Law Society Gazette

Regulars

President's message	3
News	5
Letters	8
Viewpoint	11
Tech trends	30
Briefing	42
Council reports	*42*
Committee reports	*44*
Practice notes	*47*
Personal injury judgments	*49*
FirstLaw update	*52*
Eurlegal	*57*
People and places	63
Apprentices' page	66
Professional information	67
Cross-examination	72

COVER PHOTO BY roslyn@indigo.ie. OUR THANKS TO THE IRISH WHEELCHAIR ASSOCIATION FOR THE USE OF THE CHAIR

Cover Story

14 Another brick in the wall?
For a long time the Irish state behaved as if handicapped children needed no education, but the recent High Court ruling in the *Sinnott* case left no doubt about every individual's constitutional rights in this area. And a proposed appeals system for parents who object to school board decisions could see families turning up at hearings with legal representation in tow. Barry O'Halloran reports

18 Much ado about nothing
When does an individual's day in court constitute abuse of the litigation process? And what should lawyers do to defend against – and avoid complicity in – such abuse? Dessie Shiels highlights one of the hazards of our litigious society

26 Live and let die
Doctors face tough ethical questions when making 'end-of-life' decisions for terminally-ill patients. The legal aspects of this dilemma are also thorny but, as Kieran Doran argues, American precedents for durable powers of attorney and living wills could help clarify the position in Ireland and the UK

33 Historic day for the solicitors' profession
Three years and £5 million pounds later, the Law Society's new Education Centre is now open for business. In this special feature, we focus on last month's official opening by President Mary McAleese

Editor: Conal O'Boyle MA. **Assistant Editor:** Maria Behan. **Designer:** Nuala Redmond. **Editorial Secretaries:** Catherine Kearney, Louise Rose. **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

Volume 94, number 9
Subscriptions: £45

The Ideal Christmas Gift

Leading Cases of the Twentieth Century

Leading Cases of the Twentieth Century is a unique collection of cases that takes you on a journey though the past 100 years. The selected cases are analysed by experts in the relevant fields. Included are the old and the new, those from home and abroad, together with the familiar and the unexpected.

Leading Cases of the Twentieth Century is the ideal gift this Christmas. Hand-tooled by a master craftsman this exquisitely bound book is a beautiful addition to the library of a friend or colleague this Christmas.

As the new century progresses why not take this opportunity to commemorate the 20th for some one special by presenting them with this elegant gift - certain to endure and be appreciated for many years to come.

It is the ideal present for anyone with an interest in the law.

Leading Cases of the Twentieth Century:

- Features significant contribution by distinguished authors
- Offers a unique insight into the most influential cases of the 20th century
- Shows how these influential cases have impacted on law and how the impact will continue into the new millennium
- Is a fascinating and stimulating collection of cases

Price: £98.00
ISBN: 1-85800-208-7

Round Hall
Sweet & Maxwell

43 Fitzwilliam Place, Dublin 2, Ireland Tel: **(01) 662 5301** Fax: (01) 662 5302
DX: 109032 Fitzwilliam Email: **info@roundhall.ie** Web: **www.roundhall.ie**

The final whistle

The best things come in pairs, they say, and so it was the case last month. First we had the official opening of our new Education Centre by President Mary McAleese (and you'll find a photo-record of that event elsewhere in these pages). Then we ran a most successful conference on incorporating the *European convention on human rights* into Irish law. This was the first such conference in this jurisdiction on an issue that is going to impinge on every area of law and practice.

Needless to say, we are the last of the 41 member states of the Council of Europe to incorporate the *European convention* into domestic law and it is almost impossible to overstate the potential impact that it will have here. Criminal law, of course, will be affected, but so too will civil procedures, the right to a fair trial, family law, housing, planning, the environment, licensing – you name it, the convention touches on it. The right to fair procedures will affect public authorities, courts and tribunals, of course, but also disputes on contract, commercial and insurance matters.

A promising start

One of the most interesting aspects of the conference was hearing how other countries, such as Scotland (which incorporated the convention in May of last year), have dealt with the issues raised by incorporation. We will have to wait to see how our own legislators and judiciary handle the thorny issues that are bound to arise, but this was a promising start to the debate. And I am proud that the Law Society should have been first out of the blocks in airing the problems and opportunities that incorporation brings with it. In that regard, I would particularly like to thank the society's Mary Clare Walsh and solicitor James MacGuill for the tremendous energy and commitment they put into organising this event and for making the day such a success.

I would also like to take the opportunity to thank all the speakers who came to share their collective wisdom and experience with us: attorney general Michael McDowell, Gerard Hogan SC, solicitor Michael Farrell, Justices Adrian Hardiman, John Hedigan and Donal Barrington, Lord Hope of Craighead, Anna Austin, Professor Bruce Dickson, Professor Alan Miller and John Bowman.

We will, of course, be running other conferences on this important subject in the months ahead and I would urge as many of you as possible to attend. The convention really is one of the biggest things to hit the practice of Irish law for many years, and as a profession we have to be ready for it. It's the very least our clients can expect from us.

As this is my final president's message before I pass the ball to my successor, Ward McEllin, which I hope will not be a hospital pass, I'd like to thank both him and my Junior Vice-President, Owen Binchy, for all their help and support during the year. They certainly helped to lighten my load considerably.

A particular word of thanks must also go to director general Ken Murphy and to deputy director general Mary Keane – and to the rest of the staff in Blackhall Place. For the last year, I have worked closely with the secretariat there and I can honestly say that the profession is very well served by having such a team of committed and talented people working on its behalf. I would also like to thank Bernard Magee for ensuring that there was no golf club in Ireland that he couldn't find in double-quick time.

And so that's it. I have enjoyed my year as president enormously. It has been an honour to serve, and I hope I have represented the profession as you would have wished.

Anthony Ensor,
President

'The convention really is one of the biggest things to hit the practice of Irish law for many years, and as a profession we have to be ready for it'

Law Society of Ireland

ADVANCE BOOKING FORM

Name: _____

Firm: _____

Address: _____

_____

Tel: _____ Fax: _____

Email: _____ DX: _____

Year of admission to the Roll: _____

Names of persons travelling: _____

I enclose cheque in the sum of £ _____

representing booking fee for _____ persons.

If you are thinking of attending the conference, avoid disappointment and book now. Advance bookings can be made by forwarding a booking fee of £300 per person travelling to Mary Kinsella, Law Society, Blackhall Place, Dublin 7. (Tel: (01) 672 4823. Fax: (01) 672 4833

Travel options will be available to delegates who would like to travel to Monaco in advance of the conference or stay on afterwards.

Note: THE CONFERENCE WILL BE HELD TWO WEEKS AFTER EASTER (EASTER SUNDAY 2001 IS ON 15 APRIL)

‘Danger in extending concept of human rights’, warns AG

The attorney general, Michael McDowell, has warned against discarding the notion of popular sovereignty and constitutional autonomy ‘in pursuit of a higher order of human rights’.

Speaking at the recent Law Society conference on incorporating the *European convention of human rights* into Irish law, McDowell said: ‘There is a danger that the concept of human rights will be extended to cover every political or social desideratum. There is constant chorus – thankfully from a minority of observers – seeking the wholesale extension of justiciability to what are termed social and economic rights’. This, he said, could lead to a weakening of the power of the executive and legislative branches of government, with a corresponding increase in the power of the judiciary.

And he concluded: ‘If we chop down the constitutional order established with such difficulty in the first half of the 20th century and exchange our independence and autonomy for a new international system of human rights, can we be sure that when we need to protect ourselves from the abrogation of those rights on an international level that we will have any effective constitutional shelter or defence?’

President Anthony Ensor *(left)* and attorney general Michael McDowell confer before the conference in Blackhall Place

Other speakers at the conference, which was chaired by solicitor James MacGuill, included Professor Alan Miller, who discussed Scotland’s experience with the convention since its incorporation in May 1999, Mr Justice Adrian Hardiman, Gerard Hogan SC, solicitor Michael Farrell and Bruce Dickson, the Northern Ireland Human Rights Commissioner.

Papers delivered at the ECHR conference are available on the Law Society’s website.

The society will be holding another conference on the subject, scheduled for Saturday 10 February 2001, by which time the bill should at least have been published.

Courts Service up to speed at last

All vacancies in Dublin court offices have been filled and arrangements are in place to fill the 20 or so vacancies in provincial offices, the Courts Service has announced. All vacancies in the Probate Office have been filled and the service is ‘optimistic’ that the current backlog of dealings can now be cleared. In addition, five extra staff have been assigned to the wards of court office.

According to Courts Service chief executive PJ Fitzpatrick: ‘Arrears in attending to pre-wardship enquiries/applications to register enduring powers of attorney have been effectively eliminated and it is intended that all outstanding applications for dismissal orders will be dealt with within a reasonable time-frame’. He added that there had been a great deal of interest in the Courts Service from other civil servants, with 1,700 applications coming from other departments.

Review of charities law

Charities and voluntary organisations in Ireland operate under different structures, from *ad hoc* groups to corporations to trusts, with a wide range of financial management controls. The absence of legal protection for individuals, issues of insurance, the lack of public accountability for monies raised and the disbursement of funds on winding up are some of the issues which the Law Society’s Law Reform Committee will be looking at in its planned review of charities law. The committee would welcome submissions from solicitors whose clients have experienced difficulties in this area. For further information, contact the society’s law reform executive Alma Clissmann on 01 672 4800 or by e-mail: a.clissmann@lawsociety.ie.

ORDNANCE SURVEY COPYING LICENCE

The Law Society’s Conveyancing Committee would like to hear from any solicitors currently using the licence to copy ordnance survey maps. The committee has been invited to a preliminary meeting to discuss possible changes in the fees and arrangements for these copyright licences and would like to get the views of users of the licences before making representations.

LAW SOCIETY RETIREMENT TRUST SCHEME

Unit prices: 1 October 2000
Managed fund: 373.668p
All-equity fund: 114.29p
Cash fund:180.719p
Pension protector fund: -

COMPENSATION FUND PAYOUT

The following claim amount was admitted by the Compensation Fund Committee and approved for payment by the Law Society Council at its meeting in October 2000: Conor McGahon, 19 Jocelyn Street, Dundalk, Co Louth – £296.25.

INNOCENT APPRENTICES?

The Law Society is offering apprentices the chance to apply for a placement in the Innocence Project in New York next year (see the Aug/Sept issue of the *Gazette*, page 10). The placement is voluntary and runs from the beginning of June until the end of July 2001. Applicants are asked to submit a one-page résumé and a one-page written submission outlining: why they would be suitable for the placement; how they would arrange funding; and how they would arrange accommodation in New York. (Please note that the consent of your master is necessary to partake in this placement.) Applications should be sent to Grainne Butler, Law Society, Blackhall Place, Dublin 7.

McDowell hits back: 'No di

The war of words between the Law Society and attorney general Michael McDowell over 'barrister-only' appointments to the AG's office rumbles on, with McDowell flatly refusing to change his recruitment policies (see Aug/Sept *Gazette*, page 3).

In reply to an earlier letter from Director General Ken Murphy branding the exclusion of solicitors from such posts as 'absurd and utterly indefensible' and calling for all legal positions to be open to both branches of the profession, McDowell says: 'I cannot accept your unsubstantiated assertion that present recruitment policies based on professional specialisation for both solicitors and barristers in the state's legal service operate against the public interest. On the contrary, I believe that the present policies serve the public interest very well'.

He points out that barristers are effectively excluded from 80% of the legal posts in the state, but adds: 'I believe that recruitment based on professional specialisation of the state's legal service is not at all unfairly discriminatory'.

'I am quite satisfied that the

LETTER FROM THE DIRECTOR GENERAL

31 July 2000

Dear Attorney General,

This is the letter from me which you have been expecting.

I complained to you personally in an informal manner shortly after the first appearance recently of newspaper advertisements for third and fourth legal assistant positions in the Office of the Attorney General with the eligibility for these positions confined to barristers. I now write on behalf of the Law Society to make that complaint formally and in the strongest possible terms.

We both know that there is nothing new about this issue. Similar recruitments have provoked complaint from the society on many occasions in the past. The society's position is simple and unambiguous. The exchange of correspondence which I had in late 1996 and early 1997 with your predecessor as attorney general, Dermot Gleeson SC, made clear the view of the society that every position for a lawyer in the public service should be open to all lawyers and should be filled by the best candidate regardless of whether that candidate is a solicitor or a barrister.

The only test for recruitment to public service lawyer positions, including all judicial appointments, should be whether candidates have the experience and ability to do the job – not whether they come from one branch of the legal profession rather than another.

From the society's point of view, this has always been a public interest issue. It is in the public interest that lawyers in the public service be of the highest calibre available. The wider the pool of legal talent from which the appointment of public service lawyers is made, the better will be the quality of the appointees. To exclude all solicitors, regardless of their experience or ability, from consideration for these appointments is to exclude more than 80% of the practising lawyers in the state. It constitutes discrimination without objective justification. It is a restrictive practice which is fundamentally contrary to the public interest.

What is it about the work of legal assistant in the Attorney General's Office which makes solicitors unsuitable? Every other legal assistant position in the state service of which the society is aware is open to being filled by either a solicitor or a barrister. Solicitors are now employed in other sections of the Attorney General's Office. Why should a solicitor employed in, for example, the Chief State Solicitor's Office or the Parliamentary Draftsman's Section of your own office be not even eligible for consideration for these legal assistant positions?

The advertisement says that the duties of a third or fourth legal assistant include 'advisory work and research in the fields of both domestic and international law, including the law of the European Union, participating in the formulation of law at domestic and international levels and advice on the conduct of litigation in which the state is involved'.

The only qualifications specified in the advertisement are that the applicant must have practised as a barrister in the state for at least seven years for the position of third legal assistant and at least four years for the position of fourth legal assistant. The experience so gained automatically ensures that these persons will be capable of performing the duties required. This, and this alone, distinguishes them and sets them apart from solicitors. It is, apparently, irrelevant that experience gained as a barrister in the Law Library or on circuit may have been of the most mundane kind.

As against that, it matters not that a solicitor candidate (if he or she could be a candidate) might have spent decades advising on complex legal matters for highly-demanding personal and corporate clients, might have vast experience of 'domestic and international law, including the law of the European Union', indeed could conceivably have written leading textbooks on such subjects or pleaded cases in front of the European Court of Justice. All of that would count for nothing.

It matters not that since the foundation of the state solicitors have been appointed and have served successfully as judges of the District Court. It is irrelevant that in recent years no less than six former solicitors have served with distinction as judges of the Circuit Court. It matters not, and perhaps here is a special irony, that the Attorney General's Office is currently involved in the preparation of legislation, due to be published very soon, which will give effect to a government decision, which has all-party support in the Oireachtas, that solicitors should be made eligible for appointment as judges of the High Court and Supreme Court. A solicitor could, indeed, actually be the attorney general. No solicitor, however, could possibly be a third or fourth legal assistant in the Attorney General's Office.

The position taken by your office on this matter is, in the view of the society, absurd and utterly indefensible.

If, as is clear, there is no defence on the merits to the argument that solicitors should be eligible for appointment, what is the true reason for excluding them? Is it merely an outdated tradition? Or is it simply a form of prejudice – something offensive to solicitors and highly inappropriate in the Office of the Attorney General?

Whatever the motivation for this discrimination is, it clearly operates against the public interest and should be brought to an end forthwith.

Accordingly, the society hereby calls upon you to discontinue these competitions for third and fourth legal assistant positions in the Office of the Attorney General and to re-advertise them in a manner which will make them open to solicitors. There are experienced and able solicitors performing difficult legal work elsewhere in the public service who would be very interested in applying for these positions. I make this statement advisedly as a number of them have been in contact with me on the subject. This is not an abstract issue. Real people are affected by it.

Please note that I am copying this letter to the taoiseach and to certain other members of the government. I will be pointing out to them that the continued exclusion of solicitors from eligibility for these positions is in open conflict with the opinion expressed in the Report on the Office of the Attorney General by the Dáil Select Committee on Finance and General Affairs dated 15 February 1996. I also intend to publish this letter in the next issue of the society's *Gazette*, together with whatever response to it you would care to make.

I look forward to hearing from you.

Ken Murphy, Director General

scrimination in AG's office'

present recruitment policies produce the optimal results from the state's point of view', he adds. 'Those policies recognise that solicitors recruited to the state's legal service remain professional solicitors and are entitled to promotion to senior professional posts which are reserved for solicitors. I do not intend making it possible to appoint barristers to act as professional solicitors in the state legal service. I do not intend making barristers eligible to be appointed chief state solicitor or as state solicitors. I think that your suggestion that I should do so is misconceived'.

At its meeting on 13 October 2000, the Law Society Council considered the letter received from the attorney general but remained unconvinced by the arguments he put forward. It unanimously reconfirmed its position as expressed by the director general, saying that the merit based approach recommended by the Law Society was the one which truly represents the public interest.

The full text of the exchange of correspondence between Murphy and McDowell is reproduced below.

REPLY FROM THE ATTORNEY GENERAL

2 October 2000

Dear Director General,

I refer to your letter of 31 July 2000 in relation to the position of legal assistant in the Office of the Attorney General.

As you are aware, there has been previous correspondence between my predecessor, Dermot Gleeson SC, and you on this topic. I attach a copy of that correspondence for reference.

As I understand it, the members of the Law Society continue to favour the traditional division of practising lawyers into two specialist professions. In that context, I would point out that the state's legal service for which I have responsibility has four component parts:

- The Chief State Solicitor's Office in which 91 professional solicitors practise and for which no barrister is eligible for appointment
- The network of state solicitors in which there are 32 professional solicitors and for which no barrister is eligible for appointment
- The Parliamentary Draftsman's Office in which there are 11 solicitors and barristers and for which *either* profession is eligible
- 21 legal assistants who act as counsel in this office have been by tradition recruited from the practising bar.

As you are well aware, it is clear from the foregoing that the vast majority of legal positions in the state's legal service (approximately 80%) are closed to barristers. Your society has never objected to any advertisement which has confined appointments in the Chief State Solicitor's Office or as state solicitors to practising solicitors.

When the position of chief state solicitor was recently advertised and was confined to solicitors in public or private practice, you made no comment, private or public, on the exclusion of barristers from eligibility for appointment to a post carrying the highest category of salary in the state's legal service – that of secretary general.

The policy of recruiting solicitors only to the Chief State Solicitor's Office and as state solicitors has worked well and I believe that the great majority of your members would support its continuance. I think that they would be astonished and disappointed were the government to appoint a barrister to be chief state solicitor.

I very much doubt and remain to be convinced that the members of your society who are practising as state solicitors or in the Chief State Solicitor's Office support your stated view that barristers should be eligible for appointment to their positions or would agree to it.

In the absence of evidence that the relevant members of your society would agree to equal eligibility for all practising lawyers, there is an element of '*what's mine is mine, but what's yours is ours*' to the arguments in your letter.

Turning to the recruitment policy for the much smaller number of legal assistants in the Attorney General's Office, it has long been the view that practice at the bar for seven years in the case of a third legal assistant and four years in the case of a fourth legal assistant ensures that those appointed have qualities and experience vital to the successful discharge of their duties.

These qualities include intimate practical knowledge of the realities of litigation and advocacy (which equips legal assistants to give effective and authoritative direction to counsel conducting the state's litigation and to give the government sound and experienced analysis and advice on state litigation) and long experience of acting alone in researching and writing opinions (which is a hugely important aspect of the workload of the office).

I cannot accept your unsubstantiated assertion that present recruitment policies based on professional specialisation for both solicitors and barristers in the state's legal service operate against the public interest. On the contrary, I believe that the present policies serve the public interest very well.

I believe that recruitment based on professional specialisation of the state's legal service is not at all unfairly discriminatory. On the contrary, solicitors in the state's service, as you well know, are given exclusive eligibility for the vast majority of positions. It could be easily argued with greater force that barristers suffer much more discrimination by *their* exclusion from the vast majority of posts.

Despite the numerical imbalance in favour of solicitors, I continue to support specialised recruitment for professional solicitors which makes them exclusively eligible for *all* solicitors' professional positions as state solicitors and in the Chief State Solicitor's Office.

I do not believe that the director general of the Bar Council would get or deserve much sympathy if he had written to me demanding that I re-advertise the recent appointment of chief state solicitor on the grounds that some barristers in the Attorney General's Office might have been suitable and would like to be considered for the job. And if he claimed that the advertisement which appeared was 'offensive' to barristers generally, I think your members would have dismissed his claim.

I am quite satisfied that the present recruitment policies produce the optimal results from the state's point of view. Those policies recognise that solicitors recruited to the state's legal service remain professional solicitors and are entitled to promotion to senior professional posts which are reserved for solicitors. I do not intend making it possible to appoint barristers to act as professional solicitors in the state legal service. I do not intend making barristers eligible to be appointed chief state solicitor or as state solicitors. I think that your suggestion that I should do so is misconceived.

With little rotation in the small numbers of posts as legal assistant, barristers hoping for a career in the public service are already at a huge disadvantage compared with solicitors.

I intend to continue to recruit fairly from the two professions on the basis of specialisation and, even though this policy results in 80% of legal posts being confined to the solicitors' profession, I am satisfied that it would be seriously mistaken in policy, counter-productive in result, and very unfair in practice to accept the proposal made in your letter.

You mentioned the possibility of publishing my reply to your letter. If you are doing so, I would be obliged if you would publish it in its entirety, as your letter to me when published omitted the wider context and many of the salient facts in a manner that I did not consider fair.

Michael McDowell SC, Attorney General

Letters

The measure of a man?

From: Chris Ryan, Dublin

Recent articles in the national newspapers with regard to the treatment of solicitors in open court by some judges have spurred me to write to the *Gazette*.

A minority of judges treat solicitors with disdain bordering on contempt. This conduct has largely gone unchallenged by the representatives of the solicitors' profession, but I believe that their treatment of solicitors in open court should be challenged, not only by the individual solicitors but also by the Law Society.

Such conduct does not help solicitors who wish to appear as advocates in court. But in spite of the way in which the various solicitors have been treated, the Law Society has seemingly not moved to support its members. If a senior counsel was treated in like manner, he would immediately challenge the judge in open court, sure in the knowledge that the Bar Counsel would row in behind its member and support him. The Bar Council would make it very clear to the judge the way in which it expected its members to be treated in open court, and would demand such respect and treatment for its members. However, it would seem that the Law Society is not like-minded in its support for solicitors.

Solicitors have been treated by some members of the judiciary as nothing more than messenger boys and they seem to believe that they can carry on like this. After all, solicitors are officers of the court – whatever that might mean.

It is up to the Law Society to meet the presidents of the various courts and to point out to them the petulant and ill-mannered members of the judiciary and the way in which they are treating members of the solicitors' profession.

Where complaints are substantiated, the member of the bench should be removed. Their problem seems to stem from the fact that in their own court they are God, answerable to no-one. This should change immediately. The bench is fast to demand respect for their position in the way they are addressed and in the way that people are clothed who appear before them. But the measure of a man is not the amount of respect he demands for himself, but the amount of respect he gives and demands for others.

The Director General, Ken Murphy, replies:

Contrary to what is suggested by Mr Ryan, in every case of which I am aware in which a solicitor has sought the support of the Law Society, it has been freely given. However, it may be of limited value. The real problem is the absence of any proper system for dealing with allegations, which thankfully are rare, of judicial misconduct. The society is pressing hard in public (see December 1999 Gazette, *page 3) and in private for such a system to be introduced and awaits the report of the Chief Justice's working group, which is promised by year end.*

DUMB AND DUMBER

From: Alex Gibbons, PJ O'Driscoll & Sons, Clonakilty, Co Cork

I enclose copy from an advert in the *Irish Examiner* property section recently, which a client brought to my attention with instructions to make enquiries on his behalf.

'Schull, Co Cork. A prime site with magnificent views over Roaringwater Bay and located close to Schull with all its amenities. 10-year freehold'.

I thought I had come across a new concept in property ownership and a new form of freehold title, which, in view of the location of the property, involved some complicated type of time-share arrangement with fascinating possibilities for property ownership in West Cork.

Imagine my disappointment when the auctioneer informed me that this was a misprint meant to read 'tenure freehold'.

From McCann FitzGerald, Dublin:

The following were the winners of a *New York* magazine contest asking contestants to take a well-known expression in a foreign language, change a single letter, and provide a definition for the new expression.

Harlez-vous français?: Can you drive a French motorcycle?
Ex post facto: Lost in the mail
Idios amigos!: We're wild and crazy guys!
Veni, vipi, vici: I came, I'm a very important person, I conquered
Cogito eggo sum: I think, therefore I waffle
Rigor morris: The cat is dead
Respondez s'il vous plaid: Honk if you're Scottish
Que sera serf: Life is feudal
Le roi est mort. Jive le roi: The king is dead. No kidding
Posh mortem: Death styles of the rich and famous
Pro bozo publico: Support your local clown (or politician, your call)
Monage à trois: I am three years' old
Felix navidad: Our cat has a boat
Haste cuisine: Fast French food
Veni, vidi, vice: I came, I saw, I partied
Quip pro quo: Fast retort
Aloha oy: Greetings; farewell; such a pain you would never know
Mazel ton: Tons of luck
Visa la france: Don't leave your château without it
Amicus puriae: Platonic friend
L'état, c'est moo: I'm bossy around here
Cogito, ergo spud: I think, therefore I yam (ok, more than one letter)
Veni, vidi velcro: I came, I saw, I stuck around (ok, another exception)
Ich bit ein berliner: He deserved it
Zitgeist: The Clearasil doesn't quite cover it up
E pluribus anum: Out of any group, there's always one asshole
Nomo arigato: No thanks to you
Vive le dufference: Long live golfing.

Alex Gibbons wins the bottle of champagne this month.

Send your examples of the wacky, weird and wonderful to the Editor, *Law Society Gazette*, Blackhall Place, Dublin 7, or you can fax us on 01 672 4801 or e-mail us at c.oboyle@lawsociety.ie.
As always, the best entry will win a bottle of the finest champagne that monopoly money can buy.

Registrar's Committee 'scrupulously fair' to solicitors

From: James McCourt, chairman, Registrar's Committee

I write as chairman of the Registrar's Committee of the Law Society, which is the committee having responsibility for dealing with complaints made against solicitors. I refer to the letters which Julian Deale sent to you (August/Sept and October issues) and I would wish to clarify points which he raised.

The *Solicitors (Amendment) Act, 1994* gave the Law Society additional powers of investigation regarding complaints, and in particular complaints about inadequate professional services and excessive fees in sections 8 and 9 respectively. Mr Deale has mentioned that no regulations have been made by the society pursuant to these sections. In the six years since the act was introduced, the committee has not perceived any need for rules of procedure which *may* be made under sections 8(8) and 9(7).

Mr Deale has raised the possibility that a complainant might bring a complaint of excessive fees merely to delay payment to the solicitor. Although the committee would acknowledge that a complaint might be so brought, it is entirely satisfied that any attempt to impose pre-conditions on a complainant before his or her complaint was investigated would be unsuccessful. Furthermore, all investigations are handled expeditiously.

Mr Deale also suggests that an excessive fees investigation by the society precludes taxation. However, a client who perceives a bill as being excessive can either apply for taxation or bring a complaint to the society. If the complainant is not satisfied following the society's investigation of a fees complaint, he or she can still apply for taxation. The position of the solicitor vis-à-vis taxation is not affected by the act.

I would stress that the society does **not** impose fines. Contributions towards the society's costs in investigating a complaint are only sought in a minority of cases and generally only where the investigation has been prolonged due to the solicitor's failure to communicate with the society.

The committee utterly rejects Mr Deale's view that the 'rules of natural justice are being absolutely and utterly and completely ignored'. The committee is well aware of the rules of natural justice and adheres to them scrupulously.

Playing fair on practising certificate fees

From: Carl J Haughton, Dun Laoghaire

A recent exchange of personnel in our office leads us to pen this letter to bring to the attention of the members of the profession a problem which we perceive exists in relation to the payment of practising certificate fees.

In January of this year, we paid in full for a practising certificate for a newly-qualified solicitor who was then working with us. In June of this year, that solicitor left for alternative employment with another firm of solicitors and we set about securing the employment of an alternative solicitor. We duly discharged a proportion of the practising certificate fee to the firm from where our new solicitor came, but could not secure a refund in respect of the solicitor we lost.

We understand from the Law Society that it is 'common practice' that the practising certificate fee be apportioned accordingly, but we are advised by the firm from whom we are seeking recompense that they are not aware of any such 'common practice'.

It seems to us to be inequitable and unjust that such a situation should be permitted to arise and we strongly feel there should be uniformity throughout the profession in dealing with this situation.

Registrar of Solicitors, PJ Connolly, replies:

All practising certificates issued by the society expire on 31 December in the practice year. If a solicitor changes his employment in the course of the practice year, the practising certificate that has been issued to the solicitor travels with him to his new employment. The question of a refund in relation to the unexpired portion of the practice year is a matter for the employer and employee. In some instances, this particular matter is addressed by the employer in the terms of employment. It is not a matter that the society can be involved in as the employee solicitor is the holder of a valid practising certificate.

Clarification on stamp duty arrangements

From: Brian Gallagher, chairman, Conveyancing Committee

The Conveyancing Committee would like to respond to the letter from Pierce O'Sullivan published in the last issue of the *Gazette* (page 7). Mr O'Sullivan's letter arose out of a letter from Hannah O'Riordan, the private secretary of the minister for finance, which the Conveyancing Committee published in the August/September *Gazette* (page 52) in relation to the transitional arrangements provided in the *Finance (Number 2) Act, 2000*.

The letter from Ms O'Riordan arose out of representations made by me to the minister for finance seeking to avoid a situation where the Revenue would insist on formal contracts signed by both parties. Her letter has in fact proved of considerable assistance to the profession, and I would like to reiterate my thanks to the minister for finance and his private secretary for taking the trouble to clarify the interpretation of the relevant section for the profession.

Following Mr O'Sullivan's letter, the secretary of the Conveyancing Committee, at my request, wrote to Ms O'Riordan, and she replied to that letter on the 29 Sept 2000 as follows:

'Minister for Finance Charlie McCreevy TD has asked me to reply to your letter regarding my letter of 27 July 2000 addressed to Mr Brian Gallagher, chairman of the Conveyancing Committee.

'I can confirm that there was an error in the context of my previous letter. The statement "... and provided that the contract is executed on or before 31 January 2001" should instead read as "... and provided that the instrument giving effect to the contract is executed on or before 31 January 2000".

'I apologise for any inconvenience this error may have caused'.

Ms O'Riordan's gracious letter clarifies the position.

Misunderstanding the *Good Friday agreement*

With the peace process in Northern Ireland lurching from crisis to crisis, Austen Morgan, a member of David Trimble's legal team during the Good Friday negotiations, shines a unionist light on the main points of this increasingly-fragile agreement

The *Belfast agreement* of 10 April 1998 – on which I have written a practical legal text – is widely misunderstood. It is an international agreement between the UK and Irish states, variously incorporated in Northern Irish and Irish law. I have come to conclude that the failure of the legal communities in both parts of Ireland to give that agreement a fair professional wind has not helped the Irish peace process.

This *Belfast agreement* comprises two texts: the multi-party agreement and the British-Irish agreement signed by Tony Blair and Bertie Ahern. The multi-party agreement, with the British-Irish agreement annexed, is the political face of the *Belfast agreement*. Its legal face is the British-Irish agreement, with the multi-party agreement as annex 1.

The *Belfast agreement* proper has to be interpreted according to the 1969 *Vienna convention* on the law of treaties.

The legal text comprises: 1) international obligations of (mainly) the UK, but also the Irish state, some of which require domestic legislation; 2) political rhetoric (new beginning, partnership, equality and mutual respect, self-determination, parity of esteem, birthright) of little or no legal effect; and 3) implied general principles of international law, such as legality.

Four green fields

The cultural appropriation of the *Good Friday agreement* began almost immediately in 1998. In Northern Ireland, a 71% 'yes' vote obscured a seriously split unionist community. The 94% vote in the Republic (on a 56% turnout) to amend article 29 of *Bunreacht na hÉireann* showed little nationalist concern about articles 2 and 3. Nevertheless, a place for Catholics in the North became transmogrified culturally into joint authority/sovereignty, and even a transition to a united Ireland.

Austen Morgan: private law implications in the *Good Friday agreement*

Whenever Gerry Adams or Seamus Mallon said something was, or was not, in the *Good Friday agreement*, Ian Paisley and Robert McCartney would cite this as a reason for being in the 'no' camp. Missing entirely has been the ideological and intellectual case for Trimble unionism.

A nation once again

Three characterisations of the *Belfast agreement* have been fermenting: a weakening of the North's constitutional position within the UK; a major all-Ireland institutional advance; and the centrality of unspecified rights.

Nationalist Ireland has been telling itself that it has made a structural advance beyond the 1920-22 partition settlement. In reality, the *Belfast agreement* is located firmly within that settlement, which saw the legal creation of a new state in 26 of Ireland's 32 counties.

Constitution. The most important change brought about by the first two sections of the *Belfast agreement* has been the end of the Irish territorial claim, as explained in the 1990 *McGimpsey* case. The UK affirmed the principle of consent in the 1921 *Anglo-Irish treaty* (which was not, of course, an international agreement). And British prime minister Edward Heath conceded in 1971 that the North could vote to join the Republic. It was 1998 before an Irish government could subscribe to the principle of consent.

The new article 3 of *Bunreacht na hÉireann* (article 2 has little legal effect) contains provision for separate votes.

Institutions. The next three sections of the *Belfast agreement* are dominated by the Northern Ireland assembly and executive committee. Devolution in 1920 lasted until 1972; the Sunningdale arrangement barely five months in 1974. It remains to be seen whether the Stormont assembly, with checks and balances, will survive until its next scheduled election in 2003.

Strand Two, the North/South Ministerial Council, is a great deal less 'green' than Sunningdale. The six implementation bodies – created by treaty – represent a ceding of Irish, as well as UK, sovereignty.

All-Irelandism is balanced, unlike in 1973, with Strand Three. The British-Irish Council – a Trimble contribution – promises to unite all the peoples of these islands. The 1985 *Anglo-Irish agreement* has given way to a British-Irish Intergovernmental Conference, in which the NI assembly leaders have observer status in London-Dublin dealings.

Rights. The next section of the agreement is entitled *Rights, safeguards and equality of opportunity*. In this regard, it is worth noting that the anti-state human rights community in

NOTE ON TERMINOLOGY

The *Belfast agreement* is so called for the same reason as the *Dublin convention* on EU asylum applications is named after the city where it was signed in 1990.

The government of Ireland, in municipal and international law, would appear to have created a 26-county 'Ireland'. The question of state nomenclature was not resolved by the *Belfast agreement,* also referred to as the *Good Friday agreement.*

ORDER YOUR COPY OF THE LAW SOCIETY YEARBOOK & DIARY NOW AND

win a weekend

at the Berkeley Court Hotel

(L-R) Diarmaid Lennon, John Donnelly of Ashville Media present a cheque to Mr Thomas Menton of the Solicotors' Benevolent Assocaition and Mr Ken Murphy, Director General of the Law Society

"Undoubtedly, one of the main reasons for the success over many years of the Law Society Yearbook and Diary has been the fact that all the Society's proceeds from the diary's publication go to the Solicitors' Benevolent Association.

I hope that you will once again support the diary and in doing so also support the Solicitors' Benevolent As

ALL LAW SOCIETY PROCEEDS GO DIRECTLY

ORDER NOW FOR 2001

Law Society of Ireland
YEARBOOK & DIARY 2001

Order now before October 13th and you will be automatically entered into a draw for a weekend for two to The Berekely Court Hotel, Dublin

Solicitors Diary 2001 page-a-day £30 incl. VA☐ Qty:
Solicitors Diary 2001 week-to-view £24 incl.☐T Qty:

Law Society of Ireland
YEARBOOK & DIARY 2001

ORDER FORM

I enclose a cheque/postal order ☐ made payable to Ashville Media Group
Or: Please charge my credit card ❑ Visa ❑ Mastercard ❑ American Express ❑
Card no. ☐☐☐☐ ☐☐☐☐ ☐☐☐☐ ☐☐☐☐ Card ex ☐☐☐☐

PLEASE PRINT IN BLOCK CAPITALS

Name

Address (of credit statement)

Delivery Address:

Tel: DX No.:

My Order Ref.:

Signed: Date:

Please forward all orders to Ashville Media as follows:

By Mail: Ashville Media Group "Law Society Diary Offer" Apollo House, Tara Stree
Dublin 2

By Telephone: (01) 432 2200 By Facsimile: (01) 672 7100 By Email:

Northern Ireland was not as influential as it claims. The *Human Rights Act 1998* was passing through Westminster, and the two anti-discrimination directives, based on article 13 EC of the 1997 *Amsterdam treaty*, will determine equality provisions in both parts of Ireland.

The forthcoming incorporation of the *European convention on human rights* into Irish law is attributable, through the *Belfast agreement*, to the Trimble unionists.

'From terrorism to democracy' is a more appropriate theme for this part of the agreement, given that it also deals with decommissioning, security, policing, justice and prisoners. The *Belfast agreement* (though few must believe it) does provide for 'the decommissioning of all paramilitary arms' by 22 May 2000. And the Patten report on policing is not part of this legal text.

The Patten report. This report – which broadly accepted the chief constable's reform agenda – stoked inter-communalism in the North. Nationalist Ireland was excited by Patten's liquidation of UK state symbols, which may well destroy the agreement. Meanwhile, the two Sinn Féin ministers, acting on official legal advice, have used purported royal prerogative powers to disregard the sovereign's designated days for flying the union flag.

The sash my father wore

Given that the agreement only entered into force on 2 December 1999, cases in Dublin and Belfast have been few but not unimportant:

- Denis Riordan's attempt to stop the 1998 referendum was rejected, a sovereign people being able to amend its constitution conditionally
- The Williams's case in Belfast on prisoner releases

did not secure leave from the UK House of Lords, largely because of the difficulty of proving IRA breaches of its ceasefire in judicial review

- Finally, there is the case of the McCabe four (which has yet to be mounted in Dublin). Under the *Belfast agreement*, these IRA men should be released. In domestic Irish law, however, there is no such requirement. This hypothetical case turns on the relationship between international and municipal law: articles 15.2.1 and 29.6 of *Bunreacht na hÉireann*, I submit, provide the answer.

Lawyers in both parts of Ireland, particularly solicitors on the front line, should be alert to the private-law implications of the agreement, especially in the area of North-South co-operation. Officials in both administrations give every impression of not understanding how the implementation bodies operate legally. G

Austen Morgan is a barrister in London and Belfast. His book The Belfast Agreement: a practical legal analysis *is published on 16 November (*http://www.austenmorgan.com*).*

Another the

The state has always been a slow learner when it comes to education rights for the disabled, but the recent High Court ruling in the *Sinnott* case was certainly a tough lesson in constitutional law. And with more and more parents prepared to go to court to fight for their rights, education litigation is shaping up to be a growth area, as Barry O'Halloran reports

MAIN POINTS

- The key elements of the *Sinnott* judgment explained
- The *Education Act, 1998*
- Increasing education-related litigation in the UK

Cork solicitor Ernest Cantillon admits that he was surprised by some of the reaction to the recent High Court judgment (4 October) which laid to rest any doubts that the state has a constitutional obligation to provide free primary education. Cantillon, who acted for Kathryn Sinnott, the woman who took the case on behalf of her autistic son Jamie, says the law has been clear for the last seven years.

'There is a constitutional right to free primary education; that should be plain to anyone. The constitution states it quite clearly', he says. 'I find it very surprising that the department of education should have tried to maintain otherwise'.

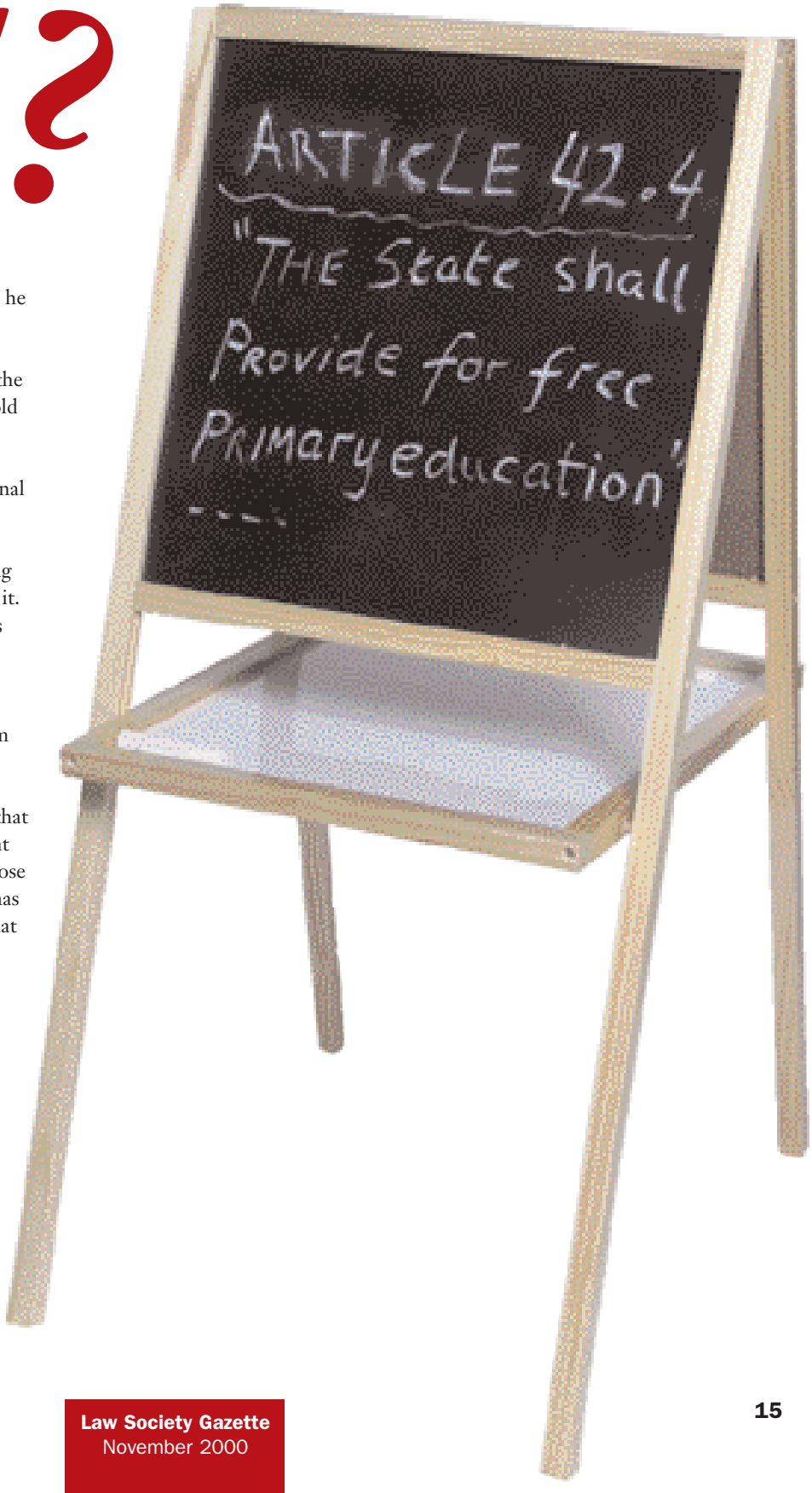
If anyone should know, it's Ernest Cantillon himself. In 1993, he took the landmark *O'Donoghue* case to the Supreme Court, which declared beyond any doubt that handicapped people have a right to free primary education.

An indictment of the state

'Before *O'Donoghue*, the attitude seems to have been that handicapped people were uneducable, which is an appalling approach for any civilised society. It's like saying that education is only for the blonde, blue-eyed Aryans', he says. '*O'Donoghue* clearly set out the position and the *Sinnott* case re-established it. It's not like the people who have been campaigning on behalf of handicapped children have been doing it on any kind of mistaken basis'.

Jamie Sinnott was diagnosed with autism before his first birthday. Mr Justice Robert Barr found that despite Irish and US experts' recommendations that

brick in wall?



the child go through various special programmes, he had had no more than two years of meaningful education in this country.

In a 70-page judgment that strongly criticised the state's failure to provide for the by-now 23-year-old man, Barr ruled that it had failed to honour its constitutional obligations. He awarded Sinnott £200,000 in damages for breach of his constitutional rights, and gave a further £55,000 in secondary damages to his mother. He ordered the state to provide Sinnott with primary education for as long as it could be shown that he would benefit from it.

The judge declared that Sinnott's story was an 'indictment of the state and cogently illustrates that it has failed to participate actively and meaningfully in the provision of appropriate services for him and those like him over the years'.

According to Ernest Cantillon, the judgment contains a number of key points that clarify the law in this area. The first is that the state must pay damages to anyone whose constitutional right to a free education has been breached. 'You need to establish that the child has not received an education and that, if he had, he would be functioning at a higher level', he explains. 'In Jamie's case, we had evidence showing him being taught to speak, and we were able to produce expert witnesses who testified that he would have made progress if that had continued. He has now lost that ability.

'His mother brought him to a special school in America. They got him to speak and sent him home with a programme that they

THE *SINNOTT* CASE: KEY POINTS

- Damages will be awarded for breach of the state's obligation to provide free primary education
- The state must take an integrated, cross-departmental approach to the provision of free primary education
- The state cannot meet its constitutional obligations partially
- It is permissible for the state to contract out its obligation to service providers, but that does not mean it can abdicate its responsibility to them
- Primary education is not age-related and can be continued past the age of 18 if this will benefit the plaintiff
- Secondary damages can be awarded to any party affected by the state's breach of its obligation to provide free secondary education.

recommended should be followed, but it was just ignored. The people from the first organisation saw him 16 weeks later, and it was clear that he was functioning at a lower level than when they had last seen him'.

The second key point in Barr's ruling is that the state must take an integrated, cross-departmental approach to education. Cantillon points out that Jamie Sinnott would have needed access to a number of therapists, including speech and physiotherapists. But, under the current system, the department of education employs some therapists, healthcare institutions employ others, while the health boards employ still more. This left Kathryn Sinnott in a situation where she had to traipse from one agency to another in order to guarantee her son the treatment he needed.

The effect of the High Court ruling means that there has to be a one-stop-shop for people in Jamie Sinnott's situation. The judge urged the state to review its existing administrative structures and to develop an improved system of delivering services to those in need.

His third point follows neatly on from this. He said that the state cannot partially meet its constitutional obligations: its services have to be of an acceptable standard. In a linked area, the judge ruled that it was permissible for the state to contract out its obligations to professional bodies and organisations, in Sinnott's case these were the Brothers of Charity and the Cork-based Cope Foundation. But he stressed that this did not allow the state to abdicate its responsibility.

As Ernest Cantillon puts it: 'They cannot say that "we passed him on to the experts and they are dealing with him so it's not our fault". There has to be supervision and they have to get the resources'.

In the most strongly-worded section of his judgment, Barr pulled no punches in criticising the state for failing to respect the rule of law and meeting its constitutional obligations. Attacking its obstruction and obduracy, he made it clear that people like the Sinnotts should not have to come to court in an effort to uphold their rights.

This part of the ruling sprang from one of the most dramatic moments in the 29-day hearing. The judge ordered a department official, who was giving evidence, to leave the court and return the next day with all the documentation relating to the state's decision to appeal the High Court's decision in the earlier *O'Donoghue* case.

At the time, the then finance minister, Bertie Ahern, and the education minister, Niamh Breathanach, maintained that they were only appealing to the Supreme Court in an effort to clarify the law. According to Cantillon, what the court discovered in the course of the *Sinnott* hearing was that the state was simply appealing the *O'Donoghue* decision in an effort to avoid the inevitable expense generated by providing free education to the handicapped and those with special needs.

Another important element of the *Sinnott* ruling is that the constitutional right is not age-related. 'We tend to think of it being limited to children aged between four and 12', says Cantillon. 'But *primary* means basic, and it does not matter if someone is 12, 42, or 62, as long as they are going to benefit from it'.

There was some debate over this issue. In the *O'Donoghue* case, O'Hanlon J agreed that age was not really an issue, but seemed to indicate that the constitutional guarantee ended once the child had reached 18. *Sinnott* clears up that point for once and for all.

In a new development, Barr ruled that anyone else affected by the state's failure to honour its obligation to provide a plaintiff with free education will be entitled to secondary damages. Cantillon points out that in a case such as Jamie Sinnott's, it is clearly foreseeable that the plaintiff's mother would also suffer.

The state has three weeks from 1 November to appeal the High Court ruling. Ernest Cantillon is unsure of what way the wind will blow, but he does believe that his firm will probably receive notice of the state's intention to go to the Supreme Court within a few days of that date.

Leave those kids alone

Similar problems relating to children with special needs have opened up a new area of education litigation in Britain, as have more routine issues such as gaining admission to schools in the first place, or the decision to expel students. And it now looks likely that Irish school boards of management could find themselves being cross-examined by lawyers acting for irate parents.

Around the same time that Barr delivered his judgment, it emerged that the Department of Education was considering an appeals mechanism for expelled and suspended students that could allow them, or rather their parents, access to legal representation. It's not clear at this stage if lawyers could find themselves going back to school to take up cudgels on behalf of pupils who feel that they have been wronged. Currently, parents can go to

the school's board of management or trustees if they feel that their child has been wrongly suspended or expelled.

Section 29 of the *Education Act, 1998* gives parents the right to appeal certain decisions made by a school board, or someone acting on its behalf, to the department's secretary-general. The legislation also provides that the minister for education will establish one or more independent committees to hear and determine these appeals, and that he should lay down procedures for the hearings.

While the act is two years' old, it seems that the government is only now considering how this appeals system might be structured. Three weeks ago, education minister Michael Woods confirmed to the Dáil that draft procedures had been drawn up. 'At the same time, planning is underway in the department for the putting in place of the necessary structures to ensure that the appeals system can operate effectively', he said.

In line with legislative requirements, his staff are now discussing these proposals with the so-called 'education partners', namely, school patrons and management organisations, teachers' unions and staff associations, and national parents' bodies. The final shape of the appeals system will be determined by this consultation process, which the minister is obliged to follow.

Initial media reports suggested that parents – or students aged 18 and over – could have the right to legal representation. This would mean that lawyers acting on their behalf would be able to question a management board's decisions, perhaps even introducing school, medical and psychological reports to support their case. But the legislation itself stresses that these hearings should be conducted with a minimum of formality. At the same time, a spokeswoman for the department of education maintains that there is still all to play for. 'We are going through the consultative process with the education partners, and there is nothing definite decided yet', she says. 'Nothing has really been ruled in or out'.

A similar system has been operating in Britain for several years and, even though this was also intended to be semi-formal, parents are now using legal muscle in the hope of getting school boards to see things their way. While the education system across the water has been in a parlous state for years, at least it provides a clue about what could eventually happen here. Official estimates show that by the end of this school year, close to 100,000 British parents are likely to appeal primary and secondary school board decisions to refuse admission to their children.

Kathryn Sinnott

'Parents – or students aged 18 and over – could have the right to legal representation'

This will mark a considerable increase on last year, when 85,900 such appeals were taken. In the 1997/98 school term, 77,000 parents challenged decisions.

The appeals system, and legislation running at the rate of one act a year, have combined to open up the area to both branches of the English legal profession. According to the Education Law Association (ELAS), a body established ten years ago to provide guidance in this area, there are around 50 barristers practising regularly in this field. This may seem like very few, but 20 years ago there were none at all, while finding a lawyer with any knowledge of education practice would have been extremely difficult ten years ago.

One of the things that sparked parents into action was a 1994 code of practice for children with special needs. This insisted that British education authorities, which are responsible for administering the system in each region, involve parents in the decision-making process and led to conflict between these bodies and parents.

According to a recent report in the *Guardian* newspaper, education authorities have used 'every procedural device to minimise the number of children officially "statemented" for special provision'. The reason is simple: the more children with special needs that have to be catered for, the higher the cost. But the inevitable result has been more parents challenging these decisions at special needs tribunals. And an increasing number are turning up with a solicitor or brief in tow.

The same report revealed that of the 1,200 parents who attend special needs tribunals every year, one-in-five are now bringing legal representation with them. Just two years ago, the comparable figure was 120, or one-in-ten.

The English courts are increasingly turning their attention to state neglect of children's' educational rights. In a judgment that does not sound too dissimilar to some of Mr Justice Barr's statements in the *Sinnott* case, the UK Court of Appeal earlier this year ruled that a tetraplegic child needed physiotherapy to get education. And in a more dramatic ruling two months ago, the British House of Lords awarded a 26-year-old woman stg£45,650 arising from the London borough of Hillingdon's failure to diagnose her dyslexia.

Whether the Irish courts will go this far remains to be seen. But, as Ernest Cantillon says, the *O'Donoghue* and *Sinnott* cases make the constitutional position of handicapped and, by extension, all children clear. Let's hope the state has learned its lesson. G

Barry O'Halloran is a staff reporter with Business and Finance *magazine*.

WHAT THE CONSTITUTION SAYS

Article 42.4

'The state shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation'.

Much ado abo

When does a person's day in court constitute abuse of the litigation process? And what steps should lawyers take to defend against – and avoid complicity in – such abuse? Dessie Shiels highlights one of the hazards of our litigious society

'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which in the event were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change'.

These comments, made by Megarry J in the case of *John v Rees* ([1970] 1 Ch 345 at 402), aptly illustrate the uncertainty which is the norm in modern litigation. Unfortunately, that uncertainty is often heightened for a defence lawyer when he is faced with proceedings which may or may not succeed – but which also may or may not be justified. Recognising this reality, the courts have reserved the right to strike out proceedings which are abusive of the litigation process. For the defence lawyer, this is to be welcomed.

The courts have repeatedly held that the jurisdiction to strike out proceedings must be exercised only sparingly (see, for example, *DK v AK* [1993] ILRM 710; *O'Neill v Ryan* [1993] ILRM 557; *Tassan Din v Banco Ambrosiano* [1991] 1 IR 569; and *Fagan v McQuaid*, unreported, High Court, 12 May 1998). Thus, Murphy J in *Looney v Bank of Ireland* ([1996] 1 IR 157) said that 'a balance must be struck between a person's right of access to the courts and the right of other persons to be protected against an abuse of their rights'. The jurisdiction is essentially a means of qualifying the constitutional right to litigate, and therefore is limited to only the clearest cases.

The defence lawyer should not lose sight of the fact that, in seeking to have a plaintiff's proceedings struck out, he is seeking to deprive that plaintiff of his right to litigate in respect of those proceedings. In such circumstances, it will always be the case that the courts will place the onus firmly on the defendant to show that the plaintiff should be deprived of that right. What is certain, however, is that the constitutional right to litigate is not absolute and where a defendant can satisfy the court that the plaintiff's proceedings are abusive, they will be struck out.

out nothing

MAIN POINTS

- The court's jurisdiction to strike out proceedings
- Counter-claiming for abuse of process
- Effective use of discovery and Isaac Wunder orders

The jurisdiction to strike out abusive proceedings consists of both the inherent jurisdiction of the courts and their jurisdiction under order 19, rule 28 of the *Rules of the Superior Courts*. As a starting point, the jurisdiction should be understood as essentially involving a two-stage test, namely:

- Has the plaintiff disclosed a cause of action? and
- Can that cause of action succeed?

A third test is often said to exist, namely whether proceedings are frivolous or vexatious. So Costello J in *DK v AK* held that since the court's inherent jurisdiction to strike out proceedings 'exists to ensure that an abuse of the court's process does not take place', then 'if it is established by satisfactory evidence that the proceedings are frivolous or vexatious or if it is clear that the plaintiff's claim must fail, then the court may stay the action'. While such a test does exist in a literal sense under the wording of order 19, rule 28, the reality is that its existence independently of the 'cannot succeed' test is tenuous at best. If a cause of action is frivolous or vexatious, then that essentially means that it is based on insufficient grounds and therefore cannot succeed. Thus, in *Farley v Ireland and Others* (unreported, Supreme Court, 1 May 1997), Murphy J properly held that to maintain an action which has no prospect of success would be vexatious.

Dubious claims

This jurisdiction under order 19, rule 28 differs from that of the inherent jurisdiction of the courts, in that in the latter the proceedings may be struck out before the pleadings are delivered (*Barry v Buckley* [1981] IR 306). The jurisdiction of the courts under order 19, rule 28 is somewhat lacking in real value. The jurisdiction to strike out is intended to restrict the instances of abusive actions which come before the courts, but it is quite easy for a party with a dubious claim to present it in such a way as to escape being caught by the rule. The potential effect of order 19, rule 28 is further undermined by the case of *Sun Fat Chan v Osseous Ltd* ([1992] 1 IR 425) and approved in *Ennis v Butterly* ([1996] 1 IR 426), where it was held that the court should be slow to exercise the jurisdiction to dismiss an action on the basis that on admitted facts it cannot succeed. To this effect, McCarthy J pointed out that 'if the statement of claim admits of an amendment which might, so to speak, save it and the action founded on it, then the action should not be dismissed'.

Essentially, therefore, a defendant will be faced with an uphill battle in trying to have a plaintiff's action struck out on the basis of order 19, rule 28. In such circumstances, he should always claim for an order striking out the plaintiff's claim pursuant to the inherent jurisdiction of the court. The advantage here is that where a defendant brings such a strike-out motion, he is not limited in his arguments to the pleadings themselves as is the case under order 19, rule 28. Instead, the defence may introduce evidence by way of affidavit relating to the issues in the case. So, in *McCabe v Harding* ([1984] ILRM 105), in circumstances where 'the relief claimed by the defendants could not have been granted under order 19, rule 28', an order was instead granted pursuant to the inherent jurisdiction of the court.

The defence lawyer should also be aware that the courts are willing to exercise, on occasion, the inherent jurisdiction of the court so as 'to preserve a proper discipline in the conduct of litigation' (O'Flaherty J in the case of *O'Neill v Ryan* [1993] ILRM 557). The potential use of the inherent jurisdiction in this way should not be underestimated, since, for example, it will often be the case that a defendant will be faced with a plaintiff who is less than forthcoming about the basis on which he is bringing proceedings.

This was the situation in the case of *Kelly v Cullen* (unreported, Supreme Court, 27 July 1998), where the court disallowed the plaintiff's appeal against the striking-out of his negligence claim against a doctor. The court was scathing in its criticism of the way in which the proceedings were handled. Barron J criticised in particular the originating letter of claim issued by the plaintiff, which he described as containing 'standard O'Byrne letter provisions', but which made no reference to the nature of the injuries sustained by the plaintiff or of any other material matter. In Barron J's opinion, it was 'a good example of the inadequacies of the modern approach to personal injuries actions' and begged the question of how a defendant could be expected to admit liability for the consequences of some alleged action when details of such matters were not brought to his attention. To this effect, the judge stated that the

WHAT THE SUPERIOR COURT RULES SAY

Order 19, rule 28 provides that: 'The court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in the case of the action or defence being shown by the pleadings to be frivolous or vexatious the court may order the action to be stayed or dismissed, or judgment to be entered accordingly as may be just'.

REASONABLE AND PROBABLE CAUSE

In considering whether the plaintiff has acted without reasonable or probable cause, the court will apply an objective test in considering the facts and the applicable legal principles. The plaintiff's belief in the merits of the case will not usually be considered by the court when deciding if there was reasonable and probable cause.

His belief may, however, be of relevance when the court considers any legal advice he received.

As a matter of course, the court should consider first whether the legal advice given was correct (see *Abbot v Refuge Assurance* [1961] 3 AER 1074), but it should then also consider whether the plaintiff has misled his legal advisers in any way. In such circumstances, it may be that the proceedings cannot be said to have been maintained with reasonable and probable cause if the action has been maintained on the basis of incorrect facts.

In the case of *Crofter Properties Ltd v Genport Ltd* (unreported, High Court, 15 March 1996), McCracken J held that once 'there was any reasonable and probable cause to institute proceedings, they cannot constitute an abuse of process'. That statement was made in the context of a case where the plaintiff had sued for breach of a number of covenants in a lease and the defendant had counterclaimed that the proceedings as a whole were an abuse of the process of the court. While McCracken J found that there was not reasonable and probable cause to issue proceedings in relation to two of the covenants, in his view this did not mean that the entire proceedings had been issued without reasonable and probable cause.

doctor's insurer's criticism of the originating letter of claim as being 'disgraceful' was 'more than justified at the time and became even more so by the failure to be supplied with the details requested' subsequent to the originating letter.

The court's inherent jurisdiction to strike out proceedings so as to prevent an abuse of process in civil proceedings further extends to cases where, notwithstanding that the traditional doctrines of *res judicata* and *issue estoppel* are inapplicable, the circumstances are such that the issue or prosecution of proceedings would be vexatious or oppressive as amounting to an attempt to re-litigate a case which has already in substance been disposed of by earlier proceedings (see *Ashmore v British Coal Corp* [1990] 2 AER 981). This aspect of the court's inherent jurisdiction to prevent abuses of its process is sometimes referred to as 'the double jeopardy rule' or 'the collateral attack principle'.

It has been considered recently in the case of *McCauley v McDermott* ([1997] 2 ILRM 486), where Keane J found the issue between the defendant and the third party to be *res judicata* and also that the defendant's issuing of third-party proceedings was an abuse of process since the 'only reason' for instituting those proceedings was 'to circumvent the final and conclusive judgment of the Circuit Court'. Keane J made it clear that he would have struck out the third-party proceedings even if he hadn't been able to find that they were *res judicata*.

There are also other forms of proceedings which can amount to an abuse of process, namely delayed proceedings, proceedings grounded on documents discovered in a separate matter, champertous proceedings, improper applications for judicial review, and proceedings for contempt of court or proceedings invoking the court's supervisory power over its own officers.

'A solicitor is an officer of the court and therefore owes the court a duty not to abuse its processes'

A counterclaim for damages?

Where a motion to strike out fails – or where the defence lawyer considers that it is unlikely to succeed – then he should consider making a counterclaim for damages for abuse of process. The fact that a motion to strike out proceedings is not brought will not be fatal to a defendant's counterclaim. It may be that matters were not clear enough in the early stages for that relief to be obtained. To this effect, McCarthy J in *Sun Fat Chan v Osseous Ltd* commented that 'experience has shown that the trial of the action will identify a variety of circumstances not entirely contemplated at earlier stages in the proceedings; oftentimes, it may appear that the facts are clear and established, but the trial itself will disclose a different picture'.

In the case of *Dorene Ltd v Suedes (Ireland) Ltd* ([1981] IR 312 at 333-4), the reasons why the plaintiff's action could be said to have been maintained maliciously only came to light after counsel's advice was received by the plaintiff. The *Dorene* case sets out that a claim for damages at common law will lie for the institution or maintenance of a civil action if it can be shown that the action was instituted or maintained without reasonable and probable cause, maliciously, and that the claimant has suffered actual damage.

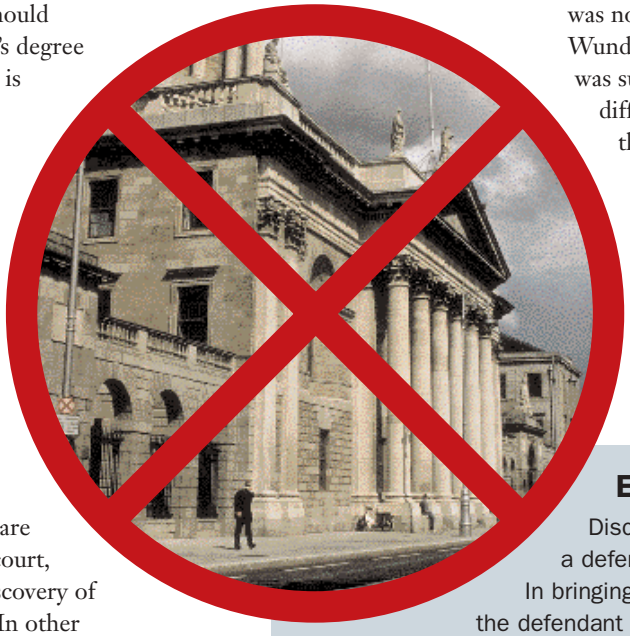
Misleading one's legal advisers will strengthen a defendant's claim for damages for abuse of process (see *Murphy v Kirwan* [1994] ILRM 293 at 297), for the reason also that it will go some way towards establishing the malice of the plaintiff. Indeed, it is difficult to envisage a situation where a plaintiff who deliberately misleads his legal advisers could not be said to be acting maliciously.

In relation to damage, the plaintiff should try to establish actual damage or otherwise show that the impugned action is one which the law regards as causing damage. The claimant for damages for abuse of process should inform the abusing plaintiff of any damage he is likely to suffer. So in the *Dorene* case, the defendant's solicitor gave full details of a substantial offer which the client was prevented from accepting by the *lis pendens* and proceedings issued by the plaintiff. This is likely to counter any pressure which a plaintiff who is persisting with abusive proceedings may be trying to exert on a defendant.

One other important issue arises for a defendant bringing proceedings for abuse of process, namely, whether he can bring his claim against the plaintiff's solicitor also. In the recent Supreme Court decision of *Moffit v Bank of Ireland and Another* (unreported, Supreme Court, 19 February 1999), Lynch J described such a scenario as being 'untenable'. The case involved a claim for damages against Bank of

Ireland's solicitor on the basis that he had arranged for an allegedly false affidavit to be sworn and filed on the bank's behalf. Lynch J said: 'People are entitled to the assistance of lawyers in maintaining actions and lawyers are entitled to render such assistance. The fact that such actions may prove to be unsustainable when tested in court renders the litigant liable for the consequences, but not the lawyer'.

Likewise, Keane J stated that where a solicitor 'merely acts on his instructions', no cause of action will arise against him as he is 'merely discharging his professional duties to the client he is acting for'. The proceedings against the solicitor were struck out as disclosing no cause of action. The blanket denial by the Supreme Court of a right of action against a solicitor who acts for a client who brings abusive proceedings is somewhat unsatisfactory. A solicitor is an officer of the court and therefore owes the court a duty not to abuse its processes. Whether a solicitor should owe a duty to a defendant in any given case should probably turn on the solicitor's degree of knowledge. For instance, it is arguable that if the solicitor is aware that the proceedings which his client is bringing are abusive, then he should be liable.



Procedural advantage

The defendant to abusive proceedings may also be able to claim a significant procedural advantage. Where a defendant counterclaims for damages on the grounds that proceedings are abusive of the process of the court, he may then be able to get discovery of all the plaintiff's legal advice. In other words, by counter-claiming the defendant may be able to defeat a claim of legal professional privilege in seeking discovery. In *Murphy v Kirwan*, the Supreme Court held that if a defendant could establish viable and plausible allegations of abuse of process, then he was entitled to discovery of the plaintiff's legal advice. It was not necessary in seeking such discovery to establish any allegation of abuse of process as a matter of probability.

Essentially, as Mr Justice Peter Kelly commented during a lecture at the Law Society, 'documents evidencing the giving of legal advice may be discoverable in circumstances where the motivation of the recipient of such legal advice is relevant to the issues to be tried in an action such as one for abuse of process'. This procedural advantage will probably be of greatest use in circumstances where the plaintiff has misled his legal advisers. Obviously, if a plaintiff's legal advisers have been misled but, on discovering this, have nevertheless persisted with the claim, they will not be at all comfortable in revealing their legal advice because of the professional ethics implications involved.

Isaac Wunder orders

Where the circumstances of a case are such that a defence lawyer considers that the plaintiff may issue more abusive proceedings after the immediate proceedings have been struck out or determined, then he should apply to the court for an 'Isaac Wunder' order. The order gets its name from the case of *Wunder v Hospitals Trust (1940) Ltd* (unreported, Supreme Court, 24 January 1967 and 22 February 1972), where the court held that it had jurisdiction to restrain the institution of proceedings without the leave of the court.

The *Wunder* case involved a plaintiff who claimed that he had a winning ticket for a 1948 sweep run. He had not, however, made any claim until 1962, and eventually claimed that he had destroyed the ticket in the mistaken belief that it was not the winning ticket. The fact that Mr Wunder's claim was not well received by the court was summed up by Kenny J's comment that 'it is difficult to imagine a more unlikely story'. In these circumstances, the court decided that Mr Wunder would be permitted to issue a plenary summons but that no further steps were to be taken without the leave of the court. It pointed out that an intention to produce evidence did not amount to evidence, and ruled that until such time as Mr Wunder had evidence that he was the

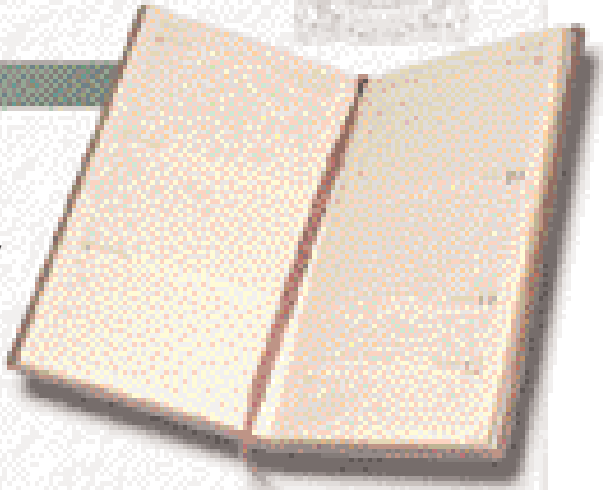
EFFECTIVE USE OF DISCOVERY

Discovery may also be used to good effect by a defendant in order to establish 'agreed facts'. In bringing a striking-out motion, it is imperative that the defendant ensures he will not be caught out by the plaintiff producing some evidence of which he was unaware. This is obviously a risk if he decides to bring a motion to strike out before the pleadings have closed. A practical example might be where a plaintiff is claiming ownership of land on the basis of unclear documentary title (there might be possessory title or contracts involved) and who might possibly produce more evidence of title at any stage before the close of the pleadings. In such a case, it might seem to a defendant that his motion to strike out will succeed on the basis of, for example, *a jus tertii* (right of a third party), but on bringing the motion it might fail because the plaintiff produces some further evidence of title.

This is a good example of a situation where a motion to strike out can be very tentative in that it relies on a single argument. In such a situation, and especially because of the *Barry v Buckley* ([1981] IR306) decision that there must be 'agreed facts', it is crucial to the success of the motion that the defendant ensures, as far as possible, that there are agreed facts. In the example given, the defendant could go a long way towards establishing agreed facts by seeking discovery of all the plaintiff's documents of title. A letter from the plaintiff's solicitor or the use of a discovery order of the court should be enough to bind the plaintiff.

THE LAW SOCIETY OF IRELAND

SLIM POCKET DIARY 2001



A Deluxe Diary £8.95 ea

16 month diary in cream paper*
Law Society information section
16pp Ireland colour maps
Perforated page corners
Gilded page edges
Ribbon marker
Gold embossed with 2001 and Law Society crest
Stitched edges
Genuine Smoothcell Leather cover

B Standard Diary £5.95 ea

16 month diary in cream paper*
Law Society information section
16pp Ireland colour maps
Perforated page corners
Gilded page edges
Ribbon marker
Gold embossed with 2001 and Law Society crest
Stitched edges
Simulated leather soft cover

* These diaries include a 16 month 124pp calendar (30 Oct 00 - 10 Mar 2002)
12 Months week-to-view PLUS 2 months Week-per-page before and after

C Spiral Diary £11.95 ea

16 month comb bound diary in cream paper
Slim wallet style - lays flat on desk
Insert replaceable each year at low cost
Law Society information section
16pp Ireland colour maps
Perforated page corners
Deluxe Smoothcell Leather slip cover
4 credit card pockets
Gold embossed with Law Society crest
Stiched edges to cover
Pull out year planner

Map and Year Planner sections

All Law Society proceeds are donated to the Solicitors' Benevolent Association.

ORDER FORM for post / fax

Payment must be sent with order.

Delivery, Please Tick ❑ **October** ❑ **November** ❑ **December**

All covers gold foil embossed.

Prices include 21% VAT.

Name (BLOCK LETTERS PLEASE)

Address

Contact Name

Tel. Fax

DX No. Order Ref.

Signed Date

Please supply ☑ (tick as appropriate)

❑ A. Deluxe Diaries:	Qty ____ @	8.95	£____:____
❑ B. Standard Diaries:	Qty ____ @	5.95	£____:____
❑ C. Spiral Diaries:	Qty ____ @	11.95	£____:____
❑ D. refill 2001:	Qty ____ @	4.95	£____:____
❑ Company Logo‡	Qty ____ @	1.80	£____:____
❑ Individual Names†	Qty ____ @	2.00	£____:____
❑ Embossing setup charge (1st order only)		30.00	£____:____
❑ Please send laser proof		8.00	£____:____
❑ Send by post/DX			£____:____

Post/DX & Packing 1-10 - £3.00 11-20 - £6.00 21-49 - £8.00 50+ - Free

Payment ❑ By cheque ❑ By postal order

‡Minimum quantity 6 diaries. Company Logo must be supplied as production-ready 1:1 size single colour bromide. †Please supply details of individual names on a separate sheet.

Send order and payment to: Portfolio Agencies, 10 Springdale Road, Raheny, Dublin 5. Tel. 01-832 9872 Fax 01-833 0356
All enquiries relating to this promotion to Richard McMullan, Portfolio Agencies.

Designed and published in Ireland by Kernow Ireland Diaries, Dublin
for the Law Society of Ireland

owner of the ticket or that he had an interest in it, he would not be allowed to proceed.

The *Wunder* jurisdiction of the court was notably used in the case of *O'Malley v Irish Nationwide Building Society* (unreported, High Court, 21 January 1994) to restrain the institution by Mr O'Malley of any further proceedings without the leave of the court, since the court considered that any proceedings issued by Mr O'Malley were likely to be abusive. Mr O'Malley had failed to make any repayments on a £75,000 endowment mortgage advanced to him by the Irish Nationwide Building Society. As a result of that, Irish Nationwide issued ejectment proceedings and eventually obtained possession on foot of a possession order. Mr O'Malley and his wife then proceeded to sue the auctioneer, solicitors and barristers who had acted for Irish Nationwide in relation to the house as well as Irish Nationwide itself and some of its officials and directors. Costello J in striking out almost all of the claims commented that 'what Mr O'Malley has done is without justification'.

In these circumstances, the court felt justified in granting an Isaac Wunder order and held that 'such an order is made in very rare circumstances but it is one which the court should make when it comes to the conclusion that its processes are being abused'. The court pointed out that it was concerned in making the order that Mr O'Malley should not be allowed to institute any further proceedings without leave of the court such as those he had already indicated he would make, seeking judicial review of the order for possession, as 'it would be an abuse of the processes of the court to allow such proceedings to be instituted'. It is clear from the *O'Malley* case that there are circumstances where a defendant will find it necessary to ensure that the plaintiff is restrained from bringing any further abusive proceedings. In such circumstances, an Isaac Wunder order should be sought.

'Where a defence lawyer thinks that proceedings may be abusive, he should strongly consider bringing a motion to have those proceedings struck out'

In summary, where a defence lawyer thinks that proceedings may be abusive, he should strongly consider bringing a motion to have those proceedings struck out. Should that fail, he should consider what other action he can take to counter those proceedings or their furtherance. In this regard, an appropriate use of discovery may be of value, while a counterclaim for damages may also be advisable. Where a plaintiff is likely to attempt to bring abusive proceedings again, an Isaac Wunder order should also be sought.

As a final note, the defence lawyer should take solace in the fact that the courts are very much alert to the kind of abuse of process that is all too prevalent in modern litigation. G

Dessie Shiels is an apprentice solicitor with McCann FitzGerald.

INVITATION TO TRIAL

The world's preferred legal software systems

Amicus ATTORNEY

A Case Management, Time Recording & Fee Earner Support System with 130,000+ users and only
£399 *per copy plus VAT*

PCLaw

Legal Accounts and Practice Management System with over 19,000 users and starting at just
£990 *plus VAT*

These two world leading 'value for money' systems are seamlessly integrated, providing a complete Law Office on Computer.

We have organised a series of lunchtime presentations starting at 12 noon at the following venues:

Dublin	Monday	4th December	Jury's Burlington Hotel
Waterford	Tuesday	5th December	Jury's Waterford Hotel
Cork	Wednesday	6th December	Jury's Cork Hotel
Limerick	Thursday	7th December	Jury's Limerick Hotel
Galway	Friday	8th December	Jury's Galway Inn

Places are limited so complete and fax back the reply slip as soon as possible! ***+44 1780 480744***

I am/we are able to attend the presentation. Please reserve me/us a place at:

Dublin [ ] **Waterford [ ]** **Cork [ ]** **Limerick [ ]** **Galway [ ]**

I am unable to attend but please send me:

- An Amicus Attorney evaluation CD pack [ ]
- A PCLaw demonstration CD pack [ ]

Name(s) (please print): _____

Practice Name: _____

Address: _____

_____

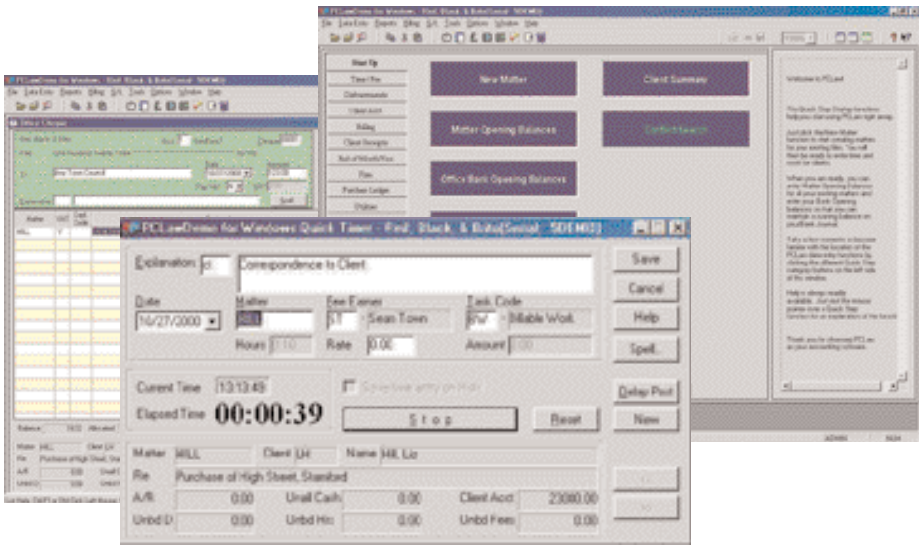
Post Code: _____ Tel: _____ Fax: _____

Amicus ATTORNEY

"The organisation and automation Amicus Attorney offers will greatly streamline any practice. And since it is also effortless to learn, it is a program that you and your staff will actually use." ***'Law Office Technology'***

The world's No.1 case management system is now even better!

- ✔ Case Management / Precedent Workflows
- ✔ Auto document production
- ✔ A diary for appointments
- ✔ 'To Do' lists
- ✔ Files recording all matter events
- ✔ An integrated contact database
- ✔ Time sheets
- ✔ A Call Centre for managing your calls
- ✔ Fax and E-mail connectivity
- ✔ You are on top of your practice
- ✔ Never miss a deadline
- ✔ Increase billable time
- ✔ Provide better service
- ✔ Increase productivity
- ✔ Rapid ROI
- ✔ Save 10% on PI insurance costs
- ✔ Gain peace of mind
- ✔ Links with a/c's systems e.g. PCLaw™



PCLaw

- ✔ Time Recording
- ✔ Financial Statements
- ✔ Accounts Payable
- ✔ Remote & Palm Links
- ✔ VAT
- ✔ E-mail Enabled
- ✔ Disbursements
- ✔ Management Reports
- ✔ Accounts Receivable
- ✔ Past Due Notices
- ✔ Client Accounting
- ✔ Spell Checking
- ✔ Conflict Checking
- ✔ Running Bank Balance
- ✔ Bank Reconciliation
- ✔ Pop-up Help Windows
- ✔ Quickstep Menus
- ✔ Word and WordPerfect
- ✔ Nominal Ledger
- ✔ Office Ledger
- ✔ Cheque Printing
- ✔ Budgeting
- ✔ On-line Tutorial
- ✔ Case Notes
- ✔ Automatic Billing
- ✔ Link with Amicus Attorney™
- ✔ User Definable Bill Formats

Gavel & Gown Limited,
Chapel Yard, North Street, Stamford, Lincolnshire, PE9 1EL
Tel +44 1780 480764

Lizard

Doctors face many tough ethical questions when making 'end-of-life' decisions for terminally-ill patients. The legal aspects of this dilemma are also thorny but, as Kieran Doran argues, American precedents for durable powers of attorney and living wills could help clarify the position here

At some point in their careers, many doctors will face the ethical and legal dilemmas related to 'end-of-life' decisions by or on behalf of terminally-ill patients. Within some specialities this is part of the daily clinical workload and it is unfair that, even with the best professional or local guidelines, doctors and other healthcare professionals should have to make such decisions in the absence of a clear legal framework.

The recent acquittal of English GP Dr David Moore on the issue of 'mercy killings' serves to highlight one extreme of a continuum which ranges from physician-assisted suicide through withdrawal of life support to a joint decision with a patient to cease treatment which might prolong life but reduce its quality. The withdrawal of treatment from a patient was an issue addressed by the Ethics Committee of the British Medical Association (BMA) in a report published last June (*Withholding and withdrawing life-prolonging medical treatment: guidance for decision-making*, BMJ Books, 1999). It took the position that current proposals to withdraw treatment such as artificial nutrition and hydration require legal review, but the courts have not specified what ought to happen in the case of patients with serious conditions of dementia or a very severe stroke. This position, the BMA Ethics Committee argues, leaves doctors in an area of legal uncertainty, which is open to legal challenge.

Mercy killings and assisted suicides

In Ireland, there has been no case in relation to mercy killings, though there is a distinction made between mercy killings and assisted suicide. In the case of *In Re Ward of Court* ([1995] 2 ILRM 401), however, Mr Justice Hamilton stated that the 'court can never sanction steps to terminate life'. In addition, the Irish Medical Council has stated categorically that deliberately causing the death of a patient is considered professional misconduct

let die

(*Medical Council: A guide to ethical conduct and behaviour*, fifth edition, 1998).

While the lack of clarity in English and Irish law on this issue potentially places doctors in legal jeopardy, this is not the case in all jurisdictions. In the state of Illinois in the USA, there is a legislative framework which, even if not immediately applicable here, would provide a useful starting point for discussion about systems which may remove healthcare professionals from this invidious position. In Illinois, the judicial concept of durable power of attorney and living wills are used in tandem with the Illinois *Healthcare Surrogate Act* to ensure that doctors have a clear framework within which to make 'end-of-life' decisions.

In Illinois, competent adults have the right to make decisions about their healthcare. The state courts have recognised this right, even where a person has become incapacitated through injury or illness. So, in effect, there is a legal right to accept or refuse any medical care, including life-sustaining treatment. In order that patients can make these decisions, they have the right to be adequately informed about their medical condition, possible treatment alternatives, likely risks and benefits of all clinical options, and any implications for their overall health and medical prognosis.

Illinois law now requires that patients be informed of their right to execute an advance directive, which can help ensure that their wishes are complied with, even in the event that they are no longer capable of making or communicating such personal decisions.

Power of attorney for healthcare

A power of attorney allows the patient (the principal) to delegate to another person (the agent) the power to make any healthcare decision that the principal would ordinarily be entitled to make. The scope of the power given to the agent can be as broad or narrow as the principal wishes it to be, while it grants the agent a wide-ranging decision-making power that the principal may limit, if he wishes. The law in Illinois does not, however, require that this particular form be used.

This agency relationship created by the power of attorney also protects the rights of third parties should the principal become incompetent. The agent will have final decision-making authority, even over that of a court-appointed guardian. But a court may intervene when it is proven that the agent is not acting for the principal in accordance with the terms of the power of attorney.

The agent cannot accept payment. A replacement may be appointed in the event that the named agent cannot or will not serve. The patient must inform

MAIN POINTS

- **Lack of clarity puts doctors in legal jeopardy**
- **Durable power of attorney and living wills**
- **The Illinois *Healthcare Surrogate Act***

DEFINITIONS IN THE ILLINOIS LEGISLATION

In relation to the term 'qualifying condition', the *Healthcare Surrogate Act* has a lot of important definitions.

Terminal condition refers to an illness or injury for which there is no reasonable prospect of cure or recovery, death is imminent, and the application of life-sustaining treatment would only prolong the dying process.

Permanent unconsciousness refers to a condition that, to a high degree of medical certainty:

- Will last permanently, without improvement
- Is a condition in which thought, sensation, purposeful action, social interaction, and awareness of self and environment are absent, and
- Is a condition in which initiating or continuing life-sustaining treatment, in light of the patient's medical condition, provides only minimal medical benefit.

Incurable or irreversible condition refers to an illness or injury for which there is no reasonable prospect of cure or recovery, or that will ultimately cause the patient's death even if life-sustaining treatment is initiated or continued. In addition, it inflicts severe pain or otherwise imposes an inhumane burden on the patient, and life-sustaining treatment, in light of the patient's medical condition, provides only minimal medical benefit.

Decisional capacity means the ability to understand and appreciate the nature and consequences of a decision about forgoing life-sustaining treatment, as well as the ability to reach and communicate an informed decision in the case. This is determined by the attending physician.

Forgoing life-sustaining treatment means withholding, withdrawing or terminating all or any portion of life-sustaining treatment in the knowledge that the patient is likely to die.

Life-sustaining treatment is defined as any medical treatment, procedure or intervention that in the judgement of the attending physician would not be effective to remove the 'qualifying condition' or would only serve to prolong the dying process, including assisted ventilation, renal dialysis, surgery, blood transfusions, and the administration of drugs, antibiotics, artificial nutrition and hydration.

the physician of this agency relationship. Although there is no duty to act, an agent must keep a record of all decisions made on his authority. This appointment may be terminated at any time, either orally or in writing, but modifications can only be made in writing.

Living wills

The living will allows patients to outline their wishes regarding death-delaying procedures should they become terminally ill. Because a living will is a statutory creation, the law must be clearly followed in order for it to be legally effective. The living will is provided in a specific form, but does not require the use of that particular version. It may also be activated by any person who is able to make his own decisions and who is at least 18 years old, but it will not be operative until the individual in question is in a terminal condition. A terminal condition is defined as 'an incurable and irreversible condition which is such that death is imminent and the application of death-delaying procedures serves only to prolong the dying process'.

Once the patient is in this irreversible state of health, the living will can say that no 'death-delaying procedures' should be undertaken. Such procedures are those that 'serve only to postpone the moment of death'. Procedures to ease pain, or the provision of artificial means of feeding and hydration, are not considered to be 'death-delaying procedures' for the purposes of a living will. The patient must inform the physician of the existence of the living will, and if the latter does not wish to comply with the provisions of this document he must inform the patient, who may then transfer to another doctor. In addition, the patient may revoke the will by destroying it or indicating orally or in writing that he is terminating it. If the patient is pregnant, and death-delaying procedures would allow foetal development to the point of live birth, the living will cannot be effective. If the patient has both a living will and an agent with power of attorney for healthcare, then the living will does not take effect unless the agent is not available.

If there is no advance directive executed, decisions regarding patient healthcare will have to be made by someone else, and may place additional burdens on the patient's family or physician. In the event that the patient lacks the ability to make decisions and suffers from a terminal disease, permanent unconsciousness or an incurable or irreversible condition, a healthcare surrogate may be chosen to make life-sustaining decisions on his behalf. In Illinois, this latter arrangement is given legal expression through the *Healthcare Surrogate Act*.

The *Healthcare Surrogate Act*

The Illinois *Healthcare Surrogate Act* defines the circumstances under which decisions to terminate life-sustaining treatment may be made, without judicial involvement, by surrogate decision-makers on behalf of patients lacking decisional capacity. The act establishes the priority by which 'surrogate decision-makers' may be identified and their authority to forgo life-sustaining treatment on behalf of a patient if he has a 'qualifying condition' and lacks 'decisional capacity'. How are these terms interpreted under the act?

First of all, 'surrogate decision-maker' refers to an adult who has the capacity to make decisions and is available to act in this capacity upon reasonable request. He must be willing to make decisions about life-sustaining treatment on behalf of a patient who lacks 'decisional capacity', and is diagnosed as suffering from a 'qualifying condition'. The surrogate decision-maker can be selected in the following order of priority:

- The patient's guardian
- The patient's spouse
- Any adult son or daughter
- Either parent
- Any adult brother or sister
- Any adult grandchild
- The patient's guardian of the estate
- A close friend.

The big picture

So how does this whole legal framework operate in practice in Illinois? It would be instructive to examine

the policy adopted in the Chicago-based hospital Rush-Presbyterian-St Luke's Medical Center.

A doctor must document the existence of a 'qualifying condition' on the hospital's *Healthcare Surrogate Act physician certification* form, including the cause and nature of the condition in question. Whether or not the patient has one or more of the 'qualifying conditions' and lacks 'decisional capacity' has to be noted. A note must also be made of the cause, nature and duration of this lack of 'decisional capacity', which is to be made to a reasonable degree of certainty by the physician. A formal identification of the surrogate decision-maker is required, along with documentation of his or her decision, as well as the substance of any discussion conducted with the patient's agent.

The patient must be informed of the identity of the decision-maker and the nature of any decision that has been made. Any such decision can be reversed if the physician believes that the surrogate is not acting in accordance with his or her responsibilities, or is unable to do so for reasons of conscience or other ethical consideration. There has to be a concurring physician in relation to the finding of a 'qualifying condition', and that second doctor's opinion must be reached through a clinical examination, as well as a determination that the patient lacks 'decisional capacity'. All the relevant documentation has to be filed in the patient's medical records. For new-born babies, the healthcare surrogate decision-maker is not authorised to seek the withdrawal or withholding of appropriate artificial hydration.

The option of implementing advance directives such as durable powers of attorney and living wills should be seriously considered. It is a constructive approach to legally recording the patient's wishes prior to undergoing any hospitalisation or course of medical treatment. These can be filed in the patient's medical records, and can be used as an irrefutable record of the patient's true wishes. In addition, these legal instruments can be operated in conjunction with legislation similar to that adopted in the state of Illinois, namely the *Healthcare Surrogate Act*. If adopted in England or in Ireland, these instruments would further eliminate legal uncertainty. This would prioritise and protect patients' wishes through the implementation of advance directives, while having in place a contingency whereby those closest to them can make decisions regarding medical treatment in the event of medical and mental incapacity.

While there are no perfect solutions to this imperfect situation, a framework based on the Illinois model would at least spare all concerned the legal uncertainty which can confound the efforts of doctors, relatives and patients to determine what is best in the most difficult of circumstances. G

Kieran Doran is an apprentice with Gannon & Liddy Solicitors.

Tech trends

By Maria Behan

Not-so-idiot box

Tired of what's on TV? You can expand the possibilities with the new 14-inch Black Diamond NetSET from Mitsubishi. It operates as a plain-vanilla boob tube until you whip out the keyboard trickily concealed in the remote control and, hey presto, you're using your sleek silver set to surf the net or send and receive e-mails. And you can send the rug rats on-line in good conscience, since the NetSET features a 'Net Protector' system that lets parents lock out material that's unsuitable for kiddies. *Available from electronics outlets, priced £349.*

For the disk jockeys in your firm

With an increasing amount of legal information stored in CD-ROM format, solicitors' firms need to be able to access and share information on disks easily. Passing disks from desk to desk can mean lost or damaged disks – or, even uglier, a tug-of-war over vital information. These are precisely the problems the Avantis Cdserve+ was designed to address by allowing several people simultaneous access to disks stored in a central repository. The server provides access to information stored in both CD-ROM and DVD format. *The CDS7 houses seven disks and is priced at £1,595; the 14-disk capacity CDS14 runs to £2,050; both are available from Sandyford Office Solutions on 01 294 3367, e-mail: sales@sandyfordsolutions.com.*

The smart money's on the cat

Long the province of science fiction, the intelligent house is well on its way to becoming a reality, thanks to the Secant Cardio home automation system. It won't dump you out of bed and into the shower or even brush you teeth for you, but a remote control system does allow you to turn on the coffee pot, or almost any other household device, while you're still lolling in bed. You can also access the system remotely, for instance, calling home from the office to play the radio for your cat or turn on the heating so the house is nice and toasty when you get home. *A basic unit which ties into the alarm system and allows control of lighting, heating and many appliances is available for about £3,700; the price varies based on the size of house and degree of customisation required. Contact IT Distributors on 01 413 9684 for further information.*

Your computer's best friend?

Billed as 'PC companions', the pocket computers in Hewlett-Packard's Jornada 540 series are designed for professionals who want to store and access business and personal info wherever they might find themselves. The Jornada lets you input fresh information like contact names and phone numbers while you're out and about. Then, once you're back at the ranch, you can synchronise functions such as calendars, 'to-do' lists and address books with your desktop or notebook PC. And Jornada lets you take Microsoft Office documents with you, since it runs pocket versions of Word and Excel. You can also surf the web and stay in touch via e-mail, not to mention recording and playing back voice memos. When the time finally comes to goof off, you can use your pocket computer to listen to audiobooks, play MP3 songs or curl up with an e-book. *The Jornada 545 comes with 16 MB of memory and costs about £470 at computer and electronics outlets, while the 548 has 32 MB and will cost around £550.*

Ready for your close-up?

The video cameras in Sony's Digital 8 Handycam range do double duty as digital still cameras, thanks to something Sony likes to call 'memory stick' technology. They also feature swivel-screen LCD displays that give you a pretty good preview of the images you're capturing and an infrared system that will come in handy during night shoots (or other low-light conditions). *The DCR-TRV320 is available for about £850 from Sony Centres and other camera and electronics outlets.*

Sites to see

Hieros Gamos (*http://www.hg.org*). Billing itself as 'the comprehensive law and government portal', this site offers everything from timekeeping to audio seminars to a powerful search engine that whips through 11,000 law and government sites to find the information you need. As its explanatory write-up proudly proclaims, 'If you cannot find the your [*sic*] legal materials from HG, they do not exist'. Maybe the site could use a better proof-reader, but you can't fault it for lack of ambition.

FirstLegal (*www.firstlegal.ie*). Claiming to be 'Ireland's first on-line legal service', this site links a network of solicitors from different areas of law with those who are interested in getting legal information on topics ranging from buying an apartment to making a will. Solicitors may find it a useful link to potential clients (information on joining the network is available on the home page), and those seeking legal information will appreciate the fact that the site is truly interactive, a rare enough commodity in the on-line world. In fact, the site guarantees a response to queries within one working day.

Gaijin A Go Go (*www.gaijinagogo.com*). Not for the faint-hearted, this site purports to 'assassinate your tastebuds' with video clips of Western celebs such as Demi Moore and Antonio Banderas selling their little hearts out for Japanese TV. If you want to have a laugh, send an electronic postcard of a celebrity behaving badly, or simply feel superior, this is the site to visit.

RTÉ News Page (*www.rte.ie/news*). Irish newshounds will revel in this site, which provides all the latest on wars, woes, scandals and sorrows. It's also a good way to keep up with RTÉ radio and broadcast offerings.

2 OCTOBER 2000

HISTORIC DAY

FOR THE SOLICITORS' PROFESSION

A special supplement on the Law Society's new Education Centre

The Law Society's new Education Centre is now open for business and playing host to 360 apprentice solicitors. In this special feature, we focus on last month's official opening by President Mary McAleese

The Law Society's new £5 million education centre was officially opened by President Mary McAleese on Monday 2 October. Among the invited guests at the ceremony were senior members of the judiciary, Law Society Council members, legal academics, representatives of the local community and of the law societies in neighbouring jurisdictions.

The opening ceremony itself was held in the centre's new state-of-the-art lecture theatre, where Law Society President Anthony Ensor welcomed An Uachtarán. Describing the occasion as 'an historic day for the Law Society and the solicitors' profession',

President Anthony Ensor welcomes everyone 'on this historic day'

he said: 'It is entirely appropriate President McAleese will be formally opening our new Education Centre and our relocated and expanded library. She is steeped in the tradition of legal education, having lectured in Trinity College, Dublin, and spent many years as director of the Institute of Professional Legal Studies at Queen's University, Belfast.

Ensor then went on to quote from the *First report of the Society of Attorneys and Solicitors in Ireland*, published on 10 May 1842: *'It will be the duty of the society to provide proper accommodation for the delivery of lectures and otherwise improving the practical education of their apprentices'*. And he noted that 'Our aims have not changed since 1842 but – due to the construction of this superb new Education Centre – our accommodation certainly has'.

President McAleese then addressed the 200 guests who had gathered for the formal opening. Describing the new building as 'the stuff of dream and the imagination', she said the decision to build a new centre for the training of solicitors' apprentices was 'a statement about the future for

Continued on page 39

It wasn't like this in our day: Director of Education TP Kennedy (*second from right*) is joined by his predecessors, (*left to right*) Dr Albert Power, Professor Richard Woulfe and Professor Lawrence Sweeney

President McAleese is greeted by Director of Education TP Kennedy

Serious faces – four former Law Society Presidents *(front)* Patrick Glynn and Laurence K Shields and *(rear)* Adrian P Bourke and Ernest and Margetson

Eyes on the prize: (*left to right*) Education Committee Chairman Michael Peart, Junior Vice-President Owen Binchy, Senior Vice-President Ward McEllin, President Mary McAleese, Law Society President Anthony Ensor and Director General Ken Murphy watch the specially-prepared video

FULL TEXT OF PRESIDENT MARY McALEESE'S ADDRESS

'Over a year ago, I saw the model of this building before any construction work had started, when it was still the stuff of dreams and imagination. I am delighted to see that the reality has lived up to, and indeed probably surpassed, all expectations. It is, of course, more than a building. It is a statement about the future, the shape of that future and what lies at the heart of it for the legal profession. In this marriage of old and new, of traditional and modern on the Law Society campus, this building is a very important crossing point from past to future.

'The Smithfield area of Dublin has had quite a make-over in recent times. Now to its rich architectural heritage has been added this centre with its contemporary design which complements the historic premises of the Law Society and the heritage of the area as a whole. It puts the mark of another generation on the history of this city and this profession.

'The entire £5 million cost is, I know, being borne by the profession, and that in itself says something about the commitment of this generation of lawyers to excellence in professional education and formation as well as to the aesthetics of the capital city. I congratulate everyone who has supported the project and who has worked towards its successful completion.

'The Law Society has been historically charged with responsibility for the education of solicitors. It's a role which I have some particular insight into from a past life. It is a truism to remark on the pace of change affecting every aspect of life and every kind of livelihood, but few professions have faced the avalanche of change which has engulfed the law. While moving with the new technologies, the demands of the consumer, the changes in the labour market, the sheer volume of this thing we call "the law" has grown to gargantuan proportions. From flotations to tribunals, from interpreting EU directives to developing our constitutional jurisprudence, from drafting wills, to making life and death decisions on finely-tuned ethical and moral considerations, the lawyer's life is a kaleidoscope of the most diverse endeavour.

'Somehow, the education and training of new generations of law students has to prepare them for this world. It has to equip them with the skills and confidence they will need to begin growing their careers, and it has to convince the rest of the profession and the public that this is a job done well. Today's young lawyers will be called to absorb much change over their lifetimes but, like a spine running through all that change, one thing cannot change and that is the call for

(*Right, top to bottom*)

So you designed it: President McAleese meets Education Centre architect Sean Mahon of Brian O'Connell Associates

Immediate past-president of the Law Society Pat O'Connor (*left*) with Vice Chairman of the Bar Council Fergal Foley BL

A judge's joke is always funny: Member of the Education Policy Review Group Judge John Buckley has Council member Geraldine Clarke in stitches

We helped to plan it: Education Committee member John Harte (*left*) and former chairman of the Education Policy Review Group Raymond Monahan

Chief Executive of the Courts Service PJ Fitzpatrick *(left)* and President of the Circuit Court Esmond Smyth

each to be exemplars and ambassadors *par excellence* of a profession which the public has confidence and trust in.

'This generation has witnessed a dramatic increase in the number of solicitors practising in Ireland. Their *milieu* is Ireland and Europe; an outward-looking Ireland dynamically engaged with many parts of the globe. Their *milieu* is the complexity of Irish life but that, too, may routinely involve trans-border and global legal practice. The demands made of them are considerable.

'You, as a profession, have taken that message to heart. You know that in order to provide a quality service, tailored to the needs and expectations of clients, the modern lawyer must be very comfortably adapted to this changed and changing environment; he or she must be out in front, not lagging behind. In this place, they will learn new skills, new applications; they will unlearn ways that are past their sell-by date and they, in turn, will become the next generation to drive forward this profession with foresight and commitment.

'As was remarked a moment ago, in another life I was privileged to have a particular insight into the work here at Blackhall Place and I am very proud of the fact that this society's high reputation for leading-edge legal professional training courses is, and long has been, acknowledged by its counterparts across these islands and much farther afield.

'Once again, you lead the field. In a few days' time, this centre will welcome 360 new professional practice course students. They will enter a new building and also a newly-introduced new educational model. They will have extensive computer training facilities and state-of-the-art technology at their fingertips. Many of us who have been down the older and more travelled roads would wish to have been born a generation or two later! Yet for all the gadgetry – and it is important gadgetry – they will still learn in this place and in their professional lives that the law is fundamentally about people, about the intricacies and consequences of human behaviour.

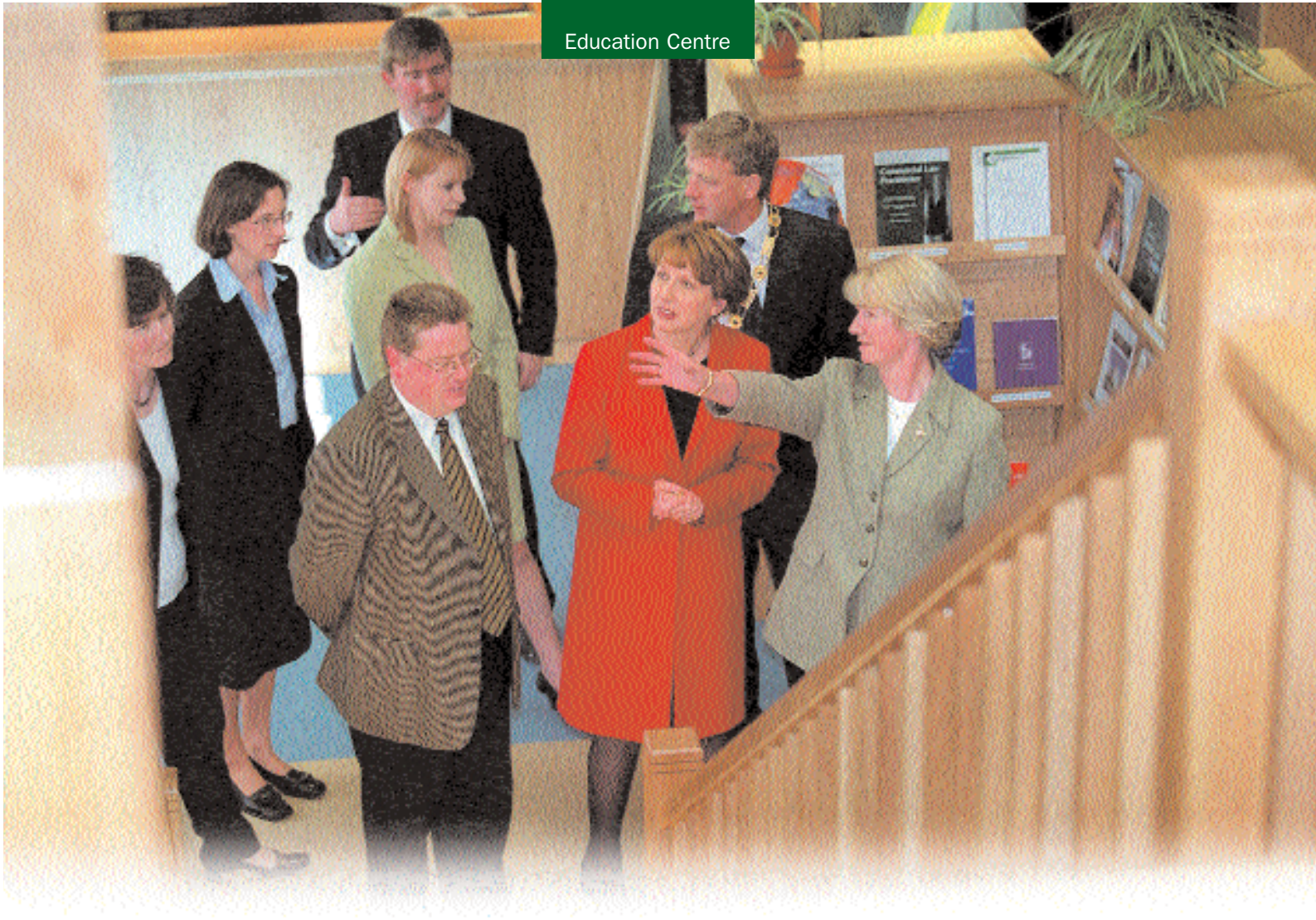
'Over 2,000 years ago, Cicero wrote that "the good of the people is the chief law". It is a motto still worth keeping to the forefront of our minds as we look to the needs of our society in the 21st century, and the role that lawyers can play in addressing those needs. Looking at this building, at the financial investment in it and the intellectual investment in what goes on in it, I think the Law Society of Ireland can take righteous pride in the profession as it sets out on the journey through this new millennium.

'It gives me great pleasure to open this new building and to wish every student who passes through its doors every success in the future'.

Four presidents: (*left to right*) President of the Law Society of Scotland Alistair Thornton, President Mary McAleese, Law Society President Anthony Ensor and President of the Law Society of Northern Ireland John Meehan

Distinguished guests: (*left to right*) Chief Justice Ronan Keane, former Law Society president Michael V O'Mahony, President of the District Court Judge Peter Smithwick and President of the High Court Mr Justice Frederick Morris

All smiles: a relaxed and informal President McAleese jokes on the way to the Presidents' Hall for lunch



'Once again, you lead the field'

– PRESIDENT MARY McALEESE

Suits you sir! President McAleese fiddles with Tony's trinkets

the legal profession'.

The full text of President McAleese's speech appears on pages 36 and 38.

Before the formal unveiling of the plaque to mark the opening of the centre, the audience was treated to a short video, specially commissioned for the occasion, charting the steps that led to the construction of the new building. Using archive footage of the previous education and training system for apprentices, combined with shots of the centre as it began to take shape and interviews with those most closely associated with the project, the video graphically demonstrated how far the society had come in a few short years.

The final speaker was Law Society Education Committee Chairman Michael Peart who thanked by name the many members of the Law Society staff and others whose remarkable efforts had ensured that the Education Centre project had been completed on time and on budget.

But for President McAleese, the day wasn't finished yet. While the guests mingled and enjoyed a glass of wine in the atrium of the Education Centre, Director General Ken Murphy and President Anthony Ensor brought An Uachtarán to see the society's new, bigger and better library, which has found a new home in what used to be the student's lecture hall.

Expanded library facilities were essential to cope with the influx of

'Can I be one of your motorbike outriders?' appears to be the question Law Society immediate past-president Pat O'Connor is putting to President McAleese

so many new apprentices at Blackhall Place, especially since the remodelled professional practice course demands much more individual research by apprentices than before. The new library has 30% more floor space, two new staff and offers greater IT resources, including a bank of 12 PCs where visitors can access the library catalogue and the Internet. There is also a discrete study area for apprentices which has been networked to the Education Centre's IT system.

As Director General Ken Murphy put it: 'Every generation has to meet its own challenges. Ours was to construct an education and training system for the solicitors of the 21st century – a system that would be at least on a par with the best anywhere in the world. I believe that history will show we have succeeded'. G

Education department staff members *(left to right):* Patricia Murphy, Sara O'Connor, Colette Reid, Brid Moriarty and Triana Murphy

Library line-up: *(left to right)* Deputy Director General Mary Keane, President Anthony Ensor, President Mary McAleese, Director General Ken Murphy, and librarian Margaret Byrne. Back row *(left to right)*: library staff members Eddie Mackey, Mary Gaynor and Aoife O'Connor

It's a deal: President Anthony Ensor with local TD Tony Gregory

Report of Law Society Council meeti

Motion: Scheme of assistance

'That this Council approves the scheme of assistance for solicitors about whom a complaint has been made to the Law Society or who are in difficulty with the Law Society.'

Proposed: Keenan Johnson
Seconded: John P Shaw

Keenan Johnson explained that the scheme of assistance was designed to meet concerns expressed by the independent adjudicator regarding the extent to which solicitors failed to respond to correspondence from the Law Society in relation to complaints from clients. It was intended that a panel of solicitor colleagues, operating independently of the Law Society, would agree to act as a 'best buddy' for colleagues who were in difficulties.

Following a suggestion from Hugh O'Neill, the Council confirmed that the scheme would operate on the basis of a solicitor/client relationship and its operation would be reviewed after a trial period of 12 months. It was also agreed that no member of the society's regulatory committees could act as a panel member and that no Council member could participate in the scheme, either while serving on the Council or for a period of three years thereafter.

Land Registry and Registry of Deeds

The president reported on a meeting with the registrar of titles, at which the society had been represented by the president, the director general and the chairman of the Conveyancing Committee, Brian Gallagher. There had been a frank exchange of views and the society had been very forceful in relation to the recent fees orders. The registrar had outlined the difficulties she faced, including the likely impact of decentralisation on the services provided. John Dillon-Leetch urged that the society should maintain pressure to ensure an improvement in the business relationship between the registry and the profession. In his view, the registry was failing to perform a statutory function.

Orla Coyne said that there had been no need for the increase in fees introduced in the fees orders and there was a sufficiency of funds already generated by the registry. She noted that, at an EGM of the DSBA, a mandate had been received to issue proceedings against the minister.

The president noted that the Department of Finance had sanctioned the recruitment of 60 additional staff in the registry. However, the recruitment procedure was so tortuous and the level of pay so low that it was unlikely the registry would succeed in its efforts to recruit those staff.

Donald Binchy said that it seemed clear that very little was going to improve in the short term. If the only proposal that was likely to improve matters was the move to semi-state status, he believed the society should not withdraw its support for that proposal.

The president agreed that the society had to support the registrar in any steps that might reasonably improve the service being provided. He also felt that the society should keep open the lines of communication with the registry and it might be necessary to approach the profession to secure its assistance in improving the quality of its dealings with the registry.

Keenan Johnson expressed his support for a collaborative relationship with the Land Registry. He said that the registry's difficulties arose because of a massive increase in the number of dealings and a reduction in the number of staff, with the responsibility for the difficulties resting firmly with the government. The

Report of Law Society Council meeti

Motion for November meeting

'That this Council recommends that practitioners be asked, on the practising certificate application form, to make a voluntary contribution to FLAC (in the same way as the Solicitors' Benevolent Fund).'

Proposed: James MacGuill
Seconded: John Costello

Motion: Family law disputes

'It is the view of this Council that it would be unprofessional conduct for a solicitor to represent both parties in a family law dispute.'

Proposed: Sean Durcan
Seconded: Stuart Gilhooly

The Council unanimously approved the motion. Michael Irvine said that, having listened to various debates at the annual meeting of the American Bar Association, he believed it was incumbent on the society to treat conflict of interest situations very carefully. He suggested that a task force might be established to consider the issue. The president asked that the senior vice-president would give consideration to this suggestion when appointing committees for the coming year.

Vacancies for legal assistants in the Attorney General's Office

The Council considered correspondence between the director general and the attorney general in relation to legal vacancies in the state service (full text of the correspondence is set out on pages 6 and 7) and affirmed the Council's position that all legal posts should be open to the best candidate – whether solicitor or barrister. This reflected the same principle underpinning the society's position in relation to judicial appointments and was totally defensible. The view was expressed that the attorney general's position was based purely on a 'division of the spoils' in numerical terms and was not defensible on any ground of principle. The director general noted that, in the Dáil on the previous Tuesday, the minister for justice had stated that there was no legal prohibition on a solicitor becoming attorney general.

EU directive on money-laundering

Mary Keane briefed the Council in relation to developments with the EU directive. An amended text of the article relating to legal professionals had been proposed and was likely to be approved by the Council of Ministers. It envisaged the reporting of suspicious transactions by solicitors and, accordingly, was not acceptable to the society. Geraldine Clarke confirmed that, while

ng held on 8 September

director general noted that the proposed move to semi-state status was proffered by the minister and the registrar of titles as the way forward. Potentially, the society's support for the move to semi-state status might increase the priority with which the registry was regarded by the government.

John Harte said that there were very basic problems with the service provided by the registry, including the requirement for personal attendance to secure a folio and a map. Unless the society obtained a guarantee of an improvement in service resulting from a move to semi-state status, he did not believe that the society should support such a move.

Michael Peart suggested that the society should assist its members by running CLE seminars, issuing checklists and, in general, adopting a shared approach with the Land Registry to dealing with the difficulties.

Anne Colley said that the Land Registry was at the wrong end of a confluence of problems, including an increase in activity, decentralisation, a haemorrhage of staff and difficulties associated with computerisation. It was likely that a move to semi-state status, with some autonomy from centralised systems, would result in a more attractive proposition for potential recruits.

Patrick O'Connor said that, if the society and the profession made a concerted effort, it should be possible to assist the registry in identifying and progressing solutions. He suggested that the Land Registry might be asked to nominate members of their staff to act as facilitators on CLE courses, which could be run as a joint venture between the society and the registry.

The president said that he would seek to progress a positive relationship with the registrar of titles and to take steps to assist the registry in its difficulties, without losing sight of the business problems for practitioners.

Multi-disciplinary partnerships/practices

The Council noted, with approval, the text of a resolution in opposition to MDPs, which had been passed by the American Bar Association at its annual meeting.

European convention on human rights

James MacGuill reported that, although there was a commitment by the Irish government to introduce the European convention into Irish law by 2 October, 2000, no legislation had yet been placed before the cabinet. The society was to meet shortly with lawyers from Scotland with a view to sharing their experiences in relation to the introduction of legislation pertaining to the convention in their jurisdiction. He noted that £6 million had been expended in Scotland with a view to training lawyers and judges in that jurisdiction on all relevant aspects of the convention. The Council noted that a conference on the issue would be held at the society on 14 October.

Apprentices' salaries

The Council considered, and approved, a proposal from the Education Committee for an increase in apprentices' salaries to £200 a week pre-professional course I, £265 a week during the period of in-office training and £315 a week post-PPC-II.

Registry of Friendly Societies Users' Council

The Council unanimously approved the nomination of William Johnston as the society's representative on the Registry of Friendly Societies Users' Council. G

ng held on 13 October

there was a high level of disagreement between the French and German representatives on the issue, it was virtually certain that the amended text would be adopted by ECOFIN. It would then move to second reading by the European Parliament.

Report on legal aid for refugees

The Council considered, and approved, a report from the Family Law and Civil Legal Aid Committee on the provision of legal aid to applicants for refugee status in Ireland. It was agreed that the officers should consider how best to promulgate the contents of the report to the profession and to government.

Andrew F Smyth, past president

The President paid tribute to Andrew F Smyth, past president, who was attending his last meeting of the Council after 23 years' service. The president complimented Mr Smyth on his dedication and commitment over so many years and presented to him a small token of the Council's appreciation of his contribution to the work of the society. G

Committee reports

PROFESSIONAL INDEMNITY INSURANCE

Renewal of PII cover

I would like to take this opportunity to advise you to seriously consider the particular circumstance of your practice when you come to renew your professional indemnity insurance cover for the forthcoming year. The committee has taken the view that the mandatory level of professional indemnity insurance cover should remain at £1m each and every claim. However, this level of cover may not be sufficient to provide every practice with an adequate level of professional indemnity insurance cover.

Each practice should immediately review its requirements in this regard in the light of the nature and extent of the practice being carried out. Such consideration is advisable both from the perspective of the protection of clients and of the practice itself.

In addition, practices conducting conveyancing transactions should take into account, when considering their professional indemnity insurance requirements, the fact that if top-up cover (cover in excess of £1m each and every claim) is obtained for any particular conveyance, that such cover will be required for an extensive period of time and ought properly to take into account increasing property values.

The matter that requires direct focus is that professional indemnity insurance cover provided is on a claims-made basis and the relevant level of cover necessary in any circumstance should be that which is sufficient at the time the claim is first notified and not the time at which the transaction originally occurred. In simple terms, if a solicitor acts in a conveyancing transaction in the current year for a figure of £3m, it will not only be necessary for that solicitor to increase his professional indemnity insurance cover to £3m for the current year, but it will also be necessary to take out a similar level of cover for a considerable period of time in the future. The likely increase in the value of the said property should also be taken into account when renewing cover.

The committee has been advised by the qualified insurers providing professional indemnity insurance cover to the profession that costs are now forming an ever-increasing part of claims and this should also be taken into account when deciding on the level of cover necessary.

In these circumstances, I would strongly advise every practice to carry out an audit of all work intakes, which might require them to review their actual professional indemnity insurance cover requirements in relation to the type of practice they operate. Practices are advised to take professional advice from either their insurer or broker in this regard.

The committee is currently reviewing the minimum level of cover as provided for in the regulations and is considering recommending an increase in the minimum level to £2m each and every claim with effect from 1 November 2001.

Please note that the Professional Indemnity Insurance Committee is happy to receive any queries a solicitor may have and to assist members where possible.

John Shaw, chairman, PII Committee

LITIGATION

High Court public computer system: information seminars

Practitioners may wish to note that the High Court Central Office is running a series of information sessions for users of the Central Office Public Computer System. The session takes place each Friday morning at 9.30–10.00am and will be repeated every Friday morning in Michaelmas term, up to and including Friday 22 December.

Attendance is free of charge and those wishing to attend should submit their name to the list room or contact Patrick Johnson on 01 888 6505. Only a limited number of places are available per session, so early booking is essential.

Litigation Committee

PROBATE, ADMINISTRATION AND TAXATION

TAX BRIEFING

The following extract from *Tax briefing*, issue 51, is reproduced by kind permission of the Revenue Commissioners.

Anti-speculative property tax

The *Finance (No 2) Act, 2000*, which was enacted on 5 July 2000, includes provision for a new tax called the anti-speculative property tax. The anti-speculative property tax applies, in general, to residential property in the state which is acquired on or after 15 June 2000 and which is not the principal private residence of the new owner.

Residential property is:

- A building or part of a building used or suitable for use as a dwelling (a mobile home will not be treated as residential property for the purposes of this tax), and
- Land which the occupier of such a building or part thereof has for his/her own occupation and enjoyment with the said building or part as its garden or grounds of ornamental nature.

Transitional arrangements

- Any property to which a person was beneficially entitled on 14 June 2000 is not liable to the tax except in the case of a principal residence which is replaced after 14 June 2000 but retained afterwards as an investment
- Property purchased before 15 June but not conveyed until on or after that date is only exempt if the contract was evidenced in writing before that date
- Property built after 14 June 2000 on land to which a person was beneficially entitled on that date will not be liable to the tax.

Exempt residential property (apart from main residence)

As well as the exemption of an individual's principal private residence, an exemption from the tax applies where:

- The property was acquired by the current owner as an inheritance
- The property was acquired as a gift so long as the donor owned the property prior to 15 June 2000
- The property is let and the landlord has complied with the registration, rentbooks and standards regulations provided for under the *Housing (Miscellaneous Provisions) Act, 1992*
- The property is held by a

charity
- The property is comprised in a trust established out of public subscriptions for the benefit of one or more permanently-incapacitated individuals
- The property is owned by a spouse but is occupied by the other spouse as his or her only or main residence in circumstances where a decree of divorce or a decree of judicial separation has been granted in respect of the marriage
- The property is comprised in the trading stock of a trade
- The property is:
  - A building which is intrinsically of significant scientific, historical, architectural or aesthetic interest and to which reasonable access is afforded to the public or which is in use as a tourist accommodation facility (a registered guest house or other accommodation facility listed under section 9 of the *Tourist Traffic Act, 1957*) for at least six months in any calendar year including not less than four months in the period commencing on 1 May and ending on 30 September
  - A 'section 23'-type property under various tax incentive schemes. The properties in question are rented residential properties, the expenditure on the construction, conversion or refurbishment of which qualify for a deduction against rental income. Thus, residential accommodation under the following schemes will be exempt:
    1 The Custom House Docks Area Scheme
    2 The Temple Bar Area Scheme
    3 The 1994 Urban Renewal Scheme
    4 The Seaside Resorts Scheme
    5 The Islands Scheme
    6 The New Urban Renewal Scheme
    7 The Rural Renewal Scheme
    8 The Scheme of Residential Accommodation for certain students
    9 The Rented Residential Accommodation element of the park-and-ride scheme
    10 The Town Renewal Scheme.
  - A Bord Fáilte-registered holiday cottage or apartment, or other listed self-catering accommodation throughout the country (such as listed holiday cottages and listed holiday apartments).

Principal private residence

An individual's principal private residence at any time is the building or part of a building occupied by the individual as his or her only or main residence:
- During the period of 12 months ending with that time, or
- Where the building was more recently acquired, from the time of acquisition to that time.

An individual is treated as occupying a building as his or her only or main residence even where the terms of a person's employment require that he or she absent themselves from the building so long as both before and after any such period of absence the individual actually occupies the building as his or her only or main residence.

Can an individual have more than one principal private residence?

It is not possible to have more than one main residence. However, where a person is moving from one residence to a second residence, and for a period of up to six months owns the two residences, neither residence in that period (if it straddles 6 April) will be liable to tax.

How will the tax operate?

Anti-speculative property tax is a self-assessment tax which will last for three years. Those liable to the tax must make a return and pay the tax on or before:
- 1 November 2001 in respect of property owned on 6 April 2001
- 1 November 2002 in respect of property owned on 6 April 2002
- 1 November 2003 in respect of property owned on 6 April 2003.

The tax due for each of those years is 2% of the market value of all non-exempt residential property owned by the person on 6 April in that year but where the property was acquired and fully paid before 6 April 2001, the price paid is taken as the market value of the property on that date.

Property abroad

Property abroad is not liable to the tax. The tax only applies to residential property in the state.

Property in the state owned by a person outside the state

Once the property is in the state, it makes no difference where its owner resides – the tax still applies.

Who is liable for the tax?

Each person with an ownership interest (excluding a future interest) is liable for the tax to the extent of his or her proportionate interest in the property. In the case of 'settled' property, the life tenant is liable for the entire tax but can raise the tax out of the property.

What is market value?

The market value of a property is the price which it would be expected to fetch on the open market assuming the sale was arranged to achieve the best possible price for the vendor.

EXAMPLE

On 14 June 2000, Mary and John jointly own their family home worth £450,000. In February 2001, they jointly purchase a holiday cottage (in need of repair) for £120,000. In September 2001, John buys an apartment in Cork to use on his many overnight business trips to the Cork region. The cost was £250,000. Assume the following:

Holiday cottage
Market value 6 April 2001 – £130,000*
Market value 6 April 2002 – £200,000
Market value 6 April 2003 – £250,000.

Cork apartment
Market value 6 April 2002 – £260,000
Market value 6 April 2003 – £300,000.

** Value for tax is £120,000 as the property was acquired and fully paid for before 6 April 2001.*

Anti-speculative property tax due:

Mary		**John**			
Family home	Exempt	Family home		Exempt	
Holiday cottage		Holiday cottage		Apartment	
2001	£1,200	2001	£1,200	2001	Nil
2002	£2,000	2002	£2,000	2002	£5200
2003	£2,500	2003	£2500	2003	£6000

The tax due for each year must be paid on or before 1 November in that year.

No account is taken of any mortgage or other debt charged on the property. The purchase price of a property purchased between 15 June 2000 and 6 April 2001 will be taken to be the market value at 6 April 2001.

Further information on the anti-speculative property tax measures included in the bill as published can be obtained by telephoning Capital Taxes Division on 01 679 2777, extensions: 24172/ 24173/24281.

Stamp duty

Conveyances/transfer/assignments of lands/building: effective rates of duty

Where conveyances and so on are executed on or after 15 June 2000, the rates in the chart at right apply. G

Probate, Administration and Taxation Committee

AGGREGATE CONSIDERATION	RATES OF DUTY RESIDENTIAL				NON-RES
	FTB	OO	T	I	
Does not exceed £5,000	E	E	E	9%	E
£5,001-£10,000	E	E	E	9%	1%
£10,001-£15,000	E	E	E	9%	2%
£15,001-£25,000	E	E	E	9%	3%
£50,001-£60,000	E	E	E	9%	4%
£60,001-£100,000	E	E	3%	9%	5%
£100,001-£150,000	E	3%	4%	9%	6%
£150,001-£170,000	3%	4%	4%	9%	6%
£170,001-£200,000	3%	4%	5%	9%	6%
£200,001-£250,000	3.75%	5%	5%	9%	6%
£250,001-£300,000	4.5%	6%	7%	9%	6%
£300,001-£500,000	7.5%	7.5%	7%	9%	6%
Over £500,000	9%	9%	9%	9%	6%

(All amounts computed are rounded-up to the nearest pound.)

Key: FTB = first-time buyer, OO = owner-occupier, T = transitional, I = investor, E = exempt, Non-res = non-residential

The above extract is reproduced by kind permission of the Revenue Commissioners.

IRISH ASSOCIATION OF LAW TEACHERS' MID-YEAR CONFERENCE:

Recent legal responses to social changes in Ireland

Date: 2 December 2000
Venue: Education Centre, Law Society of Ireland, Blackhall Place, Dublin 7
Time: 9.30-16.30
Price: £10 (IALT members and students), £15 (non-members)

The Irish Association of Law Teachers will hold its mid-year conference on Saturday 2 December. The theme of the conference is a particularly timely choice considering the extensive social and economic changes which Ireland is presently experiencing. Panels include family and child law, immigration and asylum law, criminal law and criminology and health law, legal research and teaching.

The association particularly welcomes post-graduate research students and those interested in legal research generally, as the plenary session will involve a discussion of the opportunities and pitfalls for those conducting or wishing to conduct legal research in Ireland.

Anyone interested in attending should contact:

- Ubaldus de Vries, President, Dublin City University Business School, Dublin 9, tel: 01 704 5928, e-mail: ubaldus.devries@dcu.ie
- Siobhan Duffy, Treasurer, Institute of Technology Dundalk, Dublin Road, Dundalk, Co Louth, tel: 042 933 0499, e-mail: siobhan.duffy@dkit.ie
- Oonagh Breen, Membership Secretary; University College Dublin, Law Faculty, Roebuck Castle, Belfield, Dublin 4, tel: 01 706 8787, e-mail: oonagh.breen@ucd.ie.

Practice notes

VOLUNTARY DISCLOSURE: BOGUS DIRT-FREE ACCOUNTS

Practitioners may have read in the national press that the Revenue Commissioners are to examine the bank accounts where DIRT has not been operated (accounts held by non-residents, charities and so on) after the Revenue Commissioners have completed their audits of the financial institutions and have reported back to the Public Accounts Committee. Practitioners are advised that where they have been consulted by the holders of bogus DIRT-free accounts they should point out to their client that until the Revenue Commissioners turn their attention to auditing or investigating the account-holders that the client may be able to make an unprompted voluntary disclosure to the Revenue Commissioners. Before making a voluntary disclosure, however, a practitioner would need to consider with his client whether any circumstances exist which would come within the Revenue Commissioners' prosecution criteria, which are:

- Use of forged or falsified documents
- Systematic scheme to evade tax
- False claims for repayment
- Failure (as distinct from minor delays) in remitting fiduciary taxes
- Deliberate and serious omissions from tax returns
- Use of off-shore bank accounts to evade tax
- Insidious schemes of tax evasion
- Aiding and abetting the commission of a tax offence
- *Offences under the Waiver of Certain Tax, Interest and Penalties Act, 1993* (the amnesty).

If a practitioner is in doubt as to whether his client could be prosecuted, the practitioner can discuss the matter on a no-names basis with the Revenue Commissioners. The procedure is not a guarantee that no prosecution will take place but it will give a practitioner comfort as to how the Revenue perceive the matter. Enquiries to the Revenue Commissioners should be made to 01 671 6777.

The implications and benefits of voluntary disclosure are set out in detail in the Revenue publication *Code of practice for Revenue auditors*, which is available from the Revenue forms and leaflets service on 01 8780100 or on their website at *www.revenue.ie.*

In summary, where an unprompted voluntary disclosure is made:

- Publication of the account-holder's name in the national press will not arise
- Penalties, unless prohibited by law, are mitigated up to a maximum of 95%. There is no mitigation of interest
- While no absolute assurance can be given, it is normal practice for Revenue to be influenced not to seek prosecution and a monetary settlement is accepted.

Once the Revenue Commissioners turn their attentions to the account-holders, it may be too late to avail of the benefits of voluntary disclosure and it is recommended that such clients be made aware of the position.

If a client chooses not to make an unprompted voluntary disclosure and subsequently receives communication from the Revenue Commissioners, practitioners are advised that the communication be carefully perused because if the client is being investigated by the Revenue Commissioners (as opposed to being audited, although audits can subsequently become investigations), it is with a view to prosecution and the client should be advised accordingly.

The *Code of practice for Revenue auditors* is essential reading for any practitioner advising in this area.

Probate, Administration and Taxation Committee

NEW HIGH COURT PRACTICE DIRECTION: PAYMENT OF FUNDS OUT OF THE HIGH COURT

Practitioners should note that with effect from Monday 2 October 2000 where orders of the court or Master of the High Court directing payments from funds in court are made, or notices of acceptance of lodgement are filed pursuant to order 22, rule 4 of the *Rules of the Superior Courts*, the following arrangement will apply for the discharge of stamp duty and the issue of drafts in respect of such payments:

- The accountant of the courts of justice will calculate stamp duty payable on any drafts, deduct the same from the funds in court and pay it directly to the chief clerk of the Dublin Metropolitan District Court
- The accountant will then post the cheques (less the amount of the stamp duty) to the solicitor who is on record for the payee
- Where notice of acceptance is lodged and the defendant is entitled to the accrued interest on the sum lodged, a draft for same, less stamp duty (if any) will be posted to the solicitor on record for the defendant by the accountant of the courts of justice
- Practitioners should note that, for the purpose of perfecting the court order, the registrar will require the name and current address of each solicitor on record for inclusion in the schedule to the order
- The payment schedule to High Court and Master's Court orders made on and after 2 October 2000 will incorporate the necessary directions to implement this change.

Litigation Committee

CIRCUIT CRIMINAL COURT FEES

Practitioners are advised that, as from 1 October 2000, the fees payable to solicitors for cases in the Circuit Criminal Court have been increased as follows:

- First day of trial: £865 (up from £820)
- Each additional day of trial: £432 (up from £410)
- Sentence hearing: £133.95 (up from £127).

Please also note that under the terms of SI 235/2000, a fee of £133.95 is payable to solicitors for an adjourned sentence hearing or a trial hearing which is adjourned within seven days of the scheduled trial date in the Circuit Court outside Dublin. This brings the payment scheme in line with the fees payable for such hearings in Circuit Court cases in Dublin. The above regulation is deemed to have come into effect on 1 June 1999.

Criminal Law Committee

Three wise men

Patrick Kavanagh's seat, Dublin

ORDERS MUST BE RECEIVED
BY 17 NOVEMBER
DELIVERY BY 1 DECEMBER

Send order form and cheque to:
SBA Christmas Cards,
Santry Printing Ltd, Unit 5,
Lilimar Industrial Estate,
Coolock Lane, Dublin 9.
Tel: 842 6444. Contact: Amanda

Christmas Cards

In aid of the

Solicitors' Benevolent Association

This is an opportunity to support the work of the
Solicitors' Benevolent Association, whose needs are
particularly acute at Christmas time.

GREETING PRINTED INSIDE EACH CARD:
With Best Wishes for Christmas and the New Year

Order form

Firm: _____

Contact: _____

Address: _____

_____

DX: _____ Tel: _____ Fax: _____

Each card sold in packets of 50 costing £50 (including overprinting of you firm's name). Minimum order 50 cards.
Add £3.50 for postage and packaging for each packet of 50 cards.

I wish to order _____ pack(s) of card A @ £50 (incl. VAT) _____ pack(s) of card B @ £50 (incl. VAT) _____

Personal injury judgments

Road traffic accident – car and a motorcycle – motorcyclist severely injured – dispute as to the facts

CASE

***David Cooke v John O'Sullivan*, High Court on circuit in Waterford, before Mr Justice Philip O'Sullivan, judgment of 30 June 1999.**

THE FACTS

David Cooke, aged 25, single and living with his family, was involved in a motor accident on 25 June 1997. Mr Cooke's evidence was that he moved out from a position where he had been parked on the right-hand side as one proceeds out of Carrick in the direction of Kilkenny. He moved across the road on his motorcycle and he had reached the correct side of the road, three or four feet inside the white line, before he heard the noise of a car from behind him and was then struck by that car. He stated that he was in second gear and was about to go into, or was in the course of going into, third gear. He estimated his speed at somewhere in the region of 20-25 miles per hour.

John O'Sullivan, the driver of the car involved in the accident, gave a diametrically opposed account of the accident. He testified he was travelling along uphill out of Carrick at about 25 miles per hour when he saw a motorcycle coming quickly at him from his right, leaving him with no opportunity to avoid it.

The motorcyclist, Mr Cooke, received serious injuries at the accident. He sustained a wound to his left leg and spent three or four months after the accident with an external fixator on his left leg to unite the bones. His damaged leg was in plaster for nine to ten months and it was 12 months after the accident before he was able to walk without the aid of crutches. As a consequence of the accident, he has been left with an indented scar on his left leg and he complained that he could not lift his left foot and his movements are not as quick and he is not as agile as previously. He had to undergo four operations in total. Mr Cooke issued proceedings against John O'Sullivan for personal injuries. The case proceeded to a full hearing, with Mr Justice O'Sullivan determining the issue between the parties.

THE JUDGMENT

Describing the plaintiff, David Cooke, as 'a well set-up man', Mr Justice O'Sullivan noted he was a credit to himself and to his family. The judge considered the facts and noted there was a major issue between the parties as to how the accident had occurred. The judge's first task, therefore, was to assess as best he could in the light of the evidence whether David Cooke had established on the balance of probability that the accident occurred in a manner which would mean that John O'Sullivan was responsible in law to him.

The judge reviewed the evidence in relation to skid marks on the road. The court heard evidence from an engineer on behalf of Mr O'Sullivan that there had been no damage to the rear wheel of Mr Cooke's motorcycle. There had been damage to the front of the motorcycle, to the wheel, handle bars, the covering to the left-hand side, along the left-hand side of the tank and the foot rest. There was also damage to Mr O'Sullivan's car, to the front right-hand wing and also to the driver's-side rear window.

The judge noted that Mr Cooke had given evidence that he had given a hand signal. The judge found himself in some doubt as to whether Mr Cooke's recollection was correct in this regard. Mr Cooke was cross-examined and had to accept that there would have been difficulties about giving a hand signal whilst at the same time carrying out the driving manoeuvre on the motorcycle that he clearly did.

In all the circumstances, and in the light of the evidence, the judge concluded that Mr Cooke had not satisfied him on the standard of proof required, the balance of probability, that his account of the accident was correct. Mr Cooke's account of the accident was that he had attained his correct side of the road and had heard Mr O'Sullivan's car coming from the rear and had at that stage proceeded to move in further to the left. The judge did not consider this was consistent with the physical evidence, the evidence of damage and the evidence of two engineers.

The judge stated that he must consider whether, in the circumstances, any blame could be attached to the driver of the car. Noting that he had the benefit of the evidence of engineers and of maps, he said that he came to the conclusion that Mr O'Sullivan could not have been at fault for the circumstances of the accident. In his opinion, the accident was created by Mr Cooke's motorcycle moving out from the parked position into the path of Mr O'Sullivan's car and striking it in the right-front wing area of the car. The judge said he could not see how Mr O'Sullivan could be held liable, even in a minority sense, for the circumstances. He did not think that it had been established that there had been a hand signal given by Mr Cooke or that the circumstances supported the suggestion that Mr O'Sullivan should have blown his horn. He considered that, in the circumstances, Mr O'Sullivan could not do other than he did, which was to apply his brakes and attempt to proceed over to the left of the road.

Costs were awarded against Mr Cooke.

Counsel for Mr Cooke: Tom Slattery SC, Sean Ryan SC and Aidan Doyle, instructed by James O'Reilly & Son, Solicitors.
Counsel for Mr O'Sullivan: Liam Reidy SC, Jeremy Maher BL, instructed by Nolan Farrell & Goff, Solicitors.

Employer liability – county hospital – general porter – lifting an elderly, confused patient – application of safety, health and welfare at work regulations – ambitions of accident victim to become a professional footballer

CASE

***Ciaran O'Connor v North Eastern Health Board*, High Court on circuit in Dundalk, before Mr Justice Finnegan, judgment of 13 December 1999.**

THE FACTS

Ciaran O'Connor was born on 23 October 1973 and is a married man with two children. He was educated to intermediate standard. In that examination, he passed woodwork and metalwork but failed science, mechanical drawing and Irish and left school at 16 years of age. In January 1995, he secured employment with the North Eastern Health Board, Louth County Hospital, as a general porter. He was made permanent in February 1997 and had been assigned as a medical attendant to surgical ward 7 at the hospital. Having been made permanent, he married on 31 May 1997.

Ciaran O'Connor had ambitions to be a professional footballer, initially on a full-time basis and then subsequently on a part-time basis. He played as a schoolboy with his local team in Dundalk. At age 16, he went to Everton on a six-months' trial, but due to a change of manager he returned home after three weeks. He returned to Dundalk where he subsequently played on the 'B' team. He played for the first team in pre-season matches but not in the Irish League. He subsequently joined Linfield in the Irish League but played with the reserves. He travelled as a reserve with the first team but did not play with them. He joined Kilkenny City and played in their first team in the 1995-1996 season. He stopped playing with Kilkenny City because of his work commitments with the North Eastern Health Board. These matters were relevant in the context of an accident which happened to Mr O'Connor in June 1997.

At about 3.30pm in surgical ward 7 of the Louth County Hospital on 27 June 1997, Mr O'Connor was in the linen room putting away clean linen when he heard a buzzer sound on a number of occasions. There were four nurses on duty but three were on a tea break and there was only one nurse on actual attendance on the ward with responsibility for other wards as well. The buzzer had not elicited a response from the nursing staff and Mr O'Connor assumed the nurses were busy elsewhere. He responded himself. Mr O'Connor found an elderly, confused patient was attempting to get out of his bed upon which the cot sides had been raised. Mr O'Connor found the patient towards the end of the bed lying on his left-hand side and clutching the cot side. Mr O'Connor attempted to move the patient back into the bed by leaning across the bed and releasing the patient's grip and putting his right and left hands under the patient's right and left arms and attempting to pull the patient back towards him. The patient weighed 13 stone. On moving the patient, Mr O'Connor felt something 'go in his back'. He developed immediate pain and reported the accident.

Immediately following the accident, Mr O'Connor complained of shortness of breath and pain underneath the left ribs and lower back. He attended the hospital's accident and emergency department but x-rays of the chest and lumbosacral region disclosed no abnormality. After he went home, the pain increased and the low-back pain radiated down his leg as far as his big toe. He returned to hospital the following day and was admitted for six days. Mr O'Connor was treated with bed rest and analgesic medication, including injections. However, he subsequently complained of severe low-back pain with intermittent left lower-limb radiation. His left-sided chest symptoms resolved. In the hospital, he was under the care of a consultant surgeon and a consultant orthopaedic surgeon.

Following his discharge in July 1997, he attended a general practitioner who has a special interest in low-back pain. Mr O'Connor's complaints continued and he also developed severe headache. On examination, the general practitioner found that Mr O'Connor's left leg was one-half inch shorter than his right. The doctor utilised a flexion distraction machine to manipulate the lumbosacral spine and correct the pelvic tilt and he injected the left sacroiliac joint with pain-killer and prescribed muscle relaxant and anti-inflammatory medication. Mr O'Connor continued to attend Dr Tobin and was manipulated and given pain-killing injections on alternative weeks. The regime continued until some six weeks before the hearing of the trial. In the meantime, Mr O'Connor had issued proceedings against the North Eastern Health Board for damages for personal injury.

THE JUDGMENT

Having outlined the facts, Mr Justice Finnegan stated he was satisfied that the procedure adopted by Mr O'Connor as a general porter in the hospital in attempting to move the patient back into bed required him to adopt an ergonomically unsafe position. The bed was some 27 inches high and the cot side extended above this by three inches giving a total height over which Mr O'Connor had to lean of 30 inches. The bed was some 39 inches wide. The procedure adopted by Mr O'Connor required him, with his knees unflexed, to extend his back across the bed and extend his arms at the same time. Held in this twisted position, his back had to take the strain of a considerable part of the patient's weight.

The judge referred to regulation 13(1) of the *Safety, Health and Welfare at Work (General Application) Regulations 1993*, where it is stated that it shall be the duty of every employer to provide training in matters of safety and health to ensure that employees received adequate safety and health training, including, in particular, information and instruction relating to the particular task or work station involved.

The judge noted that the same regulation provided that training was to be adapted to

take full account of new or changed risks and should be provided on recruitment of employees or in the event of a transfer of employees, a change of job, the introduction of new work equipment, a change in equipment or the introduction of new technology. Training should be repeated periodically where appropriate.

The judge noted that Mr O'Connor did not receive any training, information or instruction whatsoever in patient handling or lifting. This was so notwithstanding a clear recognition by the North Eastern Health Board in a safe work practice sheet dated September 1995 of the dangers inherent in patient handling. The judge was satisfied that if Mr O'Connor had received even rudimentary instructions in training and lifting techniques, he would have adopted a different procedure in the emergency which confronted him.

In those circumstances, the judge found the North Eastern Health Board to be in breach of the duty imposed upon it by the *Safety, Health and Welfare of Work (General Application) Regulations 1993*, particularly in the context that Mr O'Connor was faced with an emergency with a real risk of the patient falling from the bed, and taking into consideration that Mr O'Connor had no training whatsoever to assist him in coping with such an emergency. In this context, the judge referred to principles of law set out in *Kennedy v East Cork Foods Limited* ([1973] IR 244).

Mr Justice Finnegan considered the issue of contributory negligence but held that Mr O'Connor was not guilty of any contributory negligence.

In relation to medical injuries, the judge referred to the fact that the local doctor sent Mr O'Connor to a consultant at a time when he was complaining of continuing pain in his lower back radiating in the left thigh as far as the knee and going down to the ankle. This would occur seven or eight times a day. Mr O'Connor also complained of his left foot feeling weak and this caused him to fall over on two occasions. There was numbness in the left buttock and back of the left thigh as far as the knee. On examination, the consultant found that flexion was limited. Straight leg raising was 90 degrees on the right and 40 degrees on the left, the latter causing pain in the low back area. Intensive conservative treatment was started involving analgesics, anti-inflammatory drugs, hydrotherapy heat treatment and the use of a low-back board.

The consultant arranged for an MRI scan which showed signs of degeneration at L4/5 and L5/S1. There was evidence of a small broad-base posterior annular tear, but without root compression.

The consultant was of the opinion that the accident left Mr O'Connor with an injury to the left rib cage posteriorly and to the left sacroiliac joint and his lumbar sacral junction. Mr O'Connor's symptoms did not get any better. He continued to complain of constant pain in the left side of the low back, the pain radiating into his left thigh and leg and extending as far as the big toe approximately once a week. Movements remain restricted and cause pain.

The consultant was of the opinion that Mr O'Connor's condition was chronic and the pain would preclude him from returning to any work which included lifting, pushing or pulling and from any sporting activities save swimming and gentle exercise.

Mr O'Connor was also referred to a consultant neurosurgeon. The neurosurgeon arranged for him to be reviewed by a consultant in pain management and to have the left sacroiliac joint injected. In evidence, the neurosurgeon stated that the disk protrusion did not explain Mr O'Connor's pain. He had degenerative changes in the disks which predated the accident and were asymptomatic and rendered asymptomatic by the accident and he also had facet joint syndrome on the left side.

Mr O'Connor was referred to a consultant orthopaedic surgeon. An MRI scan revealed minor hypertrophy of the facet joints of L5/S1 level. A bone scan was normal. A CT scan revealed evidence of a broad bulging disk at L5/S1 level with evidence of indentation of the spinal cord and it was considered that this might be causing some compression of the emerging nerve roots on both sides.

The judge noted that, irrespective of the outcome of any discography, it was extremely unlikely Mr O'Connor would ever return to any work which involved lifting or bending or to work as a professional footballer.

All of the doctors concerned considered that Mr O'Connor was displaying depressive symptoms. He was referred to a consultant psychiatrist, who treated him with anti-depressant medication. It would appear that there were a number of life events which could have precipitated depression. However, there did not appear to be any evidence of a former psychiatric disorder.

The judge came to a conclusion that the accident had rendered Mr O'Connor unfit to engage in his employment. It had denied him the opportunity of pursuing a career as a footballer and prevented him from enjoying football as a recreation. The judge noted that Mr O'Connor had suffered intermittently from depression and, while this may be related to other life events, his chronic pain and adaptation to his lifestyle had been a factor.

THE AWARD

Mr Justice Finnegan awarded Mr O'Connor £37,500 for pain and suffering to the date of the trial, a period of two years and five months. In relation to future pain and suffering, he awarded him £75,000. Special damages were agreed at £31,000; this sum was to cover loss of earnings to date of the trial.

The judge did not propose to make an award in respect of Mr O'Connor's loss of earnings as a part-time professional footballer. The judge noted that he was unable to pursue such a career when working for the North Eastern Health Board. He found a conflict between Mr O'Connor's case that if he had continued working, he would have earned some £75 a week net overtime and allowances and the claim that he could pursue his part-time footballing career. The judge was satisfied as a matter of probability that Mr O'Connor would have been obliged to elect between undertaking over-time and playing semi-professional football.

Mr Justice Finnegan found Mr O'Connor would be capable of engaging in gainful employment after his operation and he would be capable of earning £190 a week net and this would leave him with a net weekly loss of £85. For future loss of earnings, Mr O'Connor was awarded £100,000; for loss of pension rights £9,000; and £5,000 for the loss of his retirement gratuity. The judge calculated the total award at £257,500.

Counsel for Mr O'Connor: Eoghan Fitzsimons SC and Eamonn Coffey BL, instructed by Frank McArdle, McArdle and Associates, Solicitors, Dundalk, Co Louth.
Counsel for North Eastern Health Board: Fergus O'Hagan, SC and Kevin Seagrave BL, instructed by Keaveny, Walsh & Co, Solicitors, Kells, Co Meath. G

These cases were summarised by Eamonn Hall, solicitor, from Reports of personal injury judgments *from Doyle Court Reporters, 2 Arran Quay, Dublin 7.*

Update

News from Ireland's on-line legal awareness service
Compiled by John X Kelly of FirstLaw

ADMINISTRATIVE

Medicine and misconduct

Professional misconduct – temporary registration of medical practitioners – preliminary issue – whether decision not to grant plaintiff temporary registration unconstitutional – whether open to plaintiff to challenge decision in High Court – Medical Practitioners Act, 1978, *sections 29, 46, 47-49*

The plaintiff had been found guilty of professional misconduct by the defendant and had cancelled the registration of the plaintiff's name in the general register of medical practitioners. The plaintiff issued proceedings, claiming that the decision in question was so serious as to warrant approval by the High Court. As a preliminary issue, it fell to be decided as to whether the plaintiff was entitled to apply to the High Court in respect of the decision. Morris P held that in this instance no right was afforded to the plaintiff to apply to the High Court for a cancellation of the decision.

***Anachebe v Medical Council*, High Court, Mr Justice Morris, 12/07/2000** [FL3061]

Mental health

Practice and procedure – whether to grant leave to applicant to institute proceedings – whether doctors fraudulently certified applicant as part of conspiracy with applicant's wife – whether detention in hospital unlawful and unconstitutional – whether applicant detained before doctors signed statutory certificate – onus of proof applicable – whether substantial grounds for contending that defendants acted in bad faith or without reasonable care – Mental Treatment Act, 1945, *s260*

The applicant sought leave under section 260 of the *Mental Treatment Act, 1945* to institute proceedings against two doctors, his wife and gardaí for being taken against his will to a private psychiatric hospital in 1987 and claimed that the doctors fraudulently certified him as part of a conspiracy with his wife. The High Court refused the plaintiff leave to institute proceedings and the plaintiff appealed. Keane CJ held that the plaintiff had failed to establish 'substantial grounds' within the meaning of the *Mental Treatment Act, 1945*. The plaintiff had failed to demonstrate that the defendants had acted in bad faith. The appeal should be dismissed. Murphy J, in a separate judgment, concurred with the Chief Justice and dismissed the appeal. Murray J concurred with both judgments.

***Blehein v Murphy and Others*, High Court, Chief Justice Keane, Mr Justice Murphy, Mr Justice Murray, 13/07/2000** [FL3060]

Planning and local government

Electricity cables – revocation of planning permission – whether fair procedures followed in revoking planning permission – whether 'works' had been carried out – whether applicant denied opportunity to make representations – Local Government (Planning and Development) Act, 1963, *section 30*

The applicant sought and had been granted planning permission to erect an overhead electricity line. Subsequently, the respondent revoked the planning permission in question, citing a change in circumstances such as health risks and the costs involved. The applicant sought to judicially review the revocation on the grounds that fair procedures had not been followed and that no change in circumstances had occurred to warrant the decision to revoke. The applicant also contended that the manufacture of steel structures for the project constituted 'works' on the project. Finnegan J was satisfied that the works in question were 'works' within the meaning of section 30 of the *Local Government (Planning and Development) Act, 1963* and thus the planning authority was in error. In addition, the applicant had been denied an opportunity to make representations to the planning authority and this constituted a breach of natural justice. An order of *certiorari* would accordingly be granted, quashing the decision to revoke the planning permission.

***ESB v Cork County Council*, High Court, Mr Justice Finnegan, 28/06/2000** [FL 3012]

CHILDREN

Removal by one parent without consent

Custody – whether removal of children was wrongful within meaning of Hague convention – *whether right of access implies prohibition on removal by one parent without consent of other parent* – Child Abduction and Enforcement of Custody Orders Act, 1991 – Hague convention on the civil aspects of international child abduction, *articles 3, 12, 21*

The parties had been married to one another but the marriage had been dissolved in the United States. The defendant had subsequently been granted sole legal and physical custody of the children. The defendant had also been granted child support and, due to arrears of child support being outstanding, an attachment of earnings order had been granted. The defendant eventually left for Ireland taking the children with her. The plaintiff instituted proceedings seeking the return of the children to the United States. Kearns J in the High Court had refused to make the orders sought and the plaintiff appealed. The defendant argued that as she was the person entitled to legal and physical custody of the children, then she was entitled to determine where they should reside and accordingly their removal was not wrongful. Keane CJ held that to order the return of the children and their custodial parent to the jurisdiction in which they were formerly resident merely so as to entitle the non-custodial parent exercise his rights of access was not warranted under the terms of the *Hague convention*. The defendant should have notified the plaintiff that she intended to bring the children to Ireland. However, the removal of the children was not wrongful within the meaning of the *Hague convention*. The appeal would accordingly be dismissed.

***WPP v SRW*, Supreme Court, 14/04/2000** [FL2908]

Abduction of children

Custody – welfare – proceedings under Hague convention – *whether children faced grave risk of intolerable situation if returned – whether removal of children wrongful* – Children (UK) Act, 1989, *section 8* – Child Abduction and Enforcement of Custody Orders Act, 1991 – Guardianship of Infants Act, 1964

In assessing whether or not to order the return of children under the *Hague convention*, a number of issues fell to be considered. In this instance, the

lack of detailed evidence, the fact that proceedings in relation to the matter had already been issued in a different jurisdiction and the failure by the abducting parent to establish that there was a grave risk that the children would be placed in an intolerable situation if returned to England meant that the court would affirm the relief sought by the father of the children. The Supreme Court so held in directing that the children be returned to England pursuant to article 12 of the *Hague convention*.

***MSH v LH*, Supreme Court, 31/07/2000** [FL3087]

COMMERCIAL

Warsaw convention

Contract – aviation and air transport – negligence – conflict of laws – construction of agreement – carriage of goods – limitations as to liability – damages – applicability of Warsaw convention – *hold harmless agreement – whether plaintiff had delivered 'special declaration of interest' – whether defendants had transported goods 'recklessly'* – Air Navigation and Transport Act, 1936 – Air Navigation and Transport Act, 1959

The plaintiff manufactured pharmaceutical products and had engaged the defendant to transport some of these products. While in transit, the plaintiff's goods were damaged and the plaintiff sued the defendant for the loss of the consignment. The defendant sought to limit its liability as per the terms of the *Warsaw convention*. The plaintiff sought to establish that the actions of the defendants constituted 'gross negligence' and thus the limitations as set out under the *Warsaw convention* did not apply. Finnegan J held that the terms of the hold harmless agreement did not relieve the defendant from liability under the *Warsaw convention*. The plaintiff could not be said to have delivered a 'special declaration of interest' to the defendant. However, it had been shown that the defendant had transported the goods in a reckless manner, had done so with gross negligence and was not entitled to rely on the limitations as to liability as set out under the *Warsaw convention*. The plaintiff was therefore entitled to recover the full amount of the loss incurred.

***APH v DHL*, High Court, Mr Justice Finnegan, 28/06/2000** [FL3140]

Intellectual property

Internet site – domain names – tort – passing off – interlocutory injunction – whether similar names of parties would lead to confusion – whether balance of convenience favoured granting injunction

The plaintiffs had established a company under the name 'Local ireland' and registered the domain names 'Localireland.com' and 'local.ie'. The plaintiffs subsequently became aware that the defendant had established a company under the name 'Local Ireland-Online'. The plaintiffs claimed that the defendant was operating and trading under names which amounted to passing off and were infringing their intellectual property rights. The plaintiffs sought an interlocutory injunction to restrain such activity. Herbert J, delivering judgment, held that the plaintiffs had a strong *prima facie* case that the use by the defendant of the names in question would amount to deception. Accordingly, he granted the interlocutory injunction sought by the plaintiffs on the undertaking that damages would be paid by the plaintiffs should a court so order at the trial of the action.

***Local Ireland & Nua v Local Ireland-Online*, High Court, Mr Justice Herbert, 02/10/2000** [FL3147]

CONSTITUTIONAL

Revenue and finance

Tax assessments – evidence – application of Trimble *case – whether tax assessments were correctly served – whether CAB officials properly appointed – whether deliberate and conscious violation of defendant's constitutional rights occurred – whether obligation to serve prior demand* – Criminal Justice (Drug Trafficking) Act, 1996 – Criminal Assets Bureau Act, 1996 – Fraudulent Conveyances Act 1634 – Proceeds of Crime Act, 1996 – Taxes Consolidation Act, 1997

The defendant had been arrested pursuant to a drugs investigation and was subsequently served with tax assessments while in custody. In these proceedings, the plaintiff sought to enforce the assessments in question and also sought declarations regarding the ownership of various monies and property. The first defendant claimed that the arrest in question was in violation of his constitutional rights. In addition, the first defendant claimed that no opportunity had been afforded to appeal the tax assessments in question. O'Sullivan J held that it had not been shown that the arrest of the first defendant was spurious and thus the 'fruits of the poisoned tree' doctrine did not apply. Applying the presumption of regularity, Mr Justice O'Sullivan was satisfied that the plaintiff's officials were authorised to carry out the duties in question. However, a prior demand should have been served in relation to the income tax assessment and in this regard the proceedings were premature. The proceedings with regard to the VAT demand were not premature and the declaration being sought would be granted. The presumption of advancement as between man and wife relating to the ownership of monies did not apply in such an illegal scheme. Therefore, a declaration that the first defendant was the beneficial owner of the monies in question would issue.

***Criminal Assets Bureau v Craft and McWatt*, High Court, Mr Justice O'Sullivan, 12/07/2000** [FL3093]

Insolvency

Liquidation – finality of litigation – res judicata – *duties of directors – jurisdiction of Supreme Court – whether payment of monies* ultra vires – *whether principle of* audi alteram partem *infringed – whether court empowered to rescind earlier order* – Companies Act, 1963 – Courts (Establishment and Constitution) Act, 1961 – Bunreacht na hÉireann, 1937, article 34

The applicants were shareholders in a company which was the subject of a winding-up order. The liquidator had sought and been granted an order directing the applicants to repay certain monies belonging to the company. The applicants sought to have the case re-opened on the grounds that the manner in which the case had been originally dealt with contravened the principles of natural and constitutional justice. The applicants sought the rescission of the order by the Supreme Court dismissing the appeal. Hamilton CJ held that the issues the applicants had raised had been fully dealt with in the previous judgment. There was no breach of fair procedures and the application would be refused. Denham J and Barrington J, delivering separate judgments, held that there had been no breach of the principles of natural justice and the application should be dismissed.

***Fagan and Malone v McQuaid*, Supreme Court, 09/12/99** [FL2706]

Planning, practice and procedure

Separation of powers – environment – judicial review – certiorari *– role of attorney general – district court prosecution – applicants elected to be tried summarily – whether planning authority entitled to prosecute offences on indictment – whether attorney general entitled to intervene in proceedings – whether sufficient public interest to justify joining attorney general as party to proceedings* – Local Government (Planning and Development) Act, 1963 – Local

Government (Planning and Development) Act, 1982 – Prosecution of Offences Act, 1974 – Solicitors Act, 1954 – Family Law Act, 1995 – Rules of the Superior Courts 1986, *order 15*, *rule 13; order 60*, *rules 1*, *2; order 84*, *rule 22(6)*, *26* – Bunreacht na hÉireann, 1937, *articles 29.4.1°*, *30.4.*, *34*

Fingal County Council had initiated a prosecution of the applicants in respect of a planning matter. The prosecution had been successful. However, upon judicial review proceedings being brought, an order of *certiorari* was granted in respect of the prosecution order on the grounds that the local authority had not the power to prosecute indictable offences. The matter was appealed. This application concerned an application by the attorney general to intervene in the proceedings. On behalf of the attorney general, it was contended that he was a constitutional officer who was entitled to be joined to the proceedings which concerned a matter of public importance. Held by Denham J that there was sufficient public interest in the issues being appealed to warrant making the order joining the attorney general as a party to proceedings. Hardiman J held that although the attorney general did not have an automatic entitlement to be joined to the proceedings, in this instance it was appropriate that the attorney general be joined. The order joining the attorney general may ultimately have a bearing on the issue of costs.

***TDI Metro Ltd v Fingal County Council*, Supreme Court, 31/03/2000** [FL2872]

CONTRACT

Land law, property

Sale of property – specific performance – doctrine of part performance – deposit – motion to dismiss claim – whether absence of concluded agreement – Statute of Frauds 1677 – Rules of the Superior Courts 1986, *order 19*, *rule 28*

The plaintiffs had issued proceedings seeking a decree of specific performance against the defendants in relation to the sale of property. The defendants brought a motion seeking to have the plaintiffs' claim dismissed pursuant to the inherent jurisdiction of the court. The defendants claimed that as a deposit had not been agreed, the plaintiffs' claim could not succeed. In the alternative, it was claimed that there was no note in existence which would satisfy the *Statute of Frauds*. In the High Court, the defendants' motion was dismissed and the defendants appealed. Geoghegan J, delivering judgment, held that there were issues involved in the case which should be argued out and tried at the action. It could not be said that the agreement in question could definitely not constitute a concluded agreement. The defendants' motion would be refused and the appeal dismissed.

***Supermac's v Katesan*, Supreme Court, 07/06/2000** [FL3082]

COSTS

Practice and procedure

Security of costs – litigation – radio licence – allegation of bias – notice party – whether party possessed vital interest in case

The applicant had been joined as a notice party in the substantive proceedings. The case concerned allegations of bias surrounding the issue of a radio licence. The applicant had sought an order for security of costs which the trial judge declined to make and the applicant appealed against that refusal. Keane CJ, delivering judgment, held that the trial judge had been in error in the course he had adopted. The notice party had a vital interest in the outcome of the proceedings. The appeal would be allowed and the appropriate order for security of costs would be made.

***Spin v Independent Radio and TV Commission*, Supreme Court, 14/04/2000** [FL3080]

CRIMINAL

Fair procedures

Delay – original case dismissed – judicial review – conviction recorded without hearing evidence – whether breach of applicant's constitutional rights occurred – whether respondent acted in excess of jurisdiction – whether judge entitled to change decision during sitting of court – Road Traffic Act, 1961 – Bunreacht na hÉireann, 1937, *article 38.1*

The original prosecution of the applicant on a charge of drunken driving in the District Court was dismissed on the grounds of delay. When the matter came before the Supreme Court, it was directed the matter should not have been dismissed and should proceed once more in the District Court. When the matter was reheard, a further application to dismiss by reason of delay was refused and the district judge convicted the accused. Evidence had not yet been tendered in the case. The district judge then directed that evidence be given and once this had been done proceeded to convict the applicant. The applicant issued proceedings seeking to quash the conviction in question. Kinlen J held that the trial judge had heard the evidence and had convicted the applicant. The trial judge had acted within jurisdiction and the application for *certiorari* would be refused.

***McNeil v Brennan*, High Court, Mr Justice Kinlen, 21/06/2000** [FL3064]

Judicial review

Evidence – preliminary examination – Decision of District Court judge – certiorari – *judicial review – rape – whether respondent acted in excess of jurisdiction – whether decision of District Court judge amenable to judicial review* – Criminal Procedure Act, 1967, *section 7*

The case concerned the refusal of a District Court judge to send an individual forward for trial on a rape charge. There were a number of statements before the judge relating to the incident in question. The director of public prosecutions sought an order of *certiorari* quashing the order of the judge. In the High Court, Morris P refused to grant the order sought, holding that to grant an order of *certiorari* simply because there was evidence to warrant a conviction confused want of jurisdiction with error in the exercise of jurisdiction. The DPP appealed. Keane CJ, delivering judgment, held that it was difficult to explain the decision the District judge had reached. However, it was not open to the court to inquire into the merits of the decision. This would be tantamount to affording the DPP a right of appeal. The order of the president would be affirmed and the appeal dismissed.

***DPP v Kelliher*, Supreme Court, 24/06/2000** [FL3070]

CUSTOMS AND EXCISE

Practice and procedure

Powers of Revenue Commissioners – search and seizure – validity of search warrants – whether search warrants valid – Customs Consolidation Act 1876, *section 205* – Customs and Excise (Miscellaneous Provisions) Act, 1988 – Bunreacht na hÉireann, 1937, *article 40.5*

The applicant brought proceedings relating to the search of its premises and the seizure of goods. The applicant claimed that the warrants authorising the officers of the Revenue Commissioners to carry out the acts in question were unlawful and of no effect. The applicant sought an order of *certiorari* quashing the search warrants, an injunction directing the return of the seized goods and damages for trespass. Keane J, as he was then, delivering judgment (with Barrington J agree-

ing), held that warrants which carried on their face statements to the effect that they had been issued on a basis not authorised by statute were invalid and must be quashed. An injunction would also issue directing the respondents to deliver up the goods of the applicant seized on foot of the warrants. Barron J delivered a dissenting judgment, holding that as there was no error occurring within jurisdiction relating to the issue of the warrants an order of *certiorari* should not issue.

***Simple Imports v Revenue Commissioners*, Supreme Court, 19/01/2000** [FL3117]

EMPLOYMENT

Fair procedures

Suspension of employment – disciplinary action – civil service procedures – judicial review – audi alteram partem – nemo iudex in sua causa – *whether suspensions unwarranted and unlawful – whether respondent had acted* ultra vires – *whether suspension warranted warning – whether normal rules of natural justice applied – whether constitutional right to earn livelihood interfered with* – Civil Service Regulation Act, 1956, *sections 1, 3, 13-14*

The applicants had been suspended from employment pending a full investigation into allegations of misconduct. They initiated judicial review proceedings in the High Court claiming that insufficient details had been furnished to them in respect of the allegations and that the suspensions should be quashed. O'Higgins J granted the relief sought, holding that there had been a denial of fair procedures and that the purported suspensions were invalid. The respondent appealed. Keane CJ, delivering judgment, held that the applicants had been afforded the opportunity to make representations. The conclusions reached by the learned High Court judge that there had been a denial of fair procedures were not justified. Accordingly, the appeal of the respondent would be allowed and the applicants' claim would be dismissed.

***Gavin v Minister for Finance*, Supreme Court, 12/04/2000** [FL2728]

FAMILY

Variation in agreement sought

Financial arrangements – change of circumstances – ancillary orders – variation in agreement sought – whether court should interfere with terms of separation agreement – Family Law Act, 1995 – Family Law (Divorce) Act, 1996, *section 20*

The parties had married in 1975 and had subsequently entered into a separation agreement. Due to a change in financial circumstances, the applicant now sought amendment of the terms of the separation agreement. Judge Buckley held that where both parties had the benefit of competent legal advice, the court should be slow to alter the terms of a separation agreement. In this instance, given the remarkable increase in property values (the family home was now valued at £800,000), the judge held that the applicant should continue to pay maintenance but should receive a sum equal to 10% of the net sale price on any future sale of the family home. The applicant was not to have any equitable estate in the property.

***MG v MG*, Circuit Court, Judge Buckley, 25/07/2000** [FL3058]

Evidence, practice and procedure

Litigation – evidence – admission of documents – legal profession – professional negligence – in camera *rule – whether sufficient element of public interest present to warrant disclosure of documents – whether appropriate to waive in camera rule* – Children Act, 1997 – Judicial Separation and Family Law Reform Act, 1989, *section 34* – Family Law (Divorce) Act, 1996

The applicant had made a complaint to the Barristers' Tribunal concerning the conduct of the applicant's barrister in family law proceedings. In support of his complaint, the applicant had sought to introduce certain documents which had been used in the family law proceedings into the hearing before the tribunal. The tribunal refused permission, holding that permission would have to be sought from the Circuit Court. The Circuit Court judge, referring to the *in camera* rule, refused to grant the leave sought and held that it was not in the public interest that the application be granted. The applicant appealed. Murphy J held that on the basis of the relevant statutory provisions documents which were protected by the *in camera* ruling could not be the subject matter of an investigation by a professional body investigating complaints. Accordingly, the application would be refused.

***RM v DM*, High Court, Mr Justice Murphy, 26/07/2000** [FL3086]

INTELLECTUAL PROPERTY

Injunction

Infringement of copyright – European law – application for injunction – publishing – whether works in question protected by copyright – whether injunction should issue – European Communities (Term of Protection of Copyright) Regulations 1995 – Intellectual Property (Miscellaneous Provisions) Act, 1998

The plaintiff was a trustee of the estate of the writer James Joyce. The defendant sought permission to include a number of extracts from the works of James Joyce in an anthology. Correspondence ensued between the parties but they failed

to reach agreement. Copyright in the works of James Joyce expired on 1 January 1992 but were revived from 1 July 1995 by virtue of European legislation. Works which had been initiated after 1 January 1992 but prior to 29 October 1993 were exempt from the revived copyright and a Joycean scholar, Danis Rose, claimed that his version of *Ulysses* fell under this exemption. The defendant procured permission from Danis Rose to use extracts from his version of *Ulysses*. The estate of James Joyce was also engaged in litigation with Danis Rose. The plaintiff as trustee sought an injunction to restrain the defendant's forthcoming anthology. Smyth J held that only a full hearing of the action could properly determine the substantive points. In the circumstances, the plaintiff was entitled to the injunction sought and the relief in question was granted.

***Sweeney v Cork University Press*, High Court, Mr Justice Smyth, 09/10/2000** [FL3152]

LAND LAW

Bailment

Mining – contract – bailment – trespass – possession – damages – whether defendant under duty of care as bailee of goods – whether defendant liable for loss occurring – Statute of Limitations, 1957 – Minerals Development Act, 1940 – Minerals Development Act, 1979

The plaintiff had owned lands containing coal, shale and fireclay. The plaintiff sold the lands to the defendant who wished to extract the shale and fireclay. As part of the agreement, the plaintiff was to extract the coal deposits. Difficulties arose and the plaintiff was informed that extraction of coal had to cease. Subsequently, the coal deposits were removed by third parties. The plaintiff sued the defendant claiming damages for the loss of coal. Barr J was satisfied that the relationship between the plaintiff and defendant was analogous to that of bailor and bailee. The defendant was responsible for the loss of the coal deposits. Damages of £74,991 were awarded, taking into account the remaining residue of coal and the appropriate limitation of damages under the *Statute of Limitations, 1957*.

***Scanlon v Ormonde Brick Limited*, High Court, Mr Justice Barr 21/07/2000** [FL3068]

Adverse possession

Ownership – trespass – injunction – dispute concerning title to land – damages – whether plaintiff had discontinued possession – Statute of Limitations, 1957

The proceedings concerned a dispute over the ownership of lands. The plaintiff sought an injunction restraining the defendant from trespassing on certain lands. The defendant claimed to have occupied the lands exclusively and to have acquired title to the lands by reason of adverse possession. Finnegan J was satisfied that it had not been shown that the plaintiff had discontinued possession. The defendant did not have the necessary *animus possidendi* to dispossess the plaintiff. The injunctive relief sought by the plaintiff would be granted.

***Feehan v Leamy*, High Court, Mr Justice Finnegan, 29/05/2000** [FL3072]

LICENSING

Adjoining premises

Existing licensed premises – statutory interpretation – objections – appeal – whether new licence could be granted in respect of existing premises and new premises – whether new premises 'attached or adjoining existing premises' – whether issue of new licence would render existing premises 'more suitable' for the carrying out of business – Licensing (Ireland) Act 1902, *section 6* – Intoxicating Liquor Act, 1960, *section 24* – Courts of Justice Act, 1936

The applicant had sought a publican's licence in respect of premises a portion of which was presently licensed and another portion which was unlicensed. The application was opposed by a number of objectors. In the Circuit Court, the application was refused and this refusal was appealed to the High Court. In the High Court, Kearns J posed a number of questions in the form of a consultative case stated for the Supreme Court. The main issue concerned whether the entire premises must form a single entity in order for the new licence to issue. Murphy J, in delivering the opinion of the court, held that the entire premises must be capable of forming one single unit for the purposes of licensing. In addition, the adjoining premises must be such that the premises currently licensed was rendered more suitable for the carrying out of business. The matter as answered would now fall to be determined by the High Court.

***Hannigan Holdings Ltd*, Supreme Court, 13/04/2000** [FL2729]

LOCAL GOVERNMENT

Planning

Permission granted for modified application – whether planning notice misleading – whether application should have been readvertised – whether modified application raised different planning issues – Local Government (Planning and Development) Regulations 1994

The applicant had brought proceedings seeking to have the planning permission that was granted to the notice party quashed. The applicant claimed that the permission was granted for a development which was materially different from that which was originally applied for. In this respect, it was claimed that the original planning notice was misleading. Butler J held that a planning authority was entitled to grant permission for a development that was substantially different than what was originally applied for. In this instance, the changes did not amount to a materially different development. Interested parties were aware of the proposed development. The relief sought by the applicant would be refused.

***Irish Hardware v South Dublin County Council*, High Court, Mr Justice Butler, 19/07/2000** [FL3065]

PLANNING

Abuse of process

Litigation – abuse of process – inherent jurisdiction of High Court – whether proceedings should be struck out

The plaintiff sought relief against the defendants, one of whom was Lagan Cement Limited. Lagan Cement Limited, which was a competitor of the plaintiff, had been granted planning permission to develop a cement factory in County Meath. Lagan Cement Limited brought the present application to dismiss the present proceedings on the grounds that they constituted an abuse of process. Quirke J was satisfied that the present proceedings were instituted solely to further the commercial interest of the plaintiff. The inherent jurisdiction of the High Court to strike out proceedings should be exercised sparingly. In this instance, the proceedings had been initiated for an improper purpose, constituted an abuse of process, and, accordingly, the plaintiff's claim would be dismissed.

***Quinn v An Bord Pleanála*, High Court, Mr Justice Quirke, 04/10/2000** [FL3092] G

The information contained here is taken from FirstLaw's Legal Current Awareness Service, published every day on the Internet at www.firstlaw.ie. *For more information, contact bartdaly@firstlaw.ie or FirstLaw, Merchants Court, Merchants Quay, Dublin 8, tel: 01 679 0370, fax: 01 679 0057.*

Eurlegal

News from the EU and International Law Committee
Edited by TP Kennedy, director of education, Law Society of Ireland

New EU regime for vertical agreements

The EU Commission has adopted a new regulation on the application of article 81(3) of the *EC treaty* to categories of vertical agreements and concerted practices. The regulation entered into force on 1 January 2000 and has applied since 1 June 2000. The regulation replaces the exclusive distribution block exemption, the exclusive purchasing block exemption and the franchising block exemption. Where the regulation's market share threshold is not exceeded and where the parties to the agreement avoid the inclusion of hard-core restrictions, the parties can be assured that article 81(1) of the *EC treaty* does not apply to the agreement. The arrangement will benefit automatically and without prior notification for an exemption under article 81(3) of the *EC treaty*. The regulation is accompanied by guidelines on its application. The purpose of this article is to examine the principal aspects of the regulation and, where relevant, to review its interaction with its Irish domestic equivalent, the Competition Authority's category certificate and licence in respect of agreements between suppliers and resellers.

Scope of the regulation

The regulation applies to all vertical agreements, which are defined as agreements, which:

- Involve two or more parties (the three previous vertical block exemptions were limited to agreements to which only two undertakings were party)
- Each of which operates at a different level of the production or distribution chain, and
- Relate to the conditions under which the parties may purchase, sell or resell goods or services.

The scope of the regulation therefore encompasses situations where the goods or service provided by the supplier may be used as an input by the buyer to produce its own goods or service. This is wider than the scope of the certificate and licence, which exclude from their scope agreements relating to goods or services which are not purely for resale, and agreements relating to services only. It is disappointing that the certificate and licence do not cast their scope as widely as the regulation. Consequently, a range of agreements which may not cause competition difficulties still requires individual notification to the Competition Authority under the *Competition Act, 1991*.

The regulation also applies to vertical agreements entered into between an association and its members or between such an association and its suppliers where all its members are retailers of goods and no individual member of the association, together with its connected undertakings, has a total annual turnover exceeding £50 million.

The contractual arrangements of an association of undertakings may involve both horizontal and vertical agreements. Such horizontal agreements need to be assessed according to the principles of the draft guidelines on the applicability of article 81 to horizontal co-operation. If this assessment leads to the conclusion that the co-operation between the undertakings is acceptable, a further assessment will be necessary to examine the vertical agreements concluded by the association with its suppliers or its individual members. This assessment is made pursuant to the regulation.

The regulation also includes in its application vertical agreements containing certain provisions relating to the assignment of intellectual property rights to or use of intellectual property rights by buyers. All other vertical agreements containing intellectual property rights provisions are excluded from its scope. The regulation applies to vertical agreements containing intellectual property rights provisions when five conditions are fulfilled:

- The intellectual property rights provisions must be part of a vertical agreement. This condition makes clear that the context in which the intellectual property rights are provided is an agreement to purchase or distribute goods or any agreement to purchase or provide services and not merely an agreement concerning the assignment or licensing of intellectual property rights for the manufacture of goods
- The intellectual property rights must be assigned to or for use by the buyer. This makes clear that the regulation does not apply where the intellectual property rights are provided by the buyer to the supplier, regardless whether the intellectual property rights concern the manner of manufacture or distribution. An agreement relating to the transfer of intellectual property rights to the supplier and containing possible restrictions on the sales made by the supplier is not covered. This means in particular that sub-contracting involving the transfer of know-how to a subcontractor does not fall within the scope of the regulation's application
- The intellectual property rights provisions must not constitute the primary object of the agreement
- They must be directly related to the use, sale or resale of goods or services by the buyer or its customers, and
- The intellectual property rights provisions, in relation to the contract goods or services, must not contain restrictions of competition having the same object or effect as vertical restraints which are not exempted under the regulation.

Agreements not covered by the regulation

The regulation will not apply to:

- Agreements which have no effect on trade between member states – in such cases, domestic competition law will apply, or
- Motor vehicle distribution and servicing arrangements, which are subject to the *Motor Vehicle Distribution and Servicing Arrangements Regulation*, or
- Vertical agreements entered into between competing undertakings, or
- Many agency agreements since the obligations imposed on an agent as to the contracts negotiated or concluded on behalf of the principal

will not normally fall within the scope of article 81(1). The determining factor in assessing whether article 81(1) is applicable to an agency agreement is the financial or commercial risk borne by the agent in relation to the activities for which it has been appointed by the principal. There are two types of financial or commercial risk that are material to the assessment of the nature of an agency agreement under article 81(1). First, there are the risks which are directly related to the contracts concluded or negotiated by the agent on behalf of the principal. Second, there are the risks related to market-specific investments. These are investments specifically required for the type of activity for which the agent has been appointed by the principal. The question of risk must be assessed on a case-by-case basis having regard to the economic reality of the situation. Nonetheless, the Commission considers that article 81(1) will generally not be applicable to the obligations imposed on the agent as to the contracts negotiated or concluded on behalf of the principal where property in the goods does not vest in the agent or the agent does not itself supply the contract services and where the agent:

- does not contribute to the costs relating to the supply/purchase of the contract goods or services
- is not obliged to invest in sales promotion
- does not maintain at its cost or risk stocks of the contract goods, including the costs of financing the stocks and the cost of loss of stocks and can return unsold goods to the principal without charge, unless the agent is liable for fault
- does not operate an after-sales service, repair service or a warranty service unless it is fully reimbursed by the principal
- does not make market-specific investments in equipment, premises or training of personnel
- does not undertake responsibility towards third parties for product liability unless it is liable for fault
- does not take responsibility for customer non-performance of the contract unless the agent is liable for fault.

When the agent incurs one or more of these risks or costs, article 81(1) may apply to the agency agreement. An agency agreement may also fall within the scope of article 81(1) even if the principal bears all the financial and commercial risks, where it facilitates collusion.

Vertical agreements between competitors

The regulation expressly excludes from its application *'vertical agreements entered into between competing undertakings'*. Competing undertakings are defined as *'actual or potential suppliers in the same product market'* irrespective of whether they are competitors in the same geographic market. A potential supplier is an undertaking that does not actually produce a competing product but could and would be likely to do so in the absence of the agreement in response to a small and permanent increase in relative prices. The undertaking must be able and likely to undertake the necessary additional investment required to enter the market and supply the market within one year. This assessment has to be based on realistic grounds; the mere theoretical possibility of entering a market is not sufficient.

There are three exceptions to the general exclusion of vertical agreements between competitors from the scope of the regulation, all relating to non-reciprocal agreements. Non-reciprocal agreements between competitors are covered where the buyer has a turnover below £100 million, or a supplier is a manufacturer and distributor of goods, while the buyer is only a distributor and not also a manufacturer of competing goods, or the supplier is a provider of services operating at several levels of trade, while the buyer does not provide competing services at the level of trade where it purchases the contract services.

Market-share threshold

The regulation will apply on condition that the supplier's market share does not exceed 30%. In addition, in the case of exclusive supply agreements, the regulation will apply only where the buyer's market share does not exceed 30%. For the application of the regulation, the market share of the supplier is its share on the relevant product and geographic market on which it sells to its buyers. In the case of exclusive supply, the buyer's market share is its share of all purchases on the relevant product market. The market share is to be calculated on the basis of data relating to the preceding calendar year. The calculation of the market share needs to be based in principle on value figures. Where value figures are not available, substantiated estimates can be used. Such estimates may be based on other reliable market information such as volume figures.

The approach of the regulation, which only takes into account the market share of the supplier or (where appropriate) the buyer, on the market between the parties is justified by the fact that below the threshold of 30% the effects on downstream markets will in general be limited. In addition, the thresh-

old makes the application of the regulation easier and enhances the level of legal certainty.

To calculate the market share, it is necessary to determine the relevant market. In order to do this, the relevant product and geographical markets must be defined. The relevant product market comprises any products or services which are regarded by the buyer as interchangeable by reason of their characteristics, price and intended use. The relevant geographical market comprises the area in which the undertakings concerned are involved in the supply of the relevant products or services.

Under the certificate, the Competition Authority certifies that vertical agreements covered by the certificate do not contravene section 4(1) of the *Competition Act, 1991*, provided neither party to the agreement has a share in excess of 20% of the relevant market and the hardcore restrictions set out in the certificate are not infringed. The licence applies to vertical agreements provided that neither party to the agreement has a share in excess of 40% of the relevant market and the hardcore restrictions set out in the licence are not infringed.

An anomaly may arise for parties to an agreement affecting trade between member states having a share between 30% and 40%, that is, above the threshold for benefiting from the regulation but below the threshold for benefiting from the licence. In these circumstances, a scenario could arise where the agreement is licensed by the Competition Authority but requires individual exemption by the Commission. It would appear from the ECJ decision in Case 66/86 *Ahmed Saeed Flugreisen and Silver Line Reisburo GmbH v Zenteale zur Bekampfung Unlauteren Wettbewerbse V* ([1989] ECR 803) that the Competition Authority would not be entitled to issue a licence in such circumstances, since only the Commission has power to declare article 81(1) of the *EC treaty* inapplicable pursuant to article 81(3). The Commission has highlighted the need for reform its own sole power in this area, but national authorities do not yet have this competence.

Vertical agreements falling outside the regulation will not be presumed to be illegal but may require individual examination. Undertakings to such vertical agreements are encouraged to make an assessment of the agreement without notification to the Commission. In the case of an individual examination by the Commission, the Commission will bear the burden of proof that the agreement infringes article 81(1).

In the assessment of individual cases, the Commission will adopt an economic approach in the application of article 81 to vertical restraints. This will limit its scope of application to undertakings holding a certain degree of market power where inter-brand competition may be insufficient. The following factors are the most important in establishing whether a vertical agreement contains an appreciable restriction to competition under article 81(1).

Market position of the supplier. The market position of the supplier is established by its market share of the relevant product and geographic market. The market position of the supplier is further strengthened if it has certain cost advantages over the competitors. These competitive advantages may result from a first mover advantage, holding essential patents, having superior technology, being the brand leader or having a superior portfolio of products or services.

Market position of competitors. Market share and possible competitive advantage indicators are also used to identify the market position of competitors. If the number of competitors becomes small and their market position is rather similar, this market structure may increase the risk of collusion. Fluctuating or rapidly-changing market shares are in general an indication of intense competition.

Market position of the buyer. The principal indicator of the buyer's buying power is the buyer's market share on the purchase market. Other indicators focus on the market position of the buyer on its resale market, including characteristics such as a wide geographic spread of its outlets, own brands of the buyer/distributor and its image among its final consumers.

Entry barriers. Entry barriers are measured by the extent to which incumbent companies can increase their price above the competitive level and thereby make supra-normal profits without attracting entry of new market participants. Vertical restraints may work as an entry barrier by making access more difficult and foreclosing the entry of potential competitors.

Maturity of the market. A mature market is a market that has existed for some time, where the technology used is well known and widespread, where there are no major brand innovations and in which demand is relatively stable or declining. In such a market, restrictive effects are more likely than in more dynamic markets.

Level of trade. The level of trade is linked to the distinction between intermediate and final goods and services. Negative effects are in general less likely at the level of intermediate goods and services.

Nature of the product. The nature of the product plays a role in particular for final products in assessing the likely effects. When assessing the likely negative effects, it is important whether the products on the market are homogeneous or heterogeneous, whether the product is expensive or inexpensive and whether the product is a one-off purchase or repeatedly purchased. In general, when the product is more heterogeneous, less expensive and conducive to more than a one-off purchase, vertical restraints are more likely to have negative effects.

Other factors. In the assessment of particular restraints, other factors may have to be taken into account. Among these factors can be the coverage of the market by similar agreements, the duration of the agreements, whether the agreement is imposed or agreed, the regulatory environment and behaviour that may indicate or facilitate collusion such as price leadership, pre-announced price changes, price rigidity in response to excess capacity, price discrimination and past collusive behaviour.

Hardcore restrictions under the regulation

The regulation contains a list of hardcore restrictions, which lead to the exclusion of the whole vertical agreement from its scope. Individual exemption of vertical agreements containing such hardcore restrictions is also unlikely. There is no severability for hardcore restrictions. To benefit from the regulation, parties to the vertical agreement may not:

- Restrict the buyer's ability to determine its resale prices to products. An indirect restriction on the buyer's ability to determine its resale prices to products is also prohibited. Examples of this are an agreement fixing the distribution margin, fixing the maximum level of discount the distributor can grant from a prescribed price level, making the grant of rebates or reimbursement of promotional costs by the supplier subject to the observance of a given price level or linking the prescribed resale price to the resale price of competitors. However, the provision of a list of recommended prices or maximum prices by the supplier to the buyer is permitted
- Restrict active/passive selling to end-users by retailers

in a selective distribution network. This means that dealers in a selective distribution system cannot be restricted in the users to whom they may sell. The dealer should also be free to advertise and sell through the Internet
- Restrict cross-supplies between appointed distributors within a selective distribution system. This means that an agreement or concerted practice may not have as its object to prevent or restrict the active or passive selling of the contract products between the selected distributors. Selected distributors must remain free to purchase the contract goods from other appointed distributors within the network
- Restrict end-users, independent repairers and service providers from obtaining spare parts directly from the manufacturer of these spare parts. An agreement between a manufacturer of spare parts and a buyer who incorporates these parts into its own products may not prevent or restrict sales by the manufacturer of these spare parts to end-users, independent repairers or service providers
- Restrict the territory into which, or the customers to whom, a buyer may sell if the sale results from an unsolicited order. This means that each buyer must be free to respond to a request for the product or service made by any customer within the EU. Buyers must also be free to use the Internet to respond to such orders. However, a prohibition imposed on all distributors to sell to certain end-users is not classified as a hardcore restriction if there is an objective justification related to the product, such as a general ban on selling dangerous substances to certain customers for health or safety reasons.

There are four exceptions to this restriction:

- A supplier may restrict certain sales by its direct buyers to a territory or a customer group which has been allocated exclusively to another buyer or which the supplier has reserved to itself. This protection of exclusively allocated territories or customer groups must, however, permit passive sales to such territories or customer groups. Every distributor must be free to use the Internet to advertise or sell products. If a customer visits the website of a distributor and contacts the distributor, and if such contact leads to a sale, that is considered passive selling. However, unsolicited e-mails sent to individual customers or specific customer groups are considered as active selling. The supplier cannot reserve to itself sales and/or advertising over the Internet
- A supplier may restrict a wholesaler from selling to final customers
- A supplier may restrict an appointed distributor in a selective distribution system from selling to unauthorised distributors in markets where such a system is operated
- A supplier may restrict a buyer of components supplied for incorporation from reselling them to competitors of the supplier.

Where the supplier to a vertical agreement has a market share above the 30% market share threshold, there may be a risk of a significant reduction of intra-brand competition. In order to be exempt from the application of article 81(1), the loss of intra-brand competition needs to be balanced with real efficiencies. Exclusive distribution may lead to efficiencies, especially where investments by the distributors are required to protect or build up the brand image. In general, the case for efficiencies is strongest for new products, for complex products, for products whose qualities are difficult to judge before consumption (experience products) or of which the qualities are difficult to judge even after consumption (credence products). In addition, exclusive distribution may lead to savings in logistic costs due to economics of scale in transport and distribution.

Conditions under the regulation

The regulation excludes certain obligations from coverage. These obligations can be distinguished from the hardcore restrictions in that their inclusion will not deprive the whole of the vertical agreement of the benefit of the regulation. The exemption is only lost in relation to the offending part of the agreement. It does not apply to:

- Any post-term non-compete obligations. Such obligations are normally not covered by the regulation, unless the obligation is indispensable to protect know-how transferred by the supplier to the buyer, is limited to the point of sale from which the buyer has operated during the control period and is limited to a maximum period of one year. The know-how needs to be 'substantial', meaning that 'the know-how includes information which is indispensable to the buyer for the use, sale or resale of the contract goods or services'
- Any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers. The objective of the exclusion of this obligation is to avoid a situation whereby a number of suppliers using the same selective distribution outlets prevent one specific competitor or certain specific competitors from using these outlets to distribute their products
- Any direct or indirect non-compete obligation the duration of which is indefinite or exceeds five years. Non-compete obligations are obligations that require the buyer to purchase goods and services and their substitutes from the supplier or from another undertaking designated by the supplier more than 80% of the buyer's total purchases during the previous year of the contract, thereby preventing the buyer from purchasing competing goods or services or limiting such purchasers to less than 20% of total purchases. Where for the year preceding the conclusion of the contract no relevant purchasing data for the buyer are available, the buyer's best estimate of its annual total requirements may be used. Non-compete obligations are acceptable under the regulation when their duration is limited to five years or less, or when renewal beyond five years requires the explicit consent of both parties and no obstacles exist that hinder the buyer from effectively terminating the non-compete obligations at the end of the five-year period. An exception is made when the buyer sells goods or services from the supplier's premises; in these circumstances, the non-compete restriction may be coterminous with the period of occupancy of the premises by the buyer.

This aspect of the regulation may be of particular relevance to those in the motor-fuel and beer-supply sectors in the EU. Under the previous block exemptions, non-compete obligations in service station and beer supply agreements were permitted for up to ten years. The special regime for these sectors has been brought to an end by the regulation since no convincing case was made to the Commission as to why these industries should be treated differently from others. However, under the licence, a ten-year non-compete clause is permitted in respect of exclusive purchasing agreements in the motor-fuel sector. As a result, an

agreement, which in Ireland is exempted under the licence, might be notifiable to the Commission under the regulation.

Transitional period

The regulation applies from 1 June 2000. It provides for a transitional period for vertical agreements already in force before that date which do not satisfy the conditions for exemption provided in the regulation but which do satisfy the conditions for exemption of the previous block exemptions. The latter agreements may continue to benefit from these block exemptions until 31 December 2001. After that date, all vertical agreements falling within the application of the regulation must comply with it.

Withdrawal of the regulation

The presumption of legality conferred by the regulation may be withdrawn if a vertical agreement, considered either in isolation or in conjunction with similar agreements enforced by competing suppliers or buyers, comes within the scope of article 81(1) and does not fulfil the conditions of article 81(3). This may occur when a supplier, or a buyer in the case of exclusive supply agreements, holding a market share not exceeding 30%, enters into a vertical agreement which does not give rise to objective advantages of such a character as to compensate for the damage which it causes to competition. This may particularly be the case with respect to the distribution of goods to final consumers, who are often in a much weaker position than professional buyers of intermediate goods.

When the conditions of article 81(3) are not fulfilled, the Commission may withdraw the benefit of the regulation to establish an infringement of article 81(1). Where the withdrawal procedure is applied, the Commission bears the burden of proof that the agreement falls within the scope of application of article 81(1) and that the agreement does not fulfil the conditions of article 81(3). The conditions for an exemption under article 81(3) may in particular not be fulfilled when access to the relevant market or competition therein is significantly restricted by the cumulative effect of parallel networks of similar vertical agreements practised by competing suppliers or buyers. Responsibility for an anti-competitive cumulative effect can only be attributed to those undertakings which make an appreciable contribution to it. Agreements entered into by undertakings whose contribution to the cumulative effect is insignificant do not fall under the prohibition provided for article 81(1) and are therefore not subject to the withdrawal mechanism (Case C-234/89 *Delimitis v Henniger Brau* [1991] ECR 1-935, pl 52). The exempted status of the agreements concerned will not be effected until the date on which the withdrawal becomes effective.

The competent authority of a member state may withdraw the benefit of the regulation in respect of vertical agreements whose anti-competitive effects are felt in the territory of the member state concerned or a part thereof. The Commission has the exclusive power to withdraw the benefit of the regulation in respect of vertical agreements restricting competition on a relevant geographic market, which is wider than the territory of a single member state.

The regulation constitutes reform of a key area of competition policy and is part of the wider review undertaken by the Commission to streamline and adapt competition law. Upon the adoption of the regulation, Commissioner for Competition Mario Monti stated that:

'This important reform confirms the commitment of the Commission to review and streamline Community legislation on competition. The aim is to simplify our rules and reduce the regulatory burden for companies, while ensuring a more effective control of vertical restraints implemented by companies holding significant market power. This will allow the Commission to concentrate in future on important cases, in co-operation with the member states, who will play an increased role in the application of Community competition rules'.

The new rules embody a shift from the formalistic regulatory approach underlying the previous block exemptions towards a more economic approach in the assessment of vertical agreements under EU competition rules. The basic aim of the new approach is to simplify the rules applicable to supply and distribution agreements and to reduce the regulatory burden for companies lacking market power while ensuring a more effective control of agreements entered into by undertakings holding significant market power. G

John Darby is a solicitor with the Dublin firm McCann FitzGerald.

Recent developments in European law

EMPLOYMENT

Gender discrimination

Case C-196/98 *Regina Virginia Hepple v Adjudication Officer*, judgment of 23 May 2000. In the UK, a weekly benefit is paid to employees or former employees who have suffered an occupational accident or disease. It is to compensate for a decrease in earning capacity. The allowance is calculated on the basis of the occupation which the claimant had been prevented from continuing, or any alternative occupation. In 1986, a retirement allowance replaced this benefit for those who had reached pensionable age and had ceased regular employment. It corresponds to 25% of the last weekly amount of the benefit to which the relevant recipient was entitled. In the UK, the pensionable age for men is 65 and for women 60. Ms Hepple and others claimed that the allowance received by them since reaching retirement age was lower than that received by male claimants. The ECJ held that as the UK was permitted a derogation in relation to different retirement ages for different genders, this exemption could extend to other benefit schemes provided that the discrimination is necessarily and objectively linked to that difference in age. This is the position where such discrimination is objectively necessary to avoid disturbing the financial equilibrium of the social security system or ensures coherence between the retirement pension scheme and other benefit schemes. The court held that this discrimination could not be objectively justified on the basis of wishing to avoid disturbing the financial equilibrium. However, it could be justified to ensure coherence between this scheme and the old age pension scheme.

Case C-407/98 *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist*, judgment of 6 July 2000. In 1996, the University of Göteborg announced a vacancy for the chair of hydrospheric sciences. The vacancy notice indicated that positive discrimination might be applied in accordance with Swedish legislation. The selection board placed a Ms Destouni first, Mr Anderson second and Ms Fogelqvist third. The selection took into account the scientific merits of the candidates and the requirements of positive discrimination. Ms Destouni then withdrew. The selection board found a considerable difference between the two remaining candidates and recommended Mr Anderson. In late 1997, the rector of the university appointed Ms Fogelqvist. Mr Anderson and another disappointed candidate appealed. The ECJ held that a measure intended to give priority in promotion to women in sectors of the public service where it does not automatically and unconditionally give priority to women where women and men are equally qualified and where the candidatures are the subject of an objective assessment, which takes account of the specific personal situations of all candidates. The Swedish legislation allowed preference to be accorded to a candidate belonging to the under-represented sex who, although sufficiently qualified, did not possess the same qualifications as the other candidates of the opposite sex. The ECJ noted that the assessment of the candidates' qualifications in this selection procedure was not based on clear and certain criteria. There was a risk of arbitrary assessment. Swedish legislation automatically gave priority to candidates belonging to the under-represented sex who were adequately qualified provided that the difference between the merits of the candidates of each sex was not so great as to give rise to a breach of the requirement of objectivity in the making of appointments. The ECJ held that the selection method under the Swedish legislation did not conform to EC law. The selection was based on the fact of belonging to the under-represented sex, and candidatures were not subjected to an objective assessment taking account of the specific personal situations of all the candidates. In addition, the selection method was disproportionate having regard to the aim pursued.

Free movement of workers

Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA*, judgment of 6 June 2000. Angonese is an Italian whose mother tongue is German. He went to study in Austria between 1993 and 1997. In 1997, he applied for a position with a private bank in Bolzano. One of the conditions for consideration was possession of a certificate in bilingualism in Italian and German. Obtaining such a certificate is seen as part of normal training for residents of Bolzano. Angonese did not have such a certificate. He argued that requiring such a certificate was contrary to the treaty provisions on free movement of workers. The ECJ upheld his arguments. It held that the principle of free movement of workers involved the abolition of any discrimination based on nationality between workers of member states as regards employment, remuneration and other conditions of work. This prohibition applies to both public authorities and private persons. Making access to employment conditional on one particular diploma is an obstacle to free movement of workers. Those not resident in Bolzano had little chance of acquiring the diploma and thus access to employment in Bolzano. This disadvantaged not only Italian nationals resident in other parts of Italy but also nationals of other member states. The court furthermore held that since it was impossible to submit proof of linguistic knowledge for the position other than the particular diploma issued in Bolzano, this was disproportionate to the aim of recruiting properly-qualified staff.

FREEDOM TO PROVIDE SERVICES

Case C-157/99 *BSM Geraets-Smits v Stichting Ziekenfonds and HTM Peerbooms v Stichting CZ Groef Zorgverzekeringen*, opinion of Advocate General Ruiz-Jarabo, 18 May 2000. Ms Geraets, a Dutch national, was suffering from Parkinson's Disease. She was being cared for in a German clinic, without the prior authorisation of her Dutch sickness insurance fund. An application to reimburse the costs was refused as satisfactory and adequate care was available in the Netherlands and that the treatment in Germany did not give any additional advantages. Peerbooms, a Dutch national, fell into a coma following a road traffic accident. He received special intensive therapy in an Austrian clinic, which improved his condition. He did not meet the conditions for admission to the two establishments in the Netherlands, which used the same medical technique (such admission was confined to those under the age of 25). His Dutch sickness insurance fund refused to reimburse his costs. The fund argued that the treatment given in Austria was no more beneficial than the care offered in the Netherlands. Dutch legislation provides that patients may not receive medical care in establishments not having an agreement with the sickness insurance fund unless prior authorisation is obtained. The Dutch court sought a ruling as to the compatibility of legislation of this kind with the principle of the freedom to provide services. Advocate General Ruiz-Jarabo pointed out that the funds make payments directly to the hospitals concerned – there is no element of reimbursement to the patient. The payments made are at a flat rate or paid in accordance with a scale of charges per day of treatment. The advocate general opined that since there was no element of remuneration, this system did not fall within the scope of freedom to provide services. He then went on to observe that if the ECJ did regard this case as falling within the definition the rules, it would be a restriction on the freedom to provide services. He reached this conclusion due to the restrictive national rules. However, he opined that these restrictions would be justified, as this system of prior authorisation was a necessary and proportionate means of attaining the objective of maintaining the financial balance of the Dutch sickness insurance system. G

Ensor revisits the home of Munster rugby
Pictured at a recent meeting of the Limerick Bar Association are (*front row, left to right*) Frances Twomey, Secretary Karen Kearney, Law Society President Anthony Ensor, Limerick Bar Association President Maeve Callanan, Law Society Director General Ken Murphy and Law Society past-president Paddy Glynn; (*back row, left to right*) Eamon O'Brien, Philip Culhane, Joe O'Meara, Michael Sherry, Aine Lyons, Elizabeth Ronan, Gearoid McGann, Pat Wallace and Mark Potter

CLE corporate law seminar
Pictured at the recent CLE/Corporate and Public Sector Committee seminar on corporate compliance, communication and governance were Albert Farrell of Bastow Charlton; Edward Hughes, law agent, Dun Laoghaire/ Rathdown County Council and chair of the Corporate and Public Sector Committee; and the Law Society's Geraldine Hynes. Paul Egan of Mason Hayes & Curran also took part in the seminar, but is absent from the photograph

German diplomacy
Jutta Breatnach of Dublin's Goethe Institut with graduates of the *Diploma in legal German* at a recent conferring ceremony

On the Sly
In an attempt to bolster his flagging movie career, Sylvester Stallone gatecrashes the Dublin Solicitors' Bar Association annual conference in Montreal this past September. Humouring the Hollywood hardman are (*left to right*) DSBA President Richard Bennett, Helen Quinn and James McCourt

Prize winners from the 13 October parchment ceremony

Law Society President Anthony Ensor presents Hilary Coveney with the Findlater Scholarship Prize for best overall performance on a professional and advanced course

Olivia Broderick and Aidan Small shared joint first place in the John Jermyn Prize for highest mark in wills, probate and administration of estates on a professional practice course

Richard Robinson, director of Guinness & Mahon Bank, which sponsored the tax prize for highest mark in CAT on a professional practice course, greets Anthony Ensor. This year's prize went to Margaret Feeney of the May 1999 professional practice course

Aidan Small receives the AIB Conveyancing Prize from AIB's Caroline Reidy

Anthony Ensor with Dearbhla Considine and Darren Murphy, winners of the Law Society Conveyancing Prizes for second- and third-highest marks in applied land law on a professional practice course

Dr Max Barrett receives the Ulster Bank Civil Litigation Prize for highest mark in civil litigation from the bank's Josephine Armstrong, while his family and Law Society President Anthony Ensor look on

SADSI
Solicitors Apprentices Debating Society of Ireland

Complied by Keith Walsh

Apprentices win inaugural John Edmund Doyle Memorial Trophy

Louise Rouse and Ronan McSweeney, representing SADSI and speaking for the proposition *That this house would merge the legal profession*, were the first winners of the John Edmund Doyle Memorial Trophy in the King's Inns last month. The trophy, named for the three-time auditor of SADSI in the 1940s, was presented by his son Mark Doyle, principal of Actons Solicitors. The debate was organised for SADSI by Clodagh Beresford, herself an accomplished debater and an apprentice in Actons.

Rouse emphasised the current perceived barriers to entry in the barristers' profession and lamented the resulting loss of advocates to the bar. Tradition without practical benefit, she said, has no place in either profession, and a fused profession would benefit both advocate and client. McSweeney built on the momentum created by his partner and turned in what was described by the seasoned debaters present as an oration worthy of a politician in the deep South (Mississippi, not Kerry). Competing teams were blown away when the house erupted to his declaration that the professions should 'disregard their colonial shackles and take up the republican torch'. He then urged us to agree that a united profession would benefit all, save those at the very top of the profession.

Ronan McSweeney and Louise Rouse prepare their winning speeches prior to the John Edmund Doyle Memorial Debate

The general opinion following the debate was that the final pair against the proposition, Kieran Doran and Willie Fogarty, were the informal runners-up. Doran emphasised his conservative credentials by pleading that justice should not be sacrificed on the altar of expediency. Fogarty compared the solicitor to a GP and the barrister to a surgeon and warned that a fusion of the professions would cause chaos.

Mr Justice TC Smyth chaired the debate with a remarkable impartiality, perhaps explained by the fact that he had been an apprentice, a solicitor and a barrister before his appointment to the bench.

Law School flooded with apprentices

Last month saw 360 apprentices go back to school for their professional practice course in the newly-opened Education Centre in Blackhall Place. New facilities include a large and comfortable lecture hall, a coffee shop, cloak room, a new, larger library and – most important from a student's point of view – a second, larger, bar.

SADSI elections

As the year draws to a close, apprentices are presented with the opportunity to elect their SADSI auditor for 2001. The auditor, once elected, then selects his own committee. Election details will be sent to all apprentices in the coming weeks, and the election itself will take place in the first week of December. Voting will be by postal ballot, with those apprentices in the Law School able to submit votes directly.

SADSI composition contest

Entries are invited by all apprentices for the SADSI composition competition for the best work of academic legal writing – article or paper – by an apprentice in the year 2000. Please send submissions by 8 December to SADSI at PO Box 7477, Ballsbridge, Dublin 4. Enclose name, address, apprentice number and contact telephone number. Any submissions to academic journals or other prizes may be considered again here. A substantial cash prize will be awarded to the winner, together with a gold medal and a listing in the *Law Directory 2001*.

Willie grabs Gold

Willie Fogarty, supporting the proposition *That this house would forgive and forget*, was the winner of this year's SADSI gold medal. The Gold Medal Debate is an oratory prize and this year was awarded to the best impromptu speaker.

Moot Court, Blackhall Place

King's Inns will travel to the new lecture theatre on 22 November at 7.30pm in the hopes of avenging their recent debating defeat by taking the moot court prize. Competition will be fierce, and will be preceded and followed by the usual generous wine reception in the Law Society.

LOST LAND CERTIFICATES

Registration of Title Act, 1964
An application has been received from the registered owners mentioned in the schedule hereto for the issue of a land certificate as stated to have been lost or inadvertently destroyed. A new certificate will be issued unless notification is received in the registry within 28 days from the date of publication of this notice that the original certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the certificate is being held.
(Register of Titles), Central Office, Land Registry, Chancery Street, Dublin
(Published 3 November 2000)

Regd owner: Eamonn Anthony Carolan, Carnaville North, Kilmainhamwood, Kells, Co Meath; Folio: 14871; Lands: Carnans Lower; Area: 25.32 acres; **Co Cavan**

Regd owner: Martin and Imelda Meere, Ballybeg, Clarecastle, Clare; Folio: 20612F; Lands: Townland of Clonroad More and Barony of Islands; **Co Clare**

Regd owner: The Clare County Board of Health and Public Assistance (Clare County Council); Folio: 3626; Lands: Townland of (1) Cloonakilla, (2) Cross More; Area (1) 0.2175 hectares, (2) 0.2023 hectares and Barony of Clonderalaw; **Co Clare**

Regd owner: John Keogh, 30 Lodge Road, Sixmilebridge, County Clare; Folio: 28291; Lands: Townland of (1) Reaskcamogue (2) Rossmanagher (3) Corlea; Area: (1) 17.1830 hectares, (2) 2.1090 hectares, (3) 1.3600 hectares and Barony of Bunratty Lower; **Co Clare**

Regd owner: Paul Dunne and Maureen Kelly, 25 Iniscarragh, St Flannans Drive, Ennis, County Clare; Folio: 22261F; Lands: Townland of Clonroad More and Barony of Islands; **Co Clare**

Regd owner: Patrick McMahon, Cahermoneen, Tralee, County Kerry; Folio: 26438F; Lands: Townland of (1) Lisluinaghan, (2) Lisluinaghan; Area: (1) 3.4572 hectares, (2) 2.2456 hectares and Barony of Moyarta; **Co Clare**

Regd owner: John J Fitzpatrick, Cloghaun, Lisdoonvarna, Clare; Folio: 13929; Lands: Townland of Ardemush; Area: 0.9000 hectares and Barony of Corcomroe; **Co Clare**

Regd owner: Bridget McDaid, Magheranaul, Isle of Doagh, Clonmany, Lifford, County Donegal; Folio: 22319; Lands: Magheranaul; **Co Donegal**

Regd owner: Paul Niall and Irene Niall; Folio: DN31057L; Lands: property situate to the north of Walnut Court in the parish of Clonturk and district of Drumcondra; **Co Dublin**

Regd owner: Peter and Margaret Doyle; Folio: DN18451; Lands: property situate in the Townland of Finnstown and Barony of Newcastle; **Co Dublin**

Regd owner: Texaco (Ireland) Limited, which name was changed to Texas Company (of Ireland) Limited, which name was changed to Caltex (Ireland) Limited, which name was changed to Texaco (Ireland) Limited; Folio: DN15961; Lands: property situate in the Townland of Turnapin Great and Barony of Coolock; **Co Dublin**

Regd owner: John and Sharon Keogh; Folio: DN13528F; Lands: property situate in the Townland of Rush and Barony of Balrothery East; **Co Dublin**

Regd owner: Joseph Taplin; Folio: DN55456L; Lands: property situate in the townland of Tymon South and Barony of Uppercross; **Co Dublin**

Regd owner: Michael Ansbro; Folio: 5422; Lands: Curraghaun and Barony of Dunmore; **Co Galway**

Regd owner: Diarmuid Kelleher and Frances Hill, Rossadillisk, Cleggan, County Galway; Folio: 38188F; Lands: Townland of Rossadillisk; Area: 0.058 hectares and Barony of Ballynahinch; **Co Galway**

Regd owner: James Lally, 26 Bohermore, Galway; Folio: 37042; Lands: Townland of Rinmore; Area: 0.0480 hectares and Barony of Galway; **Co Galway**

Regd owner: Patrick Kivneen, Logalisheen Ballindine, Co Mayo; Folio: 22273; Lands: Townland of Carrownurlaur; Area: 11.862 hectares and Barony of Dunmore; **Co Galway**

Regd owner: Rose Anne Griffin; Folio: 224R; Lands: Townland of Clashaphuca and Barony of Trughanacmy; **Co Kerry**

Regd. owner: Michael and Cathryn Carmody; Folio: 11927F; Lands: Townland of Ballycasheen and Barony of Magunihy; **Co Kerry**

Regd. owner: Elizabeth Ryan; Folio: 1213L; Lands: Townland of Knock and Barony of North Liberties; **Co Limerick**

Regd owner: Anne Meany; Folio: 14347F; Lands: St Mary's Terrace, Farranshone Road in the parish of St Nicholas; **Co Limerick**

Regd owner: Henry and Mary Keane; Folio: 32949F; Lands: Townland of Dromroe and Barony of Clanwilliam; **Co Limerick**

Regd owner: Philomena Ryan and Andrew Ryan, Brackloon East, Ballyhaunis, Mayo; Folio: 1015; Lands: Townland of Brackloon East; Area: 19.417 hectares and Barony of Costello; **Co Mayo**

Regd owner: Bernard Mullen, Allisabeagh, Scotstown, Co Monaghan; Folio: 9490; Lands: Killatten; Area: 18.125 acres; **Co Monaghan**

Regd owner: John Patrick Morris, Corskeagh, Frenchpark, Roscommon; Folio: 32856; Lands: Townland of Corskeagh and Barony of Frenchpark; Area: (1) 6.867 hectares, (2) 1.392 hectares, (3) 3.283 hectares; **Co Roscommon**

Regd owner: Patrick O'Connor, Drummin, Ballinagare, Castlerea, Roscommon; Folio: 25198; Lands: Townland of (1) Peak, (2) Drummin, (3) Drummin and Barony of Castlerea; Area: (1) 1.2267 hectares, (2) 7.3349 hectares, (3) 0.6416 hectares; **Co Roscommon**

Regd owner: Westward Holdings Limited, Farnbeg, Strokestown, County Roscommon; Folio: 18309F; Lands: Townland of (1) Bumlin, (2) Killinardan Beg; Area: (1) .627 hectares, (2) 1.252 hectares and Barony of Roscommon; **Co Roscommon**

Regd owner: Deirdre Gowan, Pound Street, Ballaghaderreen, Co Roscommon; Folio: 36782; Lands: Townland of (1) Ballaghaderreen, (2) Lung; Area: (1) 0.003 acres, and (2) 0.506 acres and Barony of Costello; **Co Roscommon**

Regd owner: Michael and Margaret Devine, 29 Clonmore, Mullingar, Co Westmeath; Folio: 1380F; Area: 0.138 acres; **Co Westmeath**

Regd owner: William Ringwood and Therese Ringwood; Folio: 18674F; Lands: Ballyconnigar Upper; and Barony of Ballaghkeen South; **Co Wexford**

Regd owner: John Joseph Barry; Folio: 5246 and 11960; Lands: Rickardstown and Knocknoran and Barony of Bargy; **Co Wexford**

Regd owner: Michael S Mooney; Folio: 3905; Lands: Inch, Blackwater and Barony of Ballaghkeen South; **Co Wexford**

Regd owner: Martin Murphy (deceased); Folio: 11117 and 11119; Lands: Coolgarrow and Barony of Ballaghkeen South; **Co Wexford**

WILLS

Durkan, Mary of 32A Wadelai Road, Ballymun, Dublin 11 (ward of court) and now residing at Norwood Nursing Home, Bray, County Wicklow. Would any person having knowledge of a will made by the above named, please contact Brian McLoughlin & Company, Solicitors, 3 Herbert Road, Bray, County Wicklow, tel: 01 2868211, fax: 01 2828143, e-mail: bmllaw@gofree.indigo.ie

Kirrane, Patrick Joseph (deceased), late of Effernan, Kildysart, Co Clare and formerly of Quay Road, Kildysart, Co Clare. Would any person having knowledge of a will made by the above named deceased who died on 23 July 2000, please contact Desmond J Houlihan & Company, Solicitors, Salthouse Lane, Ennis, Co Clare, tel: 065 6842244, fax: 065 6842233

Lineen, James late of Main St, Lismore, Co Waterford and Ballysaggartbeg, Lismore, Co Waterford. Would any person having knowledge of a will executed by the above named deceased who died on 15 September 2000, please contact Neil Twomey & Co, Solicitors, Fernville, Lismore, Co Waterford, tel: 058 54075, fax: 058 53323

Maher, John, late of 7 Measc Drive, Artane, Dublin 5. Would any person having knowledge of a will made by the above named deceased who died on 18 August 2000, please contact M O'Leary & Co, Solicitors, 183 Howth Road, Killester, Dublin 3, tel: 01 8331900, fax: 01 8334991

Moreland, Brendan (deceased), late of 52 Cabra Park, Phibsborough, Dublin 7, Would any person having knowledge of a will made by the above named deceased who died on 27 August 2000 at the Mater Hospital, Dublin 8, please contact Messrs Arthur O'Hagan, Solicitors, 9 Harcourt Street, Dublin 2, tel: 01 4758701

Murphy, Michael Dr (deceased), late of Cremorne, Greenmount Road, Terenure in the County of Dublin. Would any person having knowledge of a will executed by the above named deceased who died on 21 September 2000, please contact Kelly & Griffin, Solicitors, 77 Terenure Road North, Terenure, Dublin 6W, tel: 01 4901185, fax: 01 490 3505

McCarthy, Cornelius (otherwise Neil), late of Main Street, Schull, in the County of Cork. Would any person having knowledge of a will made by the above named deceased who died on 29 February 2000, please contact J&P O'Donoghue, Solicitors, 14 Main Street, Caherciveen, Co Kerry, tel: 066 9472413, fax: 066 9472667

Rendon, Margaret (deceased), late of 22 Killarney Road, Castleisland, Co Kerry. Would any person having knowledge of a will made by the above named deceased who died on 22 July 1986, please contact Donal J O'Neill & Company, Solicitors, 3 Denny Street, Tralee, Co Kerry, tel: 066 7122800, fax: 066 7125720

Sheehan, Cornelius (deceased), formerly of 26 Fitzroy Avenue, Drumcondra, Dublin 9 and late of Nazareth House, Malahide Road, Dublin 3. Would any person having knowledge of a will made by the above named deceased who died on 9 October 2000, please contact John Rochford & Company, Solicitors, 16/17 Upper Ormond Quay, Dublin 7, tel: 01 8721499, fax: 01 8721499

Smith, Peter (deceased), late of 306 Crumlin Road, Dublin 12. Would any person having knowledge of the original will and any other will made by the above named deceased who died on 7 December 1995, please contact Delahunty O'Connor & Co, Solicitors, 179 Crumlin Road, Dublin 12, tel: 01 4540766, fax: 01 4531866

Smith, Pierce (otherwise Peter or Pearse), late of 39 St Martin's Estate, Cavan. Would any person who having knowledge of a will made by the above named deceased who died on 4 October 2000, please contact Reidy Stafford, Solicitors, Newbridge, Co Kildare, tel: 045 432188, fax: 045 433019

Waldron, James (deceased), late of Reask, Knock, Claremorris, Co Mayo. Would any person having knowledge of a will of the above named deceased who died on 18 September 2000, please contact Daniel Spring & Company, Solicitors, 87 St Stephen's Green, Dublin 2, tel: 01 4755587, fax: 01 4755590, Reference TB

Whelan, Brigid (deceased), late of Clowater, Goresbridge, Co Kilkenny, Would any person having knowledge of a will made by the above named deceased who died on 30 September 2000, please contact Owen O'Mahony & Co, Solicitors, 5 John's Bridge, Kilkenny, tel: 056 61733, 056 65762

EMPLOYMENT

Locum solicitor/experienced apprentice for conveyancing and probate required for three- to four-month period commencing January 2001 with prospects to extend employment indefinitely, Dublin 6 practice. **Reply to Box No 90**

Assistant solicitor required for Killarney-based practice. Two years' post-qualification experience desirable. Work will involve primarily conveyancing and probate areas of practice with some litigation. **Reply with CV to Box No 91**

Hussey & O'Higgins, Solicitors

Are seeking an experienced solicitor for their fast-expanding Commerical/Construction Law Department.
The position would suit a lawyer with a conveyancing background and tax experience who would welcome an interesting and varied mix of work.
This is a challenging position for a self-starter who enjoys being a team player. Package up to £50K for right candidate.

Replies by 17 November to Hussey & O'Higgins, Solicitors, 17 Northumberland Road, Dublin 4, fax: 01 6682621, e-mail: Mfraser@husseyohiggins.com

Solicitor required for Galway City practice from early 2001. Might suit recently-qualified solicitor. Apply with CV and references to **Box No 92**

Two solicitors required for busy Midlands practice
Mainly conveyancing and probate
Two years' PQE required.
Applications and CV to **Box No 93**

Wanted Employment law specialist to write weekly column reviewing legislative and case law developments. Please apply to **Box No 94**

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, employment, family, criminal and property law specialists in England and Wales. Offices in London (Wood Green, Camden Town and Stratford) 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 & Co at Ashley House, 235-239 High Road, Wood Green, London N22 8HF, England, tel: 0044 181 881 7777, or The McLaren Building, 35 Dale End, Birmingham B4 7LN, tel: 0044 121 212 0000. Alternatively e-mail us on info@davidlevene.co.uk or visit our website at *www.davidlevene.co.uk*

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

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

EYE INJURIES AND OPHTHALMOLOGIAL NEGLIGENCE

Mr Louis Clearkin ChM, FRCS, FRCOphth, DO, MAI, MEWI
Consultant Ophthalmic Surgeon
Experienced expert witness in ophthalmological personal injury, medical negligence and civil litigation

Renuntiabo, 8 Rose Mount, Oxton, Wirral, Merseyside, L43 5SW
secretary: +44 (0) 151 6047047
fax: +44 (0) 151 6047152
e-mail: L.Clearkin@Liv.ac.uk

Seven-day licence for sale. Contact Garry Clarke of O'Gorman Cunningham & Co, Solicitors, 16 Upper Main Street, Letterkenny, Co Donegal, tel: 074 24828

Intoxicating liquor licence wanted – ordinary seven-day publican's licence for extinguishment anywhere in the Republic of Ireland. Apply to Dunne Ryan, Solicitors, Athbara House, Cavan, tel: 049 4332555, fax: 049 4361103

Solicitor, Dublin 2, seeks amalgamation or other arrangement. Might suit young solicitor or firm wishing to expand. **Box No 94**

Offices to let

Arran Quay/Smithfield
Choice of newly-refurbished three-storey offices
Flexible lease terms
500-1850 sq ft

CityWide Auctioneers, tel: 01 6718505

TITLE DEEDS

Lost title documents. Mary Durkan (ward of court) of 32A Wadelai Road, Ballymun, Dublin 11. Would any person having knowledge of the whereabouts of the title documents of the above mentioned property, please contact Brian McLoughlin & Company, Solicitors, 3 Herbert Road, Bray, County Wicklow, tel: 01 2868211, fax: 01 2828143; e-mail: bmllaw@gofree.indigo.ie

Lost title documents. 52 Cabra Park, Dublin 7. Brendan Moreland (deceased). Would any person having knowledge of the title documents of the above mentioned documents please contact Arthur O'Hagan, Solicitors, 9 Harcourt Street, Dublin 2.

In the matter of the *Landlord and Tenant Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) No 2 Act, 1978* and in the matter of the purchase of the freehold estate in two portions of property situate at Baldoyle Road, Dublin 13: an application by Wing View Limited, having its registered office at 64 North Strand Road, North Strand, Dublin 3

Take notice that any person having interest in the freehold estate of the following properties: a) all that piece

of ground at the rear of the premises known as Lansdowne, St Aubens or 84 and 85 Dublin Road, Sutton, Dublin 13 and the store erected thereon held under indenture of lease dated 21 July 1909 and made between Alexander Knox McIntyre, Frederick William Higginbotham, John J Garland and William F Webb of the one part and Edward Whelan of the other part for the term of 999 years from 25 March 1909 subject to the yearly rent of £20 and the covenants and conditions therein contained; b) all that piece of ground to the rear of 82 Dublin Road, Sutton, Dublin held under indenture of lease dated 15 November 1919 and made between William T Chadwick of the one part and Arthur E Williams of the other part for a term of 999 years (except the last six months thereof) from 25 March 1909 subject to yearly rent of £0.5s 0d (five shillings) and the covenants and conditions therein contained.

Take notice that the applicant, Wing View Limited, intends to submit an application to the county registrar for the county/city of Dublin at Aras Ui Dhalaigh, Inns Quay, Dublin 7 for the acquisition of the freehold interest in the aforesaid properties and any parties searching that the whole superior interest in the aforesaid premises (or any of them) are called upon to furnish evidence of title to the aforementioned premises to the below-named within 21 days from the date of this notice.

In default of any such notice being received, the applicant, Wing View Limited, intends to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the county/city of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the premises are unknown or unascertained.

Signed: O'Donoboe, Solicitors, solicitors for the applicant, 11 Fairview, Dublin 3

In the matter of the *Landlord and Tenant Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) No 2 Act, 1978* and in the matter of property situate at 124 Thomas Street, Dublin 8: an application by John Clohisey, Finbar Cahill, Noel Elliott, Andrew Madden and Francis Larkin

Take notice that any person having any interest in the freehold estate of the following property: all that and those the hereditaments and premises comprised in indenture of lease dated 2 November 1778 and made between Robert Moore and Mary Moore of the one part and Alexander Fox of the other part and therein described as 'all that small shop or tenement lately in the tenancy and occupation of John Fogarty Peruke Maker together with a small apartment behind the said shop lately in the possession of William North of the said City of Dublin Brass Founder which said demised premises are now in the actual possession of the said Alexander Fox and are situate lying and being on the North side of Thomas Street in the City of Dublin aforesaid and contain in the front to the said street four, feet two inches or thereabouts, in the rere four feet, two inches or thereabouts, and in depth from front to rere 18 feet, ten inches or thereabouts, and are bounded on the East by Brown's Alley on the West by a holding in the possession of the said William North, on the South by Thomas Street as aforesaid, and on the North by the wall and staircase of the said William North's said dwelling-house and also all that piece or plot of ground whereon the house lately in the possession of John McCabe of the city of Dublin, aforesaid sadler, stood now also in the possession of the said Alexander Fox situate on the North side of Thomas Street aforesaid and divided from the said other premises hereby granted by Brown's Alley as aforesaid which said premises are now known as 124 Thomas Street, Dublin 8'.

Take notice that John Clohisey, Frank Cahill, Noel Elliot, Andrew Madden and Francis Larkin intend to submit an application to the county registrar for the city of Dublin for the acquisition of the freehold interest in the aforesaid property and that any party asserting that they hold a superior interest in the aforesaid property are called upon to furnish evidence of title to the aforementioned property to the below named within 21 days from the date of this notice.

In default of any such notice being received, John Clohisey, Finbar Cahill, Noel Elliot, Andrew Madden and Francis Larkin intend to proceed with the application before the county registrar at the end of the 21 days from the date of this notice and will apply to the county registrar for the county of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the aforementioned property are unknown or unascertained.

Dated 19 October 2000

Signed: Cahill & Co, Solicitors, 23 Lower Leeson Street, Dublin 2

In the matter of the *Landlord and Tenant Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) No 2 Act, 1978* and in the matter of property situate at 125 Thomas Street, Dublin 8: an application by John Clohisey, Finbar Cahill, Noel Elliott, Andrew Madden and Francis Larkin

Take notice that any person having any interest in the freehold estate of the following property: all that and those the hereditaments and premises comprised in indenture lease dated 2 May 1860 and made between William Daniel Moore, Robert Henry Moore, Echlyn Molyneaux of the one part and Edward MacCready of the other part and therein described as 'all that and those that dwellinghouse messuage or tenement and yard in Thomas Street known as No 125 in the said streets containing in breadth in front to the said Street 11 feet and in depth from front to rere 46 feet or thereabouts, bounded on the South by Thomas Street as aforesaid, on the East by Browne's Abbey, on the North by James Moore's concerns, and on the West by Patrick Clarke's concerns, all of which said demised premises are situate lying and being in the parish of St Catherine and county of the city of Dublin'.

Take notice that John Clohisey, Finbar Cahill, Noel Elliott, Andrew Madden and Francis Larkin intend to submit an application to the county registrar for the city of Dublin for the acquisition of the freehold interest in the aforesaid property and that any party asserting that they hold a superior interest in the aforesaid property are called upon to furnish evidence of title to the aforementioned property to the below-named within 21 days from the date of this notice.

In default of any such notice being received, John Clohisey, Finbar Cahill, Noel Elliot, Andrew Madden and Francis Larkin intend to proceed with the application before the county registrar at the end of the 21 days from the date of this notice and will apply to the county registrar for the County of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the aforementioned property are unknown or unascertained.

Dated 19 October 2000

Signed: Cahill & Co, Solicitors, 23 Lower Leeson Street, Dublin 2

Poetic justice

'When I was sitting in court as a District Court clerk watching the solicitors at work, I decided I could do the job as well as they could'

Judge Michael Pattwell sprang to national attention earlier this year when he briefly jailed a solicitor for contempt of court, but his strong opinions were evident even in his very first job, as a customs officer in 1964. 'I had a strange experience there of being "cautioned" for seizing items from a very prominent sports personality and was told in Dublin Castle that certain people were unofficial ambassadors for Ireland and should be treated differently. I objected to this and decided to seek another job'.

He became a District Court clerk in Cork in May 1967 and married the following month, a union that resulted in eight children. He resigned from the civil service in 1971 and started as a full-time law student in University College Cork, where he took his BCL in 1974.

He was apprenticed to the late Killian Boland in Cork and qualified as a solicitor in 1976, when he bought a small practice from the family of a recently-deceased solicitor in his native Clonakilty. He practised there until 1987, when he began work as deputy law agent for Dublin County Council, and then as senior executive solicitor for Cork County Council. He was appointed to the District Court in January 1990.

Separated for the past several years, he currently lives outside Cork with his elderly mother, whom he cares for. 'I have an interest in knowing something about everything', he says, and he's done many evening courses over the years, including welding and woodwork. His current interests include reading, a little sea-fishing, boating, walking, DIY and gardening. He likes to use Irish as often as possible, and takes Irish classes in UCC every year.

What attracted you to a career in law?
When I was sitting in court as a District Court clerk watching the solicitors at work, I decided I could do the job as well as they could.

Which living person do you most admire?
In world and Irish political terms, I think Eamon de Valera. In personal terms, my mother. In legal terms, Gerald Y Goldberg, who, when he was in practice, was head and shoulders over all his contemporaries for independent thinking, ability, legal knowledge and service to his clients.

Michael Patwell: would create a 'Family Law Division' with its own scheduled sittings

What is the best piece of advice you ever got?
My mother used to say, 'Love many, trust few, and always paddle your own canoe'.

Which case do you wish you had been involved in?
Maybe the 'X' case. The result just might have been different.

Best decision you ever made?
To seek appointment to the bench.

Worst decision you ever made?
I know what it was, but it is too personal to reveal.

How do you cope with stress?
I change what I am doing, and thus change my thought patterns. I often read poetry, and occasionally I write it.

If you could make one change to the legal system, what would it be?
I am tempted to give a list of maybe a hundred items. However, I think I would amalgamate the Circuit and District Courts and create various divisions, in particular, a 'Family Law Division' with its own scheduled sittings. That would avoid the disgraceful current situation where family law is 'fitted in' to spare moments in a general list.

Time management tips?
None – I can be hopelessly disorganised myself.

Pet hate?
Without a doubt, it has to be smoking. G