Gazette LawSociety

## Regulars



## Cover Story



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Published at Blackhall Place, Dublin 7, tel: 01 672 4800, fax: 01 672 4877.
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**Volume 95, number 4**
**Subscriptions: £45**

# Law Society slams new personal injuries board

'A claimant would definitely be playing away from home, rather than in the neutral venue of the courts, in having his case assessed by the proposed Personal Injury Assessment Board', Law Society Director General Ken Murphy told interviewer Richard Downes on RTÉ Radio's One O'Clock News.

This was one of over a dozen broadcast and print media interviews which Murphy gave on behalf of the society in the wake of the publication by the government last month of the report that proposed setting up such a board.

The sporting metaphor illustrated Murphy's contention that 'the PIAB's proposed composition and method of operation reveals an inherent bias against victims', quite apart from the fact that 'the PIAB, through its new layer of bureaucracy, would, perversely, actually increase the cost of dealing with personal injury claims and introduce substantial delay where none exists at present'.

'Neither fair nor sensible' and 'good news for negligent employers' were the phrases consistently used in the media by Murphy, as they had first appeared in his *Viewpoint* in the last issue of the *Gazette* (page 13). That *Viewpoint* was subsequently republished in full in the *Irish Examiner*.

Ken Murphy: 'The voice of victims should be heard'

The society is taking every opportunity to communicate its message that the introduction of the PIAB would be contrary to the interests of victims. 'The employers, through IBEC, and the insurance industry, through the IIF, have well-funded and powerful voices on behalf of their members' vested interests. The Law Society tends to get called out on occasions such as this to argue the interests of victims because no organised voice for the victims of accidents exists. The voice of victims should be heard in relation to this PIAB proposal, however', he told RTÉ.

The Law Society has had a series of meetings with relevant parties, including a meeting attended by Murphy and president Ward McEllin with Minister for Justice, Equality and Law Reform John O'Donoghue, to argue forcefully the society's views on this proposal.

# Claims Direct coming here?

The personal injury compensation business Claims Direct, famous in the UK for its aggressive TV advertising campaigns, has been approaching Irish solicitors with a view to setting up in this jurisdiction.

However, no approach has been made to the Law Society. The society would have serious doubts as to whether solicitors would be legally able to accept referrals from Claims Direct in this jurisdiction as they do in the UK.

Claims Direct has been the subject of a substantial media backlash in the UK in recent times and this has had a major impact on the company's finances. Claims Direct's fortunes took a downward turn following negative publicity on BBC television's *Watchdog* consumer programme over allegations that people winning in court were sometimes seeing their damages virtually wiped out by fees. The TV show's host, the redoubtable Ann Robinson, put it to Claims Direct's chief executive Colin Poole that: 'you are just an over-priced insurance salesman'. This was a reference to the 'after the event' insurance policy which Claims Direct insists on selling to all those whom they sign up.

Even worse was to follow in a report in *The Sun* newspaper headed *Shames Direct – Jason awarded £1,525, he gets cheque for £63*. And the Law Society of Scotland referred to Claims Direct as 'middlemen' and said that they were 'selling fresh air'.

The Claims Direct share price has been in free-fall and the *Financial Times* reported on 29 March that, following a second profits warning within two months, the shares had collapsed from a high of 353p in September 2000 to just 12p. Claims Direct had estimated pre-tax losses for the year to 31 March 2001 would be stg£20 million.

In spite of this, Claims Direct is maintaining its multimillion-pound TV advertising campaign and has approached solicitors in this jurisdiction to see if they would pay referral fees to have claims channelled to them here. The *Solicitors (Amendment) Bill, 1998*, which is expected to be passed into law within the next few weeks, is likely to further affect the legal position for a Claims Direct-type operation in this jurisdiction.

# ONE TO WATCH: NEW LEGISLATION

***The Finance Act, 2001* and tax relief for charitable giving**

Section 45 of the *Finance Act* introduces a new regime of tax allowances for donations to charities, educational bodies and those bodies which already qualify under the different existing schemes. The existing schemes are rationalised, and relief on donations now applies to all qualifying organisations in the same way. The section allows money which is given as a donation to be supplemented by the tax which has been paid on it, at the marginal rate of the donor. Thus, if money is donated, the tax paid on it is refunded to the charity or other qualified body by the Revenue Commissioners. There are different rules for obtaining the relief depending on whether the donor is an individual on PAYE, on self-assessment or is a company. Previously, only certain corporate giving could benefit from tax relief.

This legislation will be significant both for charities and for people and businesses who wish to donate money, as it makes it more attractive for both. The advantage for the Revenue Commissioners is that they will have information as to exactly what the sector and the individual organisations are receiving.

The key points are:

- Organisations which can avail of the tax relief are 'approved bodies' and include
  - those bodies which are already eligible for donation relief under the existing schemes (for example, approved bodies providing education in the arts, bodies approved for research, the Scientific and Technical Investment Fund, bodies that promote the *Universal declaration of human rights*)
  - charities registered with the Revenue Commissioners which have been exempted from tax for at least three years and which meet certain conditions (for example, as to information filed: they must obtain an 'authorisation' from the Revenue Commissioners which states that they are an eligible charity for the purposes of this act)
  - educational institutions or bodies in the state if they meet certain conditions (for example, that their courses are approved)
- If the donor is an individual on PAYE, he will make his donation to the approved body and will fill out a form which includes details of his marginal rate of tax, his personal public service number (PPSN) and the amount of the donation. The donee can use this form to reclaim the tax paid on income at the donor's marginal rate. The donation is 'grossed up' to include the tax paid. For example, if a donor who pays income tax at the higher rate of 42% pays £580 to an approved body, the body will be able to reclaim the tax paid on that amount

# Superior courts beckon solicitors

The long wait for solicitor judges in the superior courts may finally be over with the recent publication of the *Courts and Courts Officers Bill, 2001*. The bill, which was promised as long ago as 1999, opens the Supreme Court bench to solicitors with 12 years' practising experience, while ten years' experience is needed for appointment as a High Court judge. In both cases, solicitors must have been practising continuously for at least two years before the appointment.

The bill finally puts solicitors on an equal footing with barristers in terms of judicial appointments and was warmly welcomed by the Law Society. Commenting on the bill, president Ward McEllin said: 'The Law Society has fought long and hard to win the right for solicitors to sit on the benches of the superior courts. We can now look forward to the day when one of our solicitor colleagues will be elevated to the Supreme Court – and perhaps even appointed chief justice. We have many talented lawyers in our profession who would be a real asset at all levels of the judiciary'.

Among the other provisions contained in the wide-ranging bill is the extension of the jurisdiction of the District Court from £5,000 to approximately £16,000 and from £30,000 to approximately £80,000 in the Circuit Court. This is to take effect from 1 January next year. McEllin has already warned that the extended jurisdictions could have 'a seriously disruptive effect' on the courts system (see last issue, page 4).

'It is our belief that the Circuit and District courts simply will not be able to cope with a huge infusion of work on the civil side which will occur with the enormous increases in jurisdiction', he said.

Law Society President Ward McEllin: 'Many lawyers in our profession would be a real asset at all levels of the judiciary'

### *Giles J Kennedy v The Law Society of Ireland and Ors*
### The Supreme Court, judgment of 4 April 2001

The Law Society would not normally comment on a case which is still before the courts. However, potentially misleading and incomplete reports of the above case have appeared in certain publications. In the light of this, the society wishes to advise its members as follows:

This case is still before the Supreme Court. Whereas the Supreme Court found that the investigation of fraudulent claims is not an authorised purpose under the *Solicitors Accounts Regulations, 1984*, the court also noted that the report in question formed the basis of the decision of the society in February 1996 to seek an inquiry by the Disciplinary Tribunal of the High Court into the conduct of Mr Kennedy. In its judgment, the Supreme Court stated: *'Whether in reaching that decision the society was entitled to rely on all or any part of Ms Foley's report is a matter which would require further consideration'.* The court later stated that it would seem appropriate for the court to determine *'first, whether the appointment of Ms Foley was defective in whole or in part and, secondly, whether the report prepared by her or any part of it can be relied upon by the society for any purpose'.*

The Supreme Court accordingly directed submissions by both parties on this severability point and directed that the matter should then be re-entered before the Supreme Court for further argument in relation to these outstanding issues.

The full judgment is available from the society's library.

**REQUEST FOR PHOTOS AND MEMORABILIA**

**A Law Society working group is preparing a commemorative *History of the Law Society of Ireland* to be published in 2002 as part of the celebrations to mark the 150th anniversary of the society's charter. It would be very grateful for the loan of photographs and any other memorabilia that members may have relating to Law Society events or to the solicitors' profession generally, dating from the earlier 20th century, or, indeed, the 19th century, which will be considered for inclusion in the work. Items should be sent as soon as possible to Law Society librarian Margaret Byrne at Blackhall Place, Dublin 7. They will be kept safely and returned in due course.**

**ATTORNEY GENERAL'S SCHEME**

**The Ad Hoc Legal Aid Criminal Law Committee is reviewing the operation of the attorney general's scheme and would be pleased to have the views of members who have experience of the scheme and the administrative arrangements (including any difficulties or delay) in relation to payment for work carried out under the scheme. Replies should be forwarded to Colette Carey, Secretary, Criminal Law Committee, Law Society of Ireland, Blackhall Place, Dublin 7.**

**LAW SOCIETY OF IRELAND RETIREMENT TRUST SCHEME**

**Unit prices: 1 April 2001**
**Managed fund: 359.726p**
**All-equity fund: 104.893p**
**Cash fund: 184.515p**
**Pension protector fund: -**

(£420) at the end of the tax year. Thus, the approved body will benefit from a total donation of £1,000, and the Revenue will have forgone the tax element of that amount, at £420. If the donor pays tax at the standard rate only, any donation will be deemed to be 80% of the total, the balance of 20% being reclaimable from the Revenue Commissioners. For example, if such a donor pays £800 to a charity, the charity can recoup a further £200

- If the donor is an individual who pays tax on a self-assessment basis, the arrangement is different. The donor pays the full amount to the charity, and deducts it in his accounts as a business expense
- If the donor is a company, the company likewise pays the full amount to the approved body, and claims it as a business or management expense
- The minimum payable to any one body to qualify for this relief is £200 or €250 after 1 January 2002
- There is no maximum amount which qualifies for the relief. Donors can benefit from the relief to any extent they wish provided the donation comes from taxed income. Only tax actually paid by the donor can be claimed by the donee
- A donation must be made without strings attached, and may not be returnable or conditional
- An approved body's authorisation will be valid for a period of up to five years, as may be decided by the Revenue Commissioners.

It is expected that this legislation may be the seed pearl around which an active pattern of donation will develop. According to *Warm glow in a cool climate: philanthropy in Ireland,* published by the Policy Research Centre in Dublin, individual and corporate giving here is not particularly generous or organised, and there is scope for more charitable giving. Charities and the other approved bodies now have an attractive proposal to make to prospective donors, who will see the money contributed being matched by a substantial amount from the state. This could see an increase in programmes of planned giving. The impact of the legislation will be available to be reviewed as time goes on, as it can be monitored by the reclaims and accounts going through the tax offices.

With the state giving up substantial amounts of income tax to the approved bodies, it will want to know that it is getting value for the money forgone. Legislation is expected which will deal with fundraising, and will set up a registration and monitoring body for charities. This may take on the task of controlling that charities actually do what they say they are doing, something which is not controlled at present. G

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

# Government should reject OECD on legal education

**The OECD report on *Regulatory reform in Ireland* makes an unjustified attack on an aspect of self-regulation of the legal profession. Ken Murphy indicates why it should be rejected**

There were no surprises for the Law Society representatives when we gathered with the other invited guests in the press briefing room in the lower ground floor of Government Buildings on 24 April. We had already seen a draft, some six months previously, of the section of the OECD report on *Regulatory reform in Ireland* insofar as it dealt with the legal profession, although it was good to see that some of the fundamental errors of fact which we pointed out in relation to that draft had been corrected.

The address by OECD Deputy Secretary General Sally Shelton-Colby made only a passing reference to the legal profession and the announcement by Taoiseach Bertie Ahern that 'the Competition Authority will initiate a comprehensive study of the professional services sector with a view to reporting by the end of this year' had also been signalled in advance.

There is much that is good in this OECD report, and the vision and commitment shown at the highest level of the Irish government, including Tánaiste Mary Harney and Minister for Public Enterprise Mary O'Rourke, to secure more and greater benefits for the Irish economy and the Irish people by making competition policy central to regulatory reform, was impressive.

## Competition isn't everything

It was impressive also that both the taoiseach and the tánaiste recognise that competition policy is only one aspect of public policy and that other values of a society may prevail over the dictates of pure competition policy. Both the taoiseach and the tánaiste made it clear that some of the recommendations in the OECD report would not be followed, such as the recommendation that the *Groceries Order* be abolished and, interesting from the point of view of solicitors, the recommendation that there should be no change in the manner in which solicitors are allowed to advertise for personal injury litigation cases.

Taoiseach Bertie Ahern: should disregard some of the OECD report's recommendations on the legal profession

It is to be hoped, therefore, that government can yet be persuaded not to follow the recommendation of the OECD (for reasons of space, the only one which I deal with in this *Viewpoint*) that 'the control of education and entry of legal professionals should be moved from the self-governing bodies', namely the Law Society for solicitors and the King's Inns for barristers.

In *The Irish Times* on the day after the publication of the report, the chairman of the Council of the King's Inns, Frank Clarke SC, said that 'there could be no objection to the system governing the qualification of barristers being examined to ensure that the numbers entering the profession were not being suppressed. But if the system was found to be working it should not be changed'.

I would agree entirely with that in relation to both the King's Inns and the Law Society.

From the point of view of the Law Society, the two chief characteristics of our education and admissions system are its excellence and its openness. With the opening last October of the society's £5 million state-of-the-art Education Centre, complete with the most modern course materials and teaching methods, the society can be genuinely confident that it is providing the best legal professional training for solicitors anywhere in the world.

## No quotas or controls

Irish solicitors have an open-entry profession entirely free of any numerical quotas or controls. Everyone who passes the entrance examinations, which are set and marked at arms' length from the society by leading academics and specialists in their fields, and completes the society's courses and an apprenticeship will become a solicitor. As proof of this, approximately 1,000 new solicitors will qualify in the next 18 months in a profession which currently has only 5,500 practising members.

Finally, it can reasonably be argued that control of education and entry to the solicitors' profession has already been moved from the Law Society to a large extent by virtue of the fact that all of the society's education regulations must be approved in advance, by the president of the High Court and by the minister for justice, equality and law reform, as further protection of the public interest.

## Not a shred of evidence

The OECD does not give the slightest indication as to whom 'the control … should be moved' and, indeed, offers no real argument as to why this should happen.

Not a shred of evidence is offered that the Law Society's system for the education and entry of new solicitors operates anti-competitively or in any way contrary to the public interest. No evidence could be offered because none exists. The OECD recommendation in this regard appears to be based on ideology rather than information, on prejudice rather than proof.

The independence of the legal profession is crucial in view of its role in mediating conflicts between governments and citizens in a democracy. The OECD recommendation is an unjustified attack on an aspect of self-regulation of the legal profession and should be rejected. G

*Ken Murphy is the director general of the Law Society.*

# Letters

## One for everyone in the audience

*From: Richard Devereux, Intel KK, Tokyo, Japan*

Your readers may be interested to hear that one of the newspapers here recently had a headline reporting a campaign in Japan to increase the number of lawyers and the public's right of access to legal advice. Some towns outside the big cities are without lawyers. There was a report about a Mr Kunihara who has set up in the town of Hamada (pop 47,000) which has never had a legal practitioner. He complains about being inundated with work. Japan has some 18,000 lawyers, or one lawyer for every 6,300 people (compared to one for every 290 people in the US). Reading this, I think Ireland, for the number of legal practitioners it has, probably strikes the right balance.

## DUMB AND DUMBER

*From: David Hodnett, solicitor, Competition Authority*

In the decision of the European Commission in the matter of *Stiching Certificatie Kraanverhuurbedrijf and the Federatie Van Nederlandse Krannverhuubedrijven*, two Dutch undertakings were penalised by the commission for organising a cartel in the crane-hire industry. The defendants attempted to claim that the arrangement did not restrict trade within the common market. The decision reads, '... this latter claim was based on the limited extent of cross-frontier trade in this branch of the industry, since [according to the defendants] mobile cranes are by their nature not meant to be transported. However, it is evident from the FNK handbook that Krupp cranes can travel at maximum speeds of between 63 and 78kph'!

**David Hodnett wins the bottle of champagne this month.**

**Why not make it a contest next month by sending your entries to the Editor, *Law Society Gazette*, Blackhall Place, Dublin 7, or you can fax us on 01 672 4877 or e-mail us at c.oboyle@lawsociety.ie. As always, the best entry will win a bottle of the finest champagne that monopoly money can buy.**

## A nation once again?

*From: James Somerville, Dublin*

Your Italian correspondent in the last issue of the *Gazette*, Mr Ratio Decidendi, is I believe a bit confused about the separate legal systems that apply on this island. He writes from Newry on a case before the courts of Northern Ireland and demands legislative changes granting anonymity to criminal defendants. Perhaps Mr Decidendi should be informed it would be more appropriate to either lobby the Law Society of Northern Ireland or ask his ambassador to raise the matter with the British Government.

As he seems to be concerned about anonymity, he could always use a pseudonym.

# Living in the *twilight*

MAIN POINTS

- Legal status of natural parents and foster parents
- Should we amend the constitution to protect foster children's rights?
- Impact of the *European convention on human rights*

**Although there is a greater need than ever for foster parents in this country, they inhabit a kind of legal limbo. Geoffrey Shannon analyses the law here and abroad and argues that foster parents should have similar rights to adoptive parents**

Over the past decade, the use of foster care as a substitute care facility has undergone a definite change and has been propelled to the centre of childcare in this jurisdiction. In 1998, some 3,162 of the 3,984 children in the care of health boards were placed in foster care. There has been a concentrated effort, particularly by the current minister of state at the Department of Health and Children, to encourage people to become foster parents to children whose parents cannot care for them. However, there seems to be a remarkable reluctance to grant formal legal recognition to foster care. In particular, the lack of protection and legal recognition given to long-term foster care has led to an unacceptable number of marital children remaining in care, precisely because of their parents' marital status.

## Legal standing of parents and children

The insecurity of the fostering arrangement has made it a less attractive option than adoption. Foster parents have a number of duties, few rights and are perceived by some as essentially an employee of the health board. For example, when foster parents attempt to adopt a child without the approval of the health board under the *Adoption Act, 1988*, the legislature (in the guise of section 5 of that act) imposes on the foster parents the risk of costs being levied against them if they are unsuccessful.

Acceptance of foster care by the natural parents involves acceptance of an anomalous position. They still retain the status of parents, but they can no longer directly practise the daily responsibilities of the role. They have to forfeit some of the prerogatives of parenthood to an alternative set of parents. As far as the natural parents' rights in relation to a child in voluntary care are concerned, they retain all their rights in relation to their child and can reclaim the foster child at any time. Foster parents must deliver the child to the natural parents under the terms detailed in the *Child Care (Placement of Children in Foster Care) Regulations 1995* (SI no 260 of 1995).

Children in foster families do not have stability, save through court proceedings. They are not independently represented and orders can and have been made which have resulted in children being propelled from parents they have lived with for years to virtual strangers, with no thought given to their welfare. Article 12 of the *European convention on the rights of the child 1989* and article 6 of the *European convention on human rights* require separate representation for children in proceedings of this nature. The delay in this jurisdiction in putting in

# zone

place the infrastructure for the operation of a guardian *ad litem* system has deprived numerous children of this central right.

## The legislative framework

Where a child has been placed in the care of a health board, there are several options open to the board in providing for his or her care. These are detailed in section 36 of the *Child Care Act, 1991*. One such option is placing a child with a foster parent. A foster parent is defined in section 36(2) as 'a person other than a relative of the child who is taking care of the child on behalf of a health board in accordance with regulations made under section 39 of the act'.

Inappropriate placements result in unnecessary moves and inconsistency in children's lives. When moves are unavoidable, they should always be planned to cushion the damaging impact on the child involved. In particular, a precipitate removal is to be avoided. When the child leaves foster care, it should be planned, as a result of mutual participation between the social worker, the natural parents, the foster child and the foster parents. The health board is obliged to comply with the removal procedure detailed in part V of the *Child Care (Placement of Children in Foster Care) Regulations 1995*.

An interesting provision is included in section 15 of the *Social Work (Scotland) Act 1969*, to the effect that a natural parent who wishes to remove his or her child from foster care must give 28 days' notice in writing where the child has been in care for a period of six months or more. Swedish child law is similarly child-centred. Under section 28 of the Swedish *Social Services Act 1980*, the Social District Council may prohibit the guardian from taking a child from a foster home where there is a substantial risk of harm being occasioned to the child's physical or mental health if removed. The prohibition in this section is a temporary measure pending the arrival of an appropriate moment for transferring the child from the foster home without the risk

Foster children live in a twilight world between a family that does not want them and a family that cannot fully have them

of such detrimental effects. A provision analogous to section 28 would ensure greater stability and structure in long-term foster care in Ireland.

### The *Adoption Act, 1988*

For a significant number of children in foster care, rehabilitation within the biological family unit is an unattainable goal. These children, although they no longer have active access arrangements with their biological parents, nevertheless legally 'belong' to them and are not free for adoption. Of necessity, then, they live in a twilight world between a family that does not want them and a family that cannot fully have them. These children should be eligible for adoption.

Foster parents have always, theoretically, been capable of applying for an adoption order. Prior to the enactment of the *Adoption Act, 1988*, if foster parents with whom the child had been placed believed that it was contrary to the child's welfare to remove him or her from their custody, the only legal option was to have such a child made a ward of court and then proceed to procuring an order for custody in their favour. This occurred in *Re JL (a Minor)*, unreported, High Court, 1978.

Since the *Adoption Act* of 1988, the non-consensual adoption of a child (including, but not limited to, a marital child) is now possible in exceptional and very restricted circumstances. It has been suggested that the 1988 act may be viewed as an encroachment by the state into what was originally perceived in 1952 as an area of private family law. The adoption code was originally designed 'to bolster' the constitutional model of the family based on marriage. As pointed out in *The Irish constitution* by Kelly, Hogan, and Whyte (third edition, Butterworths [1994], page 570), the adoption code as originally conceived sought to facilitate the taking of children from family units that were not based on marriage and delivering them as securely and discreetly as possible into

## DEFINING FOSTER CARE

Fostering is more than parenting. It can be termed 'parenting plus', taking the form of a partnership with social workers, the health board and often also with the natural parents. It has been advanced as an alternative to the 'emotional vacuum' of residential care, providing what many would perceive as the proper environment in which a child can develop his or her physical, mental and social capabilities to the full.

Whereas foster care involves a change in legal custody of the child, adoption embraces a change in legal guardianship. It is the latter which severs the parents' tie to the child completely. However, it must be stated that while long-term foster placements have the veneer of *de facto* adoption, the fact that legal guardianship has not transferred from the natural parents to the foster parents has considerable implications for the nature of the relationship it creates between the foster child and foster family, and it does allow the return of the child to its natural home at any time. Foster children have a dual family status: they belong, in part, to both their foster family and their natural family.

'Family life' has been held by the European Court of Human Rights to include the relationship between a foster parent and a foster child, although the court has noted that the content of family life may depend on the nature of the fostering arrangement (see *Gaskin v UK,* [1989] 12 EHRR 36, para 49; *X v Switzerland*, application no 8257/78 [Dec], [10 July 1978] 13 DR 248; and *Rieme v Sweden* [1992] 16 EHRR 155).

those that were. The scheme put in place by the 1988 act would seem, on one view at least, to have inverted this agenda.

In order for an adoption to proceed under the act, very stringent requirements must be satisfied. In effect, the act requires that the parents of the child must have so comprehensively abandoned their parental duties in such a manner as indicates that the child is unlikely ever to receive even minimal care from them. The procedures required by the act have proved themselves to be 'lengthy and cumbersome' (see the criticisms of Darling, [1999] 4 IJFL 2 at 4) and the requirements are often difficult to make out (see *Western Health Board v An Bord Uchtála*, unreported, Supreme Court, 10 November 1995).

It is perhaps time that the privileges of the marital family in this area were reconsidered. The Oireachtas should perhaps consider the possible expansion of the range of circumstances in which marital children in dysfunctional marital families can enjoy the security of a permanent adoption in a stable and loving family environment. If a constitutional amendment is required to achieve this, it will be a price worth paying to secure to those children the rights that their non-marital counterparts already enjoy.

The reform of long-term foster care, in the guise of the *Adoption Act, 1988*, was most inadequate when viewed alongside the situation that exists in other jurisdictions. In England and Wales, for example, the child welfare principle dictates the outcome of disputes between substitute parents and the natural parents. And in Northern Ireland, by virtue of sections 29(1) and (2) of the *Adoption (NI) Order 1987*, if a child has been in the care of foster parents for a period of five years or more, they acquire statutory rights independent of their role as carers for the local authority. As a consequence of this, children can only be removed from foster parents after their application for the granting of an adoption order has been heard. Thus, we see a situation where the length of the placement confers rights on the foster parents and acknowledges the value of long-established ties, whereas the legislature here has demonstrated a reckless disregard for both.

Given the implacable resistance in Ireland to terminating parental rights, it is recommended that provision be made for a legal framework for permanent custody to be vested in foster parents without terminating parental rights. Under this regime, although foster parents would have greater control over the child's life, links to natural parents would not be severed, so they could, if they wanted to, maintain access to the child. In fact, this approach has been mooted internationally for some time.

Ideally, foster care is a temporary means of providing care for a child in a family environment until parents are in a position to provide care for their child. Unfortunately, the reality is often different, with the result that a considerable number of children remain in foster care indefinitely. Many such foster parent-child relationships grow into relationships emotionally indistinguishable from biological parent-child relationships, and the foster parent becomes, in effect, a psychological parent. The Oireachtas' reluctance to terminate parental rights, except in extreme circumstances, will ensure that these children remain in foster care indefinitely. In Ireland, the protective curtain of the constitution has merely been raised by the enactment of the *Adoption Act, 1988*, but only to allow through a trickle of children from the public-law domain.

**'The Oireachtas' reluctance to terminate parental rights, except in extreme circumstances, will ensure that these children remain in foster care indefinitely'**

### European convention on human rights

When the provisions of the *European convention on human rights* are incorporated into our legal system later this year, the inconsistencies between Irish child law and practice and the standards of the convention will become apparent. Those working in the child law area should note the enormous potential of the convention to protect and promote children's rights. Once incorporated into Irish law, the convention will bind both the health boards as well as the courts at domestic level.

The case of *Olsson v Sweden* ([1988] 11 EHRR 259) illustrates the potential of the convention for foster care. In this case, the court noted that there was an obligation on national authorities to take appropriate practical measures to facilitate reunion with parents. The three Olsson children in that case were taken into foster care and placed with different foster parents a considerable distance from each other and from their parents. The geographical distance between the members of the family resulted in contact being cut off between them. The court found that this gave rise to a violation of article 8 of the *European convention on human rights*. More importantly, it attributed little weight to the

## THE PROBLEM OF SUCCESSION RIGHTS

The issue of the succession rights of foster children was considered by the Northern Circuit Court in February of last year (*Kevin O'Rourke and Gerry O'Rourke v Owen Gallagher*, Circuit Court, 17 February 2000).

The facts of the case (set out in [2000] 2 IJFL 28) highlight a *lacuna* in Irish family law. Although the plaintiffs were clearly seen by the foster parents in this case as their children, they were regarded in law as strangers. Thus, in the absence of an express provision in the will of their foster father, the plaintiffs had no entitlement under the *Succession Act, 1965* for provision out of the estate.

While past discrimination against non-marital children has been removed by the *Status of Children Act, 1987*, no provision is specifically made for the foster family (see, however, *IOT v B* [1998] 2 IR 321). At the root of this situation is the focus of the law on one particular form: that of the family based on marriage with natural children. This narrow definition of the family is in conflict with the approach adopted by the European Court of Human Rights. The Strasbourg Court has held 'family life' to include the relationship between a foster parent and a foster child on no fewer than three occasions (see *Gaskin v UK*, *X v Switzerland*, and *Rieme v Sweden*).

administrative difficulties alluded to in the case, such as the lack of appropriate foster families. Unfortunately, the court did not provide instruction as to what is an acceptable distance by which children and parents can be separated.

Private life under article 8 of the convention includes the right to establish and develop relationships with other human beings. In *Niemietz v Germany* (16 EHRR 97), the European Court of Human Rights stated (in paragraph 9):
'It would be too restrictive to limit the notion [of private life] to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings'.

So it is arguable that personal information that may be necessary to help foster carers to understand children entrusted to their care and to avoid dangers which they would otherwise be unaware of should be disclosed to them under the terms of article 8 of the *European convention on human rights*. Irish law at present requires foster carers to trust the good sense of the health board to impart all relevant information to them. That said, foster carers may attempt to obtain information by means of article 10 and the second schedule to the 1995 *Foster Care Regulations*, a course which few, if any, are likely to feel able to take.

The last decade has seen an upsurge of interest in foster care abroad. The adoption of the *Convention on the rights of the child 1989* by the General Assembly of the United Nations on 20 November 1989 signposted a new era for foster care internationally. Indeed, it was the first time that foster care was recognised at this level.

Today, foster parents feel they have many responsibilities and few rights in relation to their children. Many perceive foster care as falling well short of a partnership with social workers, which may be due to foster parents' lack of power in situations of conflict. Foster care as a childcare practice must be upgraded not only in monetary terms but also in respect of decision-making.

Although fostering is merely a temporary arrangement, long-term foster parents should arguably be given rights akin to adoptive parents. After all, they are taking the place of natural parents in making day-to-day decisions. Following a period of time, the foster parents' rights should progressively increase. They should have a right to seek custody as well as a right to challenge the natural parents, not as a stranger would challenge the parents, but as substitute parents. G

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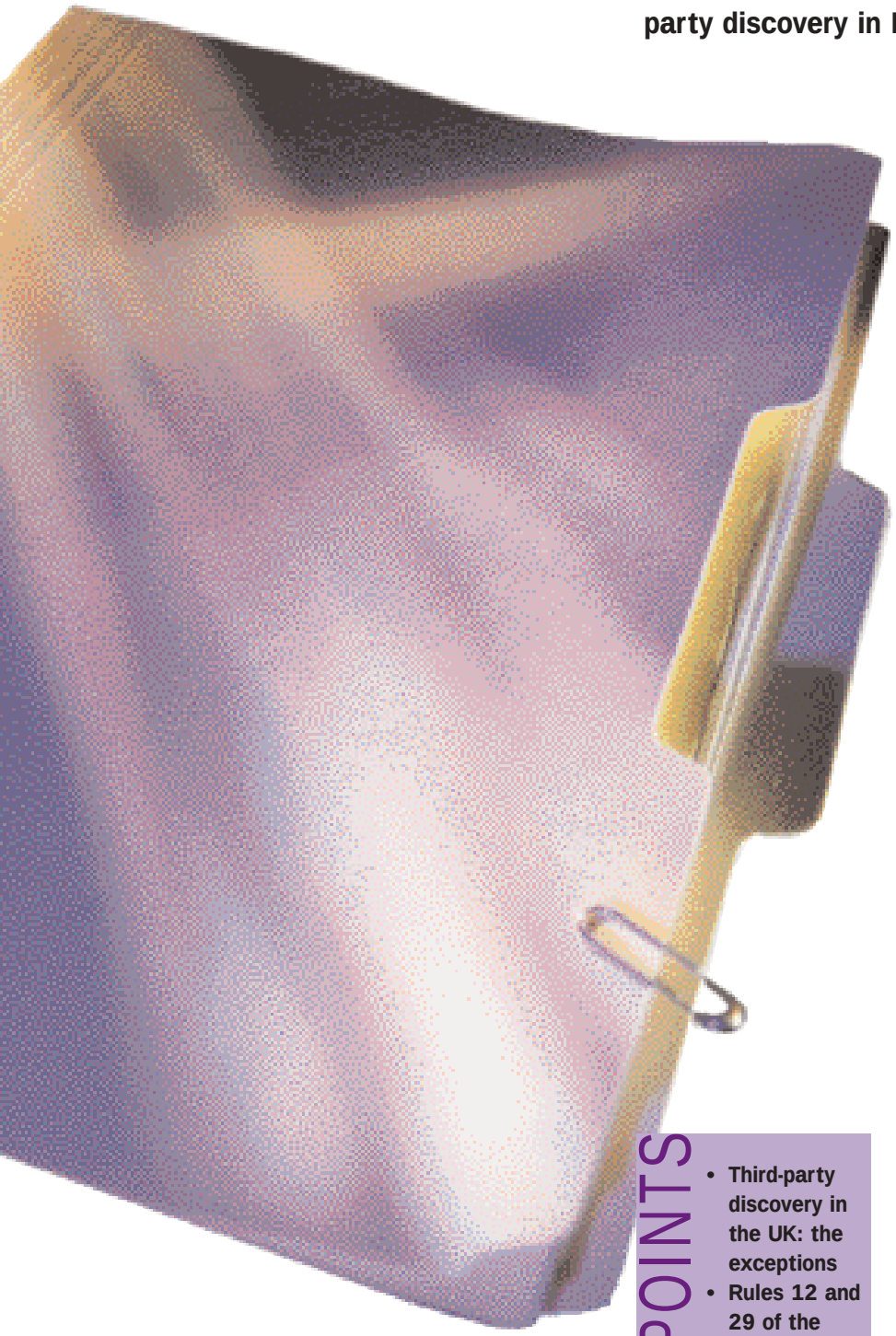
## FOSTER CARE AND THE CONSTITUTION

If true change is to be brought about in the foster care area, childcare policy in Ireland must support the philosophy that in any decision about a foster child's future, the welfare of the child should be the first and paramount consideration – and if this necessitates the termination of parental rights, that should be an option. However, the Irish constitution presents a major obstacle to the achievement of this child welfare approach. The primary nature of the family unit in article 41 of the constitution makes it impossible for the courts to give the foster child's welfare anything but a qualified consideration, since article 41 ensures that the views of married parents are paramount in relation to the welfare of their child. So foster children in Ireland find themselves in family units that make it difficult for them to assert any rights. In fact, the absence of substantive child rights in Irish law is reminiscent of the perceived deficiencies of other liberal democratic regimes.

The legal situation remains unchanged even after the implementation of the *Child Care Act, 1991* and the *Child Care (Placement of Children in Foster Care) Regulations 1995*. In effect, foster children will remain subordinate in the fostering process until a constitutional amendment is brought forward to delineate the welfare of children more clearly and in a manner that would be less prone to adverse Supreme Court interpretation than has been the case so far.

**How does the availability of third-party discovery impact on the conduct and subsequent disposal of cases? Eoin Dee examines the rules governing third-party discovery in Ireland and the UK**



# Three

MAIN POINTS

- **Third-party discovery in the UK: the exceptions**
- **Rules 12 and 29 of the *Rules of the Superior Courts***
- **Irish case law discussed**

Third-party discovery is a means of ensuring that all available evidence is put before the court in any given proceeding to better enable it to administer justice. In the United Kingdom, the traditional position was that discovery was only available between parties to the proceedings. Normally, the UK courts had no jurisdiction to order discovery against a person who was not a party to the proceedings. This was observed by Lord Kilbrandon in *Norwich Pharmacal Company v Customs and Excise Commissioners* ([1973] 2 All ER 943): 'you cannot get discovery against someone who has no connection with the litigious matters other than he might be called as a witness either to testify or to produce documents at the trial'. The situation was similarly set out by Lord Denning in *Davidson v Lloyd Aircraft Services Ltd* ([1974] 3 All ER 1) in the following way: 'Before the new act, none of the parties to an action could compel a third person to produce his records or notes before and in advance of the trial … the only to do was to issue a *subpoena duces tecum*'.

The 'new act' referred to here is the UK's *Administration of Justice Act 1970*, section 32(1) of which provides for non-party discovery in death and personal injury cases. This provision has usually related to discovery of patient records from hospitals. But section 32(1) is by no means the only exception to the general rule that discovery only applied between parties to the action. Other exceptions are listed elsewhere in this article.

### The Irish position

The basic rules which govern the concept of third-party discovery in the UK contrast with the Irish position on the matter. Before 1986, an order for discovery was not available against a party not already involved in the proceedings except through the issue of a *subpoena duces tecum*. The introduction of third-party discovery in 1986 involved provisions for this to

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be inserted into the existing rules concerning *inter partes* discovery. These provisions are now contained in order 31, rule 29 of the *Rules of the Superior Courts*. Rule 29 allows any party in an action to seek an order for discovery against one who is not a party to the proceedings. This rule also provides that a party in an action may seek the delivery of interrogatories against, or seek inspection of, relevant documents from a person not already a party to the proceedings.

The discretion allowed to the court is quite extensive, allowing it to make orders for discovery concerning documents 'which are relevant to an issue arising or likely to arise' in a cause or proceeding to which the one seeking the discovery is a party. There is an important distinction to be drawn between order 31, rule 29 governing third-party discovery and order 31, rule 12 governing discovery against other parties to the action. In simple terms, the test which governs whether or not the discovery is to be granted is one of necessity. The party seeking discovery must show that it is necessary for disposing fairly of the proceedings or for saving costs (hence the most recent amendment to the *Superior Court Rules* in SI 233 of 1999). In circumstances where a party to proceedings seeks discovery against another party, once the necessity test has been satisfied, an order for discovery will follow. A different situation prevails where third-party discovery is concerned. In this instance, even where the necessity test is satisfied, the court may still refuse to order discovery on the grounds that oppression or prejudice will be caused to the party called upon to discover the documents concerned.

The distinguishing features between rules 12 and 29 were summarised by Finlay J in *AIB v Ernst & Whinney* (1993 IR 375). In this case, the judge ruled that an application for discovery by a party to an action under rule 12 should only be refused or adjourned by the court if it 'is satisfied that it is not necessary either at all or at the time at which it is made either for disposing fairly of the cause or matter or for saving costs'. Judge Finlay went on to say that in an application under rule 29, the applicant seeking discovery must satisfy the court that the party against whom discovery is sought 'is likely to have, or to have had, documents in his possession, custody or power and, secondly, to establish that they are documents which are relevant to an issue arising or likely to arise out of the cause or matter'.

### Discretion in discovery

The second difference outlined by the judge is that with discovery under rule 12 'the court's discretion to refuse discovery is confined to its being satisfied that either in the form of the application itself or in respect of the time at which it is made, it is not necessary for disposing fairly of the cause or for saving costs. The provisions of rule 29, on the other hand, create a situation in which after it has been established to the satisfaction of the court that a person not a party has or is likely to have in his possession documents which are relevant to an issue arising, the court still has a further discretion'. This discretion, the judge noted, relates to the 'oppression or prejudice which will be caused to the person called to discover such documents'. He further stated that third-party discovery differs from ordinary discovery in that, where third-party discovery is concerned, such a third

## THIRD-PARTY DISCOVERY: FIVE-POINT TEST

A five-point test for third-party discovery was outlined by Costello J in the case of *Holloway v Belenos Publications and others* (High Court, unreported, 3 April 1987). The points are as follows:

- The existence of relevant documents must be proved
- It must be shown that these are in the possession, custody or power of procurement of the person against whom the discovery is sought
- The court must be satisfied that, in the circumstances, it is correct to exercise its discretion to order third-party discovery
- Principles we normally associate with *inter partes* discovery, such as privilege, will apply
- Requirements of the rule as regards saving costs will apply.

party cannot be expected to have as thorough a knowledge of the relevant issues in a case as a party to the proceedings.

To what extent does third-party discovery have an impact on one's right to privacy? In *AIB v Ernst and Whinney*, O'Flaherty J noted that compliance with such an order can be far less onerous than compliance with a *subpoena duces tecum*, which can involve attendance by the third party in court until a case is disposed of. That said, however, the court will be mindful of the need to protect the privacy of the third party involved – hence, the imposition of rules such as in the *Holloway* case. An example of this may be found in the case of *Fitzpatrick v Independent Newspapers and Martin* (High Court, 19 May 1988), where inspection of documents ordered to be produced by a third party was limited to the defendants' legal team and not to the defendants themselves. A further means to safeguard the rights of the third party is the rule that the initial costs of the application for discovery must be borne by the applicant. (The eventual burden of costs is decided at the hearing of the substantive proceedings between the parties to those proceedings.)

It goes without saying that the normal rules of privilege will apply to third-party discovery. In practice, this is a point which brings us back to the concept of the possible oppression of the third party, which was touched on in the preceding paragraphs. Is it bad, on the grounds of public policy, to be ordering discovery against individuals who are not a party to the given proceedings? There are several Irish decisions which focus on this area of public interest privilege.

One such case is *PMPS Ltd v PMPA Insurance Plc* ([1990] 1IR 284). The plaintiff sought discovery against the registrar of friendly societies. A memorandum was sought which had been prepared by the registrar, as well as copies of correspondence between the third party and the Department of Industry and Commerce concerning the relationship between the parties to the proceedings. It was argued that to make an order for discovery would be contrary to public interest. It was also argued that people would be inhibited from assisting the investigative function of the third party if they thought that this information could be subsequently disclosed in court proceedings. These arguments were rejected on the basis that the investigative function of the third party was not compromised and that, moreover, as the report of the registrar on foot of his investigations was discoverable and admissible, the registrar couldn't reasonably conclude that absolute confidentiality could be guaranteed.

Irish courts again considered the matter in the case of *Skeffington v Rooney* ([1993] 1IR 480). Here, third-party discovery was sought against the Garda

## NON-PARTY DISCOVERY IN THE UK

**Sections 33, 34 and 35 of the *Supreme Court Act 1981*.** This concerns claims involving personal injury and death. Sections 33 and 35 deal with pre-action discovery, whereas section 34 deals with discovery after the action has begun. In these situations, there are two different kinds of power which the court may exercise. First, it may order the inspection, photographing, preservation, custody or detention of any property. Second, it may order discovery proper to be made. It should be noted that the power to order inspection, photography and preservation of property does *not* include a power to order discovery of documents. Discovery under these sections is restricted to legal advisors and/or medical advisors only (similar to the provisions of the UK *Administration of Justice Act 1970*). The UK House of Lords has held that the powers are unfettered and should be exercised to further the administration of justice.

**Norwich Pharmacaal orders.** This derives its name from the case of *Norwich Pharmacaal v Commissioners of Customs and Excise* ([1974] AC133 HL). In this case, it was held that a person who, while not actually alleged to be a wrongdoer, could be caught up in the wrongdoing of another to such a degree that they could not be considered a 'mere witness'. Such a person could be compelled to give discovery of the identity of the actual wrongdoer to enable the victim to institute proceedings against the appropriate defendant. It should be pointed out that there are certain known defences to such an order. For instance, the court will not require disclosure to be made under this rule if such disclosure would itself complete a cause of action.

**Employees and agents of a party.** The rule against obtaining discovery from a non-party does not prevent the court from ordering discovery to be given by agents or employees of a party to litigation who aren't regarded as mere witnesses. Certainly, this would seem to square with the legal concept of vicarious liability.

**Orders ancillary to injunctions.** In simple terms, this means that a court may order disclosure of facts or documents when hearing injunctive proceedings if they are important in ensuring the effectiveness of the injunction. An example of how this works in practice may be seen in the *Mareva* injunction. Such injunctions often have as their most important facts those concerning the defendant's or respondent's assets.

**Inquests / public enquiries / previous proceedings.** Proceedings such as inquests usually have the result that certain documents, such as post-mortem results, are produced. Such documentation can be of use in subsequent legal proceedings. There is no clear rule on whether or not these can later be used without the leave of the court.

***Subpoena duces tecum*.** An important way to obtain documents from non-parties to proceedings is by way of *subpoena duces tecum*. In simple terms, this is a writ directed to a person not a party to the proceedings which can have the effect of compelling that person to produce certain documents at the trial of the action. This procedure is quite distinct from *inter partes* discovery in the following ways: first, it orders production to the court, as opposed to production to the other parties to the action; second, it requires production of the documents specified in the subpoena; third, it requires production at the

Complaints Board. The board had investigated certain incidents which were the subject matter of tortious claims against the gardaí. It was found that certain statements made to the board were similar to what might be found in a book of evidence, and therefore their disclosure would not compromise the operation of the board. That said, the court did outline a certain instance where confidentiality might apply: when the complainant might be inhibited from approaching the board if confidentiality was not assured. (For the record, I don't agree with this on three grounds. First, it is debatable if there is a basis in law for resisting discovery on a ground of confidentiality as distinct from the already existing concept of privilege. Second, is there in actual fact such a difference between statements to the registrar for friendly societies and statements to the Garda Complaints Board? Third, complaints to the Garda Complaints Board can have a profound effect on the lives of individual gardai, and in these circumstances such persons have, in my view, a basic right founded in the principles of natural justice to know their accusers and the nature of the accusations levelled. This is a concept that has been highlighted in recent days through the Catherine Nevin saga.)

No discussion of the concept of third-party discovery would be complete without a look at the provisions of the *Freedom of Information Act, 1997*. Section 26(1)(a) of the act provides that any information given to a public body in confidence and on the understanding that it would be kept confidential is exempt from disclosure if the disclosure of the information would prejudice the giving of further information of that type to the body and where it is important that the public body should receive such further information. In order to constitute a breach of confidence, three elements must be present:

- The information must be possessed of a certain quality of confidence; in other words, it must be capable of being defined as a 'secret'
- The information must have been obtained for a limited purpose
- The information must have been used or disclosed in a manner not in keeping with that limited purpose.

It is of note, however, that under section 26(3), a public body may disclose confidential information which would otherwise be exempt from disclosure under section 26(1)(c) to a third party where the body is of the view that there is a public interest which justifies disclosure. In determining whether there is a public interest factor in favour of disclosure, the relevant body must decide on the facts if the disclosure is necessary. It should also be noted that it is established under the general law concerning confidentiality that a breach of confidence will be excused if there is a public interest element in making the disclosure. The Supreme Court has ruled in at least one case involving National Irish Bank and RTÉ that such justification includes instances where the disclosure reveals a fraud, a crime or a misdeed either already committed or contemplated.

Third-party discovery is a useful and necessary tool in the disposal of causes of action. The provisions of the 1997 act will doubtless have an impact on its uses, as outlined above, but it remains an important element in the conduct of litigation. G

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trial of the action; and, finally, it requires production of documents but does not require that the source of the documents be disclosed. Practitioners should note that while the subpoena is usually directed to a third party, there is nothing to prevent a party to proceedings from directing such a subpoena to the opposing party in the proceedings. A matter of considerable importance can arise here: to what extent can a third party be required to produce documents in respect of a person to whom the third party owes a duty of confidence? Generally, apart from cases where privilege will apply, no court will grant an injunction to restrain a breach of confidence in the use of documents in legal proceedings apart from those instances where privilege applies to those documents. It should be noted that a subpoena must actually specify the documents that must be produced.

***Rules of the Superior Court*, order 38, rule 13: *order of court*.** This provision enables the UK High Court to order, at any stage, a party to the proceeding or a stranger to attend a proceeding and produce certain documents where such production is necessary for the proceeding. This order cannot compel production of any documents which couldn't be compulsorily produced at trial. This rule is similar to the *subpoena duces tecum*, the difference being that the subpoena orders production at trial, whereas this order requires production before that stage in the proceedings.

**The UK *Bankers' Books Evidence Act 1879*.** This is concerned with making the proof of banking transactions easier at trial stage. It also impacts on the law of discovery. It enables orders to be made for pre-trial disclosure of documentary evidence in the hands of third parties concerning accounts held by non-parties. It also allows for such disclosure after the trial. Section 7 of the act enables the court to order that a party be at liberty to inspect and take copies of entries in a banker's book for the proceedings. The court has the power to make an order not only concerning the account of a party to the proceedings but also of a non-party. The tests to be applied in this regard are that the accounts are those of parties to the litigation or, alternatively, the public interest involved outweighs the public interest in keeping the entries confidential.

**The UK *Evidence (Proceedings in other Jurisdictions) Act 1975*.** This act was passed to give effect to the 1970 *Hague convention* on the taking of evidence abroad in civil or commercial matters. It gives the UK High Court power to assist non-English courts in foreign civil proceedings. The power relates to actual or contemplated proceedings, and therefore has potential for broad application. For the purposes of discovery, it should be noted that the High Court may not order a person to give general discovery of relevant documents or to produce documents other than specific documents named in the order. Such documents must appear to the court to be likely to be in the possession, custody or power of procurement of the person against whom the order is directed.

**Depositions.** Where a court makes an order for the oral examination on oath of a witness before trial, it may include an order for the production of any document which appears to be necessary for the purposes of the examination.

# Calling time on

**If you have clients in the bar trade, then now's the time to pop in for a pint because the deadline is looming for those who want to upgrade to a full seven-day publican's licence. Constance Cassidy discusses the deadlines contained in the *Intoxicating Liquor Act, 2000***

Solicitors with publican clients who hold restricted licences should advise them that they are entitled to upgrade those restricted licences to ordinary publican's licences, but that they have to do this by 5 July 2001. 'Restricted licence' is defined by section 19 of the *Intoxicating Liquor Act, 2000* as 'a publican's licence which is not a full licence', or a beer house licence within the meaning of part 2 of the *Finance (1909-10) Act 1910*. A restricted licence is a six-day licence, an early-closing licence, or a beer house licence. A beer house licence is also known as a beer retailer's on-licence. It is rarely applied for, as a spirit retailer's on-licence (which is also known as a publican's licence) authorises the sale of any liquor.

Under section 19 of the *Intoxicating Liquor Act, 2000*, the Revenue Commissioners can grant a full seven-day publican's on-licence to holders of a restricted licence as long as certain conditions have

MAIN POINTS

- Restricted licenses must be upgraded by 5 July 2001
- Conditions for upgrading to a full seven-day licence
- The main provisions of the act explained

## *INTOXICATING LIQUOR ACT, 2000*: AN OVERVIEW

The main provisions of the *Intoxicating Liquor Act, 2000* came into force on 6 July 2000. These are some of the key changes introduced by the new act:

- **Amendment of prohibited hours:** The amendment to permitted hours applies in respect of all licenced premises, clubs and premises to which there is attached a special restaurant licence
- **Mixed trading.** The concept of mixed trading has been abolished
- **Special exemption orders.** The court has discretion to grant a special exemption order up until 2.30am (on weekdays), unless for stated reasons it considers it expedient to grant the order for a shorter period. All holders of on-licences can now apply for special exemption orders and there is no need to prove that the premises in respect of which the order is sought is a restaurant or hotel
- **Drinking-up time.** This is permitted after the expiry of the time during which the special exemption order is granted
- **Temporary closure order.** The court must impose a temporary closure order in respect of licenced premises where there has been a conviction relating to under-age drinking
- **Offences.** The defence of reasonable belief that an under-age drinker was over the age of 18 years is now gone in certain under-age offences
- **Grant of new licences.** A number of the jurisdictional exceptions to the general prohibition on the grant of new on- and off-licences have been repealed. In their place, an application can be made for an on- or off-licence and the following provisions apply:
  - the licence to be proffered for extinguishment

# pub licences

been satisfied. Section 19 becomes redundant on 5 July 2001, as section 19(2) specifically provides that an application to upgrade a restricted licence to a full licence must be made within one year after the commencement of the section. It is therefore imperative that practitioners alert publican clients who hold a restricted licence that the application for a full licence in its stead must be made before 5 July.

The application should be made to the Revenue Commissioners, and the appropriate District Court clerk must enter a statement where an ordinary licence has been issued in respect of the premises to the effect that the premises may not be disposed of, or the licence transferred, or consent given to its extinguishment for reward, within the period of five years after the date of the first issue of the full licence. The District Court may waive or modify compliance with the prohibition not to dispose of or transfer or give consent to the extinguishment for reward of the full licence within the five-year period.

### The Revenue's conditions

The Revenue Commissioners will grant a full seven-day publican's on-licence subject to the following conditions:

- That the sum of £2,500 is paid
- That the applicant has satisfied the Revenue Commissioners that he or she held the restricted licence for the whole of a period of five years immediately preceding 6 July 2000
- If the applicant cannot satisfy the previous condition, he or she must prove that within the period of five years immediately preceding 6 July 2000 that he or she:
  - inherited the premises, or
  - was given the premises by relative ('relative' is defined in section 19(1) of the 2000 act), or
  - was a tenant of the premises, or
  - bought the premises as a going concern within that period.
- The final condition is contained in section 19(4)(c) of the *Intoxicating Liquor Act, 2000*, which stipulates that the applicant must undertake not to dispose of the premises as a licenced premises, or transfer the full licence, or consent to its extinguishment within a period of five years after the date of the first issue of the full licence. However, as mentioned above, the District Court has discretion to waive or modify compliance with these conditions where the licensee can prove hardship.

An application under section 19 cannot be brought after 5 July 2001, so it would be prudent to make sure that you advise your clients that the opportunity to upgrade their licences must be availed of before that date. G

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can be a licence attached to any premises within the state
  - this licence can be a licence of the same character as the licence being sought, or it can be a full licence – for instance, a full seven-day publican's licence
  - The applicant must prove that the premises which is the subject of the application was never previously licenced.

- **Hotel licence upgrade.** There is now provision for upgrading the conditional licence, known as a hotel licence, to the unconditional publican's licence. Furthermore, the hotel licence – namely, the licence granted pursuant to the provisions of section 2, paragraph 2 of the *Licensing (Ireland) Act 1902*, which has no public bar facilities (where there is no order pursuant to the provisions of section 19 of the *Intoxicating Liquor Act, 1960*) – can, under a successful application under section 20(1) of the 2000 act, be deemed to be a hotel licence in respect of which an order under section 19 was made
- ***Ad interim* transfer.** In an application for an *ad interim* transfer, the applicant must now establish to the satisfaction of the court that he or she is a fit person
- **Wine retailer's licence.** The holder of a wine retailer's on-licence can offer beer for sale and consumption on his or her premises, provided certain conditions are satisfied, as contained in section 26 of the act
- **Special restaurant licence.** An applicant for a special restaurant licence does not now have to prove to the court that the premises are registered with Bord Fáilte
- **Wine retailer's off-licence:** A wine retailer's off-licence can be granted without having to prove that the applicant is a chemist or holds a spirit or beer retailer's off-licence
- **Application to Revenue Commissioners for licence:** An application by a limited liability company or a person carrying on business under a name that is not that of the beneficial owner of the business must produce certain documentation to the Revenue Commissioners when applying for grant, transfer or renewal of a licence.

# Do the right

**The High Court recently found an imaginative way to resolve problems caused by a solicitor's negligence in drawing up a will. Michael Peart examines the judgment and explains how the court dealt with the problem of 'unjust enrichment'**

In the recent case of *Kelly v Cahill and another*, Mr Justice Barr delivered a judgment on 18 January 2001 (as yet unreported) which provided an interesting solution to a solicitor's mistake in the preparation of a will. While no-one could dispute that Barr J 'did the right thing' in all the circumstances, it is illuminating to examine the route by which he arrived at his decision.

The facts of the case were simple enough. The deceased had made a will in 1968 under which he devised all his property to his wife and his brother as joint tenants for life, with the remainder to his nephew. However, some 16 years later, he changed his mind and no longer wished his nephew to inherit, but wished all his property to go to his wife. He consulted his solicitor for the purposes of making a new will. For tax reasons, the solicitor advised that instead of making a new will, it would be more appropriate, in the circumstances, for the husband to transfer all his property into the joint names of himself and his wife, so that upon his death she would become the sole owner of all his property by survivorship. The necessary transfer into joint names was executed and duly registered. However, the 1968 will was not revoked.

After the husband's death, it became clear that the transfer into joint names contained an error in as much as the solicitor had, through his admitted mistake, described the lands in question by reference to one folio number, failing to realise that in fact the lands were comprised in two folios. The result was that the lands in the second folio remained in the deceased's sole name and therefore passed, on his death, under the terms of the 1968 will, to his wife for the rest of her life (his brother having died in the interim), with the remainder going to the nephew, whom the deceased had specifically told his solicitor he did not wish to benefit.

Clearly, the solicitor was exposed to an action for breach of contract and/or negligence in the preparation of the transfer into joint names resulting

## PUBLIC POLICY AND SOLICITORS' NEGLIGENCE

From a policy point of view, it is undesirable that a solicitor who acted negligently should effectively be able to avoid liability. Likewise, if the highest standards are to be maintained in the profession, then there must be some sanction in the event of negligence. Otherwise, why take care? *Hill v Van Erp* ([1997] 188 CLR 159) stated in this regard:

'If the solicitor's carelessness results in the loss of a testamentary gift intended to be given to a beneficiary, "it is eminently fair, just and reasonable that the solicitor should be liable in damages to the intended beneficiary", as Sir Donald Nicholls VC said in *White v Jones.* Not only is the remedy in damages effective to compensate the beneficiary; it is necessary to enforce the duty owed to the client. "Otherwise", as the vice-chancellor said, "*there is no sanction in respect of the solicitor's breach in his professional duty*"' (emphasis added).

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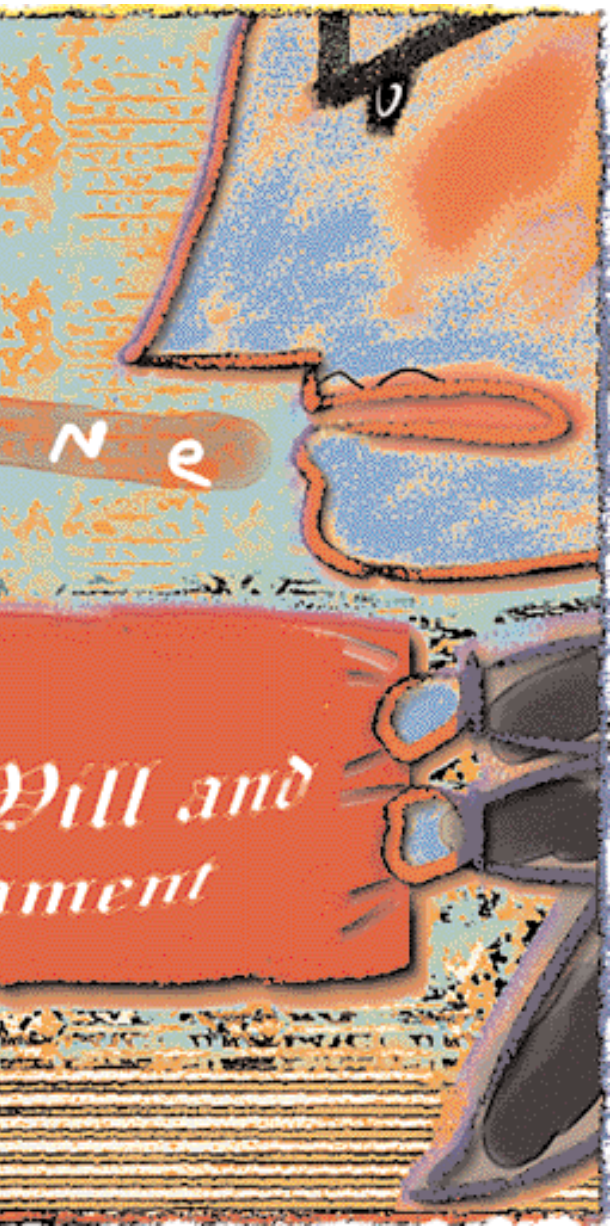


in the deceased's instructions not being properly carried out. First, a situation had arisen whereby the wife was the full owner of only a portion of the land, and had only a life interest in the remainder. Second, the nephew whom the deceased did not wish to receive any benefit had a remainder interest in the lands not included in the transfer into joint names.

Most of us would immediately conclude that the wife should sue the solicitor and recover the appropriate damages from the solicitor's insurers and that would be an end to the matter. However, in the case in question, the deceased's administrator sought certain directions from the court as to whether the lands omitted from the transfer passed under the terms of the 1968 will, or whether the nephew was a constructive trustee of his remainder interest in those lands for the benefit of the wife. In the event of the court finding that the nephew held the remainder interest as a constructive trustee, the administrator sought an order directing the nephew to execute such assurance as may be necessary to vest the lands in question in the wife.

In his judgment, Barr J found that the nephew was a constructive trustee of the remainder interest in the lands and ordered him to execute the necessary assurance in favour of the wife. He arrived at his decision by following a signpost marked 'new model constructive trust' erected originally by Lord Denning in *Hussey v Palmer* ([1972] 3 AER 744). In that case, Lord Denning stated:

'By whatever means it is described, it is a trust imposed by law wherever justice and good conscience require it. It is a liberal process, founded upon large principles of equity to be applied in cases where a defendant cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or a share of it … It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution'.

This was an imaginative resolution of the difficulty produced by the solicitor's negligence. The conventional solution, whereby the solicitor's insurers would have compensated the widow in damages, would have provided only a half-solution, because the deceased's wishes would still have been frustrated by the nephew receiving lands under the will which were not intended by the deceased. The complete solution arrived at by Barr J ensured that justice was done all round, and the end result is that the solicitor's error was rubbed out as if it had never happened.

To appreciate this judgment, it is interesting to look at the law relating to:

- The liability which solicitors have to third parties who suffer loss as a result of their negligence/ breach of contract in the carrying out of clients' instructions – the so-called 'neighbour principle'
- Constructive trusts, and
- Unjust enrichment and restitution.

### The neighbour principle

In the context of the facts of the case before Barr J, the question arising under this heading would be whether the solicitor owed any duty of care to anybody other than his client, the husband who had consulted him for the purposes of changing his will so as to exclude his nephew as a beneficiary. Of course, because of the nature of the application for directions

**MAIN POINTS**

- **Solicitors' duty of care and the 'neighbour principle'**
- **'New model constructive trusts' explained**
- **Unjust enrichment and restitution**

by the administrator, Barr J was not being asked to decide this question. If he was, however, there can be no doubt but that he would have decided that the solicitor owed a duty of care to the wife to ensure that her husband's wishes were carried out. That duty of care arises from the proximity of the relationship between the wife and the solicitor. It has been held that a solicitor must be deemed to be aware that negligence in carrying out clients' instructions can cause loss to third parties who otherwise would be without a remedy.

The relevance in this article of *Murphy v Brentwood*'s overruling of *Anns* and the line of cases following upon it (**see panel below**) is the question of whether *Ross v Caunters* has also been overruled. After all, the latter was decided a year after *Anns*. However, in *White v Jones* ([1995] 2 AC 207), the House of Lords came to the conclusion that while *Anns* had been overruled, it did not follow that *Ross v Caunters* had thereby ceased to be good law. In fact, the Lords emphatically decided, albeit by a majority, that *Ross v Caunters* was unaffected and remained good.

The facts in *White v Jones* were that a solicitor had delayed in drawing up a will and the proposed testator had died before any will was executed. The intended beneficiaries successfully sued the solicitor. That judgment – and the fact that *Murphy v Brentwood* has not been followed in this jurisdiction – make it clear that a solicitor continues to owe a duty of care not only to his client but to others whom he might reasonably be expected to believe would be affected by his actions.

It is also the case that the High Court of Australia in *Hill v Van Erp* emphatically followed *White v Jones*, and, in accordance with *Ross v Caunters*, decided that the law was unchanged as far as solicitors owing a duty of care to beneficiaries is concerned. In that case, the solicitor had allowed the spouse of a beneficiary to witness the execution of the will, thereby rendering the bequest null and void. The judgments in that case are lengthy and detailed and contain a comprehensive treatment of this whole area.

Returning to the facts of the case with which Barr J was confronted, there is no doubt that if an action had been brought in negligence against the solicitor for failing to give effect to the husband's wishes by the transfer of his property into joint names, the plaintiff would have succeeded in damages, and the nephew would have continued to enjoy his interest in remainder in the property not so transferred.

### The 'new model' constructive trust

The basis upon which Barr J decided that the unintended beneficiary (the nephew) held the remainder interest passing under the will as a constructive trustee for the deceased's widow was that the facts came within Lord Denning's decision in *Hussey v Palmer*. Referring to fine distinctions of meaning between a resulting trust and a constructive trust, Lord Denning stated that it is 'more a matter of words than anything else', and he went on:

'By whatever means it is described, it [a constructive trust] is a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded upon large principles of equity to be applied in cases where a defendant cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or a share in it … It is an equitable process by which the court can enable an aggrieved party to obtain restitution. It is comparable to the legal remedy of money had and received which, as Lord Mansfield said, is very beneficial, and, therefore, much encouraged'.

It is worth noting at the outset that in *Hussey v Palmer* the facts, briefly stated, were that the plaintiff, an elderly lady, had been persuaded by her daughter (the defendant's wife) to leave her home and go and live with her daughter and the defendant. An extension was built to the house which was paid for (directly to the builder) by the plaintiff. After she moved in, relations between the plaintiff and her daughter and the defendant had deteriorated to the

## CHANGING NATURE OF THE DUTY OF CARE

Prior to *Donoghue v Stephenson* ([1932] AC 562), a solicitor was thought to owe a duty to no-one other than his own client. That case changed everything as far as the range of people to whom a duty of care is owed in tort generally. It also concluded that the absence of privity of contract between parties did not preclude liability in tort. In the context of solicitors and their clients, the English High Court decided in *Ross v Caunters* ([1980] CH 297) that where a solicitor was negligent in the preparation of a will, he owed a duty of care to a beneficiary whose legacy had been rendered void. In that case, the solicitor had allowed the spouse of an intended residuary legatee to witness the will, thereby rendering the bequest null and void.

By the end of the 1970s, the categories of people to whom a duty of care was owed under the general law of tort had become almost open-ended. In England, the case of *Anns v Merton London Borough Council* ([1978] AC 728) began to make progress in the area of recovery in tort for economic loss, a type of loss previously irrecoverable except in contract. The high watermark was reached perhaps with *Junior Books Ltd v Veitchi Co. Ltd* ([1983] 1 AC 520). However, by the mid-1980s, the Court of Appeal had decided that matters had got out of hand, and it gradually began once again to restrict the ability of third parties to recover purely economic loss under the law of negligence, in the absence of some special relationship of proximity. Finally, in *Murphy v Brentwood District Council* ([1991] 1 AC 398), the House of Lords famously overruled *Anns*.

The result of the *Anns* decision was that local authorities were found to owe a duty to house occupiers to inspect the houses built by outside contractors. Their failure to do so, or their doing so negligently, led to a spate of claims by owners against local authorities, thereby stretching local authority resources.

The reversal of *Anns* can be said to have been dictated by policy considerations. This is a point worth noting when it come to considering whether the 'neighbour principle' has been affected in this jurisdiction by the overruling of *Anns* by the House of Lords. The same policy considerations would not necessarily apply in this jurisdiction, especially given our courts' willingness to uphold individual rights. The Irish Supreme Court's decision in *Ward v McMaster* ([1988] IR 337) came after *Anns*, but as yet there is no indication that, following *Murphy v Brentwood*, the Supreme Court has any intention of changing its mind by following *Murphy*. In particular, in relation to solicitors' duties to third parties, the Supreme Court's judgment *in Doran v Delaney* ([1996] 1 ILRM 490) found that there can be circumstances where the solicitor for a vendor will be found to owe a duty of care to a purchaser over and above the duty he owes to his own client.

point where the plaintiff left the house and lived elsewhere. She then attempted to get her money back as she was impecunious.

The plaintiff initially claimed her money back on the basis that it was a loan, but she failed. She then brought proceedings claiming the money on the basis of a resulting trust. At first instance, she lost, but the Court of Appeal held that where a person paid money for an extension to be added to a legal owner's property, an equitable interest was acquired in that property to the extent of the money paid 'because justice and good conscience so required'.

In *HKN Invest OY v Incotrade PVT Ltd (in liquidation)* ([1993] 3 IR 152 at 162), Costello J echoed Lord Denning's words when he stated:
'A constructive trust will arise when the circumstances render it inequitable for the legal owner of property to deny the title of another to it. It is a trust which comes into existence irrespective of the will of the parties and arises by operation of law. The principle is that where a person holds property in circumstances which in equity and good conscience should be held or enjoyed by another he will be compelled to hold the property in trust for another'.

As Chief Justice Keane stated in his book *Equity and the law of trusts in Ireland* (Butterworths, 1988) at paragraph 13.12, this so-called 'new model' constructive trust has not received universal acclaim. It has been criticised as going too far in allowing judges free rein in their efforts to do justice wherever justice and good conscience require it. But whatever criticisms have been levelled at it abroad, it would seem as if the Irish courts are prepared to avail of its broad concept of fairness and equity in order to do justice where required. Certainly, Barr J is in favour of it when he stated in *Kelly v Cahill*, having referred to the judgment of Costello J in *HKN* (above): 'In my opinion a "new model" constructive trust of that nature the purpose of which is to prevent unjust enrichment is an equitable concept which deserves recognition in Irish law'.

The use of the constructive trust concept in the case of mistaken payments is particularly important where the wrongful payee becomes insolvent and a contest ensues between the ordinary creditors and the payor as to the status of the money mistakenly paid over. If the money in question is held in a constructive trust, it will not be available for distribution to the creditors, but must be returned to the payor before any distribution is made to the other creditors. But different facts will produce different results.

In the area of family law, the remedial constructive trust or resulting trust has been used to deal with situations where matrimonial property is in the sole name of one spouse, and the other spouse claims that his or her financial contributions, direct or indirect or by virtue of unpaid services within the home, entitle him or her to an interest in the property.

In all of these examples, it can be seen that equity comes to the rescue in different circumstances involving the possible unjust enrichment of one party at the expense of another.

**Unjust enrichment and restitution**

From what has been said so far, it will be evident that the concept of an unjust enrichment of one person at the expense of another lies at the heart of the 'new model' constructive trust. It is a remedial trust designed to restore property to its rightful owner or to grant an interest in property to a person who in conscience ought to have one. In former times, such an action would have been brought on the basis of 'money had and received to another's use', or under an implied contract or quasi-contract.

'Unjust enrichment' is not an entirely satisfactory term. For instance, where a person has received a

## WHAT IS A CONSTRUCTIVE TRUST?

In its classic form, the constructive trust is a remedial device whereby courts can restore property to its rightful owner where the facts disclose that the holder of the legal title may not in good conscience retain the beneficial interest. This begs the question of what constitutes 'good conscience'. It has always been held that a murderer may not receive any benefit otherwise arising to him as a result of the death of his victim. In England, the courts have held that in such circumstances the legal title does not pass to the murderer. Other jurisdictions prefer to say that the legal title passes, but that it is held under a constructive trust for others.

Similarly, where a person knowingly receives trust property, he will be regarded as holding it on a constructive trust for the rightful beneficiaries of the trust. In the commercial area, where a sum of money is paid over by mistake of law or fact, the person receiving it, even though ignorant of the mistake, will hold it on a constructive trust for the payer. This scenario was the subject of Carroll J's judgment in *Re: Irish Shipping Limited* ([1986] ILRM 518). In that case, it was found not to matter that the payee bank that received a duplicate payment in error had no knowledge of the error.

benefit with no fault on his part, can it be said to be 'unjust'? In the case Barr J was dealing with, the nephew had had no hand, act or part in the solicitor's error by which he was fortuitously enriched. In that case, it is the deprivation of the widow rather than the enrichment of the nephew which was unjust. There seems to be a presumption operating in favour of the person deprived, which is only rebuttable by the recipient if he can show that he has changed his position as a result of the benefit – the so-called 'change of position defence'.

There is academic debate as to whether a necessary ingredient of the concept of unjust enrichment is some element of fraud or *mala fides* on the part of the recipient before the enrichment ought to be regarded as unjust. There is also some judicial authority for this proposition. For example, in *The Ruabon Steamship Company Limited v London Assurance* ([1900] AC 6), Lord Halsbury stated: 'I cannot understand how it can be asserted that it is part of the common law that where one person gets some advantage from the act of another a right of contribution towards the expense from that act arises on the part of the person who had done it'. In the same case, Lord Macnaghten put it this way: 'there is no principle of law which requires that a person should contribute to an outlay merely because he has derived a material benefit from it'.

The implication of these remarks is that in the days in which the words were uttered it was necessary that the retention would need to be regarded by the court as 'unjust'. The mere fact of benefit and deprivation was not enough.

This dilemma does not arise in the case of a mistaken or duplicate payment of money to a creditor, because clearly there is no legal basis for the enrichment. But in the case of a bequest under a will, it surely arises, as a correctly-executed will is a legal document conferring benefit in a perfectly legal way which forms the basis for the payment. There is certainly an argument that, in these circumstances, the fact that a person has been deprived through a mistake on the part of a solicitor, unconnected with the validity of the will itself, ought not deprive the beneficiary of the benefit conferred by it. It may be unfair to the person deprived, but that person's loss can be remedied in damages.

Space does not permit of an examination of the classic case of *Smith v Brougham* ([1914] AC 398), which held sway for over 80 years, and which effectively curtailed judicial thinking in relation to the concept of the constructive trust. Fortunately, however, it has been loudly overruled by the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington LBC* ([1996] AC 669), enabling the courts to develop their thinking in relation to the law of unjust enrichment and restitution for the 21st century. But, clearly, Lord Denning's concept of the 'new model' constructive trust, having been uttered perhaps ahead of its time, is now coming into its own time. Not for the first time has the great man had to wait for approval. His fertile and equitable mind did not always win him friends in court. His judgment in *Hussey v Palmer* offended many of his peers as going too far into the realms of uncertainty and producing what was judicially described as 'palm-tree justice'. It was felt that too much uncertainty would be created if judges were allowed to decide on loose and flexible equitable principles of what was right in a particular case, regardless of established limitations.

Nevertheless, one could not suppose for one moment that Lord Denning would have had any disagreement with the judgment of Barr J in *Kelly v Cahill*. It has all the hallmarks of fairness, even though the purists might conceive of theoretical difficulties. G

## UNJUST ENRICHMENT

The phrase 'unjust enrichment' is relatively new in this jurisdiction and in England. It has been common currency in Australia, Germany, New Zealand, the US and Canada, albeit sometimes in slightly different language. In Australia, the High Court speaks in terms of 'unconscionability' as to the test in these cases. In New Zealand, the courts view such problems from the viewpoint of 'reasonable expectations'. However, in Ireland, 'unjust enrichment' is becoming a term of more common usage. Indeed, it even finds a place in some legislation, for example, section 55 of the *Consumer Credit Act, 1995*, and section 144 of the *Finance Act, 1998*, amending section 20(5) of the *Finance Act, 1992*.

It is interesting to note a couple of Irish cases where 'unjust enrichment' was discussed, namely, *Re Frederick Inns Limited* ([1991] ILRM 582) and *Dublin Corporation v Building and Allied Trades Union* ([1996] 2 ILRM 547). Unfortunately, space does not permit an examination in this article.

## THE CANADIAN APPROACH

Other jurisdictions have used different terminology in an effort to give effect to the same concept. For example, in *Pettkus v Becker* ([1980] 2 SCR 834), the Canadian Supreme Court stated that before the legal device of the constructive trust can be used, three tests must be met. There must be:

- An enrichment of one person
- A corresponding deprivation of another, and
- No juristic reason for the enrichment.

It can also be argued that the constructive trust device should be used only where no other remedy is available to the person deprived. In another Canadian case, *White v Central Trust* ([1984] 54 NBR [2d] 293), La Forest J (as he then was) included another test, namely, that there should be an absence of any other remedy.

The third test above would not appear to be met (as well as La Forest's additional test) in the case of an unintended beneficiary under a will, as the validity of the will as an instrument provides a valid legal reason for the enrichment. It will be interesting to see the Supreme Court's attitude to problems such as this whenever a suitable case comes to be decided.

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

# Access all areas

**Solicitors are increasingly doing their title deed searches on-line. Catherine Treacy explains how the Land Registry is changing the way that titles are registered in this country**

The Land Registry's Electronic Access Service (EAS) reached another significant milestone recently when Bryan Armstrong of Sligo solicitors Hegarty and Armstrong became the 2,000th registered user. The Electronic Access Service is an integral part of the Land Registry's strategy towards delivering enhanced customer service and has been developed as an essential element of the Integrated Title Registration Information System (ITRIS). Since its launch in the Dublin region in August 1999, ITRIS (and the Electronic Access Service) has been gradually extended to other areas.

- In September 1999, it was extended to counties Galway, Clare, Roscommon, Mayo and Sligo
- By November 2000, it had been extended to counties Kildare and Wicklow
- It will be rolled out for Cork in June of this year
- It is planned to have the system operational in all counties by mid-2002.

Paragraph A.42 of *Implementing the information society: a framework for action* (December 1998) mandated the Land Registry to undertake a 'flagship project' to provide 'an electronic service for folio access'. This was achieved through the successful implementation of the EAS, which provides on-line access over the Internet (on *www.landregistry.ie*) to the organisation's existing computerised database of folios and related indices of registered land. We understand that the EAS was the first e-government project to 'go live' in the civil service and we are very pleased to have been in a position to deliver on this flagship project within the timeframe contained in the action plan.

The EAS has particular benefits for customers of the Land Registry, including the legal profession, professional law-searching firms, commercial property companies, and the law departments of public and private corporations. Authorised users are able to:

- Conduct on-line searches of the electronically available register
- Discover the existence of any relevant transactions which may already be pending in the Land Registry against a particular property
- Track progress of cases on-line
- Order certified copies of particular documents
- Avail of these services outside of normal business hours.

These benefits are derived from the increased flexibility, additional convenience and overall enhanced quality and speed of service which customers are already experiencing since the Electronic Access Service went live in August 1999. The anticipated benefits for the Land Registry relate to improved customer satisfaction, and, over time, an anticipated increase in demand for the organisation's information services. Other information available from this website includes access to the practice directions used in the operation of the registry, a comprehensive contacts list, electronic versions of forms and other relevant information.

At present, over 2,000 customers have availed of the services offered through the EAS. Between January and December 2000 more than 123,000 business transactions were conducted through the website. Indeed, experiences in other jurisdictions indicate that electronic access to information increases the usefulness and value of such information. It is also apparent that new markets arise for the information (in addition to the property service providers and financial information companies, including estate agents, public utilities, planning authorities, financial institutions and credit agencies that are currently using the service).

Folios in the counties where ITRIS has been introduced are being computerised on a gradual basis:

- All new folios created after the introduction of ITRIS in each region are in electronic format, and
- Where an application for registration is received, the relevant folio is available for all purposes in electronic format after that.

As of now all folios in Dublin – around 250,000 – are electronic and the benefits of this should be clear to solicitors and other users. Additionally, over 100,000 folios for the western counties are electronic and are increasing at over 100 a day. Already over 6,000 folios in counties Kildare and Wicklow have been converted into electronic format and are increasing at an average of 60 a day for these counties.

The Land Registry currently has approximately 1,300,000 folios in paper format and the related names index for these folios is also in paper format. However, it is intended that by mid-2004 all folios, filed plans and related indices will be available in electronic format. In the interim period customers should remember that:

- As notified on the EAS, a complete index search will involve searching both the computerised database and the paper index
- A certified copy of any folio can be requested, though it may not yet be available for inspection in electronic form. G

*Catherine Treacy is the chief executive and registrar of deeds and titles at the Land Registry.*

MAIN POINTS

- **Land Registry on-line services extended**
- **2,000 users now registered**
- **All folios available on-line by 2004**

Land Registry's 2,000th electronic user, solicitor Bryan Armstrong, Hegarty & Armstrong, with Catherine Treacy, registrar and chief executive of the Land Registry

Land Registry
Clárlann na Talún

# Land Registry Computerisation Programme

The Chief Executive/Registrar of Deeds and Titles is pleased to announce that the Land Registry's computerised 'Integrated Title Registration Information System' (ITRIS) will shortly be extended to support applications for County Cork. As a result, in addition to the existing inspection methods, **all new folios for County Cork created after the introduction date** will be available for inspection over the Internet through the Land Registry's 'Electronic Access Service' *(www.landregistry.ie)*. Information on the status of pending applications will also be available through this service and it will be possible to submit applications for copy folios and filed plan maps electronically. A programme of data capture of the existing manual folios has also commenced and these will be made available electronically as they are added to the database.

■ We also wish to remind our customers that the Land Registry Practice Directions are available on-line.

Practitioners wishing to avail of the Electronic Access Service can get information at the Land Registry website www.landregistry.ie or from:

Peter McHugh
Land Registry
Chancery Street
Dublin 7
peter.mchugh@landregistry.ie
Telephone: 01-8048167

# Book review

## Journalists and the law (second edition)

**Yvonne Murphy.** Round Hall Sweet and Maxwell (2000), 43 Fitzwilliam Place, Dublin 2. ISBN: 1 85800-194-3. Price: £36.

Law books do not have to be boring: tomes to be dipped into, pored over or probed in the hope of finding a useful precedent. They can, in fact, be interesting in subject and in writing. This one is both.

Written by a former journalist, now a Circuit Court judge, the book is aimed mainly at students of journalism and their working colleagues. It should also, indeed, be of significant interest to an increasingly educated public which looks to the courts to protect and vindicate their rights.

The law is not the preserve of lawyers any more than the church is the preserve of churchmen. It exists for the public who pay for it, who enjoy its protections and who suffer its sanctions. There is a 20-page glossary of legal terms at the beginning of the book. Its first explained term is '*a fortiori*'. Your reviewer is thus now able to continue that, while the general public would find much of interest in the book, so *a fortiori* would their legal advisors.

This second edition (first edition 1996) covers significant judgments in three recent Irish cases: *De Rossa v Independent Newspapers Limited* (1999), *O'Brien v Mirror Group Newspapers Limited* (2000), and *The Irish Times v Murphy* (1998).

The book was published before *Cooper Flynn v RTÉ*, *Bird and Howard* in the High Court, the hearing of which will surely be remembered more for colourful suggestions of exalted status and for money and reputations at stake rather than any new legal ground made (see the section on 'fair comment', page 75).

There are 11 chapters and four appendices. The topics covered can be divided into seven categories: the courts and the legal profession; restrictions on reporting the courts; defamation; contempt of court; pleadings and procedures in court; copyright and freedom of information; and, finally, a sample (and wistfully simple) book of pleadings, from *Indorsement of claim* to *Defence*.

Much of the book, from page 37 to page 118 in a total of 174 pages of text, is given to defamation law. For journalists and their contacts, from 'deep throats' to those giving microphones their full attention, defamation law in this country is best treated with awareness and respect. Relax at your peril.

The author clearly defines

## BOOKS PUBLISHED

**Food safety and product liability**
*Raymond O'Rourke BL*
*Palladian Law Publishing (2000), Beach Road, Bembridge, Isle of Wight.*
*ISBN: 1-902558-227.*
*Price: stg£49.*

**Sex discrimination law**
*Marguerite Bolger and Cliona Kimber*
*Round Hall Sweet and Maxwell (2000), 43 Fitzwilliam Place, Dublin 2.*
*ISBN: 1-85800-062-9.*
*Price: £110.*

**Termination of employment statutes**
*Annotated by Anthony Kerr*
*Round Hall Sweet and Maxwell (2000), 43 Fitzwilliam Place, Dublin 2.*
*ISBN: 1-1-85800-207-9.*
*Price: £28.*

**Revenue law, volumes 1 & 2**
*Kieran Corrigan*
*Round Hall Sweet and Maxwell, 43 Fitzwilliam Place, Dublin 2.*
*ISBN: 1-85800-205-2.*
*Price: £450.*

**Post-traumatic stress disorder and the law**
*Gillian Kelly*
*Round Hall Sweet and Maxwell (2000), 43 Fitzwilliam Place, Dublin 2.*
*ISBN: 1-85800-210-9. Price: £49.*

**Northern Ireland criminal procedure**
*John E Stannard*
*Round Hall Sweet and Maxwell (2000), 43 Fitzwilliam Place, Dublin 2.*
*ISBN: 1-85800-198-6.*
*Price: £69.*

**Taxation of costs**
*James T Flynn and Tony Halpin*
*Round Hall Sweet and Maxwell, 43 Fitzwilliam Place, Dublin 2.*
*ISBN: 1901-657-70-1.*
*Price: £175.*

**Leading cases of the 20th century**
*Eoin O'Dell*
*Round Hall Sweet and Maxwell, 43 Fitzwilliam Place, Dublin 2.*
*ISBN: 1-85800-208-7.*
*Price: £98.*

**Probate causes and related matters**
*Albert Keating*
*Round Hall Sweet and Maxwell (2000), 43 Fitzwilliam Place, Dublin 2.*
*ISBN: 1-85800-190-0.*
*Price: £69.*

**Company law (third edition)**
*Ronan Keane*
*Butterworths (Ireland) Ltd, 26 Upper Ormond Quay, Dublin 7.*
*ISBN: 1-85475-8756.*
*Price: stg£90.*

**Why lawyers should eat bananas**
*Simon Tupman*
*Simon Tupman Presentations Ply Ltd*
*ISBN: 0-646-40432-6.*
*Price: stg£14.95*

**Immigration law handbook (2nd edition)**
*Margaret Phelan*
*Blackstone Press, Aldine Press, London W12 8AA, England.*
*ISBN: 1-84174-149-3.*
*Price: stg£35.*

**Conveyancing**
*Gabriel Brennan and Nuala Casey (editors)*
*Blackstone Press (2001), Aldine Press, London W12 8AA, England.*
*ISBN: 1-84174-182-5.*
*Price: £35.*

**Landlord and tenant law**
*Gabriel Brennan (editor)*
*Blackstone Press (2001), Aldine Press London W12 8AA, England.*
*ISBN: 1-84174-177-9.*
*Price: £35.*

**Applied European law**
*Dermot Cahill, TP Kennedy and Vincent Power (editors)*
*Blackstone Press (2001), Aldine Press, London W12 8AA, England.*
*ISBN: 1-84174-175-2.*
*Price: £35.*

defamation as a statement or imputation which is false and which tends to discredit a person by damaging his good name in the eyes of reasonable right-thinking people. Detailed explanations follow of the components of the definition.

The four 'positive' defences to libel – justification, fair comment, privilege and consent – are explained. So too are the 'negative' defences – those consisting of negating one or more of the essential elements of the plaintiff's claim. They are: that the defendant did not publish the alleged words; that the words did not, or had not been shown to, refer to the plaintiff; and that they had no defamatory meaning. Finally, there are the four special defences: unintentional defamation; the 'bookseller's defence'; accord and satisfaction; and that the action is statute-barred.

Next up is contempt of court: what it is and how not to do it. While defamation law affects those, both in the media and otherwise, who speak or write false and damaging material about a person to any other person, contempt of court is different. It affects the innumerable legions who every year come to the courts as litigants, defendants, witnesses and lawyers. Its remit extends from the District Courts, where judges may have to shout for silence at the back of the court, to the dignified chamber of the Supreme Court.

As the title of the book suggests, the emphasis is on the practical, particularly for journalists – what can and cannot be written or photographed. Example: a photograph of an accused could amount to contempt where visual identification is in question. And it would take no great sensitivity to see a problem with *The vampire will suck no more* as the headline to a story about a person arrested on a murder charge.

The case of *Kelly v O'Neill and Brady* (1999) is covered. This is the case in which the Supreme Court clarified that it can be contempt of court for an article to be published before sentence is handed down, even though the jury has delivered its verdict. Judges are fallible too.

The fine line between an advocate, whether solicitor or barrister, pleading a client's case robustly and too robustly is also explored. We are told that it is 40 years since an advocate was committed for contempt – subsequently receiving an apology. No mention of more recent events in Cork.

This book was not written for lawyers, so it would be unfair to complain about no lists of cases or statutes cited or about its short general index. Far better to read the book on its stated terms. If you need further information, go to the texts.

This is a brief *tour de force* of the law relating to how the courts go about their business and how they should be approached if you want to stay out of trouble. It should be of interest to the educated general public. For some lawyers, it may be a primer. Better a primer that is read than a weighty and learned tome that props up the leg of the office table. G

*Pat Igoe is principal of the Dublin law firm Patrick Igoe and Company.*

# Tech trends

By Maria Behan

## Ooh you wascawy wabbit

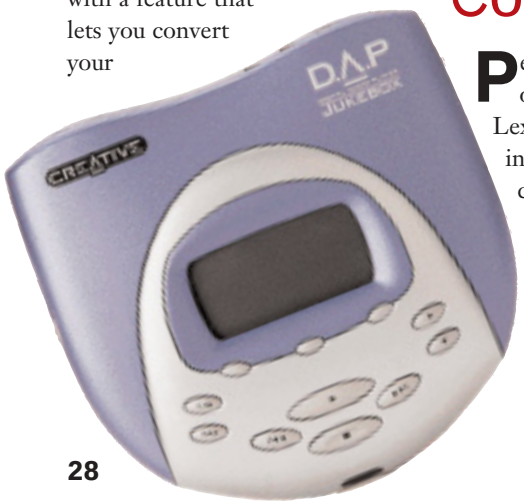
The Weemote Control is designed to make channel surfing easy – and safe – for young children. Even the stumpiest fingers can control the brightly coloured buttons, while mum and dad are pulling the strings from behind the scenes, since the remote allows junior access to just five TV stations that they've selected as kid-suitable. Once the rug rats are safely in bed, adults can disable the parental control feature and use the battery-powered remote to explore the darker corners of Channel 4 or whatever else takes their fancy. *Available for about £30 from* www.weemote.com.


## Full metal jacket

Apple's new Titanium PowerBook screams high-tech cool. For most users, the gleaming metal case is more a fashion statement than anything else, but it's actually pretty useful in protecting the unit from bangs and outright drops – which are major notebook-destroyers. The metal casing also saves on space and heft, so the PowerBook's total weight (including battery) is just over five pounds, which isn't bad, especially since the screen measures over 15 inches and the processor delivers at up to 500 MHz. This snazzy silver surfer also includes a DVD player and a five-hour battery, which should get you through two movies on a trans-Atlantic flight – or a load of work, if you must. *Priced between £2,000 to £2,500, depending on the processor and other options selected. Available at the Apple Store (http://www.store.apple.com) and computer outlets.*

## Satan's sound system?

The legality of downloading music from the Internet is questionable, so we'll ask no questions about where you've obtained your MP3 music files. But if you want to listen to them in style, check out the Digital Audio Player (DAP) Jukebox from Creative Labs. Weighing in at a mere 400 grams, it can store 6 GB of music (that's the equivalent of about 150 CDs) and comes with a feature that lets you convert your existing CDs into MP3 format. It also includes a program that allows you to categorise your digital music collection according to artist, tempo or mood. And a built-in stabilising system means you can groove, dance or jog without missing a beat. *Available for stg£339 from http://store.europe.creative.com.*




## Congress of libraries

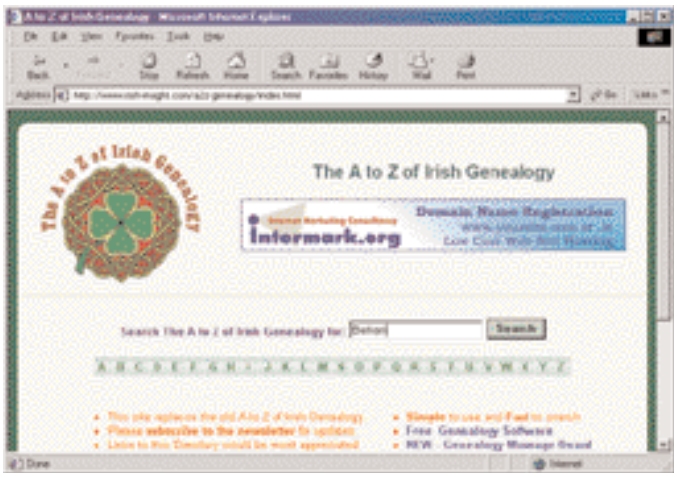
Perhaps the best-known on-line legal database, Lexis-Nexis is divided into separate libraries containing a wealth of information from various jurisdictions. The Irish case law section includes *Irish reports* from 1950, judgments of the Court of Criminal Appeal, and unreported cases dating back to 1984. It also features a section devoted to legal publications such as *The Lawyer* and the *New Law Journal*. If you're into international law, you'll find lots of information on the UK and the United States – even a smattering of information on Russia, China and Argentina. *Pricing relates to the number of solicitors in a firm, starting at £100 a month for sole practitioners, plus a £295 sign-up fee. To get connected, phone 01 671 7035 or e-mail ghouston@irish-times.com.*

LEXIS·NEXIS

# Beam me up, Scotty

This device enables you to live out your wildest fantasies, replete with astoundingly real virtual sights, sounds and smells. No, wait … that's the Holoport … this is the Timeport. But never mind: this yoke's pretty cool, too. A contender in the snazzy business phone market, the Motorola Timeport 250 is a tri-band WAP phone that can be used across Europe and the USA. And while you're navigating your way around the globe, you'll find that the list-style menu system makes the phone's features pretty easy to use. *Available for £99 from mobile phone outlets.*

# Sites to see

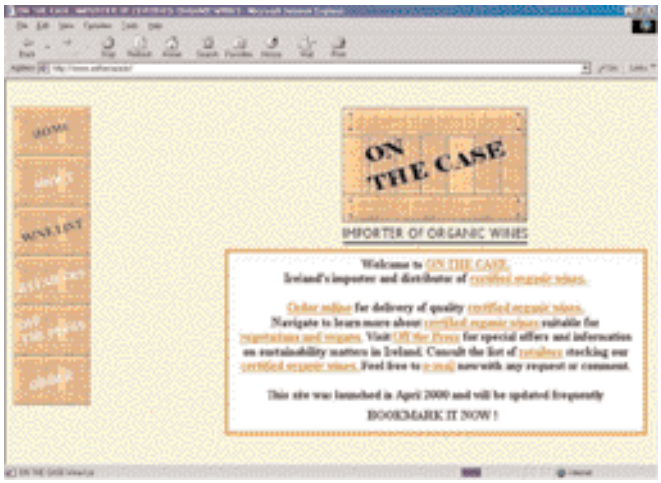



**A to Z of Irish genealogy** (*www.irish-insight.com/a2z-genealogy/index.html*). A robust resource for ancestor hunters, this site boasts message boards for pooling information and even an e-zine on the ins and outs of tracing your forebears. Best off all, you can download free GenoPro software so you can compile your family tree – and even doll it up with photos and post it on the Internet.


**Ask Jeeves for Kids** (*www.ajkids.com*). This is an offshoot of the popular Jeeves search engine, which lets you ask questions in normal English rather than racking your brain for appropriate keywords. The young ones can now ask questions in what passes for normal English in their circles.

**Lawlounge** (*http://lawlounge.com*). A capacious on-line legal resource from a London-based web-services firm, with loads of legal bulletin boards and sections on lawyers, news and academia.


**A&L Goodbody** (*www.algoodbody.ie*). Besides information on the firm, this site includes a section with facts and articles about doing business in Ireland, another that gives an overview of the taxation system, and a monthly newsletter on mutual funds and other investment schemes in Ireland and the EU.




**On the case** (*www.onthecase.ie*). This site, from an importer of organic wines, offers the opportunity to learn more about organic wines (which supposedly cut down on hangovers), peruse a list of retailers, or order on-line for delivery to your door. Sláinte!

Davy STOCKBROKERS

# Simple steps to

**In the first of a new series on investments, Jack O'Keeffe starts with the fundamental steps: taking a hard look at your own finances, learning the pros and cons of shares and other investment vehicles – then figuring out how to pick some likely winners**

Jack O'Keeffe: other than winning the Lotto, there's no easy – and legal – way to get rich quick

Whether you are a regular or a novice investor, you need a long-term strategy for creating and managing your wealth. For most of us, wealth doesn't magically appear overnight; it must be planned in a structured way. Generally speaking, this means investing in the stock markets. Investing is not as complex as it seems – provided you go about it in a measured and logical way.

The first step is to review your financial position. Only with a firm grasp of your income, outgoings and financial commitments can you begin to plan for your financial future. Your planning will involve the eight essential steps of wealth management:

1. Determine your goals in life. Where do you want to be in five, ten or 20 years?
2. Establish your net worth – your total assets minus your outgoings
3. Evaluate your retirement plans. What financial provision have you made for your retirement – and is it sufficient for your needs?
4. Work out how much free cash you have to invest. Do a cashflow statement
5. Decide your investment timeframe and your risk profile. For how long can you set aside your money? Can you tolerate an element of risk? Bear in mind that the higher the risk you are prepared to tolerate, the greater the potential for higher returns
6. Examine the various investment categories available, (we discuss this in more detail below)
7. Consider the tax implications. For example, building investments in the right companies and holding them over the long term defers capital gains tax – and enables your portfolio to benefit from the power of compounding
8. Review your plan regularly. Financial plans need to change as your life circumstances change.

Now that you've figured out your net worth, taken care of your retirement planning and other obligations and determined the amount of money you have to invest, the next step is to examine the main investment options and decide which is the best for you.

### Types of assets

There are four main asset classes: cash, bonds (corporate bonds and government gilts), property and shares. Each has its own attractions and weakness, as **table 1** shows.

In terms of investment returns, shares have consistently outperformed other asset classes over the long term, as **chart 1** shows. Having said that, it is important to be aware that past performance may not be a reliable guide to future performance.

In recent years, shares have surged in popularity. Demutualisations, privatisations and company share schemes mean that more people own shares than ever before. In addition, many people are investing in personal pension plans and a lot of these funds will be channelled into shares, requiring more direct decision-making by individuals. People are also better informed about investing and the stock markets generally and, with more disposable income in hand, are eager to explore new ways to make it grow.

**TABLE 1:** TYPICAL FEATURES OF DIFFERENT ASSET CLASSES

| | Attractions | Weaknesses |
|---|---|---|
| **Cash** | Security of principal | Low returns |
| | Liquidity | Not inflation-linked |
| **Bonds** | Long-term assets | Volatility in value |
| | Security of income | Security depends on issuer |
| **Shares** | Good long-term returns | Volatile |
| | Inflation hedge | Degree of risk |
| | More liquid | Not easily leveraged |
| | Lower transaction costs (than property/bonds) | |
| | Easier to diversify | |
| **Property** | Secure and tangible | High degree of risk |
| | Easily leveraged | Illiquid |
| | Inflation hedge | Volatile |
| | 'Comfort zone' | High cost of ownership/ acquisition |
| | Good long-term returns | |

# investing in shares

For the average person investing for the long term, shares represent an easier and more manageable investment vehicle than property or bonds. Before investing in the stock market, however, it is essential to establish your risk profile. Are you willing to take a certain amount of risk with your capital in the expectation of better returns? Or is security your number one goal?

### Spreading the risk

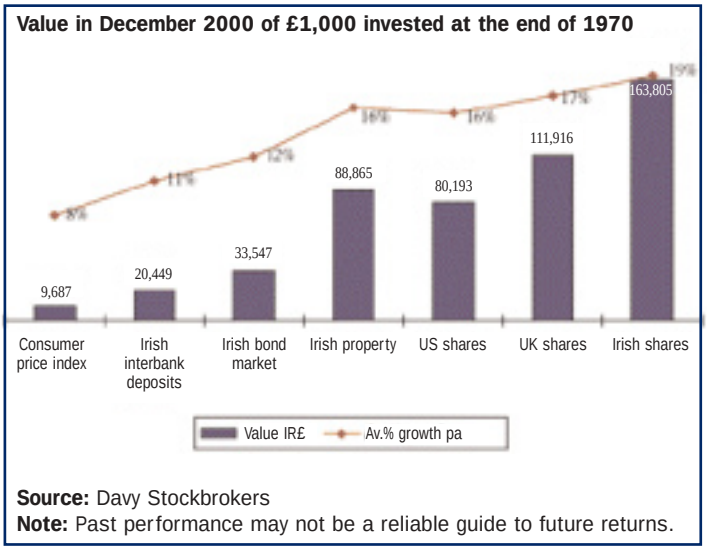
Shares are subject to a variety of risks as outlined in **table 2**, but these can be managed by taking a long-term view and investing responsibly. The key point is to spread your risk as much as possible by diversifying your portfolio across companies, sectors and markets and remaining invested over the long term to mitigate the effects of short-term market volatility.

Now that we have established the importance of shares as the core of your portfolio, how do you select the individual shares? Essentially, you have to decide what would be a good price for each share and then do a bit of star-gazing to forecast what income/dividend will derive from ownership of that share and where the price is likely to be at various times in the future.

**TABLE 2:** HOW TO MANAGE RISK

| Risk | Remedy |
|---|---|
| **Inflation** | Invest in stocks or property |
| **Market volatility** | Hold investments for the long term |
| | Avoid speculative stocks |
| **Business** | Diversify within an asset category |
| | Thoroughly analyse company stock |
| **Market risk** | Diversify among asset categories |
| **Marketability risk** | Choose according to time horizon |
| **Interest-rate risk** | Include investments with different maturities in your portfolio |
| **Currency risk** | Diversify among countries or hedge your exposure |
| **Liquidity** | Maintain sufficient funds in liquid assets |

**CHART 1:** RETURNS ON ASSET CLASSES: 1970 TO 2000




**Source:** Davy Stockbrokers
**Note:** Past performance may not be a reliable guide to future returns.

### Price versus value

To do this, one needs to distinguish between the *price* of the share and its *value*. The price of a share is determined in the markets by the supply and demand for that share. By contrast, value is a subjective estimate of future earnings based on a number of variables such as the financial strength of a company, the quality of its management, its historical performance, and its position within its market or sector.

Value and price generally vary and can sometimes diverge dramatically. For instance, the markets, which can be fickle and irrational at times, may put a high price on a particular share which does not necessarily reflect its underlying value. That's why it's important to pick your time for purchasing shares and not be influenced by market hype.

Take AIB, a good share for any portfolio. Its share price hit a high of 18.14 euro on 2 January 1999 on the back of some speculation and market hype. The price rose even though there was no significant change in the underlying value of the company to justify the increase. That would not have been the best time to buy AIB shares. You would have been better off waiting for the share price to fall (to bring it closer to your value level) and then buying in for the long term.

Conversely, when markets over-react to unexpected news and the share price falls, you may also want to consider buying – but only if the company's underlying fundamentals are sound.

When excellent companies are bought with a good margin of safety, there is a strong probability of achieving high compounding rates of return at low risk. But remember, other than winning the Lotto, there's no easy – and legal – way to get rich quick. Investment decisions should only be made in the context of life and financial goals and only after careful consideration of all the options. Tips should be kept for the racecourse – and even then are far from certainties! G

**In the next article we will look at different portfolio mixes, share selection and performance measurement.**

*Jack O'Keeffe is a director of investment services at Davy Stockbrokers in Dublin.*

# LEGISLATION UPDATE: 17 MARCH – 9 APRIL 2001

ACTS PASSED

***Finance Act, 2001***
**Number:** 7/2001
**Contents note:** Provides for the imposition, repeal, remission, alteration and regulation of taxation, of stamp duties and of duties relating to excise, and otherwise makes further provision in connection with finance including the regulation of customs
**Date enacted:** 30/3/2001
**Commencement date:** various commencement dates – see act

***Social Welfare Act, 2001***
**Number:** 5/2001
**Contents note:** Provides for increases in the rates of social insurance and social assistance payments and child benefit; improvements in the family income supplement scheme and the duration of maternity and adoptive benefit. Also provides for changes in PRSI announced in the Budget, including a reduction in the rates of contributions payable by employees and the self-employed, an increase in the annual earnings ceilings for employee social insurance (PRSI) contributions and for optional contributions, and the abolition of the earnings/income ceilings for both employers' and self-employment contributions. Provides for amendments necessary consequent on the alignment of the income tax year with the calendar year and amendments of certain monetary amounts in the *Social Welfare (Consolidation) Act, 1993* consequent on the introduction of the Euro currency with effect from 1/1/2002. Amends and extends the *Social Welfare Acts* and section 7A of the *Health Contributions Act, 1979*
**Date enacted:** 23/3/2001
**Commencement date:** various commencement dates – see act

***Trustee Savings Banks (Amendment) Act, 2001***
**Number:** 6/2001
**Contents note:** Facilitates the sale of TSB Bank by the trustees by amending and extending ss57 and 64 of the *Trustee Savings Banks Act, 1989* and schedule 12 to the *Taxes Consolidation Act, 1997*
**Date enacted:** 28/3/2001
**Commencement date:** 28/3/2001

SELECTED STATUTORY INSTRUMENTS

**Aviation Regulation Act, 2001 *(Establishment Day) Order 2001***
**Number:** SI 47/2001
**Contents note:** Appoints 27/2/2001 as the establishment day for the purposes of the *Aviation Regulation Act, 2001*

***Criminal Justice (Legal Aid) (Amendment) Regulations 2001***
**Number:** SI 124/2001
**Contents note:** Provide for an increase of 2%, with effect from 1/4/2001, in the fees payable under the criminal legal aid scheme to solicitors for attendance in the District Court and for appeals to the Circuit Court, and for an increase of 2%, with effect from 1/4/2001, to solicitors and counsel in respect of essential visits to prisons and other custodial centres (other than garda stations) and for certain bail applications

***Employment Regulation Order (Law Clerks Joint Labour Committee) 2001***
**Number:** SI 122/2001
**Contents note:** Fixes statutory minimum rates of pay and regulates statutory conditions of employment for certain workers employed in solicitors' offices
**Commencement date:** 10/4/2001

**Freedom of Information Act, 1997 *(Prescribed Bodies) Regulations 2001***
**Number:** SI 126/2001
**Contents note:** Prescribe the Industrial Development Agency (Ireland), Enterprise Ireland, National Authority of Occupational Safety and Health, Forfás, An Foras Aiseanna Saothair, FÁS International Consulting Limited, Shannon Free Airport Development Company Limited and Údarás na Gaeltachta as public bodies for the purposes of the *Freedom of Information Act, 1997* by their inclusion in paragraph 1(5) of the first schedule to the act
**Commencement date:** 21/1/2001

**Freedom of Information Act, 1997 *(Prescribed Bodies) (No 2) Regulations 2001***
**Number:** SI 127/2001
**Contents note:** Prescribe the National Standards Authority of Ireland as a public body for the purposes of the *Freedom of Information Act, 1997* by its inclusion in paragraph 1(5) of the first schedule to the act. Provide that the act shall apply only as respects specified functions of the National Standards Authority of Ireland
**Commencement date:** 21/1/2001

**Freedom of Information Act, 1997 *(Prescribed Bodies) (No 3) Regulations 2001***
**Number:** SI 128/2001
**Contents note:** Prescribe the Labour Relations Commission as a public body for the purposes of the *Freedom of Information Act, 1997* by its inclusion in paragraph 1(5) of the first schedule to the act. Provide that the act shall apply only as respects specified functions of the Labour Relations Commission
**Commencement date:** 21/1/2001

**Irish Takeover Panel Act, 1997 *(Relevant Company) Regulations 2001***
**Number:** SI 87/2001
**Contents note:** Extends the remit of the Irish Takeover Panel to public limited companies incorporated in the state and currently authorised, or not currently authorised but authorised in the previous five years, to trade on the London Stock Exchange, the New York Stock Exchange, Nasdaq, EASDAQ and the Neuer Markt
**Commencement date:** 26/3/2001

**National Pensions Reserve Fund Act, 2000 *(Establishment Day) Order 2001***
**Number:** SI 113/2001
**Contents note:** appoints 2/4/2001 as the establishment day for the purposes of the *National Pensions Reserve Fund Act, 2000*

***Rules of the Superior Courts (No 1) (*Child Abduction and Enforcement of Custody Orders Act, 1991*) 2001***
**Number:** SI 94/2001
**Contents note:** Insert a new order 133 in to the *Rules of the Superior Courts* to prescribe procedures in relation to proceedings under the *Child Abduction and Enforcement of Custody Orders Act, 1991*
**Commencement date:** 23/4/2001

***Safety, Health and Welfare at Work (Carcinogens) Regulations 2001***
**Number:** SI 78/2001
**Contents note:** Give effect to Council Directive 90/394/EEC as amended by directives 97/42/EC and 1999/38/EC on the protection of workers from the risks of exposure to carcinogens and mutagens at work. Prescribes the duties of employers wherever a carcinogen or mutagen is used in the workplace
**Commencement date:** 8/3/2001

***Taxes (Electronic Transmission of Certain Revenue Returns) (Specified Provision and Appointed Day) Order 2001***
**Number:** SI 112/2001
**Contents note:** Applies the legislation governing the electronic supply of tax-related information in chapter 6 of part 38 of the *Taxes Consolidation Act, 1997* (inserted by section 209 of the *Finance Act, 1999*) to P35 and P35L returns made under regulation 35 of the *Income Tax (Employment) Regulations, 1960* (SI 28/1960), and appoints 5/4/2001 as the appointed day for this purpose

**Full list of foot and mouth disease regulations made to-date, including regulations listed in the *Legislation Update* in the April issue of the *Gazette*, is as follows:**

***Diseases of Animals (Restriction of Movement of Animals) Order 2001***
**Number:** SI 56/2001

***Diseases of Animals (Restriction of Movement of Animals) Order 2001 (Amendment) Order 2001***
**Number:** SI 61/2001

**Diseases of Animals Act, 1966 *(Commencement of Sections 17A and 29A) Order 2001***
**Number:** SI 98/2001

**Diseases of Animals Act, 1966 *(Foot and Mouth Disease) (Export and Import of Horses) Order 2001***
**Number:** SI 105/2001

**Diseases of Animals Act, 1966 *(Foot and Mouth Disease) (Import Restrictions) Order 2001***
**Number:** SI 82/2001

**Diseases of Animals Act, 1966 *(Foot and Mouth Disease) (Import Restrictions) (No 2) Order 2001***
**Number:** SI 83/2001

**Diseases of Animals Act, 1966 *(Foot and Mouth Disease) (Import Restrictions) (No 2) (Amendment) Order 2001***
**Number:** SI 107/2001

**Diseases of Animals Act, 1966 *(Foot and Mouth Disease) (Restriction on Artificial Insemination) Order 2001***
**Number:** SI 144/2001

**Diseases of Animals Act, 1966 *(Prohibition In Respect of Certain Imported Horses, Greyhounds,***

***Machinery, Vehicles and Equipment) Order 2001***
**Number:** SI 81/2001

**Diseases of Animals Act, 1966** ***(Restriction on Movement of Certain Animals) Order 2001***
**Number:** SI 121/2001

**Diseases of Animals Act, 1996** ***(Section 29A(4)) Order 2001***
**Number:** SI 80/2001

**Diseases of Animals Acts, 1966 to 2001** ***(Approval and Registration of Dealers and Dealers' Premises) Order 2001***
**Number:** SI 79/2001

***European Communities (Import Restrictions (Foot and Mouth Disease)) Regulations 2001***
**Number:** SI 55/2001

***European Communities (Import Restrictions) (Foot and Mouth Disease) (Revocation) Regulations 2001***
**Number:** SI 120/2001

***Foot and Mouth (Controlled Area) (No 1) Order 2001***
**Number:** SI 58/2001

***Foot and Mouth (Restriction on Movement) Order 2001***
**Number:** SI 59/2001

***Foot and Mouth (Restriction on Movement) (No 2) Order 2001***
**Number:** SI 60/2001

***Foot and Mouth (Restriction on Movement) (No 3) Order 2001***
**Number:** SI 62/2001

***Foot and Mouth (Restriction on Movement) (No 3) (Amendment) Order 2001***
**Number:** SI 90/2001

***Foot and Mouth (Restriction on Movement) (No 4) Order 2001***
**Number:** SI 63/2001

***Foot and Mouth (Restriction on Movement) (No 4) (Amendment) Order 2001***
**Number:** SI 91/2001

***Foot and Mouth (Restriction on Movement of Horses) Order 2001***
**Number:** SI 68/2001

***Foot and Mouth Disease (Hay, Straw and Peat Moss Litter) Order 2001***
**Number:** SI 49/2001

***Foot and Mouth Disease (Hay, Straw and Peat Moss Litter) (Amendment) Order 2001***
**Number:** SI 86/2001

***Foot and Mouth Disease (Prohibition of Exhibition and Sale of Animals) Order 2001***
**Number:** SI 50/2001

***Foot and Mouth Disease (Prohibition on the Use of Swill) Order 2001***
**Number:** SI 104/2001

***Foot and Mouth Disease (Restriction of Import of Horses and Greyhounds) Order 2001***
**Number:** SI 52/2001

***Foot and Mouth Disease (Restriction of Import of Horses and Greyhounds) (Amendment) Order 2001***
**Number:** SI 70/2001

***Foot and Mouth Disease (Restriction of Import of Horses and Greyhounds) (No 2) Order 2001***
**Number:** SI 85/2001

***Foot and Mouth Disease (Restriction of Import of Horses and Greyhounds) (No 2) (Amendment) Order 2001***
**Number:** SI 109/2001

***Foot and Mouth Disease (Restriction of Import of Vehicles, Machinery and Other Equipment) Order 2001***
**Number:** SI 51/2001

***Foot and Mouth Disease (Restriction of Import of Vehicles, Machinery and Other Equipment) (Amendment) Order 2001***
**Number:** SI 69/2001

***Foot and Mouth Disease (Restriction of Import of Vehicles, Machinery and Other Equipment) Order 2001 (Amendment) (No 2) Order 2001***
**Number:** SI 84/2001

***Foot and Mouth Disease (Restriction of Import of Vehicles, Machinery and Other Equipment) Order 2001 (Amendment) (No 3) Order 2001***
**Number:** SI 106/2001

**Prepared by the Law Society Library**

## PRACTICE NOTES

# Equity release for the elderly: preliminary information note

It has come to the notice of the Conveyancing Committee that certain lending and other institutions are offering packages whereby those over 65 or 70 can raise capital on their residences either by way of loans or sales of a share therein. These are innovative concepts in this jurisdiction. While the committee welcomes the concept of equity release for the elderly in principle, it shares the concerns that practitioners have expressed to the committee.

The schemes being offered are complicated and difficult for the lay person to comprehend fully without effective and clear legal advice. Practitioners acting for clients availing of these schemes should take particular care to advise their clients of all the conditions therein, many of which differ from those in the usual standard residential loan documentation, including those relating to the interest rate charged, the involvement of executors and beneficiaries, and the events which will allow the lender/investor to call in the loan and sell the property.

The committee is in consultation with the institutions in question and a more detailed information note will issue at the conclusion of these consultations. In the meantime, practitioners should ensure that they fully familiarise themselves with the contents of these packages.

*Conveyancing Committee*

# *Finance (No 2) Act, 2000* and *Finance Act, 2001*

**a) Clawback of stamp duty**

The *Finance (No 2) Act, 2000* makes provision for the clawback of stamp duty in certain cases where a property or its owner ceases to meet the requirements set down by the act in order to qualify for stamp duty reliefs.

The Conveyancing Committee has made enquiries with the Revenue Commissioners as to whether or not it is necessary for a subsequent purchaser of the property in question to make enquiries at the time of purchase to ascertain if any of the conditions giving rise to a clawback has occurred.

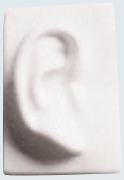
The Revenue Commissioners have confirmed that the clawback provisions in relation to the exemptions and reduced rates of stamp duty for first-time buyers and other owner-occupiers contained in the *Finance (No 2) Act, 2000* impose a penalty payable by the purchaser who originally obtained the benefit of the relief in question. Revenue has confirmed that a subsequent purchaser has no responsibility in relation to the clawback and is under no obligation to the Revenue to make any enquiries as to whether circumstances giving rise to such a clawback have arisen.

**b) Refunds of stamp duty**

The *Finance (No 2) Act, 2000* deemed a person separated by a decree of judicial separation, or whose marriage had been dissolved by a decree of divorce, to be a first-time purchaser in certain circumstances and subject to certain conditions. The *Finance Act, 2001* has extended this relief to persons separated by means of a deed of separation, or whose marriage has been the subject of a decree of nullity, again in certain circumstances and subject to certain conditions. These additional categories have been made applicable with retrospective effect to 15 June 2000. If purchasers who fulfil the new criteria have paid stamp duty since that date, they are entitled to claim a refund of the stamp duty paid.

The *Finance Act, 2001* also provided for a reduction of the 9% stamp duty rate which applied to investors purchasing new houses/apartments. This reduction applies retrospectively to instruments executed on or after 27 February 2001. If investors have paid the higher rate of stamp duty since that date, an appropriate entitlement to claim a refund will also arise.

*Conveyancing Committee*



# Practice notes

## Undertakings on probate files

It has come to the attention of the committee that in certain circumstances cheques from life assurance companies for the proceeds of life policies are paid directly to the insurance broker concerned. This can result in the solicitor who has given an undertaking in contemplation of receiving such proceeds being placed in an invidious position if the insurance broker accounts directly to the personal representative.

The solicitor should ensure that the undertaking specifically states that the solicitor is bound by the terms of the undertaking only if the monies come into his/her hands.

Solicitors should therefore ensure, when completing a claim form on behalf of the personal representative, that it is clearly stated on both the face of the claim form and in the accompanying letter that any life assurance proceeds cheques drawn in favour of the personal representative or beneficiary should be sent directly to the solicitor.

A solicitor should not give an undertaking unless he/she has sight of the claim form and is certain that the cheque for the life assurance proceeds will be sent to him.

*Probate, Administration and Taxation Committee*

## Personal injury list: Dublin

Practitioners are reminded that it is essential that the registrar be informed when cases are settled in order that they may be taken out of the list. Otherwise, settled cases which have inadvertently remained on 'the shortfall list' are called on for hearing and, as no notice to this effect issues to either party (other than the re-listing of the case in the legal diary), the list on any given day may include a number of settled cases.

In recent times, the court has taken the view that the onus to advise the court of the status of the proceedings does not rest solely with the solicitor for the plaintiff, and the solicitor for the defendant must also bear some responsibility in the matter. Practitioners should note that, whether acting for the plaintiff or the defendant, they may be summoned before the court to explain their failure to appear at previous call-overs or to notify the registrar that the case has settled.

*Litigation Committee*

## Residential property tax: certificate of clearance

Practitioners should note that while RPT was abolished with effect from 5 April 1997, a clearance certificate procedure remains in place in relation to the sale of certain residential properties to assist the Revenue Commissioners to collect outstanding tax.

The value threshold relating to the RPT certificate of clearance has been increased to £342,000 in accordance with the indexation provisions of the legislation.

The new threshold, which relates exclusively to the tax clearance procedure, applies to house sale contracts executed on or after 5 April 2001. From that date, where the sale consideration for the residential property exceeds £342,000, the vendor must provide the purchaser with a certificate from the Revenue Commissioners indicating that all RPT due **for the years for which the tax was in operation** has been paid.

*Probate, Administration and Taxation Committee*

## Commencement of District Court sittings at Cloverhill Courthouse

The Courts Service has advised that the District Court will commence sittings for remand business in Cloverhill Courthouse, Clondalkin, Dublin 22, on Wednesday 2 May 2001.

The court will sit thereafter each Wednesday, Thursday and Friday from 10.30am to 12.30pm and from 2pm to 4pm. A practice direction from the president of the District Court will be issued in this regard. Further information may be obtained from Olive Caulfield, Deputy Chief Clerk, Dublin Metropolitan District Court, Cloverhill Courthouse, Clondalkin, Dublin 22, tel: 01 630 4911.

*Criminal Law Committee*

## Lodging of caveats

Practitioners will be aware that where a caveat is lodged, there is no procedure or rule obliging the practitioner to advise his/her opposite number of such lodgment. Notwithstanding the absence of such a rule, the committee recommends that, subject to the consent of the client, the solicitor lodging the caveat should, as a matter of good practice and professional courtesy, inform his/her colleague of that fact.

*Probate, Administration and Taxation Committee*

## Retention of building bye-law records: Dublin Corporation

The Conveyancing Committee has been notified by Dublin Corporation that all building bye-law records, including decision documents prior to 1975, are no longer available. The corporation has also advised that records of decision documents since 1975 are available but there are no drawings attached as it was not the policy of the corporation to retain drawings except for a short period after the granting of a bye-law approval.

*Conveyancing Committee*

## *Statute of Limitations (Amendment) Act, 2000*: child sexual abuse cases

Practitioners should note that section 2 of the *Statute of Limitations (Amendment) Act, 2000,* which inserted a new s48A(3) into the *Statute of Limitations 1957,* provides that claims for personal injuries arising out of instances of sexual abuse will be statute-barred on 20 June 2001.

*Criminal Law Committee*

## Garda station (legal advice) scheme: fee increases

Practitioners should note that fees for consultations under the scheme have been increased from 1 April 2001, as follows:

a) £75.18 plus VAT, per visit between 9am and 7pm, Monday to Friday
b) £102.23 plus VAT, per visit between 7pm and 9am, Monday to Friday and on weekends and bank holidays.

*Criminal Law Committee*

# Personal injury judgments

**Tort – personal injury – practice and procedure – application to strike out pleadings on the basis that they showed no reasonable cause of action or were frivolous or vexatious – whether claim disclosed reasonable cause of action – *Occupiers Liability Act, 1955* and issue of negligence**

## CASE

***Keith Weldon (a person of unsound mind not so found suing by his aunt and next friend Margaret Kelly) v Aidan Mooney and James Campbell trading as Fingal Coaches*, judgment of Mr Justice Aindrais Ó Caoimh of 25 January 2001.**

## THE FACTS

In the early hours of 3 December 1995, Keith Weldon, a young man, apparently climbed into the luggage compartment of a bus owned by James Campbell and driven by Aidan Mooney. The bus had stopped in the main street in Swords, County Dublin. As it was moving away, Mr Weldon boarded the bus by opening the luggage compartment door and climbing aboard. It was claimed that this practice was commonly adopted by a number of youths coming home on the late night buses. It was alleged that while the bus was travelling on the road near a public house on the Swords road, Mr Weldon fell from the luggage compartment of the bus and suffered serious injury.

Mr Weldon issued High Court proceedings against the owner and driver of the bus. The defendants made an application to the High Court pursuant to order 19, rule 28 of the *Rules of the Superior Courts* for an order striking out Mr Weldon's pleadings on the grounds that they did not show any cause of action. In the alternative, the defendants relied on the inherent jurisdiction of the High Court and claimed that the High Court should strike out the proceedings as being frivolous or vexatious.

The various parties submitted evidence to Mr Justice Ó Caoimh. It was submitted by a solicitor on affidavit on behalf of the defence who referred to a Garda abstract arising out of the accident that Keith Weldon was very drunk on the night and early morning of the accident. A friend of Mr Weldon had stated that, as the bus started to move, Mr Weldon ran up, opened the luggage compartment door and jumped in. The friend who gave the evidence to the Gardai could not keep up with the bus and it took off without him.

Aidan Mooney, the driver of the bus, had made a statement to the effect that two youths approached him as the passengers got off at Swords and asked him if he was going to Cronins. The driver replied he was not going there but was going to Blake's Cross. The driver stated that he pulled off and drove down North Street and out onto the motorway and out to a depot in Blake's Cross. He reversed in the yard and parked the coach, locked it and drove home. He did not notice anything unusual on the way out from Swords and did not notice the back luggage door was open.

A public service vehicle inspector stated that he examined the bus in question, found the luggage compartment door open and found that it was capable of opening and closing from the outside.

Mr Weldon's solicitor, in an affidavit to the court, stated that an investigation was carried out on behalf of Mr Weldon in which the proprietor of Fingal Coaches was interviewed and stated that he (the owner) was aware, as were his drivers, that youths got into the luggage compartment of his coaches to 'hitch' a lift home. The affidavit stated that further evidence indicated that this practice was known to many of the customers of Fingal Coaches and to the security staff of the nightclub from which Fingal Coaches collected passengers. It was submitted that this practice was common and was known to the owner and the driver.

The essence of the argument by the solicitor for Mr Weldon in the affidavit was that the matter should be left to the trial court.

## THE JUDGMENT

Having recited the facts of the case, Ó Caoimh J made reference to the provisions of the *Occupiers Liability Act, 1995*, which had been relied upon by Mr Weldon's solicitor. From the pleadings, the judge stated that Mr Weldon was at all material times a trespasser on the bus in question and quoted section 4 of the 1995 act, which set out the duty owed to recreational users or trespassers. In particular, he referred to the definition of 'premises' in the 1995 act, which was defined to include vehicles, vessels, trains, aircraft and other means of transport.

In the context of a danger existing on premises, an occupier owed a duty to a recreational user of the premises or a trespasser not to act with reckless disregard for the person, or the property of the person, whether (among other things) the occupier knew or had reasonable grounds for believing that the person was or was likely to be on the premises and whether the occupier knew or had reasonable grounds for believing that the person was in, or was likely to be in, the vicinity of the place where the danger existed.

Mr Weldon was described 'as a person of unsound mind not so found'. This condition related to injuries sustained by him in the accident, the subject matter of proceedings. At the date of the accident, Mr Weldon was a person of full age and was not a person of unsound mind. Various legal authorities were considered by the judge.

## CONCLUSION OF THE HIGH COURT

Ó Caoimh J noted that a dispute may exist as to whether the action of Mr Weldon on the night in question was one which was commonly adopted by a number of youths, including Mr Weldon, coming home on late night buses and whether this was well known to each of the defendants. The court had to address the issue as to whether Mr Weldon had disclosed a reasonable cause of action.

The essential complaint against the owner and the driver related to the absence of a proper lock with which to lock the door of the luggage compartment at the time. The judge noted that it was clear that if a lock existed on the door in question, it would not have been possible for Mr Weldon to open the door of the luggage compartment and to have entered it. The judge stated that he was not satisfied that the fact that the door of a luggage compartment may be unlocked and may be capable of being opened by anyone was such as to give rise in itself to a claim in negligence against the owner or operator of the bus or driver. However, if the owner or driver knowingly permitted people to use the luggage compartment to be carried on the bus and drove the bus in knowledge of the fact that they were in the luggage compartment, then Ó Caoimh J accepted that a cause of claim may exist in favour of Mr Weldon. In light of this fact alone, Ó Caoimh J was prepared to allow the claim of Mr Weldon to proceed to trial against the owner and driver of the bus.

**Tort – public liability litigation – practice and procedure – rules of disclosure – whether engineer employed by a local authority was an expert witness – whether in-house experts such as engineers were subject to the provisions of the rules of disclosure and appropriate reports were to be exchanged with the other parties to the litigation**

## CASE

***John Galvin v John Murray, Cork County Council and Mary Buttimer*, Supreme Court (Mr Justice Murphy, Mrs Justice McGuinness, Mr Justice Geoghegan), judgment of Mr Justice Murphy of 21 December 2000.**

## THE FACTS

John Galvin was injured in an accident on 30 August 1997. On that date, he was travelling in a motor car driven by Mary Buttimer on a public road near Béal na Bláth in County Cork. It appears that Ms Buttimer braked to avoid an impact at a collapsed bridge on the roadway. It was alleged that the vehicle driven by Ms Buttimer did strike the collapsed bridge and that a motor car owned and driven by John Murray crashed into the rear of the vehicle in which Mr Galvin was travelling. It was alleged in High Court proceedings, among other matters, that Cork County Council was negligent in that it constructed or took in charge a bridge which, in all the circumstances, was unsound and not sufficiently durable to withstand the volume and weight of traffic which travelled over it.

When the pleadings closed, solicitors for Mr Galvin wrote to the solicitors for Cork County Council setting out lists of the witnesses whom they intended to call at the hearing of the action and setting out the dates of the reports provided by various expert witnesses. Subsequently, by notice of motion, Cork County Council applied to the High Court for an order pursuant to order 39, rule 50(1) of the *Rules of the Superior Courts (No 6) (Disclosure of Reports and Statements) 1998* (SI no 391 of 1998) that, in the interests of justice, the provisions of order 39, rule 46 of the disclosure rules (exchange of copies of reports) should not apply in relation to any report or statement (or portion thereof) generated for the purposes of the proceedings by two named engineers of the council.

In an affidavit to the court, it was explained that the two individuals who were permanent employees of the council had furnished reports not as experts but as employees of the county council and contended that, accordingly, these reports were not subject to the provisions of the disclosure rules.

## THE HIGH COURT HEARING

The matter came before Mr Justice Johnston of the High Court. Johnston J was of the view that the fundamental issue was: 'who is an expert?' He concluded that an engineer in the employment of a corporation or county council was not an expert or an expert witness for the purposes of the relevant disclosure rules. These rules required any party to the High Court or Circuit Court in a personal injury action to disclose to the other party or parties without the necessity of an application to court any report or statement from any expert.

The disclosure rules defined a 'report' as meaning a report or statement from accountants, actuaries, architects, doctors, dentists, engineers, psychologists, psychiatrists and any other expert intended to be called to give evidence. Rule 50(1) of the disclosure rules makes provision for an application to be made to the court by motion on notice by any party for an order that in the interests of justice the provision of the disclosure rule above shall not apply in relation to any particular report or statement which is in the possession of such party and which that party maintains should not be disclosed and served as required. The court may, upon such application, make such order as it thinks just.

Johnston J concluded that where a corporation or county council relies on its own engineers, then, for the purposes of litigation, they are not considered to be expert witnesses and their reports in the circumstances did not have to be disclosed to Mr Galvin's legal team.

## APPEAL TO THE SUPREME COURT

Mr Galvin appealed the decision of Johnston J to the Supreme Court. Murphy J delivered judgment on 21 December 2000.

Having set out the facts, Murphy J stated that the authors of the relevant reports

were engineers and the material in the reports did comprise or include material of a detailed technical and engineering nature which the council sought to adduce in evidence in the pending trial. The reports also contained certain observations which might not have been provided by an independent expert and which the council preferred not to disclose. Whatever the consequences, Murphy J considered that the two in-house engineers were, beyond doubt, experts and accordingly if the council was determined to call them as witnesses to give evidence on the technical matters included in the reports, then those documents would fall within the disclosure rules.

In general terms, the judge noted that an expert may be defined as a person whose qualifications or expertise give an added authority to opinions or statements made by a person within the area of that person's expertise. The fact that an engineer was employed by one or either of the parties may affect his independence with a consequent reduction in the weight to be attached to his evidence but it should not deprive him of his status as an expert according to the Supreme Court.

The judge noted that reports such as those obtained by the county council from its own engineers were documents which would be privileged from discovery. It was only if and when the employer determined to call the authors of the reports to give evidence that the requirement of disclosure arose. The disclosure rules were designed to forewarn other parties of expert evidence with which they may be confronted.

The disclosure rules had no role to play, according to the judge, in investigating the strengths or weaknesses of an opponent's case. It was still open to any litigant to obtain reports from a variety of experts and to decide to call as witnesses some but not others of them. It was only in respect of those whom he determined to call as witnesses that he must provide the required report. The judge noted that the county council could overcome its difficulty by engaging some other engineer to explore the matters in issue, to report on the matter and give evidence on that report. Alternatively, it would be open to a judge of the High Court to delete some part or parts of the reports, if the court was satisfied that the making of such an order was just.

Murphy J noted that the county council considered that it was placed in an invidious position because the engineers in question, being its employees, had reported more fully and widely than might be expected by an independent expert. On the other hand, if that or any other factor of itself were to permit an employee/expert to escape the requirements of the disclosure rules, it would mean that substantial corporations with a wide variety of in-house experts would have the advantage of knowing the expert evidence produced by their opponents without having themselves to provide a comparable facility. Murphy J considered that would be a manifest injustice.

The Supreme Court noted that the disclosure rules represented a radical change in the manner in which personal injury litigation was conducted. Undoubtedly, there would be difficulties in adjusting to the new regime. However, the court reversed the judgment and the order of Johnston J of the High Court and remitted the matter back to the High Court to afford the county council the opportunity of seeking, if considered appropriate, that certain parts of the reports of the engineers should be deleted before being disclosed to John Galvin, the plaintiff in the case. G

*These cases have been summarised by solicitor Dr Eamonn Hall.*

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## COMMERCIAL

### Damages, injunction

*Telecommunications – competition law – balance of convenience – alleged agency agreement – whether damages adequate remedy – whether appropriate to grant interlocutory injunction*

The appellant trader was refused interlocutory injunctions in the High Court against Eircell. The appellant had a business relationship with Eircell but, owing to certain difficulties, Eircell declined to supply the appellant with goods, namely, 'ready to go' mobile phones for the Christmas market. Kearns J refused to grant the appellant the injunction sought. On appeal, the Supreme Court (Geoghegan J delivering judgment) held that there was a serious issue to be tried. However, as the appellant's alleged loss was essentially financial, damages would be an adequate remedy and he affirmed the High Court decision to refuse to grant the injunction sought.

***O Murchu T/A Talknology v Eircell Ltd*, Supreme Court, 21/02/2001** [FL3426]

## COMPANY

### Duties of directors

*Restriction of directors – fiduciary duty – whether accountant was shadow director – whether directors acted honestly and responsibly in conduct of company's affairs – conflict of evidence – whether to apply restriction order against directors – absence of books and records – joint and separate liability of directors* – Companies Act, 1963, *section 150*

In this application, the liquidator of the company brought proceedings seeking an order under section 150 of the *Companies Act, 1963* against directors of the company and a person who the liquidator claimed was a shadow director. A statement of affairs of the company filed some months after the date of the winding-up showed a deficit of £171,202. A number of issues arose during the hearing, including whether a person involved with the company was a shadow director. Murphy J made a restriction order against the shadow director and granted a stay of 21 days to enable an application under section 152 of the *Companies Act, 1963* to be made. A restriction order would also be made against one of the directors with no stay granted.

***Vehicle Imports Limited*, High Court, Mr Justice Murphy, 23/11/2000** [FL3484]

### Revenue and financial law

*Taxation – liquidation – winding-up order sought – outstanding debts to Revenue Commissioners – whether company had substantial and reasonable defence to petitioner's claim – whether company insolvent and unable to pay debts – whether appropriate to make order winding up company* – Companies Act, 1963, *sections 213 and 214*

The Revenue Commissioners had presented a petition for the winding-up of Millhouse Taverns Limited. The petitioner relied on a demand dated 29 July 1999 made pursuant to the *Companies Act, 1963*, section 214, for the sum of £146,768.04 in respect of VAT, PAYE and PRSI together with interest. An accountant who swore an affidavit on behalf of the company stated that on the basis of an offer of £405,000 being accepted for the company's premises, it appears that a sum of £154,525 would be available to satisfy the petitioner's demand. Finnegan J was satisfied on the basis of the affidavit that a sale of the company's present premises at £405,000 would not enable it to meet its liabilities. No account had been taken of the company's liability for capital gains tax or its liability for account interest and penalties. The affidavits filed on behalf of the company fell far short of showing that the company had a substantial and reasonable defence to the petitioner's claim which would enable it to defeat the entire of the claim brought against it. The company was deemed to be insolvent and therefore an order winding up the company would be made pursuant to the provisions of the *Companies Act, 1963*.

***Millhouse Taverns Limited*, High Court, Mr Justice Finnegan, 03/04/2000** [FL3466]

## CONSTITUTIONAL

### Planning and environmental law

*Local government – practice and procedure – litigation – planning – permission granted for modified application – role of courts – whether point of law involved point of exceptional public importance – whether Supreme Court had jurisdiction to issue certificate sought* – Local Government (Planning and Development) Act, 1963, *section 82* – Local Government (Planning and Development) Act, 1992, *section 19* – Bunreacht na hÉireann 1937, *article 34.4.3°*

The applicant had brought proceedings seeking to have the planning permission that was granted to the notice party quashed. Butler J held that a planning authority was entitled to grant the planning permission in question and refused the relief sought by the applicant. The applicant then sought a certificate pursuant to section 19 of the *Local Government (Planning and Development) Act, 1992* that the point of law involved was of exceptional public importance. This application was refused in the High Court and the applicant appealed. Keane CJ, delivering judgment, held that the High Court had the power alone to issue such a certificate. The appeal would be dismissed.

***Irish Hardware v South Dublin County Council*, Supreme Court, 23/01/2001** [FL3502]

## CRIMINAL

### Delay, fair procedures

*Right to expeditious trial – fair procedures – order of prohibition sought – charges of indecent assault – judicial review – summary jurisdiction – whether dominance of older person reasonable excuse for delay in making complaint – whether court should consider guilt on balance of probabilities – presumption of innocence – whether real and serious risk of unfair trial* – Petty Sessions (Ireland) Act 1851 – Offences Against the Person Act 1861 – Courts of Justice Act, 1924 – Criminal Justice Act, 1951 – European convention on human rights and fundamental freedoms 1950 – Bunreacht na hÉireann 1937, *articles 38.1, 40.3*

The applicant sought by way of judicial review to prohibit impending criminal proceedings on indecent assault charges. The offences were alleged to have mostly occurred between 1971 and 1979 with one dating back to 1962 or 1963 and the most recent being in 1982. The applicant claimed that he had a constitutional right to a fair trial and this included the right to an expeditious trial. The High Court refused his application and he appealed. The Supreme Court, McGuinness J delivering judgment, held that the applicant's case should not be treated differently from previous similar cases because he was to be tried summarily in the District Court. On balance, the delay in reporting the alleged offences had been the result of the position of power and authority occupied by the applicant and of the continuing influence which this power and authority had over them. The applicant's trial should not be prohibited on grounds of delay. The applicant had not discharged the onus on him to establish affirmatively that there was a real and serious risk of an unfair trial.

***S v DPP*, Supreme Court, 19/12/2000** [FL3491]

### Domicile

Forum conveniens – *allegations of sexual assault – claim for damages – application to stay proceedings – whether court should stay proceedings*

The plaintiff and defendant were fellow employees who had travelled to Sweden. The plaintiff issued proceedings seeking damages for an alleged sexual assault which had allegedly occurred in Sweden. The defendant sought an order staying the proceedings on the grounds of *forum conveniens*. Finnegan J held that both the plaintiff and defendant were domiciled in order. The court, by reason of the *Brussels convention* of 1968, had no jurisdiction to stay the proceedings.

***DC v WO'C*, High Court, Mr Justice Finnegan, 05/07/2000** [FL3505]

### Extradition

*Fair procedures – racial discrimination – delay – whether unjust to order extradition of plaintiff* – Extradition Act, 1965, *sections 47, 50* – Extradition (Amendment) Act, 1987, *section 2(1)(b)* – Extradition (European Convention on the Suppression of Terrorism) Act, 1987, *section 9*

The plaintiff had been arrested in 1999 on foot of warrants issued in the United Kingdom for extradition to that jurisdiction. The plaintiff sought his release pursuant to section 50 of the *Extradition Act, 1965*. The plaintiff claimed that by reason of his race it would be unjust, oppressive or invidious to order his extradition. He claimed that there had been a history of harassment between himself and the British police. Finnegan J was not satisfied that the plaintiff had been prejudiced by reason of his race. In addition, the lapse of time between the date of the alleged offences and the issue of extradition proceedings was not so great as to render them unjust. The factors involved were not exceptional and the relief sought by the plaintiff would be refused.

***Heywood v Egan*, High Court, Mr Justice Finnegan, 14/11/2000** [FL3480]

### Extradition

*Indecent assault – guilty plea – respondent's illness – successful challenge – appeal – whether exceptional circumstances – whether unjust, oppressive and invidious to deliver up respondent – whether delay in securing respondent's extradition exceptional circumstance* – Extradition Act, 1965, *section 50(2)(bbb)*

The respondent returned to Ireland while on remand after being convicted on a plea of guilty to indecent assault in England. The English authorities took steps to secure his extradition. On 4 December 1995, a warrant was issued in England for his arrest. It was executed on 8 January 1996 and on 18 April 1996 the District Court made an order for his delivery. The applicant challenged the order, claiming that he was entitled to be released under section 50(2)(bbb) of the *Extradition Act, 1965* by reason of the lapse of time since the commission of the offence and other exceptional circumstances, including his ill health and the fact that he had lived openly in this jurisdiction. The High Court ordered his release. The assistant garda commissioner appealed against the decision. The Supreme Court held that the significant lapse of time – for which the prosecuting authorities in the requesting jurisdiction must bear some responsibility – had led to a situation in which to expose the respondent to further legal process in England in his present state of health would be oppressive and invidious. The order of the High Court would be affirmed and the appeal of the assistant garda commissioner dismissed.

***MB v Assistant Commissioner Conroy*, Supreme Court, 01/03/2001** [FL3496]

### Garda Síochána

*Fair procedures – order of* certiorari *sought – whether applicant subject to campaign of harassment by An Garda Síochána – whether applicant afforded fair procedures during course of trial*

The applicant had sought to judicially review criminal proceedings which had been brought against her. The application concerned a contention by the applicant that a campaign of harassment was being organised against her by An Garda Síochána. The judicial review proceedings were dismissed in the High Court by O'Higgins J and the applicant appealed. The Supreme Court, all three judges delivering judgments, held that the original trial had been conducted in a fair manner. The appeal would be dismissed.

***Herron v DPP*, Supreme Court, 19/05/2000** [FL3460]

### State liability

*Release of prisoners – tort – negligence – preliminary issue – whether pleadings disclosed point of law for hearing before trial – whether duty of care owed by state to plaintiff over early release of prisoners – discovery – whether failure to enforce conditions governing temporary release of assailant* – Rules of the Superior Courts 1986, *order 25, rule 1; order 34, rule 2*

The plaintiff alleged that she was abducted and raped by an assailant while he was on temporary release from prison. She brought a claim for damages for negligence and breach of duty against the defendants, claiming that they ought reasonably have known that the assailant would abduct and rape her. The defendants sought a pre-trial hearing of preliminary issues including whether they owed a duty of care in deciding whether to grant temporary release to a prisoner. The High Court refused the defendants' application for the trial of the preliminary issues and they appealed. The Supreme Court, Murphy J delivering judgment, held that on the basis of the pleadings as they existed there should be an order directing preliminary issues to be tried. The appeal would be allowed.

***Ryan v Minister for Justice*, Supreme Court, 21/12/2000** [FL3495]

### Revenue and financial law

*Taxation – revenue offences – sentence review – guilty plea – failure to make tax returns – whether fine of £7,500 unduly lenient – error of principle requirement – relevance of payment of £782,000 by respondent to Revenue – onus of proof on appellant – generality of grounds of appeal – absence of evidence of respondent's means – whether evidence that trial judge erred in imposing sentence* – Finance Act, 1983 – Finance Act, 1988 – Taxes Consolidation Act, 1997 – Criminal Justice Act, 1993, *section 2*

The Circuit Court fined the respondent a total of £7,500 after he had pleaded guilty in the District Court to ten charges of failing to make tax returns and was sent forward for sentencing. The court had been told that the sum of £782,000 was paid as a global settlement of the respondent's tax liabilities but there was

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no evidence as to how this sum was composed. The appellant applied for a review of the sentence on the basis that it was unduly lenient. He contended that the penalties were inappropriate to the offences disclosed. The appeal court held that the fact that a portion of the £782,000 might be attributable to penalties or penal interest was a legitimate factor to be considered when sentencing. The court was unable to identify an error of principle by the trial judge in sentencing the respondent. The onus lay on the appellant to identify such an error but he had not discharged that onus. While the penalties imposed might be on the low side, there was no error in principle and the fines could not be said to be unduly lenient. The appeal was dismissed.

***DPP v Redmond*, Court of Criminal Appeal, 21/12/2000** [FL3476]

### Sentencing

*Appeal against severity of sentence – applicant suffering from diabetes – whether appropriate to suspend sentence*

The applicant sought leave to appeal against severity of his sentence. He had been convicted of assault charges and received sentences of three years. Lynch J held that what had happened on that evening was very serious. However, the applicant was subject to diabetes and had undergone a loss of control as a result. The court would therefore suspend the balance of the sentences imposed on condition that he entered into a bond to keep the peace for three years in his own bond or surety of £100 and was advised to avoid drinking whiskey.

***DPP v Charles Harper*, Court of Criminal Appeal, 14/06/99** [FL3467]

## EDUCATION

### Employment, judicial review

*Contract – teaching – fair procedures – judicial review* – certiorari – *payment of applicant's salary suspended by respondents – whether decision to suspend payment of salary* ultra vires *and void – whether applicant entitled to payment of arrears – whether applicant entitled to damages for breach of contract – whether behaviour of applicant would preclude grant of discretionary relief* – Vocational Education (Amendment) Act, 1944, *section 7* – Vocational Education Act, 1930, *section 23(4)*

The applicant was employed as a principal of a school. The school was subsequently closed down. The respondent purported to suspend the salary of the applicant. In the High Court, Mr Justice Morris held that the respondents could not suspend payment of remuneration since there were no allegations of misconduct or suggestion that the applicant was unfit to hold office. The respondents appealed. Geoghegan J, delivering judgment, held that the respondent had acted *ultra vires*. The appeal would be dismissed.

***Carr v Minister & Limerick VEC*, Supreme Court, 23/11/2000** [FL3498]

## EMPLOYMENT

### Unfair dismissal

*Resignation following altered job – constructive dismissal – whether claimant justified in resigning*

The respondent company had been in serious financial difficulty resulting in some employees being let go and others, including the claimant, who had been production manager, being offered work at different levels and at reduced salaries. The claimant was offered the position of laminator supervisor but declined the offer and resigned. The tribunal determined that the rationalisation on the part of the respondent, including the offer of a different position to the claimant, was reasonable in the circumstances and dismissed the claim.

***Leahy v Aquador Boats Ireland Ltd*, Employment Appeals Tribunal, 15/01/2001** [FL3477]

### Unfair dismissal

*Conflict of evidence – disagreement with employer – whether act led to dismissal – whether there was dismissal*

The claimant was employed by the respondent company as a delivery van salesman. The respondent stated that the claimant's van was not making a profit and that it had offered the claimant a job in the storeroom at the same salary. In December 1999, there was a difficulty between the parties involving the length of time the claimant had taken to complete his deliveries which gave rise to an altercation during the course of which the respondent sought the retention of keys to the store area which, the claimant maintained, effectively resulted in his dismissal. The tribunal determined, despite conflicting evidence on all the issues, that there had been a dismissal and that the dismissal was unfair. The claimant was awarded £4,000.

***Anthony Carey v Gary Russell Frozen Foods Ltd*, EAT, 17/01/2001** [FL3478]

### Unfair dismissal

*Redundancy – whether genuine redundancy situation – whether other work available*

The claimant worked as a carpenter with the respondent company. He was let go on the basis that there had been a falling off in the demand for carpenters. The tribunal was not satisfied that a genuine redundancy situation had arisen and awarded the claimant £1,050.

***Meade v PJ Hegarty & Sons Ltd*, EAT, 25/05/99** [FL3479]

### Unfair dismissal

*Resignation – letter of resignation not stating reasons for leaving – whether a case of constructive dismissal arose*

The claimant, who was employed at the respondent's hotel, was dissatisfied with the weekend roster in operation at the hotel and wrote a letter of resignation which he hoped would result in him being offered a more suitable roster. The respondent's evidence was that the letter of resignation did not raise the issue of the roster. The tribunal determined that it was not reasonable of the claimant to terminate his own employment and his claim was dismissed.

***Gaffney v Powerscourt Manor Health Farm Ltd*, EAT, 12/01/2001** [FL3481]

### Unfair dismissal

*Whether redundancy situation arose – whether dismissal unfair*

The respondent company went into receivership following a downturn in business. The claimant, who had been employed as a valet and driver, was dismissed with no reason given. The respondent stated that the claimant's dismissal was due to cutbacks and the reason for his selection was that he was the least skilled member of staff. The tribunal determined that a genuine redundancy situation had not been established and that the claimant's dismissal was not justified. The claimant was awarded £3,800.

***Clohessy v Treaty Car Rentals Ltd*, EAT, 08/10/2000** [FL3487]

## INTELLECTUAL PROPERTY

### Practice and procedure

*Commercial law – European law – intellectual property – application to stay revocation of patent proceedings – opposition proceedings in being before European Patent Office – parallel proceedings – whether in interests of justice to grant stay on proceedings before Irish court* – Patents Act, 1992

The respondents sought a stay to proceedings being taken by the petitioners regarding the validity of an Irish patent. The respondents argued that a stay should be granted as proceedings about the matter were pending before the European Patents Office. McCracken J was satisfied that in assessing whether or not to stay patent proceedings in this jurisdiction in respect of which there are parallel proceedings in being before the European Patents Office, there were a number of factors to be considered. Primarily, as previous case law had demonstrated, the courts had to consider whether the imposition

of a stay would be unjust. In addition, it was undesirable to have proceedings concerning a patent being resolved in a national court while at the same time the corresponding European patent had still to be determined by the European Patent Office. Mr Justice McCracken so held in acceding to the motion brought by the respondents in granting a stay on the present proceedings pending the final decision of the European Patent Office.

***Monsanto & GD Searle*, High Court, Mr Justice McCracken, 14/03/2001** [FL3472]

## INTERNATIONAL

### Practice and procedure

*Evidence – examination on oath – comity of nations – copyright – allegations of fraud – computer software – discovery – privilege against self-incrimination – whether proposed examination oppressive* – Rules of the Superior Courts 1986, *order 39*, *rule 39* – Foreign Tribunals Evidence Act 1856

O'Sullivan J had ordered the appellants to appear for examination on oath before a barrister pursuant to the *Foreign Tribunals Evidence Act 1856*. The appellants sought to have the order of the High Court overturned, claiming that the request for examination was essentially a request for discovery and not 'testimony' as set out under the *Foreign Tribunals Evidence Act 1856*. Denham J, delivering judgment, held that in having regard to the constitutional guarantee of fair procedures, the court must ensure that parties to litigation were allowed to bring their cases on an equal and fair footing. If the plaintiff/respondent was permitted to examine the appellants, it would give them an advantage and potentially place the appellants in an invidious position with regard to preparing and advancing their own defence. In such circumstances, it would be oppressive for the examination to proceed. The appeal would be allowed and the order of the High Court set aside.

***Novell v MCB and Rainey*, Supreme Court, 30/01/2001** [FL3482]

## JUDICIAL REVIEW

### Planning and environment

*Telecommunications – judicial review – time limits* – certiorari – *permission by notice party to retain support pole and antennae – visual impact of mast – date when decision made – distinction between decision of planning authority to grant permission and grant itself – relevant time when decision made by respondent – whether application for judicial review out of time* – Local Government (Planning and Development) Act, 1963 – Local Government Act, 1991 – Local Government (Planning and Development) Act, 1992

Eircell Ltd, the notice party, was granted planning permission by the respondent to retain a support pole and antennae for mobile communications. The applicant sought to quash the permission on a number of grounds, including that he and his neighbours were unaware of the notice party's application and did not have an opportunity to make submissions with regard to their fears about the proposed development. The respondent contended that the applicant was out of time to bring his application. Ó Caoimh J held that the relevant time commenced on 31 March 1999, when the decision of the respondent was made. Consequently, any judicial review sought of that decision had to be commenced within two months from the date of that decision. Since no application was brought until July 1999, the application before the court was made outside the time permitted by section 82 of the *Local Government (Planning and Development) Act, 1963*. The application would be dismissed.

***Henry v Cavan County Council and Eircell*, High Court, Mr Justice Ó Caoimh, 01/02/2001** [FL3483]

## LOCAL GOVERNMENT

### Planning and environment

*Unauthorised development – local authority initiated proceedings – ground floor conversion – warning notice – whether air-handling units were exempted development – whether roof canopy unauthorised development – whether respondents deliberately disregarded planning procedures – whether development constituted material change of use* – Local Government (Planning and Development) Act, 1976, – Local Government (Planning and Development) Act, 1992

After acquiring a premises formerly used as a restaurant and fast-food outlet, the respondents converted the outlet into a Super Mac's fast food restaurant. The applicant issued a warning notice under the planning legislation but the respondents proceeded to continue the work and opened the outlet for business in December 1999. The applicant instituted proceedings against the respondents in the Circuit Court, which held that the work represented a material change of use. The respondents appealed. Morris P held that since the opening of the Super Mac facility, there had been a change of use of that part of the premises which formally constituted the restaurant area. Because of the noise that would be generated into the late hours, disturbing the residents, it was a material change of use. The Circuit Court order would be affirmed and a stay put on the order to enable the respondents to bring such application as they might be advised to regularise their position. The court would then review the situation.

***Westport UDC v Golden*, High Court, Mr Justice Morris, 18/12/2000** [FL3462]

## NEGLIGENCE

### Road traffic

*Personal injuries – liability – contributory negligence – road traffic accident – conflict of evidence – apportionment of liability – damages – whether plaintiff contributed to accident – whether plaintiff drove at excessive speed*

The plaintiff had collided with a vehicle being driven by the first-named defendant. There were conflicting accounts as to how the accident occurred. Johnson J was satisfied that the first-named defendant had crossed over to a lane without adequately checking his rearview mirrors. The plaintiff was driving at an excessive speed and had also consumed alcohol. These two factors had inhibited the plaintiff from coping with the situation. Damages would be assessed at £25,000, with £3,610 in special damages. Liability for the accident was assessed at 75% against the plaintiff, with the first-named defendant being held liable for the remaining 25%.

***Sherry v Smith*, High Court, Mr Justice Johnson, 20/12/2000** [FL3441]

## PERSONAL INJURIES

### Fair procedures

*Tort – personal injuries – damages – negligence – breach of statutory duty – whether plaintiff guilty of contributory negligence* – Civil Liability Act, 1961, *section 57(2)*

The plaintiff had sued in relation to an accident which occurred on board a fishing vessel. The defendant claimed that the plaintiff had been guilty of contributory negligence. Lavan J held that the defendant had been negligent and the plaintiff was entitled to recover damages. It could not be said that there was a delegation of duties to the plaintiff. A sum of £142,500 would be awarded to the plaintiff together with costs.

***Connell v McGing*, High Court, Mr Justice Lavan, 08/12/2000** [FL3474] G

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# Eurlegal

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

# One EU, one currency – and how many legal systems?

**Seán MacCann looks at how EU legislators are ensuring that transactions based on our common currency will be underpinned by a common regulatory treatment of on-line contracts**

The European Council held in Lisbon on 23/24 March 2000 set an ambitious objective: namely, that Europe should become the most competitive and dynamic economy in the world. These lofty objectives needed to be founded on, among other things, EU-wide legal consistency in the key area of providing a consistent regulatory framework for on-line contracts. Legally, the scale of this undertaking was complicated from the outset by much residual commercial and consumer mistrust of the very concepts of on-line contracts and electronic signatures. While the EU's legislators have addressed such text-book legal issues as a fundamental necessity, they are further working to ensure that a shared regulatory context for on-line contracts will deal comprehensively with practical legal issues such as on-line consumer protection and on-line fiscal policy. This article summarises some key legal developments in each of these areas.

## Legal status of on-line contracts

Apart from some classes of contracts falling under residual aspects of the *Statute of Frauds* (or equivalent) in various jurisdictions (such as Ireland, England and Wales and in the US) and apart from other isolated instances where paper may still be mandatory (wills, codicils, other testamentary instruments, trusts and powers of attorney), it is trite law that a contract may be validly formed on-line. Nonetheless, article 9(1) of directive 2000/31/EC (the '*E-commerce directive*') is explicitly worded:

'Member states shall ensure that their legal system allows contracts to be concluded by electronic means. Member states shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means'.

All of the *E-commerce directive*'s provisions are to be implemented into domestic law before 17 January 2002. This unexceptional iteration of an existing principle is nonetheless welcome; in the wider commercial arena, it is likely to neutralise some of the alarmist debate that might otherwise have been permitted to cloud this issue.

## Legal status of electronic signatures

Article 2 of directive 1999/93/EC (the '*Electronic signatures directive*') defines an 'electronic signature' as 'data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication'.

In keeping with the directive's principle of technical neutrality, this is a generic definition. Logically, it could encompass signing methods as diverse as a typed name at the end of an e-mail, a biometric method (such as iris or voice recognition), a personal identification number, a full digital signature or a smart card. Ironically, some of those methods might need to be supported by 'low-tech' extrinsic corroborative evidence (such as paper-based evidence) of a signatory's identity and intent.

That is why the *Electronic signatures directive* makes additional provision for 'advanced electronic signatures' that are 'uniquely linked to the signatory [and] capable of identifying the signatory'. These are more widely known as 'digital signatures'. Their *raison d'être* is nothing less than the Holy Grail of e-commerce: intrinsic authentication and verification of an on-line signatory's identity and intent respectively, without any need for supporting extrinsic evidence.

Article 5 of the *Electronic signatures directive* directs member states to ensure that digital signatures shall 'satisfy the legal requirements of a signature in relation to data in electronic form in the same manner as a handwritten signature satisfies those requirements in relation to paper-based data; and are admissible as evidence in legal proceedings' and that 'an electronic signature is not denied legal effectiveness and admissibility as evidence in legal proceedings solely on the grounds that it is in electronic form'.

All of the *Electronic signatures directive*'s provisions are to be implemented into domestic law before 19 July 2001. (Ireland's *Electronic Commerce Act, 2000* has implemented the provisions of the *Electronic signatures directive*.)

## How do digital signatures work?

A digital signature uses large numbers called 'keys'. Typically, a sender (the signatory) and a recipient at either end of a communication channel will each have both a 'public' and a 'private' key. The sender signs (encrypts) a message/contract with the sender's private key, and the recipient decrypts the message/contract using the sender's publicly available key. Since, in IT terms, it is 'computationally infeasible' to derive someone's private key from knowledge of that person's public key, it follows that the recipient cannot 'forge' the sender's digital signature.

## Final judgment on digital signatures?

As noted, the *Electronic signatures directive* is scrupulous about maintaining parity of legal validity between 'advanced' digital signing and generic electronic signing/authentication mechanisms. However, the unavoidable downside to this principle of technical neutrality is that the *Electronic signatures directive* primarily gives only negative clearance to new technologies (each particular technology will still have to prove its worth) to businesses and to the courts. At the time of writing, there has been no such authoritative judicial imprimatur on digital signatures. However, since legal validity is a

question of technical fact, it is possible to predict the court's attitude by looking at the technical facts of how a digital signature can be said to be 'uniquely linked to the signatory' in the manner prescribed by the directive. A digital signature's legal worth turns on whether or not, as a matter of technical fact, the signatory's digital signature (private key) is in fact 'uniquely linked' to him or her. So, is it?

Bruce Schneier, a well-respected US computer security expert, argues that it isn't. He explained why in a recent edition of his e-zine, *Crypto-Gram*: 'Today … digital signatures are a fundamental component of business in cyberspace. And numerous laws … have codified digital signatures into law. These laws are a mistake. Digital signatures are not signatures, and they can't fulfil their promise … [the] problem is that while a digital signature authenticates the document up to the point of the signing computer, it doesn't authenticate the link between that computer and … [the purported signatory]'.

Schneier's point is that 'proof' that a signature is 'genuine' in an on-line environment only amounts to proof that the public and private keys match. This does not prove who in fact used the private key in the first place.

Does this mean, then, that the *Electronic signatures directive* is mistaken in opting to expressly recognise digital signatures?

Probably not. It is unduly alarmist to contend that digital signatures do not work and that the laws are a mistake. Digitally, the bottom line is that so long as you follow best practice in restricting access to your private key, it's safe to sign on-line.

The nub of the issue, as Schneier correctly notes, is that a digital signature does not authenticate the link between a computer and a purported signatory. However, the vulnerability of that person-to-PC link can be remedied by ancillary methods. An obvious method is to remove the private key from the computer and store it on a smart card. The smart card should itself be secured by a PIN and/or a biometric device. Equally, the private key can be taken off the computer and stored in a physically secured proxy service where responsibility for safe storage of the private key passes to a reputable third-party organisation.

Admittedly, such methods (there are others) do not 100% eliminate the vulnerability of that person-to-PC link. But this does not mean that the laws are mistaken. The real-world issue is whether that link, when secured by such an ancillary method (a smart card or a proxy service) would persuade a court that it was secure enough to be a valid digital signature. Commercial law is, after all, informed by reasonableness and practicability: courts understand that there is no technological 'silver bullet'. Schneier himself readily accepts that 'security is a process, not a product'.

To further the point, compare a digital signature with the working realities of the paper world. In classic legal theory, contractual signatories in the paper world should all sign one original document in the presence of all the signatories.

In my experience, this rarely happens. Instead, one party will sign and the paper document will be passed between the remaining signatory or signatories (who may be in separate locations or countries). While all signatories will eventually receive a counterpart copy, the working reality is that ink signatures are accepted without active verification.

The fact that paper documents and signatures are at least as susceptible to fraudulent manipulation as their on-line equivalents has never been a bar to their acceptance in business as being legally-binding.

To put it another way, no-one blindly accepts any document simply because it is signed in ink. Instead, the decision to accept a paper document is always taken in a wider business context. Equally, in the on-line world, the onus will still be on users to manage their authentication and security solutions.

### On-line consumer protection

The *E-commerce directive* makes explicit provision for web-based retail contracts. Article 10 requires that, before any order is placed, a web-based retailer must 'clearly, comprehensibly and unambiguously' provide the following information:

- The different technical steps to follow to conclude the contract
- Whether or not the concluded contract will be filed by the service provider and whether it will be accessible
- The technical means for identifying and correcting input errors prior to the placing of the order
- The languages offered for the conclusion of the contract.

The retailer must further ensure that the contract terms and general conditions provided to the recipient will be made available in a way that allows the recipient to store and reproduce them.

Article 11 of the *E-commerce directive* further provides that:

- The service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means
- The order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them, and
- The service provider must make available 'appropriate, effective and accessible' technical means sufficient to allow the recipient of the service to identify and correct input errors, prior to the placing of any order.

The *E-commerce directive* notes that many of these stipulations would not be applicable to contracts 'concluded exclusively by exchange of electronic mail' and also provides for derogation rights therefrom when this is 'agreed by parties who are not consumers'.

### Practical legal points for web retailers

Various common-sense legal points, while not always explicit in the directive, flow from the stipulations above. Some obvious points:

- Do not place terms and conditions in pages using technology (such as Java) that may be disabled in the user's browser. Pages containing standard terms and conditions should be written in HTML
- Design your site so that the terms and conditions page cannot be bypassed, either from the home page (as a result of sloppy navigation design) or by hypertext linking or by book-marking
- The terms and conditions should appear in the 'order' page, not in the 'confirmation' page
- One term should state that the goods or services are being advertised, not offered, to prospective purchasers. This ensures that the seller retains the discretion to accept or reject the order. Otherwise, a goods/services provider may find itself inadvertently bound into contracts that it may not either be able to, or wish to, carry out
- A scroll-down presentation of terms and conditions is acceptable, subject always to compliance with the 'Red Hand Rule' (see **panel**).

### Choice of jurisdiction and law in on-line consumer contracts

Existing choice of jurisdiction and choice of legislation (primarily contained in various multilateral treaties) are unaffected by the *E-commerce directive*. While there is room for debate about the extent to which existing geographically-derived criteria can or ought to be applied on-line, it is arguable that any term purporting to deprive consumers of the right to seek the protection of their own courts would be struck out as being unfair under directive 93/13 EC on unfair terms in consumer contracts.

However, such theoretical assurances notwithstanding, the EU and the US Federal Trade Commission issued a joint statement last December endorsing dispute resolution as a practical and first-preference method of resolving on-line consumer contractual disputes.

### Distance selling

Directive 97/7/EC for the protection of consumers in respect of distance contracts (the '*Distance selling directive*') should have been implemented by all member states by 4 June 2000. The *Distance selling directive* applies only in a retail context and focuses on sales effected when seller and buyer do not meet face to face, and unsolicited direct marketing by post or e-mail. This directive obliges long-distance sellers to provide prescribed information and a cancellation right. In the related area of unsolicited direct e-mail marketing, the *Distance selling directive* gives member states a choice: they can either forbid their retailers to send such unsolicited mails unless consumers had indicated in advance that they wished to receive it (opt-in) or allow it unless consumers made it clear they did not wish to receive it (opt-out).

However laudable such directives may be, there is emerging evidence that the stipulations they contain are simply not being adhered to. In March of this year, the UK's Office of Fair Trading launched a 'consumer and business awareness' campaign in the wake of a survey that revealed that the majority of 600 UK retail websites surveyed failed to comply with essential articles of the *Distance selling directive*.

### On-line fiscal policy

On 7 June 2000, the European Commission launched a proposal to change the EU value-added tax regime for e-commerce operators. The commission had previously stated, in a working paper of June 1999, that a new VAT regime for direct e-commerce should be *clear* and *consistent* (providing legal certainty), *simple* (keeping the burdens of compliance to a minimum), *neutral* and *non-discriminatory*. International co-operation would be necessary to prevent distortions in competition between e-commerce companies inside and outside the EU.

The proposal made an important distinction between *direct* and *indirect* electronic commerce. Indirect electronic commerce concerns electronic ordering and the subsequent physical delivery of goods (such as ordering CDs over the Internet that are subsequently physically supplied). Direct electronic commerce concerns electronic ordering and the subsequent electronic delivery of the ordered product or service. Since the EU VAT regime follows the actual flow of goods, indirect electronic commerce that still involves physical delivery of goods would not have raised any substantive new issues. Accordingly, the proposal focused on the supply of direct or 'digital' electronic goods and services.

The proposed legislation would have required non-EU sellers to collect VAT on sales of digital products and services to consumers in Europe. However, this proposal has seemingly been abandoned in the face of widespread opposition from both within and outside the EU. American businesses expressed concerns about the practicability of requiring US companies with no physical European presence to act as tax-collectors within the EU. Equally, many European commentators felt that the proposal to require non-EU companies to only register for VAT in one EU country was unworkable. Given that internal VAT rates varied by as much 10%, the non-EU company would inevitably register in the lower-rate country. Far from being 'non-discriminatory', this could only tend to exacerbate inequalities. The commission is currently re-working the proposals.

Given the high-tech and supra-national nature of the subject, it is perhaps understandable that the EU directives are long on statements of principle and somewhat shorter on detailed implementation guidelines (as in VAT or digital signatures) or on practical enforcement guidelines (as in the patchy adherence to the provisions of the *Distance selling directive*). Paradoxically, however, the strength of the various EC directives lies in their lack of grainy detail. In an evolving marketplace, an excess of premature detail is the stuff of policy and technical dead-ends. And there is arguably enough common political will throughout the EU to ensure that any such currently-outstanding details will be agreed upon and implemented in the near future. G

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## THE RED HAND RULE

Few people bother to read on-line terms and conditions. At best, such terms and conditions receive a cursory once-over. Since most on-line terms seem to have been plagiarised from a common source, contracting parties do not expect to encounter any unusually onerous terms. The so-called Red Hand Rule stipulates that unusual or unusually onerous clauses should be sufficiently detached from the bulk of the terms and conditions to make them noticeable. Some jurisdictions require that such clauses be separately signed by the party who is intended to bear the burden of the obligations therein.

Best practice dictates that all such clauses should have a specific 'accept' button and, ideally, a facility (such as appears on Napster's site) whereby one cannot proceed until one has at least scrolled through all the clauses.

# Regulation on jurisdiction and enforcement of judgments in civil and commercial matters

On 22 December 2000, the European Council agreed a new regulation[1] to replace the *Brussels convention on jurisdiction and enforcement of judgments*. This is part of a package of measures in the area of justice and home affairs. It was accompanied by a regulation on jurisdiction and enforcement of judgments in matrimonial matters, a regulation on jurisdiction and enforcement of judgments in insolvency and a regulation on service of documents within the EU.

The *Brussels convention* has been undergoing a process of review for the last few years. In early 1998, the European Commission published a proposal which would have made significant changes to the jurisdictional provisions in the convention and would also have simplified the recognition and enforcement of foreign judgments.[2] It was put before the European Parliament but did not proceed any further.

The *Amsterdam treaty* took effect on 1 May 1999. On 28 May, the commission put forward a fresh proposal for the replacement of the convention with a regulation.[3] This brings the content of the former convention into the main body of EC law. At present the European Court of Justice is given the power to rule on questions of interpretation under a protocol annexed to the convention – the *Luxembourg protocol*. This will not be required for the regulation, as Irish courts will be able to make preliminary references to the ECJ under article 234 of the *EC treaty*. The regulation will enter into force on its implementation date – 1 March 2002. As a regulation, it does not require implementing legislation, though this may be required to ensure its smooth operation in the Irish context. Having these rules in the form of a regulation will make their further revision much easier. At present, every amendment requires a separate treaty, which has to be implemented by its signatories.

The legal basis for the regulation is title IV of the *EC treaty*. Measures adopted under this title are not applicable in Denmark, the UK or Ireland. At a council meeting on 12 March 1999, the UK and Ireland indicated that they would 'opt in' for this and other proposals on judicial co-operation. Denmark has not opted in so we have the strange situation that the regulation will apply between 14 member states, the *Brussels convention* will apply between those states and Denmark and the *Lugano convention* will apply between all EU member states and Switzerland, Iceland and Norway. These instruments all contain similar rules but there are some differences.

The regulation very largely corresponds to the existing convention. The amendments have been confined to those regarded as essential. In drafting the regulation, the commission emphasised continuity with the rules in the convention, which had operated successfully since 1968, and the interpretative case law. The major changes are as follows.

## General jurisdictional rules

The general jurisdictional rule in the convention is that a defendant is to be sued in his own domicile. In certain cases, such as contract and tort, a plaintiff is given a choice of an alternative forum. This remains the case in the regulation.

**Domicile.** The regulation changes the concept of domicile of companies. Article 53 of the convention currently provides that a company is domiciled in the place of its seat. The determination of the seat is left to the private international law of the forum state. The regulation provides that a company is domiciled either where it has its statutory seat, its central administration or where it has its principal place of business. The regulation gives an autonomous definition of the seat of a legal person: 'the registered office or, where there is no such office … the place of incorporation or, where there is no such place … the place under the law of which the formation took place'. It leaves questions of the validity, nullity and dissolution of legal persons and decisions of their managing bodies to national law.

**Contract.** Article 5(1) of the convention provides that in matters relating to a contract, a plaintiff can sue the defendant in the place of performance of the obligation in question or the domicile of the defendant. This is the most heavily litigated provision of the convention and has given rise to a great deal of uncertainty. Some commentators had advocated its complete deletion on the basis that it had not been successful.

The regulation contains a provision on contract which retains most of the wording of article 5(1). However, the regulation now contains a new provision for contracts for the sale of goods and the provision of services. For such contracts, the regulation defines the place of performance of the obligation in question. For the sale of goods, this will be the place where the goods were or should have been delivered. In the case of the provision of services, it

will be the place where the contract provided that the services were or should have been provided.

**Tort.** Article 5(3) of the convention provides a choice of forum for a plaintiff in tort cases. It provides that in tortious cases jurisdiction is given to the court of the place where the harmful event occurred or the domicile of the defendant. The regulation provides that it will cover cases not only where the harmful event occurred but also those where it may occur.

**Multiple defendants.** Article 6 of the convention allows a plaintiff to sue multiple defendants in the domestic jurisdiction of any one of them. The regulation makes a minor change in this provision. It adds a new requirement that defendants can be sued in the domicile of any one of them, 'provided that the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'. This follows a consistent interpretation of the original article from case 198/87 *Kalfelis v Schröder* ([1988] ECR 5565).

**Insurance contracts.** The scope of the provisions on insurance has been considerably broadened. Article 9 currently allows a policyholder to sue an insurance company in the courts of the policyholder's domicile. The rationale behind this is to protect the weaker party. The right to sue an insurance company in one's own domicile is now extended to the insured person and the beneficiary when they are the applicants. This extension is consistent with the purpose of these rules.

**Consumer contracts.** The scope of the consumer contract provision has also been extended to offer consumers better protection. The convention currently provides that a consumer can sue in his own domicile in respect of a contract for the sale of goods on installment credit terms or in respect of a credit agreement made to finance the sale of goods. There is then a residual category for contracts for the sale of goods or supply of services where the conclusion of the contract was preceded by a specific invitation addressed to the consumer or advertising in his state and the consumer took in his state the steps necessary to conclude the contract. The new provision is broader. It provides a residual category that:

'In all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the member state of the consumer's domicile or, by any means, directs such activities to that member state or to several countries including that member state, and the contract falls within the scope of such activities.

The original article was confined to contracts for the sale of goods or supply of services. There is no such limitation in the new provision. It also required an invitation to purchase or advertising addressed to the consumer and required him to take the necessary steps to conclude the contract in his state. The new provision is designed to take into account consumer contracts concluded through an interactive website accessible in the state of the consumer's domicile. Knowledge of goods or services acquired by a consumer through a passive website accessible in his home state will not be sufficient.

The removal of the requirement that the consumer take the necessary steps to conclude the contract in his home state is also meant to take electronic commerce into account. In the case of contracts concluded through an interactive website, it may be very difficult to determine where the steps necessary to conclude the contract were taken.

Great concern has been expressed about this article by the UK, companies involved in electronic commerce and UNICE (the European employers' federation). They argued that they will be exposed to potential litigation in each member state and that the only alternative to this is to specify that their products or services are not intended for consumers domiciled in certain member states. They argued that this would result in partitioning markets in a manner inconsistent with other EU legislation on electronic commerce. Commentators further argued that this provision would have a disastrous effect on start-up e-commerce businesses that would be unaware of the risks to which they were exposing themselves.[4] Consumer associations argued that this provision was a necessity to give added confidence to consumers to purchase from websites. The commission held a hearing of interested parties in 1999 but did not propose any amendments. The European Parliament had recommended delaying adoption of the regulation until a full package of electronic commerce legislation was in place in the EU. However, the Council decided to proceed.

***'The regulation should make the recognition and enforcement mechanisms for foreign judgments faster'***

The result is that the provision is ambiguous. It is unclear as to what 'directing' activities to a state will mean in practice. Earlier drafts of the regulation had included a recital which stated that a company should be considered as 'directing' its activities to any member state in which its website was accessible. This recital was removed at the request of the parliament and thus there is no guidance in the regulation as to its meaning. Practically, a company with a website written in German with prices in marks is directing its activities at Germany. However, what happens if a consumer in Belgium orders something from the German site and the order is fulfilled. The English Department of Trade and Industry has taken the view that a statement on a website of the states being targeted may prevent the site as being regarded as directed at all member states. This will require a decision of the ECJ for final clarification.

There is of course a third view, which I will mention for the sake of completeness.[5] This is to the effect that the new article 15 does not make a radical change. The contractual provision now provides that for contracts for the sale of goods, the correct jurisdiction is that of the place of delivery. This is invariably the place of the consumer's domicile. Thus, on this analysis, the new consumer provisions will be something of a paper tiger.

The original article excluded transport contracts from its scope. The regulation continues to do so but makes it clear that package holidays do come within the scope of the consumer protection.

**Employment contracts.** The jurisdictional rules on employment contracts will remain the same. However, they have been taken from articles 5 and 17 and consolidated in articles 18-21 of the regulation.

**Jurisdiction agreements.** As with the convention, the regulation allows the parties to choose the jurisdiction of a certain court and then gives that court exclusive jurisdiction. The convention requires such a jurisdiction clause to be evidenced in writing, in a form that accords with international trade or commerce practices or in a form which is consistent with practices developed between the two parties. The regulation takes account of electronic commerce and pro-

vides that 'any communication by electronic means which can provide a durable record of the agreement shall be deemed to be in writing'.

***Lis pendens.*** The convention provides that where two courts are seised of the same cause of action, the court first seised has jurisdiction. This led to some uncertainty as the rules concerning courts being seised of an action differed between common and civil law jurisdictions. In the UK and Ireland, a court is regarded as seised of a matter when a summons is issued, whereas in civil law jurisdictions, courts look to service of the originating document. The regulation attempts to resolve this by providing a definition of the date when a court is seised of a matter. Article 30 provides that a court is seised either where the document instituting the proceedings is lodged with the court or, if the document has to be first served before being lodged, when the server receives the document for service (that is, when a summons is issued). This is broadly consistent with the decision of the English Court of Appeal in *Dresser UK Ltd v Falcongate* ([1992] 2 All ER 450).

### Recognition and enforcement of judgments

The regulation should make the recognition and enforcement mechanisms for foreign judgments faster. It provides for a uniform certificate containing basic information to accompany judgments. Enforcement applications continue to be heard on an *ex parte* basis. However, the party seeking to enforce the judgment is now required to produce an authentic copy of the judgment, the certificate and give an address for service of proceedings within the enforcing state.

The court asked to enforce the judgment cannot entertain grounds for non-enforcement of its own motion. The judgment debtor must raise these. The enforcing court is limited to checking the documents submitted with the foreign judgment.

**Defences to recognition and enforcement.** One of the defences to recognition and enforcement of a foreign judgment is that it is contrary to public policy. The regulation also contains this defence but it requires that the judgment be 'manifestly' contrary to public policy. This defence has always been very narrowly interpreted – the *Jenard report* states that it is only to apply in exceptional circumstances. Indeed, it is only very recently that the ECJ has applied this defence. In case C-7/98 *Dieter Krombach v André Bamberski* (28 March 2000, unreported), the court applied this defence in the context of the breach of fundamental human rights. If the court is interpreting the defence so restrictively, this amendment is likely to render this defence almost completely inapplicable. G

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### Footnotes

1 Regulation 44/2001, OJ L 12/1, 16 January 2001.
2 OJ C 33, 31 January 1998.
3 *Proposal for a council regulation (EC) on jurisdiction and enforcement of judgments in civil and commercial matters*, COM (1999) 348 final.
4 M Pullen, 'The European Union proposed legal framework for e-commerce', ICCLR 1999, Spe 21 at 27. He gives the example: 'If you get on the ferry from Dover to Calais, you buy a bottle of wine, you take the business card of the wine seller, and when you get home you write to him asking for two cases of wine and enclose your credit card details. If something goes wrong, you cannot sue him in the UK. But if you e-mail him, then you can. This creates a climate of legal uncertainty. This is holding people back. It is the e-commerce equivalent of the old British law that you could only drive a car if you had someone walking in front of it. If you are potentially exposed to litigation costing 10% of your turnover because you haven't complied with some rule of German law which you were unaware of, then you are going to think twice about making your product available across the Internet'.
5 Stuart Dutson, 'International e-commerce', CTLR 2000, 6(3), 76.

# Recent developments in European law

## COMPETITION

Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd*, 14 December 2000. There had been proceedings in Ireland between the parties concerning an exclusivity clause in agreements for the supply of freezer cabinets concluded between HB and retailers of impulse ice cream. Masterfoods entered the Irish ice-cream market in 1989. Retailers began to stock its products in cabinets supplied to them by HB. HB obtained a High Court injunction restraining Masterfoods from inducing retailers to store its products in freezers belonging to HB. In 1992, Masterfoods appealed to the Supreme Court. In 1991, Masterfoods had lodged a complaint with the commission arguing that the exclusive distribution agreement violated articles 81 and 82. In July 1993, the commission concluded that the distribution system was in breach of articles 81 and 82. Following discussions concerning an exemption, the commission in 1998 adopted a decision finding the system in breach of the articles and rejecting a request for an exemption under article 81(3). HB brought an action under article 230 seeking to have the decision annulled. The Supreme Court decided to stay its proceedings and referred a number of questions to the ECJ. It asked for guidance on the parallel proceedings in this case. The ECJ held that a national court could not take a decision running counter to that of the commission where both are ruling on the compatibility of an agreement or practice with articles 81 and 82. If the addressee of the commission decision has brought an action for annulment of the decision, it is for the national court to decide whether to stay proceedings pending final judgment in that action or to refer a question to the court for a preliminary ruling.

## FREE MOVEMENT OF GOODS

Case C-55/99 *Commission of the European Communities v French Republic*, 14 December 2000. The French government introduced legislation in 1996 requiring a registration procedure for medical reagents and further requiring that the registration number be stated on external packaging. The commission argued that this legislation contravened article 28 of the treaty (which provides for free movement of goods). France defended its measure as it was necessary to protect human health and was proportionate to the aim pursued. The ECJ upheld the legality of the registration process. The court did not accept that the requirement of an external mark was proportionate. It held that there were less restrictive means of ensuring that the reagents were traceable.

# put a smile

# on the face of the tiger

## new tax law helps you do it better

The Celtic Tiger still has a harsh face for too many people: the 500,000 adults still dependent on Social Welfare; families and individuals struggling on very low pay; the homeless; the old; the handicapped; the ill.

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Tel: 01 8384164 Fax: 01 8387355 www.svp.ie. Charity No. CHY 6892

**Saluting solicitors' law**
Celebrating the recent publication of Patrick O'Callaghan's *Law on solicitors in Ireland* are (*from left to right*) Attorney General Michael McDowell, Law Society Director General Ken Murphy and the author

**Property law goes high tech**
Gathered at the launch of Butterworths' Irish property-law electronic service, which is available both on the Internet and in CD-ROM format, are (*from left to right*) Chief Justice Ronan Keane, Louise Leavy, Butterworths' managing editor for the legal field, and Cardiff University Professor of Law John Wylie

**Trusting to education**
At the presentation of this year's scholarship from the Rodney Overend Educational Trust were (*from left to right*): former chief justice Thomas Finlay; winner Bríd Jordan from Tipperary, who will use the scholarship to pursue post-graduate studies at the London School of Economics; Marcus T Beresford, chairman of A&L Goodbody, which sponsors the award in memory of the late Rodney Overend, solicitor; and Law Society Director General Ken Murphy, who served as a judge for the competition

# Apprentices' open day at Blackhall Place

Students from the professional practice course, part 2, found a wealth of information on display at the Law Society's recent 'open day' exhibition held at Blackhall Place


The Law Society recently hosted an open day for students on the professional practice course, part 2, who had just begun the final stage of their apprenticeships at the new Education Centre in Blackhall Place. The 300 students were part of the group who began their professional training in Griffith College while the Education Centre was being built. The aim of the exhibition-style event was to introduce them to the services provided by the Law Society and to explain its role and function in their professional lives. Almost all of the students on the PPC2 visited the Presidents' Hall at some point in the afternoon where they were able to meet staff from all the society's departments and to discuss with them the work they do and how they can help in the future. Feedback from both students and exhibitors indicated that the event was a great success.

A similar exhibition will be held in early June when a further 300 PPC2 students come to Blackhall Place to complete their training. Together, both courses represent some 10% of the future practising profession.

SADSI
Solicitors Apprentices Debating Society of Ireland

# Bar room lawyers

SADSI's first Dublin event for the new term took place in March upstairs in the Odeon bar on Harcourt Street and was a great success. Apprentices from Dublin and the surrounding counties attended in force and represented apprentices from all across the spectrum of the apprenticeship, from pre-professional course to advanced course.

Sponsored by Ulster Bank and Guinness, the evening represented an opportunity not only for apprentices to meet this year's SADSI committee, but also to swap stories about their experiences in the office and in court. Our DJ entertained us into the early hours and provided a groovy backdrop for some serious socialising. We also had a raffle for the Edith Wilkins HOPE Foundation, a charity based in India which seeks to raise funds to alleviate the suffering of street children and their families through the provision of education and healthcare. Apprentices raised £100 for this charity during the evening and the proceeds could not go to a more worthy cause.

**Preparing for the bar?**
*(From left to right)* Keith Walsh, Beibhín Lucey, John Herbert and Clare O'Shea-O'Neill

Claire O'Regan with Richard Purdy of Ulster Bank

All in all, the event was a great success and we look forward to the next event with anticipation. Thanks to all who attended and helped to make the night such fun.

# Apprentices talk themselves up

The Law Society of Ireland hosted the Law Society/ Round Hall Sweet and Maxwell moot final on Thursday 15 March 2001. The team representing the appellant in the case comprised of Aisling Kelly and Paul Madden, while their opponents were Kieran Doran and Michael Small. Both sides put their case to the panel of judges, which was made up of the president of the High Court, Mr Justice Fredrick Morris, Mrs Justice Mary Laffoy of the High Court, Judge John Buckley of the Circuit Court, Michael Peart, chairman of the Law Society's Education Committee and TP Kennedy, the society's director of education.

After an hour of keenly-contested legal argument, many challenging questions from the panel of judges and some humorous moments, the judges retired to consider their verdict. All the judges praised the high quality of the speakers and declared Kieran Doran and Michael Small the winners of the competition.

Congratulations to all the speakers who participated in this highly-successful competition.

**Eloquence personified**
Michael Small and Kieran Doran with Round Hall's Catherine Dolan

## Coming into the home stretch

Members of the first PPC2 to unleash itself on the new Education Centre arrived in style on 2 April. We hope they enjoy the final furlong of their apprenticeship!

## LOST LAND CERTIFICATES

***Registration of Title Act, 1964***
An application has been received from the registered owners mentioned in the schedule hereto for the issue of a land certificate as stated to have been lost or inadvertently destroyed. A new certificate will be issued unless notification is received in the registry within 28 days from the date of publication of this notice that the original certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the certificate is being held.
*(Register of Titles), Central Office, Land Registry, Chancery Street, Dublin (Published 4 May 2001)*

Regd owner: Robert James Shirley and John Thomas Shirley; Folio: 11367F; Lands: South-east side of Dublin Road in the townland and Barony and town of Carlow; **Co Carlow**

Regd owner: Charles Sheridan, Drumcrow, Corlismore, Co Cavan; Folio: 2172F; Lands: Drumcrow and Cloggy; Area: 48 acres approx; **Co Cavan**

Regd owner: James Nagle, Ballyhannon, Quin, Co Clare; Folio: 29993; Lands: Townland (1) Ballyhannon South and Barony of Bunratty Upper; Area: 0.4350 hectares; **Co Clare**

Regd owner: James Raymond Gibbons, 1 Walnut Drive, Cahirdavin, Co Clare; Folio: 4977F; Lands: Townland (1) Gallowshill and Barony of Bunratty Lower; Area: 0.20234 hectares; **Co Clare**

Regd owner: James V Fennell and Maura Fennell, c/o Mangan O'Beirne, 31 Morehampton Road, Dublin 4; Folio: 15101; Lands: Townland (1) Dough and Barony of Moyarta; Area: 0.4220 hectares; **Co Clare**

Regd owner: Patrick Kilkelly, Munnia, Burrin, County Clare; Folio: 1496; Lands: Townland of (1) Rossalia, (2) Corranroo and Barony of Burren; Area: (1) 7.6105, (2) 8.4377 hectares; **Co Clare**

Regd owner: John Joseph Prendergast and Margaret Mary Prendergast; Folio: 9146; Lands: Known as a plot of ground situate in the townland of Burgatia, the Barony of Carbery East (West Division), and the County of Cork; **Co Cork**

Regd owner: Eoin and Nora Hickey, Rathinree, Esker Lane, Lucan; Folio: 645; Lands: Townland of Ballydowd and Barony of Newcastle; **Co Dublin**

Regd owner: Suzanne Horgan, Site 7, Berwick Avenue, Swords; Folio: DN86080F; Lands: Townland of Mooretown and Barony of Nethercross; **Co Dublin**

Regd owner: Priscilla Carroll, 7 Grove Avenue, Blackrock, Co Dublin; Folio: 54422; Lands: Townland (1) Rosroe (Ballindoon PH) and Barony of Ballynahinch; Area: 0.4097 hectares; **Co Galway**

Regd owner: Gerard Concannon, Claremorris, Co Mayo; Folio: 13777F; Lands: Townland of Blackacre and Barony of Dunmore; **Co Galway**

Regd owner: Margaret Higgins, Curryoughter, Corofin, County Galway; Folio: 42061F; Lands: (1) Corrofin, (2) Curry Oughter and Barony of Clare; Area: (1) 0.063 hectares, (2) 0.063 hectares; **Co Galway**

Regd owner: Joseph Sharpe; Folio: 10536F; Lands: Townland of Pollagorteen in the Barony of Offaly West; **Co Kildare**

Regd owner: Pascal Plant; Folio: 11539; Lands: Townland of Hawkfield in the Barony of Connell; **Co Kildare**

Regd owner: John O'Connor; Folio: 4288; Lands: Part of the lands of Barnacrow in the Barony of Connell and part of the lands of Dunbyrne; **Co Kildare**

Regd owner: Frank Desmond, Greaghglass, Aughnasheelan, Ballinamore; Folio: 5386F; Lands: Greaghglass; Area: 0.683 hectares; **Co Leitrim**

Regd owner: Oliver and Bridget Greene; Folio: 23452; Lands: Townland of Ballinvana and Barony of Coshlea; **Co Limerick**

Regd owner: Francis Walsh; Folio: 6502; Lands: Ballycosney and Barony of Ballycowan; **Co Offaly**

Regd owner: Redmond Kerin; Folio: 3631F; Lands: Magherabane and Barony of Garrycastle; **Co Offaly**

Regd owner: Peter Patrick O'Gara, Enfield, Ballintubber, Co Roscommon; Folio: 28204; Lands: Townland of Enfield and Barony of Castlereagh; Area: (1) 2.27129 hectares, (2) 14.6015 hectares; **Co Roscommon**

Regd owner: Patrick Foley; Folio: 3675 and 3619; Lands: Graigue Lower and Killenaule and Barony of Slievardagh; **Co Tipperary**

Regd owner: Thomas Cunningham; Folio: 2551; Lands: Townland of Newtown and Barony of Decies without Drum; **Co Waterford**

Regd owner: Margaret Mythen and Michael Doyle; Folio: 709L; Lands: Newtown and Barony of Forth; **Co Wexford**

Regd owner: John Gerard Sunderland and Elizabeth Mary Sunderland (both deceased); Folio: 3124; Lands: Kilcorral and Barony of Shelmaliere East; **Co Wexford**

Regd owner: Thomas Byrne (as tenant in common of an undivided moiety); Folio: 6775; Lands: Townland of Scurlocksleap in the Barony of Talbotstown Lower; **Co Wicklow**



Regd owner: Annette Whelan; Folio: 2049L; Lands: Townland of Kilpoole Lower in the Barony of Arklow; **Co Wicklow**

Regd owner: Thomas Byrne (as tenant in common of an undivided moiety); Folio: 6775; Lands: Townland of Scurlocksleap in the Barony of Talbotstown Lower; **Co Wicklow**

Regd owner: Henry W Bolger and Bridget Bolger; Folio: 2495; Part of the lands of Crosscoolharbour in the Barony of Talbotstown Lower; **Co Wicklow**

## WILLS

**Boyce, Mary** (deceased), late of Kill, Carrigart, in the county of Donegal. Would any person having knowledge of a will executed by the above named deceased who died on 16 December 1975, please contact McCloughan, Gunn & Co, Solicitors, The Mall, Ramelton, Co Donegal, tel: 074 51100, fax: 074 51355, e-mail: mcgsolrm@eircom.net

**Conran, Elizabeth** (deceased), late of 6 Larkfield Park, Harolds Cross, Dublin 6W. Would any person with any knowledge of a will executed by the above named deceased who died on 9 July 2000, please contact Ferrys, Solicitors, 443 South Circular Road, Rialto, Dublin 8, tel: 01 454 4275, fax: 01 453 6911

**Healy, Agnes** (deceased), late of 12 Colbersfort, Tallaght, Dublin 24. Would any person having knowledge of a will made by the above named deceased who died on 22 December 1999, please contact Rochfords, Solicitors, Level 1, The Square, Tallaght, Dublin 24, tel: 01 459 7695, fax: 01 459 7399

**Higgins, Patrick** (deceased), formerly of Culleens, Killala Road, Ballina, County Mayo and late of 10 Corcoran Terrace, Ballina, County Mayo. Would any person having knowledge of a will made by the above named deceased who died on 21 February 2001, please contact John J Gordon & Son, Solicitors, John Street, Ballina, County Mayo, tel: 096 21644, fax: 096 70198

**Kennedy, Monica** (deceased), late of 124 Celtic Park Avenue, Beaumont, Dublin 9. Would any person having knowledge of a will made by the above named deceased who died December 2000, please contact Suzanne Devaney,

Solicitor, The Earlsfort Centre, Earlsfort Terrace, Dublin 2, tel: 01 664 4236

**McEntaggart, Ciaran** (deceased), late of Ratoath Road, Dunshaughlin, County Meath. The will is dated 14 June 1995 and anyone with information relating to the will should contact Liam Keane & Company, Solicitors, The Old Toll House, Dunshaughlin, Co Meath, tel: 01 825 0825, fax: 01 825 0824

## EMPLOYMENT

**Recently-qualified solicitor** (late 50s) with economics degree and 30 years' experience in the civil service seeks position in the Dublin area, tel: 01 668 6901

**Solicitor: 15 years' experience** in conveyancing/probate/litigation, seeks position in Cork city or county. **Reply to Box No 40**

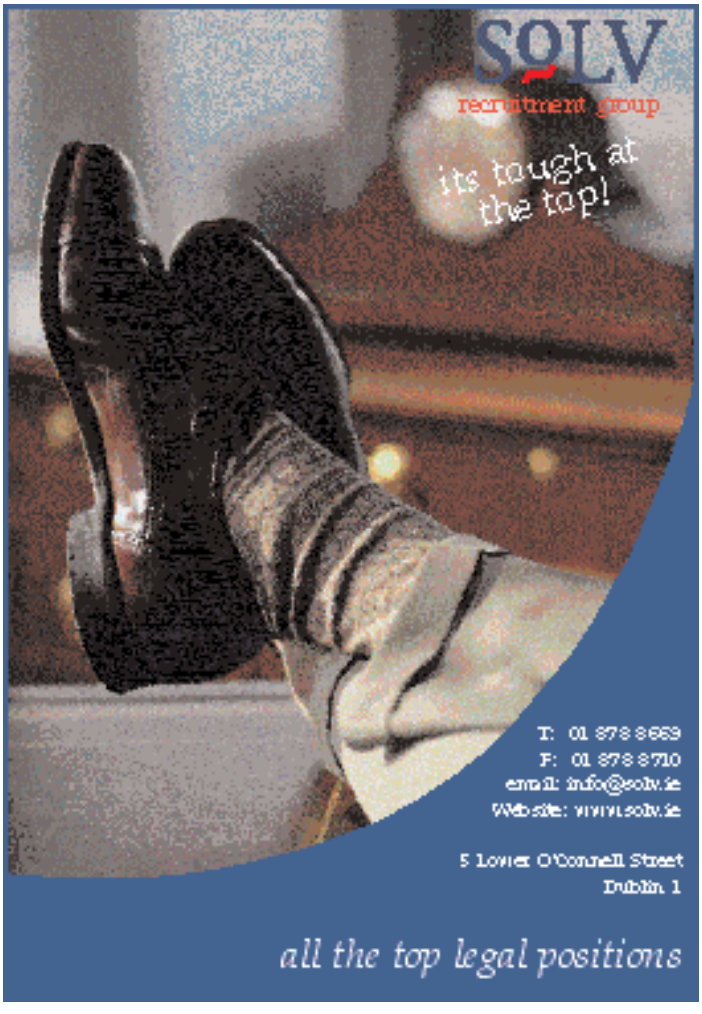
**Experienced solicitor** seeks position in general practice in Naas. **Reply to Box No 41**

**Solicitor required** for progressive, medium-sized practice. Midland area. Two to three years' PQE desirable in conveyancing, District Court work, and family law. **Reply to Box No 42**

**Solicitor available for work** in south-west Dublin/north Kildare. Has over eight years' experience in conveyancing and family law. Available to commence work from early June onwards. **Reply to Box No 43**

**Apprentice solicitor,** LLM, seeks apprenticeship in Dublin area. Available to begin immediately, tel: 091 847703





## 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

**Personal injury claims**, employment, family, criminal and property law specialists in England and Wales. Offices in London (Wood Green, Camden Town and Stratford), Birmingham and Cardiff. 'No win, no fee' available for accident and employment claims, legal aid for family and criminal cases. Contact Levenes Solicitors at Ashley House, 235-239 High Road, Wood Green, London N22 8HF, tel: 0044 20 8881 7777. Alternatively, e-mail us on info@levenes.co.uk or visit our website at *www.levenes.co.uk*

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fax: +44 (0) 151 6047152
e-mail: L.Clearkin@Liv.ac.uk

**Ordinary seven-day intoxicating liquor licence for sale.** Contact Messrs Conway Kelleher Tobin, Solicitors, 29 South Mall, Cork, tel: 021 427 3192, fax: 021 427 0390, ref: TT or DOK

**For sale: publican's licence.** Contact Louis O'Connell of Gerald Baily & Co, Solicitors, Church Place, Church Street, Tralee, Co Kerry, tel: 066 712 1015/066 712 2152/066 712 0460, fax: 066 712 3014, e-mail: gbaily@securemail.ie

**For sale: six-day publican's licence.** Contact Connellan, Solicitors, Church Street, Longford, tel: 043 46440

**For sale: seven-day ordinary publican's licence.** Contact English Leahy & Associates, Solicitors, 8 St Michael's Street, Tipperary, tel: 062 52577, fax: 062 52729

**Seven-day ordinary licence for sale**. Contact Eugene O'Kelly, Solicitor, Kilrush, tel: 065 905 1089

**For sale: ordinary seven-day publican's licence**, without restrictions, early completion required. Apply to Tormeys, Solicitors, Castle Street, Athlone (Ref: DO'F), tel: 0902 93456

## 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*: an application by the trustees of St James Band**

Take notice that the applicant intends to submit an application to the county registrar for the county of the city of Dublin for the acquisition of the freehold interest and all, if any, intermediate interest in the premises described in the schedule hereto and any person having an interest in the freehold estate or any intermediate interest or estate between the freehold and leasehold interest held by the applicant in the property are hereby called upon to furnish evidence of their title to the solicitors for the applicant within 21 days from this notice.

In default of any such notice being received, the applicant intends to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for directions which might be appropriate on the basis that the person or persons beneficially entitled to the superior interest, including the freehold reversion of the property, are unknown or unascertained.

**Schedule**

All that and those that part or piece of ground consisting of a Tanyard Drying Loft and Bark store together with the gate entrance in front lately in the possession of Mr Peter Shannon and Son containing in breadth in the front 26 feet and in breath in the rear the like number of feet and in depth from front to rear 173 three feet nine inches, be the said several admeasurements more or less and which said premises were formally part and parcel of the town of Kilmainham but are now called or known as part and parcel of Mount Brown, bounded on the north by the river Camock, on the south by the high road leading from the city of Dublin to Kilmainham and Golden Bridge, on the east by the premises in the possession of Mr Cornelius Shannon Senior, and on the west by premises in the possession of Mr Francis Tuite, and which said premises are situate lying and being in the township of Kilmainham Parish of Saint James and county of Dublin which said premises are now known as number seven Mount Brown and are now situate in the city of Dublin.

**Particulars of lease**

Lease dated 3 October 1766 and made between the Reverend Richard Chaloner Cobbe Thomas Tydd and Robert Smyth, churchwardens of the Parish of Finglas in the County of Dublin, of the one part and William Smith of the other part for a term of 900 years from 25 March 1766 and subject to the payment of the yearly rent of three pounds ten shillings old currency equivalent to three pounds four shillings and seven pence, present currency and to the convenants and conditions therein contained.

*Dated: 21 March 2001*
*Signed: Cullen & Company, Solicitors, 86-88 Tyrconnell, Inchicore, Dublin 8*

**In the matter of the *Landlord and Tenant Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978* and in the matter of the *Landlord and Tenant (Amendment) Act, 1984*: an application by Patrick Gorry and Christine Gorry**
Take notice that any person having any interest in the freehold estate of the following property: all that and those the Midway, 30a Seapoint Avenue, Blackrock, in the county of Dublin, being portion of the premises demised by an indenture of sub-lease dated 19 September 1924 between Kate Meaney of the one part and Patrick Joseph Duffy of the other part and therein described as all that and those the cottage and garden facing to Seapoint Avenue, Blackrock, together with the plot of ground at the side thereof, which said property is situate in the Barony of Rathdown and County of Dublin.

Take notice that the Patrick Gorry and Christine Gorry intend to submit an application to the county registrar for the county/city of Dublin for the acquisition of the freehold interest in the aforesaid property and any party asserting that they hold a superior interest in the aforesaid premises are called upon to furnish evidence of title to the aforementioned premises to the below named within 21 days from the date of this notice.

In default of any such notice being received, Patrick Gorry and Christine Gorry intend to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the county/city of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the premises are unknown or unascertained.
*Dated: 3 April 2001*
*Signed: Cullen & Co, 86/88 Tyrconnell Road, Inchicore, Dublin 8*

**Unknown owner of fee simple interest**
**In the matter of the *Landlord and Tenant Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978* and in the matter of purchase of freehold estate of property situate at The Stores, Bushfield Avenue, Dublin 4: an application by John Moran of The Stores, Bushfield Avenue, Dublin 4**
Take notice that any person having interest in the freehold estate of the property known as The Stores, Bushfield Avenue, Dublin 4, held under an indenture of lease dated 8 September 1860 and made between Jane Pear and Ruth Pear of the first part, Richard Waddy Renwick of the second part, and Edward Henry Carson of the third part for the term of 499 years from 1 January 1860 subject to the yearly rent of 27 pounds ten shillings and no pence and the covenants and conditions therein contained.

Take notice that James Moran intends to submit an application to the county registrar for the city of Dublin at Aras Ui Dhalaigh, Inns Quay, Dublin 7 for the acquisition of the freehold interest in the aforesaid property and that any party asserting that they hold a superior interest in the aforesaid property are called upon to furnish evidence of title to the said property to the below named within 21 days from the date of this notice.

In default of any such notice being received, John Moran intends to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the city of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the aforesaid property are unknown or unascertained.
*Dated: 11 April 2001*
*Signed: PJ Walsh & Company, Solicitors, 12 Upper Fitzwilliam Street, Dublin 2*

**O'Neill, John Patrick,** 74 Whitworth Park, Drumcondra, Dublin 7. Would any person having knowledge of the whereabouts of the original/counterpart lease dated 29 September 1900 between Henry Gore Lindsay of the one part and Thomas J Stafford of the other part or any other title documents in relation to the above property, please contact Eleanor Wardlaw & Co, Solicitors, Ballyfinogue House, Killinick, Co Wexford, tel: 053 58933

**Watson, Thomas,** Shraheens, Achill Sound, Co Mayo. Would any person having knowledge of the whereabouts of 1) any solicitor in Edenderry, Co Offaly, who may have acted on behalf of Thomas Watson in or around 1967 and who may have knowledge of a deed of transfer executed by him, or 2) names and addresses of next-of-kin of Thomas Watson, formerly of Shraheens, Achill Sound, Co Mayo and possibly Offaly, please contact John NM Lavelle, Solicitors, Achill Sound, Co Mayo, tel: 098 45209

**Kennedy, Monica** (deceased), late of 124 Celtic Park Avenue, Beaumont, Dublin 9. Would any person having knowledge of the whereabouts of title documents of the above named premises, please contact Suzanne Devaney, Solicitor, The Earlsfort Centre, Earlsfort Terrace, Dublin 2, tel: 01 664 4200