Law Society Gazette

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COVER: roslyn@indigo.ie

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Professional negligence is a serious concern for all solicitors. Brian Gallagher discusses some of the pitfalls facing conveyancers and explains how to avoid them

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Strap on your flak jacket, because new president Geraldine Clarke has declared war on media misrepresentation of the solicitors' profession. Here, she talks to Conal O'Boyle about her career and her plans for the coming year

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The day of the 'clean break divorce' seems to have come a step closer as a result of the Supreme Court's decision in *T v T* recently. Geoffrey Shannon examines the controversial judgment and assesses its impact on family law

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The data protection commissioner has announced that solicitors' firms are obliged to register themselves under the *Data Protection Act*. Paul Lavery sets out the Law Society's official position on the data protection regime as it affects the profession

35 justice@e-court.ie?

Ireland's ambition to become an international centre for e-business is well known, but we may have to change many of our traditional court processes to achieve it. Denis Kelleher argues the case for establishing an 'e-court'

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New officer team takes charge

The Law Society has a new Council and a new officer team, with Geraldine Clarke taking over as president for the next year.

Clarke was deemed elected to the post after serving as senior vice-president last year, while Gerard Griffin was elected senior vice-president for 2002/03, with John Fish as junior vice-president.

The following members were elected to the Law Society Council in the recent ballot, with the number of votes received appearing after their names:

Name	Votes
1. Gerard Griffin	1,588
2. Anne Colley	1,487
3. Patrick O'Connor	1,484
4. Michael Quinlan	1,468
5. Donald Binchy	1,466
6. John P Shaw	1,388
7. Michael Irvine	1,380
8. Philip Joyce	1,332
9. Simon Murphy	1,306
10. James MacGuill	1,305
11. John Fish	1,285
12. James McCourt	1,279
13. Peter Allen	1,269
14. Helen Sheehy	1,266
15. Orla Coyne	1,220
16. Marie Quirke	1,160

Law Society president Geraldine Clarke with senior vice-president Gerard Griffin (left) and junior vice-president John Fish

The following candidates were not elected and the number of votes received by them appear after their names:

Name	Votes
17. Edward Hughes	918
18. John P O'Malley	775

As there was only one candidate nominated for each of the two relevant provinces (Leinster and Ulster), there was no election and the candidate nominated in each instance was returned unopposed, as follows: Leinster – Andrew Cody; Ulster – James Sweeney.

Council members are elected for a two-year term: the sitting Council members who were elected last year are: Owen Binchy, Brian Sheridan, John D Shaw, John O'Connor, Kevin O'Higgins, Moya Quinlan, John Costello, Gerard Doherty, Michael Boylan, Stuart Gilhooly, Angela Condon, Hugh O'Neill, Andrew Dillon, Thomas Murran, Rosemarie Loftus, and Eamon O'Brien.

ONE TO WATCH: NEW LEGISLATION

***Solicitor's (Advertising) Regulations 2002* (SI 518)**

These regulations were introduced pursuant to section 4 of the *Solicitors (Amendment) Act, 2002*, which preserves the right of a solicitor to advertise, but severely restricts personal injuries advertising. They came into effect on 8 November 2002, but do not apply to advertisements published before 1 February 2003.

The 1996 *Solicitors Advertising Regulations* (SI 351 of 1996) are revoked by regulation 1 and regulation 2 defines the terms used in the regulations. Most of the definitions follow the exact wording of the statutory definitions contained in the 1994 and 2002 acts.

Regulation 3 provides specifically that solicitors may advertise.

Regulation 4(a) re-introduces the general prohibitions contained in the 1996 regulations, that is, advertisements that:

- Are likely to bring the profession into disrepute
- Are in bad taste
- Reflect unfavourably on other solicitors
- Assert that a solicitor has specialist knowledge superior to other solicitors
- Are false or misleading
- Are contrary to public policy.

This section also prohibits for the first time advertising in an 'inappropriate location'. This is defined in section 4(10) of the 2002 act as 'a hospital, clinic, doctor's surgery, funeral home, crematorium, or other location of a similar character'. These provisions apply to *all* types of advertising, not just personal injuries advertising.

Regulation (4)(a)(viii) then introduces for the first time a ban on advertisements that refer to claims or possible claims for damages for personal injuries, the outcome of such claims or the provision of services by solicitors in conjunction with such claims. Regulation 4(a)(ix) prohibits advertisements that 'solicit, encourage or offer any inducement' to make such claims.

Regulation 4(b) specifies that all advertisements shall not include more than:

- The solicitor's name, address, telephone and fax numbers, place of business and location of information provided by the solicitor that is accessible electronically
- Particulars of the solicitor's qualifications and legal expertise
- Factual information on the legal services and areas of law to which the services relate
- Particulars of charges, and
- Any other information permitted by regulation 5 of these regulations.

Regulation 4(c) replicates section 4(4) of the 2002 act: any advertisement which contains factual information on the legal services provided may include the words 'personal injuries'. The regulations specifically allow an advertisement to include the words 'personal injuries' in a list of services (see regulation 8(b) below).

Regulation 5 contains a list of the 'other information' permitted by the regulations, such as hours of business, job descriptions, membership of organisations, reference to other clients (with that client's consent) and other miscellaneous information.

The content of any advertisement must therefore be permissible either under regulation 4(b) or regulation 5. The inclusion of anything else in an advertisement will constitute a breach of the regulations.

Regulations 6 and 7 deal with

PI litigation 'valuable service'

Personal injuries litigation work by solicitors was branded 'a socially valuable legal service' by Law Society director general Ken Murphy on RTÉ's *Morning Ireland* programme recently.

Murphy said it was important to distinguish between the service itself and the advertising of the service: 'Solicitors simply assisting people who have suffered personal injuries through the negligence of others to obtain the reasonable compensation to which they are entitled by law is a perfectly proper and socially valuable legal service'. But he added that much of the advertising of that service by solicitors had now been judged by the Oireachtas for wider public policy reasons to be undesirable.

While it was tempting for the Law Society to say 'we told you so' when the Oireachtas turned its original policy on its head in this way, continued Murphy, the society

Murphy: 'perfectly proper'

simply contented itself with fully supporting the abolition of a type of advertising which most solicitors had never engaged in and wish had never been permitted.

Quizzed about the contribution of solicitor advertising to the 'compensation culture', Murphy said that this was a tabloid term whose exact meaning was difficult to identify. But he accepted that solicitor advertising, along with many other social factors, had contributed to an increase in personal injuries litigation. 'We are delighted to see that as a result of this new legislation and the society's regulations, this type of advertising, which has diminished the public esteem in which the solicitors' profession is held, will shortly become a thing of the past', he concluded.

LAST CHANCE FOR *GAZETTE* YEARBOOK AND DIARY

The 2003 *Law Society Gazette Yearbook and Diary* is now available (please see order form on page 36). Last year the Solicitors' Benevolent Association benefited to the tune of over 20,000 as a result of proceeds from the *Gazette Yearbook and Diary*, and your continued support is very much appreciated.

PRIZE BOND WINNERS 2002

The winners of the Law Society's prize bond draw were: Michael Cody, James Cody & Sons, Bagenalstown, Co Carlow; Liam MacHale, MacHales Solicitors, Pearse Street, Ballina, Co Mayo; Michael Foy, Smith Foy & Partners, 59 Fitzwilliam Square, Dublin 2; and Patrick T Moran, Michael Moran & Co, Mountain View, Castlebar, Co Mayo.

FORENSIC ENGINEER SEMINAR

The Association of Consulting Forensic Engineers is holding a seminar on asbestos on Friday 21 February 2003 at the Institution of Engineers of Ireland, 22 Clyde Road, Dublin 4. For further information, contact Paul Romeril on tel: 01 6620448.

RETIREMENT TRUST SCHEME

Unit prices: 1 November 2002
Managed fund: 387.846c
All-equity fund: 95.950c
Cash fund: 246.726c
Pension protector fund: 100.000c

where advertisements may or may not be published. Henceforth, advertisements may not appear on any form of transport so advertisements on the back of buses are no longer permissible. Solicitors may not advertise immediately adjacent to death notices, or in any inappropriate location, as defined in section 4(10) of the 2002 act.

If a solicitor decides to refer in an advertisement to personal injuries or other contentious business, regulation 8(a) specifies that the advertisement must also clearly refer to the prohibition on percentage charging in connection with contentious business. Regulation 8(b) extends the limitation on the use of the words 'personal injuries' to phrases such as 'motor accidents', 'workplace accidents' and other words or phrases of a similar nature.

Regulation 9(a) forbids the inclusion of any words or phrases which suggest that legal services relating to contentious business will be provided at no cost or at a reduced cost, such as 'no foal, no fee', 'most cases settle out of court', 'insurance cover arranged to cover legal costs'. This prohibition is in line with the statutory ban on advertisements that encourage or induce claims for damages for personal injuries. No advertisement can contain cartoons, dramatic or emotive words or pictures, nor can it refer to calamitous events such as a train or bus crash. This regulation also prohibits reference to the solicitor's willingness to make home or hospital visits. Obviously, the willingness of a solicitor to make such visits is laudable, but the advertisement of such services can be (and has been) interpreted as a form of 'ambulance chasing' and is therefore prohibited by the regulations pursuant to the general statutory restrictions contained in section 4(2) of the 2002 act.

Billboard advertising is restricted to the solicitor's name, address, telephone and fax numbers, place of business and the location of information provided by the solicitor that is electronically accessible (regulation 9(b)).

Regulation 10 deals with websites and provides that solicitors will be responsible (for the purpose of compliance with the regulations) for the content of sites that are linked to the solicitor's site, where it is reasonable to conclude that the intention of the linked site is to publicise the solicitor's practice. For example, if a solicitor's website has a link to a site that contains information encouraging personal injury claims, it is reasonable to construe such a site as being intended to promote the solicitor's practice. This would mean that the solicitor is deemed to be responsible for the contents, and, if they are in breach of the regulations, the solicitor will be accountable.

Advertisements must be of a size appropriate to the medium in which they appear (regulation 11(a)), and where an advertisement contains factual information on services provided, no one category shall be given prominence (regulation 11 (b)). Thus, for example, the following advertisement would not be permissible:

XYZ Solicitors,
Blackhall Place, Dublin 7
Personal injuries, conveyancing, probate, matrimonial.

Regulation 11(c) is similar in concept to regulation 10 where the advertisement is in written form, as opposed to an advertisement on a website. If an advertisement for a solicitor appears in a newspaper and, immediately under it, a second advertisement appears 'which could reasonably be

Solicitor is struck off the roll

Solicitor Maurice O'Callaghan of 18/20 Lr Kilmacud Road, Stillorgan, Co Dublin was struck off the roll of solicitors by order of the president of the High Court on 21 October 2002. The matter followed the recommendations of the Law Society's Disciplinary Tribunal made at its hearing on 31 January 2001, following a complaint made by a former client of O'Callaghan's. The tribunal made the following findings of misconduct:

a) That the solicitor produced a letter to the Law Society's Registrar's Committee purporting to be a copy of a

letter dated 24 June 1991 and failed to explain the following discrepancies which quickly became apparent:

(i) The letter was a photocopy of an original, whereas the other letters on file were carbon copies

(ii) The reference on the letter was different to the reference on any other copy correspondence on the solicitor's file. The reference was similar to the current reference used by the solicitor when responding to the Law Society

(iii) The typeface on the letter was different to other letters on the file

(iv) The telephone number on the letter was a seven-digit number and in 1991 the solicitor's telephone was a six-digit number

b) The solicitor failed to advise the client of the correct amount of the settlement

c) The solicitor concealed figures from his client in relation to the settlement

d) The solicitor deducted monies from the settlement without his client's knowledge or consent

e) The solicitor misled the Law Society in correspondence and, in particular, in his letter of 7 September 1995

f) The solicitor misled the Registrar's Committee by producing a doctored letter and attendance to them at the meeting on 19 October 1995.

In view of the findings of the Disciplinary Tribunal and having considered the submissions in relation to sanction and costs, the tribunal was of the opinion that the solicitor was not a fit person to be a member of the solicitors' profession and recommended to the president of the High Court that his name be struck off the roll of solicitors and that he pay the Law Society's costs. This recommendation was endorsed by the president when the matter came before him on 21 October 2002.

Gazette Christmas publication

As usual, the *Gazette* will be taking a well-earned break over the Christmas period, so there will be no issue in January. Normal publication will resume with a joint January/February issue, due out in early February.

COMPENSATION FUND PAYOUT

The following claim amount was admitted by the Compensation Fund Committee and approved for payment by the Law Society Council at its meeting in November 2002: Michael P McMahon, 5/6 Upper O'Connell St, Dublin 1 – €2,285.5383.

construed as relating to or elaborating on' the solicitor's advertisement, the second advertisement shall be deemed to have been published by the solicitor, until the contrary is proved. Similarly, if a solicitor's advertisement refers to the fact that the solicitor is a member of a particular organisation of solicitors, any advertisements published by that organisation shall be deemed to be published by the solicitor until the contrary is proven (regulation 11(d)).

Regulation 12(a) removes certain forms of communications (those designed primarily to give information on the law) from the definition of advertisement. A book, or unpaid article or interview on a legal topic by a solicitor will not be regarded as an advertisement. Regulations 11(b) and (c) then provide for specific exceptions to this rule – a book that issues for free or at a reduced cost may be regarded as an advertisement, as may the repeated publication of an article or interview.

The 1994 act provided in section 69(4)(f) that no advertisement should 'comprise or include unsolicited approaches to any person with a view to obtaining instructions in any legal matter'. This express prohibition is not included in the 2002 act, as it was a source of considerable confusion insofar as all advertisements could arguably be regarded as 'unsolicited approaches'. The 2002 act now specifies that the Law Society shall make regulations 'to provide for restrictions on a solicitor making, or causing to be made, unsolicited approaches to any person or group or class of persons with a view to being instructed to provide legal services'. These restrictions are contained in regulation 13(a), which simply states that an unsolicited approach may not be made where it is likely to bring the profession into disrepute. In particular, approaches at an 'inappropriate location' (as defined), or at or adjacent to a calamitous event, a Garda station, courthouse or prison, shall not be made (regulation 13(b)).

If an advertisement does not otherwise make it clear on the face of it that it is an advertisement for a solicitor (for example, 'Buying or selling your house? Contact the experts at 01 987654321'), it must state that it is published by a solicitor. The solicitor is responsible for ensuring that all advertisements published or caused to be published by him or her comply with the regulations and any advertisement in which the solicitor's name appears shall be deemed to be published or caused to be published by him or her (regulation 14).

Regulations 15 and 16 deal with investigation and enforcement of possible breaches. Regulation 17 provides that if the solicitor obtained the society's written approval of the advertisement, that shall be a defence to any allegation of breach of the regulations. It also provides that the society can issue guidelines from time to time.

The statutory definition of 'claims for damages for personal injuries' includes claims 'whether made in court proceedings, or otherwise' and therefore would include claims made before a tribunal. The 2002 act also contains a section which prohibits a person who is not a solicitor publishing advertisements which undertake to provide 'a service of a legal nature that could otherwise be provided by a solicitor' for reward and which, if published by a solicitor, would be in breach of the legislation. G

Linda Kirwan is head of the Law Society's Complaints Section.

Taxing master's surprise costs ruling is expected to be appealed

A plaintiff has let it be known that she intends to appeal a decision of the taxing master that she should recover no costs despite a Supreme Court award of costs in her favour.

In a decision of 12 November 2002, Taxing Master James Flynn in the case of *Mary Johnston v the Church of Scientology and Others* held that the plaintiff had failed to prove that she was under a liability to pay her own legal costs and that the defendants could have no greater liability than the plaintiff could. He held that 'a "no win, no fee" arrangement between the solicitor and the client does not remove legal responsibility, but if the client

cannot prove the legal responsibility, regrettably the defendant, rightly or wrongly, is not obliged to discharge that which the client will not be held liable for'.

The Law Society's Litigation Committee is considering whether or not to issue a practice note to the profession in the light of this decision, even though it is under appeal. Director General Ken Murphy said: 'This decision was reported in the newspapers on the basis that it undermined the right of plaintiffs to recover costs from defendants where the plaintiff's solicitor had taken the case on a "no win, no fee" basis. However, this does not appear to be a correct interpretation of the taxing master's decision. In fact, this case appears to turn on its own particular facts and, in particular, on rules of evidence in relation to the proof of the plaintiff's obligation to pay her own solicitor's costs. There was no section 68 letter in this case, as it was initiated before the relevant legislation came into effect'.

In the course of his judgment, Taxing Master Flynn remarked that 'usually the section 68 letter is sufficient proof of the legal liability in that it impresses the whole spectrum of costs upon the client who wishes to embark upon litigation. In future, it may be of benefit if such letters are appended to the bill of costs so as to truncate the proofs required at taxation'.

Unfair conditions: has the pen

The High Court recently prohibited 15 unfair terms in building contracts, but it seems that some members of the profession have yet to understand the implications of this. Pat Igoe provides a refresher course for slow learners

One year ago, on 5 December 2001, Mr Justice Kearns in the High Court heard a landmark application for an order against unfair conditions in building agreements. Judgment was duly given and 15 sample terms in building contracts were held to be unfair.

The successful application by the Director of Consumer Affairs, Carmel Foley, at the behest of the Law Society, to address unfair and onerous terms and conditions, received media coverage, including being the lead article in the Jan/Feb 2002 issue of the *Gazette*. Since then, the Conveyancing Committee has reminded practitioners (in October) of the futility of inserting such terms 'as they are unenforceable'.

As noted by Conveyancing Committee chairman Patrick Dorgan in the Jan/Feb 2002 issue, this problem had become very onerous both on solicitors and on purchasers of new houses. Essentially, some builders' solicitors were inserting unfair and unreasonable terms.

Pat Igoe: 'Guess whose desk the problem falls on?'

The extent of the problem

So how much has changed since then? Unless a matter is referred to the court or otherwise comes into the public domain, it is not possible to know the extent to which the problem still exists. But it does still exist. To what extent is known only to individual solicitors and clients.

The Conveyancing Committee noted in October that it had received 'numerous complaints' that some builders' solicitors persisted in refusing to remove such terms. 'The continued use of such terms is in breach of the regulations and the order of the High Court', the committee warned.

What are the terms that are offensive? The *European Communities (Unfair Terms in Consumer Contracts) Regulations 1995* provide that a contractual term will be regarded as unfair if, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer. The strength of the bargaining positions of parties will be a factor in deciding on good faith.

The background to unfair and unbalanced building agreements can be easily accessed by all practitioners. The 1995 regulations, under which the director of consumer affairs took the High Court action, are contained in statutory instrument 27 of 1995. This is contained in the *Irish statute book, 1922-1998*, published in August 1999 by the Office of the Attorney General and distributed free to all solicitors' offices in the state.

The unfair terms and conditions

The 15 sample terms (note that they are samples only), which are based on the unequal bargaining positions of the individuals hoping to secure a house or apartment and the developers and builders, can be very broadly summarised as:

- The contract and building agreement constitute the entire agreement. Thus, all assertions, promises, understandings and even commitments by the builder or the builder's agent have no effect whatsoever. While this provision gives clarity to the contract, should not all pre-contract promises to the house-hunter or apartment-hunter carry a 'health warning'?
- If the employer does not pay the balance of the contract price within 14 days, the contractor may rescind. This highlights the imbalance in the bargaining strengths of the buyer and the developer/builder
- If the employer (or, of course, the employer's solicitor) raises any objection prior to the balance contract price being paid, then the builder can rescind the agreement. The

Letters

Equality officers: compare and contrast

From: Dr Mary Redmond, Arthur Cox, Dublin

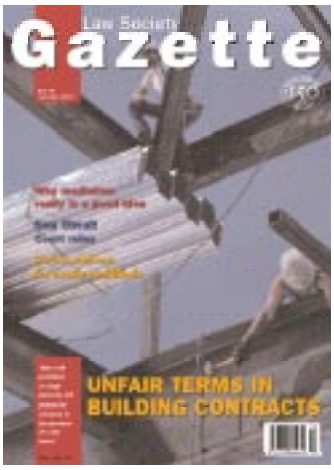
Madeline Reid's letter in last month's *Gazette* (page 9) in response to my article in September (page 18) merits reply. She directs her comments to my concern that in decisions under the *Equal Status Act*, where it is manifest that no evidence whatsoever has been adduced by the complainant as to a comparator, the equality officer without more finds in their favour on the basis of less favourable treatment with a hypothetical comparator. I wrote that where the equality officer 'picks' or assumes without evidence who the comparator is for the person bringing the claim, he or she is acting as advocate and judge.

Ms Reid disagrees. She writes that similar wording in the UK discrimination acts place employment tribunals there 'under a *duty* to consider introducing a hypothetical comparator of their own motion where none had been adduced by the complainant'.

ny dropped yet?

court noted that this could be used by a builder to end a contract even where no event had occurred going to the root of the contract

- The builder's liability also excludes defects which occur before closing, unless the builder acknowledges these defects in writing. So if the builder does not acknowledge in writing the alleged defect, then it is not actionable. As noted in the pleadings before Kearns J, it makes the commitment of the builder subject to acknowledgement in writing by the same builder
- Only one snag list can be submitted and it must be submitted within seven days of the completion notice. As pleaded in court, this seeks to limit the liability of the builder in an unfair and unbalanced way
- The time period in general condition 4(c) is reduced from 14 days to seven days. This was argued successfully before the court as unreasonable because of the serious consequences of failing to meet the short deadline
- The builder may terminate the contract. This clearly allows the builder to end the contract without reasonable cause and is not a right that is reciprocated
- If the employer does not pay the balance due on closing day, the builder may give 14 days' notice and, after that, the deposit will be forfeit, the property may be re-sold and all expenses and any deficiency in sale price will be the responsibility of the would-be buyer. Again, it was argued before the court that



this would allow the builder to be unjustly enriched at the expense of the would-be buyer

- 'The employer will build within 18 months, failing which …' But this provision is under the control of the builder. Again, as noted in the Jan/Feb *Gazette*, 'agreement binding on consumer but at the will of builder'
- 'The employer shall not assign …'. But the builder may assign
- The builder may modify the materials. Deviations from the specifications are not limited to minor deviations
- 'The contractor shall not be liable to the employer in respect of any loss, expenses, costs or otherwise incurred as a result of any delay howsoever caused in completing the works referred to in clause A hereof'. Enough said
- Any delay in completing the works will not delay the closing date. This requires closing payment to the builder irrespective of whether or not the works are completed
- The builder will not be responsible for any damage caused to materials for extras for the buyer. This disadvantages the buyer in respect of the extra materials vis-à-vis the main building materials
- If any part of the closing balance is not paid within five days, interest will be payable on a day-to-day basis at 20%. This was successfully argued as being a disproportionately high rate of interest.

Unequal bargaining power

One year on from the High Court judgment, too many of these onerous conditions are still familiar to conveyancers. So, if they are so oppressive, why do purchasers submit to them? It obviously relates to the market, purchasers' needs and unequal bargaining powers between the individual would-be buyer and the builders.

Other conditions still appearing that are arguably unfairly onerous include:

- That the *contra preferentem* rule will not apply
- That any site or layout plan is for identification purposes only and does not necessarily show the correct location, size or area of the site, and
- That the builder will be entitled to vary or alter the development in any manner subject to planning permission.

The 15 condemned conditions are explicitly non-exhaustive.

Like most of us, would-be purchasers want to believe that everything will turn out fine. The small print is for lawyers. But if everything does not turn out fine and there are problems after closing, guess on whose desks the problems fall? G

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

whether they are getting it right?

She refers to *Balamoody v UK Central Council for Nursing*, a recent decision of the Court of Appeal (approving statements in an EAT decision, *Chief Constable of West Yorkshire Police v Vento*, reported in 2001).

Far from legitimising the current practice of equality officers, these authorities make it abundantly clear that the task of constructing a hypothetical comparator is undertaken only where there is evidence before the tribunal enabling it to construct a hypothetical comparator. In *Vento*, the employment tribunal used four actual cases on which it had heard evidence as building blocks in the construction of the neighbourhood in which the hypothetical male officer was to be found. According to the EAT, 'It cannot be said [its] conclusion … represents so outlandish an inference … from the actual cases examined by the tribunal as to be a conclusion without support of any evidence'. In *Balamoody*, the court found that the chairman of the tribunal should have asked herself 'whether there was some evidence to support an inference … that evidence seems … to have been before the tribunal … on the facts it was incumbent on the chairman to construct a hypothetical comparator and test the case against that benchmark'.

Fastest Growing Chamber Recognises Fastest Growing Case Management Solution - eXpd8

At its inaugural 'Business Awards Ceremony' on Friday 22nd of November 2002 in the Great Southern Hotel, Dublin Airport the Swords Fingal Chamber Of Commerce recognised the efforts of businesses to promote excellence in the quality of their products and services.

eXpd8 with over 1100 users across 16 professional industries already, fought off stiff competition from Wine Online and RAS to pick up the award for 'Excellence and Innovation in e-Business'.

Declan Branagan, Managing Director of BBS | Business to Business Solutions the No 1 reseller of eXpd8 accepted the award on behalf of eXpd8 from Miriam O'Callaghan who presently anchors RTE's flagship current affairs programme "Prime Time".

For this award the Judges were looking for businesses who have introduced new standards in e-Business and Excellence to improve business efficiency and productivity.

Declan Branagan of BBS said at the black tie gala awards evening "This award is a testament to the innovation and change happening within the legal profession and to eXpd8 who are helping to engineer this change".

I would have no difficulty if equality officers constructed a hypothetical comparator based on evidence before them and tested the case against that benchmark (assuming no actual comparator, or one that was rejected as in *Balamoody*). My difficulty with the current practice is precisely that it is done without support of any evidence. Where an equality officer so introduces a hypothetical comparator, which is necessary jurisdictionally for a claimant to succeed, it constitutes in my view an impermissible combination of roles by the equality officer.

UK acts may use similar words to ours, but they also use qualifying modifiers regarding the comparator, namely that the relevant circumstances in the one case are the same, or not materially different, in the other. This means the hypothetical comparator must bear some equivalence to the claimant.

Indeed, Ms Reid's practical examples of investigative work by equality officers illustrate the importance of 'evidence' and of affording the parties an opportunity to comment thereon. The evidence which results from investigation eventually has to be adjudicated upon, and my thesis is that the equality officer's decision must be supported by evidence. Otherwise, it runs the risk of being seen not to be impartial.

Never metadata that I didn't like

From: Seán MacCann, www.maccann.com

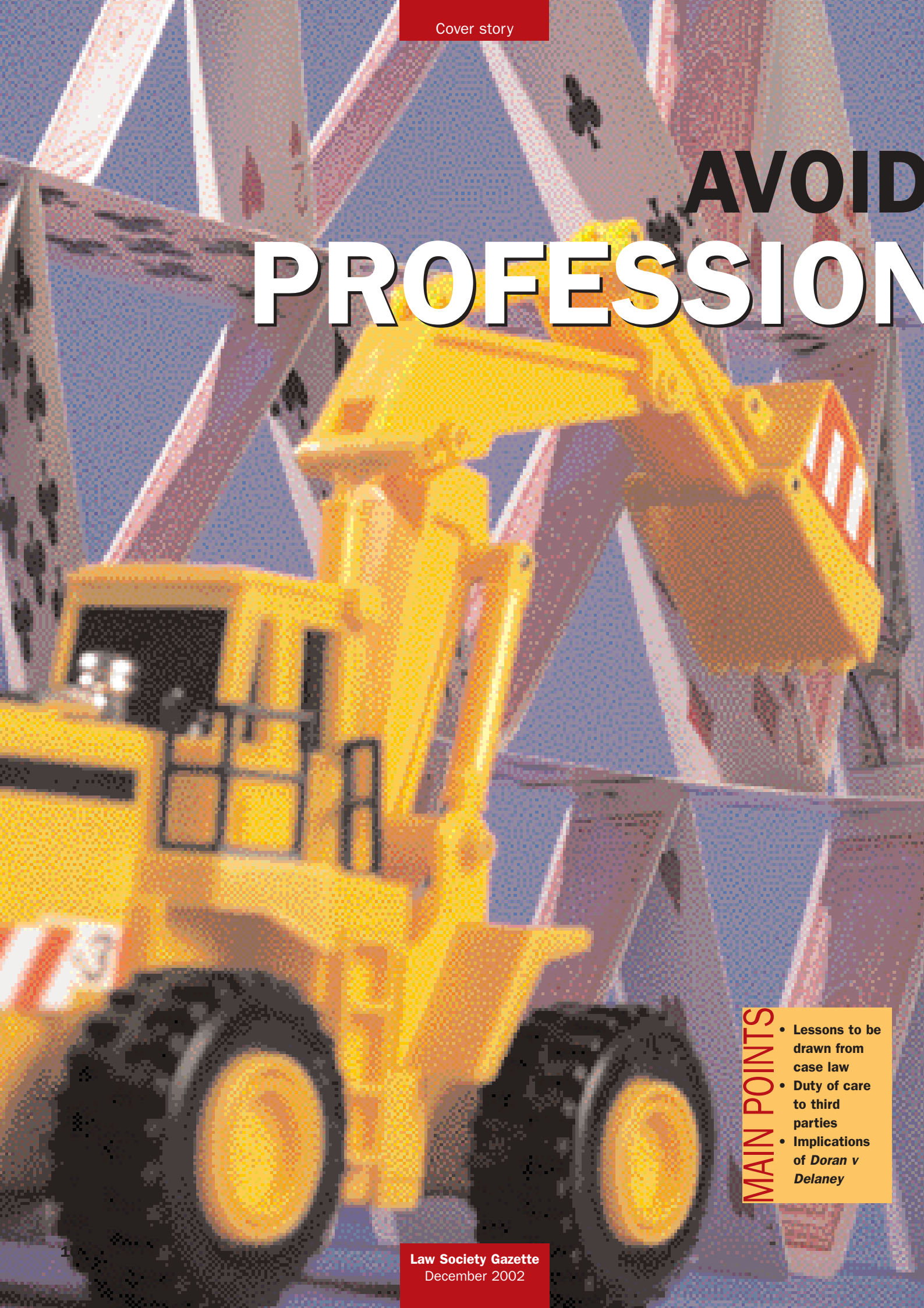
My article *Do your files need a clean sweep?* in the last issue of the *Gazette* (page 29) dealt with the risks of disclosing confidential client material as metadata. One of the examples I gave in passing was of a recent real-life instance of a partner in a US law firm who, having been asked both to supervise a minor deal and personally to draft the related documents, decided instead to delegate the drafting aspect to an assistant. Despite this, the partner still charged partner rates for all of the work. Fortunately, the partner's startling dishonesty was only matched by his ignorance of metadata, and his dishonesty was discovered.

Some readers have remarked to me that even a neutral description of this incident might be construed as unwittingly encouraging others to commit similar abuses. Obviously, that was not my intention. I simply selected a topical, widely-reported and extreme instance of unintentional disclosure of metadata in a legal context to ram home the wider point about the vulnerabilities of metadata generally and of the attendant dangers of breaching client confidentiality. All the other selected instances involved accidental disclosure of confidential client information to a third party.

I have my own opinions about the calibre of person who would cheat on his client and unfairly take the credit for his assistant's work. However, I felt his downfall spoke for itself. I felt it unnecessary and inappropriate to gloat or to comment further in the confines of a practical technical article.

Incidentally, I should also point out that, as an in-house lawyer to a security software company, I myself am a purchaser of legal services. While I have never encountered fraudulent charging, it is obvious that lawyers and clients need to talk to each other regularly to ensure that external lawyers do not carry out expensive work that may no longer be needed. Clients' circumstances and priorities can change in minutes.

Accordingly, in 1998, I was pleased to note that the firm I used to work with in London had set up a system whereby clients have a personal gateway into the firm's internal systems so that clients can access their own files – and their own billing narratives and running totals – in real time. This passive-access facility complements traditional, active communication channels. It is not intended to be a substitute for the lawyer simply picking up the phone and talking to the client. However, such systems are convenient and the technology to provide this kind of secure transparency has existed for some time. I predict that larger clients' accounting departments will increasingly come to demand that level of service and convenience as a matter of course.



AVOID PROFESSION

MAIN POINTS

- Lessons to be drawn from case law
- Duty of care to third parties
- Implications of *Doran v Delaney*

NEGLIGENCE in CONVEYANCING

It's always worrying to hear of a colleague being sued. It's worse still if you are sued yourself. Brian Gallagher sets out some of the pitfalls facing conveyancing solicitors and explains how to avoid them

The standard of care required by a solicitor in carrying out the business entrusted to him by his client was defined by Judge Griffin in *Roche v Peilow* ([1985] IR 232) as 'the ordinary level and degree of skill and competence generally exercised by reasonably careful colleagues in his profession'. The question as to whether or not a practitioner is in breach of the standard of care depends on the circumstances of the case, according to Hamilton J in his High Court judgment in *Doran v Delaney* ([1996] 2 ILRM). It is settled law that a client has a right of action in tort as well as in contract against a solicitor who has failed to show due care in the performance of his duty to that client.

1) You are obliged to exercise professional skill and judgement in your client's interests

In *McMullen v Farrell* ([1993] 1 IR 123), Mr Justice Barron stated that a solicitor is not obliged to consider every aspect of his client's affairs because he is asked for advice on a particular matter, but, as part of his duty to his client, a solicitor is obliged to exercise professional skill and judgement in his client's interests. The extent of this duty is dependent on the nature of the case presented to him and Barron J held that where pending legislation affects advice given in a current matter, there is a duty on the part of the solicitor to qualify or correct that advice as soon as possible.

He went on to say that a solicitor must consider not only his instructions but also the legal implications of the facts presented to him by his client. In this particular case, the fact that a solicitor had ceased to act for the plaintiff did not entitle him to leave unanswered certain questions put to him by the plaintiff. Instead, he ought either to have dealt with them or indicated to the plaintiff that he was not doing so, since he was no longer acting.

2) Not enough to simply carry out instructions

It is not enough for a solicitor to simply carry out instructions; he must give advice. A solicitor must seek knowledge of all the relevant circumstances. These principles were set out by the Supreme Court in *Carroll v Carroll* ([1999] 4 IR 243; [2000] 1 ILRM 243). This case related to a voluntary transfer, but the principles could also apply to all conveyancing transactions. Mr Justice Barron stated in his judgment that 'a solicitor or professional person does not fulfil his obligation to his client or patient by simply doing what he is asked or instructed to do. He owes such person a duty to exercise his professional skill and judgement and he does not fulfil that duty by blindly following instructions without stopping to consider whether to do so is appropriate. Having done so, he must then give advice as to whether or not what is required of him is proper'.

As solicitors, we must apprise ourselves of all relevant circumstances and we must give advice, and not merely carry out instructions. If someone asks us to push them over a cliff, it would clearly be wrong to do so.

3) Carry out all necessary investigations

Part of apprising oneself of all the relevant circumstances is to carry out all relevant investigations. In *Roche v Peilow*, the plaintiff house-purchaser was

SCOPE OF A SOLICITOR'S DUTIES TO THIRD PARTIES FOLLOWING *DORAN V DELANEY*

1) *Mala fides* on behalf of a solicitor is not necessary. If insufficient regard is paid to the duty to the third party, a solicitor may be liable under the Hedley Byrne principle. In *Dutton v Bognor Regis UDC* ([1972] 1QB373 at 394), Lord Denning MR said that 'since (Hedley Byrne) it is clear that a professional man who gives guidance to others owes a duty of care, not only to the client who employs him, but also to another who he knows is relying on his skill to save him from harm. It is certain that a banker or accountant is under such a duty, and I can see no reason why a solicitor is not likewise'
2) Breach of duty of care to avoid making negligent misstatements can give rise to a cause of action for damage only if the represented plaintiff has suffered loss by reason of reliance on the misstatement. That he has acted in reliance upon it without loss gives him no right of action for damages
3) It is not a blanket defence to an action for negligence by a third party that a solicitor acted on the express instructions of his client. Where there is 'any' or 'good' reason to doubt the accuracy of those instructions, there may (depending on the facts of the case) be a positive duty on a solicitor to enquire further, if the information furnished on foot of same is such that the plaintiff 'must naturally be expected to act' upon it
4) In replying to requisitions on title, a solicitor is acting in a professional capacity and not in some casual social context. Once a solicitor 'is acting professionally', he warrants that, so far as his own acts are concerned, he has taken the care and applied the skill and knowledge of a member of the profession (Mr Justice Barron)
5) However, there are many occasions when, in furnishing replies to objections or requisitions in a contract for the sale of land, a solicitor for the vendor cannot be said to assume any responsibility for information being transmitted. Thus, for example, expressing a professional opinion on whether appropriate words of limitation had been used in a deed forming part of a title is not assuming responsibility for information being furnished in the sense in which that expression is used in *Doran v Delaney*. In that situation, the solicitors on either side are dealing with the same set of documents and are doing no more than expressing their professional opinion on matters of title. Similarly, there are many circumstances in which the vendor's solicitor, in drafting a reply, could be described as transmitting information but could not be regarded as assuming any particular responsibility for that information. An example of this is a reply to the standard requisition 11, which asked whether any notice, certificate or order has been served on the vendor under a long series of listed statutes or 'under any other act'
6) Care should be taken to transmit a client's instructions accurately. In *Doran v Delaney*, it was argued that the vendors' solicitors went further than any instructions they had been given in saying that the vendors had instructed them that no adverse claim to the property being sold was made by any person, when what they had been told was that the dispute had been settled. These instructions, on one reading, did not indicate, as the reply to the requisition did, that no claim to the disputed portion was at that date being made by the adjoining landowner
7) A solicitor acting for a vendor is fixed with notice of any claim that may have been dealt with by the same solicitors' firm relating to the property. A solicitor acting in the sale of the property would therefore need to make enquiries about any disputes or any litigation that may have arisen regarding the property. In the context of *Doran v Delaney*, for example, the fourth-named defendant, having asked her client whether the dispute had been resolved, should have followed this up by verifying her instructions with her colleague and, if necessary, with the solicitors for the adjoining landowner
8) A solicitor's responsibility, if any, for replies to requisitions does not depend on the wording used, Answers such as 'vendor says no' or 'no' or 'not to vendor's knowledge' all mean that it is believed there is no information of relevance. Thus, the use of such phraseology does not make it clear that a solicitor is doing no more than conveying his client's instructions and will not result in the avoidance of liability.

successful in an action for damages for negligence and breach of contract against the defendant solicitors, who had failed to investigate and discover the existence of an equitable mortgage registered against the property, claiming it was not customary to do so. The Supreme Court held that, as the universal conveyancing practice had inherent defects which ought to have been obvious to any person giving the matter due consideration, then the defendants were negligent in failing to carry out a search in the Companies Registration Office against the builder of the new house being purchased.

4) Requisitions on title and contemporaneous notes

In *Hanafin v Gaynor* (unreported judgment of Mr Justice Egan, 29 May 1990), the court held that no responsibility attached to the solicitor who had accepted an answer regarding planning permission in the requisitions on title which subsequently turned out to be false. Proper requisitions had been raised and searches undertaken which did not reveal the existence of the defective planning permission.

Similarly, in *Murphy v Proctor* (11 October 2000), the question arose as to whether the defendant solicitor was guilty of professional negligence in and about the conduct of the purchase of a shop. Mr Justice Kelly preferred the solicitor's evidence to that of his client with regard to their meetings, based on the demeanour of the parties, the quality of their evidence, their recall and the existence of contemporaneous notes. The court accepted the defendant solicitor's evidence that he had advised the plaintiffs in non-technical language as to what they were purchasing before they entered into the contract. This illustrates the usefulness of a solicitor keeping contemporaneous notes.

5) You cannot be expected to physically or legally restrain a client from a course of action

A solicitor cannot be expected, having advised a client of the dangers of proceeding with a

transaction, to physically or legally restrain him from so doing. In the case of *Pierce v Allen & Others* (judgment of Mr Justice Murphy, delivered 9 June 1993), there were allegations that the solicitor was negligent in allowing or permitting his clients to carry out extensive renovation works while they were in possession of a property under a caretaker's agreement. Judge Murphy stated that a solicitor, having properly warned his client of the danger of his actions, could hardly be bound to take some physical or legal course of action to prevent his client pursuing a particular course if the client was determined to do so. He referred to *Roche v Peilow* and went on to rule that in all the circumstances the client was adequately advised as to the limitations of the rights that would be conferred on him by a caretaker's agreement, and that the solicitor was found not to be negligent under this head.

6) Relying on the advice of counsel

The case of *Fox v O'Carroll* ([1999] IEHC4) concerned the forgery of a transferor's signature on a Land Registry transfer which was attested by the solicitor for the vendors. The purchasers claimed damages against their solicitors on the grounds that the solicitor had general instructions from them to get compensation from whichever party was responsible in law for their losses arising out of the forgery and to sue the solicitors for the vendors for their wrongful attestation of what transpired to be the forged signature of the transferor. The purchasers' solicitors did not sue in time and the claim became statute-barred.

The solicitor for the purchasers explained to the court that he had instructed a barrister and counsel had advised that there was no claim against the vendors' solicitor. The solicitor and the client were both disappointed with this advice and the solicitor asked counsel to reconsider, whereupon counsel wrote a second letter of advice confirming that he was satisfied that there were no grounds for an action. There was a subsequent consultation with counsel, in which counsel repeated his advice. The solicitor then got advice from another barrister, who confirmed the first barrister's advice. Both counsel were wrong and the vendors' solicitors could have been sued for deceit.

Justice O'Sullivan quoted from *Cordery on solicitors* (1998 edition) at paragraph 553: 'as a general rule, a solicitor acting on the advice of properly instructed counsel can hardly be said to be acting unreasonably, save perhaps in a very exceptional set of circumstances'. He went on to say that a solicitor is not entitled to rely blindly with no mind of his own on counsel's views. Thus, it is the duty of a solicitor to reject counsel's advice that is obviously or glaringly wrong. It has been said that a solicitor does not abdicate his professional responsibility when he seeks the advice of counsel; he must apply his mind to the advice received. But the more specialist the nature of the advice, the more reasonable it is likely to be for a solicitor to accept it and act on it.

Justice O'Sullivan was unable to hold the solicitor negligent, as he did not accept the advice of counsel uncritically; in fact, he had asked counsel to reconsider and on no fewer than four occasions was advised by counsel that his client had no action. The case against the solicitor was dismissed.

7) Existence of a duty of care to a third party

It is bad enough to be sued by your own client, but the case of *Doran v Delaney* ([1998] 2ILRM) shows that you can be sued by someone else's client too. The plaintiffs purchased a plot of land which they believed had planning permission and was accessible from the road. They intended to build on the land. Post-completion, they discovered that planning permission had been granted due to the submission of an incorrect map with the application by the vendors and that the land providing access was not owned by the vendors and had not been included in the purchase. Thus, they were left with a landlocked plot of land on which it was not possible to build.

The purchasers were not informed that the adjoining owner claimed to be the owner of part of the land nor that there was an on-going dispute. In response to a requisition which asked whether there was any dispute with adjoining owners in relation to party walls and fences, the vendors' solicitors replied: 'vendor says no'. In response to a requisition which asked whether there was any litigation pending or threatened in relation to the property or whether any adverse claim had been made in respect of it, the vendors' solicitors replied: 'vendor says none'. The vendors' solicitors replied to the requisitions only after taking instructions from one of the vendors. While a partner in the vendors' solicitors' firm knew of the dispute with the adjoining owner and her previous threats of litigation, the partner in the firm informed the solicitor dealing with the matter that the dispute had been resolved. However, neither of the two solicitors ascertained from the vendors the terms on which the dispute had allegedly been settled.

The purchasers instituted proceedings against their own solicitor in the purchase, claiming damages for negligence, breach of duty and breach of contract, and against the vendors and the vendors' solicitors claiming damages for negligence, misrepresentation and breach of warranty. In the High Court, damages were awarded to the plaintiffs against their own solicitors and against the vendors, but their claim against the solicitors for the vendors was dismissed on the grounds that these defendants had merely transmitted their clients' instructions and had not assumed responsibility for, or the role of, principal in relation to that information so far as the plaintiffs or their solicitor was concerned. The plaintiffs appealed this decision.

The Supreme Court allowed the appeal and found the solicitors for the vendors liable to the plaintiff for negligence. The Supreme Court held that while there was no contractual relationship between the plaintiffs and the solicitors for the vendors, this would not itself negate the existence of a duty of care. The solicitor's obligations to protect his own client are perfectly consistent with the existence of a duty of care to the purchaser in certain circumstances.

However, the transmission by a solicitor to a third party of information which turns out to be inaccurate and upon which the third party relies to his detriment does not, of itself, afford a cause of action of negligence to the injured third party. The following factors are relevant in determining whether a solicitor, while acting for a client, also owes a duty of care to a third party:

- The solicitor must assume responsibility for advice or information furnished to the third party
- The solicitor must let it be known to the third party expressly or by implication that he claims, by reason of his calling, to have the requisite skill or knowledge to give the advice or furnish the information
- The third party must have relied on that information
- The solicitor must have been aware that the third party was likely to so rely.

'The Supreme Court held that while there was no contractual relationship between the plaintiffs and the solicitors for the vendors, this would not itself negate the existence of a duty of care'

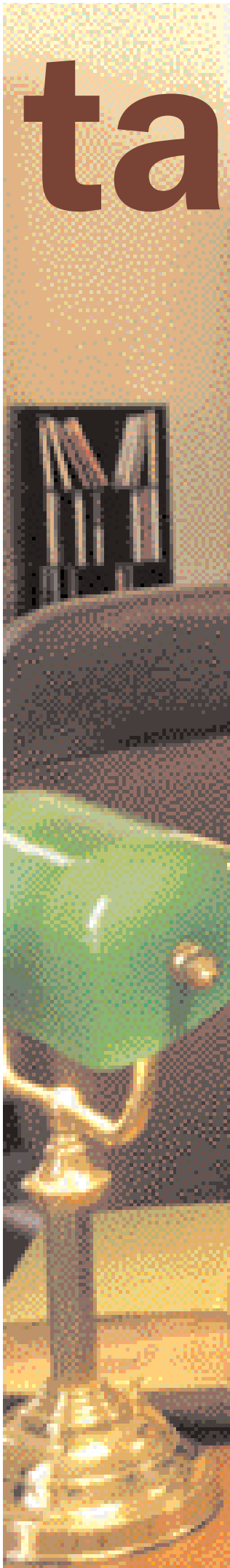
In this case, the vendors' solicitors were aware from their own knowledge that threats of litigation and adverse claims had been made and so assumed some responsibility for that information. However, there are occasions where in furnishing replies to requisitions the solicitor for the vendor cannot be said to assume responsibility, but this depends on the circumstances of the case. The vendors' solicitors were clearly acting in a professional capacity in replying to requisitions and must be assumed to be applying the skill and knowledge to be expected of a solicitor in such circumstances.

The contract of sale clearly stated that the land was sold with the benefit of planning permission and the vendors' solicitors were aware that the adjoining owner claimed the planning permission was invalid. They were also aware of the dispute with the adjoining owner and that there was no physical boundary between the site and the neighbour's land and that the purchasers' solicitors had unsuccessfully sought to have an ordnance survey map delineating boundaries incorporated into the contract. Therefore, the solicitors for the vendor must have known that, regardless of whether their reply accurately reflected the vendors' instructions to them, it would unquestionably be relied on by the purchasers.

The vendors' solicitors owed a duty of care to the purchasers, and by failing to ascertain the terms on which the dispute was resolved and by telling the purchaser that there was no dispute, they were in breach of that duty. This reply did not convey all the information to which the purchaser was entitled, and a partial statement in the circumstances may be equivalent to a misstatement or misrepresentation. Had the solicitors for the vendors got in touch with the adjoining owner's solicitors, it would have been discovered that the adjoining owner had not abandoned her claim to the disputed area and that the claim was well founded in law. G

Brian Gallagher is a partner in the Dublin law firm Gallagher Shatter.

Fighting ta



Strap on your flak jacket, because new president Geraldine Clarke has declared war on media misrepresentation of the solicitors' profession. Here, she talks to Conal O'Boyle about her career and her battle plan for the coming year

The moron who said that there's no such thing as bad publicity ought to have his head examined. And you really wouldn't want to be in his shoes if he ever met Geraldine Clarke. She'd go through him for a shortcut. Ms Clarke, the newly-elected president of the Law Society for 2002/03, has put public relations at the top of her agenda and has promised to take the offensive against the kind of lazy and ill-informed comment about solicitors that has littered the media in recent times.

'Solicitors have taken a media battering over the last numbers of years, which is quite unprecedented and completely undeserved', she says. 'The problem is that we are finding it very, very hard to get any kind of positive response to our public statements. We have been counteracting what's been said about us in the media, but our comments are not being taken into account. As president, I intend to do everything I possibly can to redress that balance'.

She acknowledges that the image of the solicitors' profession has suffered from skirmishes on a number of fronts: first came the sniping at increasingly tasteless personal injury advertising, then the scale of legal fees at tribunals mobilised armies on both sides, and war was finally declared over the so-called 'compo culture'. But, as so often throughout history, the real *casus belli* was money – or, in this case, the soaring cost of insurance bills.

'The business community and insurance industry have sought to put forward the case that it is lawyers who are responsible for the problems they are now facing. We are not responsible, but our attempts to get that message across have been less than successful'.

Full metal jacket

The war between the legal profession and the business and insurance lobbies has been fought in print and on the airwaves – and there have been a number of casualties. Truth, as usual, caught the first bullet, but then objectivity and commonsense were taken prisoner by the other side and sent to a re-education camp. The good news is that Clarke is marshalling the troops for a winter offensive. One of her first acts as president was to re-establish the society's defunct Public Relations Committee.

'I was never convinced that abolishing the PR Committee was the right thing to do', she says.

The ironic thing is that Geraldine Clarke didn't set out to be a solicitor; she had her heart set on journalism instead. She was halfway through her degree in French, Philosophy and Irish at Trinity College, Dublin, when she made friends with a fellow student who was an apprentice solicitor. His career seemed much more interesting than the one she had planned for herself so she approached a family friend, Dublin solicitor Joe Deane, and he agreed to take her on as an apprentice after she qualified. Clarke supported herself during her apprenticeship by teaching French evening classes.

'The system was totally different then', she recalls. 'We didn't have a law school and we didn't have full-time courses, so my lectures were done part-time in UCD and some of them in Trinity. I worked full time as a solicitor's apprentice, wearing out a path to the High Court Central Office and Circuit Court Office. In those days, you literally did everything from the photocopying right up to attending counsel in the High Court. I was very lucky. I got very good apprenticeship. I was given as much responsibility as I was prepared to take and was trusted probably a bit more than I should have been in some cases!

'It is gratifying to see how the profession has developed since then. Trainee solicitors are extremely well educated in the Law School and emerge more broadly qualified and more confident than we were'.

The profession, of course, is now much larger and the areas have practice have expanded dramatically. This has resulted in much greater competition, which, she believes, is a good thing. 'The Competition Authority is in the course of completing its study of the legal profession', she

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GERALDINE CLARKE FACT FILE

Occupation: Solicitor (admitted to Roll of Solicitors in 1978). Partner in the Dublin law firm Gleeson McGrath Baldwin. Specialises in intellectual property, employment law and civil litigation

Education: Secondary: Marist Convent, Carrick on Shannon, County Leitrim; third level: BA, Trinity College, Dublin, 1975; MA, TCD, 1978

Family: Married to microbiologist Frederick Falkiner, two children – Kate and Kamala

Law Society career: First elected to Law Society Council in 1986. Junior Vice-President 1997, Senior Vice-President 2001, President of the Law Society for year 2002/2003. Has chaired many of the society's committees during her 16-year tenure on Council, including finance, registrar's, compensation, litigation, public relations, and EU and International Affairs.

notes. 'We welcomed the authority's decision to initiate that study and await its findings with interest'.

After qualifying in 1978, Clarke moved from Dublin to Longford, because it was closer to her family home in Ballymote, Co Sligo. She stayed a year with Longford solicitor Patrick Groarke, before moving back to Dublin to take up an in-house position with CIE, doing High Court litigation.

The longest day

In 1983, she joined Gleeson McGrath Baldwin, having made a firm agreement with Frank Murphy that she would only stay a year 'because at that time he thought he wanted to continue to be a sole practitioner'. Some 20 years later they are still together as partners in the firm.

Clarke has no doubts that she made the right career choice. 'I've been very lucky in that I love what I do', she says. 'What I've always enjoyed most is the relationship with the client. To me, that's what it is all about. The whole purpose of our existence is to understand our clients, to provide impartial advice and to act as a bridge between them and a system that they don't understand or know very much about'.

Of course, for a young female solicitor starting out in practice, clients weren't always such a delight to work with. 'Certainly in the earlier days, it was harder to make your voice heard as a woman and to be taken seriously. I remember having to have a male solicitor sit in on some consultations with me in order for certain clients to believe that the advice I was giving them was credible. They felt much happier if there was a man sitting there, saying: "well, I agree totally". Those days have gone. I still think it is harder for women, but nothing like as hard as it was'.

These days, Geraldine Clarke specialises in intellectual property, employment law and civil litigation. She also has a long-standing interest in European law and, along with Mary Robinson, was involved in setting up the Irish Centre for European Law. She retired two or three years ago from the board of the ICEL because Law Society commitments meant that she could not give it the time it deserved. Among these commitments, she was head of the Irish delegation to the CCBE (the representative body for European bars and law societies) for five years.

Like many young solicitors, her association with the Law Society sprang from her involvement in her local bar association, in this case the DSBA. 'I was roped into the bar association by Colm Price, who proposed me for the council in my absence. When I came back, I found I had been elected! I went on to be elected president of the bar association, and at the same time I was serving on a couple of Law Society committees. I thought that since I was doing the work, I might as well just run for the Law Society Council as well.

'I firmly believe that bar associations play a vital role in providing support and a sense of collegiality for the profession. Since I took office last month, I have visited three bar associations with Ken Murphy – Tipperary, Sligo and Leitrim – and I intend to visit a great many more within my year'.

Clarke was elected at the second attempt, in 1986, and every year since, and the society has certainly got its money worth out of her. Apart from her five-year stint on the CCBE, she has served on most of the society's major committees during her 16 years on Council.

'I've enjoyed it enormously', she says. 'I've made a lot of my best friends down here. This has been my equivalent of golf. Eric and I have two lovely little girls, Kate and Kamala, who are both adopted from India, and they have really been the highlight of my private life, as opposed to my professional life. All the things that I used to do pre-children and pre-Law Society, such as the theatre and the Concert Hall, these have taken a back seat. The Law Society has taken over'.

Getting the balance right between the Law Society's regulatory functions and its representative role is very important, Clarke believes. It is certainly an issue that regulary gives rise to discussion within the profession. 'I think it is a natural state of affairs', she argues. 'It's a crucial balance that we have to achieve. My view is that, at the end of the day, the regulatory function is for the benefit of our profession as a whole. We have to be able to discipline – and be seen to discipline – members who step out of line. If we can't do that, then we are doing no service to the vast majority of our profession, who are actually doing it right, living within the rules. We all have to accept that the regulations are there for the benefit of our clients and to protect us in what we do. I have to know that if I breach them, I will be disciplined.

'Now, the question is whether I should be disciplined by the Law Society – by my peers – or by an outside body. Personally, I would prefer to be disciplined by my peers, because they understand the

job that I am trying to do. Our experience with the Registrar's Committee is that it is the solicitor members, rather than the lay observers, who are actually stricter, who are more conscious of the implications for the profession if their colleagues step out of line'.

Band of brothers

While she accepts that a year is a short timeframe in which to make her mark, Geraldine Clarke has a number of other goals apart from improving the image of the profession. 'I think that to a large extent the Law Society is seen as remote from younger members of the profession. Now that's something which most professions have a problem with, but I believe that this is a society which represents the whole of the profession, not just one section of it. I would like to try to reach out to them and to make what we do somehow relevant for them, to bring them into this wonderful building that we own, to let them see that it's their building – even if it's only playing soccer on the pitch or having a pint in the bar afterwards.

'I would also like to develop a closer bond with the large firms because, for different reasons, I think they feel that maybe the Law Society is not terribly relevant to what they do. I have written to the managing partners of the five biggest firms in Dublin and I have invited them to identify for me two issues that they would like to see the Law Society deal with in the course of this coming year, and I hope that we will be able to address the issues of concern for them.

'And I would like to see a situation where we are the first port of call for the client. All too often, clients come to us for advice when the damage is already done – the employee has been sacked, the contract has been signed. If more people asked their solicitors for advice before the problem arose, you would substantially reduce the volume of litigation. I saw a lovely logo on a pen once: it said *Don't sign the contract, phone your solicitor*. That would be my message'.

And that's a message you can expect to hear time and again. The fight has just begun. G

WHAT PRICE A 'clean break'

Could the Supreme Court's recent decision in *T v T* lead to a two-tier divorce system in this country, where those with the money can achieve a 'clean break'? Geoffrey Shannon examines the controversial judgment and assesses its impact on family law

MAIN POINTS

- Analysis of the Supreme Court decision
- Relevant case law discussed
- Implications of *T v T*

The model of divorce introduced in Ireland is the 'no clean break' option. A 'clean break' option is precluded in both the *Family Law (Divorce) Act, 1996* and article 41.3.2° of the constitution. David Byrne, former attorney general, explained the political context for the absence of a 'clean break' in the following manner:

'The Irish people ascribe a very high value to the institution of marriage. It emerged very clearly during the pre-referendum debate that the electorate had a strong concern for the position of the financially-weaker party to the marriage. I think it is fair to say that generally the Irish people, although in favour of the introduction of divorce, did not regard divorce as being an easy solution to the problem of marital breakdown. They did not see it as being a neat, clean or pain-free process and recognise that it will have enduring consequences …

'The Irish electorate ultimately chose – by a tiny majority – to opt for the introduction of divorce in this jurisdiction. The realistic response to the demand for the introduction of divorce was, I believe, tempered by a very real concern on the part of the electorate for the position of women and children in divorce.

'It is this compassionate consideration for the vulnerable parties to divorce that, in my view, led the Oireachtas to conclude that once-off final settlements in the area of divorce would not be acceptable to the Irish people and therefore should not, for now, be an option'. (Foreword in G Shannon, *The* Divorce Act *in practice*, Dublin: Round Hall, 1999, pp viii-ix).

The issue of whether or not a 'clean break' or a full and final settlement is facilitated by the *Family Law (Divorce) Act, 1996* in 'big money' cases needs to be re-assessed in the light of the judgments of the Supreme Court in *T v T* (unreported, Supreme Court, 14 October 2002). In that case, the Supreme Court upheld a decision of Lavan J in which the judge awarded the respondent a lump sum of £5 million (€6.35 million), in three instalments, together with maintenance of £800 a month for the youngest dependent child of the marriage. The fear now is that *T v T* will effectively lead to the creation of a two-tier system of divorce in Ireland between those who are able to achieve a 'clean break' and those who will have to resign themselves to the possibility of repeated applications to court for ancillary relief, so that finality can never be achieved.

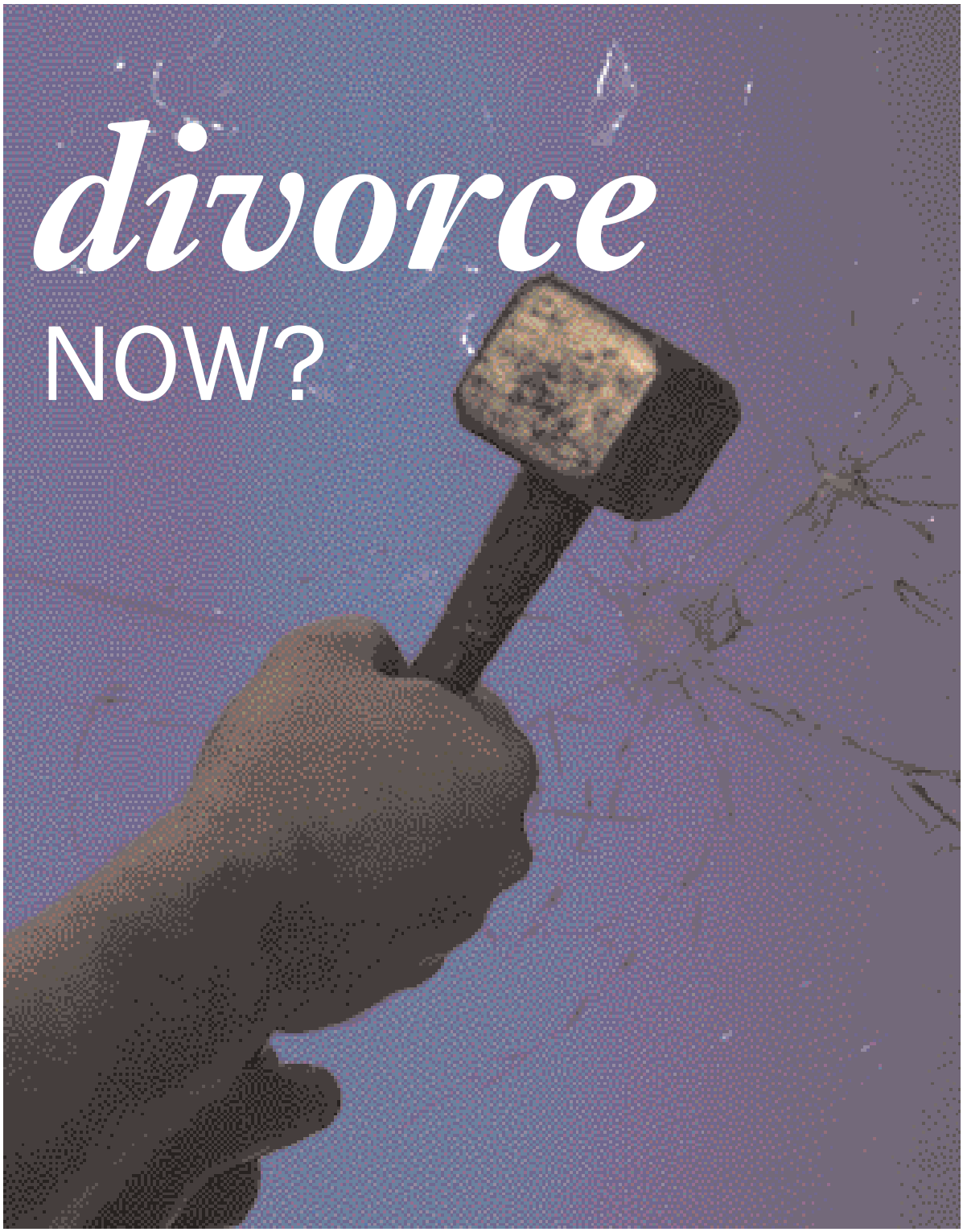
T v T: the facts of the case

The parties had been married for 22 years. There were three children from the marriage. The parties had 'separated' at the time of the divorce. The applicant husband was involved in another relationship and there was one child from that relationship. He argued that cognisance should be taken of the fact that 80% of his assets had been acquired after the date of separation and that he now had additional responsibilities and dependants to consider.

In making his award in the High Court, Lavan J reviewed the factors set out in section 20 of the *Divorce Act* and stated:

'I have no difficulty with section 20(2) [(a) through to (h)]. This is a family where the husband has assets in excess of £20,000,000 and his wife has assets of some £1.15 million. In the later years of their married life, they enjoyed an exceptional standard of living. Section 20(2)(i) causes me some difficulty ... Section 20(2)(j), (k) and (l), I have also taken account of'.

Later in his judgment, Lavan J said that he did not



see the making of a lump-sum payment as introducing the 'clean break' concept into Irish law. In his view, it was making provision for the financial security of the respondent. He reviewed the decision in *White v White* (**see panel**, page 22) and said that while distinguishing the case as a 'clean break' case, he nonetheless found the principles enunciated therein helpful in the interpretation of section 20(1) and (2) of the 1996 act.

He also endorsed the view of Mance LJ in *Cowan v Cowan* ([2001] 2 FCR 331) to the effect that the assessment of assets must be at the date of the trial or appeal. In deciding to award the respondent a 55% share of the pension funds, Lavan J stated that, while he would have been disposed to award the applicant 51%, in deference to his findings regarding the conduct of the applicant he was allowing 55%. The applicant husband was obliged to pay the respondent's costs. On appeal to the Supreme Court, the court upheld the decision of

WHITE v WHITE

In *White v White*, the House of Lords emphasised the need for equality and fairness in the division of assets. The parties in that case, who were both farmers, had been married for over 30 years and had three children. The wife claimed that, as well as contracting a marriage, she had contracted an equal farming partnership. They had both brought money to the undertaking. One farm was in joint names, although the husband's father had played a significant part in providing the initial capital. Another farm was inherited later by the husband, as his share of the father's estate. The assets were worth £4-5 million.

While the High Court accepted that the farm was run in partnership over the entire period of the marriage, the court rejected the wife's claim for an equal division of the farm, which would have enabled her to run an independent farm. Instead, the court focused on the wife's 'reasonable requirements'. Adopting this approach, the court awarded the wife approximately one-fifth of the total wealth. The wife appealed to the Court of Appeal.

The Court of Appeal accepted that the dominant feature of the case was that from first to last the parties traded as equal partners. However, the court did not consider it appropriate to divide the assets equally, as the husband's father had made a significant contribution to the acquisition of the farm. (This is consistent with the approach adopted by the Supreme Court in *T v T*.) Instead, having regard to the parties' contributions and the goal of overall fairness, it increased the wife's share to reflect approximately two-fifths of the estate.

Both parties appealed unsuccessfully to the House of Lords. The House of Lords held that in the division of assets on divorce, the court should approach the case from the point of view of fairness between the parties.

Lavan J, save that the pension award was reduced to 51% of the available funds.

Proper provision

The Supreme Court in *T v T* held that the totality of issues outlined in the legislation must be taken into account and applied in every case in order to determine what is 'proper provision' in any individual case. The *Family Law (Divorce) Act, 1996* provides that 'proper provision' be made for both spouses, and lists in section 20 of the *Divorce Act* various criteria to be considered by the court, but it does not define what 'proper provision' is.

By virtue of section 5(1)(c) of the *Divorce Act*, the court must be satisfied that such provision as the court considers proper, having regard to the circumstances, exists or will be made for the spouses and any dependent members of the family. Section 2(1) of the *Divorce Act* defines a 'dependent member' as any child under the age of 18 years (or 23, if in full-time education). It is significant that, whereas section 5(1)(c) alludes to 'dependent members of the family', article 41.3.2º of the constitution refers to 'any children of either or both' of the spouses.

In the case of *RC v CC* ([1997] 1 ILRM 401), Barron J confirms that there is little doubt that the latter interpretation will prevail:

'Since the jurisdiction invoked is that contained in the constitution and not that amplified by the act, it is necessary for the court to consider the position of the children. While I do not purport to determine that non-dependent children should necessarily have provision made for them, I am satisfied that in the particular circumstances of the present case it is proper that certainly the two daughters of the marriage should have provision made for them in the interests of the family as a whole'.

The reference to 'any children' in article 41.3.2º of the constitution is clearly capable of a much wider interpretation than that of 'any dependent members of the family' as set out in the *Divorce Act*, where the term is defined as any person under the age of 18 years, or, if over 18 but below 23, is in full-time education. There are no such limitations on the interpretation of 'child' in the provision contained in the constitution. It is therefore possible for a divorcing parent to be ordered to continue maintenance payments in respect of an adult child where he or she no longer wishes to do so, in order that the court might be satisfied that proper provision exists or will be made for the 'children' of the marriage.

The Supreme Court in *T v T* held that the reordering of the assets of a marriage is to be decided on the individual facts and circumstances of each case. Denham J held that a figure of one-third of the net assets might be 'a useful benchmark to fairness' in big money cases, but cautioned as follows: 'The concept of one-third as a check on fairness may well be useful in some cases; however, it may have no application in many cases. It may not be applicable to a family with inadequate assets'.

The court said that it was interested in proper provision, not division. It was not, therefore, a question of reordering the assets on a percentage or equal basis. While the chief justice stated that the court in divorce proceedings in this jurisdiction is primarily concerned with reordering assets by making proper provision for the spouses and their dependent children, he also held that 'it by no means follows that what is referred to as "the yardstick of equality of division" is, in every case and for all purposes, irrelevant'.

Equality and fairness

The Supreme Court in *T v T* derived some guidance from the principles enunciated in *White v White* and *Cowan v Cowan*.

The *White v White* decision was applied by the Court of Appeal in *Cowan v Cowan*. In the course of his judgment, Thorpe LJ observed that the decision in *White v White* clearly did not introduce a rule of equality. Rather, the yardstick of equality was a cross-check against discrimination, and fairness was the rule. Later in his judgment, Thorpe LJ summarised the consequences of the *White* decision as follows (at p352):

'Approved is the frequent theme of decisions in this court that the trial judge must apply such criteria as are to be found in s25. Approved also is the almost inevitable judicial conclusion that the unexpressed objective of the exercise is to arrive at a fair solution. Disapproved is any discriminatory appraisal of the traditional role of the woman as homemaker and of the man as breadwinner and arbiter of the destination of the family assets amongst the next

generation. A calculation of what would be the result of equal division is a necessary cross-check against such discrimination. Disapproved is any evaluation of outcome solely or even largely by reference to reasonable requirements'.

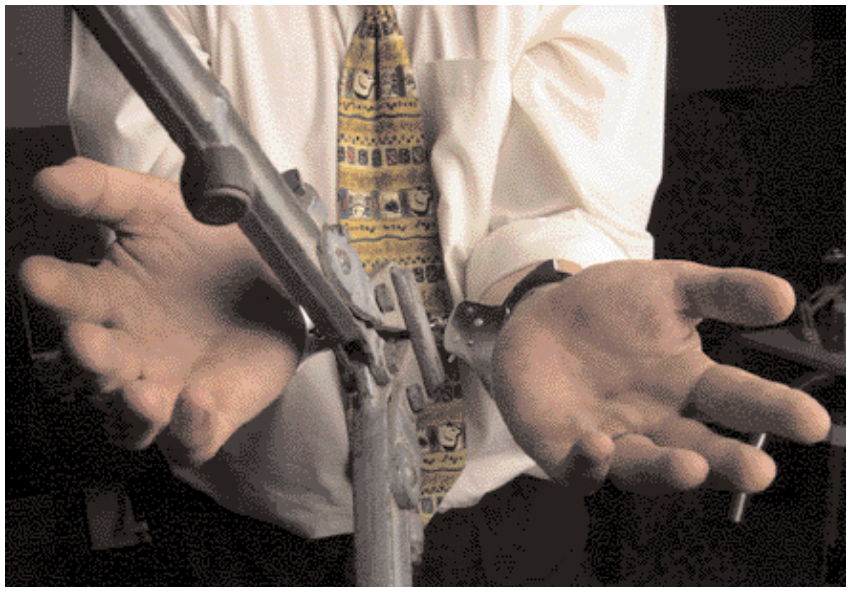
Regarding the demise of the reasonable requirements yardstick, Thorpe LJ observed that that yardstick introduced 'an element of predictability and accordingly curtailed the width of the judicial discretion conferred by Parliament'. In his view, the prohibition on the future use of the tool extended judicial discretion and created a heightened need for legislation to provide some guidance regarding the application of the criteria set out in section 25.

Both *White* and *Cowan* were big money cases, involving assets totalling millions of pounds. The application of the *White* principles to other cases involving applications for ancillary relief was considered in the neighbouring jurisdiction in *Cordle v Cordle* (Court of Appeal, 15 November 2001). In the course of his judgment in that case, Thorpe LJ stated:

'What *White v White* essentially decides … is that it is the first duty of the court of trial to apply the section 25 criteria in search of the overarching objective of fairness. It seems to me that in search of that overarching object in the typical ancillary relief case, the district judge will always look first to the housing needs of the parties … in many cases the satisfaction of that need may absorb all that is immediately available. But … where there is sufficient to go beyond that, the court's concern will be to provide the means for the absent parent to re-house … Another factor that should be considered is buttressing the ability of one or other of the parties to work … Beyond that, if there be cash beyond that, then the judge has to look to what in his estimation is a fair result'.

Variation of orders

The decision in *T v T* does not impact on the ability to vary or discharge orders following a divorce decree. Any order made on divorce may be varied pursuant to the provisions of section 22 of the *Divorce Act*, with the exception of a lump-sum payment which is not being paid in instalments. The class of person who may make an application under section 22 includes, in the case of the re-marriage of either of the spouses, the new spouse. Before varying any order under section 22, the court must have regard to any change of circumstances which may have occurred, or any new evidence which there may be. In addition to varying or discharging any order previously made, the court may suspend the operation of an existing order for a period of time.



'It is possible for a divorcing parent to be ordered to continue maintenance payments in respect of an adult child where he or she no longer wishes to do so'

LUMP-SUM ORDERS

Section 13(1)(c) of the *Divorce Act* empowers the court to order either spouse to make a lump-sum payment to the other spouse under the terms as specified in the order for the benefit of the recipient spouse, or a dependent member of the family, allowing the court flexibility to deal with a variety of situations. It takes into account the practical difficulties of raising a large sum immediately and allows the court to order the lump-sum payment to be made at various times and in varying amounts. In addition, the court can also require such instalment payments to be secured. Where a lump sum is paid by way of instalments, tax benefits arise for the paying spouse, because stage payments are tax deductible. The type of lump-sum order made by the court is dependent on the particular circumstances of the case.

Exercising judicial discretion

The Supreme Court in *K v K* ([2001] 3 IR 371) remitted the case back to the High Court, as the trial judge had not given reasons for the manner in which he exercised his discretion under section 20 of the *Divorce Act*. McGuinness J stated:

'The provisions of the act of 1996 leave a considerable area of discretion to the court in making proper financial provision for spouses in divorce cases. This discretion, however, is not to be exercised at large. The statute lays down mandatory guidelines. The court must have regard to all the factors set out in s20 in measuring their relevance and weight according to the facts of the individual case. In giving the decision of the court, a judge should give reasons for the way in which his or her discretion has been exercised in light of the statutory guidelines'.

Regarding the proper approach to the exercise of a court's discretion under section 20, Denham J in *T v T* opined:

'In this case, the learned trial judge, in relation to a number of the factors, stated that he had regard to the provisions, or that he had taken them into account. Better practice would be to consider all the circumstances and each particular factor *ad seriatim* and give reasons for their relative weight in the case'.

The Supreme Court in *T v T*, by a majority of 4 to 1, held that the absence of a 'clean break' principle in Irish divorce law did not prevent the payment of a lump-sum order as part of the proper

CONDUCT OF THE SPOUSES

In granting ancillary relief, the court is required to take into account 'the conduct of each of the spouses, if that conduct is such that in the opinion of the court it would in all the circumstances' be repugnant to justice to disregard it (section 20(2)(i) of the *Divorce Act*). Considerations of conduct are rarely relevant in practice. The courts now place emphasis on financial circumstances with a view to removing the focus on fault. Courts tend to realise that neither party will be entirely without blame, and will usually only refer to behaviour or conduct if it has caused an imbalance in the relationship between the parties. Clearly, conduct will not be ignored where it would be 'unjust' to do so, as referred to in section 20(2)(i) of the *Divorce Act*.

The approach required by section 20 is that, *prima facie,* the conduct of the parties is not relevant. Conduct, which it would be repugnant to justice to ignore, is relevant. However, it is only one of the circumstances to be taken into account along with other relevant considerations set out in section 20 of the *Divorce Act*. The onus is on the spouse who wishes to raise conduct as an issue to establish that it would be repugnant to justice to ignore it.

Even if a spouse proves conduct which should be taken into account, it may not determine the issue of entitlement to ancillary relief since the other statutory criteria detailed in section 20 of the *Divorce Act* must be considered. Section 23 of the *Divorce Act* should be noted in this context, in that it provides that where an ancillary relief order is being awarded or varied on behalf of a dependent family member, the issue of the claimant's conduct will not be relevant.

In *T v T,* Denham J stated that the 1996 act did not seek to establish a fault-based divorce system, and the High Court should not have reduced the applicant's share of his pension in light of what it considered to be the husband's behaviour in the course of the marriage. She considered section 20(2)(i) and stated:
'The facts as to the applicant's affairs and ultimate relationship and child outside marriage do not equate with a concept of "conduct" set out in s20(2)(i), which has an element of penalty … The act of 1996 does not seek to establish a fault system. Thus, the concept of "conduct" established by s20(2)(i) is of conduct which it would be unjust to disregard'.

provision for a spouse, even where no order for periodic payments by way of maintenance has been made. Denham J stated the position in the following terms:
'There is nothing in the constitution or legislation which prohibits a lump sum as part of a financial ancillary order … The fact that … a lump sum order may exclude or greatly limit any further order by a court does not make the provision improper or the order unfair. The underlying principle of the act of 1996 is fairness. As s20(5) provides: *The court shall not make an order under a provision referred to in sub-section (1) unless it would be in the interests of justice to do so*'.

Keane CJ held that he did not believe that the Oireachtas intended that the courts should exclude the possibility of achieving certainty and finality when financially reordering the assets upon divorce, or of avoiding further litigation between ex-spouses. He expressed approval for the approach adopted by Denham J in *F v F* ([1995] 2 IR 354), wherein she stated that the principles of certainty apply to family law as to other areas of the law. The chief justice disagreed with the view of McGuinness J in *JD v DD* ([1997] 3 IR 64) that 'the statutory policy is totally opposed to the concept of the "clean break"'.

The case of *JD v DD* must now be re-assessed in the light of the judgment in *T v T*. The case involved the ending of a 30-year long marriage, where there were considerable financial resources available for distribution. McGuinness J held that no 'clean break' provision could be made when financially reordering a broken marriage.

She noted that the Oireachtas had legislated to permit repeated applications to court concerning ancillary relief so that finality could not be achieved, and continued:
'It appears to me that by the subsequent enactment of the *Family Law Act, 1995* and the *Family Law (Divorce) Act, 1996*, the Oireachtas has made it clear that a "clean break" situation is not to be sought and that, if anything, financial finality is virtually to be prevented … The court, in making virtually any order in regard to finance and property on the breakdown of a marriage, is faced with the situation where finality is not and never can be achieved. This also appears to mean that no agreement on property between the parties can be completely final, since such finality would be contrary to the policy and provisions of the legislation. The statutory policy is, therefore, totally opposed to the concept of the "clean break"' (*ibid* at 89).

Considering the approach of the High Court in making a lump-sum payment without any provision for a periodic payments order, Keane CJ stated:
'The approach of the trial judge appears to have been to have effected a 'clean break' between the parties in financial terms insofar as that is permissible having regard to the constitutional and legal provisions; and, given the desirability of avoiding future litigation between spouses whose marriages have irretrievably broken down, I have no doubt that this was the correct approach for him to have adopted'.

In this regard, it is also worth noting the decision of McKechnie J in *W v W* (*ex tempore*, 17 December 2001), where, out of total assets valued at between £16.5 million and £17.5 million, he awarded the applicant wife a lump sum of £4.7 million and allowed her to retain a sum of £220,000 which she had already received. The assets consisted largely of the proceeds of the sale of land which had been transferred to the respondent by his parents. The applicant wife had to a limited degree been involved in running the family farm and had been primarily responsible for the rearing of the children. In reaching his decision, McKechnie J noted that if provision was made for the wife by way of lump sum, it was highly unlikely that she would make any further applications in regard to proper provision.

Marital responsibilities

Denham J in *T v T* held that the court in making ancillary orders must take account of, and compensate accordingly, a spouse's past and future earnings lost due to her assumption of marital and domestic responsibilities. She stated: 'Where one spouse alone is working and, in the result, a

significantly greater responsibility for looking after the home has devolved to the other, it is clear that under s20(f), the court must have regard to that as a relevant factor'.

In *K v K* ([2001] 3 IR 371), McGuinness J held that the concept of a single capital payment to the wife to meet her 'reasonable requirements' for the remainder of her life had never in fact formed part of Irish law. There were two reasons for this. First, such a capital payment was inevitably a part of a 'clean-break' settlement, which was 'neither permissible nor possible' under the *Family Law (Divorce) Act, 1996*. Second, the approach of the Irish courts in accordance with article 41.2 of the constitution and the statutory guidelines has been to give full credit to the wife's contribution through her work in the home and as a mother to her children. The first reason is weakened by the approach adopted in *T v T*.

Full and final settlement

The case of *T v T* adds significant weight to 'full and final settlement' clauses in consent ancillary relief orders, in that it appears that the Supreme Court values 'certainty and finality' over flexibility and the power of the court to vary under section 22 (see also *PO'D v AO'D* [1998] 1 ILRM 543). The value of a 'full and final settlement' clause in consent separation/divorce ancillary relief proceedings will no doubt be the subject of future litigation. In the meantime, practitioners may include such clauses and simply hope for the best.

In respect of maintenance, however, it is very clearly difficult to achieve a 'clean break'. The case of *T v T* may prompt practitioners into capitalising the periodic maintenance into a lump sum and taking a risk on the willingness of the court to bind the parties to the settlement unless there is a fairly significant change in circumstances. In summary, financial negotiation may now take place so as to provide a lump sum in 'big money' cases, which will 'buy out' maintenance, thereby facilitating a 'clean break'. While this may work in many cases, it is important to warn the client both verbally and in writing that the court may alter the settlement on an application by the other spouse.

'T v T signposts a significant departure from previous judicial interpretation of the existing statutory provisions'

Where there is a lack of full and complete disclosure in the negotiation of a consent order of a capital nature, there is a considerable danger that the court could set the consent order aside for material non-disclosure. This occurred in the English case of *Livesey (Formerly Jenkins) v Jenkins* ([1985] FLR 813). It is therefore wise to ensure the exchange of full affidavits of means in advance of executing a consent order or separation agreement. Clients should be advised of the need to make full and complete disclosure and the consequences of failing to do so (see *CF v JDF*, unreported, High Court, O'Sullivan J, 16 May 2002).

Assets post-separation

Denham J stated that assets are to be assessed as at the date of the divorce. That said, the terms of a separation agreement and the fact that the assets were acquired post-separation are factors to be taken into account when reordering the assets on divorce.

The court may depart from the benchmark of fairness to ensure the survival of an income-generating asset. Denham J stated the position in the following terms: 'It [the check on fairness] may not be relevant to a family of adequate means if, for example, it could only be achieved by a sale of assets which would destroy a business, or the future income of a party or parties'.

The recent decision of the Supreme Court in *T v T* signposts a significant departure from previous judicial interpretation of the existing statutory provisions, a departure that no doubt will facilitate a 'clean break' in certain 'ample resources' cases insofar as that is permitted by the constitution and the *Divorce Act*. In particular, the lump-sum provisions of the *Family Law (Divorce) Act, 1996* are likely to be used with greater frequency to achieve a 'clean break' where the parties seeking a divorce have 'ample resources'. G

Geoffrey Shannon is the Law Society's deputy director of education. The Law Society will be running a seminar on the implications of T v T *in February.*

DATA PROTECTION: *the implications*

The data protection commissioner has announced that solicitors' firms are obliged to register themselves under the *Data Protection Act, 1988*. The 2002 *Data Protection Bill*, which will be enacted shortly, is likely to leave little room for doubt. As a consequence, the Law Society has sought the advice of a practitioner with expertise in this area. Here, Paul Lavery explains the society's official position on the data protection regime as it affects the profession

MAIN POINTS

- **Obligations under the 1988 act**
- ***Data protection regulations 2001***
- **New regime under the *Data Protection (Amendment) Bill, 2002***

Those who collect and process data relating to living individuals are subject to data protection obligations. In Ireland, these obligations are set out in the *Data Protection Act, 1988*, as amended by the *European Communities (Data Protection) Regulations 2001*. The 2001 regulations implement part of the *European data protection directive*. The directive is due to be implemented in full by the *Data Protection (Amendment) Bill, 2002*, which was published on 21 February 2002. Although the bill has yet to be enacted, and may be subject to change as it progresses through the Seanad and Dáil, it is possible to identify the likely shape of the new regime.

Existing legislation

The 1988 act relates to the processing of personal data (that is, data relating to living individuals) held on computer. It imposes obligations on 'data controllers' and on 'data processors.' Data controllers control the content and use of personal data, while data processors process data on behalf of data controllers. Legal practices will usually be regarded as data controllers, as they control the content and use of personal data on computers.

Registration obligation

The 1988 act operates a selective registration policy whereby only certain categories of data controllers are required to register. Of relevance to legal practices is the obligation to register as a data controller where sensitive personal data is being processed. Sensitive personal data is defined as personal data relating to:

- Racial origin
- Political opinions or religious or other beliefs
- Physical or mental health (other than any such data reasonably kept in relation to the physical or mental health of employees in the ordinary course of personnel administration)
- Sexual life, or
- Criminal convictions.

In light of the foregoing, it is likely that most legal practices are processing sensitive personal data on computer and are therefore required to register. In the 1988 act, there was an exemption from data protection obligations in circumstances where computer facilities were used solely for preparing the text of documents. However, with the on-going evolution of technology, the data protection commissioner no longer regards it as tenable to argue that the only use being made of computer systems in a legal practice is for word-processing.

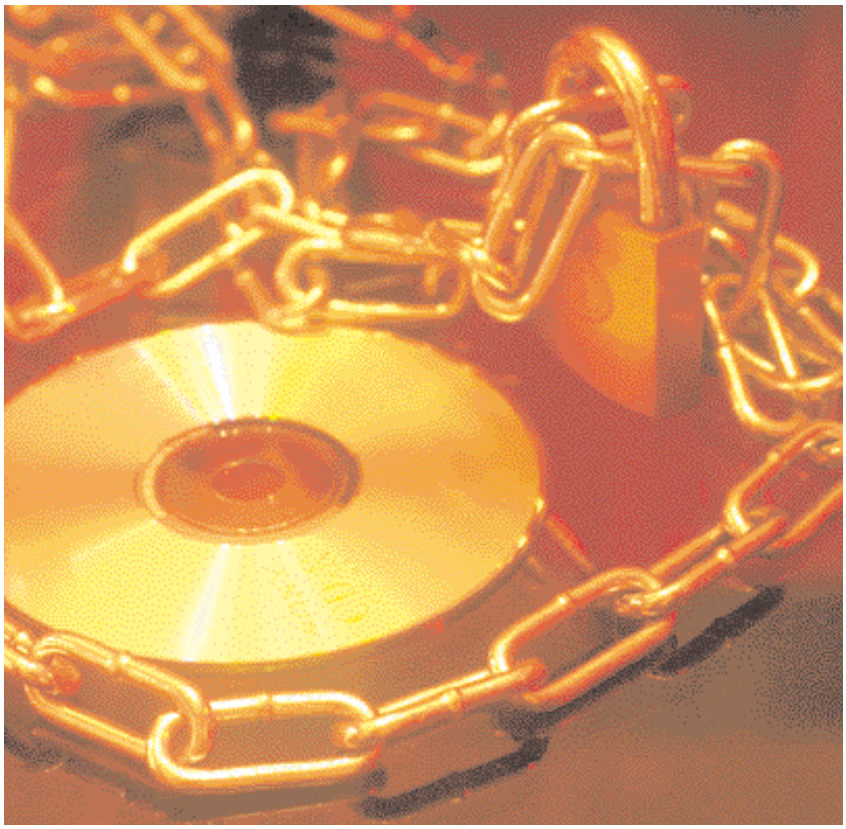
Registering as a data controller is a relatively straightforward and uncontroversial matter. The application form is four pages long and requires, among other things, a general description of the type of personal data held on the computer systems, the categories of persons to whom data might be disclosed, indications of the categories of sensitive data held, along with the safeguards in operation for the protection of the privacy of data subjects. Registration lasts for a year and the cost of registration depends on the number of those employed in the legal practice. For legal practices employing one to five people, the registration fee is €25.37. For those employing six to 25 people, the registration fee is €63.49. The registration fee for firms employing in excess of 25 is €317.43.

Principal obligations of the 1988 act

The principal obligations imposed on data controllers include the requirements:

- That personal data is obtained and processed fairly (meaning that the people to whom the information relates are aware of the uses and disclosures being made of the information)
- That appropriate security measures are taken

for solicitors



against unauthorised access to, or alteration, disclosure or destruction of, personal data
- That personal data be kept accurate and up to date, and
- That personal data should not be kept for longer than necessary.

Subject access rights

Under the 1988 act, data subjects are, with few exceptions, entitled to obtain a copy of their personal data, and to have personal data amended or deleted where it is incorrect. The access right will generally apply to employees and clients of the legal practice. For other data subjects, for example, the parties with whom a client is involved in contentious proceedings, it is worthy of note that section 5(1)(g) of the 1988 act provides that a right of access does not apply to personal data which would be the subject of legal professional privilege.

The new regime: 2001 regulations

The key provisions of the 2001 regulations, which came into force in April 2002, are:

- **Transfer of data outside the European Economic Area (EU, Iceland, Norway and Liechtenstein).** Personal data may not be transferred outside the EEA to any third country unless that third country ensures an adequate level of data protection. This prohibition on transfer will not apply if, among other things, the data subject has consented to the transfer, or the transfer is necessary for the performance of a contract to which the subject is a party, or the transfer is necessary for the purpose of obtaining legal advice or for the purpose of or in connection with legal proceedings. It is highly likely that a legal practice will be able to rely on at least one of the foregoing exemptions.

  In view of concerns about the impact of this rule, the EU and the United States agreed 'safe harbour' principles. Once a US entity signs up to these principles, a company based in the EU may transfer data to that US entity. The 'safe harbour' principles impose similar obligations on US companies to those set out in the directive. Additionally, the EU Commission has approved standard contractual clauses which, when included in contracts between a data exporter and data importer, will mean that adequate protection for the data is deemed to have been provided
- **Processing of personal data by a data processor.** Where processing is carried out by a data processor on behalf of a data controller, there must be a written contract between the parties which contains provisions obliging the data processor (i) to carry out the processing in accordance with the instructions of the data controller, and (ii) to comply with the same security obligations as those which are imposed on the data controller. Legal practices may, for example, outsource word-processing of payroll functions to a third party
- **Security obligations.** The 1988 act already imposes obligations to ensure that personal data is kept safe and secure. The 2001 regulations elaborate further on what this means by specifying that, in determining whether appropriate security measures are in place (in particular, where the processing involves the transmission of data over a network), a data controller must ensure that the measures provide a level of security appropriate to the harm that might result from unauthorised or unlawful processing, or accidental or unlawful destruction or loss of the data. At the same time, the regulations include a note of reasonableness by

REGISTRATION GUIDE AVAILABLE

The data protection commissioner has published a helpful registration guide to assist legal practices which are obliged to register under the 1988 Act. The guide can be found at *www.dataprivacy.ie*.

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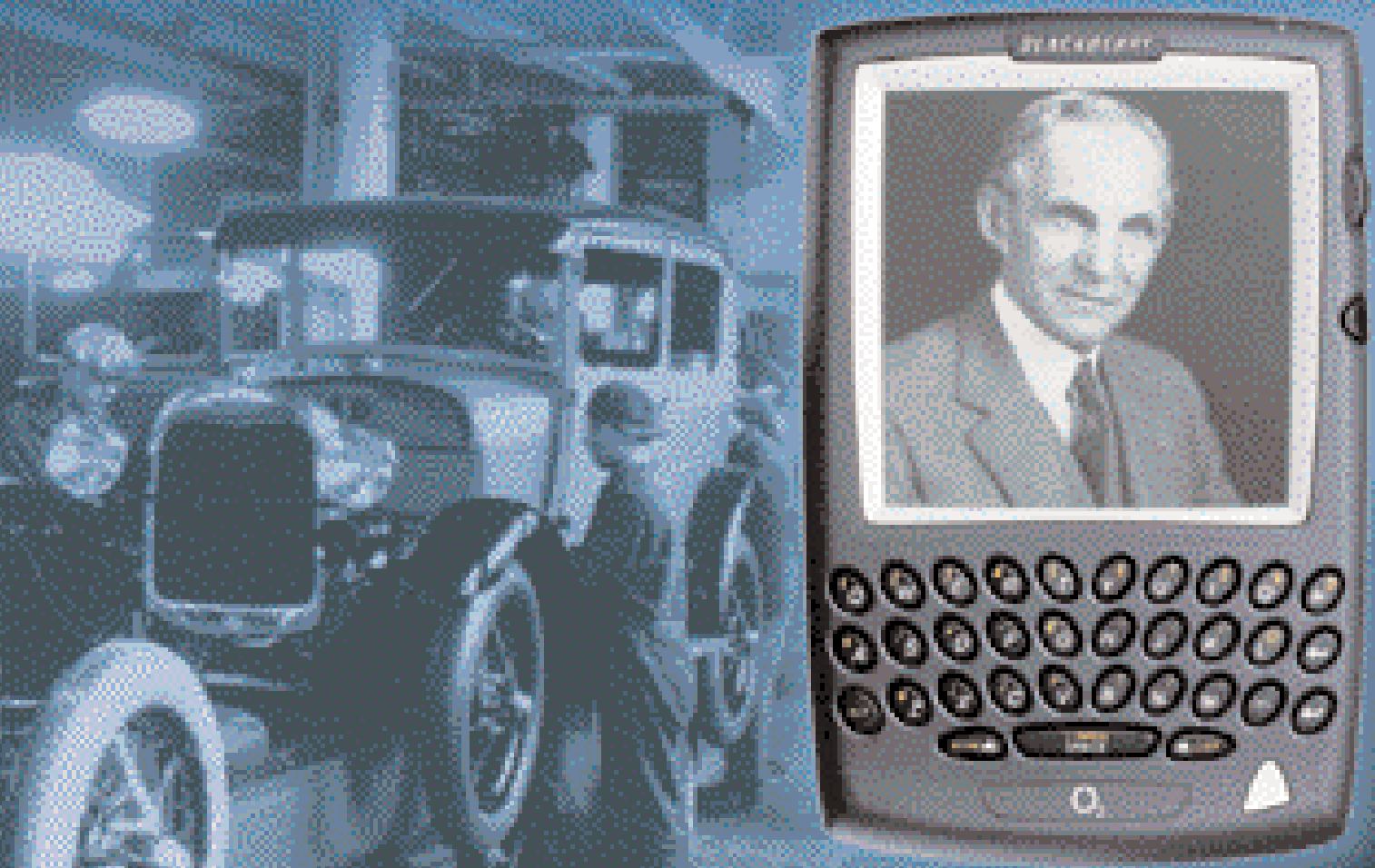


specifying that the data controller may have regard to the state of technological development and the cost of implementing the measures.

Data Protection (Amendment) Bill, 2002

The provisions of the 2001 regulations have also been set out in the bill. When the bill is enacted, the 2001 regulations will be repealed. In addition, the following are the main changes to be expected when the bill is enacted:

- **Registration obligations.** The bill extends registration obligations to the vast majority of data controllers. Under the 1988 act, only certain categories of data controllers are obliged to register (for example, banks, insurance companies, telecommunications companies, public authorities and so on). Henceforth, only a minority of data controllers (such as certain charitable bodies) will escape the registration obligations
- **Criteria for legitimising the processing of personal and sensitive data.** Section 3 of the bill amends section 2 of the 1988 act and imposes additional requirements on data controllers. Essentially, the data subject must give his 'explicit' consent to the processing of personal data. However, processing necessary for the performance of a contract to which the data subject is party will be an alternative to obtaining consent, as will processing which is necessary *'for the purposes of the legitimate interests'* of the data controller. The bill specifies that the minister may specify by regulation particular circumstances in which the 'legitimate interests' test is complied with. This will be of interest to all data controllers, as the wider the scope of 'legitimate interests', the less data controllers will need to seek consent. With regard to 'sensitive' personal data, the main means of legitimising processing will be to obtain explicit consent or to show that the processing was necessary for the purpose of obtaining legal advice or in connection with legal proceedings.

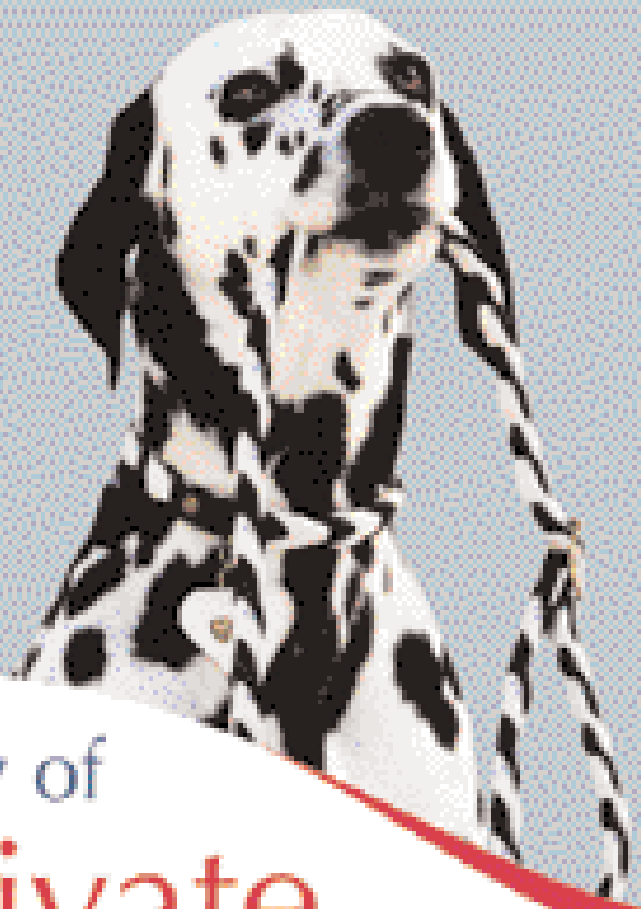
  It is worth noting that the bill's use of 'explicit' consent as one of the means of legitimising the processing of personal data (as opposed to sensitive personal data) is more onerous than the directive. The directive instead specifies 'unambiguous' consent. Greater detail regarding disclosures of the information and the uses to which it may be put must be provided to the data subject prior to obtaining an explicit, as opposed to unambiguous, consent. Further, it would appear that explicit consent must be re-confirmed regularly. It is to be hoped that later versions of the bill will revert to the lesser obligation set out in the directive
- **Requirements to notify data subjects.** Section 4 of the bill inserts a new section 2D into the 1988 act. This new provision imposes obligations on data controllers to notify data subjects proactively that the data controller holds information about them, to inform them of the uses and disclosures being made of that data and to ensure that they are aware of their right to access their data and modify it if it is incorrect

'It is likely that most legal practices are processing sensitive personal data on computer and are therefore required to register'

- **Extension to manual filing systems.** The bill extends data protection obligations to manual files, as long as those files are organised in a way that means specific information about individuals is 'readily accessible'. That the information must be readily accessible appears to exclude miscellaneous collections of data organised in chronological order, even if the individual to whom the data relates is named on the front of the file. Manual data already held in filing systems on the date of enactment of the bill will only have to comply with the main data protection obligations from 24 October 2007
- **Disclosure of references.** Section 5 of the bill inserts a new section 4A into the 1988 act. The effect of this section will be that where personal data relating to a data subject consists of an expression of opinion by a person about the data subject, the data can still be disclosed to the data subject without the consent of the person who expressed the opinion. This may be a matter of concern to those who are asked to write a reference for a job hunter
- **Individuals cannot be forced to make requests.** The bill will prohibit a person, in connection with possible or continuing employment of another person, from obliging that person to make an access request and supply him with the personal data obtained on foot of such request
- **Prohibition of automated decision-making.** Section 7 of the bill inserts a new section 6B into the 1988 act, which will provide a general ban on decision-making based solely on processing by automatic means. A decision significantly affecting an individual may not be based solely on the processing of personal data by automatic means that is intended to evaluate certain personal matters such as performance at work, creditworthiness, reliability or conduct. The general prohibition does not, however, apply where the decision is made in the course of steps taken for the purpose of considering whether to enter into a contract with the data subject or in the course of performance of such a contract and the decision is to grant a request to the data subject or adequate steps have been taken to protect the data subject's legitimate interests or the data subject has provided his consent
- **Exemptions for journalism, literature and art.** The bill includes important exemptions for data processed solely for the purposes of journalism or artistic or literary purposes. In such circumstances, most data protection obligations will not apply where the data controller believes that the publication of such work would be in the public interest and that compliance with data protection obligations would be incompatible with journalistic, artistic or literary purposes. Codes of practice may be drawn up and/or approved by the data protection commissioner in relation to the parameters of the exemption. G

Paul Lavery is a partner in the Dublin law firm McCann FitzGerald.

The Perfect Companion



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MESSAGE FROM THE PRESIDENT

Dear Colleague,

I have pleasure in inviting you to join me at the Society's Annual Conference in Istanbul on 23rd to 27th April, 2003.

Istanbul, Turkey is a vision of oriental splendour located on the crossroads of Asia and Europe. I look forward to meeting you there, for what I hope will be a stimulating Conference in a truly magnificent location.

This year the theme of the Conference will be "The *European Convention on Human Rights:* Its implications for Lawyers". The distinguished speakers will guide delegates through the principles of the Convention, the proposals to implement it into Irish Law, its implications for solicitors and other lawyers in the EU and in Eastern European Countries aspiring to join the EU.

We are most grateful to our sponsors - Bank of Ireland, Bank of Ireland Asset Management, Jardine Lloyd Thompson Ireland Limited, Solicitors' Mutual Defence Fund and Osborne Recruitment for their continued support of the Law Society's Conference and I would ask you to give them your favourable consideration in return.

I thank all of you who have made advance bookings and I hope those who have not yet booked will now do so and look forward to a memorable conference which we hope will be enjoyed by all.

Geraldine Clarke
President

BUSINESS SESSION

The European Convention on Human Rights: Its Implications for Lawyers

SPEAKERS WILL INCLUDE:

RORY BRADY, SC

Rory Brady, SC was appointed Attorney General in June of this year. Prior to his appointment, he was Chairman of the Bar Council of Ireland.

A native of Dublin, Rory Brady was educated in Synge Street CBS, University College Dublin and the King's Inns. He was called to the Bar in 1979 and to the Inner Bar in 1996. His practice involved mainly civil and commercial law cases, and he appeared as counsel for the tribunal in the inquiry into the BTSB (Finlay Tribunal) and has acted as counsel for various clients in other statutory tribunals.

In 1997, he was elected to the Bar Council and chaired a number of its committees, before becoming Chairman of the Bar Council in October 2000. In December of that year, he was elected a Bencher of the Honourable Society of the King's Inns and is currently a member of the Standing Committee of the Council of the King's Inns, as well as a member of the Editorial Board of the *Bar Review*.

DR. MAURICE MANNING

Dr. Maurice Manning is the President of the Human Rights Commission. He was appointed by the Government in August 2002 to succeed the first holder of that office, Mr Justice Donal Barrington.

Dr. Manning is an academic by background. He lectured for many years in the Department of Politics at University College Dublin and has been visiting Professor at the University of Paris (Vincennes) and at the University of West Florida. He has published several books on modern Irish Politics, the most recent being *James Dillon: A Biography.* He has also written a political thriller, *Betrayal,* which dealt with sex and corruption in Irish politics and he is currently working on a second novel.

Dr. Manning spent twenty-one years as a member of the Dail and Seanad. He was a member of the New Ireland Forum and of the British-Irish Inter-Parliamentary Body. He was Leader of the Seanad from 1994-1997 and Leader of the Opposition from 1987-1994 and 1997-2002.

PATRICK R. HOWETT

Patrick R. Howett graduated from U.C.D. with a Bachelor of Commerce in 1975 and a Master of Business Studies Degree in 1976.

He joined PriceWaterhouseCoopers in 1976 and completed his traineeship and became an Associate of the Institute of Chartered Accountants in 1979. He then spent a number of years in the PriceWaterhouseCoopers Taxation Department.

He joined Jardine Lloyd Thompson Ireland Limited in 1983 as Accountant. Having served in different capacities he was appointed to his current position as Managing Director in 1995.

He is a past Chairman of the Dublin Chartered Accountants Students Society and was elected as a Council Member of the Insurance Brokers Association for three years when he chaired the Strategic Review Group and Technology Committees

KAZIM KOLCUOGLU

President of the Istanbul Bar Association or representative to be confirmed.

PACKAGE A – BASED ON CHARTER FLIGHT - COST: €1,050.00 PER PERSON SHARING

The cost includes return flights (Dublin/Istanbul/Dublin), taxes, transfers, four nights' bed and breakfast at the Conrad Istanbul, Welcome Reception, Conference Seminar and Gala Banquet. Surcharges could apply in respect of changes in air fares or increases in insurance premiums or VAT/tax rates in respect of the hotel.

Charter Flights
23rd April, 2003 departure from Dublin to Istanbul – morning flight – times to be confirmed
27th April, 2003 departure from Istanbul to Dublin – afternoon flight – times to be confirmed
(*Times are subject to Air Traffic Control restrictions. However, we are endeavouring to secure mid morning departure and early afternoon return flight times so that we may facilitate those wishing to travel from Cork, Shannon, etc. Exact times will be detailed in your booking confirmations. The charter flight will be allocated strictly in order of bookings received.*)

Those delegates not allocated to the Charter flight will be accommodated on scheduled flights which will incur a supplemental charge and transfer charges.

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Price will be based on the charter package but will **not** include airport transfers and may incur airline and hotel surcharges.

Delegates intending to travel on scheduled flights should return a completed reservation form as soon as possible with details of their preferred travel arrangements.

REGISTRATION FEE

Payable by delegates only and **not** accompanying persons €100.00

BOOKING ARRANGEMENTS

The closing date for receipt of bookings is 21st February 2003.
Please complete the reservation form and return with deposit of €400.00 per person travelling.

CONTACT DETAILS

If you would like any further information please contact any member of the Organising Team:

Sarah Ellins (Law Society)	Tel: (01) 672 4823	Email: s.ellins@lawsociety.ie
James McCourt (Chairman)	Tel: (01) 660 6377	
Gerry Griffin	Tel: (01) 490 1185	
Mary Keane	Tel: (01) 672 4800	

For information on **extending your stay** please contact the conference travel agent:
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CANCELLATIONS

Delegates are advised that cancellations made after 21st February 2003 will be subject to a 100% cancellation charge (full invoiced amount).

Travel insurance will be automatically invoiced at approximately €26.00 per person unless delegates indicate on the reservation form that they have their own insurance and provide the name of the company with whom they are insured.

No contract shall arise until a full deposit has been received and a Reservation Form (which will be sent with written confirmation of acceptance of the reservation) has been signed and returned.

All delegates will be accommodated in the Conrad Istanbul**. The hotel offers a choice of restaurants, bars and tea lounges, room service, TV, air-conditioning, healthclub, fully equipped gym, indoor and outdoor swimming pool, hair and beauty salon.**

SOCIAL PROGRAMME

- The conference will open on Wednesday evening with a welcome reception for all participants.
- On Thursday an optional all-day tour is available on a Bosphorus Cruise followed by a visit to the Spice Market with a stop-over for shopping and lunch (not included) at leisure.
- On Friday afternoon a half-day optional tour to the Blue Mosque is available.
- On Saturday morning a half-day optional tour to visit Topkapi Palace is available.
- The conference will close on Saturday evening with a reception and banquet/dancing in the magnificent Ciragan Palace.

PROGRAMME

WEDNESDAY, 23RD APRIL 2003

- Arrival at Istanbul Airport. Transfer to hotel for check-in and conference registration
- **Welcome Reception** for all participants
  - sponsored by **Osborne Recruitment**
  Venue: **Conrad Istanbul**

THURSDAY, 24TH APRIL 2003

- Day tour on a Bosphorus Cruise departing at 10.30am followed by a visit to the Spice Market with a stop-over for shopping and lunch (not included) at leisure.
- Evening at leisure

SATURDAY, 26TH APRIL 2003

- Half-day tour to Topkapi Palace (10.30am – 1.00pm)
- Afternoon at leisure
- **Reception** – sponsored by **Bank of Ireland Asset Management**
  Conference Banquet and dancing – sponsored by **Bank of Ireland**
  Venue:**Ciragan Palace** (Dress:smart informal)

SUNDAY, 27TH APRIL 2003

- Morning departure

FRIDAY, 25TH APRIL 2003

- **Conference Business Session — The *European Convention on Human Rights*: Its Implications for Lawyers — sponsored by Jardine Lloyd Thompson Ireland Limited and Solicitors' Mutual Defence Fund Limited**
  The distinguished speakers will guide delegates through the principles of the Convention, the proposals to implement it into Irish Law, its implications for solicitors and other lawyers in the EU and in Eastern European Countries aspiring to join the EU.
  Venue: **Junior Ballroom, Conrad Istanbul**
- Half-day tour to the Blue Mosque (2pm – 5.30pm)
- Evening at leisure

ACCOMMODATION

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Ireland's ambition to become an international centre for e-business is well known, but we may have to change many of our traditional court processes to achieve it. Denis Kelleher argues the case for establishing an 'e-court', specialising in IT and intellectual property

justice@e-court.ie?

MAIN POINTS

- Changing needs of Irish citizens and businesses
- Competitive advantage in the UK
- How e-courts would work

Companies that deal in intellectual property and digital works rely on the courts and the law to protect their products from illegal exploitation. This is particularly so with regard to intellectual property. England has developed something of an advantage in this regard, with two specialised courts (the Patents Court and the Technology and Construction Court) dedicated to the resolution of disputes in the intellectual property and technology areas. Both courts have specialised procedures, with judges who are internationally-recognised specialists in intellectual property and technology law.

English courts are already providing a world-leading system for dispute resolution in the area of intellectual property and the enforcement of IP rights. In the English court system, the 'money claim on-line' system allows certain types of claim to be lodged on-line and litigants can then monitor its progress through the courts (although once the claim is opposed, the litigation will revert to traditional means). These courts help the UK to attract leading e-business companies to base their headquarters in England. Other jurisdictions, such as Holland and Scotland, are also making significant progress.

At the same time, Irish courts are developing to take account of the changing needs of Irish citizens and businesses. In March 2001, the Courts Service announced an investment plan of up to €63 million to create 'e-courts', which would allow many of the court processes to be automated (for example, e-filing and e-payments). It is hoped to introduce a system of electronic documents, evidence and pleadings in the Supreme Court next year.

Benefits of an e-court

Earlier this year, the 27th interim report of the Committee on Court Practice and Procedure commented that the specialist nature of an electronic Commercial Court would benefit the development of Dublin as an e-city and Ireland as an e-commerce centre. It suggested that Ireland's position as an e-commerce hub would be underpinned and reinforced by such a development and it would be a significant service. The committee noted that Ireland already has many advantages that assist international commercial transactions, such as a settled common-law jurisprudence, the use of English, and established skills in major commercial litigation. The committee suggested that the benefit of such a commercial court would include:

- New businesses would be attracted to Ireland by the advantages of a jurisdiction with a functioning Commercial Court which offers a court system that accommodates modern business and commercial needs
- Existing businesses would also benefit from the court
- Business would be able to realise savings from using the modern communication techniques of e-commerce when before the court
- Maintaining the state's desire to be a global leader and player in e-commerce through the provision of e-court services.

This proposal was welcomed by the president of the High Court and the Courts Service itself. Last month, the minister for justice announced that such a court would be set up in the new year. Recommendations for the creation of specialised courts have been made by a number of different bodies, such as the Company Law Review Group and the Competition and Mergers Review Group.

Developing the IT/IP expertise of our courts could have significant economic benefits, because legal expertise is just one of the resources that will be required if Ireland is to develop as a centre for e-business. This country is in the process of developing a cluster of globally-significant software and e-business firms, and these firms need access to legal expertise if they are to grow. This legal expertise has to be available locally.

Troubling implications

A failure to develop this expertise could have troubling implications for Ireland, particularly if the

REPORT ON LEGISLATIVE CHANGE

A review of how Ireland's laws would have to change was undertaken by Denis Kelleher BL for Forfás, the state research body, and published as *Legislating for competitive advantage in e-business and information & communications technologies* in November 2002. The report is available at *www.forfas.ie*.

EU creates its own specialised Community Intellectual Property Court, as was suggested in the proposed *Regulation on the Community patent*. Initially, it has been proposed that this court would deal with disputes relating to the granting of patents, but its remit would inevitably be extended to all types of disputes, including those relating to copyright and trademarks.

The proposed European court would comprise courts of first instance (similar to the Irish High Court) and a court of appeals. If a European intellectual property court of first instance were to be established in London, but not Dublin, the primacy of the UK in this field would be emphasised to our detriment. Already, the European Patents Office is based in Germany and the Trademarks Office is based in Spain. In this context, Ireland needs to be part of a European forum for the litigation of intellectual property disputes.

Demonstrating expertise

It is unlikely that simply reorganising the Irish courts in imitation of their English counterparts would give us a sufficient competitive advantage to justify the necessary outlay. Any reform or reorganisation would have to provide considerable savings in both the time taken to bring litigation forward through the courts and the costs of doing so. Obviously, our courts would also have to demonstrate expertise in the relevant areas that is equal or superior to that available in the English system. This may mean more than simply appointing or training members of the judiciary so that appropriate expertise can be applied to IT/IP disputes: to heighten the profile of the Irish courts system, it would be important for the selected judges to regularly participate in international conferences and seminars.

The training, research and other facilities made available to the judiciary would have to be examined to see whether any improvement was required. Similarly, the training – both initial and continuous – of the legal professions in this area should also be reviewed.

Much of the business of going to court is made up of processing information contained in written documents such as summonses, statements of claim, notices for particulars, interrogatories, replies, the defence and counterclaim. Last year, the Courts Service had to deal with some 600,000 different matters. The documents used in these proceedings generate colossal amounts of information, and this is an obvious area where IT should be used to lower the cost of processing pleadings. It costs more to store documents in paper files and to transport them to and from court; queues form in court offices, waiting to lodge and stamp court forms. Electronic pleading would lower or eliminate many of these costs, making the courts more efficient and productive.

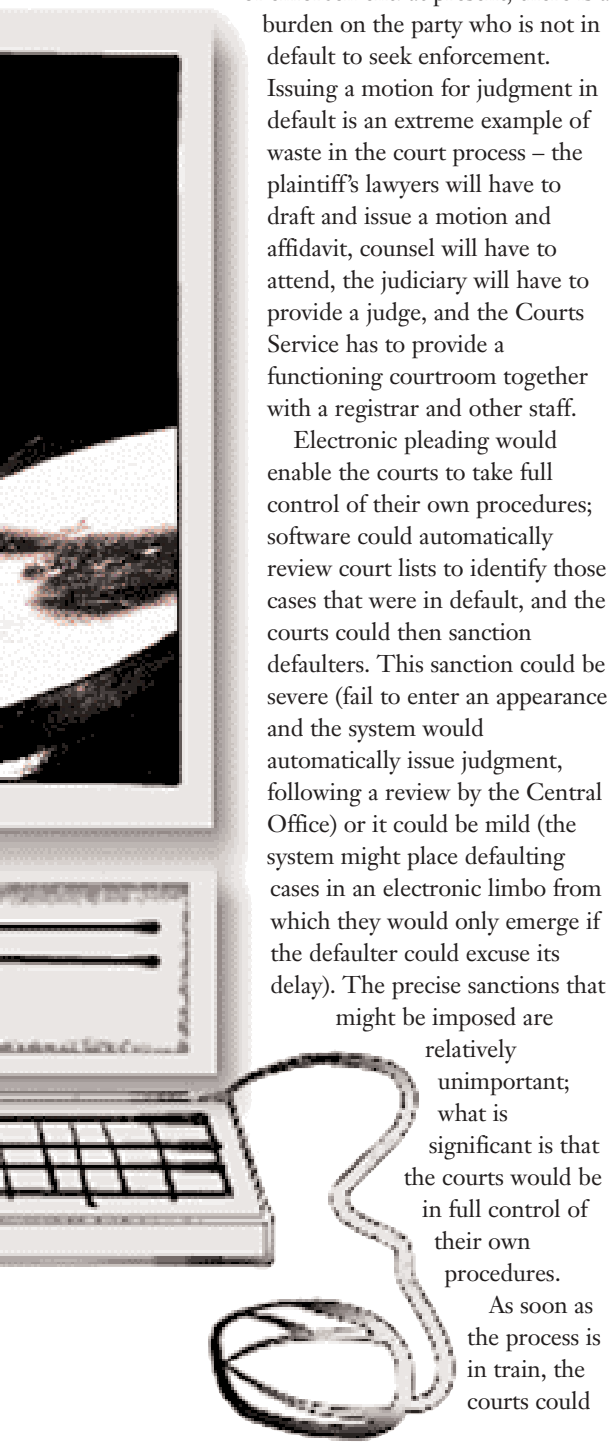
However, the intelligent implementation of IT could have far greater benefits than simply lowering administration costs; it could also help to eliminate delays in the court system. Take just one example:

'The intelligent implementation of IT could also help to eliminate delays in the court system'

when a High Court personal injury action is initiated, pleadings should take two to three months. So if a notice for trial was issued in April, the case should get into the list to fix dates at the end of July and actually be heard on some date between October and December. But a survey of some of the cases listed for Friday 26 July 2002 shows that delay is commonplace, a finding consistent with the experience of court practitioners. At one extreme, proceedings were issued in August 1995, taking seven years to get to court; at the other extreme, proceedings were issued in April 2000, taking two years to get to court.

Electronic pleading

The *Rules of the Superior Courts* do impose severe sanctions on those who cause delay during pleading. If a defence is not lodged within 28 days of the entry of an appearance or a statement of claim, then the plaintiff is entitled to seek judgment in default. But the existing paper-based system of pleading means that this severe sanction is not matched by efficiency of enforcement: at present, there is a burden on the party who is not in default to seek enforcement. Issuing a motion for judgment in default is an extreme example of waste in the court process – the plaintiff's lawyers will have to draft and issue a motion and affidavit, counsel will have to attend, the judiciary will have to provide a judge, and the Courts Service has to provide a functioning courtroom together with a registrar and other staff.



Electronic pleading would enable the courts to take full control of their own procedures; software could automatically review court lists to identify those cases that were in default, and the courts could then sanction defaulters. This sanction could be severe (fail to enter an appearance and the system would automatically issue judgment, following a review by the Central Office) or it could be mild (the system might place defaulting cases in an electronic limbo from which they would only emerge if the defaulter could excuse its delay). The precise sanctions that might be imposed are relatively unimportant; what is significant is that the courts would be in full control of their own procedures.

As soon as the process is in train, the courts could determine exactly the speed at which a case travels through the system. They would be able to weed out frivolous claims, while ensuring that properly aggrieved people have the swift and certain access to justice to which they are entitled.

Of course, there are cases where the complexity of the subject matter means that the preparation of the case will take far longer than normal. In these situations, IT should make 'case management' much easier and more cost effective, making it possible to identify those cases that will take longer and to manage their progress through the courts.

Swifter access to justice might have beneficial consequences for the Irish economy. In many of the high technology sectors in which Ireland is competing internationally, it is an accepted feature of case law that disputes will frequently be decided at the interlocutory injunctive stage. In such sectors, technologies and markets change so quickly that it is not practical to wait for a full hearing. Intellectual property is extremely valuable – owning the copyright in the *Windows* operating system enables Microsoft to earn 86% profit margins on the sale of each copy of the *Windows* program. If Ireland wants to engage with these industries in the long term, then it must provide them with the swift access to justice that they require to protect their intellectual property.

Deterrent to vexatious claims

Swifter access to justice could also act as an effective deterrent to frivolous or vexatious claims. Currently, a plaintiff can issue a plenary or summary summons in the High Court at a cost of €90, secure in the knowledge that it will be many years before the case will come to trial. Defendants faced with such a prospect may agree to settle, as this is cheaper than years of legal costs and inconvenience. An electronic pleading system might create a certainty that someone issuing a summons today would be in court in three to six months. This would radically change the calculation to be made by frivolous, vexatious or, indeed, fraudulent litigants.

Most importantly of all, electronic pleadings would give the judiciary far more control over their diaries, making the management of the judicial day more efficient. IT would allow the courts to query lawyers to confirm that individual cases are in fact going on, making the matching of available judges to actual litigation more efficient.

Ireland is in the process of modernising and updating its courts; this work will make us a more competitive location for investment. Making our courts more efficient and cost effective will have competitive advantages for the entire economy, but if this money is to be well spent it is vital that all elements of the courts should be engaged. We will only derive the full benefits from these developments if it is cheap and easy for lawyers, courts and citizens to interact.

Finally, realising the full benefits of this work will also require a reassessment and reappraisal of many of the procedures involved in our court system. A properly efficient electronic system should be designed to meet the needs of modern judges, litigants and lawyers. If it is simply designed as an electronic imitation of the existing paper-based system, it will fail to deliver its full potential. G

Denis Kelleher is a Dublin-based barrister.

Money for God's sake

You might think that a clever way to avoid the downturn in the equities market is to invest some of your money in works of art – but you would be wrong, as Brian Weber explains

Since property versus equity was a theme of this column not so long ago, it may be of interest to examine the performance of another asset class – works of art – against the overall performance of the equity markets.

On the surface, it would seem that a wisely chosen art collection could deliver strong returns. But history has shown that this is not always the case. During the early 1970s recession, the British Rail Pension Fund decided it needed to diversify its investments and did so by investing nearly $60 million, or 3% of its portfolio, in art.

Between 1975 and 1980, with the help of experts from Sotheby's, Britain's biggest pension fund bought 2,400 individual works. There was no attempt to manage the portfolio, for example, to sell works that had risen in value. Rather, the art was viewed as a long-term investment, and when pieces of the collection weren't loaned out, they were stored in a climate-controlled warehouse.

This strategy was brought to an end when, in 1983, a new portfolio manager with less enthusiasm for art arrived and started selling – a process that continued for the next 15 years. There were some winners: a Canaletto Venetian view, bought in 1975 for $330,000, sold in 1997 for $7 million; and a Monet purchased in 1979 for $380,000 fetched $9 million in 1989.

Overall, though, the investment was a disappointment. Of all of the sectors within the pension fund's art investments, only the 25 Impressionist paintings outperformed the stock market indexes as a group, and all those gains came from just eight winners. Overall, between 1975 and 1999, the art fund returned just 4% a year, far less than the pension fund as a whole. And, over the same period, the Standard & Poor's 500 index grew by 17% a year. When you look back at the performance, just 60 of the 2,400 items generated a third of the profit.

Still, with the stock market headed for its third straight losing year, a lot of investors are looking for alternative investments, and art is often suggested.

Prices in the broad art market have held up pretty well in the current downturn, falling just 8% over the two years ended in June, according to the Mei/Moses All-Art index, a highly-regarded index established by two Stern School professors, Jianping Mei and Michael Moses. Over the same period, the S&P 500 had fallen 31%. But over the longer haul, from 1900 to the present and especially from 1960 to the present, art has been a rather uninspiring investment, consistently returning less than the S&P. Moreover, evidence suggests that the art market and the stock market are positively correlated, making art nearly useless as a bear-market hedge.

Record one-off sales, however, keep making headlines. Last year, Sotheby's auctioned *The massacre of the innocents* by Peter Paul Rubens for $75 million, a near-record price that was almost 20 times the pre-auction estimate and which undoubtedly earned a handsome profit for the painting's anonymous owner. Commission cost may have reduced the gains somewhat, with auction houses typically taking 10% or more. This, coupled with the cost of insurance and security measures, really takes its toll. Nonetheless, the Rubens sale is considered one of the art world's big success stories.

Landscape by Michael Flaherty (in Matheson Ormsby Prentice)

For every painting or sculpture trotted out as an example of a profitable deal, evidence suggests there are many that do less well, either because they sell for less than what was paid or they don't sell at all because the bidding doesn't reach the seller's reserve.

Do the experts get it right?

Even the experts are wrong more often than right, according to a study by William Landes, an economics and law professor at the University of Chicago. In an attempt to examine how well critics and experts can predict which artists will do well, he studied three major art exhibitions: the Paris Exposition of 1900, the New York Armory Show of 1913 and the New York World's Fair show of American art in 1939. In each case, the critics and experts tried to choose the best contemporary art for display. So did this contemporary recognition correlate to the artist's long-term success and survival?

In short, no. Taking the 850 American artists featured at one of more of these shows, Landes looked to see how many had works that sold at a major auction house between 1987 and 1997, and how many are still being mentioned in current art dictionaries and websites. He concluded that only a very few did well. Just five artists featured in these shows now account for between 50% and 60% of auction appearances of the total group in terms of realized value.

Art for art's sake

Noted value investor and art collector Scott Black believes that art isn't an investment one can easily recommend. However, buying a painting because you love it is another story altogether. 'It's a big mistake to buy art as an investment', he says. 'You should only buy art for the love of art. Otherwise, it's no different from buying soybeans. And if you don't know what you're doing, it's easy to lose money'. G

Brian Weber is a director of Davy Stockbrokers private clients' unit.

Brian Weber: 'Art has been a rather uninspiring investment'

Committee reports

BUSINESS LAW

The *European Communities (Data Protection and Privacy in Telecommunications) Regulations 2002* came into force on 8 May 2002. These regulations strengthen privacy rules for telephone users and clarify data protection standards, including the right of individuals to opt out of unsolicited marketing via the telephone. The text of the regulations and a full explanation is provided on the data protection commissioner's website at *www.dataprivacy.ie*.

Business Law Committee

CONVEYANCING

AIB refunds old loan acceptance fees

Practitioners may recall that the AIB Bank used to charge an acceptance fee to the borrower but would refund a portion of it after the borrower's solicitor had lodged title deeds in discharge of the undertaking to the bank. It seems that a number of refunds were never claimed either because the solicitors have not yet lodged the title deeds or because the clients have discharged their loans having re-mortgaged or sold their properties before the deeds were lodged. The bank had proposed to make refunds directly to the borrowers but, following representations by the Conveyancing Committee, the bank will make refunds as follows:

1) In cases where the bank is still relying on the solicitor's undertaking, it will refund the acceptance fee through the solicitor's office and will send an advice note to the client confirming that it is doing so
2) In cases where the undertaking has been discharged by the solicitor but a refund has not been effected, the bank will correspond directly with the client
3) If cheque refunds are not negotiated within three months, the bank proposes dealing directly with the clients thereafter.

AIB Bank hopes to complete this process between November 2002 and the end of January 2003.

Conveyancing Committee

LITIGATION

Witness summonses

Pressurised practitioners dealing with cases frequently take somewhat for granted the people who are a central part of the litigation process and without whom the courts could not function – witnesses of fact. Litigation lawyers need to know when to ask these to attend court, when and how to compel attendance, and also need to show courtesy and consideration to witnesses.

When you, with counsel, if instructed, decide that a witness is necessary, the next step is to decide whether to take the risk that the witness will attend voluntarily. A possible downside to compelling a witness to attend is that the witness may be annoyed to receive a subpoena. The client should be informed of any risk. If in doubt, and if the witness is important, then the power of witness summons or subpoena should be used.

The witness summons or subpoena is an important procedure for litigation lawyers. By simply serving the appropriate form in time, following precisely the procedures set down in the relevant court rules, and tendering an adequate *viaticum* to cover reasonable travel costs, the witness is obliged to attend court on the day of trial, with relevant documents if required. Issuing a witness summons or subpoena does not require any judicial intervention in most cases; it is simply an administrative act. However, where issuing a subpoena in respect of production of any record in the custody of an officer of the state, a court order is necessary, except in the case of personal injury actions (order 39, rule 30, RSC as amended by SI 166/1997).

Securing a witness's attendance is thus a critical task. However, in achieving this, practitioners should not ignore human factors.

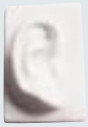
Whether a witness agrees or is compelled to attend court, they often feel isolated, ill-informed and taken for granted by solicitors and counsel. Too often witnesses are left standing and waiting, lost in an alien environment, caught in a tumult of bewigged and begowned barristers, police and prison officers, court clerks, tipstaffs and reporters.

The Litigation Committee therefore urges solicitors in all cases to tell witnesses why their attendance has been requested, where exactly and when you will meet them, and when the case may be reached. On the trial day, you should speak with witnesses and keep them informed of when their evidence may be taken. However, practitioners should be careful to observe the rule forbidding communication with witnesses under cross-examination. Witnesses under examination-in-chief may be spoken to during the ordinary breaks in proceedings, for example, lunchtimes.

The basics of common courtesy to and consideration for witnesses can sometimes be lost in the stresses of the hearing of an action. Obviously, the solicitor's duty is to his or her client, and the solicitor should not be distracted from this.

But courtesy and consideration will reflect well on the solicitor and, indirectly, on the solicitor's client.

Litigation Committee



Practice notes

INDEMNITY RE: ROADS, SERVICES

Queries have arisen recently in relation to the question of whether a separate indemnity in relation to roadways, services and so on in a new building estate is required, having regard to the provisions of clause 10(b) of the Law Society/CIF building agreement (2001 edition).

The view of the committee is that such an indemnity should be sought and furnished, for the following principal reasons:

- All of the relevant issues are contained in one document, the benefit of which may be assigned conveniently
- The document is under seal, while building agreements generally are not.

The normal form of indemnity imposes further obligations on the builder, in that the builder must indemnify the purchaser in relation to any loss arising as a result of his failure to lay or maintain such roads, services and so on.

Conveyancing Committee

PRE-CONTRACT ENQUIRIES

There have been a number of complaints to the Conveyancing Committee to the effect that some practitioners are refusing to deal with pre-contract queries.

It is the view of the committee that the raising of reasonable and appropriate pre-contract queries is in accordance with proper conveyancing practice. It follows, therefore, that such queries should be responded to by a vendor's solicitor and that no unreasonable time or other constraints should be imposed in relation to such queries.

Conveyancing Committee

NEW HOUSES AND EXEMPTED DEVELOPMENT

It has been drawn to the attention of the Conveyancing Committee that, in a number of instances, developers, in the course of building houses, have been making variations in reliance on the exempted development regulations. Such variations can involve the addition of extensions or conservatories, conversion of attic space, or revision of internal layout (with or without alterations to or additions of windows).

A planning permission must be implemented in its entirety, or not at all. The implementation of the planning permission entails the construction of the dwelling house in according with the plans lodged and on foot of which the planning permission issued.

Where a developer seeks to carry out alterations or to add extensions or conservatories in reliance on the exempted development regulations, he will first need to ensure that the house is fully complete in accordance with the planning permission and plans on foot of which the planning permission issued, and that only then is the extension or additional work carried out.

Solicitors acting for purchasers where such extensions or alterations are carried out after the house has been built should get an architect's opinion of compliance in the usual form and a further opinion confirming that the extension or works comprise exempted development and are in accordance with the *Building Control Act* and regulations.

Conveyancing Committee

UPDATE: VHI UNDERTAKINGS

In May of this year, the Litigation Committee advised practitioners that the protocol which had existed for many years between the Society and VHI Healthcare in respect of solicitors' undertakings to the VHI had come to an end. This occurred because, in the course of negotiations regarding an increase in the fee paid to solicitors in respect of such undertakings, VHI sought to impose conditions which were not only unworkable in the society's view but which, in very many cases, would be contrary to clients' interests. In particular, VHI stated that it would henceforward seek an undertaking that, subject to any court order to the contrary, the solicitor will repay to VHI, out of the proceeds which come into his/her hands, the full amount of the monies paid out by VHI on behalf of the subscriber/client. Thus, in a case where only part of the full value of the claim has been recovered, the client might have to pay not only any amount that he had recovered specifically in respect of VHI benefits, but could also have to pay, **out of the other damages recovered**, any balance due to VHI.

Practitioners should note that the wording of the undertaking which VHI is now presenting to solicitors has been unilaterally changed to incorporate this new condition.

As previously advised, practitioners will in future have to conclude their own agreement with VHI on a case-by-case basis. Practitioners should note the following:

1. A solicitor has no obligation to give an undertaking to VHI
2. If a client requests that the solicitor gives such undertaking, the solicitor should explain to the client the full effect of the undertaking
3. If a practitioner decides, after due consideration and discussion with the client, that he/she will provide an undertaking, he/she should be aware of the extent of the personal responsibility which this may entail
4. The fee to be paid is a matter of negotiation between the solicitor and the VHI in each case. In the recent negotiations with VHI, the society's representatives took the view that a fee of approximately €400 would be justified in respect of undertakings **in the form which had been agreed heretofore**
5. In the case of the 'old' form of undertaking the solicitor's obligation is to repay to the VHI, out of the proceeds that come into his/her hands, the net amount recovered in respect of the payments made by the VHI. Under the terms of the earlier agreement with VHI governing that form of undertaking, the solicitor is the ultimate arbiter of the sums recovered, subject to a clear explanation being provided to VHI where the full monies are not recovered. The committee considers that where a solicitor has given an undertaking to VHI in the 'old form' and where a case is settled for a percentage of full value, the payment to VHI of that percentage of the amount due to VHI satisfies the terms of the undertaking.

Litigation Committee

LEGISLATION UPDATE: 15 OCTOBER – 15 NOVEMBER 2002

ACTS PASSED

European Union (Scrutiny) Act, 2002

Number: 25/2002

Contents note: Provides for scrutiny by the houses of the Oireachtas of certain proposed measures presented by the Commission of the European Communities or initiated by a member state, as the case may be. 'Measure' is defined in s1 of the act as meaning: a) a regulation or directive adopted under the treaty establishing the European Community; b) a joint action adopted under article 14 of the treaty on European Union; c) a common position adopted under article 15 of the treaty on European Union; d) a measure requiring the prior approval of both houses of the Oireachtas pursuant to article 29.4.6 of the constitution not otherwise mentioned in this definition. Provides that the Joint Committee on European Affairs shall make an annual report to each house of the Oireachtas on the operation of the act in the preceding year

Date enacted: 23/10/2002

Commencement date: 23/10/2002

Twenty-sixth Amendment of the Constitution Act, 2002

Contents note: Amends article 29.4 of the constitution to enable Ireland ratify the *Treaty of Nice* amending the treaty on European Union, the treaties establishing the European Communities and certain related acts signed at Nice on 26/2/2001, and to provide that the state shall not adopt a decision taken by the European Council to establish a common defence pursuant to article 1.2 of the *Treaty of Nice* where that common defence would include Ireland

Date enacted: 7/11/2002

Commencement date: 7/11/2002

SELECTED STATUTORY INSTRUMENTS

European Communities (Labelling, Presentation and Advertising of Foodstuffs) Regulations 2002

Number: SI 483/2002

Contents note: Consolidate regulations on labelling, presentation and advertising of foodstuffs implementing directive 2000/13/EC

Commencement date: 16/10/2002

Hepatitis C Compensation Tribunal (Amendment) Act, 2002 *(Commencement) Order 2002*

Number: SI 473/2002

Contents note: Appoints 9/10/2002 as the commencement date for all sections of the act

Local Government Act, 2001 *(Commencement) (No 5) Order 2002*

Number: SI 507/2002

Contents note: Appoints 14/11/2002 as the commencement date for part 12 of the act (ss96-126) (insofar as this part has not already been commenced) and part 21 of the act (ss215-220). Part 12 deals with financial procedures and audit and part 21 deals with consequential provisions on failure to perform functions. Appoints 14/11/2002 also as the commencement date for the following provisions of the act: i) paragraph 5 of schedule 10; ii) s5(1) and part 1 of schedule 3 to the extent specified in part 1 of the schedule to this order (SI 507/2002); iii) s5(2) and part 2 of schedule 3 to the extent specified in part 2 of the schedule to this order (SI 507/2002); iv) s5(3) and schedule 4 for the purpose of a) the amendment to the *Local Government (Ireland) Act 1898* in the manner stated in column 3 of schedule 4 of the 2001 act; b) the amendments to the *Local Government (Financial Provisions) Act, 1978* in the manner stated in column 3 of schedule 4 of the 2001 act; c) the amendment to the *Local Government (Financial Provisions) Act, 1997* in the manner stated in column 3 of schedule 4 of the 2001 act; v) s231 (joint drainage committees). Appoints 1/1/2003 as the commencement date for s135 of the act (report on capital programme). Appoints 1/1/2004 as the commencement date for s1(4) of the act (collective citation)

Prevention of Corruption (Amendment) Act, 2001 *(Commencement) (No 2) Order 2002*

Number: SI 477/2002

Contents note: Appoints 4/11/2002 as the commencement date for s4(2)(c) of the act. All other provisions of the act came into force on 26/11/2001 (per SI 519/2001)

Registration of Births (Amendment) Regulations 2002

Number: SI 493/2002

Contents note: Part 6 of the schedule to the *Social Welfare (Miscellaneous Provisions) Act, 2002* provides for an amendment to s1 of the *Registration of Births Act, 1996* to allow for a change of surname, where jointly agreed by the parents, of children whose births are being re-registered under the *Registration of Births and Deaths Acts, 1863 to 1996* or the *Legitimacy Act, 1931*. These regulations provide for consequential amendments to the *Registration of Births Regulations 1988* (SI 123/1988) and for the updating of the forms set out in parts I and II of the schedule to these regulations

Commencement date: 15/10/2002

Road Traffic Act, 1961 *(Section 103) (Offences) Regulations 2002*

Number: SI 492/2002

Contents note: Provide that the fixed-charge system will be applied to the offence of exceeding a speed limit. Also prescribe the form of the notices and documents to be used where a member of An Garda Síochána alleges that a speeding offence has been committed, the amounts which a person who is liable to be prosecuted may pay as an alternative to the institution of a prosecution, details of the penalty points that will be endorsed on the driver's entry in the licence record following payment of a fixed charge and the steps that must be taken by a registered owner to identify the driver where he or she was not using the vehicle at the time of the commission of the alleged offence

Commencement date: 31/10/2002

Road Traffic Act, 2002 *(Commencement) Order 2002*

Number: SI 491/2002

Contents note: Appoints 31/10/2002 as the commencement date for ss1, 11, 21, 23, 24 and 26 of the act and for reference no 7 (offence of exceeding the speed limit under s47 of the *Road Traffic Act, 1961*) in schedule I of the act (penalty points). Appoints 31/10/2002 as the commencement date for ss2 to 7 and s22 of the act insofar as these sections apply to an offence under s47 of the *Road Traffic Act, 1961* and appoints 31/10/2002 as the commencement date for s25(2) of the act, as respects offences committed after 31/10/2002, insofar as it applies to s104 of the *Road Traffic Act, 1961*

Solicitors (Advertising) Regulations 2002

Number: SI 518/2002

Contents note: Prescribe detailed rules for advertising by solicitors. Set out the procedures for investigations by the Law Society of a possible breach of the regulations and the subsequent finding of a breach of the regulations by the Disciplinary Tribunal. Revoke the *Solicitors (Advertising) Regulations 1996* (SI 351/1996) with effect from 1/2/2003

Commencement date: 8/11/2002 (per reg 1(b)), subject to reg 1(c), which provides that the regulations shall not apply to advertisements that are published before 1/2/2003

Solicitors (Amendment) Act, 2002 *(Commencement) Order 2002*

Number: SI 494/2002

Contents note: Appoints 1/11/2002 as the commencement date for ss1 to 7 inclusive, 10, 12 to 18 inclusive, 21 and 22 of the act. Appoints 1/12/2002 as the commencement date for s8 of the act and 1/1/2003 as the commencement date for ss9, 11 and 19 of the act. G

Prepared by the Law Society Library

Personal injury judgment

Passenger on bus – state of intoxication – passenger getting off bus – passenger injured by bus – issue of liability – contributory negligence – issue of extent that passenger had caused the accident due to his intoxication – law on intoxication in the context of contributory negligence – dispute as to future loss of earnings – method of calculation of future loss of earnings

CASE

***Luke Boyne v Bus Átha Cliath and James McGrath*, judgment of Finnegan P of 11 April 2002.**

THE FACTS

Luke Boyne resided on the South Circular Road, Dublin, and at the time of the judgment was a single man aged 38 years. A diesel mechanic by occupation, at the date of the accident giving rise to the claim he was in the employment of a haulage company specialising in the delivery of ready-mixed concrete. On 20 January 1999 at 11pm approximately, Mr Boyne sustained serious injuries as a result of being run over by a bus driven by James McGrath.

On the night in question, the 51B Dublin bus left Dublin city centre at 10.30pm to travel to Bawnogue. Mr Boyne boarded the bus at Thomas Street. On that day, he had finished work with his employer at approximately 8pm. In an adjoining premises, he had carried out work on a car in a private capacity and delivered the repaired car to Baker's public house in Thomas Street at approximately 9pm. He had something to drink there and later that evening had some more to drink in O'Neill's public house in Thomas Street. In total, Mr Boyne admitted to drinking six pints. He boarded the bus, but had no subsequent recollection of the events of the evening.

Derek McKeown was a passenger in the bus at the back of the lower deck. He saw Mr Boyne board the bus. He saw Mr Boyne sitting on the side seat on the left-hand side of the bus. During the journey, Mr Boyne was swaying in the seat and Mr McKeown formed the view that he was under the influence of alcohol. Mr Boyne and the passenger, Mr McKeown, alighted at the same bus stop. Mr McKeown pressed the bell and moved towards the front of the bus, but before he got there, Mr Boyne stood in the aisle without making any progress towards the door at the front of the bus. When the door of the bus opened, Mr McKeown sprang from the bus to the kerb. Shortly thereafter, he heard a moan and, on looking around, he saw Mr Boyne falling to the ground and being run over by the rear wheel of the bus, which continued on its journey. Mr Boyne issued proceedings against Bus Átha Cliath and the driver James McGrath.

THE JUDGMENT

The case came before Mr Justice Joseph Finnegan, who delivered judgment on 11 April 2002. Having outlined the facts, the judge referred to an investigation by a garda, who found blood on the roadway. The judge found that the bus had travelled some 25 feet before it came in contact with Mr Boyne. A necessary corollary of that fact was that, on alighting from the bus, Mr Boyne proceeded past the front of the bus and in the direction of the 'travel' of the bus and that the accident occurred in the course of the bus overtaking Mr Boyne.

The president of the High Court referred to the evidence of the driver of the bus, Mr McGrath, who recalled Mr Boyne boarding the bus at Thomas Street. Mr McGrath considered that Mr Boyne was very drunk and had difficulty in getting on the bus and, indeed, Mr McGrath had some concerns as to whether he should carry Mr Boyne, but he kept an eye on him throughout the journey. Finnegan P summarised the evidence of the driver of the bus as to the demeanour of Mr Boyne by describing him as being 'pleasantly drunk'. Before getting off the bus, Mr Boyne had put 50p in the bus driver's tray, presumably by way of gratuity. He was slow getting off and, once he had alighted, Mr McGrath, the driver, had no further recollection of him. The driver was completely unaware of the accident.

The issue of liability

Finnegan P said he did not know if Mr Boyne reached the footpath and lost his balance there and stumbled against the bus or if he was walking on the roadway. However, of the two possibilities, the judge stated the most likely one, having regard to the evidence, was that the bus stopped some distance from the pavement and Mr Boyne never reached the footpath. Mr Boyne proceeded past the front of the bus and in the direction the bus was travelling and the accident occurred in the course of the bus overtaking him while Mr Boyne was on the roadway. The judge considered that Mr McGrath, the driver of the bus, was well aware of Mr Boyne's condition and ought to have taken particular care by keeping him under observation to ensure that the bus would pass him in safety. The driver did not do so and the evidence was that he had lost sight of Mr Boyne once he had alighted from the bus.

The issue of contributory negligence

Bus Átha Cliath and the driver pleaded contributory negligence, stating that, among other matters, Mr Boyne failed to have any or adequate regard for his own safety, primarily by rea-

son of the excessive consumption of alcohol. In effect, it was argued that Mr Boyne was the author of his own misfortune.

Finnegan P stated that the onus of establishing contributory negligence was on the defendants. Where there is no direct evidence, reliance must be placed on inference as a matter of probability as to what occurred (*Clancy v Commissioner of Public Works in Ireland* [1992] 2IR 449 at 467).

The issue of intoxication

Essentially, Finnegan P found that Mr Boyne, due to his intoxicated state while on the roadway and before reaching the footpath, stumbled and fell against the bus and then under the wheel of the bus.

The president referred to the issue of drunkenness in *Charlesworth on negligence* (eighth edition) at paragraph 3-48, which stated that: 'the excuse of drunkenness has to be regarded when considering contributory negligence'. The author continued: 'A drunken man cannot demand from his neighbour a higher standard of care than a sober man or plead drunkenness as an excuse for not taking the same care of himself when drunk as he would have taken when sober' (*McCormick v Caledonian Railway* [1903]).

The judge then referred to a number of cases. In *McEleney v McCarron and Another* ([1993] 2 IR 132), an accident occurred when the plaintiff, who was drunk, was being assisted to his home by two girls and he fell on the road. The girls had succeeded in moving his body so that his legs were on the footpath and his torso on the road when the second defendant's car approached. The girls moved onto the footpath and attempted to attract the attention of the defendant. The defendant believed the girls wished to thumb a lift and did not stop his car and ran over the plaintiff's head causing him severe personal injuries. In the High Court, the plaintiff was found guilty of contributory negligence and fault was apportioned at 30% to him. The defendant appealed to the Supreme Court, where it was held that the defendant, in the circumstances of that case, was not negligent. The court expressed no opinion on the questions of contributory negligence and the apportionment of fault.

In *Judge v Reape* ([1968] IR 226), referred to by Finnegan P, the plaintiff had consumed a considerable amount of alcohol before accepting a lift in the defendant's motor car, when he knew or ought to have known that the defendant was drunk. The defendant did not deny negligence but pleaded that the plaintiff knew well that the defendant was drunk and so was guilty of contributory negligence. The jury found that the plaintiff had not been negligent. The Supreme Court on appeal found that there was plain evidence of contributory negligence and ordered a retrial.

Finnegan P applied the following principles:

- If a plaintiff is under the influence of alcohol to an extent that affects his ability to take care of himself and whether he knows or ought to know of the risk he is running, this is a factor relevant to the existence and the extent of a defendant's duty of care
- In assessing the plaintiff's conduct for the purposes of contributory negligence, his intoxicated state is to be disregarded and this is notwithstanding his intoxicated state. He knew or ought to have known of the risk which he was running or was incapable of so knowing.

In the circumstances of the present case and in apportioning liability, Finnegan P took into account the circumstances that the driver of the bus was aware of the intoxicated condition of Mr Boyne and the extent of his intoxication. In so far as Mr Boyne was concerned, the president evaluated his conduct as if he were sober. The judge was satisfied that Bus Átha Cliath and the driver did not take reasonable care. Undoubtedly, if Mr Boyne had been sober, he would have moved himself promptly into a position of safety some way from the bus and would not have stumbled against and under the bus, as he did. Finnegan P apportioned liability of 75% to Bus Átha Cliath and 25% to Mr Boyne.

The extent of the injuries

Finnegan P described Mr Boyne's injuries as 'horrific'. Mr Boyne was treated at Tallaght Hospital. He was an in-patient for almost six months. He had some 21 procedures, 20 of which were under general anaesthetic and one under local anaesthetic. From an orthopaedic point of view, the movement of his right knee was virtually non-existent and in the right ankle he had a passive range so that he was just able to get his heel to come to the floor.

Mr Boyne's left leg was functioning normally. The right leg was virtually useless. In the future, the question of amputation might arise, in which event there would be some difficulties in fitting a satisfactory prosthesis in view of his extensive scarring. Mr Boyne's ability to work was seriously compromised, although he could do sedentary or office work which did not require physical exertion. Skin grafts had become infected and had taken several months to heal.

Not surprisingly, Mr Boyne developed a reactive depression in February and March 2000. This had improved over time. However, Mr Boyne still suffered from mild to moderate mood changes and anxiety and was a nervous passenger. It was expected that his psychiatric condition would resolve. A medical specialist expressed the view in evidence that it would have been better for Mr Boyne had his leg been amputated at the beginning, as this would have resulted in less pain, more function and a better overall result.

The issue of future loss of earnings

The issue of future loss of earnings is often contentious and it was contentious in this particular case. It was agreed between the parties that Mr Boyne's future loss of earnings should be calculated on the basis of a net weekly loss of £175 (€222). Finnegan P noted that the task of the court in assessing damages in the context of future loss of earnings is to arrive at a lump sum which represents as near as possible full compensation to a plaintiff. In this case, the multiplicand had been agreed but the parties differed as to the multiplier; there was no agreement as to the assumed real rate of return on capital, that is, the return net of tax and management expenses and the assumed rate of inflation. The higher the assumed rate of return on capital, the lower will be the lump-sum award.

Finnegan P stated that the courts have taken the approach that inflation can be taken into account by the assumption that a plaintiff can invest a lump-sum award and, more particularly, that it could be invested partly in equities and partly in gilts, resulting in both a hedge against inflation and a reasonable degree of security. In the United Kingdom, this approach was reviewed in detail in *Wells v Wells* ([1998] 3 All ER 481), that review being prompted by the availability in the United Kingdom of index-linked government stock which in addition to providing an income also guaranteed that the capital sum preserved its real value by being index-linked to the retail price index. Finnegan P noted that there was no equivalent investment available in this jurisdiction.

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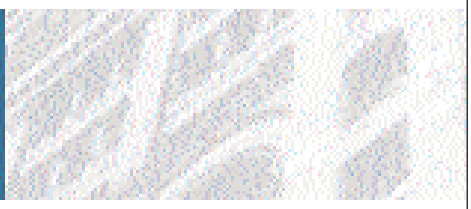

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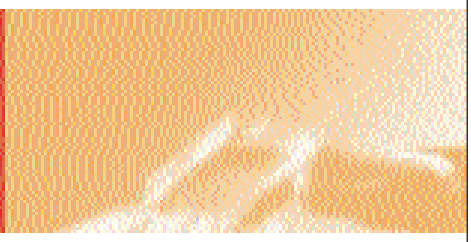

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approach of the Court of Appeal in *Wells v Wells* to the effect that it was for the court to hold the balance evenly between both sides and, just as a plaintiff was entitled to an award which achieves as near as possible full compensation for the injuries sustained, so also the defendant was entitled to take full advantage of the presumption that a plaintiff would adopt a prudent investment strategy once he receives his award. Finnegan P was satisfied that a prudent investor having a lump sum to invest would apportion the same between gilts and equities. The apportionment in any particular case, however, would depend on the particular circumstances.

Based on evidence presented to the High Court, Finnegan P considered that a percentage of 70% invested in equities and 30% in gilts (to include 5.6% in property and 4.7% cash deposits) was reasonable and prudent. Finnegan P accepted the evidence that there was no such thing as a risk-free investment and that the risk associated with investment in gilts was less than that in investment in equities.

The investment policy of the Wards of Court Office (on advice) follows a general policy in relation to longer-term funds (that is, over ten years) of maintaining a 70% to 30% equities and gilt split. Finnegan P therefore considered that course to be one which a prudent investor would follow and he regarded Mr Boyne as having a duty to act reasonably to mitigate his damages and it should be assumed that he would follow the course of a prudent investor.

The next matter to be determined on the basis of the evidence was the return to be expected if such an investment policy were to be pursued. First, Finnegan P adopted the view of the House of Lords in *Wells v Wells* that in the case of a plaintiff it should not be assumed that the income on investments would be reinvested. However, it appeared to Finnegan P that some account must be taken of the possibility of investing income. The evidence for Mr Boyne was that the real rate of return on a portfolio containing 70% equities and 30% gilts would be 2.9%. For Bus Átha Cliath, the evidence was that the real rate of return on a split portfolio would be 4% and perhaps even somewhat higher. Mr Boyne's calculations were on the basis that income would not be reinvested, while Bus Átha Cliath's calculations were on the basis that it would.

Having regard to the evidence and the view which Finnegan P took of the course which a prudent investor would pursue and the obligation of a plaintiff to act reasonably to mitigate his damages by acting as a prudent investor, the judge accepted Mr Boyne's evidence as to the real rate of return. That required some adjustment to take account of the possibility of reinvesting income to some extent. Making this adjustment, Finnegan P found that the appropriate multiplier, having regard to Mr Boyne's particular circumstances, should be calculated on the basis of a real rate of return of 3%.

Finnegan P then considered the work history of Mr Boyne. He commenced employment in 1978 as an apprentice mechanic and continued with that employer until 1983, following which he remained out of work for a year. He then obtained employment as a static guard with a security company for one year. In 1985, he resumed employment as a mechanic and continued in that employment until 1990, after which he was unemployed for some two years (other than for some casual work). In 1992, Mr Boyne again obtained employment as a security guard for one year, after which he returned to his trade and continued to work until the date of the accident.

Finnegan P had the opportunity of assessing Mr Boyne while he gave evidence and accepted that it was likely that, were it not for his accident, he would have continued to work until the age of 65. Having regard to the serious nature of his injuries and the difficulties which Mr Boyne experienced in carrying out his work, Finnegan P stated that it was now unlikely that he would continue to work until 65 and was likely that he would cease to work altogether in about 15 years' time, at age 55. G

This judgment was summarised by solicitor Dr Eamonn Hall.

THE AWARD

General damages

Pain and suffering to the date of the trial:	£75,000	(€95,230)
Pain and suffering into the future:	£75,000	(€95,230)
Agreed special damages:	£60,111.77	(€76,326.20)
Loss of earnings to date of trial:	£43,019.77	(€54,623.84).

Future loss of earnings

Taking into consideration Mr Boyne's employment history pre-accident, and that it was appropriate to make some reduction under *Reddy v Bates*, and further taking the view that notwithstanding that Mr Boyne would be unfit for full employment between the ages of 55 to 65, he had special skills as a diesel mechanic and was likely to engage in some intermittent or casual employment, Finnegan P abated the total award for future loss of earnings of £192,400 (€244,297) by 10%, which resulted in a net award under this heading of £173,160 (€219,867).

Total: £426,291.54 (€541,278.55).

Mr Boyne, having contributed to the accident by his own negligence to the extent of 25%, this total sum must be reduced in that proportion. Mr Boyne was awarded the sum of £319,718.65 (€405,958.95).

First Law Update

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Compiled by Karen Holmes for FirstLaw

CRIMINAL

Case stated, road traffic

Defective summons – defendant charged with offence unknown to law – whether defect in summons misled or prejudiced defendant – whether circuit judge entitled to amend summons to reflect amended statutory provisions – County Officers and Courts (Ireland) Act 1877, *section 76* – Road Traffic Act, 1961, *section 49* – Road Traffic (Amendment) Act, 1978, *section 10* – Road Traffic Act, 1994, *section 10*

The defendant was convicted in the District Court in circumstances where the District Court judge had before her a summons which charged the defendant with driving with a concentration of alcohol exceeding 100 milligrams per 100 mls of blood contrary to section 49 of the *Road Traffic Act, 1961*, as inserted by section 10 of the *Road Traffic (Amendment) Act, 1978*. Section 10 was repealed and replaced by section 10 of the *Road Traffic Act, 1994*, the effect of which was to replace 80 milligrams of alcohol instead of 100 milligrams. That conviction was appealed to the Circuit Court on the grounds that the complaint made by the prosecuting garda was defective and bad on its face, in that it charged an offence which was not known to law, in that the offence of driving while the alcohol concentration in a person's blood exceeded 100 milligrams per 100 mls of blood was abolished by the act of 1994. The Circuit Court, on an application by the state solicitor, amended the defect in the summons, and the conviction and order of the Circuit Court referred to the relevant offence under the act of 1994. The defendant requested the Circuit Court to state a case to the Supreme Court for its opinion as to whether: 'The court was correct in law in so holding that it was entitled to amend the charging clause of the original summons to reflect the statutory provisions as contained in the *Road Traffic Act, 1994*'.

Geoghegan J (Denham and Hardiman JJ concurring) held that the question stated that the court was not correct in making the amendment on the information then before it and remitted the case to the Circuit Court, stating that the powers of amendment of the Circuit Court in District Court appeals which are contained in section 76 of the *County Officers and Courts (Ireland) Act 1877* are only applicable in a case where the appellant was tried in the District Court for the offence for which he appears to have been convicted by reference to the order. If the defendant was tried for a non-existent offence, he cannot have a conviction entered against him in respect of an existing offence. If that happens, it cannot be cured by amendment. There could not have been a valid conviction under the 1994 act in the District Court in the absence of an amendment at the hearing, particularly having regard to the increase in penalties effected by the 1994 act.

***DPP (complainant) v Canniffe (defendant)*, Supreme Court, 29/10/2002** [FL6175]

Certiorari, conviction

Judicial review – certiorari – *conviction – road traffic offence – applicant sought order quashing order of district judge – whether insufficient evidence to support conviction – whether judge exceeded his jurisdiction – whether recall of witness in unusual circumstances gave rise to suspicion that procedures unfair* – Road Traffic Act, 1961, *s49*

The applicant sought an order of *certiorari* quashing the order of the district judge whereby he convicted and sentenced the applicant for a road traffic offence. The applicant claimed that there was fundamental unfairness in the trial and that the district judge exceeded his jurisdiction in the manner in which he conducted the trial. The applicant argued that there was no evidence of the time that the accident occurred and, as a result, there was insufficient evidence to support a conviction. The applicant also argued that the judge had recalled a witness in unusual circumstances, which gave rise to the reasonable perception that fair procedures had not been followed.

O'Higgins J granted the order sought, holding that while evidence of the time of the accident was an essential part of the prosecution case and the absence of such proof would be fatal, the applicant had not established that there was no evidence before the district judge of the time of the accident, and as a result he could not succeed on this ground. However, the unusual circumstances in which the district judge had recalled a witness might give rise to a suspicion by an impartial observer that fair procedures had not been adopted.

***Flynn v District Judge Kirby*, High Court, Mr Justice O'Higgins 19/12/2000** [FL6239]

Certiorari, fair procedures

Judicial review – certiorari – *refugee law – immigration and asylum – deportation – practice and procedure – fair procedures – whether fair procedures followed – whether lack of reasoning in formulating decision* – Refugee Act, 1996 – Immigration Act, 1999 – Illegal Immigrants (Trafficking) Act, 2000

The applicants sought leave to institute judicial review proceedings to challenge the decision to refuse them refugee status. The applicants contended that the decision was flawed for a number of reasons. It was argued that the minister had unfairly obtained information relating to the applications (in particular, information on Nigeria) from the Home Office in the United Kingdom. It was also contended that there had been an impermissible delegation of function in the making of the decision and that there was a lack of reasoning behind the decision.

Mr Justice Smyth dismissed the applications. The minister had an obligation to be *au fait* with country of origin information and the Home Office in the United Kingdom was an internationally reliable source. It was not the function of the court to advise the minister on how to run his department. There was no lack of reasoning in the decision and the applications would be dismissed.

***Eduok and Others v Minister for Justice and Others*, High Court, Mr Justice Smith, 3/10/2002** [FL6229]

Evidence

Criminal law – evidence – case stated – fair procedures – Garda Síochána – contemporaneous notes – whether District Court judge

correctly dismissed charge – whether evidence by garda admissible – Summary Jurisdiction Act 1857 – Courts (Supplemental Provisions) Act, 1961

The respondent had been prosecuted with a drink-driving offence contrary to sections 49(3) and (6)(a) of the *Road Traffic Act, 1961*. While the case was at hearing before the District Court, one of the gardaí involved in the case gave evidence from his garda notebook. The District Court judge told the garda that he had not sought the court's permission to refer to his notes. The District Court judge then dismissed the charge on the basis that the garda had given evidence without the permission of the court. A case was stated for the opinion of the High Court as to whether the District Court judge was correct in law in dismissing the charge.

Ó Caoimh J held that the District Court judge had incorrectly dismissed the charge. This was not a case about the reception of illegally obtained evidence. What was at issue was whether the judge was entitled to exclude the evidence of a garda in circumstances where the evidence before the court showed that this was supported by notes made contemporaneously. The facts as outlined suggested that the garda in question was entitled to refer to his notes as a matter of law and that this was not a matter in which the judge had a discretion. Strictly speaking, the garda should have indicated that he wished to refer to his notes. The judge erred in treating as inadmissible the evidence of the garda and had erred in law in dismissing the charge.

***DPP v Clifford*, High Court, Mr Justice Ó Caoimh, 22/7/2002** [FL6219]

CHILDREN AND YOUNG PERSONS

Sexual offences, tribunals,

Statutory interpretation – purpose of legislation – right to fair hearing – right to legal representation – right to vindication of one's good name – practice direction given by applicant – number of legal representatives limited at hearing – whether applicant had jurisdiction to give direction in suit – Commission to Inquire into Child Abuse Act, 2000, *sections 4, 12, 14, 20 and 25* – Bunreacht na hÉireann, *article 40.3*

The applicant made an order determining that it was just and appropriate that, in the course of giving evidence before the investigation committee, all parties entitled to appear should have their legal representation limited to there being present on behalf of such parties a solicitor and one counsel only, on the grounds that, in light of section 4 of the act of 2000, it was necessary so as to provide an atmosphere that is sympathetic to and understanding of persons who allege that they were sexually abused. Having so determined, it applied to the High Court pursuant to section 25(1) of the 2000 act to seek the court's approval in that regard.

In refusing an order pursuant to section 25(1) of the 2000 act, Kelly J held that the applicant did not have jurisdiction to make the direction of the type which it did. Further, if there was such jurisdiction, it was one which was to be exercised in such a manner as not to substantially interfere with the rights of the notice parties and the interests of justice. The giving of such a direction had to be done in such a way as to be compatible with the rights of others and the requirements of justice. He was satisfied that a substantial interference with the right of representation was being effected when the applicant was engaged in conducting an investigation of a type where a party to the proceedings was at risk of having his good name jeopardised. As the right to legal representation before a tribunal was a constitutional one, justice required that parties be permitted to have present at all relevant times legal representation of their choice in whatever number was required to prosecute or defend claims before the applicant to best effect.

***In the matter of an application pursuant to section 25(1) of the* Commission to Inquire into Child Abuse Act, 2000, High Court, Mr Justice Kelly, 9/10/2002** [FL6276]

FAMILY

Divorce

Maintenance – lump-sum payment – division of assets – property – policy of equal division – rule of equality – conduct of parties – whether 'clean break' principle exists in Irish law – whether divorce decree should be granted – Family Law (Divorce) Act, 1996, *sections 5, 20* – Bunreacht na hÉireann 1937

The applicant and respondent were married in 1980. The applicant sought a divorce pursuant to the terms of the *Family Law (Divorce) Act, 1996*. The respondent opposed the granting of a divorce and instead sought a decree of judicial separation. There were three children from the marriage. Evidence was given that the assets of the applicant were in the region of £20 million (in the Supreme Court, a figure of £15 million was arrived at), whereas the respondent had assets of around £1 million. Issues also arose relating to the payment of maintenance and/or a lump-sum payment. In the High Court, Mr Justice Lavan held that there was no reasonable prospect of a reconciliation between the parties. The respondent had made a very special financial contribution to the marriage and had assisted to a substantial degree in establishing her husband's practice. A sum of £5 million would be paid by the applicant to the respondent without the payment of continuing maintenance. To one of the children, who was still an infant, £800 a month would be paid in maintenance. No order would be made in relation to the other two children, as these would be discussed with the applicant. Certain orders were also made in respect of pension provisions. The judge also held that an appropriate report was required pursuant to the 1996 act in relation to determining access between the youngest child and the applicant. The applicant appealed the order regarding the payment of £5 million and the apportionment relating to the payment of 55% of the applicant's pension policy, which had been in part based on wrongdoing committed by the applicant. It was argued that the High Court judge had been wrong in ordering a lump-sum payment and had been in error in treating the date of the hearing as the appropriate time for the valuation of assets.

The Supreme Court dismissed the appeal. Keane CJ held that the relevant Irish legislation precluded the 'clean break' principle. However, Irish law could accommodate those aspects of the principle which were clearly beneficial, and it was not correct to say that the legislation went so far as to virtually prevent financial finality. Ultimately, a trial judge must be satisfied that any financial orders made under the 1996 act constituted proper provision for each of the spouses and their dependent children. To a limited extent, a court might be justified in 'ample money' cases in treating one-third of the net assets of the earning partner as the appropriate yardstick at the lower end of the scale. The appropriate time for the valuation of assets was at the date of the hearing. The trial judge was entitled to exercise his discretion in awarding the respondent a lump sum of £5 million to be paid in instalments. However, the miscon-

duct the trial judge had found with regard to the applicant did not entitle him to alter the allocation of the pension plan and the appeal in this regard would be allowed. Denham J held that the fundamental principle was that of making of making 'proper provision'. There was nothing in the legislation which prohibited the making of a lump-sum order. The appeal would be dismissed, apart from the appeal with regard to the pension order. Murphy J (dissenting) held that a 'clean break' was not an option and the current legislation required that proper provision be made for each spouse. The 1996 act made no reference to division of assets. The matter must be remitted to the High Court in order to determine the proper provision. Murray J agreed with the judgment of the chief justice and held that a court, in appropriate circumstances, might seek to achieve certainty and finality in the continuing obligations of the divorced spouses to one another. Fennelly J agreed also with the judgment of the chief justice.

***T(DMP) v T(C)*, Supreme Court, 14/10/2002** [FL6167]

Pensions, property

Division of assets – property – family home – pension adjustment order – Family Law (Divorce) Act, 1996

The applicant wife obtained a decree of divorce in the Circuit Court whereby the family home was transferred into her sole name and she was granted sole occupancy of the house. Orders were also made that she receive 45% of the respondent's pension benefits and a lump sum of £5,000, plus a further £5,000 in costs. The house was transferred into the applicant's sole name in light of the respondent's unacceptable behaviour in the manner in which he pursued an application for planning permission in relation to the property without the involvement of the applicant. Those orders were appealed to the High Court by the husband.

Abbott J affirmed the order of the Circuit Court in relation to the grant of divorce and the order transferring the family home into the sole name of the applicant, but reduced from 45% to 40% the portion of the respondent's pension that the applicant was entitled to and, vacating the lump sum and costs orders, held that the *Family Law (Divorce) Act, 1996* was a relieving piece of social legislation through which the court could digress from strict property rights, and the primary obligation on the court under it was to ensure that the spouse of the provider has proper provision. In circumstances where the applicant was in poor health and there was likely to be continuing litigation over assets, the only way to avoid the threat of continuing litigation in relation to the family home was to transfer it into the applicant's sole name. On the basis that the applicant would have the benefit of a property adjustment order in relation to the family home, the relevant pension order was varied downwards to 40%. No order was made as to the High Court costs, which was not to be seen as an adjudication on the merits but rather an element of compensation to the respondent in light of the property adjustment order.

***T(T) v T(T)*, High Court, Mr Justice Abbott, 26/6/2002** [FL6266] 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

Public procurement: recent Irish developments

This note is intended to summarise two recent Irish developments in the area of public procurement:

- The recent judgment of the Supreme Court in the *SIAC* case, in which the standard of judicial review in public procurement cases was clarified
- The new *Competition Act, 2002*, which has serious implications for those involved in the practice of 'bid-rigging'.

SIAC Construction Ltd v Mayo County Council

This recent decision of the Supreme Court is probably one of the most important in the area of public procurement to date, as it establishes the standard of judicial review to be adopted by the courts in hearing challenges to public tenders governed by the European Community procurement rules.

On 14 February 1992, Mayo County Council advertised in the Irish national newspapers, inviting tenders from civil engineering contractors for the carrying out of major sewerage works. The advertisement stipulated that the lowest tender would not necessarily be accepted. On 20 February 1992, a contract notice was published in the *Official journal* of the European Communities. It stated that the award criteria would be based on the most advantageous tender in respect of cost and technical merit.

The council received 24 tenders, three of which were short-listed, namely:

- SIAC Construction Ltd, which produced the lowest tender
- Pat Mulcair, who produced the second-lowest tender and to whom the contract was ultimately awarded, and
- Pierse Contracting Ltd, which produced the third-lowest tender.

The council awarded the contract to Mulcair. The following reasons were cited for not awarding the contract to SIAC, notwithstanding the fact that it had produced what appeared on paper to be the lowest bid:

- SIAC's failure to specify a completion date as required in the contract notice
- SIAC's failure to price major items of work in its bills of quantity, which rendered proper management and control extremely difficult, and
- SIAC's withdrawal, by means of a 100% reduction, of a provisional sum of £90,000.

In the opinion of the council's consulting engineer, SIAC's pricing proposals left too much room for uncertainty and, as Mulcair's bid was more complete, it was more likely to be the lower tender.

High Court

SIAC sought a number of reliefs from the High Court by way of an application for judicial review:

- A declaration that the council's decision to reject SIAC's tender was null and void and in breach of directive 71/305/EEC and/or the *European Communities (Award of Public Works Contracts) Regulations 1992* (SI no 36 of 1992)
- A declaration that the council acted *ultra vires* and/or without jurisdiction in rejecting SIAC's tender
- A declaration that the acceptance by the council of Mulcair's tender was in breach of the directive and the implementing regulations, and
- Damages (SIAC did not seek to set aside or suspend the council's contact with Mulcair).

SIAC argued in particular that the decision of the council was *ultra vires* because:

- In rejecting SIAC's tender on the basis that it failed to provide a completion date, the council had taken an irrelevant matter into account in that the period for completion was not a contractual criterion for the award of the contract, and
- The methodology and reasoning adopted by the council's consulting engineers in the comparison of the three lowest corrected tenders, which resulted in the council's decision that SIAC's tender was not the most economically advantageous, was so unreasonable and irrational, on various grounds of irrelevancy and self-misdirection, as to be *ultra vires*.

In her judgment of 17 June 1997, Laffoy J first addressed SIAC's argument that the council had considered an irrelevant matter, namely, the absence of a completion date. Notwithstanding the fact that the council's consulting engineers found this omission to be very serious, she found that the evidence established that they overcame their reservations insofar as they did not reject SIAC's tender on this ground. Accordingly, in her view, SIAC failed to establish that the council took into account a matter that it should not have taken into account. (This ground was not raised again on appeal.)

With regard to SIAC's contention that the council's decision was unreasonable or irrational, Laffoy J held that it is not the court's function in reviewing the exercise of a contracting authority's discretionary power of selection to conduct an appeal on the merits of its decisions. Rather, the court's function was to determine whether the council's decision was unreasonable in the sense that it 'plainly and unambiguously flew in the face of fundamental reason and common sense'.

Due to the highly competitive nature of the tender process in this case, a large measure of professional judgement and expertise as to the final out-turn came into play on both sides. In the judge's view, it was not the court's function to assess the two conflicting professional opinions to determine which one was correct on the balance of probabilities. The court's function was to determine whether SIAC had established that the council's decision was unreasonable in the sense described above. Laffoy J concluded that SIAC had not discharged that onus and accordingly dismissed its claim and refused to grant any of the reliefs sought.

Supreme Court

SIAC appealed the decision of Laffoy J to the Supreme Court. It argued a new point before the court: that the council could only take into account the tender price and not the ultimate cost to the council, as this had not been notified to tenderers. The Supreme Court stayed the appeal in order to make a referral to the ECJ for a preliminary ruling under article 234 of the *EC treaty*.

On 18 October 2001, more than four years after Laffoy J's judgment, the ECJ gave its judgment (case C-19/00). It determined that where a contracting authority chooses to award a contract to the most economically-advantageous tenderer, this confers a certain amount of discretion on the authority. However, this does not have the effect of conferring an unrestricted freedom of choice as regards the awarding of a contract to a tenderer, as this would be incompatible with article 29 of directive 71/305. The mere fact that an award criterion relates to a factual element, which will be known precisely only after the contract has been awarded, cannot be regarded as conferring any such unrestricted freedom on the contracting authority.

The ECJ ruled that it is therefore permissible for a public authority to take into account the ultimate cost of the bids, provided that this award criterion was clearly stated in the contract notice or contract documents and the professional opinion is based in all essential points on objective factors regarded in good professional practice as relevant and appropriate to the assessment made.

On 9 May 2002, more than ten years after the council had first tendered the contract, the Supreme Court gave its judgment.

The Supreme Court quickly disposed of SIAC's new argument that the criterion of ultimate cost was not mentioned in any of the contract documents. It concluded that as SIAC had not previously argued this point before the High Court, it could not do so on appeal. As a result, the Supreme Court held that claim to be inadmissible. The court did remark in passing, however, that it would have been 'desirable if the court had specified that the award would be made with due regard to the ultimate cost of the bids'.

With regard to the unreasonableness of the council's decision, the Supreme Court believed that the test Laffoy J had applied, namely, that a decision must plainly and unambiguously fly in the face of fundamental reason and common sense was too extreme. Such a formulation of the test would run the risk of not offering protection of the interests of disappointed tenderers, as the *Remedies directive* clearly mandates. Instead, the Supreme Court found that the appropriate test was one of 'manifest error', given the 'explicit concession of a wide margin of discretion to contracting authorities'.[1]

In the Supreme Court's view, however, such a discretion is not unlimited: where there is a failure to meet the principles of equality, transparency or objectivity on the part of the contracting authority, there could be no question of permitting a wide margin of discretion.

It viewed this case as involving a highly speculative and competitive contract. Moreover, the costs of the contract could not be accurately determined at the time of the award. In these circumstances, the Supreme Court held that the county council acted within its permitted margin of discretion and followed objective and objectively verified criteria. Thus, the Supreme Court affirmed the High Court order.

The Supreme Court also considered the notion of damages under domestic and EC law, although none were awarded in this case. Under the *Remedies directive*, the state is required to provide a judicial remedy for the purposes of fully implementing directive 71/305. It concluded that the courts must render those provisions effective in favour of those in a position to invoke them. The two principles to be taken into account in that regard are *equivalence* (the remedy must be at least as favourable as that available in national law for a similar complaint) and *effectiveness* (a remedy that will offer appropriate and sufficient protection for the EC law rights in question).

Finally, the Supreme Court rejected SIAC's argument that the council should have sought clarification of its pricing methods on the basis that this would offer one tenderer the opportunity to adopt a method of pricing not available to other competitors.

The decision of the Supreme Court on the test to be applied in the judicial review of public procurement decisions is likely to provide only limited comfort to unsuccessful tenderers, as the 'manifest error' test still affords contracting authorities a wide margin of discretion. It is equally clear, however, that there will be no margin of discretion afforded where breaches of EC public procurement rules and general principles of EC law, such as equality and non-discrimination, are concerned.

It will be interesting to see how the 'test of manifest error' is applied in practice by the courts. It is submitted that, notwithstanding the less onerous test introduced by the Supreme Court, courts will continue to adopt a conservative approach to overturning or providing declaratory relief in respect of decisions of contracting authorities in this area.

The case also underlines that contracting authorities should take great care in specifying in the contract notice the award criteria in any given contract governed by EC procurement rules, which in all cases should be 'objective and objectively verified'.

Finally, in this writer's view, the court's view that the council should not have sought clarification on the basis that this would offer one tenderer the opportunity to adopt a method of pricing not available to other competitors is flawed and represents a misunderstanding of EC law in this area. It is submitted that the seeking of clarifications, which is permitted under EC procurement law, is usually helpful to contracting authorities in arriving at a decision to select (or reject) an interested bidder or to award a given contract. It is not so much the clarification itself which is the problem; rather, it is the treatment of the information provided in response. Clearly, if the information provided in response to a request for clarification adopts an approach or methodology not available to other competitors, then steps need to be taken by the contracting authority to ensure equality of treatment and to avoid discrimination. It is to be hoped that contracting authorities will not be discouraged from seeking clarifications, where necessary, as a result of the Supreme Court's otherwise welcome judgment.

Increased penalties for collusive tendering

The *Competition Act, 2002* was signed into law in April 2002.[2] One of the main purposes of the act is to provide extensive powers to enforce Irish, and potentially EC, competition law more effectively. Under the Competition Act 2002 *(Commencement) Order 2002*, part 2 of the act, which sets out the principal competition rules and the ways in which they may be enforced, came into effect on 1 July 2002.

The act repeats the prohibition of restrictive agreements and concerted practices and the abuse of a dominant position. In terms of enforcing these rules, the act introduces harsher penalties for certain 'hardcore' competition law infringements, including collusive tendering or 'bid-rigging'. For this offence,

the act raises the maximum jail sentence from two to five years. Under Irish criminal law, any person subject to an investigation carrying a possible jail sentence of five years or more may be arrested in the course of an inquiry. Accordingly, persons engaged, or suspected of being engaged, in bid-rigging may be arrested and interrogated by members of the gardaí. An undertaking found guilty of a collusive tendering can be fined up to €4 million or 10% of its annual turnover, and its directors or managers may be subject to imprisonment.

In this context, it is worth recalling that in 1997 the Competition Authority published *Guidelines on the detection and prevention of collusive tendering on public sector contracts*, which, while in need of updating to reflect the recent legislative changes, still serve as a useful tool in helping public bodies to detect bid-rigging. G

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Footnotes

1 The Supreme Court referred to a number of ECJ decisions, including case C-120/97 *Upjohn Ltd v Licensing Authority* ([1999] ECR I-223).

2 *See* Hickey, *The new competition regime:* Competition Act, 2002, *Gazette* (October 2002, page 45) for a useful summary.

Recent EU legislative developments: August 2002

New motor vehicle distribution block exemption. On 1 August 2002, the commission published a new block exemption concerning motor vehicle distribution. The new regulation replaces commission regulation 1475/95 of 28 June 1995 and sets out the terms that a car distribution agreement must satisfy in order to escape the application of the *EC treaty* competition rules.

The commission stated that experience acquired in the motor vehicle sector regarding the distribution of new motor vehicles, spare parts and after-sales services makes it possible to define categories of vertical agreements that can be regarded as normally satisfying the conditions laid down in article 81(3). This experience led the commission to the conclusion that rules stricter than those provided for by commission regulation (EC) no 2790/1999 of 22 December 1999 on the application of article 81(3) of the treaty to categories of vertical agreements and concerted practices are necessary in this sector.

'Listing' of sporting events. On 8 August 2002, the commission published details of the consolidated measures taken by four member states in accordance with article 3(a)2 of council directive 89/552/EEC, known as the *Television without frontiers directive*.

Italy, Germany, the United Kingdom and Austria provided details of the measures taken at domestic level to list certain sporting events that must be made available 'free to air' in those member states. From an Irish perspective, it is interesting to note that Italy, Germany and Austria listed all competitive football matches involving the national team, both home and away. The United Kingdom listed the following sporting events: the Olympic Games, the FIFA World Cup Finals, the FA Cup Final, the Scottish FA Cup Final, the Grand National, the Derby, the Wimbledon Tennis Finals, the European Football Championship Finals, the Rugby League Challenge Cup Final, the Rugby World Cup Finals, cricket test matches played in England, non-finals played in the Wimbledon tournament, all other matches in the Rugby World Cup Finals, Six Nations Rugby Tournament matches involving home countries, the Commonwealth Games, the World Athletics Championship, the Cricket World Cup (final, semi-finals and matches involving home nations' teams), the Ryder Cup and the Open Golf Championship.

Competition law and UEFA Champions League. On 17 August 2002, the commission published a notice pursuant to article 19(3) of council regulation no 17 concerning case COMP/C.2/37.398 on the joint selling of the media rights of the UEFA Champions League on an exclusive basis. The commission stated that it intends to take a favourable view in respect of UEFA's revised joint selling arrangement. Before adopting a favourable opinion, the commission invited third parties to send their observations.

Financial services: amended proposal on prospectuses. On 9 August 2002, the European Commission presented an amended proposal for a directive on prospectuses, taking account of the European Parliament's opinion on the original proposal put forward by the commission on 30 May 2001.

The amended proposal would make it easier and cheaper for companies to raise capital throughout the EU, while reinforcing protection for investors by guaranteeing that all prospectuses, wherever in the EU they are issued, provide them with the clear and comprehensive information they need to make investment decisions. The directive would introduce a new 'single passport for issuers'. This means that, once approved by the authority in one member state, a prospectus would then have to be accepted everywhere else in the EU. In order to ensure investor protection, that approval would only be granted if prospectuses meet common EU standards on information disclosure.

Commission adopts proposal to implement ban on conflict diamonds. On 8 August 2002, the European Commission adopted a proposal for a council regulation concerning a community certification scheme for the international trade in rough diamonds. The purpose of the certification scheme is to prevent 'conflict' or 'blood' diamonds from fuelling armed conflicts, such as those in Angola, Sierra Leone and the DR Congo, thereby contributing to the EU's policy on conflict prevention (see *http://europa.eu.int/comm/external_relations/cpcm/cp.htm* for further details). An effective ban will deprive rebel movements of significant finances and will therefore be an important contribution to peace and stability. The scheme also aims to prevent conflict diamonds from discrediting the legitimate market for rough diamonds, which makes an important economic contribution, not least to certain developing countries in Africa. Less than 4% of global diamond production is regarded as involving 'conflict diamonds', while a number of developing countries that are major producers and processors of diamonds depend heavily on the legitimate diamond industry for their economic and social development. The underlying certification scheme has been developed in the 'Kimberley process', with the active participation of the EU. G

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Recent developments in European law

ASYLUM

On 25 April, the council reached agreement on a proposed directive to guarantee the same minimum standards for asylum-seekers in the EU member states. Minimum standards would be guaranteed in relation to education, accommodation and healthcare. Asylum-seekers would have freedom of movement within the host state.

COMPANY LAW

The commission has presented a proposal to modify the *First company law directive* (68/151/EEC) to make company information more readily available to the public and to simplify the disclosure formalities required from companies. The proposed amendments are also designed to take full advantage of modern technology. Companies would be able to file their documents by either electronic means or by paper. Member states would be required to make the filing of company documents by electronic means possible from 1 January 2005.

EMPLOYMENT

Sexual harassment

On 17 April 2002, the parliament and council reached agreement on a proposed directive on sexual harassment (Com (2001) 321). The directive defines sexual harassment as any 'form of unwanted verbal, non-verbal or physical contact of a sexual nature that occurs with the purpose or effect of violating the dignity of a person in particular and/or creating or administering a hostile, degrading, humiliating or offensive environment'. Employers will be required to take preventative measures against all forms of discrimination, including sexual harassment. If an employee proves the incidence of sexual harassment, the burden of proof lies with the employer to show that the necessary steps were taken to avoid its occurrence.

Temporary workers

On 20 March 2002, the commission published a draft directive on general principles for equal treatment of temporary workers. The directive will give temporary agency workers the right to the same pay and conditions as regular employees, where their work is equivalent and the worker profiles are similar. Temporary workers will be able to take advantage of maternity and sick leave, pensions and training. Employment agencies will be obliged to ensure that companies employing temporary workers comply with the rules. These provisions will not apply where the worker is a permanent employee of the agency and if the employment relationship itself affords adequate protection to the worker. It will not apply in cases where an employee is replacing a better-qualified or more experienced employee or if the employment relationship itself gives adequate protection to the worker.

FAMILY LAW

On 22 May 2002, the commission released a proposal for a new regulation on recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility. This proposal would amalgamate the current *Brussels II regulation* (1347/2000), a commission proposal on parental responsibility and a French initiative on rights of access. The draft proposes to confer jurisdiction in matters of access to the courts in the member state of the child's habitual residence. The decision of the court of the child's habitual residence has to be complied with by the authorities of the member state in which the child is found, within one month of the child being located. The court in the state of current location may order a provisional stay for the child if it considers that it would be dangerous for it to return. However, the final decision on custody is with the courts in the state of the child's habitual residence.

LITIGATION

European enforcement order

The commission has adopted a proposal to create a European enforcement order for uncontested monetary claims in civil and commercial judgments. This measure is designed to complement regulation 44/2001 (the *Brussels I regulation*). At present to enforce a judgment under the *Brussels I regulation*, a number of intermediate steps are necessary. The order will eliminate these in the case of uncontested claims being enforced in other member states. As with *Brussels I*, it will not apply to wills and succession rights, tax, customs or administrative claims, bankruptcy or insolvency proceedings, social security or arbitration. A creditor will be free to obtain such an order when a debtor has agreed to the debt in court proceedings or where the debtor does not appear in court when the claim in heard. It is the responsibility of the member state where the judgment is given to ensure that all the procedural rules have been applied, as, once granted, there is no right of appeal against the order. The proposed regulation has been forwarded to the council for its approval. The UK and Ireland may opt in to this regulation, if adopted. G

Everything's rosy
Pictured at the recent launch of *Key issues in planning and environmental law* (Butterworths, 2002) at Blackhall Place are *(from left)* Kate Byrne, author John Gore-Grimes and Chief Justice Ronan Keane

Guess who's coming to dinner?
The president's dinner table resembled a Cabinet table one night recently when Geraldine Clarke hosted a remarkable group of senior government figures. An Taoiseach Bertie Ahern was the guest of honour. All the lawyers who sit at the Cabinet table (except minister for foreign affairs Brian Cowen, who was unavailable) were in attendance. In addition to ministers John O'Donoghue and Dermot Ahern, together with attorney general Rory Brady SC, who are pictured above, the group was later joined by justice minister Michael McDowell, who was delayed by business in the Dáil

Negligible benefits
Pictured at the society's recent CLE seminar on avoiding professional negligence are *(from left)* Patrick Groarke of Groarke & Partners, Brian Spierin SC and Brian Gallagher of Gallagher Shatter, Solicitors

Any bequests?
The Galway University Foundation at NUI Galway held a seminar in August for solicitors, tax experts and other professional advisors on the issue of legacies and bequests. The purpose was to share the experience of US practitioners in this area, and the seminar was led by San Francisco-based attorney Judith Hehir. Pictured at the seminar are *(from left)* James Costello of KPMG, Galway University Foundation's Joe McKenna, Ray Murphy of NUI Galway's law faculty, Una Jordan, Maria Quinn, Judith Hehir, Jerry O'Leary of Ernst & Young, Michael Cunningham, Adrian Harris, Elizabeth Cazabon, Prof Liam O'Malley and Bruce St John Blake

Sibling rivalry
For the second year running, sisters Aisling and Ruth NicAoidh from Dundrum, Dublin, have won the Gael Linn moot court competition. High Court judge Aindrias ó Caoimh *(above)* presented the sisters with the award

Last of the summer wine
The Law Society recently hosted a lunch in honour of solicitors from the class of Michaelmas 1952. The event, which was organised by Law Society stalwart Colm Price and attended by director general Ken Murphy and president Geraldine Clarke, honoured those solicitors who qualified 50 years ago. The roll of attendees read: Eileen Bourke, Brendan Boushel, Finbarr Callanan, George Fairbrother, Frank Keane, Mary King, Brendan O'Flynn, Brian Overend, Pat Markey, Nora Murphy, Jack Phelan, Brian Price, Colm Price David Punch, Tim Ryan, David Warren and Reggie White

And justice for all

A conference on the *European Convention on Human Rights Bill, 2001* was held by the Law Society together with the Human Rights Commission on Saturday 19 October, while the future of Europe was being decided by the Irish electorate.

The conference was chaired by Mr Justice Adrian Hardiman in the morning and the president of the Human Rights Commission, Dr Maurice Manning, in the afternoon. The Minister for Justice, Equality and Law Reform, Michael McDowell, spoke on the rationale for the form of incorporation chosen in the bill. He was followed by Prof William Binchy, a member of the Human Rights Commission, who spoke on the advantages and disadvantages of the approach taken and possible alternatives. Solicitor Muriel Walls spoke on the implications and shortcomings of the bill from a practitioner's point of view. Prof Alan Miller of Scotland spoke on the working of the UK's *Human Rights Act 1998* in practice and the lessons to be learned from that experience. Solicitor Anna Austin of the Court of Human Rights in Strasbourg spoke on the likely implications of the bill for the implementation of the ECHR into Irish law and Mr Justice Brian Kerr of the High Court of Northern Ireland spoke of his experience with applications made under the *Human Rights Act 1998*.

Take 'em to Missouri

The Magee College Summer Law Academy, run by the University of Missouri (Kansas City) in co-operation with UCD's law faculty, is an intensive, six-week summer programme for US law students. This year, the academy's third, it joined forces with Suffolk College, Boston, which mounted a CLE programme for US attorneys at the Law Society, in conjunction with UMKC. Pictured at the Law Society dinner in honour of the academy are (*from left*) academy co-director Dermot Cahill of UCD, academy director Prof Edwin T Hood of the University of Missouri, RTÉ journalist Mark Little, Law Society director of education TP Kennedy and UMKC's Fred K Green

Aye, aye, captain!

Pictured at the prize-giving at the Lady Solicitors' Golf Society Captain's Day at Mount Wolseley Golf and Country Club in September are (*from left*) Moya Quinlan; Yvonne O'Gara, winner of the Captain's Prize and Quinlan Trophy; society captain Muriel Walls; Marc O'Connor, chief executive of sponsors Company Formations International; CFI's Paula O'Connor and incoming captain Mary Molloy

Northern lights

Law Society director general Ken Murphy and then-president Elma Lynch recently visited the Donegal Bar Association. Pictured on the occasion were (*front row, left to right*): Ken Murphy, Phylis McRory, Niall Sheridan, Elma Lynch, Thomas A Morrow, Margaret Mulrine, Judge John O'Donnell, Roisin Doherty; (*middle row*): Laura McCloughan, Mura Bronwe, Michael Fogarty, Valerie Kearins, Berni Smith, Michelle Kennedy and Fiona Browne; (*back row*): Marshall McCloughan, Sean Boner, Brendan Twomey, Pat McTyler, Brian McMullin, Andrew Morrow, Marie Cullen, Frank Dorrian, Yvonne McFadden and Patrick Sweeney

Come west along the road

The then-president Elma Lynch and director general Ken Murphy visited the West Cork Bar Association in September. Pictured at the event were (*front row, left to right*): Jim Long, Veronica Neville, Colette McCarthy, Ken Murphy, Elma Lynch, bar association president Con Murphy, Helen Hoare, Cindy McCarthy and Roni Collins; (*middle row, left to right*): Richard Barrett, Niamh O'Driscoll, Eamonn Fleming, Jim Brooks, Celine Barrett, Susan Fleming, Anne Lynch, Aine O'Donovan, Vivienne Ring, Lorna Brooks, Virgil Horgan, Kevin O'Donovan, Anne Marie Hourihane and Ted Hallissey; (*back row, left to right*): Tony Greenway, Maeve O'Driscoll, Geraldine Crean, Joan O'Donovan, Ellen O'Mahony and Mairead Casey

Southern Stars

The Southern Law Association recently held its annual general meeting in Cork. Pictured with the AGM attendees were (*front row, left to right*): SLA treasurer Sean Durcan, director general Ken Murphy, then-president Elma Lynch, SLA president Patrick Dorgan, vice-president Fiona Twomey and secretary Jerome O'Sullivan

Law Society Gazette
Yearbook and Diary 2003

COMING SOON: the *Law Society Gazette* Yearbook and Diary 2003, available in both week-to-view and page-a-day formats. Packed full of essential information for the busy lawyer, the *Gazette* Yearbook and Diary is the only product of this type endorsed by the Law Society

All proceeds from the Law Society Gazette Yearbook and Diary will go the Solicitors' Benevolent Association

A record €20,351.16 was raised for the Solicitors' Benevolent Association from the proceeds of the *Law Society Gazette* Yearbook and Diary 2002. Pictured above are Elma Lynch, president of the Law Society, and Thomas Menton, chairman of the Solicitors' Benevolent Association, receiving a cheque from *Gazette* advertising manager Seán Ó hOisín

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SADSI
Solicitors Apprentices Debating Society of Ireland

The SADSI ball 2002

The highlight of the SADSI social calendar was undoubtedly the SADSI ball, which took place on Saturday 2 November in the Conrad Hotel, Dublin. The evening began with a wine reception kindly sponsored by Landwell Solicitors, followed by a five-course banquet with wine. Music was provided by the Kaye Twins, who were absolutely brilliant and really got the crowd going. The DJ then played 'til the early hours of the morning.

Sincere thanks are owed to all of our sponsors. There is no doubt that we would not have been able to have as good a night without the support of the following firms: McCann FitzGerald, Arthur Cox, A&L Goodbody, Mason Hayes & Curran, BCM Hanby Wallace, LK Shields, Rochford Brady Law Searchers, Ellis & Ellis Law Searchers, McMahon O'Brien Downes, Dermot G O'Donovan & Partners, Connolly Sellors Geraghty Fitt, and Holmes O'Malley Sexton.

(Above and below) Trainee solicitors having a ball

Many thanks are also owed to the firms and enterprises that sponsored our spot prizes. There were fantastic prizes on offer, including international rugby tickets (sponsored by Donnybrook Laundry), a digital camera (sponsored by Pixels on Liffey Street), a gift basket of Neutrogena goodies (sponsored by Johnson & Johnson), champagne and chocolates from MOP, and a bottle of wine from Osborne Recruitment.

Thanks also to Bizquip, who sponsored the tickets. Finally, the staff of the Conrad must be acknowledged. They looked after us well from start to finish, providing a fantastic room, excellent food and superb service.

Julie Brennan, eastern representative

Parting shots from the auditor

Following a most successful and enjoyable year as SADSI auditor, it is now time for me to formally thank you all for your participation and support of each of the events and initiatives we have undertaken this year.

Two key annual events – the SADSI careers day and the SADSI ball – built upon previous years' experience and proved to be extremely popular once again. On a regional level, we are pleased that so many of the social events were so well attended. Thanks to all trainees who are helping to make SADSI events around the country continuously successful. It is encouraging to note that the society's debating heritage is being maintained and we hope that the trainees will encourage the SADSI debating team in various forthcoming competitions. Keep an eye on the SADSI website for further information on these events.

The SADSI sports committee added a most enjoyable new dimension to our organised activities, and it is hoped that we will have more opportunities to take on our colleagues in the King's Inns in the near future. Please remember that SADSI is always delighted to receive ideas for sporting events and will endeavor to realise those that are possible.

The 2002 SADSI careers day brought together a wealth of knowledge from a wide spectrum of the profession. Feedback from attending trainees indicated that the purpose of the day had been achieved, for many trainees felt that they had gained a greater insight into our options for the future. This year's event was generously sponsored by Benson & Associates Legal Recruitment.

This year's committee has been working hard behind the scenes since coming into office last January. Their generosity of spirit and organisational skills should be noted. SADSI simply could not survive without the willingness of the committee members to share their own free time for the benefit of all other busy trainees. Please continue to support the 2003 committee in order to ensure that the wonderful 188-year-old SADSI tradition is maintained.

I would hope that all trainees take an active role in deciding who the new auditor will be. Prospective nominees can find out more about what the position entails, by contacting me at *2002@sadsi.ie.*

Martin Hayes, auditor

REGIONAL EVENTS: CHRISTMAS PARTIES

SADSI is pleased to announce that it is hosting Christmas parties in Dublin, Galway, Limerick and Cork. Please contact your regional representative for further details.

Gaeltacht weekend

The second Law Society Irish examination is taking place on Wednesday 8 January. Many trainees have complained about having to take an exam that is essentially a repeat of one that they have already passed. Your views on the matter are, of course, welcome and we would be happy to make representations on your behalf in relation to this.

In the short term, however, in an effort to alleviate the frustration among trainees and obviously to assist in the examination preparation, we are putting together a SADSI gaeltacht weekend that will include the chance to practice our Irish, enjoy a céilí and take part in a short preparation course.

This weekend will take place only if the demand warrants it.

Martin Hayes, auditor

Residential Institutions Redress Board

Bord um Shásamh Institiúidí Cónaithe

SOLICITOR

The Redress Board has been established by the Residential Institutions Redress Act, 2002 to make financial awards to persons who as children were abused while resident in industrial schools, reformatories and similar state institutions.

The Board is seeking an experienced and energetic solicitor to advise and assist the members of the Board and Counsel to the Board on all aspects of the process of dealing with applications for redress. The duties of the post will involve the discharge of all functions normally carried out by a solicitor, and will include advising the Board in relation to the settlement of applications and assisting the Board in the conduct of hearings. Experience of personal injury litigation in the Circuit Court and/or High Court is preferable, as is the ability to form part of a team dedicated to processing applications informally and expeditiously.

Remuneration will depend on qualifications and experience.

Further details of this appointment may be obtained by contacting the Board's Registrar, Mr. T. McCarthy, at 01 268 0029.

Please submit your application in writing, giving full details of your qualifications and experience, to The Chairman, Residential Institutions Redress Board, Belfield Office Park, Beech Hill Road, Clonskeagh, Dublin 4.

The closing date for applications is Monday, 16 December 2002.

LOST LAND CERTIFICATES

Registration of Title Act, 1964
An application has been received from the registered owners mentioned in the schedule hereto for the issue of a land certificate as stated to have been lost or inadvertently destroyed. A new certificate will be issued unless notification is received in the registry within 28 days from the date of publication of this notice that the original certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the certificate is being held.
(Register of Titles), Central Office, Land Registry, Chancery Street, Dublin
(Published 6 December 2002)

Regd owner: Joan Doyle; folio: 1203F; lands: Coolnacuppoge and Aghabeg and barony of Idrone East; **Co Carlow**
Regd owner: Richard Nolan and Carmel Nolan; folio: 16631F; lands: Ballytarsna and Knocklower and barony of Carlow; **Co Carlow**
Regd owner: Liam and Caroline Bradley, Baunmore, Moyasta, Kilrush, Co Clare; Folio: 16783; lands: townland of Baunmore, Moanmore South and Carrowmore South and barony of Moyarta and Ibrickan; **Co Clare**
Regd owner: Donal Hayes; folio: 15061F; lands: a plot of ground being part of the townland of Milltown and barony of Ibane and Barryroe; **Co Cork**
Regd owner**:** Joseph O'Mahony (deceased); folio: 28133 (now incorporated in folio 9109F, Co Cork); lands: townland of Ballynacarriga, electoral division of Killeagh and barony of Imokilly; area: 91.169 acres; **Co Cork**
Regd owner: Patrick O'Mahony; folio: 14072; lands: a plot of ground being part of the townland of Agharinagh and barony of Muskerry East; **Co Cork**
Regd owner: Hannah Sheehan; folio: 54883F; lands: a plot of ground known as site no 16 Lotamore Drive, situate in the townland of Lotamore and barony of Cork; **Co Cork**
Regd owner: Mary McGeehin, Meenatinney, Fintown, Co Donegal; folio: 107R; lands: Meenatinney; area: 57.0859 hectacres; **Co Donegal**
Regd owner: Francis O'Donnell, Ardara, Co Donegal; folio: 30706; lands: Ardara; area: 0.2828; **Co Donegal**
Regd owner: Patrick Gildea, Drumbaran, Ardara, County Donegal; folio: 5566R; lands: Drumbaran; area: 1.6656 acres; **Co Donegal**
Regd owner: James Gerald Gormley, Upper Main Street, Ballyshannon, Co Donegal; folio: 4014; lands: Cashelard; area: 21.3375 acres; **Co Donegal**
Regd owners: Edward Halleron and Cecelia Halleron, c/o Reid & Sweeney, Solicitors, Ballyshannon, Co Donegal; folio: 39815F; lands: Ardfarn; area: 0.283 hectares; **Co Donegal**
Regd owner: Maria O'Donnell, Caravan Road, Dungloe, Co Donegal; folio: 34624; lands: Dunglow; area: 0.1625 acres; **Co Donegal**
Regd owner: Sheila Byrne; folio: DN18257; lands: property situate in the townland of Clonsills and barony of Castleknock; **Co Dublin**
Regd owners: Vanessa Grehan and Peter D'Arcy; folio: DN56953F; lands: property situate in the townland of Drinan and barony of Coolock; **Co Dublin**
Regd owner: Michael McCarthy; folio: DN2010; lands: property situate in the townland of Shallon and barony of Nethercross; **Co Dublin**
Regd owner: Musgrave Limited; folio: DN1259F; lands: property situate in the townland of Robinhood and barony of Uppercross; **Co Dublin**
Regd owner: Raymond Paul Sheedy; folio: DN9459L; lands: property situate on the west side of Kilmore Road in the parish of Coolock and district of Coolock West; **Co Dublin**
Regd owner: Maureen Leevy; folio: DN51485L; lands: property situate in the townland Haroldsgrange and barony of Rathdown; **Co Dublin**
Regd owners: William Johnston and Elizabeth Johnston; folio: DN44898L; lands: property situate in the townland of Kilbogget and barony of Rathdown; **Co Dublin**
Regd owner: John Coughlan (deceased), Esker, Banagher, Co Galway; folio: 42794; lands: townland of Esker and barony of Longford; area: 0.40468 hectares; **Co Galway**
Regd owner: Gleeson Developments Company (Ireland) Limited, Lenaboy, Galway; folio: 17209 & 30133; lands: townlands of Cloghahatisky and Lenaboy and barony of Costello; **Co Galway**
Regd owner: Matthew O'Donnell, Barraderry, Carraroe, Co Galway; folio: 54234; lands: townland of Keeraunbeg and barony of Moycullen; area: 1.0142 hectares; **Co Galway**
Regd owner: the Governor and Company of the Bank of Ireland, Trustee Department, Ferryhouse, 48/53 Lower Mount Street in the County of Dublin. Folio: 49684; Co Galway; area: 0 Acres 3 Roods 6 Perches Lands: a plot of land situate in Errisbeg East in the town-

land of Ballynahinch; **Co Galway**
Regd owner: Mary Teresa Gaire; folio: 19830; lands: townland of Foildarrig and barony of Clanmaurice; **Co Kerry**
Regd owner: Thomas O'Connor; folio: 22702; lands: townland of Garrynadur and barony of Corkaguiny; **Co Kerry**
Regd owner: Charles Byrne; folio: 4622; lands: Coolnambrisklawm or Coolnacoppoge and barony of Fassadinin; **Co Kilkenny**
Regd owner: Patrick Reade (deceased); folio: 10305; lands: Kilmacow and barony of Iverk; **Co Kilkenny**
Regd owner: Thomas Delaney (deceased); folio: 1398, 1416, and 8254; lands: Farnans and Ballynakill and barony of Slievemargy; **Co Laois**
Regd owner: Patrick Fahy; folio: 9174; lands: Moneyquid and Parkbeg and barony of Tinnahinch; **Co Laois**
Regd owner: John Finnerty; folio: 23113; lands: townland of Shanagolden and barony of Shanid; **Co Limerick**
Regd owners: Hugh Mulcahy and Pat Kearney; folio: 26492; lands: townland of Rivers and barony of Clanwilliam; **Co Limerick**
Regd owner: Andrew Rice; folio: 14493; lands: townland of Bottomstown and barony of Smallcounty; **Co Limerick**
Regd owner: Edward O'Grady; folio: 4051; lands: townland of Mountminnet and barony of Clanwilliam; **Co Limerick**
Regd owner: Martin Dunne, Barrack Street, Charlestown, Co Mayo; folio: 9404; lands: townland of Lavy Beg and barony of Costello; area: 4a 3r and 19.5p; **Co Mayo**
Regd owner: Margaret Philomena Feehan, Brockagh, Cuilmore, Newport, Co Mayo; folio: 10572; lands: townlands of Brockagh and Toorgarve and barony of Burrishoole; area: 8.8268 hectares; **Co Mayo**
Regd owner: Christopher McNevin; folio: 3839; lands: Towlaght and barony of Moyfenrath Upper; **Co Meath**
Regd owner: Erin Horticulture Limited; folio: 211L; lands: Derrinlough and barony of English; **Co Offaly**
Regd owner: Eileen Flynn; folio: 8487; lands: Curraghvarna and Portavolla (Banagher) and barony of Garrycastle; **Co Offaly**
Regd owner: Rita Gunning; folio: 1024F; lands: Bellmount or Lisderg and barony of Garrycastle; **Co Offaly**
Regd owner: Katie Ellen Higgins, Broher, Charlestown, Co Mayo; folio: 19632; lands: townland of Bunnacranagh and barony of Leyny; area: 3.7584 hectares; **Co Sligo**
Regd owners: Maura McNally (deceased) and Carmel Cummins, Rathfrask, Moneygold, Sligo; folio: 13663f; lands: townland of Rathfrask and barony of Carbury; area: 1.009 hectares; **Co Sligo**
Regd owner: Michael Bourke; folio: 20402; lands: townland of Ballytohill and barony of Slievardagh; **Co Tipperary**
Regd owners: Richard Heffernan and Geoffrey Dooley; folio: 4558; lands: townland of Nickeres and barony of Clanwilliam; **Co Tipperary**
Regd owner: James O'Neill; folios: 8841,8847; lands: townland of Moanvurrin and barony of Middlethird; **Co Tipperary**
Regd owner: Desmond Young; folio: 268F; lands: townland of Corriga and barony of Ikerrin; **Co Tipperary**
Regd owner: Kieran Patrick Duffy, Cartrons, Fardrum, Athlone, Co Westmeath; folio: 13551; lands: Cartrons, Ballynahownwood, Killomenaghan; area: 23.4437 acres, 1.0875 acres, 3.875 acres; **Co Westmeath**
Regd owners: Joseph and Maria Hogan; folio: 25895F; lands: Clonhasten and barony of Ballaghkeen South; **Co Wexford**
Regd owner: Michael Shelley; folio: 7526; lands: townland of Killadreenan and barony of Newcastle; **Co Wicklow**

WILLS

Bennett, Geoffrey Martin (deceased), late of 48 Brookside, Bettystown, Co Meath. Would any person having knowledge of a will made by the above named deceased who died on 11 September 1999 or information in relation to a wife, *de facto* partner or children of the deceased, please contact Paul A Moore & Co, Solicitors, 4 Dyer Street, Drogheda, Co Louth, tel: 041 983 2451 or fax: 041 9832992

Burke, Daniel (Ailbe) (deceased), late of Ballyfauskin, Ballylanders, Co Limerick. Date of death: 9 July 2002. Would any person having knowledge of the whereabouts of a will of the above named person, please contact Karen Kearney, solicitor, of Michael J O'Callaghan & Son, Solicitors, Mitchelstown, Co Cork, tel: 025 24500 or fax: 025 84325, e-mail: *mjocall@esatlink.com*

Condron (or Condren), Oliver (deceased), late of 1180 Greenfield, Maynooth, Co Kildare and formerly of Curryhills, Prosperous, Co Kildare. Would any person having knowledge of a will made by the above named deceased who died on or about 3 September 2002, please contact Mary Cowhey & Co, Solicitors, Main Street, Maynooth, Co Kildare, tel: 01 628 5711 or fax: 01 628 5613

Conway, Mary Ellen (also known as Maureen and Molly), late of 142 Beaumont Road, Whitehall, Dublin 9. Would any person having knowledge of the whereabouts of a will made by the above named deceased who died on 24 October 2002 aged 80 years, please contact Phyllis McQuillan, 86 Garville Ave, Rathgar, Dublin 6

Freyne Michael (deceased), late of 93 Baker's Road, Gurranabraher in Cork city. Would any person having knowledge of the whereabouts of a will executed by the above named deceased on 23 October 1989, who died on 26 January 1999, please contact Edmund W Cogan & Co, Solicitors, 85 South Mall, Cork, tel: 021 427 0161, fax: 021 427 3593

Golden, Patrick J (ors Patsy) (deceased), late of James Street, Westport, Co Mayo. Would any person having knowledge of a will made by the above named deceased, please contact James Hanley & Co, Solicitors, The Mall, Westport, Co Mayo, tel: 098 26076, fax: 098 26822 or e-mail: *hanleyj@indigo.ie*

Griffin, Philomena (deceased), late of 29 Gandon Close, Harold's Cross, Dublin 6W. Would any person having knowledge of a will made by the above named deceased who died on 2 September 2002, please contact Timothy JC O'Keeffe & Co, Solicitors, Abbey Street, Roscommon, Co Roscommon, tel/fax: 0903 26239

Hayden, Daniel (otherwise Danno), late of Bridge Street, Graiguecullen, Carlow. Date of death: 8 September 2002. Would any person having knowledge of the whereabouts of a will of the above named person, please contact John S O'Sullivan, Solicitor, 14 Castle Street, Carlow, tel: 0503 30833, fax: 0503 30256, e-mail: *josullivan@jos.ie*

Harris, Patrick (deceased), late of 14 St Kevin's Road, off Clanbrassil Street, Dublin 8. Would any person knowing the whereabouts of a will in connection with the above named deceased, please contact Ferry's Solicitors, 443 South Circular Road, Rialto, Dublin 8, tel: 01 454 4275

Joyce, Joan (otherwise Joan Butler) (deceased), late of Sarsfield Street, Abbeyside, Dungarvan, Co

Waterford. Would any person having any knowledge of a will being made by the above named deceased who died on 19 October 2002, please contact JF Williams & Co, Solicitors, Dungarvan

McDermott, Patrick (deceased), late of Deerpark, Manorhamilton, Co Leitrim. Would any person having any knowledge of a will for the above named deceased who died on 25 October 2002, please contact Kelly & Ryan, Solicitors, Manorhamilton, Co Leitrim, ref: KR

McNaught Ruddick, Johnathan Frederic (deceased), late of 10 Church Street, Cobh, Co Cork. Date of death: 29 May 2002. Would any person having knowledge of the whereabouts of a will of the above named person, please contact Francis C Kelleher & Co, Solicitors, 1 Pearse Square, Cobh, Co Cork, tel: 021 481 2300 or fax: 021 481 2087

Murphy, Cornelius (deceased). Would any person knowing the whereabouts of a will of the above named deceased who died on 3 July 2002 in the Bon Secours Hospital, Cork, aged 59 years, a retired Distillery worker, please contact Daly Derham & Co, Solicitors, 32 Washington Street, Cork, tel: 021 427 3269 or fax: 021 427 3260

Murphy, Joseph (deceased), late of 130 Cashel Road, Crumlin, Dublin 12. Would any person having knowledge of the whereabouts of a will which was made on 20 October 1993, please contact Anthony Harris & Company, Solicitors, 8 Saint Agnes Road, Crumlin Village, Dublin 12, tel: 01 455 4723, fax: 01-455 4596

O'Connor Patrick (Paddy), late of Moneenally, Williamstown, Co Galway (otherwise Moneenally, Castlerea, Co Roscommon). Would any person having knowledge of a will made by the above named deceased who died on 11 April 2002, please contact O'Keeffe, O'Shea, O'Connor, Solicitors, College Square, Killarney, Co Kerry, tel: 064 31137 or fax: 064 34195

Daly, Catherine (deceased) late of 7 Market Street, Clogheen, Co Tipperary. Would any person having knowledge of a will made by the above named deceased who died on 2 October 1978, please contact Donal T Ryan & Company, Solicitors, Castle Street, Cahir, Co Tipperary, tel: 052 41244 or fax: 052 42050

EMPLOYMENT

Ambitious and able solicitor with two years' PQE required by established practice. Attractive package and prospects for suitable candidate. Apply with CV to Anthony Carroll & Co, Carlton House, Fermoy, Co Cork

Assistant solicitor with two years'-plus PQE in conveyancing and litigation for Galway practice. Apply with CV to Bruce St John Blake & Co, Solicitors, Ross House, Merchants Road, Galway

Experienced able solicitor (conveyancing, probate, civil litigation) seeks association with firm in North Wicklow/Rathdown/Dun Laoghaire. Unusual titles a speciality. Reply to **box no 300**

Lavelle Coleman, Solicitors, 51/52 Fitzwilliam Square, Dublin 2 require a solicitor with two years' PQE in commercial and company law. Please send CVs to *law@lavellecoleman.ie* for the attention of James-Paul Galligan

Legal book-keeping , nine years' experience with solicitors accts software. Good accountancy background. Will convert from manual to computerised accts and assume responsibility for same. Thorough knowledge of LS regulations, accountants' requirements etc. Highly recommended. Tel: 01 283 5760, mobile: 086 3503460

Locum solicitor available, extensive experience in all aspects of conveyancing. Also probate and general. Full/part time or hours flexible to suit. Full practising cert and own insurance. Dublin/North Wicklow area preferred. Fax: 01 667 4361 or reply **box no 301**

Part-time conveyancing solicitor required (hours to suit) to assist with lodging and registration of residential conveyancing backlog. Contact Roddy Tyrell, Tyrell Solicitors, 56 Haddington Road, Dublin 4, tel: 01 667 1476, e-mail: *rod@lawyer.ie*

Part-time solicitor required for Cork city office, March 2003-July 2003. Experience of conveyancing and probate required. Please e-mail: *yvonneecd@eircom.net*

Solicitor, four years-plus PQE seeks position in criminal trial area and/or general practice. Wide variety of legal experience. Full/part–time considered. Computer literate. Please reply to **box no 302**

Solicitor required for busy general practice in Mullingar, Co Westmeath. PQE needed in conveyancing, probate, litigation and family law. Applications with CV to JA Shaw & Co, Solicitors, Mullingar, Co Westmeath or e-mail: *shaws@jashaw.ie*

Solicitor required for small Dublin 1 office. Experience in litigation, employment and/or commercial required. Please reply to **box no 303**

Trainee solicitor required: GP practice, Temple Bar, Dublin 2, requires trainee post-PPC 1 to start April 2003. Interest in conveyancing and commercial preferable. Excellent opportunity in young progressive firm. Comprehensive training provided. Pay as per Law Society scale. Please forward CV to *john@carleyandco.ie*

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

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

Northern Ireland solicitors. Will advise and undertake NI-related matters. All areas corporate/private. Agency or full referral of cases as preferred. Consultations in Dublin or elsewhere if required. Fee sharing envisaged. Donnelly Neary & Donnelly, 1 Downshire Road, Newry, Co Down, tel: 080 1693 64611, fax: 080 1693 67000. Contact K J 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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When a client makes a will in favour of the Society, it would be appreciated if the bequest were stated in the following words:

*"I give, devise and bequeath the sum of **X** euros to the Irish Cancer Society Limited to be applied by it for any of its charitable objects, as it, at its absolute discretion, may decide."*

All monies received by the Society are expended within the Republic of Ireland.

"Conquer Cancer Campaign" is a Registered Business Name and is used by the Society for some fund-raising purposes. The "Cancer Research Advancement Board" allocates all Research Grants on behalf of the Society.

irish cancer society

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15 Bridge Street, Cork. Tel: (021) 4509 918 Web: www.cancer.ie

Wanted ordinary seven-day publican's license. Please contact: O'Carroll & Co, Solicitors, 19a Merchants Road, Galway, tel: 091 565516, fax: 091 562393 or e-mail: *ocarrollsolicitors@eircom.net*

Wanted: seven-day ordinary publican's licence. Reply to Marian Higgins, Solicitor, Higgins Chambers & Flanagan, Solicitors, Headford, Co Galway, tel: 093 35656, fax: 093 35741 or e-mail at *info@hchsolicitors.com*

TITLE DEEDS

Harris, Patrick (deceased). Would any person knowing the whereabouts of title deeds to the property of the late Patrick Harris (deceased) of 14 St Kevin's Road, off Clanbrassil Street, Dublin 8, contact Ferry's Solicitors, 443 South Circular Road, Rialto, Dublin 8, tel: 01 454 4275

Barry, Emily (deceased), Lakeview, Ballyhooley Road, Cork. Would any solicitor holding any deeds or documents regarding plans at Lakeview, Ballyhooley Road, Cork, please contact Eamonn Murray & Co, Solicitors, 6 Sheares Street, Cork, tel: 021 427 6163 or fax: 021 427 4801

In the matter of the *Landlord and Tenant (Ground Rents) Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978*: an application by Desmond Mulreany
Take notice that any person having interest in the freehold estate of the property known as 6 Thompson Cottages, North Circular Road, Dublin 1, being portion of the property held under an indenture of lease dated 8 August 1878 and made between the Honourable Charles Spencer Cowper of the one part and John Thompson of the other part for the term of 200 years from 1 May 1878 subject to the yearly rent of £40 and the covenants and conditions therein contained, and an indenture of lease dated 11 January 1878 and made between Luke Reilly of the one part and John Thompson of the other part for the term of 91 years from the 1 November 1877, subject to the yearly rent of £65 and the covenants and conditions therein contained and being all of the property held under an indenture of sub-lease dated 17 September 1954 and made between William O'Dea of the one part and John Healy and Bridget Healy of the other part for the unexpired residue of the terms of the leases dated 8 August 1878 and 11 January 1878 except the last six months thereof subject to the yearly rent of £5 and the covenants and conditions therein contained.

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

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

Date: 21 October 2002
Signed: P J Walsh & Co, Solicitors, 12 Upper Fitzwilliam Street, Dublin 2

In the matter of the *Landlord and Tenant (Ground Rents) Acts, 1967-1987*: an application by Annie Healy
Any person claiming to be a person for the time being entitled to the next superior interest to that of the applicant or a person who is a superior lessor to the applicant or a person who is the owner of an encumbrance in respect of premises at 199, 201 and 201A Harold's Cross Road in the city of Dublin, formerly known as 56/57 Harold's Cross Road in the city of Dublin are requested to make themselves known to the undersigned within 14 days from the date hereof, providing details of the nature of their interest in the said premises.

Any person who is, or is aware of, the successor in title of Sarah Evans of Leinster Road, Dublin 6, John Hawker Evans of Leinster Road, Dublin 6 and Isaac Molloy of 18 Eustace Street, Dublin 2, all of whom resided at the addresses specified in or about 1883 and 1884 are requested to make themselves known to the undersigned within 14 days from the date hereof, providing details of the nature of the said succession.

Date: 20 November 2002
Signed: John G Griffin (solicitors for the applicant), 6 Cypress Park, Templeogue, Dublin 6

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 Kingsbrook Investments Limited
Take notice that any person having any interest in the freehold estate of the following property: all that and those the hereditaments and premises situate at and known as numbers 2,4 and 6 Lower Grand Canal Street in the parish of Saint Mark and city of Dublin being the premises comprised in and demised by indenture of lease dated 31 January 1956 and made between Ivy Kavanagh and Raymond Judd of the one part and Elizabeth Molloy of the other part and being part of the premises comprised in and demised by indenture of lease dated 31 July 1883 and made between William G Lennon and Henry E Taffe of the one part and William Joseph Kavanagh of the other part.

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

In default of any such notice being received, Kingsbrook Investments Limited intends to proceed with the application before the county registrar at the end of the 21

days from the date of this notice and will apply to the county registrar for the county of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest and including the freehold reversion in the aforementioned property are unknown or unascertained.
Date: 18 November 2002
Signed: Cahill & Co, Solicitors, 21 Windsor Place, Dublin 2

In the matter of the *Landlord and Tenant (Ground Rents) Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978*: an application by Suzanne O'Brien
Take notice any person having any interest in the freehold estate of the premises known as all that and those 29 Wellington Street in the city of Dublin, being a portion of the premises comprised in and demised by the indenture of lease dated 8 August 1878 and made between the Honourable Charles Spencer Cowper of the one part and Richard Donigan of the other part and therein described as all that and those a plot of ground on the north side of Wellington Street in the possession of the said Richard Donigan as a yearly tenant thereof and known or described as no 1 on the map numbered 6 attached and referred to in the recited deed of conveyance situate in the parish of St Mary and county of the city of Dublin and containing on the front to Wellington Street 48ft 6" or thereabouts in the rear 49 ft 4" or thereabouts in depth from front to rear on the west side 125ft or thereabouts and on the east side 128ft 6" by said admeasurements more or less bounded on the north by Blessington Lane on the east by the house and premises no 27 Wellington Street in the possession of Thomas Dalton and on the south side by Wellington Street and on the west by the houses and premises no 31 Wellington Street said and hereby demised premises as delineated on the map thereof on the margin thereof and for a term of 200 years from 18 May 1878, subject to the yearly rent of six pounds and 17 shillings six pence thereby reserved and to the covenants and conditions therein contained.

Take notice that Suzanne O'Brien, the owner of the premises, has submitted an application to the county registrar for the county of the city of Dublin for the acquisition of the freehold interest in the aforesaid premises and any party asserting that they hold a superior interest in the aforesaid premises are now called upon to furnish evidence of title to the aforementioned premises to the below named solicitors within 21 days from the date of this notice.
In default of any such notice being received by the below named solicitors, the said Suzanne O'Brien 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 and city of Dublin for directions which may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the premises are unknown or unascertained.
Date: 8 November 2002
Signed: Peter Morrissey & Co (solicitor for the applicant), Merrion Building, Lower Merrion Street, Dublin 2

In the matter of the *Landlord and Tenant Acts, 1967-1989* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978*: an application by Frederick and Margaret Roche
Notice to any person having any interest in the freehold estate of the following property: Woodville, York Road, Rathgar, formerly known as site number 3 York Road, held under lease dated 2 February 1968 and made between John Fallon of the one part and James Richard Harvey of the other part for 113 years from the 25 March 1950 (less the last ten days) at the yearly rent of £12.

Take notice the Frederick and Margaret Roche, the owners, have submitted an application to the county registrar for the county of the city of Dublin for the acquisition of the freehold interest in the aforesaid property and any party asserting that they hold a superior interest in the aforesaid property are called upon to furnish evidence of title to the below named solicitors within 21 days from the date of this notice.

In default of any such notice being received by the below named solicitors, the said Frederick and Margaret Roche 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 the city of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the aforesaid property are unknown or unascertained.
Date: 12 November 2002
Signed: Brendan Walsh and Partners (solicitors for the applicants), 34 Upper Baggot Street, Dublin 4

In the matter of the *Landlord and Tenant Acts, 1967-1989* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978*: an application by Michael and Helen McKenna
Notice to any person having an interest in the freehold estate of property situate at 18 Villa Park Gardens, off Navan Road, Dublin 6, held under indenture of lease dated 19 May 1959 and made between Evelyn Doris Wilkinson, Gladys Beatrice Jackson, Doreen Elliott Slattery and Sheila Louise Rosemary Goodbody of the one part and Robert Augustine Jordan of the other part for a term of 250 years from 29 September 1959 subject to the yearly rent of £25.

Take notice that Michael McKenna and Helen McKenna have submitted an application to the county registrar for the county of the city of Dublin for the acquisition of the freehold interest in the said property and any party asserting that they hold a superior interest in the aforesaid property are called upon to furnish evidence of title to the aforementioned property to the below named solicitors within 21 days of the date of this notice.

In default of any such notice being received by the below named solicitors, the said Michael McKenna and Helen McKenna 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 the city of Dublin for an order that the fee simple interest title to the above mentioned property shall be vested in the said applicants, Michael McKenna and Helen McKenna, on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the aforesaid property are unknown or unascertained.
Date: 27 November 2002
Signed: Reynolds & Co, Solicitors, The Avenue, Gorey, Co Wexford