Gazette LawSociety

Regulars

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Cover Story

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IBA DUBLIN CONFERENCE

The International Bar Association will hold a conference on technology and the law in Dublin at the end of next month. The conference will 'consider the impact of technological advancement in law practice management and its role in creating a better managed legal world'. It takes place on 29 May and further information can be obtained from June Elliott on +44 (0)20 7629 1206.

SOLICITORS IN EMPLOYMENT BOOKLET

The second edition of the Law Society information booklet for solicitors in employment outside private practice has been published. A copy is being sent to all solicitors in this category, who now number about 600. According to Kevin Finucane, chairman of the society's Corporate and Public Sector Committee: 'If you are thinking of moving from private practice to a corporate or public services position, this booklet is essential reading'. Copies are available free from Suzanne Chesney at the Law Society on tel: 01 868 1220 or at s.chesney@lawsociety.ie.

Top awards for Dublin firms

In the season of Oscar ceremonies and BRIT awards, two of Dublin biggest corporate law firms, Matheson Ormsby Prentice and A&L Goodbody, have earned plaudits of their own.

MOP has won the prestigious *European law firm of the year 2001*, run by UK publisher, Legal Business. MOP is the only Irish law firm to have won this major award, which is open to law firms across Europe and which was won last year by a leading German firm. The award is in recognition of the firm's growth over the last decade, underlined by the volume and value of business transacted and the growth in personnel numbers. By 2001, MOP had 40 partners and a total of 233 fee-earners, compared with 14 partners and 56 fee-earners in 1991.

Commenting on the award, MOP's managing partner Donal Roche said: 'This award is testament to the commercial success and innovative approach of the firm in recent years, and is a tribute to the hard work and expertise of everyone in the firm'.

Meanwhile, A&L Goodbody has won Legal Business's *Private equity deal of the year award*, for its work in advising Valentia Telecommunications on the takeover of Eircom plc. Goodbodys won the award jointly with the UK firm Freshfields Bruckhaus Deringer. Again, this is the first time that an Irish law firm has won such an award.

New developments at Land Registry

Catherine Treacy, chief executive of the Land Registry, formally presents the registry's *Statement of strategy and business plan 2002-05* to justice minister John O'Donoghue. Details of the plan are available on the registry's website at www.irlgov.ie/landreg. Meanwhile, the government has announced that the major computerisation contract for the Land Registry has been awarded to EDS Ireland Ltd. The multi-million euro project will eventually allow solicitors and other users to access the registry's records over the Internet.

ONE TO WATCH: NEW LEGISLATION

Valuation Act, 2001

The *Valuation Act, 2001* is expected to be commenced in early May 2002. It replaces legislation going back to 1838 and is designed to form a basis for a fresh valuation of all rateable property in the state, and regular reviews and updates in the future. The intention is to remove the many anomalies in existing valuations, and improve the process.

The following are the main provisions of the act:

- Properties which are rateable are referred to as 'relevant property' (s15(1)), to be construed with reference to schedule 3. This includes buildings, lands used or developed for any purpose, railways and tramways, harbours, piers, docks and fixed moorings, mines, quarries, pits and wells, fishery rights, profits a prendre, tolls, easements and rights over lands, petroleum drilling rights, canals and navigation rights, electricity generating stations and ancillary installations
- Exceptions (s15(2)) are set out in schedule 4. They include agricultural land or land used for horticulture, forestry, sport, farm buildings, domestic premises, buoys, beacons or lighthouses, turf bog used for fuel or turf mould, property used as constituency offices by TDs or MEPs. Also included are property used exclusively for religious worship, hospitals, burial grounds or crematoriums, educational establishments used exclusively for education, art galleries, museums, libraries, parks or national monuments, property occupied by a list of organisations including the National Museum, National Library and National Concert Hall, property used for caring for elderly, handicapped or disabled people, community halls, property occupied by charitable organisations or for the advancement of science, literature or the fine arts, provided that none of these has an element of private profit
- Properties occupied by the state are not rateable (s15 (3)). Instead, local authorities get a rate support payment through the local government fund
- The existing concept of net annual value is retained (s48(1)), but it is proposed to undertake a countrywide revaluation which will bring this figure up to date. The level of rate struck will, of course, have to be adjusted to reflect the new values. This revaluation will be undertaken by local authority area on the commissioner of valuation making a valuation order, appointing an officer to undertake the job (s19) to be known as a valuation manager. The valuation order will nominate a date by reference to which all valuations are to be made, and also a date for publication of the list of rateable properties and their values under s23, to be no more than three years after the date of the valuation order. On publication of a new valuation list, it will replace the existing one (s23), and every occupier will receive a certificate of the new rateable value (s24)

No ban on joint advocacy with solicitors, says the Bar

The Bar Council has publicly confirmed for the first time that there is no rule or practice preventing solicitors and barristers acting together as advocates in court proceedings. The admission came before a Dáil Select Committee hearing on the *Court and Courts Officers Bill, 2001* last month.

Both the Bar Council and the Law Society had been invited to attend before the committee to discuss an amendment to the bill proposed by deputy Alan Shatter. The amendment reads: *'For the removal of doubt, a solicitor or solicitors may together with a barrister or barristers appear and act together as advocates in any proceedings'*.

In its submission to the committee, Bar Council chairman Rory Brady said that there were no rules prohibiting joint advocacy by solicitors and barristers and denied that there would be any 'disapproval' of junior counsel if they acted in cases where a solicitor was the lead advocate. Pressed by Shatter to say whether the Bar Council had informed its members of this, Brady replied: 'As far as we're concerned, I've stated the position publicly. I don't intend to write letters to every solicitor around the country. I can't make it any clearer than that'.

The Law Society's representatives, Director General Ken Murphy and President Elma Lynch, told the committee that, while the society did not seek the amendment, it supported it. They said that the society suspected that many barristers and solicitors believed that there was indeed a rule preventing barristers from acting jointly as advocates with solicitors. Lynch added that while the Bar Council seemed to be worried about how precedence would apply between solicitor and barrister advocates, this was 'not a matter of concern' to the Law Society.

Alan Shatter: proposed amendment

'If, in circumstances where a solicitor and barrister are acting jointly as advocates, and it is the solicitor who is more suited in knowledge and ability to act as the lead advocate, then there should be no objection to this occurring in the best interest of the client', said Lynch. 'If the Law Society were to agree today to anything other than this, we would in effect be agreeing with the proposition that a solicitor acting as advocate could never be other than the equivalent of a junior counsel. This is most certainly not the case'.

COMPENSATION FUND PAYOUTS

The following claim amounts were admitted by the Compensation Fund Committee and approved for payment by the Law Society Council at its meetings in February and March 2002: Michael P McMahon, 5/6 Upper O'Connell Street, Dublin 1 – £8,625.33 and £7,534.33.

NEW LAW CENTRE AND REFUGEE SERVICE OFFICE

A new Legal Aid Board office has been opened at 48/49 North Brunswick Street in Dublin 7. The premises will house the Refugee Legal Services and the Dublin law centre that has relocated from Upper Mount Street.

PRIVATE EQUITY CONFERENCE

Inter*Trade*Ireland, the development body set up to facilitate cross-border trade, is running a conference entitled *Private equity: an island and international perspective*. The conference will be held in Belfast on 24 April. For further information, visit the organisation's website at www.intertradeireland.com or call Nicola McGuinness on 028 3083 4154.

- While the revaluation exercise will take place by local authority area, it can be expected that many areas will be revalued at the same time. S25 provides that further revaluations must take place from time to time, between five and ten years from the publication of the last valuation list
- Occupiers are to be given notice of the proposed valuation of their properties three months prior to publication of the valuation list, and may make representations within 28 days to the valuation manager. This consultation period is a welcome innovation and may reduce appeals (s26)
- Part 6 provides for revisions of valuations at the request of occupiers or persons with interest in the property, the rating authority or on the initiative of the commissioner for valuation, and a revision officer must review the valuation within six months
- In order to prevent rate inflation, s56 provides that the total rates collected in any local authority area are to be capped for the first year after the revaluation at the existing level increased by no more than the consumer price index. This will allow some rates to go up, to reflect the new valuations, and some to go down, but the total must remain much the same. After that first year, there is no guarantee of rate levels
- S53 provides for the 'global' (countrywide) valuation of public utilities and for the apportionment of their values between the various local authority areas
- The appeals system continues as before (see part 7). Initially, appeals lie to the commissioner of valuations, and from there to the Valuation Tribunal. Schedule 2 sets out the provisions in relation to the tribunal, the 13 members of which are appointed by the minister for finance. The tribunal sits with three members in private, and all decisions must be reasoned and in writing. Appeals on points of law lie to the High and Supreme Courts (s39). The appellant must indicate the grounds of appeal and the value he considers to be appropriate, based on other comparable properties in the valuation list (s31).

This act is to be welcomed because it will involve a complete revaluation of all rateable properties, which will be updated at least every ten years. The artificiality of very low rateable valuations will be a thing of the past, as will be the need to use factors to reduce the current rateable value of new properties to bring them in line with past valuations (currently 0.63 % for cities and 0.5% elsewhere). The complex law in relation to charities and other public organisations is much simplified, widening the entitlement to relief considerably. The new, simplified system will be easier to work for the Valuation Office, the local authorities, valuers and ratepayers. G

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

EU IMMIGRATION LAW LECTURE

The Irish Society for European Law is holding a public lecture entitled *EU immigration law: recent developments.* The meeting will take place on 25 April at 6.15pm in the European Parliament Office on Dublin's Molesworth Street. The meeting is free and open to the public. For further information, contact Jeanne Dermody on tel: 01 829 0010.

COPYRIGHT ASSOCIATION SEMINAR

The Copyright Association is running an all-day seminar on *The Internet, e-commerce and IPRs: recent developments,* on 30 April at the Industrial Conference Centre, Belfield, Dublin 4. Among other things, the seminar will cover: e-commerce issues and models; infringement in the digital decade; on-line arbitration; and US e-developments. For further information, contact Paul Lambert on tel: 01 644 2074.

Crackdown on smoking in the Four Courts

Smokers who light up in the Four Courts and its associated buildings could face prosecution, the Courts Service, has warned. In a letter to Law Society President Elma Lynch, the head of the Courts Services, PJ Fitzpatrick, says that the Four Courts had to be evacuated on 28 February because a fire alarm was activated, probably as a result of smokers lighting up in the particular area. 'It would

appear almost certain that it was not members of the general public who were smoking in the area', he writes. Describing smoking in public buildings as 'flagrantly in breach of the law', Fitzpatrick adds that the Courts Service has arranged with the relevant authorities to carry out regular inspections and 'we will be asking the relevant authorities to have the offenders prosecuted'.

Tackling conflict management

The International Centre for Dispute Resolution (ICDR) is holding a one-day 'conflict management forum' in Dublin on 29 May. The event will take place in the Davenport Hotel and will discuss trends, topics and issues in international commercial dispute resolution. Among the speakers at the forum will EU Commissioner David Byrne and William Slate, president of the American Arbitration Association. The ICDR Dublin forum aims to bring together international experts 'to communicate and share ideas in order to facilitate continuing global growth and development in the commercial dispute resolution arena'. For more information, contact Mandy Sawier on +353 1 418 2291.

Time to decommission the Special Criminal Court?

In a democratic state, an extraordinary court should be reserved for extraordinary times. Does the year 2002 qualify? asks Pat Igoe

At least, let nobody say that we have a pathetic, sectarian, mono-ethnic and mono-cultural courts system. The continuing quiet existence of the non-jury Special Criminal Court shows how pluralistic, diverse and imaginative we can be.

And yet, there must come a point when we agree that the guns have indeed fallen silent, even if their users have not gone away. As the mortar of the *Good Friday agreement* continues to solidify, and with the gunmen receding into the shadows, have we reached the time to 'stand-down' the Special Criminal Court and to give over its ancient Green Street building to ease the pressures in the other courts?

Almost seven years ago, the then-government announced that it was reviewing the need for the Special Criminal Court. Developments since then in the North, including the Omagh atrocity, brought the short-lived initiative to a standstill. The court remains, despite calls for its abolition by the Irish Council for Civil Liberties and challenges to its constitutionality before the Supreme Court.

In a significant judgment six years ago, presided over by the late Chief Justice Liam Hamilton, the Supreme Court reminded politicians that continuation of the court was a political decision and that the government had a duty to annul the act establishing the court if it was satisfied that it was no longer necessary. The judges also warned that the continuance in force of part V of the *Offences against the State Act, 1939* could not be regarded as being forever beyond the reach of judicial control. The government had a duty to keep the existence of the court under review.

The 'full panoply of security measures' on the way to the Special Criminal Court

But the extent and depth of the government's reported annual review of the court is unclear in the absence of a full and well-briefed annual debate in the Dáil on the 1939 act and its ethos in modern times. Most jurists would argue that emergency legislation with provisions for special courts should be subject to regular promulgation or annulment to accord with passing time and security imperatives. Section 35 provides for this. Has it been used adequately?

Part V of the 1939 act was first brought into effect in the year of its enactment. It then ceased to be in force in 1962, with the number of cases before the court being very few between 1946 and 1962. With the political temperature clearly rising in Northern Ireland in the early 1970s, the legislation was re-proclaimed on 26 May 1972 and the Special Criminal Court (or more precisely *a* Special Criminal Court) was established four days later. This was a time both when the resources of the state were more limited than now and when subversion on this side of the border was a very credible fear.

The court has been with us since then. Since 1990, there have been just over 220 cases, an average of about 20 a year. Many of the cases, especially in the 1990s, had the full panoply of security measures, with motorcycle outriders resembling motorcades up Dame Street to Dublin Castle during EU summits.

Anti-democratic nature

The anti-democratic nature of the court must trouble jurists, politicians and the public alike. And yet, it is unclear whether the lack of insistent and spontaneous questioning of its continuing existence springs from apathy of our times, inertia or simply that lawyers and the public continue to give the government the benefit of the doubt.

The drafters of the 1939 act appreciated its draconian nature. So much so that they provided in the act both that the Dáil could pass a resolution at any time annulling the government's proclamation enabling the court to be established and also that the government itself could proclaim that part V of the act be no longer in force. The legislation also significantly provided that the government could declare that offences which had been brought under the authority of the court would no longer be such scheduled offences.

So, 'whenever the government is satisfied that the effective administration of justice and the preservation of public peace and order' in relation to certain offences can be pursued through the ordinary courts, it could order their return to the ordinary courts. In this way, the act enabled successive governments to both increase and reduce the ambit of the Special Criminal Court.

The remit of the three-judge court spans the criminal code, ranging from the *Malicious Damage Act* of 1861 to the *Explosive Substances Act* of 1883 and the *Conspiracy and Protection of Property Act* of 1875. The list can be increased or reduced at will by the government, being directed in reality by just two people – the taoiseach and the minister for justice. Their view must consider the adequacy of the ordinary courts to secure justice and preserve public order.

The Special Criminal Court has a unique place in Irish jurisprudence and in Irish history – ranging from being lauded for its role in preserving the state and the population from subversive attack to its being an excessively large blot on the Irish legal landscape.

In a democratic state, an extraordinary court should be preserved for extraordinary times. Does the year 2002 qualify? G

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

Court confirms core values of legal profession

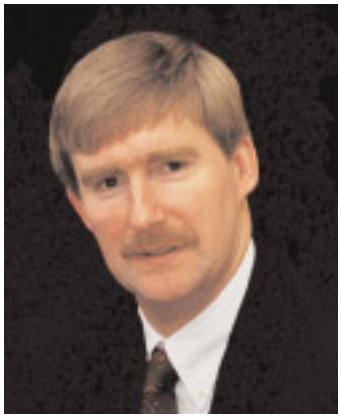
Ken Murphy argues that the recent *NOVA* decision by the European Court of Justice on multi-disciplinary partnerships between accountancy firms and law firms identifies and vindicates the legal profession's core values

In a recent landmark decision, the European Court of Justice held that a ban on multi-disciplinary partnerships (MDPs) between lawyers and accountants was legal, even though it was anti-competitive (see *Gazette*, last issue, page 3). The Dutch bar's ban was justified because of the different requirements of professional conduct between the two professions.

The judgment is a major setback for the accountancy firms involved in the case, Arthur Andersen (the auditors of the failed US energy trading giant Enron) and rivals PricewaterhouseCoopers. Other members of the 'big five' accountancy firms have also sought to create tie-ups with law firms in countries around the world. They may now have to look again at how their arrangements with law firms operate in various EU member states.

The court endorsed The Netherlands bar's rules setting out the essential duties for the proper practice of the legal profession, namely 'the duty to act for clients in complete independence and in their sole interest, the duty to avoid all risk of conflict of interest and the duty to observe strict professional secrecy'. It also found that 'by contrast, the profession of accountant is not subject, in general, and more particularly in The Netherlands, to comparable requirements of professional conduct'.

Another issue identified by the court – not a new issue for the accountancy profession but



Ken Murphy: 'MDPs involving solicitors and accountants would be contrary to the public interest'

one which has been brought into sharp focus by the Enron debacle – is the potential for conflict of interest. As the court delicately put it, 'the concurrent pursuit of the activities of statutory auditor and of adviser, in particular legal adviser, also raises questions within the accountancy profession itself'. The potential for conflict of interest outweighed any ostensible economic advantage in the availability of a 'one-stop shop'.

This judgment from the Luxembourg-based court has been welcomed by members of the legal profession throughout the EU and beyond. The Law Society of Ireland views it as a vindication of its long-held view that MDPs involving solicitors and accountants would be contrary to the public interest.

But how is it that something which the court acknowledges is anti-competitive is nevertheless approved by it? It is because the court saw the overall objective of the Dutch ban on MDPs as being 'to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience'. In particular, the court approved of the requirement that lawyers 'should be in a situation of independence vis-à-vis the public authorities, other operators and third parties, by whom they must never be influenced'.

This concept of the independence of the legal profession is the key. In essence, if there were no independent legal profession, there could be no independent judiciary. If there were no independent judiciary, there could be no rule of law. If there were no rule of law, there could be no justice, democracy or freedom. The fundamental rights of every citizen depend on the existence of an independent legal profession.

'The fundamental rights of every citizen depend on the existence of an independent legal profession'

Accordingly, this decision by the Court of Justice should not be seen as a victory for lawyers over accountants. It is a victory for the fundamental freedoms of all citizens.

A breach of the competition law principles of the *Treaty of Rome*, on which principles Irish competition law is also based, is not illegal if it can be justified. In this case, the ultimate authority on such matters, the European Court of Justice, has found the necessary justification to exist. The objective of the statutory prohibition on fee sharing by solicitors in Ireland – which effectively prohibits MDPs in this jurisdiction – is compatible with the underlying principles of EU and Irish competition law.

Even beyond the borders of the EU, in other countries such as the United States where lawyer involvement in MDPs is also prohibited in the public interest, encouragement will be taken from this hugely significant judgment.

Irish solicitors recognise the benefits of competition. Intense internal and external competition is a daily reality for practising solicitors. What this case illustrated, however, is that there can be more fundamental principles at stake which can justify a rule that infringes competition. This judgment has confirmed the special value to all citizens of the legal profession's independence, confidentiality and avoidance of conflicts of interest. G

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

Letters

Lack of judges: could arbitration be the answer?

From: Anthony Hussey, Hussey Fraser, Solicitors, Dublin

I read with interest the director general's article in the March issue of the *Gazette* (page 9), bemoaning the lack of judges available to hear cases in the High Court. It seems to me that this has reached a sufficient crisis point that solicitors embarking on litigation should at least consider the possibility of resolving any dispute through arbitration.

Apart from personal injury actions in the High Court, it would appear that the chances of a case listed for hearing being actually heard on the day is no better than 50/50 because of the lack of available judges. It is not unusual for the same case to be listed twice without being heard, and the only difference between having a case specially fixed for hearing and otherwise fixed for hearing is that in the case of the latter the presiding judge is sorry that he does not have a judge available, whereas in the case of the former he is very sorry.

Of my two most recent cases in the High Court, one was specially fixed and the other was not. The specially fixed case involved a number of witnesses travelling to court from outside Europe. There was no judge available at the 11am call-over. Fortunately, a judge became available at approximately 3.30pm. Had the case at hearing lasted until 4pm, we would have been put back into the list to fix dates with no guarantee of being heard on the next occasion either. The other case had been listed for hearing twice, but was not reached on either occasion, although it was top of the list on the second occasion. It was heard on the third occasion.

I would suggest that solicitors should give careful consideration, particularly in cases involving witnesses travelling from abroad, to referring disputes to arbitration. Even if the case has commenced in court and has been fully pleaded, there is no reason why it should not be referred at that stage to arbitration. The parties can agree that all the pleadings in the High Court action will constitute the pleadings in the arbitration and go straight to hearing. Even if one is not otherwise convinced of the virtues of arbitration over court litigation, it is suggested that clients should at least be made aware of the problems which may be encountered and of the availability of this alternative route. G

DUMB AND DUMBER

Jodee Berry, of Panama City, Florida, sits with her toy Yoda at her lawyer's office. Berry, a former Hooters waitress, has sued the restaurant where she worked saying she was promised a new Toyota for winning a beer sales contest in April. Berry, 26, believed that she had won a new car, but she was blindfolded, led to the parking lot and presented a toy Yoda, the little green guy from Star Wars.

The world has seen many changes since the last *Data Protection Act* was passed in 1988. Technology has become all-pervasive and personal information about every one of us is stored somewhere on someone's database. Denis Kelleher outlines how the long-anticipated *Data Protection (Amendment) Bill, 2002* will affect our right to know what others know about us

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MAIN POINTS

- ***Data Protection (Amendment) Bill* extends scope of protection to paper-based files**
- **Gives new rights to individuals while imposing new duties on data controllers**
- **Creates a general duty to register, with limited exceptions**

The *Data Protection (Amendment) Bill, 2002* was introduced in the Oireachtas in February. The new bill, which will implement the *Data protection directive* that should have been in force by the end of October 1998, will change Irish law in a number of different ways.

One of the key changes in the new bill is that it will now apply to 'manual data'. This is defined as 'information that is recorded as part of a relevant filing system' where a relevant filing system is defined as 'any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operation automatically in response to instructions given for that purpose, the set is structured either by reference to individuals or by reference to criteria relating to individuals'. What this means is that information which is stored in a paper-based filing system will be subject to data protection law. So it will no longer be possible to circumvent the *Data Protection Act, 1988* by holding information in a paper system. Concerns about such circumvention are one reason why this provision was introduced.

The bill should also mean that data protection will apply to audio-visual data, such as that derived from CCTV systems. This is not explicitly stated in the bill, but it does provide that 'a word or expression that is used in this act and also in the directive has ... the same meaning in this act as it has in the directive', and the directive makes it clear that its provisions extend to 'sound and image data'. However, the directive will only apply to such processing 'if it is automated or if the data processed are contained or are intended to be contained in a filing system structured according to specific criteria relating to individuals, so as to permit easy access to the personal data in question'. The advent of cheap digital recording facilities may mean that this provision will have considerable application to technologies such as the CCTV cameras that are increasingly used in Irish town centres.

If visual images are in a digital format, they can be processed. There are a number of software

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packages that can search through a stream of digital images and identify known individuals. Packages such as this are being touted as a solution to American security worries in the aftermath of 11 September and are already being used successfully. One example is the Trump Marina casino in Atlantic City, which uses facial recognition software to continually scan every face in the casino and match them with a database of over 9,000 individuals. Within days of its installation, the cameras identified a group of six baccarat cheaters who had previously been arrested in California and they have identified hundreds of 'undesirables' since then (*Fortune*, 29 October 2001). The use of systems such as this in Ireland would raise

'The giving of references is becoming controversial and some employers are beginning to refuse to give them at all, while others simply confirm the bare details that a named individual worked for them between certain dates'

obvious concerns about the right to privacy and perhaps other rights, such as those provided by the *Equal Status Act, 2000*.

New rights for individuals

The bill will give individuals (who in the jargon of the bill are termed 'data subjects') a right to object to processing if it would cause them substantial and unwarranted damage or distress. There are exceptions to this, such as where the 'subject' has given his consent or where processing is carried out by a political party in the course of electoral activities. Where a decision will significantly affect a subject, such as a decision about their performance at work, creditworthiness, reliability or conduct, then it may not be based solely on data processing by automatic means. Again there are exceptions, most notably where the subject consents.

Consent is an important issue in data protection law: the directive defines consent as 'any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed'. This means that a subject will have to indicate that he is happy to see his data processed; it is doubtful whether asking a subject to indicate if he objects to having his data processed would be sufficient. The bill also provides that subjects must be given certain information about how their data is to be processed, if that processing is to be done fairly.

The right of access is also revised and extended, and the bill takes steps to ensure that this right is not abused. One form of abuse is to force employees to access medical or other records and hand them over to the employer. The bill provides that employees or prospective employees cannot be required to request access to their personal data or to supply their employer with the results of an access request. Breach of this provision will be an offence.

The use of the right of access may cause other problems for employers, too. The bill provides that where personal data consists of an expression of opinion about the subject by another person, the data may be disclosed to the subject without the consent of that other person. References and other 'expressions of opinion' are open to review in a variety of ways. The most obvious of these is an action for defamation, but such an expression could also be grounds for complaint under the *Employment Equality Act, 1998* or a prosecution under the *Prohibition of Incitement to Hatred Act, 1989*.

The giving of references is becoming controversial and some employers are beginning to refuse to give them at all, while others simply confirm the bare details that a named individual worked for them between certain dates.

New duties for businesses

The principles of data protection are repeated (and amended) in the *Data Protection Bill, 2002*. A major change is that, in addition to these, controllers will

also have to pay attention to the criteria for making data processing legitimate. These criteria provide that data may only be processed where:

- The subject has given his explicit consent
- The processing is necessary for the performance of a contract to which the subject is party
- It is necessary in order to take steps at the request of the subject prior to entering into a contract
- It is necessary to prevent injury, loss or damage being caused to the data subject, where seeking the consent of the subject would damage those interests
- It is necessary for the administration of justice, the performance of a statutory or ministerial function, or a public nature function in the public interest, or
- It is necessary in the legitimate interests of the controller, except where the processing is unwarranted by reason of the prejudice to the rights and freedoms of the subject.

The criteria for legitimate processing have to be read in addition to and in conjunction with the principles of data protection.

Some provisions of the bill will become law on 1 April 2002, pursuant to the *European Union (Data Protection) Regulations 2001* (SI 626/2001). One relates to the securing of personal data: controllers are under a duty to keep data secure but the regulations provide that, in determining the security measures which they will use, they can have regard to the state of technological development, the harm which might result from the unauthorised or unlawful use of the data and the nature of the data concerned. A controller must brief his staff about these security measures and must ensure that sub-contractors are placed under a contractual duty to maintain the security of the data.

One significant change in the bill is that it increases the number of individuals and companies that will have to register to include all data controllers and data processors, except those who are specifically exempted under the legislation. There are exceptions to this, such as keepers of public registers, processors of manual data, or non-profit clubs and societies who maintain membership lists.

The form in which registration must be made is also changed. If a controller keeps data for two or more unrelated purposes, he must apply for registration separately in respect of each of them. Other significant changes are made to the manner in which a controller can process sensitive personal data. The bill also contains a limited exemption for processing that is done for journalistic, artistic or literary purposes.

Data protection commissioner

The position of the data protection commissioner will also change under the bill. Some of these changes are subtle: his report will be absolutely privileged for the purposes of the law of defamation and he and his staff will be placed under a duty of confidentiality, breach of which will be a criminal offence. Other changes are more dramatic.

The commissioner may be required to engage in 'prior checking', that is, controllers or processors may apply to the commissioner for an assessment of whether or not their processing complies with the *Data Protection Act, 1988*. The commissioner must then reply within 90 days, stating whether or not the processing is likely to comply, although this period can be extended. The right to prior checking is not automatic: the commissioner has to undertake this only where the processing is of a kind likely to cause substantial damage or distress to data subjects. But if the processing is of this kind, it cannot be carried on unless the processing operation is registered or the controller or processor has applied to the commissioner for prior checking in respect of it. Breach of this provision will be a criminal offence.

The powers of the commissioner will also change in relation to cross-border information exchange. The bill provides that data cannot be transferred to a country outside the European Economic Area, unless that country provides an adequate level of data protection. The bill sets out a list of criteria which may be used in assessing the circumstances in which the data is being transferred, but in time this function will be transferred to the EU. If a community finding has been made that a country such as Hungary or Switzerland has adequate levels of data protection, then that finding will be binding.

The *Data Protection Bill, 2002* also sets out a host of situations where this prohibition will not apply, including situations where the transfer is required by an Irish statute or international treaty, the subject has given his or her consent, the transfer is necessary for the performance of a contract between the subject and controller or the transfer is necessary for the purposes of getting legal advice. Although the commissioner still has the right to prohibit a transfer, these exceptions may effectively limit the commissioner's power to do so. The changes in relation to cross-border data flows are to take effect from 1 April 2002.

A brave new world?

Many political, social, economic and technological changes have taken place since 1988. New technologies such as the Internet have all had a significant impact on data protection laws – the harvesting of European personal data by US websites was one spur to the EU developing its 'safe harbour principles' with the USA, which are supposed to regulate the use of European data by US-based firms.

One of the most significant changes may be the boom in technology spending over the last few years. This means that information technology is now pervasive, from government departments to commercial organisations. As a result, the requirements of data protection have to interact with many other items of legislation. For example, section 2(1)(c)(iv) provides that data 'shall not be kept for longer than is necessary'. The precise assessment of how long it is necessary to keep data may prove difficult. The *Directive on the processing of personal data in the telecommunications sector* (directive 97/66/EC) states that details of subscriber billing may only be retained up until the end of the period within which the bill may be challenged. It has become clear that mobile phone networks were storing billing data for up to six years, stating that they were required to do so under other legislation, such as the *Statute of Limitations*.

It may be that further regulations will be required to reconcile conflicting provisions such as these. G

Denis Kelleher is a barrister and the co-author, with Karen Murray BL, of Information technology law in Ireland, *published by Butterworths.*

The *European convention on human rights* will eventually become law in Ireland. But if it's enacted in the way the government proposes, this significant addition to our law will have little practical effect, argues John Moher

One step
TWO STEPS

The *European convention for the protection of human rights and fundamental freedoms* is an international treaty devised by the Council of Europe that gives effect to some of the rights expressed in the 1948 United Nations *Universal declaration of human rights*. As such, the origins of the convention lie in the international response to the crimes against humanity perpetrated before and during the Second World War.

The convention protects fundamental civil and political rights such as the right to life (article 2), the right to freedom from torture and inhuman or degrading treatment or punishment (article 3), the right to liberty (article 5), the right to respect for private and family life, home and correspondence (article 8) and the right to freedom of expression (article 10). Further rights, including certain social and cultural rights (such as property, educational and electoral rights) were subsequently introduced by four operational protocols to the convention.

The convention was signed by the Irish minister for external affairs on 4 November 1950 and became binding on the state (but not *within* the state) on 3 September 1953.

The rights protected by the convention have been, and still are, unenforceable in Irish courts. Contracting states, and the citizens of such states accorded the right of petition (such as Irish citizens), can lodge complaints against (other) contracting states with the European Court of Human Rights in Strasbourg. But all domestic legal avenues must be exhausted before a complaint can be brought by a citizen to the court. The purpose of the *European Convention on Human Rights Bill, 2001*, when enacted, is to transpose the convention into Irish law, thereby enabling breaches of its provisions to be litigated in Irish courts.

Background to the bill

Ireland is the only member state of the Council of Europe which has yet to incorporate the convention into its domestic law, a state of affairs which the bill seeks to rectify. Further impetus for incorporating the convention was provided by the *Good Friday agreement*, in which the government committed itself to strengthening the constitutional protection of human rights in the state and, in so doing, to draw on the convention. In addition, the agreement obliges the state to establish a level of human rights protection which is at least equivalent to that in Northern Ireland.

In 1996, the Constitution Review Group considered the question of whether the convention should be incorporated into Irish law. The group believed that the outright replacement of existing fundamental rights provisions in the constitution by the convention would lead to the diminution of some individual rights (for example, personal liberty in article 40.4) which are more extensively protected by the provisions of the constitution than under the equivalent provisions of the convention. In the review group's opinion, incorporation by direct replacement would also mean 'jettisoning almost 60

MAIN POINTS

- Background to the *European convention on human rights*
- The *European Convention on Human Rights Bill, 2001*
- Influential Irish cases before the European Court of Human Rights

FORWARD BACK?

One of a long line of important Irish cases decided by the European Court of Human Rights: in 1992, it held that restrictions on the dissemination of information breached article 10 of the convention

years of well-established and sophisticated case law'.

The review group recommended that the existing fundamental rights provisions of the constitution be built upon and improved by liberally drawing on the convention text where necessary. The group concluded that the text of the convention (and other international human rights conventions) should be used where:

- The right in question is not expressly protected by the constitution
- The standard of protection of the right in question is superior to that guaranteed by the constitution, or
- The wording of a clause of the constitution protecting such a right might be improved.

The government did not adopt the recommendations of the review group. Instead, it followed the example set in the UK by the *Human Rights Act 1998* and opted for the 'interpretative model' of incorporation. This method of incorporation is explained by section 2(1) of the bill, which provides that: 'In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the state's obligations under the convention provisions'.

Section 2(2) of the bill provides that this rule of interpretation is to apply to all statutory provisions or rules of law in force immediately before the passing of the bill, and to all provisions and rules of law introduced after the enactment of the bill.

Declarations of incompatibility

Section 5(1) of the bill provides that in any proceedings, the High Court, or the Supreme Court on appeal, may, where no other legal remedy is adequate and available, declare a statutory provision or rule of law to be incompatible with the state's obligations under the convention.

These provisions are set to be deprived of any real effect, however, by section 5(2)(a) of the bill, which provides that a declaration of incompatibility

IMPORTANT IRISH CASES AT THE EUROPEAN COURT OF HUMAN RIGHTS

Decisions of the court in certain cases brought against the state have had a notable effect on the development of fundamental rights in Irish law.

- In the case of *Airey v Ireland* (application number 00006289/73, 9 October 1979), the applicant claimed that because legal aid was not available to her for the purpose of bringing separation proceedings, she was denied effective access to court in violation of article 6(1) of the convention. Article 6(1) states that in the determination of civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The parties ultimately reached a settlement, which was approved by the court. The following year, the Irish government introduced a non-statutory scheme of civil legal aid which, 15 years later, was replaced by the *Civil Legal Aid Act, 1995*.
- In the case of *Johnston and others v Ireland* (no 00009697/82, 18 December 1986), the applicants complained, among other things, of the unequal treatment under Irish law of children born outside marriage as compared to children born to married parents. The court found that the normal development of family ties between the natural parents and their daughter requires that the child should be placed, legally and socially, in a position akin to that of a child born to married parents. The court held that there had been a breach of article 8 of the convention in that the legal regime concerning the status of children under Irish law failed to respect the family life of the natural parents and their child. The government subsequently introduced the *Status of Children Act, 1987*, which sought to abolish the legal status of illegitimacy.
- In *Norris v Ireland* (no 00010581/83, 26 October 1988), the applicant challenged provisions of the *Offences against the Person Act 1861* and the *Criminal Law Amendment Act 1885*, which criminalised private homosexual acts between consenting adults. The court rejected the Irish government's argument that such provisions were necessary for the protection of 'health and morals', and found that the impugned legislation interfered with Mr Norris's right to respect for his private life under article 8.1 of the convention. Five years after this decision, the *Criminal Law (Sexual Offences) Act, 1993*, which decriminalised homosexual activity, was implemented.
- In *Open Door Counselling and Dublin Well Woman v Ireland* (no 00014234/88, 29 October 1992), the applicants challenged a Supreme Court injunction which restrained the dissemination of information to pregnant women concerning abortion facilities outside Ireland. The court held that the state did not have an unfettered or unreviewable discretion in the field of morals. It noted the absolute nature of the injunction, which imposed a perpetual restraint on the provision of information to pregnant women concerning abortion facilities abroad, regardless of age or state of health or their reasons for seeking counselling on the termination of pregnancy. The court concluded that the restraint imposed on the applicants from receiving or imparting information was disproportionate to the aims pursued and that, accordingly, there had been a breach of article 10 of the convention (which protects the right to freedom of expression).

  Shortly after this decision, and that of the Supreme Court in the *X Case*, the 14th amendment to the constitution, permitting the provision of information on services lawfully available in other states, was enacted.
- In *Keegan v Ireland* (no 00016969/90, 29 May 1994), the court agreed with the applicant's argument that the lack of any need in law for his consent as a natural father for the adoption of his child, and the related lack of access to court, constituted violations of articles 6 and 8 of the convention (protecting the right to a fair hearing and the right to respect for private and family life). Mr Keegan was awarded damages and costs. Four years later, with the passing of the *Adoption Act, 1998*, consultation procedures for natural fathers in the adoption process were introduced.

shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in question. So, for example, a statutory provision upon which civil or criminal proceedings have been instituted would remain in force, and such proceedings could continue, despite a finding by the High Court or Supreme Court that the statutory provision contravenes the convention.

The injustices that could flow from section 5(2)(a) of the bill can be easily imagined. Suppose, for example, that David Norris had not embarked on the long road to Strasbourg when he did (**see panel**), but instead brought his challenge under the bill when enacted. The High Court or Supreme Court would presumably declare the impugned statutory provisions to be incompatible with the state's obligations under the convention, but the provisions would remain in place and could conceivably have grounded future criminal prosecutions.

And what of a modern day Joseph Keegan, challenging the absence of any provision in law for his consent as a natural father regarding the adoption of his child (supposing, again, that the original challenge and subsequent change in the law did not occur)? The bill provides for declarations of incompatibility regarding existing statutory provisions and rules of law, but not their absence. Assuming this hurdle could be overcome, Mr Keegan would have been faced with the prospect of the courts agreeing with his complaint, but being powerless to make any real difference. Would anyone have suggested that his exclusion from the adoption process of his child could be remedied by a declaration and nothing more?

These are more than mere examples of how previous successful litigants before the court may have fared under the regime proposed under the bill. They also serve to illustrate how the proposed new law, when invoked, is in many cases likely to make little or no real difference to those whose convention rights have been infringed.

No entitlement to damages

To compound matters, it is intended that the High Court shall not award damages for injury, loss or damage suffered as a result of the incompatible law in question.

Section 5(4) of the bill provides that where '(a) a declaration of incompatibility is made, (b) a party to the proceedings concerned makes an application in writing to the attorney general for compensation in respect of an injury or loss or damage suffered by him or her as a result of the incompatibility concerned, and (c) the government, in their discretion, consider that it may be appropriate to make an *ex gratia* payment of compensation to that party ("a payment"), the government **may** request an adviser appointed by them to advise them as to the amount of such compensation (**if any**) and may, in their discretion, make a payment of the amount aforesaid or of such other amount as they consider

appropriate in the circumstances' (emphasis added).

The attorney general has explained the proposed lack of any entitlement to damages for loss or injury arising from a law which is incompatible with the convention, but which is constitutional, as follows: 'If legislation is *intra vires* the Oireachtas under our constitution, and if it authorises or mandates a particular action or omission in respect of a citizen, it seems on the face of it to be unconstitutional to create a jurisdiction for the courts to penalise such lawful act or omission by damages as though it were unlawful'.

In other words, if the law that breaches the convention does not breach the constitution, the courts cannot award damages. This problem would have been avoided by the incorporation of the convention in the way proposed by the Constitution Review Group: convention rights would have been brought within the constitutional framework where desirable, thus helping to ensure that laws which breach the convention would also be unconstitutional and that, as a consequence, damages for loss or injury arising from such laws could be provided.

Furthermore, Mr Justice Donal Barrington, the chairman of the Human Rights Commission and a former judge of the Supreme Court, has queried the constitutionality of legislation that creates rights but prohibits the courts from awarding compensation for breaches of those rights.

The constitutional requirement that justice be administered in courts (article 34.1) may be relevant to any review of, or challenge to, the bill for creating justiciable rights, but providing that breaches of those rights can only be compensated by the executive. Furthermore, an act of the Oireachtas purporting to confer on the High Court such a circumscribed jurisdiction could raise questions as to its compatibility with article 34.3.1 of the constitution, which confers on the High Court full original jurisdiction in all matters.

Just satisfaction

Section 5(5) of the bill provides that, in advising the government on the amount of compensation that might be appropriate, the adviser shall take appropriate account of the principles and practice applied by the court in affording 'just satisfaction' under article 41 of the convention.

Article 41 of the convention states that 'if the court finds that there has been a violation of the convention or the protocols thereto, and if the internal law of the high contracting party concerned allows only partial reparation to be made, the court shall, if necessary, afford just satisfaction to the injured party'.

While 'just satisfaction' can take the form of monetary compensation for pecuniary and non-pecuniary damage and costs and expenses, few clear principles governing the award of damages by the court exist. Several reasons have been advanced for this. For example, the court does not apply a strict doctrine of precedent, but tends to assess damages on an equitable case-by-case basis. In addition, rules or methods governing the assessment of damages vary between member states of the Council of Europe.

Would previous successful litigants before the ECHR, such as David Norris, fare as well under the proposed new regime?

For example, Irish and English rules based on causation and foreseeability can contrast with the application by French and Belgian courts of considerations of fairness.

The court does, however, apply the principle of *restitutio in integrum* (restoration to the original position) when awarding compensation and, to this extent at least, the court's assessment of damages can be said to resemble that of Irish courts.

In many cases, however, the court rules that the finding of a violation of the convention in itself (without compensation) constitutes just satisfaction. It may be interesting to see the extent to which the attorney general is advised (and decides) that a declaration of incompatibility by the courts in itself is reward enough, or just satisfaction, for the individual whose rights have been breached.

Still a last resort?

Section 3 of the bill provides for the recovery of damages for injury, loss or damage caused by the failure of an 'organ of the state' to conform with its obligations under the convention. Excluded from the definition of 'organ of the state', however, are the courts, the Oireachtas, Oireachtas committees and the president. Significantly, under the UK *Human Rights Act 1998* courts are included in the definition of the 'public authorities' which are required to comply with the convention.

The fact that loss or injury caused by breaches of the convention by UK courts can be compensated, but that such loss or injury caused by Irish courts will not, begs the question as to whether the state, in enacting the bill, will be in breach of the *Good*

Department of
Enterprise, Trade
and Employment

COMPANY LAW REVIEW GROUP
WORK PROGRAMME 2002-2003

The Company Law Review Group has been established under the Company Law Enforcement Act 2001 to advise the Minister for Enterprise Trade and Employment on reform and review of company law. The Review Group is chaired by Thomas B Courtney, solicitor. The Review Group is seeking submissions from interested parties for its second two-yearly work programme 2002 - 2003. Submissions received will be used to assist the Review Group's consideration of the issues listed below. The Review Group will produce by end-2003 a report with recommendations on the future content and structure of company law in Ireland on these issues.

1. Shares and share capital
2. Winding up of companies
3. Charges and security
4. Company management regulations (Table A)

Explanatory note: In its First Report the Review Group concluded that the provisions of Table A relating to internal corporate governance should be set out in the main statute. The Group's First Report details in Chapter 4 the approach proposed towards specific Table A Regulations. Work has begun on the translation of the recommendations in the first report into legislative proposals. In its second work programme the Review Group will consider those Regulations in Table A not dealt with in its First Report, with the intention of either migrating them to the main statute or repealing them.

5. Liquidators and liquidation service

Explanatory note: The Review Group will consider how Ireland can ensure that liquidators are appointed for the proper winding up of all insolvent companies; and in this context whether Ireland should have a State-funded public interest liquidation service.

6. Proposed EU developments in company law
7. Accounting and audit

We welcome receipt of submissions in electronic form. These can be submitted on-line at www.clrg.org They may also be emailed to clrg@entemp.ie

Submissions by post should be sent to:

PAT NOLAN, Secretary
Company Law Review Group
Earlsfort Centre
Hatch Street Lower.
Dublin 2

Information on the Review Group is available on our website: www.clrg.org.

The First Report of the Review Group was published on 28 February 2002. It can be downloaded from our website www.clrg.org and from the website of the Department of Enterprise, Trade and Employment www.entemp.ie. The First Report can be purchased from the Government Publications Sale Office, Molesworth St., Dublin 2 for _20 per copy.

Friday agreement for failing to ensure a level of human rights protection equivalent to that in Northern Ireland.

Even if an 'organ of the state' breaches a convention right, the injured party may encounter significant difficulties in recovering compensation under section 3 of the bill (when enacted). Section 3(2) of the bill provides that a person who has suffered injury, loss or damage as a result of the failure of an 'organ of the state' to conform with its obligations under the convention, 'may, **if no other remedy in damages is available**, institute proceedings to recover damages in respect of the contravention' (emphasis added).

At face value, this provision implies that where another remedy in damages might exist, this must be pursued before damages for breach of convention rights can be sought. In other words, a claimant could not plead breach of his convention rights in the alternative to other grounds. As such, the very difficulty that the bill is supposed to remedy, namely the necessity that all other remedies be exhausted before damages can be sought under the convention, is expressly perpetuated by the bill itself.

What if it is unclear as to whether a 'non-convention' ground will provide a remedy in damages? Is the claimant still required to sue on this other ground, and run the risk of losing and incurring costs, before suing under section 3? Or must he seek the assistance of the courts by looking for an appropriate declaration in cases of doubt? If the claimant must go to such lengths (as a literal interpretation of section 3(2) suggests), it might have made little difference to him had the legislature not taken the trouble to introduce the bill in the first place.

The apparent reluctance on the part of the government to allow citizens to rely on the convention in Irish courts is underscored by section 3(5)(a) of the bill, which provides that proceedings for breaches of the convention by an 'organ of the state' must be brought within one year of the breach. In other words, and attributing to the provisions of section 3 their ordinary meaning, before suing for damages under section 3, the injured party must, within one year, exhaust all other potential remedies in damages without success!

Under section 3(5)(b), the one-year limitation period may be extended by court order if it is appropriate to do so 'in the interests of justice'. Why not prevent a host of applications for such extensions, and the ensuing hardship and uncertainty for claimants, by simply allowing the convention to be pleaded in the alternative to other heads of law?

In the UK, plaintiffs suing under the *Human Rights Act 1998* are not precluded from pleading the convention in the alternative to other grounds. This difference between the bill and the UK act once again raises the question as to whether a level of human rights protection equivalent to that in Northern Ireland will exist here when the bill is enacted, and, as such, whether the state would be in breach of the *Good Friday agreement* in passing the bill as it stands.

The UK case of *Marcic v Thames Water Utilities Limited* (Technology and Construction Court, 14 May 2001) illustrates the importance, were illustration needed, of allowing the convention to be pleaded in the alternative to other grounds. The plaintiff's property was flooded repeatedly over nine years by water from the defendant's sewerage system. The plaintiff sought damages and an injunction on various grounds, including common-law nuisance, negligence, breach of statutory duty and contravention of the UK *Human Rights Act 1998*.

The court found that the defendant was not liable in nuisance, and that its failure to carry out remedial works to the sewerage system did not amount to negligence or a breach of statutory duty. The court held, however, that failure to carry out the works was a contravention of the claimant's right to respect for private and family life under article 8 of the act (which implements article 8 of the convention), and his right to peaceful enjoyment of property and possessions under article 1, first protocol, of the act (which implements article 1, first protocol, of the convention).

Were the same case to be tried here, the plaintiff would either have to sue on common law and 'non-convention' statutory and other grounds (perhaps also to no avail) before suing under the bill when enacted, to seek a declaration to the effect that such other grounds would be inadequate, or to sue under the bill (when enacted) in the first instance and try to overcome a strong argument from the defendant that he has failed to exhaust all other remedies in damages.

The bill, if enacted as it stands, would permit the continued operation of laws that infringe the convention, prohibit the courts from awarding damages in respect of 'incompatible' laws, and prohibit reliance on convention rights in the alternative to other grounds when seeking damages for convention breaches by 'organs of the state'. These features of the bill appear to be based on an assumption that adequate fundamental rights protection already exists in Ireland, but that the convention has to be seen to be incorporated into Irish law nonetheless.

While strong fundamental rights protection exists in certain areas, thanks largely to judicial activism of past years, clearly it would be wrong to assume that any framework for the protection of human rights is ever complete. Just ask David Norris. G

John Moher is a solicitor in the commercial litigation and dispute resolution department of Dublin law firm Matheson Ormsby Prentice.

'If the claimant must go to such lengths, it might have made little difference to him had the legislature not taken the trouble to introduce the bill in the first place'

A game of hi

Anyone working for the director of public prosecutions needs to have a touch of the gambler in them: they need to know when to hold them and know when to fold them. Recently, the DPP's office issued new guidelines that aim to make its prosecution decisions a little more transparent. Dr Eamonn Hall puts on his poker face and raises some issues

MAIN POINTS

- The general duties of a prosecuting lawyer
- Evaluating the strength and admissibility of the evidence
- Mitigating factors that reduce the possibility of a prosecution

The primary duty of a lawyer in charge of prosecutions is not to convict, but to ensure that justice is done. 'Justice' is referred to in the preamble of the constitution in the context of seeking to promote the common good so that the dignity and freedom of the individual may be assured and true social order attained.

In October 2001, James Hamilton, the director of public prosecutions, published a *Statement of general guidelines for prosecutors*. It sets out the principles which should guide the initiation and conduct of prosecutions in Ireland. The document was intended to give general guidelines to prosecutors so that a fair, reasoned and consistent policy underlies the prosecution function. The guidelines are of considerable significance. Although not issued on foot of any statutory duty or power, they represent the collective wisdom of the current director of public prosecutions and his office and of his predecessor, Eamonn Barnes. This article will concentrate on one aspect of the guidelines, the decision whether or not to prosecute.

Under article 30 of the constitution and the *Prosecution of Offences Act, 1974*, all crimes and offences, other than those prosecuted in a court of summary jurisdiction, are brought in the name of the People and at the suit of the director of public prosecutions, except for a limited number of offences which are still prosecuted at the suit of the attorney general. In the context of indictable offences brought at the suit of the DPP, the decision to prosecute or not is taken by the DPP personally or by an officer of the DPP who is authorised to take such a decision.

The public interest

A fundamental consideration when deciding whether to prosecute is whether to do so is in the public interest. The guidelines specify that a prosecution should be initiated or continued, subject to the available evidence disclosing a *prima facie* case, if it is in the public interest and not otherwise.

The guidelines provide that there is a clear public interest in ensuring that crime is prosecuted and that the wrongdoer is convicted and punished. It follows that it would generally be in the public interest to prosecute a case where there is sufficient evidence to justify doing so, unless there is some countervailing public interest reason not to. The guidelines state that the prosecutor approaches each case first by asking whether the evidence is sufficiently strong to justify prosecuting. If the answer to that question is 'no', then a prosecution will not be pursued. If the answer is 'yes', then before deciding to prosecute, the prosecutor will ask whether the public interest favours a prosecution or if there is any public interest reason not to prosecute.

In the context of whether to prosecute or not, much depends on the duty of the prosecutor. The new guidelines explain what these are (**see panel, page 19**).

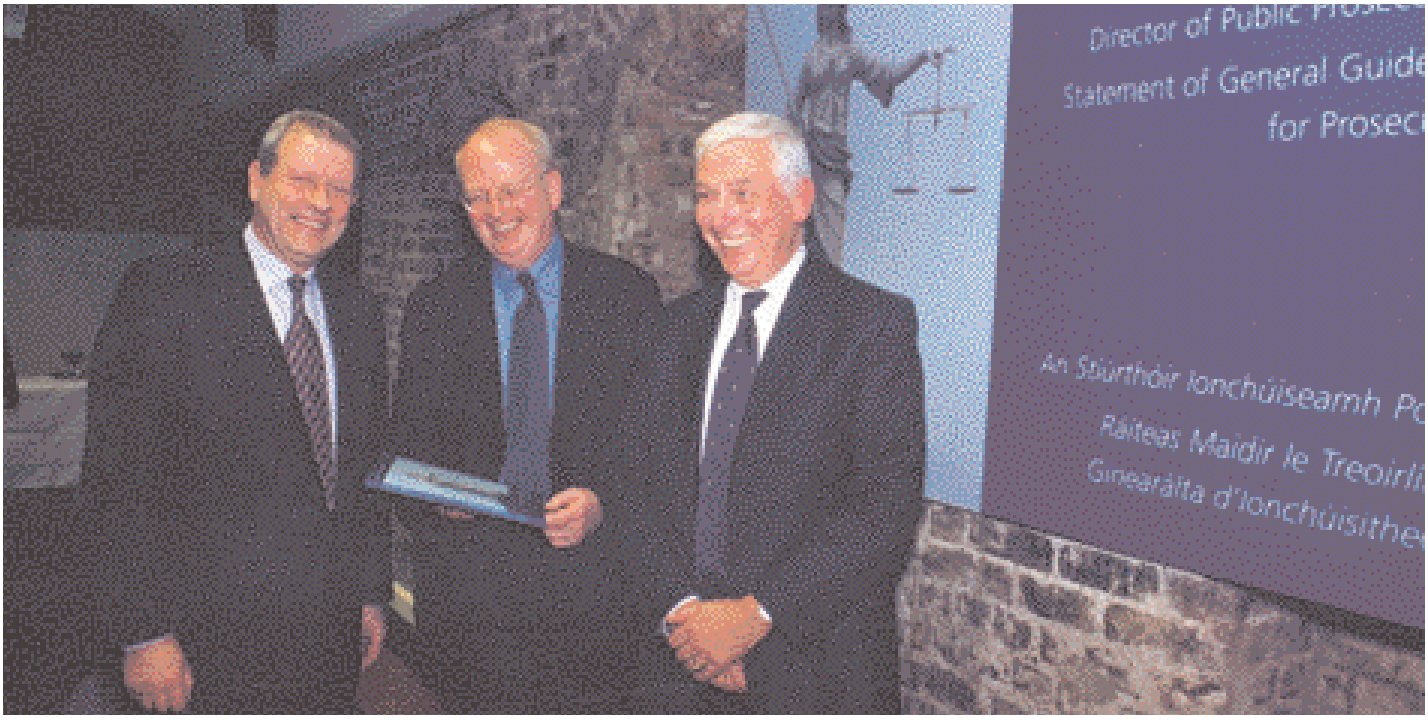
Far-reaching consequences

The decision to prosecute or not to prosecute is of great importance. It can have the most far-reaching consequences for an individual. Even where the accused person is acquitted, the guidelines acknowledge that the consequences resulting from a prosecution can include loss of reputation, disruption of personal relations and loss of employment and financial expense, in addition to the anxiety and trauma caused by being charged with a criminal offence. Further, for victims and their families, a decision not to prosecute can be distressing. As far as victims are concerned, where they have made what is often a very difficult and traumatic decision to report a crime, they may well feel rejected and disbelieved if a decision is taken not to prosecute.

The strength of the evidence

The strength of the evidence is a critical factor in deciding whether or not to proceed with a prosecution. It may be said that it is not in the public interest to use public resources on a prosecution case which has no reasonable prospect of success. Furthermore, if there is a high rate of prosecutions resulting in acquittals, the guidelines state that this could undermine public confidence in the criminal justice system. A prosecution should not be instituted unless there is a *prima facie* case against the accused. This means in essence that the evidence is admissible, substantial and reliable, and that a criminal offence known to the law has been committed by the accused. The evidence must be such that a jury, properly instructed on the relevant

igh stakes



Director of Public Prosections James Hamilton (right) with Garda Commissioner Pat Byrne and Attorney General Michael McDowell, launching the new guidelines for prosecutors

law, could conclude beyond a reasonable doubt that the accused was guilty of the offence charged.

The guidelines provide that the prosecutor should not lay a charge where there is no reasonable prospect of securing a conviction before a reasonable jury (or a judge in cases heard without a jury). The question of what is meant by 'a reasonable prospect of conviction' is not capable of being answered by a precise mathematical formula. The guidelines provide that a prosecution should not be brought where the likelihood of conviction is effectively non-existent. Where the likelihood of conviction is low, other factors, including the seriousness of the offence, may come into play in deciding whether to prosecute.

In evaluating the prospects of a conviction, the guidelines provide that the prosecutor has to assess the admissibility, sufficiency and strength of the evidence that will be presented at the trial. This goes beyond the issue of whether the statement or group of statements amounts to a *prima facie* case. In effect, the prosecutor must consider whether witnesses appear to be reliable and credible. The guidelines note that accusations of criminal wrongdoing can be unreliable for all sorts of reasons: they can be unfounded or inaccurate without being deliberately manufactured, they may be the result of human error, or they can be made maliciously. A statement may not simply be accepted at face value and acted upon without considering its credibility (**see panel, page 20**).

The guidelines provide that the assessment of the evidence not only has to be made initially, but needs to be reviewed at every stage of the proceedings. The investigator would be expected to express views on the evidence upon referring the case to the prosecution authorities. Likewise, it applies to the

THE GENERAL DUTIES OF THE PROSECUTOR

- The prosecutor has a duty to act honestly, fairly, impartially and objectively
- The prosecutor should at all times respect the fundamental right of all human persons to be held equally before the law, and should abstain from any wrongful discrimination
- The prosecutor has a duty to respect, protect and uphold the universal concept of human dignity and human rights
- The prosecutor should at all times uphold the rule of law, the integrity of the criminal justice system and the right to a fair trial
- The prosecutor should remain unaffected by individual or sectional interests and public or media pressures, having regard only to the public interest.

These fundamental duties should inform all aspects of the prosecutor's work, including decisions whether to prosecute or withdraw charges, bring appeals, decisions concerning the choice of charge and the conduct of the prosecutor in court.

solicitor for the prosecution. A decision not to charge may not be final, particularly when the reason is a simple insufficiency of evidence. To postpone the bringing of proceedings due to the lack of available evidence may be preferable to having proceedings fail because they are brought prematurely.

Factors to consider

Once the DPP, or his officer dealing with the case, is satisfied that there is sufficient evidence to justify the institution or continuance of a prosecution, the issue arises as to whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued. The guidelines provide that it is not the rule that all offences for which there is sufficient evidence must be prosecuted.

The factors that may be taken into account in the context of the public interest being not to prosecute vary from case to case. The interest in seeing the wrongdoer convicted and punished, and crime punished, is in itself a public interest consideration. The guidelines provide that the more serious the offence and the stronger the evidence to support it, the less likely that some other factor will outweigh that interest. The first factor to consider in assessing where the public interest lies is, therefore, the seriousness of the alleged offence and whether there are any aggravating or mitigating factors.

The guidelines set out the aggravating factors, which are not intended to be exhaustive, that tend to increase the seriousness of the offence and, if present, will tend to increase the likelihood that the public interest requires a prosecution:

'a) Where a conviction is likely to result in a significant penalty
b) If the accused was in a position of authority or trust and the offence is an abuse of that position
c) Where the accused was a ringleader or an organiser of the offence
d) Where the offence was premeditated
e) Where the offence was carried out by a group
f) Where the offence was carried out pursuant to a plan in pursuit of organised crime
g) Where the victim of the offence has been put in fear, or suffered personal attack, damage or disturbance. The more vulnerable the victim the greater the aggravation
h) Where there is a marked difference between the actual or mental ages of the accused and the victim and the accused took advantage of this
i) If there is any element of corruption
j) Where the accused has previous convictions or cautions which are relevant to the present offence
k) If the accused is alleged to have committed the offence whilst on bail, on probation, or subject to a suspended sentence or an order binding the accused to keep the peace and be of good behaviour, or released on licence from a prison or a place of detention
l) Where there are grounds for believing that the offence is likely to be continued or repeated, for example, where there is a history of recurring conduct'.

EVALUATING THE EVIDENCE

The guidelines set out some factors which the prosecutor should consider in evaluating the admissibility and strength of evidence. They say that each case is unique and the variety of human experience and behaviour so great so as to make a comprehensive list of all possible considerations which could arise impossible. Issues that arise may include the following, which are set out at paragraph 4.11 of the guidelines:

'a) Are there grounds for believing that evidence may be excluded, bearing in mind the principles of admissibility under the Constitution of Ireland, at common law and under statute? For example, has confession evidence been properly obtained? Has evidence obtained as a result of search or seizure been properly obtained?
b) If the case depends in whole or in part on admissions by the suspected person, are there grounds for believing that the admissions may not be reliable considering all the circumstances of the case including the age, intelligence, mental state and apparent understanding of the suspect? Are the admissions consistent with what can be objectively provided? Is there any reason why the suspect would make a false confession?
c) Does it appear that a witness is exaggerating or has a faulty memory, or is either hostile or friendly to the accused, or may be unreliable in some other way? Did a witness have the opportunity to observe what he or she claims to have seen?
d) Has a witness been consistent in his or her evidence?
e) Does a witness have a motive for telling an untruth or less than the whole truth?
f) Could the reliability of evidence be affected by physical or mental illness or infirmity?
g) What sort of impression is a witness likely to make? How is the witness likely to stand up to cross-examination?
h) If there is conflict between witnesses, does it go beyond what might be considered normal, and hence materially weaken the case?
i) If, on the other hand, there is a lack of conflict between witnesses, is there anything which causes suspicion that a false story may have been concocted?
j) Are all the necessary witnesses available to give evidence, including any who may be abroad? In the case of witnesses who are abroad, the possibility of obtaining the evidence through a live television link, pursuant to section 28 of the *Criminal Evidence Act, 1992* or by means of the issue of letter of request under the *Criminal Justice Act, 1994* should be considered
k) Are all the necessary witnesses competent to give evidence? If so, are they compellable? If competent but not compellable, have they indicated their willingness to testify?
l) Where child witnesses are involved, are they likely to be able to give sworn evidence or evidence in accordance with the criteria in section 27 of the *Criminal Evidence Act, 1992*? How is the experience of a trial likely to affect them? In cases of sexual offences or offences involving violence, should children's evidence be presented by way of television link in accordance with section 13 of the act?
m) In relation to mentally handicapped witnesses, are they capable of giving an intelligent account of events which are relevant to the proceedings so as to enable their evidence to be given pursuant to section 27 of the *Criminal Evidence Act, 1992*?
n) If identification is likely to be an issue, how cogent and reliable is the evidence of those who claim to identify the accused?
o) Where there might otherwise be doubts concerning a particular piece of evidence, is there any independent evidence to support it?'

The guidelines set out certain mitigating factors, which, if present, tend to reduce the seriousness of the offence and hence the likelihood of a prosecution being required in the public interest. These include the issue of whether the court is likely to impose a very small or nominal penalty, where the loss or harm can be described as minor and was the result of a single incident – particularly if it was caused by an error of judgement, or where the offence is a first offence – and if it is not of a serious nature and is unlikely to be repeated.

Other factors may also arise in considering whether the public interest requires a prosecution. These are set out in the guidelines and are of such importance that they deserve to be quoted in full (para 4.18):

'a) Where the offender is either very young or elderly or suffering from significant mental or physical ill health or disability. In such cases, however, other factors tending to indicate that the offence is serious or that there is a risk of the offence being repeated must be taken into account. In the case of young offenders, the use of the Juvenile Diversion Programme should be considered

b) The availability and efficacy of any alternatives to prosecution

c) The prevalence of offences of the nature of that alleged and the need for deterrence, both generally and in relation to the particular circumstances of the offender

d) Whether the consequence of a prosecution or a conviction would be disproportionately harsh or oppressive in the particular circumstances of the offender

e) The attitude of the victim or the family of a victim of the alleged offence to a prosecution

f) The likely effect on the victim or the family of a victim of a decision to prosecute, or not to prosecute

g) Whether the likely length and expense of a trial would be disproportionate, having regard to the seriousness of the alleged offence and the strength of the evidence

h) Whether the offender is willing to co-operate in the investigation or prosecution of other offenders, or has already done so

i) If a sentence has already been imposed on the offender in relation to another matter, whether it is likely that an additional penalty would be imposed

j) Whether an offender who has admitted the offence has shown genuine remorse and a willingness to make amends'.

The complex issue of delay is a crucial factor, and has resurfaced recently in the courts in the context of the prosecution of sexual offences. The guidelines state that the prosecutor should, in any case where there has been a long delay since the offence was committed, consider in the light of the case law of the courts whether that delay is such that the case should not proceed (**see panel above**).

Where there are mitigating factors present in a case, the prosecutor should consider whether these are factors that should be taken into account by the sentencing court in the event of a conviction, rather than factors which should lead to a decision not to prosecute. Nevertheless, the guidelines provide that where the alleged offence is not so serious as plainly to require a prosecution, the prosecution should consider in the circumstances whether the public interest requires it.

In the context of mitigating factors and other relevant issues, lawyers should bear in mind that pursuant to section 6 of the *Prosecution of Offences Act, 1974* and section 2(4) of the *Criminal Justice Act, 1993*, the prosecutor is precluded from considering certain unlawful communications when considering a decision to prosecute or to seek a review of sentence on the grounds of undue leniency. The prohibition on communications to the DPP does not apply to a communication made by a person who is a defendant or a complainant in criminal proceedings or who believes he or she is likely to be a defendant in criminal proceedings, or communications made by a person involved in the matter either personally or as legal or medical adviser to a person involved or as a social worker or member of the family of the person involved in the matter.

Many people consider that criminal law is confined to matters such as offences against the person, sexual offences, larceny and such like, and somehow consider that the same rigor and implications do not apply to the myriad of offences under company law and under a host of statutes which some consider to be 'civil' matters. A criminal offence under any code is a criminal offence and must be taken seriously, and a prosecution may have the most profound consequences for any individual.

All lawyers, of whatever hue, will be asked in one context or another to advise a client or a member of a client's family in relation to a criminal prosecution. Whether that lawyer is a corporate lawyer, one of the great solicitors in single or two-person practices, in one of the large firms, or an in-house lawyer to a corporation, we should note that these guidelines will have an impact on the governance of the lives of all citizens and business entities in the state. G

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DELAYS IN TAKING PROSECUTIONS

According to the DPP's guidelines (para 4.19), prosecutors should bear in mind the following factors in relation to delays in prosecution:

'a) Whether any delay was caused or contributed to by the alleged offender

b) Whether the fact of the offence or of the alleged offender's responsibility for it has recently come to light

c) Where any delay was caused or contributed to by a long investigation, whether the length of the investigation was reasonable in the circumstances

d) Where the victim has delayed in reporting the offence, the age of the victim both when the offence was committed and when it was reported

e) Whether the alleged offender exercised a dominant position over the victim

f) Whether there is actual prejudice caused to the alleged offender by reason of any delay or lapse of time'.

'The guidelines provide that the assessment of the evidence not only has to be made initially, but needs to be reviewed at every stage of the proceedings'

DEFAMATION: which court

Recent costs awards in the *Sherwin* and *Mangan* libel actions have turned the spotlight firmly on the penalising provisions of the *Courts Act, 1981*, as amended in 1991. Pamela Cassidy argues that careful consideration should be given to whether a plaintiff's defamation claim justifies going to the High Court at all

MAIN POINTS

- Plaintiff's entitlement to costs recovery under the *Courts Acts*
- The *Sherwin* and *Mangan* cases
- Complexities of defamation suits

On 7 December 2001, a High Court libel jury found that a 1999 *Sunday Independent* report suggested that Seán Sherwin had wrongfully solicited money from a property developer for his sister-in-law, and that this suggestion was false. Nevertheless, they awarded him damages of just £250. The *Sunday Independent* argued that this was no vindication and that Mr Sherwin should have no costs at all or, alternatively, that any award of costs should be limited to the Circuit Court scale. Furthermore, it argued that Mr Sherwin should pay the difference between the paper's actual High Court costs and its costs had it defended a Circuit Court action.

The trial judge refused the 'no costs' application, dismissing the argument that the award was 'nominal'. He awarded Mr Sherwin costs of £5,000 – the District Court does not have jurisdiction to hear libel actions, but the judge accepted that, in view of the actual damages awarded, costs must be limited to the Circuit Court threshold of £5,000. Mr Sherwin was also ordered to pay the costs of the paper, amounting to half of the difference between its High Court costs and what those costs would have been had the case been taken in the Circuit Court, estimated at £100,000. Despite the jury verdict in his favour, Mr Sherwin was left with a costs bill estimated at £300,000.

The *Mangan* case

On 19 February 2002, a High Court libel jury found that a 1998 *Sunday Independent* article suggested that District Judge Joseph Mangan had acted in a manner inconsistent with the proper discharge of his judicial functions by taking a call on his mobile phone from the bench, rejecting the paper's case that it had not libelled the judge. The jury awarded the plaintiff €25,000 in damages. The plaintiff immediately accepted that his costs should be limited to the Circuit Court scale. The paper argued that he should make a contribution to its High Court costs. The judge refused this application, and awarded the plaintiff his costs on the Circuit Court scale. The paper will appeal.

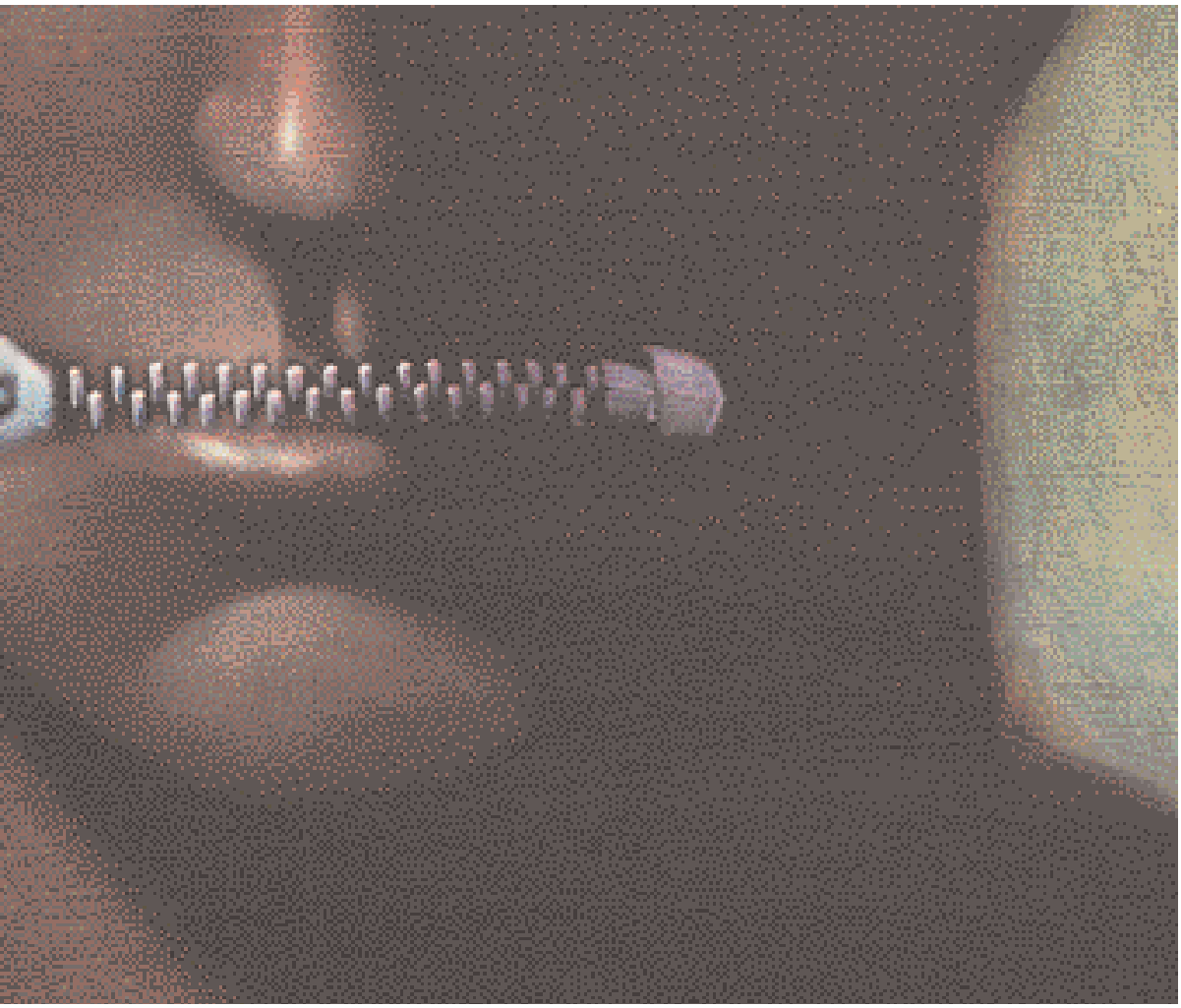
Actual costs of both parties are estimated at €750,000. The plaintiff is unlikely to be left with an outstanding costs bill, as his legal team have agreed to limit their fees to the Circuit Court scale. In short, the lawyers who advised Judge Mangan to take his case in the High Court will bear the penalty for the low award.

Trial by jury

One consequence of the costs provisions of the *Courts Act, 1981* **(see panel)** is to penalise the plaintiff who seeks a jury trial. A favourable verdict from a jury is of value in itself. Mr Justice Hardiman has said, speaking extra-judicially, that 'the verdict of a jury is felt to carry a degree of authoritative vindication difficult to replace in any other way'.

The issue is not merely academic: in the *Mangan* case, a decision in the plaintiff judge's favour by a fellow judge, sitting alone without a jury (as he must do in the Circuit Court) may have caused public unease, which

to choose?



makes his case 'exceptional'. But if jury vindication is to have any value, the courts must take it into account in cost awards. Under the present legislation, a High Court judge can only do so where the award exceeds €31,743.45. He has no discretion otherwise.

A jury vindication is particularly important in a jurisdiction like ours, where a publisher can never be forced to apologise. Jury trial in defamation actions is regarded in England as a constitutional right for both plaintiff and defendant, and judges are reluctant to accede to applications for trial by judge alone without the consent of both parties.

Defamation complexities

The question of 'which court?' is complicated by the difficulty in forecasting how a jury will react to the disputed issues (for example, what they will make of the words complained of) and in predicting the level of the jury award. What words mean and whether they are defamatory is an essential preliminary question in many libel actions. This makes the defamation action different from, say, personal injury actions, where there is a recognised level of awards for particular injuries.

In the *Mangan* case, the *Sunday Independent* argued that it was not defamatory to call a judge a mobile phone freak. In a case tried by a Dublin jury last July, the *Irish Times* argued that it was not defamatory of Peter Boyle, former chairman of the Leinster branch of the IRFU, to report the alleged criticism of a French rugby player over a three-week suspension from play. The jury in each case

MEDICAL MALPRACTICE

The Medical Report

Article written by John H Scurr, Consultant Surgeon and Director Of Medico Legal Chambers Ireland. He has just been awarded the JW Starkey medal by the Council of the Royal Society for Promotion of Health for his outstanding research in the field of Deep Vein Thrombosis (DVT) Travel Thrombosis.

Advances in medical care have lead to increased expectation. In the last fifty years we have seen major infections controlled, major advances in cardiovascular surgery leading to cardiac transplantation, liver transplantation and the introduction of in-vitro fertilization with life expectancy greatly prolonged.

With all these advances comes a public perception that all operations should be 100% successful, that complications should no longer occur, that every baby born is perfect and doctors do not make mistakes. Sadly, despite major advances in science, much of medicine remains marred. Outcomes cannot be guaranteed. Some patients will suffer minor and on occasions, serious complications. Doctors are now more accountable than ever before, better trained with better technology but despite this problems arise. The culture whereby it became common practice to sue doctors arose in the United States, it has rapidly spread to the UK and now Ireland. Mistakes do happen. Patients do suffer and some form of compensation is appropriate. In many instances, patients are simply looking for an explanation. Good communication, a thorough explanation of events and many potential medical negligence cases will resolve.

For medical negligence cases to succeed there has to be a breach of duty and this breach of duty must cause some damage. Sadly, the only outcome of a medical negligence case is a financial contribution to the victim if negligence is proven. It is for the victim to show both breach of duty and causation and that is where medical reports become essential. Medical reports are prepared from the medical records and witness statements. The reports may be supplemented by reference to learned literature and by examination and re-examination of the patient.

Medical records remain a variable part of the process. The records may be incomplete, illegible or inaccurate. Medical records are created by the doctors and nurses treating the patient. The entries represent their findings and their interpretation of the findings. Medical students are trained to write a full set of notes. In particular this may include negative findings indicating that a particular examination was not carried out which may be extremely useful in constructing a Defence. Sparse notes may imply that an examination was not carried out, but as is so common in clinical practice, the doctor when providing his witness statement will often refer to the fact that it is normal practice to do a particular examination in a certain way.

Operative findings again record the surgeon's perception of what he saw and what he did. When a surgeon records that all layers were sutured, this is his perception of what was done as opposed to what was actually done. When nursing notes indicate "no problem seen" it is a matter of interpretation as to how careful that examination was.

MEDICAL REPORTS:

Medical reports range from a simple letter through to a more structured document, detailing the source of information, providing a chronology opinion, conclusions and references. It perhaps goes without saying that it is important to obtain the appropriate expert. The appropriate expert should be somebody practicing within that field of medicine, with specific experience and regard to the specific problems and complications. The person must be truly independent. A medical report prepared for a claimant or defendant by somebody who has a specific interest is of little use. A truly independent report aimed at assisting the court, analyzing the facts, identifying areas of conflict and offering an adequate explanation of events is always preferred. It remains an intellectual myth that the greater the expert, the greater the complexity of the report. The best experts will provide a very simple report, with a very simple understanding. Medical issues are often complex and a full explanation of the terminology, the issues and the outcome are essential. When providing a report, it is important to consider all issues, to take account of statements from both the defendants and the claimant and carry out a thorough and comprehensive review of all the medical records. Deficiencies in the medical records can be identified. Absent charts and missing results can be highlighted.

The preparation of the medical report is akin to a detective story. It may be necessary to look at the outcome and attempt to work back, creating a hypothesis. Using the medical records the hypothesis can be tested and an opinion derived.

The best Medico-Legal reports are ones that identify the issues, provide a full and comprehensive explanation and then provide adequate conclusions. Any statement in the report should be supported by references. Statements like "it is always done that way" have no value, unless supported by medical literature. It has long been recognised that there may be alternative ways of achieving an outcome and therefore there are a reputable body of medical opinion who will do things in a different way. It is no longer acceptable in the UK to get a group of experts to support a hypothesis, unless they can truly back that with scientific evidence. When preparing a report, it is clearly important to consider alternative methods of treatment and alternative outcome.

CURRENT CONDITION AND PROGNOSIS:

Reports relating to Current Condition and Prognosis are important, particularly with regard to quantum. In the UK there is an increasing tendency to issue joint instructions to a single joint expert. The report is then accepted by both sides, who are free to question the expert. The report is prepared for the court and clearly if independent in the preparation of these reports, it may be necessary to carry out up to date investigations which may be useful to determine the long term outcome. Nerve conduction studies, vascular assessment, blood tests can be extremely helpful. In the preparation of these reports primarily intended to settle the case, recommendations about future treatment and the cost of future treatment are often included.

MEDICO LEGAL CHAMBERS:

Medico-Legal chambers were developed to assist in the preparation of medical reports and provide expert opinions in the management of Medico-Legal cases. Experts covering all medical disciplines with experience in the preparation of Medico-Legal reports, and the provision of opinions, work together assisting both the claimant and the defendant. Preliminary letters of instructions will be evaluated and the appropriate expert selected. Full and precise instructions will be given to the expert, along with all documentation required for the purpose of preparing the report. In addition to receiving the report, further recommendations concerning other expert opinions may be offered. Experts are available to attend Medico Legal Conferences and are available to attend court.

- **Selection of Expert(s)**
- **Obtaining appropriate documentation.**
- **Sorting and processing medical records.**
- **Full and proper instruction of Expert(s).**
- **Preparation of the independent Medical Report: addressing positive and negative issues.**
- **Preparation of references to substantiate Medical Report.**
- **Preparation of Report on Current Condition and Prognosis.**
- **Recommendation for further Expert opinion.**

Further details of the chamber from:
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DX 76012 Dundrum

WHAT THE *COURTS ACT* SAYS

Section 17 of the *Courts Act, 1981*, as substituted by section 14 of the *Courts Act, 1991* reads:

'17(1) Where an order is made by a court in favour of the plaintiff or applicant in any proceedings (other than an action specified in sub-sections (2) and (3) of this section) and the court is not the lowest court having jurisdiction to make an order granting the relief the subject of the order, the plaintiff shall not be entitled to recover more costs than he would have been entitled to recover if the proceedings had been commenced and determined in the said lowest court

(2) In any action commenced and determined in the High Court, being an action where the amount of damages recovered by the plaintiff exceeds €31,743.45 but does not exceed €38,092.14, the plaintiff shall not be entitled to recover more costs than he would have been entitled to recover if the proceedings had been commenced and determined in the Circuit Court, unless the judge hearing the action grants a special certificate, for reasons stated in the order, that, in the opinion of such judge, it was reasonable in the interests of justice generally, owing to the exceptional nature of the proceedings or any question of law contained therein, that the proceedings should have been commenced and determined in the High Court

(3) In any action commenced and determined in the High Court, being an action where the amount of the damages recovered by the plaintiff exceeds €6,348.69 but does not exceed €19,046.07, the plaintiff shall not be entitled to recover more costs than whichever of the following amounts is the lesser, that is to say, the amount of such damages or the amount of costs which he would have been entitled to recover if the action had been commenced and determined in the Circuit Court

(4) It shall not be lawful for rules of court to contain or impose any restriction on the amount of costs recoverable by any party from any other party in any action or other proceeding, but nothing in this sub-section shall prevent the insertion in rules of court of a restriction on the amount of the costs recoverable which is identical with a restriction imposed by this section nor the fixing by rules of court of the amount recoverable by any person as and for the costs and expenses incurred by him in the doing of any specified thing in any particular form of action or other proceeding

(5) (a) Where an order is made by a court in favour of the plaintiff or applicant in any proceedings (not being an appeal) and the court is not the lowest court having jurisdiction to make an order granting the relief the subject of the order, the judge concerned may, if in all the circumstances he thinks it appropriate to do so, make an order for the payment to the defendant or respondent in the proceedings by the plaintiff or applicant of an amount not exceeding whichever of the following the judge considers appropriate:

(i) the amount, measured by the judge, of the additional costs as between party and party incurred in the proceedings by the defendant or respondent by reason of the fact that the proceedings were not commenced and determined in the said lowest court, or

(ii) an amount equal to the difference between

(I) the amount of the costs as between party and party incurred in the proceedings by the defendant or respondent as taxed by a taxing master of the High Court or, if the proceedings were heard and determined in the Circuit Court, the appropriate county registrar, and

(II) the amount of the costs as between party and party incurred in the proceedings by the defendant or respondent as taxed by a taxing master of the High Court or, if the proceedings were heard and determined in the Circuit Court, the appropriate county registrar on a scale that he considers would have been appropriate if the proceedings had been heard and determined in the said lowest court

(b) A person who has been awarded costs under paragraph (a) of this sub-section may, without prejudice to his right to recover the costs from the person against whom they were awarded, set off the whole or part thereof against any costs in the proceedings concerned awarded to the latter person against the first-mentioned person

(6) In this section "relief" includes damages'.

disagreed with the paper and found for the plaintiff. Mr Boyle was awarded £50,000.

And there are other complexities, such as difficult issues of law, which may make a case more suitable for determination in the High Court. How, for example, is a Circuit Court judge likely to react to an application for service of interrogatories by a plaintiff, made before he particularises his claim, where he has a good cause of action in slander but is obliged to resort to the defendant to make out that case, or the plaintiff who seeks immediate disclosure of e-mail material? The authorities suggest that the proper procedure is the issue of a High Court plenary summons, followed by an application for interrogatories or disclosure. If he contemplates taking his case in the Circuit Court, the plaintiff is most unlikely to obtain interrogatories or disclosure before he issues his civil bill, although he cannot properly particularise his case until he has this material. Yet this plaintiff will be penalised on costs for proceeding in the High Court if he does not obtain an award of damages of more than €31,743.45.

Which court to choose?

The client's objective is the vindication of his reputation, achieved by a combination of three factors: a verdict in his favour on the substantive issue, a sum in damages sufficient to serve as a warning that the allegations are false and should not be repeated, and recovery of his costs.

Prudence dictates that unless your client has a very clear case (so that a jury verdict against him would be perverse) and the defamation and/or the publisher's conduct is particularly grave, he should be advised to give very careful consideration as to whether his claim justifies trial before a jury in the High Court. G

Pamela Cassidy is a partner with the Dublin law firm BCM Hanby Wallace.

Your business clients know the story: the cheque is in the post, but they have yet to see the colour of their customers' money while their own creditors are banging down the door. So how can they manage the gap between book debts and cashflow without extending their company's overdraft or getting deeper into hock? Barry O'Halloran looks at some options

BRIDGING

MAIN POINTS

- Managing cashflow is difficult if customers are slow to pay
- Factoring and invoice discounting are alternative sources of working capital
- Most business types, including partnerships, can avail of these services

It's stating the obvious, but cashflow is the lifeblood of any business. Many businesses stand or fall on the simple operation of managing what's coming in and going out. Accountants point to it as an indicator of the real underlying health of an organisation.

Take last year's collapse of Independent Insurance in the UK, which left 900 Irish motorists and a range of large and small businesses in this country without cover. In 1999, Independent Insurance reported profits of stg£61 million, while it had negative cashflow of stg£45 million – a stg£106 million difference. The pattern was repeated on a smaller scale the following year, with a stg£17 million difference between cash from operations and its reported profits of stg£15 million. A number of analysts pointed to these warning signs, but nobody (least of all Independent's own management) appeared to be listening. The result was that the business went to the wall.

One of the reasons for last year's hi-tech collapse was that investors suddenly realised that a high proportion of these companies were spending money at an enormous rate, but bringing in little or nothing. The result was that the investors said 'no more' and the rest, as they say, is history.

THE GAP

For the 90% or so of Irish businesses that fall into the small or medium-sized category, cashflow is almost a life-and-death matter. But the biggest source of that cash is, in most cases, the money they are owed by their customers. In fact, a look at most of their balance sheets will show you that one of the biggest assets they have is their book debt. In theory, this should provide a ready source of, well, readies.

But like a lot of theories, this doesn't always work in practice. Customers can be slow to pay: 30 days' credit can stretch into 60 or even longer. According to the Small Firms' Association, the average payment time in this country is 57 days, even though most people agree to cough up within 30.

In some cases, large and powerful customers can impose onerous terms on their smaller suppliers, requiring them to wait the longest possible time for their money. In turn, suppliers have creditors who are banging down the door demanding to be paid.

This so-called 'vicious cash cycle' can reach a point where businesses actually find themselves at risk, as they are effectively in a situation where they cannot pay their own debts as they fall due. Extending an overdraft or raising new loans from the bank are not necessarily viable ways out of this situation.

So, while you're waiting weeks for the proverbial cheque in the post and your own creditors are on the point of sending around a couple of guys with baseball bats, what do you do? Or more particularly, what do you do if you can't afford, or don't want, conventional short-term credit from the banks?

There is one, or rather two, ways out of this: invoice discounting and factoring. These basically involve getting a financial institution to advance you most of the money your customers owe you. They in turn collect the money, for a fee, normally charged as a percentage of the total amount. In short, they convert the unpaid invoices into cash or working capital.

On the face of it, this looks like a route that an increasing number of businesses take. According to the latest figures available from the Factors' and Discounters' Association (FDA), a British-based organisation whose members include the major Irish players in the market, namely AIB, Bank of Ireland Finance and Ulster Bank, members' turnover more than tripled over the last decade.

In 1993, invoice-discounting volumes came to stg£12.4 billion for the year; by 2000 that had grown to stg£57.2 billion. During the same period, factoring volumes grew from stg£6.5 billion to stg£16 billion. Total volumes, including international business, went from stg£19.7 billion to stg£77 billion during the same seven-year period.

Small businesses were by far the biggest customers. Almost half of FDA members' clients (47%) had annual turnovers of stg£500,000 or less. Those in the stg£500,000 to stg£1 million range accounted for 18%, while those in the stg£1m to stg£5m bracket generated 27% of all the business done during the same seven-year period.

This means that over 92% of FDA clients had turnovers in a range where they would be classed as small businesses in this country. In terms of sectors, manufacturing and services were the biggest clients, but all bar financial services had recourse to either factors or invoice discounters. The FDA's figures are largely UK focused, but there are no comparable surveys carried out here.

FACTORING AND INVOICE DISCOUNTING: WHAT'S INVOLVED?

FACTORING
A factor advances you 80% to 85% of approved trade debts, and assumes responsibility for credit control and collection. They will charge you a fee or percentage of turnover for the service. The factor puts an assignment stamp on the invoices, as they are effectively the creditors. This means the relationship is disclosed to the customer.

INVOICE DISCOUNTING
A discounter advances you 80% to 85% of approved trade debts. You still maintain control of collection, but the funds are placed in an account that the discounter administers. The relationship is generally not disclosed to the customer. Note that for this to work effectively, you need to have an efficient credit control system of your own.

The business banking or asset financing arms of the country's leading financial institutions provide factoring and invoice discounting services. There are a number of independent providers. A full list of Irish and UK players is available from the Factors' and Discounters' Association (FDA) Ltd, Second Floor, Boston House, The Little Green, Richmond, Surrey TW9 1QE, England. Tel: + 44 20 8332 99 55; website: www.factors.org.uk.

Some key providers of the service:
- AIB Commercial Services
- Anglo Irish Bank plc
- Bank of Ireland Finance
- Ulster Bank Commercial Services
- Celtic Invoice Discounting plc.

However, the picture in this country is reckoned to be broadly similar. Pat Gallagher, marketing manager of Bank of Ireland Finance, one of the market leaders here, says invoice discounting has grown 'phenomenally' over the last three years.

Old fashioned image

Invoice discounting accounts for a higher proportion of the volumes, largely, industry sources say, because factoring 'went out of fashion, or was perceived as old fashioned'. Sean Forrestal of AIB points out that factoring is not popular in this country, as it has historic connotations. 'It used to be seen as a sign that you could not get credit anywhere else and that your own controls were not that good', he says. But he adds that the bank does provide factoring to exporters.

In fact, there is not a huge difference between the two financing methods (**see panel**). They are both based on a particular class of assets, that is, a company's book debts, and they are both geared towards managing the gap between those debts and reliable cashflow.

Factoring (sometimes called full-service factoring) is considered to be the better option for slow paying creditors or for dealing with a short or medium-term shortage of working capital. It's generally the option most frequently recommended to exporters, and some factors will offer a form of protection or insurance against bad debts.

A factor pays a percentage of approved debts (that is, approved by the factor) on receipt of invoice copies. The percentage depends on the agreement itself, but generally comes to around 80% to 85% of the full amount. The balance, less charges, is paid when the customers pay. The charges may vary, but are usually negotiated on the basis of turnover.

The factor then takes over the business of credit control and collection, normally with the aim of speeding up the rate at which customers pay, without losing their good will. This generally involves working out an agreed credit terms policy with the client and the customers. In theory at least, the two key advantages are that there is less need to borrow because cashflow is dependable and debtors are paying faster, and that companies can save substantially on the administration associated with credit control and collection. It may also be useful for a business that does not have the resources for good credit control.

The fundamental difference between factoring and invoice discounting is that in the latter case the business maintains control of the sales ledger, collection and credit control, while customers are not generally told about the service. This implies that the business already has the staff and systems to manage credit control. The institution still takes ownership of the debt, and the customer is required to sign a debt purchase agreement before getting the facility.

'It's a simple, cost-effective method of raising working capital by converting trade debts into cash', says Bank of Ireland's Pat Gallagher. 'It's an ideal product for expanding companies: as sales and debtors grow, so too does the amount of money available'.

But it does not necessarily have to be used solely for raising working capital, Ulster Bank Commercial Services (UBCS) says that it can also be an appropriate method of raising money for management buy-outs or mergers and acquisitions.

It's worth noting that factors print an assignment notice on invoices. This informs customers that the benefit of the contract has passed to the factor, and that they are effectively the creditors, even though someone else is providing the goods or services for which the customer is invoiced. Depending on the kind of business relationship that companies maintain with their customers, this may not suit everybody. As a result, there may be situations where it may be better to use invoice discounters.

Money up front

In common with factors, invoice discounters provide a percentage of approved debts up front on receipt of invoice copies. Again, this is normally around 80% to 85% of the amount owed, but there is no hard and fast rule. In general, the payments received are paid into a bank account administered by the invoice discounter. It takes repayment for the advance from this, subtracts its own charges and credits the balance to the business. Depending on the financier and the nature of the client, the charges can be a flat fee or a percentage of turnover. The latter option appears to be the most common. In some cases, discounters will also offer some form of cover or insurance against bad debts.

The financial institutions offering these services do not restrict themselves to limited companies. UBCS says it will cater for small owner-managed businesses, limited companies, plcs and partnerships. In general, businesses that are involved in manufacturing and the sale of goods and services are most suited. Construction, and any industries where stage contracts are common, tend not to be favoured because there are

particular difficulties associated with these agreements.

Ulster Bank stipulates that, to qualify, the business should have a turnover of €1.27 million (previously £1 million) a year. The Bank of Ireland Finance threshold is lower, at €317,400 (previously £250,000). AIB stipulates a threshold of €0.5 million. AIB's Sean Forrestal says that it will also look for a certain level of debtors. 'We would generally look for a minimum of €0.5 million', he says. 'But if you have a scenario where you are a start-up and it is likely that you will have a turnover of €0.5 million or over within 12 months, then we could agree to give you a facility'.

Before getting final approval for invoice discounting, the banks will carry out a kind of mini due diligence exercise which is aimed at ensuring that the business has the requisite credit controls in place. 'Part of the whole process is that you would have to get credit approval', says Forrestal. 'Our surveyors will go in and sit down with the client and look at their controls and collection system, look at the arrangements they have with customers and look for things like proof of delivery'.

Invoice discounting and factoring can be used to:

- Meet day-to-day cash flow requirements
- Fund new market development or new product lines
- Finance mergers and acquisitions
- Finance management buy-outs.

Exposure to risk

Banks will also scrutinise the debts for their exposure to risk, and will determine the facility's limit as a percentage of the approved amount. Forrestal points out that debts outstanding for 90 days or more are unlikely to be approved unless this is the result of a special agreement. 'Unless there are special credit terms, it's more than likely that it will be a difficult debt to collect, and it hints at problems', he says.

He explains that if a client has total book debts valued at €200,000, and €40,000 of that figure is outstanding for more than 90 days (or whatever other time limit the individual institution sets), the bank subtracts this and multiplies the remainder by the pre-payment rate, for example, 70%. In this case, it is 70% of €160,000, or €112,000 – amounting to 56% of the overall debt.

The limit can be adjusted up or down according to how good the client is at collecting the debts. The banks get a copy of the monthly sales ledger and if it shows that the collection performance improving, then the facility's limit will be increased accordingly. Conversely, if performance heads in the other direction, then the limit is cut.

'In one way that's the beauty of invoice discounting', Forrestal argues. 'We had a client who started with us two years ago with a limit of €350,000. He came back to us after three months and said: "Look, this has gone through the roof. I'm right up against my limit", so we increased it to €500,000. He was back again after another three months and we were able to give him €750,000. He also had an overdraft of €100,000, so he had total facilities of €850,000. That working capital added a huge amount to his bottom line'.

Presumably not all stories are as good as this one, but it does indicate that invoice discounting can be a more flexible system of raising cash than straightforward loan finance. G

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

Book review

Sources of law (second edition)

Thomas O'Malley. Round Hall Sweet & Maxwell (2001), 43 Fitzwilliam Place, Dublin 2. ISBN: 1-85800-185-4. Price: €50.

Lawyers of my age were taught fundamental principles of law. Negligible attention was given to the issue of 'finding' the law. Today, knowledge of the principles of law is still important, but more is required. A lawyer today needs to possess the skill to 'find' the law.

It was Thomas Jefferson who wrote that a lawyer without books would be like a workman without tools. We all know that the mass of the law is accumulating with frightening rapidity. That is why the skill to 'find' the law is of such importance.

Tom O'Malley, a barrister and lecturer in law at NUI Galway and the author of several publications, states in his preface that the objective of this book is to introduce students to the primary and secondary sources of law and to equip them with basic research skills. Modestly, the author quotes Sir Robert Megarry in the first edition of the *Manual of the law of real property* that his (Sir Robert's) stated aim was to help the 'examination candidate whose main anxiety is not whether he will head the list but whether he will appear in it at all'. Noting, with even greater modesty, that his book could not even guarantee an appearance on the list, Tom O'Malley hopes that it will eliminate some of the confusion understandably felt by students as they try to become familiar with legal sources. The problem is not confined to students: I have learned much from this book.

The author has added new material in this edition for the benefit of practitioners, and this is most welcome. The new chapters on electronic sources of law and legal citation are particularly helpful, and the chapters on legal writing have been extensively revised. Other chapters provide a comprehensive account of the paper and electronic sources of Irish, British, European, American, Commonwealth and international law.

Appendices to the book contain a list of abbreviations commonly encountered in legal literature and a glossary of Latin and French words commonly used in legal writing. If a judge said '*res integra*', you would appreciate that the judge was speaking about an issue on which there is no existing rule or precedent and which therefore must be decided in accordance with first principles. A list of Irish law books published since 1950 is set out under different subject headings. The final appendix contains a selection of useful websites.

Readers will undoubtedly know all about split infinitives and other matters of grammar and syntax, but the author provides a most useful refresher course for all of us. There is also a certain charm in getting titles correct: for example, 'The Honorable Society of King's Inns' is correct, but 'The Honourable Society of the Kings' Inns' contains at least three errors. One refers to 'Queens' College, Cambridge', named after two queens, but 'The Queen's College, Oxford', named after one queen.

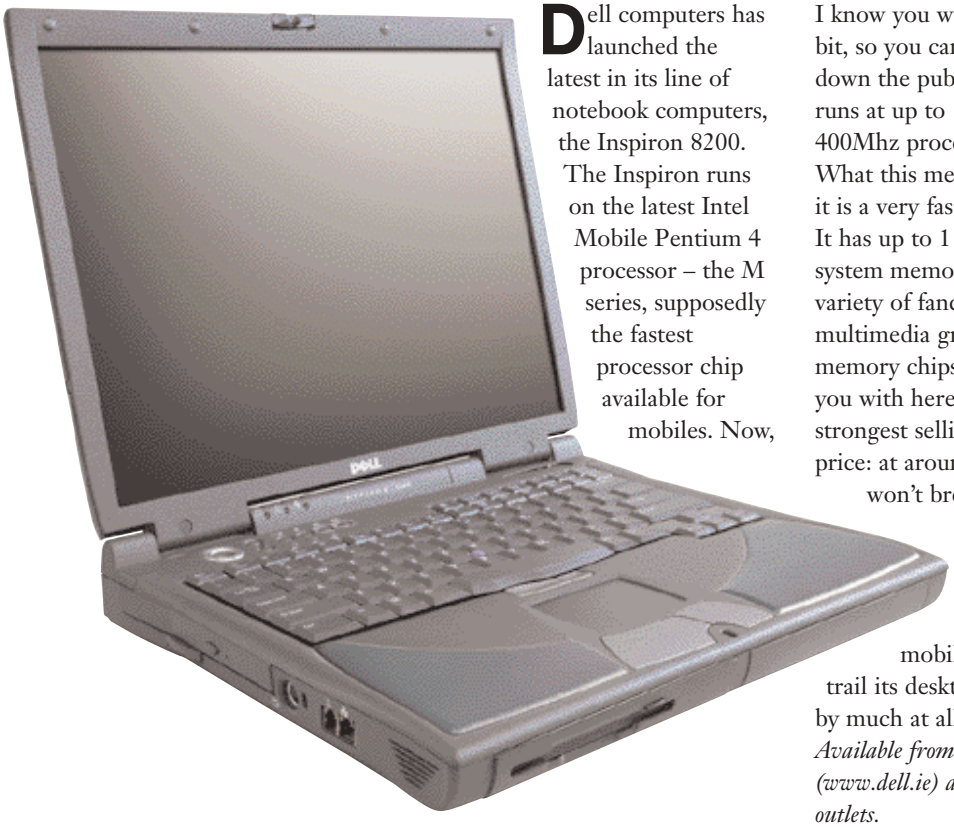
Why is legal writing important? Words are the vehicle of thought; style is the neat dress of thought. Words express thoughts and words are the very tools of our profession. Words count.

Sources of law is a gem of completeness and accuracy that will provide a most valuable aid to law students, practitioners and high priests of the law. It is written in a very readable style, with an abundance of authoritative information. G

Dr Eamonn Hall is chief legal officer of Eircom plc.

Tech trends

Small notebook, big performance



Dell computers has launched the latest in its line of notebook computers, the Inspiron 8200. The Inspiron runs on the latest Intel Mobile Pentium 4 processor – the M series, supposedly the fastest processor chip available for mobiles. Now, I know you want to hear this bit, so you can bluff your mates down the pub: the Inspiron runs at up to 1.7Ghz with 400Mhz processor bus speed. What this means really is that it is a very fast machine indeed. It has up to 1 gigabyte of system memory and runs a variety of fancy-sounding multimedia graphics and memory chips that I won't bore you with here. But perhaps its strongest selling point is the price: at around €1,500, it won't break the bank and you will have in your hands a seven-and-a-half pound mobile PC that doesn't trail its desktop counterpart by much at all.

Available from Dell computers (www.dell.ie) and from computer outlets.

A dumb idea for a phone?

Now that the world and his wife has a mobile phone, the companies that make them are beating themselves up trying to find a new angle to make you part with your cash. This one might just work. It's a phone that takes pictures. Doesn't that sound like a good idea, if you're a deaf mute? The new Nokia 7650 doubles as an 'integrated digital imaging device'. That's a camera to you and me. Point the phone, use the colour display as a viewfinder, snap a picture, and share the moment by texting it to someone who, like you, has more money than sense. This handset is almost guaranteed to take all the fun out of making phone calls from the toilet. The Nokia 7650 should be in the shops this summer, but the company hasn't a clue how much it will cost yet.

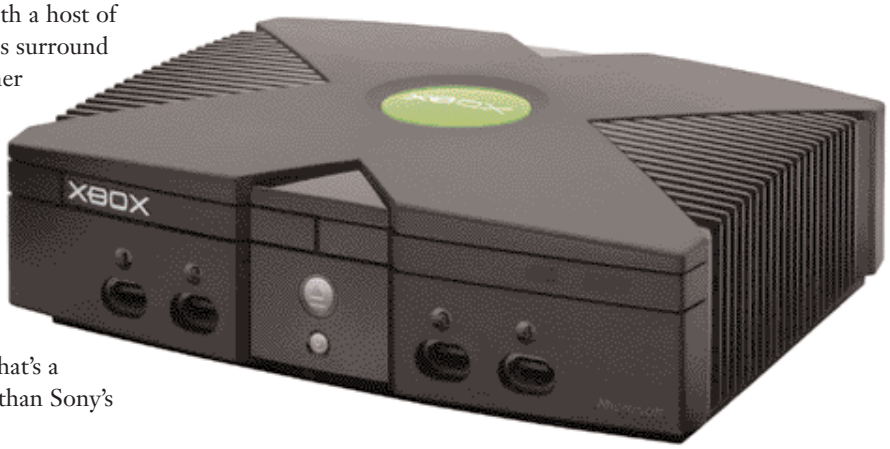
Gaming for generation X

'Nothing beats the simple joy of a monkey knife-fight', the Duke of Wellington once memorably said. Everyone loves monkeys, and if they ever invent a monkey knife-fighting game we'll be first in the queue to buy it. And there'll probably be only one games console that could do it justice: the new Xbox from Microsoft.

It's been a long time coming, and in the meantime Sony's Playstation and PS2 consoles have developed a near monopoly on the gaming market, which is estimated to be worth about €23 billion a year. Microsoft's Xbox represents the first realistic competition to Sony's stranglehold. It boasts an Intel 733MHz Pentium III processor, the most powerful CPU of any games console, an 8Mb internal hard drive (allowing faster loading of games), a DVD player and 64Mb of memory. Microsoft claims that its 233Mhz graphics-processing unit (GPU) will deliver more than three times the graphics performance of other consoles on the market. This may well be true, because the Xbox is basically a PC dressed up as a games console, with a host of peripherals such as surround sound, a CD burner and on-line capabilities. The downside – and it's a very big downside if you're a parent – is that the Xbox costs €479 including VAT. That's a good €150 more than Sony's PS2, which does many of the same things.

Whether the Xbox will represent a real challenge to the Playstation's market dominance, only time (and your wallets) will tell. In the meantime, let the monkey fights begin!

Available from Virgin Megastores and electronics outlets.



Take all the fun out of being a kid!

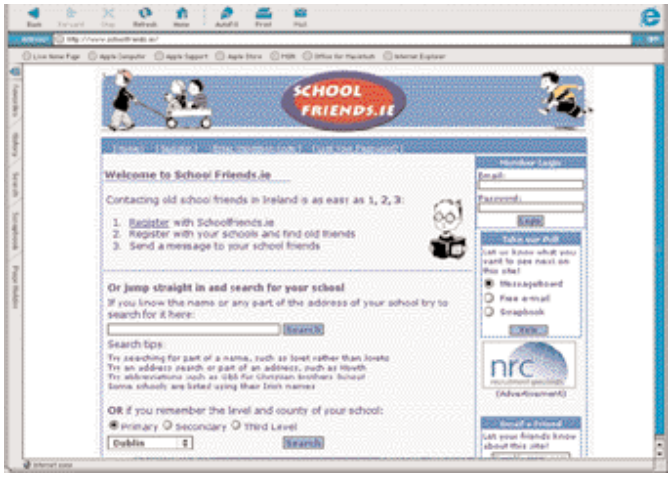
This one's a bit of a cheat because it's not available in Ireland, but it's such a cool idea that we thought you'd like to know about it. I mean, how many times have you wished that you could electronically tag your kids? For that matter, how many times have you wished you could bang the little buggers up in jail and throw away the key? Well, you can't do that, but you can make sure you know where they are, to within a few feet, at any given time by using a global positioning system (GPS) to keep tabs on them. The Personal Locator from US electronics firm Wherify is a rugged, lightweight and near indestructible device worn on a child's wrist like a watch. You simply log onto your computer (or call the company) and Wherify will flash up a map showing your child's current location and provide you with the closest street address (it also includes a one-button 911 emergency response feature). What a perfect opportunity to ruin their teenage years. The device costs just under $400 and is currently only available in the USA.

For more information, see www.wherifywireless.com/prod_watches.

Sites to see

Guitar chords on-line *(www.guitartabs.cc)*. A good site to visit if you're looking for the lyrics of a particular song or just advice on how to play it. The songs are presented as guitar tablature (an alternative to traditional music notation). The extensive database of old and new songs should put you well on the road to annoying your neighbours with your bizarre musical stylings.

DVD rentals *(www.dvdrentals.ie)*. Couch-potato heaven! If you're too lazy to walk to the video shop, log on to this site and they'll send you out a rental DVD film on the same day by first-class post. The site boasts an extensive list of films and they say you can keep your rental as long as you like without incurring any late return fees.



Blast from the past *(www.schoolfriends.ie)*. The international fad for digging up old school friends has come to Ireland. Log on to this site and find out what happened to the school bully (assuming the big lunkhead ever learnt how to use a computer). A great excuse to lie about how well you're doing.

Custom-made speeches *(www.speechwriters.com)*. Within 60 seconds of receiving your order, this site will e-mail you pre-written speeches, poems and eulogies that you can trot out for weddings, funerals and formal dinners. Give them a few more days, and they'll prepare a personalised speech for you.

If it's a recovery, a way to participate

It looks like a US economic recovery may be on the cards. Alan Murphy outlines what may be a safer way to move back into equities quickly and efficiently

Many economic indicators are starting to show that the US economy is emerging from its zero-growth period, although whether it will continue to build on its recent strength and avoid the much-vaunted double-dip back to recession is unclear.

In March, the US Federal Reserve (Fed) changed its policy stance to 'neutral' from an interest rate 'easing bias'. This can be interpreted to mean that US interest rates may have bottomed. It stated that the economy was 'evenly balanced' and it believes the US economy is showing signs of a sustainable and robust recovery, with US manufacturing starting to produce again. This reinforces the optimists' view.

On the face of it, while it may look like the Fed is moving to a neutral stance, market reaction has been mixed. The market sees the change in stance as the first step towards a round of monetary tightening from the summer months onwards.

Earnings pre-announcements are improving

On the earnings front, most US companies will not officially report first quarter figures until April. But many have already told the market what to expect. So far, according to Thomson Financial/First Call, almost 30% of first-quarter earnings pre-announcements have been positive and 48% were negative.

Though earnings warnings still outnumber good news, this quarter is shaping up to be better than last year's brutal first quarter, when 70% of pre-announcements were negative and only 14% were positive.

Interestingly, though, the earnings estimates and pre-announcement data for technology firms hint at continued tough times for the sector. More than twice as many tech companies have issued earnings warnings for the first quarter than raised expectations.

All in all, the pessimists could be in for a difficult time, particularly over the next six to eight weeks, and especially if a pronounced flow of investors' funds returns to equities.

However, history has shown that it will take a sustained period of positive equity performance before a marked shift in asset allocation by retail investors occurs. As company fortunes do not appear to be improving dramatically in the short term in tandem with the economy, a safer way to move back into equities quickly and efficiently might be to buy from the expansive list of exchange traded funds on offer.

What are exchange traded funds?

During the past eight years, there has been significant growth in the exchange traded fund (ETF) market. ETFs represent shares in either funds or unit investment trusts that hold portfolios of stocks which closely track the performance and dividend yield of specific indexes, either broad market or sector based.

The first ETF began trading in January 1993. Since then, the number of ETFs has increased to over 100, as investors seize the opportunity to buy or sell an entire portfolio of stocks in a single security. ETFs can be bought and sold via your stockbroker throughout the trading day – as easy as buying or selling a share. As such, they are excellent tools for wary investors seeking market exposure with the enhancement of liquidity.

Two of the largest ETFs, the S&P Depository Receipts (SPDRs) and the Nasdaq 100 Trust, account for 67% of the total asset size of the ETF market. However, exposure to the market is not limited to just these two. There are also Diamonds, streeTracks, and recently Barclays Global Investors entered the market with its suite of iShares providing greater international exposure.

There is no minimum investment amount, or indeed timeframe, required for investing in exchange traded funds. As with all securities, the value of ETFs can go down as well as up, and there is an element of risk attached to investing in them.

At present, investors might consider the FTSE 100 iShare as an index fund of choice. The FTSE 100 has unjustifiably underperformed the S&P, the Dow Jones and continental European equity markets. As the earnings that underpin the FTSE are no less robust in nature than its counterparts, it is a great way to build a weighting in a market that is 25% off its all-time high. It also trades on 18.5 times earnings compared to 23 times for the S&P 500. G

Alan Murphy is a portfolio manager with Davy Stockbrokers' private clients unit.

TYPES OF EXCHANGE TRADED FUNDS

Broad-based

These track a broad group of stocks from various markets. For example, S&P SPDR is a broad-based ETF that tracks the S&P 500 in the US, and the iShares FTSE tracks the FTSE 100.

Sector-based

These track companies represented in related industries. For example, the iShare Dow Jones US Healthcare-sector Index Fund is a sector ETF that tracks the Dow Jones healthcare sector, and the XLK Technology Select SPDR tracks the top 100 technology stocks listed in the US.

Davy STOCKBROKERS

Alan Murphy: 'ETFs are excellent tools for wary investors seeking market exposure with the enhancement of liquidity'

Report of Law Society Council meeting held on 1 February 2002

Motion: Mentor programme

'That this Council approves the report of the Mentor Programme Task Force.'

Proposed: Stuart Gilhooly

Seconded: Kevin D O'Higgins

Stuart Gilhooly noted that the task force had been established following the passing of a motion at the last AGM that a programme should be developed by the Law Society whereby sole practitioners could approach mentors within the profession when faced with difficulties in their practices. The proposal was that a panel of mentors should be established, with a requirement of ten years' qualification in order to participate on the panel, and that practitioners should be invited to participate through the society's committees and the bar associations. The Council approved the proposal, subject to the exclusion of current members of the society's regulatory committees.

In briefing this month ...

Personal Injuries Assessment Board (PIAB)

Ward McEllin reported that a letter had been received from the Interdepartmental Implementation Group for the PIAB, inviting the society to meet the group to express its views on the PIAB. The society's task force had considered the matter and had agreed to seek access to the group's draft proposals in advance of any such meeting. He noted that, having ignored the legal profession so far, it was now proposed to 'consult' at a very late stage. The Council agreed that the task force should not engage in a cosmetic exercise and should seek to secure adequate information before agreeing to participate in any discussion.

Motor Insurance Advisory Board (MIAB)

The director general reported that the forthcoming report of the MIAB, which had been leaked to the media, appeared to be very critical of solicitors and of solicitor/client costs. One newspaper article indicated that the report 'accuses many solicitors of being paid on the double when they win insurance claims for clients'. The Council noted that the MIAB had advertised in the media the previous summer inviting clients who believed they had been overcharged by their solicitors to contact the board. Clearly, this had yielded 'war stories' from a self-selecting group of people invited to complain, but would probably be presented as 'evidence' of overcharging by solicitors.

The Council noted that, in certain circumstances, it was perfectly legitimate to charge a solicitor/client fee in addition to party-and-party costs already received. It was agreed that this should be clarified in the media, as should the right of clients to tax their costs or to make a complaint of excessive fees. However, the society could not support any solicitor who did not reveal a party-and-party fee to his client, who charged on a percentage basis or who charged a fee that would not tax. Andrew Dillon said that the assertion that 42% of awards were required to meet legal costs was patently untrue and he said that the costs associated with the delays in settlements caused by insurance companies should also be emphasised.

Anne Colley said that the real issue was not solicitor/client charges, but rather the structure of the delivery of compensation. She believed that the society's primary concern should be to protect a client's right to obtain fair and reasonable compensation.

Competition Authority study

The director general reported that a detailed questionnaire comprising 74 questions had been received from the Competition Authority and responses were being prepared by a task force comprising himself, John Fish, Michael Peart and Mary Keane, in conjunction with advisors from A&L Goodbody, Solicitors. While the Competition Authority had initially sought a response by 4 February 2002, the society had sought and obtained an extension of time. The draft response, which currently stood at 200 pages, would be circulated for consideration by the Council shortly.

'Tesco Legal Services'

The director general reported that the Law Society of England & Wales was considering the removal of its prohibition on solicitors employed by non-solicitors giving legal advice to anyone other than their employer. The proposal had been dubbed 'Tesco Legal Services' and was a very serious issue, impacting as it did on the core values of independence, confidentiality and conflicts of interest. Michael Irvine said that the cost of independent legal advice represented the price of democracy. If legal services were to be provided by organisations who were dependent on the government for lucrative contracts or business deals, this would represent a most invidious form of pressure in relation to legal proceedings in which the state was involved, and true independence would be a thing of the past.

The director general agreed that there were organisations that would wish to exploit the brand of 'solicitor' by providing legal services as one of a range of products, but not necessarily with the public interest in mind. He said that the society would communicate its views at a meeting with the law societies of England & Wales, Scotland and Northern Ireland being held on 28 February.

Supreme Court computerisation

The Council approved the nomination of Frank Nowlan and Frank Lanigan to a working group being established by the chief justice to consider issues relating to the computerisation of the Supreme Court. G

Committee reports

CONVEYANCING

The Land Registry has brought to the attention of the Conveyancing Committee the fact that conference papers from a property registration conference which took place in October of last year are available on the Land Registry website and might be of interest to practitioners. The subject matter was property registration in the electronic era. There are two ways of accessing the conference papers:

- www.irlgov.ie/landreg – when you access this site, you go to *What's new*
- Alternatively, the Land Registry's own website can be accessed at www.landregistry.ie and you then go to *Land Registry Information Publications website* and then to *What's new*.

The committee is happy to pass on this information to the profession and it has been indicated that the conference papers in relation to the Irish and English systems would be of particular interest to conveyancing practitioners.

BUSINESS LAW

CRO waives late filing penalty for strike-off applications

The Companies Registration Office has announced a waiver of the late filing penalty for applications for strike-off received prior to close of business on 2 August 2002. Its statement reads:

'Section 311 of the *Companies Act, 1963* (as amended) empowers the registrar of companies to strike companies off the register where he has reasonable cause to believe that a company is no longer carrying on a business. However, this is a discretionary power which the registrar is prepared to use only if a director of a company furnishes a statement to the effect that the company has ceased trading or has never traded, that it has no assets or liabilities and that it wishes its name to be struck off the register. In a revised process, introduced on 12 October 2001, such a statement must be accompanied by the following:

- All outstanding annual returns, including accounts, and relevant filing fees, including late filing penalty (if any)
- A letter of no objection from the Revenue Commissioners
- A copy of an advertisement in the approved form published in one daily newspaper indicating the intention to apply to have the company struck off the register.

In order to facilitate the removal of moribund/off-the-shelf companies from the register, it has been decided to waive the late filing penalty in respect of applications for voluntary strike-off which comply with all other conditions, where applications are received prior to the *close of business on Friday 2 August 2002*.

Note, none of the other conditions will be waived and absolutely no further extension of time will be granted. Applicants for voluntary strike-off since 12 October 2001, who have paid the late filing penalty, will have the penalty refunded in due course'. G

PROBATE, ADMINISTRATION & TAXATION

TAX GUIDE 2002

An error occurred in the recently distributed *Tax guide 2002*. Practitioners should note that, in the stamp duties section, under 'residential property', the third column which reads 'buyer rate' should read 'first-time buyer rate'.

CRIMINAL LAW COMMITTEE

SEMINAR

THE COURTHOUSE*, SLIGO, SATURDAY 11 MAY 2002

*By kind permission of the Courts Service

€120 per person (includes materials, morning coffee and lunch)

Chairman: Judge Conal Gibbons

10am **Registration**

10.30am **Morning session**

- *Putting justice to the hazard: developments in the area of disclosure/discovery for criminal trials*
  Speaker: Niall Dolan, solicitor
- *Forensic science from an independent viewpoint*
  Speaker: Keith Borer, consultant forensic scientist

12.45pm **Lunch**

2.15pm **Afternoon session**

- *Section 4 of the* Criminal Justice Act, 1984: *detentions and Garda video-taping of interviews (including on-site video demonstration)*
  Speaker: Hugh Sheridan, state solicitor, Sligo
- *The Lion Intoxylizer 6000 and the Intoximeter EC/IR: an update*
  Speaker: Kevin Kilrane, solicitor

4pm **End of seminar**

BOOKING FORM

Name: _____

Firm: _____

_____

Please reserve _____ place(s)

Cheque in the sum of _____ attached

Please forward booking form and payment (to be received no later than Thursday 9 May) to: Colette Carey, Solicitor, Criminal Law Committee, Law Society of Ireland, Blackhall Place, Dublin 7.

LEGISLATION UPDATE: 12 JANUARY – 21 MARCH

ACTS PASSED

State Authorities (Public Private Partnership Arrangements) Act, 2002
Number: 1/2002
Contents note: Makes provision in relation to the functions and powers of certain state authorities, in particular to enable them to enter into public-private partnership arrangements; also empowers state authorities to form companies and to enter into joint ventures for the purpose of a public-private partnership and gives state authorities the legal capacity necessary to contract with the private financiers of public-private partnerships; provides that the functions of a state authority may be conferred under the public-private partnership arrangement to the private sector, subject to the general control of the state authority
Date enacted: 21/2/2002
Commencement date: 21/3/2002 (per section 9(2) of the act)

Sustainable Energy Act, 2002
Number: 2/2002
Contents note: Provides for the establishment of the Sustainable Energy Authority of Ireland, under the auspices of the minister for public enterprise, which will generally trade under the name Sustainable Energy Ireland. The main functions of the authority are to promote and assist environmentally and economically sustainable production, supply and use of energy in all sectors of the economy; to promote energy efficiency and renewable energy; and to minimise the environmental impact relating to the production, supply and use of energy. The functions are primarily based on those outlined in the green paper on sustainable energy (1999)
Date enacted: 27/2/2002
Commencement date: 27/2/2002. Establishment day order to be made (per section 3 of the act)

SELECTED STATUTORY INSTRUMENTS

ACC Bank Act, 2001 *(Sections 6, 8, 10, 11(2) and 12) (Commencement) Order 2002*
Number: SI 69/2002
Contents note: Appoints 28/2/2002 as the commencement date for the above sections

Capital Gains Tax (Multipliers) (2002) Regulations 2002
Number: SI 1/2002
Contents note: Specify the multipliers by reference to which sums (such as the base cost of an asset and enhancement expenditure incurred on it) which are allowable as a deduction from the consideration for the disposal of an asset in the year of assessment 2002 are to be increased, under section 556(2) of the *Taxes Consolidation Act, 1997,* for the purpose of computing the chargeable gain accruing to a person on such a disposal

Civil Legal Aid Regulations 2002
Number: SI 8/2002
Contents note: Amend the *Civil Legal Aid Regulations 1996* (SI 273/1996) to give effect to revised financial criteria for eligibility to obtain legal aid or advice. Also amend the *Civil Legal Aid Regulations 1996* to allow a member of staff of the Civil Legal Aid Board give a signed opinion as to whether a certificate should be granted: previously this opinion was given only by a solicitor
Commencement date: 16/1/2002

Companies Act, 1990 *(Commencement) Order 2002*
Number: SI 57/2002
Contents note: Appoints 28/2/2002 as the commencement date for section 248 of the act

Companies Act, 1990 *(Form and Content of Documents Delivered to Registrar) Regulations 2002*
Number: SI 39/2002
Contents note: Prescribe the form, content and manner of completion of documents deposited with the Companies Registration Office
Commencement date: 1/3/2002

Companies (Forms) Order 2002
Number: SI 38/2002
Contents note: Substitutes a new form B1 for the form outlined in part II of the fifth schedule to the *Companies Act, 1963* as amended by the *Companies (Forms) Order 1991* (SI 161/1991) (annual returns). Prescribes a new form B73 and B73(a) for the purposes of section 127 of the *Companies Act, 1963* as amended by section 60 of the *Company Law Enforcement Act, 2001* (annual returns)
Commencement date: 1/3/2002

Companies (Forms) (No 2) Order 2002
Number: SI 54/2002
Contents note: Prescribes a new form B74 for the purposes of section 195 of the *Companies Act, 1963* as amended by section 91 of the *Company Law Enforcement Act, 2001* and for the purposes of section 3A of the *Companies (Amendment) Act, 1982* as inserted by section 101 of the *Company Law Enforcement Act, 2001*. The form sets out the additional statement that must be sent to the registrar by a person who has been disqualified under the law of another state from being appointed director or acting as a director or secretary of a company
Commencement date: 26/2/2002

Company Law Enforcement Act, 2001 *(Commencement) (No 4) Order 2002*
Number: SI 43/2002
Contents note: Appoints 1/3/2002 as the commencement date for the following sections of the act: 1) paragraphs (a) and (c) of section 25, insofar as those paragraphs relate to investigations under section 8 of the *Companies Act, 1990* initiated on or after 1/3/2002; 2) section 107

Company Law Enforcement Act, 2001 *(Commencement) (No 5) Order 2002*
Number: SI 53/2002
Contents note: Appoints 1/3/2002 as the commencement date for sections 40, 41, 42, 84(b), 91(a) and 101 of the act

Customs and Excise (Mutual Assistance) Act, 2001 *(Commencement) Order 2002*
Number: SI 59/2002
Contents note: Appoints 22/2/2002 as the commencement date for the act

Diseases of Animals Act, 1966* (Foot and Mouth Disease) (Restriction on Imports from the United Kingdom) (No 3) Order, 2001 *(Amendment) Order 2002
Number: SI 6/2002

Diseases of Animals Act, 1966* (Foot and Mouth Disease) (Restriction on Imports from the United Kingdom) (No 3) Order 2001 *(Second Amendment) Order 2002
Number: SI 12/2002

Employment Equality Act, 1998 *(Code of Practice) (Harassment) Order 2002*
Number: SI 78/2002
Contents note: Declares that the code of practice on sexual harassment and harassment at work set out in the schedule to the order is an approved code of practice for the purposes of the *Employment Equality Act, 1998*
Commencement date: 8/3/2002

European Communities (Civil and Commercial Judgments) Regulations 2002
Number: SI 52/2002
Contents note: Set out the effect on domestic legislation and provide for the administration of council regulation (EC) no 44/2001 of 22/12/2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*Brussels I regulation*). The *Brussels I regulation* supersedes the 1968 Brussels convention in the member states of the European Community, other than Denmark. The *Jurisdiction of Courts and Enforcement of Judgments Act, 1998* shall, except as provided in article 68 of the council regulation, cease to apply as between the state and member states
Commencement date: 1/3/2002

Extradition (European Union Conventions) Act, 2001 *(Commencement) Order 2002*
Number: SI 85/2002
Contents note: Appoints 20/3/2002 as the commencement date for the act

Industrial Relations Act, 1990 *(Code of Practice detailing Procedures for addressing Bullying in the Workplace) (Declaration) Order 2002*
Number: SI 17/2002
Contents: Declares that the code of practice set out in the schedule to the order is a code of practice for the purposes of the *Industrial Relations Act, 1990*
Commencement date: 25/1/2002

Local Government Act, 2001 *(Commencement) Order 2002*
Number: SI 65/2002
Contents note: Appoints the following commencement dates for specified provisions of the *Local Government Act, 2001* (mainly relating to local authority meetings and committees, including repeals): 11/3/2002 for section 5(1) of and part 1 of schedule 3 to the act for the purposes of the repeal of section 4 of the *City and County Management (Amendment) Act, 1955,* insofar as that section is not already repealed; 1/5/2002 for section 19 and for section 5(1) of and part 1 of schedule 3 to the act for the purposes of the repeal of section 11 of the *Local Government Act, 1994*; 17/7/2002 for part 6 and part 7 of the act and for schedule 10 to the act other than paragraphs 3(3) and 5 of schedule 10; 17/7/2002 for section 5(1) of and part 1 of schedule 3 to the act for the purposes of the repeal of local government legislation set out in part 1 of the schedule to this order (SI 65/2002); 17/7/2002 for section 5(2) of and part 2 of schedule 3 to the act for the purposes of the revocation of articles 36 and 38 of the schedule to the *Local Government (Application of Enactments) Order 1898* (SR & O 1898/1120); 1/5/2004 for paragraph 3(3) of schedule 10 to the act

Local Government Act, 2001 *(Meetings) Regulations 2002*
Number: SI 66/2002
Contents note: Provide for matters relating generally to meetings of local authorities, including public and media access to their committee meetings
Commencement date: 17/7/2002

Lottery Prizes Regulations 2002
Number: SI 29/2002
Contents note: Increase the limit on the total value of prizes for lotteries held under section 28 of the *Gaming and Lotteries Act, 1956* from €19,046.07 (£15,000) to €20,000
Commencement date: 1/3/2002

Mental Health Act, 2001 *(Establishment Day) Order 2002*
Number: SI 91/2002
Contents note: Appoints 5/4/2002 as the establishment day for the purposes of part 3 of the act

Mental Health Act, 2001 *(Sections 1 to 5, 7, 31 to 55) (Commencement) Order, 2002*
Number: SI 90/2002
Contents note: Appoints 5/4/2002 as the commencement date for the above sections

Ordnance Survey Ireland Act, 2001 *(Establishment Day) Order 2002*
Number: SI 73/2002
Contents note: Appoints 4/3/2002 as the establishment day for the purposes of the act

Planning and Development Regulations 2002
Number: SI 70/2002
Contents note: Modify the scales of location maps to be used in areas other than built-up areas. Also modify the details to be indicated on location maps to be submitted with a planning application. Amends the *Planning and Development Regulations 2001* (SI 600/2001)
Commencement date: 11/3/2002

Road Traffic (Construction, Equipment and Use of Vehicles) (Amendment) (No 2) Regulations 2001
Number: SI 93/2002
Contents note: Prohibit the use of a hand-held mobile phone or similar communications apparatus while driving a mechanically-propelled vehicle
Commencement date: 19/3/2002

Safety, Health and Welfare at Work (Chemical Agents) Regulations 2001
Number: SI 619/2001
Contents note: Give effect to council directive 98/24/EC of 7/4/1998 on the protection of the health and safety of workers from the risks related to chemical agents at work, and give effect to commission directive 2000/39/EC of 8/6/2000, establishing a first list of indicative occupational exposure limit values in implementation of council directive 98/24/EC, through an approved code of practice
Commencement date: 19/12/2001. G

Prepared by the Law Society Library

Solicitors' Benevolent Association

138th report and accounts

Year 1 December 2000 to 30 November 2001

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

The amount paid out during the year in grants was IR£245,816. Currently, there are 54 beneficiaries in receipt of regular grants and approximately one third of these are themselves supporting spouses and children.

The directors anticipate that, particularly in view of the increasing number of families with young children being helped, there will be a need for increased assistance in the coming years. Again, in a number of cases, the directors are conscious of the fact that grants have not been increased for some time, despite rising costs. Also, in several instances increased needs are apparent in cases where beneficiaries are of advanced age. For these reasons, the directors particularly welcome higher levels of subscriptions, donations and legacies and the general support of the profession.

The rules of the association were amended at a special general meeting on 5 July 2001, in order for the association to retain its charitable status. Copies of the new rules can be obtained from the secretary or any of the directors. There are currently 15 directors, three of whom reside in Northern Ireland, and they meet monthly in the Law Society's offices, Blackhall Place. They meet at Law Society House, Belfast, every other year. The work of the directors, who provide their services entirely on a voluntary basis, consists in the main of reviewing applications for grants and approving new applications. The directors also make themselves available to those who may need personal or professional advice.

The directors are grateful to both law societies for their support and, in particular, wish to express thanks to Ward McEllin, past president of the Law Society of Ireland, John Neill, past president of the Law Society of Northern Ireland, Ken Murphy, director general, John Bailie, chief executive and all the personnel of both societies.

I wish to express particular appreciation to all those who contributed to the association when applying for their practising certificates, to those who made individual contributions and to the following:

- The Law Society
- Northern Ireland Law Society
- Dublin Solicitors' Bar Association
- Belfast Solicitors' Association
- Faculty of Notaries Public in Ireland
- Limavady Solicitors' Association
- Tipperary and Offaly Bar Association
- Mayo Bar Association
- Southern Law Association
- County Galway Solicitors' Bar Association
- West Cork Bar Association
- Kerry Law Society.

To cover the ever greater demands on the association, additional subscriptions are more than welcome as, of course, are legacies. Subscriptions and donations will be received by any of the directors or by the secretary, from whom all information may be obtained at 73 Park Avenue, Dublin 4, and I would urge all members of the association, when making their own wills, to leave a legacy to the association. You will find the appropriate wording of a bequest at page 26 of the *Law directory* and on page 11 of the 2002 *Gazette yearbook and diary*.

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

Thomas A Menton, chairman

RECEIPTS AND PAYMENTS ACCOUNT
YEAR ENDED 30 NOVEMBER 2001

	2001	2000
RECEIPTS		
	IR£	IR£
Subscriptions	189,595	187,454
Donations	29,975	19,664
Investment income	35,116	34,799
Bank interest	2,980	2,640
	257,666	**244,557**
PAYMENTS		
Grants	(245,816)	(215,170)
Bank charges	(1,537)	(1,322)
Administration expenses	(17,006)	(15,839)
Deficit on movements in investments	–	(528)
	(264,359)	**(232,859)**
(DEFICIT) / SURPLUS FOR THE YEAR BEFORE SPECIAL EVENTS PROCEEDS	(6,693)	11,698
Lawyers diaries and christmas cards	(369)	16,910
Irish conveyancing precedents publication	4,678	–
(DEFICIT) / SURPLUS FOR THE YEAR BEFORE LEGACIES	**(2,384)**	**28,608**
Legacies	165,016	111,418
SURPLUS FOR THE YEAR	**162,632**	**140,026**

DIRECTORS AND OTHER INFORMATION

Directors
Thomas A Menton (chairman)
John Sexton (deputy chairman)
Sheena Beale, Dublin
Desmond Doris, Belfast
Felicity M Foley, Cork
John Gordon, Belfast
Colin Haddick, Newtownards
Niall D Kennedy, Tipperary
Mary H Morris, Swinford
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Sylvia O'Connor, Wexford
Brian K Overend, Dublin
Colm Price, Dublin
David Punch, Limerick
Andrew F Smyth, Dublin

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Brian K Overend
John M O'Connor
Andrew F Smyth

Secretary
Geraldine Pearse

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37/38 Upper O'Connell Street
Dublin 1

First Trust
31/35 High Street
Belfast BT1

Stockbrokers
Bloxham Stockbrokers
2-3 Exchange Place
IFSC
Dublin 1

Accountants
Deloitte & Touche
Chartered Accountants
Deloitte & Touche House
Earlsfort Terrace
Dublin 2

Offices of the association
Law Society of Ireland
Blackhall Place
Dublin 7

The Law Society of Northern Ireland
Law Society House
90/106 Victoria Street
Belfast BT1 3JZ

Personal injury judgment

Negligence – duty of care – purchase of cotton dress – dress catching fire – no chemical fire-retardant treatment on dress – whether retailer liable – High Court dismissed claim of mother – appeal to Supreme Court on basis of inadequacy of fire warning – argument about whether warning was too bland

CASE

***Rebecca Cassells (a minor), suing by her mother and next friend, Martina Cassells v Marks and Spencer plc*, Supreme Court (Murphy, Murray and McGuinness JJ), judgment of McGuinness J of 30 July 2001.**

THE FACTS

Rebecca Cassells, born 27 September 1989, lived with her mother in Navan. Prior to late 1994, the family lived in Brixton, London. In September 1994, Martina Cassells, mother of Rebecca, purchased a cotton day dress for Rebecca at the retail store of Marks and Spencer at Brixton. The dress had a full flared skirt. As Rebecca was small for her age, the skirt reached to within three to four inches of her ankles.

At 5.30pm on 24 May 1995, Rebecca and her mother returned home to their house in Navan. Rebecca was wearing the dress with a light cardigan and normal underclothes. She complained she was cold. When Rebecca and her mother entered the living room, Mrs Cassells lit the fire, which was in a typical open domestic fireplace. There was no fire guard. Rebecca went to turn the television on as her mother left the room briefly to go upstairs. The mother was out of the room for about three minutes. On her way downstairs, the mother heard Rebecca screaming. She ran downstairs and found the child in the kitchen with the back of her dress in flames. Mrs Cassells put her daughter into the kitchen sink and extinguished the flames by turning on the cold tap. Rebecca suffered severe and extensive burns involving the upper leg and buttock on the left side, the back, the left armpit and left upper arm.

The dress which Rebecca was wearing was made of 100% cotton material. This cotton material had not been treated with a chemical fire retardant. On a label on the dress there was a warning in red, 'keep away from fire', in English and three other languages. The label was a permanent part of the dress.

The normal practice of Marks and Spencer was to attach to the dress two sizeable cardboard tags which hung below the hem of the dress and were intended to be removed after purchase. One of these tags, which was approximately one-and-a-half inches wide by two inches long, contained on one side a warning in large red letters that read 'in the interest of safety, it is advisable to keep your child away from fire'. The same warning was repeated in small red capital letters on the other side of the tag in English and three other languages.

Mrs Cassells issued High Court proceedings, claiming that Marks and Spencer was negligent in selling and marketing the dress in question without having it treated with a chemical fire retardant. It was also contended by Mrs Cassells that the dress did not contain an adequate warning of the dangers of fire.

THE HIGH COURT

The matter came before Barr J of the High Court, who delivered judgment on 25 March 1999. In his judgment, Barr J stated that the probability was that, having turned on the television, Rebecca went over to the fire to warm herself and stood with her left side nearest the flames as she watched the television. He stated that the hem of her flared skirt on that side caught fire and the flames spread rapidly upwards. As soon as she became aware that her dress was on fire, or at least when she began to feel pain from the burning, the child screamed and ran towards the kitchen where she was rescued by her mother a few seconds later.

Barr J stated that it had been established that a cotton material comprised in the dress was highly flammable and a source of immediate danger for a child to wear if exposed to fire.

In the High Court, Barr J accepted that in all probability the warnings referred to earlier had been appended to the dress, as contended by Marks and Spencer.

Mrs Cassells conceded in the High Court that she should have fitted the fire guard after she lit the fire and that children should not be left unaccompanied in a room with an open fire. Mrs Cassells had not intended to be out of the room for long. Barr J rejected the contention that Marks and Spencer was negligent in selling and marketing the dress in question without having it treated with a chemical fire retardant. He also rejected the argument on behalf of Mrs Cassells that the dress did not contain an adequate warning of the dangers of fire. Barr J dismissed Mrs Cassells's claim.

Mrs Cassells appealed to the Supreme Court. There was no appeal from the decision of Barr J on the fire retardant issue. Mrs Cassells appealed only on the issue of the inadequacy of the fire warning given by Marks and Spencer that the dress should be kept away from fire. It was claimed that the High Court was wrong in law and on the facts in holding that, despite the finding that the cotton used in Rebecca's dress was highly flammable, the warning by Marks and Spencer was adequate.

THE SUPREME COURT

The case came before the Supreme Court composed of Murphy, Murray and McGuinness JJ, with McGuinness J delivering judgment on 30 July 2001. In the Supreme Court judgment, the court reviewed the facts and the decision of the High Court. McGuinness J noted that there had been considerable technical evidence in the High Court as to the testing of materials for flammability and as to statutory and other regulations in England and Ireland covering both the flammability of materials and the need for warning labels on garments. Certain regulations as to flammability applied only to nightwear, and it appeared there were no regulations of a particular type relating to children's daywear.

It was noted by the Supreme Court that the High Court had observed that Marks and Spencer was one of the leading retailers of children's clothing both in the United Kingdom and Ireland, and their clothing had 'long enjoyed a high reputation for quality and value'. The High Court had accepted that Marks and Spencer had a regard for safety which exceeded that displayed by many of their competitors in the clothing industry.

Standard of flammability

McGuinness J stated that, during the course of the trial, 18 children's dresses made of cotton and other comparable materials that had been purchased from Marks and Spencer's major competitors were introduced in evidence. All had been tested by independent experts. None conformed to the Marks and Spencer's standard of flammability for children's daywear and none had any fire warning label. It was noted that Barr J in the High Court had stated that Marks and Spencer had 'voluntarily adopted and is complying with a minimum standard of safety vis-à-vis fire risk relating to children's daywear which leads the field in the retail trade in the UK and Ireland'.

Counsel for Rebecca Cassells submitted in the High Court that, in the circumstances of the case, the warnings provided by Marks and Spencer were inadequate. It was argued that the warnings were 'mere platitudes' and did not tell purchasers anything they did not already know. It was argued that the light cotton material was very dangerous if exposed to fire because of the rapidity and acceleration of the flame along the fabric. Counsel for Rebecca referred to the case of *O'Byrne v Gloucester* (Supreme Court, unreported, 3 November 1988), where, in similar circumstances, Finlay CJ in his judgment suggested the attaching to the garment in question of 'a simple warning that it was dangerous if exposed to a naked flame and would burn rapidly'. It was suggested by counsel that this wording was much more effective than that the 'bland' warning in the present case.

Counsel for Marks and Spencer submitted that the warning was sufficiently clear. It was also submitted that the evidence showed that some 200,000 children's dresses of the style in question had been sold by Marks and Spencer with 60,000 of the dresses sold in that season alone. The present case was the only case known to Marks and Spencer where a child wearing one of these dresses had been injured by fire. It was argued that this demonstrated that Marks and Spencer's fire warning was in fact adequate and effective.

McGuinness J stated that there was no requirement either in Ireland or the United Kingdom for children's daywear clothes, of whatever material, to meet any particular flammability standard or to carry any label warning against fire. In the case of Rebecca's dress, Marks and Spencer of its own volition provided a permanent label carrying a warning.

Duty of care

Of the cases open to the court by counsel on both sides, McGuinness J noted that the two most relevant were *Duffy (a minor) v Patrick Mooney and Dunnes Stores (Dundalk) Limited* (Supreme Court, unreported, 23 April 1988) and *O'Byrne (a minor) v Brendan Gloucester and others* (Supreme Court, unreported, 3 November 1988). The court noted that in both these cases children were badly burnt as a result of their clothes catching fire. However, in neither case did the garment in question bear any label whatsoever warning of the dangers of fire. In both cases, the court accepted the need for such a label and that the failure to provide a warning label was a breach of the retailer's duty of care. In the present case, Marks and Spencer acknowledged the duty of care owed to the purchaser. It also accepted that, without the provision of the warning label, it would be in breach of this duty of care. McGuinness J stated that she found it somewhat difficult to follow the logic of the argument asserted on behalf of Rebecca Cassells that the warning 'keep away from fire' merely 'tells people what they know already' and is too bland. The warning clearly indicated that the garment was made of flammable material; otherwise there would be no need for the warning.

The judge added: 'Is it suggested that because the label does not warn that the material burns rapidly, one might think that there was really no danger in allowing the garment to come in contact with a naked flame? Is it suggested that a child dressed in material which burns more slowly, but is nonetheless flammable, may safely be exposed to unprotected fire, or in that case, a "keep away from fire" warning may be ignored?'

McGuinness J noted that different materials had different properties when exposed to fire; it was well known that some emit fumes, others melt and may adhere to the flesh causing severe burns, and others – like cotton – burn rapidly. The judge noted that when a purchaser was presented with a warning label that read 'keep away from fire', the only logical reaction is to do precisely that, regardless of the nature of the particular garment or the material of which it was made. The court noted that, to her credit, Mrs Cassells accepted that she had seen the warning label and knew of the danger of an unguarded fire.

Tragic accident

The Supreme Court stated that it was tragic that Rebecca Cassells had suffered serious injury. Unfortunately, the court observed that it was a fact of life that, in spite of reasonable care on the part of those concerned, such as retailers and parents, such tragic accidents do happen. McGuinness J joined with Barr J in the High Court in admiring the way in which Rebecca Cassells and her mother had dealt with a sad situation. Nevertheless, the Supreme Court dismissed the appeal and upheld the decision of the High Court judge holding that Marks and Spencer was not liable. G

This case was summarised by solicitor Dr Eamonn Hall.

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Compiled by Robert Forde BL for FirstLaw

CRIMINAL

Bail, delay, *res judicata*

Appeal – rape charge – res judicata – *delay – whether change of circumstance had occurred sufficient to grant bail*

The applicant had sought bail, which had been refused in the High Court. The applicant had been charged with rape offences and at a previous hearing there had been evidence given of threats and intimidation, and bail was refused. The applicant now appealed against the refusal of bail and contended that the trial date was a considerable time away. The applicant also indicated a willingness to reside elsewhere, away from the complainant.

The Supreme Court (Keane CJ delivering judgment) dismissed the appeal, holding that the fact that there would be a delay in bringing the applicant to trial was not a change of circumstance. The undertaking to reside elsewhere was not a change in circumstance. The appeal would be dismissed and the order of the High Court affirmed.

***DPP v Doherty*, Supreme Court, 30/07/2001** [FL4734]

Bail, fair procedures

Jurisdiction of High Court – whether bail correctly revoked – whether change of circumstance had occurred

The applicant had been charged in respect of the death of a woman. Originally, the applicant had been granted bail by Mr Justice Quirke. Bail was granted on the basis that a cash lodgement of £10,000 be made as well as two independent sureties of £20,000, together with signing on conditions at a garda station. The applicant had sought to vary the terms of bail and had applied to Mr Justice O'Higgins, who decided that the matter warranted a complete re-hearing. Mr Justice Smyth in the High Court revoked bail on the basis that the applicant would not stand trial if admitted to bail.

The Supreme Court allowed the appeal. Originally, given the circumstances of the applicant, bail had been granted on quite stringent conditions. There had been no appeal against the order of Mr Justice Quirke and there was no suggestion that the wrong principles had been applied. Settled jurisprudence precluded one High Court judge from reopening the terms of bail granted by another High Court judge unless there had been a change in circumstance. The order of the High Court revoking bail was wrong in law and the matter would be remitted to the High Court to determine on what conditions the applicant should be admitted to bail.

***DPP v Horgan*, Supreme Court, 21/12/2001** [FL4759]

Dismissal of proceedings, evidence

Practice and procedure – evidence – sexual offences – application that case be withdrawn from jury – role of jury – right to fair trial – whether case should be left to jury

The accused had been charged with alleged rape. At the conclusion of the case for the prosecution, an application was made that the case be withdrawn from the jury and a verdict of not guilty be directed. It was submitted that the quality of the state's evidence was poor and unreliable, owing to inconsistencies in the evidence given by the complainant.

Mr Justice Herbert refused the application. Notwithstanding the apparent inconsistencies, it was still a matter for the jury to determine. It was not just a borderline case. A mild direction would be given to the jury that, given the inconsistencies, it should only convict after assessing the complainant's evidence with great care.

***DPP v Nolan*, High Court, Mr Justice Herbert, 27/11/2001** [FL4802]

Drink driving, powers of arrest

Road traffic – drink driving – whether accused arrested under correct section – whether person arrested under section 49(8) of the Road Traffic Acts, 1961-95 *could be charged with offence under section 50 of the acts* – Road Traffic Act, 1961 – Road Traffic Act, 1994

The respondent had been requested by a garda to give a breath sample on the suspicion that he had consumed alcohol. The sample was positive and the garda informed the respondent that it was his opinion that the respondent had committed an offence under section 49 of the *Road Traffic Act, 1961* and was arresting him pursuant to that section. The respondent was in fact later charged under section 50 of the act. In the District Court, the solicitor on behalf of the respondent contended that the state was not entitled to prosecute a section 50 charge when the respondent had been arrested under section 49 of the act. It was argued that there were two distinct powers of arrest – one set out in section 49(8) and the other in section 50(10). It was submitted that neither section gave power to arrest for an offence under the other section. On behalf of the appellant, it was argued that the respondent had been lawfully arrested, no issue regarding the taking of the specimens was raised and the prosecution was entitled to put either charge to the respondent. It was submitted that the evidence before the court supported a charge of either section 49(2) or section 50(2). The District Court judge accepted the argument made on behalf of the respondent and dismissed the charge against him. The District Court judge stated a case for the opinion of the High Court as to whether he was correct in law in dismissing the charge.

Mr Justice Finnegan answered the case stated in the negative, holding that if a man was to be deprived of his freedom he was entitled to know the reason why. However, an arrest did not become wrongful merely because a man was arrested for one felony and was subsequently charged with another one. The garda had formed the opinion that the respondent had consumed intoxicating liquor and had so informed the respondent. The respondent furnished a specimen of his breath which proved positive. The respondent was told that he was being arrested for drink driving. It was quite clear that the arrest was lawful. These facts together were sufficient to constitute the crime with which he was charged, which was an offence under the *Road Traffic Acts, 1961-1994*. It was immaterial that he was in fact arrested pursuant to the statutory power of arrest conferred by section 49(8) of the acts. The scheme of the *Road Traffic Acts* was also relevant.

Had the respondent in fact been charged under section 50 of the acts, he could have been convicted under section 49 of the act and vice versa. The district judge was not correct in dismissing the charge.

***DPP v Moloney*, High Court, Mr Justice Finnegan, 20/12/2001** [FL4820]

Sentencing

Drug offences – appeal against sentence – statutory guidelines – whether minimum sentence appropriate – whether sentence unduly harsh – Misuse of Drugs Act, 1977, *sections 15(A) and 27(3)* – Criminal Justice Act, 1999, *sections 4 and 5*

The applicant had pleaded guilty in the Circuit Court to five counts of being in possession of controlled drugs for the purpose of sale or supply contrary to the *Misuse of Drugs Act, 1977*. The applicant was sentenced to six years' imprisonment in respect of one of the counts and also received a number of lesser sentences. An application was brought for leave to appeal on the ground that the sentences were unduly severe.

The Court of Criminal Appeal dismissed the application, holding that section 27 of the *Misuse of Drugs Act, 1977* provided for a mandatory minimum sentence of ten years' imprisonment. The Circuit Court judge had assessed a sentence of 15 years and had adjusted this downwards taking into account a plea of guilty and the fact that it was a first offence. This resulted in a sentence of six years. The Circuit Court judge had felt that it was inappropriate to increase the sentence to the statutory minimum, but had taken into account the existence of a statutory minimum sentence and was bound to do this. The court was unable to detect any error in principle on the part of the Circuit Court judge and the application would be refused.

***DPP v Duffy*, Court of Criminal Appeal, 21/12/2001** [FL4796]

DISCOVERY

Practice and procedure

Litigation – notice for particulars – damages – whether order of discovery complied with – whether plaintiff should furnish further particulars of claim

The case concerned allegations by the plaintiff that the defendants, as members of the Church of Scientology, put undue pressure on her to pay for and attend various courses. The plaintiff alleged that the actions of the defendants had breached the plaintiff's constitutional rights to bodily integrity, mental and psychological integrity and personal privacy. The defendants denied the claims of the plaintiff and brought two motions to the High Court, one seeking further and better particulars of the plaintiff's claim and the other seeking to have the plaintiff's claim dismissed for an alleged failure to comply with an order of discovery. Both motions were refused in the High Court and the defendants appealed to the Supreme Court. The Supreme Court held that it was most unfortunate that an action begun in December 1995 was pursuing a laborious and protracted course through the courts. The issues in the case were relatively straightforward and did not require the immense panoply of particulars and of discovery that had so far issued. However, some of the legal issues involved were novel and the defendants were entitled in some respects to further particulars of the claim being alleged against them. It ordered that further particulars should be furnished regarding the alleged pressure that was brought on the plaintiff to subscribe to other courses. The plaintiff should indicate what form the alleged pressure took. In other respects, the particulars sought were matters relating to evidence which the plaintiff would give at trial. To a certain extent, the defendants' appeal in this matter would be allowed. The application for the dismissal of the plaintiff's action on the basis of an alleged failure to comply with an order of discovery would be refused. The order of discovery was extremely wide ranging and covered a huge quantity of correspondence. The court had undoubtedly a jurisdiction to strike out proceedings over non-compliance with a court order. The plaintiff had maintained that she had complied with the order of discovery. The High Court judge had correctly declined to dismiss the plaintiff's proceedings and the defendants' appeal would be dismissed.

***Johnston v Church of Scientology*, Supreme Court, 07/11/2001** [FL4752]

FAMILY

Delay, legal aid

Judicial review – legal aid – family law – delay – damages – statutory interpretation – Legal Aid Board – whether board failed to process request of applicant with reasonable expedition – whether respondent in breach of statutory duty – Civil Legal Aid Act, 1995

The applicant had applied to the legal aid board for legal aid in connection with an application for judicial separation. By letter, the board indicated that on account of the demand for legal services it could not process her application. The applicant's request was not processed until almost 20 months later. While awaiting the outcome of the application for legal aid, the applicant was forced to leave the family home because of a violent incident. The applicant sought various declarations, including orders of *mandamus*, to the effect that the respondent was obliged to consider her application for legal aid within a reasonable time and that the board had failed to prosecute her proceedings for judicial separation with reasonable expedition. The respondents argued that the proceedings were now moot as the proceedings for legal separation had been concluded.

Mr Justice Butler refused the relief sought, holding that there was no connection between the applicant being forced to leave her home and the delay in the judicial separation proceedings, as legal aid was available to her under the private practitioner scheme. The delay suffered by the applicant in the processing of her application for legal aid was the ordinary inconvenience caused by any such delay. Orders of *mandamus* could not be obtained as the proceedings for legal separation were moot. The language of section 5(1) of the *Civil Legal Aid Act, 1995* was plain and obvious and required no special interpretation. The board was obliged to provide, within its resources and subject to other provisions of the act, legal aid to persons who satisfied the requirements of the act. The words simply meant that legal aid shall be provided within the board's resources and that was precisely what the board did in this case. The board had a method of dealing with cases in a certain order of priority and within that scheme the applicant was given equal treatment to all other applicants. The relief sought was refused.

***Kavanagh v the Legal Aid Board and Others*, High Court, Mr Justice Butler, 24/10/2001** [FL4793]

Divorce, domicile

Recognition of foreign divorce – preliminary issue – whether respondent had discharged onus of proof that he had relinquished domicile of origin – whether foreign divorce entitled to recognition – Judicial Separation and Family Law Reform Act, 1989 – Family Law Act, 1995 – Family Law (Divorce) Act, 1996 – Family Law (Maintenance of Spouses and Children) Act 1976 – Domicile and Recognition of Foreign Divorces Act, 1986

The applicant had sought a decree of judicial separation pursuant to the *Judicial Separation and Family Law*

Reform Act, 1989 and other ancillary reliefs. It was ordered that the issue of whether a divorce obtained in the Netherlands was entitled to recognition in this state should be tried as a preliminary issue. The respondent claimed that the divorce obtained in the Netherlands was entitled to recognition in the state on the basis that on the date when the divorce was obtained he was domiciled in that jurisdiction. The respondent also claimed that the divorce was entitled to recognition on the basis of residence. Both parties had a domicile of origin in Ireland and had married and set up the family home in Dublin. Some years later the family moved to the Netherlands when the respondent was appointed to a position there. Both parties learnt and spoke Dutch fluently. Their children were enrolled in primary schools. Differences arose in the marriage, and the applicant and the children returned to Ireland. The applicant believed that the respondent was in negotiation with his employer with a view to returning to Ireland. The respondent contended that the idea of returning to work in Ireland was one of many options he considered and did so only in the hope that it might save the marriage and that it was always his intention to remain in the Netherlands. The respondent contended that he had severed his connections with Ireland and that he now had acquired a domicile of choice in the Netherlands. The applicant disputed the respondent's assertion and contended that the respondent's move to the Netherlands was no more than a career change and was motivated by the tax regime in Ireland and that he had returned to Ireland to discuss the job which his employer (an international firm) would give him in Ireland. The applicant stated that she had initiated divorce proceedings in the Netherlands as she needed sufficient funds to keep herself and the children. She applied for interim maintenance in the Netherlands and it was a condition of such an order that the applicant prosecute the case to seek a divorce.

Mr Justice Morris stated that the respondent had not acquired a domicile of choice in the Netherlands. The respondent became fond of living in the Netherlands and was content to remain there for the purposes of his work. However, the respondent had not formulated any intention of abandoning Ireland as his domicile of origin. Accordingly, on the date on which the divorce was obtained in the Netherlands, the respondent was domiciled in Ireland. The court was satisfied that the respondent, being aware of the divorce proceedings, availed of their existence to settle up outstanding matters. It was common case that a Dutch court would accept jurisdiction based on the residence of one of the parties. The divorce was granted after the coming into operation of the *Domicile and Recognition of Foreign Divorces Act, 1986*. The question was whether foreign divorces were regulated by the common law or were they regulated by statute. With the enactment of section 5 of the 1986 act, the rules relating to recognition of foreign divorces passed from the common law and thereafter were regulated by statute. Thereupon the court's right to alter the rules ceased. Residence was not a basis for recognition under the act. Accordingly, the respondent was not entitled to a declaration that the divorce obtained in the Netherlands was entitled to recognition in this state.

***DT v FL*, High Court, Mr Justice Morris, 23/11/2001** [FL4839]

LAND LAW

Negligence, occupier's liability

Personal injuries – negligence – damages – whether defendant failed to take reasonable care to ensure plaintiff did not suffer injury – whether plaintiff guilty of contributory negligence – Occupier's Liability Act, 1995

The plaintiff had been injured in a 'trip and fall' accident at an equestrian centre and as a result had sued the defendant, claiming that the defendant had failed to take reasonable care to ensure that the plaintiff had not suffered injury within the meaning of the *Occupier's Liability Act, 1995*. On behalf of the defendant, it was submitted that the saddle of the door (where the accident occurred) did not constitute a danger or a hazard. Furthermore, it was submitted that the proximate cause of the accident was that the plaintiff failed to look where she was going.

Mr Justice Lavan found in favour of the plaintiff, holding that there had been a danger and a hazard present due to the state of the premises. The plaintiff's actions in talking to her family and walking through the door was an act of momentary inadvertence. It would be unreasonable to make a finding of contributory negligence. A total of £41,200 in damages would be awarded.

***Sheehy v Devil's Glen Tours*, High Court, Mr Justice Lavan, 10/12/2001** [FL4730]

LANDLORD AND TENANT

Contract, land law

Equity – option to purchase – specific performance – whether option could be exercised – whether vendor had wrongfully refused to complete – whether just and equitable to grant relief sought

The plaintiff had negotiated a lease with his landlords (the second- to seventh-named defendants) for the rental of a particular premises. The lease provided that a non-returnable deposit was to be paid along with an option to purchase the premises. The tenant paid the deposit and signed a standing order for the payment of rent. During the currency of the lease, the landlords

sold their interest to the first-named defendant (Albion). The plaintiff was not notified of this transaction for some time and continued to pay rent to his original landlords. Subsequently, the plaintiff cancelled the standing order and wrote to Albion seeking to exercise the option to purchase. At this point, rent had not been paid for three months. Albion then wrote to the plaintiff pointing out that there were arrears of rent, that these should be discharged and also pointed out that the title deeds had been lost for a number of years. The plaintiff replied that it had been assumed that the deposit would cover the outstanding rent. Albion then sought the prompt payment of the option purchase price. Further correspondence ensued and Albion stated that it was not bound by the option to purchase agreement. The plaintiff issued proceedings seeking to enforce the option agreement. Albion contended that the sale should have been completed by a certain date. It was argued that the option could only be exercised if the plaintiff was not in breach of covenant at the time of the exercise of the option. As the plaintiff was in arrears with his rent, it was submitted that the exercise of the option was invalid. Albion also argued that specific performance was an equitable remedy and that it would not be just and equitable to grant it.

Mr Justice McCracken granted the relief sought, holding that the plaintiff had wrongly believed that the deposit could be used for the payment of the rent for three months. The lease only provided that the deposit could be used to pay the rent for the last three months of the term granted by the lease provided the lease had run its full term. By exercising the option, the plaintiff ensured that the lease had not run its full term. However, this would appear to have been put right by the payment by the tenant of the three months' rent. The contents of the letter from Albion which challenged the option were quite astonishing. None of the grounds had the slightest validity. The option clearly formed part of the tenancy agreement. Undoubtedly there was an argument to be made that time should be of the essence of the contract. However, the landlords were bound to furnish evidence of title within six months from the date of the lease and had failed to do so. As a result, the plaintiff could not complete within the specified time and there could not be any question of time being of the essence of the contract. Also, Albion's solicitors had undertaken to issue contracts for sale. Undoubtedly the plaintiff was technically in arrears of rent when the option was exercised, due to his mistaken belief that he could use the deposit to pay the last three months' rent. However, the plaintiff had furnished a cheque for the rent and subsequently a bank draft. The option agreement did not contain any express provision making it a condition precedent to the exercise of the option and the court was not prepared to imply such a condition. In the circumstances, the plaintiff had validly exercised the option to purchase and Albion had wrongfully refused to complete. There was nothing inequitable in the plaintiff's behaviour which would warrant a refusal of the remedy of specific performance. A declaration would issue that Albion was bound by the option agreement and specific performance would be ordered.

***Terry v Albion Enterprises Limited and Others*, High Court, Mr Justice McCracken 14/11/2001** [FL4807]

LITIGATION

Evidence, negligence

Personal injuries – litigation – evidence – negligence – appeal – whether findings of fact made by trial judge correct – whether trial judge incorrectly dismissed evidence of expert witness

The plaintiff had been injured in an accident at his workplace and had brought a claim for damages for personal injuries. The plaintiff was awarded £50,300 in damages, which was reduced to £37,725 on the basis of contributory negligence. The defendants appealed the judgment on the basis that the findings of facts of the trial judge were unsatisfactory. The plaintiff had slipped on the floor of the workplace and evidence had been given in relation to the build-up of water on the floor. The defendants contended that the trial judge had failed to adjudicate on a matter relating to the seeping of water from a manhole cover and also objected to the rejection of the evidence of their expert witness.

The Supreme Court dismissed the appeal, holding that the trial judge had made findings on the evidence which he was entitled to make. He had also preferred the evidence of one expert engineer over another. The appeal would be dismissed and the order of the High Court affirmed.

***Cassidy v Wellman International Limited*, Supreme Court, 31/10/2001** [FL4733]

Negligence, *Statute of Limitations*

Practice and procedure – Statute of Limitations – *tort – property and construction – negligence – contract – whether action statute-barred – whether cause of action accrued from date of construction of house* – Statute of Limitations 1957 – Statute of Limitations (Amendment) Act, 1991 – Rules of the Superior Courts 1986, *order 25*

The plaintiffs instituted proceedings against the defendants in respect of the building of their dwelling-house. Cracks had appeared in the house shortly after it was built and repairs had been carried out. However, some years later further cracks appeared and the plaintiffs sued, basing their claim on both contract and negligence. The defendants denied the claims and a preliminary issue arose as to whether the action was statute-barred. Counsel for the defendants argued that any cause of action of the plaintiffs in contract accrued when the defective blocks were used in the construction of the house.

Mr Justice Finnegan declared that the action by the plaintiffs based on tort was not statute-barred. The relevant period of limitation in tort applicable in this matter was six years from the date on which the cause of action accrued. An action in contract had become time-barred by the time the plenary summons was issued. The existence of a contractual relationship between parties did not preclude the injured party from seeking a remedy in tort on the same facts. The cracks that occurred did not develop until well within the limitation period of six years. The cause of action pleaded in tort against the defendants was not time-barred.

***O'Donnell and Anor v Kilsaran Concrete and Anor*, High Court, Mr Justice Herbert, 02/11/2001** [FL4777]

Occupier's liability

Personal injuries – litigation – negligence – status of plaintiff on building site – access to unsecured ladder – whether plaintiff trespasser or visitor – Occupier's Liability Act, 1995

The plaintiff was the manager of a guttering distribution firm and had been requested by a builders' providers to fly over from England to look at a problem relating to the installation of guttering at a building site. While on the site, the plaintiff accessed a ladder, fell and suffered personal injuries. The plaintiff issued proceedings and claimed damages for personal injuries on the basis of common-law negligence or breach of statutory duty. Mr Justice Morris held that the first issue to be decided must be the status of the plaintiff on the site at the relevant time. Counsel on behalf of the defendants submitted that the plaintiff was on the building site as a trespasser. It was submitted that within the meaning of the *Occupier's Liability Act, 1995* they had not

acted with reckless disregard for the person or his property. On behalf of the plaintiff, it was submitted that he was on site as a visitor and that he was owed the duty of care as set out in the *Occupier's Liability Act, 1995*. It was further submitted on behalf of the plaintiff that section 8 of the *Safety, Health and Welfare at Work Act, 1989* imposed a further duty on the occupiers of the site.

Mr Justice Morris said he found some conflict in the evidence given by the plaintiff's witnesses. The court did not believe that the party had come to be on the roof in the manner described on behalf of the plaintiff. The court was not satisfied that the plaintiff was entitled to be regarded in law as a visitor within the meaning of the *Occupier's Liability Act, 1995*. No case had been made out that the first-named defendant acted in such a reckless way, and therefore the plaintiff was not entitled to any relief under the *Occupier's Liability Act*. There was no evidence which established that the premises were 'made available to the plaintiff' and accordingly the plaintiff was not entitled to any rights under section 8 of the

Safety, Health and Welfare at Work Act, 1989. There was a responsibility on a main contractor if a ladder was allowed to be left unattended and unsecured, leaning against a scaffolding, and if a visitor as defined in the 1995 act used the ladder and suffered personal injuries as a result of a fall. However, the plaintiff was not a visitor within the terms of the act and was not entitled to succeed in this action.

***Williams v TP Wallace Construction and Others*, High Court, Mr Justice Morris, 23/11/2001** [FL4794]

MEDICAL NEGLIGENCE

Delay, dismissal of proceedings

Practice and procedure – dismissal of proceedings – medical negligence – lay litigant – whether delay inordinate and inexcusable

The plaintiff had initiated proceedings against the defendants over an alleged failure to treat the plaintiff's medical problems properly. The plaintiff's claim had been dismissed in the High Court by Mr Justice Johnson for want of prosecution. The plaintiff sought to appeal against the decision and also sought liberty to adduce fresh evidence and to amend the notice of appeal. The plaintiff was a lay litigant and contended that the defendants had not made a full discovery of relevant documents and that on the merits of the issue the plaintiff had an arguable case.

The Supreme Court dismissed the appeal, holding that there had been inordinate delay in the case and that the question to be determined was whether it was inexcusable. The matter of seeking an additional medical report was not a sufficient excuse for the delay in obtaining a second notice of trial. The problems in relation to discovery could have been dealt with by the former solicitors engaged by the plaintiff. The inordinate delay had given rise to a substantial risk that it was not possible to have a fair trial and the delay was likely to have caused serious prejudice to the defendants. The High Court had not erred in its discretion in dismissing the proceedings.

***Brennan v Fitzpatrick and Others*, Supreme Court, 23/11/2001** [FL4851]

MENTAL HEALTH

Detention, guardianship

Practice and procedure – mental health – detention – whether welfare of applicant best met by continued detention – whether case should be heard or adjourned

The applicant had been detained in the Central Mental Hospital by order of the High Court (Mr Justice Kelly). The guardian of the applicant wished to appeal against the decision. At the High Court hearing, the applicant made an unsworn statement to the effect that she would prefer to stay in the Central Mental Hospital. In the Supreme Court, Chief Justice Keane held that the applicant was a young woman with a significantly troubled past. The court was not in a position to embark on the hearing of the appeal from the order by the High Court made on the previous day. None of the materials which were before the High Court judge were before the Supreme Court. The appropriate procedure was to adjourn the case to a date in respect of which submissions by counsel would be heard. This would give the guardian *ad litem* an opportunity to consider how best to proceed.

***P v Eastern Health Board*, Supreme Court, 10/05/2000** [FL4804]

PRACTICE AND PROCEDURE

Amendment of pleadings, delay

Litigation – amendment of pleadings – delay – whether amendment of counterclaim should be allowed – whether amendment would prejudice plaintiff's case

Ejectment proceedings had been taken by the plaintiff over non-payment of rent. The defendant brought a defence and counterclaim, alleging that the plaintiff had committed a number of torts against the defendant, including injurious falsehood and negligent misstatement. In particular, allegations were made that malicious phone calls were made from telephone lines owned by a person who was associated with the plaintiff. The defendant had sought to obtain documents which would support its counterclaim and experienced considerable delay in obtaining these documents. When these documents were obtained, it was apparent that the defendant might wish to amend its pleadings. Mr Justice McCracken refused the application to amend the pleadings on the grounds of delay and also on the grounds of prejudice that would result to the plaintiff.

The Supreme Court (Keane CJ delivering judgment) allowed the appeal, holding that the plaintiff in a broad sense must have been aware of the nature of the case that the defendant was making. Where an amendment could be made without causing prejudice to the other party and enable the real issues to be tried, the amendment should be made. In order for the real issues to be tried in this case, the amendment sought should be allowed. If the defendant was precluded from producing that evidence, an injustice would be created. While there had been a delay in seeking the amendment, the delay of itself would not be a sufficient ground for refusing the amendment. There was not any degree of prejudice to the plaintiff which would justify the refusal of the amendments. The order of the High Court would be discharged and the amendment allowed.

***Crofter Properties v Genport*, Supreme Court, 16/03/2001** [FL4827]

Dismissal of proceedings

Litigation – application for non-suit – whether trial judge had incorrectly applied test for non-suit

When the present case was being heard in the High Court, counsel on behalf of the defendant had applied for a non-suit. The trial judge had inquired as to whether the defendant intended on going into evidence if the application was refused. The defendant indicated he would and the trial judge held that the defendant had a case to answer. Having heard the defendant's evidence, the trial judge held that the plaintiff was not entitled to succeed and dismissed the plaintiff's case. However, the trial judge had stated when dealing with the application for a non-suit that if the defendant had proposed not to go into evidence then he would have dismissed the plaintiff's case. The plaintiff appealed against the dismissal of proceedings.

The Supreme Court allowed the appeal, holding that the trial judge had not dealt with the application for a non-suit in a satisfactory manner. Where a trial judge believed there was no 'case to meet', then that was all the trial judge was required to say. To indicate to the defence that the plaintiff had not made out a case could only be an indication to the defendant that the more evidence they called the more their prospects of winning the case diminished. The appeal would be allowed and a re-trial would be ordered on all issues.

***O'Donovan v Southern Health Board*, Supreme Court, 02/11/2001** [FL4749] G

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Eurlegal

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

Damages now available for breaches of EC competition law: the ECJ's judgment in C-453/99 *Courage v Crehan*

The European Court of Justice (ECJ) has recently sent an important and double-edged message to people or companies that are party to illegal agreements, namely that: (1) being a party to an illegal agreement does not necessarily stop you from seeking full remedies before national courts (even damages) against your 'partners in crime', provided you were not significantly responsible for the illegality in question; and (2) as a result, the chances of parties going to court over anti-competitive agreements have now increased. The ECJ's judgment comes in the case of *Crehan* (on reference from the English Court of Appeal) and has been heralded as a potential starting point for a wave of competition-law based litigation. This article examines what the ECJ has said in some more detail and, in particular, considers what it might mean in Irish terms.

Legal basis

Article 81(1) of the *EC treaty* prohibits agreements having a potential effect on trade between member states and which prevent, restrict or distort competition. Article 81(2) renders such agreements void and unenforceable. The European Commission is the guardian of the treaty, and has wide-ranging powers to enforce respect for article 81 and other EC competition provisions. However, what the European Commission (and indeed the European courts) cannot do is adjudicate civil remedies between private parties based on infringement of EC law. This is the preserve of national courts, based on general EC law principles of direct effect. The ECJ has long since ruled that article 81, by its very nature, produces direct effects in relations between individual undertakings, and therefore article 81 creates a direct right for such undertakings, which national courts have a responsibility to safeguard.

Actions for breach of article 81 before national courts

In the UK, it had been generally accepted that a third party affected by the unlawful conduct of others contrary to article 81 had a right of action before the national court and a remedy available in damages. What was not accepted, however, was the idea that a party to an agreement itself, which infringed article 81, had a right of action against his co-contractor(s), together with a remedy in damages. The theory was that no-one could base a cause of action upon an illegal agreement to which they themselves were a party, and therefore complicit (*in pari delicto*).

The facts of the *Crehan* case

Bernie Crehan was a tenant of a public house, who in 1991 entered into two tenancy agreements with his landlord, Inntrepreneur Estates Limited (IEL), a joint venture between Courage and Grand Metropolitan. Crehan leased the pub under a standard 20-year IEL lease which contained an exclusive purchasing obligation, the beer tie, in favour of Courage. The standard lease was notified to the European Commission for exemption from article 81(1), which was refused, partly due to tenants' submissions that there were significant price differences between Courage beer supplied to tied tenants and free houses. IEL withdrew that notification and notified a new standard form lease, which afforded tied tenants discounts off list prices for Courage beer.

Meanwhile, Crehan left the pub, claiming that the beer tie and the inflated prices had driven him out of business. Courage sued Crehan for unpaid beer, and he counter-claimed for loss suffered by adhering to the original beer tie, which had prevented him from buying beer from cheaper sources. Crehan claimed that the original lease to which he had been a party evidently infringed article 81(1) given its rejection by the commission, and that therefore his misfortunes were the result of an illegal agreement to which, admittedly, he was a party, but for which in reality he was not responsible and had no control over.

Questions before the ECJ

The Court of Appeal was aware of a US decision, *Perma Mufflers v Intl Oarts Corp* (US 134 [1968]), that states that a party to an anti-competitive agreement, which is at an economic disadvantage, may bring an action for damages against the other party. The Court of Appeal felt there was a need for clarification of this issue, hence the referral to the ECJ.

The ECJ was asked essentially to judge the compatibility with EC law of English laws by which a party to an 'illegal' agreement cannot seek declaratory relief (that the agreement is void) or claim damages from the other party to the agreement, on the basis that one should not be able to profit from unlawful conduct. The ECJ replied that:

- Article 81 is a fundamental provision of EC law and essential for the proper functioning of the internal market
- The nullity of agreements breaching article 81(1) can be relied on by anyone
- Article 81 has direct effect which includes granting rights to individuals without limitation. The ECJ ruled therefore that an individual has a right to seek declaratory relief based on a breach of article 81 even where he is a party to a restrictive agreement
- To preclude the possibility of damages would breach the principle of effective protection. If a contractor has a right to seek declaratory relief, this right alone (that is, without possibility for damages) might be insufficient to provide effective protection for that right. A right to seek damages may not then be precluded. The ECJ added that a clear right to claim damages would positively strengthen enforcement of EC competition law and discourage unlawful contracts
- To recover damages it must be shown that the party claiming damages was not 'significantly responsible' for the agreement. In this

regard, the ECJ suggested that matters to be taken into account by national courts in determining 'significant responsibility' might include the economic and legal context in which the respective parties to the agreement had found themselves, their respective bargaining power, and their conduct.

The discretion as to the role played by each party and whether or not parties will be allowed to claim damages will still remain with the national courts. Crehan's case will now return to the Court of Appeal, which, having established that he is able to bring a claim against Courage and can claim damages as a result of that action, will decide on the facts whether or not actually to award damages and, if so, in what amount.

Significance of the judgment throughout the EU

The long-term significance of the judgment remains to be seen, but a healthy prediction is that it will open the eyes of litigators to the possibility that national courts are a viable option for competition law-based remedies. Furthermore, would-be infringers of EC competition law will now know that being dragged into national courts on account of their actions is a far more real and greater possibility. The fact that current proposals before the European Commission seek an even greater enforcement role for national courts may significantly add to this.

What the above basically means is that the chances of litigation arising from agreements with one's business partners have risen dramatically, particularly where there is an imbalance in each party's relative bargaining power. Where this is most obvious is in so-called 'vertical agreements' – that is, those between parties operating at a different level in the supply and distribution chain. The regulation of such agreements under EC competition law is heavily linked to the market shares of the parties concluding the agreement, especially if over 30%. A rule of thumb therefore might be that the more market power enjoyed by parties to vertical agreements, especially if over 30%, the greater the likelihood of competition law problems arising, which in turn, based on *Crehan*, may now lead to a greater likelihood of national court litigation and thereafter possibly damages. This is an over-simplification, but will surely create a more genuine commercial concern on a day-to-day basis when concluding and operating vertical agreements, and will also create a more significant concern in due diligence assessments of risk when buying or selling companies.

Significance of the judgment in Ireland

The significance of this judgment for the Irish courts is three-fold:

- It offers a new and potentially valuable weapon for the courts to ensure the full enforcement of EC competition law
- It challenges the autonomy of national courts to decide upon matters relating to remedies and rules of procedure, when adjudicating on EC law[1]
- Litigants pleading breach of section 4 of the *Competition Act, 1991* will not benefit from the same 'advantage' available to litigants pleading on the grounds of EC law. Thus it would appear that litigants before the Irish courts seeking damages relating to contracts in breach of the 1991 act, to which they themselves have been a party, will find themselves frustrated by the *in pari delicto* principle.

It is perhaps notable that the last point above regarding the lack of benefit of the judgment to cases concerning the 1991 act would not seem to apply equally to breaches of the UK *Competition Act 1998*. This is because section 60(2) of that act obliges the national courts to ensure, as far as possible, consistency between decisions made under the 1998 *Competition Act* and the principles enshrined in the *EC treaty*, as interpreted in the decisions of the European courts. Conversely, the Irish act of 1991 is said to function 'by analogy with articles 85 and 86 of the treaty' only; it contains no provision such as that found in the UK act. As noted by Shanley J in *Bleming v David Patton Ltd* (High Court, unreported, 15 January 1997): 'In applying the jurisprudence of the ECJ, the CFI and the commission to sections 4 and 5 of the 1991 act, there is no doubt that decisions of those bodies should have very strong persuasive force – however, it should be borne in mind that such decisions are based on competition rules which are, textually and contextually, different from the 1991 rule and which often are decisions influenced or affected either by policy considerations, objectives or articles of the treaty which do not necessarily underpin the 1991 act'.

As a general principle, community law does not create any remedies for the infringement of the rights that it confers: rather, that is a matter for national law, as emphasised by the ECJ in Case C 158/80 *Rewe v Hauptzollamt Kiel* ([1981] ECR 1805). However, the national rules regarding the remedies available for European law litigants are ruled by the twin principles of *equivalence* and *effectiveness*. Equivalence essentially amounts to ensuring that all remedies available under national law should be available to litigants pleading a community law right. However, this principle is subject to the overriding rule, as proved in *Crehan*, that national courts must ensure that community rights are given *effective protection*. Moreover, this applies even if in so doing national courts find themselves giving those litigating on a point of community law access to a remedy denied to litigants relying purely on national law.

The present regulation 17/62 governing the application of the EC competition rules is expected to be replaced in mid-2003 by a directly effective enforcement system which shall see both the Irish Competition Authority enforcing EC competition rules and the Irish courts adjudicating upon them. If and when this happens, the basis of the above comments may change entirely. In principle, however, it should remain a matter for the national courts to provide the necessary remedies to ensure effective enforcement. This has led many commentators to criticise the commission for decentralising the application of the competition rules without either ensuring the harmonisation of the national rules of procedure so as to 'level the playing field', or guaranteeing litigants access to adequate remedies.

Nonetheless, the judgment gives a clear indication of the steps the ECJ is prepared to take to do both. G

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Footnote

1 In this respect, the decision in *Courage v Crehan* fits into an established line of ECJ case law, under which the ECJ has forced national judges to ignore national procedural rules which would impede a litigant's ability to access their EC law rights, even if those rules would have produced the same impediment for a litigant pleading under national law.

In particular, see Case C-312/93 *Peterbroek v Belgium* ([1995] ECR I-4599).

Recent EU legislative developments:
December 2001, January and February 2002

Standardisation of public procurement notices. The European Commission has adopted a directive imposing, from 1 May 2002, the use of standard forms in contract notices published in the EU's *Official journal* when public entities purchase goods, works or services in circumstances where the EU procurement directives are applicable. The object of this initiative is to promote efficiency and transparency and facilitate electronic procurement.

Emergency measures to support EU airlines and increase security. This proposed regulation deals with the adoption and enforcement of common security rules for civil aviation. Notwithstanding the adoption of this package by the commission, all state aid and agreements still require to be notified to the commission and be assessed on a case-by-case basis. Under this package, member states are allowed to compensate airlines for revenue losses as a result of the closure of US airspace for four days; the underwriting by member states of the additional insurance costs to the end of the year will be looked on favourably by the commission; increased security measures will also be favourably considered; competition rules will be relaxed between airlines whose function is to maintain regular schedules on less frequented routes or to co-ordinate schedules during off-peak periods; and airlines are also permitted to keep their existing airport slots until 26 October 2002. Provision is also made for a code of good conduct in relation to the US authorities, which will be proposed by the commission and will avoid distortions of competition resulting from aid being given to the US airlines. Proof of minimum insurance cover will be required from airlines from non-EU countries.

Data protection: standard clauses. The commission has, by decision, stipulated standard clauses for contracts that will be considered to meet the data protection safeguard requirements of the *Data protection directive* (95/46/EC). The clauses cover the transfer of personal data from EU-based controllers to recipients in non-EU countries where an adequate level of data protection has not been recognised. When contracts involving the transborder flow of data incorporate the standard clauses, national authorities in the EU will not be able to block the transfer of information based on reasons of inadequate data protection (decision 2002/16EC, OJ L6/52, 10 January 2002).

Proposed directive to extend the scope of the *Seveso II directive* (96/82/EC) on the control of major accident hazards involving dangerous substances. The adoption of this proposed directive by the commission follows several major industrial accidents over the last few years. The amendments cover tailings, explosives, storage and carcinogenic and aquatoxic substances. It is expected that there will be a further amendment to cover land use planning.

Two directives on investment funds (UCITS). The first of these directives removes barriers to cross-border marketing of units of collective investment funds by widening the scope of assets in which they can invest. These include bank deposits, money market instruments and financial derivatives. The second directive permits management companies to operate throughout the EU, increases the activities which they are allowed to undertake as non-core services, and increases investor protection by the introduction of a simplified prospectus requirement which will provide more accessible and detailed information.

Framework directive on worker information and consultation. This directive sets out the rules for companies on informing and consulting with their employees. Three years is the period within which national governments have to implement this directive into national law. Before certain decisions involving a company are taken, including those affecting employment, all businesses having more than 50 employees will be obliged to supply information to and consult with their employees. Provision must be made at national level for sufficient penalties to deter companies from breaching the directive.

Commission green paper on merger control reform. The proposals include extending the scope of the commission's proposal to cover cases subject to notification under the EU *Mergers control regulation* regarding transactions involving undertakings in three or more member states in the interest of impending EU enlargement. The green paper also proposes to simplify the circumstances in which the commission is empowered to refer transactions back to national authorities or receive referrals from national authorities under articles 9 (referral to a member state) and 22 (referral by a member state). It is also proposed in relation to article 9 that the commission would be given the power of its own initiative to carry out an investigation. A number of potential changes to the concept of concentration are also being examined.

One of the substantive reforms includes holding a debate on the substantive test applied by the *Merger regulation* (4069/89/EEC) to include whether a concentration will create or strengthen a dominant position in the common market. Comments are invited on whether the proposed test of the 'substantial lessening of competition' as used in other jurisdictions, such as the US, would be desirable.

The proposed procedural reforms include allowing the parties to request the extension of the timetable for the submission and discussion of remedies designed to meet objections raised by the commission in phase I or phase II of the merger review process. Comments are also invited on the procedural issues, in particular whether the procedures involve due process, on the event which leads to notification, the standstill obligation, filing electronically, notification filing fees, submission by the parties themselves of notification copies to member states, the stage at which the commission can declare a notification incomplete and the enforcement procedures which the commission has at its disposal. Provision is also made for lessening the burden of notification in simple cases.

Ratification of *Rotterdam convention* on hazardous chemicals. This proposal would ratify the *Rotterdam convention* procedure for handling hazardous chemicals in international trade. Countries participating in the *Rotterdam convention* have the right to refuse imports of certain dangerous chemicals and establish a sys-

tem of information exchange regarding dangerous chemicals. The commission has decided to propose detailed rules for the implementation of the convention's provisions, replacing current EU arrangements controlling the import and export of dangerous chemicals. The commission's proposal goes further than the convention in important areas; for example, by covering a wider range of chemicals.

Registration procedure on traditional herbal medicines. The rationale for this proposed directive is to improve quality checks and market surveillance. By creating a clear and reliable regulatory environment for these products, it is intended to benefit both patients and manufacturers, most of which are small and medium-sized enterprises. The rules governing the placing on the market and surveillance of herbal medicines differ between member states, which has a detrimental impact on public health protection standards and the free movement of goods within the EU.

Immunity from, and reduction of, fines in cartel cases. From 14 February 2002, this notice replaces the 1996 *Leniency notice* for all cases in which an undertaking has not contacted the commission in order to take advantage of the favourable treatment set out in that notice. The purpose of the new rules is to make the policy even more effective and attractive for companies to come forward, to obtain full immunity and to provide more certainty against the imposition of fines or the level of fines. The main requirement for qualifying for full immunity, besides having to be the first to come forward, is not to have taken steps to coerce other undertakings to participate in the infringement. Immunity applicants will be quickly informed of their situation and, if they qualify, conditional immunity will be granted to them in writing. If companies comply with their obligations of complete and continuous co-operation, this conditional immunity will be confirmed in the final decision. G

Jennifer McGuire is a trainee solicitor with the Dublin law firm LK Shields.

Recent developments in European law

CONSUMER LAW

The commission has proposed a regulation (2 October 2001) to remove national restrictions on sales promotions within the EU. The regulation will apply to certain price-related restrictions on promotional instruments. This will cover free gifts, discounts and promotional contests and games. Its objective is to make it easier to use such promotions on a cross-border basis.

COMPETITION

Case C-475/99 *Ambulanz Glöckner v Landkreis Südwestpfalz*, 25 October 2001. In 1990, the applicant received authorisation to provide a patient transport service until October 1994. In July 1994, it applied for the renewal of its authorisation to the territorial authority – the Landkreis. Under a 1991 law, the authority could refuse to grant such an authorisation if its use might have an adverse effect on the functioning and profitability of the public ambulance service. The Landkreis refused the authorisation, as the two public facilities in the area were not fully used and were operating at a loss. The German court asked whether the grant of a monopoly over the transport of patients in a limited geographical region was compatible with EU rules on competition. The ECJ held that the public ambulance service to which was reserved the emergency transport service was an undertaking subject to EU competition law. It left it to the German courts to determine whether there had been any abuse of a dominant position. It examined whether any abuse of a dominant position might be justified by the existence of a task of general economic interest. The ECJ held that this was such a task, as it consisted of an obligation to provide permanently the service of transporting sick or injured persons throughout the territory at a uniform rate and on identical conditions as to quality without regard to individual situations or to the degree of economic profitability of each individual operation. In that context, restrictions or exclusions of competition may be permissible if they are necessary for the performance of the particular task. There is a need to offset the costs of providing the emergency transport service with revenue from non-emergency transport, which is more lucrative. The German court had to determine whether the restriction of competition placed on non-emergency transport patients was necessary to enable the public service to carry out their task of general interest in economically acceptable conditions. It also had to be ascertained that these organisations provided a transport service in an effective manner.

CRIMINAL LAW

On 28 September 2001, the commission adopted a green paper on whether EU action should be taken to improve state compensation to victims of crime. At present there are significant differences between states on the level of compensation payable and the criteria on which an award for compensation is based. The commission wishes to ascertain whether the situation can be improved in cross-border cases. It outlines two possible approaches. Firstly, it will examine whether it should be compulsory for states to provide an adequate level of compensation. The second approach is to ensure that compensation is accessible regardless of where the individual became a victim. Interested parties were invited to submit views before 31 January 2002, after which a public hearing will be organised to further debate the issues raised to consider whether legislation is necessary.

EMPLOYMENT

Discrimination

Cases C-438/99 and 109/00 *Maria Luisa Jiménez Melgar v Ayuntamiento de Los Barrios* and *Tele Danmark A/S v Handels-og Kontorfunktionærernes Forbund i Danmark (HK)*, 4 October 2001. The municipality of Los Barrios recruited Ms Melgar for three months. Her contract was renewed twice until 2 May 1999. On the following day, she signed a new contract on a part-time basis and for a fixed term. Subsequently, the municipality was informed that she was pregnant. She received a letter indicating that her contract would terminate on 2 June. She challenged her dismissal on grounds of discrimination and breach of fundamental rights.

Tele Danmark had employed Ms Brand-Nielsen for six months from 1 July 1995. In August, she informed her employer that she was pregnant and expected to give birth in early November. On 23 August, she was dismissed with effect from 30 September, as she had not informed her employer of her pregnancy when she was recruited. She argued that her dismissal was discriminatory.

The two courts referred questions to the ECJ on the scope and interpretation of the EU provisions on equal treatment and the specific measures which oblige member states to prohibit the dismissal of female workers during the period from the start of pregnancy to the end of maternity leave, save in exceptional cases not linked to their condition. The ECJ held that there is no distinction between fixed term and indefinite employment contracts and that the measures apply equally to both. However, the non-renewal of a fixed-term contract, which has reached its termination date, cannot be equated with dismissal. In certain circumstances, such non-renewal can be regarded as a refusal of employment. The refusal to employ a woman, despite the fact that she is considered suitable to perform the work in question, on account of her pregnancy is direct discrimination on grounds of sex. G

Foreign affairs

The entire membership of the Supreme Court of Cyprus recently visited Blackhall Place, meeting members of the society's EU and International Affairs Committee to explore the legal effects of joining the European Union. Pictured above are *(seated, from left)* Christakis Elades and Pallas Gavrielides, both judges of the Cypriot Supreme Court; Georghias M Pikis, president of the court; Law Society President Elma Lynch and Solon Nikitas, judge of the Supreme Court of Cyprus. Standing *(from left)* are Director General Ken Murphy; Cypriot ambassador Nicholas Emiliou; Wendy Hederman; John Handoll; TP Kennedy, the society's director of education; former Circuit Court Judge John Buckley; and the Law School's Brid Moriarty

New recruit

Tamsyn Broderick recently joined the legal recruitment team at Osborne Recruitment. She is responsible for recruiting solicitors, paralegals and legal executives

Joint effort

Pictured at the joint conference of the Society of Young Solicitors Ireland and the Northern Ireland Young Solicitors Association in March are *(seated, from left)* Law Society President Elma Lynch; Alan Hewitt, president of the Law Society of Northern Ireland; Maureen Bell, chairperson of NIYSA; Daniel Morrissey, president of the Waterford Bar Association; and Kay Finnegan. Also pictured *(back row, from left)* are Neil Faris, managing partner of Cleaver Fulton Rankin, Solicitors, Belfast; Osborne Recruitment's Tamsyn Broderick; Enda Murphy of Bank of Ireland; Nora Lillis, secretary of the SYS; President of the High Court Mr Justice Joseph Finnegan; Suzanne Johnston, director of Osborne Recruitment; Nessa Agnew, vice-chair of NIYSA; and William Aylmer, chairman of SYS

Distinguished guests

Pictured at the recent SADSI guest speaker debate are *(from left)* Director General Ken Murphy, Professor Ivana Bacik of TCD's law school, and Liam Herrick, chair of the ICCL. The motion for the debate was that 'Ireland has a justice system to be proud of'

Wood you be interested?

Don't forget the Calcutta Run on Sunday 19 May, which is organised by solicitors to help homeless children in Calcutta and Dublin. Run or walk or sponsor a colleague, and enjoy a barbecue afterwards. Information and sponsorship cards can be obtained by e-mailing run@calcuttarun.com, or visit the website www.calcuttarun.com

On the road again

The Law Society's 'roadshow' to explain the *Solicitors' accounts regulations 2001* recently visited Kilkenny and Sligo. Pictured at the Kilkenny seminar *(above left)* are Anne Colley of the society's Compensation Fund Committee and accountant Charles Russell. Pictured in Sligo are *(above right, from left)* investigating accountant Tim Bolger; immediate past president Ward McEllin; Tina Beattie, executive officer with the society's regulatory department; Simon Murphy, chair of the Compensation Fund Committee; and accountant Charles Russell

Conference call

Law Society President Elma Lynch and Rory Brady SC, chairman of the Bar Council, pictured at a working session during the Conference of European Presidents in Vienna in February

On a silver platter

Eric Plunkett and his wife Myra recently presented the Law Society with a salver that was owned by the late Eric A Plunkett, a former secretary (director general) of the society. The salver was presented to Mr Plunkett in 1955. Pictured with Eric Plunkett and his wife are President Elma Lynch and Director General Ken Murphy

It's all moot

The finalists of the trainee solicitors' moot court competition: pictured *(above left)* are the successful appellants Patrick English and Caoimhe Daly, and *(above right)* are the respondents Sinead Lynch and Sinead Keaveney

Presidents and secretaries

The leaders of approximately 120,000 solicitors met in Dublin last month to discuss a range of issues of mutual interest. The presidents, vice-presidents and secretaries of the law societies of Northern Ireland, Scotland, Ireland and England & Wales meet twice a year in either Belfast, Edinburgh, London or Dublin, with each society hosting the event once every two years. Among the issues discussed over the two-day meeting in Dublin were the core values of the profession, the controversy in England about 'Tesco legal services', the European Court of Justice judgment in the *NOVA* case, the UK's Office of Fair Trading report, Scotland's 'Justice I' Committee and Ireland's Competition Authority study, the future of self-regulation, the Personal Injuries Assessment Board proposal, legal aid reform and legal expenses insurance, the CCBE, e-conveyancing and digital signatures.

Pictured are *(front row, from left)* Martin McAllister, president of the Law Society of Scotland; David McIntosh, president of the Law Society of England & Wales; President Elma Lynch; and Alan Hewitt, president of the Law Society of Northern Ireland. Standing are *(from left)* Joe Platt, vice-president elect, Law Society of Scotland; Ken Murphy, director general; Douglas Mill, secretary, Law Society of Scotland; Janet Paraskeva, chief executive, Law Society of England & Wales; Geraldine Clarke, senior vice-president; Mary Keane, deputy director general; David Preston, vice-president, Law Society of Scotland; Joe Donnelly, junior vice-president; and John Bailie, chief executive, both from the Law Society of Northern Ireland

Yes, minister

The Minister for Justice, Equality and Law Reform John O'Donoghue, who is a solicitor, was heavily engaged recently in piloting through the Oireachtas two pieces of legislation of considerable interest to the solicitors' profession, namely the *Solicitors (Amendment) Bill* and the *Courts and Court Officers Bill*. Before doing so, and in recognition of his nearing completion of a term of five years as minister, he met recently in Blackhall Place with the representatives of the society pictured above: *(seated)* Minister O'Donoghue and President Elma Lynch, and *(standing, from left)* Senior Vice-President Geraldine Clarke, Director General Ken Murphy, immediate past president Ward McEllin, Junior Vice-President Philip Joyce and Deputy Director General Mary Keane

Seat of power

At a recent dinner in Blackhall Place for the four solicitors who represent the Fine Gael party in the Dáil, Deputy Jim O'Keeffe got the opportunity to sit in the Law Society president's chair, and seemed to enjoy it very much. Also pictured are *(from left)* Charles Flanagan TD, Tom Enright TD and Director General Ken Murphy. Alan Shatter TD also attended the dinner

Royal charter

This year is the 150th anniversary of the 1852 charter from Queen Victoria that established the Incorporated Law Society of Ireland. The term 'incorporated' was deleted by statute in 1994. The original charter hangs in the Council chamber and some distinguished visitors to Blackhall Place were recently given the opportunity to see it. Pictured with the charter and President Elma Lynch are *(above left)* Minister for Justice, Equality and Law Reform John O'Donoghue and *(above right)* the leader of Fine Gael, Michael Noonan

Gerald Hickey: a tribute

James Gerald Hickey was born on 16 March 1927, at Naas, Co Kildare, to James Joseph Hickey and his wife Greta. His father moved to Dublin in the early 1930s, setting up practice in O'Connell Street and then going into partnership with the late Tommy O'Reilly, who was subsequently president of the then Incorporated Law Society for 1954/55.

Gerry, as he is known to his colleagues and friends, was educated in Xavier's Private School in Donnybrook, graduating from there at the young age of 17 to enter Trinity College in 1944. At that time it was necessary for his father to obtain permission from the Catholic Archbishop of Dublin, John Charles McQuaid, for Gerry to begin his studies at what was then perceived to be a Protestant institution! He began his apprenticeship in the family firm and took the professional examinations with the Incorporated Law Society. He qualified in an unusually short period, with the result that he had to wait some time to reach his 21st birthday, when he was duly admitted as a solicitor in Easter Term 1948.

He practised with the family firm, dealing particularly with litigation and commercial matters. He was a splendid advocate and a tough opponent, especially in his younger days, when he enjoyed the cut and thrust of District Court practice in civil matters. In 1973, the firm of Hickey & O'Reilly amalgamated with Beauchamp Kirwan and O'Reilly, and Gerry became its chairman.

In 1966, he was elected to the Council of the Incorporated Law Society of Ireland and he continued to serve on that body as chairman of different committees until his election as president of the society in 1979.

In the 1970s and 80s he became very much involved in the commercial life of Dublin, serving with distinction as chairman of ICC Bank, director of New Ireland Assurance and director of Cement Roadstone Holdings, now CRH plc.

During this period, he was also involved with many significant property developments, including the award-winning redevelopment of the old Dolphin Hotel, which now houses a number of District and Circuit Court facilities. He continued in active practice until 1988, when he joined Amory's Solicitors as a consultant. He retired from active practice entirely in 1995.

Although – as will be appreciated – Gerry was heavily engaged with his professional and commercial activities, he was a man who thoroughly enjoyed golf and horse racing. From his student days representing Dublin University Golf Club through to his membership of Portmarnock Golf Club and Milltown Golf Club, of which he was captain in 1961/1962, he was a serious golfer, playing off a single figure handicap during most of his career. In addition to this, he had a great knowledge and love of nature and was something of an ornithologist, spending many holidays in West Cork, where he maintained a holiday home for some years. There he had ample opportunity to indulge his other hobby, that of reading. He was a well-read man in the very broadest sense of the term. Being gifted with total recall made him the most interesting company on any occasion.

During his period as a member of the Council of the Law Society, Gerry served as chairman of many different committees and was actively involved in the development of the society's headquarters at Blackhall Place. His organisational skills and enthusiasm played an enormous part in raising the necessary finance from within the profession to make the undertaking the success it is today. As president, Gerry, with his gracious wife Dorinda, represented the society in the US and elsewhere. His ability as an erudite and witty public speaker, as well as his ability to appreciate the good things in life, assured his success as a worthy ambassador, not only for the Irish legal profession but for Ireland as well.

Those of us who had the privilege of serving with Gerry on the Council, and who indeed would have known him as a colleague, always marvelled at the pride he held in his profession and how highly he regarded the importance of high standards of integrity, not only between solicitors and their clients, but between solicitors and their colleagues in their day-to-day dealings with each other. While he was the most compassionate of men, he expected of his colleagues the same high standards he himself held in practice.

As Oliver Goldsmith said of one of his ancestors in the poem *In retaliation*:

'Here Hickey reclines, a most blunt, pleasant creature,
And slander itself must allow him good nature;
He cherish'd his friend, and he relish'd a bumper;
Yet one fault he had, and that was a thumper.
Perhaps you may ask if the man was a miser?
I answer, no, no, for he always was wiser;
Too courteous perhaps, or obligingly flat?
His very worst foe can't accuse him of that;
Perhaps he confided in men as they go,
And so was too foolishly honest? Ah no!
Then what was his failing? Come, tell it, and burn ye –
He was, could he help it? A special attorney'.

Despite his busy professional and public persona, Gerry was essentially a very private person who shunned publicity of any kind. His happiest times were with his wife Dorinda, his children – James, who follows him into the legal profession, David, Gerald (deceased), Greta, Maurice, Dorinda Anne, and Paul – and his adored grandchildren, who also will miss him greatly.

The profession he served so loyally will be the poorer for his passing as we who have been his colleagues will be the richer for knowing this man, of whom it may truly be said: 'he was a man for all seasons'. G

Moya Quinlan is a former president of the Law Society and a partner with the Dublin law firm Dixon Quinlan.

OBITUARY

James P Sweeney 1912 – 2002

James Patrick Sweeney, solicitor, formerly of Falcarragh, Co Donegal, died on 27 January, in his 90th year. Jim was born in Burtonport in 1912 and was the eldest of 12 children. He moved to Dublin with his family in 1922. One of his first memories of Dublin was being brought by his father to the funeral of Michael Collins. He was educated at Blackrock College, for which he held a lifelong affection. While a pupil, he excelled on the rugby pitch and was a member of the Leinster Schools Senior Cup winning team in 1930. He was admitted as a solicitor in 1935 and commenced practice in Falcarragh, where he worked until retirement in 1981. After his retirement, he moved to Dublin, and he assisted his successor in the firm as an advisor and consultant.

Jim was for many years a familiar figure in the Four Courts, where he made his reputation as a skilful negotiator with a disarming charm and gentle sense of humour. He was a wise and practical advisor and established a successful legal practice. He retained a keen interest in sport, particularly rugby and cricket. Jim's life was long, successful and happy. He bore his personal tragedies with equanimity, particularly the untimely death of his wife Billie in 1957 and their son Paddy in 1996. He remarried in 1961 and enjoyed 40 happy years with Joan, who survives him. Their devotion to each other was evident to everyone who knew them.

He is also survived by his daughters Eithne and Siobhan, son and colleague James, daughter-in-law Irene, sons-in-law Alistair and Peter and grandchildren Evanna, Davida, Andrew and Sarah.

A long sort o' sigh seemed to come from us all
As the waves hid the last bit of auld Donegal
(Percy French). G

Brendan J Twomey is a solicitor with the Falcarragh, Co Donegal, law firm James P Sweeney & Co.

SADSI
Solicitors Apprentices Debating Society of Ireland

Trainee solicitors' ball

The annual PPC1 trainee solicitors' ball took place in February at the Davenport Hotel, Merrion Square. The event was a huge success and was attended by over 340 trainees from the course – reputed to be the largest ever attendance at such an event.

The evening began early with a pre-ball wine reception, and musicians from the Royal Irish Academy of Music – whom we must heartily thank – provided a superb ambience throughout dinner. After dinner, there was music from the band Junk, who, despite their rather inauspicious name, ensured a packed dance floor all through the night. But there's more. As has become *de rigueur* with this year's PPC1, the night would not have been complete without a trip to an infamous wine bar on Leeson Street. We have been warned not to say any more! Suffice to say, the night was a great success and was thoroughly enjoyed by all.

Line dancing
Pictured at the ball are *(from left)* Elaine Campbell, Roberta Grealish, Dawn Carney, Caoimhe Heery and Claire Campbell-Murphy

It is with grateful appreciation that we thank the sponsors who helped ensure such a memorable occasion: Ulster Bank and BCM Hanby Wallace. Our thanks also to Frank Ellis of Ellis & Ellis Law Searchers, The Royal Irish Academy of Music, Alan Greene of the Law Club, and the management and staff of the Davenport Hotel.

A DATE FOR YOUR SUMMER DIARY

The SADSI careers day, which will focus on alternative careers in law, and the annual summer barbecue will be taking place on Friday 5 July. The speakers will provide an insight into how you can put your professional qualification to use in a variety of environments both at home and internationally. Benson & Associates Legal Recruitment Agency have generously agreed to sponsor the event. Please let us know if there is a specific topic you wish to be addressed by the speakers on the day by e-mailing 2002@sadsi.ie.

Partying in the city of the tribes

Western representative Dawn Carney and sports liaison officer Noel Devins put together a weekend in Galway in March to allow those of us in the Pale a chance to socialise with our colleagues in the West. The weekend was a great success, and provided an opportunity to catch up with trainee solicitors preparing to come back on the PPC2 course this April.

Quite a crowd gathered on the Friday in the Skeffington Arms, Eyre Square, to socialise, imbibe and avail of the excellent food.

The group also experienced Galway City's night spots and left in the early hours with the promise of meeting the next day for some outdoor activities. However, when dealing with the western climate, a better plan involved convening in the bowling alley. This had the dual benefit of being indoors as well as being a licensed premises.

Talents exhausted, we met up again in the city and proceeded at a respectable hour to the fantastic Quays Bar, where we remained until embarking to experience talents of a different sort in Salthill.

Sunday saw the return to Dublin for those based there, with stories from a successful weekend and expectations of more to come.

Thanks must be given to Ulster Bank, kind sponsors of this event. With the standard now set for such events, trainees around the country can look forward to meeting colleagues in different venues later in the year.

SNOW JOB

Unfortunately, or fortunately for our aching heads, all efforts to engage in a healthy lifestyle on the Saturday in Galway were in vain as a blanket of snow covered the city. Upon checking the football pitch in case it was playable, we discovered that half of it was under snow while the other half was under water. Swimming and skiing being out of the question, and the match having been called off, we retired to participate in some bowling.

Despite the fact that we did not get the chance to unveil our new soccer kit at the Galway event, we would like to take this opportunity to thank our sponsor, Frank Ryan & Son, for their assistance in securing the kit.

• We are currently in the process of compiling a sports page for the SADSI website, and those with suggestions as to content, queries, or information on contact numbers or names for sports clubs in their area may contact us at 2002@sadsi.ie. As we are hoping to create an extensive database on a wide range of sports, any information is much appreciated.

Noel Devins,
sports liason officer

OFFICE OF THE ATTORNEY GENERAL

KNOW-HOW OFFICER

Applications are invited for the position of Know-how Officer in the Office of the Attorney General. The Know-how Officer will be based in the Office's Library and Know-how Unit. The principal responsibility of the Know-how Officer will be to maintain and develop the existing know-how database.

Key duties will include:

- identifying suitable material for inclusion in the know-how database
- analysing, abstracting and indexing selected materials in accordance with an established indexing system
- provision of a help-desk for users of the know-how database
- organising and running training sessions on the know-how database and generally promoting its effective use
- abstracting legal materials for the library catalogue
- contributing to current awareness services

The Office has recently produced a three year IT strategy which will guide the future management of legal know-how. The Know-how Officer will have a key role in the development of a new know-how application.

A recognised university honours law degree, strong information technology skills and good communication skills are essential. The ability to work with a small team but also on initiative is essential. In addition experience of abstracting or indexing legal documents and/or of working in a legal library/knowledge management environment would be an advantage.

The position will be filled on the basis of a temporary full-time contract for a period of one year. The salary level is to a maximum of €28,569.11 per annum.

Further information and application forms are available from:

The Human Resource Unit
Office of the Attorney General
Upper Merrion Street
Dublin 2

Telephone: 01-6616944 (ext. 4134)
Fax: 01-6314191

Alternatively, application forms can be downloaded from our website at **www.attorneygeneral.ie**

The closing date for receipt of completed application forms is **12th April 2002.**

The Office of the Attorney General is committed to a policy of equal opportunity.

Bank of Ireland

Treasury & International Banking

Legal Adviser

We have a fixed term contract position available for a legal adviser. This role would involve providing general servicing of legal needs to our Treasury & International Banking Business.

The successful candidate will be required to work with all business areas within Treasury & International Banking as well as with other divisions of Bank of Ireland, external legal advisors and counter-parties.

He/she will have 4 years minimum experience with transactional and/or banking experience preferred. Knowledge of capital markets and ISDA documentation desirable.

Skills Required:
- Good understanding of the internet and IT
- Experience in the review and negotiation of legal agreements
- Strong understanding of corporate structures
- Excellent drafting and written communication skills
- Excellent organisational skills with strong ability to prioritise
- Excellent attention to detail & computer skills

If you are interested in applying for this position then please forward your curriculum vitae in confidence to **recruitment@boitib.com.** If you require further information then please telephone Janette Pegley-Reed at (01) 6094579.

Closing date for receipt of applications is 20th April, 2002.

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Dublin 2, Ireland
T +353 (0) 1 670 3997
F +353 (0) 1 670 3998
E jobs@benasso.com

LOST LAND CERTIFICATES

Registration of Title Act, 1964

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

(Register of Titles), Central Office, Land Registry, Chancery Street, Dublin 7
(Published 5 April 2002)

Regd owner: Colm and Brenda O'Connor; folio: 18412F; lands: Morterstown upper and barony of Carlow; **Co Carlow**

Regd owner: William Murphy; folio: 9167F; lands: townland of Kilcolgan and barony of Dunkellin; area: 0.0254 hectares; **Co Clare**

Regd owner: Denis Coveney and Susan Curtis Coveney; folio: 6821F; lands: known as the townland of Kilpatrick (ED Brinny) situate in the barony of Kinalmeaky and the county of Cork; **Co Cork**

Regd owner: Patrick J Hickey (deceased); folio: 13142; lands: a plot of ground being part of the townland of Gurteenard and barony of Duhallow and the county of Cork; **Co Cork**

Regd owner: Patrick J Doherty; folio: 20355F; lands: Meenderrygramph; area: 45.450 hectares; **Co Donegal**

Regd owner: Connie Nixon (formerly McGealy); folio: DN39664F; lands: property known as 47 Walnut Court, Courtlands estate, situate to the north of Griffith Avenue in the parish of Clonturk and district of Drumcondra; **Co Dublin**

Regd owner: Michael John Early; folio: DN4807L; lands: property situate in the townland of Kilmacud West and barony of Rathdown; **Co Dublin**

Regd owner: Carl Keenan; folio: DN127916F; lands: property known as 2 Warrenstown Court, Blanchardstownheath; **Co Dublin**

Regd owner: Leslie and Bernadette Stone; folio: DN64408F; lands: property situate in the townland of Whitehall and barony of Rathdown; **Co Dublin**

Regd owner: Patrick J and Eileen Keenan; folio: DN23052L; lands: a plot of ground known as 32 Walnut Avenue in the parish of Clonturk and in the district of Drumcondra and in the county borough of Dublin; **Co Dublin**

Regd owner: William McGuirk; folio: DN9299; lands: property situate in the townland of Stillorgan Grove and barony of Rathdown; **Co Dublin**

Regd owner: Patrick Finn and Kathleen Finn; folio: DN7210L; lands: property situate to the west of Grange Road in the parish and district of Kilbarrack; **Co Dublin**

Regd owner: Paschal Vincent Doyle; folio: DN4588; lands: property situate in the townland of Whitehall and barony of Rathdown area; **Co Dublin**

Regd owner: the County Council of the County of Dublin; folio: DN9088; lands: property situate in the townland of Yellowmeadows and barony of Uppercross; **Co Dublin**

Regd owner: the Right Honourable the Lord Mayor Aldermen and Burgesses of Dublin; folio: DN4161; lands: property situate on the west side of Le Fanu Road in the parish of Ballyfermot, district of Ballyfermot and city of Dublin; **Co Dublin**

Regd owner: John and Maureen O'Toole; folio: 21548; lands: townland of Killeany and barony of Aran; Area: 11.06070 hectares; **Co Galway**

Regd owner: Kathleen Mitchell (née Skehill); folio: 41897; lands: townland of Castlebin East and barony of Kilconnell; Area: 0.2730 hectares; **Co Galway**

Regd owner: William McDonagh; folio: 8158; lands: townland of Rooaun and barony of Longford; Area: 19 acres, 1 rood, 30 perches or thereabouts; **Co Galway**

Regd owner: Ellen Rowan; folio: 28050; lands: Lohercannon and barony of Trughanacmy; **Co Kerry**

Regd owner: Helen O'Sullivan; folio: 710; lands: townlands of Ballygreany and barony of Offaly West; **Co Kildare**

Regd owner: Thomas Flynn; folio: 5962 (now folio 18748); lands: townland of Kilmurray and barony of Carbury; **Co Kildare**

Regd owner: Agilux Limited; folio: 16692; lands: townland of Allenwood North and barony of Connell; **Co Kildare**

Regd owner: Carmel O'Neill; folio: 15377; lands: Ballyverneen and barony of Ida; **Co Kilkenny**

Regd owner: the County Council of the County of Laois; folio: DN12395F; lands: property situate in the townland of Portlaoise; **Co Laois**

Regd owner: Greg Petrie; folio: 1259; lands: Curraun; area: 27.625 acres; **Co Leitrim**

Regd owner: Thomas McNamara; folio: 6003F; lands: Castleroberts and barony of Coshma; **Co Limerick**

Regd owner: Michael F Doyle; folio: 2158, 2159; lands: Drumanure; area: F2158 38.9062 acres and F2159 28.2312 acres; **Co Longford**

Regd owner: Peter Walsh; folio: 3839F; lands: Drumderg, Carrowlinan, Castlebaun; area: 2.806 hectares, 0.829 hectares, 21.125 hectares; **Co Longford**

Regd owner: Thomas Morris; folio: 2558; lands: townland of Kilbarriff and barony of Costello; area: 9.6492 hectares; **Co Mayo**

Regd owner: John Conmy; folio: 38319; lands: townland of Bellanumera and barony of Erris; area: 3.6927 hectares; **Co Mayo**

Regd owner: Colm O'Donoghue; folio: 26946; lands: Teltown; area: 0.35 acres; **Co Meath**

Regd owner: Thomas Quinlan; folio: 4590F; lands: Clonlee and barony of Ballybritt; **Co Offaly**

Regd owner: Dermot Foley; folio: 29696 & 14844; lands: townland of Cleaheen and barony of Boyle; area: 15.0671 hectares; **Co Roscommon**

Regd owner: Owen McGreevy; folio: townland of Dorrary and barony of Boyle; area: 12.077 hectares; **Co Roscommon**

Regd owner: Francis Kelly; folio: 7417; lands: townlands of Garrynagran and barony of Athlone north; area: 12.8563 hectares; **Co Roscommon**

Regd owner: Mary O'Loughnan; folio: 38602; lands: Lisgibbon and barony of Clanwilliam; **Co Tipperary**

Regd owner: Norma Caples; folio: 13497F; lands: a plot of ground situate in the townland of Crooke and situate in the barony of Gaultier; **Co Waterford**

Regd owner: Eileen Fortune, Bridget O'Neill (deceased), Mary O'Neill and Anne Maher (sisters of Our Lady of Mercy); folio: 6538; lands: Castlemoyle and barony of Bantry; **Co Wexford**

Regd owner: James Synnott; folio: 11265; lands: townland of Ballynerrin Lower and barony of Arklow; **Co Wicklow**

Regd owner: Michael and Phyllis Davis; folio: 643; lands: townland of Merginstown and barony of Talbotstown Lower; **Co Wicklow**

WILLS

Bacon, Frederick (deceased), late of 25 Rutland Cottages, Lower Rutland Street, Dublin 1. Would any person having knowledge of a will made by the above named deceased who died on 30 October 1993, please contact Ken J Byrne & Co, Solicitors, 17 Rock Hill, Main Street, Blackrock, Co Dublin, tel: 01 283 2715 or fax: 01 283 3453

Clifford, Patrick (Joseph) (deceased), late of Faha West, Killarney, Co Kerry and 57 Gandon Close, Harolds Cross, Dublin, 6W. Would any person having knowledge of a will being made by the above named deceased who died on 10 May 2001, please contact Padraig J O'Connell, Solicitors, Glebe Lane, Killarney, Co Kerry, tel: 064 33278 or fax: 064 34286

Connor, William (deceased), late of 6 Cromlech Court, Ballymun, Dublin 11. Would any person having knowledge of a will made by the above

named deceased after 17 January 1992, please contact Stephen Connor at 28 Knowth Court, Poppintree, Dublin 11, tel: 01 842 6096 or fax: 01 847 1714. The deceased passed away on 29 January 2002.

Foley, Ellen (deceased), late of 21 St Patrick's Cottages, Rathfarnham, Dublin 14. Would any person having knowledge or possession of the original will dated 11 June 1987 in relation to the estate of the said Ellen Foley who died on 4 July 2000, please contact John Synnott & Co, Solicitors, 24 Dame Street, Dublin 2, tel: 679 3630 or fax: 679 3449, ref: JS/BOB

Jackson, Patrick (deceased), late of 1 O'Neill Crowley Terrace, Mitchelstown. Would any person having knowledge of a will made by the above named deceased who died on the 31 January 2001, please contact Messrs John Molan & Sons, Solicitors, 57 Lower Cork Street, Mitchelstown, Co Cork, ref: KM/J.5955, tel: 025 24543 or fax: 025 84343

Lambe, Katherine (otherwise Kathleen) (deceased), late of St. Bridgid's Home, Crooksling, Brittas, Co Dublin, formerly of 67 Galtymore Drive, Drimnagh, Dublin 12. Would any person having knowledge of the whereabouts of the original will executed by the above named deceased on the 15 April 1998, the said deceased having died on 5 August 2001, please contact Taylor & Buchalter, Solicitors, Greenside House, 45/47 Cuffe Street, Dublin 2, tel: 01 478 2966 or fax: 01 478 2776, quoting reference RMcL

McCoy, Felix (deceased), late of Ballyroan Road, Abbeyleix, Co Laois. Would any person having knowledge of a will being made by the above named who died on 26 November 2001, please contact Cahill and Company, Solicitors, Abbeyleix, Co Laois, tel: 0502 31220 or fax: 0502 31480

O'Connell, Annie (deceased), late of 99 Errigal Road, Drimnagh in the city of Dublin. Would any person having knowledge of a will made by the above named deceased who died on 16 December 2000, please contact Bourke & Co, Solicitors, 167-171 Drimnagh Road, Walkinstown, Dublin, tel: 01 456 1155 or fax: 01 456 1176 (reference FOD/LS)

O'Connell, Frank (deceased). If anyone knows the whereabouts of the will of Frank O'Connell, otherwise known as Francis O'Connell, Ballygibbon, Blarney, Co Cork, who formerly worked in Swissco, Little Island, Co Cork, who died on 29 January 2002, could they please contact Katherine Kelleher, Conway Kelleher Tobin, Solicitors, 29 South Mall, Cork, tel: 021 427 3192 or fax: 021 427 0390

Roche, Barry (otherwise Daniel Finbar), late of 46 College Road, Cork (formerly Rathfadden, Endsleigh, Douglas Road, Cork). Would any person having knowledge of a will made by the above named deceased who died on 10 March 2002, please contact Farrell and Partners, Solicitors, O'Connor Square, Tullamore, Co Offaly, tel: 0506 21477 and 0506 21805, fax: 0506 51532, e-mail: farrellandpartners@eircom.net

Shanahan, Frances (otherwise Frances Brown) (deceased), late of Vesey Hill, Abbeyleix, Co Laois. Would any person having knowledge of a will being made by the above named deceased who died on 13 February 2002, please contact Cahill and Co, Solicitors, Abbeyleix, Co Laois, tel: 0502 31220 or fax: 0502 31480

Trehy-Butler, Jean Alice, late of 1 Bishops Dale Court, Ridgeway Heights, Sheffield, S20 5PD, England, and also of 18 Glenvale Court, Clybaun Road, Salthill, Co Galway, and formerly of 97 Clyborne Heights, Galway. Would any person having knowledge of a will made by the above named deceased who died on 16 February 2002, please contact Arthur O'Hagan, Solicitors, 9 Harcourt Street, Dublin 2, tel: 475 8701 or fax: 478 1583

Twomey, Fr Timothy (deceased), late of Sandyford Road, Dundrum, Dublin 16. Would any person have knowledge of a will made by the above named who died at the Pallotine College in Thurles on 4 September 2001, please contact Moriarty & Co, Solicitors, 11 Anglesea Street, Dublin 2, tel: 01 677 7306 and fax: 01 677 0277

EMPLOYMENT

Newly-qualified solicitor required for busy Galway practice. Apply in writing to Tom O'Regan & Co, Solicitors, 60 Lower Salthill, Co Galway

Solicitor with savvy, experience, and the constitution available for employment. Divorce and conveyancing preferred. North West. Tel: 074 58274

Mullingar firm need qualified solicitor for full-time position; general practice. Experience preferable. Contact Sally-Ann O'Donnell or Paddy Crowley at 044 40887/8 or send CV to JJ Macken, Bishopsgate, Mullingar, Co Westmeath

Locum solicitor needed for general practice in Mullingar, 4/5 months; May to September; experience needed. Contact Sally-Ann O'Donnell or Paddy Crowley at 044 40887/8 or send CV to JJ Macken, Bishopsgate, Mullingar, Co Westmeath

Corporate lawyer to €55k + bens required for top class multinational in the midwest region. Candidates will be fully qualified lawyer/barrister with commercial experience. Drafting skills and knowledge of EU law essential. Contact Jackie Kelly, IRC Limerick, tel: 061 313744, fax: 061 417553 or e-mail: jkelly@irish-recruitment.com

Busy Dublin 7 practice seeks newly-qualified solicitor for litigation and conveyancing work; attractive salary for suitable candidate. Please reply to **Box no 40**

Solicitor required for busy litigation department of practice in the north east. Must have experience. Attractive remuneration package for suitable candidate. Apply with full details of experience to KMR Accountants, Crowe Street, Dundalk; reference JMK

Solicitor required: experience in conveyancing and probate essential (min three years' PQE). Court experience desirable. Busy practice – half hour's drive from Galway City. Apply to A Gerard Moylan & Co, Solicitors, Loughrea, Co Galway, tel: 091 841356 or fax: 091 842120

Legal secretaries wanted: avoid the commute, enjoy flexible hours and work in Dalkey. Apply in writing with CV to Dominic Dowling, Solicitors, 37 Castle Street, Dalkey, Co Dublin, or e-mail: dominicdowlingsolicitors@eircom.net

MISCELLANEOUS

Northern Ireland solicitors providing an efficient and comprehensive legal service in all contentious/non-contentious matters. Dublin-based consultations and elsewhere. Fee apportionment. ML White, Solicitors, 43-45 Monaghan Street, Newry, Co 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, England, 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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South West – busy sole practitioner's practice for sale, inquiries in confidence to **Box no 42**

Established solicitor's practice for sale in Co Louth. Excellent opportunity. Principals only. Please reply to **Box no 43**

Publican's ordinary seven-day licence for sale. Please contact Messrs John Casey & Co, Solicitors, Bindon House, Bindon Street, Ennis, Co Clare, tel: 065 682 8159, reference: OA/MK

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 Bernard Richardson
Take notice that any person having any interest in the freehold estate of the following properties: the premises at the rear of 28 Gardiner Place, Dublin, more particularly known as 27A Gardiner Place (Grenville Lane) in the city of Dublin held under a periodic tenancy subject to the yearly rent of £85 per annum.

Take notice that Bernard Richardson intends to submit an application to the county registrar for the county of the city of Dublin for the acquisition of the freehold interest in the aforesaid properties, and any party asserting that they hold a superior interest in the aforesaid premises (or any of them) are called upon to furnish evidence of title to the aforementioned premises to the below named within 21 days from the date of this notice.

In default of any such notice being received, the applicant intends to proceed with the application before the county registrar for the county of 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 each of the aforesaid premises, are unknown and ascertained.
Date: 26 February 2002
Signed: Kent Carty, Solicitors, 47-48 Parnell Square, Dublin 1

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 Bernard Richardson
Take notice that any person having any interest in the freehold estate of the following properties: all that and those the hereditaments and premises being the stable at the rear of the house premises no 29 Gardiner Place situate in the parish of St George and county of the city of Dublin and held under an indenture of lease dated 26 July 1946 made between Linda McWhinney of the one part and Bernard Richardson of the other part for the term of 500 years from 1 July 1946 subject to the yearly rent of £1, 10s and the covenants on the part of the lessee to be performed and the conditions therein contained.
Take notice that Bernard Richardson intends to submit an application to the county registrar for the county of the city of Dublin for the acquisition of the freehold interest in the aforesaid properties, and any party asserting that they hold a superior interest in the aforesaid premises (or any of them) are called upon to furnish evidence of title to the aforementioned premises to the below named within 21 days from the date of this notice.
In default of any such notice being received, the applicant intends to proceed with the application before the county registrar for the county of 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 each of the aforesaid premises, are unknown and unascertained.
Date: 26 February 2002
Signed: Kent Carty , Solicitors, 47-48 Parnell Square, Dublin 1

In the matter of the *Landlord and Tenant (Ground Rents) Acts, 1967-1978*: an application by Gerard Kinahan
Take notice that any person having any interest in the freehold estate of the following property: all that and those dwelling house and premises

situate at Church Street, Clara, in the county of Offaly.

Take notice that Gerard Kinahan intends to submit an application to the county registrar for the county of Offaly for the acquisition of the freehold interest in the aforesaid property, and any party asserting that they hold 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, Gerard Kinahan intends to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the county of Offaly for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interests, including the freehold reversion, are unknown and unascertained.

Date: 1 April 2002

Signed: O'Donovan & Cowen, solicitors for the applicant, William Street, Tullamore, Co Offaly

In the matter of the *Landlord and Tenant (Ground Rents) Act, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978* and in the matter of the *Landlord and Tenant (Ground Rents) Acts, 1967-1984*: notice of intention to acquire the fee simple

To any such person or persons for the time being entitled to the interest in the freehold estate of the following property: all that piece or plot of ground situate at Sidney Place of Saint Anne Shandon and the city of Cork, more commonly known as Glenvera Hotel car park and more particularly delineated and described in the map thereof thereunto annexed and thereon coloured orange and held under indenture of lease dated 24 April 1906 and made between John Cotter Wood and George Augustus Wood of the first part, Richard Wood of the second part and PH Thompson & Son Limited of the third part for a term of 848 years for a yearly rent of thirty pounds and subject to the covenants and conditions on the part of the lessee therein contained.

Take notice that the executors of the estate of John A O'Connor, deceased, being the person entitled to the fee simple, intend to submit an application to the county registrar for the county of Cork for the acquisition of the freehold interest in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid are called upon to furnish evidence of title to the aforementioned premises to the below named within 21 days from the date of this notice.

In default of any such notice being received, the executors of the estate of John A O'Connor, deceased, intend to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the county of Cork for such 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 property, are unknown and unascertained.

Date: 20 March 2002

Signed: Timothy J Hegarty & Son, solicitors for the applicants, 58 South Mall, Cork