code and amount of duty will be repeated if more than one transaction is included in the document)
- Capital letter P followed by an amount indicating that penalty/interest was imposed and paid (if applicable)
- Letters PM followed by an amount indicating that penalty/interest had been partially mitigated (if applicable)
- Letters PM not followed by an amount indicating that penalty/interest had been fully mitigated (if applicable).

ii) Summary part of the string:

- Letter A indicating that the document had been adjudicated (if applicable)
- Letters PD indicating that a Particulars Delivered form had been received (if applicable)
- Letters EUR or IEP showing the currency of the document
- Amount showing the total amount paid including duty, interest and penalties.

iii) Collateral and counterpart:

- In the case of a collateral and/or counterpart document, the following text will be printed as appropriate: 'Collateral – principal fully and properly stamped' or 'Counterpart – original, fully and properly stamped'.

iv) Exempt documents:

- In the case of documents adjudged exempt, the word 'exempt' will replace the amount.

The string will usually be printed on the front of the document in a one-line, two-line or three-line format, depending on the space available. If space is very limited, only the summary information will be printed on the front and the detailed information will be printed on the back.

b) Embossed clear foils

The summary information will be covered with either one or two transparent foils. The number required will be dependent on the length of the summary. Each of these foils will display three images of castle gates. The word 'Revenue' will appear at an oblique angle on these foils in colours of green and orange. The foil protects the data which it covers and is intended to prevent tampering.

c) Silver coloured securagrafix

A non-transparent silver coloured foil incorporating a registered holographic image of a harp with matt white detail with grating infill will be impressed adjacent to the transparent foil(s), on the right hand side. This hologram will indicate the end of the printed string.

Changes in practice

The Revenue Commissioners have indicated they will introduce the following changes in practice when the new computerised system becomes operational:

1. In the Dublin office a one-stop service will be available in most instances. An electronic ticketing system will be in place and persons will take a ticket (adjudication/straight or straight only). They will then wait to be called to the appropriate desk. It will no longer be necessary to queue separately for marking, stamping and PD stamping. Persons attending at the public office are asked to have their documents, supporting documentation and payments correctly ordered before seeking service. The committee has not yet been given information on what procedures will be adopted in the Cork office.
2. It will no longer be possible to have a document marked without stamping. Instead, an assessment will issue as required.
3. The PD stamp will no longer be impressed separately. It will form part of the marking string which, together with the foils and secure graphics, will form the stamp. A properly completed PD form, where required, must be presented before stamping may proceed. It will be possible to make payment in advance of delivery of the PD form in order to prevent penalties accruing.
4. Change from cheques and so on will no longer be given in cash. Refunds will be made by means of payable order through the post. Refunds will be made to the solicitor of record unless written authorisation to the contrary is provided.
5. When cancelling stamps, the old system of blockouts will be replaced by a simple inked stamp or manual embossment. The database will contain full details of all cancellations.

Conveyancing Committee

Safety files and once-off houses

The Conveyancing Committee would like to thank Rory O'Donnell and Breda Sweeney of O'Donnell Sweeney, Solicitors, for the following practice note which has been approved by the committee.

The object of this practice note is to consider who is 'the Client' (if there is one at all) within the meaning of the *Health and safety regulations* where an individual buys a site for a house for himself and arranges to get a building contractor to build a house as a residence for himself or herself. The following definitions are important in considering this.

'Client' means any person engaged in trade, business or other undertaking who commissions or procures the carrying out of a project for the purpose of such trade, business or undertaking. 'Contractor' means a contractor or an employer whose employees undertake or carry out construction work or any person who carries out construction work for a fixed or other sum and who supplies the materials and labour (whether his own labour or that of another) to carry out such work or supplies the labour only. 'Project' means any development which includes or is intended to include construction work.

The definition of construction work is quite long and it is not necessary to set it out in full. It includes construction, alteration, conversion, fitting out, renovation, repair, upkeep and redecoration. In other words, everything you could possibly think of in relation to a building.

It is clear that the definition of contractor includes both a main contractor and a sub-contractor. To illustrate the point best, we would like to give a series of examples:

1. A development company is developing a business park. It engages architects, engineers and so on to prepare drawings and obtain planning permission for its development. It then employs an independent building contractor to construct the building in accordance with the approved drawings. In that case, the development company is the Client who has the responsibility to appoint the Project Supervisor for the design stage and the Project Supervisor for the construction stage. The Project Supervisor for the construction stage in appropriate cases has the obligation to prepare the safety file. In such a case, the independent building contractor is the Contractor.
2. A house-building company buys a site on which to build 100 houses. It retains an architect, an engineer and obtains planning permission. It then proceeds to build houses. Typically, it would have a foreman and a small staff, and most of the work would be done by specialist sub-contractors. In this case, the house-building company is the Client and it is also a Contractor. Each sub-contractor would also be a Contractor.
3. A company buys a site to expand its builders' providers business. It appoints an architect and engineer to procure planning permission for the building it wants and then puts the building contract out to tender, and in due course enters into a building contract with an independent builder. In that case, the company carrying out the builders' providers business is the Client and the building contractor is the Contractor.
4. An individual or company buys sites, gets planning permission for a house and builds the house. Say, for example, that it buys a two-acre site for the purposes of sale. The individual/company gets an architect/engineer to design a house and obtain planning permission. The individual or company who buys the site is the Client and the company who carries out the building of the house is the Contractor.
5. An individual buys a site upon which to erect a house for his own use as a residence. He gets an architect and engineer to arrange for the preparation of drawings and to obtain planning permission. He puts the job out to tender and an independent building contractor tenders for the job and proceeds to build the house on behalf of the individual. The question is: who in this scenario is the Client? Clearly, the individual is not the Client. The building contractor is clearly a Contractor within the meaning of the regulations but the question is: is he also the Client? He is clearly a person engaged in trade business or other undertaking who carries out a project *for the purposes of such trade, business or undertaking*. However, the definition is a person engaged in trade, business or other undertaking who *commissions a project for the purposes etc* or *who procures the carrying out of a project for the purposes etc*.

The *Oxford Dictionary* defines 'commission' as follows:

1. Authority committed or entrusted to any one specially delegated authority to act in some specified capacity, to carry out an investigation or negotiation, perform judicial functions, take chargeable office and so on.
2. The action of committing or giving in charge the entrusting of (authority etc to any one).
3. A charge or matter entrusted to any one to perform: in order to execute objective work.
4. Authority given to acts of agent or factor for another in the context of business or trade; system of trading in which a dealer acts as agent for another, generally receiving a percentage as its remuneration.
5. To furnish with a commission or legal warrant to empower by a commission.
6. To give a commission or order to (a person) for a particular piece of work: chiefly used of the orders given to artists.
7. To send on a mission, despatch.

It seems clear that the word 'commission' means the act of getting someone else to do something. When the expression 'procures the carrying out' is examined, it is self-evident that this also means getting someone else to do something.

It seems, therefore, that the use of the word 'commissions' or the words 'procures the carrying out' excludes the application of the definition to a person *actually carrying out the work* (save in a case such as that outlined in example 2 above, where the person carrying out the work is also the owner of the land). It is arguable, however, in the theoretical event that a contractor bought a site and had sufficient capacity within its own organisation to carry out the construction work (so that no sub-contractor or any other third party whatsoever was necessary) whether the contractor would come within the definition of 'the Client'.

The distinguishing factor between these two scenarios is the engagement of sub-contractors. In the latter, no-one has been procured or commissioned to carry out a project.

It would seem, however, that the engagement of sub-contractors does not of itself bring one within the definition of 'the Client'. There seems to be a difference between engaging a contractor for the purposes of the 'Project' (as in example 1 above) and a main contractor engaging sub-contractors who carry out construction work and/or supply labour and so on. In the latter case, the sub-contractors have not been appointed for the purposes of carrying out the project (which is the broader picture). However, this rationale does not in our opinion taint the conclusion reached in example 2 above. In such a case, the project is being 'commissioned'.

The obligation to appoint the Safety Supervisors is imposed on the Client. If there is no Client in connection with a particular project, it seems that there would be no person fixed with the obligation to make the appointments of the Safety Supervisors, and consequently no person is obliged to prepare a safety file.

The regulations also clearly intend that the Client will be the owner of the land on which the project is carried out. We say this because the Safety Supervisor (Construction Stage) is obliged in appropriate cases to prepare a safety file and give it to the Client. The Client is then fixed with the obligation to keep the safety file so that it will be available for persons who need to inspect it. The only way in which the Client can relieve himself or herself from this obligation is under regulation 3(6) which reads: 'It shall be sufficient compliance with paragraph (5) by a client who disposes of his or her interest in the property involved in the project if he or she delivers the safety file for that property to the person who acquires such interest in that property and such person shall keep available such

Continued on page 34 ➜

Continued from previous page

safety file in accordance with paragraph (5)'.

It seems, therefore, that it is implicit that the Client must also be the owner of the land (or perhaps entitled to control the ownership thereof).

The building of houses like this is a very common feature in rural Ireland and this matter of interpretation is going to become the focus of much attention. In conclusion, it is clear that in some cases where 'once-off' houses are being built that there is no Client and therefore no obligation on any person to prepare a safety file. In such cases, solicitors dealing with conveying the house should not concern themselves with the matter of a safety file.

Conveyancing Committee

New *Superior courts rules*

Rules of the Superior Courts (No 2) (Discovery) 1999

Practitioners should note that order 31 of the *Superior courts rules* has been amended by the substitution of a new rule 12 which provides, *inter alia*, that the notice of motion in respect of an application for discovery must now specify the precise categories of documents sought and must be grounded upon affidavit. The affidavit must verify that the discovery is necessary for disposing fairly of the matter or for saving costs and must set out the reasons why each category of documents is required. The court may refuse or adjourn the application if voluntary discovery has not been requested prior to the application for an order. Requests for voluntary discovery must specify the precise categories of documents sought and must set out the reasons why each category of documents is required. The new rule is operative from 3 August 1999.

Litigation and Arbitration Committee

Deduction of tax from payments of interest

On the payment of yearly interest:

1. By a company to any party, tax must (in almost all instances) be deducted at source
2. By an individual to any party other than a non-resident, payment should be made gross (that is, without deduction of tax)
3. By an individual to a non-resident, tax must be deducted at source.

Interest on the balance of purchase money payable in respect of a conveyancing transaction is regarded as yearly, because it could technically cover a period in excess of a year. This was held to be the case in *Bebb v Bunny* (1854), and it has been confirmed by the Revenue Commissioners as being their acknowledged practice.

Tax in the foregoing context means tax at the standard rate and, where deducted at source:

a) Same should be accounted for to the Revenue Commissioners by the party deducting, who

b) Should forward to the recipient of the interest a certificate of deduction in *Form 185* or its equivalent.

Payments of short (that is, non-yearly) interest should in all instances – irrespective of the identities of the payer and of the recipient – be paid without deduction of tax.

This note has been approved by the Revenue Commissioners.

Conveyancing Committee

PROBATE, ADMINISTRATION AND TAXATION COMMITTEE

In recognition of the United Nations International Year of Older Persons, the Probate, Administration and Taxation Committee invites members to attend a seminar on

MENTAL HEALTH AND INCAPACITY

Saturday, 4 December 1999

President's Hall, Law Society of Ireland, Blackhall Place, Dublin 7

9.30am – 1pm

Admission is free. Places are limited and will be allocated on a first-come, first-served basis.

'LEGAL ISSUES'
John Costello
Chairman, Probate, Administration and Taxation Committee
Eugene F Collins & Co

'LAW REFORM'
Patricia Rickard-Clarke
Solicitor, Probate, Administration and Committee
McCann FitzGerald

'MEDICAL ASPECTS OF INCAPACITY'
Dr Colm Cooney
St Vincent's Hospital

'PRACTICE PROBLEMS WITH ALZHEIMER PATIENTS'
Barbara Scully
Alzheimer Society

'WARDS OF COURT MATTERS'
Nuala McLoughlin
Registrar, Wards of Court Office

BOOKING FORM

NAME: _____

ADDRESS: _____

_____

Please reserve _____ place(s) for me.

Joint carriage of sale

The Conveyancing Committee receives many queries about the conduct of a sale of property where there is joint carriage of sale. The committee has considered a practice note published by Dublin Solicitors' Bar Association in March 1996 and the committee has decided to adopt this practice note and recommends same to the profession. While the practice note is drafted in the context of a sale arising out of family law matters, the committee has decided that the principles involved should be adopted in all cases where there is joint carriage of sale. This would be particularly important where the parties are co-owners of the property in question.

The committee wishes to thank the conveyancing and family law sub-committees of the DSBA for their permission to re-produce the practice note as set out below:

'The precise terms of the joint carriage should be agreed in writing in advance, or the procedures laid down by this protocol be followed. The committees recommend the following procedure:

Letter of authority

1.1 Both parties sign a letter of authority for one of the solicitors to take up the deeds on accountable receipt. The solicitors for the spouses should specify the proportions in which the proceeds of sale are to be distributed between the parties after payment of costs, outlay and encumbrances, including the redemption of any mortgage and payment of local authority and similar charges. The committees recommend the usual searches affecting the property be carried out against the husband and the wife at this stage to ensure that no unforeseen encumbrances appear on closing.

The first solicitor's instructions

1.2 The authorised solicitor (the 'first solicitor') takes up the title deeds, takes instructions, investigates title and prepares: *(If one of the solicitors involved acted in the purchase of the property, then it is recommended that that solicitor be the first solicitor as defined)*

1.2.1 Letter of engagement (section 68)
1.2.2 Draft contract
1.2.3 Draft replies to requisitions
1.2.4 Draft family law declaration
1.2.5 Draft ST21
1.2.6 Draft tax clearance forms.

These are then submitted to the solicitor for the other party ('the second solicitor') for approval with the results of the searches, including a planning search for comment. The solicitors should pay particular attention to the contents to be included in the sale, the closing date and the division of the remaining contents between the husband and wife.

The second solicitor's Instructions

1.3 The second solicitor takes instructions and approves the draft documents before returning them. A letter of engagement issues.
Note: Unless there are substantive issues of title or contract involved, the second solicitor should refrain from commenting on the conduct of the transaction.

Issue of contract

1.4 When the draft documentation is returned, the first solicitor sends the engrossments with the copy title to the purchaser's solicitors, informing them that the second solicitor has joint carriage of sale.

Exchange of contract

1.5 On receipt of the signed contracts and deposit from the purchaser's solicitors, the first solicitor puts the deposit on interest and asks his or her client to sign. Contracts are then sent to the second solicitor for signature.
Where the property is a family home and title is in the name of one spouse only, the solicitor for the non-owning spouse arranges for that spouse to execute his or her consent prior to the execution of the contract by the other spouse.

1.6 The second solicitor returns the signed contracts to the first solicitor, having kept a copy.

Undertaking

1.7 The first solicitor asks the mortgagee for details of the redemption figures and sends a copy to the second solicitor with an undertaking to send the first solicitor's client account cheque payable to the second solicitor for the amount due to the second solicitor's client immediately after completion. The first solicitor should obtain his or her client's irrevocable written authority to give this undertaking.
The second solicitor furnishes his or her client's RSI number and income tax district to the first solicitor at the same time.

Completion of exchange of contract

1.8 The first solicitor completes the exchange of contract with the purchaser's solicitors and either forwards the CORT requisitions on title with replies to the purchaser's solicitors or replies to the purchaser's solicitors' requisitions on title in accordance with the draft replies already approved by the second solicitor. The first solicitor should not give a reply to a requisition on title without the prior approval of the second solicitor.

Approved draft deed

1.9 The first solicitor approves the draft deed. If in doubt, it should be referred to the second solicitor for further approval.

The engrossed deed

1.10 On receipt, the first solicitor sends the engrossed purchase deed and all other original documentation to the second solicitor for signing. On return, the first solicitor has his client sign and arranges a completion.

Completion

1.11 Prior to completion, the first solicitor prepares a draft financial statement for approval by the second solicitor. Following completion, the mortgage, if any, is redeemed by the first solicitor and the proceeds of the sale divided as agreed. The second solicitor then discharges the first solicitor from all undertakings insofar as the second client is concerned.

If it is agreed that one solicitor may have **sole carriage of sale**, the committees recommend as follows:

2.1 That the spouses both sign a letter confirming which solicitor should act.
2.2 The solicitor acting has the replies to the factual requisitions confirmed by the other solicitor.
2.3 That a similar undertaking be given concerning the sum to be paid to the other spouse's solicitor.

Costs

The scale fee does not apply to a joint carriage. The engagement letters should state the fees to be charged, to be agreed between the solicitors before the section 68 letters issue. The committees note that it is a regular practice that a fee of 1.5% of the sale proceeds be charged, plus VAT and outlays; that two-thirds of the fee should be paid to the first solicitor and one third to the second solicitor. The clients should be informed that the fee quoted in the section 68 letter is based on the presumption that the sale proceeds without undue complications.'

Conveyancing Committee

Personal injury judgments

Public liability – rock-climbing on a cliff face opposite a railway line – whether rock-climber lawfully on railway property or a trespasser – whether Iarnród Éireann liable in negligence or breach of duty

Case

Stephen Barry v Iarnród Éireann, High Court, Cork, before Mr Justice Smith, judgment of 20 January 1999.

The facts

Stephen Barry claimed that on 8 July 1993 he was lawfully on the property of Iarnród Éireann at Lower Glanmire Road in the city of Cork. He claimed he was in the process of climbing a cliff face opposite a railway line, and that an employee of Iarnród Éireann ordered him to desist and to descend from the cliff face. In attempting to return to the ground, he fell and suffered severe personal injuries, loss and damage. Mr Barry sued Iarnród Éireann.

Mr Barry claimed that the accident was caused by the negligence and breach of duty of Iarnród Éireann, their servants or agents. Iarnród Éireann denied the allegations of negligence and pleaded contributory negligence on the part of Mr Barry.

It was claimed that Iarnród Éireann was negligent in allowing Mr Barry to use the cliff for rock-climbing when Iarnród Éireann knew or ought to have known that rock-climbing was going on in the area. It was also claimed that Iarnród Éireann should have checked to see that the rock cliff was safe for rock-climbing and, if unsafe, should have prevented access to the area.

It was further alleged by Mr Barry that a Mr Aidan Barrett, a gate keeper at a level crossing in the area, was negligent in requesting Mr Barry to come down from the cliff and in refusing to allow Mr Barry to continue to the top of the cliff and descend by rope, a process known as abseiling.

In evidence, Mr Barry stated that he had been engaged in rock-climbing since he was 12 years of age. He began climbing when he was with the boy scouts. He did a considerable amount of climbing, mostly at weekends, up to 40 weekends in a year, until he met with this accident when he was just 21 years of age.

On the day of the accident, Mr Barry was the first to climb the rock face. He had two friends with him, Andrew Daly and Paul Daly. They were at the bottom of the rock face. Mr Barry put the first pin in the rock ten to 12 feet up and the second pin was inserted a further six feet up. As he could find no secure place for the third pin, he continued to climb for a further distance of 30 feet.

When Mr Barry was about 45 feet up on the rock face, he stated in evidence that he heard a man, whom he now knew was Mr Barrett, the gate keeper, who shouted at him to come down. Mr Barry claims he asked the gate keeper could he go further up to tie the rope and then abseil down. He stated in evidence that the gate keeper said that he was to come down immediately. At that stage, Mr Barry was safely standing on the ledge of a rock. Mr Barry stated he then started to descend as directed and his foot slipped, the rock gave way, he was unable to hold on with his hands and he fell to the ground. The pin that should have halted his fall gave way and came out of the rock so that he had nothing to protect him against falling to the ground. He suffered severe injuries.

The judgment

Smith J, having outlined the facts above, stated that rock-climbing is by its nature a hazardous sport. It depends a lot on the climate and a person's skill and judgement as to where and when to climb. The judge stated that one must be fully equipped with the necessary equipment, including ropes, harnesses, pins, hammers and shoes or boots. As one climbs upwards, pins must be inserted securely into the rock surface every six to seven feet, and the judge noted there was always present the danger of falling to the ground. The possibility is greatly reduced if all the necessary precautions are taken.

The judge noted that inside the railway gate, near to the scene of the accident and the cliff face, was a sign forbidding trespass on the railway line. But Mr Barry said he took no notice of the contents of this sign. However, the judge stated that Mr Barry knew that he was trespassing on the railway line and should not be there. Andrew Daly, a friend of Mr Barry's, who was with him on the date of the accident, gave evidence and accepted in cross-examination that he knew they were trespassing on Iarnród Éireann's property. He agreed with counsel for Iarnród Éireann that as adults they were going to the rock face to climb at their own risk.

Pat Valvey, an experienced mountain- and cliff-climber, stated in evidence that the rock at the scene of the accident was sandstone and a dangerous rock for climbing. He stated that Mr Barry should have continued the climb to the top and then abseiled down. The climbing down was always unsafe and there was always the possibility of falling. The judge noted that Mr Valvey stated in cross-examination that Mr Barry should not have climbed in the area where a person might be stopped, as this might interfere with a person's concentration. Mr Valvey accepted that the gate keeper would not be expected to know anything about rock climbing. He also gave evidence that before Mr Barry descended it would have been safer to put another pin in the rock.

The last witness for Mr Barry was John Lennon, consulting engineer, who stated that greater precaution should have been taken to prevent people gaining access to the railway track and rock face, preferably by putting up a wall and fencing, in the event of Iarnród Éireann knowing at the time that rock-climbing was taking place.

The judge noted there was no doubt that what Mr Barry did was highly dangerous when he climbed the rock face against the railway line to a height of 45 feet at a time when the nearest pin was 30 feet below him. Once he attempted to descend, everything, apparently, gave way and he came crashing down to the railway line.

Smith J noted that it had been argued that Iarnród Éireann was negligent in the sense that the railway company knew or should have known of rock-climbing activity at the scene of the accident and that the place was unsafe for climbing. It was further argued that the gate keeper was negligent in ordering Mr Barry to come

down and threatening to call the gardaí if he did not do so and refusing to allow him to continue up the cliff face and then abseil down.

At the end of Mr Barry's case, Iarnród Éireann sought a direction but this was refused by the judge and so Iarnród Éireann had to proceed to give evidence and a number of witnesses were called.

The gate keeper, Mr Barrett, stated that his job was to ensure that the gates were open for trains at all times as they passed through and to watch out for trespassers on the railway line.

On the morning of the accident, at about 11am, the gate keeper saw three figures up the line crossing the railway line. He reported this fact to his superiors as he thought they were 'winos' and that drivers should be warned of their presence. The three people were, in fact, Mr Barry and his two friends, the Daly brothers.

The judge noted that sometime after 11.45am the gate keeper saw Mr Barry who was up on the cliff with another man, presumably one of the Daly brothers, holding a rope at the bottom. Mr Barrett walked towards those men. He asked them to come down, told them they were trespassing and if they did not come down he would call the gardaí. Mr Barry had stated to the gate keeper that he wanted to proceed further up but the gate keeper again reminded him that he was trespassing and that if he failed to come down he would call the gardaí. Mr Barrett gave evidence that he did not hear Mr Barry say anything to the effect that he wanted to go to the top so that he could abseil down. The gate keeper then stated that he had gone to another gate that had been opened, and before he had returned, the accident had happened.

In cross-examination, the gate keeper accepted that if rock-climbing had been occurring on Iarnród Éireann's property, then he should have known about it. He rejected any suggestion that he threatened or pressurised Mr Barry into coming down. It never occurred to the gate keeper that it might be safer in the circumstances to go to the top and then slide down.

Evidence was also given by drivers of various trains on the Cobh railway line and other officials of Iarnród Éireann to the effect that none of them had been aware of any rock-climbing at the scene of the accident. In evidence for Iarnród Éireann, Timothy Sheehan, who had been in the station in 1993 and knew about most matters that were going on at the time, stated he was not aware that any trespassing or rock-climbing in the area had been taking place. If he had been so aware, he would not tolerate such climbing or trespassing as only authorised persons were entitled to go on to the line. From his knowledge of the gate keeper, Mr Sheehan stated that the gate keeper was an observant man and not likely to behave in a threatening manner.

The judge stated that the issue he had to decide on the entirety of the evidence was whether or not there was any negligence on the part of Iarnród Éireann, their servants or agents.

Smith J said that he was satisfied with the evidence as to the probability that Iarnród Éireann did not know or were not aware of any rock-climbing on the railway track, the area where Mr Barry and his friends were trespassing when the accident occurred. Smith J referred to the allegation of negligence relating to the gate keeper in the manner in which he requested Mr Barry to descend from the rock face. The judge noted that the gate keeper was obliged to ensure that there was no trespassing on Iarnród Éireann's railway track. He did no more than was reasonable in the circumstances. He requested Mr Barry to come down to cease trespassing and said that if he failed to do so he would report the matter to the gardaí. The judge noted that he behaved as he would expect any reasonable employee of Iarnród Éireann's to behave in similar circumstances in the event of anyone trespassing on Iarnród Éireann's property. In those circumstances, the judge held that negligence had not been proved against Iarnród Éireann, and the blame for this most unfortunate accident rested with Mr Barry.

Counsel for Iarnród Éireann sought his client's costs but stated that he did not believe that the order would be pursued.

Counsel for Mr Barry noted that, having regard to the fact that the judge had discretion in relation to costs, in the tragic circumstances he felt that the judge should not make an order as to costs. Counsel for Iarnród Éireann replied that although he was instructed to ask for costs, his personal belief was that they would not be pursued. The judge gave judgment for Iarnród Éireann, dismissing Mr Barry's claim and making an order for costs against Mr Barry and in favour of Iarnród Éireann.

Mr O'Driscoll SC, Mr M Gleeson SC and Mr Lucey BL, instructed by Martin A Harvey & Co, solicitors, represented Mr Barry.
Mr D McCullough SC and Mr D McCarthy BL, instructed by Philip William Bass & Co, solicitors, represented Iarnród Éireann. G

This summary was compiled by Dr Eamonn G Hall, solicitor, from Reports of personal injuries *from Doyle Court Reporters, 2 Arran Quay, Dublin 7.*

LEGISLATION UPDATE: 14 SEPTEMBER – 18 SEPTEMBER

SELECTED STATUTORY INSTRUMENTS

Circuit Court (Fees) Order 1999
Number: SI 292/1999
Contents note: Provides for increases in fees chargeable in Circuit Court offices and provides for the exemption from fees of family law proceedings. Revokes the *Circuit Court (Fees) Order 1989* (SI 342/1989)
Commencement date: 4/10/1999

District Court (Affidavits) Rules 1998
Number: SI 286/1999
Contents note: Amend order 9 of the *District Court rules 1997* (SI 93/1997) to allow a practising solicitor to sign an affidavit for use in the District Court
Commencement date: 27/9/1999

District Court (Discovery of Documents) Rules 1998
Number: SI 285/1999
Contents note: Add a new order 46A (discovery of documents) to order 46 of the *District Court rules 1997* (SI 93/1997). Regulate and expand the procedure of discovery in the District Court. Set out the procedures to be followed to obtain discovery, the sanction for failure to comply with an order for discovery and the costs which the court may award in both circumstances
Commencement date: 27/9/1999

Criminal Justice Act, 1999 (Parts IV and V) (Commencement) Order 1999
Number: SI 302/1999
Contents note: Appoints 1/10/1999 as the commencement date for parts IV (amendments relating to confiscation orders) and part V (guilty pleas and certificate evidence) of the *Criminal Justice Act, 1999*

Copies of the above statutory instruments are held in the Law Society Library. They may be purchased from Government Publications, in person at the Sales Office, Sun Alliance House, Molesworth Street, Dublin 2, or by post or fax from Government Publications Postal Trade Section, 4-5 Harcourt Road, Dublin 2, tel: 01 6613111, fax: 01 4752760.

Prepared by the Law Society Library

ILT digest

of legislation and superior court decisions

Compiled by David P Boyle

ADMINISTRATIVE

Pensions for persons involved in 'Sheedy' affair

A Bill has been presented allowing for the payment of the following pensions by the State: Hugh O'Flaherty – £40,000; Cyril Kelly – £30,000; Michael Quinlan – £15,000.

Further changes proposed to Údarás na Gaeltachta

A Bill has been presented which seeks to increase the number of board members of Údarás na Gaeltachta from the present 13 to 20, with 17 of these members being elected by residents of Gaeltacht areas. A new constituency structure would also be put in place with each of the seven counties having a Gaeltacht area having a constituency. The Bill also:

- Provides for the updating of various aspects of the 1979 legislation
- Places the regional committees on a statutory basis
- Provides for the establishment of an evaluation committee, and
- Sets out new procedures in relation to the fixing of limits for financial assistance from Údarás na Gaeltachta.

Údarás na Gaeltachta (Amendment) (No 3) Bill, 1999

AGRICULTURE

New beef assurance scheme?

A new Bill proposes the establishment of a national beef assurance scheme, the purpose of which is to:

- Develop common standards for production, processing and trade in Irish cattle and beef for human consumption and the manufacture and trade of feeding stuffs
- Apply these standards through a process of registration, inspection and approval, and
- Enhance the animal identification and traceability system for Irish cattle.

National Beef Assurance Scheme Bill, 1999

COMMUNICATIONS

Digital broadcasting on the way

A Bill has been presented which seeks to facilitate the introduction of digital terrestrial television.

Broadcasting Bill, 1999

RTÉ must maintain balance

- Partisan broadcasts by the national broadcasting service weighted on one side of an argument is an interference with the referendum process and is undemocratic and constitutionally unfair.

The applicant sought to quash a decision of the Broadcasting Complaints Commission on the ground that it misapplied the relevant law in holding that there was no breach by RTÉ of the provisions of the *Broadcasting Acts* relating to alleged imbalances in the divorce referendum coverage. In granting the application, it was held that:

- RTÉ, as the national broadcasting service, was subject to the Constitution and also to the *Broadcasting Act, 1960*, which required that it uphold the democratic values enshrined in the Constitution
- A package of uncontested or partisan broadcasts by the national broadcasting service weighted on one side of the argument was an interference with the referendum process and was undemocratic and a constitutionally unfair procedure
- The imbalance of time allocated to each side of the divorce argument led to the conclusion that the scales were not held equally and that RTÉ's weight was thrown behind one side of the argument
- RTÉ's approach resulted in inequality which amounted to unconstitutional unfairness. Such unfairness would not have arisen had they afforded equality to each side of the argument to which there could only have been a yes or no answer.

Coughlan v The Broadcasting Complaints Commission (Carney J), 24 April 1998

COMPANY

Companies (Amendment) Act, 1999 (No 8 of 1999)

This Act (referred to before enactment as the *Companies (Amendment) (No 3) Bill, 1999*) was signed by the President on 19 May 1999. The Act came into effect on 24 May 1999 by virtue of the Companies (Amendment) Act, 1999 *(Commencement) Order 1999* (SI No 144 of 1999).

COMPETITION

Power to summons granted

New regulations prescribe a procedure to allow the Competition Authority to summons witnesses under the *Competition Act, 1991* and the *Competition (Amendment) Act, 1996*. The regulations came into effect on 27 May 1999.

Competition Authority (Witness Summons) Regulations 1999 (SI No 137 of 1999)

CONSTITUTIONAL

Extension under article 29.7

A Bill has been presented seeking to provide a period of two years from the date of coming into force of art 29.7.5° for the purposes of that provision of the Constitution. The provision in question reads: '5º The State may ratify the *Treaty of Amsterdam* amending the *Treaty on European Union*, the *Treaties Establishing the European Communities* and certain related Acts signed at Amsterdam on the second day of October 1997'.

Less favourable treatment for deserted husband not unconstitutional

- It is settled law that article 40.1 of the Constitution does not require that all citizens be treated identically.

In 1984 the plaintiff and his two young children were deserted by the plaintiff's wife, which resulted in the plaintiff having to give up his job in order to look after his children. In these proceedings, the plaintiff claimed that the *Social Welfare (Consolidation) Act, 1981* made provision for deserted wives but not for deserted husbands in similar situations during the same period, and was, accordingly, unconstitutional. The defendant argued that the distinction in treatment between the two categories was permissible and submitted, among other things, that the rationale behind the deserted wives scheme was that married women were more in need of income support than men. In dismissing the appeal, it was held that:

- The fact that wives deserted by their spouses between 1979 and 1990 were more favourably treated in respect of social welfare payments than husbands similarly deserted during the same period is beyond dispute
- It has long been recognised that the burden of establishing the unconstitutionality of a law is a formidable one
- It is settled law that article 40.1 of the Constitution does not require that all citizens be treated identically
- The facts proved in evidence before the High Court judge showed clearly how women in employment at the material times were at a financial disadvantage in comparison with men
- The plaintiff's claim was presented and contested on the narrow grounds that there was no economic justification for differentiating between deserted husbands and deserted wives
- It was only necessary to conclude that there were ample grounds for the Oireachtas to conclude that deserted wives were, in general, likely to have greater needs than deserted husbands so as to justify legislation providing for social welfare, whether in the form of benefits or grants or a combination of both, to meet such needs.

Lowth v The Minister for Social Welfare (Supreme Court), 14 July 1998

CRIMINAL

Criminal Justice (Location of Victims' Remains) Act, 1999 (No 9 of 1999)

This Act was signed by the President on 26 May 1999 and came into operation with effect from the same day by virtue of the Criminal Justice (Location of Victims' Remains) Act, 1999 *(Commencement) Order 1999* (SI No 155 of 1999).

Criminal Justice Act, 1999 (No 10 of 1999)

This Act (referred to before enactment as the *Criminal Justice (No 2) Bill, 1997*) was signed by the President on 26 May 1999. Parts I and II of the Act were brought into operation with effect from 29 May 1999 by the Criminal Justice Act, 1999 *(Parts I and II) (Commencement) Order 1999* (SI No 154 of 1999).

No right to Irish-speaking jury

The applicant was charged with certain criminal offences and was to be tried before a judge and jury in the Circuit Court. The applicant was brought up through the medium of Irish and sought to conduct his case through Irish. He brought an application seeking, among other things, to prohibit the trial continuing unless the jury was composed of members who could understand Irish without the need of a translator. He submitted that his constitutional rights would be breached if a jury composed of members fluent in the Irish language was not selected. In refusing the appeal, it was held that:

- There were difficulties involved in the use of translation but as yet there was no better solution in Ireland
- If every member of the jury had to be able to understand legal matters in Irish without the aid of a translator, the majority of the people of Ireland would be excluded. This would be a breach of article 38.5 of the Constitution.

Mac Cárthaigh v Ireland (Supreme Court), 15 July 1998

EDUCATION

New institute of technology for Dublin

A Bill has been presented which seeks to establish the Institute of Technology in Blanchardstown, Dublin, on a statutory basis.
Regional Technical Colleges (Amendment) Bill, 1999

EMPLOYMENT

Reduction in doctors' hours?

A private member's Bill has been introduced which seeks to end the complete exemption from the *Working Time Act, 1997* currently enjoyed by junior hospital doctors and doctors in training.
Protection of Patients and Doctors in Training Bill, 1999

Injunction granted restraining enquiry into employee's conduct

The plaintiff was employed by the defendant as secretary to the manager of the defendant's studs in this country. She received notice by letter from the personnel manager that he was holding an inquiry into her improper use of the property, and she was required to attend. This meeting was postponed on a number of occasions. The plaintiff was attending a doctor during this time. She claimed that she was not afforded basic fairness of procedures and that the personnel manager was proceeding with 'indecent haste'. She was of the view that she was placed in a position where she would face serious allegations without being adequately prepared. She also alleged that the personnel manager was not an appropriate person to conduct the inquiry, as there was a real risk of bias on his part. The plaintiff sought an order restraining the inquiry, and an order that the defendant would pay her sick pay for absence on medical grounds. There was no written contract of employment between the parties and it was not an express term that she was entitled to be paid her salary while absent from work due to illness or incapacity. In granting the orders sought, it was held that:

- There were fair issues to be tried as to whether the inquiry was merely an investigation or was a disciplinary process, and whether the plaintiff could be assured of a hearing in accordance with natural and constitutional justice and, in particular the principle of *nemo iudex in causa sua*
- Damages would not be an adequate remedy for the plaintiff if she were subjected to an inquiry which was later found to have contravened natural and constitutional justice. The allegations made by the defendant against the plaintiff were very serious and her dismissal

from employment was one possible outcome from the inquiry
- The balance of convenience clearly favoured the granting of the injunction to restrain the inquiry until the issues between the parties in relation to the conduct of the inquiry were determined at the trial of the action
- The plaintiff was absent from work on certified medical grounds and had not been paid her salary. She had established there was a fair issue to be tried that it was an implied term of her contract that she be paid her salary less disability benefit received for a reasonable period while absent from work on medical grounds. The defendant was not entitled to rely on the *Employment Regulation Order* made by the Labour Court on 10 July 1988 in relation to the plaintiff's employment. Damages would not be an adequate remedy for the plaintiff. While her liquidity was in issue, she had sufficient assets to support the undertaking as to damages.

Charlton v HH The Aga Khan's Studs Société Civil (Laffoy J), 22 December 1998

EUROPEAN

No obligation to promulgate EU law

- In general, there is no obligation on Member States to promulgate Community law, and its application in Member States can not be accelerated or postponed by the decision of national authorities.

The issue in this case was whether the applicants, a group of farmers, were entitled to be notified individually by the respondent of the adoption of Council Regulation (EEC) 1639/91, *Mulder Two Regulations*, and of their right to apply for milk quotas, *Mulder Two Quotas*, under that regulation. Farmers who had withdrawn from milk production in 1983 were not entitled to quotas under Council regulations 856/84 and 857/84, the *Milk Quota Regulations*. *Mulder One Regulations* were then introduced entitling Irish farmers who had been excluded under the *Milk Quota Regulations* to a 'special reference quantity'. The *Mulder Two Regulations* were introduced in order to remedy certain deficiencies in the *Mulder One Regulations*. The respondent publicised the making of the *Mulder Two Regulations* in newspapers, as well as journals most closely associated with the farming industry, and also communicated directly with the co-operatives and creameries who effectively operated the milk quota scheme. The applicant contended that there was a duty on the competent authority of every Member State to lay down procedures which were adequate and appropriate to give notice of the making of the *Mulder Two Regulations* and the right of the applicant to apply for quotas thereunder. The applicant argued that the *Mulder Two Regulations* were incomplete and that national procedures had to be adopted before the Community regulations could be truly effective. The respondent contended that the relevant regulations had direct effect and that the Minister was not under any obligation to adopt any measure by way of legislation, statutory instrument or otherwise to give effect thereto. The trial judge in the High Court concluded there was no obligation on the Minister to give notice to the individual appellants, or any other parties whose claims for a quota under the *Mulder One Regulations* had been rejected. However, the trial judge held that the seventh-named plaintiff was entitled to pursue a claim to damages as the notice published by the respondent in the national press was misleading and had misled him. The applicant appealed and the respondent cross-appealed the court's findings. In dismissing the appeal and allowing the cross-appeal, it was held that:
- It was clear that in general, there is no obligation on Member States to promulgate Community law. The application of Community law in Member States cannot be accelerated or postponed by the decision of national authorities. Whatever the hardship, it was clear that European legislation took effect from the date of its publication in the *Official journal* of the European Communities
- The *Milk Quota Regulations* did not impose a duty upon the competent authority to give publicity to the making of any regulations by the Council
- There was no basis for an obligation to notify individual citizens, however obvious their interests or however desirable that course might appear. Indeed, a decision to give notice individually to persons affected by regulations would create not merely a precedent, but perhaps an expectation which the competent authority could not ignore in other and less meritorious cases
- Where in particular cases the court held that certain regulations which prohibited the granting of a milk quota were invalid, or were administratively interpreted as having that effect, the offending regulation could not be ignored by national competent authorities until remedial regulations were adopted
- The applicant, in the present case, would have had no redress unless and until remedial legislation was adopted
- The advertisement published by the respondent, taken in conjunction with his communications with the creameries and co-operatives, fully discharged any obligation which he had assumed, there was no inaccuracy therein and on a fair reading the persons to whom it was addressed should not have been misled.

Campbell v Minister for Agriculture Food and Forestry (Supreme Court), 8 December 1998

HUMAN RIGHTS

Commission to be set up?

A Bill has been presented which aims to establish an independent body to be known as the Human Rights Commission. The establishment of such a body was agreed as part of the multi-party negotiations on Northern Ireland and the proposed body is to have a mandate and remit equivalent to that in Northern Ireland.

Human Rights Commission Bill, 1999

Clampdown on trafficking of immigrants?

A Bill has been presented which will, if passed:
- Define 'illegal immigrant' as a non-national who enters the state or has entered the state unlawfully
- Create an offence of trafficking in illegal immigrants, having a maximum penalty of an unlimited fine and/or ten years' imprisonment
- Give extraterritorial effect to the offence, and
- Provide for search and seizure.

Illegal Immigrants (Trafficking) Bill, 1999

INTERNATIONAL RELATIONS

Changes to British-Irish agreement?

An Act has been signed by the President incorporating the exchange of letters between the government of the United Kingdom and the Irish Government on 18 June 1999. The text of the letters appears as a schedule to the Act.

British-Irish Agreement (Amendment) Act, 1999 (No 16 of 1999)

LEGAL COSTS

District Court scale altered

With effect from 21 May 1999, the *District Court rules* are amended to include the term 'actual and necessary outlay' in order 51. This sum, as set out in the schedule of outlays attached to the rules, is to include postage, photocopying, registered post, fax and sundries.

District Court (Costs) Rules 1999 (SI No 126 of 1999)

Importance of motion justified two senior counsel

- The motion in this case was of such importance as to constitute exceptional circumstances, and the taxing master was wrong to disallow the costs of one of the senior counsel.

The first-named defendant and the second-named defendant sought a review of a taxation of costs in respect of a motion. The plaintiff's action against the defendants was dismissed by the High Court, and the plaintiff appealed to the Supreme Court. Two motions then came before the Supreme Court, one by the defendants to dismiss the appeal for want of prosecution, the other being the plaintiff's motion to adduce additional evidence in the Supreme Court. The second motion was dismissed, with the costs of it being awarded to the defendants. The costs of that motion were taxed, and it is from that taxation that the defendants appealed. The defendants argued that an affidavit filed in support of the first motion related almost exclusively to the second, and the costs of it should be awarded or apportioned accordingly. The defendants also disputed the fact that the taxing master only allowed one senior counsel in respect of the motion, and the fact that counsel's fees were reduced. The taxing master also disallowed all fees in respect of written submissions to the court on the basis that they were included in the brief fee. In varying the award of the taxing master, it was held that:

- For the court to alter the decision of the taxing master, it must find that his decision was unjust
- The court could not approach the issue on the basis of trying to assess what costs it would have awarded had it been the taxing master
- The taxing master erred in principle as the affidavit was a vital part of their defence of the second motion, and 75% of the costs claimed in respect of the affidavit should be allowed
- While the case of *In Re South Meath Election Petition* was correct as a general statement of practice, that only two counsel would be allowed on a motion save in very special circumstances, there were very special circumstances in this case
- The motion was of such importance as to constitute exceptional circumstances, and the taxing master was wrong to disallow one senior counsel
- If only one senior counsel had been briefed, then the agreed fee might have been appropriate, but as two counsel were briefed, the fee should be reduced
- The taxing master, in respect of his disallowance of fees for written submissions, erred in that he applied what was a correct ruling in respect of a hearing at first instance to the circumstances of an appeal or motion to the Supreme Court.

Smyth and Genport Limited v Tunney (McCracken J), 12 June 1998

LEGAL PROFESSION

Tax clearance required to join legal aid

With effect from 1 August 1999, tax clearance procedures will apply to solicitors and barristers who operate under the criminal legal aid scheme.

Criminal Justice (Legal Aid) (Tax Clearance Certificate) Regulations 1999 (SI No 135 of 1999)

LOCAL GOVERNMENT

New regional authorities established

An order having effect from 21 July 1999 establishes the Border, Midland and Western Regional Assembly and the Southern and Eastern regional assembly under the *Local Government Act, 1991*.

Local Government Act, 1991 *(Regional Authorities) (Establishment) Order 1999* (SI No 226 of 1999)

NATURAL RESOURCES

Minerals Development Act, 1999 (No 21 of 1999)

This Act came into operation on 7 July 1999. It has the effect of deeming minerals or exclusive mining rights vested in the Land Commission to be and always have been the property of the State and vested in the State.

PLANNING AND DEVELOPMENT

Local Government (Planning and Development) Bill, 1998

This Bill has been amended in the Select Committee on Environment and Local Government and passed by Dáil Éireann.

Order made against landfill site

- The circumstances in which the court could withhold an order included genuine mistake cases, acquiescence for a long period of time on the part of the applicants, where the infraction was a mere triviality or technicality, or if gross or disproportionate hardship occurred.

The applicants were residents of County Galway and brought an application pursuant to s27 of the *Local Government (Planning and Development) Act, 1976* in respect of a dump in County Galway. The respondent was sued as the developer of the lands situated in County Galway. It had been granted planning permission by An Bord Pleanála in respect of the dump on 9 April 1997, subject to a number of very stringent conditions. The applicants submitted that there had been and continued to be many breaches of the conditions upon which the permission was granted, including the breach of condition no 6 concerning rehabilitation measures which had to be complied with by 9 April 1998. The applicants submitted that the respondent continued to use the dump after that date contrary to the conditions of planning permission. In ordering the closure of the dump as of one month from that date, the court held that:

- It was accepted that many of the planning requirements which were to have been complied with by the respondent by April 1998 were not so complied with and still were not. The respondent had accepted that it had been in breach of condition no 6 and had accepted that, insofar as they had not complied with it, they had been involved in the commission of a criminal offence
- The respondent was in serious breach of the planning laws. It was the recipient of a planning permission and it quite flagrantly had not complied with the terms of that permission
- If the respondent were dissatisfied with the order made by An Bord Pleanála, it had rights and remedies available to it, particularly if, as it alleged, the decision of An Bord Pleanála was arbitrary
- When it became clear that the respondent was not going to be able to comply with condition no 6 of the planning permission, it had no lawful entitlement to continue to allow the

site to be used as a landfill site and it was open to apply for a fresh permission
- Although the respondent had submitted that an order would give rise to very considerable difficulties in complying with its statutory obligations, the court could not – in order to enable the respondent to comply with its statutory obligations under one piece of legislation – permit it to breach obligations imposed upon it by another piece of legislation
- The circumstances in which the court could withhold an order included genuine mistake cases, acquiescence for a long period of time on the part of the applicants, where the infraction was a mere triviality or technicality or if gross or disproportionate hardship occurred.

Curley v Mayor, Aldermen and Burgesses of the City of Galway (Kelly J), 11 December 1998

Local Government (Planning and Development) Act, 1999 (No 17 of 1999)

This Act has been signed by the President and comes into operation on 1 January 2000 by operation of s42(3).

PRACTICE AND PROCEDURE

Changes to periods of limitation?

A private member's Bill has been introduced which seeks to make new provisions regarding the date from which the Statute of Limitations runs in respect of actions for certain personal injuries arising from sexual or physical abuse.

Statute of Limitations (Amendment) Bill, 1999

New custody rules for District Court

With effect from 21 May 1999, new rules amend order 58 to include the provisions of the *Children Act, 1997*:
- Enabling relatives of a child's parents or any person acting *in loco parentis* to apply to the court for access to the child
- Taking into account the provisions of the *Guardianship of Children (Statutory Declaration) Regulations 1998* which prescribe a form of declaration to allow the father of a non-marital child to be guardian of the child with the consent of the mother.

District Court (Custody and Guardianship of Children) Rules 1999 (SI No 125 of 1999)

Enforcement procedures strengthened in District Court

A new procedure of attachment and committal for contempt of a District Court Order has been introduced with effect from 21 May 1999.

District Court (Attachment and Committal) Rules 1999 (SI No 124 of 1999)

Orders should not be appealed during course of hearing

- Appeals should not be made against orders or rulings made by a trial judge during the course of an action being tried by him or her.

The plaintiff sought to recover, under policies of insurance, compensation from the defendants (the first, second and third-named defendants) and L, (the fourth-named defendant). L made a lodgment into court. During the course of proceedings, the plaintiff sought an order to extend time for acceptance of the lodgment, in settlement of all aspects of the claim against L. The trial judge refused the application. On appeal, the plaintiff submitted, among other things, that the ruling made by the trial judge refusing the application was not made during the course of proceedings. By virtue of the agreement reached between the plaintiff and L, all proceedings against L were closed and all that was required to implement the settlement was to grant the plaintiff the extension of time. In allowing the appeal, it was held that:
- Appeals should not be made against orders or rulings made by a trial judge during the course of an action being tried by him or her
- The plaintiff and L were the only parties to the proceedings who had any possible proprietorial interest in the monies lodged in court. The other defendants had not identified any circumstances in which they might obtain any interest in those monies
- The proceedings in the case so far as they related to the claim by the plaintiff against L had been finally determined by virtue of the agreement between them and without derogating in any way from the proposition that appeals should not be made to the court against orders or rulings made by a trial judge during the course of an action being tried by him or her
- In the particular and unique circumstances of the case, the relevant proceedings between the plaintiff and L having been finally determined, the court was entitled to deal with the matters raised on appeal
- There was no rule of law, nor did the interests of justice require, that there would be any impediment to the implementation of a desired settlement of even a portion of those protracted proceedings.

Superwood Holdings plc v Sun Alliance and London Insurance plc (Supreme Court), 21 July 1998

Validity of warrant a matter solely for trial judge

- The question of the validity of a warrant is solely within the jurisdiction of the trial judge and should not be dealt with prior to the trial, by way of *certiorari* or otherwise.

The applicant issued proceedings challenging the validity of a search warrant in a case that had not yet come to trial. The applicant now appealed the decision of the High Court refusing to grant him the relief sought. In dismissing the appeal, it was held that:
- Any challenge that might be made to the validity of the search warrant would be more properly dealt with by the trial judge
- Similarly, the revelation to the applicant of the name of the informant who had led to the search warrant being issued was a matter totally within the jurisdiction of the trial judge to rule on
- The court had no jurisdiction to order the Oireachtas or the Attorney General to enact any legislation in any circumstances.

Cummins v Director of Public Prosecutions (Supreme Court), 3 December 1998

SPORT

Alterations to betting levy system

A Bill has been presented which aims to:
- Introduce a 0.3% betting turnover charge on all on-course and off-course bookmaker betting (increasable by subsequent regulations up to 5%)
- Introduce a flat-rate charge of £2,000 on each off-course bookmaker's shop (increasable by subsequent regulations up to £5,000)
- Introduce a flat-rate charge on on-course bookmakers, the rate of which is to be set by the IHA.

Horse and Greyhound Racing (Betting Charges and Levies) Bill, 1999

SUCCESSION

Plaintiff fails to meet s117 criteria

- The scheme of the *Succession Act, 1965* implies that among the circumstances which a court could take into account in assessing the fulfilment of a moral duty was the behaviour of the plaintiff towards his parent, which was a circumstance which had to be taken into account together with the benefit which the plaintiff had in fact got during his lifetime.

The plaintiff was the eldest son of the testator who died on 15 November 1993. By his will, the testator appointed the defendant to be his sole executrix and bequeathed everything to his daughter subject to the payment of £5,000 to the plaintiff 'in discharge of any moral obligations' he might have towards him. The plaintiff brought these proceedings pursuant to s117 of the *Succession Act, 1965* asking the court to consider whether the testator failed in his moral duty to make proper provision for the plaintiff in accordance with his means. In dismissing the claim, it was held that:

- The plaintiff's behaviour towards his father, at least from 1984 when he refused to leave the lands, was quite appalling. The plaintiff and his family continued to reside on and work the home farm and the family home to this day, although they clearly had no right so to do
- It was a tragic background and gave rise to considerations of whether and to what extent the behaviour of a child towards his father could affect the father's moral duty under the section
- The existence of a moral duty to make proper provision by will for a child had to be decided by objective considerations. The court had to decide whether the duty existed and the view of the testator that he did not owe any was not decisive
- The recent Supreme Court decision of *EB v SS* ([1998] 2 ILRM 141) supported the view that there could be cases where the child was in serious need, but nevertheless no moral obligation to provide for that child existed. Admittedly, that was a case where the testatrix had already made considerable provision for the plaintiff during his lifetime, and therefore presumably could be considered to have fulfilled such moral obligation as did exist
- The court had to decide whether a prudent and just parent, in the circumstances of the present case and given the behaviour of the plaintiff, reached a decision which was in accordance with his moral duty to the plaintiff
- It was extremely relevant that the plaintiff had the benefit of the testator's farm for which he paid nothing, not by a voluntary act of the testator but because he took it against the will of the testator
- The scheme of the 1965 Act implied that among the circumstances which a court could take into account in assessing the fulfilment of a moral duty was behaviour of the plaintiff towards his parent, which was a circumstance which had to be taken into account together with the benefit which the plaintiff had in fact got during his lifetime.

McDonald v Norris (McCracken J), 18 December 1998

TAXATION

Reduced and tax-free betting

From 1 July 1999, as a consequence of the coming into operation of s117(1) of the *Finance Act, 1999*, the rate of excise duty on bets is reduced to 5%. With effect from 25 July 1999, s75 of the *Finance Act, 1996* comes into operation. As a consequence, bets placed on-course (other than bets placed by means of telecommunications) at a greyhound meeting in respect of events taking place off-course are to be relieved of off-course excise duty.

Finance Act, 1999 *(Commencement of s117(1)) Order 1999* and Finance Act, 1996 *(Commencement of Section 75(1)) Order 1999* (SI Nos 178 and 223 of 1999)

Business tax incentives in rural renewal scheme

The qualifying period for the purposes of s372L of the *Taxes Consolidation Act, 1997* has been defined as the period commencing on 1 July 1997 and ended on 31 December 2001. This relates to business tax incentives in areas qualifying for the rural renewal schemes. The incentives consist of capital allowances for expenditure on the construction or refurbishment of certain industrial and commercial buildings and will be available initially in respect of expenditure incurred from 1 July 1997 to 31 December 2001. It is understood, however, that the termination date for the scheme will be extended to 31 December 2002 for publication by way of a legislative provision in the *Finance Bill, 2000*.

Taxes Consolidation Act, 1997 *(s372L) (Commencement Order) 1999* (SI No 205 of 1999)

Abolition of duty free within the EU

Regulations have been made, amending the *VAT Act, 1972*, so as to give effect to the abolition of duty-free sales to passengers making intra-EU journeys after 30 June 1999. From that date, sales of goods to passengers will be liable to VAT at the appropriate rate. However, certain food, drink and tobacco products supplied to passengers for consumption on board a vessel or aircraft during any intra-EU journey will continue to be liable to VAT at the zero rate. Duty-free sales will continue to apply in respect of journeys outside the Community.

European Communities (Value-Added Tax) Regulations 1999 and *Value-Added Tax (Supply of Food, Drink and Tobacco Products On Board Vessels or Aircraft for On Board Consumption) Regulations 1999* (SI Nos 196 and 197 of 1999) G

News from the EU and International Law Committee
Edited by TP Kennedy, Legal Education Co-ordinator, Law Society of Ireland

Reform of European competition policy (part 2)

The EC Commission recently published *Commission regulation on the application of article 81(3) of the* EC treaty *to categories of vertical agreements and concerted practices* together with *Guidelines on vertical restraints* (the text of both documents can be found on the DG4 web site: europa.eu.int/comm/dg04/index_en.htm). The regulation (also referred to as the block exemption) will cover and exempt a wide range of vertical arrangements which were previously analysed under one of a number of different regulations (for example, the regulations on exclusive distribution/purchasing) or which fell to be considered under the individual notification system managed by the EC Commission. Comments from interested parties on the provisions of the regulation were to be lodged with the EC Commission by 23 October and comments on the guidelines are to be submitted by 23 November 1999. The EC Commission plans, in the normal course of events, to adopt the regulation by the end of the year and to put in place the guidelines early next year.

The publication of this regulation and set of guidelines is the result of extensive consultation with interested parties which began with the publication of *The green paper on the reform of EC Commission policy towards vertical restraints* (again, to be found on the DG4 web site). The green paper suggested a number of options for reform which interested parties were asked to review and which led to the submission of 227 written comments. The majority of the submissions considered that the current system was too legalistic. This criticism has been levelled at the EC Commission for quite some time in that it is widely considered that EC Commission decisions fail to consider adequately whether the restraint at issue harms competition in the consumer welfare sense of economics. In other words, it is thought that the EC Commission fails to take into account adequately the effect which any given vertical restraint has on price and output. This failure on behalf of the EC Commission is attributed to its prioritisation of its market integrationist goal. This goal, it is argued, forces it to reject efficiency arguments or justifications and to favour the promotion of intra-brand competition over inter-brand competition.

Balancing the conflicting goals of efficiency and market integration is not an easy task as both goals raise very different issues. In the words of Barry Hawk (*System failure: vertical restraints and EC competition law*, 1995 CMLR):

'The effect of the market integration goal and the continuing governmental and private barriers to trade between Member States makes EC policy towards vertical restraints radically different from US anti-trust policy … The free rider rationale does not have the same influence in the EC, at least where parallel imports are concerned … Nonetheless, resolutions of the tensions between vertical efficiencies and intra-brand competition, on the one hand, and market integration and distributive concerns on the other remains one of the most important issues in EEC anti-trust law'.

The EC Commission itself is aware of the shortcomings in its policy and has highlighted some of them in both the green paper and in its *Communication on the application of the Community competition rules to vertical restraints* (also to be found on the DG4 EC Commission web site). In the *Communication*, it states that it now wishes to shift the focus of its analysis when assessing vertical restraints. In particular, it notes that it is only when inter-brand competition is weak and market power exists that it becomes important to control vertical agreements. On the other hand, it states in its green paper that, in the light of the future enlargement of the Community, market integration remains an important objective when assessing competition issues.

Specific proposals

The regulation/block exemption provides for a number of significant changes to be made to the current system and to the manner in which vertical restraints are managed by the EC Commission. In particular, the regulation provides for the following innovations.

The regulation is to cover all vertical arrangements relating to goods and services, final and intermediate. This essentially means that the goods or services may be resold by the buyer or, alternatively, may be used as an input by the buyer to produce its own good or service.

Article 2 of the regulation provides that the exemption for vertical arrangements will not apply to a situation where the market share held on the relevant market by the supplier, and by undertakings connected with the supplier, exceeds 30%. Obviously, in the case of exclusive supply obligations, the threshold of 30% will apply to the market share held by the buyer, and by undertakings connected with the buyer, on the market on which it purchases the contract goods or services.

The market share is to be calculated on the basis of the market sales of the contract goods or services and other goods or services sold by the supplier, or an undertaking connected with the supplier, and which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their price and their intended use.

The relevant market share is to be calculated on the basis of data relating to the preceding calendar year. There are provisions in the regulation which deal with the scenario where an undertaking normally benefits from the exemption but where it does particularly well in the market during a number of years, thus temporarily pushing its market share over the threshold. These provisions provide for the following: if the relevant market share of a particular undertaking exceeds 30% but does not exceed 35%, the exemption shall continue to apply during a period of two consecutive calendar years. If the relevant market share exceeds 35%, the exemption shall continue to apply for one calendar year. The benefit of this relaxation cannot, however, be used for more than two years.

Article 3 of the regulation provides that the exemption is not to apply to agreements which have the object of restricting the buyer in determining his resale price, of limiting active or passive resales to users by members of a selective distribution system, of restricting cross-supplies between distributors, again within a selective distribution system, or of prohibiting sales of spare parts to independent repairers and service providers. Article 3 also provides that the exemption will not apply to agreements which have the object of restricting resales made by the buyer except in certain instances – for example, where the supplier restricts the members of its selective distribution system from reselling to unauthorised distributors. There is no severability for these hardcore restrictions: in other words, if one of these clauses is included in an agreement, the offensive clause cannot be severed in order to allow the remainder of the agreement to operate (paragraph 56 of the guidelines).

The regulation also provides that the exemption will not apply to any of the following specific obligations contained in vertical agreements: any direct or indirect non-compete obligation if its duration is indefinite or exceeds five years; any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase or distribute goods or services; any direct or indirect obligation imposed on the members of a selective distribution system to sell or not to sell specified brands of competing suppliers. These restrictions can, however, be severed and the rest of the agreement can continue in force (paragraph 57 of the guidelines).

The regulation provides that the EC Commission may withdraw the benefits of the regulation where it finds that an agreement covered by the regulation has certain effects which are incompatible with the conditions laid down in article 81(3) of the treaty and, in particular, where access to a market or competition therein is significantly restricted by the cumulative effect of parallel networks of similar vertical restraints practised by competing suppliers or buyers.

The EC Commission may also, by regulation, declare that where parallel networks of similar vertical restraints cover more than 50% of a relevant market the exemption laid down in the regulation will not apply to vertical arrangements containing specific restraints and relating to that market. Finally, it is noteworthy in this regard that in certain circumstances the competent authorities in the Member States may also withdraw the benefit of the exemption.

Guidelines on vertical restraints

The aim of the guidelines is to outline the enforcement policy of the EC Commission in the application of article 81 to vertical arrangements. In this regard, the guidelines explain, among other things, the application of the new regulation and also describe the general framework of analysis for vertical agreements and the enforcement policy of the EC Commission outside the scope of application of the new regulation. They also address some of the market definition issues, although not in any great depth.

Section IV of the guidelines entitled *Enforcement policy outside the scope of the block exemption* is perhaps the most instructive section and will no doubt be of help to practitioners when advising clients who wish to enter into vertical arrangements with their distributors or buyers. The section begins by outlining the possible negative and positive effects of vertical restraints. It then lays down the general rules which it will apply when evaluating vertical restrictions. For example, it notes that vertical restraints which reduce inter-brand competition are generally more harmful than those which reduce intra-brand competition. It also notes that the possible negative effect of vertical restraints are reinforced not just when one supplier with its buyers practises a certain vertical restraint but also when other suppliers and their buyers organise their trade in a similar manner.

The EC Commission in this section also outlines its methodology for analysing vertical arrangements which do not fall within the perimeters of the new regulation. It states that when deciding whether an agreement is prohibited under article 81(1), the following factors should be considered:

- The market position of the supplier: the market share of the supplier is stated to be of the utmost importance in deciding upon the market power of the supplier
- The market position of competitors: in this regard, the EC Commission notes that the stronger the established competitors are, and the greater their number, the less risk there is that the supplier or buyer in question will be able to foreclose the market individually and the less risk there is of a reduction in inter-brand competition
- Entry barriers
- Buying power
- Maturity of the market
- Level of trade
- The nature of the good or service
- Other factors: for example, the duration of the agreements, their cumulative effect or whether the agreement is agreed or imposed.

Section IV also sees the EC Commission analysing particular vertical restraints and types of vertical agreements with the help of examples to show when the particular agreements/restraints can have anti-competitive effects.

The guidelines are not unlike the *Guidelines of the US National Association of Attorneys General* (see *Antitrust and trade regulation report*, vol 68, no 1706) which are of particular importance in the US in that section 1 of the *Sherman Act* can be enforced by civil actions taken by state officials and, in particular, by attorneys general. In the US, these guidelines have been found by practitioners to be of enormous help in analysing vertical arrangements. The practical significance and usefulness of the Commission's guidelines will be best tested in practice and will hopefully become a important tool for competition lawyers.

Resale price maintenance

Article 3(1)(a) of the regulation/block exemption provides that the exemption shall not apply to an agreement the object of which is: 'the restriction on the buyer in determining its resale price, without prejudice to the possibility for the supplier to impose a maximum resale price or to recommend a resale price, provided that these do not amount to a fixed or minimum resale price as a result of pressure or incentives created by any of the parties'.

This approach by the EC Commission is consistent with the approach adopted throughout the world: there is virtual unanimity amongst the competition policies of states that resale price maintenance (RPM), and in particular minimum resale price mainte-

nance, should be *per se* illegal. The only country I can think of in which it is not *per se* illegal is New Zealand. That country's *Commerce Amendment Act* of 1990 provides that RPM may be authorised by the Commerce Commission in cases where benefits can be shown to outweigh anti-competitive effects.

However, consistent economic analysis/empirical evidence does not exist which proves that the effects of RPM on economic efficiency are any more detrimental than those of other vertical restrictions. In fact, it has been argued by certain economists that the benefits of vertical price restraints are similar to the benefits derived from vertical non-price restrictions – that price-related vertical restrictions in general, and RPM in particular, accomplish directly what non-price vertical restrictions accomplish indirectly.

As mentioned above, the empirical evidence on the effects of RPM is also contradictory. One valuable and thorough review of the empirical evidence is a study by Overstreet (Overstreet, Th Jr, (1983) *Resale price maintenance: economic theories and empirical evidence*, Bureau of Economics Staff Report to the Federal Trade Commission) who looked at RPM during a time when it was broadly legal in much of the United States under federal fair trade law. He concluded that: 'the empirical evidence on the effects of RPM validates the implications of current economic theory. Theory suggests that RPM *can* have diverse effect, and the empirical evidence suggests that, in fact, RPM has been used in the US and elsewhere in both socially desirable and undesirable ways'.

Not all analysts have reached the same conclusion so there is some uncertainty.

At a legal level, it is interesting to note the case of *Dr Miles Medical Company v John D Park & Sons* (220 US at 373) where the US court drew the conclusion that vertical price-fixing was equivalent in all respects to horizontal price-fixing and constituted an unlawful restraint. Since then, there has been some movement from the US Supreme Court in that it found that vertical maximum price-fixing should not be considered a *per se* violation of competition rules (see *State Oil Company v Barkat U Kahn and Kahn & Associates, Inc*, judgment of the US Supreme Court of 4 November 1997). We wonder, however, whether the entire question should not once again be considered, preferably at a European level.

This, however, appears unlikely in the foreseeable future, given the attitudes of the EC Commission. This was summed up by Jonathan Faull, Former Director in DGIV for General Competition Policy on Co-ordination and International Affairs, at a British Chamber of Commerce Conference in Brussels in April 1997. In his speech, he conceded that certain types of RPM could, in certain circumstances, be said to be pro-competitive but he stated that in general they were likely to be harmful. Therefore, he considered that a simple legal rule dealing with this would in his opinion be the best option, especially in view of the available resources. But this hardly amounts to a coherent policy or a convincing reason for the application of a *per se* rule to a particular category of vertical restraint.

The practical implications of the adoption of the regulation and guidelines will undoubtedly be significant for lawyers who practise in the area. Hopefully, the amendments will translate into a more flexible legal environment in which business people can operate more effectively and, in addition, to a greater degree of legal certainty. The proposed amendments appear to introduce a degree of pragmatism into a system which, in the past, failed to marry legal formalisms with economic theory and business reality. The new system, whatever its flaws, does represent a step forward towards an effective competition policy. How significant a step the amendments to the system represent will only be apparent once we have seen the operation of both the regulation and guidelines in practice. G

Lynn Sheehan is a solicitor with Philip Lee, Solicitors.

RECENT DEVELOPMENTS IN EUROPEAN LAW

COMPETITION

Mergers

Case T-221/95 *Endemol Entertainment Holding BV v EC Commission*, judgment of 29 April 1999. The Dutch TV joint venture Holland Groep (HNG) operated three Dutch TV channels. The Dutch Government requested an investigation under article 22 of the *Merger regulation*. The Commission conducted an investigation and declared in September 1995 that the joint venture was incompatible with the common market. It concluded that the concentration created a dominant position on the TV advertising market in the Netherlands and the strengthening of the dominant position on the Dutch TV production market of one of the parent companies. One of the companies (the applicant) withdrew from the joint venture and, as a result, the Commission cleared the joint venture in July 1996. The applicant appealed against the 1995 decision. It argued that the Dutch Government had authorised the Commission to investigate only the TV advertising market and not the TV production market, that the commission had not given the applicant adequate access to the file, and that it had breached articles 2 and 3 of the *Merger regulation*. The Court of First Instance (CFI) held against the applicant. It held that article 22 did not enable a Member State to control the Commission's investigation or define its scope once the concentration has been referred to the Commission. The Commission examination has to relate to the concentration as a whole and not just to particular aspects of it. The Commission had not breached the applicant's rights of the defence by providing it only with non-confidential summaries of the third parties involved or by not indicating their identity. The applicant's right of access to the file had to be balanced against the right of protection of business secrets of the third parties, as well as with the need for speed when adopting merger decisions. The CFI also held that articles 2 and 3 had not been breached. The Commission had correctly defined the market and it was one in which the applicant held a dominant position.

Undertakings

Joined Cases C-51/96 and C-191/97 *Christelle Deliege v Asbl Ligue Francophone de Judo and Ors*, opinion of Advocate General Cosmos of 18 May 1999. Ms Deliege has been practising judo since 1983. She claimed that the Belgian judo federation had impeded her career by not permitting her to participate in important competitions such as the 1992 and 1996 Olympic Games. She argued that she was carrying out an economic activity, the freedom of which is guaranteed by EC law. She argued that EC rules on fair competition and freedom to provide services had been breached. The Advocate General determined that leading amateur sportsmen who receive financial contributions that enable them to devote themselves to the sport – as would a professional sportsman – can be seen as carrying on an economic activity. Thus, such sportsmen can be considered as undertakings for the purposes of competition law. Restrictions on this activity by national rules for the selection of national squads can be justified in the public interest. Thus, regulations limiting the number of sportsmen who compete in international competitions and requiring such athletes to be authorised by national federations to participate in international competitions do not breach free movement rules. The Advocate General considered that there were insufficient factual and legal points raised to allow the court to reach a conclusion on any violation of competition law.

COMPETITION

Equality

Case C-273/97 *Angela Maria Sirdar v The Army Board and Secretary of State for Defence*, opinion of Advocate General La Pergola, 18 May 1999. Ms Sirdar had been employed as a cook in the British Army since 1983. In 1994 she received a redundancy notice due to overstaffing and the need to reduce defence costs. She requested a transfer to the Royal Marines. Her request was refused, as the Marines did not admit female employees. She brought a gender discrimination claim. The UK government argued that the Royal Marines operates on the basis that each member must be in a position, independent of his specialisation, to fight as part of an infantry. Theoretically, one cannot join the Marines to carry out a specialised activity. The Advocate General opined that the *Directive on equal treatment* is of universal scope. Its prohibition of gender discrimination applies to any branch of activity. The only permitted exemptions are those set out in the directive itself. The ECJ has already held that the directive applies in the field of internal safety. The field of defence is directly comparable. One of the exemptions provided in the directive is where gender is a determining condition for access to work. Military activity in itself is insufficient to allow the invocation of this exemption. However, the special conditions that the Marines operate in and its principle of requiring all marines to be capable of combat could theoretically come within the exemption. Determining whether it does would require a thorough evaluation by the national authorities. Such an evaluation must take account of the principle of proportionality to properly and rigorously determine whether the absolute exclusion of women is an appropriate and necessary measure for the safeguarding of the military effectiveness of the Marines.

FREE MOVEMENT OF GOODS

Case C-255/97 *Pfeiffer Großhandel GmbH v Löwa Warenhandel GmbH*, judgment of 11 May 1999. Pfeiffer had sought an order restraining Löwa from using the trade name 'Plus' in certain districts of Austria. Austrian law allowed such an order to be granted to prevent 'unfair competition'. The ECJ was asked whether a national law not allowing a trade name to be used as the des-

Conferences and seminars

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

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

Topic: *38th annual congress*
Date: 27 August–1 September 2000
Venue: Helsinki, Finland

HAWKSMERE
Contact: (Tel: 0044 207 8811858)

Topic: *International acquisitions*
Date: 29 November–1 December
Venue: Brussels, Belgium

ignation of an undertaking where there is a risk of confusions contravened articles 28 and 43 of the treaty. It held that legislation prohibiting the use of a trade name could discriminate against undertakings in other Member States wishing to establish there. However, such legislation was justified as it safeguarded trade names against the risk of confusion.

Case C-350/97 *Wilfried Monsees v Unabhängiger Verwaltungssenat für Kärnten*, judgment of 11 May 1999. The case concerned proceedings taken by Monsees against the Independent Administrative Board for Carinthia. His truck had been stopped while transporting a herd of live cattle destined for Istanbul. The point of origin was in Germany. He questioned the application of legislation governing maximum journey times and distances for the transport of live animals for slaughter. The *Law on transport of animals by road* provides that the transport of live animals must end at the nearest suitable abattoir in order for the animals to be killed. It was argued that this provision is an obstacle to transport of live animals to or from Austria and transit through it. The ECJ held that it was a measure having an effect equivalent to a quantitative restriction prohibited by articles 28 and 32 of the treaty. The court held that the measure could not be justified by article 34 – to protect the health and life of the animals. It went beyond what was necessary to achieve this aim and made international transit by road of animals for slaughter almost impossible in Austria.

FREE MOVEMENT OF SERVICES

Case C-224/97 *Erich Ciola v Land Voralberg*, judgment of 29 April 1999. In 1990 the plaintiff took a lease on several plots of land on the Austrian shore of Lake Constance with permission to erect 200 moorings. The local authority issued the plaintiff a decision setting a quota limiting the amount of moorings allocated to non-Austrian nationals to a maximum of 60 by 1 January 1996. In June 1996 a local court found the plaintiff guilty of exceeding the quota by two and fined him 75,000 sch. The two persons resided in Germany and Liechtenstein. The ECJ held that the quota was an act of indirect discrimination contrary to article 59. It had been put forward on economic grounds rather than based on reasons of public policy, public health or public security.

FREEDOM OF ESTABLISHMENT

Case C-311/97 *Royal Bank of Scotland plc v Greece*, judgment of 29 April 1999. The Royal Bank of Scotland has a Greek subsidiary established in Piraeus. Greek law requires a 40% corporation tax of companies whose head office in not situated in Greece. In its 1995 tax declaration, the bank claimed that it should be subject to the tax rate applicable to companies whose head office is situated in Greece – 35%. The tax authorities rejected this request. The ECJ held that the distinction drawn between companies whose head office was located in Greece and those with a head office located outside Greece was contrary to EC law and was not justified by any objective criterion. The taxation powers of state must be used in compliance with the general principle of non-discrimination – article 6. Article 52 further develops this principle for companies. It ensures that companies established in a Member State may operate in other Member States on the same terms as the companies of that Member State.

INTELLECTUAL PROPERTY

Trademarks

Case C-108/97 *Windsurfing Chiemsee Produktions-und Vertriebs GmbH v Boots-und Segelzubehör Walter Huber* and Case C-109/97 *Windsurfing Chimesee v Attenberger*, judgment of 4 May 1999. Windsurfing Chimesee is a clothes designer and manufacturer, which is established on the shores of Lake Chiemsee in Bavaria. The company uses the word Chimesee as a product brand and has registered a number of graphics containing the name. Huber and Attenberger are two more recent clothes manufacturers who established their operations by Lake Chimesee and incorporated 'Chiemsee' on their products. Windsurfing brought proceedings against them on the basis that their use of 'Chiemsee' was misleading and in breach of the *Trademark directive* (Directive 89/104). Article 3(1)(c) provides that 'trademarks which consist exclusively of signs or indications which may serve, in trade, to designate the … geographical origin' may not be registered as trademarks. Article 3(3) provides that a trademark shall not be refused registration or declared invalid if, before the date of application for registration and following the use which has been made of it, it has acquired a distinctive character. The ECJ held that the prohibition on the registration of designations of geographical origin is to ensure that such indications remain available to all. The rule applies both to places with a close association with certain products and to places of lesser renown, which may become associated with particular products. Whether a place is or may be associated with a product is for national courts to determine, taking into account the perceptions of consumers of a given place and product. Where a place name does not appear to be connected to specific products, registration may be possible. A designation of geographical origin may, as a result of usage, acquire a meaning broader than its original description of origin. National courts should consider the specificity of the name, the length of time of the alleged usage and its intensity, the market share and geographical market of the product sold under the mark, the company's investment into the mark, its perception by consumers, declarations by chambers of commerce or other professional bodies and opinion surveys. If, as a result of such examination, the national court is satisfied that the market considers this mark as identifying a specific product of a specific company, the mark will be eligible for registration under article 3(3).

Zino Davidoff SA v AG Imports Ltd, 24 May 1999, *The Times*. In *Silhouette International Schmied GmbH KG v Hartlauer Handelgesellchaft mbH*, the ECJ decided that there was no doctrine of international exhaustion of trademarks. It held that goods with a trademark and first marketed outside the EEA could not be imported into the EEA and sold without the consent of the trademark owner. Davidoff is the manufacturer of luxury toiletries and cosmetics. These products are sold at a lower price outside the EU. AG Imports purchased some of these products abroad and imported them into the UK. Davidoff sought to rely on *Silhouette*. Laddie J in the English High Court accepted that Davidoff had given an implied consent to the importation of its trademarked products. In selling the products abroad, it had not attempted to restrict non-EEA purchasers in their freedom to resell the products anywhere.

LITIGATION

Brussels convention

Case C-267/97 *Eric Coursier v Fortis Bank, Martine Coursier, née Bellami*, judgment of 29 April 1999. Fortis Bank had given a loan to Mr and Mrs Coursier. They failed to make repayments and the bank commenced proceedings against them. The Cour d'Appel in Nancy required repayment of the loan, including interest at the rate agreed to and costs. A French commercial court subsequently held that there were insufficient assets to put the Coursiers into court-supervised liquidation. This court reinstated the initial claim to bring individual proceedings under French insolvency law. The effect of this was to make the bank's claim unenforceable. Mr Coursier took up employment as a frontier worker in Luxembourg. The bank began proceedings against him before the Luxembourg courts. Mr Coursier argued that the unenforceable order of the French courts under article 31 of the convention precluded the granting of an order for enforcement by a Luxembourg court. The ECJ held that article 31 deals solely with the execution of foreign enforceable instruments and not with the procedure for obtaining such an order. 'Enforceable' in article 31 does not refer to the circumstances in which a decision may be executed in the state of origin. G

London Irish solicitors have a ball

The tenth Irish Solicitors' Bar Association's Charity Ball in London was held in The Savoy last month, and was attended by lawyers from major London firms, the English and Irish bars and American law firms. The event raised just under £14,000 (bringing the total raised to date to £90,000), and once again the proceeds were donated to the Westminster Branch of the NSPCC. The ball was supported by the five biggest Dublin law firms and sponsored by Allied Irish Bank (GB), Anglo-Irish Bank and Bank of Ireland.
(*Above:*) Law Society President Patrick O'Connor with Cliona O'Tuama, President of the Irish Solicitors' Bar Association, London

Moylan to advise AG

Declan Moylan, Managing Partner at Mason Hayes & Curran, has been appointed personal solicitor to the Attorney General, Michael McDowell. Moylan will advise the AG in relation to charities and other matters

Justice Media Awards 1999

Margaret C Ward

Tom Mooney

Carol-Anne O'Reilly

Diarmaid MacDermott

Mary Raftery

Barry O'Kelly

Pictured at the *Justice Media Awards* ceremony in Blackhall Place last month were: Margaret E Ward of the *Irish Times* who won the *Justice Award* in the daily newspapers category; Tom Mooney of *The Echo* in Enniscorthy, Co Wexford, who won the *Justice Award* in the non-daily newspapers category; in the magazine category, the *Justice Award* went to *Consumer Choice*'s Carol-Anne O'Reilly; Diarmaid MacDermott of the Ireland International News Agency picked up the *Justice Award* for radio; and RTE's Mary Raftery won the *Justice Award* for television. Barry O'Kelly, the reporter who broke the Philip Sheedy story for the *Star* newspaper, was named Overall Winner of the competition (see also *News*, page 11).

Pictured at a recent CLE seminar on shareholders' agreements were (*l-r*) Patricia McGovern, LK Shields; Paul Keane, Reddy Charlton & McKnight; Barbara Joyce, Law Society; and Barbara Cotter, A&L Goodbody

Law Society President Patrick O'Connor and Director General Ken Murphy pictured at a recent meeting with the West Cork Bar Association

All you ever needed to know about the CCBE

The Council of European Bars and Law Societies (CCBE) was set up ten years ago as a liaison body between law societies and bars in Europe and to represent the interests of the legal professions before the European institutions.

What does it do?

The CCBE monitors and analyses proposals and legislation of the European Commission, individual Member States and other bodies, such as the World Trade Organisation, which affect lawyers and make submissions and representations concerning their provisions to the relevant bodies. Its agenda over the past year has included:

- Submissions to the European Commission, urging a reduction of VAT on legal services for private individuals, in the forthcoming amendment to the *VAT directive*
- Analysing the *E-commerce directive*
- Responding to the proposals of the GATS 2000 committee of the WTO on the removal of the barriers to trans-national legal practice
- Drawing up and circulating guidelines on the implementation *Establishment directive*.

Who are its members?

Its membership comprises 18 national delegations, representing the legal profession in each Member State of the EU and the European Economic Area. There are also observer members from a number of eastern European countries.

What is its structure?

It has a president, first vice-president and second vice-president who are elected annually and serve for one year. This year the president is Sotiris Felios from Greece.

John Fish has been nominated by the Irish delegation for election to the position of first vice-president for the year beginning 1 November 1999. If elected, he will go on to serve as president during the year November 2001 to November 2002. The only Irish president to-date was John Cooke, then senior counsel, now a judge of the European Court.

Who represents Ireland?

Geraldine Clarke (Council member) is the present head of the Irish delegation and its other members are John Fish (Council member), and Harry Whelehan SC and Mary Finlay SC representing the Bar. They have been ably assisted by TP Kennedy, Legal Education Co-ordinator (now Director of Education) of the Law Society, who acted as correspondent to the delegation.

Present priority

Following the proposals of the European Commission to extend to lawyers existing obligations under the *EU directive on money laundering*, the CCBE established a small task force under the chairmanship of John Fish to monitor the progress of these proposals. The task force has made a number of vigorous responses to the European Commission regarding the proposed requirement that lawyers would, in relation to certain financial activities, be bound to report suspicious transactions to state authorities without reference to the client.

It would appear that the Commission has, to some extent, recognised the concerns of the CCBE by including a provision in its proposal that Member States will have the option of designating the bar association or appropriate self-regulatory body as the authority for combating money laundering and to exclude such obligations in regard to information received from a client in order to enable the lawyer to represent that client in legal proceedings.

This task force was also charged with the task of reviewing and negotiating with the European Commission the terms of a charter, adopted by the European Professional Associations in July of this year, in relation to money laundering and the professions.

Geraldine Clarke

New Director of Education

The Law Society has named TP Kennedy as the new Director of Education, taking over from Albert Power who left to join the Institute of Chartered Accountants in Ireland. Prior to his appointment, Kennedy was the Legal Education Co-ordinator in the Law School and secretary to the EU and International Law Committee, among other things. He takes over at one of the most challenging times in the history of the Society's professional education and training, with the ongoing construction of the new £5.2 million Education Centre and the establishment of the new Curriculum Development Unit to oversee the new improved courses. Commenting on the new appointment, Law Society Director General Ken Murphy said: 'There are still major changes ahead, and the Society is very happy that with TP leading the Education Department, these challenges will be met and managed with the commitment to excellence that has always characterised his work'.

Director of Education TP Kennedy: major challenges ahead

Gardening Tipps

At the Tipperary Bar Association's summer garden party were Philip Joyce, Tipperary and Offaly (Birr Division) Sessional Bar Association; Gillian O'Connor; Rosario Boyle; Law Society President Patrick O'Connor; Superintendent Mary Fitzgerald; District Judge Michael Reilly and District Judge David Riordan

Law Society President Patrick O'Connor and Director General Ken Murphy pictured at a recent meeting with members of the Waterford Bar Association

Certificate in legal German

The *Certificate in legal German* is a course which was offered by the Law Society in association with the Goethe Institute for the first time in 1998/99. The course is taught through interactive tutorials about German law and the German legal system. The Society's EU and International Law Committee was instrumental in bringing this project to fruition. A great deal of work was put in by committee member Philip Daly, who put forward many ideas for the course and then monitored it, and by Jutta Breatnach from the Goethe Institute, who did most of the teaching on the course.

The conferring ceremony for the course took place recently. Ten candidates graduated from the course: Laura Sullivan Byrne, Kenneth Clear, Meriel Fitzsimon, Paul Fogarty, Oisin McClenaghan, Laura Mulleady, Sean O'Ceallaigh, Elaine O'Keefe and Hilda Clare O'Shea.

The diplomas were awarded by Law Society President Patrick O'Connor and the Director of the Goethe Institute, Rheinard Schmidt-Supprian.

Law Society President Patrick O'Connor with Director General Ken Murphy and Director of Education TP Kennedy (*front row, second from right*) at the conferring ceremony for the *Certificate in legal German*

Diploma in property tax conferring

The *Diploma in property tax* is a course which has been offered by the Law Society since 1992. It was the first of the Society's diploma/certificate courses and has been offered on eight occasions in various parts of the country. The 1999 course was held in Cork and the conferring ceremony for the 35 graduating solicitors and apprentices was held in Jury's Hotel, Cork, last month. The graduates of the course were: Gillian Ahern, Owen Binchy, Eimear Binchy, Finola Burke, Aeibhin Cahalan, Michael Cotter, Anne Marie Cullen, Sheila Duff, Finola Dunne, Gail Enright, William Fitzgibbon, Fiona Foley, Kevin Goggin, David Guilfoyle, Conleth Harlow, Jeremiah Healy, Francis Kelleher, Fiona Kelly, Kay Lynch, Kieran McCarthy, Saundra McNally, Veronica Neville, Michele Nunan, Mary O'Connell, Brian O'Halloran, Annette O'Sullivan, Marcella Power, Greg Ryan, Valerie Ryan, Carol Sheehy, Giles Smyth, Elaine Sweeney, Clodagh Tayler, Mary Tunney and Deirdre Wilson. Fiona Foley obtained the highest marks on the course, with Conleth Harlow second and Mary Tunney third.

The diplomas were awarded by Law Society President Patrick O'Connor. The Chairman of the Education Committee, Owen Binchy, addressed the gathering and expressed his thanks to the long-suffering spouses and family members of the conferees. The President thanked Owen Binchy, who had co-ordinated the course in Cork, while also attending it. He also expressed his thanks to the lecturers on the course, most of whom are solicitors. He announced that the ninth course is currently being planned for Dublin.

The great and the good

Law Society President Patrick O'Connor recently hosted a number of dinners at Blackhall Place for leading political movers and shakers, including Taoiseach Bertie Ahern and Tánaiste Mary Harney.
(*Above*) Taoiseach Bertie Ahern and Patrick O'Connor with (*from left*) Junior Vice-President Gerard Griffin, Law Society Director General Ken Murphy, Finance Committee Chairman Ward McEllin, and Registrar of Solicitors PJ Connolly
(*Below*): Tánaiste Mary Harney and Patrick O'Connor (*front row*), flanked by Gillian O'Connor and Attorney General Michael McDowell; (*back row, l-r*) Fergus O'Hagan SC, Beatrice Ensor, Dr Niamh Brennan, Director General Ken Murphy, Yvonne Chapman and Senior Vice President Tony Ensor
(*Bottom*) Ken Murphy; Patrick O'Connor; Brendan Howlin TD, Labour Party Spokesman on Justice, Equality and Law Reform; Deputy Director General Mary Keane; and past-president Michael V O'Mahony

Apprentices' page

Compiled by Keith Walsh

There are 900 apprentices at various stages of their apprenticeship as we reach the end of this century. Some 300 of these apprentices are currently engaged in the professional practice course in Griffith College. Another 300 will start their professional course in February 2000. Faced with the huge expansion in apprenticeship numbers, it is clear that both the Law School and the apprentices themselves have to deal with great changes both in the educational and social nature of their courses.

The current professional course has evolved from the cosy five-month, 80-people course into a gargantuan nine-month, 300-apprentice monster. Indeed, the large numbers on this and the next professional practice course have meant that it is of a very different nature to its predecessors. It resembles a huge college group rather than an intimate professional course.

That is why an *Apprentices' Page* is probably more needed now than at any time in the past. Although we may not know each other personally, we are all apprentices, and it is always interesting to see the developments on other courses and who is doing what or, indeed, who is representing apprentices in various events here and abroad. This *Apprentices' Page* is a start. If successful, it may be expanded in length, but will definitely be expanded in terms of contributors and the breadth of apprentice activities covered. This page is open to all apprentices, so comments, criticisms and suggestions to: kgwalshie@ hotmail.com. or c/o the Law School, Law Society, Griffith College, Dublin 8.

Popcorn for the soul

Cast of *Philadelphia here I come*

(*Back row l-r*) David Fahy, Willie Brennan, Ronan O'Brien, Ashley O'Connell, Olivia Broderick, Ross Moore and Cathal McGreal; (*seated ladies*) Edel McCormack and Deirdre Kelly; (*front row*) Dave Peters, Tommy Byrne and Domhnaill Forde

August saw a Blackhall Place production of Brian Friel's *Philadelphia here I come*, staged by members of the current professional course. I directed it, and by all accounts we were a hit. There were 12 people in the cast, and we all got on like a house on fire (everybody trying to escape!).

We rehearsed the show over a period of nine weeks with no shortage of blood, sweat, tears and general heartache. When showtime finally arrived, 'Get out there and be brilliant' was my much-considered pre-show pep talk to the cast. And they didn't let me down.

I've been in a lot of plays in my time, but this was easily my favourite production. Among the cast, there was a tremendous sense of spirit, camaraderie and general enthusiasm. It was a brilliant experience and the professional course presents the ideal opportunity for such a venture. So if you're an apprentice waiting to go on the next professional course, remember: It's not the things you do that you regret, it's the things that you don't do.

Ronan O'Brien

The West's Awake: apprentices in Westport

Westward, ho! Michael Gilroy on guitar and Gary Daly on bodhrán

It has almost become a tradition that the apprentices undertake a weekend away to Westport as part of their professional course. The current course's pilgrimage to the west started with an inspiring *seisiún* by Mike Gilroy on guitar and Gary Daly on bodhrán which passed the four-hour train journey in the blink of an eye.

Once in Westport, it was off to the *Towers* pub and restaurant on the quays for an aperitif and a light meal. A free bar was opened to the apprentices for a portion of their stay, although predictably enough it was dry within the hour. In search of the famous Mayo hospitality, the apprentices traipsed into the standard Friday night fleshpot in the centre of town known locally as the 'cattle-mart'. Happily the apartment complex occupied by the apprentices was equipped with a wine bar and the staff were none too shy about ensuring that the grape kept flowing.

Westport Arts Festival kicked off on Saturday evening and the town was ablaze with fireworks displays. Sunday was a relaxing stroll through Westport before the circus that is an apprentice weekend away left town with the music of Mayo ringing in their ears.

Human rights seminar

Designed to raise the awareness of human rights issues in the day-to-day practice of a solicitor's office, the human rights seminar held in the Law Society on 7 October, organised by Eleanor Edmond and Keith Walsh, was a great success. The seminar was a blend of a number of human rights voices on this island. Professor Brice Dickson, chairman of the Northern Ireland Commission on Human Rights, articulated the difficulties of getting both sides of the sectarian divide in the North to acknowledge the need for human rights. Marie Quirke, the solicitor in charge of the newly-formed (State) Law Centre for Refugees, emphasised the obligations imposed on the State and the individual by human rights. Michael Farrell, co-chairperson of the Irish Council for Civil Liberties and a practising solicitor with Hanahoe & Co, set out the appalling disgrace that is the Irish domestic record on human rights. And Siobhain Phelan BL, Chairperson of FLAC, spoke eloquently on the need to give a voice to the voiceless. G

Book reviews

Regulation of investment capital markets: Irish and European regulatory arrangements and laws

Kevin McHugh

Blackhall Publishing (1999), 26 Eustace Street, Dublin 2. ISBN: 1-901657-13-2. Price: £75 (hbk), £45 (pbk).

Regulation of investment capital markets is the second book on this area of the law to be published in recent times. The main author, Kevin McHugh, is Director of Compliance and Risk at Goodbody Stockbrokers. Chapters have been contributed by Mary O'Dea, Deputy Head of Securities and Exchanges Supervision in the Central Bank, and Jack O'Farrell, a partner with solicitors A&L Goodbody.

The book is divided into eight chapters. The *Investment services directive* (transposed into Irish law by the *Stock Exchange Act, 1995* and the *Investment Intermediaries Act, 1995*) is considered at length in chapter 2. Particular attention is given to the authorisation process which firms wishing to provide services on markets which come within the ambit of the directive must undergo. Relevant questionnaires and guidance notes are reproduced in appendices to the chapter.

Chapter 3 considers conflicts of interest between a firm and its clients and between clients. Attention is drawn to the increasing scepticism of regulators about the inscrutability of 'Chinese walls' and suggests buttresses to ensure that such oriental architecture is not merely ornamental. Chapter 4 contains an interesting discussion on money laundering and draws attention to the wide-ranging application of US law in this area; unfortunately, the author does not go so far as to indicate which federal or state enactments firms should beware of. The book could also have benefited by the inclusion of tables of cases and statutes.

Chapter 5, contributed by Mary O'Dea, sets out the role of the Central Bank under both the *Stock Exchange* and *Investment Intermediaries Acts* and considers, in particular, advertising and financial requirements and client asset protection. The author goes on to consider the CREST Equity Settlement System (introduced in Ireland in September 1996) and the *Listing directives* and rules. Chapter 8, contributed by Jack O'Farrell, considers related-party transactions and disclosure of interests in shares, offerings of securities by Irish-listed companies and insider dealing.

This is a useful book and will be of assistance to those working in the financial services area and to lawyers seeking a readable introduction to the latest legislative and stock exchange requirements in this increasingly-technical area of the law. G

Niall O'Hanlon is a barrister specialising in taxation and chancery matters. He is also a qualified chartered accountant and has recently been appointed editor of the journal Irish business law.

Jordan's Irish company secretarial precedents

Paul Egan, Liam Brazil and Patricia Haran

Jordan Publishing Limited (second edition), 21 St Thomas Street, Bristol. ISBN: 0-85308-389-4. Price: stg£80.

As Dr Conor Cruise O'Brien might say from his eyrie in fashionable Howth, a book on company secretarial precedents is unlikely to make the rafters ring down in County Roscommon. Yet such a book has significant and immediate relevance – to employers and to the great majority of workers in the private sector who are employees of companies. Not to mention their professional advisors.

There are almost 150,000 limited companies in Ireland, and about 5,000 public limited companies. This book will help both categories to keep within the law – which is being increasingly policed.

The price of not bothering, or of getting it wrong, is increasing. Post-McDowell, so is the likelihood of detection. Meanwhile, excuses are disappearing. Indeed, *Jordan's Irish secretarial precedents* by solicitors Paul Egan and Liam Brazil and chartered secretary Patricia Haran has now reached second-edition status.

The courts are increasingly reluctant to grant a fool's pardon to those who use the corporate frame without bothering with its forms – literally and metaphorically. The old approach of board meetings and members' meetings over breakfast (if at all), without proper records, are increasingly dangerous for companies, and their advisors.

Most or all of the precedents in frequent use are here. They range from an example of completed 'Statement of first secretary and directors and situation of registered office; Declaration of compliance; and Companies capital duty statement' (Companies Office form A1) on page 13 to 'Shareholders' resolution for disposal of books and papers after liquidation' on page 345.

Between conception and demise of a company, whether private or public, the law requires varying private and public records of status and decisions to be maintained. Through the 15 chapters in this book, the precedents range through re-registration of a multi-member company as a single-member company, allotment of shares, borrowings and debentures, appointment and dismissal of directors, shareholders' meetings and required records and registers.

What is a stop notice? If you need reminding, see page 118 for a brief explanation. A precedent notice to the server of a stop notice is on page 123. There is no mention of caselaw or the rules of the superior courts. For those, we must go to the textbooks or the rules.

This is not a work of profound erudition and scholarship. It does not seek to be. Its function is different and, to the busy practitioner and business person, probably more valuable. The authors do not make the mistake of trying to achieve too much. Yet most of the procedural requirements that a company secretary, solicitor, accountant or director will face on an on-going basis are covered here.

One or two minor criticisms. Firstly, Appendix 1 reproduces the first schedule (tables A to E) of the *Companies Act, 1963* and the second schedule (forms of memorandum of association of a public limited company) to the *Companies (Amendment) Act, 1983*. This reproduction is arguably unnecessary. Secondly, the ten-page index could be more comprehensive.

The authors, who practise law with the Dublin firm Mason, Hayes & Curran, give us a wide array of precedents. Whether a firm boasts dozens of plcs or merely a handful of small private companies among its clients, this book is highly recommended. G

Pat Igoe is principal of Dublin-based solicitors' firm Patrick Igoe and Company.

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 5 November 1999)

Regd owner: James Cooney, Legland, Tunnyduff, Bailieborough, Co Cavan; Folio: 8542; Lands: Legland; Area: 16.588 acres; **Co Cavan**

Regd owner: David Morrissey, Cuannakeen House, Clancy Strand, Limerick; Folio: 27050; Lands:Townland of Clonmoney West and Barony of Bunratty Lower; Area: 1a 0r 10p; **Co Clare**

Regd owner: Roadstone Limited, Naas Road, Dublin 12; Lands: (1) Clonmoney South, (2) Clonmoney North; (1) Bunratty Lower (2) Bunratty Lower; (1) 58a 3r 26p, 47a 2r 00p; **Co Clare**

Regd owner: Association Le Patriarche otherwise known as Association Dianova; Folio: 34523F; Lands: Situate in the townland of Glebe, Barony of Carbery West [East Division]; **Co Cork**

Regd owner: Mary and Johanna Hanlon, The Square, Kilworth, County Cork; Folio: 16229; Lands: Kilworth; Area: 2a 3r 10p**; Co Cork**

Regd owner: Michael and Irene Henchy; Folio: 37827F; Lands: Situate in the townland of Carrigrohane; **Co Cork**

Regd owner: Colin and Sylvie Sheil; Folio: 835F; Lands: A plot of ground situate in the townland of Ballintubbrid and Barony of Barrymore; **Co Cork**

Regd owner: Philip White; Folio: 12136; Lands: Situate in part of the lands of Ballyhilloge, in the Electoral Division of Knockantota and Barony of Baretto; **Co Cork**

Regd owner: Charles Gallagher, c/o O'Donnell & Sweeney, Solicitors, Dungloe, County Donegal, and 1914 Columbia Pike-9, Arlington, Virginia 22204, USA; Folio: 9590; Lands: Maghernagran; Area: 85.681 acres; **Co Donegal**

Regd owner: Arthur Sweeney, Doaghcrabbin, Porsalon P.O., Letterkenny; Folio: 23849; Lands: Doaghbeg, Drumnacraig, Drumavohy and Ballybolagan, Murren, Rosskirk & Killhill, Doaghcrabbin; **Co Donegal**

Regd owner: Mary Byrne; Folio: 8994; Lands: Townland of Tolka and Barony of Castleknock; **Co Dublin**

Regd owner: The County Council of the County of Dublin; Folio: DN7181; Lands: Townland of Churchtown Lower and Barony of Rathdown; **Co Dublin**

Regd owner: Pascal A Logan; Folio: 475L; Lands: Property known as No 100 Home Farm Road situate on the south side of the said road in the parish of Clonturk, District of Drumcondra; **Co Dublin**

Regd owner: John and Dolores McMahon; Folio: 108649F; Lands: 23 Seskin View Road, Parish of Town Tallaght, Dublin 24; **Co Dublin**

Regd owner: Padraic Crowley, Furrymelia East, Barna, County Galway; Folio: 16288; Lands: Townland of Forramoyle East (parts) and Barony of Galway; **Co Galway**

Regd owner: Laurence Leo Prendergast (deceased); Folio: 1203; Lands: Grayrobin and Barony of Bargy; Coane & Company, Solicitors, 2nd 71 Hardiman House, Eyre Square, Galway, tel: 091 566767; **Co Galway**

Regd owner: Brownes Drinks Limited; Folio: 1208F; Lands: Townland of Castleview and Barony of Trughanacmy; **Co Kerry**

Regd owner: Mary Galvin (deceased); Folio: 4111; Lands: Townland of Doonard Upper and Barony of Iraghticonnor; Area: 38a 2r 15p; **Co Kerry**

Regd owner: Edmond Walsh; Folio: 28624; Lands: Townland of Knocknagoshel West and Barony of Trughenackmy; Area: 2a 0r 2p; **Co Kerry**

Regd owner: Kenneth Potterton and Richard Cross; Folio: 17130; Lands: Dreenan and Barony of Carbury; **Co Kildare**

Regd owner: Martin Doyle and Gary Hayes; Folio: 9773; Lands: Ballytarsney and Barony of Iverk; **Co Kilkenny**

Regd owner: Gene Heatherington, Drumrane, Ballinamore, County Leitrim; Folio: 3778F; Lands: Drumraine Glebe; Area: 8.364 hectares; **Co Leitrim**

Regd owner: Joan Sweeney; Folio: 18144; Lands: Ballycollin Lower and Barony of Ballyboy; **Co Offaly**

Regd owner: John A Malone, Derrynargan, Boyle, Co Roscommon; Folio: 36971; Lands: Townland of USNA and Barony of Boyle; Area: 65a 0r 0p; **Co Roscommon**

Regd owner: Mary Lysaght; Folio: 12761; Lands: Loughbrack and Barony of Kilnamanagh Upper; **Co Tipperary**

Regd owner: Margaret Brown (deceased); Folio: 4308F; Lands: Townland of Parish of Trinity Without; **Co Waterford**

Regd owner: John Doyle; Folio: 875 and 7214F; Lands: Townland of Knockane and Barony of Middlethird; **Co Waterford**

Regd owner: John Christopher O'Meara, Connaught Street, Athlone, County Westmeath; Folio: 11140; Lands: Creggan Upper; Area: 37.056 acres; **Co Westmeath**

Regd owner: James Begley; Folio: 20515; Lands: Ballygerry and Barony of Forth; **Co Wexford**

Regd owner: Kathleen Murphy (deceased); Folio: 122R; Lands: Ballyfarnoge and Barony of Ballaghkeen; **Co Wexford**

Regd owner: Anne Walsh; Folio: 19111; Lands: Ballytegan Park and Barony of Gorey; **Co Wexford**

WILLS

Markham, Maureen (deceased), late of 59 Willow Park, Lifford, Ennis, Co Clare. Would any person having knowledge of a will of the above named deceased who died on 20 June 1999, at the County Hospital, Ennis, Co Clare, please contact M Petty & Company, Solicitors, Parliament Street, Ennistymon, Co Clare, tel: 065 7071445

O'Mahony, Richard, late of 173 Pearse Road, Ballyphehane, Cork. Would any person having knowledge of a will executed by the above named deceased who died on 7 July 1999, please contact Frank Buttimer & Company, Solicitors, 19 Washington Street, Cork, tel: 021 277330 (Reference GH)

Prendergast, Ellen (deceased), late of 240 The Sycamores, Kilkenny. Would any person having knowledge of a will of the above named deceased who died on 15 May 1999, please contact O'Shea Russell, Solicitors, Main Street, Graignamanagh, Co Kilkenny, tel: 0503 24106, fax: 0503 24687 (Reference MOS/1093)

Somerville (otherwise Sommerville, otherwise Summerville), Sean, late of Cappaghnagapple, Cloughbrack, Clonbur, Co Galway. Would any person having knowledge of a will executed by the above named deceased who died on or about August 25 1999, please contact Kieran Murphy & Company, Solicitors, 9 The Crescent, Galway, tel:091 587171 (Reference 346.99/BT)

Sweeney, Norah (deceased), late of 22 Ferguson Road, Drumcondra, Dublin 9 and also of Kyle, Killea, Templemore, County Tipperary. Would anyone having knowledge of a will made by the above named deceased who died on 26 August 1999, please contact Messrs. O'Keeffe & Lynch, Solicitors, 30 Molesworth Street, Dublin 2 (Reference EA)

Wall, David W (deceased), late of Glenealy, County Wicklow. Would any person having knowledge of a will executed by the above named deceased who died on 19 September 1999, please contact R Roper of Orpen Franks, Solicitors, 28/30 Burlington Road, Dublin 4, tel: 01 6689622, fax: 01 6689004

Wright, Anthony (otherwise known as Tony Wright), late of 16 Harty Place, Lower Clanbrassil Street, Dublin 8 and 61 Cluain Aoibhinn, Maynooth, County Kildare. Would any person having knowledge of a will executed by the above named deceased who died on 28 September 1999, please contact Murray Flynn, Solicitors, 4 Pembroke Road, Dublin 4, tel: 01 6600622 (Reference ER/MMcL)

EMPLOYMENT

Experienced conveyancing solicitor seeks change to part-time work in Dublin South city/county area. **Reply to Box No 90**

Engineer (29) LLB 96 and subsequent post-graduate legal qualifications with six years managerial experience seeks immediate apprenticeship. **Please reply to Box No 91**

Solicitor required for expanding Mid-West legal practice. Commercial, conveyancing and litigation experience desirable, but not essential. **Apply with CV to Box No 92**

Belfast City Centre. Due to continued expansion further positions have arisen within our Litigation and Commercial Conveyancing Departments. Applicants must be ambitious and self-motivated. Apply in writing enclosing current CV and quoting reference NTB/SD/01200/34/1 to McIldowies, Solicitors, Lincoln House, 51/53 Victoria Square, Belfast BT1 4DG

Solicitor required for Donegal Town general practice. Newly-qualified considered. **Reply to Box No 93**

Solicitor available on ad hoc basis to attend High Court, prepare briefs, consultations, attend counsel etc, also short term High Court locums. **Reply to Box No 94** or phone 087 2603316

Experienced conveyancing solicitor (at least 2-3 years' pqe) required for small, busy Dublin 2 practice. Salary in accordance with experience. **Reply to Box No 95**

Solicitor required for upmarket D2 general practice! Sal £25-30k. NQ – 2yrs' exp. Tel: Gina @ Osborne Recruitment 662 8686, fax: 662 8689, e-mail: osbornerec@eircom.net

Legal secretary/PA for lively large firm! Generous salary, flexible working hours. URGENT! Tel: Gina @ Osborne Recruitment 662 8686, fax: 662 8689, e-mail: osbornerec@eircom.net

MISCELLANEOUS

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

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

Personal injury claims, family law, criminal law and property law in England and Wales We have specialist departments in each of these areas, and offices in London (Wood Green and Camden) and Birmingham. One of our staff is in Ireland for one week in every month. Legal aid available to clients that qualify. Contact David Levene & Company, Ashley House, 235-239 High Road, Wood Green, London Nial experience seeks immediate apprenticeship. **Please reply to Box No 91**

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

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

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

Advertiser acts for hotel company commencing to build new hotel January 2000, expected completion March 2001, needs to acquire one clean publican's seven-day licence anywhere in Ireland. **Replies please to Box No 96**

Galway practice, city or county required. May suit senior practitioner interested in remaining as consultant, or sole practitioner interested in merger. All replies treated in strict confidence. **Reply to Box No 97**

For sale, ordinary clean seven-day publican's licence. Enquiries to John J Gordon & Sons, Solicitors, Ballina, tel: 096 21644, (Reference MOB)

Churchtown Meeting Place. Anyone acting for the estate of Alfred Wormser Harris, or for the successor in title to the said Alfred Wormser Harris claiming to have the premises in Churchtown under a fee farm grant dated 6 February 1852 made between Charles Arthur Waker of the one part and Langrish Prim, Elizabeth Hutton and Daniel Hutton of the second part and Olympia Hutton of the third part, the lessor of the Churchtown Meeting House, please contact Orpen Franks, Solicitors, Ref (80917/NC) 28/30 Burlington Road, Dublin 4, solicitors for the lessees to buy out the leasehold