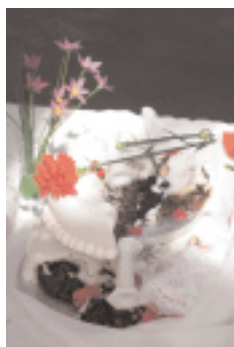


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COVER PHOTO: roslyn@indigo.ie



Cover Story

14 Cut to the quick

You think the arguments over divorce in Ireland finished with the *Family Law (Divorce) Act, 1996*? Wrong. Geoffrey Shannon reports that a new regulation from the EU means that 'quicky' divorces and 'forum shopping' are once again on the agenda

20 Don't look back

The *European convention on human rights* is set to play a vital role in one of the most sensitive (and politically charged) areas of law – refugees and asylum-seekers. Noeline Blackwell looks at the convention articles that are likely to have the biggest impact on practitioners



24 Is Ireland out of tune on copyright?

The *Napster* case has sent shock waves through the record industry, the Internet community and the public at large. Denis Kelleher discusses the US decision and analyses Ireland's attempts to address the issue of copyright infringement without unfairly crippling on-line initiatives



28 Avoiding mistaken settlements

Settling out of court may seem like the quickest and most cost-effective way of solving a contentious issue but, as Paul Anthony McDermott explains, disagreement about the terms can bring litigants and their lawyers back into conflict



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:** Pat Igoe (Chairman), Conal O'Boyle (Secretary), Eamonn Hall, Mary Keane, Ken Murphy, Michael V O'Mahony, Michael Peart, Keith Walsh

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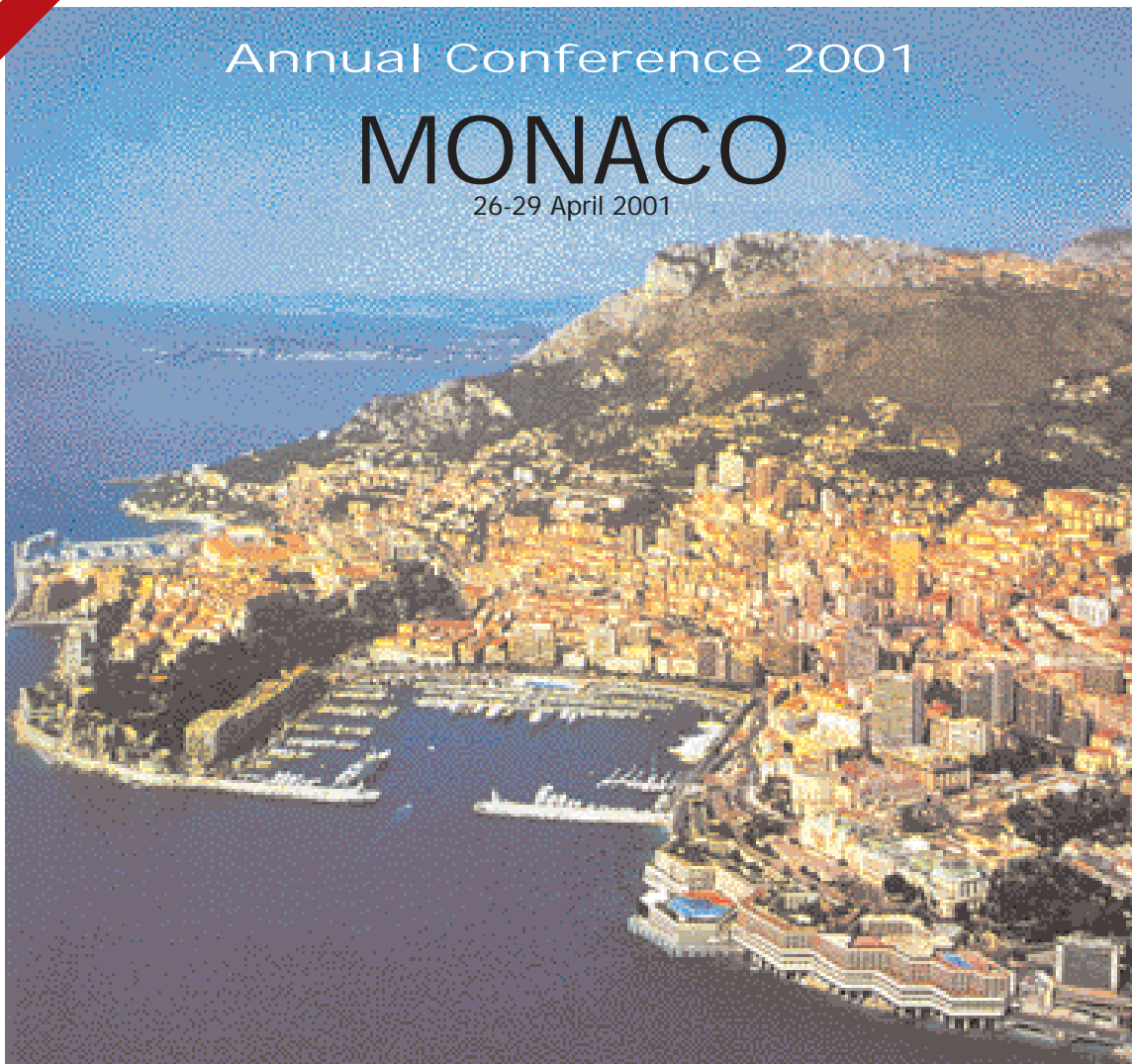


Law Society of Ireland

Annual Conference 2001

MONACO

26-29 April 2001



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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)

A confederacy of dunces

Isn't this a great little country all the same? While we're still waiting for any sign from the government that it's prepared to incorporate the *European convention on human rights* into Irish law and while other vital legislation – vital as far as our profession is concerned at any rate – such as the *Solicitors (Amendment) Bill* languishes in the parliamentary process, the government can move at lightning speed to announce a new Personal Injuries Assessment Board.

Now, this bolt from the blue took most of us by surprise. You might think that any government worth its salt might actually consult those most likely to be affected by its latest wheeze. Not in this case. Neither the Law Society nor the Bar Council had any inkling that a task force had been set up to investigate this particular hot political potato. I say 'political' because it's quite obvious from the composition of the 'task force' that the Irish Business Employers' Confederation had more than a passing interest in the deliberations of this body. Pardon the cliché, but isn't that a little like putting the fox in charge of the chicken coop? Before you can say 'vested interest', this task force has come to the conclusion that the real problem facing Irish society is not negligent employers but the victims of their negligence.

Who provoked this 'national crisis'?

Apparently, the country is facing bankruptcy because all those people who suffer serious injury as a result of shoddy work practices are suing for what they are legitimately entitled to in law. If the government buys into this piece of nonsense, perhaps they should have cut out the middleman and banned personal injury litigation altogether. Don't you think they should take just a smidgen of responsibility for having provoked this 'national crisis'? After all, from an employer's perspective, they are the ones who keep passing all those pesky laws relating to health and safety.

But what do they do when the average citizen decides to take them at their word and sue for what he is entitled to, as set out in black and white in the various acts of the Oireachtas? They say it is costing the country – and for 'country', you can read 'big business' – too much. It must be stopped. It's a national disgrace. Employers can't afford it. And, of course, victims of negligence would never have dreamed of suing for compensation if it weren't for the likes of us. So of course it makes sense to cut lawyers out of the equation. Sure everyone knows we're just in it for the money anyway.

So the next time you're sitting in your office and you're visited by a client (or their bereaved spouse) who's been seriously injured as a result of someone else's greed and negligence, you'll know exactly what to say them, won't you? 'Sorry, Gungha Din, I can't help you there. Why don't you toddle along to the assessment board to find out what your life is worth?'

And don't even start me on the recently-announced changes to the jurisdictions of the District and Circuit courts.

Government by consent? A confederacy of dunces. What a great little country.

Ward McEllin,
President



'Before you can say "vested interest", this task force has come to the conclusion that the real problem facing Irish society is not negligent employers but the victims of their negligence'

Law Society warns of big delays as result of jurisdiction changes

The government's proposal to increase jurisdiction limits of District and Circuit courts is 'simply unworkable', the Law Society has said. In a letter to the Minister for Justice, Equality and Law Reform, John O'Donoghue, Law Society President Ward McEllin said that the proposals to increase jurisdiction in the District Court from €5,000 to €16,000 and in the Circuit Court from €30,000 to €80,000 will undo the good progress which has been made in the last five years



McEllin: District courts will not be able to cope

in eliminating delays.

'In our view, these enormous increases of jurisdiction are very unwise', says McEllin's letter. 'They will have a seriously disruptive effect on a courts system which is currently working well and, in particular, through the introduction of delay to that system, will diminish the quality of justice available to the public.'

'Under what is now reportedly proposed, a claim for €16,000, a case which ten

years ago would have been heard by the High Court, would now be dealt with by the District Court. The society very seriously questions whether the District Court or, for that matter, the Circuit Court, will be able to give the amounts of time appropriate and necessary to deal properly with cases at the upper levels of the new proposed jurisdictions. This will inevitably result in a much higher level of appeals being taken than is currently the case.

'It is our belief that the District courts simply will not be able to cope with the huge infusion of work on the civil side which will occur if the jurisdiction is more than trebled. For example, in Dublin at present it takes some four or five months between the issuing of a civil process and its hearing date. It is anyone's guess what delay would result from the proposed increase in jurisdictions. However, it seems not at all unlikely that the five months could become 18 months or more.'

Copyright and the Law Society library

New rules governing the photocopying of material held in libraries came into force on 1 January 2001. Copying by librarians is permitted subject to the conditions set out in sections 59 to 70 and section 229 of the *Copyright and Related Rights Act, 2000*, and in the *Copyright and Related Rights (Librarians and Archivists) (Copying of protected material) Regulations 2000*.

From 1 April, anyone requesting articles from periodicals (including law reports) or extracts from textbooks to be photocopied by a member of the library staff must have supplied the librarian in advance with a personally-signed copyright declaration form in relation to each item requested. This effectively says that he has not previously been supplied with a copy of the material, will not

use it except for research and will not supply a copy to anybody else.

The regulations apply to a permitted number of articles from a periodical or extract from a textbook. They do not apply to bills, acts or statutory instruments held under Oireachtas copyright, or to unreported judgments. Materials to be copied for judicial proceedings are also exempt from the regulations.

ONE TO WATCH: NEW LEGISLATION

Equal Status Act, 2000

(implemented 25 October 2000)

'The Equal Status Bill will, for the first time, provide protection against discrimination outside the field of employment. It deals with discrimination on the grounds of gender, marital status, family status, sexual orientation, religion, age, disability, race and membership of the traveller community and gives those who are discriminated against a statutory means of redress. It has a broad ranging scope covering provision of goods and services, disposal of premises and accommodation, education and registered clubs. This measure complements the Employment Equality Act, 1998, which prohibits discrimination on

similar grounds in the workplace'.

That's how the Minister for Justice, Equality and Law Reform, John O'Donoghue, introduced the second stage of the bill in the Dáil in May 1999.

In 1997, the previous *Equal Status Bill* was referred to the Supreme Court, which found two aspects of the bill to be unconstitutional: vicarious liability of employers for criminal acts of employees and use of a certificate in a criminal trial. The bill was redrafted in the light of the Supreme Court judgments on that bill and the *Employment Equality Bill*.

The following are its key elements in brief:

- Different treatment of people under 18 does not amount to

discrimination on the ground of age

- There is a general duty to 'do all that is reasonable' to accommodate the needs of disabled people, though only at a nominal cost. This gives scope for development in the future, as decisions have to be made as to what is reasonable, and what is a nominal cost
- Special allowance is made for services requiring physical contact
- Special allowance is made for insurance and finance based on actuarial or similar data
- Sporting facilities and events are exempted, and there are exemptions for other generally accepted situations

- The act applies to sale and rental of property, which is of increasing relevance in the context of increased immigration. There are some exceptions, as for small accommodation where the owner will continue to live in part of it, and special accommodation such as refuges, nursing homes, and retirement homes. Likewise, housing authorities may discriminate on the usual grounds of family size, family status, and so on
- Educational establishments are included, with generally accepted exemptions such as for single-sex schools and schools with a certain religious ethos
- Positive discrimination for

Overhaul of courts system needed, says chief justice

The days of the Circuit Court may be numbered, if suggestions from Chief Justice Ronan Keane are taken on board by the government. In a speech in Cork last month, the chief justice said that the replacement of our three-tier system of courts with a two-tier system 'should seriously be considered'.

'Instead of two courts at the local level', he argued, 'there could be one court, the District Court, with an increased jurisdiction embracing some of the present Circuit Court jurisdiction. The jurisdiction of the Circuit Court in serious crime could then be exercised by the High Court. The High Court would then sit outside Dublin regularly in criminal cases, as it does already in a great range of civil cases involving personal injuries'.

While accepting that the system established after the War of Independence 'had undoubtedly served us well', Keane added that its principal features must now be reassessed to determine whether they are ideally designed to meet the



challenges of a very different Ireland of the 21st century.

And referring to the 'patent anomalies' in the current system, he said: 'There appears to be no rational basis for the distribution of serious crime between the Circuit Court and the Central Criminal Court. It has never been explained why, if murder and rape can be tried only in the Central Criminal Court, the same does not apply to, for example, kidnapping, manslaughter, robbery with violence and massive fraud. The same would apply to grave sexual offences which fall short of rape. At the appeal level, there is no rational

justification for a Court of Criminal Appeal with a constantly changing membership, composed as it is of one Supreme Court judge and two High Court judges'.

He concluded by calling for a 'wide-ranging enquiry into how the present system is operated, what delays and inefficiencies appear to result from its operation and what lessons can be learned from the experience of other jurisdictions'. This, he said, would be the first step in giving Ireland a new court system designed to meet the challenges of the new century.

See also Viewpoint, page 11.

LAW CONGRESS COMES TO DUBLIN

The International Law Congress will take place in Dublin from 14-16 May. The conference will feature more than 100 speakers on such themes as communications and IT law, innovations in legal management, international financial law, and EU competition law. For further information, visit www.lawcongress.com or tel: 0044 (0) 1932 893 852.

NEW MEDICAL EXPERT BODY LAUNCHED

A new medical expert witness organisation has been set up in Dublin to provide expert opinions in medical negligence and personal injury cases. Medico-Legal Chambers Ltd is an offshoot of a similar company based in London. Its fee for preparing a medical negligence report will be in the range of £1,200-£1,500. The cost for examining clients for the purpose of preparing a report on current conditions and prognosis is £400, and the examination can take place in Dublin. Its fee for High Court appearances is £1,500. For further information, tel: 01 296 2570.

disadvantaged groups is not prohibited

- The act does not prohibit discrimination by clubs against members or applicant members. Instead, it discourages such behaviour by putting in jeopardy a club's registration (which allows it to hold a liquor licence). A complainant can apply to the District Court for a determination that a club is a discriminating club, in which case its licence cannot be renewed until the position is rectified. However, the club will not be denied public funds or the use of publicly-owned recreational facilities
- There are some exemptions for registered clubs, which are not regarded as discriminating just

because they cater for persons of a particular religion, age, nationality or ethnic origin. Other common-sense exemptions relate to sporting facilities or events, and positive discrimination

- Harassment or sexual harassment is prohibited, and the management of premises must take steps to prevent it
- Advertising tainted by discrimination is prohibited. Breach is an offence. It is also an offence to involve another person in prohibited conduct
- There is a general exemption for court orders, EU legislation and obligations under international law. There is also a general exemption for positive discrimination

- There is an exemption where there would be 'a substantial risk of criminal or disorderly conduct or behaviour or damage to property', and action taken in good faith for the sole purpose of ensuring compliance with the *Licensing Acts* is not discrimination. This will permit publicans, for example, to control conduct on their premises
- Other exemptions are special fees for families or pensioners, for example, discrimination on the basis of clinical judgement and treating a person differently who is unable to enter into a contract or give an informed consent
- The minister is empowered to make regulations for public

- transport to promote accessibility by disabled people
- The Equality Authority, established under the *Employment Equality Act*, has its functions extended to deal with enforcement of the provisions of this act. The procedure involves the complainant, or the authority, sending a notice to the respondent within two, or, exceptionally, four, months of the occurrence complained of. Assuming the matter does not end there, it may be referred to the director up to six months of the occurrence complained of, or, exceptionally, 12 months
- The director may refer the case to an equality mediation officer, with the parties' agreement

CONTINUED ON PAGE 7→



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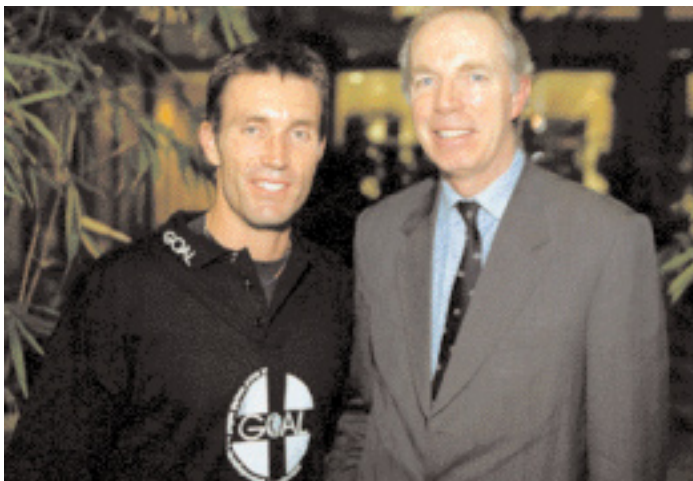


As this is a stock market related investment, values may fluctuate, and returns are therefore variable. All taxes are paid by the fund and investors have no liabilities to personal taxes on returns received.

The Calcutta Run is back

The Calcutta Run, an annual charity event organised by solicitors and supported by the Law Society, will take place on Sunday 27 May. It comprises a 10k fun run/walk, followed by a barbecue at Blackhall Place. The participants raise money through sponsorship for their participation.

Last year's event was a great success with over 750 runners and walkers taking part, and a total of £100,000 was raised for the two charities, GOAL's project for street children in Calcutta and Fr Peter McVerry's shelters for homeless youths in Dublin. It is hoped that this year's event will be even bigger and better, and the organisers



Tennis legend Pat Cash with Law Society Junior Vice-President Michael Irvine

are looking for participants and also for reps who will recruit and organise participants within their own firms. For further

information, contact Laura Wyse on tel: 01 649 2000 or run@algoodbody.ie or visit the website at www.calcuttarun.com.

NEW LITIGATION PRIMER PUBLISHED

Dublin law firm William Fry has produced a new booklet called *Litigating in Ireland*. For a free copy of the guide, tel: 01 639 5000 or e-mail: central.mail@williamfry.ie. It can also be downloaded from William Fry website at <http://www.williamfry.ie/litigation.htm>.

TIPPERARY COURT GOES HIGH TECH

Practitioners should note that Circuit Court lists for cases set down in Co Tipperary will be forwarded only by e-mail (to offices with e-mail addresses). Practitioners who do not have e-mail will still receive the lists by post – for the present.

NEW LRC PUBLICATIONS

The Law Reform Commission has issued four new publications: *The rule against perpetuities and cognate rules*, *Homicide: the mental element in murder*, *The variation of trusts*, and *The statutes of limitations: claims in contract and tort in respect of latent damage*. To obtain copies, contact the Law Reform Commission, IPC House, 35-39 Shelbourne Road, Ballsbridge, Dublin 4, tel: 01 637 7600 or e-mail: info@lawreform.ie.

Last chance to book for Monaco

Extra places have been provided for the Law Society's annual conference because of unprecedented demand. This year the conference takes place in Monaco from 26–29 April and the theme is *Money and people: getting it right*. The business session will explore such issues as the introduction of the euro and staff recruitment and retention.

A full range of social activities will be on offer as well.

The original closing date has been extended to accommodate the extra demand, much of which is coming from firms that regularly return to the Law Society conferences. 'We send staff as a reward for their efforts during the year', says Susan Stapleton of Ivor Fitzpatrick in Dublin. 'Not only do solicitors

love going and get a boost from it, but it's a worthwhile outing since they have an opportunity to mix with colleagues and get information on other jurisdictions'.

To sign up for the conference or to obtain further information, contact Mary Kinsella, the Law Society's publications and events manager, on tel: 01 672 4823 or e-mail m.kinsella@lawsociety.ie.

- The director conducts his investigation and hears 'all persons appearing to the director to be interested and desiring to be heard' and makes a decision. The director may order compensation (up to the amount the District Court could award in contract cases), or the taking of a course of action
- Appeals lie to the Circuit Court, and to the High Court on a point of law
- Decisions of the director are published, and have absolute privilege
- Enforcement of the director's decision, or a mediated agreement, is by application to the Circuit Court which will make an order as appropriate
- The director (or his designated officer) has wide power of

investigation, including entering premises, requiring production of documents, inspection of documents and records, and obtaining a search warrant from the District Court

- The director may require witnesses to appear, and apply to the Circuit Court for an order if there is a lack of co-operation. Disclosure of information to the director, authority or authorised person will not give rise to liability in contract or tort for such disclosure, but such information may only be used for the purposes of the investigation. Obstruction of the investigation is an offence. Cases not pursued after one year can be dismissed at the discretion of the director
- Vicarious liability is imposed on

employers, whether or not they knew or approved of what their employee did in the course of employment, but they have a defence if they show they took reasonable steps to prevent the prohibited behaviour

- Offences under the act can incur a fine of up to £1,500 and/or one year's imprisonment, or a fine of up to £25,000 and/or two years' imprisonment. On-going offences incur daily penalties
- Officers of a company can be found guilty in their personal capacities, along with the company.

This is an innovative piece of legislation which will give rise to a new area of practice. It is interesting in its use of a specialised authority rather than

the District Court to both investigate and make decisions on individual cases. It is also interesting in the option to use mediation to arrive at settlements. Mediation may well prove to be particularly suited to conflicts of this kind.

Background information on the act can be found in the Oireachtas debates on the government website at www.ir.gov/oireachtas. Look up *Legislative information*, *Bills initiated in both Houses*, 1999 and find the dates of the debates at the different stages of the bill. Then look up the debates in the Dáil or Seanad, which are listed by date. **G**

Alma Clissmann is the Law Society's parliamentary and law reform executive.



Letters

Piqued penguin protests picture prank

From: Gerry Doherty, O'Reilly Doherty & Co, Dublin

For the second time in the space of 12 months I find it necessary to write to you in relation to the content of the *Gazette*.

My complaint relates to the photograph published in the March *Gazette* (page 50). I should not need to remind you that last year you published an equally offensive photograph which portrayed me as drunk (see *Gazette*, March 2000, page 6). Fortunately, it was not a Council election year. This is, and the recent photograph portrays me as an illiterate and holds me up to ridicule. As you are no doubt well aware, this is a situation that was orchestrated by the Law Society president who, presumably, found this amusing for some bizarre reason.



Ward and Ann McEllin admire Mr Doherty's sartorial elegance, while suggesting slightly more appropriate attire

What is disappointing is that you can talk all you like about editorial independence, but it does appear that Mr McEllin subverted same. It is a pity you did not stand on your editorial independence and tell him where to put his offensive photograph.

You will recall on the previous occasion I wrote to you that, rather than litigating this matter, I would afford you the opportunity of printing a full apology, together with a full-page photograph of my choosing, to be published in the next edition of the *Gazette*.

I am now repeating this offer.

You probably are not aware that people from Mayo can be extraordinarily vicious and vindictive. Moreover, the further west you go, the more vicious and vindictive they become. So you may have more reason to watch your back than you realise.

I now await your grovelling apology.

PS. Who is the strange woman in the photograph? Presumably from your point of view she might as well have not been there, as no indication is given to her identity.

The Editor replies:

Apology? Absolutely. We deeply regret omitting the name of Ann McEllin, wife of the president, from the caption accompanying the photograph in the March Gazette.

Meditations on mediation

From: Michael Williams, by e-mail

I was interested in the article in the March issue of the *Gazette* (page 16) about how the Rush Hospital in Chicago uses mediation to explore the possibility of settlement in medical malpractice claims. The idea seems valuable, and one that might be taken up in Ireland, and I thought comments from a former lawyer and mediator might interest some of your other members. I will limit myself to the process of selecting mediators, as described in the article.

Experience shows that 'empowering' the parties to the mediation process greatly increases the prospect of a settlement. An individual suing a large organisation is likely to feel powerless and insecure, and, with this in mind, I wonder whether a system by which the plaintiff must choose a mediator from a panel selected and trained (apparently by the defendant hospital) is ideal. It might get the process off to a better start if the plaintiff patient and the defendant hospital together chose a suitably trained and qualified mediator who had no

prior connection with either party.

And that the hospital's panel consisted exclusively of lawyers – either retired judges or practitioners – seems to limit choice unnecessarily. Moreover, I would expect a full-time professional mediator to serve his clients more effectively than a lawyer acting as a part-time mediator.

Finally, it seems from the article that the Chicago mediators are trained to take certain steps in a specific order, and that they do so. This is what I call 'mediation

by numbers'. Any adequately trained mediator is aware of the stages described in the article and can bring his or her clients through them, but a professionally competent mediator, like a good advocate, understands the stages in the process, but does not adhere to them slavishly.

For these reasons, my sense is that plaintiffs, and, over a period of time, defendants, too, would be better served by using professional mediators than by limiting themselves to a panel of part-timers from a legal background.

Don't name 'abusers' until after conviction

From: Ratio Decidendi, Newry

Probably unlike the other members of the general public who attended the recent trial of Father Green in Newry Crown Court, I am neither a member of the Roman Catholic Church (having left that organisation over 22 years ago) nor am I an active Republican sympathiser. However, after having listened very carefully to the complainant's 'evidence', and assimilated the manner in which the prosecution case had been prepared by the RUC's Child Abuse and Rape Enquiry (CARE) Unit and then the Office of the Director of Public Prosecutions, I am suspicious that there were other agendas in operation in relation to this extremely well-publicised prosecution.

It is common currency in the Newry area that Father Green has strong Republican sympathies and (in relation to this prosecution) it may not be without significance that this priest's brother escaped from Long Kesh in a clerical outfit many years ago. Was this trial a belated 'settling of scores' before the new Northern Ireland Police Service comes

into operation and before crucial changes are made to the province's criminal justice system?

Certain aspects of the pre-trial publicity, the complainant's evidence and the prosecution concern me.

First, the complainant (now aged 32) has been allowed to remain anonymous (purportedly for legal reasons), whereas Father Green's impending prosecution had been publicised in the media for years. Even though there is an acquittal in this case, some 'mud' may stick, and there may always be the lingering suspicion in people's minds that some form of 'abuse' occurred, but insufficient proof was adduced in court to produce a conviction to the criminal standard; that is, 'beyond reasonable doubt'.

Second, the complainant claimed to have been sexually abused by Father Green (a close family friend) after having been taken for a meal in the Aylesforte House restaurant in Warrenpoint in late 1985, on his 17th birthday. However, this well-known restaurant did not actually open until 1986! Why did the RUC's investigating officer not check this

elementary fact at the very outset and confront the complainant with this crucial piece of evidence, thereby potentially obviating the considerable expense of a week-long trial that included the cost of a Crown Court judge, two leading Queen's counsel, two junior counsel, 12 jurors, four prison officers, the services of a leading firm of solicitors, several officials from the DPP, members of the Newry Court office staff and the RUC?

Third, there was no independent objective evidence to confirm the allegations, and there were significant discrepancies in the complainant's age (when the abuse purportedly took place) that he gave to the RUC. These ranged from the ages of 15 to 17, nine to 11, and 14 to 16. There were also elementary mistakes in the investigating

officer's notes about the crucial 'abuse' dates.

It is undeniable that hundreds of people have been abused by members of the Catholic Church, whether that be by priests or members of religious orders. A lot of unresolved hurt and emotional damage will emerge in the forthcoming years, and the church must deal with genuine victims sympathetically. However, there is a danger that unsubstantiated, untrue allegations will be made against members of the church many years, sometimes decades, after abuse supposedly took place.

To protect the innocent victims of spurious allegations, I contend that an immediate legislative change is needed to prevent publication or broadcast of any alleged abuser's name until *after* their conviction.

Lauding the librarians

From: Michael Twomey, Dublin

In recent times, I have had reason to spend a considerable amount of time in the Law Society's library. While in the library, I have found it impossible not to be impressed with the courteous and professional assistance given by the librarians to queries on every conceivable

area of law. The assistance is the same whether the query is raised in person or over the telephone, whether from a large Dublin firm or a sole practitioner down the country. It struck me that this assistance and expertise is a considerable resource to our profession and one which may sometimes be taken for granted.

And more lauding ...

From: Thomas J O'Halloran, Tralee

I recently had reason to request the Law Society library to send me a number of articles from various journals. The matter was extremely urgent and I asked that they would be faxed to me. It transpired that some of the articles were from the *Tort law review*, which is unavailable in Ireland.

The library staff member

proceeded to check with the British Library and the Institute of Advanced Legal Studies and, at the end of the day, she had obtained all of the articles bar one.

My request was dealt with in a most courteous and professional manner. I was certainly left under the impression that no effort would be spared to try and facilitate me. The service rendered was most impressive.

DUMB AND DUMBER

From: Martine E Kerr, Tarrant & Tarrant, Co Wicklow

I am quoting from a letter of instruction from a Danish firm of solicitors to ourselves in connection with a debt-collection matter. It reads as follows: 'and thereby kindest ask you on my behalf to try to collect my client's account'.

From Declan Molan, John Molan & Sons, Co Cork

I feel that the following extract from a letter that I recently received from a colleague

calls into question the powers that the Garda now have in view of recent legislation, and, in particular, the *Criminal Justice (Public Order) Act, 1994*: 'Your client, (name withheld), violently assaulted this young lady totally without any provocation and indeed the matter has now been brought to the attention of the Garda and an execution is pending'.

Very extreme, I would think.

Declan Molan wins the bottle of champagne this month.

Time to rethink our conveyancing fees?

From: James Cabill, Cabill & Cabill, Castlebar

Before Christmas, I had occasion to examine an old file of my father, the late John F Cahill, solicitor. On the file was a bill prepared by solicitor Alfred VG Thornton, grandfather of our Law Society president's wife, Ann McEllin. I thought the bill for the purchase of a £300 premises was particularly interesting. I prepared some calculations on a spreadsheet which shows what the current position would be if one were to apply the CPI inflation factor of 394 (see panel).

Note, in particular, that the premises has increased in value by a factor of 394, which would be about accurate, or a little low, for the value of the particular premises in Castlebar today. The

government's take, you will note, has increased by a factor of 4,887, while the solicitor's fee, assuming that there was no mortgage in 1930, has increased by a factor of 97.

My late father got his first job in a Dublin office as a solicitor in or about 1932, a

time of no inflation. He was paid £1.50 a week. If the equivalent was as little as £300 a week today, the inflation factor would be 200.

It is clear that the biggest inflation effect has come from government. Solicitors who do not charge a rational sum

for conveyancing work cannot in the long term afford to recruit and hold on to staff. Solicitors' offices are doing far more work in conveyancing for proportionately far smaller fees than their grandparents would have charged and received in 1930.

I do feel that solicitors throughout the country should examine these figures with a view to charging rational business-like fees for work done by their offices. To my mind, failure by a solicitor to charge a rational fee in conveyancing matters represents bad practice management. From an examination of these figures, you will also see that a house is less affordable today than it was for a solicitor in 1930, at a time of much less affluence.

	1930		2000		Factor by
	%	£	%	£	
Property	100	300.00	100	118,050	394
Government take					
Duties		1.50		7,083	
VAT on fees				248	
	0.5%	<u>1.50</u>	6.2%	<u>7,331</u>	4,887
Legal costs					
Approval fee	1.1%	3.15		–	
Seller solicitor	<u>3%</u>	<u>9.00</u>	1%	<u>1,181</u>	
	4.1%	12.15		1,181	97
Other comparatives					
Junior solicitor per week		1.50		300	200
Consumer price index		1.50		591	394



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A courts system for the twenty-first century

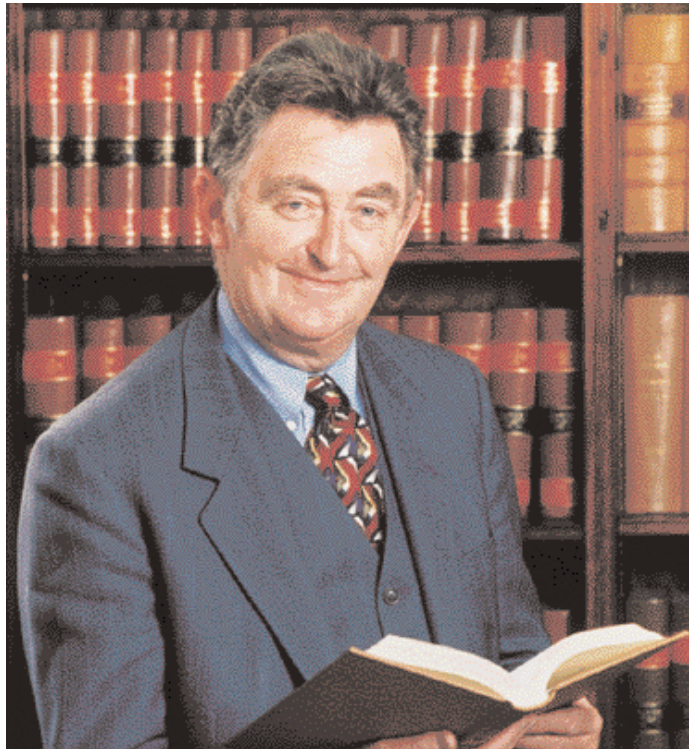
Just how many types of court should we have in this country? Could we get by with a two-tier system? Probably, argues Chief Justice Ronan Keane, who says that it's time to take a long hard look at the way we organise our courts

The Irish courts system, since it was first established in 1924, has never been subjected to any critical analysis conducted with a view to ascertaining how far it falls short of achieving the presumed objectives of any such system. It would probably be generally agreed that the objective should be to provide the citizens with a system of civil and criminal justice that is accessible to all and which functions in a manner that is impartial, open and expeditious. I do not propose here any detailed solutions to such problems as appear to arise: I content myself with indicating possible strategies that might at least be considered.

The system which was established in 1924 was in many ways a radical departure from that which existed before independence. It has undoubtedly served us well, but its principal features must now be reassessed to determine whether they are ideally designed to meet the objectives I have suggested in the very different Ireland of the 21st century.

A solid foundation

There have, of course, been many changes in the system since 1924, but its basic features remain untouched. The High Court has unlimited original jurisdiction in all civil cases, has exclusive jurisdiction in the criminal law in murder and rape cases, and is the only court of first instance in which the constitutionality of laws can be considered and the decisions of inferior tribunals and bodies



Chief Justice Ronan Keane: 'there appears to be no rational basis for the distribution of serious crime between the Circuit Court and the Central Criminal Court'

reviewed. The Supreme Court is the final court of appeal in civil matters (save where the law provides otherwise) and in all constitutional cases. The Court of Criminal Appeal hears appeals from serious crimes in both the Circuit Court and High Court (the Central Criminal Court) and the Special Criminal Court (the non-jury criminal court established to deal with subversive crimes and other crimes for which the jury system is deemed unsuitable).

Questions of European Union law in disputed cases must ultimately be resolved by the Courts of Justice of the European Communities in Luxembourg.

In only two areas have alterations been introduced to

the system. First, the jurisdiction of the District and Circuit courts in civil cases has on occasion been increased, sometimes simply to reflect the fall in money values, sometimes more extensively. In addition, new legal jurisdictions created by statute – such as family law, planning and employment law – have been assigned to the different court levels. In every other respect, the structure has remained unchanged.

Even if there were no evidence whatever of any delays, inefficiencies or inequities resulting from the present system, one would be struck with the patent anomalies. They are perhaps most striking in the criminal law: there appears to be no rational basis for the

distribution of serious crime between the Circuit Court and the Central Criminal Court. It has never been explained why, if murder and rape can be tried only in the Central Criminal Court, the same does not apply to, for example, kidnapping, manslaughter, robbery with violence, and massive fraud. The same would apply to grave sexual offences which fall short of rape. At the appeal level, there is no rational justification for a Court of Criminal Appeal with a constantly changing membership, composed as it is of one Supreme Court judge and two High Court judges.

Lengthy court sittings

While little research has been done on the extent to which the present system is producing delays, such delays undoubtedly exist, although they are worse in some areas than in others. The Court of Criminal Appeal is a particularly serious example, but there are also significant delays in bringing at least some criminal cases to trial and in the hearing of some civil actions. What is beyond doubt is that some courts, in order to deal with the volume of business which they have, have to conduct protracted sittings sometimes well into the night. Although the dedication of the judges to their work is unquestionable, there must be serious anxiety as to the quality of justice being administered at lengthy sittings of that nature.

A remedy sometimes proposed of increasing the number of judges is frequently met with the response from the executive that many courts,

particularly in rural areas, are notably under-worked. Far from suggesting that the present system is satisfactory, that merely serves to emphasise how unsatisfactory it is: clearly the inadequate resources now available are simply not being used to the best effect.

There is, accordingly, need for a two-fold strategy: a re-examination of the present court structure in existence since 1924 and a significant increase in the number of judges at the three first instance levels, the District, Circuit and High courts. Ireland has the lowest number of judges per head of population in the European Union and, while that undoubtedly reflects aspects of our system which differentiate us from the civil-law countries of continental Europe, there is a strong case for appointing more judges. That again, however, is subject to the *caveat*, which cannot be too strongly emphasised, that this should be accompanied by

an attack on the defects in the present court system.

One model which should seriously be considered is the replacement of the three-tier system of first instance courts with a two-tier system. Instead of two courts at the local level, there could be one court, the District Court, with an increased jurisdiction embracing some of the present Circuit Court jurisdiction. The jurisdiction of the Circuit Court in serious crime could then be exercised by the High Court. The High Court would then sit outside Dublin regularly in criminal cases, as it does already in a great range of civil cases involving personal injuries.

Courts of appeal

Under such a new system, there would be a two-tier appellate structure. There would be a permanent court of appeal sitting in two divisions, civil and criminal. The Supreme Court, in the result, would deal only with civil and criminal cases

'Instead of two courts at the local level, there could be one, the District Court, with an increased jurisdiction'

where a point of law of general importance was involved and with constitutional cases.

A structure of that nature would more closely resemble the courts structures of most of the other members of the European Union, but would also be similar to the structures in existence in at least some common-law jurisdictions, such as New Zealand and some of the states of the United States.

What is required in the first instance is a wide-ranging enquiry into how the present system is operated, what delays and inefficiencies appear to result from its operation and what lessons can be learned

from the experience of other jurisdictions. The reports of the Denham Working Group and their speedy implementation by government has resulted in a major revolution in the manner in which our courts are administered, which is already bearing fruit in the massive court repair and rebuilding programme and the introduction of information technology, all going forward under the aegis of the Courts Service.

The establishment of a working group drawn, as that was, from all the interested sections of the community and equipped, as that was, with the necessary resources to undertake such an enquiry should be the first step in giving Ireland a new courts system designed to meet the challenges of the new century. **G**

Mr Justice Ronan Keane is the Chief Justice of Ireland. This is an edited version of a lecture he gave to the UCC law society last month.

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Personal injuries board: neither fair nor sensible

Ken Murphy argues that the real objective of a Personal Injuries Assessment Board is to reduce the compensation paid to the victims of negligent employers

The Law Society would welcome any fair and sensible proposals to improve the current system for dealing with personal injury claims. Unfortunately, the recommendations in this deeply flawed report (**see panel**) are neither fair nor sensible.

The recommendations of this report are unfair in that:

- There could be no confidence for a claimant in having their claim assessed by a three-member board, one member of which would be a senior manager of an insurance company. The file for the board would be prepared by an insurance company, and the claimant would be neither seen nor heard by the board. The insurance company representative would have an overall interest in reducing the level of awards to claimants. No-one on the board would have a counterbalancing interest in favour of the claimant. This contrasts with the independent and unbiased approach of the judiciary established by the people of Ireland under the constitution.

The recommendations of this report are not sensible in that:

- They would inevitably involve the creation of a whole new bureaucracy, to deal with many thousands of cases every year, operating on a national basis. In essence, a sort of parallel courts system would be set up throughout the country to attempt to 'first guess' the existing courts system.

This report represents good news for negligent employers and bad news for their victims. The inherent bias against victims in the composition of the proposed new board shows that its real objective is to reduce the compensation paid to the

innocent victims of negligent employers. Although the stated objectives are to reduce cost and delay in the current system, it is ironic that two main effects of the establishment of the board would be to increase costs and introduce delay where none exists at present. It seems that proceedings could not be determined by a court until the PIAB had assessed the claim. The potential for constitutional problems with this are as obvious as the potential for serious delay.

The press release from Minister of State Noel Treacy which was issued with the report emphasised that: 'The establishment of the new board will not infringe on the individual's right of access to the courts. Rather, it is intended that the Personal Injuries Assessment Board will work as an independent and expert entity



Ken Murphy: 'good news for negligent employers'

within the Courts Service'. How the government proposes to resolve the obvious contradiction whereby this 'independent entity' is supposed to exist within another independent entity, namely the Courts Service, has not been explained. The board of the Courts Service was unaware of this proposal until the report was published.

They were not alone in being excluded from consultation. It

would appear from the report that practically no-one with any expertise or experience in litigation was consulted by a working group which appears to have operated almost by stealth. When news of the report's pending publication was leaked, I wrote the Tánaiste Mary Harney to complain in the strongest of terms at the society's exclusion from consultation. The Bar Council had also been excluded.

I pointed out that no-one knows more about the claims and compensation system in this country and the manner in which it could be improved than the solicitors and barristers who are engaged in it. I asked why a deliberate decision appeared to have been taken to exclude us from any involvement in this review. A month later, my letter has yet to be responded to, or even its receipt acknowledged.

In the Law Society we are not surprised at the apparent antipathy felt in some quarters, IBEC, for example, towards the involvement of lawyers in anything to do with personal injury claims. However, we would have hoped that the government would have had the vision to see that while the economics of personal injury claims is very important, there is more at stake than economics.

The maintenance of constitutionally-acceptable norms of justice and the protection of the rights of citizens are also of fundamental importance. Both the courts and the legal profession are required for this. **G**

Ken Murphy is the director general of the Law Society.

THE WORKING GROUP'S KEY RECOMMENDATIONS

'It is proposed that, in every case where a person suffering bodily injury in a road traffic accident or in the course of employment makes a claim for compensation against the alleged defendant or defendant's insurer, the alleged defendant or his/her insurer must notify the PIAB of such claim. After allowing the parties a prescribed period of time to reach a settlement, and if agreement had not been reached, the PIAB would make an independent assessment of compensation.

'While the PIAB's assessment would be expert and authoritative, it would not preclude the claimant from exercising his/her constitutional rights to go to court. In that event, the assessment by the PIAB would be made available to the courts.

'The PIAB would have discretion not to make an assessment in particular cases, for example, in cases of exceptional complexity and/or where the scales of injuries was particularly severe, or where liability was totally rejected by the defendant.

'It is proposed that the PIAB should be established on a statutory basis to give it the requisite authority and status'.

– *The Second report of the Special Working Group on Personal Injury Compensation, published by the Department of Enterprise, Trade and Employment*

Cut to the

So you thought the arguments over divorce in Ireland finished with the *Family Law (Divorce) Act, 1996*? Wrong. A new regulation from the EU means that 'quicky' divorces and 'forum shopping' are back on the agenda. Geoffrey Shannon reports

The European Union Commission's decision to convert the *Brussels II convention*¹ into a directly applicable

regulation will significantly impact on the practice of family law in Ireland. The regulation came into force on 1 March 2001 and will have far-reaching effects in determining the forum in which the application for separation or divorce must be heard and is likely to cause significant upheaval in the determination of the appropriate forum for issues of ancillary relief.

In summary, the regulation sets out rules for determining jurisdiction in family law disputes within the EU and requires courts of member states to recognise and enforce family law judgments in other member states. It applies in civil proceedings relating to divorce, legal separation or marriage annulment and parental responsibility for the children of both spouses. The scope of parental responsibility is broadly confined to custody matters linked to the matrimonial proceedings. The regulation covers both biological and adopted children of the couple, but not the children of one or other of the spouses from a previous union. Non-marital children are excluded from its scope, as are pre-nuptial agreements.

The regulation sets down the rules of direct

jurisdiction that determine which member state's court is competent to rule both on status matters and on related custody matters. It can apply where one of the parties is habitually resident in a member state or is a national of or domiciled (in the Irish sense) in such a state (article 7).

As a result, there is clearly increased potential for the courts of England and Wales to assume jurisdiction. This could arise, for example, where the petitioner is habitually resident in England and Wales and has been residing there for at least one year. Significantly, the practice adopted by the English courts of staying ancillary relief proceedings in favour of a foreign jurisdiction in cases where the appropriate forum is the foreign jurisdiction is likely to be departed from. Such an approach is not possible given the fact that *forum non conveniens*² is not available under the regulation. Alternatively, if one of the parties moved out of the Irish family home and lived in England and Wales for one year, they could apply for a fault-based divorce. The new regulation requires the Irish courts to recognise such a divorce. Habitual

MAIN POINTS

- The *Brussels II regulation* clearly undermines Ireland's constitutional position on divorce
- 'Quicky' divorces obtained in England will have to be recognised by the Irish courts
- Residence requirements and defences explained

e quick



residence will be interpreted in a manner similar to that adopted by the European Court of Justice in relation to other conventions.

The second broad ground for jurisdiction is the state of either the domicile or the nationality of both parties, established on a long-term settled basis. States must choose between nationality and domicile. Ireland and the United Kingdom have chosen domicile. It ought to be remembered that the state

RESIDENCE REQUIREMENTS

Habitual residence of one or other of the parties is the central governing criterion for jurisdiction under the regulation. In particular, article 2 allows jurisdiction to the following:

- The state of the habitual residence of both parties at the time of the application, or
- The former habitual residence of both spouses when one spouse still resides there, or
- The state where the respondent is habitually resident, or
- In a joint application, where either is habitually resident, or
- The state where the applicant is habitually resident, once he has resided there for a year before the application, or
- The state where the applicant is habitually resident, once he resided there for six months before the application and is domiciled in that state.

‘The constitutional position is clearly undermined by the decision to convert the Brussels II convention into a directly applicable regulation’

referred to must be a member state, and if no member state has jurisdiction under the regulation, states are free to apply their own national rules.

Parental responsibility

The forum exercising jurisdiction in respect of matrimonial proceedings has jurisdiction for custody issues where the child is habitually resident in the same state. Where the child is habitually resident in another member state, the courts of the state exercising jurisdiction in the proceedings will also have jurisdiction, subject to one of the spouses having parental responsibility in relation to the child. In this regard, that jurisdiction must be accepted by the spouses and be in the best interest of the child.

The jurisdiction of a state over parental responsibility under this regulation is linked to the substantive application and thus will cease when the judgment allowing or refusing the application for divorce, separation or annulment has become final. Where those proceedings have finished but where proceedings in relation to parental responsibility are still pending, the state retains jurisdiction until they also end. One notable feature of the new regulation is the non-availability of the principle of *forum non conveniens*. This will impact significantly on the custody issue and may result in this sensitive issue being considered in a jurisdiction other than that in which the children resided.

Jurisdictional conflicts

Applying the jurisdictional rules, the courts of more than one state may have jurisdiction. To resolve any conflict, article 11(1) provides that if the same action is brought in two different courts, the second court

shall stay its proceeding until such time as the jurisdiction of the first court is established and then decline jurisdiction in favour of that court. This is known as the *lis pendens* doctrine. Once a court is validly seised, it has exclusive jurisdiction and there is no provision for the country first validly seised to stay its proceedings in favour of any other country. There is no choice of law facility in the regulation, whether by agreement or otherwise. So, for example, an Irish person habitually resident in England or Wales for one year would be entitled to bring an application for divorce. Once the English court accepts jurisdiction and agrees to deal with the matter, under the new regulation the Irish courts would be obliged to decline jurisdiction if the matter were challenged by the other spouse. The regulation does not adopt the usual requirement that both actions be identical. Rather, it adopts a much wider interpretation of *lis pendens* so that if a party files for divorce in one forum, and the other spouse files for annulment in another contracting state, the second forum must decline jurisdiction.

The regulation leaves it up to national law to determine when the court is seised of the matter. Generally, in civil-law countries, the court is seised when the defendant is served, whereas in common-law countries, the court is seised when proceedings are issued.

Recognition of foreign divorces

One of the most common problems when dealing with foreign divorce and separation judgments is how to enforce them. Indeed, the acute nature of the problem of recognition in this jurisdiction can be gleaned from the recent decision of *GMcG v DW* (unreported, High Court, McGuinness J, 14 January 1999). In that case, McGuinness J extended the range of circumstances in which a foreign divorce decree could be recognised by an Irish court. Previously, at least one of the parties to a foreign divorce had to be domiciled in the state granting the divorce at the time the decree issued. By contrast, an Irish court will consider a divorce petition where either party is ordinarily resident in this jurisdiction for at least one year prior to the institution of proceedings. McGuinness J considered it only fair and proper that Irish courts respect and endorse the judgments of their foreign contemporaries made on the basis of a jurisdiction similar to that enjoyed by the Irish courts and ruled that a foreign divorce decree would be recognised where it was based on ordinary residence alone.

CHILDREN’S RIGHT TO BE HEARD

A judgment will not be recognised if it was given without the child having been given the opportunity to be heard, ‘in violation of fundamental principles of procedure of the member state in which recognition is sought’, or without a similar opportunity being given to any other person claiming

that the judgment infringes his or her right of parental responsibility. Member state rules must set out how the child should be heard. The *Borras report* provides that these rules must include the provisions of the 1989 *United Nations convention on the rights of the child*.

As in the *Brussels convention*, a judgment given in the courts of one member state must be recognised in all others. Recognition is restricted to the dissolution of the marriage bond (that is, annulment, legal separation or divorce) and does not apply to other matters. Article 14 provides that a judgment given in a member state shall be recognised in another member state without any special procedure. Unlike the *Brussels convention*, article 14 then goes on to specify the effects of recognition. The existence of a final judgment relating to divorce, legal separation or marriage annulment in another member state is declared to be sufficient for updating the civil status records of a member state. An interested party can contest recognition of the foreign judgment.

Defences and public policy

There are a small number of defences to automatic recognition. Article 15(1) details the grounds for non-recognition of judgments for divorce, legal separation or marriage annulment, while article 15(2) contains the grounds of non-recognition of custody judgments in the event of matrimonial proceedings. Four defences are listed in article 15(1) and six in 15(2).

Judgments irreconcilable with public policy.

The first defence to enforcement of an order granting a divorce, legal separation or marriage annulment is the fact that it is in serious conflict with public policy in the state in which recognition is sought. The significance of this provision is diluted by article 17, which prohibits non-recognition of a foreign judgment on the grounds that divorce, legal separation or marriage annulment would not be permitted on identical facts by the law of the member state in which such recognition is sought. It is not surprising to note that this provision caused considerable difficulty for Ireland. In order to address this, it was agreed, pursuant to article 46(2) of the former *Brussels II convention*, that a declaration by Ireland would be annexed to the convention. The status of this declaration has been fundamentally undermined by the conversion of the convention into a directly-applicable regulation.

Refusal of recognition also remains possible on the public policy ground, under article 15, paragraph 2, in custody disputes connected with the matrimonial proceedings. This ground for non-recognition, however, differs from that pertaining to the non-recognition of judgments for a divorce, legal separation and annulment in that it is not possible to refuse recognition purely because the judgment is manifestly contrary to public policy. In a provision that broadly mirrors article 23(2)(d) of the 1996 *Hague convention*, paragraph 2(a) also provides that consideration be given to taking the best interests of the child into account.

Under the *Brussels convention*, the analogous defence is restricted to circumstances in which a fundamental principle of the national law of the court in which recognition is sought is in question. There is no definition of public policy in the regulation. The European Court of Justice has said



PROCEDURE FOR ENFORCING FOREIGN JUDGMENTS

Article 22 sets out the procedure for enforcement of a foreign judgment. The documents to be produced in an application for either recognition or enforcement, or an application contesting such recognition, are specified in articles 31 and 32. When the required documents are not available to the court, article 33 allows the court, before recognition is sought, to specify a time by which they must be produced or, alternatively, to vary the documents required. If the court considers it has sufficient information before it, it may dispense with the documentary requirements. Article 21 specifies the courts in the member states to which application is to be made. Significantly, article 23 says that the court to which application is made should give its decision without delay.

Under the regulation, the practical measures for enforcement are a matter for internal law, whereas the procedure whereby the foreign judgment is declared enforceable is a matter for the regulation itself.

APPEALS

Article 25 provides a party against whom enforcement is ordered with a right of appeal and gives a party seeking enforcement a right of appeal from an order refusing enforcement.

that the refusal to recognise a judgment based on public policy should operate only in exceptional circumstances (see *Hoffman v Krieg*, case 145/86, [1988] ECR 645). However, the sensitivities inherent in family law cases may result in a wider interpretation being taken of this defence.

Natural justice. If there is a default judgment, the applicant must show that the respondent was duly served with the documents in due and sufficient time to arrange for his defence. In judging the questions of whether due service has occurred and whether defective service can be remedied, the court is to apply the law applicable in the state of origin, including any international conventions.

Irreconcilable judgments. For divorce, legal separation or marriage annulment, the regulation excludes recognition of a judgment which is



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irreconcilable with a judgment given in a dispute between the same parties in the member state in which recognition is sought. Pre-eminence is given to the judgment of the recognising court. There is no requirement that the judgment of the recognising state pre-dates the judgment for which recognition is sought. In parental responsibility cases, the regulation takes a somewhat different approach. It provides that in such cases a court can refuse recognition of a judgment if it is irreconcilable with a later judgment of the member state in which recognition is sought. The European Court of Justice has taken a very narrow approach to this provision of the *Brussels convention*.

Enforcement of judgments

The enforcement provisions are confined to judgments relating to parental responsibility. For judgments relating to matrimonial matters, recognition procedures are sufficient. Article 20 provides that an enforceable judgment from one member state can be declared enforceable in another member state on the application of any interested party. 'Interested party' includes spouses, children and, in some states, a relevant public authority. The applicant does not have to be resident in the jurisdiction. Enforcement of foreign judgments will be almost automatic.

Legal aid. Article 29 provides that if the applicant has benefited from complete or partial legal aid or exemption from costs in his state of origin, he will also be entitled to benefit from the most favourable legal aid or the most extensive exemption from costs and expenses provided for by the law of the state addressed.

Judgments of non-member states. The regulation has no application to judgments originating from non-member states.

The regulation and the other conventions

Generally, the regulation will take precedence over the other conventions to the extent that they address matters governed by both instruments. For example, insofar as its scope includes matters concerning custody of a child of both spouses, the regulation supersedes the 1996 *Hague convention* in circumstances in which protection of the child is connected to the separation or divorce. An exception relates to the *Hague convention on the civil aspects of international child abduction* 1980, which, by virtue of article 4 of the regulation, maintains precedence. The risk of parental abduction is obviously highest at times of marriage breakdown. This is, therefore, a welcome provision, ensuring that the lawful habitual residence of the child is maintained as the criterion for jurisdiction in cases where, because of the abduction of the child, there has been a *de facto* change in the habitual residence.



'The new regime will undoubtedly encourage divorce planning and 'forum shopping', this approach will facilitate the 'quicky divorce' syndrome'

Ireland had some particular concerns that the original *Brussels II convention* might be used to circumvent our rigid divorce rules by allowing parties resident here to slip through and get judgment elsewhere. As a compromise, a declaration was annexed to the original convention whereby Irish courts could refuse recognition to a judgment if it was obtained as a result of deliberately misleading the foreign court in relation to the jurisdictional requirements, and where such recognition would be incompatible with our constitution. However, the status of this declaration has been undermined by the fact that it was decided to transpose the substance of the *Brussels II convention* into a regulation that has direct effect in member states. It does not require any implementing provisions, save for some amendments to the *Rules of Court*. Significantly, there is no place for the previously referred to declaration in a uniform regulation. While it was agreed that Ireland could read the terms of the declaration into the minutes of the Council meeting, this is of little or no legal effect.

The constitutional position is clearly undermined by the decision to convert the *Brussels II convention* into a directly applicable regulation. The new regime will undoubtedly encourage divorce planning and 'forum shopping' (which is what private international law refers to as choosing a jurisdiction that suits a particular claim). This approach will facilitate the 'quicky divorce' syndrome of finding a country to grant a divorce, when other countries might not, that must be recognised elsewhere. Further, the non-availability of the doctrine of *forum non conveniens* will prompt parties to litigate earlier in an attempt to secure jurisdiction in their home state. This militates against the recent statutory provisions encouraging parties to engage in mediation and other forms of alternative dispute resolution.

In conclusion, the regulation is unlikely to achieve its central objective of reducing the incidence of 'limping marriages' due to a failure on the part of the drafters of the convention/regulation to acknowledge and address the real practical problems in achieving uniformity in family law. **G**

Geoffrey Shannon is the Law Society's deputy director of education. He wishes to acknowledge the help given by TP Kennedy, the society's director of education, who read and commented on a draft of this article.

Footnotes

- 1 The *Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses* ([1998] OJ C221/1).
- 2 The doctrine of *forum non conveniens* is a distinctive feature of the law relating to jurisdiction in common-law systems and affords the court a discretionary power to refuse to take jurisdiction if there is some other available forum which *prima facie* is clearly more suitable for the trial of the case.



Don't look

With the incorporation bill promised soon, the *European convention on human rights* is set to play a vital role in one of the most sensitive (and politically charged) areas of law – refugees and asylum-seekers. Noeline Blackwell looks at some of the articles in the convention that are likely to have the biggest impact on practitioners



Bosnian refugee and child in Dublin

The international human rights law which gives Ireland its understanding of refugee protection is articulated in the 1951 *United Nations convention relating to the status of refugees* and its 1967 protocol. Its major planks of protection are the definition of a refugee and the prohibition on expulsion (or *refoulement*). Both planks are reflected in the *Refugee Act, 1996*, sections 2 and 5 respectively. A refugee can be described as someone 'who is outside her country because she reasonably believes that her civil or political status puts her at risk of serious harm in that country, and that her own government cannot or will not protect her' (*The law of refugee status*, James C Hathaway, Butterworths, 1991). Certain categories of people who either do not need or do not deserve protection are excluded.

Also excluded are many others who are in need of protection from torture, unlawful killing, or inhuman or degrading treatment or punishment but who will not qualify as refugees. Some of these may not qualify as individual refugees because they cannot prove, for example, a sufficient level of individual harm for one of the reasons of civil or political status mentioned in the definition of a refugee. Some of those excluded will come back under the protection umbrella because of the prohibition on expulsion contained in the 1951 UN refugee convention, reflected in section 5 of the *Refugee Act, 1996*. This states that: 'A person shall not be expelled from the state or returned in any manner whatsoever to the frontiers of territories where, in the opinion of the minister, the life or freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion'.

While attention tends to focus on the definition of who qualifies as a refugee – indeed, the entire asylum-determination procedure in Ireland is devoted to an examination of this – the principle of *non-refoulement*, of non-expulsion, is, in fact, the

cornerstone of international protection. After all, the sole purpose of refugee law is to protect those who would be at risk if sent back to their own country.

This human right of non-expulsion, based on the need for protection, is not confined to the UN refugee convention. Although not directly expressed, it also arises pursuant to an individual's right not to be tortured under the *European convention on human rights*. The terms of the convention are of particular interest at the moment while we await its incorporation into Irish domestic law. Incorporation was due to take place in autumn 2000 to permit the government to comply with its commitments under the *Hillsborough agreement*. Incorporation would also allow Ireland to move from its unenviable position as the only country in the 41 member states of the Council of Europe which does not have the convention as part of its domestic law. For several months now, the indications have been that publication of the legislation was just around the corner but either the corner moved, or those expecting the draft legislation misjudged the distance to it.

It is as near a political certainty as political certainty allows that, sooner or later, the *European convention on human rights* will be incorporated into Irish law. When that is done – however it is done – the convention is likely to impact to some extent on many areas of Irish law, not least the procedures and laws dealing with asylum and refugees. Certainly incorporation will make more available to Irish law the rich jurisprudence of the European Court of Human Rights sitting at Strasbourg. Areas of particular importance in refugee law are likely to be the prohibition on torture (article 3), the right to private and family life (article 8) and the right to fair procedures and effective remedies (articles 6 and 13).

Curbs on expulsion

Article 3 of the *European convention on human rights*, one of the shortest articles in the entire treaty, states: 'No-one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

MAIN POINTS

- Protection of refugees under the convention
- UK and Irish case law
- Family rights and refugee law

back



A protest outside the Four Courts in Dublin seeking to halt the deportation of a Nigerian asylum seeker

Unlike other rights expressed in the convention, article 3 admits of no reservations and no exceptions. Taken with article 1 of the convention, which obliges participant states to ‘*secure to everyone within their jurisdiction the rights and freedoms ... of this convention*’, the prohibition on torture has been held by the European Court of Human Rights to mean not only that torture is forbidden in member states, but also that a member state must not expel anyone to a country where the person would be at risk of torture or to inhuman or degrading treatment or punishment (*Soering v United Kingdom* [1989] 11 EHRR 439). Similarly, if expulsion risks a person’s unlawful killing, contrary to article 2 of the convention, the expulsion is also forbidden. This prohibition then turns into a positive protection which may in some cases be more comprehensive than the protection given under the UN refugee convention, which is mirrored in the Irish legislation relating to *non-refoulement*.

The prohibition on expulsion where article 3 harm might follow applies to all, not just to those who can prove all the attributes of a ‘refugee’. Article 3 guarantees are ‘of an absolute character, permitting no exception’ (*Chahal v UK* [1997] 23 EHRR 413; *Abmed v Austria* [1997] 24 EHRR 278). It matters not what a person’s character or activity is. It matters not how weak the asylum case was. Thus,

the Strasbourg Court found that the protection of article 3 accrued in *Chahal v UK*, though the UK reckoned the Sikh separatist applicant to be a threat to national security, and also in *Abmed v Austria*, where the applicant had been convicted of criminal offences. In both cases, the court found that both were entitled to call on article 3, as each could reasonably claim to be subjected to a real risk of unlawful killing, torture, inhuman or degrading treatment or punishment. That prohibition on expulsion extends to those who are to be expelled directly to a country of harm and also to those who are expelled to a country which itself may not harm them, but which will permit or facilitate their expulsion to harm.

This has consequences for the operation of the EU *Dublin convention*, which permits the transfer of asylum claims between EU states. Regulations made under the *Dublin convention* do not specifically require the Irish state to have regard to the provisions of article 3. The very least that may be expected following incorporation of the *European convention on human rights* is that there will be a domestic law obligation on the Irish state to transfer only when it is satisfied that article 3 concerns do not arise.

On the wider level of expulsions generally, section 3(1) of the *Immigration Act, 1999* states that a

INCORPORATION UPDATE

The minister has committed himself to publishing the bill to implement the ECHR into Irish law in this session of the Oireachtas, that is, before the summer recess. There are indications from the department of justice, equality and law reform that it may come as soon as the Easter break, or shortly afterwards.

ministerial decision to expel or deport a person will be 'subject to the provisions of section 5 (prohibition of refoulement) of the Refugee Act, 1996'. That the rights under article 3 of the European convention are not mentioned in no way diminishes their impact and they must be taken into account.

However, a substantial counter-balance has emerged in the case law to that right articulated in article 3. While article 3 is absolute, permitting of no exception, its interpretation by the European Court of Human Rights has been quite narrow. The court has held that an expelling state must consider article 3 prior to the expulsion, and that its examination must be rigorous (*Vilvarajah v UK* [1991] 14 EHRR). But it has also held that the obligation not to expel extends only to someone who has shown 'substantial grounds' of 'real risk' (*Cruz Varas v Sweden*, 20 March 1991, [1992] 2 EHRR 25). A 'mere possibility ... of ill-treatment' is insufficient to give rise to a breach of article 3 (*Vilvarajah v UK*, 20 Oct 1991. In this case, the expulsion of Tamils who had experienced ill-treatment in Sri Lanka was permitted on the grounds that they were no worse off than other Tamils and the court accepted the state's right to the view that the situation had improved. When returned, the applicants claimed that they did suffer the ill-treatment feared).

In *Ireland v the UK* ([1978] 2 EHRR), a leading early case on what constitutes ill-treatment, the court said that it 'depends on all the circumstances of the case'. The court considered treatment to be degrading which 'arouse(s) in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance'. Comprehensive as that seems, the commission of the court found that the expulsion from Finland to the former Soviet Union of two mentally-healthy applicants who had been declared mentally ill and therefore unable to work, marry or create a family was not sufficient to attract the protection of article 3 (*Kozlov v Finland* [1991], commission decision no 16832/90; *Varfolomejev v Finland* [1991], commission decision no 17811/91, both unpublished).

So although article 3 will guarantee the right not to be tortured to those on a member state's territory, the high level of proof sought by the court makes it difficult to prove a case.

Family rights and the convention

The family rights and the definition of a family in article 8 of the convention are interesting in the context of refugee law and also in a consideration of the difference – if any – that the *European convention on human rights* will make to people already protected by Irish constitutional rights. Pursuant to article 8 of the convention, 'everyone has the right to respect for his private and family life'. Interference with this right is permissible only when it is lawful and necessary for stipulated reasons.

As Muriel Walls recently pointed out in the *Gazette* (Jan/Feb issue, page 16), 'family' has been

'There might be circumstances where the rights developed under the Irish constitution could provide better protection than is available in the convention'

interpreted widely by the European Court of Human Rights. The court noted in *Keegan v Ireland* that family was not confined solely to marriage-based relationships. Family and domestic circumstances have been held by the European Court of Human Rights to recognise foster children, adult siblings not dependent on each other, and a divorced man with his daughter (*Moustaquim v Belgium* [1991] 13 EHRR).

Different cultures and societies have different family structures. Dependents and intimate family of refugees regularly include aged parents, uncles and aunts. Depending on where it is based, a family unit may consist of one or several generations and various blood and matrimonial links. Refugee law recognises the right of refugees to re-unification with their family. In Irish law, the right of a refugee to be re-united with 'family' is confined to re-unification with a spouse of a subsisting marriage, a refugee's children under 18 or, where the refugee is under 18, the child's parents. The minister has a discretion to permit re-unification with a 'dependent' member of the family outside that range (s18, *Refugee Act, 1996*). Whether this definition of 'family' is sufficient to meet the requirements of article 8 of the convention remains to be seen.

The definition will also be relevant to a person not recognised as a refugee who applies to remain in Ireland on other protection grounds or on what are commonly called 'humanitarian grounds'. Among the matters that the minister for justice, equality and law reform must consider is the 'family and domestic circumstances of the person' (s3(6)(c), *Immigration Act, 1999*). In that examination, compliance with the convention case law will require a wider understanding of family than the nuclear family described in the *Refugee Act, 1996*.

A difficulty in assessing the impact of the convention is that an examination of the case law points up inconsistencies. There are a number of cases from the European court where family rights are recognised in circumstances where the Irish constitution might not consider a family life exists but, on the other hand, there are cases where it is hard to see why the right to family or private life was excluded. In his address to a Law Society Conference on the convention last October, Gerard Hogan SC suggested that while the incorporation of the convention would be significant, there might be circumstances where the rights developed under the Irish constitution could provide better protection than is available in the convention. He noted that the European court had never interpreted article 8 as going as far as the Irish Supreme Court did in asserting the rights of an Irish child in *Fajujono v Minister for Justice* ([1990] ILRM). Indeed, article 53 of the convention recognises that in some cases the rights guaranteed by domestic law may be superior to those of the convention which is, after all, a document aimed at producing a base line below which member states of the Council of Europe should not fall.

STUDY TRIP TO STRASBOURG

As part of the Law Society's programme of training, the Law Society Task Force on the implementation of the ECHR into Irish law is organising a study visit to the European Court of Human Rights in Strasbourg around 15 May. Anyone interested should contact the society's law reform executive, Alma Clissmann, as soon as possible at the Law Society, Blackhall Place, Dublin 7, tel: 01 672 4831 or on e-mail: a.clissmann@law.society.ie.

Procedures to guarantee rights

The European Court of Human Rights has regularly stressed the importance of procedures to guarantee rights. In his address to the Law Society's October conference, solicitor Michael Farrell pointed out that the Irish legislation is expected to provide a provision similar to section 6 of the UK's *Human Rights Act*, making it unlawful for a public authority to act contrary to a convention right. Article 6 of the *European convention on human rights* guarantees the right to a fair trial and article 13 the right to an effective remedy before a national authority in relation to convention violations.

Once an applicant has established an arguable claim under articles 2 and 3 of the convention, article 13 can apply. As Anna Austin, solicitor and registrar with the European Court, pointed out to the October 2000 conference, the application of article 13 will require an asylum procedure which is 'independent of the executive and of the parties to the matters at issue; which (has) the power to review the asylum case on its merits, applying criteria similar to those applied under article 3 of the convention; and which can render a binding decision'. She also noted with interest that certain provisions of the *Refugee Act, 1996*, including the ability of the minister to set aside a decision of the Appeal Tribunal in the interest of public order



(section 17), and the absence of an oral appeal where a claim is found to be 'manifestly unfounded' under section 12 of the *Refugee Act, 1996*, may prove problematic under article 13 of the convention. Issues may also arise in relation to judicial review of asylum decisions.

Apart from these three main areas of impact, there are likely to be new examinations of refugee rights in other areas, such as detention, as a result of incorporation. Study will continue on convention rights *per se* and the connection between them and constitutional rights. Doubtless the tension which exists between the expression of individual rights, and the protection of state privileges in the human rights jurisprudence of the European Court of Human Rights will continue. In the case of *Soering v UK*, the court stated that in its interpretation a 'fair balance' has to be found between the individual's interest and the general interest of the community. That remains the case and it is to be hoped that, however it does so, Irish legislators, adjudicators and advocates will ensure that the convention is used for the protection and promotion of human rights. **G**

Noeline Blackwell is the principal of the Dublin law firm Blackwell & Co and a member of the Law Society's Family Law and Civil Legal Aid Committee.

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The recent *Napster* case has sent shock waves through the record industry, the Internet community and the public at large. Denis Kelleher looks at the US decision and analyses Ireland's attempts to come to grips with the issue of copyright infringement without unfairly crippling on-line initiatives

Is Ireland out on copyright



Although many of the dot.com hopefuls of last year are now finding the business environment and stock markets particularly unwelcoming, Ireland remains steadfast in its ambitions to become a hub for e-commerce. Last year we passed the *Electronic Commerce Act, 2000*, which has become an international model for such legislation, and the country has secured so many web-hosting companies that they threaten the stability of the national electricity grid. While developing the legislative and physical infrastructure is important, ultimately it is the provision of product that will determine success in e-commerce. Content in the form of copyright works is a vital product on-line, since these can be digitalised and distributed over the Internet at little or no cost. Ireland excels at the production of such works: it is now the second-largest exporter of software in the world. But our indigenous producers of copyright work are far more significant.

From Seattle to Singapore, it is impossible to avoid the songs of the countless Irish performers who have broken through to international success, while UK television is clogged with Irish actors, producers, directors and writers. The Internet offers a channel through which all of these works can be distributed worldwide to anyone with an Internet connection; the only problem is that nobody has yet worked out a way to make money out of it. As a result of this fundamental difficulty, while the Internet should offer a huge opportunity to authors and artists, it is now being portrayed as their enemy. These problems

came to a head in the US case of *A&M v Napster*, which pitted one of the Internet's most popular businesses against the American record industry.

Napster is an Internet-based version of a record club where members can swap music tracks when and where they want. The difference is one of scale: instead of swapping a vinyl LP or cassette tape, both of which will deteriorate with repeated copying and use, Napster allows users to copy an infinite number of tracks as often as they like with quality close to that of a CD, using the MP3 standard for compressing music files. Anyone who wants to use the Napster service can register and download its MusicShare software free of charge at www.napster.com. There are currently some 60 million users registered, although this number may include individuals who have registered under different names.

The service relies on users to make tracks available for others to copy in the MP3 file format. Users who wish to do this will upload a list of the MP3 files which they wish to make available to the Napster servers. The

MAIN POINTS

- Background to the *Napster* case
- The *Copyright and Related Rights Act, 2000*
- Problems with the Irish approach to regulating e-commerce

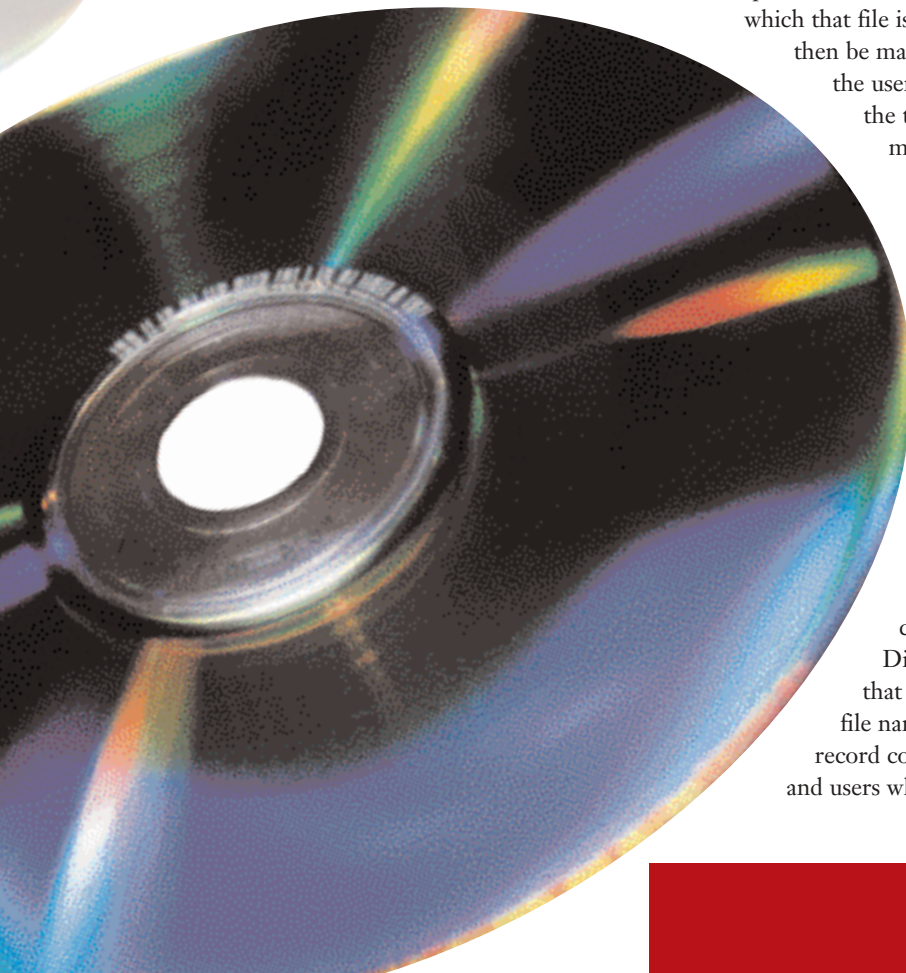
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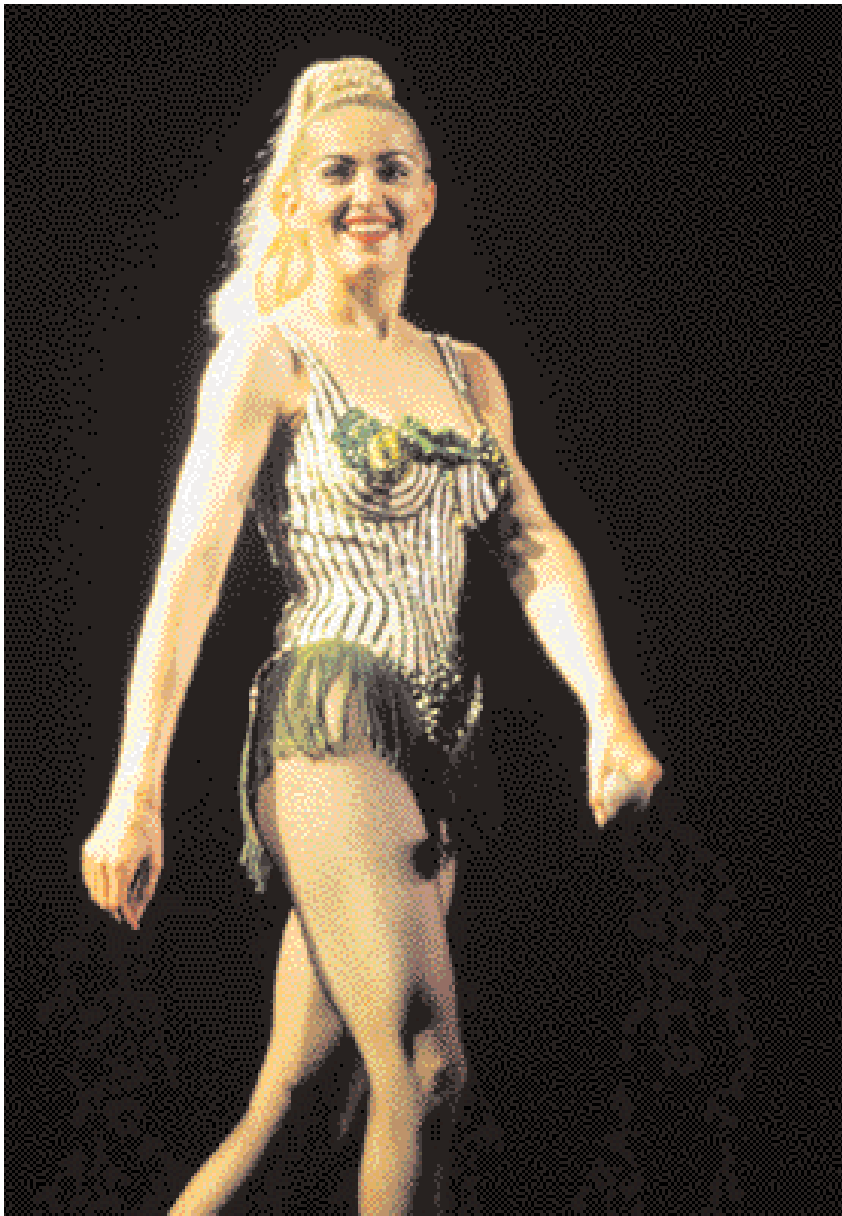
actual files themselves remain on the user's computer. This list becomes part of a collective directory of files available for swapping, administered by Napster, and the directory will only display the user's list while that user is connected and his MP3 files are immediately accessible.

If a user wishes to download music, he can either search the collective directory for the song he wants or else Napster will make available a 'hotlist' of users from whom he has downloaded music in the past. Once the user has identified an MP3 file which he wishes to download, the Napster service will notify his computer of the identity of the computer upon which that file is stored. A connection will then be made between the computer of the user who wishes to download the track and that of the user making the track available, and the file will be transferred over the

Internet. The recipient can then play these files on his computer or on another digital device, such as an MP3 player.

Although Internet users love this system, record companies hate it in equal measure. There is no question that the Napster system is in serious breach of copyright. The US Ninth District Court of Appeals held that Napster users who upload file names to Napster violate the record companies' distribution rights and users who download files





We'll use any excuse to run a picture of Madonna, but the pop diva's copyright was almost certainly infringed by Napster

containing copyrighted music violate their reproduction rights. Unsurprisingly, Napster failed in its claim that these users were engaging in 'fair use', so the court then turned its attention to whether or not Napster itself was liable for contributory copyright infringement. It held that: 'Napster, by its conduct, knowingly encourages and assists the infringement of (the record company's) copyrights'.

Napster was held to be engaged in vicarious copyright infringement, and the court rejected its attempts to rely on an exemption for service providers contained in the USA's *Digital Millennium Copyright Act* (17 USC & 1008) and an exemption for users in the *Audio Home Recording Act* (17 USC & 512) and its defences, based upon waiver, implied licence and copyright misuse. The Court of Appeal held that an injunction was 'not only warranted but required'. However, it did hold that the injunction would have to be limited, so that it would only apply where Napster receives reasonable knowledge of specific infringing files, knows that such files are available on

the Napster system and fails to act to prevent distribution of the works.

Since this judgment was given on 12 February 2001, the case has returned to a lower court to amend the injunction. The implementation of this has caused problems, for instance, the misspelling of the names of tracks and artists has made excluding them difficult. To give one example, there are some 50 different spellings of the group N'Sync's name. The extent of Napster's problems can be gauged by the fact that its offer to settle for a payment of \$1 billion was rejected out of hand by the record companies, while new plaintiffs, such as its on-line competitor E-music, are joining the action against it. The continuing publicity seems to be doing Napster some good, though: in the week following the issue of the amended injunction, traffic on Napster's site increased by 3.5%, according to a report in the *Washington Post*.

The world's worst copyright laws?

If anything, Napster would be even more illegal in Ireland than in the USA. The *Copyright and Related Rights Act, 2000* has amended and reformed Irish copyright law to ensure that it will be impossible for Napster-type services to set up here. Section 40(1) of the act provides that the copyright holder has the exclusive right to control the making available of a work to the public, including 'making available to the public of copies of the work, by wire or wireless means, in such a way that members of the public may access the work from a place and at a time chosen by them (including the making available of copies of works through the Internet)'.

The whole purpose of the Napster system is the 'making available of copies of works through the Internet', so it would obviously infringe against this right. There are a variety of other rights that would be infringed. The system itself might infringe against the distribution right as defined in section 41 of the act, and users who uploaded music files through the system would be in breach of both these rights. Users who 'ripped' tracks from CDs and converted them to the MP3 format used by Napster would infringe the adaptation right mentioned in section 43, while users who downloaded files would infringe against the reproduction right cited in section 39. Both the system and users would also be committing secondary infringement by making infringing copies available to the public and the system might also be providing the means for making infringing copies, which is prohibited by section 46 of the act. As in the USA, it is unlikely that either the system or users would be able to avail of any of the fair use exceptions or any other defences available in law. The only remaining issue is whether or not the system and its users would be able to avoid criminal charges in addition to civil liability.

So both the commercial system and individual user will commit an offence. Furthermore, the Oireachtas is currently debating in committee the *Criminal Justice (Theft and Fraud Offences) Bill, 2000*. In its current form, section 9 of the bill provides that: 'A person

PLAINTIFFS IN THE NAPSTER CASE

The full list of plaintiffs reads:

- A&M Records
- Geffen Records
- Interscope Records
- Sony Music Entertainment
- MCA Records
- Atlantic Recording Corp
- Island Records
- Motown Record Co, and
- Capitol Records

who dishonestly, whether within or outside the state, operates or causes to be operated a computer within the state with the intention of making a gain for himself or herself or another, or of causing loss to another, is guilty of an offence'.

'Dishonest' is defined by the bill as 'without a claim of right made in good faith' (section 2.1). Since both system and users would be in breach of the copyright holders' rights, they would be acting dishonestly. The significance of these new proposed offences is two-fold: first, the penalties are higher than under the *Copyright Act, 2000*; and, second, the definition of offence is much broader. Offences can only be committed under the *Copyright Act, 2000* in very limited circumstances; the new bill will criminalise any breach of copyright or indeed any other intellectual property right. If the bill should become law in its current form, Ireland will have gone from having one of the world's worst copyright laws to having its most draconian. As such, the bill goes too far. Although it is important that Ireland should have effective protections for intellectual property, it would not be helpful or wise to turn everybody who infringes copyright in even the most minor way into a criminal.

Concerns have been raised with regard to the privacy of users in these proceedings. One group, called Aimster, has produced an encoder to frustrate the process of filtering music files, arguing that the contents of individuals' files is none of the business of Napster or the record companies. Given that users are uploading files voluntarily, it is likely that their consent to the filtering can be implied if it was not given explicitly when the users registered, so nullifying such privacy arguments. In an Irish context, any attempt to invoke the *Data Protection Act, 1988* or the *Data protection directive* would probably fail.

Winning the battle, losing the war

The success of the record companies against Napster appears to be unquestionable, but while winning this battle, they may be in danger of losing the war. The motives of the industry have been questioned and not just in Internet chat-rooms which cater to the lunatic fringe. *The Economist* has suggested that 'the Napster case is not just, or even mainly, about piracy. It is about business models. The industry wants to stick to its old one – selling expensive compact discs – and to protect it. But Napster's success shows that there is a lot of appetite for a new model ... Artists' interests deserve legal protection, within limits; business models do not'.

On-line music is hugely popular, and the tens of millions who have used the Napster system make up a potentially powerful political constituency. So the record companies are under pressure to provide their own alternatives to Napster, and one major publisher, Bertelsmann, has taken the step of acquiring an option over Napster itself. If it fails to do so, then the US legislature may come under pressure to change the law to facilitate peer-to-peer

PENALTIES UNDER THE COPYRIGHT AND RELATED RIGHTS ACT, 2000

Section 140(1) states that an offence punishable by up to five years' imprisonment and a fine of up to £100,000 will be committed by any person who 'in the course of a business, trade or profession, has in his or her possession, custody or control, or makes available to the public, or ... otherwise than in the course of a business, trade or profession makes available to the public to such an extent as to prejudice the interests of the owner of the copyright, a copy of a work which is, and which he or she knows or has reason to believe is, an infringing copy of the work'.

services. The problem for the record industry is that there are plenty of other systems that permit the sharing of Internet music, such as Gnutella. Many of these dispense with central servers or control, which makes them harder to use than Napster, but it also makes them harder to sue. For as long as such free systems remain in operation, the success of any legitimate system which wants to charge for its services will remain in doubt. But if the record companies cannot provide the public with all the advantages of low-cost Internet distribution, then it will appear that they are simply trying to preserve their distribution networks in the form of CD pressing plants, warehouses and record stores.



Tough choices to make

This environment will create tough regulatory choices for an Ireland that wants to become a central hub for e-commerce. Although Ireland produces a surfeit of copyright authors and creators, it is not home to anything approaching a major publishing industry of music, literary or other works. So it is in Ireland's interest to see the development of low-cost on-line publishing. The benefits to Irish authors may be substantial: although the publication of books on-line is still at an experimental stage, authors get a much higher royalty when their books are published electronically than when they are published in printed form. The digital signature industry, which Ireland hopes to develop as a result of the *Electronic Commerce Act, 2000*, may facilitate the development of such services. But it is possible that the privacy protections that are an integral element of that act may also enable a Napster-type service to defy copyright law. (Under the *Electronic Commerce Act, 2000*, the privacy of an electronic signature is pretty much inviolate, so a program could be designed which would use this protection to hide the identity of users on a Napster-type system.)

It is important to recognise that the Internet developed rapidly because it was not restricted by over-regulation or, indeed, any regulation in many cases. It must be a concern that in its enthusiasm to legislate for e-commerce, Ireland may create a regulatory environment that hinders its growth. **G**

Denis Kelleher is a practising barrister and co-author of Information technology law in Ireland and IT law in the European Union.

Settling cases out of court may seem like the quickest and most cost-effective way of solving a contentious issue but, as Paul Anthony McDermott explains, misunderstandings about the terms can bring litigants and their lawyers back into conflict

One area which has given rise to a considerable amount of litigation in this jurisdiction is out-of-court settlements. Sometimes settlements are conducted in less than ideal conditions. Lawyers may be under pressure from their clients, the trial judge might be growing impatient in his empty court, the hour may be late and the case complex. So it should come as no surprise that occasionally, when the dust has settled and both

Avoiding mistakes

sides seek to enforce what they think they have agreed, it becomes apparent that they walked away from the negotiations with a very different idea of what was agreed.

Two matters in particular seem open to potential pitfalls in this regard. The first is the issue of who is to pay for the costs incurred up to the settlement. And where there are multiple proceedings, the second common bone of contention is whether or not all of the existing proceedings have been disposed of by the settlement.

It is apparent from the case law that two scenarios must be distinguished. The first is an instance where, on an objective view, there has been an offer and acceptance that coincide, and one party has merely made a unilateral mistake as to the effect or consequences of the settlement. Such a mistake will not affect the validity of the settlement.

Costello J has identified three reasons for the existence of such a rule in *O'Neill v Ryan (No 3)* ([1992] 1 IR 166 at 187):

- There is a need for certainty in business
- The rule is required for the proper administration of justice. One party to a contract cannot defend himself against it by setting up a misunderstanding on his part as to the real meaning and effect of the contract. To permit such a defence would be to open the door to perjury and to destroy the security of contracts
- If an offeror intends his offer in one sense but fails to convey that sense in the words he uses (as objectively determined) and the offeree accepts it in the sense in which the words could reasonably be construed, the offeror is estopped from relying on his own error if the offeree would suffer as a result.

MAIN POINTS

- Unilateral mistakes and mutual mistakes
- Approach taken by the courts
- Case law on mistaken settlements



taken settlements

The second scenario is where, on an objective view, the offer and acceptance did not coincide. In other words, a mutual mistake has occurred. In such circumstances, the alleged settlement is a nullity.

On its face, this dichotomy seems simple enough. The problem is that one can often fit the facts of a case into either scenario, depending on the results that one wants. There are an infinite number of ways in which a mistake can be made and, rather than falling neatly into one of two categories, most mistakes are somewhere on a spectrum, ranging from a pure unilateral mistake at one extreme to a case of a pure mutual mistake at the other. Rather than focusing on the technicalities of mistakes, it may be more helpful to consider the nature of settlement discussions. In the most recent English case to look at the issue, *Clarion Ltd v National Provident Institution* ([2000] 2 All ER 265), Rimer J stated:

‘The compromise of litigation is a contractual exercise in which it is the commonest thing for each side to be aware of facts and matters of which it either knows or at least suspects the other side is ignorant. If each side knew all that the other side knew, then either no or only a very different compromise would be reached. In the negotiation of such compromises, the parties must be careful not to make any misrepresentations. But there is in my view no general duty imposed upon them in the nature of a duty of disclosure. The negotiations are in the nature of an arm’s length commercial bargain. Each party has to look after his own interests and neither owes a duty of care to the other. It would in my view be astonishing if, in the ordinary case, a defendant could later set aside a compromise merely because he had learnt from some “loose talk at a bar function” that he had materially over-paid a claimant who, unbeknown to him but well known to the claimant’s advisers, probably

could not have proved his case at all’.

This statement should be borne in mind when attempting to analyse the Irish case law.

Unilateral mistakes

A case which fell on the unilateral mistake end of the spectrum was *Reen v Bank of Ireland Finance* ([1983] ILRM 507). An action for breach of contract was settled for £3,000 on terms which the plaintiff’s solicitor erroneously believed would include all legal costs involved. This was incorrect. In fact, the solicitor for the defendant was aware that further expenses would accrue for the plaintiff. The plaintiff claimed that the contract was liable to be set aside for mistake. McMahon J dismissed the action, remarking that the offer and acceptance corresponded and that there was no mistake as to the terms of the agreement. He stated:

‘This is a case of a man entering into an agreement which he intended to make but which he would not have made but for a misunderstanding as to a matter extraneous to the agreement, namely, his client’s position vis-à-vis other parties in the litigation. [The plaintiff’s solicitor] was mistaken in his motive for entering into the agreement. He thought that it would get his client out of the litigation with a sum of £3,000 to cover the defects in her car and her liability for costs [to the plaintiff’s solicitor] as her solicitor. The mistake lay not in his consent to the agreement but in his motive for entering into it’.

He also concluded that there was no duty on the defendant’s solicitor to enquire of the plaintiff’s solicitor whether the costs of the plaintiff had all been dealt with. McMahon J quoted *Smith v Hughes* ([1871] LR 6 QB 597) for the proposition that ‘a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit; for whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake not induced by the act of the vendor’.

A similar conclusion was reached in *O’Neill v Ryan* (No 3). The plaintiff instituted proceedings under section 205 of the *Companies Act, 1963* against the defendants. He then issued proceedings against a number of parties (including the first defendant) in respect of a series of alleged wrongs, including misrepresentation and conspiracy. The plaintiff subsequently sought specific performance of an alleged agreement with the defendants to settle the first dispute. The defendants claimed that the agreement had been entered into by mistake and that the offer to settle was made on the basis that both sets of proceedings would be terminated. Costello J considered whether it could be said that an operative mutual mistake had occurred and quoted the following passage from *Chitty on contracts* (26th edition, Sweet & Maxwell, 1989) as representing the law:

‘The intention of the parties is, as a general rule, to be construed objectively. The language used by one party, whatever his real intention may be, is to be construed in the sense in which it would be reasonably understood by

‘If a reasonable man would have understood the contract in a certain sense, then, despite his mistake, the court will hold that the mistaken party is bound’

the other, or at least in the sense in which a reasonable person would construe it. Nevertheless, cases may occur in which the terms of the offer and acceptance suffer from such latent ambiguity that it is impossible reasonably to impute any agreement between them; or it may happen that one party knowingly accepts a promise in different terms from those intended by the other. In such circumstances, the mistake may render the contract void.

‘In most cases the application of the objective test will preclude a party who has entered into a contract under a mistake from setting up his mistake as a defence to an action against him for breach of contract. If a reasonable man would have understood the contract in a certain sense, then, despite his mistake, the court will hold that the mistaken party is bound. But where parties are genuinely at cross-purposes as to the subject matter of the contract, and the terms of the offer and acceptance are so ambiguous that it is not possible to point to one or other of the interpretations as the more probable, the court must necessarily hold that no contract exists’.

In objectively construing the words used by the defendant’s solicitors in their offer, they would be reasonably understood as an offer to settle the section 205 proceedings only, and not as an offer to settle both sets of proceedings. It was in this sense that the offer was accepted. The court could not take into account the fact that ‘the authors of the letter may have intended to make an offer of settlement different to that which a reasonable construction of the words they used disclosed’.

Mutual mistakes

A case which fell on the mutual mistake end of the spectrum was *Mespil v Capaldi* ([1986] ILRM 373). An action for possession of rented premises was initiated by the plaintiff lessor for breaches of covenant. Prior to these proceedings beginning, the defendants had settled existing litigation in respect of premises under an agreement which referred to ‘a full and final settlement of all matters’. The defendants claimed that on entering this agreement they had intended to settle all matters outstanding between the parties, including all current disputes which were not the subject of the proceedings.

RECTIFYING A SETTLEMENT

Rather than seeking to have a settlement declared void, a party may attempt to persuade the court to rectify it. In order to do this, it will be necessary to convince the court that there was a pre-existing settled agreement between the parties that was not reflected in the written document. The difficulty of establishing this is illustrated by the facts of *RMcD v VMcD* ([1993] ILRM 717), where the parties to a settlement of a matrimonial dispute simply overlooked the question of whether liability to pay costs formed part of the agreement. Finlay CJ refused to permit rectification of the agreement:

‘Even if there was an agreement made expressly that the husband was to pay the wife’s costs, it is clear from the drafting of the subsequent documents that there was no consensus ad idem as to the matters to be dealt with on taxation. Taking all the evidence and these matters into account, it seems to me that the plaintiff has failed to establish an express agreement entered into ... to the effect pleaded’ ([1993] ILRM 717 at 723).

O'Hanlon J held that the contract was not capable of having this extended application and held that because both sides were not under the same misapprehension as to the effect of the agreement 'there was an element of mutual mistake involved in the transaction' which could not, however, operate so as to defeat the plaintiff's legitimate expectations. On appeal, the Supreme Court held that the agreement was void for mutual mistake. Henchy J was satisfied that the two counsel for the parties had left court on the day of the agreement each with a genuine but opposite belief as to what the settlement had achieved. It was not a case where one party was seeking to rely on a secret intention in order to try to walk away from the contract. Rather, there was a mutual mistake as to the true nature of the agreement:

'It is of the essence of an enforceable simple contract that there be a consensus ad idem, expressed in an offer and an acceptance. Such a consensus cannot be said to exist unless there is a correspondence between the offer and the acceptance. If the offer made is accepted by the other person in a fundamentally different sense from that in which it was tendered by the offeror, and the circumstances are objectively such as to justify such an acceptance, there cannot be said to be the meeting of minds which is essential for an enforceable contract. In such circumstances, the alleged contract is a nullity.'

On the facts of the case, Henchy J was satisfied that the negotiations and the wording of the settlement were capable of justifying the opinion of counsel for the defendant that the settlement was adequate to cover all outstanding complaints between the parties. It could also be said, on an objective consideration of the relevant circumstances, that counsel for the plaintiff was justified in thinking that the settlement was limited to the matters in dispute in the two actions then being settled. He concluded:


'In those circumstances of latent ambiguity and mutual misunderstanding, it must be held that there was no real agreement between the parties. The two counsel who negotiated the settlement were understandably at cross-purposes. The result was that the seeming agreement expressed in the written consent was in fact no agreement. There was a fundamental misunderstanding as to the basis of the settlement. It is clear that the defendants would not have agreed to make the payments required by the settlement if they knew that the plaintiffs could seek to oust them from the premises by means of other proceedings. It is equally clear that counsel for the plaintiffs would not have signed the settlement if he knew it would be treated by the defendants as an absolution of them from all complaints by the plaintiffs.'

While the Supreme Court upheld the distinction between a mistake as to the impact or effect of the bargain (which is not effective) and a mistake as to the true nature of the agreement (which may be effective), it categorised the mistake before it as falling into the second category.

Time of the mistake

In order to attract legal consequences, the mistake must substantially be shared by both parties and must relate to facts as they existed at the time the settlement was made. If the fact in issue was true at the time the settlement was entered into, then it is irrelevant to the law of mistake. This simple proposition is clearly illustrated in *Fitzsimons v O'Hanlon* ([1999] 2 ILRM 551). The plaintiffs, who were cousins of the deceased, sought to extract a grant of representation in the belief that they were his next of kin. However, the defendants issued proceedings seeking a declaration that they were the non-marital children of the deceased. If successful, this application would have resulted in the plaintiffs being excluded from sharing in the estate of the deceased. In 1995, a compromise was reached under which the plaintiffs would receive a sum of £60,500 and costs in full and final settlement of any claim that they might have against the estate of the deceased. At this time, both parties were under the apprehension that the net value of the estate was approximately £120,000. In 1997, it emerged that, contrary to earlier investigations, another sum of almost £60,000 was on deposit with a building society in the name of the deceased. The plaintiffs issued proceedings seeking a share of this money and, if necessary, an order setting aside the settlement. They argued that the compromise of £60,500 amounted to a 50/50 split of the net estate and that the real basis of the agreement was a 50/50 split. Thus, they claimed that the agreement should be set aside on the basis of a shared mistake of fact. Budd J was unable to identify any mistake that could be said to have had occurred at the time of the compromise:

'In this case, the parties all bona fide believed that all the assets had been located and their approximate value ascertained. There was no mistake as to what assets were included in the estate at the time when the compromise was reached in consideration of which the plaintiffs withdrew their opposition to the declaration of paternity. The fact of the further fund in the building society which came to light subsequently, while an important factor, did not destroy the identity of the subject matter of the agreement as it then was when the contract was made and accordingly the contract was not void.'

The cases discussed in this article emphasise the need for care to be taken in settling even the most seemingly straightforward cases. Irish courts are extremely slow to overturn what appears to be a concluded settlement. It is only where the parties to a settlement can be shown to have been genuinely at cross-purposes that a court will even consider setting aside a settlement. In conclusion, it can be said that if a mistake is made in a settlement, a greater mistake can often be committed in attempting to overturn the first mistake. 

Paul Anthony McDermott is a barrister and the author of three books, Res judicata and double jeopardy, Irish prison law and Irish criminal law (with Peter Charleton SC and Marguerite Bolger BL).



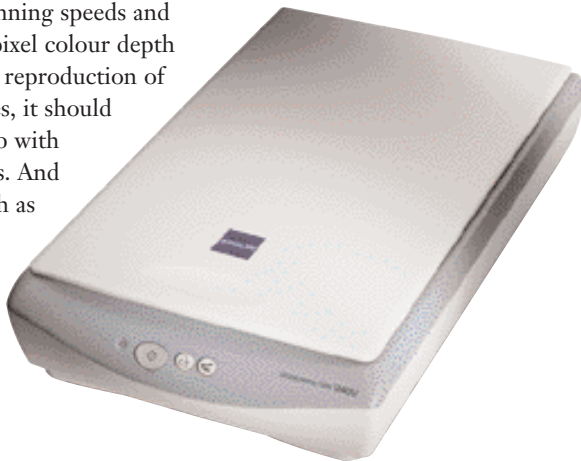
Tech trends

By Maria Behan

Scantastic business tool

Epson's none-too-modestly named Perfection 1240U photo and text scanner is designed for home and small business use. Here comes the science bit: with an optical resolution of 1,200 by 2,400 dpi, fast scanning speeds and 42-bit-per-pixel colour depth for accurate reproduction of subtle shades, it should do a nice job with photographs. And features such as document

recognition and automatic skew correction mean this device should have little trouble making sense of printed material either. *Available for about £310 from CompuStore.*



Get nagged in Latin

Designed by and for lawyers, Amicus Attorney presents you with an on-screen interface that looks like the platonic ideal of a solicitor's office, down to the panelled walls, mahogany desk and padded leather chair. But this software suite isn't just a pretty (stuffy) face: it packs functions such as a file organiser, appointments manager, time tracker and contact-management software. Two other features that might come in handy are the auto-dialler, which means you can click on an icon to auto-



matically ring any of the contacts listed in the system, and a daily report, which starts the morning with an overview of the tasks for the day ahead, and prompts you to tie up yesterday's loose ends with reminders such as 'some of the items on your to-do list are getting rather stale'. *The advanced version lets you network together a firm of up to 29 users and costs £399 per user; the client/server edition adds additional capabilities, supports up to 200 users and costs £499 per seat; available from Legal IT on 021 432 1829. For additional information, visit www.amicusattorney.com.*

The EZ way to get snap happy

The compact Kodak EZ200 digital camera aims to simplify digital photography. Its 4 MB internal memory stores up to 128 images as fast as you can click on them, so you can shoot away to your

heart's content, then later delete the snaps that don't make the grade because of dodgy camera angles, inopportune blinks or double chins. The digital stills that you think are up to snuff can

be printed, e-mailed, or posted to the web – and the EZ200's video capabilities mean that you can even get things moving. *Available for about £134 from CompuStore outlets.*

Big blue beauty

IBM's NetVista A20i desktop computer system comes with a 700MHz processor, a 15-inch monitor, 64 MB of RAM, a roomy 15 GB hard disk, a 12x DVD drive and a 56 kbps modem. Now that these numbers are out of the way (and solid ones they are, especially given the price), we can point to this PC's most obviously outstanding feature: its cool blue-and-black colour scheme. *Available for about £880 at computer outlets.*



Digital bean-counting

If you're looking to bring your firm's book-keeping into the 21st century, you might want to look into Sage Ireland's accounting software, which comes in different versions to suit the needs of different companies. Sage Line 50, a

Windows-based program designed for companies of up to 50 employees with a turnover of £2 million and under, may be just the thing for many firms. It features ledger tracking, VAT management, credit control

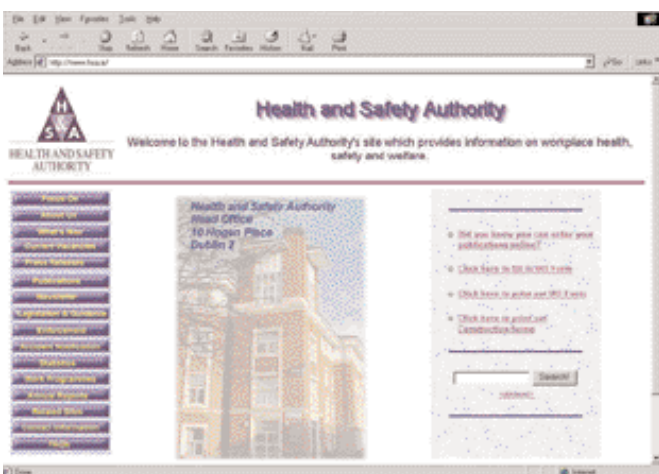
and a euro currency converter. Available from software outlets such as ADP Business Solutions on 01 298 0025. Prices start at £520 and increase based on the particulars of your installation and the support services required.



Sites to see



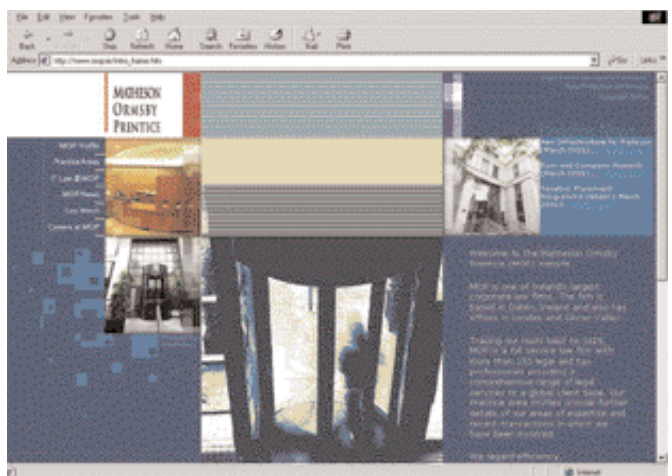
The Paper Boy (www.thepaperboy.com). With links to more than 3,000 periodicals in 129 countries from Angola to Zaire, this site offers enough fodder to satisfy even the most ravenous news-hounds. There are 28 titles in the Irish section, from *An Phoblacht* to the *Westmeath Examiner*. There's even a translation feature, but be warned: an attempt to translate *An Phoblacht* into Italian caused the system to crash – but that's probably not a very common request.



Health and Safety Authority (www.hsa.ie). Features meaty information on laws, regulations and codes. It also includes forms that can be printed out and used, a section devoted to statistics, and a *What's new* area.

Entertainment Ireland (www.entertainmentireland.com).

Looking to add a little pizzazz into your life? This site offers the latest listings on everything from TV and clubbing to museum exhibitions and restaurants. You can even check up on the weather or the latest Lotto numbers, and the *Tickets* feature lets you make bookings for concerts and other events.



Matheson Ormsby Prentice (www.mop.ie). This rather slick-looking site offers the low-down on the firm, as well as a *Law Watch* section that features updates on changes in legislation.



CoWorkerHints (www.coworkerhints.com). Trying to come up with a gentle way to let a colleague know that he's got the table manners – or the breath – of a mountain yak? Then log on to this site, which lets you pay a fee and have an anonymous letter pointing out the problem posted from the United States. If you're bold enough to handle matters yourself, you might avail of the site's tips on addressing delicate matters with the subtlety they deserve.



Book reviews

Equity and the law of trusts in Ireland (second edition)

Hilary Delany. Round Hall Sweet & Maxwell (1999), 43 Fitzwilliam Place, Dublin 2.

ISBN 1-85800-138-2 (paperback), 1-85800-137-4 (hardback). Price: £49 paperback, £89 hardback.

In the preface to the first edition of her book (1995), the author wrote that her work was designed primarily to fulfil the needs of students. There is no doubt that this aim was triumphantly achieved and surpassed. In the years that have passed, it has also become an invaluable reference point for even the most experienced practitioner, whether solicitor or barrister.

The second edition is a wonderful addition to the library shelves, bringing up to date the many developments which have taken place in the case law relating to equitable principles and trusts. The author is able to set out with great clarity the often-complex concepts involved in these areas.

For example, the developments which have taken place in the area of constructive trusts are described in most

interesting detail. The author explores the development of the so-called 'new model constructive trust' from its dramatic emergence per Lord Denning MR in *Hussey v Palmer* ([1972] 1WLR 1286). He stated that such a trust would be imposed 'whenever justice and good conscience require it'. This judgment was not greeted with universal approval either from the bench in England or from academic commentators, and was regarded as going too far in its efforts to enable courts of equity to do justice. The author reviews how the new model constructive trust has been greeted in other common-law countries, including in this jurisdiction. This concept is closely related to the concept of unjust enrichment.


Another topic of increasing importance, which the author sets out in most helpful detail,

is the *Mareva* injunction. She deals with the developments in this jurisdiction concerning the requirement that a plaintiff seeking a *Mareva* injunction must prove an intention on the part of the defendant to dissipate his assets so that they would not be available to meet a decree. This, as explained by the author, is in contrast to the jurisprudence of the English courts, which concentrates more on the effects of the defendant's actions rather than his intention.

Academics, practitioners and students alike will also welcome the interesting treatment of proprietary estoppel, and, in particular, her discussion of the need to establish detriment if such estoppel is to operate. Sections on proprietary estoppel and the related topic of 'unconscionability' will provide the reader with a real insight into recent

developments both here and abroad.

This book should be compulsory reading for anyone interested in the law of equity and trusts. We are all fortunate in having amongst us such a prolific author of such consistently high standards. She follows in the footsteps of her late father, Vincent Delany, who gave us such an excellent work on the law of charities.

It is her clarity which immediately appeals. Even when dealing with complex concepts, she never loses her ability to engage the reader. This clarity is to no small extent assisted by the excellence of the backroom work done by her publishers, Round Hall Sweet and Maxwell. Together they have produced a work of real worth. 

Michael Peart is a partner in the Dublin law firm Pearts.

Partnership law

Michael Twomey. Butterworths (2000), 26 Upper Ormond Quay, Dublin 7. ISBN: 1-85-475-8853. Price: stg£95.

This is a serious scholarly work by a colleague. When I undertook to do this review last November, I did so with enthusiasm, as it is a subject in which I have great interest. I underestimated the time in which I would complete my review. This was due in part to my preoccupation with other matters, but largely because the work is so interesting and extensive. It consists of 847

pages of text. It is written in a careful and logical style. Having lectured in this area of the law, I admire the extensive research that has clearly been involved in putting this work together.

I never realised the hundreds of Irish cases that exist in this branch of law. The use of these cases helps the reader to understand many aspects of the *Partnership Act 1890*. At first glance, you

might be tempted to criticise the author for repetition of certain cases, but this would be an injustice, as their repetition was absolutely necessary to illustrate other points. The author has also used the opportunity to suggest improvements in the law. The 1890 act, I have always held, is an extraordinary lucid and clear piece of legislation which has stood the test of time, but is in

need of improvement in the many ways suggested in this book. The importance of section 46 is correctly stressed, in that it preserved the rules of equity and common law. There is also useful discussion of quasi-partnerships. The author's comments in relation to the cross-fertilisation between company and partnership law, by means of the application of partnership principles to

certain closely-held companies, demonstrate his practical understanding of the law of partnership. I share his view that partnership law is in greater need of fertilisation from the considerably more active field of company law, rather than vice versa.

The practical nature of the work is also demonstrated in

the chapter on limited partnerships. The author suggests that it is prudent to provide in the limited partnership agreement that the partnership is not to begin to trade until the registration of the limited partnership has taken place. He also points to the apparent oversight in part 8 of the *Stamp Duties Consolidation*

Act, 1999 in relation to the capital duty imposed on limited partnerships.

This work demonstrates the enthusiasm of the author for his chosen topic. It is evident that he enjoyed writing the work, although I am sure at times he wondered about his mission. I say with confidence that this is a work to which the legal

profession will turn time and time again. It is a book which deserves to be purchased by all members of the legal profession and all others who are involved in or study this area of law. I earnestly commend this excellent work. **G**

Laurence K Shields is managing partner of LK Shields, Solicitors.

Annual review of Irish law (1999)

Raymond Byrne and William Binchy. Round Hall Sweet & Maxwell (2000), 43 Fitzwilliam Place, Dublin 2. ISBN: 1-85800-164-1. Price: £115.

Raymond Byrne and Professor William Binchy have produced their 13th volume in the *Annual review* series. This is most welcome. The authors provide a review of legal developments, judicial and statutory, that occurred in 1999.

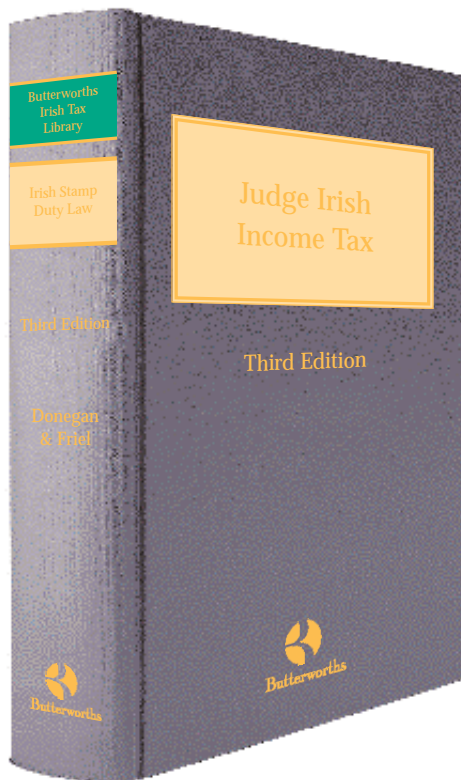
Apart from a table of cases, table of legislation and an index, the law under 33

separate headings is considered by the authors and some specialist contributors. These headings include: administrative law, agriculture, constitutional law, education, employment and labour law, land law, law reform, licensing, limitation of actions, planning law, practice and procedure, restitution, safety and health, social welfare and torts.

In a previous notice welcoming this book, I wrote that the *Annual review* represented a monumental achievement providing practitioners, academics and students with an analytical and perceptive account of legal developments. That standard has been maintained. The *Annual review* is a treasury of scholarship and practical guidance.

As early as the first volume, I described the achievement of the publication of the *Annual review* as heralding the inauguration of a new Irish institution. We have not been disappointed. An investment in the latest *Annual review* should be repaid handsomely. **G**

Dr Eamonn Hall is company solicitor of Eircom plc.



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Report of Law Society Council meeting held on 26 January 2001

Motion: amendment to guide for criminal lawyers

'That this Council approves the amendment of the Guide to professional conduct for criminal law practitioners to include an additional sub-paragraph at recommendation 5 thereof, as follows:

"5.1. A solicitor shall not offer any inducement to any person in order to encourage referrals to that solicitor or any solicitor in his or her firm".'

Proposed: James MacGuill

Seconded: John Fish

The Council agreed that it was totally unacceptable for any solicitor, including a criminal law practitioner, to offer any form of inducement to any person in order to encourage referrals to their firm. The motion was unanimously approved by the Council.

Miley v Flood

The Council discussed a summary of the judgment of Kelly J, delivered on 24 January 2001, in *Miley v Flood*. The director general reported that the Law Society submissions in the case had considered every case involving identity privilege in other jurisdictions. Kelly J had concluded that the issue of privilege was dominated in Ireland by the *Smurfit Paribas* case and that, as a matter of law, legal professional privilege in Ireland attached only to legal advice and not to legal assistance. He had found that the only circumstances in which identity privilege might arise were (a) where a criminal offence was involved and disclosure of identity might amount to breach of the right against self-incrimination, and (b) where the name of the client was so bound up with the advice given that to reveal one would reveal the other.

The Council discussed the fundamental importance of confi-

dentiality to the solicitor/client relationship and in the administration of justice generally. It was unanimously agreed that the society should continue its efforts to reinforce the principle and should participate again as an *amicus curiae* in any appeal brought by Stephen Miley to the Supreme Court.

Proposed Judicial Council on judicial conduct and ethics

The director general outlined the contents of a report from the Committee on Judicial Conduct and Ethics, which recommended the establishment of a Judicial Council. It was envisaged that the council would deal with judicial conduct and ethics, studies and publications, remuneration and conditions of work. He noted that the proposed council would be comprised solely of judges, but that a committee of the council, which would deal with complaints of judicial misconduct, would comprise one lay member and two judges when conducting an inquiry. Most disappointingly, the report concluded that it was preferable not to involve solicitors and/or barristers in the complaints process, on the basis that lay participation was sufficient to meet the need for transparency.

The Council discussed the report and concluded that there could not be full confidence in any such body if it did not include a representative of practising lawyers, as is the case in other jurisdictions. Lay members would not have either the knowledge or expertise to challenge the judiciary in relation to systems operating in the courts. Concerns were also expressed about the procedures involved, in that a complainant would be required to make his case in writ-

ing and reveal his identity, with no suggestion of a similar requirement on a judge to put his case in writing. There was also no suggestion of oral hearings or of the giving of reasons for decisions.

It was agreed that the president should write to the chief justice enquiring as to the reasons for the exclusion of lawyers from the process. It was also agreed that the society should continue to make strong representations for solicitor membership of the committee.

Judicial case management discussion document

The Council considered a discussion document on judicial case management, prepared by the Litigation Committee. David Martin explained that the document had been prepared at the invitation of the president of the High Court and represented the results of a consultation process with the profession and the local bar associations. It envisaged a role for judicial case management in large complex commercial and similar disputes, but felt that it would be expensive, over-elaborate and unnecessary in other forms of litigation. He noted that a sub-committee had now been established, under the chairmanship of Mr Justice Nicholas Kearns, and involving three representatives of the solicitors' profession – Isabel Foley, Roddy Bourke and Gordon Holmes – to progress matters. It appeared that a pilot scheme would be introduced, with judicial case management being operated in cases selected by agreement of the parties.

New Solicitors' Accounts Regulations

Gerard Doherty outlined proposals in relation to new *Solicitors' Accounts Regulations*, to replace the

In briefing this month...

- Council report page 37
- Solicitors' Benevolent Association 137th report and accounts page 39
- Legislation update page 40
- Personal injury judgments page 42
- FirstLaw Update page 46
 - Constitutional Courts
 - Criminal Damages
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 - Negligence
 - Planning
 - Practice and procedure
 - Probate
- Eurlegal page 51
 - The Treaty of Nice
 - Recent developments in European law

regulations which had been in place for over 16 years. The proposals reflected developments in the law and practice over that time, together with policy decisions taken by the Council. The Council approved the proposals and agreed that the draft regulations should be circulated for consideration at the next Council meeting.

Law Society representative

The Council approved the appointment of Michael Boylan, Augustus Cullen & Son, as the society's representative on a group established by the Department of Health and Children to consider the introduction of no-fault compensation for brain damaged babies. **G**

LIBER MEMORIALIS

PROFESSOR JAMES C. BRADY

EDITED BY
OONAGH BREEN, JAMES CASEY AND ANTHONY KERR

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Round Hall are privileged to publish a collection of essays written in honour of the late Professor James C. Brady. The essays are written by a team of distinguished scholars and practitioners – friends, contemporaries and colleagues.

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Solicitors' Benevolent Association

137th report and accounts

Year 1 December 1999 to 30 November 2000

The Solicitors' Benevolent Association, founded in 1863, is the profession's voluntary charitable body. It consists of members of the profession throughout Ireland who contribute to our funds, and its aim is to assist members or former members of the profession and their spouses, widows, widowers, families and dependants who are in need. The association also provides advice and financial assistance on a confidential basis and functions independently of both law societies.

The amount paid out during the year in grants was IRE£215,170. Currently, there are 54 beneficiaries in receipt of regular grants. One third of these are themselves supporting spouses and children.

The association is only in a position to provide beneficiaries and their dependants with the bare necessities to live and the vast majority of applicants would also be in receipt of social welfare assistance from the state. All cases are kept under regular review.

It has been the policy of the directors in recent years to provide financial assistance in suitable cases by way of loans repayable by the estate of the applicant or out of the proceeds of sale

of any assets which he or she may have. Applicants are asked to complete documentation in acknowledgement of such loans and, as some of these loans have now been repaid, this has increased the income of our association.

There are currently 19 directors, three of whom reside in Northern Ireland, and they meet monthly in the Law Society's offices, Blackhall Place. They meet at Law Society House, Belfast, every other year. The work of the directors, who provide their services entirely on a voluntary basis, consists in the main of reviewing applications for grants. The directors also make themselves available to those who may need personal or professional advice.

The directors are grateful to both law societies for their support and, in particular, wish to express thanks to Anthony H Ensor, Immediate Past-President of the Law Society of Ireland, and John Meehan, Past-President of the Law Society of Northern Ireland, Director General Ken Murphy, Chief Executive John Baillie, and the personnel of both societies.

I wish to express particular appreciation to all those who contributed to the association when applying for their prac-

tising certificates, to those who made individual contributions and to the following: the Law Society of Ireland, Dublin Solicitors' Bar Association, Belfast Solicitors' Association, Faculty of Notaries Public in Ireland, Limavady Solicitors' Association, Kilkenny Solicitors' Association, Tipperary and Offaly Bar Association, County Wexford Solicitors' Association, Ashville Media Group Ltd (Law Diary), West Cork Bar Association, and the Law Society of Northern Ireland.

To cover the ever-greater demands on the association, additional subscriptions are more than welcome as, of course, are legacies. Subscriptions and donations will be received by any of the directors or by the secretary, from whom all information may be obtained at 73 Park Avenue, Dublin 4, and I would urge all members of the association, when making their own wills, to leave a legacy to the association. You will find the appropriate wording of a bequest on page 26 of the *Law directory*.

I would like to thank all the directors and the association's secretary, Geraldine Pearse, for their valued hard work, dedication and assistance during the year.

Thomas A Menton, chairman

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RECEIPTS AND PAYMENTS ACCOUNT

YEAR ENDED 30 NOVEMBER 2000

	2000	1999
Receipts	IRE	IRE
Subscriptions	187,454	174,267
Donations	19,664	27,314
Investment income	34,799	31,666
Bank interest	2,640	2,324
Tax refund	-	5,301
Repayment of grants loaned	-	3,301
	244,557	244,173
Payments		
Grants	(215,170)	(198,614)
Bank charges	(1,322)	(910)
Administration expenses	(15,839)	(11,543)
	12,226	33,106
Surplus for the year before special events proceeds		
Lawyers' diaries and Christmas cards	16,910	507
Irish conveyancing precedents publication	-	39
Library book sale	-	107
	16,910	653
Surplus for year before legacies	29,136	33,759
Legacies	111,418	5,027
	140,554	38,786
Transfer from/(to) reserve account	-	(60,000)
Surplus/(deficit) for year	140,554	(21,214)

ACCOUNTING POLICIES

a) Accounting convention. The accounts have been prepared under the historical cost convention. The currency used in these accounts is the Irish pound as denoted by the symbol IRE.

b) Receipts and payments. Receipts and payments are recognised in the accounts as they are received and paid.

c) Investments. Investments are stated at cost less provision for any permanent diminution in value.

d) Sterling. Assets and liabilities denominated in sterling are converted to Irish pounds at the rate of exchange prevailing at the balance sheet date. Income and expenditure denominated in sterling are converted to Irish pounds at the average exchange rate prevailing during the year. The rates applicable for the year ended 30 November 2000 were:

	IRE	Stg£
• Year end:	1	0.7782
• Average:	1	0.7745

ACCOUNTANTS' REPORT

We have prepared the accounts set out above for the year ended 30 November 2000 from the accounting records and information and explanations supplied to us. In our opinion, the accounts are in accordance therewith.

*PricewaterhouseCoopers
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Registered Auditors
Dublin*

LEGISLATION UPDATE: 12 JANUARY – 16 MARCH 2001

ACTS PASSED

Aviation Regulation Act, 2001

Number: 1/2001

Contents note: Establishes the Commission for Aviation Regulation, which will be responsible for the independent regulation of airport charges, including charges for terminal services provided by the Irish Aviation Authority, and also for a number of other aviation functions currently under the responsibility of the minister for public enterprise; amends the *Irish Aviation Authority Act, 1993*, the *Freedom of Information Act, 1997*, the *Air Navigation and Transport (Amendment) Act, 1998*, and the *Air Navigation and Transport Act, 1973*

Date enacted: 21/2/2001

Commencement date: 21/2/2001. 27/2/2001 appointed as the establishment day for the purposes of the act (per SI 47/2001)

Broadcasting Act, 2001

Number: 4/2001

Contents note: Makes further provision in relation to broadcasting. Provides for the introduction of digital terrestrial television (DTT) in the state; provides that the minister for arts, heritage, gaeltacht and the islands may designate a company which will be licensed by the director of telecommunications regulation to construct and operate the DTT infrastructure. Provides for the name of the Independent Radio and Television Commission (IRTC) to be changed to the Broadcasting Commission of Ireland and gives this body expanded powers and functions. Repeals and restates the provisions of the *Broadcasting Authority Act, 1960* and the *Radio and Television Act, 1988* in relation to the Broadcasting Complaints Commission and extends the powers of investigation of the Commission. Establishes Teilifis na Gaeilge as a statutory corporate body and defines its functions, and provides for related matters

Date enacted: 13/3/2001

Commencement date: commencement order/s to be made (per s1(4) of the act)

Customs and Excise (Mutual Assistance) Act, 2001

Number: 2/2001

Contents note: Gives the force of law to the EU convention of 26/7/1995 on the use of information technology for customs purposes; to the agreement on provisional application of that convention; to the protocol of 19/11/1996 on the interpretation of that convention by the Court of Justice of the European Communities; to the protocol of 12/3/1999 which corrects two deficiencies in that convention; and to the EU convention of 18/12/1997 on mutual assistance and co-operation between customs administrations

Date enacted: 9/3/2001

Commencement date: commencement order/s to be made (per s12 of the act)

Diseases of Animals (Amendment) Act, 2001

Number: 3/2001

Contents note: Amends and extends the *Diseases of Animals Acts, 1966 to 2000* to enable significant powers to be exercised in circumstances where there is a risk of an outbreak of serious animal disease or during an outbreak. Confirms the *Foot-and-Mouth Disease Order 1956* (SI 324 of 1956), as amended, and confirms a number of newly-made orders and regulations: SI 49/2001; SI 50/2001; SI 51/2001, SI 52/2001; SI 55/2001; SI 56/2001; SI 59/2001; SI 60/2001; SI 61/2001; SI 62/2001 and SI 63/2001

Date enacted: 9/3/2001

Commencement date: 9/3/2001

SELECTED STATUTORY INSTRUMENTS

Adoptive Leave Act, 1995 (Extensions of Periods of Leave) Order 2001

Number: SI 30/2001

Contents note: Amends the *Adoptive Leave Act, 1995* to extend the periods of leave under the act

Commencement date: 8/2/2001

Data Protection (Registration) Regulations 2001

Number: SI 2/2001

Contents note: Provide for the registration, under section 16 of the *Data Protection Act, 1988*, of per-

sons who provide telecommunications services and Internet services, and who keep personal data relating to users of those services

Commencement date: 10/1/2001

Diseases of Animals (Restriction of Movement of Animals) Order 2001

Number: SI 56/2001

Diseases of Animals (Restriction of Movement of Animals) Order 2001 (Amendment) Order 2001

Number: SI 61/2001

European Communities (Import Restrictions (Foot and Mouth Disease)) Regulations 2001

Number: SI 55/2001

Foot and Mouth (Controlled Area) (No 1) Order 2001

Number: SI 59/2001

Foot and Mouth (Restriction on Movement) (No 2) Order 2001

Number: SI 60/2001

Foot and Mouth (Restriction on Movement) (No 3) Order 2001

Number: SI 62/2001

Foot and Mouth (Restriction on Movement) (No 4) Order 2001

Number: SI 63/2001

Foot and Mouth Disease (Hay, Straw and Peat Moss Litter) Order 2001

Number: SI 49/2001

Foot and Mouth Disease (Prohibition of Exhibition and Sale of Animals) Order 2001

Number: SI 50/2001

Foot and Mouth Disease (Restriction of Import of Horses and Greyhounds) Order 2001

Number: SI 52/2001

Foot and Mouth Disease (Restriction of Import of Vehicles, Machinery and other Equipment) Order 2001

Number: SI 51/2001

Health Insurance Act, 1994 (Establishment Day) Order 2001

Number: SI 40/2001

Contents note: Appoints 1/2/2001 as the establishment day for

the purposes of part IV of the *Health Insurance Act, 1994* relating to the establishment of the Health Insurance Authority

ICC Bank Act, 2000 (Sections 5 and 7) (Commencement) Order 2001

Number: SI 46/2001

Contents note: Appoints 12/2/2001 as the commencement date for sections 5 and 7 of the act

Life Assurance (Provision of Information) Regulations 2001

Number: SI 15/2001

Contents note: Require suppliers of life assurance to provide information to clients resident in Ireland before they sign a proposal or an application form in respect of life assurance, and also throughout the term of the policy. The information is to include details of the policy, its appropriateness to the needs of the client, early encashment consequences, projected benefits and charges, intermediary/sales remuneration, review of premium, cancellation rights, together with other general and additional information, some of which is already subject to disclosure pursuant to the *Third life assurance framework directive* (92/96/EEC) as implemented by SI 360/1994

Commencement date: 1/2/2001

Local Government (Planning and Development) General Policy Directive (Shopping) 1998 (Revocation Order) 2001

Number: SI 1/2001

Contents note: Revokes, with effect from 2/1/2001, the *Local Government (Planning and Development) General Policy Directive (Shopping) 1998* (SI 193/1998). However, SI 193/1998 will continue to apply to any planning application which is before a planning authority before the date of coming into force of this order (2/1/2001) and to any appeal against a decision on such application

Maternity Protection Act, 1994 (Extension of Periods of Leave) Order 2001

Number: SI 29/2001

Contents note: Amends the *Maternity Protection Act, 1994* to extend the periods of leave under the act

Commencement date: 8/2/2001

Protection of Employees (Employers' Insolvency) (Variation of Limit) Regulations 2001

Number: SI 42/2001

Contents note: Increase the limit of an employee's weekly remuneration from £300 to £400 for the purposes of calculating benefits under the *Protection of Employees (Employers' Insolvency) Acts, 1984 to 1991*. The increased ceiling applies to debts arising under the acts where the date of termination of employment or the date of insolvency is on or after 1/4/2001

Qualifications (Education and Training) Act, 1999 (Commencement) Order 2001

Number: SI 57/2001

Contents note: Appoints 26/2/2001 as the commencement date for parts I and II, and part VIII and the first, second and third schedules insofar as those provisions apply to part ii of the act

Taxes Consolidation Act, 1997 (Amendment of Schedule 4) Order 2001

Number: SI 43/2001

Contents note: Section 227 of the *Taxes Consolidation Act, 1997* provides that certain income of specified non-commercial state-sponsored bodies is exempt from certain tax provisions. This order amends the list of specified bodies – set out in schedule 4 of the *Taxes Consolidation Act, 1997* – to include county enterprise boards (within the meaning of the *Industrial Development Act, 1995*) and the National Milk Agency

Wildlife (Amendment) Act, 2000 (Commencement) Order 2001

Number: SI 71/2001

Contents note: Appoints 12/3/2001 as the commencement date for sections 3 and 46 of the *Wildlife (Amendment) Act, 2000*

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Personal injury judgments

Tort – personal injury – employer's liability – employee falling on footpath – relatively minor accident – depression and post-traumatic stress – damages in High Court – appeal to Supreme Court – whether damages excessive

CASE

***Sheila Brennan v Lissadell Towels Limited*, Supreme Court (Mrs Justice Denham, Mr Justice Fennelly and Mr Justice Hardiman), judgment of Mr Justice Hardiman (for the court) of 15 November 2000.**

THE FACTS

Sheila Brennan, born on 12 May 1955, fell over a timber plant or flower container which had been placed on the footpath leading from the premises of her employer, Lissadell Towels Ltd, to their car park. The accident occurred on the evening of 11 December 1995. Mrs Brennan was 40 years old at the time of the accident. Her husband was a mechanic. At the date of the accident, Mrs Brennan had been employed at Lissadell Towels for some 22 years, first as an assistant designer and subsequently as a designer. Her work related to computer-assisted designing of towels.

As a result of the fall, Mrs

Brennan suffered a neck injury and a fracture of the right elbow. Normally, this would take six weeks to heal. She recovered from the arm fracture but developed persistent pain in her neck aggravated by any movement. She also developed paraesthesiae of her hands and headaches. She complained of clumsiness and loss of grip in her hand. The elbow injury healed, subject to a slight limitation of movement.

Mrs Brennan was unable to work in the immediate aftermath of the accident. As time went by, she appeared to worsen; she had difficulty in holding a pen and gave evidence in the High Court that she would not be able to sit

on a stool in front of a computer and move her neck. She was unable to continue her hobby of painting.

Because her condition failed to improve, she began to feel useless and depressed. Her general practitioner recommended that she see a psychiatrist. Despite regular visits to the psychiatrist, there was evidence that she had become depressed to a disabling degree.

A consultant orthopaedic surgeon, a consultant neurosurgeon and a consultant neuro-physiologist had investigated the cause of her neck pain, loss of grip and clumsiness. A scan had established that she had disc degener-

ation at the C5/6 and C6/7 levels with annular bulges and small central disc prolapses. These conditions gave rise to pain and insomnia and affected her depressive condition. A consultant maxillo-facial surgeon stated that Mrs Brennan had a condition of the jaws involving clicking and full extension which were of a soft-tissue nature and were contributed to in large part by on-going stress and depression.

Mrs Brennan's gross weekly wage of at the time of the accident was £191. She alleged that she had been made redundant by Lissadell in March 1996, although this was denied in evidence by the company.

THE HIGH COURT HEARING

The case came for hearing before McGuinness J of the High Court. McGuinness J held that that Mrs Brennan appeared to be significantly disabled in a rather complex way with the interaction between pain in her neck and shoulders and the depression from which she was suffering. The judge considered that the key problem was that she had a career and a job which were very important to her and

that these had been lost. The judge noted that there was a

general lack of ordinary optimism by all the medical doctors

in the case in the context of a physical or psychological prognosis.

McGuinness J noted that by the end of the ten years, Mrs Brennan would probably have been disabled in any case despite the accident. Accordingly, she took this fact into account. Mrs Justice McGuinness awarded Mrs Brennan, in total, the sum of £191,881.

THE AWARD IN THE HIGH COURT

Agreed special damages:	£2,306
Special damages:	£1,907
Loss of earnings to date of trial:	£14,163
Loss of earnings for the future:	£43,554
General damages:	
(a) pain and suffering to date of trial:	£70,000
(b) pain and suffering in the future:	£60,000

APPEAL TO THE SUPREME COURT

Lissadell appealed the award to the Supreme Court, submitting that the sums awarded for general damages and for future loss of earnings were excessive. It was argued by

Lissadell that £70,000 was excessive for three years' pain and suffering and that it was illogical for the High Court to award a greater sum for the past than future suffering. It was also sub-

mitted that the prospect of recovery had been understated by the High Court, particularly in relation to the depression. It was further argued that McGuinness J had erred in the

High Court in concluding without evidence that some form of other employment would have yielded £120 a week. It was also argued that the High Court failed to adequately take into

consideration the possibilities that Mrs Brennan might not have returned to work at all, might have recovered or might have become disabled in any event, independent of the accident.

The Supreme Court delivered judgment on 15 November 2000.

Hardiman J delivered the judgment of the court. He stated it was common case that Mrs Brennan was good at her work and, apart from her wages, she derived considerable satisfaction from that work. He also stated that her work appeared to be

uniquely suited to her talents.

The judge noted that there was no serious challenge in the High Court to the evidence that Mrs Brennan was now a chronic pain-sufferer. In the context of any pre-existing degenerative condition on her part, he noted

the evidence of the surgeons that in any event the symptoms provoked by her accident could represent a premature onset by approximately five to ten years. He noted that that was the most favourable statement of the position from Lissadell's point of view.

APPROACH ADOPTED BY THE SUPREME COURT

Hardiman J stated the approach of the court to the hearing of appeals, such as Mrs Brennan's case, had been authoritatively considered in the case of *Hay v O'Grady* ([1992] 1 IR 210). He noted that the matters were usefully dealt with in the judgment of McCarthy J, beginning at page 217.

Hardiman J considered that the findings of fact of the High Court were perfectly reasonable and indeed moderate. He stated that there was, of necessity, an element of speculation as to when degenerative changes would have become seriously symptomatic. He noted that McGuinness J in the High Court had rejected Mrs Brennan's contention that she was entitled to damages for loss of earnings for her full working life and instead opted for the longer of the periods envisaged by the surgeons before, as a matter of probability, serious symptoms would have arisen. The Supreme Court considered that the High Court was quite entitled to do this on the evidence.

In relation to the significant general damages awarded, Hardiman J held that there was strong medical evidence to justify such an award. He referred to the surgeon who stated that Mrs Brennan had consistent pain in her neck and shoulders and a tingling sensation in both hands. There had been evidence from a psychiatrist that Mrs Brennan did

suffer and continued to suffer from a depressive illness and post-traumatic stress disorder and severe and persistent pain, all of which had arisen or were directly attributable to the accident on 11 December 1995. The psychiatrist had stated that Mrs Brennan's capacity to work and enjoy life had been enormously reduced and she was considerably incapacitated as a result. The psychiatrist had also stated that Mrs Brennan's experience with the physical and intimate side of her marriage had been considerably impaired.

The court referred to another psychiatrist who stated that Mrs Brennan would need constant monitoring and support on an indefinite basis and would certainly need home help.

In those circumstances,

Hardiman J stated that McGuinness J's award for general damages was by no means excessive. Mrs Brennan had a condition of constant pain, significant loss of function and insomnia, all of which contributed to the depression and made it impossible for her to work. She had suffered the loss of her previous lifestyle, of her independence and her physical integrity. He noted that, with the aid of counselling and medication, she had come to terms with them to some extent but was still suffering considerable pain. The loss of her work meant more to Mrs Brennan, according to Hardiman J, than the loss of the associated income. Considering the sum awarded for general damages as a whole, he considered that it

seemed impossible to criticise these in light of the evidence.

The consequences of a relatively simple accident for Mrs Brennan were indeed severe. Since the overall figure for damages seemed proportionate to the complaints, he would not disturb the findings of McGuinness J who had seen Mrs Brennan and her advisers.

Hardiman J emphasised that, in this case, the substantial sum awarded to Mrs Brennan was justified by the exceptional and on the whole uncontested evidence of the comprehensive destruction of her quality of life, which was quite out of proportion to the original comparatively minor injury to her right radial bone. As a consequence of the combination of depression and post-traumatic stress disorder and associated pain, she had suffered the loss of her satisfying and personally rewarding employment and disruption of her family and marital life. The judge concluded that, even if the onset of her physical symptoms was to be regarded as an acceleration of the effects of an underlying condition, her depression was considered by her medical advisers as likely to be permanent.

The Supreme Court dismissed the appeal of Lissadell Towels and affirmed the order of McGuinness J, who had awarded £191,881 to Mrs Brennan.

GENERAL APPROACH OF APPELLATE COURT IN PERSONAL INJURIES

'An appellate court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial judge who hears the substance of the evidence but, also, observes the manner in which it is given and the demeanour of those giving it. The arid pages of a transcript seldom reflect the atmosphere of a trial.

'If the findings of fact made by the trial judge are supported by credible evidence, [the Supreme] court is bound by those findings, however voluminous and apparently weighty the testimony against them.

An appellate court should be slow to substitute its own inference of fact where such depends upon oral evidence or recollection of fact and a different inference has been drawn by the trial judge.'

– McCarthy J in *Hay v O'Grady*

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EXPERTS

Tort – personal injuries – employer's liability – negligence – extent of corporate and individual liability – whether sufficient control by individual of business to render him liable in negligence

CASE

Samuel Shinkwin v Quin-Con Limited and Nicholas Quinlan, Supreme Court (Chief Justice Ronan Keane, Mr Justice Geoghegan and Mr Justice Fennelly), judgment of Mr Justice Fennelly (for the court) of 21 November 2000.

THE FACTS

On 3 August 1993, Samuel Shinkwin, then 20 years of age, was involved in an accident in a small factory near Clogheen, Co Cork where Quin-Con Ltd made trophies. Mr Shinkwin was requested to work on a woodworking machine which caused him an injury. He was asked to do this

work eight months before the accident. The machine was an electric circular saw with a jig which had to be moved or adjusted from time to time.

Mr Shinkwin moved the jig when the saw was in motion and while it was inadequately guarded. He had never been instructed to do otherwise.

The jig shifted suddenly, as it was stiff. Mr Shinkwin's right hand slipped and came into contact with the saw. He lost the index, middle and ring fingers and part of his thumb. Mr Shinkwin issued proceedings in the High Court against Quin-Con Ltd and Nicholas Quinlan, who was described as

virtually the sole owner of the business. Quin-Con Ltd was uninsured, had no assets and did not defend the claim. Mr Shinkwin was anxious to succeed against the second defendant, Nicholas Quinlan, described as the effective sole shareholder and controller of Quin-Con Ltd.

THE JUDGMENT OF THE HIGH COURT

In the High Court, the trial judge held that Mr Shinkwin regarded Mr Quinlan as his boss. The judge stated that Mr Quinlan, as manager of the factory premises, did owe a duty of

care to Mr Shinkwin. The judge was satisfied that Mr Quinlan failed in that duty and that he failed to provide proper training for Mr Shinkwin. He failed to warn Mr Shinkwin of the dan-

gers inherent in the work that he was obliged to do. Mr Quinlan failed to ensure that the guard was at all times properly adjusted over the saw and he failed to ensure that the saw

was switched off at all times when the jig was being moved. The High Court awarded Mr Shinkwin £304,000. Mr Quinlan appealed to the Supreme Court.

THE SUPREME COURT

The case was argued before the Supreme Court, consisting of Chief Justice Keane, Mr Justice Geoghegan and Mr Justice Fennelly. Mr Justice Fennelly delivered the judgment of the court on 21 November 2000. Fennelly J stated that the appeal concerned one principal issue, whether Mr Quinlan was correctly held liable to Mr Shinkwin for seri-

ous injuries sustained in the accident at the factory premises where he was employed by Quin-Con Ltd.

It was argued in the Supreme Court by counsel for Mr Quinlan that the duty to provide a safe system and a safe place of work was an obligation imposed directly in law on Quin-Con Ltd as the employer. If the High Court decision were

allowed to stand, it would open the door too wide in establishing a new category of basis of liability for factory managers. It was argued that Mr Quinlan must be regarded merely in the guise of a manager. It was argued that people in such positions do not attract personal liability.

Counsel for Mr Shinkwin relied on the principle stated in

Donoghue v Stevenson ([1932] AC 562) that everybody owes a duty to exercise reasonable care not to cause injury to a person who should be regarded as his neighbour, that is, anybody to whom he was in such a relationship of proximity that it was reasonably foreseeable that that other person may suffer injury as a result of his negligent acts.

Fennelly J considered that a

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person might be the sole effective and controlling shareholder of the business run by a company but may have no involvement in its day-to-day operations. Such a person would have control over the company but not of the manner in which it conducted its operations. He considered that such a person would not be responsible to employees injured by the negligent acts of the company and, in particular, the failure of the company to ensure that there was a safe system of work in operation in its factories.

On the other hand, the judge submitted that any employee owes to his fellow employees a duty to exercise at least such care in the performance of his work that he does not cause direct injury to his fellow workers. An example was given of a careless dropping of a hammer by one worker on the foot of another. Fennelly J noted, how-

ever, that Mr Quinlan fell between the two scenarios. He was the effective sole shareholder and effective day-to-day manager. The question arose: did he involve himself so closely in the operation of the factory and, in particular, in the supervision of Mr Shinkwin, as to make himself personally liable for any of the acts of negligence which injured Mr Shinkwin?

The evidence had disclosed that Mr Shinkwin dealt personally with Mr Quinlan from the beginning. Mr Quinlan was always in and out of the machine area when the shop was busy, and saw Mr Shinkwin using the machine and the difficulties he had in moving the jig. Mr Quinlan repeatedly warned the employees that there was no insurance and was aware of a history of accidents that made it impossible to get insurance. Mr Quinlan gave instructions, for example, about not playing foot-

ball for the same reason. These factors, according to Fennelly J, demonstrated the intimate involvement of Mr Quinlan in the management of the factory and supervision of Mr Shinkwin.

The Supreme Court considered the issue of 'control' and reference was made to *dicta* of Ó Dálaigh CJ in *Purtill v Athlone UDC* ([1968] IR 205 at 213). Fennelly J concluded that Mr Quinlan, on the particular facts of the case, placed himself in a relationship of proximity to Mr Shinkwin. Mr Quinlan had personally taken on a young and untrained person to work in a factory managed by him and personally put him to work on a potentially dangerous machine over which he exercised control to the extent of giving some, though completely inadequate, instructions to the workers. He was bound to take appropriate steps to warn Mr Shinkwin of such obvious dangers as failing

to stop the circular saw from revolving while adjusting the jig or to ensure that it was guarded.

In his supervision and instruction of Mr Shinkwin, Mr Quinlan was negligent. The court concluded by stating that Mr Shinkwin made his claim directly in negligence against Mr Quinlan and not as his employer or shareholder, but as a person who had placed himself by his own actions in such a relationship to Mr Shinkwin as to call upon himself the obligation to exercise care. Fennelly J considered it was not necessary on the facts to express an opinion on the issue raised in the argument as to the potential exposure generally of factory managers to personal liability. Accordingly, the Supreme Court dismissed Mr Quinlan's appeal. **G**

These cases have been summarised by solicitor Dr Eamonn Hall.



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CONSTITUTIONAL

Immigration and nationality

Service of documents – deportation order – notification of change of address – proof of service – habeas corpus application – whether documents properly served – Bunreacht na hÉireann 1937, article 40 – Immigration Act, 1999, section 6

The application concerned the service of documents by the department of justice, equality and law reform on the applicant concerning a deportation order. The department had served papers on the applicant by way of service on the Refugee Legal Service. As part of *habeas corpus* proceedings under article 40 of *Bunreacht na hÉireann*, the applicant challenged the service of the documents. The Supreme Court held that there was no power in the *Immigration Act, 1999* for deeming such service good. Accordingly, the enquiry under article 40 would be remitted to the High Court where the issue of whether the department was notified of the change of address by the applicant would be determined.

Gabrel v Governor of Mountjoy Prison, Supreme Court, 08/02/2001 [FL3415]

COURTS

Practice and procedure

Judicial review – certiorari – consolidation of two indictments in the Circuit Court – whether Circuit Court had jurisdiction

The High Court refused judicial review of an order of the Circuit Court permitting the prosecution to consolidate two indictments. The court was asked to consider whether the Circuit Court had any such power to

consolidate and, if it had, whether in the circumstances it was fairly exercised. The court considered the provisions of the *Criminal Justice (Administration) Act, 1924*. The central issue was whether the Circuit Court had power to consolidate two independent indictments containing counts based on separate returns for trial. The court found there was no statutory authority or otherwise for the consolidation of two indictments of the sort under review, allowed the appeal and granted an order of *certiorari*.

Conlon v Judge Cyril Kelly & Ors, Supreme Court, 21/02/2001 [FL3427]

CRIMINAL

Practice and procedure, bail

Principles for granting bail – bail sought pending hearing of appeal against conviction – point of law of exceptional public importance – Courts of Justice Act, 1924, sections 29, 32 – Criminal Procedure Act, 1993, section 3

The appellant had sought bail while awaiting an appeal against conviction and was refused. The appellant appealed the decision to the Supreme Court. The central issue before the court was: what were the appropriate principles that should apply in the granting of bail in such an instance? Geoghegan J, delivering judgment, held that to grant bail in such a case there should be a strong chance of success in the appeal. The possibility that the sentence of imprisonment would expire before the hearing of the appeal was also a factor. Applying these factors, the appellant's situation was not an appropriate case to grant bail.

The appeal would be dismissed.
DPP v Corbally, Supreme Court, 15/12/2000 [FL3428]

Bail

Criminal law – prisoner on bail pending determination of judicial review proceedings – penal servitude – whether Criminal Law Act abolished penal servitude – Criminal Law Act, 1997, section 11 – Interpretation Act, 1937

The respondent was out on bail pending the outcome of a judicial review hearing and, subsequent to his unsuccessful judicial review application, the DPP sought his return to prison to complete the balance of a three-year penal servitude sentence. The respondent contested the application by motion on a number of grounds, including a declaration that section 11 of the *Criminal Law Act 1997* did not have the effect of retrospectively altering the nature and condition of a sentence of incarceration imposed by a court of competent jurisdiction before the coming into operation of the 1997 act from penal servitude to one of imprisonment. The court considered a number of authorities open to it and also considered the *Interpretation Act, 1937* and found that the respondent had a legitimate expectation that on the passing of the *Criminal Law Act, 1997* his three-year penal servitude sentence would come to an end. The applicant's case was dismissed.

DPP v Murphy, High Court, Mr Justice O'Donovan, 20/11/2000 [FL3420]

Evidence

Estoppel – res judicata – trial – jury disagreement – retrial – fire damage – admissibility of proposed evidence – ruling by first trial

judge that proposed evidence inadmissible because irrelevant – res gestae – judge at retrial not informed of ruling at first trial – whether proposed evidence res judicata – whether conviction should be set aside – Criminal Procedure Act, 1967 – Criminal Damage Act, 1991

During the trial of the appellant on a charge of causing damage by fire to a house, the judge ruled that evidence proposed to be given by a witness for the prosecution was inadmissible because irrelevant. There was a jury disagreement and at the retrial of the appellant the judge was not informed as to the ruling on the same issue by the judge at the first trial. The appellant was convicted and appealed. At the appeal hearing, the central issue was whether the finding by the judge on the issue at the first trial precluded admission of that evidence at the retrial. The appeal court held that it was not necessary to decide whether the proposed evidence was or was not relevant or was or was not more prejudicial than probative. Where issue estoppel arose, it was not because the first decision was necessarily right but because it must be taken as correct. The question of the admissibility of the proposed evidence was *res judicata*. The conviction would be set aside and a new trial ordered.

People (DPP) v O'Callaghan, Court of Criminal Appeal, 18/12/2000 [FL3450]

Maritime and shipping law

Detention of accused – international law – fair procedures – drug smuggling charges – whether continued detention in breach of applicant's constitutional rights –

whether accused detained under false pretences – Maritime Jurisdiction Act, 1959, section 11 – Criminal Justice (Drug Trafficking) Act, 1996, section 2 The applicant had been arrested on board a ship in conjunction with the alleged smuggling of a quantity of cannabis resin. Proceedings were then instituted against the applicant. Some time later, it transpired that a certificate under section 11 of the *Maritime Jurisdiction Act, 1959* had not been issued. Such a certificate was necessary in order to ground proceedings against the applicant. The respondent entered a *nolle prosequi* against the applicant. The appropriate certificate was then obtained and fresh proceedings were initiated against the applicant. The applicant sought an order of *certiorari* in respect of the certificate and sought an order of prohibition against any further proceedings. Ó Caoimh J held that the respondent had correctly sought the further detention of the accused while the correct position regarding the certificate necessary to ground proceedings was researched. The subsequent decision by the minister in question to issue a certificate pursuant to section 11 of the *Maritime Jurisdiction Act, 1959* was not invalid. Further proceedings against the applicant would not be prohibited. The application would be dismissed.

Preece v DPP, High Court, Mr Justice Ó Caoimh, 07/12/2000 [FL3436]

Practice and procedure

Dismissal of case by reason of delay – assault – delay in service of summons – garda responsible for service of summons taken ill – whether delay in prosecution of offence inordinate and inexcusable – whether risk of unfair trial should prosecution continue – Non-Fatal Offences Against the Person Act, 1997, section 2

The case concerned the dismissal of a charge of assault against the respondent by the

District Court judge hearing the case. The judge had been of the view that an inordinate delay had arisen in the prosecution of the offence. The DPP stated a case on the matter for the opinion of the High Court. Ó Caoimh J held that while the overall delay was somewhat inordinate, the District Court judge had not been entitled to infer prejudice on the facts of the case. The respondent's constitutional right to a fair trial had not been interfered with and the matter would be remitted for hearing to the District Court.

DPP v Ferguson, High Court, Mr Justice Ó Caoimh, 21/12/2000 [FL3385]

DAMAGES

Garda compensation

Personal injuries – damages – assessment of compensation – loss other than financial loss – method of calculation – psychological evidence – whether appropriate to award damages under ‘mental distress’ – Garda Compensation Act, 1941 – Garda Compensation Act, 1945

The applicant brought these proceedings under the *Garda Compensation Acts*. She was the widow of a garda who had suffered fatal injuries in an arson attack. In this application, the court had to assess the amount of compensation payable in regard to the loss (other than financial loss) sustained by the applicant. Counsel disagreed on the basis on which such a sum should be calculated. O’Sullivan was satisfied that there was no jurisdiction to grant an award of general damages. There was, however, jurisdiction to award an amount which was reasonable in all the circumstances. O’Sullivan J therefore made a number of awards in respect of the applicant and her children.

Callanan v Minister for Finance, High Court, Mr Justice O’Sullivan, 06/12/2000 [FL3422]

Medicine, negligence

Adequacy of damages – personal injuries – assessment of damages – quantum – practice and procedure – causation – whether trauma of accident exacerbated plaintiff’s multiple sclerosis

The plaintiff had suffered a fall in the defendant’s shop premises. O’Donovan J found the defendant entirely responsible for the fall and damages were assessed at £100,000. A year before the accident, the plaintiff had developed multiple sclerosis. In calculating the appropriate damages, O’Donovan J held that the trauma of the accident had not progressed the plaintiff’s multiple sclerosis. The plaintiff appealed this aspect of the decision and sought damages on the basis that the accident had progressed her multiple sclerosis. The Supreme Court in a majority decision allowed the appeal and remitted the case to the High Court for an assessment of damages. O’Neill J held that, as a matter of probability, the fall had caused an aggravation of the plaintiff’s multiple sclerosis condition. The plaintiff would be awarded a total of £329,158 in damages.

Curran v Finn, High Court, Mr Justice O’Neill, 29/01/2001 [FL3390]

DISCOVERY

Tort and negligence

Personal injuries claim against employer – order granted by master – appeal – documents required to prove defendant’s state of knowledge and negligence – whether failure to specify precise category of documents sought in discovery – whether failure to furnish reasons why each category was required to be discovered – jurisdiction of master – whether rules complied with Rules of the Superior Courts (No 2) (Discovery) 1999, order 31, rule 12(4)(1)

The plaintiff claimed damages for negligence arising out of an accident in the course of his employment at the defendant’s meat-processing plant, and for the purposes of his claim his solicitor wrote to the defendant’s solicitors asking

them to make discovery of certain classes of documents, including the accident report book/record details. When the defendant failed to furnish the documents, the plaintiff applied successfully to the master of the High Court for an order of discovery. The defendant appealed. Morris P held that the plaintiff’s solicitor had failed to specify the precise categories of documents sought in discovery and to furnish reasons why each of the categories was required to be discovered. The master derived his jurisdiction to determine the issues arising between the parties from the identification of the issues in the plaintiff’s originating letter or letters. The plaintiff failed to comply with order 34, rule 12(4)(1) of the *Rules of the Superior Courts* and the court accordingly did not have jurisdiction to make the order sought.

Sword v Western Proteins Ltd, High Court, Mr Justice Morris, 29/11/2000 [FL3447]

EDUCATION

Pensions

Teacher – not in receipt of full pension – whether non-teaching experience should be considered in calculating pension entitlement – whether error made in calculation of pension

The plaintiff was a secondary school teacher who previously had worked in the civil service. She received her teacher’s pension but, as she was short of her full service as a teacher, she did not qualify for a full pension. The plaintiff sought a declaration that there was a miscalculation in determining her entitlement. She claimed her time spent as a civil servant should have been taken into consideration. In determining her non-teaching experience, Mr Justice Morris considered a scheme for allowing incremental credit for relevant non-teaching experience and found that she was excluded from this scheme. While the court ruled against the plaintiff on her other claims,

FAMILY

it was sympathetic to her plight and recommended that the minister make an *ex gratia* payment to the plaintiff without an admission of liability.

Clare v Minister for Education, High Court, Mr Justice Morris, 09/11/2000 [FL3414]

EMPLOYMENT

EAT appeal

Parental leave – meaning of ‘urgent, immediate and indispensable’ – force majeure – whether plaintiff entitled to leave with pay on taking day off to care for sick child – Parental Leave Act, 1998, sections 13, 20 – Parental Leave (Notice of Force Majeure Leave) Regulations 1998 – Council directive 96/34/EC

The plaintiff, who was employed by the defendant, had noticed a rash on her child's legs and took her to the doctor and chemist. She remained off work to observe the child. Section 13 of the *Parental Leave Act, 1998* allows employees to take leave

with full pay where urgent family matters arise which can be categorised as ‘urgent, immediate and indispensable’. The child had a temperature and the plaintiff was concerned. It subsequently transpired to be nothing serious. The plant manager of the defendant company told the Employment Appeals Tribunal that he not believe a rash could be termed ‘immediate and indispensable’, stating that it was normal in bringing up children. The EAT determined that the relief fell short of the act and dismissed the claim. The High Court found that the tribunal's approach to the case was wrong. It had taken the view that the reason the *force majeure* leave was refused was that the rash turned out to be harmless. This was judging with hindsight. It should have looked at the plaintiff's reasons at the time the decision was made not to go to work, and the court allowed the appeal.

Carey v Penn Racquet Sports Ltd, High Court, Ms Justice Carroll, 24/01/2001 [FL3391]

Judicial separation

Ancillary orders – discovery – attitude of respondent husband – no prospect of reconciliation – findings on blame for marriage breakdown – adultery – assets and income of respondent – nullity petition – respondent's liabilities – respondent's new relationship – welfare of children – applicant's right of occupancy in family home – mortgage – whether to direct sale of company – application of proceeds of sale – plan to rationalise respondent's finances – costs sanction because of wasted court time – Judicial Separation and Family Law Reform Act, 1989 – Family Law Act, 1995

The applicant and the respondent were married in 1993 and they had two children. The marriage broke down and they had not lived together as husband and wife since February 1997. Initially, the respondent husband maintained that the ceremony of marriage did not constitute a valid marriage and

issued an application for nullity. In the course of the hearing in October 1999, the respondent withdrew the petition. He was now in a new relationship. The applicant sought a decree of judicial separation and ancillary orders. O'Donovan J held that on the evidence there was no prospect of a reconciliation between the parties. Both parties were to blame: the applicant because of her inappropriate behaviour towards the latter end of their life together and the respondent because of his inability to appreciate that, to a limited extent, the applicant's behaviour was attributable to illness involving post-natal depression. The respondent apparently did not understand this and he was unable to make allowances for it. A decree of separation and ancillary orders would be granted. There was no justification for the amount of time that was spent on certain issues pressed by the applicant. As a result, while the hearing lasted for

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HUMAN RIGHTS

nine days, the costs allowed to the applicant would be on the basis of a six-day hearing.

CO'R v MO'R, High Court, Mr Justice O'Donovan, 19/09/2000 [FL3449]

Practice and procedure

Medical health – costs of proceedings in moot issue – policy of health board – births and maternity – practice and procedure – mandamus – declaratory relief – whether appropriate to grant relief in moot case – Health Act, 1970, section 62 – Chancery (Ireland) Act 1867, section 155 – Rules of the Superior Courts 1986, order 19, rule 29

The applicants sought to have the birth of their sixth child at home. The respondents had a policy that all births take place in properly-equipped maternity units, but would facilitate home births. The policy regarded as unsuitable for home delivery the sixth and subsequent deliveries and refused the applicants' request. The respondent did offer a grant towards the cost of home delivery by way of *ex gratia* payment. The applicants sought to challenge the policy of the respondents and in this regard obtained leave to apply for an order of *mandamus* compelling them to provide birth services as set out in section 62 of the *Health Act, 1970*. However, as the child was subsequently born, the issue before the court was whether it was appropriate to grant the relief originally sought. Finnegan J held that as events had overtaken the relief sought, an order of *mandamus* should not now issue. Such relief should not be granted where the declaration relates to future rights or depends on a contingency or where a mere academic question of no practical value was involved. The application for declaratory relief was refused.

Maguire v South Eastern Health Board, High Court, Mr Justice Finnegan, 25/01/2001 [FL3395]

Judicial review

Asylum – refugee status – leave to apply for judicial review already granted – application by respondent to discharge original order – refugee status granted to some applicants – inherent jurisdiction of court – whether order granting leave to apply for judicial review should be discharged – whether original application premature – Rules of the Superior Courts 1986, order 19, rule 28 – European convention on human rights 1951 – Refugee Act, 1996 – Bunreacht na hÉireann 1937, articles 29.3, 29.4 and 40.3

The applicants, a group of Romanian nationals, had been granted leave to apply for judicial review in respect of their applications for refugee status. The minister for justice now sought to have the order granting leave discharged. On behalf of the minister, it was claimed that some of the applicants had already been granted refugee status. In addition it was contended that there was no evidence that the applications for asylum had been dealt with unfairly. O'Donovan J held that due to the differing nature of the cases of the applicants it had been inappropriate to include them in one set of proceedings. The respondent was not obliged to take account of the *European convention of human rights* in assessing applications for asylum but was bound to comply with the principles of natural and constitutional justice and the relevant provisions of the *Refugee Act, 1996*. There was no evidence before the court which would warrant interfering with the decision-making process in question. Pursuant to the inherent jurisdiction of the court, the original order granting the applicants' leave would be discharged.

Adam & Others v Minister for Justice, High Court, Mr Justice O'Donovan, 16/11/2000 [FL3448]

JUDICIAL REVIEW

Licensing

Certiorari – prohibition – licensing – objections – conditions – renewal – matters to be taken into consideration

The applicant was a holder of a seven-day licensed premises, dance hall and a full restaurant licence and sought orders for *certiorari* and prohibition against the respondent District Court judge and DPP. The licenses had been objected to from residents from time to time and the District Court judge dealt with these problems by attaching conditions to the licenses. One of the conditions was that an ex-garda would prepare a report on the conduct of the premises for the judge's consideration. At the September licensing renewal, the applicant had four applications before the court. Additionally, there were six prosecutions against him for breaches of the liquor licensing laws which were adjourned to November. Of the six charges, the solicitor for the applicant entered a plea for three of them. On one of them, the applicant was convicted. The applicant sought an order of prohibition to prevent the first respondent from dealing with them and *certiorari* against the orders made. The court found the decisions reached were flawed and set them aside on the basis that the judge took into consideration matters extraneous to the actual prosecution.

O'Donnell v O'Connell & DPP, High Court, Mr Justice Morris, 29/11/2000 [FL3412]

LOCAL GOVERNMENT

Planning and environmental law

Application for planning permission – county development plan – original site notice deemed insufficient – request for additional information by local authority – address of applicant inadequate – whether applicant entitled to default planning permission – whether development contravened county develop-

ment plan – Local Government (Planning and Development) Regulations 1994, articles 18(1), 33(3) – Local Government (Planning and Development) Act, 1963, sections 7(1), 27(3)

The applicant had applied to the respondent for planning permission to build a dwelling house. The respondent requested additional information concerning the application pursuant to article 33 of the *Local Government (Planning and Development) Regulations 1994*. The respondent had great difficulty in the delivery of the request to the applicant. The request for further information was not issued within the two-month period as required by section 27(3) of the *Local Government (Planning and Development) Act, 1963*. The applicant sought a declaration that he was entitled to a default planning permission pursuant to section 27(3)(a) of the *Local Government (Planning and Development) Act, 1963*. Finnegan J held that had the applicant given complete details of his address, then the respondent would have been able to effect personal service of the correspondence as intended. Accordingly, the application for planning permission was bad. In addition, had the planning permission been granted, it would have involved a material breach of the county development plan. The relief sought would be refused.

Walsh v Kildare County Council, High Court, Mr Justice Finnegan, 29/07/2000 [FL3403]

NEGLIGENCE

Road traffic

Personal injuries – application to strike out – inherent jurisdiction of court – occupier's liability – whether plaintiff's claim disclosed reasonable cause of action – Occupiers Liability Act, 1995, section 4 – Rules of the Superior Courts 1986, order 19, rule 28

The plaintiff boarded the lug-

gage compartment at the rear of a bus and sustained an injury when falling out onto the road. It emerged in evidence that it was a common custom of youths in the area to get a free ride and this was known to the defendants. It emerged that the compartment door could be opened from the outside. The plaintiff sued the defendants who operated the bus. The defendants sought to strike out the claim on the grounds that the claim disclosed no reasonable cause of action. Ó Caoimh J held that there was an issue as to whether the defendants knowingly permitted persons to use the luggage compartment on the bus to hitch a lift. The application of the defendants would be refused and the case would be allowed to proceed.

Weldon v Fingal Coaches, High Court, Mr Justice Ó Caoimh, 25/01/2001 [FL3440]

Personal injuries

Traffic accident – fatal injuries – claim by widow of deceased driver – circumstantial evidence – whether defendant's left-hand drive vehicle stationary in middle of road when struck by deceased driver – whether impact occurred solely on deceased's side of road – only witnesses to accident were defendant and his wife – plaintiff's case dependent on extrinsic evidence and theories – whether speed of deceased's vehicle major contributing factor to accident

The plaintiff claimed damages arising out of the death of her husband, whose car was in collision with a left-hand driver camper van driven by the defendant near Athlone. The deceased was accompanied by two colleagues from the Defence Forces who were seriously injured and had no recollection of the accident. The defendant's van had been stopped at an angle in the centre of the road preparing to turn into a road leading to a hotel when it was struck at speed by the deceased's car. Damages had been agreed at £247,000 and the court was asked to decide the question of liability. O Caoimh J

held that the deceased's car was being driven at an excessive speed and this was a major contributing factor to the accident. The essential liability for the accident must rest with the deceased. The defendant was 20% negligent for failing to have his vehicle in the correct position on the road at the time of the impact.

Furey v Suckau, High Court, Mr Justice Ó Caoimh, 14/07/2000 [FL3417]

PLANNING

Maritime and shipping law

Challenge to planning permission – nature of judicial review – maritime and shipping law – construction of shipping quay – whether decision to grant planning permission ultra vires – whether respondent complied with statutory obligations – whether failure to notify applicant that environmental impact statement would be included in decision-making process – Local Government (Planning and Development) Act, 1963 – European Communities (Natural Habitats) Regulations 1997, article 27

The applicant in these proceedings sought, by way of judicial review, to challenge the decision of the respondent to grant planning permission for a 60-metre riverside quay. The applicant claimed that the decision to grant planning permission was *ultra vires* and made in excess of jurisdiction. The applicant contended that the respondent's determination that there would be no increase in shipping tonnage due to development was irrational. Butler J rejected the arguments advanced by the applicant. Attention had been drawn to the existence of an environmental impact statement in condition one of the planning permission and the same was considered in the planning process.

Waddington v An Bord Pleanála, High Court, Mr Justice Butler, 21/12/2000 [FL3384]

PRACTICE AND PROCEDURE

Personal injuries

Rules of disclosure – litigation – expert witness – whether engineer employed by local authority regarded as expert witness – whether reports of in-house experts subject to rules of disclosure – Rules of the Superior Courts (No 6) (Disclosure of Reports and Statements) 1998 – Rules of the Superior Courts 1986, order 39, rules 45, 46 and 50 – Courts and Court Officers Act, 1995, section 45

The application concerned the applicability of the rules relating to disclosure of reports compiled by in-house experts. The High Court (Johnson J) had deemed that an engineer in the employment of a local authority who compiled a report for his employer could not be considered an expert. The matter was then referred to the Supreme Court. Murphy J, delivering judgment, held that engineers were undoubtedly 'experts' and the fact they were employed by one of the parties did not deprive them of this status. However, the requirement of disclosure only arose if the employer intended on calling the authors of the reports to give evidence. The disclosure rules represented a radical change in the processing of personal injury claims. The order of the High Court would be reversed but the matter would be remitted to the High Court to allow the respondents the opportunity to argue that certain parts of the reports of the engineers should be deleted before being disclosed to the plaintiff pursuant to order 39, rule 50 of the *Rules of the Superior Courts*.

Galvin v Murray & Anor, Supreme Court, 21/12/2000 [FL3425]


PROBATE

Administration of estate

Deed of transfer of deceased's lands before death – error on transfer – whether court follows provisions of will on part of will not in the trans-

fer – whether court gives effect to the intention of the testator in seeking to change his will – whether constructive trust arises

The deceased, a farmer, died without issue. In his will, he left all his property to his wife and brother as joint tenants for life with the remainder to trustees in trust for his nephew, the second defendant. The deceased's brother predeceased him. Several years prior to his death, he instructed his solicitor to change the will to leave everything to his wife and drop his nephew. His solicitor believed there would be tax issues and advised transferring his land into the joint names of himself and his wife so the property would then pass to her as sole owner if she survived him. The testator agreed and the solicitor drew up a deed of transfer. Unfortunately, in so doing some property was inadvertently omitted. The issue before the court was whether in light of the error regarding the property did a constructive trust arise in regard to the land not transferred into the joint ownership. In reviewing the law and adopting Lord Denning's 'justice and good conscience' approach, the court held that the testator had changed his mind regarding the disposal of his estate after death and took steps to give effect to his revised intention. Accordingly, it ruled that the nephew did not benefit from the lands excluded in the deed of transfer and that he was a constructive trustee of the remainder interest for the benefit of the widow.

Kelly v Cahill, High Court, Mr Justice Barr, 18/01/2001 [FL3396] 

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Edited by TP Kennedy, director of education, Law Society of Ireland

The *Treaty of Nice*

The intergovernmental conference of the member states of the European Union, which was convened in February 2000 and concluded at the Nice Summit on 9 December (referred to as 'IGC 2000'), was initially convened to deal with the so-called 'Amsterdam leftovers'. These were those issues of institutional reform which the 1996 IGC had so spectacularly failed to address. As set out in the relevant protocol to the *Amsterdam treaty*, a link was established between two key institutional issues, the composition of the Commission and the re-weighting of votes in the Council. The protocol referred to the need to 'compensate those member states which gave up the possibility of nominating a second commissioner'. The IGC 2000 agenda was broadened to deal with other issues of institutional reform, including the reform of the judicial organs of the European Union, the issue of flexibility and closer co-operation, and article 7 TEU, which allows sanctions to be imposed on member states guilty of a persistent and serious breach of fundamental rights. Some limited reforms were also undertaken in relation to the TEU provisions on common foreign and security policy.

IGC 2000: the process

The process which led to the *Treaty of Nice* has been described as the most fractious IGC to date. Despite being the longest IGC, many issues remained to be resolved at the final summit in Nice. This has been variously

ascribed to the poor conduct of the presidency by the French government and, more reasonably, to the nature of the agenda. With all the issues on the table of an institutional nature, there was little stock to horse trade. Instead, it took hard negotiation and several dubious compromises, together with the familiar EU-style of postponing agreed changes, to achieve the necessary compromise.

The conduct of the IGC has led to several calls to reform or redesign the treaty amendment process itself. One suggestion, which has gained some support, is to carry out future treaty reform by means of a convention, along the lines of that used to draft the EU *Charter on fundamental rights*. The next IGC in 2004 looks likely to depart from the familiar intergovernmental model, at least for a preparatory consultative stage.

The European Commission

The practice has always been that the European Commission comprised at least one commissioner per member state. The current composition of the Commission is such that each member state 'has' one commissioner and each of the larger member states (France, Germany, Italy, Spain, UK) 'has' an additional second commissioner. Although commissioners are legally independent, and in no sense are to represent national interests, national interest clearly permeates the Commission. On one view, such national representation is necessary in order to ensure that the Commission can adequately

represent the common EU interest, its nominal objective. However, the threat that a larger Commission would be unable to function as a collegiate entity demanded that the *de facto* nationality representation be relinquished.

From January 2005, the Commission is to have the same number of members as there are member states. Thus, at that point, the larger states will forgo the practice of nominating a second commissioner. Following the accession of the 27th member state, the number of commissioners will be reduced below that of the number of member states. The final number of commissioners has not been set down. Instead, the *Treaty of Nice* provides that the Council is to lay down the num-

ber of commissioners by unanimity, and establish a rotation system, based on 'the principle of equality'. Each composition is to reflect 'the demographic and geographical range of all the member states of the Union'.

the European Parliament and the president of the European Commission. *Nice* provides that the members of the Commission are to be nominated by the member states. However, the college of commissioners and the president of the Commission are then to be appointed by the Council acting by qualified majority, subject to the approval of the European Parliament (article 214 EC[N]). The change to appointment by the Council by qualified majority voting (QMV) appears to have been a last-minute one. Neither the Commission nor parliament sought such a reform, which is extraordinary in light of the relatively recent political conflicts that have arisen around the appointment of the president of the European Commission.

The president of the European Commission. The *Treaty of Nice* also enhanced the powers of the president (article 217 EC[N]). The president is currently *primus inter pares*, but the *Nice* reforms go further and give legal status to several practices which have recently evolved in the Commission and which formalise the hierarchy between the president and the other members of the Commission. The most noteworthy of these is the power to require the resignation of individual commissioners, albeit with the approval of other members of the Commission, a codification of the so-called *lex Prodi*, the informal agreements between the current incumbent and members of the Commission. In addition, *Nice* speaks of the president devolv-

NOTE ON CITATION: treaty articles are given their post-Amsterdam numbering only. Where the article referred to is contained in the *Treaty of Nice*, the suffix [N] is applied.

ber of commissioners by unanimity, and establish a rotation system, based on 'the principle of equality'. Each composition is to reflect 'the demographic and geographical range of all the member states of the Union'.

The procedure for appointing the Commission has also been revised. The procedure was already amended by *Maastricht* and *Amsterdam*, gradually increasing the role of

ing duties on individual commissioners, which gives legal recognition to the distinct institution that is the Commission presidency.

Re-weighting of votes

The arcane detail of the weighting of votes in the Council was not the most accessible aspect of the *Nice* agenda.¹ In addition, on one view it is of little practical significance. According to a survey of Council decisions in the mid-1990s, neither re-weighting nor a double-majority requirement would have altered the outcome of any Council decision during that period. However, the issue is of constitutional significance. Despite successive treaties' empowerment of the European Parliament, the Council represents the powerhouse of the Union and Community. Although many decisions are taken on the basis of consensus, that consensus is shaped by the knowledge of the possibility of the weighted vote, which determines the relative power of the member state governments. The need to recalibrate these relative weights was based on two features of the current system. First, with each successive enlargement, the blocking minority became a smaller proportion of the EU's population. Second, a feature of particular concern to larger member states was the relative over-representation of small member states, which would be aggravated in an enlarged EU.

Renegotiating the weights of

votes was the single most intractable issue in the *Nice* negotiations, as heads of government were required to concede on issues concerning the relative power of their states. Underlying the apparently technical issue of choosing a model for determining the weight of member state votes was the threat to the historic equality of votes between France and Germany and Belgium and the Netherlands respectively. In addition to resolving these difficulties between current member states, the negotiators also had to address the future weight of acceding member states.

The results in this area are particularly complex, arcane and, in some respects, contradictory. What follows is of necessity a simplified overview. The re-weighting of votes is to begin on 1 January 2005. At that time, the weighting will be as follows: Germany, UK, France and Italy – 29; Spain – 27; Netherlands – 13; Greece, Belgium and Portugal – 12; Sweden and Austria – 10; Denmark, Finland and Ireland – 7; and Luxembourg – 4.

The threshold for a qualified majority on a Commission proposal will be 169 votes out of the total 237, with a blocking minority requiring 69 votes. In essence, while the relative power of more populous states is increased, the system of digressive proportionality is retained. However, *Nice* introduces two additional requirements. First, there is a requirement that any qualified majority

must also comprise 'at least a majority of the members of the Council'. In addition, there is a demographic break in that 'any member of the Council may request verification that the qualified majority comprises at least 62% of the total population of the Union'. This clause was seen as a concession to Germany, which is the most populous state.

In addition, a declaration on enlargement appended to the treaty indicates the number of votes which each of the current candidate states is to have, in a Union of 27 member states. This provides as follows: Poland – 27; Romania – 14; Czech Republic and Hungary – 12; Bulgaria – 10; Slovakia and Lithuania – 7; Latvia, Slovenia, Estonia and Cyprus – 4; and Malta – 3.²

Several criticisms have been levelled against these changes, not least of which is the fact that they appear to make the adoption of Community measures more difficult.

The bargains

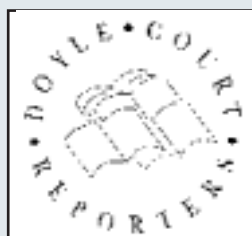
The historic parity between Germany and the other three large member states was retained, with the concession of the requirement of a 62% population requirement. In addition, Germany's number of MEPs was increased to 99. The final political concession to Germany was a further IGC in 2004 to deal with issues of constitutional significance. Belgian lost its historic parity with the Netherlands, the issue which

almost precluded the conclusion of the negotiations at Nice. The political concessions to Belgium included the holding of European Council summit meetings in Brussels, after the accession of the 18th member state. Spain, which sought parity with the other four large member states, was rewarded with a significant increase in its relative voting strength.

Seats in the European Parliament were allocated as concessions in the negotiations. Thus, the ceiling of 700, established as recently as the *Treaty of Amsterdam*, was shattered. With 27 member states, there will now be 732 MEPs. Seats in the parliament are reallocated as follows: Germany – 99; UK, France and Italy – 72; Spain – 50; Netherlands – 25; Greece, Belgium and Portugal – 22; Sweden – 18; Austria – 17; Denmark and Finland – 13; Ireland – 12; and Luxembourg – 6.

The number of seats for the accession states will be as follows: Poland – 50; Romania – 33; Czech Republic and Hungary – 20; Bulgaria – 17; Slovakia – 13; Lithuania – 12; Latvia – 8; Slovenia – 7; Estonia and Cyprus – 6; and Malta – 5.

The allocation of MEPs on this unprincipled basis means that representation in the parliament is not even approximately proportionate to population. For example, the Czech Republic will have fewer seats than Portugal and Belgium, despite being more populous. In its initial appraisal of *Nice*, the European Parliament bemoans



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the fact that there is 'no demographic logic whatsoever in the list of MEPs for a 15-member EU and even less so in the figures for a 27-member EU'.³ The new arrangements are supposed to come into force in time for the next elections in June 2004. New member states will have had to sign their accession treaties by 1 January that year in order to participate in the elections.

The Council: extension of qualified majority voting

It had long been acknowledged that in a Union of over 15 members, requiring unanimity in the Council effectively precluded the adoption of all but the least contentious measures. Accordingly, one of the first items on the agenda was a review of existing treaty provisions in order to apply QMV in more areas. The results were significant, if modest. In relation to 22 legal bases, QMV will apply for the first time. These include judicial co-operation in civil matters (with the exception of family law – article 65 EC[N]) and trade in services and commercial aspects of intellectual property (article 133(5) EC[N]).

In a number of areas, the move to QMV is conditional. For example, in the area of the establishment of a common asylum policy, it was foreseen that QMV will not apply until effective border controls have been put in place, which itself requires unanimity in the Council (article 62 EC[N]). An interesting feature is that in several of these areas, the European Parliament is only marginally involved. After *Maastricht* and *Amsterdam*, a certain symmetry was emerging in that, generally speaking, where the Council acted by QMV, the European Parliament was involved as co-legislator via the co-decision procedure. This is no longer the case. However, parliament can take some consolation in the fact that it has been granted full *locus standi* to

challenge the legality of Community acts under article 230 EC.

Despite the extension of QMV to over 30 new areas, several key areas remain subject to unanimity in the Council. Article 93 EC on indirect taxation remains subject to unanimity, as do most aspects of social policy. It was proposed that article 13 EC, which deals with combating discrimination on various grounds, should be subject to QMV. However, the

apparent for some time, but previous IGCs failed to address the issue. In contrast, IGC 2000 established a parallel process wherein government legal advisors undertook the revision of the treaty provisions and other rules governing the Community courts. The two most significant reforms in this area are the creation of new judicial boards of appeal and the greater empowerment of the Court of First Instance.

A general result of that

'The allocation of MEPs on this unprincipled basis means that representation in the parliament is not even approximately proportionate to population'

adoption of measures remains subject to unanimity, with the exception of incentive measures to support action taken by the member states. Most areas of justice and home affairs remain subject to unanimity, with the exceptions noted above. Overall, the increased complexity of the legal bases has certainly not lent itself to the elegance or accessibility of the treaty provisions.

Court of Justice and Court of First Instance

The issue of the reform of the court was subject to much comment, both official and academic. The members of the European Court of Justice (ECJ) and Court of First Instance (CFI) themselves drew attention to the serious overburdening of the Community courts, which leads to delays which threaten the functioning of the Community legal system. The ECJ and CFI's May 1999 paper, *The future of the judicial system of the European Union: proposals and reflections*⁴ and the *Due report*⁵ contained an array of reform proposals. The problem of overburdening has been

process is that in future the courts' rules of procedure are to be adopted by qualified majority vote (article 223 EC[N]). Regrettably, there was no alternation in the method of appointment or the short term of office for the judges and advocate generals of the ECJ and CFI, which remains six years.

Judicial panels. Article 220(2) EC[N] provides that the panels are to exercise 'in specific limited areas, the judicial competence laid down in this treaty'. Their establishment is for the Council, acting by unanimity. The role of judicial panels is 'to hear, at first instance, certain classes of action of proceeding brought in specific cases'. It is likely that the first two such panels will be established to deal with staff cases, and to formalise the Board of Appeal of the Community Trade Mark Office, currently in Alicante, Spain. The panels are to be attached to the CFI, and their members must be 'persons whose independence is beyond doubt and who possess the abil-

ity required for appointment to judicial office'.

The Court of First Instance. Several provisions of the *Treaty of Nice* reflect the enhanced role of the Court of First Instance. The membership criterion now refers to the 'ability required for appointment to *high* judicial office' (emphasis added). *Nice* makes the CFI the court of first instance for many issues, including all actions for annulment, actions for failure to act and damages, except those brought by the Community institutions, the European Central Bank and the member states.⁶

Most notably, *Nice* envisages that the CFI may be granted preliminary ruling jurisdiction, albeit in limited fields. The Council is to decide in which areas this will apply, on the basis of unanimity. There was originally much opposition to this change. First, it was viewed as a burden-shifting rather than burden-relieving measure. Second, it was argued that it would be difficult to reconcile with the one-stop nature of the preliminary ruling. *Nice* adopts a rather awkward review mechanism, whereby the CFI may refer the matter to the ECJ if it considers that 'the case requires a decision of principle likely to affect the unity or consistency of Community law'. In addition to this preview mechanism, there is provision for exceptional review by the ECJ, where 'there is a serious risk of the unity or consistency of Community law being affected'. The conditions for such review are to be set out in the courts' statute. The draft statute provides that the first advocate general is to assess whether there is a 'serious risk of the unity or consistency of Community law being affected'. Within one month of receiving the proposal made by the first advocate-general, the Court of Justice shall decide whether or not the decision should be reviewed.

It appears that only the Council, Commission and member states may lodge an application for review by the Court of Justice. The CCBE has argued that parties to the national court proceedings should also be able to lodge such proceedings.⁷ In addition, a declaration has been included to the effect that the review mechanism should only be used in exceptional circumstances, using an accelerated procedure. Several outstanding issues are set out in a declaration to the treaty, namely the role of the parties in the proceedings, the effect of the review procedure on the enforceability of the decision of the CFI and the effect of the ECJ decision on the dispute between the parties. Further difficulty relates to the criteria of unity and consistency. These are not familiar terms, and the determination of this issue could well pose problems.

The European Court of Justice. *Nice* purports to copper-fasten the current practice, whereby each member state nominates one member to the European Court of Justice.⁸ Arguably in response to the increased size of the court, *Nice* creates a new formation, the Grand Chamber, which is to comprise the president of the ECJ, together with the presidents of the chambers of the five judges, and other judges to be appointed in accordance with conditions laid down in the court's rules of procedure.⁹ A further compositional change is that the role of the advocate general may be dispensed with. Article 223 EC[N] provides that the advocate general shall provide an opinion 'on cases which, in accordance with the statute of the Court of Justice, require his involvement'.

Enhanced co-operation

Since the inception of the EEC, the treaties have entailed aspects of differentiated integration, that is, instances where certain member states opt out of certain aspects of European integration

or adapt to that integration at a different pace. This practice is evident today in various treaty provisions, most notably those on European monetary union and the protocols of the various member states, such as that of Ireland and the UK opting out of the provisions of Title IV EC

'The crisis provoked by the inclusion of a far-right party in the Austrian government gave impetus to the reform of article 7 TEU'

on visas, asylum and immigration. The *Treaty of Amsterdam* included a general provision on closer co-operation, which aimed to allow groups of member states to undertake further policy integration without the need to wait for the required consensus among the other EU member states. However, these provisions were subject to such restrictions as to render them virtually inoperable.

Nice changes

Nice introduces a number of changes in relation to these provisions, aiming to clarify their scope and render them usable. There is now an overarching requirement that closer co-operation must reinforce the integration process. At least eight member states must take part, but all must be encouraged to do so. The provisions are still to be employed only as a matter of last resort, and only after a reasonable period of trying to reach agreement between all member states. Under the *EC treaty*, the requirement that all member states be in agreement is abolished.

In relation to common foreign and security policy, enhanced co-operation can be used to implement a joint action or common position, for example, in the field of arms procurement. However, there is also a somewhat contradictory stipulation that enhanced co-operation in this area 'shall not relate to matters having military or defence implications' (Title V, article J TEU [N]).

Article 7 TEU

Article 7 TEU provides that where there is deemed to be a 'serious and persistent breach' of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rules of law, certain treaty rights of the offending member state may be suspended. Currently, the finding of serious and persistent breach requires unanimity in the Council and the assent of the European Parliament. The crisis provoked by the inclusion of a far-right party in the Austrian government gave impetus to the reform of article 7 TEU. The main reform is the inclusion of a preliminary stage, during which a group of experts may be convened to investigate. In addition, a finding of breach is now to be based on a decision of a four-fifths majority of the member states, rather than unanimity.

The post-Nice agenda

The *Treaty of Nice* will ultimately be judged on its ability to accommodate enlargement. In that respect, certain shortcomings are evident. Decision-making has been made more complex, and more cumbersome. In addition, there are several representational anomalies. However, the treaty does contain a political commitment to future deeper reform. The *Declaration on the future of the European Union* provides that a further IGC will be convened in 2004 in order to deal with further deeper reform. It states that 'important reforms have been decided in Nice' which

'will have completed the institutional changes necessary for the accession of new member states'. Not satisfied with having 'opened the way for enlargement', however, the heads of government call 'for a deeper and wider debate about the future development of the European Union'.

It is envisaged that the Laeken European Council next December will adopt a declaration on how to pursue this process. The four issues explicitly set out in the declaration include the questions of: 1) how to 'establish and monitor a more precise delimitation of competencies between the European Union and the member states, reflecting the principle of subsidiarity'; 2) the status of the *Charter of fundamental rights*; 3) 'a simplification of the treaties with a view to making them clearer and better understood without changing their meaning'; and 4) 'the role of national parliaments in the European architecture'.

It has been suggested that *Nice's* place in the history of the European Union will turn on the effectiveness of the post-Nice process. **G**

Cathryn Costello is lecturer in European law at Trinity College, Dublin, and director of the Irish Centre for European Law.

Footnotes

- 1 For a detailed analysis of the reform proposals, see Brigid Laffan, 'The Council' in *IGC 2000: issues, options, implications*, IEA November 2000.
- 2 The enlargement scenario envisages only the 12 states with which accession negotiations are in train. No calculations were made for the inclusion of Turkey, which is already a candidate country, or of Iceland, Norway or Switzerland, which may become candidates.
- 3 European Parliament, *Draft analysis of the Treaty of Nice*, Directorate-General for Committees and Delega-

tions, Brussels, 10 January 2001, 15.

- 4 Court of Justice of the European Communities, *The future of the judicial system of the European Union: proposals and reflections*, (May 1999), <http://europa.eu.int/cj/pres/avenng.pdf>. The court also made a *Contribution to the intergovernmental conference*, and several members of the court wrote scholarly pieces on the reform issues: Hirsch, 'Dezentralisierung des Gerichtssystems der Europäischen Union' *Zeitschrift für Rechtspolitik* 2000, 57-60; Rodriguez Iglesias, 'Der EuGH und die Gerichte der Mitgliedstaaten – Komponenten der richterlichen Gewalt der Europäischen Union' (2000) *Neue Juristische Wochenschrift*, 1889-1896; Rodriguez Iglesias, 'Het Hof van Justitie en de institutionele hervorming van de Europese Unie' 18 April 2000, www.nrc.nl/Doc/hof.html; Cooke, John, Judge of the European Court of First Instance, 'European judicial architecture: back to the drawing board' (1999) *Bar review*, vol 5:1, pp14-19.

- 5 Report by the Working Party on the Future of the European Communities' Court System, January 2000, <http://europa.eu.int/en/comm/sj/rapdue.pdf>. The Reflection

Group comprised Ole Due, Yves Galmont, Jose Luis da Cruz Vilaca, Ulrich Everling, Aurelio Pappalardo, Rosario Silva de Lapuerta, Lord Slynn of Hadley. For an analysis of the reform proposals, see Costello, Cathryn, 'The preliminary reference procedure and the 2000 intergovernmental conference' (1999) 21 *DULJ* 40-65.

- 6 Draft statute, article 51. It was proposed to remove this exclusion from the CFI's jurisdiction, and it may be reviewed in the future.
- 7 CCBE, *Submission of the CCBE for the intergovernmental conference 2000* (November 2000).

8 Article 221 EC[N] provides: 'The Court of Justice shall consist of one judge from each member state. The Court of Justice shall sit in chambers in a Grand Chamber, in accordance with the rules laid down for that purpose in the statute of the Court of Justice. When provided in the statute, the court may also sit in plenary session'.

- 9 Draft statute, article 16. For a discussion of these provisions, see Fennelly, *Reform of the Community courts*, paper presented at the Irish Centre for European Law/Dialogue on European Event on the *Treaty of Nice*, 3 February 2001.

Recent developments in European law

EMPLOYMENT

Overtime


Case C-350/99 *Wolfgang Lange v Georg Schünemann GmbH*, 8 February 2001. Lange was employed as a lathe operator by the respondent. His contract of employment gave no details concerning overtime. He refused to work overtime and as a result his employer terminated his contract. The German Labour Court asked the ECJ for clarification on the application of EU law in relation to the obligation of employers to inform employees of the conditions applicable to the employment relationship. The ECJ looked at Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the employment relationship. It held that this directive laid down a general obligation on the employer to inform employees of all the essential elements of the contract. The list of such elements in the directive is not exhaustive. Thus, a term of an employment contract under which an employee is required to work overtime whenever requested to do so by his employer is one of the mat-

ters which must be brought to the employee's notice in writing. Such information can take the form of a reference to the relevant laws, regulations and administrative or statutory provisions or collective agreements. The ECJ held that the directive does not require an essential element of the employment contract that has not been brought to the attention of the employee to be regarded as inapplicable.

Working time directive

Case C-173/99 *Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) v secretary of state for trade and industry*, Opinion of Advocate General Tizzano, 8 February 2001. BECTU is a union representing workers in the broadcasting, film and related sectors. It has approximately 30,000 members. Legislation in the UK implementing the *Working time directive* provides that entitlement to leave is conditional upon the person concerned having been continuously employed for 13 weeks by the same employer. It may not be replaced by a payment in lieu except where the employment is terminated. The workers represented by BECTU

work on short-term contract which are often less than 13 weeks. Thus, they did not become entitled to annual leave under UK law. BECTU brought a legal action seeking to have the UK legislation annulled. The English High Court made a reference to the ECJ asking whether the *Working time directive* allowed a member state to prescribe that a worker's entitlement to paid annual leave does not begin to accrue until the worker has completed a qualifying period. The advocate general said that the right to paid annual leave is a fundamental social right. He pointed out that this is stated in various international instruments and is enshrined in the *Charter of fundamental rights* of the EU. He emphasised that the purpose of the charter, where its provisions allow, is a substantive point of reference for all those involved in the EU context. He said that the right to annual leave corresponds to a general social interest for the health and safety of workers. Therefore, this is an automatic and unconditional right, which does not fall within the derogation allowed for in the directive in other circumstances. The aim of the directive is the harmonisation

and improvement of the working environment. It provides for minimum requirements. Member states can only go beyond these standards in a way that is favourable to workers. The minimum standards cannot be subordinated to purely economic circumstances. The directive does provide that the right to leave is in accordance with the conditions for entitlement to and the granting of such leave under national legislation. However, this only relates to the organisational and procedural aspects. It cannot preclude the existence of the right itself. The national legislation here is prejudicial to workers who have contracts of less than 13 weeks. As they do not have any leave entitlement, they will not be able to claim payment of the allowance which must be paid in lieu of leave to a worker who is entitled to leave in the event of premature termination of the employment relationship. A worker who ended the working relationship before the period of 13 weeks would get neither the period of leave nor the allowance in lieu. Thus, the advocate general considered the UK law to be unlawful. 

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Stressed out?

Professor Anthony Clare (*third from right*) exerts a calming influence on (*from left to right*) Deirdre Crowley, Law Society Deputy Director General Mary Keane, Director of Education TP Kennedy, Law School Administration Manager Deirdre Healy and Deputy Director of Education Geoffrey Shannon after his Blackhall Place lecture on stress



Southern men

Pictured at the recent Southern Law Association dinner were (*left to right*) District Court Judge Con O'Leary, Circuit Court Judge John Clifford, SLA President Patrick Casey and Circuit Court Judge AG Murphy



Up, up and olé

Tánaiste and Minister for Enterprise, Trade and Employment, Mary Harney, joins Osborne Recruitment Director Brendan Murphy and Managing Director Lesley Osborne (and a couple of dodgy-looking tango dancers) to mark the opening of the recruiting firm's new office in Madrid

Medical indemnity conference



Pictured at a recent conference on medical indemnity for the 21st century were (*left to right*) Andrew O'Rorke, managing partner of Hayes & Sons, Solicitors, which hosted the event; Denis Cusack of UCD's Department of Forensic Medicine; Mary Irvine SC; Minister for Health and Children Michael Martin; US attorney John Hoff; and Finbarr Fitzpatrick of the Irish Hospital Consultants' Association. The event, which was attended by nearly 600 delegates, explored the proposals from the Department of Health and Children to change the present system of medical indemnity to one of 'enterprise liability', which in essence means that the defence of all claims against hospitals and health boards in Ireland would be handled, and funded by, a state agency



Judging judicial review

At the recent CLE seminar on judicial review were (*left to right*) Gerard Hogan SC, CLE's Barbara Joyce, solicitor James MacGuill and Mr Justice Geoghegan



Arthur Cox invades Britain

Gathered for the announcement that Arthur Cox has established a London office to advise on matters involving UK and Irish business are (*from left to right*) Chairman James O'Dwyer, Ronan Walsh, who will head the London office, and Managing Partner Eugene McCague

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Regional events kick off in style

Cork turned into an apprentices' haven on 20 February, with ultra-cheap drink, good chats and great music. Thanks to our sponsor, Ulster Bank, SADSI organised the first of the regional events at the Quad in Cork. If this evening was anything to go by, the coming year is set to be a good one for the south.

There was a great turn out. Many of the usual faces were there, together with a few brave souls who are new on the scene. It was a great chance to let your hair down and put names to the faces that you might recognise from the courts. Even though the event was held in Cork, it was open to all apprentices. A few Dublin faces were scattered among the crowd. It was really great to see the enthusiasm that some of us had for the event. Brian O'Regan came in from Kerry for the night and we hope that wherever the regional events are held, apprentices

from nearby places will make similar efforts in pursuit of the honourable ideals of alcohol and craic!

It was an occasion with a serious side, too. It was a chance for apprentices to talk to some committee members about issues arising in their own offices and in the course of their apprenticeships

generally. This kind of dialogue helps us to focus on what will work best for the coming year.

Suggestions and queries are welcome at all times to help SADSI work as best as it can for you. So if you have any ideas on what we should do, or if any aspect of your apprenticeship concerns you,

please contact someone from the committee. We might just be able to help!

Last month's *Gazette* lists who we are and where to find us. Alternatively, you can e-mail us at SADSI2001@yahoo.com.

Hope to see you again at the next event.

Clare O'Shea-O'Neill



Real Corkers?

Leone Cahill and Emmett McCann put their heads together at the SADSI regional event which took place in Cork in February

Equestrian intervarsities 2001

The Apprentices' Equestrian Club colours appeared for the first time at an inter-university sporting event at the annual equestrian intervarsities in Galway in February.

The newly-established Apprentices' Equestrian Club fielded three teams in all. Teams of three riders participated in the show-jumping, dressage, and prix caprilli competitions. The club, as newcomers to this event, received great encouragement, and the weekend was a resounding success.



Horsing around

The Apprentices' Equestrian Club committee shares a laugh with representatives of the Irish Universities' Riding Club Association. Pictured (left to right) are Shane Kingston, chair of IURCA; Equestrian Club chair Mona Costelloe; Gary Hassett, president of IURCA; Kelly Breen, Equestrian Club secretary; Darragh Feeney, SADSI Galway rep; Conor Delaney, Equestrian Club Treasurer; and Alma Kelly, the Equestrian Club's PRO

2000-2001 law ball

The PPC 2000-2001 ball took place at the Davenport Hotel in Dublin. An eventful evening was provided. It included an awards ceremony with categories ranging from 'The Barbie and Ken Award' to 'The King and Queen of the Ball', along with a specially-commissioned 'Eminem' rap in honour of our director of education. The social reps would like to thank everyone who attended and also our sponsors, Balloon Events, Chief O'Neill's, Ellis and Ellis Law Searchers, Leonidas, Murphys and Ulster Bank.

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ADVERTISING RATES

Advertising rates in the *Professional information* section are as follows:

- **Lost land certificates** – £30 plus 20% VAT (£36.00)
- **Wills** – £50 plus 20% VAT (£60.00)
- **Lost title deeds** – £50 plus 20% VAT (£60.00)
- **Employment miscellaneous** – £30 plus 20% VAT (£36.00)

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All advertisements must be paid for prior to publication. Deadline for May Gazette: 20 April 2001. For further information, contact Catherine Kearney or Louise Rose on 01 672 4828 (fax 01 672 4877)

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 6 April 2001)

Regd owner: Michael Kelly; Folio: 5026F; Lands: Heath and Barony of Idrone East; **Co Carlow**

Regd owner: James Dillon; Folio: 10385F; Lands: Currane, St Mullin's Lower; **Co Carlow**

Regd owner: Bernadette Swords; Folio: 17286F; Lands: Situate on the east side of Link Road and Barony of Parish and Urban District of Carlow; **Co Carlow**

Regd owner: Thomas McGovern, The Bawn, Killeshandra, Cavan; Folio: 492F; Lands: Yewer Glebe; Area: 0.5125 acres; **Co Cavan**

Regd owner: Ken Downey and Rachel Spillane; Folio: 6231F; Lands: Known as a plot of ground situate in the townlands of Commons, situate to the west side of road leading from Mallow to Cork in the Parish of St Anne's Shandon, and the County of Cork; **Co Cork**

Regd owner: Michael O'Leary; Folio: 10885; Lands: Known as a plot of ground situate in the townland of Teerbeg, the electoral division of Macloneigh, the Barony of Muskerry West and the County of Cork; **Co Cork**

Regd owner: Frank Gildea, Drumma Cross, Glenties, County Donegal; Folio: 13335; Lands: Drumma Cross; Area: 35a 3r 10p; **Co Donegal**

Regd owner: Patrick McCarron, Earne, Buncrana, Co Donegal, owner of property no 1 and Patrick McCarron, Tullydush Lower, Buncrana, County

Donegal owner of property nos 2 and 3; Folio: 36153F; Lands: Tullydush Lower and Meenkeeragh; Area: (1) 76.397 acres, (2) Meenkeeragh 35.560 acres; **Co Donegal**

Regd owner: Martin Gallagher, Meenderryowan, Annagry; Folio: 15814F; Lands: Meenderryowan; Area: 0.888 acres; **Co Donegal**

Regd owner: Michael Linnane, Crannagh, Gort, Galway; Folio: 8113F; Lands: Townland of (1) Crannagh, (2) Polldonoghoe, (3) Crannagh and Barony of Kiltartan; Area: (1) 9.3450 hectares, (2) 4.2490 hectares, (3) 0.1460 hectares; **Co Galway**

Regd owner: James Desmond Hurley; Folio: (1) 18119F, (2) 18171F; Lands: Townland of Balloonagh and Barony of the Urban District of Tralee; **Co Kerry**

Regd owner: Thomas Crean and William Crean; Folio: 30551; Lands: Townland of Ballynasare and Barony of Trughanacmy; **Co Kerry**

Regd owner: John Keane; Folio: 22564; Lands: Kiltomy and Barony of Clannaurice; **Co Kerry**

Regd owner: Elizabeth Murphy; Folio: 12150; Lands: townland of (1) Redbog, (2) Wolfestown, (3) Redbog and Barony of Naas North; **Co Kildare**

Regd owner: Liam Dowd, John Ferrick, James Creighton, Brendan Mullins, Laurence Keenaghan and Michael Divilly; Folio: 16217F; Lands: Townland of Newtown (Ed Leixlip) and Barony of North Salt; **Co Kildare**

Regd owner: Kathleen Dunne; Folio: 11223; Lands: Townland of Ballysaxplain and Barony of Offaly East; **Co Kildare**

Regd owner: Thomas Kent; Folio: 17896; Lands: Smartscastle West and Barony of Knocktopher; **Co Kilkenny**

Regd owner: John Oliver O'Gorman; Folio: 368; Lands: Bonilla and Barony of Gowran; **Co Kilkenny**

Regd owner: James Flanagan; Folio: 3285F; Lands: Ballinlough and Barony of Maryborough East; **Co Laois**

Regd owner: John Cronin (deceased); Folio: 233F; Lands: Townland of Kilmallock and Barony of Kilmallock; **Co Limerick**

Regd owner: Roadstone Dublin Ltd; Folio: 26208; Lands: Townland of

Gooig and Barony of Clanwilliam; **Co Limerick**

Regd owner: Patrick Evers, c/o TW Delany & Company, Solicitors; Folio: 1649; Lands: Treel; Area: 6.3312 acres; **Co Longford**

Regd owner: Ina Heneghan and Patrick Heneghan; Folio: 15371F; Lands: Townland of Elly and Barony of Erris; Area: 0.5670 hectares; **Co Mayo**

Regd owner: Katherine V and Marjorie LR Moore; Folio: (1) 26097, (2) 12962F; Lands: Roberstown; Area: 0.53125 acres; **Co Meath**

Regd owner: Laurence Wilson, Carrickspringan, Moynalty, Kells; Folio: 10878; Lands: Carrickspringan; Area: 0.48125; **Co Meath**

Regd owner: John McArdle, Bath Lodge, Corrinshigagh, Broomfield; Folio: 331; Lands: Corrinshigagh; Area: 11.125; **Co Monaghan**

Regd owner: Patrick McEneaney, Shankill, Shercock, Co Cavan; Folio: 7225; Lands: Shankill; Area: 13.843 acres; **Co Monaghan**

Regd owner: Kevin Conlon, Dooraa, Laragh, Castleblayney; Folio: (1) 17530, (2) 17620; Lands: Dooraa; Area: 27.775 acres; **Co Monaghan**

Regd owner: Peter Nolan; Folio: 8070; Lands: Raheen and Barony of Kilkoursey; **Co Offaly**

Regd owner: Michael Shine, Crannaghmore, Summerhill, Athlone, Co Roscommon; Folio: 8551F; Lands: Townland of Crannaghmore and Barony of Athlone South; Area: 0.6010 hectares and 0.6070 hectares; **Co Roscommon**

Regd owner: Teresa Veronica Forde, Church Street, Strokestown, Roscommon; Folio: 11204; Lands: Townland of Lisroyne and Barony of Roscommon; Area: 3.7812 hectares; **Co Roscommon**

Regd owner: John Kelly, Ballaghderreen, Roscommon; Folio: 9673; Lands: Townland of Ballaghderreen and Barony of Costello; Area: 0.0252 hectares; **Co Roscommon**

Regd owner: Noel and Philomena Bugler; Folio: 5420F; Lands: Inchadrinagh, Ballina, Co Tipperary and Barony of Owny and Arragh; **Co Tipperary**

Regd owner: John Tormey, Drumcree, Mullingar; Folio: 9368; Lands:

Archerstown; Area: 58.869 acres; **Co Westmeath**

Regd owner: Michael Harte, Arden Heights, Tullamore, Co Offaly; Folio: (1) 4424F, (2) 4425F; Lands: Ballycahan; **Co Westmeath**

Regd owner: Liam Meehan; Folio: 19847F; Lands: Ballymacar and Barony of Bantry; **Co Wexford**

Regd owner: Fintan Carroll and Susan Doyle; Folio: 16527F; Lands: Poulmari and Barony of Taghmon; **Co Wexford**

Regd owner: Timothy Bolger; Folio: 1363F; Lands: Clohamon (ED Newtownbarry) and Barony of Scarawalsh; **Co Wexford**

Regd owner: Margaret Vanex; Folio: 11295; Lands: property nos 1 and 2 – townland of Ballinderry Lower in the Barony of Ballinacore North; property nos 3 and 4 – townland of Ballydowling in the Barony of Ballinacore North; **Co Wicklow**

Regd owner: Margaret Vanex; Folio: 3546; Lands: Townland of Ballinderry (part) in the Barony of Ballinacore North; **Co Wicklow**

Regd owner: Margaret Vanex; Folio: 5055; Lands: Townland of Ballydowling in the Barony of Ballinacore North; **Co Wicklow**

Regd owner: John Merrigan; Folio: 6413; Lands: Townland of Laragh East in the Barony of Ballinacore North; **Co Wicklow**

Regd owner: Robert Casey and Jackie Dixon; Folio: 14821F; Lands: Townland of Mount Kennedy Demesne, situate in the Barony of Newcastle; **Co Wicklow**

Regd owner: John Byrne; Folio: 138L; Lands: situate on the north side of Harbour Road in the town of Arklow; **Co Wicklow**

WILLS

Coady, Michael, late of Kilmoughter, Castlegar in the County of Galway. Would any person having knowledge of the whereabouts of the original will dated 26 November 1996 of the above named deceased who died on 16 February 2000, please contact Blake & Kenny, Solicitors, 2 St Francis Street, Galway



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Cooper, Victor Hubert (deceased), late of 2 Chapel Lane, New Ross, Co Wexford, and formerly of Blackstick Farm, Courteencurragh, Gorey, Co Wexford. Would any person having knowledge of the whereabouts of a will made by the above named deceased who died on 27 September 2000, please contact O'Doherty Warren & Associates, Solicitors, Charlotte Row, Gorey, Co Wexford, tel: 055 21587, fax: 055 21313

Craig, Mona Lillian (deceased), late of 683 Howth Road, Raheny, Dublin 5. Would any person having knowledge of a will made by the above named deceased who died on 22 March 2000, please contact Carvill Rickard & Co, Solicitors, Watermill House, 1 Main Street, Raheny, Dublin 5, tel: 01 8312163, fax: 01 8312452

Exshaw, Eldon Young (deceased), late of Dunamase, Ulverton Road, Dalkey, Co Dublin. Would any person having knowledge of a will executed by the above named deceased who died on 22 February 2001, please contact Vincent & Beatty, Solicitors, 67/68 Fitzwilliam Square, Dublin 2, tel: 01 6763721, ref: WBS/SMcL

Foyle, Liam (deceased), would any person having knowledge of a will made by the above named deceased who died on 3 January 2001, please contact Michael A O'Brien & Co, Solicitors, Castle Street, Carrick-on-Suir, Co Tipperary, tel: 051 641244, fax: 051 641377

Gay, Kevin (deceased), would any person having knowledge of a will made by the above named deceased who died on 2 November 2000, please contact Good & Murray Smith & Co, Nassau House, 40/43 Nassau Street, Dublin 2, tel: 01 6791201

Ging, Sr Patricia (deceased), late of St John of God's Convent, Rosslare, Co Wexford. Would any person having any knowledge of a will made by the above named deceased who died on 6 May 1999, please contact Rollestons, Solicitors, Church Street, Portlaoise in the County of Laois, tel: 0502 21329, fax: 0502 20737, DX 47002 Portlaoise

Gleeson, Geraldine, late of 2 St George's Villas, Inchicore, Dublin 8 and 107 St Mary's Road, East Wall, Dublin 3. Would any person having knowledge of a will made by the above named deceased who died on 21 January 2001, please contact James A Connolly & Co, Solicitors, 13 St Andrew Street, Dublin 2, tel: 01 6714966

Kennedy, Maurice (deceased), late of St John's, Clifton Road, Montenotte Park, Cork. Would any person having knowledge of a will made by the above named deceased who died on 29 March 1982, please contact Jerry Desmond, Solicitor, Pearse Street, Bandon, Co Cork, tel: 023 43072, fax: 023 43092, e-mail: dessolic@iol.ie

O'Brien, Patricia (otherwise Hannah Patricia) (deceased), late of Patrick Street,

Clonakilty, Co Cork. Would any person having knowledge of a will made by the above named deceased who died who died on 30 January 2001, please contact Collins Brooks & Associates, Solicitors, 7 Rossa Street, Clonakilty, Co Cork, tel: 023 33332, fax: 023 34204

Sheridan, Mary, late of 8 Summerville Park, Rathmines, Dublin 6. Would any person having knowledge of a will made by the above named deceased who died on 24 September 1999, please contact Sean E McDonnell & Co, Solicitors, 24 Upper Rathmines Road, Rathmines, Dublin 6, tel: 01 4961833

Quinn (Quinn), Thomas (deceased), late of 16 Fortnary Park, North Circular Road, Limerick. Would any person having knowledge of the whereabouts of a will made by the above named deceased who died on 3 February 2001, please contact Tynan Murphy Yelverton, Solicitors, 16 William Street, Limerick, tel: 061 415888, fax: 061 415253, Ref: LT

EMPLOYMENT

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TITLE DEEDS

In the matter of the Landlord and Tenant (Ground Rents) Acts, 1967-84: notice of intention to acquire a fee simple (section 4)

To the person or persons for the time being entitled to the interest of William Brudenell Murphy in the premises hereinafter described under the leases hereinafter described. Description of land: all that and those the premises known as number 46 Smithfield in the parish of Saint Peter in the city of Dublin.

Particulars of applicants' lease or tenancy: lease dated 4 August 1897 between William Brudenell Murphy (lessor) and Michael Kelly (lessee) for a term of 99 years from 1 November 1897 at an annual rent of stg£6 and subject to the covenants and conditions therein contained.

Take notice that the applicant Fusano Properties Limited, having its registered office at 125-126 Lower Baggot Street, Dublin 2, being a person entitled under the provisions of sections 9 and 10 of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978*, proposes to purchase the fee simple interest in the lands described at paragraph 1 above.

Dated: 27 January 2000

Signed: Beauchamps, Solicitors, Dollard House, Wellington Quay, Dublin 2 (solicitors for the applicant)

In the matter of the Registration of Title Act, 1964 and of the application of Wexford County Council in respect of property in the county of Wexford
County: Wexford
Lands at: The Machinery Yard
Dealing no: D2001JS000396M

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

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

Signed: Sean MacMahon, Examiner of Titles Schedule

- 1 Conveyance dated 23 September 1920: Beatrice, Countess of Portsmouth to Enniscorthy Co-Operative Agricultural Society
- 2 Conveyance dated 19 August 1922: Beatrice, Countess of Portsmouth to Enniscorthy Co-Operative Agricultural Society
- 3 Lease dated 10 October 1938: Enniscorthy Co-Operative Agricultural Society to Wexford County Council.

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: an application by John Dennehy and Helen Dennehy of Keelovenogue, Dunmanway, Co Cork

Take notice that any person having any

interest in the freehold estate of the following property, Park Road, Dunmanway, in the county of Cork.

Take notice that John Dennehy and Helen Dennehy of Keelovenogue, Dunmanway in the county of Cork intend to submit an application to the county registrar for the county of Cork for the acquisition of the freehold interest in the aforesaid property and any party asserting that they hold a superior interest in the aforesaid premises 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, John Dennehy and Helen Dennehy of Keelovenogue, Dunmanway in the county of Cork, intend 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 of Cork for direction 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.

Dated: 20 March 2001

Signed: P.J. O'Driscoll & Sons, 41 South Main Street, Bandon, Co Cork (solicitor for the applicant)

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 Landlord and Tenant (Ground Rent) Acts, 1967-1984: an application by the trustees of the Rathgar Congregation of Jehovah's Witnesses

Take notice that any person having any interest in the freehold estate of the following property: the premises known as Kingdom Hall, 24A Wesley Road, Rathgar in the Barony of Newcastle and County of Dublin.

Take notice that the trustees of the Rathgar Congregation of Jehovah's Witnesses intend to submit an application to the county registrar for the county of Dublin for the acquisition of the freehold interest in the aforesaid property and any party asserting that they hold a 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 trustees of the Rathgar Congregation of Jehovah's Witnesses 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 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.

Dated: 1 March 2001

Signed: Lewis E Citron & Company, Solicitors, 4 Waldemar Terrace, Main



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Street, Dundrum, Dublin 14 (solicitor for the applicant)

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: an application by Siobhan Kenny (applicant) and the Riall Estate and Robert Briscoe, landlords (respondents)

Take notice that any person having any interest in the freehold estate or any superior leasehold estate in the following property: part of the lands comprised in indenture of lease dated 3 April 1934 made between Robert Briscoe of the first part, Mary Woods of the second part and Andrew Woods of the third part, and more particularly known as 1 Belmont Avenue, situate in the parish of St Mary's, Donnybrook, in the Barony and County of Dublin (now situate in the city of Dublin), being a sub-lease held *inter alia* under a superior indenture of lease dated 20 November 1884 made between Lewis Riall of the one part and John Newport of the other part.

Take notice that Siobhan Kenny intend to submit an application to the county registrar for the county and city of Dublin for the acquisition of the freehold interest in the aforesaid property and any party asserting that they hold a superior interest in the aforesaid premises 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, Siobhan Kenny intends to proceed with the said 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 and 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.

Dated: 23 March 2001

Signed: Lockhart & Company, 99 Vernon Avenue, Clontarf, Dublin 3 (solicitor for the applicant)

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: an application by Patrick Collins and Catherine Mary Collins

Take notice that any person having any interest in the freehold estate of the following property: all that and those the lands, dwellinghouse and hereditaments at Montpelier, Tallaght, Dublin 24 (hereinafter called 'the property') held under lease subject to the covenants and conditions therein set out.

Take notice that the Patrick Collins and Catherine Mary Collins intend to submit an application to the county registrar for the county and city of Dublin for the acquisition of the freehold interest in the aforesaid property and any party asserting that they hold a superior interest in the aforesaid premises 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 aforesaid Patrick Collins and Catherine Mary Collins intend 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 and 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.

Dated: 27 February 2001

Signed: Cornelius Sheehan & Co, Solicitors, 2 Alma Place, Monkstown, Co Dublin (solicitor for the applicant)

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: an application by Michael Wade and Noel Wade

Take notice that any person having any interest in the freehold estate of the following property: the lands with the buildings thereon the subject matter of indenture of lease dated 7 October 1971 and made between Edward Waters of the one part and Maureen Wade of the other part, consisting of a triangular plot of ground adjoining the south-western boundary of premises known as the lodge situate at Ballycorus, Kiltarnan, in the county of Dublin as more particularly delineated and described on the map annexed to the said lease and thereon coloured red.

Take notice that Michael Wade and Noel Wade intend to submit an application to the county registrar for the county of Dublin for the acquisition of the freehold interest in the aforesaid property and any party asserting that they hold a superior interest in the aforesaid premises 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, Michael Wade and Catherine Wade intend 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 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.

Dated: 8 March 2001

Signed: Daly Lynch Crowe & Morris, Solicitors, The Corn Exchange, Burgh Quay, Dublin 2 (solicitor for the applicant)

Thomas Joyce (deceased), late of 12 Mayfield Road, Kilmaham, Dublin 8. Would any person having knowledge of the whereabouts of title documents of the above named deceased's premises at 12 Mayfield Road, Dublin 8, please contact James D Aitken & Co, Solicitors, 107 Trees Road, Mount Merrion, Co Dublin, tel: 01 288 2772, fax: 01 288 8204, ref: AM/HL

Vincent Landy SC (deceased), late of Annefield, 47 Butterfield Park, Rathfarnham, Dublin 14. Would any person having knowledge of the whereabouts of the title documents of the above mentioned property, please contact Orpen Franks, Solicitors, 28/30 Burlington Road, Dublin 4. Ref: RMW, tel: 01 668 9622, fax: 01 668 9004

Mary Sheridan (deceased) and Edward Sheridan (deceased). Premises: 8 Summerville Park, Rathmines, Dublin 6. Would any person having knowledge of the whereabouts of the title deeds of the above premises, please contact Sean E McDonnell & Co, Solicitors, 24 Upper Rathmines Road, Dublin 6, tel: 01 496 1833

J. DAVID O'BRIEN

ATTORNEY AT LAW

20 Vesey St, Suite 700
New York, NY, 10007

Tel: 001212-571-6111

Fax: 001212-571-6166

Email: obrienlawusa@aol.com

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Arran House,
35/36 Arran Quay, Dublin 7.*

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Fax: (01) 872 5404

e-mail: moranryan@securemail.ie
or Bank Building, Hill Street
Newry, County Down.
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Fax: (0801693) 62096
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