Law Society Gazette

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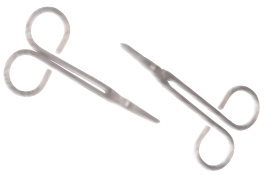

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SBA ANNUAL GENERAL MEETING

The 137th annual general meeting of the Solicitors' Benevolent Association will be held at the Law Society, Blackhall Place, Dublin 7, on Monday 9 April at 12.30pm to consider the annual report and accounts for the year ended 30 November 2000, to elect directors, and 'to deal with other matters appropriate to a general meeting'. For more information, contact SBA secretary Geraldine Pearse on 01 283 9528.

GOAL CHARITY CYCLE

A leisure cycle in aid of the charity GOAL has been organised for members of the legal profession. The event will take place on Saturday 26 May, starting at the National Basketball Stadium in Tallaght and continuing over 65 miles through Wicklow, the Sally Gap and the Wicklow Gap, returning via Blessington to the starting point.

Each participant on the cycle is expected to raise £250 in sponsorship and all are welcome to attend. For further information, call 01 676 7192 or 676 7193.

Law Society expresses concern over no-fault compensation body

The Law Society has expressed its concern over the composition of the working group set up to examine proposals for a no-fault compensation scheme for brain-damaged babies.

The scheme was first mooted over a year ago by the then health minister Brian Cowen, who was reported as keen to introduce a no-fault compensation scheme for children born with cerebral palsy, in an effort to reduce medical negligence costs in state hospitals (see *Gazette*, January 2000, page 5). But in a letter to the minister for health and children, Michéal Martin, the society's director general, Ken Murphy, says that the recently-announced membership of the working group 'lacks balance' and that the absence of relatives of brain-damaged infants or their representatives is a 'a serious omission'. He adds that this omission 'could foster the belief that the views and insights which can be provided by such individuals are not of interest to the working group'.

Murphy also argues that the working group should be chaired by a High Court judge, rather than by a member of the medical profession as proposed by the minister. 'The very fact of having a medical practitioner in the chair creates at least the perception that the working group begins its consideration of the "tort v no-fault" issue with an in-built bias in favour of a change to a no-fault system', he concludes.

Ken Murphy: working group 'lacks balance'

• The Law Society has nominated solicitor Michael Boylan as its representative on the No-Fault Compensation Working Group and on the Enterprise Liability Advisory Group, the body overseeing the working group's deliberations. Boylan has extensive experience of medical negligence litigation.

Gazette reader survey results

Eleven of the whopping 18 responses we received to our 2000 reader survey rated the *Gazette* as 'very good' overall, which we've decided to interpret as thunderous approval. Six rated the magazine as 'good' and one generous soul even rated us 'excellent' (Oliver O'Sullivan of Castlepollard, Co Westmeath, who wins the bottle of the Law Society's special *Millennium Malt* whiskey because, after all, one good turn deserves another). The other four readers who win a bottle of whiskey are: Ray Finnegan, Co Meath; Norma Garvey, Co Monaghan; Katherine Killalea, Co Mayo; and Garry Clarke, Co Donegal.

The rest of you stayed pretty quiet, which we'll take as a compliment. But if you want to have your say, you'll get a second chance when we do another survey later this year.

ONE TO WATCH: NEW LEGISLATION

National Minimum Wage Act, 2000

Signed into law on 31 March 2000, implemented from 1 April 2000, the act sets the current minimum wage at £4.40 an hour.

This legislation is one of a number of measures taken by the government as part of its contribution to the social partnership. It sets up a framework for a national minimum wage, estimated by an ESRI impact study to apply to 163,000 people.

The following are its key elements in brief.

- The act does not apply to relatives, who are quite widely defined
- It cannot be contracted out of
- It sets up a means of calculating working hours in a 'pay reference period'
- Employees whose working hours are not controlled must keep records of hours worked, and cheating is an offence punishable with a fine of up to £1,500
- The act lays down the factors which the minister or Labour Court (making a recommendation to the minister) must take into account, including national wage agreements, the impact the proposed rate may have on employment, the overall economic conditions in the state and national competitiveness
- People aged 18 or over are entitled to the minimum wage – this is a general rule
- People under 18 are entitled to at least 70% of the minimum wage
- People over 18 starting employment are entitled to 80% of the minimum wage in their first year and 90% in their second year
- People already in employment who reach the age 18 are likewise entitled to 80% of the minimum wage in their first year and 90% in their second year
- There are reduced rates for training – 75% of the minimum wage for the first third of the training course (up to one year), 80% for the second third, 90% for the last third
- Employers must keep records for three years; failure to comply is punishable with a fine up to £1,500

Major shake-up for High Court offices

A number of High Court offices are to move shortly from their current home in Aras Ui Dhalaigh to the Courts Service's new corporate headquarters in Smithfield as part of a sweeping administrative shake-up. Meanwhile, the High Court Central Office is set to move into the space vacated in Aras Ui Dhalaigh.

Among the offices scheduled to move are the Probate Office, the Examiner's Office, the Office of the Official Assignee, the Office of the Wards of Court, the Office of the Accountant of the Courts of Justice, and the Office of the General Solicitor for Minors and Wards of Court. The Courts Service says that the relocation is part of a drive to improve the quality of service to users. The corporate headquarters will be based in Phoenix Street, at the south end of Smithfield Plaza.

The Courts Service chief executive officer and directors will also move to the new building when it's ready for occupation, probably in early April.

Telephone and fax numbers will remain unchanged, and the staff of the offices have promised to make every effort to minimise the disruption in service to the profession and the public. In the meantime, if you plan to visit one of the offices mentioned above, you might want to telephone ahead to check on its location.

Four Courts: big changes ahead

- In a separate development, the Central Office of the High Court will be moving in December to the second floor of the Aras Ui Dhalaigh, and all of the registrars attached to the High Court will be moving to that building. The Judges' Library will also relocate there.

The east wing of the Four Courts will be converted to provide additional courtrooms for criminal trials. Work on this project is planned to begin in January 2002, and it is intended that separate access to this part of the building will both protect the privacy of people in custody and enhance security.

Plain English is best, says LRC

Legislation should be worded so that ordinary citizens can easily understand it, according to the most recent report from the Law Reform Commission. The report, *Statutory drafting and interpretation: plain language and the law*, recommends that familiar vocabulary should be used when drafting legislation, and that Latin and French terminology should be consigned to the dustbin of history. Archaic legal terms such as 'herein', 'heretofore' and 'aforesaid' should be used only when strictly necessary, says the commission, and common words such as 'must' should replace more esoteric ones like 'shall' whenever possible.

Similarly, the report also recommends that the language used to draft laws reflects both new technology and modern usage, for instance, replacing cumbersome phrases such as 'electronic communication' with 'e-mail'.

New marketing guide for the legal profession

By now every law firm in the country should have received a copy of the *Marketing handbook for solicitors* by Matthew Moore. Based on a similar publication from the Law Society of England and Wales, the handbook has been specially adapted to suit the requirements of the Irish legal market and aims to help practitioners in the marketing of their firms.

The handbook concentrates on illustrating the basic principles of successful marketing for professional service firms and contains many useful examples of good marketing practice. Management concepts such as business planning and market research are outlined and explained, and key business strategies such as the development of inter-personal selling skills and effective presentations and pitches are set out in detail.

- Employees may request a written statement of average hourly pay for any period in the previous 12 months. Failure to comply is an offence
- The remedy lies in referral to a rights commissioner within six months, or 12 at the outside. An appeal lies to the Labour Court. Enforcement is through a determination of the Labour Court being enforced by order of the Circuit Court
- The minister is empowered to appoint inspectors who have wide authority to investigate. Another remedy for an employee is to request an investigation by an inspector, who may refer the matter to a rights commissioner
- Failure to pay the minimum wage is an offence, punishable by a fine of £1,500 on summary prosecution or £10,000 on indictment, and/or imprisonment for three years. Every day the offence continues, it attracts further penalties. Officers of a company can be personally liable as well as the company
- The act gives protection to employees who use this legislation, including against dismissal
- There are limited exemptions for employers in financial difficulty
- The act provides that any increase in pay resulting from this legislation is not to be used as the basis for higher pay claims for others to restore a pay differential
- There are special provisions to give priority to minimum wage arrears on winding-up or bankruptcy. Employees may recover money due as a simple contract debt.

The Oireachtas debates on the act give excellent background and are available on the government website at *www.irlgov.ie/oireachtas*. Look up *Legislative information* first to get the dates, and then *Parliamentary debates*, where the debates are listed by date. G

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

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Law Society sets up panel to help solicitors in trouble

The Law Society has created a panel of solicitors to help colleagues about whom a complaint has been made to the society. When solicitors are notified of a complaint by the Law Society, some fail to respond. This can exacerbate a situation which might be resolved quite easily and quickly if the solicitor had given it the proper attention. The problem often arises because many solicitors find it hard to confront and cope with the situation when a complaint is made or when other difficulties arise. They need assistance to do so.

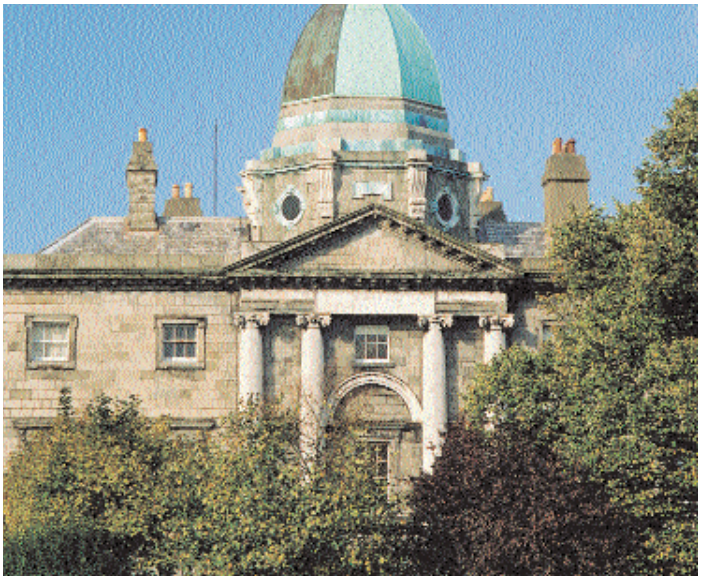
To address this problem, Law Society Council members were asked to nominate solicitors, not Council members or members of the society's regulatory committees, who would have appropriate experience to be on a panel to help solicitors in difficulty. The panel now comprises approximately 50 solicitors. One group has already attended a seminar designed to give them an overview of the regulatory machinery of the Law Society. This will better equip them to understand the context in which they may be asked to help. A further seminar is being arranged for the remaining group.

The solicitor seeking assistance will select a solicitor of his or her choice. For instance, the solicitor could select (or avoid) a local colleague. The solicitor on the panel will be free to choose not to become involved in any particular matter and to request the solicitor seeking assistance to approach another member. The solicitors will communicate directly with each other. The society will have no involvement.

The scheme will operate only during the period when the matter is being processed by the secretariat. The majority of complaints are resolved during this period without reference to a committee. The primary objective of the scheme is to help the solicitor send an appropriate response to the society. This will be a voluntary scheme, but it is envisaged that the relationship of solicitor/client will exist between the panel solicitor and the solicitor he or she is helping.

The scheme will start on 1 March. From that date, when a solicitor is notified by the society of a complaint or other difficulty, the letter will be accompanied by a list of the panel members. It will then be a matter for the solicitor involved, if he or she requires assistance, to contact a panel member.

Commenting on the initiative, John P Shaw, Chairman of the Guidance & Ethics Committee, which was asked to set up the scheme, said: 'We are delighted to have been part of this initiative which offers practical help to our colleagues in difficulties'.



Blackhall Place: giving practical help to the profession

Great leap backwards?

London barrister-turned-solicitor Brian Kennedy plans to submit a claim to the British Lord Chancellor that solicitor-advocates be allowed to wear wigs. As reported in the UK Law Society's *Gazette*, he feels that the wig commands 'respect and authority and bestows on the wearer gravitas and anonymity' when addressing a court, so defendants might be prejudiced if represented by bare-headed advocates.

But Bar Council chairman Roy Amlot QC maintains that barristers should have the exclusive right to wig out in court. 'We train more extensively as advocates', he says. 'Solicitors don't have the same level of training or constant experience in advocacy'.

Beauchamps does the business

Businessman Tom Hardiman has been appointed chairman of Dublin law firm Beauchamps. This is believed to be the first time that an Irish law firm has appointed a non-lawyer chairman. Hardiman is chairman of IBM International Treasury Services and holds a number of company directorships.

ECHR CONFERENCE

Last month the Law Society hosted a conference on *The implementation of the* European convention on human rights *into Irish law: effective remedies under the ECHR*. Pictured at the conference in Blackhall Place were Law Society President Ward McEllin, Minister for Justice John O'Donoghue, Attorney General Michael McDowell and Law Society Director General Ken Murphy

Computer records: the undiscovered country

New technologies such as e-mail have created vital new evidence that can – or should – be unearthed by the discovery process. Yet, as Declan O'Reilly points out, many are still oblivious to the helpful or damning potential of computer documents

The role of discovery has undergone a somewhat silent, though nonetheless cataclysmic, change of late. Traditionally, discovery has been restricted to paper documents, but with the advent and widespread use of e-mail, many truths that would otherwise not be admitted are coming to light. What people dare not write on paper for fear of litigation, they often seem happy to send by e-mail. There is a common tendency to treat e-mail in a casual manner, akin to casual chit-chat.

Yet the seemingly unknown reality is that e-mails can have unparalleled longevity of life. Computer records in most companies are backed-up, copied and archived on a daily basis. While such processes are intended to facilitate the restoration of damaged files, they have the potential to form a fountain of information to litigants. Even deleted messages remain relatively intact when deleted, unless extraordinary steps are taken to permanently destroy the file. It is an impossible task to recover a burnt letter, yet a deleted message may be 'undeleted' with surprising ease, often with the double-click of a mouse.

It is in the US where the full potential of discovery was first realised. For instance, *United States v Poindexter* (Crim No 88-0080-01 [HHG] 1990, US Dist LEXIS 6173, at 12, n12 [DDC May 29, 1990]) concerned the undeleting of previously deleted White House e-mails in the Iran-Contra affair. Morgan Lewis and Bockius, one of the largest US law firms, cites an example of an age-discrimination case where the letter of termination was on the face of it reasonable and fair. However, during the discovery process, computer consultants were engaged to undelete previously deleted e-mails. The case which seemed certain to fail suddenly settled for a reported $250,000 when an undeleted e-mail revealed the true sinister and unlawful reasoning behind the dismissal. Not even computer experts are exempt from careless e-mails. Bill Gates, creator of Microsoft, has recently suffered at the hands of ghost e-mails that have come back from the grave to haunt him in the recent Microsoft anti-trust case.

Under the *Rules of the Superior Courts*, a 'document' remains undefined. However, in the case of *McCarthy v O'Flynn* ([1979] IR 127), the Supreme Court considered that a document was 'something which gives information'. So the test is not whether an item is paper-based in the traditional sense, but whether the item is capable of giving information. Kenny J cites Humphreys J in the case of *Hill v King* ([1945] KB 329) in stating: 'To constitute a document, the form which it takes seems to me to be immaterial; it may be anything on which the information is written or inscribed – paper, parchment, stone or metal'.

> ***'There is a common tendency to treat e-mail in a casual manner, akin to casual chit-chat'***

To this one can now surely add bytes of information written on a computer disk.

The question of whether computer files are the subject of discovery on the basis of being a 'document' has come before English courts. In *Grant v Southwestern and County Properties Ltd* ([1974] 2 All ER 465), the court was faced with whether a tape recording of a telephone conversation was a document. Walton J rejected the argument that the recording was not a document merely on the grounds that it could not be visually inspected, stating: 'A litigant who keeps all his documents in microdot form could not avoid discovery because in order to read the information extremely powerful microscopes or other sophisticated instruments would be required. Nor again if he kept them by means of microfilm which could not be read without the aid of a projector'.

This reasoning was extended to computer files in *Derby & Co Ltd and Others v Weldon and Others* ([1991] 2 All ER 901). Vinelott J concluded that computer records were, on the basis outlined above, subject to discovery under RSC, order 24. Moreover, the court can order reprogramming so as to enable relevant material to be retrieved.

The recent case of *Western Provident Association v Norwich*

Union, which concerned allegedly defamatory remarks made by employees on the defendant's internal e-mail system, serves as a salutary warning. While the case did not come to trial, reports suggest that it settled for more than half a million pounds. It should also be noted that certain reports suggest that Western Provident obtained an order for e-mails to be preserved and handed to its solicitors even before issuing the writ. The threat of imminent destruction of the subject matter of an action may warrant such a step.

It is therefore quite clear that e-mails, together with deleted messages that are stored on back-up systems, are liable for discovery under RSC, order 31. A litigant who fails to disclose e-mails in the ordinary course of discovery potentially exposes himself or herself to the full sanctions available for failure to make proper disclosure. E-mails and computer files can, in common with all discovery, be subject to an order for inspection. As with all inspection, the party seeking discovery is entitled to have the documents inspected by experts, so computers may be examined by computer experts who specialise in e-mail recovery. Where a party fails to make adequate disclosure of documents, or when a litigant fears destruction of computer files pertinent to an action, that party may seek remedy under order 50, rule 4. This rule provides the court with the authority to order the preservation of the subject matter of the cause and may authorise any person to enter any property to obtain full information or evidence. Accordingly, litigants should not consider computer records as undiscoverable merely because ordinary office practices have never necessitated discovery of computer records.

Similar acts are to be found in the US case of *Playboy Enterprises Inc v Terri Welles* (60 F Supp 2d 1050), where the court held that it had the power to appoint a neutral expert to recover deleted e-mails. The court also held that the defendant's attempted deletion of e-mails does not render the e-mails undiscoverable if they can reasonably be recovered. In many cases, what the casual computer user considers impossible becomes completely reasonable when left to a computer expert.

'Unbeknownst to many, computers have an uncanny knack of compiling data files more extensively, thoroughly and permanently than their paper counterparts'

Hamlet referred to the future as 'the undiscovered country'. Today we live in that futuristic country of e-mail, SMS messages, voice-mail and computer files. And unbeknownst to many, computers have an uncanny knack of compiling data files more extensively, thoroughly and permanently than their paper counterparts. In light of the gems of information that can be revealed in e-mails, draft word-processed documents and voice-mail messages, this futuristic country is well worth discovering. G

Declan O'Reilly is an apprentice solicitor with Dublin and Waterford solicitors Kenny Stephenson Chapman.

The incorporation of the *European convention on human rights* will have a major impact on the practice of law in this country, not least in the areas of media and defamation law. Michael Kealey discusses the convention articles that are most likely to put editors in a sweat

Hold the f

At the Law Society's conference on incorporating the *European convention on human rights* into Irish law last October, Gerard Hogan SC predicted that 'the incorporation of the ECHR will make an important difference in some cases – especially, perhaps, in the vitally important free speech cases'. Prophesying the future is a dangerous pastime, but it might be possible to identify some trends. In any event, with legislation incorporating the ECHR into Irish law due in this Dáil session, it is certainly an opportune time to look at the likely impact of the convention's provisions on the law affecting the media.

ECHR and the Irish constitution

The right to freedom of expression is guaranteed in article 10 of the ECHR. Article 10 also recognises the need for restrictions on the exercise of this right such 'as are prescribed by law and are necessary in a democratic society'; these restrictions include laws 'for the protection of the reputation … of others' (see also article 40.3.2 of the Irish constitution). It has been argued that the right to freedom of expression guaranteed by article 10 is stronger than that contained in the equivalent provision of the Irish constitution, namely article 40.6.1. The former chief justice, Liam Hamilton, disagreed, saying: 'There does not appear to be any conflict between article 10 and the common law or the constitution' (*De Rossa v Independent Newspapers plc* [1999] 4 IR 432 at 450).

Also of significance is article 8 of the convention, which provides that: 'Everyone has the right to respect for his private and family life, his home and

ront page!

MAIN POINTS

- Conflicting rights of freedom of expression and right to a good name
- *De Rossa v Independent Newspapers*
- The impact on media law in the UK

ARTICLE 10: FREEDOM OF EXPRESSION

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

his correspondence'. The right to privacy has long been recognised as an unenumerated right guaranteed by article 40.3 of the constitution (see *Kennedy & Arnold v Ireland* [1988] ILRM 472).

Defamation and the convention

The need to balance the constitutionally- and convention-protected rights of freedom of expression and to a good name was highlighted in the case of *De Rossa v Independent Newspapers*.

In July 1997, a jury awarded the former government minister, Proinsias de Rossa, £300,000 damages for a libel contained in an Eamon Dunphy article published in the *Sunday Independent* in December 1992. The newspaper appealed on *quantum* only, arguing that the award was excessive and disproportionate to any damage done to Mr de Rossa's reputation. It also argued that the present practice whereby juries are given only limited guidance as to appropriate damages (unlike in the UK, where financial parameters are laid down by the parties and judge) rendered the system of awards so erratic as to infringe the media's rights under article 10. In this respect, they relied on a decision of the European Court in *Tolstoy Miloslawsky v UK* (1995 20 EHRR 442), where the absence of adequate and effective safeguards at trial, including very limited jury guidance, lead to an award of stg£1.5m. The lack of proper safeguards was held to infringe article 10.

The newspaper's appeal failed. The Supreme Court declined to change the rules on judges directing juries. The existing common law and constitutional rules were adequate protection against disproportionately high awards and did not infringe the ECHR. While accepting that the damages were 'at the top of the bracket', the majority of the court felt that they appropriately marked the gravity of the defamation and were proportionate to the damage done (the case was decided by a four-to-one majority with a dissent by Denham J).

This decision has come in for some criticism. Eoin Quill of the University of Limerick has said:

'The principles (upheld by the Supreme Court) are the traditional rules of defamation at common law and do not differ significantly from the principles applied by the English courts in *Tolstoy*, which were held to violate article 10 of the convention. The bare assertion of proportionality by Hamilton CJ is surely inadequate if the substantive legal principles are largely the same as those which were held to lack such proportionality in *Tolstoy*. The constitutional gloss, by way of a back-drop in Irish law, is meaningless if there is no change in the substantive principles'.

('*Jury instructions on the* quantum *of damages in defamation cases in the wake of* de Rossa', paper delivered at a seminar in Trinity College, Dublin, on 22 January 2000.)

Independent Newspapers have lodged papers challenging the determination of the Supreme Court to the European Court of Human Rights. Subsequently, the Supreme Court again upheld the practice of issuing jury instructions which leave the question of *quantum* at large.[1] It will be interesting to see if the European Court shares this view.

ARTICLE 8: THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

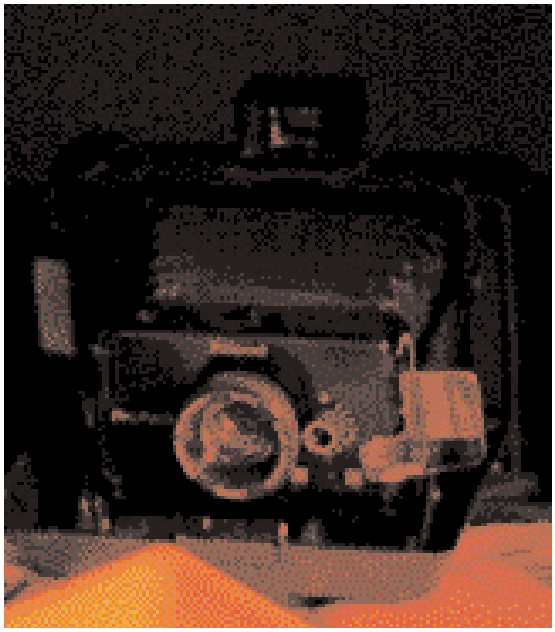
1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Privacy issues

There have been very few Irish decisions on the sometimes conflicting rights of free expression enjoyed by the media and of privacy. This may be due, to some extent, by a reticence on the part of media defendants to allow cases on the point to run to trial, which would give the Irish courts the opportunity to clarify and perhaps extend the ambit of the right to privacy guaranteed in article 40.3 of the constitution and in article 8 of the ECHR.

Some pointers on how the Irish courts might view article 8 of the ECHR (or its constitutional equivalent) are contained in a recent decision of the Court of Appeal in the UK. On 18 November 2000, the celebrity couple, Michael Douglas and Catherine Zeta-Jones, married in New York. *OK!* magazine paid approximately £1m for exclusive rights to cover the wedding. Shortly before publication, however, a rival magazine, *Hello!*, began printing an edition containing unauthorised photographs of the nuptials. An *ex-parte* injunction was granted on 21 November but lifted by the Court of Appeal on 23 November 2000. In a judgment shortly before Christmas, the Court of Appeal gave the reasons for its decision. The injunction was lifted, primarily on *American Cynamid* principles, on the grounds that the balance of convenience favoured publication of the



photographs complained of, as damages would be an adequate remedy.

Although English law had been willing to recognise an enforceable obligation of confidentiality, the Court of Appeal emphasised that it had not to date been relied upon to preclude an unwarranted intrusion into people's privacy, where the obligation of confidence did not apply. However, while stressing that it was not making a final decision, as the case was at an interlocutory stage, the court recognised the importance of article 8 of the ECHR and determined, in the words of Lord Justice Sedley, that: 'Mr Douglas and Ms Zeta-Jones have a powerful *prima facie* claim for redress for invasion of their privacy as a qualified right recognised and protected by English law'. That the Court of Appeal entertained arguments on a convention right to privacy is of itself significant; that it would do so in the case of two well-known public figures, who by their own admission were in the business of selling strictly controlled insights into their family life, is a powerful indication of the strength of article 8.

The media and the right to life

Article 2 guarantees the most basic human right, the right to life. Perhaps surprisingly, this has already had an impact on media law in the United Kingdom.

The murder of James Bulger by Jon Venables and Robert Thompson on 12 February 1993 was a horrific crime that caused much public outrage and attracted international media attention. At the end of the murder trial the judge determined that, notwithstanding the youth of the accused, they could be named and their images shown by the press. During the period of their detention, however, injunctions were in place which restricted the information which the media were entitled to publish. Those injunctions came to an end when Venables and Thompson reached the age of 18. They then applied to the president of the Queen's Bench Division in the UK for injunctions preventing their identification for the rest of their lives. They were supported in this by the Home Office. While in detention, Venables and Thompson had received death threats and the authorities proposed to give them new identities on their release. Notwithstanding resistance by lawyers for the print media, the injunctions were granted.

Dame Elizabeth Butler-Sloss determined that Venables and Thompson were 'uniquely notorious' and for the rest of their lives would be at serious risk of attacks from members of the public, as well as from relatives and friends of the murdered child. Therefore:

'If any section of the media decided to give information leading to the identification of either young man, such publication would put his life at risk. In the exceptional circumstances of this case and applying English domestic law and the right to life enshrined in article 2 of the European convention, I have come to the conclusion that I am compelled to take steps in the almost unique circumstances of this case to protect their lives and well-being'.

The *Human Rights Act* has only been in force in England since 2 October 2000, but the incorporation of the European convention has already had a real and substantial impact on the law there. While the Irish courts have long experience of balancing and enforcing constitutional rights, there can be little doubt that UK convention-based jurisprudence will be of persuasive effect here. It would certainly be surprising if practitioners, acting for and against the media, did not seek to rely upon the principles applied in, for example, the Douglas and Zeta-Jones and Thompson and Venables cases in appropriate cases here.

Allied to the existing bank of European jurisprudence, it is clear that the ECHR will have a major impact on all aspects of practice, including media law. G

ARTICLE 2: THE RIGHT TO LIFE

1 Everyone's right to life shall be protected by law. No-one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2 Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
   a) In defence of any person from unlawful violence
   b) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained
   c) In action lawfully taken for the purpose of quelling a riot or insurrection.

Michael Kealey is a partner at the Dublin law firm McCann FitzGerald.

Footnote

1 *O'Brien v MGN Limited* (Sup Ct, unreported, 25 October 2000). The court did, however, overturn an award of £250,000 as excessive and ordered a re-trial.

The Supreme Court recently reassessed Irish nullity law in the context of one party's on-going infidelity and adultery. John Healy examines fresh attempts to widen the basis of nullity law as it applies to marriages based on lies and deception

Till deceit d

Although divorce is the normal avenue for those seeking to dissolve their marriages, the High and Circuit courts can declare marriages null and void if specified exceptional circumstances are proved. The decree of nullity effectively declares that because the marriage lacked some fundamental element, such as the consent of one of the parties, it had never validly been created.

The drastic nature of the nullity declaration is best understood by contrasting its effects with those of divorce. Whereas the divorcing spouse typically faces negotiation and compromise over present and future rights to property, and remains obliged to provide maintenance for the support of his or her former spouse, parties to the successful nullity application leave the court with their conjugal slates wiped clean.

While the nullity declaration does not affect the parties' obligations to support their children (enforceable under the *Guardianship of Infants Act, 1964*, as amended by the *Status of Children Act, 1987*), nowadays its principal effect is to disentangle the petitioner from any statutory obligations to the former partner which would have arisen by reason only of the marriage. In brief, it treats the marriage as never having occurred, and as such it is the remedy *par excellence* for the spouse who feels wronged.

In each and every nullity application, petitioners must establish their case to a very high level of proof (occasionally described as being equal to the standard of proof in criminal trials, namely, 'beyond all reasonable doubt'). They must further prove that the defect of which they complain existed at the time the parties purported to create the state of marriage.

The element of consent has assumed prominence in recent years, chiefly because lawyers increasingly contrived to import into the nullity arena devices cultivated elsewhere by the law which attempt to invalidate or vitiate an apparent consent (typically through the doctrines of misrepresentation, mistake and fraudulent concealment). These gradually chipped away at the general rule that 'no marriage shall be held void merely upon proof that it had been contracted upon false representations and that, but for such contrivances, consent would never have been obtained' (*Swift v Kelly*, 1853).

The courts were encouraged to reason that because some relevant fact was concealed from the petitioner, his or her consent rested upon false premises and was not as such 'real'. This gradually developed into the broader argument that the marriage was invalid because of the failure to secure an informed consent – a concept more familiar to medical negligence law, and synonymous with recent attempts to expand the duty on doctors to disclose 'material risks' in the run-up to a patient's decision to submit to medical treatment or surgery. The trend seemed to have the support of Shatter who, perhaps over-hastily, declared in the fourth edition of *Family law* that 'a full, free and *informed* consent to marriage is essential for a valid marriage'.

GROUNDS FOR SEEKING NULLITY

The main grounds on which a nullity can be sought are as follows:

1. Lack of capacity to marry, where, for example, one of the parties was already married
2. Lack of consent to the marriage, where, for example, one of the parties was forced to undergo the ceremony
3. Non-observance of the necessary formalities
4. Refusal or failure to consummate the marriage by 'ordinary and complete' sexual intercourse, and
5. Inability to enter and sustain a 'normal marital' relationship, where, for example, one of the parties is not by nature heterosexual.

o us part?

In *F v L (orse F)* ([1990] 1 IR 348), the petitioner's consent was found to lack 'reality' in light of the respondent's deceitful concealment of his homosexuality, which he had continued to indulge after the marriage. Though the decree was awarded partly on the basis that the respondent lacked the capacity to 'maintain the life-long relationship required of marriage', the High Court was equally persuaded to nullify the marriage on the basis that the petitioner had 'deliberately painted a false picture of himself'.

In *BJM v CM* ([1996] 2 IR 574), the High Court declared a marriage null and void because the respondent had failed to disclose a physical disfigurement suffered as a child which had left her with pale white scar tissue across her torso. The court accepted the petitioner's explanation that his fiancée had resisted pre-marital sexual intimacy in an effort to conceal the scars, though at the time he had put this down to her religious beliefs. The court further accepted his assertion that if he'd seen the scars in time he would never have consented to marry her, as the disfigurement 'in the sensual province gave rise in his mind not to desire but to revulsion'. Although the point was also considered in the context of the man's inability to enter a normal marital (that is, sexual) relationship upon sight of the scarring, the court separately reasoned that the respondent's deliberate concealment of her disfigurement deprived him of a necessary 'election', and meant that he had 'in fact not entered into the contract of marriage with a full, free and informed consent'.

In *MO'M (orse O'C) v BO'C* ([1996] 1 IR 208), the Supreme Court appeared to endorse this emerging association between information and consent, between concealment and invalidity. The man, a former priest, had resisted informing his fiancée that he'd had to undergo a protracted laicisation over six years, and consulted a psychiatrist for depression. The consultations had taken place about three to six times a year, and had been terminated some three years

MAIN POINTS

- **Main grounds for seeking a nullity**
- **Recent attempts to widen grounds**
- **Supreme Court decision in *PF v GO'M***

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before the marriage. Despite accepting evidence that at no stage had the respondent been found to suffer a 'psychiatric illness', the court was satisfied that this information regarding his 'mental health' was a 'circumstance of substance' – in the sense that if it had been disclosed, it would have caused the petitioner not to marry the man. On this basis, the court reasoned that her consent to marry him was not valid because it was not 'informed'.

The most disquieting aspect of the decision was its acceptance of a subjective test of the information necessary to disclose in order to secure an informed consent to marriage. By its nature, such a test grants undue weight to an applicant's self-serving claims that if the information had been disclosed, consent to marriage would never have been given. It also encourages the court to examine the matter with 20-20 hindsight. Indeed, in this case the court's findings were very much coloured by the knowledge that the marriage had proved stormy and occasionally violent.

Seen in this light, *MO'M* suggested the possibility of nullity on demand, with disastrous consequences for the ousted partner. But in a decision late last year, the Supreme Court wisely jammed the brakes on this attempt to widen and deepen the grounds for nullity, albeit in a case which understandably attracts much sympathy for the petitioner. In *PF v GO'M (orse GF)* (28 November 2000), the respondent had pursued an affair with another man throughout her two-year engagement to the petitioner, a wealthy businessman, and subsequently throughout the marriage. Relying upon *MO'M v BO'C*, Mr F argued that because his wife's infidelity had been concealed from him, he had never been in a position to give an informed consent to marry her, and for this reason the marriage was invalid.

Rejecting the application, McGuinness J of the Supreme Court was evidently concerned to limit the availability of the nullity decree to exceptional cases, for reasons of public policy, and to encourage recourse instead to judicial separation or divorce proceedings in the event of marital breakdown. Were the law to accept a test of consent based on information relevant to the respondent's *conduct*, the validity of a great number of marriages would be called into question. The courts had always stressed the need for certainty with respect to the marriage commitment, and this flowed from a constitutional imperative under article 40.3.1, whereby the 'state pledges itself to guard with special care the institution of marriage on which the family is founded, and to protect it against attack'.

In response to the argument that the marriage was invalid because the petitioner had never given an 'informed' consent to it, McGuinness J accepted submissions by Máire Whelan BL that the notion of an 'informed consent' had wrongly slipped into more general family law use having first been adverted to in the specific context of adoptions. In *G v Bord Uchtála* ([1980] IR 32), Walsh J had spoken of the need to ensure that a mother's consent to the placing of her child for adoption was a 'fully informed, free and willing intention'. This rightly had emphasised that the mother must have been in a position to understand the alternatives to adoption.

Subsequently, 'informed consent' emerged in nullity applications in the comparable context of ascertaining whether the petitioner by reason of her pregnancy had been coerced into marriage, so that her consent to the marriage contract could not realistically be said to have been free or voluntary (see *N (orse K) v K* [1986] ILRM 75 and *DB (orse O'R) v O'R* [1991] 1 IR 289). In those decisions, however, 'informed' referred to information about the alternatives to marriage available to the young girls in question, and not to information about the character or conduct of the respondent.

McGuinness J accepted that, historically, mistake, misrepresentation and fraud had never been grounds for nullity, save in exceptional cases where their effect was to drain the consent of any reality (such as where one party misrepresents his identity, or misrepresents the nature of the ceremony and the vows being exchanged). A consent could also be invalidated by evidence of duress or undue influence, but, again, only to the extent that it showed the consent to have lacked the crucial element of voluntariness. Marriages had never been invalidated merely due to non-disclosure of information relating to one party's fortune, rank, conduct or personality.

Finally, McGuinness J was of the view that *MO'M* had been concerned with concealment of 'some condition, disposition or proclivity rather than merely a matter of conduct' – a view shared by O'Higgins J in the High Court.

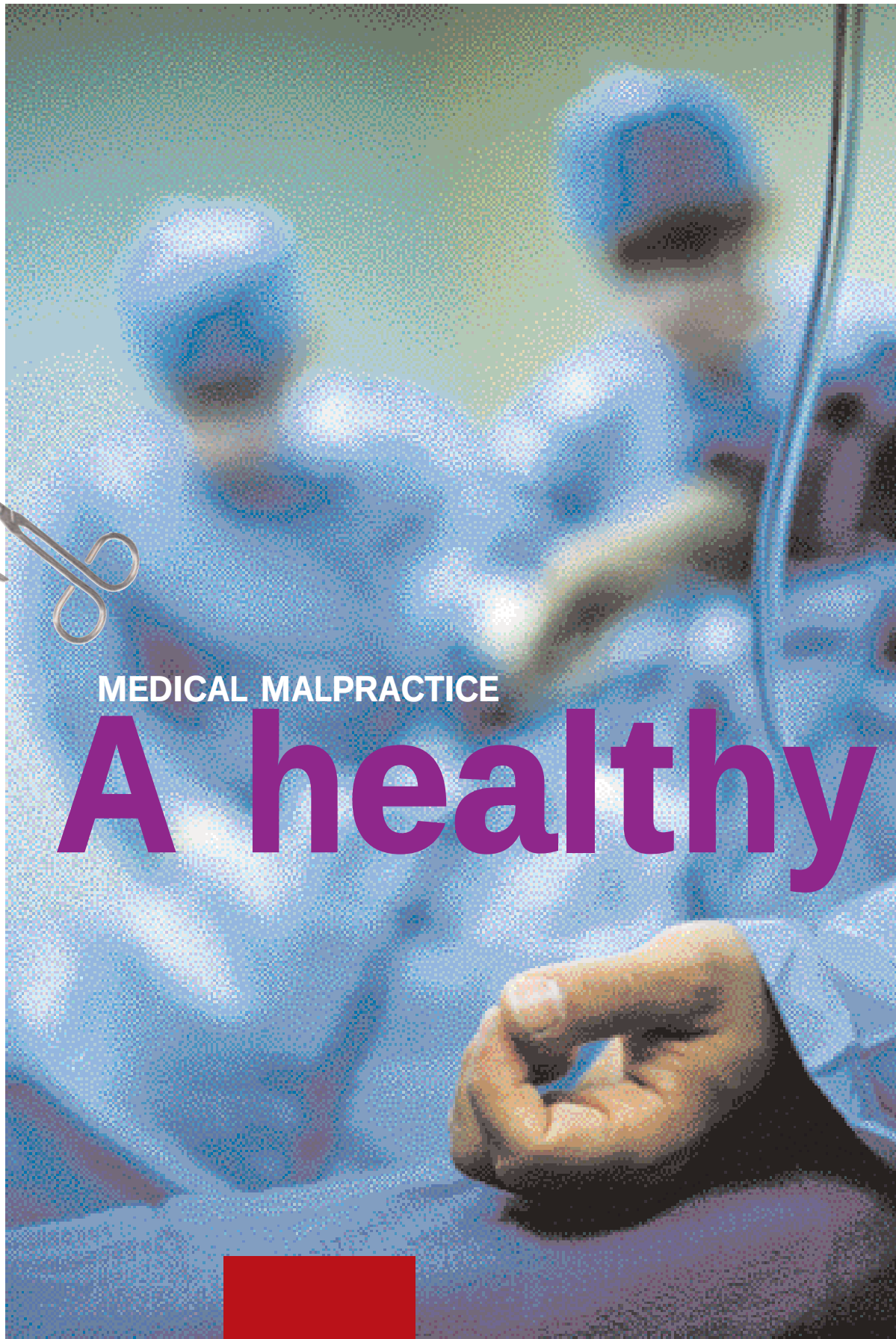
The decision in *PF* rightly lays down limits to the consent/informed consent line of attack in nullity proceedings, but it is likely that further bids will be made along these lines, chiefly because *PF* restricts but does not overrule the decision in *MO'M*. Future nullity applications are likely to exert strain on this distinction between disposition and conduct, for how robust can a distinction be which assigns such weighty consequences to the decision to treat in one case past depression as evidence of 'disposition', and in another case sustained deceitfulness and infidelity merely as evidence of 'conduct'?

A review of the series of decisions which led inexorably but unhappily to *MO'M* demonstrates how easily judicial logic sometimes bends to principle at the expense of policy, and this may well have been in McGuinness J's mind when she advised that nullity law should be governed less by judicial precedent than by statute, particularly given the comprehensive legislative scheme now in place for judicial separations and divorce. G

'The most disquieting aspect of the decision was its acceptance of a subjective test of the information necessary to disclose in order to secure an informed consent to marriage'

John Healy is a practising barrister and author of Medical negligence: common law perspectives *(Sweet & Maxwell, 1999).*

As in so many other countries, medical malpractice cases are on the rise in Ireland. Kieran Doran looks across the Atlantic to US efforts to stem the tide there by employing non-binding mediation to resolve disputes and restore confidence in the doctor / patient relationship



MEDICAL MALPRACTICE

A healthy

MAIN POINTS

- The average jury award in US medico-legal cases is $2 million
- The non-binding mediation process explained
- A case study of mediation in practice

alternative?

According to the most recent research by the US Insurance Information Institute, there are an increasing number of medical malpractice claims against American doctors. The institute's most up-to-date statistics indicate that the average jury award in 1996 was more than $2 million, an increase of over 100% on the previous year. In the first half of the 1990s, million-dollar verdicts accounted for over a third of all decisions in that period. By 1996, this figure had increased to a staggering 74%. The level of settlements have also been on the increase, averaging just under $700,000 in 1995, up from a level of $677,000 the previous year.

All of this has had dire consequences for doctors' livelihoods through increased insurance premiums. This, coupled with the growing levels of medical malpractice litigation awards and out-of-court settlements, has caused widespread disillusionment among the medical profession. In turn, this has undermined the sense of trust and mutual respect between doctors and patients.

A major contributory factor is the series of technological advances in medical science in recent years, which have given rise to unrealistic expectations on the part of patients and their families of complete and rapid cures for even those most difficult and complicated illnesses. Doctors blame overly-aggressive and demanding patients, who expect more than is reasonable from the course of treatment or medical procedure being undertaken.

The other major cause in the growth of medical malpractice litigation is the emergence and subsequent predominance of managed care in America. There has been a dramatic increase in patient membership of health maintenance organisations (HMOs), which provide comprehensive healthcare services to an enrolled membership for a fixed *per capita* fee. In 1980, 9.1 million US citizens subscribed to HMOs, but within ten years that number had quadrupled. At the current rate of growth, it is estimated that managed care will cater for the healthcare requirements of over 80% of the population by the end of the year 2001. This growth can be attributed to the ability of these organisations to provide affordable healthcare by cutting costs, achieved by employing closed panels of full-time physicians who agree to participate in, and co-operate with, the HMOs' cost-containment plans.

Unfortunately, the doctor's specific role in the HMOs' cost-control process has driven a wedge in the clinical relationship with the patient. The physician acts as a financial gatekeeper for the HMO, determining whether or not a subscriber to the HMO is eligible to obtain medical care, given the medical resources available and the budgetary constraints imposed by the HMO. The ability of the physician to advise his or her patients of alternative (and more expensive) treatments is severely restricted by the cost controls imposed by the HMO.

So how can this distrust in the clinical relationship, with its origins in poor communication between doctor and patient, be addressed? Is there an alternative to legal proceedings in medical malpractice cases?

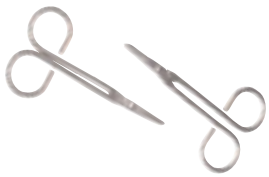
Mediation to the rescue?

To many, mediation seems to be the answer. According to Barry C Dorn, author of *Renegotiating health care* (Josey Bass, 1995), the process of non-binding mediation has a number of distinct stages. First, there is the pre-mediation stage. Here, the primary aim is to establish whether the parties to the dispute are disposed to using non-binding mediation as an alternative to litigation. The main purpose is to initiate communication between both parties, who may be entrenched in their respective positions, and help them to consider alternatives to judicial proceedings.

In the event of an agreement to proceed with mediation, the next stage is the pre-meeting investigation. Here, the mediator further examines the factual background to the case. In this regard, the mediator is required to be incisive in evaluating the relative merits of the claim, to discern opportunities for settlement, and to encourage both sides to consider one another's perspective on the case. The objective is to build a relationship of trust between the mediator and the parties involved.

If the pre-meeting investigation is successful, the next step is for the parties to meet. Here, the mediator seeks to further develop trust with the parties, and consequently gain support for the objectives of the mediated settlement.

Medical malpractice cases are characterised by tension between the plaintiff patient and defendant physician, with both sides well known to one another, primarily on an antagonistic basis. Initially, there is an attempt to change the nature of exchanges between



the parties, and hence improve the character of the overall relationship. At the opening session, the mediator structures the seating arrangements and controls the course of the discussion so as to ensure a full and fair exchange of views. The forum is opened with a brief outline of the process by the mediator, and an explanation of the settlement procedure. Overall, the primary goal is to encourage the release of anger or frustration that may have built up over the course of the dispute, and satisfy the desire to air any sense of grievance. Once this has been achieved, both sides will be more amenable to the drawing up of settlement proposals. However, before a solution is reached, points of agreement and contention need to be established.

This is achieved through the next part of the mediation process, the 'issue clarification' stage. The mediator's priority here is to establish the areas of agreement between the parties. In relation to the areas of contention, he lists the points of disagreement in specific order, ranging from those most likely to be settled to those most difficult to reconcile. By gaining agreement on a number of less controversial issues, the mediator tries to engender an atmosphere of conciliation and agreement.

By drawing up alternative options for solution in this part of the procedure, the mediator seeks to bring both sides closer to consensus on the disputed aspects of the case. This is undertaken in the course of 'brainstorming sessions', where the parties express preferences in relation to the options for settlement presented by the mediator. The consequences of the preferred option are considered, namely the probable impact on the other party and whether or not this will be acceptable. Overall, the basic goal is to help the parties to state their own preference, assess the elements of the proposals that are acceptable, and so move closer to a mutually-acceptable settlement.

If this point is reached, the final stage of the mediation process begins. On reaching the 'solution stage', the mediator works with the parties to draw up a specific list of potential settlement options. These alternatives are based on the exchange of preferences by each side during the course of the brainstorming sessions. The collective options are used as a general blueprint for an overall settlement to the claim, elements of which may either be rejected or accepted in the course of the deliberations during the solution stage.

In the event that a settlement proposal is rejected by one of the parties, the mediator refers both sides back to the original draft agreement, to reconsider and evaluate the options as well as the probable outcomes, and ultimately achieve a final settlement. If this is successful, the mediation process has achieved its original aim of shifting both parties from positions of confrontation and disagreement to one of compromise and ultimately settlement.

Putting the theory into practice

This is the theory behind the process of non-binding mediation, but how does it work in practice? Is it effective in settling cases of medical malpractice litigation and restoring trust in the doctor-patient relationship? Let us examine a case study of a programme of non-binding mediation operated by Rush-Presbyterian-St Luke's Medical Centre in Chicago. A HMO hospital, Rush is a major medical facility with more than 900 beds and nearly 1,300 healthcare professionals. On average, Rush is involved in litigating more than 200 tort law claims a year, of which 90% are medical malpractice cases (reported in the August 1998 *Illinois Bar Journal*).

As a result of this on-going level of malpractice litigation, Rush decided to develop its own programme of non-binding mediation. After consultation with the city's trial bar, and the specialised assistance of a retired Circuit Court judge, the hospital introduced its programme in late 1995.

According to Max D Brown, Rush's general counsel, there are a number of basic stages to the hospital's mediation programme, which is based on the theoretical model outlined earlier. First, there is the pre-mediation process, which focuses on six basic questions:

- Do the parties genuinely want to settle?
- Is the hospital prepared to offer a monetary settlement?
- Are the sides informed as to the relative strengths

and weaknesses of each party's case?
- Have the parties attempted discovery of any legal documentation relevant to the case?
- Is the result of the case unpredictable for either side? and
- Have the parties been negotiating or are they about to begin the process?

Initially, there is the selection of the mediator(s), which is pivotal to the entire procedure. Usually, retired judges and experienced litigators are recruited. Ordinarily, the Rush programme offers the services of a retired judge as a mediator, or two litigators drawn from the Chicago plaintiff and defendant bars respectively. Candidates are chosen on the basis of possessing the required traits of honesty, trustworthiness, patience, flexibility and creativity. The training of the selected mediators is absolutely crucial, with all new mediators undergoing an intensive coaching and education programme in relation to the general techniques of mediation.

Either party can withdraw and reactivate the legal proceedings at any time. In addition, there is a confidentiality clause, which prohibits the use of any material statement or evidence raised during the mediation in any subsequent legal proceedings. This is designed to encourage the parties to communicate openly and effectively, without fear of the legal consequences of disclosure.

Once the pre-mediation stage is completed through the signing of the written mediation agreement, there is the pre-meeting investigation stage. Here, each side submits a statement of the facts of the case, estimates of the damages suffered by the plaintiff, reports of the consultants and expert witnesses, the existing status of the claim, and details (if any) of an offer to settle. After this comes the mediation meeting itself.

The meeting usually begins with a brief outline of the mediator's background in medical malpractice litigation. Once the parties have been introduced to one another, there are the opening representations by their respective counsel. The presentations take the form of a 15-minute address to the meeting, with the aim of initiating dialogue between the parties, as well as helping the mediator clarify the issues involved in the case. This establishes areas of agreement and contention for the mediator, as well as the likely strengths and weaknesses of the case. The initial part of the meeting can last up to an hour-and-a-half.

Finally, there are the 'breakout sessions', where the mediator gathers information and shares relevant pieces of evidence to encourage both sides to consider the options for settlement. According to general counsel Max Brown, there are a number of different tactics available to the mediator at this stage. First, there is the 'conduit' tactic, which is restricted to the reporting of the settlement proposals from each side to the other. Another choice is the 'surrogate' tactic, which involves providing additional justification for a proposed settlement. A third option is the 'reshaping' tactic, where a more proactive approach is adopted by amending the proposals with the mediator's own suggestions. Finally, there is the 'clarification' tactic, in which responses are elicited, proposed terms for settlement reiterated, and previous statements that may help the parties reach a solution are highlighted.

In the Rush mediation process, the settlement stage begins when both sides have returned to the negotiating room. This may or may not result in a settlement being reached. But even in the absence of an agreement to settle, this is an opportunity to bring the parties face-to-face again and maintain the channels of communication. At this point, it is an established policy at Rush to apologise to the patient. The intention is to preserve the cordial nature of the meeting and establish a basis for future dialogue and an ultimate settlement of the claim. It is the maintenance of communication between both parties, even in the absence of an agreed settlement to the claim, which is the most beneficial aspect of non-binding mediation in relation to the preservation of trust in the doctor-patient relationship.

How successful has the Rush programme been since its introduction in late 1995? In purely statistical terms, the hospital has mediated 33 cases at a total cost of $15 million. The highest settlement figure was $4.5 million, the lowest $21,700, at an average of just over $450,000 a case. As a process, it has helped Rush settle claims for amounts which are compatible with the hospital's insurance reserves. The costs of mediation are estimated to be half those even for a case which is settled out of court or pre-trial, while the number of cases in which Rush has been named as a defendant has been reduced steadily.

Once patients sue their doctor, there is no realistic prospect of them returning to their physician's practice or clinic. However, mediation does provide both doctor and patient with a sense of closure. In addition, the collective sense of grievance seems to be somewhat alleviated, and faith in the clinical relationship partially restored. While there is usually no winner or loser in the mediation procedure, both parties leave feeling that there has been some benefit from participating in the process.

More importantly, perhaps, non-binding mediation is less confrontational and more flexible than litigation. It provides a faster, more efficient and cost-effective alternative to a legal claim. And the fact that it can be used to expedite a satisfactory and mutually-acceptable settlement to a medico-legal claim makes it a worthwhile alternative to court proceedings.

This is an important consideration for Irish doctors, lawyers and patients alike, especially as levels of medical negligence claims continue to rise. It is time for this country to learn from the American experience and to consider non-binding mediation as a viable alternative to medical malpractice litigation. G

Kieran Doran is an apprentice solicitor with the Dublin law firm Gannon and Liddy.

HOW DOCTORS AND PATIENTS SEE THE PROBLEM

In a recent US survey, two-thirds of doctors who were subject to medical malpractice litigation thought they had been open and honest with patients. However, only a third of patients agreed, with more than 20% stating that the clinician was actually dishonest. Although most of the respondents were of the opinion that their own clinical relationship was characterised by good communication, 33% of patients and one-tenth of physicians reported that it was poor.

The Pakistani Supreme Court recently decided a case involving significant issues in commercial arbitration. Max Barrett considers the lessons that may be important to practitioners in other jurisdictions, including Ireland

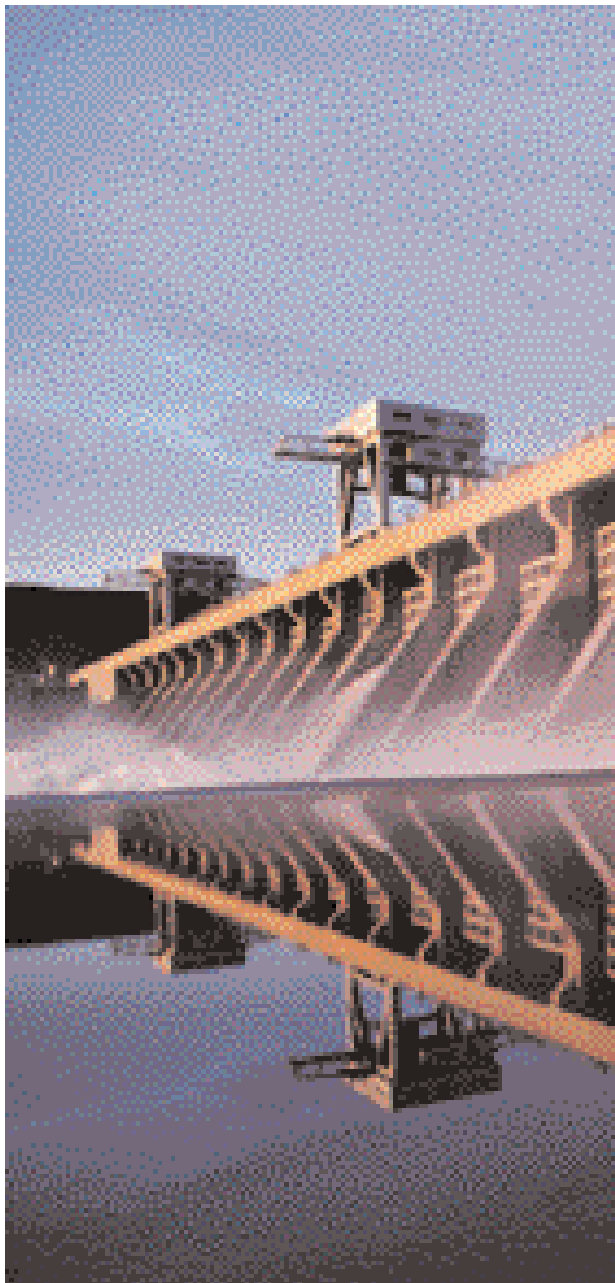
In *The Hub Power Company Limited v Pakistan Water and Development Authority* (14 June 2000, combined civil appeals nos 1398 and 1399 of 1999), the Pakistani Supreme Court was asked to decide whether an arbitration clause in a principal agreement unaffected by illegality could be relied upon when disputes arose under supplementary agreements that were alleged to have been procured by corrupt means. There was no doubt that the arbitration clause in the principal agreement was worded broadly enough to capture disputes arising under the supplementary agreements.

ARBITRATION

The issue for the Pakistani Supreme Court to decide was whether the alleged illegality surrounding the genesis of the supplementary agreements was sufficient to preclude the arbitration of disputes arising from them, notwithstanding the fact that the relevant arbitration clause was contained in a separate valid agreement.

The *HUBCO* case had its origins in a series of contracts concluded between the Hub Power Company Limited (HUBCO) and the Pakistan Water and Power Development Authority (WAPDA) in 1992 concerning the construction and operation of an electricity power plant. There were three core contracts: the implementation agreement, the fuel supply agreement, and the power purchase agreement. Under the implementation agreement, HUBCO was responsible for designing, building, operating and maintaining the electricity power plant. Under the fuel supply agreement, HUBCO agreed to buy its fuel requirements from a particular supplier. And under the power purchase agreement, WAPDA was required to buy the electricity generated by the power plant. Any disputes between the parties arising out of this last agreement were to be resolved by negotiation between the parties. If the dispute persisted, there was provision for referral to an expert and ultimately for the matter to be resolved by arbitration.

Between 1993 and 1994, HUBCO and WAPDA entered into three supplementary agreements whereby the amount payable by WAPDA to HUBCO under the power purchase agreement was increased. WAPDA later claimed that these amending agreements were 'illegal, fraudulent, collusive, without consideration, *mala fide*, and designed to cause wrongful loss to WAPDA and the government of Pakistan'. It suggested that certain officers of WAPDA and certain government officials who were in a position to exert influence over WAPDA had been persuaded by corrupt means to bring about the supplementary agreements. It contended that, as a result of the alleged illegalities surrounding the genesis of the supplementary agreements, those agreements were of no legal effect. And it sought the recovery of an alleged Rs16 billion (approximately IR£252 million) loss that it claimed to have suffered on foot of the supplementary agreements.



MAIN POINTS

- The background to the *HUBCO* case explained
- Section 13 of the *Arbitration (International Commercial) Act, 1998*
- Public policy in the context of international arbitration

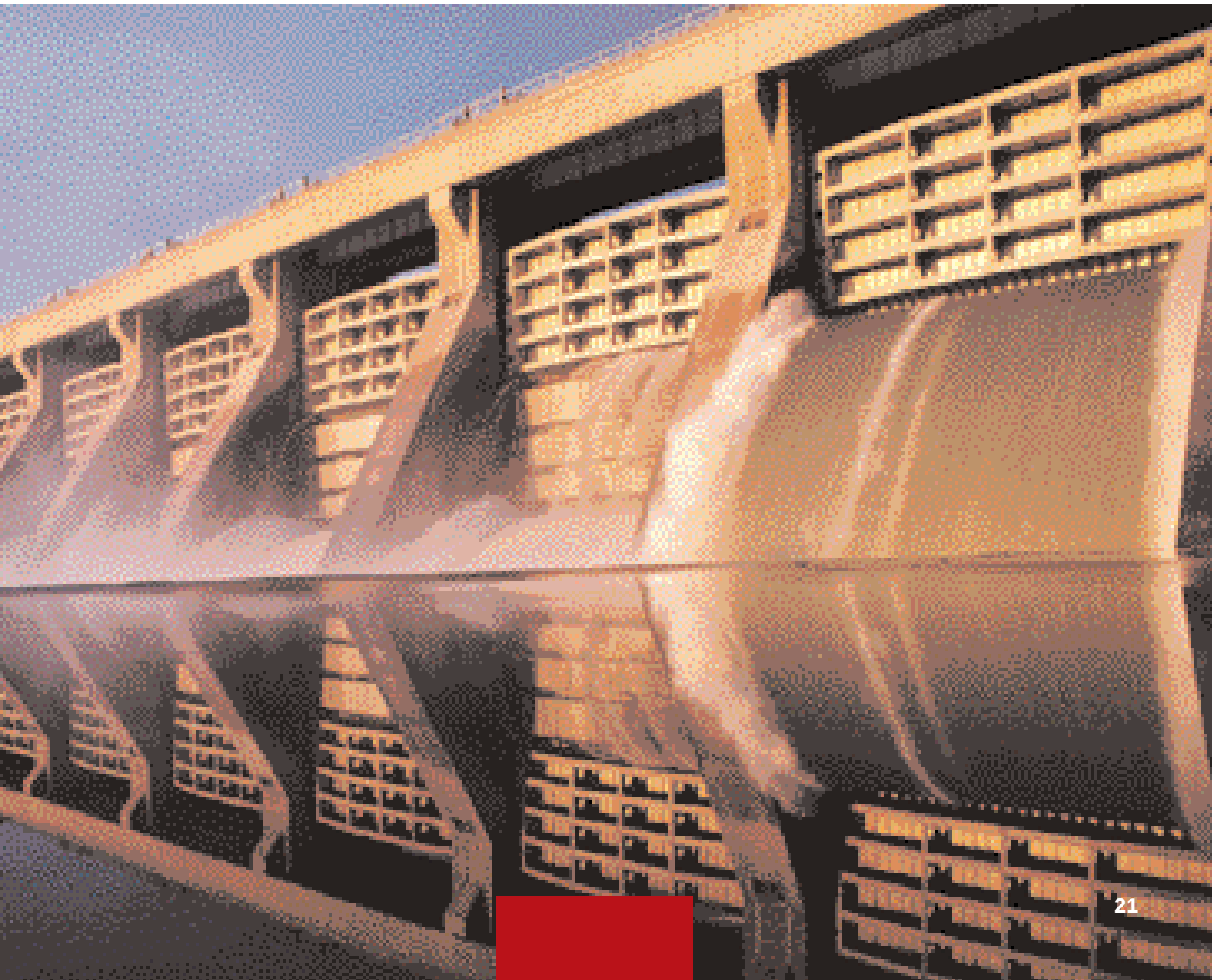
HUBCO's immediate response was to seek two temporary injunctions, one restraining WAPDA from terminating its liabilities under the supplementary agreements, the other restraining WAPDA from invoking the jurisdiction of any judicial or quasi-judicial tribunal in connection with or in furtherance of the dispute between the two parties. This was the first of a number of applications that were to be made by each of the parties before the courts in Lahore and Karachi.

To a great extent, these applications sprang from the question of whether or not the dispute between the parties should be allowed to proceed to arbitration. A core argument against allowing arbitration of the dispute was that, as the public policy of Pakistan does not allow disputes arising from illegal activities to be arbitrated, and as the supplementary agreements in this case were allegedly tainted by illegality, it followed that the dispute between the parties could not be the subject of arbitration. The Pakistani Supreme Court was asked to rule on the matter.

By a 3-2 majority, the court decided that there was sufficient *prima facie* evidence before it to suggest that the allegation of corruption made in this case did require further investigation and was not merely a spurious allegation made to frustrate the arbitration process. As there was *prima facie* evidence of corruption, this meant that a determination as to the validity of the supplementary agreements would involve reaching a finding as to whether those agreements had been brought about by means of corrupt (criminal) acts, and, because public policy required that criminal matters be adjudicated by the courts, it followed that any question as to the validity of the

AND PUBLIC POLICY

Dammed if you do, dammed if you don't: the construction of a Pakistani power plant sparked more than just electricity



"We've got chaps in overseas offices.
No idea about their names."

DUBLIN 5th April 2001

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supplementary agreements would have to be decided by the courts.

The conclusion of the majority that public policy required ostensibly credible criminal allegations to be the subject of judicial consideration, and not commercial arbitration, met with a lengthy dissent from Jehangiri J. He also addressed two further issues that are of interest to those involved in international commercial arbitration: the doctrine of separability and the relationship between the *lex actus* (the law of the transaction) and the *lex fori* (local law). Much of what Jehangiri J has to say is not new, but all of what he has to say is of interest. His judgment involves something of a 'refresher course' on a number of the core issues that arise in the field of international commercial arbitration.

Public policy as a ground for challenge

Just as prayer is sometimes portrayed as the last refuge of a desperate sinner, it is fair to say that public policy-based arguments are viewed by some as the last refuge of a desperate litigant. Indeed, almost two centuries ago, Burrough J was moved to remark in *Richardson v Mellish* that a public policy point 'is never argued at all but when other points fail'. Be that as it may, the decision of the majority in the *HUBCO* case would suggest that, at least in the context of international commercial arbitration, a public policy-based challenge to an arbitration can be well worth making.

The role of public policy within the context of international commercial arbitration is not only a live issue in Pakistan; it is also a live issue in Ireland. Here, section 13 of the *Arbitration (International Commercial) Act, 1998* provides that the three-month time limit on challenges to awards prescribed by article 34(3) of the UNCITRAL *Model law on international commercial arbitration* (which the 1998 act effectively transcribes into Irish law) 'shall not apply to an application to the High Court to have an arbitral award set aside on the grounds that the award is in conflict with the public policy of the state'. Shortly after the 1998 act was passed into law, the then attorney general (now the Irish member of the European Commission), David Byrne, opined that the type of awards he envisaged being set aside under section 13 are those obtained by fraud, bribery or corruption. This may be so, but it is nonetheless fair to say that there will be an element of uncertainty about the precise ambit and effect of section 13 pending a decision by the Irish courts.

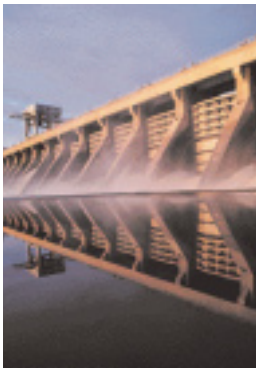
In the meantime, guidance must be sought elsewhere. The *HUBCO* decision is of some interest in this regard. Although the decision was concerned with a challenge to arbitration proceedings and not a challenge to an arbitral award (the focus of section 13), it provides an insight into how the supreme court of another jurisdiction has grappled with the issue of public policy within the context of international arbitration.

The essence of the majority judgment in the *HUBCO* case was that the public policy of Pakistan reserves criminal issues to the courts. And because a determination as to the validity of the supplementary agreements in that case would involve an investigation of allegations of corrupt behaviour (which, of course, is criminal behaviour), the case fell to be decided by the courts and should not be referred to arbitration.

In his minority judgment, Jehangiri J sounded a general note of caution over the degree of receptiveness that the courts should display when presented with public-policy arguments in cases coming before them. He quoted a *dictum* of Donaldson MR in the English Court of Appeal to the effect that 'considerations of public policy should be approached with extreme caution' (*DST v Ras Al Khaimah National Oil Co* [1987] 2 All ER 769 at 779). He also referred to case law from New Zealand and Pakistan which strikes a similarly cautious note.

Jehangiri J then referred to the opportunities for abuse that could arise if individuals were able to halt arbitration proceedings merely by making allegations of fraud or criminality. He noted the proposition in *Russell on arbitration* (Sweet and Maxwell, 1997) that 'fraud can be within the scope of an arbitration agreement', and referred to *Westacre Investments v Jugoimport* ([1988] 4 All ER 570), in which allegations of bribery of Kuwaiti government officials were held to be within the scope of a standard ICC arbitration clause, and the US case of *Mar-Len of Louisiana v Parsons-Gilbane*, in which certain amendments to a contract that were alleged to have been induced by fraud were likewise held to come within the scope of an arbitration agreement ([1985] 773 F2d 633, decision of the US Court of Appeals, 5th Circuit). Continuing in this vein, he also referred to a precedent from Pakistan, *Island Textile Mills Ltd, Karachi v V/O Technoexpert and another* in which it was held that there was no legal principle to the effect that an arbitration tribunal cannot try the question of fraud or misrepresentation ([1979] CLC 307).

In short, Jehangiri J was able to point to a line of Anglo-American authorities and one Pakistani case in which the issue as to whether there was unlawful behaviour had been allowed to go to arbitration. He considered that this line of authority was relevant in the *HUBCO* case because the arbitration agreement at issue had itself provided that it was to be governed by English law. He did not agree with or dissent from the version of Pakistani public policy espoused by the majority judges. Instead, he decided the issues which the case presented by reference to the line of authority just mentioned. He considered it appropriate to do this because of the doctrine of separability and the role which that doctrine accords to the *lex fori* in international commercial arbitration proceedings. In short, he considered that the answer to the question as to whether the disputes between HUBCO and WAPDA were open to arbitration lay not in public policy but in the arbitration agreement itself.



'Just as prayer is sometimes portrayed as the last refuge of a desperate sinner, it is fair to say that public policy-based arguments are viewed by some as the last refuge of a desperate litigant'

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Jehangiri J observed that the validity of the power purchase agreement had not been disputed by the parties to the case. And he opined that the validity of that agreement could not be, and was not, tainted by the alleged fraud which had surrounded the conclusion of the later supplementary agreements. He referred to the doctrine of separability, whereby arbitration clauses contained in agreements are treated as separate and self-contained agreements: '[If that] were not so, arbitration clauses would not at all survive an attack on the main contract'.

Separability and *lex fori*

He mentioned that a consequence of the doctrine of separability is that even where the agreement containing an arbitration agreement is alleged to be invalid, the arbitration agreement itself can be valid and thus the question as to the validity or otherwise of the main agreement can be referred to arbitration. Jehangiri J also mentioned a further attribute of the doctrine of separability, namely, that while the law of the arbitration agreement usually follows the proper law of the main contract, the separability of the arbitration agreement means that it can actually be subject to a separate law from the main contract.

Strictly speaking, Jehangiri J did not actually consider that the issue of separability arose in the *HUBCO* case because the validity of the power purchase agreement (the agreement within which the relevant arbitration agreement was contained) had not been disputed, nor was there any doubt raised about the validity of the arbitration agreement. However, having mentioned the issue of separability, Jehangiri J went on to cite a number of authorities from England and Pakistan in which the doctrine of separability has been endorsed and applied.

He accepted the limit placed on the doctrine of separability by the English Court of Appeal in the recent case of *Soleimany v Soleimany* ([1999] 3 All ER 847), in which it was decided that contracts for illegal adventures which are illegal or tainted in their very purpose (such as a contract of co-operation between highwaymen) could not be the subject of arbitration. However, he did not consider that the case at hand was such a case. Here, the agreement within which the arbitration clause was contained (the power purchase agreement) was, by common consent, a lawful agreement pertaining to the provision of electricity by HUBCO to WAPDA. Such illegality as was alleged arose in connection with the supplementary agreements. Jehangiri J did not consider that an arbitration clause contained in a valid agreement which had been amended by supplementary agreements that may or may not have been tainted by illegality could be considered to be part of an overall illegal arrangement and hence of no effect.

The respective approaches adopted by the majority and the minority judges in the *HUBCO* case each have their own advantages and disadvantages. Notwithstanding case law to the contrary, there is an instinctive attractiveness to the view of the majority that where a dispute raises criminal issues, then national courts should resolve that dispute. There does seem to be something amiss in having issues that touch on criminal law resolved behind the closed door of arbitration proceedings. National courts would naturally be concerned at any 'privatisation' of criminal justice, not only because they want to see fairness done, but because the sovereignty of a state is necessarily qualified if allegedly criminal acts within its jurisdiction fall to be adjudicated by an international arbitrator or arbitral tribunal.

On the other hand, of course, there is the danger (highlighted by Jehangiri J in the *HUBCO* case) that truculent litigants who wish to delay or frustrate arbitration proceedings will bring some form of public policy challenge to do so. In the *HUBCO* case, the majority stated that they were persuaded there was a *prima facie* case of criminality that required further investigation. Had the allegations of corruption been spurious in nature, the majority would, one suspects, have allowed the arbitration to proceed.

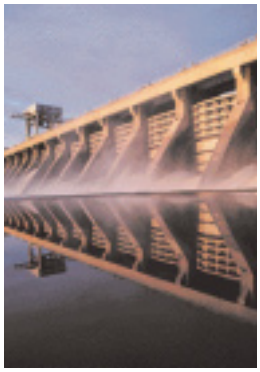
The difficulty is that, even with a *prima facie* case requirement, the fact that a court shows itself at all receptive to public policy challenges is likely to encourage litigants to take a chance, to bring challenges (thereby delaying arbitration) and to see if they can avoid a previous commitment to arbitration. An alternative solution touched upon by Jehangiri J in his closing comments is to allow arbitrations to proceed and thereafter to allow a public policy challenge to an award. Such a challenge would, of course, be akin to the type of action envisaged by section 13 of the *Arbitration (International Commercial) Act, 1998*.

How would such an action fare in Ireland? The Irish courts have traditionally adopted a positive approach to arbitration, but without case law on the matter, it is not at all certain what their approach would be. That, of course, is why the *HUBCO* case is so interesting from an Irish perspective. It illustrates how the supreme court of another state has sought to balance the competing demands of effecting justice and fairness on the one hand and ensuring the practicability of the arbitration process on the other.

The judgments in the case demonstrate the contrasting approaches that can be adopted by judges when presented with public policy challenges to international commercial arbitrations. And the case possibly provides a certain comfort to those who might be concerned that section 13 of the 1998 act could diminish the attractiveness of Ireland as a venue for international commercial arbitrations.

The role that national public policy should play within the context of international commercial arbitrations is, as the *HUBCO* case makes clear, a vexed issue that confronts all nations interested in encouraging international trade by fostering an effective system of international commercial arbitration. G

Dr Max Barrett is a solicitor at McCann FitzGerald in Dublin.



'There does seem to be something amiss in having issues that touch on criminal law resolved behind the closed door of arbitration proceedings'

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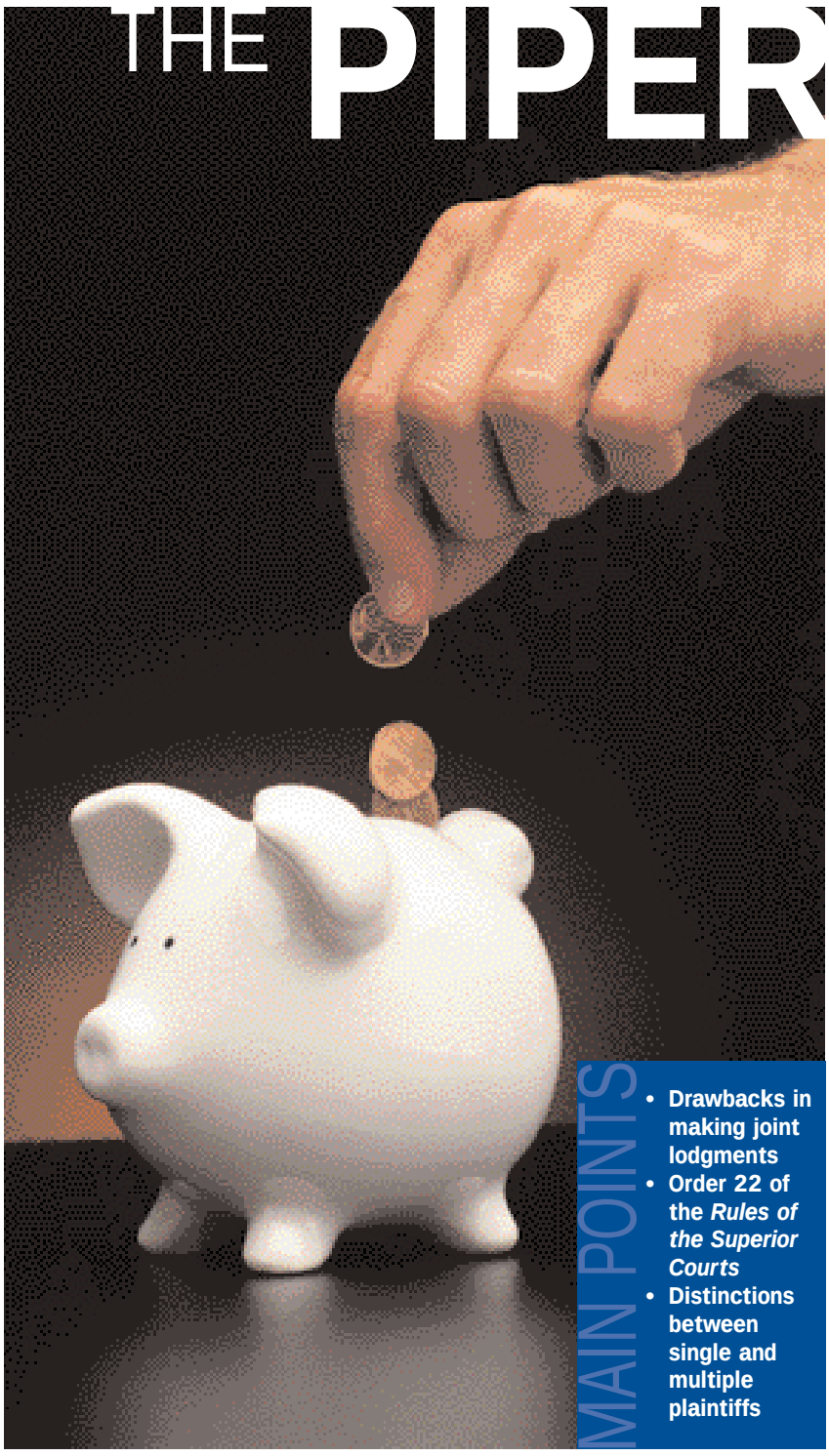


Joint lodgments are a viable way for defendants to handle liabilities in court cases. But, Dessie Shiels and Karl Henson argue, they're not always without risks – or appropriate in all circumstances

MAIN POINTS

- Drawbacks in making joint lodgments
- Order 22 of the *Rules of the Superior Courts*
- Distinctions between single and multiple plaintiffs

There are many instances in modern litigation in which plaintiffs bring a case where defendants realise that they are liable and will be so held at trial. It may be, however, that settlement negotiations will break down because the plaintiffs' estimate of what their claim is worth is wholly unrealistic. In such circumstances, defendants who are guilty in the sense of being liable to the plaintiffs, but who are innocent in the sense of being willing to settle a claim realistically, may avail of order 22 of the *Rules of the Superior Courts*. That rule permits defendants to pay a sum of money into court in purported satisfaction of a claim which, if not exceeded at trial by plaintiffs who persist with a claim, will relieve them of any liability for the plaintiffs' costs in bringing the claim. While it is clear that this lodgment device provided in order 22 may be availed of by a single defendant, the question arises as to whether it may be availed of by multiple defendants jointly, something which is not provided for in the *Rules of the Superior Courts*.

Are joint lodgments permissible?

Where there are two or more defendants to an action, it may be desirable, in appropriate circumstances, to make a joint lodgment. The defendants may decide between them that each will accept a proportion of liability and then make an appropriate lodgment made up of each defendant's agreed proportion of liability. Take the case of two defendants who decide that a lodgment of £1,000 would be appropriate and who

accept 70% and 30% of the liability respectively. In making a joint lodgment, the first defendant will make a lodgment of £700 and the second defendant will make up the remaining £300 necessary to make a cumulative lodgment of £1,000. Would such a joint lodgment be permissible under order 22?

In the case of *Robertson v Aberdeen Journals Ltd and Others* ([1954] 2 AER 766), three defendants sought to make a joint lodgment in respect of the plaintiff's two causes of action. The court held that by virtue of the English equivalent of order 22, rule 1(1), combined with another English rule, namely order 71, rule 2 (which provides that: 'In these rules, unless repugnant to the context, the singular number shall include the plural, and the plural shall include the singular'), the defendants were entitled to join together in making a payment into court. This was so notwithstanding the provisions of the English equivalent of Ireland's order 22, rule 12. While there is no rule in the Irish *Rules of the Superior Courts* which is equivalent to order 71, rule 2 of the English rules, there is section 11(a) of the *Interpretation Act, 1937*, which states that 'every word importing the singular shall, unless the contrary intention appears, be construed as if it also imported the plural, and every word importing the plural shall, unless the contrary intention appears, be construed as if it also imported the singular'. Therefore, by applying the *Robertson v Aberdeen Journals* case to the *Rules of the Superior Courts*, there is no reason why two or more defendants to an action in Ireland cannot make a joint lodgment.

Such a joint lodgment may also be made in respect of each of a plaintiff's causes of action without apportionment. In this regard, the court in *Robertson* pointed out that it could properly exercise its jurisdiction under the English equivalent of order 22, rule 1(5) in permitting all the defendants to pay into court a single sum in respect of all the causes of action. This was so as 'it would be a grave hardship on the defendants if they had to pay in separate sums in respect of each cause of action', whereas there would be no hardship on the plaintiff if a joint lodgment was made in this way. Essentially, the plaintiff was in a position to determine which of his causes of action was his main cause of action, and therefore worth the most, whereas the defendants were unable to determine this and so make a proportionate lodgment.

'When a lodgment is made, a plaintiff must be able to determine what he will receive if he accepts, and whether he thinks that will satisfy his claim'

The *Courts of Justice Act, 1936*

In Ireland, we need to consider section 78 of the *Courts of Justice Act, 1936*, which reads: 'Where, in a civil proceeding in any court there are two or more defendants and the plaintiff succeeds against one or more of the defendants and fails against the others or other of the defendants, it shall be lawful for the court, if having regard to all the circumstances it thinks proper so to do, to order that the defendant or defendants against whom the plaintiff has succeeded shall (in addition to the plaintiff's own costs) pay to the plaintiff by way of recoupment the costs which the plaintiff is liable to pay and pays to the defendant or defendants against whom he has failed'.

This section may be problematic if one is considering making a joint lodgment. It allows a plaintiff to proceed against all defendants and then, if unsuccessful against all of them but successful against some of them, to seek a court order attaching the entire costs of the action to the defendant he succeeded against. If two defendants make a joint lodgment, there is a risk that while the plaintiff might not beat the full lodgment made, he might nevertheless beat the lodgment made by one of the defendants. In the example given above of the two defendants making a joint lodgment of £1,000 (contributing £700 and £300 respectively), if the court were to award the plaintiff £900, he would have failed to beat the entire lodgment, but if the court awarded him £500 against the first defendant and £400 against the second defendant, then arguably he would have succeeded against the second defendant so as to allow him to apply under section 78 to attach the entire costs of the action to the second defendant. Whether section 78 could apply in this way depends on whether a court would allow a plaintiff to use it to effectively deprive the whole procedure of making a joint lodgment of any value to a defendant whose portion of a joint lodgment was insufficient to meet a plaintiff's award against him. Ultimately, this would depend on whether the court, 'having regard to all the circumstances', 'thought it proper so to do'.

In this regard, the case of *Rice v Toombes* ([1971] IR 38 at 41) is relevant. In that case, O'Dalaigh J was of the opinion that section 78 was 'an enabling provision, not a restrictive one' for the benefit of plaintiffs. Arguably, section 78 stands independent of the lodgment rules available for the benefit of defendants and would permit a plaintiff succeeding against an individual contribution in a joint lodgment to attach his entire costs of the action to the defendant who had made the inadequate contribution. However, it should be remembered that a plaintiff might fail to beat a lodgment and also fail to beat each defendant's individual contribution to the lodgment. In such circumstances, section 78 could have no application.

Apportionment

The case of *Walker v Turpin* ([1993] 4 AER) is also relevant here. In that case, the court held that a defendant, in making a payment into court in an action where there were multiple plaintiffs, could be ordered to make an apportionment of the sum paid in, so as to inform each plaintiff of what money was being paid in respect of their respective claims. In so deciding, the court placed emphasis on the English equivalent of order 22, rule 1(5) of the *Rules of the Superior Courts*. The Irish courts would order apportionment of a defendant's lodgment in an action brought by multiple plaintiffs so as to ensure that the plaintiffs would not be prejudiced.

Thus there is a distinction between the case where there is a single plaintiff with multiple causes of action and the case where there are multiple plaintiffs and so

multiple causes of action. This distinction is wholly justifiable. When a lodgment is made, a plaintiff must be able to determine what he will receive if he accepts, and whether he thinks that will satisfy his claim. A single plaintiff with multiple causes of action can make that decision. On the other hand, multiple plaintiffs would not be able, without apportionment, to weigh up what they would each receive on acceptance of the lodgment against what they estimate their claim to be worth. Were apportionment not ordered, the prejudice to the plaintiffs would greatly outweigh that to the defendants. This is because where there are multiple plaintiffs the defendant can make a judgement on the value of each plaintiff's claims, and non-apportionment would give them an unfair advantage which would go against the constitutional ethic of fair procedures which the *Rules of the Superior Courts* seek to uphold.

The position from a plaintiff's perspective was summed up by Sir Donald Nicholls in *Walker v Turpin*, when he said in relation to multiple plaintiffs that: 'the plaintiffs are individuals, with their own separate interests, and each is pursuing his own separate causes of action. Joinder as co-plaintiffs should not be allowed to deprive them of the opportunity for each to decide independently of the other whether he wishes to accept the payment or wishes to continue'.

It is always possible that in certain circumstances a court could remove the benefit of an apportionment. For example, where there has been a material change of circumstances which affects the risks of the litigation for the plaintiff. If there has been such a change, a defendant could obviously object to any application for acceptance of an apportioned sum where this would give a plaintiff an opportunity to accept an apportioned sum greater than he was likely to receive after the event detrimental to his case (for example, after the exchange of medical reports).

Infant plaintiffs

The position of defendants trying to make a joint lodgment is further complicated where a plaintiff is an infant. In such instances, under order 22, rule 10 of the *Rules of the Superior Courts*, the infant plaintiff will have to apply to the court to accept that lodgment. Where, however, the judge decides that the action should instead go to trial, as the lodgment is insufficient and the plaintiff fails to beat the lodgment, the court may nevertheless, under section 63 of the *Civil Liability Act, 1961*, award the plaintiff his or her costs anyway. This mechanism is even wider than section 78, since in such a case all the defendants could be liable to their proportionate degrees of liability (at the discretion of the judge) to contribute to the infant plaintiff's costs, even if they had made a successful joint lodgment together. All of this presupposes that an infant plaintiff is willing to accept a lodgment. Where he or she is not, and no application is made to the court under order 22, rule 10 to accept the lodgment, section 63 will not apply. It is, of course, also possible that the judge would not award the infant plaintiff costs under section 63.

In conclusion, the possibilities that might arise in respect of joint lodgments may be summarised as follows:

- Where there is one plaintiff with one cause of action, a joint lodgment by defendants should be permissible. There will, however, always be a risk for defendants that their individual contribution will be defeated and that they might be singularly liable for the plaintiff's costs of the action because of section 78. The risk is even greater where an infant plaintiff is involved
- Where there is one plaintiff with multiple causes of action, the position is the same as it is above
- Where there are several plaintiffs, and thus several causes of action, a joint lodgment should be permissible. An apportionment of the lodgment between the different causes of action may be ordered because only each individual plaintiff can estimate what they consider the value of their claim to be. The risk posed by section 78 for defendants is greatly increased because any one of the plaintiffs may defeat a contribution made in respect of their cause(s) of action. However, a defendant who was held liable for an individual plaintiff's costs because of section 78 would only be liable for that plaintiff's costs. Again, an infant plaintiff will complicate the risk.

There will be cases where a joint lodgment is very advantageous to defendants, and should be permitted. The advantages, however, will in many cases be balanced against the risk of being held liable for the costs of action because of section 78 and the rules in relation to infant plaintiffs. In the end, however, where such matters result in dispute, the courts will determine any issues according to the rule of constitutional fair procedures which the *Rules of the Superior Courts* seek to uphold for both plaintiffs and defendants. G

Dessie Shiels and Karl Henson both work at the Dublin law firm McCann FitzGerald.

WHAT THE *RULES OF THE SUPERIOR COURTS* SAY

Order 22, rule 1(1) states: 'In any action for a debt or damages (other than an action to which section 1(1) of the *Courts Act, 1988* applies or in an admiralty action), the defendant may at any time after he has entered an appearance in the action and before it is set down for trial, or at any later time by leave of the court, upon notice to the plaintiff, pay into court a sum of money in satisfaction of the claim or (where several causes of action are joined in one action) in satisfaction of one or more of the causes of action'.

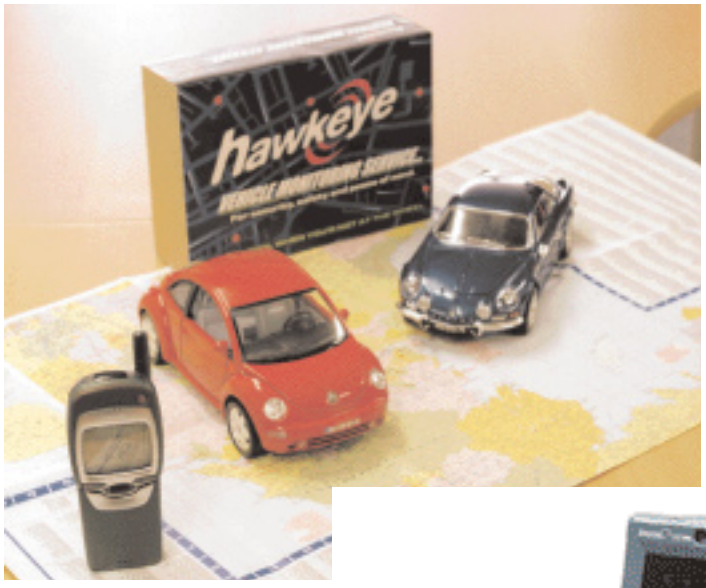
Order 22, rule 12 states: 'Money may be paid into court under this order by one or more of several defendants sued jointly or in the alternative upon notice to the other defendant or defendants', while order 22, rule 1(5) stipulates that: 'Where money is paid into court in satisfaction of one or more causes of action, the notice shall specify the cause or causes of action in respect of which payment is made, and the sum paid in respect of each cause of action unless the court orders otherwise'.

Tech trends

By Maria Behan

Your car's guardian angel

Talking cars are a staple of bad television shows, but did you ever hear of one making a phone call? Well, that day has dawned at last, courtesy of the people behind the Hawkeye car-monitoring device. It connects to your mobile phone, raising the alarm with a call if anyone tries to nick your car. You can even subscribe to a web-based tracking service that tells you exactly where your car is if you don't arrive in time to foil the intruder. And speaking of foiling, parents hoping to limit junior's behind-the-wheel exploits will be delighted by the feature that lets you programme Hawkeye to send you text messages if the car exceeds a designated speed. *Available for about £1,200 (which includes installation) from Danny Corcoran at Cellular World on 086 606 2666; additional information is available on the CellularWorld website*, www.cellularworld.ie.



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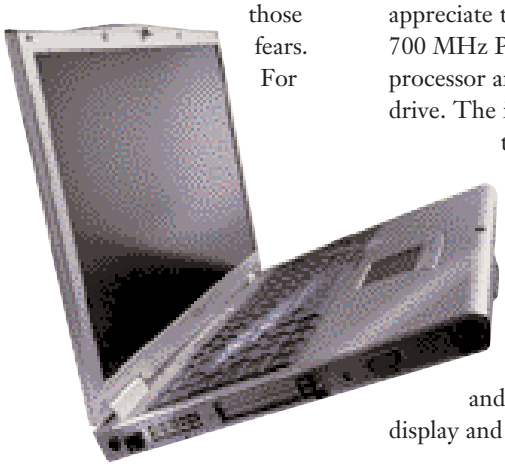


Picture this

Long *de riguer* in science fiction movies, it looks as if the video phone may finally move out of fantasyland and onto your desk. The best thing about this model, which sends and receives video images, is that it uses normal phone lines, so you just have to plug it in and dial – the call costs the same as old-fashioned voice-only calls. The downside is that the video portion of things only works with people who also have phones from the European Video Telephone Co, so your circle of visible friends will probably be limited. At least the phones come in pairs, so you can give the second one to the person you most want to see on the other end of the line. But before you get ied away with the saucy lities, get your head out of the gutter and consider the manufacturer's claim that the Video Phone is an easy-to-install alternative to complicated video-conferencing equipment. *Available from CompuStore outlets for £1,675.*

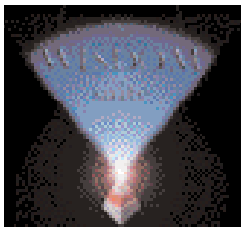
Banking on cyberspace

Bank of Ireland's Business On Line is an Internet banking service tailored to – you guessed it – businesses. You can access account information and carry out transactions from any computer, wherever you are in Ireland or around the world. Designed to be fast and, above all, secure (we're talking about your money, after all), Business On Line comes in three different flavours. Level 1 covers standard domestic banking needs, level 2 is for those who need to make cross-border payments and level 3 is for those who want to go full whack with what BOI bills as 'a comprehensive electronic banking and treasury service'. *Pricing varies based on the type of services required, contact the Business On Line sales team on 01 618 7435; additional information can be found on the Bank of Ireland website*, www.bankofireland.ie.

Bank of Ireland

A word to the wise?

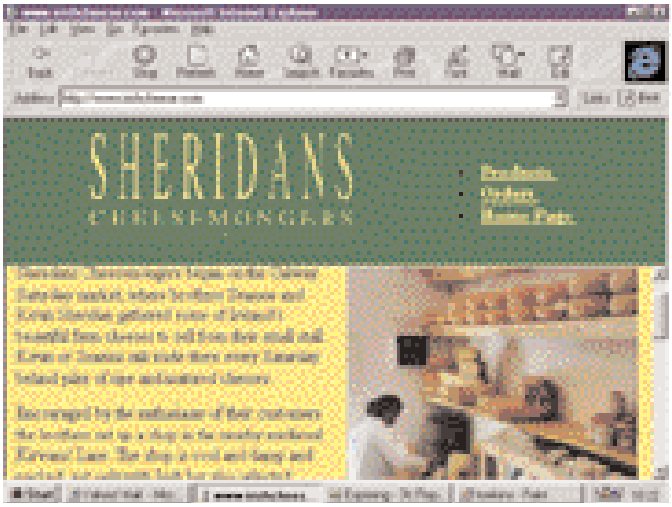
Designed to be used by solicitors, accounting personnel and secretaries alike, Avenue Legal Systems' Wisdom Suite is a collection of software that can be as basic – or as comprehensive – as your practice demands. To start off, you might keep it simple, just using the client database, word-processing and billing applications. Down the road, you might add on the e-mail and marketing modules and a couple of case-management functions in areas such as conveyancing, probate or matrimonial law. Whatever part of the Wisdom Suite you're using, you can pull information from other areas, which streamlines information sharing, not to mention data entry. The manufacturers even claim that this software package 'increases available fee-earner chargeable time'. If you have doubts about that, click on the program's fee-earner analysis button and find out



for yourself. *Prices start at about £5,000 and increase with the number of users and software modules added; available from Legal IT at 021 432 1829 or info@legalit.ie*.

Sites to see

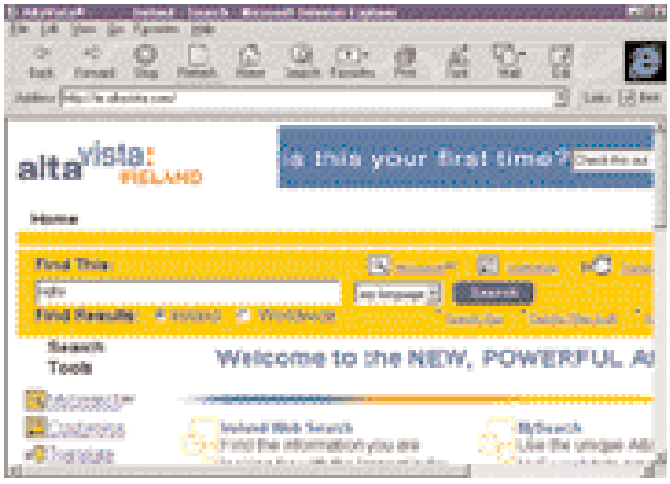
Museum stuff (*www.museumstuff.com*). Adults and children can get lost for hours on this site (watch those phone bills!), which lets you explore both virtual and real museums – including the wax kind and even zoos. The vast array of topics covered includes art, fun facts for kids, and sports.



Sheridan's cheesemongers. (*www.irishcheese.com*). Fancy a little gubeen or coolea? Wander over to this site, where you can read about mouth-watering delicacies and, if you're not near the Sheridan's shops in Galway and Dublin, you can arrange to have your cheesy delight delivered right to your doorstep.

LEXicon (*www.courtservice.gov.uk/lexicon/links.htm*). A round-up of links that will whisk you off to sites offering free information on UK, European and international law, as well as human rights-related material.

Tomkins and Co (*www.tomkins.ie*). Sponsored by the Dublin firm of patent attorneys, this site offers info on Irish and European patents, trademarks – even Internet domains.



AltaVista Ireland (*www.altavista.ie*). This comprehensive search engine lets you scour all of cyberspace or just the Irish portion of it.

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Practice notes

Foreign lawyer's opinion

It is becoming increasingly common in property transactions to find that you are dealing with a company which is not incorporated in Ireland. A foreign company may be selling property, taking a lease, giving a guarantee or issuing security for an advance. In those circumstances, the Conveyancing Committee recommends that you should ask the solicitors representing the foreign company to provide to your client on closing an opinion from a lawyer based in the jurisdiction where the company was incorporated to cover the following points:

1. That the company was properly incorporated, is still in existence and has power to enter into the transaction in question
2. That the deed, as executed by the company, has been correctly executed by it and that the document binds the company and is enforceable against it
3. That any corporate or statutory procedures required in the jurisdiction in which the company was incorporated (required in relation to the execution of the deed) have been attended to, and
4. That there are no charges or other encumbrances registered against the company which affect it or which are capable of affecting the property involved in the transaction.

A precedent of an opinion is set out below and this could be adapted for use. It is not uncommon for foreign lawyers when giving these opinions to choose to use an opinion in a form which they feel comfortable with and clearly this is acceptable, provided the relevant points are covered in that opinion. There are a couple of points worth noting:

1. The practice of issuing these letters of opinion has carried forward from commercial transactions, and the party giving the opinion will often try to put in numerous exclusions which can have the effect of watering down the letter so that it is of little value. The most frequent clause that foreign lawyers tend to insert in these opinion letters is one limiting the reliance on the opinion to the person to whom it is addressed. It would be preferable that the opinion letter should not be limited in this way. In a case where this becomes a sticking point, the letter could be limited so that it can be relied upon by the parties whom it could be reasonably anticipated will need to rely on the letter
2. There is a tendency for lawyers in certain tax havens to seek very substantial fees to issue these letters. It is therefore strongly recommended that you clarify the question of the cost in advance of obtaining the letter. It is the view of the committee that the cost of obtaining the opinion should be borne by the foreign company.

Conveyancing Committee

PRECEDENT OPINION

Draft [ ]
[Date]
[Your ref]
[Ref/matter no]

To: [your client]

Dear Sirs,

We have acted on behalf of [the company] who has requested us to give you this opinion in connection with [specify transaction].

1 We have examined:

1.1 [specify document] ('the agreement'), and[1]

1.2 [specify ancillary documents];

and such other documents as we have considered necessary or desirable to examine in order that we may give this opinion.

[Terms defined in the [specify document] shall have the same meaning herein].[2]

2 For the purpose of giving this opinion we have assumed:

2.1 the conformity to the originals of all copies of all documents of any kind furnished to us by [company/company's Irish solicitors];

2.2 that the certified copies produced to us of minutes of meetings and/or of resolutions are true copies and correctly record the proceedings of such meetings and/or the subject matter which they propose to record and that the resolutions contained in the minutes remain in full force and effect;

2.3 the genuineness of the signatures and seals on all original or copy documents which we have examined;

2.4 that the certified up-to-date memorandum and articles of association of [the company] or other constitutional documents furnished to us by [the company] are correct and up to date;

2.5 without having made any investigation, that the terms of [the agreements] are in all respects lawful and enforceable under Irish law;

2.6 the accuracy and completeness of all information appearing on public records.

3 We express no opinion as to any matters falling to be determined other than under the laws of [specify jurisdiction in which the company is incorporated]. Subject to that qualification and to the other qualifications set out herein we are of the opinion that:

3.1 [the company] is a company duly incorporated under the laws of [specify jurisdiction], is a separate legal entity, subject to suit in its own name. It is validly existing under the laws of [specify jurisdiction] and no steps have been taken or are being taken to appoint a receiver, examiner, liquidator or similar officer over or to wind it up.

3.2 [the company] has the necessary power and authority and all necessary corporate and other actions have been taken to enable it to sign, deliver and perform the obligations undertaken by it under the agreement and implementation by [the company] of the foregoing will not cause:

3.2.1 any limit on [the company] or its directors (whether imposed by the documents constituting them, state or regulation) to be exceeded; or

3.2.2 any law or order to be contravened.

3.3 The agreement has been duly executed and delivered on behalf of [the company] and the obligations on the part of [the company] are valid and legally binding on and are in a form capable of enforcement against [the company] under the laws of [specify jurisdiction] in the courts of [specify jurisdiction] in accordance with their respective terms.

3.4 All authorisations, approvals, licences, exemptions and consents of governmental or regulatory authorities required in [specify jurisdiction] with respect to the agreement have been obtained.

3.5 Under the laws of [specify jurisdiction] in force at the date hereof [the company] will not be required to make any deduction or withholding from any payment it may make under the agreement.

3.6 Under the laws of [specify jurisdiction] in force at the date hereof the claims of [your client] against [the company] will rank at least *pari passu* with the claims of all other unsecured creditors except claims which rank at law as preferential claims in a winding-up or receivership [save for a claim of [your client] against [the company] under the [security document] which will rank in priority to the claims of any other creditor].[3]

3.7 It is not necessary or desirable under the laws of [specify jurisdiction] in order to ensure the validity, enforceability and priority of the obligations and rights of [your client] under the agreement that it be filed, registered, or notarised in any public office or elsewhere or that any other instrument relating thereto be signed, delivered, filed, registered or recorded.[4]

3.8 In any proceedings taken in [specify jurisdiction] for the enforcement of the agreement the choice of Irish law as the governing law of the agreements would be upheld by the [specify jurisdiction] courts.

3.9 The submission by the parties to the [exclusive or non-exclusive] jurisdiction of the Irish courts will be upheld by the [specify jurisdiction] courts.

3.10 It is not necessary under the laws of [specify jurisdiction] (a) in order to enable [your client] to enforce its rights under the agreement or (b) by reason of the execution of the agreement that it should be licensed, qualified or otherwise entitled to carry on business in [specify jurisdiction].

3.11 The agreement will not be liable to *ad valorem* stamp duty, registration tax, or other similar tax or duty in [specify jurisdiction].

3.12 Based solely on searches which we have carried out on [date of search] in [details of search carried out] there are no charges registered against the assets of the company.[5]

4 This opinion is addressed to [your client] and may be relied upon by [your client] for its benefit in connection with the transaction contemplated. It may also be relied on by all assignees of the interest of [your client] under the agreement but not by any other person.[6]

Footnotes

1 Depending on the nature of the case, it may be simpler to refer here to 'the conveyance', 'mortgage' etc as appropriate.

2 This clause is helpful in a complicated transaction but otherwise it may be sufficient simply to define the company and the property.

3 This is usually only required where the opinion relates to a lending transaction.

4 The reference to priority in this clause is usually only required in a lending transaction.

5 This clause will usually be amended but it is helpful and more cost effective if the overseas lawyers carry out basic searches which can be supplemented by the purchaser's own searches here. This is mainly because the external register in the Companies Office may not show the full position.

6 Overseas lawyers will usually try to limit the opinion so as to limit their liability. Ideally this limitation would not appear in the opinion letter.

Undertakings re: timber-framed houses

It has come to the attention of the Conveyancing Committee that companies in the business of providing construction systems or kits for wooden-framed houses frequently insist on obtaining a letter of undertaking from a purchaser's solicitor to discharge the cost of the system/kit to the supplying company. This notwithstanding the fact that there is a written contract in place between the purchasing client and the supplying vendor which states that the purchaser will pay the cost of the system to the vendor.

The committee has received several queries from solicitors from whom undertakings have been demanded by the supplying companies before they will deliver the timber-framed structure to the purchaser's site. It is the recommendation of the Conveyancing Committee that a purchaser's solicitor should not under any circumstances give an undertaking of this nature. In the same way as a purchaser and vendor/builder of a conventional block-built dwelling will enter into a contract for the construction of the dwellinghouse, the purchaser of a timber-framed dwellinghouse will enter into a contract with the supplier of the house for the supply and construction of the timber-framed dwelling in the same way. In both cases, the vendor/builder and the supplier/builder agree to provide a dwellinghouse and the purchaser agrees to pay a certain purchase price for same. It is not necessary in either case to obtain a further undertaking from a solicitor to pay the vendor/builder or the supplier/builder the amount as agreed in the contract. This is tantamount to asking a solicitor to pay for his/her client's house and the committee is most concerned that such an undertaking would be sought.

Solicitors asked to provide such an undertaking should refuse to do so as they might compromise their client's rights under the contract in the event of a dispute arising between the client and the supplier as to the suitability or adequacy of the materials supplied. In such cases, solicitors might find themselves personally liable to comply with their undertaking while the client might instruct them not to pay any monies due to the inadequacy or unsuitability of the materials supplied or the service rendered.

Conveyancing Committee

Law Society general conditions of sale/ building agreement

It has come to the notice of the committee that some practitioners have attempted to exclude the Law Society general conditions of sale where reliance is placed upon a building agreement solely, incorporating some special conditions dealing with title. Practitioners are reminded that the format of the certificate of title clearly expresses that the **'purchase was effected on foot of the current Law Society's conditions of sale and/or building agreement'.** The committee is of the view that to preclude any such conditions *en bloc* would prevent the purchaser's solicitor giving a certificate of title.

The committee is further of the view that it is not correct to state that the Law Society form of conditions of sale was never intended for use in relation to new houses in the course of construction where a building agreement has been entered into. Practitioners are therefore forewarned to be very careful about accepting any condition in the building agreement which expressly or by implication excludes the Law Society general conditions of sale.

For the avoidance of doubt, the committee confirms that the use of the wording 'conditions of sale and/or building agreement' in the certificate of title documentation was intended to mean that the conditions of sale are required in relation to the purchase of a second-hand property and both the conditions of sale and building agreement are required in relation to the purchase of a newly-constructed property or property in the course of construction.

Conveyancing Committee

PRACTICE NOTE

Solicitors' certificates v family law declarations

The *Family Home Protection Act, 1976*, *Family Law Act, 1981*, *Judicial Separation and Family Law Reform Act, 1989*, *Family Law Act, 1995* and *Family Law (Divorce) Act, 1996*.

The practice of providing and accepting solicitors' certificates in relation to the above-mentioned acts on dispositions by individuals (otherwise than in exceptional circumstances) is a matter of concern to the committee.

Solicitors should always seek or provide (as the case may be) the best evidence that is reasonably available in relation to the above-mentioned acts on any disposition. The best evidence in the case of a disposition by a married individual would be a statutory declaration from the vendor and the vendor's spouse. In some cases, it may be reasonable to accept a declaration from the vendor alone. The practice of giving certificates simply because it is more convenient should be discouraged.

Vendors' solicitors should only offer certificates where the best evidence is not available. In giving certificates, vendors' solicitors should be able to stand over the reason for the non-availability of the best evidence and also have a personal knowledge which allows them to give a certificate. While it may appear relatively straightforward to certify that a disposition is not affected by the *Family Home Protection Act, 1976*, it is difficult, if not impossible, to certify with absolute certainty that any disposition is not reviewable or that proceedings have not been commenced or threatened by the vendor's spouse. Accordingly, vendors' solicitors may find themselves in personal difficulties if the certificate in question turns out to be incorrect.

Purchasers' solicitors should always ask for the best evidence that is reasonably available. They should only accept a certificate where the best evidence is not reasonably available and where there is good reason for its non-availability.

Conveyancing Committee G

LEGISLATION UPDATE: ACTS PASSED IN 2000

This list was updated by the Law Society Library on 13 February 2001

Appropriation Act, 2000
Number: 36/2000
Date enacted: 15/12/2000
Commencement date: 15/12/2000

Cement (Repeal of Enactments) Act, 2000
Number: 31/2000
Date enacted: 24/10/2000
Commencement date: Commencement order to be made (per s2(2) of the act): 28/11/2000 (per SI 361/2000)

Comhairle Act, 2000
Number: 1/2000
Date enacted: 2/3/2000
Commencement date: 2/3/2000. Establishment day order to be made (per s3 of the act): 12/6/2000 appointed as the establishment day (per SI 167/2000)

Commission to Inquire into Child Abuse Act, 2000
Number: 7/2000
Date enacted: 26/4/2000
Commencement date: 26/4/2000; establishment day order to be made for the purposes of the act (per s2 of the act): 23/5/2000 appointed as the establishment day for the commission (per SI 149/2000)

Copyright and Related Rights Act, 2000
Number: 28/2000
Date enacted: 10/7/2000
Commencement date: Commencement order/s to be made (per s1(2) of the act): 1/1/2001 for the following sections of the act: part I – all sections except s10(2) insofar as it applies to s56 of the *Copyright Act, 1963*; part II – all sections except ss98, 198 and 199; part III – all sections except s247; part IV – all sections; part V – all sections; part VI – all sections; part VII – all sections (per SI 404/2000)

Courts (Supplemental Provisions) (Amendment) Act, 2000
Number: 15/2000
Date enacted: 28/6/2000
Commencement date: 28/6/2000

Criminal Justice (Safety of United Nations Workers) Act, 2000
Number: 16/2000
Date enacted: 28/6/2000
Commencement date: 28/6/2000

Criminal Justice (United Nations Convention Against Torture) Act, 2000
Number: 11/2000
Date enacted: 14/6/2000
Commencement date: 14/6/2000

Education (Welfare) Act, 2000
Number: 22/2000
Date enacted: 5/7/2000
Commencement date: Commencement order/s to be made (per s1(2) of the act); 5/7/2000 for any sections of the act not in operation by that date (per s1(3) of the act)

Electronic Commerce Act, 2000
Number: 27/2000
Date enacted: 10/7/2000
Commencement date: Commencement order/s to be made (per s1(2) of the act)

Equal Status Act, 2000
Number: 8/2000
Date enacted: 26/4/2000
Commencement date: Commencement order/s to be made (per s48 of the act): 14/6/2000 for s47 of the act which deals with transitional arrangements for the *Employment Equality Act, 1998* (per SI 168/2000); 25/10/2000 for all other sections of the act (per SI 351/2000)

Finance Act, 2000
Number: 3/2000
Date enacted: 23/3/2000
Commencement date: 6/4/2000 for part I (ss1-89) except where otherwise expressly provided (per s166(9) of the act); 23/3/2000 for part III (ss107-124) except for ss107, 121 and 123(a) and 123(b) which shall be deemed to have come into force and take effect as and from 1/7/1999 and ss111 and 113 which shall be deemed to have come into force and take effect as and from 1/3/2000 (per s166(10)(a), (b) and (c) of the act). Various commencement dates for other sections – see act

Finance (No 2) Act, 2000
Number: 19/2000
Date enacted: 5/7/2000
Commencement date: 15/6/2000 for part 1 (stamp duties), except where otherwise provided; see act for part 2 (anti-speculative property tax) and part 3 (miscellaneous)

Firearms (Firearm Certificates for Non-Residents) Act, 2000
Number: 20/2000
Date enacted: 5/7/2000
Commencement date: 14/7/2000 (per s8(3) of the act)

Fisheries (Amendment) Act, 2000
Number: 34/2000
Date enacted: 15/12/2000
Commencement date: 15/12/2000

Gas (Amendment) Act, 2000
Number: 26/2000
Date enacted: 10/7/2000
Commencement date: 10/7/2000

LEGISLATION UPDATE: ACTS PASSED IN 2000 (contd)

Harbours (Amendment) Act, 2000
Number: 21/2000
Date enacted: 5/7/2000
Commencement date: 5/7/2000

Hospitals' Trust (1940) Limited (Payments to Former Employees) Act, 2000
Number: 23/2000
Date enacted: 8/7/2000
Commencement date: 8/7/2000

Human Rights Commission Act, 2000
Number: 9/2000
Date enacted: 31/5/2000
Commencement date: 31/5/2000; establishment day order to be made for the purposes of the act

ICC Bank Act, 2000
Number: 32/2000
Date enacted: 6/12/2000
Commencement date: Commencement order/s to be made (per s8(2) of the act): 7/12/2000 for all sections other than ss3, 5 and 7 (per SI 396/2000)

Illegal Immigrants (Trafficking) Act, 2000
Number: 29/2000
Date enacted: 28/8/2000
Commencement date: 5/9/2000 (per SI 266/2000)

Insurance Act, 2000
Number: 42/2000
Date enacted: 20/12/2000
Commencement date: Commencement order/s to be made (per s1(4)(a) and (b) of the act): 1/1/2001 for part 1; part 2, other than s8; s6 for the purposes of s3; scheds 1 and 2. 1/4/2001 for s8, except insofar as it provides for the repeal of s47 of part IV of the *Insurance Act, 1989*; part 3, insofar as it did not come into operation on 1/1/2001; part 4 (per SI 472/2000)

International Development Association (Amendment) Act, 2000
Number: 12/2000
Date enacted: 20/6/2000
Commencement date: 20/6/2000

Intoxicating Liquor Act, 2000
Number: 17/2000
Date enacted: 30/6/2000
Commencement date: 6/7/2000 for all sections, other than sections 5, 17 and 27; 2/10/2000 for section 27 (per SI 207/2000)

Irish Film Board (Amendment) Act, 2000
Number: 35/2000
Date enacted: 15/12/2000
Commencement date: 15/12/2000

Local Government Act, 2000
Number: 25/2000
Date enacted: 8/7/2000
Commencement date: 8/7/2000

Local Government (Financial Provisions) Act, 2000
Number: 6/2000
Date enacted: 20/4/2000
Commencement date: 20/4/2000

Medical Practitioners (Amendment) Act, 2000
Number: 24/2000
Date enacted: 8/7/2000
Commencement date: 8/7/2000

Merchant Shipping (Investigation of Marine Casualties) Act, 2000
Number: 14/2000
Date enacted: 27/6/2000
Commencement date: Commencement order/s to be made (per s1(2) of the act): 1/8/2000 for ss44, 45 and 46 of the act (per SI 252/2000)

Multilateral Investment Guarantee Agency (Amendment) Act, 2000
Number: 10/2000
Date enacted: 7/6/2000
Commencement date: 7/6/2000

National Beef Assurance Scheme Act, 2000
Number: 2/2000
Date enacted: 15/3/2000
Commencement date: Commencement orders/s to be made (per s1(5) of the act): 29/5/2000 for part V of the act (per SI 130/2000); 22/12/2000 for ss20, 21, 22 of part II of the act (per SI 414/2000)
Explan memo: Yes

National Minimum Wage Act, 2000
Number: 5/2000
Date enacted: 31/3/2000
Commencement date: 1/4/2000 (per SI 96/2000)

National Pensions Reserve Fund Act, 2000
Number: 33/2000
Date enacted: 10/12/2000
Commencement date: 10/12/2000; establishment day order to be made (per s3 of the act)

National Stud (Amendment) Act, 2000
Number: 40/2000
Date enacted: 20/12/2000
Commencement date: 20/12/2000

National Training Fund Act, 2000
Number: 41/2000
Date enacted: 20/12/2000
Commencement date: Commencement order to be made (per s11(2) of the act): 21/12/2000 (per SI 494/2000)

National Treasury Management Agency (Amendment) Act, 2000
Number: 39/2000
Date enacted: 20/12/2000
Commencement date: Commencement order/s to be made for part 2 of the act (per s1(2) of the act); 20/12/2000 for all other sections

Planning and Development Act, 2000
Number: 30/2000
Date enacted: 28/8/2000
Commencement date: Commencement order/s to be made (per s270 of the act): 1/11/2000 for ss1, 2 (insofar as it relates to the sections commenced on that date), part V (ss93-101) on housing supply, part IX (ss165-171) on strategic development zones, certain sections in part II on plans and guidelines – ss13, 28, 29, 30, and ss262, 266, 269 and 270; 1/1/2001 for s2 (insofar as it relates to the sections commenced on that date), the rest of part II – ss9-12, 14-27, 31, and the first schedule of the act (per SI 349/2000); 1/1/2001 for s2 (insofar as it relates to the sections commenced on that date), s50 (insofar as it relates to decisions under subsection (2)(b)(iii) of that section), ss71-78 incl, 182, 210-223 incl, 263, 264 (insofar as it relates to the repeal of s55A of the *Roads Act, 1993*, as inserted by s6 of the *Roads (Amendment) Act, 1998*), 265(3), 267, 268(1) (other than paragraphs (a), (b), (c) and (d) of that subsection), 271-277 incl (per SI 449/2000)

Protection of Children (Hague Convention) Act, 2000
Number: 37/2000
Date enacted: 16/12/2000
Commencement date: Commencement order/s to be made per s19(2) of the act

Social Welfare Act, 2000
Number: 4/2000
Date enacted: 29/3/2000
Commencement date: Various – see act, and SI 101/2000, SI 311/2000, SI 312/2000, SI 339/2000, SI 471/2000

Statute of Limitations (Amendment) Act, 2000
Number: 13/2000
Date enacted: 21/6/2000
Commencement date: 21/6/2000

Town Renewal Act, 2000
Number: 18/2000
Date enacted: 4/7/2000
Commencement date: 16/2/1999 for ss3, 4, 5 and 6; 17/7/2000 for all other sections (per SI 226/2000)

Wildlife (Amendment) Act, 2000
Number: 38/2000
Date enacted: 18/12/2000
Commencement date: Commencement order/s to be made (per s2 of the act)

PRIVATE ACT PASSED
The Trinity College, Dublin (Charters and Letters Patent Amendment) Act, 2000
Number: 1P/2000
Date enacted: 6/11/2000
Commencement date: 6/11/2000

Personal injury judgments

Tort – personal injury – accident in swimming pool – dispute as to medical condition of injured person

CASE

***Breda Whelan v Tom Mowlds (in his capacity as secretary to the Glenalbyn Social and Athletic Federation)*, High Court, before Mr Justice Daniel Herbert, judgment of 12 October 2000.**

THE FACTS

Breda Whelan, 55 years of age, with three children and two grandchildren, was participating in a swimming lesson at Glenalbyn pool on 3 October 1996. She was accidentally kicked in the area of her coccyx.

Later in the same day, she consulted her general medical practitioner who recorded that she complained of pain in the coccygeal and sacro-iliac zones. X-rays showed no evidence of bony injury to her pelvis, sacrum or coccyx. The general practitioner was of the opinion that there was no need to refer Mrs Whelan to an orthopaedic surgeon. The local doctor recommended that she adhere to a good posture and prescribed anti-inflammatory medication.

Mrs Whelan claimed that her position was not improving. She considered that she was unable to get through her household chores. She gave evidence that she was never without some pain at the base of her spine and the right hip area. She stated that she had a lot of discomfort at night and had difficulty in sleeping. After consulting her solicitors, she was sent to a consultant orthopaedic surgeon. The surgeon concluded that Mrs Whelan had low- to medium-grade discomfort, probably due to soft-tissue injury to her gluteal muscle and sacro-iliac areas. He recommended physiotherapy.

Subsequently, Mrs Whelan had several sessions of physiotherapy. A bone scan was carried out in March 1997 which showed no evidence of fracture or disease. An MRI scan was subsequently carried out in May 1999 which showed early degeneration of discs which, in the opinion of a consultant, had no relationship to her symptoms. Mrs Whelan was seen by a surgeon on behalf of the swimming pool and, on examination, the surgeon found tenderness over the right sacro-iliac joint, but he felt somewhat surprised that she should have such symptoms on such a protracted basis. In his opinion, her symptoms two years from the accident were quite minor and should not specifically interfere with her activities. In his opinion, there certainly would be no long-term complications.

Mrs Whelan was subsequently referred to a specialist in pain management. She was about to undergo a diagnostic facet block injection but became distressed at the thought and was reluctant to proceed. There was evidence that the purpose of the diagnostic facets was primarily to establish if there was any organic pathology accounting for her persistent discomfort, notwithstanding the silent bone scan. The specialist considered that because of Mrs Whelan's reluctance to have any further intervention to try to establish the cause of her pain, one could only assume that she had a soft-tissue complaint, no more and no less. The specialist stated that he could see no further purpose in follow-up review examinations.

THE JUDGMENT

Herbert J, having outlined the facts, stated that he greatly doubted if the doctors – especially in these litigious times – had left Mrs Whelan in any doubt as to the purpose of the diagnostic facet block injection. If Mrs Whelan believed that the purpose of the injections was to relieve pain, the judge found her explanation, or rather lack of explanation, as to why she would not accept such rapid minimally intrusive and non-perilous treatment very unconvincing.

The judge also referred to Mrs Whelan's claim that prior to the incident in the swimming pool, she and her husband were keen set dancers and now she was obliged to dance more slowly, tired easily and had to sit down.

The judge held that Mrs Whelan suffered a moderate to mild soft-tissue injury. This resulted in low- to medium-grade pain and discomfort in the right sacro-iliac and coccygeal zones of her body. The judge stated that this pain and discomfort diminished with time until it had become quite minor and was not significantly interfering with her day-to-day activities. He accepted on the balance of probability that there were intermittent episodes of increased pain and discomfort from time to time.

Herbert J accepted that if Mrs Whelan was suffering any significant pain or discomfort, she would not have rejected what she believed to be a course of pain-relieving injections. The judge did not consider that she was deliberately exaggerating her symptoms. However, in the absence of any physical evidence or explanation for the continuance of the symptoms complained of, and having regard

THE AWARD

Herbert J stated he did not accept that Mrs Whelan now had or would have in the future any significant pain or discomfort associated with the incident in the swimming pool. Accordingly, he assessed general damages at £10,000. Special damages had been agreed at £1,394, which came to a total of £11,394 with costs appropriate to such a decree. In the exercise of his discretion, the judge did not make an order under section 14(5) of the *Courts Act, 1991*.

to the total absence of any medical treatments since October 1996 and any physiotherapy or other paramedical treatment since autumn 1998, the judge conceded that there had been since at the latest 1998 a very large subjective element involved in her complaint. He believed that the conclusion of these proceedings would unfocus her attention from this most unfortunate incident in her life with considerable benefit to her well-being.

RTA – liability admitted – assessment of damages – injuries to abdominal region – psychological trauma – depression

***Timothy Corbett v Munster Forktruck*, High Court on circuit, before Mr Justice McCracken, judgment of 4 October 1999.**

THE FACTS

A traffic accident occurred on 26 March 1996 in which Timothy Corbett was involved. It was a head-on collision between two lorries and Mr Corbett suffered a serious life-threatening injury. The primary injury was abdominal. There was evidence of internal bleeding, a ruptured liver, serious chest injuries, a deep cut on the knee, abrasions of embedded glass in his head and hands, and soft-tissue injuries. Mr Corbett was trapped in the cab of the lorry for two hours during which time he was conscious and awake.

When Mr Corbett was eventually cut out of the lorry, he was taken to Mallow Hospital. Almost immediately, abdominal surgery was carried out on him which was very successful and it would appear to have saved his life. He was subsequently discharged on 9 April 1996 but was in considerable pain and made slow but satisfactory progress over the next few months.

In January 1997, Mr Corbett was deemed fit to return to work. He returned to work as a long-distance lorry driver, covering the same road where the accident occurred. In mid-1997, he suffered severe chest pains which he thought were the result of a heart attack. However, it turned out that the pains were caused by the accident and ultimately cleared up. From mid-1997, the only serious physical symptom he suffered was low back pain which at times extended into his leg and some pain in his knee after long-distance driving. The back pain appeared to have been caused by some form of tissue injury.

In February 1997, Mr Corbett had a minor operation to have some glass removed from his hand. He also suffered emotional difficulties and was prescribed anti-depressants.

THE JUDGMENT

Mr Justice McCracken noted that this case was for assessment of damages only. Liability had been admitted by Munster Forktruck. Noting that from mid-1997 on, the only physical symptom Mr Corbett suffered from was back pain which appeared to be initially caused by some form of tissue injury, the judge stated there was no doubt there had been an existing degenerative change in his back and this was triggered by the injuries which he had suffered. The back pain had persisted to the date of the trial. Noting that it was not particularly restrictive for Mr Corbett, since he was still able to carry on long-distance lorry driving and help on his brother's farm, the judge said there was no doubt that the long periods in the lorry increased the back pain and he was satisfied it was unlikely to get much better, if at all.

Observing that Mr Corbett was left with a scar on his abdomen which had healed remarkably well, and a rather unsightly scar on his knee, Mr Justice McCracken also referred to serious psychological problems which had not existed at all prior to the accident. He noted that the psychological problems developed in the weeks after the accident. Mr Corbett suffered nightmares and relived the accident and could not talk about the accident without becoming emotional. The judge was satisfied that when he did give evidence he did his best, but noted that the emotion did show 'quite noticeably'.

Then there were bouts of depression. In early July 1996, Mr Corbett's family doctor prescribed anti-depressants and he had been taking them regularly ever since. Medical evidence seemed to accept that Mr Corbett's emotional outbursts were quite uncontrollable when he talked about the accident. He was sent to a psychiatrist, but the psychiatrist considered that all that could be done was to keep him on the anti-depressants and see what happened. Mr Corbett did not go back to the psychiatrist for some time. In early 1999, Mr Corbett's anti-depressant medication was changed and the psychiatrist considered that he had improved considerably. The judge considered there was no doubt he was still suffering from depression. He noted the possibility that the depression would improve greatly when the litigation was over, but was satisfied that the depression would not simply just disappear.

It had been mentioned in cross-examination that, because of the depression, Mr Corbett tended to exaggerate the back pain. The judge noted that to some extent that might be so, but pain was very subjective. It was Mr Corbett's case and Mr Corbett felt the pain. The judge observed that the back pain might ease if the depression improved, but it was going to continue, although not to the extent that it would prevent him from working. Mr Corbett's view was that he might have to give up work, but all the medical evidence was that he would not be obliged to do so, that he would be able to continue as a driver but there was no doubt that he would continue to have back pain if he drove for long periods.

THE AWARD

In awarding damages, the judge considered Mr Corbett had suffered considerably to date, particularly psychologically, and it was a factor that needed fair compensation. The judge awarded Mr Corbett £55,000 in damages to the date of the trial, noting that the back pain would continue and there would be some depression. He awarded £25,000 for future pain and suffering and special damages of £12,900, making a total of £92,900.

Counsel for Mr Corbett: Mr McCullough SC and Mr Don McCarthy, instructed by Conway Kelleher & Tobin, Solicitors.
Counsel for Munster Forktruck: Mr H Hickey SC and Mr Sean Lynch, instructed by MJ Horgan & Sons, Solicitors. G

These cases were summarised by solicitor Dr Eamonn Hall.

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ADMINISTRATIVE

Planning and environmental law

Local authority granted outline planning permission – planning permission subsequently overturned by An Bord Pleanála – development located in special amenity area – whether appropriate to grant leave to seek judicial review – whether applicant had raised 'substantial grounds' – Local Government (Planning and Development) Act, 1963 – Local Government (Planning and Development) Act, 1992, *sections 4 and 19(3)*

The applicants had been granted planning permission by their local planning authority in respect of a development. Subsequently, a third party applied to An Bord Pleanála appealing against the decision in question. The third party claimed that the proposed development would be located in an area of special amenity as designated under the relevant county development plan. Subsequently An Bord Pleanála refused planning permission for the development. The applicants sought leave to judicially review the decision on the basis that An Bord Pleanála had taken certain matters into account without affording the applicants the right to make submissions with regard to same. O'Neill J was satisfied that the applicants had raised a number of substantial grounds. Leave to seek judicial review was accordingly granted.

***Stack v An Bord Pleanála*, High Court, Mr Justice O'Neill, 11/07/2000** [FL3309]

CHILDREN

Practice and procedure

Family law – children and young persons – custody hearing – appeal – whether High Court hearing amounted to 'moot' – whether High Court order should be set aside

The proceedings related to previous High Court proceedings concerning the lawful custody or otherwise of an infant. A party against whom an order had been made appealed on the grounds that at the material time the infant in question was no longer in the custody of the party in question. Keane CJ, delivering judgment, held that the infant at the time of the court hearing was in the lawful custody of the Eastern Health Board and the High Court had in fact decided a moot. The appeal would be allowed and an order would issue holding that the infant was at the time in the lawful custody of the Eastern Health Board.

***Eastern Health Board v EM & Others*, Supreme Court, 19/10/2000** [FL3326]

COMPANY

Practice and procedure

Security for costs – litigation – dispute over the sale of lands – contract rescinded – order of specific performance sought – whether order for security for costs should issue – whether actions of defendants should act as bar to granting of relief sought – whether impecuniosity brought about by wrongdoing of defendants – Rules of the Superior Courts 1986, *order 29* – Companies Act, 1963, *section 390*

The main proceedings concerned the breakdown of an agreement to purchase a leasehold interest. The plaintiff, as prospective purchaser, sought a decree of specific performance against the first-named defendant. The first-named defendant sought an order for security for costs against the plaintiff alleging that the plaintiff was a 'shelf company' and had no assets. This assertion was disputed by the plaintiff. O'Neill J held that it had been proved on the balance of probabilities that the plaintiff would be unable to meet the costs of the defendants if unsuccessful. However, the plaintiff had demonstrated a connection between its impecuniosity and the actions of the defendants. This was a special circumstance which would act as a bar to refusing the order for security for costs sought by the first-named defendant.

***Ochre Ridge v Cork Bonded*, High Court, Mr Justice O'Neill, 20/12/2000** [FL3342]

Road traffic

Service of summons – agency – road traffic offences – criminal prosecution – right to fair trial – whether service valid – whether necessary to have notice of intended prosecution – whether pursuance of appeal estopped applicant from pursuing judicial review proceedings – whether proper to extend time for judicial review application

The applicant, a managing director of a company, had been charged with certain road traffic offences. In pursuance of the charges, the relevant summons had been served on the workplace of the accused. The accused was not present at the time of the service of the summons and the gardaí purported to serve the summons on an individual at the applicant's workplace. The proceedings in any event continued and the applicant was convicted of the offences in question. On appeal, the Circuit Court upheld the convictions. The applicant sought to judicially review the convictions on the basis that the summons was improperly served. Murphy J held that although service of a summons on a company secretary could be held to be good service on a company, it could not be said to be good service on the director of a company. Accordingly, the applicant was not properly served. However, in this instance the appropriate remedy was not to grant the remedy sought and to remit the matter back to District Court.

***O'Shea v DPP*, High Court, Mr Justice Murphy, 30/11/2000** [FL3306]

CONSTITUTIONAL

Family law

Role of attorney general – divorce – nullity of marriage – recognition of foreign divorces – domicile – validity of decree of dissolution of marriage – finality of litigation – whether attorney general should be joined as notice party to proceedings after final court order had been made – whether variation of High Court order permissible – Legitimacy Declaration (Ireland) Act 1868, *section 6* – Rules of the Superior Courts 1986, *order 28*, *rule 11* – Family Law Act, 1995, *section 29* – Family Law (Divorce) Act, 1996 – Status of Children Act, 1987, *section 35* – Bunreacht na hÉireann 1937, *article 41.3.2*

The proceedings concerned the validity of a marriage and the recognition of a foreign divorce. McGuinness J had held that a divorce granted in England between the petitioner and the notice party was entitled to recognition in this state and that accordingly the marriage between the petitioner and

respondent was a valid one. After judgment had been delivered in the High Court, the attorney general made an application to be joined as a party to the proceedings, which was refused. The attorney general appealed that refusal. Denham J held that it was not mandatory that the attorney general be joined to the proceedings. A final order had been delivered so there were no proceedings in being. The appeal would be dismissed. Murphy J held that the order of the High Court was final and conclusive and disposed of the issues between the parties. There was no basis for an amendment of the order and the appeal would be dismissed. Murray J held that neither the High Court nor the Supreme Court could attribute to itself some inherent jurisdiction for the purpose of joining the attorney general to the proceedings beyond those already set out in legislation. Accordingly, the application of the attorney general should be refused. Barron J and Hardiman J agreed with all three judgments.

***GMcG v DW and AR, notice party*, Supreme Court, 31/03/2000** [FL2906]

Courts

Jurisdiction of Supreme Court – jurisdiction to set aside previous court order – whether appropriate to set aside previous court order – Bunreacht na hÉireann 1937, *article 34(4)(6)*

The plaintiff had formerly initiated proceedings against the state, which were dismissed in the High Court on the basis that the statement of claim disclosed no cause of action. The order was affirmed in the Supreme Court. The plaintiff now sought an order to set aside the order of the Supreme Court on the grounds that it was unconstitutional. The plaintiff alleged that the actions of the state had brought down the 'economic viability and the economic independence' of his household. Murphy J, delivering judgment, held that there was nothing in the affidavit of the plaintiff or in the circumstances of the case to suggest, less still establish, that the court should set aside its previous order. Accordingly, the court would dismiss the application.

***Kearney v Ireland*, Supreme Court, 10/11/2000** [FL3321]

COSTS

Practice and procedure

Education – children – duty of health board to provide appropriate education facilities – appeal – whether plaintiff entitled to order for costs

Proceedings had been instituted regarding the alleged failure of the Eastern Health Board to provide appropriate arrangements regarding the education and welfare of the infant plaintiff. The case was not in fact proceeded with, the only outstanding issue being the question of costs. The trial judge had refused to grant the plaintiff costs on the basis that the Eastern Health Board had done the best it could in this instance. The plaintiff appealed. Murphy J, delivering judgment, held that the trial judge was justified in his ruling and dismissed the case. An application might have been made under the Attorney General's Scheme but this had not been done.

***Eccles v Minister for Education*, Supreme Court, 24/11/2000** [FL3317]

CRIMINAL

Discovery

Fair procedures – applicant charged with criminal damage and trespass – furnishing of statements – whether disclosure necessary to vindicate constitutional rights of applicant

The applicant had been charged with criminal damage and trespass and as a result had sought disclosure of certain documents held by the prosecution. The prosecution produced witness statements, the custody record and a memorandum of an interview carried out with the accused. The applicant was not satisfied with the documents produced and sought further documents. The District Court declined to make the required orders and the applicant initiated judicial review proceedings. The applicant claimed that the disclosure of the materials in question was necessary to vindicate his constitutional rights. Ms Justice Laffoy was satisfied that the applicant's trial was being conducted in accordance with fair procedures The withholding of notebook entries by the prosecution until the day of trial was entirely justified in order that the trial judge could deal with the question of privilege.

***McHugh v Judge Brennan and DPP*, High Court, Ms Justice Laffoy, 14/04/2000** [FL3322]

Evidence

Appeal – admission of evidence – handling conviction – whether contested evidence was hearsay – Larceny Act 1916 – Larceny Act, 1990 – Criminal Evidence Act, 1992

The applicant had been convicted of a handling offence and was sentenced to three years' imprisonment. The applicant had been refused leave to appeal and appealed that refusal. The applicant argued that the trial judge had wrongfully admitted hearsay evidence and had not correctly charged the jury. Keane CJ, delivering judgment, held that the evidence in question had been correctly admitted and a certificate under section 6 of *Criminal Evidence Act, 1992* was not required. The jury had been correctly charged by the trial judge and in the light of the directions received from the trial judge must have been aware of the correct standard in relation to the onus of proof. The application would therefore be refused.

***DPP v Michael Byrne*, Court of Criminal Appeal, 07/06/2000** [FL3332]

Fair procedures

Video identification evidence – applicant seeking order of prohibition – detention of applicant – whether applicant entitled to have prosecution prohibited – Criminal Law Act, 1997, *section 4* – Criminal Justice Act, 1984 – Larceny Act 1916 – Bunreacht na hÉireann 1937, *article 38.1, 40.1.1*

The applicant had been arrested on foot of a robbery charge. The prosecution claimed that there was video evidence in existence which connected the applicant with the relevant charge. The defence asserted that the prosecution had failed to provide copies of the video evidence in question. The applicant sought an order of prohibition to prevent his trial from proceeding. The applicant also claimed that his original detention had not been carried out in accordance with fair procedures. Ó Caoimh J was satisfied that the prosecution case was relying upon a statement made by the accused and not the visual identification evidence. The applicant was entitled to challenge all such evidence at trial. The order of prohibition would be refused.

***Braddish v DPP*, High Court, Mr Justice Ó Caoimh, 21/12/2000** [FL3340]

Fair procedures

Garda Síochána – role of investigating garda – right to cross-examine – judicial review – right of defending solicitor to consult with gardaí – whether all relevant statements furnished to accused – Larceny Act 1916 – Larceny Act, 1990

The applicant had been arrested and charged with larceny. The applicant sought an order of prohibition against the impending prosecution on the grounds that he was being denied fair procedures. Principally, the applicant complained that his solicitor had not been provided with all the relevant statements and that the defence had not been allowed to cross-examine one of the gardaí connected

with the case. Ó Caoimh J held that there was no onus on the garda in question to communicate with the applicant's solicitor. The relief sought would be refused.

***Molloy v DPP*, High Court, Mr Justice Ó Caoimh, 01/12/2000** [FL3352]

Fair procedures

Garda Síochána – role of investigating garda – refusal to permit cross-examination – judicial review – whether presiding judge should have adjourned taking of depositions – whether accused prejudiced in his defence – whether all relevant statements furnished to accused – Larceny Act 1916 – Larceny Act, 1990

The applicant had been arrested and charged with larceny. The applicant sought an order of prohibition against the impending prosecution on the grounds that he was being denied fair procedures. The applicant claimed that he sought an adjournment of the taking of depositions at the preliminary examination in the District Court in order to instruct a solicitor. The applicant further claimed that the presiding judge would not permit the cross-examination of one of the gardaí involved in the case but only the examination-in-chief. Ó Caoimh J held that there was no onus on the garda in question to communicate with the applicant. While it would have been preferable for the presiding judge to have granted an adjournment, the applicant had not shown that he had been deprived of any essential advantage. Accordingly, the relief sought would be refused.

***Brennan v DPP*, High Court, Mr Justice Ó Caoimh, 01/01/2000** [FL3353]

Jurisdiction of Circuit Court

Charges pending against applicant in different Circuit Court areas – applicant wished to have all charges dealt with in one Circuit Court area – whether appropriate to grant leave to seek judicial review

The applicant had sought leave to issue judicial review proceedings seeking orders of *certiorari*, *mandamus* and prohibition. Leave was refused by the High Court (Finnegan J) in orders dated 23 May 2000 and 8 June 2000. The applicant had charges pending against him at Limerick, Killarney and Galway. The applicant was anxious that all these matters should be dealt with in the Circuit Court in Galway and that he should be sentenced in that court. The applicant appealed against the decision to refuse him leave. Mrs Justice McGuinness, delivering the ruling of the court, held that the applicant had raised an arguable issue and the appeal would be allowed. Leave would therefore be granted to the applicant to seek a declaration by way of judicial review that the judge of the western circuit sitting at Galway, when sentencing the applicant for offences committed in the area of the western circuit, may also deal with offences which were committed in the Circuit Court areas of Limerick and Kerry where the applicant had admitted his guilt.

***Hasset v DPP*, Supreme Court, 30/11/2000** [FL3318]

Provocation

Appeal – prejudicial pre-trial publicity – murder conviction – evidence – defence of provocation – subjective test – comments of trial judge – whether applicant received fair trial – whether defence of provocation should have been put to jury

The applicant had applied for leave to appeal against his conviction for murder. Hardiman J, delivering judgment, rejected the application. The evidence adduced during the trial clearly supported the jury's verdict. The publishing of photographs showing the accused during his trial in handcuffs was inappropriate and could amount to contempt of court. The defence of provocation had correctly not been left to the jury to consider.

***DPP v Davis*, Court of Criminal Appeal, 23/10/2000** [FL3347]

Rehabilitation of accused

Sentencing – application to change review date – rehabilitation of accused – larceny – armed robbery – whether appropriate to fix earlier review date

The applicant had been sentenced to ten years' imprisonment in respect of larceny. In this application, counsel for the applicant sought to have the review date altered. Barrington J, delivering judgment, held that in this instance, given the progress of the applicant, it was appropriate to fix an earlier review date.

***DPP v Terence Coughlan*, Court of Criminal Appeal, 24/01/2000** [FL3371]

Road traffic

Conviction for dangerous driving – appeal – whether conviction unsafe – whether jury verdict delivered in accordance with relevant legislation – Criminal Justice Act, 1984, *section 25(2)*

The appellant had been convicted of dangerous driving causing death. The appellant sought to overturn his conviction on the grounds that the jury's verdict was unsafe and unsatisfactory. Keane CJ, delivering judgment, held that the jury's verdict had not been delivered in accordance with section 25(2) of the *Criminal Justice Act, 1984*. In addition, on the basis of the evidence adduced regarding the speed of the appellant's vehicle and the condition of the road, the verdict could not be regarded as safe or satisfactory. Therefore the appeal would be allowed and a re-trial would not be ordered.

***Higginbotham v DPP*, Court of Criminal Appeal, 17/11/2000** [FL3310]

Sentencing

Robbery – consecutive sentences – appeal against sentences imposed – whether sentences imposed excessive

The applicant had been sentenced to seven years' imprisonment for a robbery offence. In addition, the applicant received further sentences, some of which were consecutive, in respect of burglary offences. The applicant sought leave to appeal against the sentences imposed. Lynch J, delivering judgment, held that the offences committed were outrageous. The application would be refused.

***DPP v Fallon*, Court of Criminal Appeal, 28/07/99** [FL3369]

Sexual offences

Sexual assault – evidence – conviction – appeal – jury verdict – whether evidence improperly admitted – whether trial judge had properly charged jury – whether proper procedures followed with regard to jury's deliberations – Criminal Law (Rape) (Amendment) Act, 1990

The appellant was convicted of an offence of sexual assault. The appellant appealed against both the conviction and sentence. McGuinness J, delivering judgment, held that the disputed evidence should not have been admitted. The evidence of the garda, which had been admitted, was hearsay and could not have been regarded as evidence of the truth of the complaint. In addition, the procedures followed by the jury in their deliberations were improper. On these grounds the appeal would be allowed and the conviction quashed. A new trial would not be ordered.

***DPP v Anthony Gavin*, Court of Criminal Appeal, 27/07/2000** [FL3324]

DAMAGES

Defamation

Libel – damages – compensation for injury suffered – meaning of 'substantial' – doctrine of stare decisis *– role of jury in awarding damages – freedom of speech – whether amount of damages awarded excessive – whether juries should receive guidance from trial judge as to level of damages applicable – whether Supreme Court*

should depart from previous ruling in De Rossa *case* – European convention on human rights, *article 10* – Bunreacht na hÉireann, *articles 40.3*, *40.6.1*

The plaintiff had been awarded damages of £250,000 in respect of a libel action taken against the defendants. The defendants appealed against the size of the award on various grounds. They claimed that the level of damages itself was excessive and argued that juries should receive more guidance regarding the level of damages applicable. Keane CJ, delivering the leading judgment, held that the award was disproportionately high and should be set aside. Geoghegan J delivered a dissenting judgment. The plaintiff in a cross-appeal was awarded the costs of an earlier trial.

***O'Brien v Mirror Group*, Supreme Court, 25/10/2000** [FL3354]

Employer's liability, personal injuries

Tort – personal injuries – employers' liability – safe system of work – negligence – company law – corporate liability – negligence – industrial accident – proximity of relationship between plaintiff and owner of business – whether sufficient element of control by defendant over actions of plaintiff to found claim in negligence – whether safe system of work in operation

The plaintiff had been employed by the first defendant, which was owned by the second defendant. The plaintiff sustained a serious injury while at work. The first defendant was not insured. The second defendant was found liable for the accident and the plaintiff was awarded £304,000. The second defendant appealed. Fennelly J, delivering judgment, held that the second defendant had placed himself in a relationship of proximity to the plaintiff. The plaintiff had been put to work on a potentially dangerous machine. The second defendant was negligent in his supervision and instruction of the plaintiff. The appeal would be dismissed.

***Shinkwin v Quin-Con*, Supreme Court, 21/11/2000** [FL3372]

Employment law

Negligence – plaintiff suspended from Garda Síochána – fair procedures – whether claim statute-barred – whether damages for distress recoverable – Statute of Limitations 1957

The plaintiff had been accused of criminal embezzlement and as a result had been suspended from An Garda Síochána since 1987. The plaintiff was subsequently found not guilty in the Circuit Court. Subsequent attempts to hold a disciplinary inquiry into the behaviour of the plaintiff were prohibited by various court orders. In this claim, the plaintiff sought damages in relation to the losses allegedly arising from loss of pay and the interest arising thereon and also in relation to the alleged loss and distress that had arisen as a result of the suspension. The president of the High Court, Mr Justice Morris, held that the delay in concluding the proceedings was the responsibility of the defendants. The claim was not statute-barred. The defendants had been negligent in not conducting matters with reasonable care. The plaintiff would be awarded damages for the amount of extra pay lost and the accompanying interest. In addition, £40,000 would be awarded for the stress and anxiety suffered bringing the total amount of damages to £52,198.04.

***McGrath v Garda Commissioner*, High Court, Mr Justice Morris, 09/11/2000** [FL3356]

Garda Síochána

Tort – personal injuries – garda compensation – recurring back injury – whether compensation adequate – Garda Síochána (Compensation) Act, 1941 – Garda Síochána (Compensation) (Amendment) Act, 1945

The applicant had sustained injuries while on duty. In addition, the applicant some years later had suffered a fall which he claimed had arisen as a result of the first accident. The applicant sought compensation for both accidents under the *Garda Síochána Compensation Acts*. Lavan J held that on the balance of probabilities the second accident could not be said to be related to the first accident. The applicant would be awarded £20,000 for pain and suffering arising from the first accident.

***O'Longaigh v Minister for Finance*, High Court, Mr Justice Lavan, 14/04/2000** [FL3335]

Personal injuries

Tort – employer's liability – damages – employee suffered fall on footpath – negligence – medical evidence – whether employer liable for injuries suffered – whether damages awarded excessive

The plaintiff had suffered a fall on a footpath leading to the car park at her employer's premises. The plaintiff sued and was awarded approximately £191,881 in damages. The defendant appealed in relation to the amount of damages awarded. Hardiman J, delivering judgment, held that the amount of general damages awarded was by no means excessive. The appeal would be dismissed and the High Court order affirmed.

***Brennan v Lissadell Towels*, Supreme Court, 15/11/2000** [FL3357]

Practice and procedure

Libel – slander – practice and procedure – Circuit Court jurisdiction – application to dismiss on grounds that proceedings lacked jurisdiction – whether claim maintainable in Dublin Circuit Court – Courts (Supplemental Provisions) Act, 1961 – Rules of the Circuit Court, *rule 2*

The plaintiff had issued proceedings concerning certain allegations which were carried in the *Sunday Business Post*. Proceedings were issued in the Dublin Circuit Court. The defendant, who resided in County Cork, issued a motion seeking to have the proceedings struck out for failing to show jurisdiction. The defendant contended that the plaintiff had not been identified in the article. Judge Buckley was satisfied that the plaintiff had a stateable case and the case should proceed. The Dublin Circuit Court possessed the requisite jurisdiction to hear the case. Other matters raised by the defendant should be dealt with by the trial judge.

***Ahern v O'Brien*, Circuit Court, Judge Buckley, 11/12/2000** [FL3316]

EXTRADITION

Sexual offences

Habeas corpus – *correspondence of offences – delay – whether offence alleged in warrant corresponded with offence in this jurisdiction* – Extradition Act, 1965, *sections 47*, *50* – Extradition (Amendment) Act, 1987 – Criminal Law (Rape) (Amendment) Act, 1990, *section 4* – Criminal Law (Rape) Act, 1981, *section 2* – Bunreacht na hÉireann 1937, *article 40*

The applicant had been arrested on foot of a warrant for extradition to Scotland. The offence the applicant had allegedly committed was a sexual offence. The relevant extradition order had been made in the District Court which the applicant challenged in High Court proceedings. The applicant argued that the offence in question did not correspond to an offence in this jurisdiction and, in addition to the lapse of time, the extradition should not proceed. O'Donovan J dismissed the proceedings in a judgment delivered on 7 December 1999. The applicant appealed.

Denham J, delivering the leading judgment, affirmed that the offence in question corresponded to the offence of rape contrary to section 2 of the *Criminal Law (Rape) Act, 1981*, as amended, and dismissed the appeal.

***Stanton v O'Toole*, Supreme Court, 09/11/2000** [FL3305]

LIABILITY

Medical negligence

Tort – failure to diagnose condition of plaintiff – plaintiff suffering 'panic attacks' – standard of care – whether medical staff negligent in treatment of patient – Civil Liability Act, 1961

The proceedings were brought by a widow of the deceased. The deceased had suffered from a rare form of abdominal tumour known as a phaeo. It was common case that the primary cause of death was the tumour. The plaintiff claimed that the defendants ought to have diagnosed the condition and treated the deceased accordingly and were negligent for not having done so. Barr J was satisfied that there was a failure to investigate fully the symptoms of the deceased. Negligence had been established. Further evidence was required before damages could be assessed.

***Wolfe v St James Hospital*, High Court, Mr Justice Barr, 22/11/2000** [FL3376]

Personal injuries

Negligence – road traffic accident – plaintiff driving in excess of speed limit – damages – whether plaintiff guilty of negligence or contributory negligence

The plaintiff had been involved in a traffic accident involving his vehicle and a bus. Evidence was given by both the plaintiff and a witness that the plaintiff was travelling at a speed which was greater than the relevant speed limit. Murphy J held that, having considered all the evidence, the plaintiff would be held to be 90% at fault for the accident while the liability of the defendants would be the remaining 10%.

***Callaghan v Dublin Bus*, High Court, Mr Justice Murphy, 01/12/2000** [FL3343]

PRACTICE AND PROCEDURE

Dismissal of proceedings, *res judicata*

Finality of litigation – res judicata – *estoppel – motion to dismiss proceedings – solicitors – plaintiff seeking to re-litigate certain matters concerning land transaction – allegations of fraud – whether appropriate to dismiss action* – Rules of the Superior Courts 1986, *order 19*, *rule 27* – Solicitors (Amendment) Act, 1994

The plaintiff had initiated proceedings against the defendants regarding a land transaction. Six of the nine defendants brought motions to dismiss the proceedings. The action related to the sale of land by the plaintiff's father to the first defendant. The plaintiff claimed that the fourth defendant, the Law Society, had failed to furnish the plaintiff with a comprehensive list of solicitors prepared to act for him. O'Sullivan J held that the plaintiff had no case against the Law Society and the case must be struck out. Many of the issues raised by the plaintiff had already been decided and could not be raised again. The case against a number of defendants would be dismissed. Certain other defendants were allowed time to file a defence and the plaintiff's motion for judgment was denied.

***Ewing v Law Society*, High Court, Mr Justice O'Sullivan, 16/05/2000** [FL3344] G

Eurlegal

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

The free movement of persons: recent developments

John Handoll sums up the main developments in the European Union in relation to the free movement of persons up to February 2001

In November 1999, the commission published its *Strategy for Europe's internal market* for 2000 to 2005. Continuing limits on labour mobility were to be remedied by more effective application of internal market rights, easier access to information on jobs in the member states and the development by national administrations of a 'common administrative culture' offering high levels of service and a means of swiftly resolving problems.

In early 2000, the commission launched a new website, *Dialogue with citizens*, on rights and opportunities in the internal market (http://europe.eu.int/scadplus/citizens/en/inter.htm). In a recent report on EURES (the Europe-wide employment service), the commission has referred to the need for geographic mobility in a European labour market in the context of the Union's European employment strategy (COM (2000) 607 final). The need to open up the 'new European labour market' by tackling barriers resulting from red tape, tax and benefits systems, pensions and the recognition of qualifications has been highlighted in a recent commission communication (COM (2001) 79 final) made in the framework of the *Lisbon strategy* (council press release no 100/1/00).

In December 2000, the commission issued a communication on an internal market strategy for services, which was intended to start the process of adapting the internal market to the fundamental changes in the way in which services are offered and taken up (COM(2000) 888 final).

Free movement and residence

In Case C-176/96 *Lehtonen*, the court confirmed that the free movement of persons rules apply to the sporting sector, though non-nationals may continue to be excluded from certain matches – such as international matches – which are not of an economic nature. Belgian rules imposing a deadline for the transfer of foreign basketball players as a condition for their playing in official matches inhibited access by other Community nationals to employment and appeared to go beyond what was necessary to ensure the regularity of sporting competitions. In the joined cases C-51/96 and C-191/97 *Deliège*, which involved judo players, the court made it clear that a judoka with 'amateur' status could nonetheless be regarded as a worker or service provider. It held that rules on selecting athletes competing on a personal basis in high-level sports events could not, in themselves, be regarded as constituting restrictions on the provision of services.

In a case brought by the commission against Belgium (C-355/98), the court condemned Belgian provisions which (a) made the operation of security activities dependent on having a place of business in Belgium, on managers and employees having residence there and on prior authorisation not taking into account requirements satisfied in the member state of establishment, and (b) required persons wishing to exercise a security activity in Belgium to be issued with a special identity document. The court held that the 'official authority' exception of article 45 EC did not apply, that the 'public policy' derogation could not be used to exclude specific sectors from free movement rules, that the residence requirement was disproportionate, that the requirement for prior authorisation was disproportionate and failed to take account of the situation in the state of establishment and that the requirement for an additional identity document was also disproportionate and would make the provision of services more difficult.

In relation to the rules of residence, the commission has begun infringement proceedings against Germany in relation to the expulsion of Italian nationals from Baden Württemberg (IP/00/747). It criticises:

- German legislation making an automatic, or virtually automatic, link between certain offences and expulsion
- The failure to look at the personal conduct of the individual concerned
- The absence of any real threat to public policy
- The violation of the principles of proportionality and of the protection of family life
- The assertion of the deterrent effect of expulsion, and
- The making with immediate effect of expulsions, even where no particular urgency has been established.

The commission's decision to issue a reasoned opinion follows on from its July 1999 communication on special measures concerning the movement and residence of citizens of the Union on grounds of public policy, public security or public health (COM(1999) 372 final).

In its November 1999 internal market strategy document, the commission announced its intention to make proposals for a regulation recasting the directives on rights of residence and for a regulation on a common format for residence cards. There was a perceived need to make Community legislation on the free movement of persons clearer and to restructure it around the idea of Union citizenship.

Non-discrimination

The court has considered the application of the principle of non-discrimination in a number of cases. It will be recalled that article 12 of the *EC treaty* prohibits discrimination on grounds of nationality within the scope of application of the treaty. There are specific non-discrimination rules in the free movement provisions. Covert (or indirect) discrimination is prohibited unless objectively justified reasons, satisfying requirements of proportionality, fitness for purpose and fundamental rights requirements, are present.

In the *Angonese* case, the court considered the legality of a requirement imposed by an

Italian bank that persons taking part in a recruitment competition should provide evidence of linguistic knowledge only by means of a diploma issued in Bolzano. The requirement constituted discrimination. Persons not resident in Bolzano would be clearly disadvantaged and 'since the majority of residents of the province of Bolzano are Italian nationals, the obligation to obtain the requisite certificate puts nationals of other member states at a disadvantage by comparison with residents of the province'. The court pointed out that such a requirement could be justified only if it were based on objective factors unrelated to the nationality of the persons concerned and if it were proportionate to the aim pursued. It was not proportionate since the linguistic aim could be satisfied by linguistic skills obtained and evidenced elsewhere. The *Angonese* case is also significant since the court held that the prohibition of discrimination on grounds of nationality laid down in article 39 of the *EC treaty* should apply to private persons.

In the *Kaba* case, the court considered the case of a Yugoslav husband of a French national working in the UK who had been denied indefinite leave to remain because his wife was not 'settled and present' in UK territory. Although the requirement to be 'settled and present' was more easily satisfied by UK nationals, this did not constitute prohibited indirect discrimination. Member states were entitled to rely on objective differences between their own nationals and nationals of other member states when they laid down the conditions under which leave to remain indefinitely in their territory was to be granted to the spouses of such persons. A spouse of a person who did not enjoy an unconditional right of residence could thus be required to be resident for a longer period than that required for spouses of persons who did enjoy such a right.

Article 13 of the *EC treaty*, introduced by the *Amsterdam treaty*, provides:

'*Without prejudice to the other provisions of this treaty and within the limits of the powers conferred by it upon the Community, the council acting unanimously on a proposal from the commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.*'

Three measures have been adopted on the basis of this provision. In June 2000, the council adopted directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L180/22). The speed of adoption is impressive (and nearly unprecedented). However, the member states have over three years to implement its provisions. In November 2000, the council adopted council directive 2000/78 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L303/16), which covers discrimination on grounds of religion or belief, disability, age and sexual orientation. At the same time, the council adopted a decision establishing a Community action programme to combat discrimination (OJ 2000 L303/23).

These measures are not explicitly aimed at promoting free movement within the Community. They are nevertheless important since they create new standards which will benefit all Community nationals, and – subject to certain qualifications – third-country nationals living and working within a member state.

Mutual recognition

The council has adopted a common position on the 1997 proposal to amend the general and medical mutual recognition directives. This will bring into the first general directive the concept of 'regulated education and training', to require account to be taken of professional experience where educational knowledge is lacking, to improve co-ordination and to update the medical directives.

In the *Haim* case (Case C-424/97 *Haim* [4 July 2000]), the court considered the question of liability of an association of dental practitioners for loss and damage caused by infringement of mutual recognition rules. Such an association, as a public law body, could be held liable for serious breaches of Community law. The court also considered the legality of a linguistic requirement, holding that a dentist authorised to practise in one member state but without the qualifications required by the *Dentists directive* could be subject to a linguistic requirement on public interest grounds, subject to requirements of non-discrimination, aptness for purpose and proportionality.

'The need to respect member state sensitivities will require great care in selecting the appropriate basis for legislation'

The commission has issued reasoned opinions against a number of member states, including Ireland, for their failure to notify measures implementing the 1998 *Lawyers' establishment directive* (IP/01/107). It has also continued proceedings against France (hospital administrators, pharmacists), Germany (academic titles) and Italy (ski instructors) (IP/01/186).

In its 1999 resolution on mutual recognition (OJ 2000 C141/5), the council called for the need to improve the application of the principle of mutual recognition, in particular in relation to diplomas. The commission has announced its intention to issue a communication on the subject, together with a proposal for amending the second general directive, by December 2000.

A challenge by Luxembourg to the validity of the 1998 *Lawyers' establishment directive* has been rejected by the Court of Justice (Case C-168/98).

Union citizenship

There have been few concrete developments in relation to Union citizenship as such. The *Charter of fundamental rights* (OJ 2000 C364/1), adopted in December 2000, contains a chapter on citizens' rights, substantially reflecting the *EC treaty* provisions on citizenship. The question of the legal status of the charter has been deferred. A commission report on Union citizenship – which might herald the beginning of the post-*Nice* debate – is now overdue.

In December 2000, the commission issued a communication on the application of directive 93/109 to the June 1999 elections to the European Parliament (COM(2000) 843 final), focusing on difficulties of providing information on the right to participate in elections in the member state of residence.

Article 18(2) of the *EC treaty* currently provides a broad (though not yet utilised) basis for council measures to facilitate Union citizens' rights of free movement and residence under article 18(1). In the *Treaty of Nice*, the member states have agreed to replace the current unanimity requirement with the use of the co-decision procedure in article 251 EC. However, this is to be at the expense of excluding from the scope of article 18(2) action in the sensitive areas of passports, identity cards, residence permits, social security or social protection. Article 18(2) will henceforth be used as a residual provision where the treaty has not otherwise provided the necessary powers. The opportunity to use article 18(2) as an umbrella provision allowing the more effective development of 'across-the-board' rules on free movement and residence will be consider-

ably diminished. The need to respect member state sensitivities will require great care in selecting the appropriate basis for legislation and may lead to continued delays in arriving at a coherent 'citizenship-based' structure for free movement and residence.

Schengen

Council decision 1999/453 (OJ 1999 L176/1) provides that the Schengen *acquis* was, in large part, to be published in the *Official journal*. This was done in September 2000, with the publication of the *Schengen agreement*, convention and accession agreements, together with decisions and declarations classified under various headings: 'horizontal' issues, abolition of checks at internal borders and free movement of persons, police co-operation, judicial co-operation in criminal matters and the Schengen Information System. The separate exercise of integrating *Schengen* into the Union system, with the *acquis* divided up between the Community, the Third Pillar and the member states continues.

Agreements with Norway and Iceland in relation to the implementation, application and development of the Schengen *acquis* entered into force in June 2000.

Under the *Amsterdam treaty*, the United Kingdom and Ireland have remained outside the *Schengen* integration arrangements. However, a mechanism for their partial or total involvement was introduced. The UK has availed of this mechanism under a May 2000 council decision in relation to the *acquis* relating to law enforcement and criminal judicial co-operation, including the SIS (OJ 2000 L131/43). In June 2000, Ireland submitted a request to take part in the *acquis* relating to police and judicial co-operation in criminal matters, drugs and the SIS. A generally favourable opinion has been given by the commission (SEC(2000) 1439 final). Ireland has, unlike the UK, excluded cross-border surveillance from its request: the commission accepts that there are special considerations which currently warrant such exclusion.

Immigration and asylum policy

There have been significant developments in relation to immigration and asylum policy, though it should be remembered that Ireland, together with the UK, has obtained an 'opt out' of the new *EC treaty* provisions. Only a brief indication of some of the most significant developments can be given here.

In the area of immigration policy, the commission presented an amended proposal for a directive on the right to family reunification in October 2000 (COM(2000) 624 final). In November 2000, the commission issued a communication on a Community immigration policy (COM(2000) 757 final), setting out the framework for debating the future of Community policy on the admission and integration of third-country nationals, focusing on economic migrants. A proposal for a directive on the status of long-term resident third-country nationals is expected in early 2001. French proposals for measures to combat illegal immigration were made in 2000 and may be adopted in mid-2001. In December 2000, the council adopted conclusions on co-operation between member states in combating illegal immigration networks (council press release 13865/00).

In the area of asylum, the council adopted a decision establishing a European Refugee Fund in September 2000 (OJ 2000 L252/12). The 'Eurodac' regulation – providing for the fingerprinting of asylum-seekers – was adopted in December 2000 (OJ 2000 L316/1). The commission has issued proposals for directives on common minimum standards for granting or withdrawing refugee status (COM(2000) 578 final) and for giving temporary protection in the event of a mass influx of displaced persons (COM(2000) 303 final). The commission is expected shortly to issue proposals for amending the *Dublin convention*. In December 2000, the council adopted conclusions on conditions for the reception of asylum-seekers (council press release 13865/00).

In November 2000, the commission issued an important communication (COM(2000) 755 final) on a future common asylum procedure and a uniform status, valid throughout the Union, for people granted asylum.

Fundamental rights

The *Charter of fundamental rights of the European Union* was solemnly proclaimed by the European Parliament, the council and the commission in Nice in December 2000 (OJ 2000 C364/1). The question whether the charter will itself be binding and enforceable has been left open and will be considered in the intergovernmental conference planned for 2004. If it is to become binding and enforceable, it will count as a significant advance in the 'ever closer Union' comparable to the *Single European Act* and the *Maastricht treaty*.

The charter says nothing new about free movement or about the way in which competences are divided as between the Union and the member states (the latter issue is, again, deferred until 2004). As far as free movement is concerned, the Union citizenship provisions on free movement are repeated in the draft charter, discrimination of grounds of nationality within the EC and EU treaties is prohibited, social security benefits and advantages are to be available to everyone residing and moving legally within the EU, the right to asylum is stated and collective expulsions are prohibited.

Lessons from Austria?

Finally, mention should be made of the evolving system for ensuring the observance of core values by the member states in their *internal* sphere. The *Treaty of Amsterdam* introduced a mechanism in the EU and EC treaties for the imposition of sanctions where the existence of a serious or persistent breach by a member state of core principles – liberty, democracy, respect for human rights and fundamental freedoms and the rule of law – is established (see articles 6 and 7 TEU and article 309 EC).

This mechanism cannot be used for *anticipatory* breach. Thus, when the extreme right-wing politician, Mr Haider and his party, the Austrian Freedom Party, gained power in a coalition government in Austria in February 2000, the other 'XIV' member states could not invoke *EU treaty* mechanisms, but had to express their disapproval by adopting controversial bilateral sanctions. The crisis has been resolved, or papered over, by the XIV's acceptance of the report of the 'three wise men', presented in September 2000. This report considered, amongst other matters, the record of Austria in observing international standards on the protection of refugees and on the rights of immigrants and, on these issues, gave Austria a relatively clean bill of health. It is now clear that such issues have now become a matter of Union concern.

In the *Nice treaty*, the member states have agreed to introduce a mechanism for dealing with anticipatory breach by a member state of the core principles. Where there is a clear risk of serious breach, which may be determined on the basis of an independent report, the council may, after hearing the member state concerned, address appropriate recommendations to that state. No sanctions are provided for at this stage. G

John Handoll is a partner in the Dublin law firm William Fry.

Recent developments in European law

DIRECTIVES

Direct effect

Case C19/97 *Criminal Proceedings against Kortas* ([1999] ECR I-3413). Criminal proceedings had been taken in Sweden against Kortas for selling confectionery imported from another member state containing a colorant E124. The colorant was banned in Sweden but permitted by directive 94/36. This directive was to be brought into force by member states by 21 December 1995. Sweden on accession had requested a derogation from this directive on public health grounds. The commission did not reply but indicated that a decision would soon be adopted. The ECJ was asked to determine whether the directive had direct effect and to consider the effect of the derogation request. It held that the directive had direct effect. Direct effect was not to be determined by reference to whether its legal basis permitted member states to apply for a derogation. The ECJ held that, although a failure by the commission to act with due diligence following a notification could be a failure to fulfil its obligations, it did not affect full application of the directive concerned.

EMPLOYMENT

Mutual recognition of qualifications

Case C-238/98 *Hugo Fernando Hocsman v Ministre de l'Emploi et de la Solidarité,* 14 September 2000. Dr Hocsman holds a medical qualification awarded in 1976 by an Argentinean university and a specialist qualification in urology awarded in 1982 by a Spanish university. He acquired Spanish nationality in 1986 and became a French citizen in 1998. In 1980, the Spanish authorities had recognised his Argentinean qualification as equivalent to a Spanish medical qualification and allowed him to train there as a specialist. As he was not a national when he obtained the urology qualification, he obtained it as an academic title. When he acquired Spanish nationality, he received authorisation to practise as a specialist in urology. After working in Spain for some years, he moved to France. He held posts as an assistant specialising in urology in several hospitals. He applied for registration to be entitled to practise in France. The French minister for employment and solidarity refused to register him on the grounds that an Argentinean diploma was not recognised in France. The ECJ held that national authorities must take into account all qualifications and experience of an applicant who is applying for authorisation to practise a profession, access to which is restricted to those with certain qualifications or experience. This principle had been laid down in previous decisions of the court.

FREE MOVEMENT OF GOODS

Case C-448/98 *Criminal Proceedings against Jean-Pierre* Guimont, 5 December 2000. French law lays down conditions for a cheese to be allowed to be called 'Emmenthal'. One of the most significant of these is the presence of a rind. Mr Guimont is the technical director of a French company. He was fined for selling Emmenthal cheese without a rind. A French court asked the ECJ whether the French legislation was compatible with article 28 of the treaty. The ECJ held that the French legislation could constitute a restriction of intra-Community trade or be a measure having equivalent effect. The court then examined whether the legislation was necessary to satisfy overriding requirements relating to fair trading and consumer protection. It also considered whether the rules imposed were proportionate and whether they might be achieved by measures less restrictive of trade. International rules and the practice of several member states allowed for a cheese to be made as 'Emmenthal' without a rind. The ECJ held, therefore, that EU law precluded the French legislation. It was for the national court to consider whether national goods should be given the same treatment as that given to imported goods.

Case C-366/98 *Yannick Geffroy v Casino France SNC*, 12 September 2000. The case concerned proceedings relating to misleading labelling. Mr Geffroy had been fined by a French court for selling foodstuffs with misleading labels and for breach of French rules that labels be in French. A French appeal court made a reference to the ECJ asking whether article 28 of the treaty and directive 79/112 precludes national legislation on labelling which requires the use of a particular language. The court held that while national legislation can contain provisions about appropriate labelling, it cannot require the use of a specific language without allowing for the possibility of using another language easily understood by purchasers or of ensuring that the purchaser is informed by other means.

LITIGATION

Brussels convention

Pollard and Anor v Ashurst, Court of Appeal (England), 21 November 2000. An English husband and wife owned immovable property in Portugal, which was registered in their names. A bankruptcy order was made in England against the husband. A trustee in bankruptcy obtained an order from a county court for the sale of the Portuguese property. The husband and wife argued that article 16(1) of the *Brussels convention* applied and that the Portuguese courts had exclusive jurisdiction to hear and determine the claim. Article 16(1) provides for exclusive jurisdiction for the courts of a state in which immovable property is located for disputes concerning *in rem* rights to such property. At first instance, Jacob J dismissed the appeal. The husband and wife appealed. The Court of Appeal held that the application for sale of the bankrupt's property did not fall within the bankruptcy exception in article 1(1) of the convention. Therefore the matter was a civil or commercial one falling within the scope of the convention. The court held that the matter did not fall within article 16(1). The application was *in personam* and did not directly involve rights *in rem* or changes to public records in Portugal. G

Council of the Law Society of Ireland 2000/2001

(*Front row, left to right*), Keenan Johnson, John Dillon-Leetch, Gerard Griffin, Francis D Daly, Immediate Past President Anthony Ensor, Junior Vice-President Michael Irvine, President Ward McEllin, Senior Vice-President Elma Lynch, Director General Ken Murphy, Moya Quinlan, Hugh O'Neill; (*second row*) Edward Hughes, Donald Binchy, Orla Coyne, John P Shaw, Simon Murphy, Anne Colley, Philip Joyce, Patrick Casey, Kevin O'Higgins, John Costello, Peter Allen, Gerard Doherty, Michael Peart; and (*back row*) James MacGuill, David Bergin, James McCourt, John Harte, David Martin, John O'Connor, Tom Murran, Owen Binchy, Eamon O'Brien, Stuart Gilhooly and Patrick Dorgan

Georgie girl
Well known and loved by every felon in South County Dublin, George Lynam, who works the criminal desk at the Partners at Law firm, celebrates her 90th birthday with firm partners (*from left to right*) Rory O'Riordan, her son Ronald Lynam and Justin McKenna

Seems like old times
Gathered at the February reunion for the 2nd and 3rd professional practice courses were (*from left to right*) Aidan Eames, Ber Young, Pat Barriscale, Patricia McNamara and Tim Shannon

Good bodies
Paul Carroll (*left*) has been appointed managing partner of A&L Goodbody, Solicitors, while Frank O'Riordan will become senior partner of the firm this May

Masters of moot

The European Law Moot Competition is a competition in which teams of students prepare written pleadings with respect to a problem of European Community law and present their arguments before the Court of Justice of the European Communities. The competition takes place annually and is bi-lingual, English and French being the official languages. Issues that arose in this year's problem included advertising restrictions on the free movement of goods and services and the *E-commerce directive*.

Of approximately 100 teams entering, 40 are invited to regional finals on the basis of an appraisal of written submissions. The Law Society team scored an impressive 20.25 out of 25 marks for its written submissions. Also competing in Maastricht were teams from Denmark, Estonia, Finland, Germany, Hungary, Latvia, Portugal, Spain and Sweden. The Irish team finished in the top four in this regional final, placing it in the top 16 teams overall.

The Law Society team looked suitably proud after its impressive showing in the regional finals of the European Law Moot Competition in Maastricht last month. The team and their two coaches are (*front row, left to right*): Jonathan Tomkin (McCann FitzGerald) and team coaches Linda Ní Chualladh (Philip Lee) and Bríd Moriarty (Law Society course co-ordinator); (*back row*): Barry Sheehan (McCann FitzGerald), Rosemary O'Loughlin (O'Donnell Sweeney) and Jill Callanan (LK Shields)

The team would like to thank the following for the financial support which made its participation possible: the Law Society, McCann FitzGerald, LK Shields and O'Donnell Sweeney.

Swinging solicitors

The Lady Solicitors' Golf Society is holding its spring outing at Luttrellstown Castle Golf and Country Club on 6 April and its autumn outing is planned for 25 September. To book or get further information, contact the society's captain, Geraldine Lynch, on 01 660 8955.

Arthur Cox man on the move

Rory Williams, formerly of Arthur Cox, has been appointed director of legal and commercial at Treasury Holdings, the Dublin investment company

Pick up a penguin

Council member Gerry Doherty found himself a little out of place at a recent dinner hosted by Law Society President Ward McEllin. Unfortunately for him, he was the only one that dressed to impress. Sometimes it pays to read the fine print …

Making sure that quality counts

(*From left to right*) Keenan Johnson, outgoing chairman of the Guidance and Ethics Committee, Law Society President Ward McEllin and John P Shaw, incoming chairman of the Guidance and Ethics Committee, display the Quality Service Statement that the Law Society has developed for firms interested in demonstrating their commitment to quality

OBITUARY

Ernest J Margetson

Ernest Margetson (*left*) pictured with Jack Charlton at the Law Society's annual conference in 1990

On 13 February, Ernie Margetson left us. He passed away peacefully after an illness which he bore with courage and dignity and, as you might expect, without complaint and surrounded by his family and loved ones. His death leaves a void in the legal profession which it will be difficult to fill.

Ernest J Margetson (to give him his full name) was born in 1930 and went to The High School in Dublin, from where he won a scholarship, and thereafter to Trinity. He studied law and, on graduation, qualified as a solicitor in 1951. This had given him the distinction, which is rare in this day and age, of being 50 years as a practising solicitor.

On being admitted to the roll, he practised in Dublin first with Hardman Stokes and Winder and ultimately joined Matheson Ormsby Prentice in 1959, where he remained for the remainder of his working life.

He became senior partner in the firm in 1988 until his retirement from the post in 1995. During his period as senior partner, he laid the groundwork for the development and expansion of the firm to what it is today, one of the leading, progressive and dynamic legal firms in the country.

Despite a very busy professional practice, he still found time to devote a huge amount of his energy to the service of the profession through the Law Society. He was first elected to the Council in 1973 and served as chairman of the registrar's and finance committees, as junior- and senior-vice president, culminating in his election as president of the Law Society in 1989/90, which office he filled with great distinction. Practitioners will remember his conference in Killarney that year, when he introduced as his guest speaker Jack Charlton, who regaled us with stories which had only a minimum of legal content.

His outstanding career was further recognised in his being invited to serve on the Legal Aid Board, the Superior Court Rules Committee and as a chairman of the Insurance Ombudsman Board, to name but a few of his distinguished posts he held.

Probably one of his greatest achievements was his work in the establishment of the Solicitors' Mutual Defence Fund Limited, which was set up for the benefit of the solicitors' profession and where he served as vice-chairman for many years.

You might ask yourself the question: with all the duties which were imposed on him during his busy life, where could he find the time for anything else? Space does not permit me to mention in full the entire list of committees, both charitable and sporting, to which he was attached during his lifetime, but, of all, he was probably most proud to have been elected captain and president of Foxrock Golf Club, which was always very close to his heart.

I could not let this occasion pass without the mention of the great camaraderie and friendship experienced by being in his company on many trips – visits to the International Bar Association and All Sphere Club in Edinburgh, Harewood Downs Golf Club in England and our annual trip to the British Open (which we attended for many years) spring readily to mind. There was no greater friend that you could have and no better companion whose company you could enjoy.

Ernest was always kind and generous with his time. He helped many a lame dog over the style and always had time for a friendly word of encouragement and advice for any colleague who requested assistance. It is nice to be able to record in this day and age that I never heard anyone in the profession say a bad word about him.

But, as must happen to everyone, the path of life comes to a close and we must say our goodbyes to a dear friend. The legal profession is much the poorer for his passing, but it is consoling that the standards of excellence which he set for himself in his legal practice are being continued in the person of his son Stuart, to whom we can pay no greater tribute than that he is a true son of a great father.

To his family, Maura, Julian and Adrian; to Ruth, Stuart and Gay; to his daughter-in-law Rhoda and grandsons Philip, Richard, Edwin and Scott, we extend our deepest sympathy.

Ernest Margetson, we salute you – a man amongst men, but a prince amongst solicitors.

TDS

www.lawsociety.ie

The Law Society's website contains a wealth of information for the practising solicitor including:

- Employment opportunities: updated weekly
- Continuing Legal Education programme
- An overview and updates on the work of the society's committees
- Contact names of Law Society personnel
- Comprehensive index of member services
- *Gazette* on-line: updated monthly
- Links to other legal sites on the net
- Legislation updates: updated quarterly
- Committee reports and publications
- Forthcoming conferences and seminars: regularly updated
- What's new: updated weekly

THE MEMBERS' AREA of the website contains practical information for solicitors such as practice notes, policy documents, precedents for practice, professional information, frequently asked questions and an interactive bulletin board

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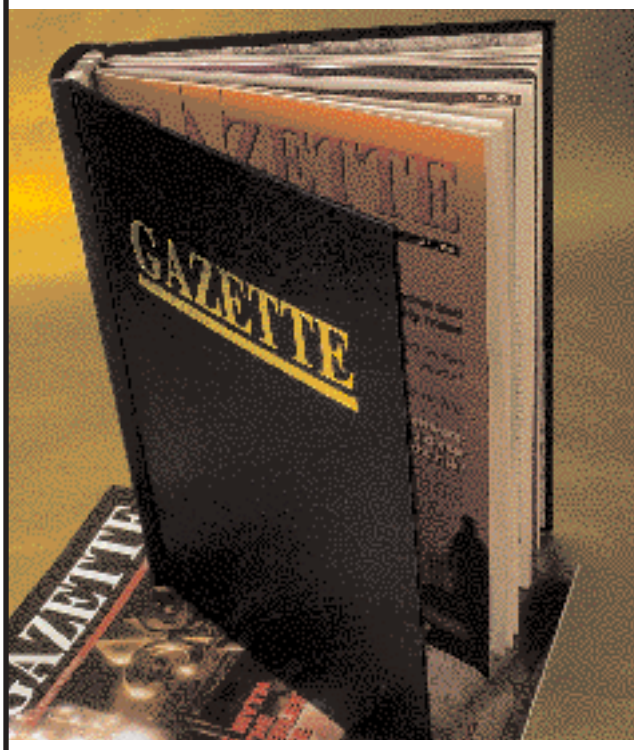

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SADSI
Solicitors Apprentices Debating Society of Ireland

Message from the new auditor

The year 2000 and last year's SADSI committee brought the apprenticeship system kicking and screaming into the 21st century. A purpose-built Law School saw its first influx of new apprentices a few short weeks after representations from SADSI helped to achieve the most significant pay increase ever in the history of the master-apprentice system. And thanks to SADSI, apprentices currently in the Law School will be re-dispatched into the working world with new rights of audience which further legitimise and highlight the role of apprentices.

It is our job, as the committee for the year 2001, to guard against complacency and strive to redress the remaining inadequacies in the apprenticeship system. More wage reform is required, and we are campaigning for payment on the professional practice courses. Plans for the SADSI ball and careers day are also in motion. And in line with new rights of audience, we hope to introduce advocacy training on a nation-wide basis.

SADSI began life as a debating society, and its victory over the King's Inns in the John Edmund Doyle Memorial Debate marked a particular victory for Louise Rouse as a member of the SADSI team. As debating co-ordinator for the year 2001, she will organise moot trials, internal competitions and international debates.

This year's committee comes from a broad spectrum of small and large firms, with a corresponding understanding of particular problems, and we encourage you to approach us with any issue. We hope the planned series of country-wide social events will help build a stronger network of apprentices and serve as a forum for discussion between committee members and other apprentices. There is a further opportunity for feedback through public relations officer Conor Delaney, who is co-ordinating the receipt and sending of e-mails, and any correspondence can be sent to SADSI2001@yahoo.com. To assist in building up a robust regional network, secretary Kieran Doran will begin compiling an *Apprentices' directory*, including a county-by-county listing of apprentices. Those of you in offices before the professional practice course 1 have been particularly under-represented, but you can now make your voice heard through pre-professional practice course rep Dawn Carney.

SADSI is the only representative organisation for apprentices, and can only function effectively with the assistance and enthusiasm of its committee and the endorsement and participation of all apprentices. I'm honoured to have this opportunity to represent apprentices and look forward to meeting you at the various events around the country.

Claire O'Regan

The 2001 SADSI committee: *(front row, left to right)* Clare O'Shea-O'Neill, Una McEvoy, Louise Rouse, Deirdre Crowley, Claire O'Regan, Kieran Doran, John Herbert, TP Kennedy and *(back row)* Conor Delaney, Lillian O'Sullivan, Darragh Feeney, and Marc Bairead

The 2001 SADSI committee

Auditor: Claire O'Regan, firm: MacGuill and Co, Dublin; **Vice auditor / welfare officer: Deirdre Crowley,** firm: A&L Goodbody, Dublin; **Honorary secretary: Kieran Doran,** firm: Gannon and Liddy, Dublin; **Honorary treasurer: Marc Bairead,** firm: Mason Hayes and Curran, Dublin; **Public relations officer: Conor Delaney,** firm: O'Hare and Co, Dublin; **Debating co-ordinator: Louise Rouse,** firm: Arthur Cox, Dublin; **Western representative: Darragh Feeney,** firm: MG Ryan and Co, Galway; **Southern representative: Clare O'Shea-O'Neill,** firm: Coakley Moloney, Cork; **Mid-Western representative: John Herbert,** firm: Holmes O'Malley Sexton, Limerick; **Eastern representatives: Una McEvoy and Lillian O' Sullivan,** Una McEvoy's firm: John Feaheny and Co, Dublin; Lillian O'Sullivan's firm: Arthur Cox, Dublin; **Pre-professional course representative: Dawn Carney,** firm: Lewis C Doyle and Co, Galway

Availing of local authority grants

The application criterion for local authority grants has widened. Until now, those who held a post-graduate qualification were not allowed to apply. Now, any candidate who already holds a post-graduate qualification and is pursuing a further post-graduate course (such as the professional practice course 1 or 2) at a higher level that represents progression from the level at which the first qualification was attained may be deemed eligible for grant aid. Those who are commencing professional practice courses this year and wish to apply for funding should contact their local authority. All the other local authority criteria apply. A letter from the Law School verifying that the PPC1 or PPC2 is 'progression' is also required, and may be obtained from TP Kennedy at the Law School.

Claire O'Regan

HORSING AROUND

The first-ever apprentices' equestrian club was recently established. Its principal aim is to cater for apprentices who have an interest in horses. The club accommodates various levels of experience and membership is open to all apprentices. We have already had a day out at the Leopardstown Races and ride-outs are organised on a fortnightly basis. The club is currently seeking sponsorship. For further information or queries, send an e-mail to 5663@ireland.com.

LOST LAND CERTIFICATES

Registration of Title Act, 1964

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

(Register of Titles), Central Office, Land Registry, Chancery Street, Dublin (Published 2 March 2001)

Regd owner: Michael Byrne; Folio: 6164F; Lands: Bahana and Barony of St Mullins Lower; **Co Carlow**

Regd owner: Patrick Clarke, Lisanalsk, Bailieborough; Folio: 2472 and 2473; Lands: Lisanalsk; Area: 20.99375 acres; **Co Cavan**

Regd owner: Stephen Liddy, Cragroe, Tulla, Clare; Folio: 14134F; Lands: Townland of (1) Cragroe, (2) Craggaunkeel and Barony of Tulla Upper; Area: (1) 16.7340 hectares, (2) 6.1260 hectares; **Co Clare**

Regd owner: Alan and Siobhan Hogan, Tuamgraney, Scariff, Clare; Folio: 27591F; Lands: Townland of Tomgraney and Barony of Tulla Upper; Area: 0.144 hectares; **Co Clare**

Regd owner: John Marsh, Gort Road, Tulla, Clare; Folio: 11049; Lands: Townland of Doonaun and Barony of Tulla Upper; Area: 1.0409 hectares; **Co Clare**

Regd owner: John Marsh, Gort Road, Tulla, Clare; Folio: 29040; Lands: Townland of Tulla and Barony of Tulla Upper; Area: 0.2655 hectares; **Co Clare**

Regd owner: Eileen Lee, Cappalaheen, Kiltishen, Clare; Folio: 7381; Lands: Townland of Cappalaheen and Barony of Tulla Upper; Area: 4.8580 hectares; **Co Clare**

Regd owner: Eileen Lee, Cappalaheen, Kilkishen, Clare; Folio: 27657; Lands: Townland of (1) Lakyle, (2) Snaty (Cooper) and Barony of Tulla Upper; Area: (1) 3.6240 hectares, (2) 4.5980 hectares; **Co Clare**

Regd owner: Michael Cahill, Shragh, Moyasta, Clare; Folio: 7758; Lands: Townland of Sragh and Barony of Ibrickan; Area: 12.7375 hectares; **Co Clare**

Regd owner: Michael O'Gorman, Carniskey, Kilmurray McMahon, Clare; Folio: (1) 20419, (2) 14814; Lands: Townland of Derryshaan and Barony of Clonderalaw; Area: folio: 20419 – 22.1640 hectares; folio: 14814 – (1) 12.6211 hectares, (2) 0.3288 hectares; **Co Clare**

Regd owner: James Colleran and Geraldine Anne Colleran, Ballyminogue, Scariff, Clare; Folio: 3953F; Lands: Townland of Ballyminogue and Barony of Tulla Upper; Area: (1) 0.1214 hectares and (2) 0.0506 hectares; **Co Clare**

Regd owner: Ashbourne Holdings Limited; Folio: 5759; Lands: Known as a plot of ground situate in the townland of Downmacpatrick or Old Head and Barony of Courceys, and the County of Cork; **Co Cork**

Regd owner: Richard Lombard; Folio: 56478; Lands: Known as a plot of ground situate in the townland of Tullogh and Barony of Imokilly and the County of Cork; **Co Cork**

Regd owner: O'Flynn's Stores Limited; Folio: 46255F; Lands: Known as a plot of ground situate in the south side of Davis Street, in the townland of Mallow, the urban district of Mallow and the County of Cork; **Co Cork**

Regd owner: Mary Breslin, Mountargus, Redcastle; Folio: 1370; Lands: Ballyargus; Area: 15.00 acres; **Co Donegal**

Regd owner: Charles George Gordon Newsom of 26 Merlyn Road, Ballsbridge, Dublin; Folio: 4136L; Lands: Property situate on the West side of Trimleston Gardens in the Parish of Taney, Borough of Dun Laoghaire, Townland of Trimleston or Owenstown and Barony of Rathdown; **Co Dublin**

Regd owner: Brendan O'Connor; Folio: DN10180; Lands: property situate in the townland of Piercetown and Barony of Balrothery East; **Co Dublin**

Regd owner: Martin Casserly and Mary Casserly; Folio: 3965F; Lands: Townland of Cregboy and Barony of Dunkellin; Area: 0.1970 hectares; **Co Galway**

Regd owner: Mary Coneys, Ballyleame, Ballyconneely, Co Galway; Folio: 19512; Lands: Townland of (1) Keerhaunmore, (2) Duck Island, (3) Chapel Island, (4) Doonglush, (5) Ballinaleama and Barony of Ballynahinch and Doonglush; Area: (1) 7.4940 hectares, (2) 2.8010 hectares, (3) 2.1410 hectares, (4) 0.3280 hectares, (5) 0.3000 hectares; **Co Galway**

Regd owner: Oliver Thomas Holden; Folio: 1883; Lands: Moanamought Commons and Barony of Callan; **Co Kilkenny**

Regd owner: Denis Lanigan; Folio: 305L; Lands: East side of Freshford Road and Barony of the Parish of St Canice; **Co Kilkenny**

Regd owner: Peter and Sheila Marnell; Folio: 6670F; Lands: Ballybur Lower and Barony of Shillelogher; **Co Kilkenny**

Regd owner: Kathleen Curran, Laragh, Gorvagh, Carrick-on-Shannon; Folio: 2529; Lands: Laragh; Area: 43.3125 acres; **Co Leitrim**

Regd owner: Owen Fogarty and Mary Ita Fogarty (deceased); Folio: 17556F; Lands: Townland of Ballinard and Barony of Smallcounty; **Co Limerick**

Regd owner: Philip Kirby (deceased); Folio: 29769F; Lands: A plot of ground situate on the West side of Shelbourne Road in the Parish of St Nicholas and County Borough of Limerick; **Co Limerick**

Regd owner: Michael Byrne, Minard, Longford; Folio: 4967F; Lands: Minard; **Co Longford**

Regd owner: John Gartlan, Lurgankeel, Kilcurry, Dundalk; Folio: 12019; Lands: Lurgankeel; Area: 0.35 acres; **Co Louth**

Regd owner: Reginald Naylor, Stapleton House, Dublin Street, Dundalk; Folio: 7306; Lands: Marshes Upper; Area: 7.938 acres; **Co Louth**

Regd owner: Patrick Flannery, Kilbride, Claremorris, Mayo; Folio: 9573; Lands: Townland of Houndswood and Barony of Kilmaine; Area: 15.3830 hectares; **Co Mayo**

Regd owner: Seamus Gavin, Greenfields, Castlebar, Mayo; Folio: 2879F; Lands: Townland of Tawnylaheen and Barony of Carra; Area: 0.903 hectares; **Co Mayo**

Regd owner: John and Margaret Harnedy, 9 The Willows, Beaufort Place, Navan, County Meath; Folio: 24298F; Lands: Abbeyland; **Co Meath**

Regd owner: Patrick Christie, 44 Willowpark Road, Dublin 11; Folio: 15954F; Lands: Glebe; **Co Meath**

Regd owner: Francis Egan and Nora Egan, Friars Park House, Friars Park, Trim, County Meath; Folio: 24015F; Lands: Ballynafeeragh (second division); Area: 5.329 hectares; **Co Meath**

Regd owner: William Gogarty and William Gogarty Junior as tenants in common, Donore Road, Drogheda, County Meath and Flat 1, 42 Merritt Gardens, Chessington, Surrey KT9 29J, England; Folio: 9398; Lands: Rathmullen; Area: 0.95 hectares; **Co Meath**

Regd owner: Gerald Murphy, Killycard, Castleblayney; Folio: 10388; Lands: Tullyskerry (part); Area: 21.65625 acres; **Co Monaghan**

Regd owner: Bernard McCormack, Killyvane, Monaghan; Folio: 967F; Lands: Killyvane; Area: 0.944 acres; **Co Monaghan**

Regd owner: Myles Cash; Folio: 5802; Lands: Derry Lower and Barony of Eglish; **Co Offaly**

Regd owner: Augustine Lynch, Caplevane, Lusmagh, Banagher, Offaly; Folio: 35392; Lands: Townland of Cloongowanagh and Barony of Boyle; Area: 0.372 hectares; **Co Roscommon**

Regd owner: John McManus, Elphin Street, Stroketown, Roscommon; Folio: 29706; Lands: Lisroyne and Barony of Roscommon; Area: 0.0250 hectares; **Co Roscommon**

Regd owner: Fortland Easky Limited, 5 Foster Place, Dublin; Folio: 22774; Lands: Townland of (1) Cloonagleavragh, (2) Fortland, (3) Cloonagleavragh, (4) Kilmacurkan, (5) Fortland, (6) Kilacurkan, (7) Cloonagleavragh, (8) Cloonagleavragh, (9) Curraghnagap and Barony of Tieragh; Area: (1) 11.7485 hectares, (2) 9.9173 hectares, (3) 0.0632 hectares, (4) 6.9809 hectares, (5) 4.4591 hectares, (6) 0.8093 hectares, (7) 00.1517 hectares, (8) 0.1770 hectares, (9) 0.0379 hectares; **Co Sligo**

Regd owner: John McKeogh; Folio: 2910; Lands: Ballyard and Barony of Owney & Orra; **Co Tipperary**

Regd owner: Michael Coffey; Folio: 5211; Lands: Shower and Barony of Owney and Arra; **Co Tipperary**

Regd owner: The Council of the County of Tipperary (NR); Folio: 10115; Lands: (1) Cloncracken, (2) Townparks, (3) Demesne and Barony of Skerrin; **Co Tipperary**

Regd owner: Seamus and Claire Quain; Folio: 2071F; Lands: Townland of Curragh and Barony of Decies within Drum; **Co Waterford**

Regd owner: Bernard McLoughlin, Corry, Rathowen; Folio: 4071F; Lands: (1)

Corry, (2) Joanstown, (3) Cappagh; Area: (1) 73.997 acres, (2) 12.090 acres, (3) 1.250 acres; **Co Westmeath**

Regd owner: Rosemarie O'Leary; Folio: 13433; Lands: St Iberius and Barony of Forth; **Co Wexford**

Regd owner: Eamonn McGlone; Folio: 840L; Lands: South of Herbert Road in the parish and urban district of Bray; **Co Wicklow**

WILLS

David-Gray, Andree, late of 21 Londonbridge Road, Sandymount, Dublin 4. Would any person having knowledge of a will executed by the above named deceased who died on 20 August 1998, please contact Daly Lynch Crowe & Morris, Solicitors, The Corn Exchange, Burgh Quay, Dublin 2, tel: 01 671 5618, Ref: KM/D/98

Eustace, Matthew, otherwise known as Matthew John Eustace, late of Killua Lodge, Navan, Co Meath. Would any person having knowledge of the whereabouts of a will made by the above named deceased who died on 7 September 2000, please contact Peter Morrissey & Company, Solicitors, Merrion Buildings, Lower Merrion Street, Dublin 2, tel: 01 676 1556, Ref: NS/UoB

Gallagher, Michael (deceased), late of 28 Wheatfield Avenue, Clondalkin, Dublin 22. Would any person having knowledge of a will made by the above named deceased who died on 25 February 2000, please contact Becker Tansey & Co, Solicitors, Jubilee House, New Road, Clondalkin, Dublin 22, Ref MT, tel: 01 459 3927, 457 1294

Gallegos, Adrian (deceased), late of 308 Andalucia del Mar, Marbella, Spain. Would any person having knowledge of a will made by the above named deceased who died on 17 November 1996, please contact Paul McCutcheon, A&L Goodbody, Solicitors, International Financial Services Centre, North Wall Quay, Dublin 1, tel: 01 649 2000, e-mail: pmccutcheon@algoodbody.ie

Hughes, Michael Valentine (deceased), late of Tonashammer, Ballymanus, Castlepollard, Co Westmeath. Would any person having knowledge of a will made by the above named who died on 19 January 2001, please contact NJ Downes & Co, Solicitors, Mullingar, Co Westmeath, tel: 044 48646, fax: 044 43447

Kilduff, Paul (deceased), late of Rahandoon, Sallins, Co Kildare and 8A Connolly Street, Athlone, Co Westmeath and 146 Monread Heights, Naas, Co Kildare. Would any person having knowledge of a will made by the above named deceased who died on 3 January 2001, please contact Hanahoe & Hanahoe, Solicitors, 16 North Main Street, Naas, Co Kildare, tel: 045 897784, fax: 045 976272

Malone, Peter Hugh (deceased). It is understood that Mr Peter Hugh Malone (deceased) may have made a will in the Dundalk area. If any solicitor has a reference to same, please contact Joseph F McCollum & Company, Solicitors, 52 Regent Street, Newtownards, County Down BT23 4LP, tel: 028 9181 3142, fax: 028 9181 2499

O'Neill, Martin (deceased), late of Balingale, Ferns, in the County of Wexford. Would any firm of solicitors holding a will or having knowledge of a will made by the above named deceased who died on 20 July 1954, please contact John A Sinnott & Co, Solicitors, First National House, Enniscorthy, County Wexford, tel: 054 33111, fax: 054 33042

Walsh, Patrick, late of Killeen, Gort, Co Galway. Would any firm of solicitors holding a will or having knowledge of a will made by the above named deceased who died on 10 January 2001, please contact Colman Sherry, Solicitors, The Square, Gort, Co Galway, tel: 091 631383, fax: 091 631993

Whelan, Mary, otherwise known as Mai Whelan (deceased), No 111 Lower Bridge Street, Portlaoise, Co Laois. Would any person having knowledge of a will made by the above named deceased who died on 10 January 2000, please contact Rollestons, Solicitors, Church Street, Portlaoise in the County of Laois, tel: 0502 21329, fax: 0502 20737, DX 47 002 Portlaoise

EMPLOYMENT

Solicitor required for general practice in County Tipperary. **Reply to Box No 20**

MISCELLANEOUS

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

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

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

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

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EYE INJURIES AND OPHTHALMOLOGIAL NEGLIGENCE

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Consultant Ophthalmic Surgeon
Experienced expert witness in ophthalmological personal injury, medical negligence and civil litigation

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e-mail: L.Clearkin@Liv.ac.uk

Publican's ordinary seven-day licence for sale. For further particulars, please contact Fergus A Feeney, Solicitor, Legal Centre, Ballinalee Road, Longford, County Longford, tel: 043 45981, fax: 043 45981

For sale: seven-day ordinary publican's licence. Enquiries to O'Donovan Murphy & Partners, Solicitors, Wolfe Tone Square, Bantry, Co Cork, tel: 027 50808, fax: 027 51554. Ref: MFC/CH/F4501

For sale: seven-day ordinary publican's licence, tel: 063 89667, reference Denis Linehan

Established legal practice for sale: South West of Ireland. **Box No 21**

Seven-day ordinary publican's licence for immediate sale: contact John Hughes, Solicitor, Bridge Street, Tullamore, Co Offaly, tel: 0506 52500

Ordinary seven-day publican's licence for sale: contact Mullaney's Solicitors, Thomas Street, Sligo, tel: 071 42529, fax: 071 44093, e-mail: michael@mullaneysol.com. Ref: MM

Publican's ordinary seven-day licence for sale, County Donegal. Please contact O'Gorman Cunningham & Co, Solicitors, 16 Upper Main Street, Letterkenny, Co Donegal, tel: 074 24828, fax: 074 21900

For sale: seven-day publican's licence. Contact Wolfe & Co, Solicitors, Bantry, Co Cork, Ref: RH/CP489

Publican's ordinary seven-day lic-ence: please contact Wolfe & Co, Solicitors, Market Street, Skibbereen, Co Cork, tel: 028 21177, fax: 028 21676, quote ref: POR/CK

Seven-day licence for sale: particulars from Branigan Cosgrove Solicitors, 31 Pembroke Road, Dublin 4, tel: 01 6682477, fax: 01 6670119, e-mail brancosg@securemail.ie

TITLE DEEDS

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*: Harrison Burnell & Co Ltd (applicant) and successors in title to Espinasse Estate or any superior leasehold or freehold interest being person or persons unknown (respondent)

Take notice that any person having interest in the freehold estate or any superior leasehold estate in the following property: all the lands comprised in indenture of lease dated 25 September 1908 made between Martha Espinasse of the one part and William Burnell of the other part and more particularly delineated on the map attached to the said lease being property located at Deansgrange Road, Blackrock, now being part of Deansgrange Marble Works situate in the Barony of Rathdown, parish of Monkstown and County of Dublin.

Take notice that Harrison Burnell & Co Ltd intends to submit an application: 1) to the Circuit Court for grant of a reversionary lease, and 2) upon resolution of such application to the county registrar for the County of the 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 property is 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, Harrison Burnell & Co Ltd intends to proceed with the 14814 application before the Circuit Court and thence before the county registrar at the end of 21 days from the date of this notice and will apply to the Circuit Court and the county registrar for the County of the City of Dublin 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: 9 February January 2001
Signed: Pearse Mehigan & Company, Solicitors, 83/84 Upper George's Street, Dun Laoghaire, Co Dublin